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ARTICLE

A UNANIMITY-REINFORCING MODEL OF EFFICIENCY IN THE COMMON LAW: AN INSTITUTIONAL COMPARISON OF COMMON LAW AND LEGISLATIVE SOLUTIONS TO LARGE- NUMBER EXTERNALITY PROBLEMS

Todd J. Zywicki†

The rise of the regulatory state in the twentieth century has been accompanied by a general displacement of traditional common law remedies by statute. In fields such as warranties, liability, fraud, deception, design of consumer goods, standards for automobiles, and a multitude of other areas, uniform statutes have eroded the traditional domain of the common law. The displacement of common law by statutory law has been most significant with regard to large-number externalities such as pollution control.

Conventional wisdom holds that legislation has been adopted in response to the failure of the common law. With respect to externalities, it is claimed that the collective decision-making process of legislative approaches is necessary to eliminate divergences between private and social costs.¹ Ronald Coase's insight that

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1. The classic statement of the necessity of legislative intervention is given in A.C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932):

externalities could be dealt with through private contract² is considered inapplicable to most externalities cases because high transaction costs make negotiation infeasible. Legislative action, so the theory goes, is the most efficient remedy for cases of pollution and other large-number externalities. Judges have come to echo this preference for legislative, as opposed to common law, remedies for large-number externality cases.³ The thesis underlying this Article is that the conventional wisdom is based on a misunderstanding of the common law process and the values that the common law can and should seek to achieve. Once a proper understanding of the common law is accomplished, the common law process is seen to be applicable in numerous instances where it traditionally has been ignored.

It is plain that divergences between private and social net product of the kinds we have so far been considering cannot . . . be mitigated by a modification of the contractual relation between any two contracting parties, because the divergence arises out of a service or disservice rendered to persons other than the contracting parties. It is, however, possible for the State, if it so chooses, to remove the divergence in any field by "extraordinary encouragements" or "extraordinary restraints" upon investments in that field. The most obvious forms which these encouragements and restraints may assume are, of course, those of bounties and taxes.

Id. at 192. William Baumol and Wallace Oates offer a contemporary restatement of the conventional view:

The important point for us is that most of the major externalities problems that concern society so deeply today are large-number cases. *Even where the number of polluters in a particular neighborhood is small, so long as the number of persons affected significantly by the emissions is substantial, the process of direct negotiation and agreement will generally be unmanageable.* The same point, obviously, applies to all other types of externality. It thus seems to us that the role of voluntary negotiation among individual decision makers is of limited applicability for environmental policy.

WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* 10-11 (2d ed., Cambridge University Press 1988) (footnotes omitted) (emphasis in original).

2. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

3. As the New York Court of Appeals concluded,

[a] court should not try to [control pollution] on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River Valley.

Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 871 (N.Y. 1970).

The foundation for this conclusion is the development of a unanimity-reinforcing model of the common law. Understanding this model provides grounds for questioning the long-standing presumption favoring the institutional superiority of legislation to correct externality problems. By comparing legislation and the common law as alternative institutional structures for dealing with externalities, this Article establishes a presumption in favor of the common law rather than legislative solutions to externality problems.⁴ By linking efficiency to a unanimity standard, this Article attempts to move beyond Richard Posner's dictum that "judge-made rules tend to be efficiency-promoting while those made by legislatures tend to be efficiency-reducing."⁵ The common law's strength as an institutional approach in replicating the unanimity standard suggests that it is superior to legislation in many circumstances traditionally thought to require legislative intervention.

Throughout this Article, the problem of environmental pollution is used as a case study to illustrate the problem of dealing with large-number externalities, as it represents what is generally thought to be the paradigmatic example of large-number externalities that the common law cannot control.⁶ Once the ability

4. Buchanan suggests the importance of using the "comparative institutions" approach in presenting solutions to problems generated by human interaction. The comparative institution approach was used by the classical political economists, and revived in recent years by the Public Choice School. Discussing this approach, Buchanan explains,

Classical political economy was, from its eighteenth-century origins on, largely concerned with the comparison of alternative social or institutional orders. Its main purpose was not the predicting of economic behavior for its own sake; its purpose was, instead, that of developing appropriate models of the working of alternative institutions in order that the choice between those institutions might be better informed.

JAMES M. BUCHANAN, *EXPLORATIONS INTO CONSTITUTIONAL ECONOMICS* 4 (1989). Similarly,

Given the legal order of the protective state (the protection of property and the enforcement of contracts), we now know that under some conditions "markets fail" when evaluated against idealized criteria, whether these be "efficiency," "justice," or other abstract norms. We also know that "politics fails" when evaluated by the same criteria. Any positive analysis that purports to be of use in an ultimate normative judgment must reflect an informed comparison of the working properties of alternative sets of rules or constraints.

Id. at 59; see also *id.* at 25-26 (describing the impact of public choice theory on institutional comparisons); James M. Buchanan, *The Domain of Constitutional Economics*, 1 *CONST. POL. ECON.* 1, 10-11 (1990) (discussing the origins of constitutional political economy in the traditions of classical political economy as advocated by Adam Smith).

5. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 523 (4th ed. 1992) (footnotes omitted).

6. Admittedly, the common law cannot cope with situations of a huge number of

of common law to cope with the difficulties of environmental pollution is established, the need for statutory interference in many of the other fields of law that it has overtaken should be reexamined. Showing how the common law can work in the difficult context of environmental pollution implies that a stronger case could be made for the applicability of the common law in less-difficult contexts. The example of pollution control also helps to distinguish the unanimity-reinforcing model developed here from previous law and economics models of the common law.

Legislative regulation of environmental pollution appears to be relatively ancient in origin. The latter half of the twentieth century, however, has seen an expansion of state power to regulate environmental use. Some local legislation existed as early as 1861 in Chicago and 1917 in Pittsburgh.⁷ Local regulation did not begin in earnest, however, until the 1940s as numerous municipalities adopted air pollution control ordinances.⁸ Following these emerging steps toward regulation, state, regional, and finally national authorities entered the fray, seeking to control environmental pollution. Generally, the introduction of each higher level of government has tended to supplant the efforts of lower authorities, until by the 1970s, the federal government almost exclusively directed pollution control efforts.

Prior to the introduction of political control, even at the local level, pollution problems were dealt with through the common law process.⁹ Rules of trespass, property, and nuisance helped to force polluters to consider the costs imposed on society through the polluters' use of valuable environmental resources. While a more cumbersome process than blanket regulations, the case-by-case decisions of common law courts allowed judges to tailor their decisions to local circumstances.¹⁰ The long history of common law approaches in dealing with environmental pollution, as well as the inability of other models of the common law to explain how the common law historically dealt with these problems, provides

small polluters such as automobile pollution. In such cases, legislation may be necessary, despite its institutional flaws.

7. BRUCE YANDLE, *THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION: TRACKING THE UNICORN* 49 (1989).

8. *Id.*

9. *Id.* at 43-48.

10. *Id.* at 48 ("Settling environmental disputes through the courts was slower than actions taken under an ordinance, but the courts offered something unique. They could provide needed flexibility when community circumstances seemed to call for that.")

fertile ground for understanding the unanimity-reinforcing model of the common law.

This Article will not attempt to explain why legislation has supplanted the common law in wide ranges of American law.¹¹ Rather, it will demonstrate that this trend is not driven by fundamental institutional defects in the common law. In practice, statutory solutions have not produced superior results to the common law. An institutional comparison of the common law and legislation suggests that the argument in favor of legislative control over many areas of law, including environmental pollution, is more tenuous than commonly thought. While the common law is not perfect, neither is the legislative law. This Article relies on both theory and historical practice to compare the common law and legislation as competing institutional approaches to correcting the problems of large-number externalities.

Part I discusses the concept of subjective value and establishes why the subjective nature of value dictates that unanimity be used as the proper benchmark for standards of efficiency. Part II compares the common law and legislation as institutional approaches by demonstrating that under certain ideal circumstances, the two approaches are equally effective in achieving the unanimity benchmark, but that when we move away from the ideal, the superiority of the common law in achieving unanimity becomes evident. In particular, the two institutional systems are compared with reference to what will be called "static and dynamic" efficiency by examining their relative degrees of predictability and the preservation of expectations. Part III identifies and discusses institutional features of the two systems that either ease or inhibit movement towards unanimity. Part IV presents several cases where courts, acting through the common law, have shown a capacity to deal with difficult large-number externality problems in the context of pollution control. Finally, Part V presents some concluding thoughts for future studies of the relationship between the common law and legislation.

11. However, some tentative speculations for the rise of legislative dominance will be offered in the concluding thoughts of Part V.

I. SUBJECTIVE COST AND UNANIMITY

A. *Subjective Value*

1. Value is Subjective

The subjective value or subjective cost tradition¹² of economic analysis has an honored tradition of dissent from the orthodox position that implicitly holds that value can be measured.¹³ The real cost of a good to an individual is not measurable in monetary terms, but rather is the foregone opportunity: in other words, what could have been purchased with that money and how much happiness that alternative could have produced. Economists readily accept the definition of value as the opportunity cost of a good or service,¹⁴ but are reluctant to apply it consistently.¹⁵ Indeed, the impossibility of third-party measurement of individual preferences¹⁶ provides the basis for the widely-accepted norm of Pareto efficiency.¹⁷ Subjective value poses a problem for positive economic analysis because as long as individual preferences vary, no aggregation of preferences is possible.¹⁸ An individual's true pref-

12. Value and cost are just two words for the same concept, as both are properly measured with reference to opportunity cost.

