
PROMOTING WIND ENERGY DEVELOPMENT THROUGH ANTINUISANCE LEGISLATION*

I. INTRODUCTION¹

Art Lindgren carefully picks his way through the darkness outside his home in Vinalhaven, an island off the coast of Maine. It is early morning, and he would rather be in bed, but he is determined to get the audio measurements he needs. He approaches his makeshift sound station and plugs in his laptop. As he kneels, the sound of crackling leaves and twigs, combined with the soft rustling of the wind, drowns out all other noise. But as the wind dies down, a low hum makes its way through the trees. Mr. Lindgren grabs his sound meter and points it toward the three giant wind turbines that peek up over the tree line. The meter fluctuates between forty-seven and forty-eight decibels, exceeding the State nighttime noise limit of forty-five. Mr. Lindgren, a retired engineer, plans to send his results to the Maine Department of Environmental Protection, which he hopes will take seriously his pleas for relief from the sound: “It’s not greenhouse gases and save the world and global warming—that’s not what we’re dealing with here. . . . [W]hat are we going to do with the people [when] it . . . ruins their lives?”²

The New York Times ended its article there, but it might have continued like this: After taking his measurements, Mr. Lindgren retreated to the quiet of his home (thirty to fifty decibels).³ He then trudged through the kitchen, passing the humming refrigerator (forty decibels)⁴ on his way to the bedroom, finally ready to settle in for the night. His wife, startled awake by the sound of her husband shutting the door, turned to ask him how his research was going. After a short conversation (fifty decibels)⁵ the couple went to sleep in their quiet bedroom (thirty decibels).⁶

* Tyler Marandola, J.D., Temple University James E. Beasley School of Law, 2012. A special thanks is due to Professor Amy Sinden, whose thoughtful criticism and insight greatly improved the final product presented here. Thank you as well to the editors and staff of the *Temple Law Review* for dedicating so much time to refining and publishing this Comment. Finally, I owe my greatest debt of gratitude to my family; your love, support, and encouragement made higher education possible for me. Given all the help I have had, the remaining deficiencies in this Comment are mine.

1. The narrative presented in the Introduction is based on an article that recently appeared in the New York Times. Tom Zeller Jr., *For Those Living Nearby, that Miserable Hum of Clean Energy*, N.Y. TIMES, Oct. 6, 2010, at A1. I have taken some liberties with the story, but have kept the important facts the same.

2. N.Y. Times Video, *The Fight Over Wind Power in Vinalhaven*, N.Y. TIMES (Oct. 6, 2010), <http://video.nytimes.com/video/2010/10/05/business/1248069136443/the-fight-over-wind-power-in-vinalhaven.html>.

3. *Decibel Table-SPL-Loudness Comparison Chart*, SENGPIELAUDIO.COM, <http://www.sengpielaudio.com/TableOfSoundPressureLevels.htm> (last visited Sept. 6, 2012).

4. Nat’l Inst. on Deafness and Other Comm’n Disorders, *Sound Ruler, Text-Only Version*, NAT’L INSTS. OF HEALTH, http://www.nidcd.nih.gov/health/education/decibel/pages/decibel_text.aspx (last updated Feb. 9, 2011).

5. *Id.*

6. *Decibel Table-SPL-Loudness Comparison Chart*, *supra* note 3.

The next day, Mr. Lindgren awoke to the sound of his alarm (eighty decibels),⁷ and went outside to grab the morning paper while cars buzzed past (seventy-five decibels).⁸ He returned to his home to find his wife vacuuming the living room floor (seventy decibels)⁹ and thus decided to enjoy the paper out on his porch. From his porch, he watched as his neighbor's children got into a loud argument over which of them had been playing with a particular ball first (seventy-four decibels).¹⁰ Mr. Lindgren sighed heavily and opened his newspaper.

This Comment argues that wind energy projects should be protected from nuisance lawsuits, much like agricultural facilities are protected under the Right-to-Farm (RTF) regime. Part II of this Comment presents an overview of the current law. First, nuisance law is briefly introduced, with an eye toward explaining the balancing test that courts apply. Next, a detailed discussion of RTF laws is presented. The RTF regime, which provides nuisance protection to qualifying farms, provides the model for the antinuisance law proposed in this Comment. Finally, Part II concludes with a discussion of wind power and its use and growth in the United States, including an overview of two recent nuisance cases involving wind energy projects.¹¹ Part III proposes an antinuisance statute that would serve to protect wind energy projects from nuisance suits so long as they conform to particular standards of operation.

II. OVERVIEW

A. *An Introduction to Nuisance Law*

With civilization comes conflict.¹² A cement factory can make nearby land nearly uninhabitable,¹³ while a breeder's barking dogs can annoy and infuriate his neighbors.¹⁴ The law's attempts to deal with these conflicts have produced the law of nuisance.

7. *Control the Volume to Protect Kids' Hearing*, THE KIM KOMANDO SHOW (Oct. 3, 2009), <http://www.komando.com/kids/tip.aspx?id=7399&page=1>.

8. *Decibel Table-SPL-Loudness Comparison Chart*, *supra* note 3.

9. Nat'l Inst. on Deafness and Other Comm'n Disorders, *supra* note 4.

10. See Tom McGrath & Seth Porges, *Is Life too LOUD?*, MEN'S HEALTH, Mar. 2006, at 106, 108 (reporting a reading on a commercially available sound meter, made in his kitchen).

11. It is common in everyday speech to use the phrase "wind farm" to refer to wind energy projects. That term will be avoided throughout this Comment. When juxtaposed with the lengthy discussion of RTF laws, which protect "farms" in the traditional sense, use of the term to refer to harnessing wind energy to produce electricity would confuse rather than enlighten.

12. See RESTATEMENT (SECOND) OF TORTS § 822 cmt. g (1979) (noting that "[p]ractically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference").

13. See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970) (alleging the cement plant emitted "dirt, smoke and vibration" and caused significant air pollution in the neighborhood).

14. See, e.g., *Tichenor v. Vore*, 953 S.W.2d 171, 173 (Mo. Ct. App. 1997) (alleging that defendants' dogs interfered with plaintiffs' enjoyment of their property).

If predictability is desirable in the law, then the doctrine of nuisance may be quite troubling.¹⁵ Famed treatise writer William Prosser even went so far as to call the law of nuisance an “impenetrable jungle.”¹⁶ A paragraph from the *Corpus Juris Secundum* illustrates the difficulty in nailing down the test to be applied to an alleged nuisance:

Since most nuisances are nuisances per accidens, as a general rule, the question of nuisance is one of degree and usually turns on a question of fact, although it has been held that whether a nuisance exists raises a question which involves technical propositions of law and matters of public policy. No hard and fast rule controls the subject. Precedents drawn from other cases are usually of little value because of the differences in the facts and circumstances; and every case must stand on its own footing. Whether a nuisance exists is a question to be determined not merely by an abstract consideration of the thing itself but also with respect to its circumstances. No particular fact is conclusive, but all the attending circumstances must be taken into consideration.¹⁷

Nuisance is split into two types: public and private.¹⁸ As its name suggests, a public nuisance is generally defined as an “unreasonable interference with a right common to the general public.”¹⁹ A private nuisance, on the other hand, is a “nontresspassory invasion of another’s interest in the private use and enjoyment of land.”²⁰ The typical remedy for a public nuisance is an injunction prohibiting the activity causing the nuisance, which is achieved through a lawsuit brought by the government.²¹ However, an individual may sue to enjoin a public nuisance if she can show an injury that is “peculiar” or different in kind from that suffered by the rest of the public.²² On the other hand, a private nuisance involves, by definition, a private

15. See EDMUND W. GARRETT & HENRY G. GARRETT, *THE LAW OF NUISANCES* 4 (3d ed. 1908) (dividing nuisances into several classes, but noting that it is “impossible, having regard to the wide range of subject-matter embraced under the term nuisance, to frame any general definition”); Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 90 (1998) (collecting the thoughts of various legal scholars as to the difficulty of finding discernible principles in the field of nuisance law).

The more ancient roots of the nuisance doctrine are beyond the scope of this paper. Those wishing to know more about the origins of the doctrine and its progression would do well to begin with Williams A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948).

16. WILLIAM LLOYD PROSSER & PAGE KEETON, *LAW OF TORTS* 616 (5th ed. 1984).

17. 66 C.J.S. *Nuisances* § 13 (2009) (footnotes omitted).

18. This Comment is concerned mostly with private nuisance, but plaintiffs often assert claims under both theories. See, e.g., *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 508 (Tex. App. 2008) (asserting that a wind farm constitutes both a public and private nuisance). The term “nuisance” will often be used without an adjective throughout this Comment. These references, unless otherwise indicated, are to private nuisance.

19. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

20. *Id.* § 821D. The precise wording of the definition of nuisance is not consistent in every state. However, the Restatement definition provides a good starting point and encompasses many of the other formations, along with their progression in the common law.

21. E.g., *Andersen ex rel Andersen v. Univ. of Rochester*, 458 N.Y.S.2d 404, 405 (App. Div. 1982).

22. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 821C(1) (“In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”).

right of action based on an unreasonable interference with an interest in land affecting a limited number of people.²³

The key to success in a nuisance action is proof by the plaintiff that the defendant has somehow *invaded* her rights, meaning that the defendant has used her own land in a way that unreasonably interferes with the plaintiff's property rights.²⁴ To explain the concept, the oft-used reference to property rights as a bundle of sticks²⁵ is helpful: nuisance law answers the question of who owns a particular stick in the bundle.²⁶ For instance, a plaintiff may find that she owns a right to exclude the operation of a dog kennel from the universe of possible uses of the neighboring land, or at least to limit the number of dogs.²⁷

Of course, determining who owns which stick is no easy task, as two cases dealing with noise as a nuisance serve to demonstrate. In *Myer v. Minard*,²⁸ the plaintiff alleged that the defendant's roosters, which crowed from five o'clock to six thirty a.m. in fifteen minute intervals, were a private nuisance.²⁹ The court, unimpressed, mocked the plaintiff out of the courtroom:

We cannot conceive of a normal person, endowed with ordinary sensibilities and ordinary habits, being greatly discomforted by the announcement of a new day from the well-trained voice of a stately cock, the sound of which is used as a symbol of good cheer by many advertisers. The voice of the rooster can be heard daily in motion pictures, on the radio and at the birth of a new day all over the world, whether in the country, town or city, one only has to awaken to hear the cheery voice of Chantecler announce the day. He has been doing that all over the world since before the year 1 and, so far as we can find, no one has until now tried to silence his cheerful greetings.³⁰

Despite the fact that a rooster can surely be noisy and annoying (and interrupt sleep, as the plaintiff alleged it did), the court refused to find that it was a nuisance, based on the balancing test that nuisance law demands.³¹

23. See *Venuto v. Owens-Corning Fiberglas Corp.*, 99 Cal. Rptr. 350, 355 (Ct. App. 1971) ("[A] private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large.").

24. 66 C.J.S. *Nuisances* § 2 (2009).

25. See, e.g., 63C AM. JUR. 2D *Property* § 1 (2009) ("The right to exclude others, as well as their property, is one of the most essential sticks in the bundle of rights that are commonly characterized as property.").

26. Cf. *Myer v. Minard*, 21 So. 2d 72, 74 (La. Ct. App. 1945) (noting in a nuisance suit brought due to a rooster's noise that "the right claimed by the plaintiffs is the right to prohibit defendant from keeping a rooster on his [own] premises").

27. See *Tichenor v. Vore*, 953 S.W.2d 171, 173, 177-78 (Mo. Ct. App. 1997) (affirming the trial court's decision to issue an injunction limiting the defendant in a nuisance action to the possession and keeping on her land of two dogs).

28. 21 So. 2d 72 (La. Ct. App. 1945).

29. *Myer*, 21 So. 2d at 73.

30. *Id.* at 76.

31. The timing of the case also figured on the defendant's side. The court explained that, in the midst of World War II:

The time for this action is most inopportune, with the Government taking for the Armed Forces of our Nation all the broilers, friers, excess hens and eggs from our large poultry-producing centers, as

In *Kentucky & West Virginia Power Co. v. Anderson*,³² the Kentucky Court of Appeals (the highest court in Kentucky at the time) reached a conclusion seemingly at odds—or at least difficult to reconcile—with *Myer*. The case involved allegations by the plaintiff that an electrical substation near his home produced noise that interfered with the use and enjoyment of his property, and so constituted a nuisance.³³ The defendant at trial introduced audio evidence of the level of sound present on plaintiff's property. At the fence line (the boundary between plaintiff's property and the substation), the reading was forty-four decibels.³⁴ At a point removed from the plaintiff's property, where the substation noise could not be heard at all, the reading was forty-three decibels.³⁵ The expert later compared these readings to the noise level in his hotel room (fifty-two decibels) and in the courtroom (fifty-six decibels).³⁶ Nevertheless, the court upheld the jury verdict for the plaintiff, finding that such levels could potentially constitute a nuisance: "Though the noise be harmonious and slight and trivial in itself, the constant and monotonous sound of a cricket on the hearth, or the drip of a leaking faucet is irritating, uncomfortable, distracting and disturbing to the average man and woman."³⁷

The remedy for the plaintiff, once a nuisance has been found to exist, is either money damages or an injunction. The default (to use the term loosely) is damages, and courts have noted that injunctive relief "is not a remedy which issues as of course."³⁸ Instead, courts perform a balancing of the equities, taking into account the hardships and benefits of the injunction, as well as the social benefit of the activity that will be enjoined.³⁹

One famous case is useful in describing how courts attempt to balance the equities when deciding if an injunction is appropriate. In *Madison v. Ducktown Sulphur, Copper & Iron Co.*,⁴⁰ the Supreme Court of Tennessee refused to enjoin the operation of the defendants' copper ore roasting business.⁴¹ The court acknowledged that the smoke from the plants' operations had destroyed much of the value of the plaintiffs'

well as a great part of the beef and other meats, and the Agriculture Department at Washington urging everyone to raise poultry, eggs, Victory gardens and other foods. The figures given out at Washington showing the quantity of vegetables produced and canned from Victory gardens last year were astounding and the figures, if given, showing the number of chickens raised and eggs produced in back yards of towns and cities would be more astounding. If we destroyed the roosters, within a very short time the chicken family would become extinct and the familiar American breakfast of bacon and eggs would be no more.

