Can You Sue the Government? An Examination of the Legal Doctrines for Government Liability Regarding Their Involvement with Wind Power Development

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* J.D. 2014, Columbia Law School. The author thanks Professor Thomas Merrill for his guidance with this Note and the staff of the *Journal* for their diligent editorial work.

INTRODUCTION

Federal and state governments have increasingly supported renewable energy in order to alleviate harms caused by traditional non-renewable sources of energy,[1] as well as to encourage energy independence and job creation.[2] The states have been the primary drivers of renewable energy, namely through state renewable portfolio standards,[3] but the federal government also gives support

1. Recently, the federal government has developed new grants and tax incentives to support renewable energy. *See, e.g.*, *U.S. Wind Power: Next Gen Drivetrain Development*, GRANTS.GOV, http://www.grants.gov/web/grants/view-opportunity.html?oppId=69153 (last updated Feb. 7, 2011); *Federal Renewable Energy Tax Credit*, DSIRE, http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=US37F (last updated Dec. 11, 2012).

2. *See generally Advancing American Energy*, THE WHITE HOUSE, http://www.whitehouse.gov/energy/securing-american-energy (last visited Aug. 6, 2014). The first sentence of the White House's current statement of administration energy and environmental policies uses standard rhetoric about the economy and national security: "President Obama's All-of-the-Above Energy Strategy is making America more energy independent and supporting jobs."

3. *See generally Current RPS Data*, DSIRE, http://www.dsireusa.org/rpsdata/index.cfm (last visited Aug. 6, 2014).

through grants and tax incentives.[4] Furthermore, both President Bush and President Obama have included investments in renewable energy as a key element of their domestic energy agendas.[5] Governments are likely to increase these efforts in the future.

Wind power offers a competitive alternative to traditional fuels. Aside from hydroelectric energy, it is the most cost-competitive renewable energy source because costs have fallen by 85% in the last twenty years.[6] It is cheaper than solar energy and is becoming more competitive with traditional sources of energy such as coal and natural gas.[7] Furthermore, wind power offers important advantages over hydroelectric energy. One advantage is that it does not rely on water supply, a critical feature in regions where the sustainability of water supplies is a concern.[8] Therefore, efforts to develop renewable energy include, and should include, the encouragement of wind farms.

However, wind farms also present potential negative consequences. Wind turbines may cause a variety of harms to neighboring landowners.[9] These landowners have brought nuisance claims against wind farm developers, complaining of the noise, vibration, and flicker effect caused by wind turbines.[10]

With increasing government involvement in the development of wind power, neighboring landowners experiencing harms related to wind turbines might wish to—indeed, in some cases may need to—recover from the government as well as private parties. They

4. *See generally Federal Incentives for Renewable Energy*, DSIRE, http://www.dsireusa.org/summarytables/finre.cfm (summarizing various incentives and policies of both the federal and state governments).

5. 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); Barack Obama, U.S. President, 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.

6. *Renewable Energy for America: Harvesting the Benefits of Homegrown, Renewable Energy*, NATURAL RES. DEF. COUNCIL, http://www.nrdc.org/energy/renewables/wind.asp (last visited Aug. 6, 2014).

7. *See Levelized Cost and Levelized Avoided Cost of New Generation Resources in the* Annual Energy Outlook 2014, ENERGY INFO. ADMIN. (Apr. 17, 2014), http://www.eia.gov/forecasts/aeo/electricity_generation.cfm.

8. *See generally Climate Change, Water, and Risk: Current Water Demands Are Not Sustainable*, NATURAL RES. DEF. COUNCIL, http://www.nrdc.org/globalwarming/watersustainability/index.asp (last updated July 16, 2010).

9. *See infra* Part I.A.

10. *Id.*

may wish to bring nuisance claims against the government, which will largely mirror claims against private wind developers, and may bring claims alleging a Taking in violation of the Fifth Amendment of the United States Constitution. Government liability for harms caused by wind farms may increase the costs of wind power development.

This Note determines that the Takings claim is the stronger claim and proposes which Takings jurisprudence courts should apply, depending on the nature and scope of government action in particular cases. Specifically, this Note focuses on the three possible ways that the government may become involved with the development of wind farms: (1) explicit grants of nuisance immunity to wind farms; (2) government authorization of wind farms; (3) and wind farms planned and developed by the government on government lands (hereafter "government-developed" wind farms).

Part I reviews relevant nuisance claims against private parties, such as claims premised on auditory and aesthetic harms, and summarizes recent nuisance suits brought against wind energy developers. With this background, Part II explores the viability of nuisance and Takings claims to hold the government liable for harms caused by wind farms. With regard to nuisance claims, the discretionary function exception in the Federal Tort Claims Act ("FTCA") will likely bar recovery from the government. Therefore, this Note concludes that Takings is the more likely means of recovery. After reaching that conclusion, this Part evaluates the applicability of different Takings jurisprudence. Finally, in Part III, this Note argues that courts should address Takings claims differently depending on the government activity in question. This Part proposes the specific takings jurisprudence that courts should apply in determining whether the government should be held liable. For cases involving express governmental grants of nuisance immunity, courts should apply the *Bormann* doctrine that granting nuisance immunity to farms is a grant of easement, and the *Penn Central* test. For cases involving government-authorized wind farms, courts should not apply the *Richards* test, and should apply either *Bormann* or *Penn Central*. Lastly, for cases involving government-developed wind farms, courts should apply *Richards* test and not the *Penn Central* test.

I. BACKGROUND: NUISANCE SUITS AGAINST PRIVATE PARTIES FOR HARMS CAUSED BY WIND FARMS

This Part addresses nuisance suits against private wind developers to provide a basis for assessing potential governmental liability for nuisances allegedly caused by wind energy development. First, it discusses the general jurisprudence governing nuisance claims arising from noise, vibration, and aesthetic harms. Next, this Part examines how courts have applied this nuisance jurisprudence in the context of suits against private wind farm developers.

A. Harms to Neighboring Property Owners of Wind Farms

Although wind farms impose few of the environmental harms associated with traditional non-renewable sources of energy, they nonetheless can negatively affect wildlife and neighboring landowners.[11] The spinning turbines kill birds and bats, although this can be limited through careful siting.[12] Other harms directly affect neighboring property owners. Neighboring landowners most commonly complain about the noise from the wind turbines.[13] The turbines generally create two types of noise: aerodynamic and mechanical.[14] Aerodynamic noise is generated by turbine blades passing through the air and has been described as "a buzzing, a whooshing, pulsing, or even sizzling sound."[15] In addition, turbines have been known to cause a thumping sound as each blade passes the tower.[16] The noise from two or more turbines may combine to create an "oscillating or thumping 'wa-wa' sound effect."[17] Finally, wind turbines may create mechanical noise, which is "generated by the turbine's internal mechanical components . . . [and] may have discernible tones."[18] In addition to noise complaints, some landowners adjacent to wind farms have complained that turbines

11. The benefits of wind power have been discussed exhaustively elsewhere. *See, e.g.*, *Renewable Energy for America*, *supra* note 6.

12. Tyler Marandola, Comment, *Promoting Wind Energy Development Through Antinuisance Legislation*, 84 TEMP. L. REV. 955, 981 (2012).

13. *Id.*

14. DAVID A. RIVKIN ET AL., WIND TURBINE TECHNOLOGY AND DESIGN 164 (2013).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

cause nearby windows to rattle and walls to hum.[19] More generally, neighboring landowners claim that turbines blow sediment into nearby water bodies, diminish the aesthetic and tourism value of surrounding areas, cause radar interference, and disrupt wireless communication and television signals.[20] Finally, wind turbines may cast debris from the turbine blades, blow dust and particles onto nearby property, reduce property values, and cause flickering lights.[21]

In some instances, claimants have argued that wind turbines cause deleterious health effects. One researcher has given the name "Wind Turbine Syndrome" to the constellation of symptoms experienced by many residents neighboring wind turbines.[22] These symptoms include: sleep disturbances, headaches, ringing or buzzing in the ears, ear pressure, dizziness, vertigo, nausea, visual blurring, tachycardia, irritability, problems with concentration and memory, and panic episodes associated with sensations of internal pulsation or quivering.[23] While others have questioned the validity of the Wind Turbine Syndrome,[24] the potential harms associated with wind farms must be balanced with the advantages of furthering wind energy developments. Courts determining nuisance suits brought against wind farm developers must carefully consider this balance.

B. Nuisance Generally

Although nuisance law differs from state to state,[25] nuisance generally defined has important characteristics relevant to landowners' prospects for recovery. There are two types of nuisance: public and private. Public nuisance is generally defined

19. Renner Kincaid Walker, Note, *The Answer, My Friend, Is Blowin' in the Wind: Nuisance Suits and the Perplexing Future of American Wind Farms*, 16 DRAKE J. AGRIC. L. 509, 519–21 (2011); Eric Rosenbloom, *A Problem with Wind Power*, http://www.aweo.org/problemwith wind.html (last visited Aug. 6, 2014).