13. See generally JAMES M. BUCHANAN, *COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY* 16-37 (1969) (explaining the origin and development of the London School of Economics' tradition of cost theory).

14. See, e.g., ARMEN A. ALCHIAN, *ECONOMIC FORCES AT WORK* 301 (1977) ("In economics, the cost of an event is the highest-valued opportunity necessarily forsaken.").

15. For examples of applications of subjective cost to the operation of the legal system and the quest for legal "efficiency," see Louis De Alessi & Robert J. Staaf, *The Common Law Process: Efficiency or Order?*, 2 *CONST. POL. ECON.* 107 (1991) and Christopher T. Wonnell, *Four Challenges Facing a Compatibilist Philosophy*, 12 *HARV. J.L. & PUB. POL'Y* 835 (1989).

16. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1108-10 (1972) (discussing the difficulty of determining individual valuations).

17. The Pareto efficiency standard "holds one condition to be superior to another only if at least one person is better off and no one is worse off." John S. Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 *HARV. L. REV.* 713, 749 n.167 (1986).

18. Jules Coleman recognized the difficulties presented by the subjectivity of preferences in his analysis of Posner's attempt to incorporate the Coase Theorem into statutory law. Jules L. Coleman, *The Economic Analysis of Law*, reprinted in *LAW, ECONOMICS, & PHILOSOPHY: A CRITICAL INTRODUCTION, WITH APPLICATIONS TO THE LAW OF TORTS* 102, 117 (Mark Kuperberg & Charles Beitz eds., 1983) [hereinafter *LAW, ECONOMICS, & PHILOSOPHY*].

ferences can be discovered only by actually making a decision.¹⁹ As James Buchanan argues,

Simply considered, cost is the obstacle or barrier to choice, that which must be got over before choice is made. Cost is the underside of the coin, so to speak, cost is the displaced alternative, the rejected opportunity. Cost is that which the decision-maker sacrifices or gives up when he selects one alternative rather than another. Cost consists therefore in his own evaluation of the enjoyment or utility that he anticipates having to forgo as a result of choice itself.

In any general theory of choice cost must be reckoned in a *utility* rather than in a *commodity* dimension. From this it follows that the opportunity cost involved in choice cannot be observed and objectified and, more importantly, it cannot be measured in such a way as to allow comparisons over wholly different choice settings [T]he opportunity cost relevant to choice-making must be translated [from monetary terms] into a utility dimension through a subjective and personal evaluation.²⁰

Thus, monetary prices do not identify an objective set of costs or value for any single identifiable individual. Rather, monetary prices must be translated into utility measurements to understand the full cost to the individual.²¹ Goods do not have any intrinsic value but only have value attached when individuals choose them instead of

19. One author stated about decision-making,

It is not merely the enormous amount of data that exceeds the capacity of the human mind. Conceivably, this data might be sorted in a computer with sufficient capacity. The real problem is that the knowledge needed is a knowledge of *subjective patterns of trade-off that are nowhere articulated*, not even to the individual himself. I might *think* that, if faced with the stark prospect of bankruptcy, I would rather sell my automobile than my furniture, or sacrifice the refrigerator rather than the stove, but unless and until such a moment comes, I will never *know* even my own trade-offs, much less anybody else's. There is no way for such information to be fed into a computer, when no one has such information in the first place.

THOMAS SOWELL, *KNOWLEDGE AND DECISIONS* 217-18 (1980) (emphasis in original).

20. James M. Buchanan, *Introduction: L.S.E. Cost Theory in Retrospect*, in L.S.E. *ESSAYS ON COST* 1, 14-15 (James M. Buchanan & G.F. Thirlby eds., 1981) [hereinafter L.S.E. *ESSAYS*].

21. ALCHIAN, *supra* note 14, at 305 ("Market prices, to which all people can adjust their choices, provide a common measure of the value in increments of one event relative to others.").

another. The cost of a given action will differ for the same person in different settings or for different people in the same setting.²² In sum, "[c]ost is subjective; it exists in the mind of the decision-maker and nowhere else [It] cannot be measured by someone other than the decision-maker because there is no way that subjective experience can be directly observed."²³

2. Transaction Costs are Subjective

Transaction costs are also subjective; some serve no function but to limit mutually beneficial exchanges. Other expenditures increase transaction costs in the short run, but decrease them in the long run. Examples are investments in knowledge,²⁴ name-brand

22. Buchanan, *supra* note 20, at 15. Regarding cost-value assessment, Buchanan states,

The cost faced by the utility-maximizing owner of a firm, the value that he anticipates having to forgo in choosing to produce an increment to current output, is not the cost faced by the utility-maximizing bureaucrat who manages a publicly owned firm, even if the physical aspects of the two firms are in all respects identical The private owner may evaluate the objectively measurable consequences of choice quite differently from the bureaucrat, although both are utility maximizers.

Id. Sowell also recognizes the subjective nature of cost:

[I]t may be apparent that a given physical object has a value that varies greatly according to the location of that object in time and space, and according to the risks associated with it. Otherwise people would not go to the trouble and expense of transporting things, or insuring them, or buying them on credit with interest charges. Indeed, no exchanges of goods (for other goods or money) would ever take place, unless the same physical things had different values to different people.

SOWELL, *supra* note 19, at 67.

23. BUCHANAN, *supra* note 13, at 43. Judge Alex Kozinski and David Schnizer have described subjective cost in a more humorous and intuitive way:

[t]he idea . . . is pretty simple: In deciding how much to pay for something, people don't say, "Well, I guess I should pay whatever some poor slob spent to produce it." They don't really care about the poor slob. Instead they will pay what the item is worth to them—that is, how much it would enhance their welfare compared to other goods they could buy.

Alex Kozinski & David M. Schizer, *Echoes of Tomorrow: The Road to Serfdom Revisited*, 23 SW. U. L. REV. 429, 433 (1994).

24. Christopher T. Wonnell, *Contract Law and the Austrian School of Economics*, 54 FORDHAM L. REV. 507, 532-33 (1986) (criticizing the neo-classical model because it assumes perfect knowledge, and arguing instead that "[e]fficiency requires the use of vast quantities of knowledge that exist in no single place but only in the separate minds of millions of individuals"); see also FRIEDRICH A. HAYEK, *The Meaning of Competition*, in INDIVIDUALISM AND ECONOMIC ORDER 92, 94 (1948) (arguing that the causal factors to be considered in competition analysis are acquisition of new knowledge or data by individuals).

capital,²⁵ and other human and physical capital.²⁶ Bruce Yandle and Hugh Macaulay note,

[T]ransaction costs include more than the cost of getting to the final result. They should include the result. What does it profit one to save money on a transaction but receive a good that has little value? An investment in transaction costs may yield great returns. Conversely, saving transaction costs may be very expensive.²⁷

The inability of third parties to read the minds of those engaged in a transaction implies that a judge cannot distinguish between efficiency-reducing and efficiency-enhancing investments in transaction costs. This problem suggests that the standard admonition by law and economics scholars, that judges should mimic the result reached in a world without transaction costs,²⁸ is plagued from the outset by the inability to measure transaction costs.

3. Expectations and Uncertainty

Uncertainty is inherently costly. Moreover, the costs of uncertainty are subjective because attitudes towards risk differ across individuals. Cost "is based on anticipations; it is necessarily a forward-looking or *ex ante* concept."²⁹ As a result of the subjec-

25. See Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615, 626 (1981) (arguing that brand name capital investments could "take the form of sunk investments in the design of a logo or an expensive sign," in order to increase wealth maximization in the long run).

26. HUGH H. MACAULAY & BRUCE YANDLE, *ENVIRONMENTAL USE AND THE MARKET* 34 (1977) ("It may be better to spend time and effort to learn about prices, quantities and alternatives . . . and it may be better to seek and find instead of to wait and trust that someone will provide the good you want.").

27. *Id.* at 34-35.

28. Coleman, *supra* note 18, at 117. Criticizing the "mimic the market" position, Coleman argues that,

because of information problems, it is doubtful whether following Posner's rule can guarantee that the assignment of entitlements will be Pareto optimal; that is, it is doubtful that Posner's rule will duplicate the efficient outcome aspect of costless voluntary exchange In following Posner we abandon the market in an effort to mimic its outcome. Once we abandon the market, however, how are we to gather the pertinent information regarding the respective parties' willingness to pay? [Due to information problems,] it is doubtful whether following Posner's rule can guarantee that the assignment of entitlements . . . will duplicate the efficient outcome aspect of costless voluntary exchange.

Id.