Id.

32. 156 S.W.2d 857 (Ky. 1941).

33. *See Anderson*, 156 S.W.2d at 858 (indicating plaintiff won on jury verdict below based on noise from substation).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 859.

38. *E.g.*, *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–38 (1933).

39. *See id.* at 338–40 (accounting for the costs and benefits of an injunction and noting that "[w]here an important public interest would be prejudiced, the reasons for denying the injunction may be compelling").

40. 83 S.W. 658 (Tenn. 1904).

41. *Madison*, 83 S.W. at 667.

lands,⁴² and explained that the decision to grant an injunction “rests in the sound discretion of the court, to be determined on a consideration of all of the special circumstances of each case, and the situation and surroundings of the parties, with a view to effect the ends of justice.”⁴³ The copper plants produced significant tax revenue, created over a thousand jobs, and spent a large amount of money purchasing supplies produced in the county in which it was located.⁴⁴ In short, the defendants operated a lucrative business that benefitted society economically. On the other hand, the lands on which the plaintiffs lived were “thin mountain lands, of little agricultural value,” and the most expensive tract (consisting of one hundred acres) was assessed at \$180, which was insignificant when compared to the over \$1 Million in tax revenue alone generated by defendants’ businesses.⁴⁵ The court, on those facts, overturned the decision of the court of appeals granting an injunction:

In order to protect by injunction several small tracts of land, aggregating in value less than \$1,000, we are asked to destroy other property worth nearly \$2,000,000, and wreck two great mining and manufacturing enterprises, that are engaged in work of very great importance, not only to their owners, but to the state, and to the whole country as well, to depopulate a large town, and deprive thousands of working people of their homes and livelihood, and scatter them broadcast. . . . We see no escape from the conclusion in the present case that the only proper decree is to allow the complainants a reference for the ascertainment of damages, and that the injunction must be denied to them.⁴⁶

The *Madison* decision illustrates how closely the facts of individual cases are bound to the nuisance balancing test. The test is one that many commentators find unprincipled and difficult to apply with any regularity.⁴⁷

B. *The Right-to-Farm Framework*

Right-to-Farm (RTF) laws are one of the most widespread and well-known examples of state legislatures using statutes to override the common law. Such laws exist in all fifty states,⁴⁸ though their form and scope vary significantly. The RTF laws

42. *See id.* at 659–60 (noting that the plaintiffs’ “timber and crop interests have been badly injured,” and that they “are prevented from using and enjoying their farms and homes as they did prior to the inauguration of these enterprises”).

43. *Id.* at 664.

44. *See id.* at 660 (finding that the defendants were responsible for nearly half the taxes in the county, employed 1,300 people, and purchased eighty percent of its supplies from citizens of the county).

45. *Id.* at 659.

46. *Id.* at 666–67.

47. *See, e.g.*, Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 359 (1990) (“The law of nuisance has long been noted for the confusion that marks so many decisions rendered under its rubric. . . . [I]n any given era and jurisdiction the rules remain extremely elusive.”); Halper, *supra* note 15, at 90 (“The common law of nuisance has a reputation as a messy and dated doctrine.”).

48. Terence J. Centner, *Agricultural Nuisances: Curbing the Right-to-Farm*, CHOICES MAGAZINE, First Quarter 2000, at 41; *see also* Elizabeth R. Springsteen, *States’ Right-to-Farm Statutes*, NAT’L AGRIC. LAW CTR., <http://www.nationalaglawcenter.org/assets/righttofarm/index.html> (last visited Sept. 6, 2012) (compiling the text of all fifty states’ RTF statutes).

eliminate the common law right to an injunction or damages for harm caused by certain uses of land. As their name suggests, RTF laws protect farms from lawsuits that purport to be based on a theory of public or private nuisance.⁴⁹

The RTF regime is a recent development, with most of the laws having been enacted in the late 1970s and early 1980s.⁵⁰ Many commentators concur that the National Agricultural Lands Study (NALS), which warned of the epidemic of farmland conversion,⁵¹ was the catalyst for this rapid and substantial change in the law.⁵² This Section discusses the purpose of RTF laws, the types that exist, the mechanisms (outside the broad types) that they use to effectuate their ends, and the constitutional problems with the regime, which effectively allows farmers to maintain a nuisance on their property.

1. The Purpose of Right-to-Farm Laws

Traditionally, the purpose of RTF laws has been to protect the agricultural industry from encroaching urbanization.⁵³ Such encroachment leads to the loss of farmland not only through nuisance suits—which often end in damages substantial enough to make the continued operation of the farm unprofitable, or an injunction, which shuts down or modifies the farming operation—but also through “voluntary” conversion. As suburban or urban uses extend into farmland, the value of the land goes up, and the pressures on the farmer to sell increase.⁵⁴ Naturally, the constant threat of a

49. *E.g.*, DEL. CODE ANN. tit. 3, § 1401 (2011).

50. Jeffrey R. Gittins, Comment, *Bormann Revisited: Using the Penn Central Test to Determine the Constitutionality of Right-to-Farm Statutes*, 2006 BYU L. REV. 1381, 1383 (noting that, in the five years between 1978, when the first RTF statute was passed, and 1983, “the vast majority of states” had passed RTF laws); Alexander A. Reinert, Comment, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1696 (1998) (“Most RTFs were passed at the state level between 1978 and 1983.”).

51. NATIONAL AGRICULTURAL LANDS STUDY, FINAL REPORT 8–10 (1981). The United States Department of Agriculture and the President’s Council on Environmental Quality sponsored this interagency study. *Id.* at 4.

52. *See* Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO ST. L.J. 1033, 1037–39 (1999) (noting the effect that the NALS had in spurring on the RTF revolution); Reinert, *supra* note 50, at 1696–97 (discussing the effect of the NALS on the national discussion of farmland preservation).

53. *See* Cordes, *supra* note 52, at 1037–39 (discussing the role of the NALS in “sound[ing] a substantial alarm” about the problem of cropland conversion); Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 290–91 (1984) (noting that, post-World War II, the flood of people to suburbs and rural areas tended to threaten the most productive farmland surrounding cities); Wendy K. Walker, Note, *Whole Hog: The Pre-Emption of Local Control by the 1999 Amendment to the Michigan Right to Farm Act*, 36 VAL. U. L. REV. 461, 468 (2002) (noting the importance placed on protecting and preserving farmland from encroaching residential development).

54. *See* Cordes, *supra* note 52, at 1033 (noting that land is often of greater value to the farmer (and other parties to a sale) when converted, regardless of “its broader worth to society as farmland”); John M. Hartzell, *Agricultural and Rural Zoning in Pennsylvania: Can You Get There From Here?*, 10 VILL. ENVTL. L.J. 245, 246 (1999) (noting that “[a]pproximately 125,000 acres of farmland are converted to non-agricultural uses annually,” and that this is “not merely a local problem”); Randall Wayne Hanna, Comment, *“Right to Farm” Statutes—The Newest Tool in Agricultural Land Preservation*, 10 FLA. ST. U. L. REV. 415, 415 (1982) (reporting that “three million acres are converted each year from agricultural to nonagricultural uses”); Reinert, *supra* note 50, at 1697 (recounting the traditional “narrative” from RTF supporters, which says that as residential uses encroach on agriculture, complaints and the threat and reality of nuisance suits lead to farmers being forced to sell their land to developers).

nuisance lawsuit only adds to the incentive for the farmer to sell and allow a developer to convert the land to a nonagricultural use. RTF laws have as one of their purposes the prevention (or at least the delay) of conversion. Florida's statute is illustrative:

The Legislature finds that agricultural production is a major contributor to the economy of the state; that agricultural lands constitute unique and irreplaceable resources of statewide importance; that the continuation of agricultural activities preserves the landscape and environmental resources of the state, contributes to the increase of tourism, and furthers the economic self-sufficiency of the people of the state The Legislature further finds that agricultural activities conducted on farm land in urbanizing areas are potentially subject to lawsuits based on the theory of nuisance and that these suits encourage and even force the premature removal of the farm land from agricultural use. It is the purpose of this act to protect reasonable agricultural activities conducted on farm land from nuisance suits.⁵⁵

A clear statement of a legislature's intent is not a superfluous preface to the substance of the law. It provides courts with a starting point from which they must determine the scope of the law and the structure of its protections. A legislature can, for example, indicate to the courts its intention that a law be construed liberally in order to achieve its stated purpose.⁵⁶

On the other hand, courts can read a statement of legislative intent as indicating that a statute should be construed strictly, which is what the Supreme Court of Vermont did in *Trickett v. Ochs*.⁵⁷ The case involved a nuisance suit against the owner of an apple orchard.⁵⁸ The defendant-orchard owners had sold their farmhouse, which was just across the road from the main operation of the orchard, to the plaintiffs.⁵⁹ The defendants then expanded their operation, resulting in greater annoyance to the plaintiffs primarily due to increases in light and noise.⁶⁰ When their complaints through other channels proved fruitless, the plaintiffs sued, alleging that the farm was a private nuisance.⁶¹ The defendants in turn claimed that Vermont's RTF law protected their operation from suit.⁶²

55. Florida Right to Farm Act, FLA. STAT. ANN. § 823.14(2) (West 2011); see also ARK. CODE ANN. § 2-4-101 (West 2011) ("When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. . . . It is the purpose of this chapter to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance."); IDAHO CODE ANN. § 22-4501 (West 2011) ("It is the intent of the legislature to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance. The legislature also finds that the right to farm is a natural right and is recognized as a permitted use throughout the state of Idaho.").

56. See ARK. CODE ANN. § 2-4-108 ("This chapter is remedial in nature and shall be liberally construed to effectuate its purposes.").

57. 838 A.2d 66 (Vt. 2003).

58. *Trickett*, 838 A.2d at 68.

59. *Id.*

60. *Id.*

61. *Id.* at 69-70.

62. *Id.* at 70.

The Supreme Court of Vermont allowed the nuisance suit to go forward, holding that the RTF law did not protect the defendants' farm.⁶³ The court based its holding largely on a narrow reading of the legislative purpose section of the statute.⁶⁴ Quoting the entire text of the section,⁶⁵ the court determined that the legislature only intended to protect farmers when nuisance suits resulted from "[t]he increased encroachment of nonagricultural uses upon traditional agricultural uses" of land.⁶⁶ Although conceding that "the present case might fit within a broad reading of the Legislature's rationale," the court ruled that the circumstances of the case made application of the RTF law inappropriate.⁶⁷ The court held that, because the plaintiffs had purchased their house from the defendants prior to the expansion that constituted the alleged nuisance, the lawsuit could not be said to have arisen from the encroachment of nonagricultural uses on agricultural ones.⁶⁸

Trickett indicates that statements of purpose are important; they can have a substantial effect on how courts will interpret the law. If a legislature conveys its intent clearly, it can dictate the direction the law will take as it is molded during the litigation process.

2. Types of RTF Laws

Classifying RTF laws into distinct types is not an exact science by any stretch of the imagination. The exercise has been tried on at least a few different occasions, and commentators have reached varying conclusions as to the number of RTF types that exist.⁶⁹ This is, in many respects, understandable considering that many RTF statutes

63. *Id.* at 73.

64. *Id.* at 73–74.

65. At the time *Trickett* was decided, the legislative findings and purpose section of Vermont's RTF law read as follows:

The legislature finds that agricultural production is a major contributor to the state's economy; agricultural lands constitute unique and irreplaceable resources of statewide importance; that the continuation of agricultural activities preserves the landscape and environmental resources of the state, contributes to the increase of tourism, and furthers the economic self-sufficiency of the people of the state; and that the encouragement, development, improvement, and preservation of agriculture will result in a general benefit to the health and welfare of the people of the state. The legislature further finds that agricultural activities conducted on farmland in urbanizing areas are potentially subject to lawsuits based on the theory of nuisance, and that these suits encourage or even force the premature removal of the lands from agricultural use. It is the purpose of this act to protect reasonable agricultural activities conducted on farmland from nuisance lawsuits.

VT. STAT. ANN. tit. 12, § 5751 (West 2003) (amended 2004).

66. *Trickett*, 838 A.2d at 73.

67. *Id.* at 73–74.

68. *See id.* at 76 ("Although plaintiffs are not farmers, they used their home in the same way it had been used for nearly two centuries—as a residence—and the conflict between the parties concerned that use. And finally, the case does not involve urban encroachment.")

69. *See* Terence J. Centner, *Government and Unconstitutional Takings: When do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 94 (2006) ("Although the laws defy easy categorization, one can observe five significant approaches to anti-nuisance protection."); Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121, 128 (2000) ("Right to Farm laws may be categorized generally into six different types . . ."); Hanna, *supra* note 54, at 430

incorporate more than one approach to protection.⁷⁰ For the purposes of this Comment, it is sufficient to place RTF statutes into three categories: traditional, statute of repose, and good agricultural practices.⁷¹

a. Codifying the Common Law Coming-to-the-Nuisance Defense

These types of RTF laws have been called “[t]raditional,”⁷² probably because they speak directly to the original intent of RTF laws. They prevent those who come to rural areas from complaining about the farms that now surround them.⁷³ These statutes ultimately limit the RTF protection to a rather narrow set of circumstances in which nonrural landowners move in and change the character of a locality—effectively making a nuisance out of a farm that was appropriate for the conditions prior to the influx. This means that rural landowners or other farmers who lived in the area at the time the agricultural operation began are not precluded from bringing a nuisance suit.⁷⁴

Despite their limited nature, these laws still provide important protections for the farmer. Typically, the fact that a plaintiff moved to a piece of property affected by an existing nuisance (the so-called coming-to-the-nuisance defense) is no defense to the lawsuit.⁷⁵ The law, however, generally provides that the fact that the plaintiff came to the nuisance can be taken into account by a court as part of the nuisance balancing test.⁷⁶ The traditional RTF laws alter the common law by elevating the coming-to-the-nuisance principle from a factor to be considered to a complete defense.

Traditional RTF statutes usually speak in terms of “changed conditions,” meaning that a farming operation that was appropriate for an area when first established does not become a nuisance because others introduced uses of land into the area that are

(“Although each of the statutes has similarities, they can generally be broken down into two separate groups.”).