20. Walker, *supra* note 19, at 520–21.

21. *Id.*

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

23. *Id.*

24. Keith Kloor, *Can Wind Turbines Make You Sick?*, SLATE (Mar. 20, 2013, 1:17 PM), http://www.slate.com/articles/health_and_science/alternative_energy/2013/03/wind_turb ine_syndrome_debunking_a_disease_that_may_be_a_nocebo_effect.html

25. Brett Slensky & Angela Pappas, *Wind Power Projects, Nuisance Claims and Right-to-Farm*, ABA AGRIC. MGMT. COMMITTEE NEWSL. 9, (Nov. 2010), *available at* http://apps.americanbar. org/environ/committees/environimpactassess/newsletter/nov10/EIA_Nov10.pdf. .

as "an unreasonable interference with a right common to the general public."[26] Examples of public nuisances include noise, vibrations, and vehicle exhaust encountered by the general public.[27] Generally, a private party has no right of action for public nuisances on the theory that government is responsible for redressing generalized harms.[28] In fact, some have argued that public nuisance is properly regarded as a public action as opposed to a private tort.[29] By comparison, the *Restatement (Second) of Torts* defines private nuisance as an "unreasonable" interference with the use and enjoyment of an individual piece of land that causes "significant harm" to the landowner.[30] Nuisance is a non-trespassory interference with enjoyment,[31] and this interference can be either intentional and unreasonable, or negligent and reckless, and can be caused by one's action or omission.[32]

The requirement that a landowner alleging a private nuisance demonstrate "significant harm" precludes plaintiffs from recovering for mere inconveniences or petty annoyances.[33] For example, in *Welcker v. Fair Grounds Corp.*, the plaintiff owned an historic structure that neighbored the defendant's lighted racetrack.[34] The plaintiff claimed that the defendant's infield track lights, which were used for no more than thirty-six days per year, damaged the ambiance of the neighboring historic structure.[35] The trial judge agreed, holding that the distortion of the "historic, original color" of the plaintiff's building was compensable damage under Louisiana law.[36] The Louisiana Court of Appeals reversed, holding that the damage to the plaintiff's building did not rise

26. RESTATEMENT (SECOND) OF TORTS § 821B.

27. Thompson v. City and County of Denver, 958 P.2d 525, 529 (Colo. Ct. App. 1998).

28. RESTATEMENT (SECOND) OF TORTS § 821B, cmts. g–h (1979).

29. *See* Gregory Keating, *Nuisance as a Strict Liability Wrong*, 4 J. TORT L. 1 (2012).

30. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2d ed. 2012) (discussing RESTATEMENT (SECOND) OF TORTS §§ 821F, 822. Although the *Restatement* definition of nuisance is widely followed, there are alternative definitions of nuisance to the Restatement's definition worth noting briefly. The following are the possible alternative definitions of nuisance: an invasion that causes significant harm, which deviates from the "normal uses" of land, that which does not have temporal priority, or that which goes against the general norms of "neighborliness." MERRILL & SMITH, *supra* at 27–28.

31. Lever Bros. v. Langdoc, 655 N.E.2d 577, 582 n.3 (Ind. Ct. App. 1995).

32. Christenson v. Gutman, 249 A.D.2d 805, 807–08 (N.Y. App. Div. 1998).

33. Crites v. Sho-Me Dragways, Inc., 725 S.W.2d 90, 95 (Mo. Ct. App. 1987)

34. *See* Welcker v. Fair Grounds Corp., 577 So. 2d 301 (La. Ct. App. 1991) *writ denied* 580 So. 2d 670 (La. 1991).

35. *Id.* at 304.

36. *Id.* at 303.

above mere inconvenience because the lights were infrequently used and any resulting economic damage was negligible.[37] *Welcker* demonstrates courts' reluctance to recognize insignificant harms as actionable nuisances even where a defendant's actions interfere with the use or enjoyment of neighboring property.

In addition to the significant harm requirement, a private nuisance must also be an unreasonable interference. To allege unreasonable interference, a plaintiff must demonstrate that "the gravity of the harm outweighs the utility of the [defendant's] conduct."[38] Courts generally employ a cost-benefit analysis,[39] weighing the "utility of the actor's conduct" against the "gravity of harm" to the neighboring landowner.[40] Under this analysis, several circumstantial factors are often important, including: the nature of the interfering use and the enjoyment invaded; the extent and duration of the interference; the suitability of the interference and the plaintiff's enjoyment to the locality; and, whether the defendant took all feasible precautions to avoid unnecessary interference.[41] These requirements are an important backdrop in nuisance cases brought against wind farms.

C. Nuisance Suits Against Private Wind Farm Developers

Nuisance claims against wind farms usually hinge on state common law related to noise, vibration, and aesthetic nuisances.[42] Therefore, a review of how state courts have examined analogous nuisance cases illuminates how courts will analyze nuisance claims against private wind farm developers. These cases demonstrate that although states differ in their treatment of these alleged nuisances, there are certain prevalent views among the courts in noise and vibration cases and aesthetic concern cases.

37. *Id.* at 304

38. RESTATEMENT (SECOND) OF TORTS § 826.

39. *Id.*; *see also* Hendricks v. Stalnaker, 380 S.E.2d 198, 202 (W. Va. 1989).

40. Stephen Harland Butler, Comment, *Headwinds to A Clean Energy Future: Nuisance Suits Against Wind Energy Projects in the United States*, 97 CAL. L. REV. 1337, 1345 (2009) (quoting RESTATEMENT (SECOND) OF TORTS § 826).

41. 58 AM. JUR. 2D NUISANCES § 77

42. *See, e.g.*, Burch v. Nedpower Mount Storm, LLC, 647 S.E.2d 879, 885 (W. Va. 2007); Rankin v. FPL Energy, LLC, 266 S.W.3d 506 (Tex. Ct. App. 2008).

1. Noise and Vibration Nuisance Cases

Noise and vibration cases generally turn on "the extent of the harm involved,"[43] in keeping with the significant harm and unreasonableness requirements of the *Restatement* definition of nuisance. Where plaintiffs are *significantly* harmed and disturbed by noise and vibrations, courts have tended to find nuisance liability. For example, in *Kentucky & West Virginia Power Co.*, the plaintiffs alleged that the operation of a nearby electric sub-station generated a constant humming that disturbed their conversations and sleep and caused general emotional distress.[44] The Kentucky Court of Appeals affirmed the judgment for the plaintiffs because the noise caused "actual physical discomfort and annoyance to a person of ordinary sensibilities, rendering adjacent property less comfortable and valuable."[45] The plaintiffs were able to recover because the court determined that this harm was substantial.[46] The court in *Fendley v. City of Anaheim* reached a similar conclusion, allowing the plaintiffs to recover for vibrations caused by the operation of a nearby gas engine because the harm was substantial.[47] The court concluded that the vibrations, which occurred more or less continuously, and were of such severity that they caused nearby objects to shake slightly, inflicted substantial harm that warranted recovery.[48] Conversely, in *Mississippi Power Co. v. Ballard*, the Supreme Court of Mississippi held that the constant hum from an electrical substation was not "of sufficient intensity" to constitute a nuisance.[49] However, the court noted that the tremendous noise caused by explosions within the substation would constitute a nuisance upon a finding by the jury that the noise associated with the explosions caused substantial harm.[50] Therefore, plaintiffs seeking damages stemming from noise and vibrations caused by wind turbines will recover only if they demonstrate that the alleged nuisance causes substantial harm.

43. Butler, *supra* note 40, at 1349–50..
44. Ky. & W. Va. Power Co. v. Anderson, 156 S.W.2d 857, 858 (Ky. 1941).
45. *Id.*
46. *Id.*
47. Fendley v. City of Anaheim, 294 P. 769, 771 (Cal. Ct. App. 1930).
48. *Id.*
49. Miss. Power Co. v. Ballard, 153 So. 874, 875 (Miss. 1934).
50. *Id.* at 876.

2. Aesthetic Nuisance Cases

Turning to aesthetic nuisance claims, plaintiffs alleging only aesthetic injuries are unlikely to prevail, but they may recover if their alleged injuries are accompanied by other complaints, such as noise and vibrations.[51] In general, courts have rejected aesthetic nuisance claims for fear that alleged aesthetic harms are too subjective and nebulous to quantify.[52] For example, relevant to complaints about wind farms that the turbines causes flicker effect, courts have almost universally found that blocking sunlight or a view is not a cognizable nuisance.[53] However, in some jurisdictions, those aesthetic nuisances that are coupled with other more traditional nuisances are actionable.[54] In *Yeagar v. Traylor*, the Pennsylvania Supreme Court held that a parking garage in an "exclusively residential" neighborhood must be redesigned to reduce "noise, gas, and vapors" from the cars, as well as for aesthetic reasons.[55] Therefore, plaintiffs alleging aesthetic harms related to wind energy development would likely have to demonstrate that the turbines cause substantial noise and vibration, perhaps in a residential area, in *addition* to the flicker effect and other aesthetic concerns, to prevail.