29. BUCHANAN, *supra* note 13, at 43. Sowell also recognizes the prospective nature of

tive nature of expectations and uncertainty, the fundamental economic problem is not to try to reach some optimal point as measured by a fictional social welfare function,³⁰ as is generally postulated, as the individual preferences that comprise such a function cannot be measured and aggregated.³¹

cost:

The costs of an industry are difficult—if not impossible—for third parties to determine. . . . [C]osts are foregone options—and options are always *prospective*. The past is irrevocably fixed, so all options are present or future. The objective data available to third parties refer to past actions taken in response to the prospective options subjectively foreseen as of that time. Those subjective forecasts themselves exist neither in the objective data of the past actions nor in the objective record of subsequent events, which may or may not have conformed to the forecasts.

SOWELL, *supra* note 19, at 169 (emphasis in original).

30. KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 22 (2d ed. 3rd prtg. 1966); Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152, 156-57 (1970).

31. BUCHANAN, *supra* note 13, at 71-72. In analyzing the corrective tax problem, Buchanan states,

Consider . . . the determination of the amount of the corrective tax that is to be imposed. This amount should equal the external costs that others than the decision-maker suffer as a consequence of decision In order to estimate the size of the corrective tax, however, some objective measurement must be placed on these external costs. But the analyst has no benchmark from which plausible estimates can be made. Since the persons who bear these "costs"—those who are externally affected—do not participate in the choice that generates the "costs," there is simply no means of determining, even indirectly, the value that they place on the utility loss that might be avoided. In the classic example, how much would the housewife whose laundry is fouled give to have the smoke removed from the air? Until and unless she is actually confronted with this choice, any estimate must remain almost wholly arbitrary.

Id. Similarly, Turvey analyzes the costs of achieving optimum resource allocation:

Let us begin by calling *A* the person, firm or group (of persons or firms) which imposes a diseconomy, and *B* the person, firm or group which suffers it. . . .

We now turn to the case where *A* and *B* cannot negotiate, which in most cases will result from *A* and/or *B* being too large a group for the members to get together. . . . [I]f the state can ascertain and enforce a move to the optimum position at a cost less than the gain to be had, and *if* it can do this in a way which does not have unfavorable effects on income distribution, then it should take action.

These two "ifs" are very important. The second is obvious and requires no elaboration. The first, however, deserves a few words. In order to ascertain the optimum type and scale of *A*'s activity, the authorities must . . . list and evaluate all the alternatives open to *A* and examine their effects upon *B* and the adjustments *B* could make to reduce the loss suffered. When this is done, if it can be done, it is necessary to consider how to reach the optimum

Because individuals reveal their utility orderings only by making choices, it is impossible for third parties to estimate individual preference functions accurately. Determining the efficient policy for a collective group is impossible; efficiency can only be recognized in the course of individual planning. Thus, the efficient policy is not the policy that is aimed towards reaching some collective end, but the policy that preserves the maximum range of action for individuals to pursue their personal ends.³² Implicit in the attempt to preserve the individual's range of choice is a necessity to preserve individual expectations to make it possible to coordinate future plans. Because cost is an *ex ante* concept, individuals can accurately estimate costs only if expectations are preserved. The subjectivity of preferences among individuals implies that the direct maximization of wealth or some other aggregate social function is an incorrect way to approach efficiency. Rather, efficiency should be seen as the mutual adjustment of interconnected plans of separate individuals with a minimum of predictable dislocation.³³ As Hayek suggests, "[w]hat is relevant is not whether a person as such is or

These complications show that in many cases the cost of achieving optimum resource allocation may outweigh the gain.

Ralph Turvey, *On Divergences Between Social Cost and Private Cost*, 30 *ECONOMICA* 309, 312-13 (1963); see also DON LAVOIE, *NATIONAL ECONOMIC PLANNING: WHAT IS LEFT?* 56 (1985). Lavoie asserts that those seeking to reach an "optimal" position will be confounded because "[i]n the relevant sense of the term, the data do not exist." *Id.*

32. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 59 (1944) [hereinafter HAYEK, *SERFDOM*]. Hayek comments about individualism:

[Individualism] does not assume, as is often asserted, that man is egoistic or selfish or ought to be. It merely starts from the indisputable fact that the limits of our powers of imagination make it impossible to include in our scale of values more than a sector of the needs of the whole society, and that, since, strictly speaking, scales of value can exist only in individual minds, nothing but partial scales of values exist—scales which are inevitably different and often inconsistent with each other. From this the individualist concludes that the individuals should be allowed, within defined limits, to follow their own values and preferences rather than somebody else's; that within these spheres the individual's system of ends should be supreme and not subject to any dictation by others.

Id.; see also *id.* at 81 (arguing that the question is not whether the state should interfere, but rather whether the individual can predict the state's action); Mario J. Rizzo, *Rules Versus Cost-Benefit Analysis in the Common Law*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 225, 233 (James A. Dom & Henry G. Manne eds., 1987) [hereinafter *ECONOMIC LIBERTIES*] ("If the law cannot systematically achieve specific social goals, then the best it can do is provide a stable order in which individuals are free to pursue their own goals.").

33. Buchanan, *supra* note 20, at 5 (stating that in a theory of social interaction, there is "mutual adjustment among the plans of separate human beings").

is not in equilibrium, but which of his actions stand in equilibrium relationships to each other."³⁴ To the extent that expectations regarding the behavior of others are interrupted, the individual's plans are disturbed, creating disequilibrium.³⁵ Efficiency, therefore, results from maximizing the ability of individuals to see their plans through to fruition.³⁶ Wealth maximization can be achieved only indirectly, through maximizing individual freedom to plan and realize those plans.

Thus, one component of the cost to an individual of a proposed action is the risk that he will be unable to complete the action.³⁷ Because each person's plans are to some degree dependent on the actions of others, it is important to have confident expectations regarding others' behavior.³⁸ The cost of an action to

34. F.A. Hayek, *Economics and Knowledge*, in L.S.E. ESSAYS, *supra* note 20, at 48.

35. *Id.* at 49. Hayek describes the creation of this disequilibrium:

[S]ince equilibrium relations exist between the successive actions of a person only in so far as they are part of the execution of the same plan, any change in the relevant knowledge of the person, that is, any change which leads him to alter his plan, disrupts the equilibrium relation between his actions taken before and those taken after the change in his knowledge. In other words, the equilibrium relationship compromises only his actions during the period during which his anticipations prove correct.

Id.

36. D.T. Armentano, *Comment: Efficiency, Liberty, and Antitrust Policy*, in ECONOMIC LIBERTIES, *supra* note 32, at 309, 313.

37. Hayek, *supra* note 34, at 50-51. Hayek explains,

Actions of a person can be said to be in equilibrium in so far as they can be understood as part of one plan. Only if this is the case, only if all these actions have been decided upon at one and the same moment, and in consideration of the same set of circumstances, have our statements about their interconnections, which we deduce from our assumptions about the knowledge and the preferences of the person, any application. It is important to remember that the so-called 'data', from which we set out in this sort of analysis, are (apart from tastes) all facts given to the person in question, the things as they are known to (or believed by) him to exist, and not in any sense objective facts.

Id. at 48.

38. *Id.* at 50-51. Hayek argues,

[I]n a society based on exchange their plans will to a considerable extent refer to actions which require corresponding actions on the part of other individuals. This means that the plans of different individuals must in a special sense be compatible if it is to be even conceivable that they will be able to carry all of them out. Or, to put the same thing in different words, since some of the "data" on which any one person will base his plans will be the expectation that other people will act in a particular way, it is essential for the compatibility of the different plans that the plans of the one contain exactly those actions which form the data for the plans of the other.

an individual will be related to the probability of his plans coming to fruition. Because perfect certainty is impossible, an individual's attitude towards remaining uncertainties affects the total cost of an action.³⁹ Attitudes towards risk will differ across individuals, creating a subjective component to all choices.⁴⁰ Jack Wiseman observes that once uncertainty is admitted,

It is no longer possible . . . to interpret the opportunity-cost problem as one of scarcity alone, to be solved by a choice between alternative factor inputs and product outputs with all prices known. That is, opportunity cost is no longer a simple question of summation and comparison of known data. Prices and other variables have to be estimated: opportunity-cost decisions involve uncertainty (and therefore judgement) as well as scarcity. The cost problem now arises as a *choice between alternative plans of action*, i.e. a choice between a series of estimates of the outlays likely to be incurred and the revenues likely to be obtained as a result of the adoption of particular courses of action.⁴¹

Attitudes towards uncertainty and risk will cause individuals to make different choices in different situations. It is impossible to know which decision is the efficient decision at the time the individual chooses, other than to assume that the individual was making his optimal decision given the situation in which he found himself. Subjective evaluations regarding the information confronting the individual will result in different conclusions. Only in the act of choosing, however, can the preferred plan for each individu-

39. See R.H. Coase, *Business Organization and the Accountant*, in L.S.E. ESSAYS, *supra* note 20, at 99, 103 ("[C]osts and receipts cannot be expressed unambiguously in money terms since courses of action may have advantages and disadvantages which are not monetary in character, because of the existence of uncertainty and also because of differences in the point of time at which payments are made and receipts obtained.").

40. See *id.* at 104 ("There is no one decision which can be considered to maximize profits independently of the attitude of risk-taking of the businessman."); see also SOWELL, *supra* note 19, at 61 (The cost of a risk is as subjective as other costs because there "are numerous gradations of individual concern for a given risk, and therefore a different psychic cost paid in carrying that risk, or different financial costs paid to reduce that risk.").