70. Centner, *supra* note 69, at 94.

71. The choice to divide RTF laws into three categories may seem somewhat arbitrary, and in many ways it is. A reader familiar with this area of law will undoubtedly be able to imagine more nuanced categories that would allow for further discrimination. Alternately, it is arguably possible to find enough similarities between the RTF laws to fit them into two broader categories (for example, in application, an RTF law that utilizes a statute of repose may look much like a traditional codification of the coming-to-the-nuisance defense). The concern here is to provide enough delineation so that readers will take away a broad understanding of differing approaches to antinuisance protection in the context of RTFs, and therefore better understand this Comment’s proposal.

72. Richardson & Feitshans, *supra* note 69, at 128.

73. Centner, *supra* note 48, at 41; Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 121 (1983).

74. See Grossman & Fischer, *supra* note 73, at 122 (noting that most agricultural nuisance suits are brought by other rural residents, and that preventing these suits from going forward would not further the policy behind RTF statutes).

75. See, for example, *Curry v. Farmers Livestock Market*, 343 S.W.2d 134, 138 (Ky. 1961), in which the court stated:

It has been held that the purchaser of property affected by an existing nuisance is not estopped to complain of it, though the circumstance may be considered as a factor in determining the equities of the case. That the complainant has “moved to the nuisance” is no defense. The same principle applies to the erection of a residence in the vicinity after the nuisance is created.

76. RESTATEMENT (SECOND) OF TORTS § 840D (1979).

incompatible with the farm.⁷⁷ In this respect, the traditional RTF statutes can be quite simple for courts to apply. Consider *Cline v. Franklin Pork, Inc.*,⁷⁸ in which the Supreme Court of Nebraska held that the Nebraska RTF statute was inapplicable.⁷⁹ The case arose when the plaintiffs, who owned a farmhouse, sued to enjoin the defendant's hog-raising operation.⁸⁰ When the defendant argued that the RTF law provided a defense to the action, the court simply compared dates.⁸¹ It noted that the plaintiffs had lived in their home since July of 1974, and defendants had been operating their farm only since August of 1974.⁸² Because the plaintiffs' use of land came before the defendant's, the court held the act "inapplicable on its face."⁸³

Traditional RTF statutes offer a measure of predictability as compared to the nuisance balancing test, at least when applied in the manner used by the Supreme Court of Nebraska in *Cline*.⁸⁴ Such a test has the benefit of reducing the uncertainty a lawsuit

77. See, e.g., ALASKA STAT. § 09.45.235(a) (West 2011) ("An agricultural facility or an agricultural operation at an agricultural facility is not and does not become a private nuisance as a result of a changed condition that exists in the area of the agricultural facility if the agricultural facility was not a nuisance at the time the agricultural facility began agricultural operations."); DEL. CODE ANN. tit. 3, § 1401 (West 2011) ("No agricultural or forestal operation within this State which has been in operation for a period of more than 1 year shall be considered a nuisance, either public or private, as the result of a changed condition in or about the locality where such agricultural or forestal operation is located."); IDAHO CODE ANN. § 22-4503 (West 2011) ("No agricultural operation, agricultural facility or expansion thereof shall be or become a nuisance, private or public, by any changed conditions in or about the surrounding nonagricultural activities after it has been in operation for more than one (1) year . . ."); 740 ILL. COMP. STAT. 70/3 (West 2011) ("No farm or any of its appurtenances shall be or become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year . . .").

78. 361 N.W.2d 566 (Neb. 1985).

79. The Nebraska RTF has not changed substantially since *Cline* was decided. At the time, the language read as follows:

A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of land in and about the locality of such farm or farm operation and before such change in land use or occupancy of land the farm or farm operation would not have been a nuisance.

NEB. REV. STAT. § 2-4403 (1985) (amended 1998).

80. *Cline*, 361 N.W.2d at 569.

81. *Id.* at 572.

82. *Id.*

83. *Id.*

84. This is not to say, of course, that traditional RTF statutes are wholly mechanical or predictable. Questions may still arise over when a farm became operational, whether the defendant's operation is of the type that receives the protection of the statute, or whether expansions should be considered a new date of operation such that the defendant loses the protection of the RTF statute with respect to the people already living in the area at the time of the expansion. Questions of the latter sort arise often enough that many RTF statutes address the issue of expansion explicitly. Some provide that the date of the expansion becomes a new date of operation, but does not divest the farmer of protection for the original operation. *E.g.*, TEX. AGRIC. CODE ANN. § 251.003 (West 2011) ("If the physical facilities of the agricultural operation are subsequently expanded, the established date of operation for each expansion is a separate and independent established date of operation . . . and the commencement of expanded operation does not divest the agricultural operation of a previously established date of operation."). Others provide full protection for expansions and improvements. *E.g.*, N.M. STAT. ANN. § 47-9-3(C) (West 2011) ("If an agricultural operation or agricultural facility is subsequently expanded or a new technology is adopted, the established date of operation does not change."). Finally, others deny farmers who make material changes to their operations RTF protection. *E.g.*, ME. REV.

presents and therefore reducing the pressure on farmers to sell their lands to developers.⁸⁵

b. Statutes of Repose

Statutes of repose operate by barring claims brought a certain amount of time after some act done by the defendant.⁸⁶ Texas's RTF law follows this model, and reads:

No nuisance action may be brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought, if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation.⁸⁷

Statutes of repose raise many of the same issues as the traditional statutes, in that a law like Texas's requires the trier of fact to determine the established date of operation. This may not be always an easy task, particularly if the law includes, as Texas does, a provision that requires the "conditions or circumstances complained of as constituting the basis for the nuisance action [to] have existed substantially unchanged since the established date of operation."⁸⁸ The proper interpretation of this provision was the question before the Supreme Court of Texas in *Holubec v. Brandenberger*.⁸⁹

The Holubecs owned a farm and had operated it since 1987.⁹⁰ In late 1996, they began building a feedlot for sheep about 160 feet from the Brandenbergers' home.⁹¹ By March 1997, the feedlot was nearly completed.⁹² The Brandenbergers filed suit on July 31, 1998, alleging that dust, noise, light, flies, and odors from the feedlot constituted a nuisance.⁹³

The court was asked to decide whether the state's RTF law was a statute of repose, beginning to run when the conditions on which the nuisance suit was based

STAT. ANN. tit. 7 § 153(3) (West 2011) ("This subsection does not apply to a farm . . . that materially changes the conditions or nature of the farm . . . after a change in the land use or occupancy of land within one mile of the boundaries of the farm . . .").

85. Grossman & Fischer, *supra* note 74, at 100 (discussing factors that may go into a decision by a farmer to sell her land to developers, including "neighbors' complaints about perceived farm nuisances"); Hand, *supra* note 53, at 292-93 (noting that threat of nuisance lawsuit can cause "impermanence syndrome," which pressures farmers to sell by convincing them that they will be unable to farm their land long-term without legal trouble).

86. BLACK'S LAW DICTIONARY 1546 (9th ed. 2009). A statute of repose should not be confused with a statute of limitations, which bars claims brought a certain amount of time after a claim has *accrued*, generally meaning the date on which the injury is discovered. *Id.* This distinction is important; it means that, under a statute of repose, the potential plaintiff can lose the right to sue for nuisance before she even realizes that an interference with her use and enjoyment of land has occurred.

87. TEX. AGRIC. CODE ANN. § 251.004(a) (West 2011). *See also* Centner, *supra* note 69, at 98 (referring to these types of RTFs as "statutes of limitation," but acknowledging that they bar claims by "neighbors who fail to file a nuisance claim within a stated time period after the commencement of the offensive activity")

88. TEX. AGRIC. CODE ANN. § 251.004(a).

89. 111 S.W.3d 32 (Tex. 2003).

90. *Holubec*, 111 S.W.3d at 34.

91. *Id.*

92. *Id.*

93. *Id.* at 35.

began, or a statute of limitations, beginning when the complaining party discovered the alleged injury.⁹⁴ The court held that, based on the language of the statute, the time at which the offending conditions were discovered was immaterial, making the RTF law a statute of repose.⁹⁵ The court remanded to the trial court so that the Holubecs would have an opportunity to argue that their operation fit under the RTF defense.⁹⁶

In some ways, the statute of repose may be even simpler to apply than the traditional-type RTF statute. The trier of fact must determine the date of operation for the operation or improvement, and whether or not the conditions constituting the nuisance have been substantially unchanged. Beyond that, however, the application of the statute is simple math, adding a year to the date of operation and comparing that date to when the claim was filed.

RTF laws that utilize a statute of repose are not particularly common, with only a handful of states adhering to the model.⁹⁷ It is not uncommon, however, for a traditional RTF statute to incorporate a time period, usually one year.⁹⁸ In these states, the one-year period is a minimum threshold at which a farm operation qualifies for protection, subject to the other requirements of the traditional statute.⁹⁹ With a statute of repose, however, the fact that a farm has been in operation for longer than the statutory period entitles the farm to broad-sweeping immunity.

c. Good Agricultural Practices (GAP)

This type of RTF law provides protection from nuisance lawsuits for farming operations that conform to certain management practices.¹⁰⁰ This requirement arguably results in farming operations that are no less objectionable than they need to be to carry

94. *Id.* at 37.

95. *Id.* at 38.

96. *Id.* at 40.

97. *See, e.g.*, MISS. CODE ANN. § 95-3-29(1) (West 2011) (“In any nuisance action, public or private, against an agricultural operation, . . . proof that the agricultural operation . . . has existed for one (1) year or more is an absolute defense to the nuisance action, if the operation is in compliance with all applicable state and federal permits.”); 3 PA. CONS. STAT. ANN. § 954(a) (West 2011) (“No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action . . .”).

98. *See, e.g.*, ALA. CODE § 6-5-127(a) (2011) (“No agricultural, manufacturing, or other industrial plant or establishment, farming operation facility, . . . or any of its appurtenances or the operation thereof shall be or become a nuisance, private or public, by any changed conditions in and about the locality thereof after the same has been in operation for more than one year during which such . . . farming operation facility . . . has not been found by a court of competent jurisdiction to be a nuisance . . .”).

99. *See supra* Part II.B.2.a for a discussion of the traditional RTF law model.

100. *See, e.g.*, HAW. REV. STAT. ANN. § 165-4 (West 2011) (“No court, official, public servant, or public employee shall declare any farming operation a nuisance for any reason if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices. There shall be a rebuttable presumption that a farming operation does not constitute a nuisance.”); ME. REV. STAT. tit. 7, § 153(1) (2011) (declaring that no farm operation shall be a nuisance if it complies with applicable state and federal laws, rules, and regulations and “conforms to best management practices, as determined by the commissioner in accordance with Title 5, chapter 375”); MICH. COMP. LAWS ANN. § 286.473(1) (West 2011) (“A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture.”).

on their business, thus striking a balance between harm to neighboring property owners and agricultural productivity.¹⁰¹ By limiting the protection of the RTF law, good agricultural management practices avoid the problems of statutes that confer broad immunity, namely the alienation of neighboring landowners who have had their property rights stripped away.¹⁰²

One of the problems with GAP-type RTF laws is that the use of vague terms such as “good agricultural practice,”¹⁰³ “farming practice,”¹⁰⁴ or “generally accepted agricultural practices”¹⁰⁵ raises many of the problems associated with the nuisance standard. Unless the terms are defined concretely, a farmer may be no more certain that his farm qualifies for RTF protection than he is that his farm will not be found to be a nuisance. Of course, if a statute conditioned protection from nuisance suits on conformity with good agricultural practice, and defined good agricultural practice as “those practices that do not unreasonably interfere with the use and enjoyment of neighboring properties,” the statute would provide neither certainty nor any practical protection.¹⁰⁶ Its bounds would be coterminous with those of nuisance law.

Not surprisingly, states have taken different approaches to defining the standards that an agricultural operation must meet to qualify for RTF protection. California’s RTF law defines “proper and accepted customs and standards” as those “established and followed by similar agricultural operations in the same locality.”¹⁰⁷ Inquiring into what types of agricultural practices are followed in the locality seems similar to one of the factors to be weighed in determining the utility of the conduct under the law of nuisance: “the suitability of the conduct to the character of the locality.”¹⁰⁸ Although such a standard may aid in the predictability of the outcome by eliminating the other factors and limiting the necessity for the court to “weigh” the harm against the utility, it still leaves farmers with a great deal of uncertainty as to what they must do to receive protection from the RTF statute.

Although California’s definition of good agricultural practices is somewhat vague and nuisance-like, Colorado’s is nonexistent. Its RTF law conditions immunity for

101. See Centner, *supra* note 69, at 109 (arguing that this sort of RTF statute allows legislatures to “balance the rights of producers and neighbors so that unreasonable activities remain nuisances”).

102. See *id.* (noting that an RTF that takes too many rights away from land owners “may be more objectionable than common law nuisance”). The discussion of how limited protection based on good agricultural practices avoids some of the neighbor conflicts that broader protections do is closely tied to the discussion of when an RTF law may go so far as to amount to a constitutional taking of private property without just compensation. See *infra* Part II.B.4 for a discussion addressing this problem.

103. NEV. REV. STAT. ANN. § 40.140(2)(a) (West 2010).

104. OR. REV. STAT. ANN. § 30.930(2) (West 2011).

105. TENN. CODE ANN. § 43-26-103(b)(1) (West 2011).

106. See RESTATEMENT (SECOND) OF TORTS § 822 (1979) (defining a nuisance in this way); Grossman & Fischer, *supra* note 73, at 162 (noting that requiring compliance with environmental laws limits RTF protection, particularly when the laws “define odor and other kinds of pollutions in nuisance terms”).

107. CAL. CIV. CODE § 3482.5(a)(1) (West 2011). The California RTF law is more properly considered a traditional coming-to-the-nuisance type. As a prerequisite for protection, however, a farm must show that it is operated consistent with proper and accepted customs and standards, and that it has been in operation for three years prior to the filing of the nuisance suit. *Id.* California’s law demonstrates why commentators have such difficulty placing RTF laws into distinct categories.