3. Recent Nuisance Cases Against Wind Farms

Following these rules, courts considering nuisance claims against wind farms have held that only significant noise and vibrations may constitute a nuisance and that mere aesthetic concerns are insufficient to constitute actionable nuisance. In *Burch v. NedPower Mount Storm*, the West Virginia Supreme Court considered a series of claims against two private wind energy developers.[56] Specifically, the plaintiffs alleged three related nuisance claims. They claimed that the turbines: (1) would generate significant noise; (2) would create a "flicker" or "strobe" effect when the sun is near the horizon; and (3) would reduce the plaintiff's property values.[57]

With regard to the noise complaint, the plaintiffs alleged that the wind turbines would cause constant noise, particularly as wind

51. *See* Foley v. Harris, 286 S.E.2d 186, 190–91 (Va. 1982).
52. *See* Ness v. Albert, 665 S.W.2d 1 (Mo. Ct. App. 1983); Butler, *supra* note 40, at 1351.
53. Kruger v. Shramek, 565 N.W.2d 742, 747 (Neb. Ct. App. 1997)
54. Butler, *supra* note 40, at 1352–53.
55. *Yeagar v. Traylor*, 160 A. 108, 108 (Pa. 1932).
56. Burch v. Nedpower Mount Storm, LLC, 647 S.E.2d 879 (W. Va. 2007).
57. *Id.* at 885.

velocity increased.[58] The court acknowledged that previous precedents have held "noise alone may create a nuisance depending on time, locality and degree."[59] The court also cited longstanding state precedent that "every person . . . has the right not to be disturbed in his house; he has the right to rest and quiet and not to be materially disturbed in his rest and enjoyment of home by loud noises."[60] As such, the court held the plaintiffs' allegation regarding noise was cognizable as an abatable nuisance.[61]

With regard to the claim that a "flicker" or "strobe" effect would create an eyesore, the court recognized that courts have traditionally hesitated to recognize something as a nuisance merely because it was offensive aesthetically.[62] However, the court recognized that an eyesore that is (1) improperly placed, (2) unduly offensive to its neighbors and (3) accompanied by other interferences to the property owner's use and enjoyment of their property may be an actionable nuisance.[63] Determining that these factors were met, the court held that the wind turbines did present a cognizable aesthetic injury because they were sited in a residential area and generated other nuisances.[64]

The court applied similar reasoning in reviewing the plaintiff's last complaint that the turbines would reduce neighboring property values. Again, the court noted that while diminution of property value alone is not an abatable nuisance, a diminution in property values is actionable where it is accompanied by other unreasonable interferences.[65] Here, because the reduced property values were accompanied by other nuisance claims, the court held that the plaintiffs had an abatable nuisance claim regarding the diminution of the value of their property.[66] Therefore, the court in *Burch* followed the nuisance jurisprudence by emphasizing the significance of the noise by looking at the time, locality, and degree, and only recognizing aesthetic nuisance and property diminution when other traditional nuisance is also alleged.[67]

58. *Id.* at 891.
59. *Id.* (quoting Ritz v. Woman's Club of Charleston, 173 S.E. 564 (W. Va. 1934).
60. *Id.* (quoting Snyder v. Cabell, 1 S.E. 241, 251 (W. Va. 1886)).
61. *Id.*
62. *Id.* (citing Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368, 369 (W. Va. 1937)).
63. *Id.* at 891–92.
64. *Id.* at 893–94.
65. *Id.* at 892.
66. *Id.*
67. *Id.* at 893–94.

Though reaching a different outcome, the Texas Court of Appeals has also affirmed the majority rule on aesthetic nuisance as applied to wind energy development. In *Rankin v. FPL Energy, LLC*, plaintiff landowners claimed that a proposed wind farm would generate noise, would be an eyesore, and would reduce the value of their property.[68] After losing at trial, the plaintiffs appealed only the issue of aesthetic nuisance.[69] Like the West Virginia court in *Burch*, the Texas court in *Rankin* noted that aesthetic injury alone does not constitute actionable nuisance.[70] Thus, because the plaintiffs' alleged aesthetic injuries were not accompanied by other actionable nuisances on appeal, the court in *Rankin* held that the loss of their view was insufficient to establish an actionable nuisance.[71]

These two cases present the rule that noise and vibrations may constitute a nuisance only if it is significant, and that mere aesthetic concerns are insufficient to make out a nuisance claim in cases against wind farms as well. However, *Burch* demonstrates that at least some courts will allow nuisance claims based on aesthetic concerns caused by wind farms if abatable nuisances accompany these concerns.

II. POSSIBLE GOVERNMENT LIABILITIES: NUISANCE AND TAKINGS CLAIMS

In addition to seeking damages from private parties, landowners affected by wind energy development may seek to recover from the federal government and the States because of their involvement in such development. Both federal and State governments have increasingly encouraged and supported wind power developments.[72] While in some cases government involvement may be too tenuous, other governmental actions supporting wind energy may lead to instances where a plaintiff may regard the government as one of the main parties—or the only party—against whom they can bring a cause of action.[73]

68. *See* Rankin v. FPL Energy, LLC, 266 S.W.3d 506 (Tex. Ct. App. 2008).
69. *Id.* at 506–09.
70. *Id.* at 509.
71. *Id.* at 511.
72. *See supra* notes 1–5 and accompanying text.
73. An instance where a government entity may be the sole party is if the government develops their own wind farms. Governments have not yet done so, but given the trend towards developing renewable energy, this possibility does not appear far-fetched.

This Part will examine three possible ways that the government may be exposed to liability through involvement with the development of wind power. In particular, it will examine potential governmental liability arising out of: (1) explicit immunization of private parties from nuisance liability through legislation; (2) permitting of wind farm developments and implicit immunization of wind farms from nuisance claims; and (3) government-developed wind farms.

A. Government Nuisance Liability: Sovereign Immunity and the Discretionary Functions Exception Hurdle

Even where courts hold wind farm developers liable for nuisances caused by wind energy development, plaintiffs will encounter additional obstacles in seeking to recover against government parties. Most importantly, plaintiffs seeking damages from government parties must navigate sovereign immunity doctrines that insolate the federal government and the states from liability for official acts. At the federal level, the discretionary functions exception to the Federal Torts Claims Act[74]—a statute that permits private parties to sue the United States government–likely preserves federal sovereign immunity for many activities associated with wind energy development. Likewise, the Eleventh Amendment provides sovereign immunity to states in both state and federal courts.[75] This Part will address each of these potential barriers to recovery against government parties for nuisances created by wind farms.

1. Nuisance Claims Against the Federal Government: The Federal Tort Claims Act

Although the FTCA broadly waives federal sovereign immunity, the discretionary functions exception reserves immunity against "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation."[76] The discretionary function exception protects both legislative and administrative decisions rooted in policy from tort actions.[77] Experts in the field have suggested that the purpose of

74. *See* 28 U.S.C. §§ 2671–80; Jed Michael Silversmith, *Takings, Torts & Turmoil: Reviewing the Authority Requirement of the Just Compensation Clause*, 19 UCLA J. ENVTL. L. & POL'Y 359, 364 (2002).

75. U.S. CONST. amend XI.

76. 28 U.S.C. § 2680(a) (2012).

77. United States v. Gaubert, 499 U.S. 315, 323 (1991).

this exception is to preserve separation of powers between the judicial branch and other branches of the government[78] by preventing the courts from displacing executive and legislative policymaking through common law tort judgments.[79] The Supreme Court in *United States. v. Gaubert* outlined a two-part test for applying this exception.[80] First, the challenged conduct must involve an element of judgment or choice; second, this judgment or choice must be based on policy considerations.[81]

The discretionary function exception covers many government actions. As one commentator has noted, "With ingenuity it would be possible to argue that almost every claim otherwise cognizable under the Tort Claims Act is barred by the discretionary function exception of section 2680(a)."[82] A survey of district court cases revealed that the government's success rate in asserting the discretionary function exception post-*Gaubert* is 76.3 percent.[83] This broad application of the discretionary function exception is due, at least in part, to the fact that the government need only show that government action alleged to have caused injury was "*susceptible* to policy analysis."[84] Under this test, it is irrelevant whether federal actors actually considered a policy rationale for their decision.