41. Jack Wiseman, *Uncertainty, Costs, and Collectivist Economic Planning*, in L.S.E. ESSAYS, *supra* note 20, at 234-35 (emphasis added). Wiseman also notes that if a third party were to attempt to measure the cost of a decision when it was actually made, he would have to try to consider estimations of the foregone alternative revenues that would have been generated by the various alternative (rejected) plans, a difficult task at best.

al be discovered. Maintaining individuals' expectations will allow them to pursue their various ends most efficiently.

B. Unanimity as Efficiency

1. Subjectivism and Unanimity as Efficiency

The problem of subjective value disappears when individuals voluntarily trade in the market. In market transactions, all individual trades can be considered to be efficient.⁴² Individuals willingly trade one good for another, demonstrating that they value the acquired goods more highly than those surrendered. Both trading parties are better off, or at least no worse off, after the trade than before, thus satisfying the criteria of Pareto efficiency. Third parties need not evaluate the trade to determine its efficiency because its unanimous acquiescence attests to its efficiency. Moreover, all costs and benefits are internalized by both trading parties. Indeed, the virtue of the market economy is that wholly private trades can be made without the consent of the community at large.⁴³

For collective decisions, the implicit assumption of unanimity breaks down, as it is difficult to bring all concerned parties into agreement on a collective choice. Because all forms of cost are subjective, it is impossible for a third party to aggregate individual preferences into a single efficient choice.⁴⁴ Unanimous agreement

42. See LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 312 (rev. ed. 1963) (discussing the selection function of markets); James M. Buchanan, *Rights, Efficiency, and Exchange: The Irrelevance of Transaction Cost*, reprinted in *ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY* 161 (Robert D. Tollison & Viktor J. Vanberg eds., 1987) [hereinafter *ECONOMICS*] (arguing that market outcomes are efficient).

43. James M. Buchanan, *Social Choice, Democracy and Free Markets*, reprinted in *ECONOMICS*, *supra* note 42, at 179, 179-80 ("The market exists as a means by which the social group is able to move from one social state to another as a result of a change in environment without the necessity of making a collective choice.").

44. See James M. Buchanan, *Politics, Property, and the Law: An Alternative Interpretation of Miller et al. v. Schoene*, 15 *J.L. & ECON.* 439, 446 (1972) ("If so much as one person in the community is harmed, there is no insurance that the damage he suffers may not outweigh the benefits or gains to all other persons in the group."). According to De Alessi and Staaf, the view that the development of common law rules as a collective auction generating efficient rules

[seems to imply] that any actual or potential plaintiff (or defendant) obtaining a new rule (A) values it more than any actual or potential defendant (or plaintiff) values the old rule (B). Some defendants, however, may value B more than some plaintiffs value A. If precedent (B) is overturned because plaintiffs valued

by all parties, therefore, must remain the benchmark for the determination of efficiency.⁴⁵ Efficiency must be approached through an exchange framework—what individuals would actually choose—rather than maximization framework—maximizing some collective outcome.⁴⁶ The efficient solution to a collective problem is that which garners universal acceptance.⁴⁷ More precisely, unanimity is the only guide to Pareto efficiency. Efficiency is the summation of all the individual trades that individuals feel will leave them better off, with all such possible trades executed.⁴⁸

A more than *their* (paired) defendants valued *B* in a majority of the suits over time, it does not follow that the move from *A* to *B* is even Pareto efficient. If *A* and *B* were actually placed on a *collective* auction block (with a collapse in time so that all actual and potential participants to the disputes were present) and side payments were allowed, it is possible that a minority of the defendants would value *B* more than the majority of the plaintiffs value *A* and outbid the majority.

De Alessi & Staaf, *supra* note 15, at 115 (emphasis in original).

45. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF A CONSTITUTIONAL DEMOCRACY* 88 (1962) (observing that the unanimity “decision-making rule acquires a unique position in our whole analysis which suggests that if costs of decision-making could be reduced to negligible proportions, the rational individual should always support the requirement of unanimous consent before political decisions are finally made”).

46. BUCHANAN, *supra* note 4, at 7 (explaining that the best predictive model of monopoly behavior “is one that generates an expected price-output equilibrium”); James M. Buchanan, *What Should Economists Do?*, reprinted in *ECONOMICS*, *supra* note 42, at 26 (arguing that economists have no special ability to determine human behavior).

Hayek also sees justice in essentially procedural terms, as requiring predictability and equality in the sense of the equal application of abstract rules regardless of circumstance: “[J]ustice is not concerned with the results of the various transactions but only with whether the transactions themselves are fair.” 1 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 141 (1973) [hereinafter HAYEK, *LAW, LEGISLATION* 1973]; see also FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 205-10 (1960) (offering further elaboration on Hayek’s view of justice).

Hayek also criticizes the concept of “end-state” standards of justice in 2 FRIEDRICH A. HAYEK, *LAW, LEGISLATION, & LIBERTY* 68-69 (1976) [hereinafter HAYEK, *LAW, LEGISLATION* 1976]. Note, however, that an emphasis on the procedural content of the rule of law does not eliminate concern about all substantive ends of law. Indeed, procedural content may be more complementary to some substantive standards than others. See Randy E. Barnett, *Foreword: Can Justice and the Rule of Law Be Reconciled?*, 11 *HARV. J.L. & PUB. POL’Y* 597, 599 (1988) (explaining how “the conflict between justice and the rule of law may be resolved by determining a specific content of each value that addresses these more fundamental social problems”).

47. See Knut Wicksell, *A New Principle of Just Taxation*, reprinted in *CLASSICS IN THE THEORY OF PUBLIC FINANCE* 72, 73 (R.A. Musgrave & A.T. Peacock eds., 1959) (describing voluntary consent and unanimity in terms of “tax justice”).

48. BUCHANAN, *supra* note 4, at 62-63. As Buchanan argues, “[i]f only individual evaluations are to count, and if the only source of information about such evaluations is the revealed choice behavior of individuals themselves, then no change could be consid-

Since the values of society "do not exist apart from individual values in a free society, consensus or unanimity (mutuality of gain) is the only test which can insure that a change is beneficial."⁴⁹ Therefore, it is not enough to rely on a Kaldor-Hicks standard⁵⁰ lacking actual compensation.⁵¹ Efficiency can only result from the actual completion of the exchange of rights accepted by unanimous consent.⁵² As a result, compensation to "losers" *must* be paid to maintain the unanimity benchmark.⁵³ The efficiency of collective rules only has meaning within a unanimity framework.

The role of the judge-as-economist is to try to fashion a rule that will meet with the unanimous consent of those affected, rather than what the judge perceives to be the efficient rule.⁵⁴ Often the two will be the same, but not always. The judge's perception of efficiency and the community standard of efficiency will diverge

ered 'efficient' until and unless some means could be worked out to bring all persons (and groups) into agreement." *Id.*; see also BUCHANAN & TULLOCK, *supra* note 45, at 92 (arguing that the economist is "silent" on collective action outside of the Pareto rule).

49. James M. Buchanan, *Positive Economics, Welfare Economics, and Political Economy*, 2 J.L. & ECON. 124, 137 (1959).

50. Kaldor-Hicks efficiency requires "not that all be indifferent or better off, but that those who are better off are better off by enough to compensate those who are worse off for the harm the change causes them." Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1002 (1995).

51. Posner has been an ardent advocate of the usefulness of a Kaldor-Hicks standard of efficiency. See POSNER, *supra* note 5, at 12-13. For a criticism of this approach, see Coleman, *supra* note 18, at 116.

52. If actual compensation is not paid, then a third-party observer must aggrandize the power to pass judgment on whether compensation could have potentially been paid. In doing so, the third party observer will tend to substitute his preferences for those affected by the proposed action. See Buchanan, *supra* note 49, at 129 (arguing the preferences of a third party will render the Pareto rule inapplicable).

53. Compensation serves as a check by minorities against tyranny by the majority. The prohibition of the taking of individual property for public use without just compensation is an application of the unanimity principle. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 15-16 (1985); see also Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1727 (1984) (arguing that compensation ensures a public value is being served).

54. See BUCHANAN & TULLOCK, *supra* note 45, at 93-94. Buchanan states,

The welfare or political economist may construct operational propositions about specifically proposed policy changes; he may advance a proposal as "presumed Pareto-optimal." This proposal then takes the form of a hypothesis subject to testing, subject to conceptual refutation. The test lies in the degree of support that the proposal obtains. The attainment of consensus in support of the change would lend support to the hypothesis; failure would tend to refute the hypothesis.