108. RESTATEMENT (SECOND) OF TORTS § 828(b).

agricultural operations on the employment by the operation of “methods or practices that are commonly or reasonably associated with agricultural production.”¹⁰⁹ The words “commonly” and “reasonably” certainly conjure up thoughts of the very nuisance standard that legislatures are trying to avoid with the RTF regime. The Colorado RTF law also fails to provide any definition at all of the term. Because the statute has been infrequently cited, it is difficult to say how courts would interpret the provision. For example, in *Board of County Commissioners v. Vandemoer*,¹¹⁰ the farmer failed to raise the RTF statute as a defense in circumstances where it would seem to apply.¹¹¹ The court therefore mentioned in its opinion that “[i]t may be that [the RTF statute] would preclude a county from asserting a common law nuisance claim concerning the movement of an implement of husbandry on county roads,” but refused to consider the issue.¹¹² Nonetheless, the court found that the county had not alleged facts sufficient to show that the farmer was maintaining a public nuisance.¹¹³

Michigan’s RTF law, in contrast to those discussed above, takes a much more detailed approach to defining “generally accepted agricultural and management practices”:¹¹⁴

Generally accepted agricultural and management practices means those practices as defined by the Michigan commission of agriculture. The commission shall give due consideration to available Michigan department of agriculture information and written recommendations from the Michigan state university college of agriculture and natural resources extension and the agriculture experiment station in cooperation with the United States department of agriculture natural resources conservation service and the consolidated farm service agency, the Michigan department of natural resources, and other professional and industry organizations.¹¹⁵

By enlisting the help of experts, the Michigan law allows for standards that are based on science, rather than the notoriously difficult to apply nuisance test.¹¹⁶

It is important to note that compliance with good agricultural practices, under any RTF statute, is wholly voluntary.¹¹⁷ Any farmer who wishes to go her own way is free

109. COLO. REV. STAT. ANN. § 35-3.5-102(1)(b) (West 2012).

110. 205 P.3d 423 (Colo. App. 2008).

111. *Vandemoer*, 205 P.3d at 430.

112. *Id.*

113. *Id.* The case involved a farmer who, seven times a year, hauled his sprinkler system (which was on wheels) across a little-used county road. *Id.* at 425. The process blocked access to the road for a grand total of about eleven minutes, and the farmer was careful enough to park a truck with warning flashers on either side to alert oncoming traffic. *Id.* When the facts are combined with the protections provided under state law for implements of husbandry (which the trial court determined the sprinkler system was), it appears that this was a very easy case, which might explain why the farmer felt it unnecessary to rely on the RTF law. *Id.* at 429.

114. MICH. COMP. LAWS ANN. § 286.473(1) (West 2011).

115. *Id.* § 286.472(d) (internal quotation mark omitted).

116. See Centner, *supra* note 69, at 111 (discussing how the Michigan Commission of Agriculture formulates generally accepted agricultural management practices). For a lengthier discussion of Michigan’s RTF law, see *id.* at 111–13.

117. MICH. DEPT. OF AGRIC., GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES FOR PESTICIDE UTILIZATION AND PEST CONTROL 1 (2012), [hereinafter GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES]. The practices for pesticide use and pest control represent just

to do so, but she may not invoke the protection of the RTF statute. Instead, she must take her chances against a nuisance lawsuit, should a neighbor choose to bring one.

3. Tools Used to Effectuate the Ends of RTF Statutes

This subsection discusses three major arrows that legislatures have in their quivers when trying to carry out the goal of preserving and protecting farmland from nuisance suits. First, RTF laws may provide for the preemption of local laws and ordinances that would otherwise conflict with state policy and render farms a nuisance. Second, an RTF statute can provide for an award of attorney's fees to the farmer if her RTF defense succeeds. Third, to set an outer limit to RTF protection, a legislature may provide that the statute does not apply in cases where a farm is operated illegally or negligently. Alternately, an RTF law may deny a farmer protection if the plaintiff can show that the operation of the farm has an adverse effect on public health and safety.

Local control over land use is an issue that RTF laws must confront. Local ordinances may be used to make certain uses of land a nuisance, and zoning—a common local control—could potentially discourage or prohibit farm activities in a certain area. Legislatures must balance traditional local authority against the policy of protecting and preserving farmland. Typically, this occurs through preemption.

Many RTF statutes include an express preemption clause that explains the scope of the law and the types of local ordinances it invalidates.¹¹⁸ However, courts are still required to decide when local ordinances are in conflict with the state RTF law. The Supreme Court of New Jersey dealt with that issue in *Township of Franklin v. Hollander*.¹¹⁹

The question before the court was whether or not the New Jersey RTF act preempted the local Municipal Land Use Law.¹²⁰ The court answered the question in the affirmative, endorsing the lower court's opinion in total.¹²¹ However, the court added a cautionary note to the County Agricultural Boards and the State Agricultural Development Committee.¹²² The court stated that, despite the authority of the Board

one of the sets of practices published by the Michigan Department of Agriculture. *See id.* (providing a list of other generally accepted agricultural and management practices developed by the Michigan Department of Agriculture). The department is required to review and, if necessary, revise the practices each year. MICH. COMP. LAWS ANN. § 286.473(1).

118. *See* ALA. CODE § 6-5-127(c) (2011) (“Any and all ordinances heretofore or hereafter adopted by any municipal corporation in which such [protected activity] is located, which purports to make the operation of any such [protected activity] a nuisance or providing for an abatement thereof as a nuisance in the circumstances set forth in this section are, and shall be, null and void . . .”); CAL. CIV. CODE § 3482.5(d) (West 2011) (“This section shall prevail over any contrary provision of any ordinance or regulation of any city, county, city and county, or other political subdivision of the state.”).

119. 796 A.2d 874 (N.J. 2002).

120. *Hollander*, 796 A.2d at 876.

121. *Id.*

122. *Id.* at 876–78. The County Agricultural Boards (CABs) have the power to determine that a commercial farm constitutes a “generally accepted agricultural operation or practice.” N.J. STAT. ANN. § 4:1C-9 (West 2011). The State Agricultural Development Committee has the power to adopt “agricultural management practices.” *Id.* Either a determination by a CAB that the operation of a commercial farm constitutes a generally accepted agricultural operation or compliance with the agricultural management practices entitles a commercial farm to an irrebuttable presumption that it does not constitute a public or private

and the Committee to override local ordinances in conflict with their determinations, it does not follow that they have “*carte blanche* to impose their views.”¹²³ Instead, the court indicated that it would be an abuse of discretion on the part of the agency to wholly ignore local concerns.¹²⁴ The court found it instructive to offer some examples of when local ordinances and zoning laws would be entitled to deference. It noted that, when enforcing an ordinance would not interfere with farming, such as in the case of a height limitation on buildings, the zoning ordinance should probably prevail.¹²⁵ A tougher case might arise, the court suggested, if the farmer had a good agricultural reason for wanting to depart from the ordinance, such as needing greater space in a barn than the height limitation would not otherwise allow.¹²⁶

Hollander demonstrates the tightrope that a state must attempt to walk when deciding how far to go with RTF protection. In a state like New Jersey, where nuisance immunity is based on compliance with certain standards, those standards will inevitably come into conflict, at some point, with local ordinances. States must decide how much deference can and should be paid to local concerns while still carrying out the policy behind the RTF law—that is, encouraging the preservation of farmland. Farmers left wholly to the whims of local governments might find themselves with little protection at all, and thus the RTF law would not serve to quell the incentives for a farmer to convert or sell her land. On the other hand, states that allow the committees setting the standards for protection to run roughshod over local rules would undoubtedly find themselves alienating municipalities.

A second way in which legislatures increase the effectiveness of RTFs is by shifting attorney’s fees. It is no secret that attorney’s fees are often substantial.¹²⁷ It follows that forcing a litigant to pay the other side’s fees if she loses—without the potential for a similar result should the case go the other way—would strongly discourage the filing of suits in the first place. Therefore, some states provide that the defendant may recover costs and/or reasonable attorney’s fees in the event that she prevails over the plaintiff bringing the nuisance action.

There is one major distinction between RTF statutes with regard to the recovery of fees: those that condition recovery for the defendant on the lawsuit being frivolous,¹²⁸ and those that allow recovery in any case in which the defendant

nuisance (subject to certain limitations, such as compliance with federal and state laws and regulations, and not posing a threat to public health and safety). *Id.* § 4:1C-10.

123. *Hollander*, 796 A.2d at 877.

124. *See id.* (holding that, when an agricultural management practice is at issue, “the CAB or SADC must then consider relevant municipal standards in rendering its ultimate decision” (quoting *Twp. of Franklin v. Hollander*, 769 A.2d 427, 440 (N.J. Super. Ct. App. Div. 2001))).

125. *Id.* at 878.

126. *Id.*

127. *See* Susan Lorde Martin, *Wind Farms and NIMBYS: Generating Conflict, Reducing Litigation*, 20 *FORDHAM ENVTL. L. REV.* 427, 427 (2010) (acknowledging that those who successfully file lawsuits against wind farms are typically affluent, given that they are the only ones who can afford the long litigation process against a (usually) wealthy corporation).

128. *See* LA. REV. STAT. ANN. § 3:3605 (West 2011) (“If the court determines that any action alleging that an agricultural operation is a nuisance is frivolous, the court may award costs of court, reasonable attorney fees, and any other related costs to the defendant.”); MO. ANN. STAT. § 537.295(5) (West 2011) (“In any nuisance action brought in which an agricultural operation is alleged to be a nuisance, and which is found to be

prevails.¹²⁹ The former, under the current range of RTF laws, are more common than the latter. Other RTF statutes take the less noteworthy route of permitting recovery of costs for either litigant at the court's discretion.¹³⁰

Although it is easy to see why provisions that award attorney's fees to the defendant deter lawsuits, the provisions potentially raise environmental justice issues. Surely they do not deter equally.¹³¹ The problem of "hotspots," meaning areas where there is a higher than average concentration of unhealthy polluters, is well documented.¹³² These hotspots tend to encompass overwhelmingly poor neighborhoods, as the impoverished people who live there have neither the political clout to demand relocation of the offending activities, nor the resources to fight back in the courts.¹³³ On the other hand, for wealthy litigants such as those who successfully opposed an offshore wind project in Massachusetts, the prospect of paying a farmer's court costs may not be horribly frightening.¹³⁴

Finally, clauses in RTF laws that condition protection on a farm being operated in a nonnegligent manner or on not having an adverse effect on public health and safety serve to balance the rights of landowners against the immunity provided by the

frivolous by the court, the defendant shall recover the aggregate amount of costs and expenses"); N.M. STAT. ANN. § 47-9-7 (West 2011) ("If a court determines that any action alleging that an agricultural operation is a nuisance is frivolous, the court may award reasonable costs and attorneys' fees to the defendant."); OKLA. STAT. ANN. tit. 50, § 1.1(D) (West 2011) ("In any action for nuisance in which agricultural activities are alleged to be a nuisance, and which action is found to be frivolous by the court, the defendant shall recover the aggregate amount of costs").

129. See MICH. COMP. LAWS ANN. § 286.473b (West 2011) ("In any nuisance action brought in which a farm or farm operation is alleged to be a nuisance, if the defendant farm or farm operation prevails, the farm or farm operation may recover from the plaintiff the actual amount of costs . . . together with reasonable and actual attorney fees."); TEX. AGRIC. CODE ANN. § 251.004(b) (West 2011) ("A person who brings a nuisance action for damages or injunctive relief [against a farm that qualifies for protection under the RTF law] is liable to the agricultural operator for all costs and expenses incurred in defense of the action").

130. See, e.g., OR. REV. STAT. ANN. § 30.938 (West 2011) (prevailing party shall be entitled to attorney's fees in "any action . . . alleging nuisance or trespass and arising from a practice that is alleged by either party to be a farming or forest practice"). There are also general fees and costs statutes that may apply, which is what makes this provision less important than those that allow recovery only for the defendant. See HAW. REV. STAT. § 607-14.5 (West 2011) (a court, in any civil action may, upon a finding that some or all of a party's claims were frivolous, assess attorney's fees and costs against the party, whether or not the party prevailed).

131. The fact that frivolity is a low standard that will rarely leave a plaintiff liable for costs and fees may not do much to decrease the deterrence factor of the provision. See Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 111 (1998) (noting that "at least in Iowa, there appears to be a great deal of confusion about this provision, with many people believing it requires hard fee-shifting whenever a party loses a suit").

132. See, e.g., Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1002-03, 1009-15 (1992) (observing that locally undesirable land uses tend to be sited in neighborhoods "populated disproportionately by the poor and by people of color," and reviewing literature supporting this observation); Uma Outka, Comment, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 211-15 (2005) (discussing the "disproportionately large environmental burden on poor and minority communities").

133. See Martin, *supra* note 127, at 427 (noting that poor tend to end up surrounded by more than their fair share of objectionable land uses).

134. See *id.* at 450 (describing the wealthy and powerful opponents of the Cape Wind project).

statute.¹³⁵ They provide an outer limit for RTF protection. In a sense, those statutes that use these provisions introduce into the calculus some type of standards for agricultural management, even if the statute as a whole utilizes the traditional or statute of repose models.

4. Constitutional Issues with the RTF Regime¹³⁶

The most famous case addressing the constitutionality of RTF statutes comes from the Supreme Court of Iowa, which in 1998 decided *Bormann v. Board of Supervisors*.¹³⁷ There, the plaintiffs were several landowners living near a proposed agricultural area.¹³⁸ Under the Iowa RTF law in force at the time, any qualifying farm within an agricultural area would receive RTF protection.¹³⁹ The plaintiffs mounted a facial challenge to the RTF law, arguing that, among other things, it amounted to a taking of property without just compensation under both the United States and Iowa Constitutions.¹⁴⁰ The Iowa Supreme Court agreed, finding the law “plainly—we think flagrantly—unconstitutional.”¹⁴¹

The court began by laying out its approach to the Takings issue. There were, it noted, three questions to answer: First, “Is there a constitutionally protected private property interest at stake?”¹⁴² second, “Has this private property interest been ‘taken’ by the government for public use?”¹⁴³ and finally, “If the protected property interest has been taken, has just compensation been paid to the owner?”¹⁴⁴ Because the third question was not in dispute—neither side contended that payment had been offered by the State—the court focused on only the first two.