Although some federal actions are not protected under the discretionary functions exception, these exceptions are rare. Activities not covered by the discretionary functions exception only include violations of an agency's own rules, the utter failure to address a clearly hazardous condition, or careless driving.[85] Because these activities do not involve an element of judgment or choice based on policy decisions, the otherwise broad discretionary functions exception does not protect federal actors from liability.

78. Cornelius J. Peck, *Absolute Liability and the Federal Tort Claims Act*, 9 STAN. L. REV. 433, 452 (1957).

79. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986).

80. *Gaubert*, 499 U.S. at 322–23.

81. *Id.*

82. Peck, *supra* note 78, at 450.

83. Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exemption to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 296 (2009).

84. *Gaubert*, 499 U.S. at 324–25 (1991) (emphasis added).

85. *See* David S. Fishback, *The Federal Tort Claims Act Is a Very Limited Waiver of Sovereign Immunity—So Long as Agencies Follow Their Own Rules and Do Not Simply Ignore Problems*, U.S. ATT'YS' BULL. 16, 19–26 (Jan. 2011), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5901.pdf.

The Supreme Court has also distinguished between negligence during the planning stage and the operational stage of a federal project or action.[86] For example, negligence in ordering an army maneuver is within the discretionary function exception, but negligent operation of an army vehicle is not.[87]

The discretionary function exception has been criticized for nearly swallowing the FTCA's general wavier of sovereign immunity,[88] and thus barring many meritorious claims.[89] Commentators also contend that policy goals behind the exception can be met with other alternatives that do not have the same prohibitive effect.[90]

a. Noise and the Discretionary Function Exception

As described above, nuisance actions against private wind farm developers often stem from the noise generated by wind turbines.[91] While the courts have not yet had occasion to consider whether government actors may be held liable in such circumstances, cases involving noises from aircraft can inform how the discretionary function exception would apply to these claims. In general, courts have held that certain government actions causing noise, such as the decision to operate facilities that cause noise, fell under the exception, but that negligence in operating these facilities did not.

For example, in *Schubert v. United States*, the plaintiffs sued the government under the FTCA to recover for alleged harms arising from noise caused by a jet engine testing facility in a nearby naval air station.[92] The court denied recovery, holding that the government had a right to operate a naval air station and test its airplane engines.[93] The court further held that the government's

86. *See* Dalehite v. United States, 346 U.S. 15, 42 (1953).

87. Ward v. United States, 471 F.2d 667, 670 (3d Cir. 1973).

88. *See, e.g.*, Rosebush v. United States, 119 F.3d 438, 444 (Merritt, J., dissenting) ("Our Court's decision in this case means that the discretionary function exception has swallowed, digested and excreted the liability-creating sections of the [FTCA]. It decimates the Act."); Mark C. Niles, *"Nothing But Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1334 (2002) (arguing that current doctrine constitutes a "veritable reassertion of [the] discarded limitation" of federal sovereign immunity in tort).

89. Jonathan R. Bruno, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 444 (2012).

90. Donald N. Zillman, *The Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act*, 76 MIL. L. REV. 1, 35 (1977).

91. *See supra* Part I.A.

92. Schubert v. United States, 246 F. Supp. 168 (S.D. Tex. 1965).

93. *Id.* at 169.

operation of the station involved a discretionary function, and therefore fell within the discretionary function exception.[94] Other cases involving aircraft noise have also held that the determination of where the government will test aircraft falls within the discretionary function exception.[95]

However, where plaintiffs allege operational negligence, courts have held that the exception might not apply.[96] In *Ward v. United States*, the plaintiffs complained of injuries resulting from sonic booms caused by an Air Force aircraft.[97] One plaintiff alleged that he was injured when the automobile he was working under fell due to the sonic boom.[98] Others claimed that the sonic boom caused damage to their home and garage.[99] Reviewing these claims, the Third Circuit court drew a distinction between discretionary planning and negligent operation.[100] Thus, while the supersonic flights were an exercise of discretion, the government could be held liable for any operational negligence.[101] The court remanded the case for an examination of whether there was operational negligence, in which case the plaintiffs would be able to recover for their damages.[102]

b. Application to Possible Government Actions with Regard to Wind Farms

In light of the broad scope of the discretionary functions exception, all three government actions related to wind energy development would likely be covered by the exception. If the federal government decides to develop wind farms on federal property, this would constitute a planning action involving the consideration of public policy. Similarly, federal legislation permitting wind farms is a legislative action involving public policy considerations that is also protected by the exception. It involves judgment and choice, and the government can easily argue that it required a policy consideration—namely, the decision to

94. *Id.*
95. *See, e.g.*, Nichols v. United States, 236 F. Supp. 241 (S.D. Cal. 1964); Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964).
96. *See, e.g.*, Ward v. United States, 471 F.2d 667 (3d Cir. 1973).
97. *Id.* at 668.
98. *Id.*
99. *Id.*
100. *Id.* at 670.
101. *Id.*
102. *Id.* at 670–71.

encourage renewable energy development. Finally, the authorization of a wind farm is also a planning action by the government, exercising choice and judgment, which requires a consideration of policy.

Likely the only avenue for recovery under the FTCA is when operational negligence occurs in the direct federal development of wind farms, without the use of private contractors. Where the federal government is responsible for developing and operating wind farms, harms arising out of the operation of the turbines may incur federal liability under the FTCA. However, the government generally does not develop wind farms itself, instead leasing its property to private farm developers.[103] Thus, the parties responsible for the operational aspect of the wind farms will be private parties and not government employees. Furthermore, because nuisance claims generally assert harms caused by wind turbines in their normal operation, these claims are likely barred under the FTCA. In light of the aircraft noise cases,[104] which can be analogized to wind farm challenges in which claimants allege injuries arising from persistent noise, courts will likely hold that the government decision of where to place the wind farms is within the discretionary functions exception.

2. Nuisance Claims Against State Governments: Sovereign Immunity Under the Eleventh Amendment

Because state governments maintain broad sovereign immunity, nuisance claims against States are also likely to be non-actionable. The Supreme Court has held that suits against a State in federal court without the State's consent are barred under the Eleventh Amendment.[105] The Supreme Court further held that private suits against a State in *state* court were also barred without its consent.[106] The Eleventh Amendment states, "The judicial power of the United States shall not be construed to extend to any suit in law or equity,

103. Brit T. Brown & Benjamin A. Escobar, *Wind Power: Generating Electricity and Lawsuits*, 28 ENERGY L.J. 489, 501 (2007).

104. *See supra*, notes 93–96 and accompanying text.

105. Edelman v. Jordan, 415 U.S. 651, 662–63 (1974); Hans v. Louisiana, 134 U.S. 1, 16 (1890); Cohens v. Virginia, 19 U.S. 264, 302–03 (1821).

106. Alden v. Maine, 527 U.S. 706, 742 (1999). It is important to note, however, that Eleventh Amendment immunity does not extend to cities or counties. *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 609 n.10 (2001); Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 400- 01 (1979); Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890).

commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[107] The Supreme Court held that state sovereignty is not limited to the Eleventh Amendment, nor does it necessarily derive from it.[108] Therefore, although the Eleventh Amendment does not expressly discuss suits by a citizen against their own state, the Supreme Court held that citizens are also constitutionally barred from bringing suits against their own state without the State's consent.[109] This general rule is subject to two exceptions. First, state governments may be liable for claims arising under the Fourteenth Amendment.[110] Second, plaintiffs may bring claims arising out of federal statutes that demonstrate Congress's express legislative intent to abrogate state immunity and are enacted under proper constitutional authority under Article I of the United States Constitution.[111]

States must consent to nuisance suits by citizens, as they are not Fourteenth Amendment claims. For example, in *Souders v. Washington Metro. Area Transit Auth.*, the D.C. Circuit held that WMATA was barred from nuisance suits under the Eleventh Amendment sovereign immunity because it shares the Eleventh Amendment sovereign immunity of both Maryland and Virginia.[112] Therefore, the State governments will be immune from nuisance suits that allege that wind farms cause nuisance unless the state consents to the suit.

B. Government Liability Under the Takings Clause

Since nuisance claims against the federal and state governments are unlikely to succeed under current sovereign immunity doctrine, plaintiffs seeking damages from state and local governments for harms caused by wind farms must rely on alternate claims to prevail. One such alternative is a Takings claim.[113] To

107. U.S. CONST. amend. XI.

108. *Alden*, 527 U.S. at 728 (1999).

109. *Edelman*, 415 U.S. at 662–63.

110. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

111. Stephanie C. Bovee, Note, *The Family Medical Leave Act: State Sovereignty and the Narrowing of Fourteenth Amendment Protection*, 7 WM. & MARY J. WOMEN & L. 1011, 1025 (2001).