Id.; see also Buchanan, *supra* note 49, at 129 (arguing the preferences of a third party will render the Pareto rule inapplicable).

because the judge's evaluation of the trade-offs that a society should make will be limited by his own subjective interpretation of the optimal rule.⁵⁵ Because there is no objectively measurable social welfare function, the final efficiency of an action can be determined only through the unanimous acceptance of those affected. As Buchanan argues,

Utility is measurable, ordinally or cardinally, only to the individual decision-maker. It is a *subjectively* quantifiable magnitude. While the economist may be able to make certain presumptions about "utility" on the basis of observed facts about behavior, he must remain fundamentally ignorant concerning the actual rankings of alternatives until and unless that ranking is revealed by the overt action of the individual in choosing.⁵⁶

It is irresponsible for a third-party decision-maker to impose a policy that he considers to be the "efficient" policy for the dispute at hand.⁵⁷ The judge cannot possibly be aware of the subjective links that individuals have with each other, links conditioned by the rules that define the status quo. As a result, the judge-as-economist should attempt to derive a rule that will be acceptable to all, rather than the one he believes to be the best one for the society to adopt.⁵⁸ "The conceptual test is *consensus* among members of

55. See Buchanan, *supra* note 49, at 126. Buchanan explains that,

"Efficiency" in the sense of maximizing a payoff or outcome from the use of limited resources is meaningless without some common denominator, some value scale, against which various possible results can be measured. To the individual decision-maker the concept of an "efficiency criterion" is a useful one, but to the independent observer the pitfalls of omniscience must be carefully avoided. The observer may introduce an efficiency criterion only through *his own estimate of his subjects' value scales*. Hence the maximization criterion which the economist may employ is wholly in terms of his own estimate of the value scales of individuals other than himself.

Id. (emphasis added).

56. *Id.* (emphasis in original).

57. See Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 647 (1980) (arguing that broad legal rules have a greater ethical appeal than narrow legal rules).

58. For further explanation, see Buchanan, *supra* note 49, at 134:

The approach adopted here is based upon the idea that no "social" values exist apart from individual values. Therefore, the political economist, instead of choosing arbitrarily some limited set of ethical norms for incorporation into a "social welfare function," searches instead for "social compromises" on particular issues Whereas the "social welfare function" approach searches for a

the choosing group, not objective improvement in some measurable social aggregate."⁵⁹

Legal rules condition the ways in which individuals pursue their various ends.⁶⁰ No judge can be fully aware of how legal rules enter into individual decision-making. In particular, expectations of future behavior are formed by legal rules. Changing the rules also changes these expectations in an unpredictable manner. The unanimity benchmark assures that legitimate expectations will not be disrupted by a dramatic change in the legal environment. Because the judge cannot be aware of the different ways legal rules enter into personal subjective utility functions, he is bound to the unanimity rule that preserves a variety of ends rather than the attainment of an arbitrarily imposed social welfare function.

2. Unanimity and Law and Economics Scholarship

Efficiency as unanimity provides a response to one of the most prevalent criticisms of law and economics scholarship: the rational-actor model fails to fully consider the many different influences that contribute to human action.⁶¹ Robert Ellickson, for instance, has suggested that the rational-actor model should be enriched

critera independent of the choice process itself, presumably with a view toward influencing the choice, the alternative approach evaluates results only in terms of the choice process itself.

59. *Id.* at 127 (emphasis added).

60. For example, Fuller defines law as "the enterprise of subjecting human conduct to the governance of rules," showing the guiding nature of laws. LON L. FULLER, *THE MORALITY OF LAW* 74 (1969). Similarly, Posner describes law as a "set of prices" giving individuals incentives to behave in certain manners. POSNER, *supra* note 5, at 242. Hayek argues that adherence to the Rule of Law means

that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's affairs on the basis of this knowledge. . . . [Laws] are intended to be merely instrumental in the pursuit of people's various individual ends They could almost be described as a kind of instrument of production, helping people to predict the behavior of those with whom they must collaborate, rather than as efforts toward the satisfaction of particular needs.

HAYEK, *SERFDOM*, *supra* note 32, at 72-73.

61. See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 *CHI-KENT L. REV.* 23, 35-54 (1989) [hereinafter Ellickson, *Bringing Culture*] (urging practitioners of law and economics to look to psychology and sociology to enrich economic analysis); see also Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 *YALE L.J.* 611, 627 (1989) [hereinafter Ellickson, *Case for Coase*] (stating that the rational person often bases decisions on informal norms, rather than legal rules).

through the inclusion of psychological and sociological explanations of action.⁶²

While criticisms of the rational-actor model are warranted, Ellickson provides no hierarchy for deciding which approach should predominate when the various approaches conflict. As a result, any of the disciplines that he would subordinate in a given situation could rightfully claim that reliance on the elevated discipline is insufficiently inclusive. Thus, Ellickson's call to open the door to other disciplines merely confuses matters.

Ellickson's concerns can be eliminated by focusing on individual's preferences as revealed through voluntary exchange. His attempt to provide alternative explanations fails because it is impossible for any third party to distinguish the motivations for human action: this is the essence of the subjectivity postulate.⁶³ The unanimity standard abandons the quest for an over-arching explanation of human motivations. Human motivations are simply unknowable. Similar to Robert Bork's conclusion that a judge who cannot ascertain the meaning of a legislative provision should not attempt to invent one,⁶⁴ we should conclude that if our understanding of human motivations is cloudy, we are not justified in inventing explanations on the ground that there must be *some* motivation. The strength of the unanimity approach is that it does not attempt to determine *how* people decide the ends they want to pursue, but focuses only on *what* they decide to do, as revealed through their actions.⁶⁵

Viewing economics as exchange, rather than the maximization of a constrained utility problem, answers Ellickson's charges. As Buchanan comments, the exchange notion of efficiency "does not

62. Ellickson, *Bringing Culture*, *supra* note 61, at 35.

63. See Buchanan, *supra* note 42, at 153-56 (postulating that voluntary exchange allows for allocative efficiency).

64. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990). Bork explains that even judges need written material to work with:

The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with. There being nothing to work with, the judge should refrain from working. A provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the ground that there must be something under it.

Id.

65. In this sense the unanimity approach draws support from the classical economists. See BUCHANAN, *supra* note 4, at 10-11 (offering the unanimity approach).

require that economic value be the only argument in the preference function or even that this argument be dominant in influencing behavior."⁶⁶ The unanimity standard allows each individual to subjectively rank the alternatives open to him, regardless of the rankings' origins. We can see his action, we need not read his mind. In sum, unanimity is efficiency.

II. UNANIMITY IN LEGISLATION AND THE COMMON LAW CONTRASTED

A. *Unanimity Generally*

1. Unanimity with No Transaction Costs

In a world without transaction costs, legislative and common law approaches are equally capable of reaching unanimity.⁶⁷ As Coase demonstrated, when transaction costs and income effects are absent, the common law serves as an efficient institutional arrangement by establishing an initial allocation of rights and enforcing contractual agreements allow those rights to be traded.⁶⁸ Implicit in Coase's model is a standard of unanimity. All of the relevant parties to a transaction are involved and the agreement of all is necessary for the transaction to occur. There are no third-parties left out of the transaction because all affected people are included in the negotiations.⁶⁹ Externalities are internalized by bargaining and finally by a contract (costlessly arrived at and costlessly enforced) specifying the use of the resource in question. The courts simply act to create the initial assignment of property rights, but do not affect the final allocation of rights to resources. Indeed, parties remain free to contract around common law rules, thus assuring their unanimous agreement to a transaction.⁷⁰

The implicit unanimity rule can be given explicit content in the process of legislation. If the relevant legislative group is the same as the group affected by the reciprocal externality in Coase's model, then legislative action arrived at through unanimous vote is

66. *Id.* at 28.

67. Buchanan, *supra* note 42, at 62.

68. Coase, *supra* note 2, at 1-44. For an application of the unanimity standard of efficiency to Coase's model, see Buchanan, *supra* note 42, at 153-68.

69. For a discussion of the inclusion of third parties in common law suits, see Part IV.

70. De Alessi & Staaf, *supra* note 15, at 112.

analogous to the unanimity guaranteed by Coase's market arrangement.⁷¹ As Buchanan observes, "On this basis, we can interpret the 'trades' among the parties [in Coase's model] as being analogous to collective or governmental decisions reached under the operation of a Wicksellian rule of unanimity."⁷² Within the legislative framework, Coasian bargaining takes place through the process of logrolling. External costs associated with certain property rights arrangements will be compensated through the side-payments given by logrolling. In both cases, property rights will flow to their highest valued uses. Coase begins his analysis from individual actions that spill over onto third parties; Buchanan begins with the collective and narrows down to the relevant private actors.

In a world with no transaction costs or income effects, either approach is efficient because unanimity is attainable. The surplus generated through voluntary exchange will create a positive social product, although the distribution will be uncertain. Threats of strategic bargaining that could otherwise dissipate these possible social gains will be mitigated by the adoption of appropriate decision-making rules.⁷³ Government in this model is an extension of the market, an instrumentality for internalizing externalities.⁷⁴ Government can be viewed as a super-firm⁷⁵ arising indigenously from the market to efficiently organize team production rather than an external force imposed upon the market.⁷⁶

71. Robert J. Staaf & Bruce Yandle, *Collective and Private Choice, Constitution, Statutes and the Common Law*, in *ECONOMIC ANALYSIS OF LAW—A COLLECTION OF APPLICATIONS* 254 (Wolfgang Weigel ed. 1991); see also James M. Buchanan, *The Coase Theorem and the Theory of the State*, 13 *NAT. RESOURCES J.* 579, 583 (1973) (explaining that government intervention is unnecessary when political unanimity is achieved according to Coase's theorem on allocation neutrality).