As to whether the RTF law implicated a private property right, the court first determined that, for the purpose of a Fifth Amendment Takings analysis, state law

135. See S.D. CODIFIED LAWS § 21-10-25.2 (2011) (“The provisions of this section do not apply if a nuisance results from the negligent or improper operation of any such agricultural operation or its appurtenances.”); TEX. AGRIC. CODE ANN. § 251.004(a) (West 2011) (“This subsection does not restrict or impede the authority of this state to protect the public health, safety, and welfare or the authority of a municipality to enforce state law.”); VA. CODE ANN. § 3.2-302(A) (West 2011) (“The provisions of this section shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural operation or its appurtenances.”); WASH. REV. CODE ANN. § 7.48.305 (West 2011) (stating that a qualifying agricultural activity shall not be a nuisance “unless the activity or practice has a substantial adverse effect on public health and safety”).

136. The Takings Clause aspect of antinuisance legislation is not the primary concern of this Comment. The question of whether or not a particular government action amounts to a constitutional taking is a “problem of considerable difficulty.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978). The purpose of this subsection is, therefore, simply to acknowledge the existence of the Takings problem and to refer the reader to sources in which it is discussed at greater length.

137. 584 N.W.2d 309 (Iowa 1998).

138. *Bormann*, 584 N.W.2d at 312.

139. *Id.* at 321.

140. *Id.* at 312.

141. *Id.* at 322.

142. *Id.* at 315.

143. *Id.*

144. *Id.*

controlled in deciding what property is.¹⁴⁵ It then stated that—based on a 100-year-old precedent—the right to maintain a nuisance amounts to an easement over the property of those living nearby.¹⁴⁶ Therefore, the Supreme Court of Iowa determined that the RTF statute involved the State Legislature giving farmers an easement over the property of their neighbors.¹⁴⁷

The court then turned to the more difficult question of whether or not the private property interest (the easement) had been “taken” from the neighbors by the RTF statute.¹⁴⁸ Laying out the general rules of Takings jurisprudence, the court noted that there are two situations in which the U.S. Supreme Court has found a taking without any balancing of factors (a so-called *per se* taking): physical invasion of property by government action and deprivation of all economically beneficial or productive use of the land.¹⁴⁹ All other takings (so-called regulatory takings) are analyzed on a case-by-case basis using a number of factors.¹⁵⁰

The court finally concluded that the RTF law amounted to a governmental sanctioning of a nuisance, which qualified as a physical taking of the plaintiffs’ property.¹⁵¹ Citing first a number of physical intrusions onto land that had been held to require compensation, the court then moved on to situations in which seemingly nonphysical intrusions had been ruled *per se* takings, such as in the case of low-flying planes.¹⁵² Lastly, the court found that it was unconstitutional for the legislature to authorize the use of property in such a way as to “infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation.”¹⁵³ This, they contended, was a species of physical intrusion that did not require a balancing test to determine whether or not a taking had occurred.¹⁵⁴

Takings challenges involve a tricky balancing act for RTF laws. When a state legislature authorizes certain uses of land that would otherwise constitute a nuisance, it clearly restricts the rights of the neighboring landowners. Indeed, any regulation of land use is a limitation on private property rights. *Bormann* indicates that legislators must be cognizant of the constitutional limits on such restrictions. However, *Bormann* does not mean that all RTF laws are constitutionally suspect. Many legal commentators have opined on the constitutionality of various RTF laws, with most of them determining that the vast majority should stand up to a Fifth Amendment challenge.¹⁵⁵

145. *Id.* (citing *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

146. *Id.* (citing *Churchill v. Burlington Water Co.*, 62 N.W. 646, 647 (Iowa 1895)).

147. *Id.* at 316.

148. *Id.*

149. *Id.*

150. *Id.* at 316–17.

151. *Id.* at 321.

152. *Id.* at 317–18.

153. *Id.* at 321.

154. *See id.* at 317–21 (asking whether RTF law sanctioned a physical invasion of plaintiffs’ property and answering in affirmative, though never specifically referring to the invasion as “physical”).

155. *See* Terence J. Centner, *Anti-Nuisance Legislation: Can the Derogation of Common-Law Nuisance Be a Taking?*, 30 ENVTL. L. REP. 10253, 10260 (2000) (arguing that RTF laws providing expansive, nearly unlimited protection may well be found unconstitutional, but that “for a majority of RTF laws,” the interference with neighboring property rights should be minor and intermittent, which makes the laws less

5. The Dark Side of Right-to-Farm

RTF certainly has its critics, and for good reasons. After all, to be effective, RTF laws must wrest from neighboring landowners some of their property rights and put them in the hands of farmers.¹⁵⁶ Although this approach prevents nuisance lawsuits from interfering with an important economic activity,¹⁵⁷ it also raises a number of potential problems. RTF protections can be drawn too broadly, such that they become unfaithful to the underlying purposes of the regime. Similarly, they can define the protected class of activities too widely, protecting massive agribusiness activities that are objectionable by any reasonable measure. Finally, and perhaps most troublesome, RTF laws can have the effect of increasing regulation of farms rather than protecting them from interference. This additional regulation can be either by design¹⁵⁸ or the result of political backlash.

The initial purpose of RTF laws was to protect farmland from the pressures of urbanization by blocking one of the possible avenues of relief for a disgruntled neighbor.¹⁵⁹ This led to many RTF statutes providing that, as a precondition to

vulnerable to constitutional challenge); Eric Pearson, *Immunities as Easements as "Takings"*: *Bormann v. Board of Supervisors*, 48 *DRAKE L. REV.* 53, 76 (1999) (presenting a very strong criticism of the *Bormann* decision and arguing that it has "logical distortions" that demand it be overruled); Jennifer L. Beidel, Comment, *Pennsylvania's Right-to-Farm Law: A Relief for Farmers or an Unconstitutional Taking?*, 110 *PENN. ST. L. REV.* 163, 184 (2005) (arguing that Pennsylvania's RTF law would probably be upheld by the Pennsylvania courts); Jason Jordan, Comment, *A Pig in the Parlor or Food on the Table: Is Texas's Right to Farm Act an Unconstitutional Mechanism to Perpetuate Nuisances or Sound Public Policy Ensuring Sustainable Growth?*, 42 *TEX. TECH L. REV.* 943, 972–77 (2010) (arguing that, under a traditional takings analysis, Texas's RTF law would likely be held constitutional). *But see* Richardson & Feitshans, *supra* note 69, at 135–36 ("The *Bormann* result and reasoning find firm foundation in settled nuisance law principles and takings law reasoning. In elucidating these basic, yet difficult, principles the *Bormann* court brings the law back to the future. The *Bormann* opinion, and its ramifications, are not anomalies." (footnote omitted)); Lisa N. Thomas, Comment, *Forgiving Nuisance and Trespass: Is Oregon's Right-to-Farm Law Constitutional?*, 16 *J. ENVTL. L. & LITIG.* 445, 458–62 (2001) (arguing that, because Oregon's law is broader than Iowa's and also includes immunity for trespass, it effects a taking).

156. Hamilton, *supra* note 131, at 105. However, one commentator has interpreted Pennsylvania's RTF law as intending to "protect farmers from unsubstantiated nuisance actions." Thomas B. McNulty, Comment, *The Pennsylvania Farmer Receives No Real Protection From the Pennsylvania Right to Farm Act*, 10 *PENN. ST. ENVTL. L. REV.* 81, 81 (2001). If by "unsubstantiated nuisance actions" the comment simply means actions that the legislature believes should be disallowed, then the statement raises no problems. However, if it means nuisance actions that would fail even under the normal nuisance framework, then it largely misses the point. As the Pennsylvania RTF statute states, its purpose is to protect farmers by "limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances." 3 *PA. CONS. STAT. ANN.* § 951 (West 2011). Its ultimate purpose is not to protect farmers from unsubstantiated nuisance actions, but from actions that would have substance but for the RTF protection. RTF statutes *define* what is and is not a nuisance when it comes to farms. As Professor Hamilton points out, this naturally involves a reallocation of property rights. Hamilton, *supra* note 131, at 105; *see also* Grossman & Fischer, *supra* note 73, at 101 ("In an attempt to permit the farmer to continue farming, right to farm statutes alter traditional nuisance law principles.").

157. Walker, *supra* note 53, at 470.

158. For example, RTF statutes that require adherence to good agricultural practices, discussed *supra* Part II.B.2.c, necessarily involve a number of very specific regulations.

159. *See supra* Part II.B.1 for a discussion of the general purposes of the RTF regime. *See also* Hamilton, *supra* note 131, at 104 (arguing that "the basic premise of right-to-farm laws, which is in many

protection, the defendant-agricultural operation must have been in operation prior to the arrival of the plaintiff.¹⁶⁰ Professor Neil Hamilton has argued that these types of RTF statutes that have the “strongest equitable justification.”¹⁶¹ Now that a number of RTF statutes have departed from the preexistence requirement,¹⁶² there is concern the protections have gone too far, and that certain farming operations are unfairly receiving the protection of the RTF framework. More specifically, the elimination of the preexistence requirement is troubling because it destroys the underlying logic of the RTF regime, which relies on the premise that those moving near a protected farm were aware of the farm when they chose to move.¹⁶³

Perhaps more disturbing than expanding RTF protection beyond its logical boundaries are the types of activities to which such protections will extend. Although the idea of protecting farmland from urban encroachment might call to mind images of small family farms dotting the countryside, the reality is substantially different. Much farming is now done on a tremendous scale, as the growth of concentrated animal feeding operations (CAFOs) demonstrates.¹⁶⁴ This specialization and concentration may be economically efficient, but having more farming done by fewer operations has a downside: it can be filthy, smelly, and downright oppressive for neighbors living nearby.¹⁶⁵

Rigid RTF laws not only give sanction to these objectionable activities, but can work to prevent changes. As one commentator has noted, even requiring conformity with generally accepted agricultural management practices (GAAMPs) leaves open the possibility that the agency responsible for regulation will miss the mark.¹⁶⁶ Michigan’s GAAMPs, for example, allow even heavy manure spreading by CAFOs and prohibit private parties from participating in regulation through nuisance suits.¹⁶⁷

This problem may be exacerbated by the fact that RTF laws, although facially neutral with respect to size, are likely to favor larger facilities.¹⁶⁸ At the very least, it

ways a codification of the common law defense of ‘coming to the nuisance,’ ha[s] and retains both an element of legal validity and equitable justification that cannot be denied”).

160. See *supra* Part II.B.2.a for a discussion of the traditional, coming-to-the-nuisance type of RTF.

161. Hamilton, *supra* note 131, at 108.

162. See *supra* Parts II.B.2.b and II.B.2.c for a discussion of the statute of repose and good agricultural practices types of RTF laws. Many of these types have done away with the requirement of preexistence.

163. Hamilton, *supra* note 131, at 108.

164. See Walker, *supra* note 53, at 488–89 (noting that many of the new farms, which are protected under Michigan’s RTF law, will be CAFOs, rather than smaller operations).

165. See Centner, *supra* note 69, at 90 (noting the “industrialization of agricultural production,” along with the fact that less than two percent of the country’s population is now engaged in farming); Hamilton, *supra* note 131, at 109–10 (noting that, when dealing with “mega-scale livestock feeding operations,” one must deal with “such intractable disputes as odor control, waste handling, potential water pollution, and swine production’s impact on the social structure” (footnote omitted)).

166. Karly Zande, Note, *Raising a Stink: Why Michigan CAFO Regulations Fail to Protect the State’s Air and Great Lakes and Are in Need of Revision*, 16 BUFF. ENVTL. L. J. 1, 25–26 (2008) (noting that preemption of local regulation by the Michigan RTF Act, combined with prohibition of private suits “makes it imperative that the Michigan legislators craft more restrictive CAFO regulations designed to protect the state’s air and lakes”).

167. *Id.* at 25.

168. Hamilton, *supra* note 131, at 112.

makes sense that a larger farm operation would face a greater threat from nuisance suits than a smaller one.¹⁶⁹ This is problematic, and it raises issues of whether giant facilities should be classed as farms at all, instead of industrial operations.¹⁷⁰

One of the effects of RTF protection is that it frees farms from regulation through the law of nuisance. On the other hand, some RTF laws, particularly those that require a farm to conform to certain business practices, may result in burdensome and particularized regulation, an irony that Professor Hamilton has noted.¹⁷¹ Under such a statute, in return for not having to worry so much about nuisance plaintiffs, a farmer must worry about “farming by the book.”¹⁷² The result is that a statute meant to provide a farmer greater security and autonomy actually leaves her subject to the pervasive, comprehensive authority of the State.¹⁷³

While none of these concerns are necessarily enough in themselves to make RTF laws undesirable, they do expose a side of the regime that should make legislators think carefully about the types of antinuisance protections they want to provide to certain businesses. Although RTFs can be criticized for their interference with neighbors’ property rights and their protection of objectionable activities, this is to some measure unavoidable.¹⁷⁴ These mechanisms are what make the protections effective.

C. *Wind Power and Nuisance Law in the United States*

Power generated from wind and other renewable sources is playing a more and more important role in American energy policy, particularly as energy costs remain volatile.¹⁷⁵ The last two Presidents of the United States have made renewable energy, including wind, a part of their political agenda.¹⁷⁶ President Obama, for example, broached the subject of renewable energy in his 2011 State of the Union address: “We’ll invest in biomedical research, information technology, and especially clean energy technology . . . an investment that will strengthen our security, protect our planet, and create countless new jobs for our people.”¹⁷⁷

169. *Id.* However, smaller operations can attract their share of complaints as well. See Tiffany Dowell, Comment, *Daddy Won’t Sell the Farm: Drafting Right to Farm Statutes to Protect Small Family Producers*, 18 SAN JOAQUIN AGRIC. L. REV. 127, 131 (2009) (noting that “approximately thirty-three percent of all small farms in New York have received complaints from neighbors”).

170. See Hamilton, *supra* note 131, at 113 (discussing a number of challenges to the application of RTF laws on this basis).

171. *Id.* at 109.

172. *Id.*

173. *Id.* Of course, should such regulations become too onerous, a farmer can “opt-out” by not complying with the rules and subjecting herself to the nuisance standard.

174. See *id.* at 105 (“[I]t is necessary to acknowledge that to be effective right-to farm laws require a reallocation of property rights (or at least of societal priorities).”).

