DIRTY DISHES, DIRTY LAUNDRY, AND WINDY MILLS: A FRAMEWORK FOR REGULATION OF CLEAN ENERGY DEVICES

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When Congress and the Federal Communications Commission acted in 1996 to protect the right of property owners and tenants to place small satellite dishes on private property, they hoped, among other things, to increase the availability of video services, enhance consumer choice, create competition, and contain consumer costs in the video services market. Today, there are a number of parallels between the government's interests that led it to occupy a space in the regulation of satellite dish placement and the government's interests in encouraging Americans to conserve energy and incentivizing the creation of "green" energy technology. Should the federal government step in to protect the ability of property owners and tenants to install windmills, solar panels, clotheslines, and other clean energy devices, then it could logically look to its regulation of over-the-air reception devices and borrow some of the most significant principles of FCC's Over-the-Air Reception Devices Rule (OTARD Rule) and other similar rules. The OTARD Rule might serve as a blueprint for a federal rule protecting the right to install and use clean energy devices.

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I. INTRODUCTION

When Congress and the Federal Communications Commission (FCC or Commission) acted in 1996 to protect the right of property owners and tenants to place small satellite dishes on private property, they hoped, among other things, to increase the availability of video services, enhance consumer choice, create competition, and contain consumer costs in the video services market.[1] Today, there are a number of parallels between the government's interests that led it to occupy a space in the regulation of satellite dish placement and the government's interests in encouraging Americans to conserve energy and incentivizing the creation of "green" energy technology. Should the federal government step in to protect the ability of property owners and tenants to install windmills, solar panels, clotheslines, and other clean energy devices, then it could logically look to its regulation of over-the-air reception devices (OTARDs) and borrow some of the most significant principles of FCC's Over-the-Air Reception Devices Rule (OTARD Rule or Rule)[2] and other similar rules. The OTARD Rule might

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 54 (codified as amended in scattered sections of 15, 18 & 47 U.S.C.). *See generally* 47 C.F.R. § 1.4000 (2009) (protecting private satellite dishes from excessive regulation).

[2] 47 C.F.R. § 1.4000 (2009).

serve as a blueprint for a federal rule protecting the right to install and use clean energy devices.

Consumers desiring satellite service have a powerful tool in the OTARD Rule should they run up against state and local restrictions or prohibitions against the installation or use of satellite reception devices. FCC and federal courts have uniformly held that such prohibitions are preempted by federal regulation to the extent that they impair, delay, or raise the cost of receipt of satellite service.[3] Widespread demand for and presence of satellite reception devices has resulted in numerous clashes between property owners, tenants, and homeowners' associations about the rights to install or prohibit installation of satellite dishes on private property.[4] In recent years, homeowners and tenants have engaged in battles with neighborhood homeowners' associations over the installation of satellite dishes and component dish equipment on homes and condominiums in subdivisions where homeowners' associations have enacted a wide range of restrictions on the installation of satellite dishes.[5] These restrictions include, for example, outright prohibitions on installation; complex pre-approval procedures and monetary pre-installation fees; requirements that devices be concealed, painted a particular color, or placed in particular locations; as well as ongoing inspection requirements. The OTARD Rule preempts most of these types of prohibitions.[6]

Clashes now are brewing in communities across the country over the placement of clean energy devices such as windmills, clotheslines, and solar panels.[7] One of the most contentious topics of the modern eco-revolution is the increasing presence of windmills and wind farms in rural areas. For example, one upstate New York family has nearly been torn apart by the decision of the family's patriarch to lease family farm land to a wind farm operation despite the noise and other headaches that the wind turbines have caused their neighbors—some of whom are members of the family.[8] Others

3 *See Building Owners*, 254 F.3d 89, 91 (D.C. Cir. 2001); Roberts, 16 F.C.C.R. 10972, 10978 (2001); Frankfurt, 16 F.C.C.R. 2875, 2893 (2001); Bell Atl. Video Servs. Co., 15 F.C.C.R. 7366, 7372 (2000); Holliday, 14 F.C.C.R. 17167, 17172 (1999); Trabue, 14 F.C.C.R. 8602, 8610 (1999); Sadler, 13 F.C.C.R. 12559, 12572 (1998); Lubliner, 13 F.C.C.R. 16107, 16116 (1998).

4 *See, e.g.*, Roberts, 16 F.C.C.R. at 10972.

5 *See, e.g.*, Holliday, 14 F.C.C.R. at 17167, 17169; Roberts, 16 F.C.C.R. at 10972.

6 *See* discussion *infra* Part II.A.

7 *See, e.g.*, Kurtis Alexander, *Santa Cruz Wind Turbine Presents Conundrum for State Regulators*, SANTA CRUZ SENTINEL, Dec 31, 2009, http://www.santacruzsentinel.com/business/ci_14099284 (last visited July 11, 2010); Henry Brean, *Windmill Plan Unites Neighbors*, LAS VEGAS REV.-J., Mar 21, 2010, at 1B, http://www.lvrj.com/news/windmill-plan-unites-neighbors-88756167.html (last visited July 11, 2010); John Richardson, *Home-Grown Energy Generates Hot Neighbors and Ill Winds*, PORTLAND PRESS HERALD (Maine), July 28, 2007, at B1, http://www.windaction.org/news/11020 (last visited July 11, 2010); Allison Ross, *Solar Home or 'Monstrosity'?; A Scarborough Homeowner Is Getting Heat from Neighbors for his Energy-Saving Array*, PORTLAND PRESS HERALD (Maine), July 24, 2007 at B1, 2007 WLNR 14135171.

8 David Baron, *Wind Farm Buffets Family, Town Relations*, NAT'L PUB. RADIO, Apr. 9, 2008, http://www.npr.org/templates/story/story.php?storyId=89432191. The decision of Ed Yancey to lease his family farm land in Lowville, New York to the Maple Ridge Wind Farm has pitted Ed Yancey and a daughter against Yancey's adult sons. *Id.* Yancey's sons complain that the noise from the wind turbines has become unbearable, prompting one son to consider altogether

in the Lowville, New York community applaud the positive economic impact that the wind farm has had on the community, including generating jobs and tax revenue, as well as the overall benefit to the environment.[9] Similar disputes have occurred in less rural residential areas.[10] Similarly, the placement of solar panels has also given rise to notable litigation.[11] In California, neighbors have been embroiled in litigation regarding the placement and overgrowth of redwood trees that block sunlight to solar panels installed on the neighboring property.[12]

Local governments, which are often caught in the middle, must balance a number of competing interests and concerns in this so-called eco-revolution. One interest that local governments must consider IS the interests of people who have adopted what has been labeled an "eco-chic" lifestyle, people who simply seek to reduce monthly energy costs, and people who want to protect the environment.[13] On the other hand, local governments must also consider interests of neighboring property owners and homeowners' associations who are concerned about a panoply of nuisances, such as noise, the threat of personal physical harm, harm to property, harm to the aesthetic appeal of neighborhoods, harm to panoramic views, and the diminution of property values. Of course, many of these seemingly competing parties have some overlapping interests which are similar to those involved in disputes regarding placement of satellite dishes. The overwhelming success of the OTARD Rule in resolving disputes over the placement and use of satellite dishes suggests that a regulation similar to the

leaving the area he has called home his entire life. *Id.* The elder Yancey and his daughter contend that the $45,000 annual lease payments he receives from the wind farm operation helps him pay his bills, particularly the annual taxes on the rural property. *Id.*; *see also* Marie Morelli, *Windmills Stir Up a Storm: Cape Vincent is Divided on Whether Turbine Proposals Make Economic Sense, or Threaten Its Peaceful Landscape*, POST-STANDARD (Syracuse, NY), Feb. 14, 2010, at A1, http://www.syracuse.com/news/index.ssf/2010/02/windmills_stir_up_a_storm_in_c.html (last visited July 11, 2010).

9 However, the lease between Yancey and Maple Ridge Wind Farm, has also created some ill will between the haves and the have-nots in the community. *See* Baron, *supra* note 8. There is a sentiment that the larger landholders are becoming even more wealthy whereas the poorer members of the community who own little or no land are not. *See id.*

10 *See, e.g.*, Felicity Barringer, *Trees Block Solar Panels, and a Feud Ends in Court*, N.Y. TIMES, Apr. 7, 2008, at A14 (describing a fight between neighbors over solar panels in Palo Alto, California).

11 *See, e.g.*, Zipperer v. County of Santa Clara, 35 Cal. Rptr. 3d 487, 490 (Cal. Ct. App. 2005) (claiming, among other torts, trespass and nuisance for the interference with solar panels by neighbor's shade trees); Taylor v. Ridge at the Bluffs Homeowners' Ass'n, 579 So. 2d 895, 896 (Fla. Dist. Ct. App. 1991) (alleging that the "aesthetic nature of the community" was imperiled by the installation of solar panels); Garden Lakes Cmty. Ass'n v. Madigan, 62 P.3d 983, 989 (Ariz. Ct. App. 2003) (affirming homeowners' right to install solar panels over homeowners' association's restrictions).

12 *See* Barringer, *supra* note 10, at A17 (describing the first criminal conviction under the Solar Shade Act). California's Solar Shade Act provides that trees that block a solar panel's access to the sun may constitute a nuisance and be subject to a fine of up to $1,000 per day. CAL. PUB. RES. CODE § 25983 (West 2007) (amended 2008). The California legislature later changed the violation from a criminal penalty into a private nuisance claim. *Id.* at § 25983 (supp. 2010).

13 Christine Woodside, *Drawing a Line on Outdoor Clothes Drying*, N.Y. TIMES, Dec. 2, 2007, at CT2.

OTARD Rule could present a workable resolution to the problems posed by the placement and use of clean energy devices as well.

Governmental balancing of competing interests is happening largely in a piecemeal fashion—from town to town—resulting in a lack of uniformity of laws across the country. With energy issues occupying such a prominent place in current federal government policy, it is natural to ask whether the United States needs a nationally coordinated effort to protect the rights of private property owners to install and maintain windmills and similar devices on private property while preserving and protecting the rights of other property owners and those of the public at large.

Just as the federal government took great interest in the availability and affordability of communications services, as reflected in the OTARD Rule, states and the federal government have increasingly adopted a more proactive environmental conscience in recent years. The Obama Administration has adopted an energy policy based on promoting conservation and promoting alternative and renewable sources of energy.[14] The Administration has also adopted an economic policy, a significant component of which focuses on creating green jobs, such as windmill manufacturing.[15] It remains to be seen whether the Administration's policy will include express protections of the right to install clean energy devices.

The public's renewed interest in energy conservation and efficiency could prompt the federal government to enact legislation and regulations with certain key similarities to the Telecommunications Act of 1996 (1996 Act)[16]—which authorized FCC to enact the OTARD Rule—with a focus on encouraging and incentivizing Americans to "go green."[17] More specifically, the federal government could provide similar sweeping protections to property owners and renters who want to install energy conservation devices and apparatus on their property over the objections of homeowners' associations, landlords, and despite private covenants and state and local laws.

Of course, there are significant differences between satellite dishes and clean energy devices, such as differences in their size, placement, and the potential to harm persons and property. These differences may also invoke different reactions on the state and local level as those governments seek to balance the interests of their constituents. Because of the potential for fields of windmills and solar panels in suburbia, the relevant legal issues are much more profound in those areas. Generally, clean energy devices are significantly larger, obtrusive, noisier, and more disruptive than satellite dishes. Another difference between satellite dishes and clean energy devices

14 *See* Matthew Holden, Jr., *Energy Policy and the Obama Administration: Some Choices and Challenges*, 30 ENERGY L.J. 405, 405–06 (2009). Professor Holden was discussing a speech given by President Obama describing the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42 & 47 U.S.C.).

15 *See* Holden, *supra* note 14, at 405–06.

16 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15, 18 & 47 U.S.C.).

17 "Going green" is a colloquial term used to describe the process of adopting environmentally conscious and environmentally friendly lifestyles and methods. *See* Lionel Beehner, *Going Green, Luxuriously*, N.Y. TIMES, December 2, 2007, at TR6.

is that the problems associated with excessive energy consumption are arguably more profound than the lack of access to communications and video services. One could argue that the public interests involved in energy conservation are more compelling than the public interests in the communications arena. However, while many might subscribe in theory to the value of widespread communications connectedness and energy conservation, the time honored mindset of "not-in-my-backyard" often stifles well-intended public policy when these policies are actually implemented.

On the other hand, there are several similarities and parallels between satellite dishes and clean energy devices, such as their need for particular location, directional orientation, and their vulnerability to natural elements such as sunlight and wind. Should the federal government choose to protect the right to install clean energy devices, then pursuing legislation similar to the 1996 Act and the OTARD Rule, with some nuanced changes as discussed herein, would be a viable option. The federal government could adopt a similar, preemptive regulatory scheme, complete with federal preemption of state and local laws, leases, contracts, and deed restrictions. The federal government could also pursue options similar to the so-called right-to-dry and right-to-farm laws, which effectively preempt private nuisance lawsuits.[18]

The most significant hurdles the federal government would have to clear, were it to implement an OTARD rule-like regulatory scheme, would involve issues of balancing competing interests, issues of preemption, and constitutional takings issues. An OTARD rule-like preemptive law permitting the installation of energy-conserving equipment raises several concerns, such as 1) whether a homeowner generally has a common law private nuisance action against a neighbor for installation of devices such as satellite dishes, windmills, solar panels, or other such apparatus of significant social value, 2) whether a common law private nuisance action is preempted by the rule, and 3) whether there has been a compensable taking of a homeowner's property if such federal regulation indeed does preempt a common law private nuisance action.[19] These concerns raise the additional questions of whether there is a property right in aesthetics, and whether a nuisance claim based on aesthetic concerns can succeed. These particular questions have not yet been addressed by the courts. This article suggests that any federal regulatory efforts could look very much like the

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[18] *See* Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1695 (1998). *Contra* Tory H. Lewis, Note, *Managing Manure: Using Good Neighbor Agreements to Regulate Pollution from Agricultural Production*, 61 VAND. L. REV. 1555, 1569–70 (2008).

[19] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The government may take private property for public use but must pay just compensation to the affected property owner. *Id.* Takings may be one of two types: 1) a per se physical taking or 2) a regulatory taking which is an exercise of police power that has the effect of depriving property of all value or use. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–15 (1992). The OTARD Rule also has raised Equal Protection and First Amendment questions that are not discussed in this article. *See* LaVonda N. Reed-Huff, *Are You Still Settling for Cable? A Case for Broader Application of the FCC's Over-the-Air Reception Devices Rule*, 26 HASTINGS COMM. & ENT. L.J. 179, 201–06 (2004).

communications legislation and regulation of OTARDs while addressing some of the areas of that regulatory landscape that lack sufficient clarity. This article will explore the bounds of the OTARD Rule and the potential applicability to windmills and other clean energy devices. Further, it will offer proposals for addressing the interests of the various parties involved in clean energy device disputes. There also must be recognition of the fact that states and local governments have a significant interest in preserving the sanctity of state and local jurisdiction over land and property law which could be undermined by federal intervention.

Part II of this article will provide a brief background of the OTARD Rule and will examine briefly United States consumer communications policy. Part II will compare some of the federal policies sought to be furthered by the OTARD Rule with those involved in the new energy and environmental debates. It will explore the possibility that any new energy regulation might raise many of the same issues raised by the enactment of the OTARD Rule.

Part II will also discuss laws enacted in many states protecting the right to install clotheslines and solar panels as well as state laws protecting a farmer's right-to-farm from nuisance liability. Enactment of these state laws indicates that lawmakers have begun to take notice of what some environmentalists have advocated for years—the wider-spread use of clean energy devices affords alternative means of generating renewable energy, which simultaneously conserves precious resources and cuts consumers' utility costs. Part II will also briefly address relevant federal and state energy law and policy, as well as state right-to-dry and right-to-farm laws. It will not provide an in-depth overview of all United States energy policy, but will contemplate just how far Congress might go to effectuate broad protections for energy conserving devices in the same manner as has been done regarding federal communications policy. This part will examine the OTARD Rule, seeking to determine whether Congress and FCC truly intended to preempt all common law civil actions including private nuisance actions.

Part III of this article will explore the boundaries of nuisance law—particularly whether lack of beauty or other aesthetic concerns are or should be permissible bases for private nuisance actions. It will consider the nuisance implications—specifically those dealing with aesthetic nuisance—of the placement and use of clean energy devices such as solar panels and windmills. This part also will explore the intersection of nuisance and takings law. Part IV will explore whether federal preemption of common law private nuisance actions by the OTARD Rule or a similar energy rule would constitute a compensable taking in light of the government's interest in the availability and affordability of competing services. Finally, Part V will propose a framework for government action. Throughout, this article will draw comparisons and make distinctions between issues relating to the OTARD Rule, foretelling the possible ramifications of the enactment of similar federal legislation and regulations protecting clean energy devices.

II. SELECT COMMUNICATIONS AND ENERGY GOVERNMENTAL LAW AND POLICY

Eventually, there may be a need for federal coordination of what currently has the potential to evolve into a hodgepodge of incongruous state and local laws. There are several key areas the federal government could consult in determining whether it should seek to regulate the placement of clean energy devices. First, of course, is its own OTARD Rule. The Rule should provide a workable framework or even a blueprint for any clean energy device regulation. The Rule implicates the issues of private rights of action, preemption, and takings. Second, the federal government should look to state right-to-dry laws designed to protect the right to install clotheslines, as well as solar panels and other similar apparatus. Third, the government should assess the level of potential challenge to such a federal law by reviewing challenges to state right-to-farm laws that grant farmers immunity from nuisance suits. Namely, it should consider the takings challenges to those statutes. The federal government should also consider the current treatment of clean energy devices and issues already being addressed on the local level, such as zoning, land use, noise, aesthetics, and safety. Finally, the federal government should consider its own past attempts to regulate in the area of energy and the goals that have motivated it over time to address energy crises.

A. The Over-the-Air Reception Devices Rule

Over a decade ago, intending to overhaul the regulatory landscape of the communications industry and the delivery of communications services in the United States, Congress enacted the 1996 Act. The 1996 congressional directive to FCC sought to promote one of the primary objectives of the earlier Communications Act of 1934 (1934 Act),[20] which was "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[21] The 1996 Act furthered this broad earlier objective, and was an attempt by Congress to better tailor communications regulation to foster competition and to incorporate the technologies that had emerged over the sixty-two years since the 1934 Act.