72. Buchanan, *supra* note 71, at 583.

73. Buchanan, *supra* note 42, at 156-57. Buchanan comments,

The agreement test for efficiency may be elevated or moved upward to the stage of institutions or rules, as such. Agreement on a change in the rules within which exchanges are allowed to take place would be a signal that patterns of outcomes reached or predicted under the previously existing set of rules are less preferred or valued than the patterns expected to be generated under the rule-as-changed. Hence, the new rule is deemed more efficient than the old. The discussion and agreement on the change in the rules here is analogous to the trade that takes place between ordinary traders in the simple exchanges made under postulated rules.

Id. at 159.

74. See Buchanan, *supra* note 71, at 583 (discussing theory of government as the instrument by which individuals achieve joint objectives).

75. Coase, *supra* note 2, at 17.

76. See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 397 (1937)

Thus, in its broadest terms, in a world without transaction costs and income effects, the legislative process with unanimous voting rules and the common law/market approach are identical as far as guaranteeing an efficient outcome. If transaction costs are positive or income effects are present, however, the guarantee of allocational neutrality may break down. The relevant question then becomes which of the two institutional approaches will most closely approximate the resource allocation that would result if the world were free of "friction." The central concern is the effect of transaction costs on the efficiency results of the two alternative institutional approaches, ignoring the distributional questions raised.⁷⁷

2. Unanimity with Positive Transaction Costs

Large-number externalities are problematic because of the high transaction costs involved in negotiating between huge numbers of parties affected in diverse ways by the externality. More precisely, the problem is how to weigh the various social benefits generated by allowing varying levels of the externality. As Bruce Yandle observes, "Cleaner air [is] not a free good. One man's pollution [is] symbolic of another's economic opportunity."⁷⁸ Individuals trade off environmental quality against other goods at varying rates, depending on their preferences. The problem is trying to determine

(arguing that the size of the firm increases as new inventions reduce spatial distribution of production factors and bring those production factors closer together). As Buchanan comments,

In this model, collective or governmental decision-making remains equivalent to freely-negotiated voluntary exchange. Hence, there is little or no cause for concern about "governmental intervention" as such, because any action that might properly be classified as "governmental" would not emerge unless all parties agree on the contract terms. . . . [T]he contractual process would lead to allocational results that are both efficient and invariant.

Buchanan, *supra* note 71, at 584.

77. But note that a movement from market mechanisms to less-than-unanimity political apparatuses serves as a type of "income effect" in favor of the poorer members of society, by increasing their power to obtain goods and services. The inequalities in power that characterize market relationships yield to equality in the political arena. See Buchanan, *supra* note 42, at 185. The boost to equality in power can serve as an income effect because political power provides the legislator with "a spigot that allows him to tap into other people's property, money, and liberty. The legislator that casts a vote on an appropriations bill is spending not only his own wealth, but everyone else's." Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, in *ECONOMIC LIBERTIES*, *supra* note 32, at 40.

78. YANDLE, *supra* note 7, at 51.

what institutional structure better reconciles these differing preferences. The policy challenge lies in trying to replicate the unanimous contract that they would arrive at if bargaining were possible.

Introducing transaction costs exposes problems confronting each of the institutional approaches. The dilemma of the common law with regard to pollution is coping with third parties not directly involved in the case in question. The interests of the disparate public will be underrepresented before the court in balancing the costs and benefits of continued pollution.⁷⁹ Legislative approaches suffer from the opposite problem: the possibility of overrepresenting third parties not directly involved with the issue at hand.⁸⁰ Introducing less-than-unanimity rules in response to positive transaction costs opens the possibility of inefficient or non-unanimous outcomes, where some individuals are excluded from sharing in the benefits generated by social action.

In short, the trade-off between the common law and legislation is a trade-off between the potential for underrepresentation or overrepresentation of third parties, respectively. Under the common law, the concerns of third parties might be ignored; whereas legislative approaches risk the dominance of third party concerns over those directly affected.

The alleged superiority of the legislative approach to the common law has been thoroughly argued elsewhere.⁸¹ As a result, this Article does not explore all of the costs and benefits of the two alternative approaches. Rather, it will concentrate on the factors that obstruct the legislative attempt to achieve unanimity and those that aid the common law. Both the supposed institutional superiority of legislation and the institutional inferiority of the common law will be questioned. The obvious strengths of legislation and weak-

79. See JAMES E. KRIER, ENVIRONMENTAL LAW AND POLICY 216-17 (1971). Krier states that

Environmental problems are almost always diffuse in their impact: a huge number of persons may be injured by the pollution but each to only a small degree. Though total social costs may be very high, individual damage will ordinarily be so low as to discharge an individual from prosecuting a lawsuit.

Id.

80. See Peter H. Aranson & Peter C. Ordeshook, *Public Interest, Private Interest, and the Democratic Polity*, in THE DEMOCRATIC STATE 87, 105-06 (Roger Benjamin & Stephen L. Elkin eds., 1985) (discussing how jurisdictional control determines who is affected by legislation).

81. See, e.g., BAUMOL & OATES, *supra* note 1, at 10-11 (indicating that in situations involving many people, a legislative approach is generally preferred because the likelihood of voluntary negotiation is small).

nesses of the common law have been detailed repeatedly, leading to the widespread belief in the necessity of legislative action for pollution problems. Nonetheless, a realistic comparison of the two suggests that the common law approach may be more efficient at achieving the unanimity benchmark—thus, implying its applicability to a wider variety of situations than previously thought.

B. *Static Unanimity*

The introduction of transaction costs makes it impossible to secure actual unanimous consent to the problems caused by externalities. As a result, some collective action must be taken without explicit unanimity present. Thus, implicit unanimity must be the goal. As mentioned, actions may be either essentially private in nature, as with the common law or collective in nature, as with the legislative process. This section looks first at the legislative process and the deleterious efficiency impact of movements away from the unanimity voting rule as a requirement for collective action. Next, the common law's traditional orientation towards unanimity is explored. James Buchanan's model of decision-making under non-unanimous decision-making standards is used to illuminate the distinctions drawn.

1. Efficiency Considerations of Non-Unanimous Voting

When the unanimity requirement for collective decisions is abandoned, governmental action is no longer a more complex version of the voluntary exchange process.⁸² The premise of implicit unanimity, and hence efficiency, that underlies market transactions disappears. Non-unanimous voting rules make it possible to force collective action without the consent of all, because no compensation is paid to those who oppose the action. The presence of subjective cost means that those who are outvoted may actually attach greater value in the aggregate than the majority. The Pareto-Efficient action is not necessarily the one that gains a majority. The proposal that gains the most political votes is not necessarily that which would have gained the most "dollar votes" if put on an auction block.

Legislative action under a non-unanimous voting rule severs the link between the strength of individual preferences and the ability to influence outcomes. The full cost of a decision is not felt by

82. Buchanan, *supra* note 71, at 584.

some individuals because they are able to gain desired goods and services without having to forego options of equivalent value to them. There is no one-to-one correspondence between the costs and benefits of acquiring desired products, as there is in the market.⁸³ As Buchanan notes, the possibility that political action can sever the link between the cost of an action on oneself and others corresponds to the classic definition of an externality.⁸⁴ A different, but still inefficient allocation of resources may result in such a situation just as if no collective action were taken.

The possibility of collective action with less-than-unanimous consent raises the possibility that the legislative course chosen may be less efficient than alternative courses of action. As Buchanan observes,

If decisions that are to be binding over the inclusive group can be made by a subset of this group, there is no guarantee that a particular individual holds against the imposition of net harm or damage. Once his own contractual agreement to the terms of governmental or collective action is dropped as a requirement, an individual can no longer be certain that he will share in the gross gains that governmental action will, presumably, generate. *From this it seems to follow that collective action, motivated by improvement in the positions of members of a decisive coalition smaller than the totality of community membership, need not produce results that are efficient, even with zero transaction costs. Any nonunanimity voting rule, for example, that of simple majority voting, would seem to produce results that may be, in the net, inefficient.*⁸⁵

83. Buchanan, *supra* note 42, at 186.

84. In BUCHANAN & TULLOCK, *supra* note 45, at 89-90, the authors suggest that it is especially surprising that the discussion about externality in the literature of welfare economics has been centered on the external costs expected to result from *private* action of individuals or firms. To our knowledge little or nothing has been said about the *external* costs imposed on the individual by *collective* action. Yet the existence of such external costs is inherent in the operation of any collective decision-making rule other than that of unanimity. Indeed, the essence of the collective-choice process under majority voting rules is the fact that the minority of voters are forced to accede to actions which they cannot prevent and for which they cannot claim compensation for damages resulting. Note that this is precisely the definition previously given for externality.

85. Buchanan, *supra* note 71, at 584-85 (emphasis added).

With respect to large-number externalities such as pollution, severing the costs from the benefits of collective action suggests that one type of inefficiency simply may replace another. Separating influence over results from the costs of those results means that the original underrepresentation of third parties to the externality is replaced by an ability of those only tangentially linked to the matter to dominate the decision process. For example, third parties may vote for stricter pollution regulation when they are hardly affected by the pollution source in question, but feel none of the costs of the action, such as the loss of jobs.