175. See, e.g., Motoko Rich et al., *Rising Oil Prices Pose New Threat to U.S. Economy*, N.Y. TIMES, Feb. 25, 2011, at A1 (discussing rising energy prices as result of “political violence” and “unrest” in Libya).

176. Victoria Sutton & Nicole Tomich, *Harnessing Wind is Not (by Nature) Environmentally Friendly*, 22 PACE ENVTL. L. REV. 91, 93 (2005) (noting that the Bush administration focused on the use of renewables to reduce production of greenhouse gases, and that financial incentives were used to spur development).

177. Barack Obama, President of the United States, State of the Union Address (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

As renewables and clean energy technology grow, they will take a greater part of the energy landscape, and dirtier fossil fuel-produced energy will be displaced. As President Obama continued: “I’m asking Congress to eliminate the billions in taxpayer dollars we currently give to oil companies. . . . [I]nstead of subsidizing yesterday’s energy, let’s invest in tomorrow’s.”¹⁷⁸ Finally, the President laid out a concrete (and ambitious) goal: “By 2035, 80 percent of America’s electricity will come from clean energy sources.”¹⁷⁹

1. The Growth of Wind Energy

Concern about global climate change has helped to focus the public’s attention on the enormous levels of greenhouse gas emissions in industrialized countries.¹⁸⁰ There is an ever-growing acknowledgment that humans can and are altering their environment for the worse. The danger is that man-made greenhouse gas emissions may irreparably alter the sensitive ecosystems of our planet.¹⁸¹ That possibility has encouraged both politicians and business people to make the expansion of renewable energy a top priority.¹⁸²

Combustion of fossil fuels is a major factor in global climate change. The greenhouse gas most responsible is carbon dioxide, which has been steadily building up in the atmosphere since the industrial revolution began in the eighteenth century.¹⁸³ But global climate change is not a specter hanging over some distant horizon; there is evidence that it has already impacted ecosystems and caused a certain amount of irreversible damage.¹⁸⁴ Even if the worst-case scenario predictions do not materialize, it is difficult to imagine a downside to encouraging the production of energy through means that do not emit carbon dioxide. As one recent article put it, “What’s not to love?”¹⁸⁵

178. *Id.*

179. *Id.*

180. See VOLKER QUASCHNING, RENEWABLE ENERGY AND CLIMATE CHANGE 42 (Hedy Jourdan trans., John Wiley & Sons 2010) (2008) (noting that industrialized countries are the biggest emitters of greenhouse gases per capita); Stephen Harland Butler, Comment, *Headwinds to a Clean Energy Future: Nuisance Suits Against Wind Energy Projects in the United States*, 97 CALIF. L. REV. 1337, 1338 (2009) (identifying the coincidence of increased political push for renewable energy and higher awareness of climate change).

181. See Brit T. Brown & Benjamin A. Escobar, *Wind Power: Generating Electricity and Lawsuits*, 28 ENERGY L.J. 489, 490 (2007) (discussing the rising public awareness of global climate change and its impact on the political feasibility of renewable energy).

182. See *id.* (noting that businesses are devoting larger amounts of capital to wind energy projects, and politicians are moving to “facilitate the expansion of renewable fuels”).

183. See Roberta Mann, *Waiting to Exhale?: Global Warming and Tax Policy*, 51 AM. U. L. REV. 1135, 1142 (2002) (noting that circumstances strongly suggest a connection between human activity and global climate change); Jennie Shufelt, Comment, *New York’s CO₂ Cap-and-Trade Program: Regulating Climate Change Without Climate Change Legislation*, 73 ALB. L. REV. 1583, 1585–86 (2010) (acknowledging that “most scientists agree that, at least to some extent, human activity is causing or accelerating climate change”).

184. See QUASCHNING, *supra* note 180, at 38 (“What is clear is that there is no way to stop climate change completely. However, determination and appropriate countermeasures can keep the consequences of climate change within a manageable limit and largely save the climate.”); Shufelt, *supra* note 183, at 1585 (noting that evidence indicates that climate change has already impacted ecosystems around the globe).

185. Brown & Escobar, *supra* note 181, at 491.

Beyond climate change, renewable energy is also spurred on by pocketbook concerns. Although notions of environmental harm—even catastrophic harm—may not pique everyone’s interest, energy prices open their eyes.¹⁸⁶ This lack of price stability¹⁸⁷ undoubtedly puts pressure on energy companies and politicians to take greater environmental risks in an attempt to secure access to energy.¹⁸⁸ Renewable energy has a role to play in solving this problem.

Wind power is growing, and quickly. For the past several years, it has been the fastest-growing source of electric power, outpacing coal, natural gas, and other renewables.¹⁸⁹ Large chunks of the Midwest, along with parts of New England, are fertile ground for new wind-energy projects.¹⁹⁰ This, along with favorable tax incentives or grants,¹⁹¹ helped to produce a massive increase in wind-energy generation in the United States over the last few years, “from about 6 billion kilowatthours in 2000 to about 120 billion kilowatthours in 2011.”¹⁹² In addition, wind power has been positively influenced by new technologies that reduce cost, and by programs, including so-called green pricing options, that encourage states as well as individual consumers to embrace wind power.¹⁹³

As of September, 2010, the United States has slightly less than 37,000 megawatts in installed wind capacity.¹⁹⁴ Texas is by far the national leader, with almost 10,000 megawatts,¹⁹⁵ although Iowa comes in a distant second at around 3,700 megawatts.¹⁹⁶ This represents a significant jump from only ten years ago, when the entire United

186. See Sutton & Tomich, *supra* note 176, at 93 (discussing how public interest in renewable energy has “fluctuated inversely with the availability of fossil fuels over the years”).

187. See Butler, *supra* note 180, at 1338 (noting that the price of gasoline has been particularly unstable ever since the drastic price increases in 2008).

188. Surely no reminder is needed of the environmental horror that was (and still is) the BP oil spill. See generally Jeffrey Ball & Robert Lee Hotz, *The Gulf Oil Spill: Gauging Harm to Ecosystem Could Take Years*, WALL ST. J., May 28, 2010, at A8. Enormous demand for oil, along with the uncertainty of its availability, undoubtedly plays a role in the decision to drill deep. Such drilling, as the whole world now knows, carries with it larger environmental risks.

189. U.S. Energy Info. Admin., *Wind*, U.S. DEP’T OF ENERGY, <http://www.eia.doe.gov/cneaf/solar.renewables/page/wind/wind.html> (last updated Jan. 2011).

190. U.S. Energy Info. Admin., *Figure 13. Wind Resource Potential*, U.S. DEP’T OF ENERGY, <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/fig13.html> (last updated Apr. 29, 2003).

191. See U.S. Energy Info. Admin., *supra* note 189 (noting the role of federal tax credits and grants in making investment in wind energy more attractive, and also mentioning renewable portfolio standards).

192. U.S. Energy Info. Admin., *Electricity Generation from Wind*, U.S. DEP’T OF ENERGY, http://www.eia.doe.gov/energyexplained/index.cfm?page=wind_electricity_generation (last updated Mar. 15, 2012).

193. See *id.* (explaining that technology has reduced the costs of wind energy, and that green pricing programs, which allow customers to volunteer to pay a little more for electricity that is produced through renewable sources, have encouraged individual consumers to bear some of the cost of renewable development).

194. *U.S. Wind Energy Projects*, AM. WIND ENERGY ASS’N, <http://archive.awea.org/projects> (last updated Sept. 30, 2010); see also Nat’l Renewable Energy Lab., *Current Installed Wind Power Capacity (MW)*, U.S. DEP’T OF ENERGY, http://www.windpoweringamerica.gov/images/windmaps/installed_capacity_current.jpg (last updated Dec. 1, 2011) (reprinting the same information in map form, but updating it to reflect developments in 2011, and citing to the American Wind Energy Association data).

195. *U.S. Wind Energy Projects*, *supra* note 194.

196. *Id.*

States carried only about 2,500 megawatts of wind energy capacity, and California was the only state that could boast a capacity of greater than 1,000 megawatts.¹⁹⁷

Even with the enormous gains made, wind stands a long way from being a major player in the United States energy market. For example, coal accounted for around forty-two percent of the net electrical power generation in the United States in 2011,¹⁹⁸ whereas currently wind makes up only about three percent.¹⁹⁹ Though as a percentage of total production wind energy is a rather small player, its growth shows no signs of slowing. Between 2011 and 2015, developers have plans to install over 15,043 megawatts of new capacity.²⁰⁰

The price of wind power is largely a function of where the energy is produced.²⁰¹ More favorable wind conditions lead to more favorable prices.²⁰² Additionally, the availability of tax credits for wind energy, most notably the federal renewable energy production tax credit, makes wind more attractive to investors from a cost perspective.²⁰³

Wind power also comes with much lower environmental costs than do traditional fossil fuels. Physically, a wind turbine takes up a much smaller space than a fossil fuel plant relative to the amount of energy produced.²⁰⁴ Wind turbines also emit nothing harmful²⁰⁵ into the air, ground, or water when operating in the normal fashion.²⁰⁶ The result of this is that, if wind energy displaces—as opposed to merely supplementing—fossil fuel energy, air quality in the vicinity of the turbines improves.²⁰⁷ Additionally, wind turbines, while in operation, use significantly less water than do their fossil-fuel-run counterparts.²⁰⁸

197. Nat'l Renewable Energy Lab., *2000 Year End Wind Power Capacity (MW)*, U.S. DEP'T OF ENERGY (Mar. 5, 2009), http://www.windpoweringamerica.gov/images/windmaps/installed_capacity_2000.jpg.

198. U.S. Energy Info. Admin., *Electricity in the United States*, U.S. DEP'T OF ENERGY, http://www.eia.doe.gov/energyexplained/index.cfm?page=electricity_in_the_united_states (last updated May 2, 2012).

199. U.S. Energy Info. Admin., *supra* note 189.

200. *Id.*

201. See New England Wind Forum, *Wind Power Economics*, U.S. DEP'T OF ENERGY, <http://www.windpoweringamerica.gov/newengland/economics.asp> (last updated Jan. 13, 2011) (acknowledging wind speed as one of the primary factors in cost of wind power in a particular area).

202. *Id.*

203. *Federal Production Tax Credit for Wind Energy*, AM. WIND ENERGY ASS'N, http://www.awea.org/issues/federal_policy/upload/PTC-Fact-Sheet.pdf (last visited Sept. 6, 2012).

204. U.S. Energy Info. Admin., *Wind Explained: Wind Energy and the Environment*, U.S. DEP'T OF ENERGY, http://www.eia.doe.gov/energyexplained/index.cfm?page=wind_environment (last updated Mar. 19, 2012).

205. This general statement should be qualified with the disclaimer that wind turbines do use lubricating fluids, and the fluids have escaped and contaminated soil and groundwater on some occasions.

206. See U.S. Energy Info. Admin., *supra* note 204 (noting that, under normal circumstances, wind turbines do not pollute the air or water, and may in fact reduce the amount of air pollution if they replace fossil-fuel-generated electricity).

207. *Id.*; see also *Wind Turbines and Health*, AM. WIND ENERGY ASS'N, http://www.awea.org/learnabout/publications/upload/Wind-Turbines-and-Health-Factsheet_WP11.pdf (last updated May 2010) (noting that, when wind energy is used to offset pollution-generating sources, air quality is improved).

208. U.S. Energy Info. Admin., *supra* note 204.

This is not to say, of course, that wind energy is entirely harmless to the environment or to humans. Wind turbines do not produce harmful emissions while in operation, but the process of choosing an appropriate site and constructing the turbines does cause environmental damage.²⁰⁹ Construction requires large machinery and trucks, access roads, and transmission lines.²¹⁰ These naturally produce emissions and require significant amounts of water.²¹¹ In addition, the construction and decommissioning processes involve more subtle environmental harms, such as grading and the removal of topsoil, which can speed erosion and reduce the value of previously arable land.²¹² This is on top of the potential harm to wildlife that comes from the operation of the turbines. Spinning turbines can kill birds and bats,²¹³ though this impact can be limited through careful siting.²¹⁴

Other potentially negative impacts on humans from wind turbines are more direct and immediate. Perhaps the most commonly cited problem is the noise that comes from the turbines.²¹⁵ Among the other problems are shadow flicker, the potential of ice being thrown from the spinning blades, the negative visual impacts, and risk of blade breakage.²¹⁶ Recently, persons living near turbines have expressed concerns that living near a wind farm might have direct impacts on health, effects that one researcher has termed “Wind Turbine Syndrome.”²¹⁷ Naturally, advocates of greater wind energy development vigorously dispute the claims that wind turbines come with adverse health effects.²¹⁸

209. BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT ON WIND ENERGY DEVELOPMENT ON BLM-ADMINISTERED LANDS IN THE WESTERN UNITED STATES 5-3 (2005) [hereinafter PROGRAMMATIC EIS], available at http://windeis.anl.gov/documents/fp_eis/index.cfm.

210. *Id.* at 5-3 to 5-5.

211. *Id.* at 5-10.

212. *Id.* at 5-5 to 5-6.

213. U.S. Energy Info. Admin., *supra* note 204; see also Sutton & Tomich, *supra* note 176, at 95–97 (discussing the ways in which wind turbines negatively affect birds and bats).

214. See *Wind Energy and Wildlife*, AM. WIND ENERGY ASS’N, http://www.awea.org/learnabout/publications/upload/Wind-Energy-and-Wildlife_May-2011.pdf (last updated May 2011) (pointing out that bird and bat deaths vary according to site, and noting that the site screening tools and mitigation measures can lower impact on wildlife).

215. See *infra* Part II.C.2 for a discussion of nuisance cases involving allegations of noise from wind turbines. Such complaints center, at least with regard to modern wind turbines, around what is known as aerodynamic noise: the sound created when wind passes over the blades. PROGRAMMATIC EIS, *supra* note 209, at 5-23 to 5-24. The other type of noise is mechanical noise, which is the product of the internal mechanisms of the turbine. *Id.* at 5-23. Mechanical noise has been all but eliminated by improvements in turbine design, and therefore its existence can be seen as a design flaw. *Id.*

216. See Butler, *supra* note 180, at 1337–38 (cataloguing the types of complaints lodged against wind turbine owners). See also *infra* Part II.C.2 for a discussion of various nuisance cases brought against wind energy producers.