112. Souders v. Wash. Metro. Area Transit Auth., 48 F.3d 546, 550 (D.C. Cir. 1995)

113. A takings claim is not the only alternative. Plaintiffs can potentially also bring a claim against the government under the public trust doctrine, but this is largely outside the scope of this Note which focuses on the private harms faced by residents. The public trust doctrine prevents the state from abrogating its control over the public trust resources on behalf of the public. *See* Patrick Redmond, Note, *The Public Trust in Wildlife: Two Steps*

assess the viability of such a claim, this Part will first describe general Takings Clause jurisprudence. This Part will then examine the potential takings claims arising from the government activities discussed above: (1) explicit immunization of private parties from nuisance liability through legislation; (2) permitting of wind farm developments and implicit immunization of wind farms from nuisance claims; and (3) government-developed wind farms.

1. Takings Claims Generally

The Fifth Amendment Takings Clause states that "private property [shall not] be taken for public use, without just compensation."[114] Applied to the States through the Fourteenth Amendment, the Takings Clause limits the exercise of government power over private property.[115] In particular, the Takings Clause is intended to prevent the government "from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."[116] Because a takings claim is a constitutional claim, it is not barred by federal sovereign immunity.[117] Similarly, because the Takings Clause applies to the States through the Fourteenth Amendment, takings claims against state governments are not barred by state immunity from suit.[118]

Takings claims generally involve a physical invasion of private property or other government appropriation of property.[119] In the absence of a permanent physical occupation or deprivation of all economically beneficial or productive use, courts employ a fact-specific inquiry to determine whether government regulation

Forward, Two Steps Back, 49 NAT. RESOURCES J. 249, 250 (2009). In the context of wind farms, plaintiffs can bring a claim applying the public trust doctrine to avian wildlife. In one case, the California Court of Appeals expanded the public trust doctrine to wildlife. *See* Ctr. for Biological Diversity v. FPL Grp., 83 Cal. Rptr. 3d 588, 597 (Cal. Ct. App. 2008). The court also held that members of the public may enforce the public trust doctrine against the government for permitting the wind turbines. *Id.* at 600–01. However, California is one of the few states that has explicitly included wildlife within the public trust doctrine. Redmond, *supra*, at 259.

114. U.S. CONST. amend. V.

115. *See* 26 AM. JUR. 2D EMINENT DOMAIN § 9.

116. Armstrong v. United States, 364 U.S. 40, 49 (1960).

117. Specifically, in *Malone v. Bowdoin*, 369 U.S. 643, 648 (1962), the Court interpreted the Supreme Court precedent *United States v. Lee*, 106 U.S. 196 (1882), to hold that the constitutional exception to sovereign immunity applies to takings claims.

118. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 316 (1987).

119. *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519, 522 (1992); United States v. Causby, 326 U.S. 256, 261–62 (1946).

constitutes a "regulatory taking" requiring just compensation.[120] In particular, courts consider the three prongs of the *Penn Central* test: (1) the economic impact of the regulation on the property owner; (2) the extent the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[121] The Supreme Court has also recognized two *per se* regulatory takings. The first *per se* regulatory taking is when government regulation forces a private property owner to submit to a permanent physical occupation of his or her property.[122] The second is a regulation that deprives the private property owner of all economically beneficial or productive use of property.[123] With this as background, this Part will now examine potential takings claims arising from various government activities related to wind energy development.

2. State Legislation Immunizing Wind Farms from Nuisance Claims

One way the government may be encourage wind farm developments is by legislating immunity from nuisance liability for private parties that develop wind farms. The most likely vehicle for such legislative immunity is Right-to-Farm legislation. Right-to-Farm statutes immunize private parties from nuisance suits in order to protect and encourage farming activities.[124] Right-to-Farm statutes have been enacted in all 50 states. These statutes generally provide either a qualified or absolute immunity from nuisance liability relating to certain farming or agricultural operations, subject to certain regulatory requirements such as the operation's conformance with relevant local laws or guidelines.[125] In certain states, wind farms may fit within the existing definition of agricultural activities protected by the statute.[126] Similarly, future Right-to-Farm legislation or amendments to existing statutes may include the development of wind farms among protected activities.

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

121. *Id.*

122. *See, e.g.*, Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 560 U.S. 702, 711 (2010); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

123. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

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

125. Slensky & Pappas, *supra* note 25, at 10–11.

126. *See, e.g.*, N.J. STAT. ANN. § 4:1C-9(i) (West 2010); VT. STAT. ANN. tit. 12 § 5752 (2014).

For example, in a recent case brought in Michigan state court, the defendants claimed that their windmill was protected under the Michigan Right-to-Farm Act.[127] While the judge determined that the act did not apply,[128] the case demonstrates that state governments may be liable for including wind farm developments to under applicable Right-to-Farm legislation.

Though most Right-to-Farm statutes include only traditional farming activities, two states—Vermont and New Jersey—explicitly include on-site generation of renewable energy.[129] For example, New Jersey's Right-to-Farm Act states that engaging in "the generation of power or heat from biomass, solar, or wind energy" is a protected activity.[130] In addition, the Vermont Right-to-Farm statute protects the "on-site production of fuel or power from agricultural products or wastes principally produced on the farm."[131] Although this limits Right-to-Farm protection to renewable energy projects utilizing agricultural products or farm waste, it suggests arguments that other sources of renewable energy, such as wind power, are likewise be protected under the statute.[132] This argument may have weight since the statute states that what is included in "agricultural activity" is not limited to the activities explicitly listed in the statute.[133]

Similarly, wind energy proponents have argued that other states should expressly include wind power in Right-to-Farm legislation to encourage alternative energy development and to eliminate the uncertainty and costs of nuisance lawsuits.[134] To the extent that state governments move forward with legislation insulating wind energy from nuisance liability, these governments may be susceptible to takings claims from affected landowners. As described below, some courts have recognized that explicit grants of nuisance immunity in Right-to-Farm legislation are a taking. The difference between the states generally turns on the distinctions in state property law. With this in mind, this Part will

127. *See* Amy Hubbell, *Windmill Can Stay*, LEELANAU ENTERPRISE, http://www.leelanaunews.com/?q=node/15926 (last visited Aug. 6, 2014).
128. *Id.*
129. Slensky & Pappas, *supra* note 25, at 11.
130. N.J. STAT. ANN. § 4:1C-9(i) (West 2010).
131. VT. STAT. ANN. tit. 12 § 5752 (2014).
132. Slensky & Pappas, *supra* note 25, at 11.
133. VT. STAT. ANN. tit. 12 § 5752 (2014).
134. *See* Marandola, *supra* note 12, at 986.

consider whether inclusion of wind farms in such legislation presents an avenue for potential government liability.

a. *Bormann*: Nuisance Immunity is a Taking

Some state courts have found that nuisance immunity granted by a Right-to-Farm statute is a taking under the United States Constitution. Most significantly, in *Bormann v. Board of Supervisors In & For Kossuth County*, the plaintiffs brought a facial challenge to the Iowa Right-to-Farm statute,[135] claiming that the statue represented a taking without just compensation under the federal Takings Clause. [136] The Kossuth County Board of Supervisors approved an application to establish an "agricultural area."[137] This approval triggered statutory provisions that granted applicants immunity from nuisance suits.[138]

The plaintiffs claimed that the grant of immunity was a taking without just compensation. Specifically, they argued that the immunity provision gave applicants the right to create or maintain a nuisance over the neighbor's property, which created an easement in favor of the applicants.[139] The plaintiffs further argued that this creation of an easement was a regulatory taking.[140] Agreeing that nuisance immunity effectively granted the wind farm an easement against neighboring property owners, the court held that the immunity was a Taking.[141] The court noted that under Iowa state law, the right to maintain a nuisance is an easement,[142] which is a property right. Therefore, the court held that a provision providing immunity from nuisance suits was a Taking of this property right.[143] Because the statute did not provide plaintiffs with the just compensation to which they were entitled, the court determined that the provision violated the Takings Clause and the state constitution.[144]

135. IOWA CODE § 352.11(1)(a) (2011).
136. Bormann v. Bd. of Supervisors In & For Kossuth Cnty., 584 N.W.2d 309, 311 (Iowa 1998).
137. *Id.*
138. *Id.* at 313.
139. *Id.* at 311.
140. *Id* at 313.
141. *Id.* at 316–17
142. *Id.*
143. *Id.* at 319–21.
144. *Id.* at 321–22.

b. Courts Holding that Nuisance Immunity is Not a Taking

While *Bormann* recognized Right-to-Farm legislation as a taking under Iowa property law, other state courts have refused to recognize similar claims by stating that the right to commit a nuisance is not an easement.[145] In *Moon v. North Idaho Farmers Ass'n*, the plaintiffs challenged Idaho's Right-to-Farm Act, which granted immunity to farmers from nuisance suits.[146] As in *Bormann*, the plaintiffs claimed that the statute created an easement in favor of the farmers over their property.[147] Unlike the Iowa Supreme Court, however, the Idaho Supreme Court held that the immunity was not a taking.[148] The court in *Moon* stated that the Idaho state law did not recognize the right to commit a nuisance to be an easement.[149] Because the statute thus did not create an easement against the plaintiffs' property, the Idaho Supreme Court rejected the takings claim.[150]