Usually there will not be a perfect relationship between the area affected by the externality and the jurisdiction of the legislative body charged with its regulation. The boundaries of a political jurisdiction will not be coextensive with boundaries of the externality. Either too much or too little of the affected group will be considered by a legislative body. Some of those intensely affected will have no influence on political action against the polluter due to inter-jurisdictional spillovers, such as the downstream recipient of polluted water. Politicians will have little incentive to consider the concerns of individuals outside their districts because they do not vote.⁸⁶ Indeed, a politician's concern for non-constituents could be construed as shirking by his own constituents. Conversely, some people with little concern will still retain a voting right over the use of the environmental resource. In short, political boundaries may be both more inclusive and more exclusive than the group affected by the externality.⁸⁷

As Buchanan shows, if the affected group and the political group taking action are identical, then an efficient result can still be attained.⁸⁸ Side-payments out of the surplus generated by the socially-beneficial action can be paid to the regulator to pursue the optimal policy. The side-payments compensate the regulator for pursuing the socially beneficial policy, rather than his own prefer-

86. See Peter H. Aranson, *Judicial Control of the Political Branches: Public Purpose and Public Law*, in *ECONOMIC LIBERTIES*, *supra* note 32, at 96.

87. Note that the use of "independent" regulatory bodies does not alleviate the problem because their independence is more apparent than real. In reality, regulatory bodies appear to be tightly controlled by elected politicians. As a result, they respond to the same political forces as elected officials. See Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 *CORNELL L. REV.* 43, 55-56 (1988) (arguing that regulatory bodies do not regulate as strongly in the districts of representatives who can influence them as they do in other representatives' districts).

88. Buchanan, *supra* note 71, at 589.

ences. Because the regulator is chosen from within the group, his preferences "count" in the determination of the optimal social policy. If the side-payment exceeds the value the regulator attaches to his preferences, then the efficient action will be taken. If the side-payment is not large enough, then the action was not efficient to begin with because its net social value did not exceed the social cost, when the regulator's preferences are included.⁸⁹

Generally, however, the regulator will be chosen from outside of the affected group, because the externality effects will be spread unevenly across several jurisdictions, while the source of the externality will be concentrated in few jurisdictions. In such a case, the regulator's personal preferences become an (illegitimate) part of the decision-making calculus. Thus, the presumption of efficiency breaks down. The outsider will simply want to know whether the side-payment exceeds the utility he gets from the action. For example, assuming it is efficient to drain a swamp, if the regulator's assessment of its natural beauty exceeds the side-payments that the drainage could generate from social surplus, then the drainage will not occur. If the regulator were drawn from inside the group, the action would be optimal because the strength of his preferences outweighs the possible side-payments. An outsider making the same decision may generate an inefficient outcome because his preferences are not properly relevant to the decision-making calculus.⁹⁰

The extension of Buchanan's model to environmental legislation is straightforward. If those included in the voting group are different than those affected by the pollution, then legislation may not generate an efficient outcome. In its most dramatic form, this inconsistency between political and environmental boundaries can be seen in the ability of the federal government to regulate dispa-

89. *Id.*

90. For further explanation, see *id.* at 590, where Buchanan states,

The question of whether the decision-maker is selected from within or without the initial membership of the group [is] critical If the selection is internal, the project is inefficient under the conditions suggested, and it will not be undertaken under any rights assignment. This is because the person's negative evaluation would be an input in any internal contractual negotiations that might produce an allocative outcome. In this case, the neutrality theorem remains valid. Suppose however, that the bureaucrat is not in the initial group of members. In such case, his own personal evaluation of the project alternatives will not enter and will not affect allocative outcomes when the assignment of rights is limited to initial members. This decision-maker's evaluation will, however, enter as a determinant when he is assigned the rights to choose for the group.

rate regions of the country. Congressmen from Maine have the power to regulate pollution in New Mexico. Outsiders, in this case the residents of Maine, regulate areas whose externalities are Pareto-irrelevant⁹¹ to the residents of Maine.⁹² The residents of Maine may decide that clean air in New Mexico makes them feel good psychologically, or they may simply want to hamper economic competitors who manufacture rival products in New Mexico.⁹³ Indeed, empirical evidence suggests that the power of those from one area to regulate the behavior of those in another has had a profoundly deleterious effect on economic efficiency.⁹⁴ Regulation routinely has been used to transfer wealth from the residents of some parts of the country to others, obviously without unanimous consent.⁹⁵

While less obvious than in national politics, the power of outsiders to pass inefficient regulation applies to local legislation as well. As long as there remains a disparity between political and externality boundaries, there is the possibility that outsiders (those not directly affected by the pollution source) will pass inefficient regulations. Because outsiders can vote their preferences without bearing the costs of their votes, enough weekend fishermen may find it advantageous to stop the emissions of a paper plant into a river, regardless of whether it is more efficient to use the river for recreational fishing or industrial production. Because the political process will not accurately reflect the costs to those actually affect-

91. A Pareto-irrelevant externality is one in which the value of creating the externality to the creator exceeds the price that the recipients of the externality would be willing to pay to have it internalized. In the example discussed, the residents of Maine are only minimally affected by the externality, and therefore would not want to compensate the residents of New Mexico if it were eliminated. If its elimination is essentially "free" through the political process, then they may vote for its eradication. For a discussion of the distinction between Pareto-relevant and Pareto-irrelevant externalities, see James M. Buchanan & W. Craig Stubblebine, *Externality*, 29 *ECONOMICA* 371 (1962).

92. See BRUNO LEONI, *FREEDOM AND THE LAW* 105 (3d ed. 1991) (explaining that "regulations are enforced upon everybody, including those who never participated in the process of making the regulations and who may never have had notice of it").

93. For a discussion of "rent-seeking" or "special-interest" theory of government, see Part III.

94. See ROBERT W. CRANDALL, *CONTROLLING INDUSTRIAL POLLUTION: THE ECONOMICS AND POLITICS OF CLEAN AIR* 110-30 (1983) (discussing the process by which legislators and regulators transfer environmental rights across regions); B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?*, 23 *ECON. INQUIRY* 551, 551 (1985).

95. Pashigian, *supra* note 94, at 551.

ed, higher-valued jobs could be sacrificed to the aesthetic preferences of lower-valuing weekend users.

Thus, in trying to include third parties in the decision process, the legislative approach risks allowing them to dominate that process. Those who vote will not necessarily internalize all of the consequences of their votes. Trying to induce the polluter to internalize all of the costs of his actions may result in allowing those previously victimized to impose excessive costs on the polluter. The one-to-one correspondence between private and social costs and benefits guaranteed by the unanimity rule breaks down. As a result, deviations from allocational efficiency may result.

2. The Common Law and the Judge as Insider

In contrast to the difficulties of outsiders in the legislative model to interfere with the efficient allocation of property rights, the common law presents a model of the judge as an insider. The judge can internalize the effects of a decision in a manner that the legislator, acting as a representative of a large voting block, cannot. To some degree, the common law reestablishes the link between the costs and benefits of a decision by linking it to the judge personally. The common law judge is a type of residual claimant to the ramifications of his decision. Adam Smith recognized the positive impact the personalized nature of the judicial process would have on judges relative to the more disparate reward system confronting legislators. He observed,

In the republics of ancient Greece, particularly in Athens, the ordinary courts of justice consisted of numerous, and therefore disorderly, bodies of people, who frequently decided almost at random, or as clamour, faction and party spirit happened to determine. The ignominy of an unjust decision, when it was to be divided among five hundred, a thousand, or fifteen hundred people (for some of their courts were so very numerous), could not fall very heavy upon any individual. At Rome, on the contrary, the principal courts of justice consisted either of a single judge, or of a small number of judges, whose characters, especially as they deliberated always in public, could not fail to be very much affected by any rash or unjust decision.⁹⁶

96. 2 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 299 (1976).

The personalized nature of the social scrutiny cast upon judges induces them to consider the needs of the entire community, rather than just those in a given political jurisdiction.

Unlike legislators, common law judges are free to draw the boundaries of those to be considered in a lawsuit to fit the boundaries of those affected. The independence of common law judges isolates them to a large degree from political pressures. As a result, they are responsible to no fixed set of constituents. They are free to consider everyone damaged by an externality, removing the distorting effects of arbitrary political boundaries. The danger of under- or over-inclusion that results from differences between political and externality boundaries is mitigated. The judge has discretion to define the appropriate jurisdiction in each case.

The view of the common law judge as an insider in a community is most strongly advanced in the common law models of F.A. Hayek⁹⁷ and Bruno Leoni.⁹⁸ In their models, the judge draws his authority from an ability to discover a law that exists independently of the will of particular political authorities or the judge, embedded in the customs and expectations of the society in which the judge operates.⁹⁹ As Hayek writes,

It is only as a result of individuals observing certain common rules that a group of men can live together in those

97. For a discussion of Hayek's contribution to legal theory, see LIBERTY AND THE RULE OF LAW, (Robert L. Cunningham ed., 1979), which explains formulations of the ideal rule of law, and the articles collected in *Economic Symposium: F.A. Hayek & Contemporary Legal Thought*, 23 SW. U. L. REV. 507 (1994), which discuss Hayek's political and legal philosophy.