217. See generally NINA PIERPONT, WIND TURBINE SYNDROME: A REPORT ON A NATURAL EXPERIMENT (2009).

218. See *Utility Scale Wind Energy and Sound*, AM. WIND ENERGY ASS’N, http://www.awea.org/learnabout/publications/upload/Utility-Scale-Wind-Sound-Fact-Sheet_WP11.pdf (last visited Sept. 6, 2012) (acknowledging that noise from wind turbines may cause “annoyance” for some people, but such annoyance is “not pathological”).

2. Nuisance Cases Involving Wind Energy Producers

The process of producing electrical energy through the use of wind turbines naturally impacts those living nearby. Nuisance law is currently one method through which those offended by the use of such technology may seek relief. This subsection presents a brief history of nuisance suits as applied to wind turbines. The first two cases involve personal wind turbines in residential areas, whereas the remaining two involve large-scale, modern wind-energy projects.

In *Rose v. Chaikin*,²¹⁹ the New Jersey Superior Court was asked to decide whether or not a wind turbine erected in a suburban area for personal use constituted a private nuisance.²²⁰ The plaintiff and defendant owned neighboring lots in the coastal town of Brigantine.²²¹ In 1981, the defendant, hoping to save money and conserve energy, procured a building permit and installed a sixty-foot-tall wind turbine.²²² When the construction was complete, the turbine stood only ten feet from the plaintiff's property line.²²³ The turbine produced enough noise that the plaintiff's complained of "stress-related symptoms" and the "general inability to enjoy the peace of their homes."²²⁴

The level of the noise that the turbines produced was a matter of dispute, but the court found that the noises "resemble[d] those produced by a large motor upon which there is superimposed the action of blades cutting through the air."²²⁵ Sound readings taken at the site of the turbine ranged from fifty-six to sixty-one decibels.²²⁶ The court found the sound of the turbine was also "unnatural to the scene" and "more or less constant."²²⁷

As for the application of the law, the court began its analysis with a general overview of private nuisance:

The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land. The elements are myriad. . . . The utility of the defendant's conduct must be weighed against the *quantum* of harm to the plaintiff. The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor's land.²²⁸

On that standard, the court found the wind turbine to be clearly unreasonable.²²⁹ It argued that the turbine was out of place in the neighborhood, and that the noise it produced could (and did) have a negative effect on the health of those living nearby.²³⁰

219. 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982).

220. *Rose*, 453 A.2d at 1380.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 1381 (emphasis and omission in original) (quoting *Sans v. Ramsey Golf & Country Club*, 149 A.2d 599, 605 (N.J. 1959)).

229. *Id.* at 1382.

230. *Id.* at 1382–83.

The court did acknowledge that alternative energy sources carry with them substantial social benefit, but held that the benefit in the current case was “relatively small,” and did not warrant the larger intrusion on the plaintiffs’ use and enjoyment of their land.²³¹

About a decade later, a personal wind turbine owner in North Dakota fared better. *Rassier v. Houim*²³² involved a personal wind turbine installed by Garry Houim, on his residential lot in the town of Mandan.²³³ The turbine went up in 1986, and the eventual plaintiff, Janet Rassier, moved in two years later.²³⁴ Two years after that (four years after the installation of the turbine) Rassier filed suit, alleging private nuisance and violation of restrictive covenants.²³⁵

The evidence showed that the turbine was placed about forty feet from the plaintiff’s property line, and that measurements of the volume of noise produced ranged from fifty to sixty-nine decibels.²³⁶ The plaintiff produced expert testimony that noise at the measured level could be “irritating, stressful, and interfere with sleep.”²³⁷ This evidence, however, was opposed by other neighbors who testified that the noise did not bother them.²³⁸ The defendant also contended that the tower supporting his turbine was actually made for a larger model, and that he had employed safety devices to eliminate the “danger of blades, or ice, being thrown from the wind generator.”²³⁹

The Supreme Court of North Dakota deferred to the trial court’s finding that the wind turbine did not constitute a nuisance, stating that “[a]fter reviewing [the] evidence, we are not left with a definite and firm conviction that the trial court made a mistake in finding that Rassier had not proved a nuisance.”²⁴⁰ The court also approved the trial court’s use of the coming-to-the-nuisance doctrine in denying Rassier relief.²⁴¹ As the court stated: “[T]he [coming-to-the-nuisance doctrine] is one of the factors considered in determining whether a nuisance exists.”²⁴²

Two cases from recent history illustrate the types of complaints that neighbors lodge against wind energy projects. *Rankin v. FPL Energy, LLC*²⁴³ involved the Horse Hollow Wind Project, which plaintiffs claimed was noisy, created a flickering, strobe-light effect at dawn and dusk, and amounted to an eyesore.²⁴⁴ At the trial level, the defendant was granted partial summary judgment insofar as the plaintiffs’ claim

231. *Id.* at 1383.

232. 488 N.W.2d 635 (N.D. 1992).

233. *Rassier*, 488 N.W.2d at 636.

234. *Id.*

235. *Id.*

236. *Id.* at 638.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 638–39. *See also id.* at 638 (noting that a “finding of fact is clearly erroneous when, although there is some evidence to support it, a reviewing court, on the entire record, is left with a definite and firm conviction that a mistake has been made”).

241. *Id.* at 638.

242. *Id.*

243. 266 S.W.3d 506 (Tex. App. 2008).

244. *Rankin*, 266 S.W.3d at 510.

alleged aesthetic harms.²⁴⁵ The jury, after being instructed by the judge that it was not to consider the visual impact of the turbines in making its findings, returned a verdict for the defendant.²⁴⁶

The Texas Court of Appeals affirmed, holding that Texas law did not allow a nuisance finding based on injury to an aesthetic interest.²⁴⁷ In so finding, it wrote that “the law does not cater to men’s tastes or consult their convenience merely, but only guards and upholds their material rights.”²⁴⁸ Aesthetic concerns, which the court characterized as an emotional response to the presence of wind turbines, could not constitute a material right under Texas law.²⁴⁹ Finally, the court rejected the plaintiffs’ argument that, even if aesthetic harm could not make out a cognizable nuisance claim by itself, a jury should be allowed to consider it in conjunction with other alleged harms that have traditionally been associated with nuisance (meaning, primarily, the noise pollution alleged by the plaintiffs).²⁵⁰ The court dismissed the argument as a distinction without difference, stating that if juries were allowed to consider aesthetics as a factor, they could also find a nuisance based on aesthetic harm.²⁵¹

Wind-project neighbors found more success in a 2007 case, *Burch v. NedPower Mount Storm, LLC*.²⁵² Much of the court’s holding in *Burch* was unsurprising. The opinion began by countering the defendant’s argument (one of the reasons for dismissal at the lower level) that the approval of the Public Service Commission of West Virginia (PSC), which had specifically authorized the Mount Storm wind energy project, preempted any nuisance claim relating to the project.²⁵³ The court reasoned that, because the legislature gave the PSC its authority, and in doing so had not evinced any intention to displace the common law of nuisance, the right to sue the wind project had survived the siting certificate issued by the PSC.²⁵⁴ The court also quickly dismissed the argument that collateral estoppel barred the nuisance suit, holding that the PSC did not decide the issue of whether the “social utility of the wind power facility outweighs any interference with the appellants’ private use and enjoyment of their properties.”²⁵⁵

The more compelling issue facing the court was whether or not the plaintiffs had stated enough facts at the pleadings stage to survive a motion to dismiss.²⁵⁶ The court answered in the affirmative, holding that the plaintiffs’ allegation that the noise from the turbines would amount to a nuisance presented a cognizable claim for relief.²⁵⁷ In short, the court held that noise, by itself, can be a nuisance.²⁵⁸ Additionally, the court,

245. *Id.* at 508.

246. *Id.*

247. *Id.* at 509.

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

249. *Id.* at 511.

250. *Id.* at 512–13.

251. *Id.*

252. 647 S.E.2d 879 (W. Va. 2007).

253. *Burch*, 647 S.E.2d at 889.

254. *Id.*

255. *Id.* at 895.

256. *See id.* at 891 (discussing the pleading issue in depth).

257. *Id.*

258. *Id.*

contrary to the holding of the *Rankin* court one year later,²⁵⁹ then found that “while unsightliness alone rarely justifies interference by a circuit court applying equitable principles, an unsightly activity may be abated when it occurs in a residential area and is accompanied by other nuisances.”²⁶⁰ The court cited a case in which it had held that salvage yards located in residential areas could be abated as nuisances in part because they created an eyesore that would offend the sensibilities of the average person.²⁶¹

Rankin and *Burch* both indicate that the application of nuisance law to the relatively new phenomenon of large-scale wind energy facilities can be difficult and unpredictable. This unpredictability, however, would be unsurprising to anyone familiar with the volatile, fact-bound test that defines the modern law of nuisance.²⁶²

III. DISCUSSION

In his candid piece addressing some of the problems with the RTF regime, Professor Neil Hamilton suggests that several components are necessary for a functioning antinuisance law: “(a) a level of public support sufficient to pass and accept the rule, (b) a definition of the conduct being protected, and (c) a method to periodically readjust the rule or definition in light of changing industry practices or changing societal attitudes towards the activities protected.”²⁶³ Although this Comment takes no position on whether the polity in any individual state would be receptive to an antinuisance law protecting wind energy projects, it does try to craft a proposal that takes Professor Hamilton’s final two suggestions into account. Thus, the Wind Energy Promotion Act advanced here tries to provide for a precise definition of the shielded conduct and also allows for periodic reconsideration of its provisions.

A. *The Need for a Wind Energy Promotion Act*

The unpredictability of nuisance law has never been doubted, from Prosser to the present. This unpredictability is not always negative; after all, unpredictability in this context also means flexibility, and courts faced with difficult land-use conflicts can use their judgment to fashion an appropriate remedy for both the parties and for society. Obviously, legislation could not possibly serve to address all the specific circumstances that might arise in the law of nuisance. An attempt to do so would be a costly and futile exercise.

On the other hand, when the costs are very high, and the benefit to the public very great, it is difficult to justify the significant uncertainty that goes along with a nuisance lawsuit. Such lawsuits can discourage investment, given that wind project developers will naturally be reluctant to put significant capital on the line if there is a chance that—after jumping through numerous environmental and siting hoops—their projects

259. *Rankin v. FPL Energy, LLC* 266 S.W.3d 506, 513 (Tex. App. 2008) (finding that the trial court did not err in precluding the jury from considering the wind farm’s effect on the area’s aesthetic beauty).

260. *Burch*, 647 S.E.2d at 892.

261. *Id.* (citing *Mahoney v. Walter*, 205 S.E.2d 692, 694 (W. Va. 1974)).

262. See *supra* Part II.A for a discussion of modern nuisance law and its unpredictability.

263. Hamilton, *supra* note 131, at 106.

will be unceremoniously shut down at the behest of a nearby homeowner.²⁶⁴ This problem is made worse by the fact that recent anecdotal evidence suggests that there may be little possibility of productive postjudgment Coasean bargaining between the parties, should a court issue an injunction.²⁶⁵

In contrast, predictability has the benefit of encouraging growth of wind resources. It eliminates (or at least mitigates) the need for spending exorbitant sums of money defending nuisance lawsuits. A Wind Energy Promotion Act that provided for clear standards would also serve to inform neighbors as to what their rights are, by letting them know the confines within which the wind project will likely operate. And if those standards are too great a burden, the landowners will know to whom they must complain: the state government.

The environmental benefits of wind energy over traditional fossil fuels are legion and well known.²⁶⁶ Wind is clean, and the energy it produces comes with few harmful emissions, at least once the turbine is actually in operation.²⁶⁷ It is also plentiful, and can be expected to become more and more cost competitive. In sum, its environmental harms pale in comparison to those associated with fossil fuels.

Renewable energy, including wind, is vital to the national security of the United States, as well as to the effort to combat global climate change. Not only are traditional fossil fuels environmentally damaging, but they are often located in countries with which the United States shares strained relations. Even when supply seems secure, global unrest can cause price instability and economic harm. Reliance on renewable energy—produced here in the United States—would have the effect of securing supply and stabilizing prices.

B. The Form of the Wind Energy Promotion Act

If a legislature agrees with the argument so far and concludes that antinuisance legislation is an appropriate way to promote the growth of wind energy, the question will arise as to how to properly carry out this goal. This Section discusses two ways: incorporating wind energy into already existing RTF laws or creating a separate law.

264. This threat is especially daunting when the majority of the people in an area support the wind energy project about which the plaintiff complains. See *Rassier v. Houim*, 488 N.W.2d 635, 638 (N.D. 1992) (noting that none of the other wind-turbine neighbors complained about it, and many of the neighbors actually testified for the defendant); N.Y. Times Video, *supra* note 2, at 0:58 (noting that residents of Vinalhaven, before the wind energy project was built, voted in favor of it by a vote of 384 to 4).

265. See Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 421 (1999) (surveying parties to nuisance suits and finding that none engaged in postjudgment bargaining, a consequence Farnsworth attributes, in part, to enmity between the parties).

266. See *supra* notes 204–08 and accompanying text for a discussion of the environmental benefits of wind energy.

267. Naturally, there are also environmental costs associated with building a wind energy project. See *supra* notes 209–18 and accompanying text for a discussion of some of these costs.

So far, New Jersey is the only state that has explicitly taken the former approach.²⁶⁸ In 2010, the state amended its RTF law's "permissible activities" section to protect "the generation of power or heat from biomass, solar, or wind energy."²⁶⁹ Its law thus provides broad protections to wind farms that are either given a stamp of approval by a county agricultural board or are in conformity with particular agricultural management practices.²⁷⁰

Although New Jersey's approach may work fine in some circumstances, it is important to note that this Comment's proposal seeks to serve different interests than the RTF regime does. RTF laws address a distinct problem: the elimination of productive farmland as a result of urbanization.²⁷¹ The problems with respect to wind energy are quite different. As explained above, nuisance suits involving wind farms typically express concern about noise, blade or ice throw, strobe light effects, and so on. Many of these problems simply do not arise in the operation of a traditional farm committed to agriculture. Therefore, the RTF laws that only seek to address the specific problem created by farmland conversion will likely be ill suited to protect wind energy projects.