In section 207 of the 1996 Act (Section 207), Congress directed FCC to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."[22] Specifically,

20 Pub. L. No. 73-416, 48 Stat 1064 (codified as amended at 47 U.S.C. §§ 151–614 (2006)).

21 47 U.S.C. § 151 (2006).

22 Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 58 (providing that within 180 days after the date of enactment of this Act, the Commission shall, pursuant to § 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution

Congress directed FCC to adopt rules concerning governmental and non-governmental restrictions on viewers' ability to receive video programming signals from a variety of sources including direct broadcast satellites (DBS), multichannel multipoint distribution—wireless cable—providers (MMDS), and television broadcast stations.[23]

In response to this congressional directive, the Commission adopted FCC Rule Section 1.4000 (OTARD Rule, or the Rule, or Rule 1.4000)[24] in a 1996 Report and Order (First OTARD Order).[25] In furtherance of Congress's goal of widespread availability of video and data services and of fostering competition in those markets, the OTARD Rule prohibits certain governmental and private non-governmental restrictions that impair the ability of antenna users to install, maintain, or use certain over-the-air reception devices (OTARDs) on property they own or lease.[26] Effectively, the

service, or direct broadcast satellite services); *see* 47 U.S.C. § 303(v); *see Building Owners*, 254 F.3d 89, 95 (D.C. Cir. 2001). Among many other things, the 1996 Act granted the Commission "exclusive jurisdiction to regulate the provision of direct-to-home satellite services." 47 U.S.C. § 303(v) (2006) ("[T]he term 'direct-to-home satellite services' means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment."). Section 207 was not codified in the U.S. Code.

23 Telecommunication Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 58. Direct Broadcast Satellite is a term for a satellite that sends relatively powerful signals to small (typically 18-inch diameter) dishes installed at homes. *See* HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 211 (17th ed. 2001). Multipoint Multichannel Distribution Service is a way of distributing cable television signals, through microwave, from a single transmission point to multiple receiving points. *Id.* at 444. Television Broadcast Stations are over-the-air radio or television stations licensed by FCC or an equivalent foreign (Canadian or Mexican) agency. *Id.* at 103.

24 47 C.F.R. § 1.4000 (1996).

25 Preemption of Local Zoning Regulation of Satellite Earth Stations (First OTARD Order), 11 F.C.C.R. 19276 (1996).

26 47 C.F.R. § 1.4000 (2009). The OTARD Rule was designed to promote the two complementary federal objectives of ensuring that consumers have access to a broad range of video programming services, and fostering full and fair competition among different types of video programming services. *See* First OTARD Order, 11 F.C.C.R. at 19281. Pursuant to the Rule, a restriction impairs installation, maintenance, or use of a protected antenna if it: 1) unreasonably delays or prevents installation, maintenance, or 2) unreasonably increases the cost of installation, maintenance, or use, or 3) precludes reception of an acceptable quality signal of a covered section 207 Device. *See id.* at 19286–88. A local restriction that prohibits all antennas would prevent viewers from receiving signals and is prohibited by the OTARD Rule. *Id.* at 19279–80. Likewise, procedural requirements can unreasonably delay installation, maintenance or use of an antenna covered by the Rule. Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 58; *see* Fed Commc'ns Comm'n, FCC Fact Sheet on Placement of Antennas, http://www.fcc.gov/mb/facts/otard.html (last visited July 11, 2010) [hereinafter Information Sheet]; First OTARD Order, 11 F.C.C.R. at 19286–87. An unreasonable expense may be found in a requirement to pay a fee to the local authority for a permit to be allowed to install an antenna, and such permit requirements generally are prohibited. *Id.* at 19286–87. It may also be unreasonable for a local government, community association or landlord to require a viewer to incur additional costs associated with installation. *Id.* at 19279–80. Things to consider in determining the reasonableness of any costs imposed include: 1) the cost of the equipment and services, and 2) whether there are similar requirements for comparable objects, such as air conditioning units or trash receptacles. *Id.* at 19288. For example, restrictions cannot require that expensive landscaping screen relatively unobtrusive DBS

OTARD Rule affords property owners and lessees the affirmative right to install satellite dishes on property that is within the owner's or lessee's exclusive use or control. In relevant part, the OTARD Rule prohibits:

> Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulations, or any private covenant, contract provision, lease provision, homeowners' association rule or similar restriction, on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property that impairs the installation, maintenance, or use of [an OTARD].[27]

Generally, the OTARD Rule applies to video reception antennas including direct-to-home satellite dishes that are less than one meter in diameter, TV antennas, and wireless cable antennas.[28] It protects antenna

antennas. *Id.* at 19288. A requirement to paint an antenna so that it blends into the background against which it is mounted would likely be acceptable, provided it will not interfere with reception or impose unreasonable costs. Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 58; First OTARD Order, 11 F.C.C.R. at 19288; *see also* Information Sheet, *supra*; A restriction will be deemed to impair a viewer's ability to receive video programming signals if "reception would be impossible or would be substantially degraded." First OTARD Order, 11 F.C.C.R. at 19288. "A requirement that an antenna be located where reception would be impossible or substantially degraded is prohibited by the [R]ule." Information Sheet, *supra*. The standard is different for devices designed to receive differing services. For example, in order for a digital antenna to receive or transmit a signal of acceptable quality, the antenna must be installed where it has an unobstructed, direct view of the satellite or other device from which signals are received or to which signals are transmitted. *Id.* In 1986, the Commission adopted a rule restricting potential barriers to the development of satellite-based residential video programming. *See* Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519 (Feb. 14, 1986) (codified at 47 C.F.R. pt. 25). In 1996 FCC promulgated rules to safeguard viewers' ability to use devices designed for direct broadcast satellite services, television broadcast services, and multichannel multipoint distribution services. *See* Preemption of Local Zoning Regulations, 61 Fed. Reg. 10896 (Mar. 18, 1996) (codified at 47 C.F.R. pt. 25); First OTARD Order, 11 F.C.C.R. at 19281–82.

[27] 47 C.F.R. § 1.4000 (2009). While the original OTARD Rule did not include leased property, the Commission amended its original OTARD Rule to include rental property. *See* Implementation of Section 207 of the Telecomms. Act of 1996 (Second OTARD Order), 13 F.C.C.R. 23874, 23875 (1998).

[28] *See* 47 C.F.R. § 1.4000 (2009). Specifically, the OTARD Rule applies to small satellite devices designed 1) to receive "direct broadcast satellite service, including direct-to-home satellite service, or to receive or transmit fixed wireless signals via satellite," 2) to receive video programming via broadband radio service or to receive or transmit fixed wireless signals other than via satellite, and 3) to receive television broadcast signals. *Id.* Section 207 Devices or OTARDs include antennas that are one meter (39.37 inches) or less in diameter or diagonal measurement and are designed to receive direct broadcast satellite services; video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, local multipoint distribution services; and television broadcast signals. *See id.* There is no such size limitation on satellite dishes located in Alaska. *See id.*; Information Sheet, *supra* note 26. The rule also applies to masts extending no more than 12 feet above the roofline that are within the exclusive use or control of the viewer. *See* Information Sheet, *supra* note 26. Expansion of the protections offered by the Rule to the Internet has important implications as consumers seek alternatives to traditional dial-up, DSL, voice and data services, and cable modem Internet service. *See* Promotion of Competitive Networks in Local Telecomms. Markets, 15 F.C.C.R. 22983, 22985

users who place antennas on property they own or lease as long as the device is installed in an area within the users' exclusive use or control.[29] The Rule protects tenants, condominium owners, cooperative owners as well as owners of single-family homes, town homes, manufactured homes, and mobile homes.[30] Despite its broad prohibitions, the OTARD Rule does permit local governments, community associations, and landlords to enforce narrowly-tailored, nondiscriminatory, safety and historic-preservation restrictions that are not unnecessarily burdensome and that do not impair

(2000) (discussing the ongoing effort to extend the competition incentives of the Telecommunications Act to additional customers). "'[F]ixed wireless signals' means any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location. Fixed wireless signals do not include, among other things, AM radio, FM radio, amateur (HAM) radio, Citizen's Band (CB) radio, and Digital Audio Radio Services (DARS) signals." 47 C.F.R. § 1.4000(a)(2) (2009). Nor does the Rule apply to television antennas used to receive a distant signal or very small aperture terminals (VSAT) that transmit information. *See* First OTARD Order, 11 F.C.C.R. at 19294 n.71, 19295. In the Competitive Networks proceeding, however, FCC also moved in the direction of extending similar rules to wiring that occupies what the Commission called "rights-of-way" inside privately owned buildings. Promotion of Competitive Networks in Local Telecomms. Markets, 15 F.C.C.R. at 23023. DSL stands for Digital Subscriber Line, a means of accessing the Internet via a high speed telephone connection. *See id.* at 23006 n.118.

29 The Commission's initial OTARD Rule prohibited restrictions "on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property." First OTARD Order, 11 F.C.C.R. at 19279–80 (applying only to property in which the "user" of the satellite services had an ownership interest while allowing for exceptions for a clearly defined safety objective and historic district preservation). The OTARD Rule was later amended to include leased property as well, permitting persons who lease property—tenants—to install such devices without obtaining the consent of the landlord or owner of the property. Second OTARD Order, 13 F.C.C.R. at 23877 (expanding the OTARD Rule to include rental property by applying it to installations "on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or *leasehold* interest in the property" upon which the antenna is to be located). "Exclusive use" means an area of the property that only the tenant, and persons the tenant permits, may enter and use to the exclusion of other residents. *See id.* at 23890, 23897 (describing the nature of the tenant's interest). The Second OTARD Order became effective January 22, 1999. *See* Information Sheet, *supra* note 26. In general, however, the Commission has characterized a rooftop as a common area and has excluded rooftops from areas that are within the exclusive use or control of a tenant. *See* Second OTARD Order, 13 F.C.C.R. at 23896–97; *see also* Bannister, Case No. CSR 7861-O at 4 (Jul. 28, 2009) (citing Wojcikewicz, 18 F.C.C.R. 19523, 19525 (2003)), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1673A1.pdf ("Roofs or exterior walls may be restricted access areas where tenants are not granted exclusive or permanent possession, but, as the Commission has noted in the *Wocikewicz* [sic] case, the agreed-upon scope of physical possession is set forth in the lease or other controlling document covering the property in question."); Culver, Case No. CSR 7925-O (Jul. 28, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1674A1.pdf.

30 *See* Second OTARD Order, 13 F.C.C.R. at 23876. The Commission generally has characterized rooftops and outer walls of multi-unit dwellings as common areas and has excluded such common areas from areas that are within the exclusive use or control of a tenant. *See id.* at 23897; *see generally* Reed-Huff, *supra* note 19 (discussing the shortcomings of the OTARD Rule).

the installation, maintenance, or use of the types of antennas described in the Rule.[31]

Partly as a result of the 1996 Act and the subsequent OTARD Rule protecting the right to install, maintain, and use an over-the-air reception device on private property, satellite dishes are everywhere.[32] With statutory and regulatory changes allowing for greater competition in the video and data services markets and broader protections for consumers, many Americans have abandoned cable service and traditional broadcast signals for delivery of video television programming and have turned to direct broadcast satellite service.[33] This consumer switch has resulted in a residential landscape littered with round reception devices, as satellite dishes are perched on balconies, patios, rooftops, and yes, planted squarely in the middle of the front yards of some homes in otherwise uniform and orderly residential neighborhoods.[34]

In early exercises of its regulatory authority, FCC considered aesthetic concerns significant enough to warrant an express exception from federal

[31] *See* Information Sheet, *supra* note 26. Examples of valid safety restrictions include fire codes that prevent people from installing antennas on fire escapes and restrictions prohibiting the placement of antennas close to power lines. *Id.* Similarly, requirements directing the proper method to secure an antenna are permitted. *Id.* The safety reason for the restriction must be specified "in the text, preamble or legislative history of the restriction, or in a document that is readily available to antenna users, so that a person who wishes to install an antenna knows what restrictions apply." *Id.* To qualify for the historic preservation exception, the relevant property must be included in, or eligible for inclusion on, the National Register of Historic Places. *Id.* FCC revised the Rule to conform to the National Historic Preservation Act of 1966, which defines protected historic properties to mean "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register." 16 U.S.C. § 470w(5) (2006). Such historic restrictions, like safety restrictions, must be narrowly tailored, no more burdensome than necessary to accomplish the historic preservation goal, and must be applied in a nondiscriminatory manner as compared to modern structures of comparable size and weight in the regulated area. 47 C.F.R. § 1.4000(b) (2007); *see also* Telecommunications Act of 1996, Pub. L. No. 104–104, § 207, 110 Stat. 56, 58; First OTARD Order, 11 F.C.C.R. at 19282. The Commission may grant waivers upon the request of a local government or nongovernmental private entity. *See* 47 C.F.R. § 1.4000(d) (2009). A waiver is available in instances in which a local government, community association, or landlord acknowledges that its restriction impairs installation, maintenance, or use and is preempted under the OTARD Rule, but believes it can demonstrate "highly specialized or unusual" concerns. *Id.*; *see also* Telecommunications Act of 1996, Pub. L. No. 104–104, § 207, 110 Stat. 56, 58; First OTARD Order, 11 F.C.C.R. at 19280.

[32] DirecTV claims to have more than 18.6 million subscribers in the United States. *See* DirecTV, Investor Relations, http://investor.directv.com (last visited July 11, 2010). DISH Network claims to have over 14.1 million customers. *See* DISH Network, Investor Relations, http://dish.client.shareholder.com (last visited July 11, 2010).

[33] Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885, 990 (2003).

[34] While an outstanding attempt to remove barriers of access to certain communications services, the OTARD Rule fails to fully satisfy the primary goal of section 207 of the 1996 Act. *See* Reed-Huff, *supra* note 19, at 194. In addition to the unanswered questions dealing with state common law actions, the OTARD Rule suffers from several other important failings such as failing to provide adequate protection for renters, failing to address the economic disparity between those who rent and those who own their homes, failing to deal with allocation of liability, and failing to deal adequately with safety concerns. *Id.* at 195.

preemption of local governmental regulations of satellite earth stations.[35] A 1986 FCC rule preempted local regulations of satellite earth stations "unless the regulations (a) had a reasonable and clearly defined health, safety, or aesthetic objective, and (b) did not unreasonably limit, or did not prevent reception, or impose unreasonable costs on users."[36]

The First OTARD Order considered the role that the aesthetics of OTARDs play in property values, marketability, and property management, but FCC ultimately declined to include "aesthetics" in the language of the Rule as enacted.[37] Instead, the original text of the OTARD Rule, while it did not expressly provide an aesthetic exception to federal preemption, did provide for consideration of the "appearance" of a device in determining the validity of a regulation with a clearly defined safety objective—particularly when the safety regulation was allegedly applied in a discriminatory manner.[38]

Upon reconsideration, and in light of concerns that the appearance of a device would be used as a pretext for discriminatory treatment of satellite reception devices, the Commission revised its original OTARD Rule in 1998 and removed all references to a device's appearance.[39] The Commission concluded that appearance did not help in assessing whether a reception device posed a safety risk.[40]

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35 *See* First OTARD Order, 11 F.C.C.R. at 19277–78, 19298, 19304, 19312–13.

36 *Id.* at 19277–78. The 1996 Preemption of Local Zoning Regulation of Satellite Earth Stations (DBS Order and Further Notice) modified a 1986 rule creating "a rebuttable presumption of unreasonableness" of local regulations imposing any restrictions on the installation, use, or maintenance of DBS reception devices. *Id.*

37 *Id.* at 19277–78, 19298, 19304, 19306. "In proposing a strict preemption of such private restrictions . . . we noted that nongovernmental restrictions appear to be related primarily to aesthetic concerns. We tentatively concluded that it was therefore appropriate to accord them less deference than local governmental regulations that can be based on health and safety considerations." *Id.* at 19304. "[C]ommenters strongly object to our limiting community associations' ability to maintain the appearance of their communities, and argue that people buy into a community because they want the protection of the homeowners' association." *Id.* at 19306.

38 *Id.* at 19280.

39 *See* Implementation of Section 207 of the Telecommunications Act of 1996 (Order on Reconsideration of First OTARD Order), 13 F.C.C.R. 18962–64, 18969, 19006–19007 (1998). ("[We] adopt a proposal to remove the appearance of a device from the factors we examine to determine the validity of a safety objective, and amend our Section 207 rules to examine how a safety objective treats other objects that pose a similar or greater safety risk . . . we will adopt [the] proposal that the term 'appearance' be deleted from the list of potential attributes that should be examined to determine whether a safety restriction is being applied in a discriminatory manner.").

40 The OTARD Rule as originally adopted read, in relevant part, as follows:

> Any restriction otherwise prohibited by paragraph (a) is permitted if: (1) it is necessary to accomplish a clearly defined safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size, weight and appearance to these antennas and to which local regulation would normally apply[.]

First OTARD Order, 11 F.C.C.R. at 19280. The Commission further cleared up any potential confusion regarding the standard for reviewing aesthetic, safety and historic regulations. Order on Reconsideration of First OTARD Order, 13 F.C.C.R. at 18969. The Commission clarified that

In a later order, FCC minimized concerns about the aesthetic impact on property caused by OTARDs.[41] Referring to environmental effects of properties subject to the OTARD Rule, the Commission concluded that the harm to property would be minimal due to the small size of the covered devices and the limited location on which an antenna user legally may install a reception device pursuant to the Rule.[42] Citing the safety and historic preservation exceptions in the Rule and the mechanism in the Rule for seeking a waiver to "address local concerns of a highly specialized or unusual nature," the Commission suggested that significant and legitimate aesthetic concerns could be addressed by the waiver provision of the Rule without an express aesthetic or appearance exception.[43]

The OTARD Rule provides a procedure for filing a petition for declaratory ruling to address a restriction.[44] Such petitions may be filed with FCC or with a court of competent jurisdiction.[45] The property owner, local government, community association, or management entity attempting to enforce the restriction has the burden of proving that the restriction is valid.[46] This means that no matter who initiates a proceeding questioning the validity of the restriction, the burden will always be on the entity seeking to enforce the restriction to prove that the restriction is permitted under the Rule or that it qualifies for a waiver.[47]

FCC has issued declaratory rulings in a number of cases in which the Commission reviewed the legality of nongovernmental restrictions in light of various specific factual scenarios.[48] The decisions of the Commission have

any fees associated with these restrictions must be reasonable in light of the cost of the equipment as well as the restrictions on and regulation of comparable devices. *Id.* at 19006. The Order on Reconsideration of First OTARD Order amended the OTARD Rule to read, in relevant part, as follows:

> Any restriction otherwise prohibited by paragraph (a) is permitted if: (1) it is necessary to accomplish a clearly defined, legitimate safety objective . . . and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas and to which local regulation would normally apply[.]