Other state courts have similarly determined that their state laws do not equate the right to commit a nuisance with an easement, and rejected takings claims. For example, intermediate courts in Indiana and Texas determined that their state laws do not recognize nuisance immunity as an easement.[151] Therefore, the potential downfall of relying on the easement argument accepted by the *Bormann* court is that while some states may recognize nuisance as an easement, other states may not.

c. Other Criticisms of *Bormann*

Just as various state courts have rejected the reasoning of *Bormann*, critics have questioned the logic of the court's holding on several grounds, potentially undermining future takings claims arising from the inclusion of wind farms in state Right-to-Farm statutes. Some argue that the *Bormann* court mistakenly conflated different property doctrines.[152] In *Bormann*, the Iowa court relied on *Churchill v. Burlington Water Company* to hold that nuisance

145. *See, e.g.*, Moon v. N. Idaho Farmers Ass'n, 96 P.3d 637 (2004).
146. *Id.* at 641–42.
147. *Id.* at 644.
148. *Id.* at 644–46.
149. *Id.*
150. *Id.*
151. Lindsey v. DeGroot, 898 N.E.2d 1251, 1258–59 (Ind. Ct. App. 2009); Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544 (Tex. Ct. App. 2004).
152. Jennifer L. Beidel, Comment, *Pennsylvania's Right-to-Farm Law: A Relief for Farmers or an Unconstitutional Taking?*, 110 PENN ST. L. REV. 163, 178 (2005)

immunity created an easement in favor of the wind farm.[153] However, some read *Churchill* merely to reaffirm the doctrine of adverse possession, which holds that a trespasser can obtain an interest in another's property after a period of open and continuous use.[154] Noting that *Churchill* does not comment on nuisance immunity, critics of *Bormann* have chastised the court for an unwarranted amalgamation of property doctrines.[155]

Other critics argue that nuisance immunities are simply not easements. These critics generally contend that immunities are rights to resist legal challenges, aptly regarded as a shield to deter legal challenges to their activities.[156] Easements, on the other hand, are not shields but enforceable property rights.[157] Easements are the right to use others' land, whereas immunities are not.[158] Under this view, *Bormann* is not an authorization for defendants to use plaintiffs' land, it is a defense made available to litigants in one class of cases.[159]

Moreover, even if this immunity is a land-use right, it may nonetheless not be an easement.[160] Because an easement "is not a right held by one in the land of another," it only enhances the holder's right to use his or her own land.[161] Critics of *Bormann* generally agree on this point, and argue that the flaw of the *Bormann* opinion is its "zero-sum assumption."[162] Critics contend that nuisance immunity merely enhances the property owner's right to use his own land and does not burden the property rights of neighboring property owners.[163]

Finally, critics argue that *Bormann* creates a slippery slope.[164] Other statutes, such as pollution control provisions, landmark laws, and other zoning laws also restrict an individual's right to use his land for the benefit of the public and the general good.[165]

153. *Id.* (citing Churchill v. Burlington Water Co., 62 N.W. 646, 647 (1895)).
154. *Id.*; *see also* JESSE DUKEMINIER ET AL., PROPERTY (5th ed. 2002).
155. Beidel, *supra* note 153, at 178.
156. Eric Pearson, *Immunities as Easements as "Takings"*: Bormann v. Board of Supervisors, 48 DRAKE L. REV. 53, 60 (1999).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id*
161. *Id.*
162. *Id.* at 76–77.
163. *Id.*
164. Beidel, *supra* note 153, at 178.
165. *Id.*

Therefore, the rationale behind *Bormann* may encompass these other laws. If the government may be held liable for zoning because it is deemed to create an easement, and thus an uncompensated taking, then the state would be "stripped of virtually all of its power to regulate land use."[166] Despite these criticisms, the *Bormann* logic may apply in states that recognize nuisance immunities as easements.

3. Government Authorization as an Implicit Immunization from Nuisance

Another way in which the government may be liable for harms caused by a wind farm is if the government authorizes its development, implicitly immunizing the farm from nuisance liability. Permitting authority varies from state-to-state, but states and/or local counties require wind farms to go through a permitting process before the developers can build wind farms.[167] For example, in 1980, the California Energy Commission created the Altamont Pass Wind Resource Area and issued forty-six use permits to operate private wind energy generation facilities over the next twenty-four years in an approximately 40,000-acre Alameda County portion of this area.[168] Where a state or local government has granted a permit to the wind farm developer, the government is authorizing the development of the wind farm. In this way, the government may become liable for damages arising from the operation of the farm under the theory that government-issued permits allowing wind farms to proceed constitute a regulatory taking.

One Supreme Court case that a plaintiff could apply to reject legislative immunity from private nuisance liability is *Richards v. Washington Terminal Co.*[169] In *Richards*, Congress enacted legislation authorizing the Washington Terminal Company to construct and operate a railroad in Washington, D.C.[170] The plaintiff, whose property was near the tracks and next to the entrance of a railroad tunnel built by the defendant, alleged various nuisances arising

166. *Id.*

167. *See generally Chapter 6: Permitting Basics*, WINDUSTRY.ORG, http://www.windustry.org/community-wind/toolbox/chapter-6-permitting-basics#psbs (last visited Aug. 6, 2014) (summarizing federal and state permitting requirements for wind farms).

168. Ctr. for Biological Diversity v. FPL Grp., 83 Cal. Rptr. 3d 588, 591–92 (2008).

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

170. *Id.* at 551

from the operation of the railroad.[171] Though the federal government was not a party in the suit, the Court couched its analysis under the Fifth Amendment Takings Clause framework.[172] In so doing, the Court drew a distinction between public and private nuisance and concluded that the government may not immunize parties from private nuisance without running afoul of the Takings Clause.[173]

On one hand, the defendant could not be held liable for the noise, gases, gusts, dirt, and smoke caused by the ordinary operation of the railroad. Because legislation authorized such ordinary operation, the federal government effectively barred whatever public nuisance claim may have lain.[174] On the other hand, the gases and smoke that wafted onto the property because of the operation of the tunnel's ventilation system was a private nuisance.[175] The Court reasoned that the harm from the tunnel was actionable because it led to a "special and peculiar damage to the plaintiff," while the harm incurred from the normal operation of the railroad was shared by many other property owners along the tracks. [176] The Court stated that "under the 5th Amendment . . . while the legislature may legalize what otherwise would be a *public nuisance*, it may not confer immunity from action for a *private nuisance* of such a character as to amount in effect to a taking of private property for public use."[177] Despite the Court analyzing the railroads' actions under the Takings Clause framework, the government was not held liable for just compensation in *Richards* because the government was not a party to the case.

Some commentators have taken *Richards* to provide a framework for identifying when a nuisance immunization becomes a taking. Under this view, *Richards* outlines a three-part test to determine whether a nuisance immunization has amounted to a taking: whether the burden is (1) direct; (2) peculiar to the property owner; and (3) substantial.[178] Under this interpretation, a government-authorized action by a private party that causes direct,

171. *Id.*
172. *See id.* at 533–55.
173. *Id.* at 556–57.
174. *Id.* at 551.
175. *Id.* at 551–52.
176. *Id* at 557.
177. *Id* at 552–54 (emphasis added).
178. Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. REV. 819, 829–30 (2006).

peculiar, and substantial harm to the neighboring resident would be a taking meriting just compensation from the government.

However, others have noted that this theory of "special and peculiar damage" has not been widely followed outside cases that concern railroads.[179] Other cases cite *Richards* most often to support the proposition that plaintiffs cannot recover for damages that are not special or peculiar.[180] However, courts have not cited *Richards* to hold that the government is liable for granting nuisance immunity to a private party causing "special and peculiar damage." Therefore, whatever potential *Richards* had to develop a jurisprudence regarding nuisance and takings has either not been utilized, or at least has not been utilized outside of the narrow railroad context.

Furthermore, a much narrower interpretation of *Richards* is available. *Richards* may refer to the Fifth Amendment merely as an analogy or a useful framework; an alternative reading is that it holds that the government is unable to immunize private nuisances, although it may be able to immunize public nuisances. Therefore, the plaintiffs can recover from the private party responsible for the private nuisance action even though their activity was implicitly immunized from public nuisance actions. Under this interpretation, *Richards* does not speak to whether a plaintiff can recover from the government if the government authorizes private nuisances. This interpretation would also explain why the case has not led to the development of a line of cases utilizing *Richards* to determine whether government immunization from nuisance constitutes a taking.