The traditional-²⁷² and statute-of-repose-type²⁷³ RTFs will generally not serve the purposes outlined below in the "purpose" section of the model Wind Energy Promotion Act.²⁷⁴ This is because they generally provide nuisance protection only when the agricultural facility predated the surrounding uses. This may result in the appropriate outcomes if the farms being protected are the target of a nuisance suit only as a result of an influx of urban dwellers into the country. However, in order to promote wind energy and encourage developers to expand into places where it does not currently exist, a Wind Energy Promotion Act must in some way protect developers from nuisance suits even if the wind energy project is the newest structure in the area.

But the problems associated with the traditional and statute-of-repose model types of RTFs do not end there. Such statutes may provide broad protections for farm activities that never fell under the purpose of the RTF laws in the first place. For example, providing RTF protection for concentrated animal feeding operations imposes on neighboring landowners far more onerous burdens than the small and moderate-sized family farms that RTFs were originally meant to protect.²⁷⁵ As business models

268. N.J. STAT. ANN. § 4:1C (West 2011). Vermont's RTF law provides protection for energy production, but only when it is generated "from agricultural products or wastes principally produced on the farm." VT. STAT. ANN. tit. 12, § 5752(1) (West 2011).

269. N.J. STAT. ANN. § 4:1C-9.

270. See *supra* note 122 for a short discussion of how a farm becomes eligible for protection under New Jersey's RTF law.

271. See *supra* Part II.B.1 for a discussion of the purpose of RTF laws.

272. See *supra* Part II.B.2.a for a discussion of the traditional coming-to-the-nuisance RTF law.

273. See *supra* Part II.B.2.b for a discussion of the statute of repose RTF law.

274. See *infra* Part III.D.1 for the "purpose" section of this Comment's proposed Wind Energy Promotion Act.

275. See Terence Centner, *Nuisances from Animal Feeding Operations: Reconciling Agricultural Production and Neighboring Property Rights*, 11 DRAKE J. AGRIC. L. 5, 10 (2006) (noting that, with respect to CAFOs, "it is not clear that neighbors should have to accept the aggravating situations that accompany these specialized business activities").

and methods change, RTF protection ought to change too. The failure to do so in states using traditional or statute-of-repose RTFs risks harming neighbors. Such concerns may have played a role in the Supreme Court of Iowa finding its RTF law “plainly . . . unconstitutional.”²⁷⁶

Although a GAP-type RTF (such as New Jersey’s) will accommodate the addition of wind energy much more simply, this will not necessarily be better than creating a new law.²⁷⁷ GAP-type RTF statutes depend on the ability to discern exactly what are the “good agricultural practices” that one is bound to follow. Surely the standards for the operation of wind turbines will differ significantly from those that will be applicable to traditional farms. It thus might be preferable—if only conceptually—to separate the two.

C. *The Content of the Wind Energy Promotion Act*

Because of the need to protect new wind energy projects from nuisance suits, and because the RTF statutes that exist in most states are a poor fit for such projects, it makes sense for states to create a new Wind Energy Promotion Act, modeled on the GAP-type RTF law.²⁷⁸ Such laws allow for the setting of clear, knowable standards for wind energy projects to follow, thereby eliminating the complexities and uncertainties of nuisance law, at least to as great an extent as possible.²⁷⁹ The result will be that both wind project developers and the landowners who live nearby will understand exactly what the law is with regard to wind turbine operation. The state government, and even ordinary citizens themselves, will be able to understand whether or not a wind project is in compliance.

Such regulations, however, ought to be as precise as possible. Reliance on vague standards, rather than clearer rules, defeats the purpose of the protection.²⁸⁰ For example, the Vermont RTF statute, although nominally of the GAP-type, provides that “[t]he presumption that the agricultural activity does not constitute a nuisance may be rebutted by a showing that the activity has a substantial adverse effect on health, safety, or welfare, or has a noxious and significant interference with the use and enjoyment of the neighboring property.”²⁸¹ Such language begs the question of how courts are to determine if the plaintiff has met her burden of showing that a farming activity is a “significant interference with the use and enjoyment of neighboring property.” The language cries out for a nuisance-type test: the very thing that RTF laws are meant to avoid.

276. See *supra* notes 137–54 and accompanying text for a discussion of the *Bormann* decision.

277. Amending an existing RTF might, of course, be much easier politically than passing a new law protecting wind energy projects from nuisance suits.

278. See *supra* Part II.B.2.c for a discussion of RTF laws that condition protection on compliance with good agricultural practice.

279. *E.g.*, GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES, *supra* note 117, at iii (providing “uniform, statewide standards and management practices” for pesticide utilization and pest control).

280. See Grossman & Fischer, *supra* note 73, at 162 (noting that requiring compliance with environmental laws limits RTF protection, particularly when “they define odor and other kinds of pollutions in nuisance terms”).

281. VT. STAT. ANN. tit. 12, § 5753(a)(2) (West 2011).

At the same time, the nuisance protection rules can be drawn in such a way that unreasonable activities remain nuisances, simply by excluding them from the statutory protection. For example, there is no reason that the defendant in *Rose v. Chaikin*²⁸² should enjoy protection greater than nuisance law. Such a turbine, built in a residential area, may be dangerous, not particularly socially beneficial, and far more of an annoyance than a wind-energy project located in a rural area. A Wind Energy Promotion Act can—and this Comment’s suggested statute does—remove such turbines from its protections.

Similarly, turbines that are overly loud or dangerous should not be protected. Technology has advanced to the point at which mechanical noise from wind turbines has been almost totally eliminated.²⁸³ Although aerodynamic noise still exists and always will, technology has significantly reduced the overall noisiness of wind turbine operation.²⁸⁴ The standards governing wind turbine noise under the Wind Energy Promotion Act would ideally be low enough to encourage companies investing in wind energy to use the least intrusive designs for the projects they are building.²⁸⁵

It is with these factors in mind that the Michigan RTF law²⁸⁶ was chosen to provide the basis for the Wind Energy Promotion Act proposed here. The Michigan RTF Act provides protection from nuisance suits so long as a farm “conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture.”²⁸⁷ The generally accepted agricultural management practices (GAAMPs) are set with reference to a number of different sources of information, including expert opinions from Michigan State University and the U.S. Department of Agriculture.²⁸⁸

The model Wind Energy Promotion Act takes the same approach as the Michigan RTF law in setting limits on nuisance protection. It provides for the State Department of Energy to set particular standards of operation for wind energy facilities, compliance with which would entitle a producer to immunity from nuisance lawsuits.²⁸⁹ Unlike the Michigan RTF law, the proposed law does not require the Department of Energy to refer to any particular information or seek any particular opinion in setting the standards. This is done as a matter of design. Individual states are in the best position to decide what information, if any, the standard-setting department should be mandated to consider.

The Michigan RTF Act also provides for the preemption of local rules or ordinances that conflict with RTF protection or the GAAMPs established under the

282. 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982). For a more detailed discussion of the facts of the case and its holding, see *supra* notes 219–31.

283. PROGRAMMATIC EIS, *supra* note 209, at 5-23.

284. *Id.*

285. The real problem here is not that the standards developed for and applied to wind energy projects will be too strict. If they are, the owners will bow out of the antinuisance regime and into the nuisance rules. The danger, rather, is that the standards will be too lenient and thus protect activities that should be left as a nuisance.

286. MICH. COMP. LAWS ANN. §§ 286.471–286.474 (West 2011).

287. *Id.* § 286.473(1).

288. *Id.* § 286.472(d).

289. See *infra* Part III.D for the text of the model Wind Energy Promotion Act.

statute.²⁹⁰ The antinuisance statute proposed here follows suit. Preemption is particularly important in the context of an antinuisance law conditioning protection on conformity with specific standards and practices. The system of regulation envisioned by the Wind Energy Promotion Act is comprehensive and should be insulated from the whims of local legislatures. This is not to say that local governments should have no say at all in the standards for wind energy producers in their areas. But there are other ways to accomplish this involvement. In Michigan, for example, proposed GAAMPs are evaluated by an advisory panel that must include, among others, two representatives of townships and one representative of counties.²⁹¹ States adopting the Wind Energy Promotion Act would be free to make local participation part of the standard-setting process.

One way in which the Model Act departs from Michigan's RTF law is in its treatment of fee shifting. Michigan's law provides for fee shifting in any nuisance action in which the defendant "prevails."²⁹² Indeed, Michigan's law does not even seem to require on its face that the defendant assert the RTF statute as a defense in order to collect costs. As Professor Hamilton has noted, fee-shifting provisions can add to the public's perception that an antinuisance law is unfair.²⁹³ Additionally, fee shifting seems a harsh remedy in many cases. It is important to remember that, either in the case of agribusiness or wind energy producers, it is probably the plaintiff who is most likely to be cash strapped.²⁹⁴ If the plaintiff is seeking an injunction—a change in operating practice—rather than large money damages, fee shifting seems particularly onerous.

Therefore, the proposal modifies the Michigan RTF statute by allowing fee shifting only upon a finding that the nuisance action was frivolous. Although there is anecdotal evidence that such a provision can cause confusion among laypersons, who may not understand that frivolity is a very high bar,²⁹⁵ the frivolity requirement draws a middle path between deterrence—which is desirable to a certain extent—and unfairness—which is not.

The Model Act proposed here performs a delicate balancing. On one hand, the rights of people who live near industrial-size wind projects deserve thorough consideration. On the other hand, there is potentially enormous social benefit in the promotion of renewable energy in general, and wind energy in particular. A statute that provides nuisance protection for reasonably operated wind energy projects, while denying it to others, balances the interests properly. The next Section lays out the suggested text of a Wind Energy Promotion Act, which states can use and modify to fit their own wind energy needs.

290. MICH. COMP. LAWS ANN. § 286.474(6). See also *supra* notes 118–26 and accompanying text for a discussion of the use of preemption in the RTF regime more generally.

291. MICH. COMP. LAWS ANN. § 286.474(8)(a).

292. *Id.* § 286.473b.

293. Hamilton, *supra* note 131, at 111.

294. The Kennedys notwithstanding. See Martin, *supra* note 127, at 450 (discussing the opposition of wealthy, coastal landowners, including the Kennedy family, to Cape Wind, a project seeking to install offshore wind capacity in Massachusetts).

295. See Hamilton, *supra* note 131, at 111 (discussing the difference between "hard" and "soft" fee shifting and the confusion in Iowa regarding the two in the context of its RTF law).

D. A Model Wind Energy Promotion Act

1. Purpose

It is the declared policy of this State to encourage the production of wind power and to further the exploitation of wind resources. The State recognizes that the development of wind power to its full potential is an important step toward energy independence. Furthermore, the use of wind power, by reducing the need for outside sources of energy, contributes to the security of both this State and the Nation as a whole. Wind is a clean, renewable source of energy, and its greater use serves to power the State, as well as protect the environment. It is therefore the State's intent, through this chapter, to limit the circumstances under which a wind power facility may be deemed a nuisance.

2. Definitions

(a) "Wind power facility" means any operation conducted to utilize wind for the production of electric power to be sold to the public. The Wind Energy Promotion Act shall not be construed to apply to any wind power operation used to supply power primarily for personal use.

(b) "Accepted Management Practices" are those standards and practices that will be established by the State Department of Energy for the operation of wind power facilities.

The Accepted Management Practices will be reviewed and revised every two (2) years, with opportunity for public comment. In establishing such Accepted Management Practices, the Department shall consider:

- (i) The stated policy of encouraging and protecting wind power facilities.
- (ii) The rights of landowners who live near wind power facilities.
- (iii) The availability of technology for reducing potential annoyances, such as noise, light, and vibrations, from wind power facilities.
- (iv) The health, safety, and welfare of the citizens of this State.

Additionally, the Department may consider any other factor it deems relevant to establishing the accepted management practices.

3. Local ordinances preempted

It is the express intention of the legislature to preempt any local ordinance, regulation, or resolution that extends or revises, in any manner, the provisions of this Act or the Accepted Management Practices established hereunder. Any such local ordinance that would make a wind power facility a nuisance when it would not otherwise be so under this Act is void.

4. Wind power facilities not to be considered a nuisance under certain circumstances.

(a) A wind power facility shall not be found to be a nuisance, public or private, if the wind power facility conforms to accepted management practices as defined in this chapter. Inspection and certification by the State Department of Energy that a wind power facility is operated in conformity with accepted management practices shall entitle the wind power facility to a presumption of such conformity in any nuisance action brought within one year of such inspection. Compliance with the accepted management practices shall create a rebuttable presumption that the wind power facility does not have a substantial adverse effect on the public health or safety. This subdivision shall not apply if:

(i) The wind power facility is operated negligently, recklessly, or with the purpose of causing the harm complained of; or

(ii) if it can be shown by the complainant that the wind power facility has a substantial adverse effect on public health or safety.

(b) The protections of this subsection (a) shall not be deemed waived, nor shall a wind power facility that is operated in conformance with subsection (a) be found to be a nuisance, public or private, as a result of any of the following:

(i) A change in ownership or size.

(ii) Temporary cessation or interruption of power production.

(iii) Enrollment in government programs.

(iv) Adoption of new technology.

5. Costs

In any nuisance action against a wind power facility in which the defendant wind power facility prevails as a result of a defense created by this Act, the wind power facility may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the wind power facility in connection with the defense of the action, together with reasonable and actual attorney's fees. The court may award such costs and attorney's fees only if it determines that the nuisance action brought by the plaintiff was frivolous.

IV. CONCLUSION

This Comment started out with the story of two persons aggrieved by wind energy. It should end by making sure the record is straight. By now it should be clear that nothing in this Comment would change the outcome of the New York Times article. Mr. Lindgren could still collect his data, and he could still report that data to the Maine Department of Environmental Protection. The statute proposed here would not foreclose the State from setting nighttime noise limits, nor would it prevent the enforcement of such limits against wind energy projects.

On the contrary, this proposal encourages just the type of regulation at issue in the Vinalhaven story. The point is not that wind energy developers, with their millions (or

billions) of dollars in start-up capital and big corporate backing, should be able to trample on the rights of small landowners like the Lindgrens. The point, rather, is that there should be clear limits for the developers and operators to abide by. These limits, set by the political process, would provide a much-needed substitute for the amorphous rules that determine such limits under the nuisance doctrine. By providing certainty, states could delineate the rights of landowners and promote the growth of wind energy.