Id. at 19006–07.

41 Promotion of Competitive Networks Order, 15 F.C.C.R. 22983, 23037–38 (2000), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-00-366A1.pdf.

42 *Id.*

43 *Id.* at 23037–38; *see* 47 C.F.R. § 1.4000(b)(2), (d) (2007).

44 Telecommunication Act of 1996, 47 U.S.C. § 208(a) (2006); 47 C.F.R. § 1.4000(e); *see also* Information Sheet, *supra* note 26.

45 47 C.F.R. § 1.4000(e).

46 *Id.* § 1.4000(g); *see also* Information Sheet, *supra* note 26.

47 Information Sheet, *supra* note 26.

48 *See, e.g.*, Rhoad, Case No. CSR 7862-O, at 2, 5 (Jul. 29, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1675A1.pdf (Petitioner sought to install a satellite dish on a driveway or other area not within his exclusive use or control. The court held that "[m]erely because an individual does not have an area within his exclusive use that he can use for antenna installation does not require an association or landlord to allow installation in a common area."); Wojcikewicz, 18 F.C.C.R. 19523 (2003); Roberts, 16 F.C.C.R. 10972 (2001); Frankfurt, 16 F.C.C.R. 2875 (2001); Bell Atl. Video Servs. Co., 15 F.C.C.R. 7366

almost uniformly struck down private property covenants established by homeowners' associations.[49] These cases provide insight into the Commission's view with respect to the issue of aesthetics and safety.

In *In re Roberts*, petitioners installed an MMDS antenna on a single-family home. The regulation of their neighborhood homeowners' association prohibited dish placement on property unless the dishes were fully screened and not visible from neighboring property.[50] Petitioners argued that an acceptable signal could only be achieved from the antenna's current location.[51] The Commission stated that, although the association's preference for installations not visible from neighboring property may be permissible, the association could not implement its preference by delaying installation while its landscape control committee examined the required screening proposal.[52] The Commission concluded that where prospective antenna users cannot receive an acceptable signal in the locations preferred by a community association, they have the right under the OTARD Rule to place their antennas in alternative locations.[53]

In *In re Bell Atlantic Video Services Co.*,[54] Bell Atlantic was an alternative video service provider challenging a prior approval requirement and a restriction prohibiting installation of any outside antennas visible from the front yard of the lot. FCC found that the size and placement restrictions and the prior approval requirement were preempted because they caused unreasonable delay or prevented installation, maintenance, and use, increased costs, and impaired signal reception.[55]

In *In re Trabue*,[56] a community regulation required prior approval and painting of any satellite dish and mounting materials, accessories, and cabling so that it blended into the background against which it was to be mounted, provided that such painting did not interfere with reception.[57] The association conceded that its restriction was not founded on safety concerns and that it erred in attempting to require prior approval, but claimed a

(2000); Holliday, 14 F.C.C.R. 17167 (1999); Trabue, 14 F.C.C.R. 8602 (1999); Lubliner, 13 F.C.C.R. 16107 (1998); Sadler, 13 F.C.C.R. 12559 (1998).

[49] *See, e.g.*, Roberts, 16 F.C.C.R. 10972; Frankfurt, 16 F.C.C.R. 2875; Bell Atl. Video Servs. Co., 15 F.C.C.R. 7366; Holliday, 14 F.C.C.R. 17167; Trabue, 14 F.C.C.R. 8608; Lubliner, 13 F.C.C.R. 16116; Sadler, 13 F.C.C.R. 12559.

[50] Roberts, 16 F.C.C.R. at 10974.

[51] *Id.*

[52] *Id.* at 10976.

[53] *Id.* The Commission went even further to say that an antenna user need not be the owner of the property or have the owner's permission to install an antenna, and found the restriction, which also included a pre-approval provision, was preempted and unenforceable. *Id.* at 10977; *see also* Sadler, 13 F.C.C.R. at 12568 (Discussing how the defendant condominium association required that the dish be mounted out of sight from the street which would have prevented petitioner from receiving an acceptable quality signal, and demanded that the dish be moved to the building's roof, which would result in the petitioner incurring unreasonable reinstallation charges of $250–$350).

[54] 15 F.C.C.R. 7366 (2000).

[55] *Id.* at 7370–71.

[56] 14 F.C.C.R. 8602 (1999).

[57] *Id.* at 8604.

clearly defined aesthetic objective.[58] The petitioner claimed disparate enforcement of the painting requirement from owner to owner and the absence of comparable painting requirements for air conditioning units and trash receptacles which are visible in the community.[59]

In resolving the matter, FCC stated that "[i]n general, a requirement that a satellite dish be painted to blend with the color of the house does not violate the [OTARD] Rule, provided the specific requirements do not result in voiding the manufacturer's warranty or otherwise imposing unreasonable expense."[60] In this case, painting all of the component parts of the satellite dish, such as the cables and accessories, did void the warranty and "impose an unreasonable expense or otherwise impair installation, maintenance or use of the antennas covered by the Rule."[61] Painting the dish itself did not.[62] Therefore, the restriction was preempted to the extent it applied to cables and other accessories the painting of which would void the warranty.[63]

1. OTARD Rule Provides No Private Right of Action

The Ninth Circuit, in *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang* (*Opera Plaza*),[64] held that the OTARD Rule does not grant a private right of action.[65] Specifically, Rule 1.4000 states: "*No* civil, criminal, administrative, or other legal action *of any kind* shall be taken to enforce any restriction or regulation prohibited by this section except pursuant to paragraph (d) or (e) of this section."[66]

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58 *Id.* at 8606.

59 *Id.* at 8607.

60 *Id.* at 8608.

61 *Id.* at 8609.

62 *Id.* As to the dish itself, there was no evidence that such a requirement imposed unreasonable delay or precluded reception of an acceptable quality signal. *Id.* The requirement for prior approval, however, was prohibited by the OTARD Rule because it may have imposed an unreasonable delay. *Id.* Due to lack of information in the record, FCC was unable to rule on allegations that there was disparate or discriminatory enforcement of the painting requirements, but noted that the association did require screening of air conditioning units and trash receptacles if they were visible from neighboring units. *Id.* at 8610. FCC found the requirement that the dish be painted did not impose an unreasonable expense or otherwise impair installation, maintenance, or use of antennas covered by the OTARD Rule. *Id.* at 8609.

63 *Id.*

64 376 F.3d 831 (9th Cir. 2004).

65 *Id.* at 837–38. The court applied the four factors from *Cort v. Ash*, 422 U.S. 66 (1975), to determine whether a private cause of action exists: 1) whether the plaintiff is a one of a class of beneficiaries specifically mentioned in the statute to be conferred a federal right; 2) whether there is any indication of legislative intent to create a private right of action; 3) whether it is consistent with the purpose of the legislative scheme to imply such a remedy; and 4) is the cause of action one traditionally delegated to state law, and if so whether it would be inappropriate to infer a cause of action based solely on federal law. *Opera Plaza*, 376 F.3d at 834–35 (quoting Cort v. Ash, 422 U.S. at 78).

66 47 C.F.R. § 1.4000(a)(4) (2007) (emphasis added). Paragraph (c) of the OTARD Rule allows for local governments and associations to apply to FCC for a waiver of the Rule, and paragraph (d) allows parties to petition the Commission or a court of competent jurisdiction for declaratory ruling or other determination of the permissibility of a proposed restriction. *Id.* § 1.4000(c)–(d).

The court correctly concluded that while the OTARD Rule does not give antenna users the right to install satellite dishes on common areas, neither does the OTARD Rule or Section 207 grant property owners or homeowners' associations a private right of action to enforce the provisions of Section 207 or the OTARD Rule itself.[67] The court in *Opera Plaza* confirmed that only federal statutes, and not the rules enacted pursuant to federal statutes, may create private causes of action.[68] The court held that, despite its silence on the matter, Section 207 of the 1996 Act does not confer jurisdiction to the federal courts to hear a homeowners' association's suit to enforce its rules against a homeowner who installed a satellite dish on a common area within the association's boundaries in violation of the association's rules.[69]

While it is clear that a plaintiff may not successfully sue to enforce a restriction or prohibition against a neighbor who installs a satellite dish on private property under the OTARD Rule, it is not entirely clear on the face of the Rule whether the regulation also forecloses suits based on other legal theories, such as nuisance. The type of suit contemplated in this article would not seek to enforce a restriction but rather would seek to enforce state common law rights germane to the notion of property ownership—the right of quiet enjoyment of one's property and the right to be free of nuisance. Any clean energy device rule should include a similar provision in order to make clear that the role of the regulation is to remove barriers to installation and use of the devices, but not to open the floodgates of litigation between private parties.

2. Preemptory Scope of the OTARD Rule

The OTARD Rule seems to prohibit only those civil and other actions seeking to enforce a specific restriction or regulation. Most notable for the purposes of this article is the federal prohibition against most restrictions by homeowner, townhome, condominium, or cooperative associations including private deed restrictions, private restrictive covenants, association by-laws, and any other similar restrictions that impair installation of dishes or the ability of dishes to receive a quality signal.[70]

More important is the issue of whether the OTARD Rule forecloses all common law actions seeking to protect private property rights such as claims sounding in tort—particularly nuisance actions. The language of the regulation does not expressly preempt common law rights of action such as

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67 *Opera Plaza*, 376 F.3d at 836.

68 *Id.*; *see also* Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) ("[T]he fact that a federal statue has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 688 (1979))).

69 *Opera Plaza*, 376 F.3d at 832–38. The condominium association sought a declaration that the association's policy was valid, a permanent injunction requiring the Hoangs to remove their satellite dish, and damages for breach of contract. *Id.* at 833. The court found no substantial questions of federal law sufficient to confer federal jurisdiction. *Id.* at 840.

70 *See* Telecommunications Act of 1996, 47 U.S.C. § 207 (2006); Second OTARD Order, 13 F.C.C.R. 23874, 23880–81 (1998); Information Sheet, *supra* note 27.

the tort of nuisance a plaintiff might assert against a satellite dish user, nor have any cases been initiated.

In the case of nuisance law, which will be discussed in greater detail below, there may be a general statute prohibiting public nuisances such as noxious or offensive uses of property which provide procedures for statutory relief from such an offense. What is clear from the OTARD Rule is that a state or locality may not enact a statute directly prohibiting the installation, use, or maintenance of a covered device. "[W]e have not hesitated to abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[71] What is not clear from the language of the OTARD Rule is whether the regulation was intended to prohibit a private suit based on common law principles of private nuisance law.

Neither the courts nor FCC have decided what would happen if an individual homeowner, acting on his or her own behalf—not on behalf of a homeowners' association—objects to a neighbor's installation of a satellite dish on the neighbor's own property, and seeks to enforce the owner's private property rights based on a common law nuisance theory rather than through the traditional avenues such as claims of violations of local zoning ordinances and land use statutes. Neither the relevant federal statutes nor regulations squarely address the issue of whether the OTARD Rule preempts a private nuisance action filed by one homeowner against another, presuming that a private nuisance action would stand based on the alleged harms caused by the installation and use of satellite dishes. Perhaps FCC did not pursue the question of nuisance claims because most of the claims regarding the installation and use of satellite dishes would be based on aesthetics—not noise or vibrations, for example—and because courts are resistant to recognizing aesthetic nuisance claims.[72] In sum, the issue boils down to whether the OTARD Rule gives satellite dish users the right to create a nuisance and simultaneously forecloses a neighboring property owner's right to seek redress of the harms caused by the installation and use of a satellite dish.

In other words, what is unclear is what results when a complainant seeks not to enforce a specific restriction, but rather seeks relief under another legal principle that does not specifically restrict the installation of satellite dishes. It is not clear whether a federal agency may deprive a property owner of this particular property right without providing just compensation. The OTARD Rule does not elucidate the issue. The OTARD Rule is unclear as to whether OTARD users have the affirmative right to create a nuisance. If it does, the OTARD Rule also leaves open the question

71 Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 535 (1959) (quoting Bethlehem Steel Co. v. N.Y. State Labor Relations Bd., 330 U.S. 767, 773 (1947)).

72 *See* George P. Smith II & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENVTL. L. REV. 53, 54 (1991) ([C]ourts continue to deny relief for injury to the aesthetic interests of residential landowners." (footnote omitted)).

of whether preemption of a nuisance action constitutes a taking.[73] This is discussed in greater detail below in Part IV. Any federal law regarding the placement of windmills and other such clean energy devices should address the issue of whether harms caused by these devices are immune from state and local nuisance liability more clearly than the OTARD Rule addresses these issues for satellite dishes.

3. The OTARD Rule Has Been Interpreted to Not Be a Compensable Taking

The extension of the OTARD Rule to leased property has been the source of most of the legal challenges to Rule 1.4000.[74] This extension of the OTARD Rule to rental property has raised constitutional questions including challenges by property owners, landlords, and various real estate organizations and associations who argue that application of the OTARD Rule to rental property constitutes an unconstitutional taking of private property in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.[75]

The OTARD Rule preempts all state and local laws and regulations, "including zoning, land-use, or building regulations," private covenants, lease and contract provisions, and homeowners' association rules prohibiting the installation, maintenance, or use of covered devices when the devices are installed on areas within the exclusive use or control of the antenna user.[76] The Commission contends that the OTARD Rule as it applies to rental property "strikes a balance between the interests of tenants, who desire access to more video programming services, and the interests of landlords, who seek to control access to and use of their property."[77] FCC and federal

[73] *See generally*, Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373 (2009). Professor Blumenthal asserts that "[a] lawsuit is property." *Id.* at 373. He argues that where the government exercises its powers of eminent domain "to condemn the legal claims of private citizens . . . the condemnation must be for public use and just compensation must be given to the condemnee." *Id.* at 422–23.

[74] *See, e.g.*, *Building Owners*, 254 F.3d. 89, 91 (D.C. Cir. 2001). Challenges have included objections to the installation of numerous antennas by a single viewer, the color of equipment, the location of equipment, and devices on highly visible areas of property such as the front of a house. *See, e.g.*, Roberts, 16 F.C.C.R. 10972 (2001); Frankfurt, 16 F.C.C.R. 2875 (2001); Bell Atl. Video Servs. Co., 15 F.C.C.R. 7366 (2000); Holliday, 14 F.C.C.R. 17167 (1999); Trabue, 14 F.C.C.R. 8602 (1999); Sadler, 12 F.C.C.R. 12559 (1998); Lubliner, 13 F.C.C.R. 16107 (1998); Second OTARD Order, 13 F.C.C.R. 23874. In general, however, the Commission has characterized rooftops as a common area and has excluded rooftops from areas that are within the exclusive use or control of a tenant. The Commission also issued an Order on Reconsideration addressing a number of issues related to Rule 1.4000, including, among other things, the safety exception, antenna painting requirements, federal preemption of permit requirements. Order on Reconsideration of First OTARD Order, 13 F.C.C.R. 18962, 18969 (1998).

[75] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[76] 47 C.F.R. § 1.4000 (2007).

[77] Second OTARD Order, 13 F.C.C.R. at 23875.

courts have uniformly held that extending the OTARD Rule to leased property does not trigger a compensable taking.[78]

In *Building Owners and Managers Ass'n Int'l v. FCC* (*Building Owners*),[79] a landlords' association brought a facial challenge against FCC's extension of the OTARD Rule to leased property.[80] In that case, the petitioners argued that a tenant's unauthorized use of leased property against the express wishes of the property-owning landlord was an invasion of property rights that the landlord had chosen to retain and, in effect, enlarged the tenant's rights beyond the contractual provisions found in the lease.[81] The court concluded, however, that the landlord had consented to the occupation of the property and had relinquished possession.[82] By doing so, the landlord had transferred some part of his property rights.[83] The court stated that the petitioners failed to correctly apply the United States Supreme Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp.* (*Loretto*).[84] The Court, in *Loretto*, focused on a physical occupation by a third party and stated that a per se taking has occurred only where there has been a permanent physical occupation of private property by an uninvited third party.[85] The OTARD Rule does not enlarge the rights of a third party stranger to the property, but rather regulates the terms of the landlord-tenant relationship, which is within the powers of government.[86] *Loretto* applies only narrowly to regulations that require a landlord to suffer the physical intrusion of private property by a third party.[87] The Court held that tenants are not forced on landlords, and therefore the right to exclude was not taken facially or by enforcement of the regulation.[88] Furthermore, a tenant does not become a third-party stranger to the property by merely inviting others onto the leased property.[89] The landlord has consented to the tenant's use and possession of the leased premises. Governmental restrictions on the exercise of landlords' property rights "do not necessarily constitute a per se taking."[90] Therefore, relying on *Loretto*, the D.C. Circuit, in *Building Owners*, concluded that the extension of the OTARD Rule to leased property was not a per se taking of the landlord's property.[91]

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78 *See generally* Reed-Huff, *supra* note 19 (surveying FCC and federal court decisions on the OTARD rule).

79 254 F.3d 89 (D.C. Cir. 2001).

80 *Id.* at 91.

81 *Id.* at 93–94, 97.

82 *Id.* at 98.

83 *Id.*

84 458 U.S. 419, 441 (1982).

85 *Id.* at 426, 441.

86 *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519, 539 (1992); Fed. Commc'ns Comm'n v. Florida Power Corp., 480 U.S. 245, 252–53 (1987); Gulf Power Co. v. United States, 187 F.3d 1324, 1329 (11th Cir. 1999).

87 *Loretto*, 458 U.S. at 441.

88 *Building Owners*, 254 F.3d. at 97–98.

89 *Id.* at 97.

90 *Id.* at 89; *see Loretto*, 458 U.S. at 441.

91 *See Building Owners*, 254 F.3d. at 97.