To the extent that *Richards* limits the ability for governments to grant immunity from nuisance liability without compensation to affected landowners, governments may be held liable for just compensation in cases where the "*Richards* test" is met. However, if the case is interpreted to have very little authority except perhaps in railroad contexts, governments will not be held liable where they authorize wind farms. Lastly, if the case is interpreted to have held simply that the government cannot immunize private parties from private nuisances, then the case has very little applicability to the

179. WILLIAM STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN, 156–58 (1977).

180. *See, e.g.*, Andrews v. United States, 108 Fed. Cl. 150, 156 (Fed. Cl. 2012); Bellamy v. United States, 235 F. Supp. 139, 141 (E.D.S.C. 1964); Moore v. United States, 185 F. Supp. 399, 400 (N.D. Tex. 1960).

question of whether the government may be liable for having authorized wind farms.[181]

4. Government-Developed Wind Farms

The last government action that this Note will examine is the government developing its own wind farms, by leasing its property to wind farm developers.[182] For example, in July 2013, Secretary of the Interior Sally Jewell and Bureau of Ocean Energy Management (BOEM) Director Tommy P. Beaudreu held a competitive lease sale for wind energy in federal waters.[183] With these leasing activities in mind, plaintiffs may seek to recover for nuisances created by the government under the Takings Clause as an alternative theory to tort law. In this context, *Richards* may also be helpful in identifying nuisance-causing actions that raise potential governmental liability.

The *Richards* doctrine could allow compensation for government-created nuisance. As noted above, the specific holding in *Richards* might not be that the government is liable for government authorized nuisance caused by private parties. Nevertheless, *Richards* suggests that takings jurisprudence may allow recovery for government-created nuisance. Commentators have noted that the *Richards* "comes very near to recognizing that governmental nuisances may amount to a taking,"[184] and that the *Richards* doctrine could grow to "allow compensation for activities of the traditional nuisance type"[185] created by the government.

Some subsequent cases have applied *Richards* to government nuisances, or at least have recognized that plaintiffs may be able to recover for government nuisances. These cases demonstrate that courts have adopted the *Richards* framework when government activity allegedly causes nuisance. In *Nunnally v. United States*, the plaintiff sought to recover from the government under the Takings Clause for the nuisance created by testing weapons on nearby government property.[186] There, the Fourth Circuit applied *Richards*

181. *Richards* may also be applicable to Right-to-Farm statutes.

182. Brown & Escobar, *supra* note 103, at 501.

183. Press Release, U.S. Dep't of the Interior, Interior Holds First-Ever Competitive Lease Sale for Renewable Energy in Federal Waters (July 31, 2013), *available at* http://www.doi.gov/news/pressreleases/interior-holds-first-ever-competitive-lease-sale-for-renewable-energy-in-federal-waters.cfm.

184. STOEBUCK, *supra* note 179, at 156.

185. *Id.* at 157–8.

186. Nunnally v. United States, 239 F.2d 521, 522 (4th Cir. 1956).

to bar recovery because the plaintiffs did not suffer a peculiar damage.[187]

Likewise, the Supreme Court of California has applied *Richards* to allow a plaintiff to make out a takings claim where activity on government property created a nuisance. The court relied on *Richards* in holding that the plaintiff should have been given the opportunity to demonstrate that the burden on its property—due to odors from the City's property—was sufficiently direct, substantial, and peculiar to constitute a taking.[188] The court's reliance on *Richards* demonstrates that the case has been interpreted as providing a test for when a government nuisance becomes a taking.

The cases that followed *Richards* support the contention that the *Richards* doctrine applies to government nuisances, even though *Richards* itself was not a decision on government-created nuisances. Because *Richards* did not itself concern a government-created nuisance, it may stretch the Court's holding too far to apply the case to government-created nuisances.

III. PROPOSED BASES OF GOVERNMENT LIABILITY FOR HARMS CAUSED BY WIND FARMS UNDER THE TAKINGS CLAUSE

With the objective of clarifying and maintaining the integrity of this area of law, this Part proposes the doctrines that courts should apply to different government actions to support wind farm development. The focus of the proposals will be on the Takings claim because sovereign immunity appears to be a significant hurdle to nuisance claims against state and federal governments, as described above. Therefore, the only viable avenue plaintiffs have in seeking government liability would be a Takings claim. First, this Part will examine how courts should determine government liability under the Takings Clause for enacting legislation immunizing wind farms from nuisance immunity. This Note argues that *Bormann* should apply where state law recognizes immunity from nuisance as an easement, and *Penn Central* should apply in states that do not recognize immunity from nuisance as an easement. Second, this Part will examine which doctrines should apply in seeking recovery under the Takings Clause when government approvals of wind farms implicitly grant nuisance

187. *Id.* at 524.

188. Varjabedian v. City of Madera, 20 Cal. 3d 285, 298-99 (Cal. 1977).

immunity. This Note suggests that courts should apply *Bormann* or *Penn Central* instead of *Richards*. Third, this Part will examine what doctrines should apply in determining whether a government-created nuisance is a taking. This Note determines that courts should apply *Richards* in assessing claims alleging government-generated nuisance.

A. Courts Should Apply *Bormann* or *Penn Central* to Express Nuisance Immunity Legislation

When plaintiffs seek to recover from state governments that have granted nuisance immunity to wind farms, courts should apply *Bormann* in states that recognize immunity from nuisance as an easement. In states that do not recognize immunity from nuisance as an easement, courts should instead apply *Penn Central* to determine whether legislative nuisance immunity constitutes a regulatory taking. Under this bifurcated doctrine, courts can adequately address the major criticisms of *Bormann*.

1. Courts Should Apply *Bormann* in States that Recognize Immunity from Nuisance as an Easement

The above discussion of the *Bormann* doctrine highlighted the criticisms of recognizing a taking based on the idea that the right to nuisance is an easement.[189] An examination of these criticisms reveals that they fall short. Thus, courts should apply the *Bormann* doctrine in jurisdictions where nuisance immunity is recognized as an easement.

In jurisdictions where immunity from nuisance is an easement, the logic of *Bormann* is valid. Because an easement is a property right and nuisance immunity gives this property right to another party, nuisance immunity is rightly viewed as a taking of a property right under the Takings Clause. The added advantage of adopting *Bormann* is that it forgoes a more nebulous and judge-dependent regulatory takings analysis outlined in *Penn Central*.

The criticisms of *Bormann* are also easily addressed. The first criticism is that *Bormann* erroneously conflates two different legal doctrines: immunities and easements.[190] Immunity from nuisance liability in effect gives defendants the legal right to create nuisance. By extension, this immunity deprives those harmed by the nuisance

189. *See supra* Part II.B.2.a.
190. *See supra* Part II.B.2.c.

of the right to the use and enjoyment of their property with respect to this immunized nuisance. The courts can evaluate this immunity in conjunction with the decision in a precedent *Bormann* court relied upon which stated that "the right to discharge soot and smoke upon the premises of another [*i.e.* the right to create a nuisance] is an easement."[191] By extension, the right to create nuisances free of legal consequences is clearly an easement.

Bormann is also able to overcome the second criticism. As described above, some have argued that *Bormann* erroneously regarded nuisance immunity as burdening the neighboring property owner when it only granted additional rights to the property owner with the immunity.[192] As noted above, nuisance is defined as an unreasonable interference with the use and enjoyment of land causing significant harm.[193] Since nuisance is defined as an *interference*, it is hard to imagine how a nuisance does not burden the property rights of neighboring property owners. Nuisance immunity prevents the harmed property owners from recovering damages for this infringement upon their property right. Therefore, although certain land-use rights should perhaps not be regarded under a zero-sum assumption, that assumption does not seem out of place with regard to nuisances.

The last criticism is the slippery slope argument.[194] On one hand, this appears to be a more compelling argument than the earlier critiques because it may be unreasonable to force governments to be held liable for all current or future zoning regulations. On the other hand, it is unclear whether common zoning regulations will amount to a recognized nuisance. Since not all zoning regulations lead to otherwise actionable nuisances, even if *Bormann* was extended, the government will be liable for only a small portion of zoning regulations. For example, as will be examined in more detail below, a zoning regulation may authorize wind farms because the government can approve wind farms by granting permits authorizing their development in specific areas. This Note argues that the government should be held liable under this scenario as well and suggests that courts apply certain takings doctrines in that context in addition to this one.

191. Churchill v. Burlington Water Co., 62 N.W. 646, 647 (1895).
192. *See supra* notes 153–56 and accompanying text.
193. *See supra* note at 26 and accompanying text.
194. *See supra* notes 165–67 and accompanying text.