Additionally, Rule 1.4000 does not trigger a regulatory taking.[92] A regulatory taking occurs when a government regulation goes so far as to be tantamount to a physical occupation of property.[93] Courts apply three ad hoc factors to determine whether a regulation constitutes a compensable taking.[94] Courts will look to 1) the character of the government action, 2) the economic impact of the regulation on the claimant, and 3) the extent to which the regulation interferes with distinct investment-backed expectations.[95] A government regulation is more likely to be found a taking if 1) the property owner is subject to a forced permanent physical occupation of private property, 2) a core property right has been taken, or 3) there has been an "extraction of a benefit" for the good of the public, as opposed to a prevention of a harm caused by the property owner.[96] This particular element of the character of the regulation could weigh in favor of finding a regulatory taking, but where there is no permanent physical occupation of private property, or complete taking of the property's economic value, the three ad hoc factors must be weighed against each other.[97]

Also, while diminution in the value of property alone is insufficient to successfully claim that a compensable taking has occurred, the greater the diminution in value of property caused by the government regulation, the more important the public interest must be to justify the impact of the regulation.[98] Where a government regulation leaves a property owner without any economically viable use of the land, the Supreme Court has found a categorical taking unless 1) the regulation prohibits uses that the owner was never permitted to engage in prior to the enactment of the regulation, 2) the regulation is necessary to protect human life, or 3) there are other compelling governmental interests.[99]

In the case of the OTARD Rule, the character of the action is not of the nature that it constitutes a permanent physical occupation of a neighbor's property. While the electromagnetic waves transmitted to a reception device may cross a neighbor's property, these waves are invisible and usually peaceably co-exist with and occupy space shared by all other sorts of utilities, including wireless and broadcast technology services.[100] The OTARD Rule does extract a benefit for the good of the public rather than prevent harm caused by the property owner. The spirit of the law is to make certain wireless technologies more widely available. Unlike the actions taken by the

92 *Id.* at 99–100.

93 Penn Cent. Transp. Co. v. New York City (*Penn Central*), 438 U.S. 104, 124 (1978).

94 *Id.*

95 *Id.*

96 Babbitt v. Youpee, 519 U.S. 234, 239–40 (1997); Hodel v. Irving, 481 U.S. 704, 713–17 (1987); *Loretto*, 458 U.S. 419, 441 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413–15 (1922).

97 *Penn Central*, 438 U.S. at 124.

98 *Lucas*, 505 U.S. 1003, 1028–29 (1992).

99 *Id.* at 1027–28.

100 *See e.g.*, NASA, Electromagnetic Spectrum – Introduction, http://imagine.gsfc.nasa.gov/docs/science/know_l1/emspectrum.html (last visited July 11, 2010) (explaining the basic properties of electromagnetic waves).

landowner in *Lucas v. South Carolina Coastal Council*, there is no harmful conduct that the government is seeking to prevent.[101]

While there might be a diminution of value of the property caused by the OTARD Rule, the diminution is probably minimal. The property owner may still make the same uses of the property he or she could prior to the enactment of the OTARD Rule. Additionally, if the right to sue to enforce a property right has been taken, then the property owner may suffer a significant interference with investment-backed expectations. The Court in *Lucas* stated that a taking will not be found, even if an owner is deprived of all economically viable use of the property, if the governmental regulation in question prevents the property owner from doing something the owner never had the right to do in the first place.[102]

While the court in *Building Owners* addressed small devices that generally are uniform in size, it remains unclear whether a court would give greater weight to the enormity of windmills in determining whether extending an OTARD Rule-like regulatory scheme to windmills on leased property lends itself to a different result—namely a compensable taking. Depending on the size and number of windmills on a parcel, a court likely could hold that the use constitutes a nuisance and that any protection afforded the user of the device constitutes a taking. Because of the types of harms caused by windmills, courts possibly could conclude that a taking has occurred if tenants were given the right to install devices over the objections of a landlord and if nuisance claims of neighboring property owners were preempted.

Aside from landlord-tenant takings-related challenges to Rule 1.4000, some challenges have been related to the issue of the impact of satellite dishes on the aesthetics of the property on which they are installed as well as the aesthetic impact on neighboring properties.[103] Because of the significantly different physical characteristics between satellite dishes and windmills and because of the different aesthetic concerns, the preemptory scope of an OTARD Rule-like regulatory scheme might require an expansion on the takings analysis in the context of windmills and other such larger

101 *Lucas*, 505 U.S. at 1029. The South Carolina Supreme Court applied what has been called, in regulatory takings parlance, the "nuisance exception." The court stated that the governmental action in that case did not go too far because it was a valid attempt by the government to prevent a use of private property that was deemed to be harmful to the general public at large. Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 901 (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992). The U.S. Supreme Court found that the South Carolina Supreme Court misapplied the nuisance exception. *Lucas*, 505 U.S. at 1004. First articulated in *Mugler v. Kansas*, 123 U.S. 623 (1887), the nuisance exception provides that where pursuant to a state's police powers, the state passes a land use regulation promoting public health, safety, or welfare, that regulation is valid and does not require just compensation. *Id.* at 665–66.

102 *See Lucas*, 505 U.S. at 1029–30.

103 *See, e.g.*, Roberts, 16 F.C.C.R. 10972, 10972 (2001); Frankfurt, 16 F.C.C.R. 2875, 2875 (2001); Bell Atl. Video Servs. Co., 15 F.C.C.R. 7366, 7366 (2000); Holliday, 14 F.C.C.R. 17167, 17167 (1999); Trabue, 14 F.C.C.R. 8602, 8602 (1999); Sadler, 13 F.C.C.R. 12559, 12559 (1998); Lubliner, 13 F.C.C.R. 16107, 16107–08 (1998). Challenges have included objections to the installation of numerous antennas by a single viewer, the color of equipment and the location of equipment and devices on highly visible areas of property such as the front of a house.

devices. If Congress and administrative agencies choose to coordinate federal legislation and regulation regarding windmills and other clean energy devices, then they must be careful not to create unintended constitutional takings issues—particularly as they relate to the issue of federal preemption of private nuisance actions.

Because it covers a broad range of legal issues while simultaneously balancing private property rights and the public interest, the OTARD Rule could provide a viable framework upon which to model clean energy device regulation. Although it does not address all possible scenarios, the Rule balances the rights of private property owners, considers the interests of local governments in zoning and land use, and considers the constitutional issues related to takings and preemption.

B. State Right-to-Dry Laws

Another symbol of the eco-revolution is the clothesline. Private property in many communities is subject to restrictive covenants and other deed restrictions prohibiting or at least discouraging the use of clotheslines.[104] These restrictions often go hand-in-hand with neighborhood restrictions on usage and storage of outdoor household items such as the trash receptacles, junk cars, chain link fences, and basketball hoops.[105]

While there is currently no federal legislation on the subject, some states have enacted what are commonly referred to as "right-to-dry laws," which broadly refer to the right of residents to maintain clotheslines for the purpose of drying wet laundry in lieu of using energy consuming clothes dryers.[106] Similar state laws protect the right to install solar panels on one's home.[107] These laws generally are efforts to remove barriers to achieving

104 See Project Laundry List, *Stop the Ban! Registry*, http://www.laundrylist.org/en/programs/advocacy/97-stop-the-ban-registry (last visited July 11, 2010), for a list of reported communities with restrictions prohibiting or discouraging clothesline use. Project Laundry List is a clothesline advocacy group.

105 *See, e.g.*, SABINE INVESTMENT COMPANY OF TEXAS, INC., DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE ARBORS AT DOGWOOD CREEK 3–4 (July 14, 1997), *available at* http://www.arborsia.org/ACC/section1dr1-5.pdf (one of the homeowner's associations referenced on Project Laundry List's Stop the Ban Registry).

106 Many states have enacted some type of legislation protecting the right to dry by limiting the ability of homeowners' associations to restrict or prohibit the placement and use of "energy systems" on private residential property. *See, e.g.*, CAL. CIV. CODE § 714 (West 2007 & Supp. 2010); FLA. STAT. ANN. § 163.04 (West 2006); HAW. REV. STAT. § 196-7 (1993 & Supp. 2008); NEV. REV. STAT. § 278.0208 (2007); N.H. REV. STAT. ANN. § 674:17 (LexisNexis 2007); N.C. GEN. STAT. § 160A-201 (2009); UTAH CODE ANN. § 10-9a-610 (2007); VT. STAT. ANN. tit. 24, § 2291a (Supp. 2009); VT. STAT. ANN. tit. 27, § 544 (Supp. 2009); WIS. STAT. ANN. § 236.292 (West 2009). The laws in Utah and Florida expressly include clotheslines. FLA. STAT. ANN. § 163.04 (West 2006); UTAH CODE ANN. § 10-9a-610 (2007) (providing for governmental refusal to renew plats, subdivision plans, street dedications if deed restrictions, covenants, or other agreements prohibit installation of "solar collectors, clotheslines, or other energy devices based on renewable resources").

107 *See, e.g.*, California Solar Rights Act of 1978, CAL. CIV. CODE §§ 714, 714.1, 801, 801.5 (West 2007 & Supp. 2010); CAL. GOV'T CODE §§ 65850.5, 66473.1, 66475.3 (West 2009); CAL. HEALTH & SAFETY CODE § 17959.1 (West 2006); Solar Shade Control Act, CAL. PUB. RES.

greater energy and cost savings and to reduce energy usage. The use of clothes dryers may have a significant effect on global warming by requiring large amounts of electricity, accounting for an estimated six percent of total household electricity consumption in the U.S.[108] These right-to-dry state laws generally protect the right of their residents to install and maintain on their private property, not only clotheslines, but also certain other energy-conserving apparatus.[109] For instance, Florida's statute is similar to the OTARD Rule in that it prohibits all deed restrictions, covenants, and other agreements running with the land that "prohibit or have the effect of prohibiting solar collectors, clotheslines, or other energy devices based on renewable resources" from being installed on buildings erected on land subject to the deed restriction, covenant, or agreement.[110] Among the expressly stated purposes of the Florida statute is to encourage the "development and use of renewable resources."[111]

In Vermont, "no deed restrictions, covenants, or similar binding agreements, running with the land shall prohibit or have the effect of prohibiting solar collectors, clotheslines . . . from being installed on buildings erected on lots or parcels covered by the deed restrictions, covenants, or binding agreements."[112] The Vermont statute does, however, expressly state that the statute does not apply to "patio railings in condominiums, cooperatives, or apartments."[113] Utah and North Carolina also have similar statutes.[114]

The right to sunlight is an issue currently under debate, possibly signaling a trend away from homeowners' association rights in favor of consumer rights. Hawaii protects the placement of "solar energy devices,"

CODE §§ 25980–25986 (West 2007); HAW. REV. STAT. § 196-7 (1993 & Supp. 2008) (providing that any covenant, bylaw, deed restriction, lease restriction, contract, and other agreement that prevents placement of a solar energy device is void). Utah Code Ann. § 10-9a-610 (2007).

108 ENERGY INFO. ADMIN., END-USE CONSUMPTION OF ELECTRICITY BY END USE AND APPLICATION (2001), http://www.eia.doe.gov/emeu/recs/recs2001/enduse2001/enduse2001.html (last visited July 11, 2010).

109 *See, e.g.*, FLA. STAT. ANN. § 163.04 (West 2006) (protecting "energy devices based on renewable resources"); UTAH CODE ANN. § 10-9a-610 (2007) (providing for governmental refusal to renew plats, subdivision plans, street dedications if deed restrictions, covenants, or other agreements prohibit installation of "solar collectors, clotheslines, or other energy devices based on renewable resources").

110 FLA. STAT. ANN. § 163.04 (West 2006).

111 *Id.* ("The legislative intent in enacting these provisions is to protect the public health, safety, and welfare by encouraging the development and use of renewable resources in order to conserve and protect the value of land, buildings, and resources by preventing the adoption of measures which will have the ultimate effect, however unintended, of driving the costs of owning and operating commercial or residential property beyond the capacity of private owners to maintain.").

112 VT. STAT. ANN. tit. 27, § 554(a) (Supp. 2009).

113 *Id.*

114 *See* N.C. GEN. STAT. § 160A-201 (2009); UTAH CODE ANN. § 0-9a-610 (2007). A similar conservation statute has been proposed in Nova Scotia, Canada. *See* Private Member's B. 185, 60th Gen. Assem. (S.N.S. 2007), http://www.gov.ns.ca/legislature/legc/bills/60th_1st/1st_read/b185.htm (last visited July 11, 2010).

which seems to include clotheslines.[115] California protects access to sunlight for solar energy projects.[116] A New Hampshire statute allows owners to create "solar skyspace easements."[117]

Many of these laws are strikingly similar to the OTARD Rule in that they afford users of the respective devices and equipment an affirmative right to install and use the devices and equipment over the objections of other relevant prohibitions. Unlike OTARDs, however, clotheslines are associated with certain socio-economic stereotypes.[118] Were the federal government to enact a similar law protecting clean energy devices, any similar stereotypes should not influence regulatory policy. Were the federal government to enact a clean energy device rule, through an administrative agency or directly through congressional action, it should consider the physical differences between clotheslines and wind turbines as well as the difference between a single wind turbine and a wind farm of numerous wind turbines.

C. State Right-to-Farm Laws

Almost all states already provide some protection of the right-to-farm land even where there is no similar right to install clean energy devices on private property. Some of the right-to-farm laws grant farmers immunity from nuisance actions.[119] The Iowa Supreme Court caused a stir in 1998 and again in 2004 when it found that the nuisance immunity granted by state statute constituted a taking of neighboring properties—under both the U.S. and state constitutions—for which compensation was due.[120] These cases offer some guidance as to which issues may be raised by a federal law that grants a right to use a clean energy device and that grants a corresponding right of immunity from nuisance liability.

1. Bormann v. Kossuth County Board of Supervisors[121]

In *Bormann v. Kossuth County Board of Supervisors*, the Iowa Supreme Court reviewed a challenge to a state statute that provided that once a parcel was designated an agricultural area, the owner of that parcel was immune

115 HAW. REV. STAT. § 196-7(a), (f) (1993 & Supp. 2008).

116 California Solar Rights Act of 1978, CAL. CIV. CODE §§ 714–714.1, 801, 801.5 (West 2007 & Supp. 2010); CAL. GOV'T. CODE §§ 65850.5, 66473.1, 66475.3 (West 2009); CAL. HEALTH & SAFETY. CODE § 17959.1 (West 2006); Solar Shade Control Act, CAL. PUB. RES. CODE §§ 25980–25986 (West 2007). *See generally* Renewableenergyweekly.com, http://www.renewableenergyweekly.com/Solar_Energy_Information.cfm (last visited July 11, 2010).

117 N.H. REV. STAT. ANN. § 477:49–51 (2008).

118 *See* Meg Wilcox, *Poor White Trash—Not!*, Newton TAB, August 28, 2007, *available at* http://www.wickedlocal.com/newton/opinions/x766805666 (last visited July 11, 2010).

119 CONN. GEN. STAT. ANN. § 19a-341 (West 2003); KAN. STAT. ANN. § 2-3202 (2001); OR. REV. STAT. § 30.935 (2009).

120 *See* Gacke v. Port Xtra, L.L.C., 684 N.W.2d 168, 175 (Iowa 2004); Bormann v. Kossuth County Bd. of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998).

121 584 N.W.2d 309 (Iowa 1998).

from nuisance suits.[122] The court held that the land in question was immune from nuisance suits and that the nuisance immunity granted by the statute "create[d] an easement in the property affected by the nuisance . . . in favor of the applicants' land . . . because the immunity allow[ed] the applicants to do acts on their own land which, were it not for the easement, would [have] constitute[d] a nuisance."[123] The court concluded that "easements are property interests subject to the just compensation requirements of the Fifth Amendment . . . and [the Iowa] Constitution."[124] The court held that the statute violated both the Iowa state constitution and the Takings Clause of the U.S. Constitution.[125]

2. Gacke v. Pork Xtra, L.L.C.*[126]*

In a related case the Iowa Supreme Court, six years later, found that a state statute affording animal feeding operations immunity from nuisance suits effected an unconstitutional taking under the Iowa state constitution.[127] The court held that the statute violated the state constitution "to the extent it deprives property owners of a remedy for the taking of their property resulting from a nuisance created by an animal feeding operation."[128] Specifically, the court held that the statute effected a taking only to the extent that it prevents property owners "subjected to a nuisance from recovering damages for the diminution in value of their property" and thus, was an unreasonable use of the state's police power.[129] The Takings Clause, the court held, "does not prohibit the legislature from granting animal feeding operations immunity from liability for any other damages traditionally allowed under a nuisance theory of recovery."[130] This immunity

122 *Id.* at 311; IOWA CODE ANN. § 352.11(1)(a) (West 2001). Right-to-farm statutes typically also do not immunize against violations of other state and federal laws. *See id.* § 352.11(1)(b). Additionally, the farming operation has to have been in place prior to the changed character of the area. *See, e.g.*, OR. REV. STAT. § 30.937(1), (3) (2009).

123 *Bormann*, 584 N.W.2d at 316. The Iowa statute involved states in part: "A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation." IOWA CODE ANN. § 352.11(1)(a) (West Supp. 2009).

124 *Bormann*, 584 N.W.2d at 316.

125 *Id.* at 321–22.

126 684 N.W. 2d 168 (Iowa 2004).

127 *Id.* The Iowa statute gives nuisance immunity to animal feeding operations, providing in part:

> An animal feeding operation, as defined in section 459.102, shall not be found to be a public or private nuisance under this chapter or under principles of common law, and the animal feeding operation shall not be found to interfere with another person's comfortable use and enjoyment of the person's life or property under any other cause of action.

IOWA CODE ANN. § 657.11(2) (West Supp. 2009).

128 *Gacke*, 684 N.W.2d at 171.

129 *Id.* at 175; *see* U.S. CONST. amend. V.

130 *Gacke*, 684 N.W.2d at 175.

does not attach where a farm has operated negligently or fails to use generally accepted agricultural and management practices.[131]

In order to fully realize any national goal for the widespread use of clean energy devices and robust competition in the market, any federal regulation would seek to revoke as many barriers to achieving that goal as possible. The right-to-farm cases, however, reveal the possible pitfalls of a regulation that goes as far as granting blanket nuisance immunity.

D. State and Local Ordinances Regulating Windmills and Similar Devices

Many towns have proposed or already have enacted ordinances addressing the increasing demand for clean energy devices such as solar panels and windmills.[132] In most cases, towns have attempted to balance the competing interests of public safety, reducing consumption of electricity, reducing pollution, protecting the aesthetic qualities of their communities, and preserving property values in those communities.[133]

Several states and towns have proposed or enacted legislation designed to protect the rights of its residents to install and maintain equipment, devices, and apparatus such as clotheslines and solar panels on their residential property over the objections of homeowners' associations and despite any restrictive covenants prohibiting them.[134] Some states have restricted local control over windmill projects, except in cases in which they are protecting the health and welfare of their communities.[135] Some states provide incentives for using small wind systems designed for homes, farms, and small businesses.[136] Ohio, Washington, and Wisconsin have restricted local government control over windmill projects.[137] Colorado has also enacted similar legislation.[138] A New York law took siting decisions for power facilities out of local government control.[139] It does not appear that any states or towns have granted an unrestricted right to install a windmill on private property.

On the local level, recent regulatory efforts addressing windmills generally do not include a grant of the right to install windmills, but rather seek to limit their size, control their location, and prohibit interference with

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131 *Id.* at 173.

132 *See, e.g.*, CAZENOVIA, N. Y., TOWN CODE § 165-102 (2009); CICERO, N.Y., CODE OF THE TOWN OF CICERO, § 207 (2008), http://ecode360.com/ecode3-back/getSimple.jsp?guid=12359133 (last visited July 11, 2010); SPAFFORD, N.Y., ZONING CODE § 8-13 (2010); Fenner, N.Y., Local Law No. 2000-1 (2000).

133 *See, e.g.*, CAZENOVIA, N.Y., TOWN CODE § 165-102(a)1 (2009).

134 *See infra* part II.B.

135 *See* Kristin Choo, *The War of Winds*, A.B.A. J., Feb. 2010, at 54, 60.

136 *See, e.g.*, CAZENOVIA, N.Y., TOWN CODE § 165-102 (2009); CICERO, N.Y., LOCAL LAW § 207-1 (2008); SPAFFORD, N.Y., ZONING CODE § 8-13 (2010); Fenner, N.Y., Local Law No. 2000-1 (2000).

137 *See* Choo, *supra* note 135, at 60.

138 *See* COLO. REV. STAT. § 38-30-168 (2009).

139 *See* N.Y. PUB. SERV. LAW, art. X (repealed 2003). Another New York law, the State Environmental Quality Review Act, requires an environmental review of certain developments. State Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 2005 & Supp. 2010). The review should take into account aesthetic concerns as well as the impact on health and the character of a neighborhood. *Id.* § 8-0105.

wireless technology. Recent local laws, recognizing aesthetic and other concerns raised by the proliferation of these devices, have trended toward either imposing moratoria on windmill installations or toward heavily regulating their size and placement, or imposing rigorous pre-approval requirements prior to installation.[140]

States and localities have identified differing public concerns between commercial wind turbines and commercial wind farms and residential windmills or small wind systems, and have regulated in light of differences in size, degree and volume of use, the number of devices per parcel, and location. For example, the towns of Cazenovia and Spafford in central New York have proposed or enacted laws that address windmill use.[141] The Cazenovia law addresses small wind systems and requires non interference with microwave, broadcast, and wireless signals.[142] The law states that a commercial wind system may not be used on a lot unless the town grants a zoning variance, and requires permits for non commercial wind systems on residential land.[143] All applications must be accompanied by a full environmental assessment as required by the town.[144] There are limits on noise levels, a 30-foot blade to ground clearance requirement, and a requirement that the windmill have 15-foot anti climb area.[145] The law permits only the owner of the fee interest to place a windmill on the property.[146] Cazenovia sets a maximum height of 100 feet for residential systems and 150 feet for nonresidential uses as measured from the ground to the highest point of the blades at the vertical position.[147] The law restricts windmill lighting unless such lighting is required by the Federal Aviation Administration, and it provides that windmills may be required to be painted a neutral color in order to "achieve visual harmony with the surrounding area."[148]

In addition to some of the same requirements found in the Cazenovia law, the Spafford law limits installation of windmills and wind turbines to districts designated as Residential Agricultural, and requires town approval prior to installation.[149] It limits the number of windmills on a particular property, requires a 20-foot blade to ground clearance, and requires an automatic braking mechanism to slow or stop blade rotation.[150] Windmills in Spafford may not exceed 60 feet in height.[151] Any federal regulation wisely would consider the differences between commercial and residential uses and adopt some of the same provisions found in these local laws while

140 *See, e.g.*, CAZENOVIA, N.Y., TOWN CODE § 165-102 (2009); CICERO, N.Y., LOCAL LAW § 207-4 (2008); SPAFFORD, N.Y., ZONING CODE § 8-13 (2010); Fenner, N.Y., Local Law No. 2000-1 (2000).

141 CAZENOVIA, N.Y., TOWN CODE § 165-102 (2009); SPAFFORD, N.Y., ZONING CODE § 8-13 (2010).

142 CAZENOVIA, N.Y., TOWN CODE § 165-102(C)(1)(a)–(b) (2009).

143 *Id.* § 165-102.

144 *Id.* § 165-102(D)(1)(h).

145 *Id.* § 165-102(C)(1)(d), (g), (n).

146 *Id.* § 165-102(C)(1)(j).

147 *Id.* § 165-102(C)(1)(e).

148 *Id.* § 165-102(D)(1)(e).

149 SPAFFORD, N.Y., ZONING CODE § 8-13(C)(1), (D)(1) (2010).

150 *Id.* § 8-13(C)(2), (D)(1), (D)(2)(d).

151 *Id.* § 8-13(D)(2)(h).

remaining loyal to goals of removing unreasonable barriers to the installation and use of clean energy devices.

Even though many of these new laws do permit installation of clean energy devices, the prior approval requirements can be burdensome, as they tend to be costly, can impose time delays, and may reduce the maximum effectiveness of a device. Each of these burdens on the user were concerns that motivated Congress and FCC to craft OTARD regulation in its current form. These concerns are squarely addressed by prohibitions on regulations that cause undue delay, increase costs, interfere with a quality signal, and otherwise burden satellite users. Any federally coordinated regulation of windmills and similar devices also must effectively harness the power of states and localities if the regulation is to achieve its goals of reducing pollution and promoting alternative forms of energy without unduly burdening consumers.

These local laws evidence the disparities from locale to locale. They also illustrate that current local laws focus primarily on restricting and limiting use of clean energy devices. They do not focus, as the federal government would, on removing barriers of access or on enhancing competition and consumer choice. In all, they erect the type of barriers federal regulation likely would seek to remove.

E. Recent Attempts at Federal Energy Legislation

There is a striking similarity in the governmental interests supporting the national policies relating to the availability of communications devices and clean energy devices. Both are grounded in larger global purposes with little to distinguish them, for the purposes of this discussion, other than consumer demand and necessity and the size of the apparatus that fulfills those governmental policies. They also are similar in that they may pose concerns about aesthetics and beauty. In each instance, the government seeks to protect consumers by containing costs and giving consumers choices. To date, consumer choice seems to be of greater import in the context of communications services, as Congress and FCC have proactively sought to increase competition in communications markets—particularly wireless and wireline telephony markets.[152] In the case of energy conservation, the government seems concerned with containing consumer costs and also with protecting the environment by lowering carbon dioxide emissions and reducing energy consumption.

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152 *See, e.g.*, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, WT Docket No. 09-66, FCC 10-81, 2010 FCC LEXIS 3186 (May 20, 2010); Telephone Number Requirements for IP-Enabled Services Providers, Report and Order, 22 F.C.C.R. 19531 (Nov. 8, 2007); Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order, 18 F.C.C.R. 16978 (Aug. 21, 2003).

For years, the federal government and states have attempted to deal with recurring energy crises, and the federal government has on numerous occasions attempted to craft a workable energy policy. Collectively, these efforts have included a variety of goals and initiatives such as improving efficiency, promoting conservation, and promoting alternative and renewable energy sources. In recent years, legislative and public awareness efforts have focused on recycling, reduction of automotive vehicle fuel consumption and emissions reduction, as well as a reduction in household and commercial energy consumption.[153] Manufacturers have introduced energy-saving household appliances and hybrid vehicles that run in part on alternative energy. High-efficiency light bulbs have gained popularity. Other devices that further these efforts are likely to be part of any new legislation. The federal government could demonstrate a more significant commitment to household energy conservation and go much farther by providing greater protections for environmentally friendly technological devices and those who use them, but it has not done so to date.

Congress and modern Presidents, from Jimmy Carter to Barack Obama, have attempted to synchronize the country's energy and environmental challenges. When President Carter created the Department of Energy, he set a goal of twenty percent solar energy in the United States by the year 2000.[154] The National Energy Act[155] and the Energy Security Act of 1980[156] also arose during Carter's term. Over the years numerous bills have been introduced into Congress, including, but certainly not limited to, America's Climate Security Act of 2007,[157] the Energy Policy Act of 1992;[158] the National Energy

153 *See* Michael Northrop, *Leading by Example: Profitable Corporate Strategies and Successful Public Policies for Reducing Greenhouse Gas Emissions*, 14 WIDENER L. SYMP. J. 21, 39–53 (2004) (surveying various regulatory programs and public policies aimed at greater energy efficiency).

154 Remarks to Lincoln Land Community College Students and Local Residents, 2 PUB. PAPERS 1862, 1864 (Sept. 22, 1980).

155 The National Energy Act of 1978 included five statutes: The Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (codified as amended at 16 U.S.C. §§ 2601–2645 (2006)); the Energy Tax Act of 1978, Pub. L. 95-618, 92 Stat. 3174 (codified as amended at 26 U.S.C. § 4064 (2006)); the National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206 (codified as amended at 42 U.S.C. §§ 6215–8201 (2006)); the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 (codified as amended at 42 U.S.C. § 8301–8484 (2006)); and the Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3350 (codified as amended at 15 U.S.C. §§ 3301–3432 (2006)). President Jimmy Carter also ordered the creation of the U.S. Department of Energy in 1977. Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (codified as amended at 42 U.S.C. §§ 7101–7352 (2006)); *see also* Alan S. Miller, *Energy Policy From Nixon to Clinton: From Grand Provider to Market Facilitator*, 25 ENVTL. L. 715, 715–19 (1995) (summarizing circumstances surrounding the passage of the National Energy Act).

156 The Energy Security Act included, among other pieces of legislation, the Renewable Energy Resources Act of 1980, Pub. L. 96-294, 94 Stat. 715 (codified as amended at 42 U.S.C. § 7371–7375 (2006)), and the Solar Energy and Energy Conservation Act of 1980, Pub. L. 96-294, 94 Stat. 719 (codified as amended at 42 U.S.C. §§ 8285–8286(b) (2006)).

157 *See* S. 2191, 110th Cong. (2007). The bill was passed and reported out of the Senate Environment and Public Works Committee on December 5, 2007. This bill contained a cap-and-trade system similar to the European Trading Scheme (ETS) that also sets out to reduce emissions. *Id.* at § 1101–2104. Cap-and-trade sets a mandatory limit on emissions and requires companies to hold permits, or "allowances" to cover their emissions. Those who reduce emissions

Security Act of 2001;[159] the Comprehensive and Balanced Energy Policy Act of 2001;[160] the Comprehensive Energy Research and Technology Act of 2001;[161] the Energy Independence and Security Act of 2007;[162] and the American Clean Energy Leadership Act of 2009.[163] In March of 2010, Senators John Kerry and Joseph Lieberman released a discussion draft of a new energy policy called the American Power Act.[164]

The extraordinary efforts of former Vice President Albert Gore, Jr. have raised the collective consciousness of the American populace to the problem of global warming and the need to take immediate and drastic corrective measures.[165] Similarly, the malfunction of the Deepwater Horizon oil rig in the Gulf of Mexico in mid-2010 also highlighted the energy challenges facing the country.[166] Additionally, current or pending legislation in several key states also lend some guidance in assessing the likelihood of more widespread legislation protecting efforts of individuals to tap alternative sources of renewable energy.[167] The United States also has coordinated with other nations to address issues of climate change.[168]

The federal government has recently re-entered the energy conservation arena. In 2008, Congress passed the Food, Conservation, and Energy Act of 2008 (Farm Bill) and a companion tax package both designed to promote energy conservation and the use of renewable energy sources.[169] The Farm Bill is comprehensive legislation that supports, among other things, investments in research and development relating to energy conservation and renewable energy.[170] The Farm Bill does not specifically mention windmills and solar panels, but rather addresses the use of

beyond their required level can sell their excess allowances to others. There is a financial incentive to beat the cap. In it, businesses are given specific carbon-reduction targets. It was approved and ordered reported by the Senate Committee on Environment and Public Works. Despite these milestones, the federal government has yet to provide full protection to alternative energy sources. Cap and trade is widely believed to be dead. See, e.g., John M. Broder, *Cap and Trade Loses Its Standing as Energy Policy of Choice*, N.Y. TIMES, Mar. 25, 2010, at A13.

158 H.R. 776, 102nd Cong. (1992) (codified in scattered sections of 12, 16, 25, 26, 30, & 42 U.S.C. (2006).

159 S. 389, 107th Cong. (2001).

160 S. 597, 107th Cong. (2001).

161 H.R. 2460, 107th Cong. (2001).

162 H.R. 6, 110th Cong. (2007).

163 S. 1462, 111th Cong. (2009),

164 S. ___, 111th Cong. (2010), *available at* http://kerry.senate.gov/imo/media/doc/APAbill3.pdf.

165 *See* AL GORE, AN INCONVENIENT TRUTH (2006).

166 *See* Helene Cooper, Jackie Calmes, Justin Gillis, *President Calls for a New Focus on Energy Policy*, N.Y. TIMES, June 16, 2010, at A1.

167 *See e.g.*, FLA. STAT. ANN. § 163.04 (West 2006).

168 In 2008, the United States participated in the United Nations Framework Convention on Climate Change in Bali, Indonesia, which focused on the negotiation processes for future emissions reductions.

169 Food, Conservation, and Energy Act of 2008 (Farm Bill), H.R. 2419, 110th Cong. (codified as amended in scattered sections of 7, 12, 15, 16, 19, 20, 21, 25, 26, 40 & 42 U.S.C.). The tax package approves $16 billion in new taxes on oil companies. It also requires investor-owned utility companies to generate at least 15% of their electricity from renewable energy sources by the year 2020.

170 *See id.* at §§ 6101, 6103, 6103, & 7104.

renewable energy—defined as "energy derived from a wind, solar, renewable biomass, ocean (including tidal, wave, current, and thermal), geothermal, or hydroelectric source"—in the context of its authorization of the Secretary of Agriculture to award grants for increasing the energy self-sufficiency of rural communities through the development of integrated renewable energy systems.[171] In 2007 President Bush signed the Energy Independence and Security Act.[172] This legislation seeks to lower vehicle emissions and raises fuel economy standards for cars and light trucks.[173] It sets new energy efficiency standards for light bulbs,[174] but left out wind, solar, and geothermal power credits. The 2009 economic stimulus package included tax credits for the installation of small wind systems on private property.[175] The federal Production Tax Credit affects only large utility-scale wind projects, not individuals who want to install their own wind power systems for on-site power.[176]

Despite significant federal interest in the area of energy conservation, whether the federal government will adopt a sweeping national alternative energy policy is doubtful. So far, the federal government has not acted to protect the installation of solar panels, windmills, and other clean energy devices.

III. WHEN THE WELL-INTENDED BECOMES A NUISANCE

No matter how well-intended the person seeking to install a windmill on private property, the physical characteristics of these devices will inevitably impose negatively upon the senses and tastes of some neighboring property owners and raise possible nuisance issues. There are two general categories of nuisance: public and private.[177] Of primary concern in this article is private nuisance. As discussed above, some of the most common challenges to the installation of windmills on private property involve concerns about noise, wind, and harm to birds. There also is the threat of physical harm to persons or property in the event a windmill blade malfunctions and falls to the ground, if ice is thrown from a windmill blade, or if a mast supporting a windmill fails. Additionally, claims of aesthetic harm and obstruction of views of the horizon are common.[178]

171 *Id.* at 383–402.

172 Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007).

173 *Id.* at Title I.

174 Energy Independence and Security Act of 2007 § 321.

175 William Armsby, *Stimulus May Get Small Wind Turbines Spinning*, CNN.COM, Mar. 9, 2009, http://www.cnn.com/2009/TECH/03/09/small.wind.turbines/index.html (last visited Mar. 20, 2010).

176 26 U.S.C. § 45 (2006).

177 *See, e.g.*, JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY, 122–23 (2d ed. 2005).

178 A nuisance could also be found where there is simply too much of a good thing. For instance, neighbors frequently find themselves at odds when one seemingly gets carried away with holiday cheer and over-adorns a private residence with holiday decorations. These displays often attract large crowds of spectators who create traffic, noise, air pollution, and litter. Courts

A. Public and Private Nuisance Law

Nuisance has been described as "merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."[179] The basis of nuisance law lies in the right to possess, use, and enjoy property.[180] Generally, the law of nuisance has been treated as "a catch-all category [that] provides remedies for conduct that causes substantial and unreasonable harm to the use or enjoyment of property."[181] It is generally understood to be "'something that is offensive, physically, to the senses and by such offensiveness makes life uncomfortable' [such as] noise, odor, smoke, dust, or even flies."[182] Nuisance cases also may involve air or water pollution.[183]

Nuisance law is bifurcated into public and private nuisances. Public nuisance law generally is reflected by statutes and ordinances whose purpose is to protect human welfare, tranquility, and safety. Such statutes may take the form of zoning or land use ordinances as well as attempts to govern personal conduct.[184] Public nuisance actions consist of a broad category of acts or omissions which obstruct or cause inconvenience or damage and are brought by governments on behalf of the public at large.[185] The interest or right which is harmed must be one common to the general public as a class and not merely a right or interest of an individual person or a small group of persons.[186] Public nuisance encompasses minor crimes as well as interferences with public health, morals, welfare, convenience, and comfort.[187] Examples of public nuisances include the operation of houses of ill repute such as brothels and drug houses, the storage and use of explosives and fireworks, loud noises, bad odors, excessive smoke, dust, and vibrations, as well as obstruction of navigable waterways, and other bothersome or unsafe conditions or activities.[188] The remedy for a public nuisance is criminal prosecution pursuant to the relevant statute or ordinance.[189]

On the other hand, when the rights or interests of a single individual or a small group of individuals have been harmed, private nuisance is the

must balance the tension between the First Amendment and the rights of the public to be free of public nuisances.

179 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

180 *See, e.g.*, SINGER, *supra* note 177, at 98. A trespass requires a physical intrusion as well as physical damage, but nuisance does not. *Id.* at 99. Certain acts could constitute both a private as well as a public nuisance provided the requirements under each definition are satisfactorily shown by the claimant. *Id.* at 123.

181 *Id.* at 101.

182 *Id.* at 99 (alteration in original); *see also In re* Chicago Flood Litigation, 680 N.E.2d 265, 278 (Ill. 1997).