Because *Bormann* involved a deprivation of a property right, critics of the decision have suggested that *Penn Central* provides a more appropriate test than the easement analysis embraced by the Iowa Supreme Court.[195] However, there are disadvantages to forgoing a clear *Bormann* rule in this context in favor of the more nebulous *Penn Central* analysis. The *Penn Central* framework is "almost universally decried as hopelessly vague, impossible to apply in a consistent fashion, and an invitation to judicial subjectivity."[196] The Supreme Court has stated that the *Penn Central* framework does not define a set framework, and courts applying *Penn Central* have engaged in ad hoc, factual inquiries.[197] Recognizing this concern, the Supreme Court has attempted to create alternative, bright-line tests following the *Penn Central* decision for several different types of regulatory takings.[198] In this context of express nuisance immunity, courts should embrace this alternative bright-line rule in order to avoid the vagueness of the *Penn Central* framework, which is susceptible to judicial subjectivity.

Courts should apply *Bormann* in jurisdictions where immunity from nuisance liability is recognized as an easement against neighboring property. Although some critique the propriety of combining these doctrines, the Iowa precedent and the nuisance definition under the *Restatement* both support the holding in *Bormann*. Furthermore, the slippery slope argument fails. In jurisdictions where courts consider unabated nuisances to constitute an easement, courts should apply *Bormann*. Applying *Bormann* will require courts to examine whether the jurisdiction recognizes immunity from nuisance liability as an easement.[199] It

195. Steven J. Laurent, Comment, *Michigan's Right to Farm Act: Have Revisions Gone Too Far?*, 2002 L. REV. MICH. ST. U. DET. C.L. 213, 233–34 (2002)

196. Gary Lawson et. al., *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 3 (2005). Note that the few defenders of *Penn Central* praise this vagueness, claiming it is an appropriate judicial response to the competing human values at stake. *See* F. Patrick Hubbard, Palazzolo, Lucas *and* Penn Central: *The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465, 517–18 (2001).

197. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

198. *See generally* Molly McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U.L. REV. 591 (1998) (describing the evolution of the Supreme Court's "bright line" takings tests). For example, in *Lucas*, the Supreme Court promulgated the bright-line rule that a regulation denying the owner of "all economically viable use" of private property represents a per se taking. As well, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court ruled that a regulation resulting in a permanent physical occupation of private property is a *per se* taking.

199. *See supra* notes 140–45 and accompanying text.

will also require an examination of whether nuisance immunity was granted by the government.[200]

2. Courts Should Apply *Penn Central* in States That Do Not Recognize Immunity from Nuisance as an Easement

Although this Note argues that courts should apply *Bormann* where state law recognizes nuisance immunity as an easement, courts should not limit themselves to *Bormann* where jurisdictions do not recognize that the right to nuisance is an easement.[201] Since the easement analysis would not be applicable in these jurisdictions, courts must instead apply *Penn Central*. As described above, outcomes under *Penn Central* will be vulnerable to the idiosyncratic views of individual judges trying to apply this test, as it is unclear what combination of these three factors balance towards finding a taking.[202] However, in the absence of a clearer alternative in these jurisdictions, courts must rely on *Penn Central* to determine whether grants of legislative nuisance immunity constitute actionable takings. As briefly described above, under *Penn Central*, a court considers: (1) the economic impact of the regulation on the property owner; (2) the extent the regulation has interfered with distinct investment-backed expectations; and, (3) the character of the governmental action.[203]

Courts will need to analogize to similar takings claims that courts examined under *Penn Central*. For example, with regards to noise and vibration claims, courts should examine how *Penn Central* was applied in other noise and vibration cases in that specific jurisdiction, if such cases exist. Whether plaintiffs will be able to recover under certain specific fact patterns is outside of the scope of this Note.[204] Outcomes will largely depend on how courts apply the *Penn Central* test to specific factual scenarios.

200. *Id.*

201. *See, e.g.*, Moon v. N. Idaho Farmers Ass'n, 96 P.3d 637 (2004), Lindsey v. DeGroot, 898 N.E.2d 1251, 1258–59 (Ind. Ct. App. 2009); Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544 (Tex. Ct. App.2004).

202. *See supra* note 199 and accompanying text.

203. *See supra* notes 120–24 and accompanying text.

204. For example, it will depend on the intensity of noise generated by individual turbines, on the expert witnesses presented, medical records, and other fact-specific evidence.

B. Courts Should Apply *Bormann* or *Penn Central*, Not *Richards*, to Government-Authorized Wind Farms

Courts should not apply *Richards* in determining whether a taking has occurred through nuisance caused by government-authorized wind farms. Although *Richards* discusses the takings doctrine in its analysis, the holding itself does not deal with government liability because the government was not a party to the case.[205] Although the case apparently lends support for takings claims arising from nuisances created by government-authorized activities, courts have rightly avoided this path.[206] Therefore, courts should not now extend *Richards* to impose government liability in cases of government-authorized wind farms. Instead of *Richards*, the courts should rely either on *Bormann* or *Penn Central*.

Government authorization through permitting is analogous to *implicit nuisance immunity*. Both under *Bormann* and *Penn Central*, whether the grant of nuisance immunity was express or implicit does not appear to change the analysis. As such, the same bifurcated analysis would apply in this context as well. Courts should apply the *Bormann* doctrine in jurisdictions that recognize nuisance immunity as an easement, but must apply *Penn Central* in jurisdictions that do not. Analysis under *Penn Central* will be the same as the analysis outlined above for the express nuisance immunity context.

C. *Richards* Should Apply to Nuisances Created by Government-Developed Wind Farms

Although *Richards* should not apply to the government-approved wind farm context, *Richards* should apply in the government-developed wind farms context. As noted above, *Richards* has not led to robust jurisprudence addressing government-authorized activities.[207] However, courts have recognized *Richards*'s applicability to government nuisance.[208] Although *Richards* did not explicitly allow recovery for government-created nuisances under the Takings Clause, subsequent cases applying *Richards* have found government-created nuisance to constitute a taking. In these situations, courts applying *Richards* must consider (1) whether the

205. *See supra* notes 175–79 and accompanying text.
206. *See supra* notes 180–82 and accompanying text.
207. *Id.*
208. *See supra* notes 186–90 and accompanying text.

burden is direct, (2) peculiar to the property owner, and (3) substantial.[209]

Richards should be applied instead of *Penn Central* because *Richards* gives the courts more specific prongs that are tailored to the government nuisance context. The *Richards* framework comports with the three-pronged *Penn Central* test, as well as other Supreme Court takings opinions. With regard to the first requirement that the burden be direct, it comports with the takings requirement that the effect on the property owner be more than merely incidental.[210] Second, the peculiarity factor goes to one of the primary purposes of the Takings Clause articulated by *Armstrong v. United States*, which prevents individuals from bearing public burdens.[211]

The Supreme Court in *Penn Central* emphasized the fact that the landmark legislation at issue imposed a unique and distinct burden on its property in determining the legislation to be a taking.[212] The undue burden on the private property owner speaks to the *Penn Central* factor of the character of governmental action. Finally, the third *Richards* factor also squares with two factors of the *Penn Central* test: economic effects on the property owner and investment-backed expectations. These two factors speak to whether the burden on the private property owner is substantial.

Although *Richards* is in line with *Penn Central* and other takings cases, *Richards* has the added advantage of being a more particularized test for nuisance-related suits. Under the *Penn Central* analysis, courts must navigate through factors that have been criticized for being too vague—particularly the investment-backed expectations factor. Courts and commentators have struggled to agree on what this factor means and how to apply it.[213] *Richards* may not be the pinnacle of judicial clarity either, but its 'substantial and peculiar' test is useful, if only for its similarity to

209. *Id.*

210. Armstrong v. United States, 364 U.S. 40, 48 (1960).

211. *Id.*

212. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133–35 (1978).

213. For example, Richard Epstein stated, "[W]e should be deeply suspicious of the phrase 'investment-backed expectations' because it is not possible to identify even the paradigmatic case of its use." Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993). Andrea Peterson commented, "It is not at all clear . . . what role 'interference with reasonable expectations' plays in the Court's takings analysis." Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1324 (1989).

the nuisance analysis. *Penn Central* may generally be useful because it is the main test provided by the Supreme Court for regulatory takings analysis. Here, however, courts should rely on *Richards* to ensure greater clarity and consistent outcomes.

IV. CONCLUSION

Although wind power is an important energy source that we should increasingly rely upon, it also creates harms to those neighboring the wind turbines. Due to the discretionary function exception under FTCA and general sovereign immunity doctrines, governments are most likely immune from nuisance liability. Therefore, plaintiffs are more likely to recover from the government under a takings claim. This Note examined the best doctrines with respect to the different government involvement with wind farms. Courts should apply *Bormann* and/or *Penn Central* to both express and implicit nuisance immunity depending on state property law regarding easements. *Richards* should apply to nuisance claims against government-developed wind farms where the government has developed a wind farm on its property.