183 SINGER, *supra* note 177, at 99.

184 *Id.*; *see also Village of Euclid*, 272 U.S. at 387–88.

185 SINGER, *supra* note 177, at 122–23.

186 *Id.*

187 *See id.* at 122–24.

188 *See, e.g.*, *id.*

189 See *id.* at 122–23 (stating that public nuisance traditionally applied only to certain criminal conduct).

appropriate cause of action.[190] A private nuisance is a condition or activity that substantially and unreasonably interferes with a possessor's use and enjoyment of her land or an interest in land.[191] As with public nuisances, private nuisances tend to involve offenses to one or more of the human senses.[192] Like a public nuisance, a private nuisance may cause some sort of personal, physical discomfort or adverse sensory perception such as a foul odor, smoke, dust, insects, noxious gases, excessive noise, excessive light or high temperatures, and even repeated telephone calls.[193] The primary difference between a private and public nuisance is the number of persons harmed and the available remedy, which for a private nuisance is damages and in some cases a limited self-help privilege to enter upon defendant's land to abate a nuisance. As in most cases where competing property rights are in question, a balancing of the interests of plaintiff and defendant is required.

Nuisance is closely tied to trespass and takings.[194] In fact, courts often allow cases to be brought as both trespass and nuisance claims.[195] Trespass is generally understood to be the unlawful or unauthorized intrusion of the private property of another.[196] The difference between nuisance and trespass is that trespass focuses on the physical intrusion onto the private property of another, whereas nuisance focuses on the harm to the beneficial use and enjoyment of private property of another caused by one's use of his own private property.[197] An interference constituting a nuisance may occur by incorporeal or non-trespassory invasions of the sort a landowner cannot reasonably be expected to bear without compensation.[198] The interference may cause tangible harm to the land, a diminution in its market value, or

190 SINGER, *supra* note 177, at 122–23.

191 *See, e.g.*, Rodrigue v. Copeland, 475 So.2d 1071, 1077–79 (La. 1985) (applying common law principles of nuisance to find that a Christmas display drawing heavy traffic caused real damage to the neighbors' right to enjoy their own property); Dunlop v. Daigle, 444 A.2d 519, 520–21 (N.H. 1982) (finding a dog kennel to be a private nuisance).

192 SINGER, *supra* note 177, at 99; *see, e.g.*, CAL. CIV. CODE § 3479 (West 2010).

193 *See* Baldwin v. McClendon, 288 So. 2d 761, 765 (Ala. 1974) ("[I]t has been repeatedly held that smoke, offensive odors, noise, or vibrations, when of such degree or extent as to materially interfere with the ordinary comfort of human existence, will constitute a nuisance."); Valley Poultry Farms, Inc. v. Preece, 406 S.W.2d 413, 414–15 (Ky. 1966) (finding that insect swarms resulting from a poultry farm constituted a nuisance whether or not poultry farm was negligently maintained); Ryan v. City of Emmetsburg, 4 N.W.2d 435, 438 (Iowa 1942) (finding that noxious gases from a sewage plant constituted a private nuisance); Adkins v. Boetcher, No. 08CA3060 WL 571987, at § 13 (Ohio Ct. App. 2010) ("[N]oise and light from [a] race track constitute[s] a qualified private nuisance."); Macca v. Gen. Tel. Co. of NW, Inc., 495 P.2d 1193, 1195 (Or. 1972) ("[T]he erroneous listing of plaintiff's telephone number and the numerous telephone calls to plaintiff resulted in an invasion of plaintiff's right to enjoy her property without unreasonable interference."); Hartford Penn-Cann Serv., Inc. v. Zymbloski, 589 A.2d 208, 209 (Pa. Super. Ct. 1988) (affirming trial court's finding that a "dust problem constituted a nuisance as a matter of law").

194 *See, e.g.*, Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. Rev. 819 (2006).

195 *See* RESTATEMENT (SECOND) OF TORTS § 821D (1979).

196 *Id.* at § 158 (1965).

197 *See id.* at § 821D, comment (d) (1979).

198 *Id.* at § 822, comment (g) (1979).

adversely affect some property right.[199] While a nuisance need not physically harm property, courts generally have understood that a nuisance results from a physical effect upon the land itself, such as by vibration, objects hurled upon it, destruction of crops, flooding, or pollution of its water or soil.[200]

B. Where is the Harm?

As stated herein, a successful private nuisance claim must make a showing of some substantial and unreasonable interference with a possessor's use and enjoyment of land or an interest in land.[201] This interference can be seen easily when there is some physical impact on the land itself, but is a bit more elusive when the complained of activity merely negatively impacts the aesthetic character of property. The requisite type of harm would be much easier to show as it relates to windmills and possibly solar panels than it would be as it relates to OTARDs and clotheslines.

1. Diminution of Property Value

One of the oft complained of harms to property caused by nearby nuisances is a diminution in property value. The court in *Gacke* held that foreclosing a remedy for property owners who are subjected to nuisance and who suffer a diminution of value of private property constitutes a taking.[202] "Proof that the nuisance has resulted in a diminution of the land's market value tends to show that the harm is not merely the result of the plaintiff's sensitivity, since loss of market value necessarily means that potential buyers would also be affected by the nuisance."[203] A diminution in value caused by a nuisance, however, can be difficult to prove.[204]

In addition to nearly religious adherence to the "Location, Location, Location" golden rule of purchasing real estate, most prospective residential home buyers place high value on the exterior appearance of a property and neighboring properties both in deciding whether to purchase and how much to pay for the parcel. The characterization of property as aesthetically pleasing—and thus worthy of the asking price—is a complex and highly subjective process. For those prospective purchasers with even modestly discriminating taste, the appearance of neighboring properties factors prominently in the process of deciding to actually purchase the target property.[205] Buyers often factor in whether the neighbors maintain their

199 *Id.* at § 827, comment (c), (d) (1979).

200 *See id.*

201 *Id.* at § 821D (1979).

202 *Gacke*, 684 N.W.2d 168, 171 (Iowa 2004).

203 DAN B. DOBBS, THE LAW OF TORTS 1322 (West Group 2000).

204 *See* RESTATEMENT (SECOND) OF TORTS § 827, comment (d) (1979).

205 *See, e.g.*, GEORGE C. GALSTER, A REVIEW OF EXISTING RESEARCH ON THE EFFECTS OF FEDERALLY ASSISTED HOUSING PROGRAMS ON NEIGHBORING RESIDENTIAL PROPERTY VALUES (2002) *available at* http://www.cacities.org/resource_files/24071.galsterreport2.pdf (discussing the location of federal housing projects in some cases as having a negative effect on existing nearby residential house values).

properties and whether neighboring properties pose the risk of nuisance. Such considerations may include the architecture, color scheme, size, landscaping, storage of inoperable vehicles, presence of cluttered play and recreational equipment, proximity of swimming pools, presence of domestic animals particularly barking dogs, and perhaps location of satellite dishes and energy conservation devices, apparatus, and machinery. The existence of a nuisance in proximity to the target property, therefore, likely impacts the market value of the target property. One discreetly situated OTARD or clean energy device may have a different effect on neighboring property values than would multiple devices placed in conspicuous locations.

2. Is Ugliness Actionable?

As it relates to satellite dishes and their placement on residential properties, the typical complaints are that the reception devices are ugly or that the owner's choice of placement and installation are out of place or distasteful. Each, it is argued, diminish the beauty or aesthetic of that and neighboring properties and ultimately diminish the property values of those properties. Zoning regulations work to maintain a certain aesthetic quality and, as a consequence, property values. That courts allow local zoning authorities to determine aesthetics might explain why they are reluctant to promote private nuisance actions based on aesthetic concerns.

While courts permit local zoning regulations of aesthetics, courts have been reluctant to find a taking based solely on aesthetic concerns.[206] Most courts have equated a determination of aesthetic value with a hard-to-quantify individual judgment as to the beauty of the subject in question.[207] Beauty, they have determined, is too subjective a basis upon which to permit actions in nuisance.[208] These courts subscribe to the notion of beauty being in the eye of the beholder, and thus, subject to infinite interpretations. With such subjectivity of interpretation as to what is visually pleasing, these courts claim that no objective standard can be found.[209]

Because of the unreliability of the subjective criteria for making judgments about what constitutes good taste, courts have been reluctant to inject their own personal assessments of distastefulness and beauty as the inappropriate standard for conduct that warrants equitable relief.[210] In

206 *See, e.g.*, Green v. Castle Concrete Co., 509 P.2d 588, 591 (Colo. 1973); Livingston v. Davis, 50 N.W.2d 592, 598 (Iowa 1951). *But see generally*, Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENVTL. L.J. 1 (2002) (discussing why this approach is inconsistent with aesthetic concerns of modern society).

207 Dodson, *supra* note 206, at 2–3.

208 *Id.*

209 *Id.* at 7.

210 *See, e.g.*, People v. Wolf, 216 N.Y.S. 741 (N.Y.Co.Ct. 1926) (holding that an ordinance tending to promote the public welfare through aesthetics could not be sustained); Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 141, 141 (1987); *see also* Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368, 371 (W. Va. 1937).

Rankin v. FPL Energy,[211] an Abilene, Texas court held that noise caused by the Horse Hollow Wind Farm was not a nuisance.[212] While willing to consider noise as a nuisance, the court made its decision on the grounds that aesthetics is not a basis for nuisance claims under Texas law.[213] Similarly, FCC has rejected the concern that aesthetics alone should be a permissible basis for restrictions under the OTARD Rule.[214] As discussed above in Part II.A, FCC considered the role of aesthetics and included language addressing aesthetics in its original OTARD Rule, choosing later to delete such references.[215] The original text of the OTARD Rule, while not expressly providing an aesthetic exception to federal preemption, did provide for consideration of the "appearance" of a device in determining the validity of a safety objective—particularly whether a safety restriction was applied in a discriminatory manner.[216]

Property owners, landlords, and the public at large certainly have an interest in preserving the aesthetic appeal of their property, particularly with respect to residential property and commercial retail property where an economic interest is closely tied to the beauty and visual appeal of the property. Aesthetics is part of the public health, safety, and welfare in its own right. Property owners also have a distinct interest in encouraging their neighbors to also maintain their property, so as not to detract from the overall aesthetic appeal of the entire community. For instance, if balconies or patios on the front of a building or a side of a building facing an entrance or a byway look messy, they project an image of clutter and consequently diminish property value. Buildings with balconies and patios on the front of a property facing the southwest sky may become littered with reception devices.[217]

Some scholars have criticized the presumptive dismissal of aesthetic nuisance claims on grounds that the harm is hard to measure or perhaps even inconsequential. Professor Raymond Robert Coletta writes that "aesthetic valuations are a direct reflection of the interaction between the individual and his or her environment."[218] Humans attach cognitive and emotional meaning to what they see as "[u]nsightliness is, to a great degree, a response to the incongruity that a particular visual patter causes within a given visual environment."[219]

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211 266 S.W.3d 506 (Tex. App. 2008).

212 *Id.* at 508, 512–13.

213 *Id.* at 512–13.

214 *See, e.g.*, Holliday, 14 F.C.C.R. 17167, at 17171 (1999) (petition for declaratory ruling); Trabue, 14 F.C.C.R. 8602, at 8608 (1999).

215 *See* Second OTARD Order, 13 F.C.C.R. 23874 (1998); Order on Reconsideration, 13 F.C.C.R. 18962, ¶¶ 75, 87 (1998); First OTARD Order, 11 F.C.C.R. 19276, 19288 (1996).

216 *See* First OTARD Order, 11 F.C.C.R. 19276, 19280.

217 Because most communication satellites are in equatorial geostationary orbit, OTARDs in North America must face the southwest sky to receive a signal from a transmitting satellite. *See* WRIGHT ET. AL., THE PHYSICS OF SPACE SECURITY: A REFERENCE MANUAL 29 (2005).

218 Coletta, *supra* note 210, at 142.

219 *Id.* at 174.

Virginia Woolf said, "The eye has this strange property: It rests only on beauty."[220] The same cannot necessarily be said about the ear, as the ear rests on the most annoying sounds—those that drive us crazy.[221] Coletta is critical of courts' unwillingness to approach aesthetic nuisance claims in the same way that they approach nuisance claims based on foul odors or loud or annoying noises.[222] In typical nuisance cases, courts consider the context of the odors and noises.[223] This approach acknowledges that while a foul odor or offensive noise could be found a nuisance in certain situations, they may be innocuous in others.[224] These nuisance claims are assessed based on the reasonableness for the locations in which they occur.[225] For instance, certain noises are more acceptable in urban areas than they are in rural areas of the countryside. Similarly, certain odors might be expected in industrial and agricultural areas, but might indeed constitute a nuisance if occurring in a residential area. Typically, these surrounding circumstances are not similarly taken into account when assessing aesthetic nuisance claims. Coletta advocates adopting an objective reasonableness standard in all nuisance cases involving all of the senses including sight.[226]

Some courts have found a nuisance where a use is wholly inconsistent with the neighborhood's character, "even though its impact derives solely from visual perception and distaste."[227] The Supreme Court of New Hampshire, in *Robie v. Lillis*,[228] held that in making private nuisance determinations, the unsightliness of a defendant's property may be considered in balancing the rights of the plaintiff and defendant.[229] The majority in *Parkersburg Builders Material Co. v. Barrack* (*Parkersburg Builders*)[230] took an interesting look at the meaning of aesthetic beauty and whether the lack of beauty could so offend a property owner such that it supports a private action in nuisance.[231] That case involved property owners who complained of a nearby property owner's use of his property to store and wreck abandoned automobiles.[232] Citing the Wisconsin Supreme Court's

220 VIRGINIA WOOLF, *Street Haunting: A London Adventure, in* THE VIRGINIA WOLF READER 246, 249 (1984). *See also* Walter Pater, *Preface* to THE RENAISSANCE at ix (4th Ed. 1890) ("Beauty, like all other qualities presented to human experience, is relative; and the definition of it becomes unmeaning and useless in proportion to its abstractness. To define beauty not in the most abstract, but in the most concrete terms possible, not to find a universal formula for it, but the formula which expresses most adequately this or that special manifestation of it, is the aim of the true student of aesthetics.").

221 *See* Paul Vitello, *That Racket? It's the Sound of Suburbia*, N.Y. TIMES, July 22, 2007, at NJ1, NJ8.

222 Coletta, *supra* note 210, at 165–66.

223 DOBBS, *supra* note 203, at 1331–32.

224 *See, e.g.*, Martin v. Williams, 93 S.E.2d 835, 843 (W.Va. 1956).

225 *See generally Village of Euclid*, 272 U.S. 365, 387–88.

226 Coletta, *supra* note 210, at 171–72. *See also* Martin v. Williams, 93 S.E.2d at 844–45 (finding that a used automobile sales lot constituted a nuisance inparty because of its unsightliness).

227 DOBBS, *supra* note 201, at 1331–32.

228 299 A.2d 155 (N.H. 1972).

229 *Id.* at 159.

229 191 S.E 368 (W. Va 1937).

231 *Id.* at 371.

232 *Id.* at 369.

dicta in *State ex rel. Carter v. Harper*[233] for its discussion of aesthetic beauty, the court took issue with the exclusion of nuisance suits based solely on visually offensive property conditions.[234]

> [A] thing visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes, and may produce a decided reduction in property values. Courts must not be indifferent to the truth that within essential limitations aesthetics has a proper place in the community affairs of modern society.[235]

The court in *Harper* wrote:

> It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered.[236]

Even the *Parkersburg Builders* court agrees that a complaint alleging solely that a condition is offensive to the sight is not sufficient grounds to justify the granting of equitable relief stating that "[e]quity should act only where there is presented a situation which is offensive to the view of average persons of the community."[237] The court suggests that usages of property must be "properly placed" and the character of surrounding properties and the neighborhood in which it is located should be considered.[238] The *Parkersburg Builders* court does not suggest that all uses of property must be visually appealing, acknowledging that many commercial uses, for example, which are necessary to modern life, might be offensive to neighbors if "located in a community of unquestioned residential character."[239]

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233 196 N.W. 451, 455 (Wis 1923).

234 *Id.* at 370.

235 *Id.* at 371.

236 196 N.W. at, 455 (Wis. 1923).

237 *Parkersburg Builders*, 191 S.E. at 371.

238 *Id.* ("The surroundings must be considered. Unsightly things are not to be banned solely on that account. Many of them are necessary in carrying on the proper activities of organized society. But such things should be properly placed, and not so located as to be unduly offensive to neighbors or to the public.").

239 *Id.*

As interpreted by the courts, the OTARD Rule provides for protection against some of these concerns.[240] For example, to address possible concerns about clutter, the OTARD Rule does not permit a satellite user to install or maintain multiple, duplicative devices.[241] In *In re Holliday*,[242] the petitioners owned a single-family dwelling in a planned community subject to plat covenants and restrictions. The petitioners installed multiple antennas, masts, and satellite dishes providing reception for multiple video devices.[243] The homeowners' association argued that its policy limiting each property to one satellite dish antenna and one television antenna protected the safety, aesthetics, and property values of the community.[244] Concerned about overreaching restrictions, FCC found the two-to-a-property restriction to be a prohibited absolute limit based solely on aesthetic concerns and not on a valid safety concern or other basis.[245] On appeal, however, the Indiana Court of Appeals found the equipment to be duplicative and ruled in favor of the homeowners' association.[246]

When it comes to the placement of satellite dishes and private nuisance claims, current law suggests that a claimant must show more than simply a distaste for the relevant satellite dish placement. To put it plainly, the claimant must do more than claim merely that the dishes are ugly or are aesthetically displeasing.[247] Claimants must show some objective harm.

The more common objections to the placement of satellite dishes actually are based on their lack of aesthetic appeal or even their plain ugliness. While few are likely to argue that satellite dishes are objects of beauty that actually enhance a neighborhood's appearance, many probably would claim that a neighborhood free of dishes and windmills is more aesthetically pleasing and thus more beautiful than one littered with the devices. But this article poses the question of whether a neighborhood that is host to dishes and windmills scattered about the neighborhood necessarily lacks beauty or is so aesthetically displeasing as to cause the type of harm necessary to make out a successful claim for private nuisance. More specifically, when are the presence of satellite dishes, windmills, clotheslines, or similar socially beneficial devices so lacking in beauty that they actually interfere unreasonably with an owner's beneficial use and enjoyment of the owner's property triggering an actionable nuisance?

Beauty is defined as a "perfect combination of characteristics pleasurable to see" or alternatively "a particular grace, adornment or

240 *See* 47 C.F.R. § 1.4000 (2007).

241 *Id.*

242 14 F.C.C.R. 17167 (1999).

243 *Id.* at 17618–19.

244 *Id.* There also was a restrictive covenant requiring approval prior to installation, which FCC found was prohibited as well. *Id.*

245 *Id.*

246 Holliday v. Crooked Creek Vills. Homeowners Ass'n, 759 N.E.2d 1088, 1094 (Ind. Ct. App. 2001). Holliday admitted that he received all of the television programming he wished to receive on the television in his master bedroom, which is one of at least ten on the first and second floors of his home. *Id.*

247 *Parkersburg Builders*, 191 S.E. 368371 (W.Va. 1937).

excellence."[248] To be beautiful, thus, is "marked by beauty . . . keenly delighting the senses as approaching perfection or the ideal in form."[249] Aesthetic means "relating to the beautiful as distinguished from the merely pleasing, the moral, and esp. the useful or utilitarian."[250] On the one hand, a determination of aesthetic beauty is as much an indictment of the character of the property as it is of the taste and class of the person who resides thereon. Many nuisance complaints by one neighbor against another are extensions of some other personal dispute between them. Clearly, neither these interpersonal conflicts nor claims of personal unattractiveness are actionable. An indictment of the state of the property, on the other hand is another matter.

For some, the ubiquitous round satellite devices have become a tolerable part of the residential and commercial property landscape. But, while many are not bothered by the presence of these technological residential accessories, just as many find them tacky and obtrusive eyesores that block views, taint scenery, and clutter residential neighborhoods. While few would characterize them as beautiful or even aesthetically pleasing, many people have developed a growing tolerance for their omnipresence as just another necessity in the quest for greater connectedness with the world around them. It is not clear that the same could be said for windmills and solar panels should a greater number of Americans buy wholeheartedly into the movement to "go green" and seek to install energy conserving apparatus on their residential property.

Windmills, it could be argued, are works of art that are indeed beautiful—literally and figuratively.[251] Indeed, some people may find the sight of a wind farm gracing the rural landscape breathtaking, evoking a sense of awe and serenity.[252] Windmills are beautiful in the literal sense in their simplicity and figuratively beautiful in their utilitarian significance in preserving natural resources. The major difference, of course, between windmills and satellite dishes is their size. Satellite dishes do not share the same graceful simplicity that could be described as beautiful, as they are much more compact and squat by comparison. By most who behold them, satellite dishes probably would not be defined as beautiful.

Courts and the general property-owning population might be much less receptive to broad preemption of local ordinances governing the placement of solar panels and windmills than they have been with respect to rules seeking to prohibit the placement of satellite dishes. Take the man in Beach Haven Terrace, New Jersey, for example.[253] Seeking to cut his gas and electricity bills, he installed a windmill in the backyard of his suburban

248 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 194 (Phillip Babcock Gove ed. 2002).

249 *Id.*

250 *Id.* at 34.

251 *See* Justin Good, *What is Beauty? Or, On the Aesthetics of Wind Farms*, OBSERVATORY, May 25, 2006, http://observatory.designobserver.com/entry.html?entry=4337 (last visited July 11, 2010).

252 *Id.*

253 Vitello, *supra* note 221, at NJ1.

home.[254] While managing to trim his utility costs, in the process, he also managed to become the subject of a suit alleging that his environmentally friendly energy source was ugly, out of place, and a nuisance in violation of local noise and height ordinances.[255] Other common complaints against windmills are that they interfere with television and radio reception and that "they kill too many birds."[256] Should the federal government adopt a national energy policy and take the same level of interest in encouraging use of alternative sources of renewable energy as it has with respect to making OTARDs widely available, we might see a proliferation of windmills and solar panels on residential properties, as well as the inevitable litigation that will follow.

Meanwhile, all across the country, property owners in neighborhoods governed by homeowners' associations are surreptitiously stringing clotheslines across their backyards in efforts to save the economy and their monthly household budgets. These acts, which amount to modern-day civil disobedience, are, for many clothesline users and advocates, efforts to change what they view as outdated restrictions on the use of private property. Homeowners' associations argue that property values go down with the presence of clotheslines, which they would argue are unsightly, tacky, low class, and aesthetically out of place in pristine homogeneous suburban communities.

If the tolerance accorded satellite dishes proves not to extend to windmills, solar panels, and clotheslines, the question arises again of whether a claim of private nuisance is actionable aside and apart from any public nuisance claim. For those who find such devices at the least offensive and at the extreme a nuisance, it currently is unclear whether they have any grounds for objecting in their individual capacities for harm to their property rights or to their use and enjoyment of their property when a neighbor installs a satellite dish on the neighbor's own property.

As it applies to satellite dishes, FCC and consumers probably have hoped that industry would respond to complaints about the size of satellite dishes by developing smaller, more compact, and less visible devices. To date, that has not occurred. The same could be true of windmills and other devices such as solar panels, although it could prove more difficult to achieve the same level of production from smaller clean energy devices than is very likely possible in the case of smaller sized satellite dishes and other communications devices. Industry has proposed connecting windmill farms via utility wires for the purpose of increasing reliability and dependability of

254 Richard G. Jones, *Windmill Cuts Bills, But Neighbors Don't Want to Hear It*, N.Y. TIMES, July 11, 2007, at B1.

255 The suit is against the city council for its alleged illegal approval of the installation of the windmill and failure to enforce its own laws. *Id.*

256 *See, e.g.*, Editorial, *Sen. Reid and Green Power*, LAS VEGAS REV.-J., July 29, 2007, at 2D, *available at* http://www.lvrj.com/opinion/8795177.html.

wind power technology. Such interconnection also could significantly reduce the cost of wind power.[257]

3. Physical Harm

a. Physical Harm to the Person

Although personal physical harm without more is insufficient to support a private nuisance action, if such personal physical harm can be shown to interfere with the claimant's use and enjoyment of the claimant's property, then a private nuisance action might stand.[258] One might ask how a satellite dish might physically harm a neighbor. The most obvious scenario would be if the satellite dish fell on someone causing physical injury, but obviously there are other tort principles, particularly negligence, that would address that scenario.

Recently, there have been interesting claims asserting physical harm resulting from electromagnetic waves.[259] Specifically, a market is growing for devices that detect the presence of electromagnetic waves circulating in our living environment. Markets are growing as well for "radiation fear" protective gear.[260] These devices have gained popularity in response to medical complaints of allergies and allergic sensory reactions to the exposure to electromagnetic waves typical of those emitted by microwave ovens, Wi-Fi and Wi-Max networks, mobile or cellular telephones, and satellite dishes.[261]

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257 Amer. Energy Producers, *Interstate Transmission Vision for Wind Integration*, ELECTRICITY TODAY, Sep. 2007, at 30, 37, *available at* http://www.electricity-today.com/et/issue0707/Wind_Integration.pdf.

258 *See* RESTATEMENT (SECOND) OF TORTS § 822, comment (c) (1979) (requiring an invasion in an "interest in the use and enjoyment of land" to maintain an action for private nuisance).

259 *See, e.g.*, *Tired? Stressed? Are You Living in a Sick Building?*, DERBY EVENING TELEGRAPH (U.K.), Apr. 5, 2007, at 30. The business and study of "electromagnetic pollution" is developing to help individuals deal with the health and spiritual implications of living in environments being co-occupied by increasing amounts of electric equipment. *Id.*

260 Thomas Claburn, *Radiation Fears Drive Sales of Protective Gear*, INFORMATIONWEEK, May 23, 2007, http://www.informationweek.com/story/showArticle.jhtml?articleID=199701540 (last visited July 11, 2010). Carbon paint and protective window coverings are some of the products being employed to deflect radio waves. Many are skeptical not only of the harms caused by radio frequencies, but some including the Federal Trade Commission (FTC) also are wary of claims as to the effectiveness of such protective gear. *Id.* In 2003, FTC won a settlement with Interact Communications, Inc., makers of cell phone radiation shields, requiring the company to stop making unsubstantiated claims about its product WaveShield. Press Release, Fed. Trade Comm'n, Marketers of Cell Phone Radiation Protection Patches Settle FTC Charges (Dec. 15, 2003), http://www.ftc.gov/opa/2003/12/interactcomm.shtm (last visited July 11, 2010).

261 *Wireless Incorporated*, THE ECONOMIST (SPECIAL REPORT: A WORLD OF CONNECTIONS), Apr. 28, 2007, at 15. A nightclub in Barcelona has begun using microchips implanted in the arms of its patrons in lieu of a more traditional ticket for admission. The chip is used to identify patrons when they enter the club and pay for drinks from the bar. The RFID tag is read by a special tag reader waved near the arm. A radio signal identifies a number that calls up the patron in the club's computer system. *Id.* In other cases, wireless technology is used in medicine. *Id.* Chips may be implanted or ingested by patients. *Id.* at 16. Use of these devices could become much more prevalent as their cost drops. Some individuals have claimed to suffer

FCC, to date, has declined to address certain claims of harm caused by exposure to radio frequency (RF) waves emitted by certain wireless transmitters.[262] The Commission does, however, set limits on the maximum RF emission allowable by personal wireless communications devices as well as fixed transmitting antennas including those used to facilitate wireless technology and those used in broadcasting.[263] The Commission contends that its limits are far below those levels generally agreed to be harmful to humans.[264] Licensees are required to report RF emissions.[265] However, it is not entirely clear that the Commission's conclusion is based on sound medical research or if it has been updated to consider the cumulative exposure to these waves in the average person's life. Nevertheless, the Commission has published ways of minimizing absorption of RF energy into the head when using cellular telephones, suggesting that prolonged exposure even at low levels indeed might be unhealthy.[266] Some public interest groups have asserted for years that exposure to RF has potentially harmful medical effects on humans.[267] Other groups have made the grave assertion that exposure to certain types of RF could cause cancer.[268]

Similarly, complaints have been alleged about the health effects of windmills.[269] Neighboring property owners have complained of headaches and nausea caused by the noise generated by windmills as well as by the

from "extreme sensitivity syndrome" caused by increased exposure to radio frequency emitted from commonly used electronics and electric-powered devices such as laptop computers, microwave ovens, mobile phones, and chargers. They complain of skin rashes and swelling. *See Effects of Wi-fi Still Uncertain*, E. GRINSTEAD COURIER (U.K.), Mar. 29, 2007, at 15.

262 EMR Network, 18 F.C.C.R. 16822, 16822 (2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-191A1.pdf (upholding the Chief of the Office of Engineering and Technology's dismissal of EMR's petition to revise FCC regulations regarding human exposure to RF emissions); *see also* Fed. Commc'ns Comm'n, HUMAN EXPOSURE TO RADIO FREQUENCY FIELDS: GUIDELINES FOR CELLULAR AND PCS SITES 1 (2007), *available at* http://www.fcc.gov/cgb/ consumerfacts/rfexposure.pdf.

263 Fed. Commc'ns Comm'n, *supra* note 257, at 2.

264 *Id.*

265 *See* 47 C.F.R. §§ 1.1307(b)(2), 1.1310, 2.1093(c) (2007) (describing the evaluation requirements and exposure limits for devices whose use can result in RF exposure).

266 Fed. Commc'ns Comm'n Office of Eng'g & Tech., Radio Frequency Safety Frequently Asked Questions, http://www.fcc.gov/oet/rfsafety/rf-faqs.html#Q11 (last visited July 11, 2010).

267 *See generally* Marvin C. Ziskin, *COMAR Technical Information Statement: The IEEE Exposure Limits for Radiofrequency and Microwave Energy*, IEEE ENG'G IN MED. AND BIOLOGY MAG., Mar.–Apr. 2005, at 114, 114, *available at* http://ewh.ieee.org/soc/embs/comar/standardsTIS.pdf (discussing IEEE's reason and methodology for its radiofrequency standards); Nat'l Council on Radiation Prot. & Measurements (NCRP), Mission Statement, http://www.ncrponline.org/AboutNCRP/Our_Mission.html (last visited July 11, 2010) (describing organization's focus on radiation protection); Am. Nat'l Standards Inst. (ANSI), Mobile Phone Radio Wave Exposure Limited by Standards, https://www.ansi.org/news_publications/news_story.aspx?menuid=7&articleid=887 (last visited July 11, 2010) (publicizing radio frequency standard issuance).

268 *See, e.g.*, Melinda Wenner, *Fact or Fiction? Cell Phones Can Cause Brain Cancer*, SCIENTIFIC AM., Nov. 21, 2008, http://www.scientificamerican.com/article.cfm?id=fact-or-fiction-cell-phones-can-cause-brain-cancer (last visited July 11, 2010).

269 *See* Choo, *supra* note 135, at 54, 56.

shadows large wind systems cast.[270] While there is some skepticism about these health claims, and while there is a lack of clear empirical data showing a causal connection between windmills and physical ills, any future regulation should consider health impacts.

b. Physical Harm to Property

It is not difficult to ascribe some type of physical harm to property caused by the presence of a satellite dish on a neighboring property. The most obvious type of physical harm would occur if the satellite dish fell and landed on a person or property. Again, in such cases, tort principles such as negligence would be available, as the OTARD Rule does not immunize manufacturers or installers from liability for negligent design or installation.

The possibility of harm caused by a windmill is even easier to contemplate. Windmills might generate noise and vibrations, stir up dust, and throw off ice from the blades. Additionally the masts supporting the windmill could collapse and fall to the ground. These are the more common types of complaints generating claims of nuisance. Were a federal regulation to preempt a suit for nuisance where such interference has occurred, the issue of whether such preemption triggers a compensable taking arises. It is difficult to see how a clothesline might cause physical harm sufficient to form the basis of a private nuisance action. Perhaps the same problems of negligent installation or use would apply.

The Wisconsin Supreme Court, in *Prah v. Maretti*,[271] addressed the issue of solar access and nuisance law.[272] Acknowledging the importance of solar access, the court concluded that a complaint alleging blockage of solar access stated a claim of private nuisance upon which relief could be granted.[273] Prah had built a solar-powered home in a residential subdivision.[274] Maretti purchased the adjoining lot and built a two-story house ten feet from Prah's lot line despite notice from Prah that the house would interfere with Prah's solar energy system.[275] The court concluded that blocking light from a solar collector may be a private nuisance.[276] The court in *Prah*, however, was not asked to address the inverse question of whether the installation of a solar collector would itself constitute a private nuisance.[277]

Prah broadened protections for solar devices.[278] It recognized a nuisance claim for blockage of solar access.[279] Until the holding in this case,

270 *Id.*

269 321 N.W.2d 182 (Wis 1982).

272 *Id.*

273 *Id.* at 184.

274 *Id.* at 192.

275 *Id.* at 184, 199.

276 *Id.* at 192.

277 *See id.* at 190 (private nuisance law has flexibility to protect competing interests).

278 *See* Steven M. Cherin, *Casting a Shadow on a Solar Collector—A Cause of Action Recognized; An Alternative Resolution Framework Suggested:* Prah v. Maretti, 68 CORNELL L. REV. 941, 941–42 (1983).

279 *Id.* at 942.

blockage claims were almost uniformly struck down until courts recognized claims for malicious blockage of light using an analysis similar to that applied to spite fences.[280]

IV. DOES THE OTARD RULE'S PREEMPTION OF COMMON LAW NUISANCE ACTIONS EFFECT A COMPENSABLE TAKING?

A. Government-Created Nuisances

The government in some cases may effectuate a taking through its regulation of land use that permits a landowner to create a nuisance. When the government uses land or permits a third party acting pursuant to explicit governmental authority "in such a way as to create nuisance, the action rises to the level of a taking when the burden placed on the plaintiff is peculiar and substantial."[281] There is no compensation requirement unless the burden placed on owners is substantial and the burden unfairly burdens one owner rather than being evenly and widely distributed.[282] Where a government or third party acting under authority of the government, creates a nuisance, such nuisance may ripen into a taking.[283]

Because of sovereign immunity, these cases often are pursued not as common law nuisance claims, but as takings cases.[284] In the case of the OTARD Rule and any potential similar clean energy rule, neither the government nor a third party acting pursuant to explicit government authority is itself using the land upon which the device is installed. If the alleged nuisance results solely from aesthetic harm, no compensation likely would be due because of the difficulty of quantifying aesthetics and beauty. If the alleged nuisance is based on a more traditional harm, the opposite could hold true. To the extent that there is no mechanism for compensation, there could be an unconstitutional taking.[285]

B. Is There a Compensable Taking?

On the one hand, property owners have the right to beneficial use of their property free from nuisances caused by neighboring property owners. To divest an owner of this property right could be said to constitute a taking.[286] On the other hand, as suggested by Professor Richard Singer, the

280 *Id.* at 947; *see also* Sher v. Leiderman, 181 Cal. App. 3d 867, 875 (Cal. Ct. App. 1986) ("[B]lockage of light to a neighbor's property, except in cases where malice is the overriding motive, does not constitute actionable nuisance, regardless of the impact on the injured party's property or person.").

281 Ball, *supra* note 194, at 822.

282 *Id.* at 823.

283 *Id.* at 821.

284 *Id.* at 821, n.6.

285 *See, e.g.*, Fed. Commc'ns Comm'n v. Fla. Power Corp., 480 U.S. 245 (1987); Gulf Power Co. v. United States, 187 F.3d 1324 (11th Cir. 1999).

286 *See generally* Blumenthal, *supra* note 73.

analysis of *Bormann* should not be taken too far.[287] He suggests that using the rationale of this case, a legislature could never alter nuisance law without triggering a compensation requirement.[288] He suggests that unless nuisance laws "deprive the owner of economically viable use, they can be viewed as adjusting the benefits and burdens of economic life to ensure that certain uses . . . are allowed to continue.[289]

In order to fulfill the true spirit of the 1996 Act, courts should assume that Congress intended not only to foreclose all actions seeking to expressly restrict or impair installation, maintenance, and use, but also any action, state or federal, with limited exceptions, which have the effect of impairing or restricting installation, maintenance, or use of the covered reception devices. Any other interpretation of the 1996 Act could potentially open the flood gates of litigation and thwart any attempts at widespread availability and accessibility of communications services in not only residential settings, but in commercial settings as well. Pursuant to its police powers, the federal government must be, and has been, given certain powers to curtail the rights of individuals where those rights are outweighed by the interests of the larger society. There are many other examples of exercise of this power. For instance, a property owner cannot deny a tenant the right to receive mail or public utilities like electric power or water.[290] While video services might not be quite on par with utilities such as water, electricity, or United States mail, the ability, and indeed the right, to receive communications and information is a protected right.[291] The availability of, and the ability to receive, service and information from competing sources serves the public interest as all of society benefits from lower cost and better quality goods and services that generally flow from competitive markets. Additionally, all of society benefits when each of us is better informed about the world around us.

Assuming that a private right of action in nuisance based on an objectionable placement of a satellite dish, a windmill, clothesline, solar panels, or the like is actionable, if a federal rule such as the OTARD Rule preempts a common law action, the question becomes whether such a federal rule might trigger a compensable taking under the Fifth Amendment to the United States Constitution. Property viewed as a bundle of rights also is viewed as a collection of remedies and causes of action including trespass

287 *See* SINGER, *supra* note 177, at 104, 706.

288 *See id.* at 104.

289 *See id.* at 706–07, 719–22.

290 *See, e.g.*, Lamont v. Postmaster Gen., 381 U.S. 301, 305-07 (1965) (holding that addressees have a right to receive mail from willing senders). The implied warranty of habitability, for example, requires landlords to maintain "bare living requirements" and premises that are fit for human occupation. Acad. Spires, Inc. v. Brown, 268 A.2d 556, 559 (N.J. 1970). The implied warranty of habitability generally applies to necessities such as running water and electricity. Wade v. Jobe, 818 P.2d 1006 (Utah 1991).

291 *See, e.g.*, Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 663–64 (1994); Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972); Red Lion Broadcasting v. Fed. Commc'ns Comm'n, 395 U.S. 367, 390 (1969); State v. Shack, 277 A.2d 369 (N.J. 1971).

and nuisance actions.[292] Most regulatory takings cases and related scholarly articles address two questions: 1) whether a governmental regulation of a public nuisance thus depriving property of value constitutes a taking under the Fifth Amendment,[293] and 2) whether a government-created or authorized nuisance in and of itself constitutes a taking.[294] The question addressed in this article is closely related to the second question and is whether a governmental regulation that expressly or impliedly preempts a common law nuisance action, constitutes in and of itself a taking—really whether a governmental regulation goes too far beyond the government's power to regulate in granting the authority of a property owner to create a nuisance and preempting a private action in nuisance effects a compensable taking.

For additional insight into takings and nuisance actions, one could look to cases involving railroads and airports. Professor Carlos Ball looks at three particular cases at the intersection of nuisance and takings law[295]—*Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*,[296] *Richards v. Washington Terminal Co.*,[297] and *United States v. Causby*.[298] In *Fifth Baptist Church*, the church sued its neighbor, a locomotive repair company, alleging nuisance resulting from the smoke, cinders, dust, loud noises, and offensive odors emitted from the repair company's operations.[299] The Court made an observation relevant to modern society when it recognized that there will be no liability for "consequential harms that result from the reasonable and expected use of a duly-authorized business such as a railroad."[300] Living in modern society, the Court said, requires tolerance of some inconveniences that result from modern technology. Society can only benefit from modern technology if the government is relieved of the obligation to compensate for the inconvenience modern technological advances cause. Choosing not to focus on or even explicitly mention the Takings Clause, the Court distinguished between private and public nuisances and concluded that Congress could not authorize and immunize private nuisance.[301] In that case, the social utility of the railroad outweighed the harms caused by its operation and the harm was distributed widely throughout the community.

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292 Eric T. Freyfogle, *Eight Principles for Property Rights in the Anti-Sprawl Age*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 777, 787 (1999) (suggesting that the scope of property rights is decided by communities in ways that benefit the society as a whole); *see also* Blumenthal, *supra* note 73.

293 *Lucas*, 505 U.S. 1003, 1007 (1992); Duffield v. DeKalb County, 249 S.E.2d 235, 236 (Ga. 1978); *Bormann*, 584 N.W.2d 309, 311 (Iowa 1998); Thornburg v. Port of Portland (*Thornburg II*), 415 P.2d 750, 751 (Or. 1966).

294 Thornburg v. Port of Portland (*Thornburg I*), 376 P.2d 100, 101 (Or. 1962).

295 *See* Ball, *supra* note 194, at 822, 826, 832.

296 108 U.S. 317 (1883).

297 233 U.S. 546 (1914).

298 328 U.S. 256 (1946).

299 108 U.S. at 317, 329–31. The locomotive repair company argued that it was immune from suit because it was acting under congressional authority. The court rejected this argument because of the "implied qualification" that the railroad would not unreasonably interfere with its neighbor's property rights. *Id.*

300 Ball, *supra* note 194, at 827.

301 *Fifth Baptist Church*, 108 U.S. at 331–32, 335.

However, the Court concluded that the locomotive company had used its property "in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship" and affirmed the lower court's damage award.[302]

In *Richards*, a property owner again brought suit against a railroad company operating pursuant to congressional authority and the power of eminent domain.[303] The railroad was alleged to have emitted noise, gases, dust, dirt, and smoke.[304] In this case, the Court took into account the Takings Clause and nuisance law, and distinguished again between unavoidable consequential damages and incidental inconveniences that result from reasonable and proper operation of the railroad—those that are "shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad"[305]—and those that directly invade or harm a particular property.[306] The Court declined to hold the railroad liable for its activity—opining that railroads could not continue to operate if they were held liable for damages resulting from normal operations.[307] It suggested, however, that where the gases and smoke emitted from the train engines in a tunnel contaminated air and invaded the plaintiff's property, there is a "special and peculiar damage to the plaintiff," and a different conclusion was warranted.[308] The Court focused on the Takings Clause concluding that "the acts of Congress in the light of the Fifth Amendment [could not be construed to] authorize the imposition of so *direct and peculiar and substantial* a burden upon plaintiff's property without compensation to him."[309]

In *Causby*, a property owner operated a chicken farm on land adjoining a runway that serviced military aircraft. The military aircraft flew at very low altitudes barely above the chicken farm, causing such disruptively loud noises that the owner was forced to close the chicken farm.[310] The Court in *Causby* was interested in the physical intrusion of the airplanes on the chicken farm. The Court held that the airplane activity effected a taking.[311] The Court held that the flights interfered with the plaintiff's land and created an easement over plaintiff's land for which the government owed compensation.[312] The flights, the Court held, "subtract[ed] from the owner's full enjoyment of the property and [] limit[ed] his exploitation of it."[313]

302 *Id.* at 331.
303 *Richards*, 233 U.S. 546, 551–53.
304 *Id.* at 549, 551, 554.
305 *Id.* at 554.
306 *Id.*
307 *Id.* at 555–58.
308 *Id.* at 557.
309 *Id.* (emphasis added); *see* Ball, *supra* note 194, at 829.
310 *Causby,* 328 U.S. 256, 259 (1946).
311 *Id.* at 264–65.
312 *Id.* at 268.
313 *Id.* at 265.

Compensation was to be determined based on the basis of diminution of value of plaintiff's land.[314]

Additionally, the Oregon Supreme Court in *Thornburg v. Port of Portland*,[315] (*Thornburg I*) suggested that a nuisance alone may effect a taking.[316] The Oregon Supreme Court stated:

> [U]nless there is some reason of public policy which bars compensation in cases of governmental nuisance as a matter of law, there is a question, in each case, as a matter of fact, whether or not the governmental activity complained of has resulted in so substantial an interference with use and enjoyment of one's land as to amount to a taking of private property for public use.[317]

The court urged a focus on the degree of interference with the property owner's property interests.[318] Declining to adopt a bright line rule and reserving that decision for the trier of fact, *Thornburg I* does not clarify just when a nuisance ripens into a taking.[319] Professor Bell outlines the problems of collapsing nuisance analysis into takings determinations.[320] He advocates instead for a "nuisance plus" standard that requires a greater degree of intrusiveness on a property owner's interests to show a taking than to show a nuisance. [321]

Because of the remote likelihood of success of a nuisance action based solely upon aesthetics and the lack of beauty of a relatively small reception device, it could very easily be said that the property interest itself is so questionable that to take it does not constitute a taking at all. To determine that such an exercise of governmental power constitutes a compensable taking would defeat the government's compelling interest in making available to as many people as possible quality service delivered via competitive markets. The OTARD Rule is sufficiently tightly crafted so as not to unduly burden neighboring property owners or landlords to the extent that compensation for infringing any rights would be due.

The same could be true were federal law to prevent actions alleging nuisances resulting from clotheslines and solar panels. As it relates to a possible suit involving something larger like a windmill, on the other hand, the result could be quite different. In that situation, the nuisance action is much more likely to succeed, if the suit is based not solely upon lack of aesthetic appeal, but rather on the noise or other more easily measured physical harm and impacts upon the property of the complainant. If there is

314 *Id.* at 266–67. This case was remanded for further findings on whether the easement taken was permanent or temporary for the purpose of calculating the proper amount of a damages award.

315 376 P.2d 100 (Or. 1962).

316 *Id.* at 105 ("While not every wrong committed by government will amount to a taking of private property, there are some wrongs which do constitute a taking.").

317 *Id.* at 105.

318 *Id.* at 104.

319 *Id.* at 116.

320 Ball, *supra* note 194, at 856–58.

321 *Id.* at 858.

a valid nuisance claim, then preemption of such a suit would constitute a clearer taking of a property interest for which compensation would be due.

V. A POSSIBLE REGULATORY FRAMEWORK FOR CLEAN ENERGY DEVICES

President Barack Obama's energy policy includes, among others, the goals of reducing emissions, improving fuel economy standards, and creating "clean jobs," including jobs in manufacturing solar panels and windmills.[322] With a potential hodgepodge of state and local laws, as well as countless homeowners' association rules and deed restrictions interfering with achieving federal goals of public importance, the federal government very well could, and perhaps should, step into this arena. It could preempt these contrary and incongruous laws and rules all in the spirit of fostering competitive markets, lowering costs, removing barriers to entry, and idealistically, saving the planet. Should Congress or the Obama administration propose any specific legislation or agency regulation, it must seriously consider these property, preemption, and takings issues.

Like the OTARD Rule, a rule protecting the right to install a windmill, solar panels, and other clean energy devices should extend the right only to property within the exclusive use and control of the user of the device. Any rule necessarily must include preemption of state and local laws, private deed restrictions, and homeowners' association prohibitions that prevent, delay, or increase cost of installation, maintenance, and use of these devices. The rule should limit the number of windmills on any residential property and should provide for common-use windmills on properties with multi-resident dwellings. Such a limitation should not apply to commercial properties. As for preemption of nuisance suits, the proposed rule should preempt most nuisance actions. At a minimum, it should preempt nuisance suits when the claimant has come to the nuisance. If this proposed federal preemption is found to constitute a taking, then the federal government must determine how it will compensate property owners for taking the right to pursue nuisance actions.

If the federal government chooses to pursue an OTARD Rule-like regulatory scheme regarding clean energy, it must decide which agency will regulate in the area. It very well could enact legislation and regulations that draw upon the OTARD Rule, the right-to-dry-laws, and the right-to-farm laws. Such a law should have some level of federal preemption. It should prohibit rules that delay, interfere with, or increase costs of installing, using, and maintaining clean energy devices. It could require insurance for users of devices over a certain size. It could provide exceptions for historic property.

The federal government should consider the differing rationales for creating such a rule in the first place. In the case of satellite dishes and receipt of video services, a consumer's right to receive information is a paramount consideration. Whether the right to install clean energy devices

322 The White House, Energy and Environment, http://www.whitehouse.gov/issues/energy-and-environment (last visited July 11, 2010).

invokes such significant individual rights is not as clear or convincing. If it is not, then a preemptive regulatory scheme may go a bit too far. To a certain extent, installation of a clean energy device is very much a personal choice that must be balanced against the public's interest in retaining a role in regulating placement of these devices. Obviously, there are potentially huge societal benefits to saving energy, and of employing renewable forms of energy. Unlike concerns about access to video services, an energy crisis would more significantly impact society from a practical and economic standpoint than would lack of access to multiple competing platforms for receipt of news and information. Any law should draw distinctions between rural areas and residential areas, and should permit size restrictions in residential areas.

It should permit tenants to install clean energy devices on leased property, but could require a landlord's consent, such consent not to be unreasonably withheld. The law could provide for revenue sharing between a tenant and the owner of the fee. Finally, the law should provide for producers of excess energy to be paid by utilities for this excess production. Any rule that expressly preempts restrictive deed covenants and homeowners' association rules prohibiting windmills, clotheslines, and solar panels and similar devices also is likely to be opposed on grounds that it unnecessarily restricts the rights of parties to freely negotiate contracts. As it relates to landlords and tenants, however, courts have uniformly held that the government may regulate the landlord-tenant relationship.

Unlike in the area of communications law, the federal government has not assumed near-exclusive jurisdiction over energy policy and regulation. This type of federal intervention into state property law likely will not be welcomed. To date, energy regulation is something that largely occurs on the state level. Property law also is an area of law largely believed to be reserved to the states. Real property is viewed as unique and to be governed by state law. For the federal government to preempt state law to protect the rights of people to install windmills, clotheslines, and solar panels, would be a more significant step than is regulation of satellite dishes. Any clean energy regulation must seek to balance the interest of federal, state, and local governments in recognition of uniqueness of real property. Such a federal effort also might trigger more compelling arguments for compensable takings. The possibility of triggering a taking raises the question of compensation and how affected parties will be compensated. A procedure for compensating property owners must be determined.

Physically, clotheslines are more similar to satellite dishes than are windmills, in that like satellite dishes, they do not raise nuisance concerns based on noise. OTARDs, however, do raise questions of the possibility of harm to persons and property resulting from improper installation or removal of the device while clotheslines may not. Opposition to clotheslines largely is along the lines of aesthetics and raises issues of class and economics. Most of the opposition to clotheslines has arisen in middle and upper class residential communities where there is a prevalent sentiment that clotheslines are the household appliances of poor rural areas and of

poor urban ghettos. While those opposing clotheslines and windmills might agree in principle with the ideals of a clean energy policy and of protecting the planet, the old adage "not in my backyard" is just as compelling a sentiment against wider acceptance of these devices. Still, courts are unreceptive to nuisance actions based on aesthetics alone but certainly are not when it comes to the more traditional bases for nuisance suits.

Should the government adopt an OTARD Rule-like regulatory scheme to protect the right to install, use, and maintain clean energy devices, it also must be mindful of the physical differences between clean energy devices and satellite dishes. The most obvious difference between satellite dishes and windmills is their size. While the OTARD Rule only applies to satellite dishes one meter or less in diameter and a few other antennas and masts, windmills can exceed 400 feet in height, and a single blade can exceed 150 feet in length. Windmills, of course, convert wind energy into electricity. They also tend to create noise and can pose a threat to birds. Ice also can be thrown from the blades of windmills. Moreover, any malfunction of a windmill, such as a mast or blade breaking and falling to the ground, presents the real threat of physical harm to humans as well as physical damage to real and personal property. Neighboring landowners claim large windmill installations cause a variety of ills including headaches, nausea, and general discomfort.[323]

Any clean energy device rule must balance carefully the competing interests of neighboring property owners and of the community at large. Therefore, any proposed rule should apply to reasonably small residential wind systems, taking into account the industry standards for wind systems intended for residential purposes and any practical and technical requirements necessary to sufficiently service the average American home.

The OTARD Rule provides an exception for clearly defined safety objectives, but does not address in any greater detail allocation of liability in tort cases such as those for private nuisance or for allocation of liability in the event of damage to person or property. Additionally, the OTARD Rule addresses the installation of satellite dishes on historic landmarks. The Rule provides an exception for properties that are included in or are eligible for inclusion on the National Register of Historic Places.[324] Each exclusion is reasonable, yet any OTARD Rule-like regulatory scheme must more clearly define the parameters of these exceptions and any others it adopts.

VI. CONCLUSION

The time may be approaching when the federal government may need not only to encourage the use of clean energy devices, but also to protect the right to install, use, and maintain them. If the federal government were to wade into these waters, obviously it would not be the first time it has occupied an arena in an effort to create uniformity in laws from town to

323 *See* Choo, *supra* note 135, at 54-61.

324 47 C.F.R. § 1.4000 (2007).

town and state to state where it has identified an issue of great public interest. One obvious area to look for guidance and analogy would be to the regulation of the communications industry, and particularly the regulation of OTARDs.[325]

A look to the OTARD Rule provides a valuable lesson in crafting legislation and regulations capable of withstanding constitutional muster as well as public opinion. As it applies to policies encouraging the use of devices such as solar panels and windmills, the government must set about the challenging task of balancing the public interest of preserving natural resources against private property rights in the same way it did in crafting the OTARD Rule. Because solar panels and windmills are much larger in size than the satellite dishes covered by the OTARD Rule, this task likely will be much more difficult. However, in order to significantly counter problems and consequences of excessive energy consumption, any legislation or regulation in this area must contemplate federal preemption of state and local laws as well as private deed restrictions that impair or delay the installation and maintenance of windmills and solar panels.

Current law likely would not provide relief for nuisance based upon the placement of a satellite dish, but might provide relief where a windmill was installed on private property causing more harm. Arguably, windmills are more than just eyesores; they are known to be loud, and may put neighbors at risk of physical harm. Likely, no taking would be triggered by preemption of nuisance actions by the OTARD Rule largely due to the remote likelihood of success of a nuisance action based solely on aesthetics. These devices are relatively small in size and the public interest sought to be derived from the rule and its underlying congressional mandate would be lost were state nuisance actions not preempted.

In the case of windmills and solar panels, on the other hand, the preemption of a common law suit could trigger a taking for which compensation is due—particularly if such a claim is based on harm other than aesthetic nuisance. To deny a common law state action where the device in question actually causes definable harm beyond offense to the aesthetic character of neighboring properties, is to interfere more certainly with one or more of the rights in the bundle of rights defining property. Should the federal government desire incentives for Americans to install windmills and other such equipment, any legislation and regulations must be carefully crafted so as to afford neighbors a cause of action in nuisance only where the well-intended exceeds community standards of reasonableness. It must not unduly interfere with the rights of property owners to install, maintain, and use clean energy devices in furtherance of important public interests.

[325] Consider also the federal protections to install the American flag on private property. Freedom to Display the American Flag Act of 2005, Pub. L. No. 109–243, 120 Stat. 572 (codified as a note to 4 U.S.C. §5 (2006)). Similarly, federal aviation laws are perfect examples of preemptory regulations foreclosing nuisance suits based on noise complaints.