98. For discussions of Leoni's contributions to legal thought, see Peter H. Aranson, *Bruno Leoni in Retrospect*, 11 HARV. J.L. & PUB. POL'Y 661 (1988), which explains Leoni's views on freedom, law, and legislation, and Leonard P. Liggio & Tom G. Palmer, *Comment: Freedom and the Law: A Comment on Professor Aranson's Article*, 11 HARV. J.L. & PUB. POL'Y 713 (1988), which notes that Leoni's work "offers insights into the proper relationship between law, legislation, and liberty."

99. Hayek argues that common law rules

are *discovered* either in the sense that they merely articulate already observed practices or in the sense that they are found to be required complements of the already established rules if the order which rests on them is to operate smoothly and efficiently. They would never have been discovered if the existence of a spontaneous order of actions had not set the judges their peculiar task, and they are therefore rightly considered as something existing independently of a particular human will

HAYEK, LAW, LEGISLATION 1973, *supra* note 46, at 123 (emphasis in original).

orderly relations which we call a society. It would therefore probably be nearer the truth if we inverted the plausible and widely held idea that law derives from authority and rather thought of all authority as deriving from law—not in the sense that the law appoints authority, but in the sense that authority commands obedience because (and so long as) it enforces a law presumed to exist independently of it and resting on a diffused opinion of what is right.¹⁰⁰

In Hayek's model, the judge is the consummate insider. He is the living embodiment of the texture of customs and expectations that define the community from which he draws his authority. The judge is a type of engineer applying pre-existing rules and expectations to find the right decision in a given case.¹⁰¹ For Hayek and Leoni, law is not made, rather it is found or discovered in the fabric of society.¹⁰² The common law judge's responsibilities are different from the duties that legal realists assign judges, namely to create the efficient or just policy. Instead, the judge is little more than an expert trained in articulating the tacit beliefs and expectations that undergird the ongoing order of the community; the judge's responsibility is to discover an existing law, not create the law anew.¹⁰³

100. *Id.* at 95. Rizzo describes the development of common law:

The Law and the courts are not creations of the sovereign but rather are evolved institutions within which all individuals, including the sovereign, must operate. The common law antedates legislation, and it draws on preexisting implicit societal rules or customs, as well as on previous judicial decisions. It is by deference to this preexisting opinion that the common law judge can lay claim to authority and legitimacy. People respect his judgments because, in part, they see in those judgments the crystallization of commonly held moral views.

Rizzo, *supra* note 32, at 228; see also FULLER, *supra* note 60, at 138 ("There is no doubt that a legal system derives its ultimate support from a sense of its being 'right.'"); JOSEPH DE MAISTRE, *Essay on the Generative Principle of Political Constitutions*, in THE WORKS OF JOSEPH DE MAISTRE 25-26 (1971) (expressing the idea that laws and rights exist naturally).

101. HAYEK, LAW, LEGISLATION 1973, *supra* note 46, at 119-20.

102. *Id.* at 78; LEONI, *supra* note 92, at 84 ("[T]he law was never to be submitted, as a rule, to the arbitrary will or to the arbitrary power of any legislative assembly or of any one person."); *id.* at 143 ("Law was conceived of, not as something enacted, but as something existing, which it was necessary to find, to discover."); see also Aranson, *supra* note 98, at 673 (arguing that laws conform to social behavior); Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON., 215, 215-16 (1994).

103. HAYEK, LAW, LEGISLATION 1973, *supra* note 46, at 78. Hayek describes the difference between creating new law and applying old law:

The model of the common law described by Hayek and Leoni implies that the law is, and should be, a result of local preferences and traditions. The society in which the judge operates is an ongoing spontaneous order of self-reinforcing expectations and customs. The appropriate decision in a given case will derive from the constraints of local norms and circumstances that lead the judge to "draw his conclusions not exclusively from articulated [rules] but from a sort of situational logic, based on the requirements of an existing order of actions which is at the same time the undesigned result and the rationale of all those rules which he must take for granted."¹⁰⁴

The ongoing coherence of the common law contrasts with the periodic nature of legislative rule-making. The judge takes pre-existing rules and applies them to new cases.¹⁰⁵ The legislative process, on the other hand, is characterized by the creation of new rules for each circumstance.¹⁰⁶ While proponents of legislation argue that it can be used to force homogeneity in situations where no such agreement is present,¹⁰⁷ the attempted imposition of uniformity where none is present is often inefficient,¹⁰⁸ if not

[A]rticulation will often become necessary because the "intuitive" knowledge may not give a clear answer to a particular question The task will be regarded as one of discovering something which exists, not as one of creating something new, even though the result of such efforts may be the creation of something that has not existed before.

Id.

104. *Id.* at 115.

105. SIR HENRY MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 26 (Dorset Press 1861).

106. See Liggio & Palmer, *supra* note 98, at 716 ("Legislation is inherently based on policy—the pursuit of specifically intended outcomes. Common law, in contrast, addresses the needs of parties coming before judges to seek resolution of specific conflicts, or redress of specific grievances.").

107. See, e.g., LEONI, *supra* note 92, at 17-18. Leoni criticizes the justification of legislation:

The advocates of inflated legislation at the present time have drawn from the reasonable assumption that no society is centered on exactly the same convictions as other societies and that, moreover, many convictions and feelings are not easily identifiable within the same society the very peculiar conclusion that *therefore* what real people decide or do not decide within a society should be neglected altogether and replaced by what any handful of legislators may happen to decide for them at any time. In this way, legislation is conceived as an assured means of introducing homogeneity where there was none and rules where there were none.

108. FULLER, *supra* note 60, at 1322. Hayek argues that attempts to lead the evolution of the law will often be frustrated as the new law will be changed to fit old standards,

impossible.¹⁰⁹ Indeed, the introduction of legislation may disrupt

rather than the intended displacement of the old law:

Every lawyer will, when he has to interpret or apply a rule which is not in accord with the rest of the system, endeavour so to bend it as to make it conform with the others. The legal profession as a whole may thus occasionally in effect even nullify the intention of the legislator, not out of disrespect for the law, but, on the contrary, because their technique leads them to give preference to what is still the predominant part of the law and to fit an alien element into it by so transforming it as to make it harmonize with the whole.

HAYEK, LAW, LEGISLATION 1973, *supra* note 46, at 66. In short, the content of written laws are severely constrained by the consensus on legal principles that underlies the community. Leoni compares the origin and evolution of law to the creation of language:

Law, . . . like language, is a spontaneous expression of the minds of the people concerned. Grammarians . . . may have a great influence on the language, and the rules they work out may well react on the linguistic usage of their country, but grammarians can not create a language—they are simply given it. People who create languages are usually unsuccessful What these purported languages lack is people behind them. In the same way, one could not create a universal or even a particular law if no people were behind it, with their convictions, habits and feelings. Law, like language, is not a gadget that a man can contrive at will. Of course one can try. But according to the whole experience we have, he can only succeed within very narrow limits or he doesn't succeed at all.

LEONI, *supra* note 92, at 218. Similarly, Robert Sugden observed that "if a law is to work it must not go too much against the grain of the forces of spontaneous order." ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE 5 (1986). Another author notes,

The man of the system . . . does not consider that . . . in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might chose [sic] to impress upon it. . . . If they are opposite or different, the game will go on miserably, and the society must be at all times in the highest degree of disorder.

ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 233-34 (D.D. Raphael & A.L. Macfie eds., 1982).

109. See De Alessi & Staaf, *supra* note 15, at 116. De Alessi & Staff describe the flexibility in the common law:

In general, individuals are permitted to contract around the common law, because the common-law rules are the means for resolving private disputes rather than the outcomes of collective decisions (e.g., statutes). That is, the market process allows individuals to exchange property rights without requiring the consent of some fraction of the collective body. Accordingly, the common law as a process makes it easier for individuals to be different.

Id. The cost of imposed uniformity through statute law is the foregone trades that could have taken place if individuals were free to contract-around the rule. Similarly,

The choice of a new statute (social contract) means forgoing the common law whereas the choice of a contract within the common law does not mean society forgoes statute law. Thus collective choice transactions have an opportunity cost of fewer market transactions. This opportunity cost may be what Hayek had in

settled customs and existing rules, introducing chaos and rivalry into once orderly systems.¹¹⁰

Common law judges do not try to impose homogeneity where it is not present. They respond to the norms and expectations of the community as given, rather than affirmatively trying to mold them. Established rules are already embedded in the expectations and institutions of the society and those who disagree can contract around them.¹¹¹ When contracting around the old rule becomes so prevalent that investing resources in changing the rule is less costly than the mounting transaction costs of repeatedly contracting around the rule and enforcing those contracts, then the rule will change to match what individuals have been doing.¹¹² As a result, changes in the law lag behind changes in the expectations, customs, and other institutions that condition social interaction.¹¹³ Hayek suggests,

mind when discussing interference with the market order: “. . . the more indirect and remote effects will mostly be unknown and will therefore be disregarded.”

Staaf & Yandle, *supra* note 71, at 260. Abrogating the common law in favor of legislative solutions will have an opportunity cost: “The beneficial effect of State intervention, especially in the form of legislation, is direct, immediate, and, so to speak, visible, whilst its evil effects are gradual and indirect, and lie out of sight Hence the majority of mankind must almost of necessity look with undue favor upon government intervention.” A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION DURING THE NINETEENTH CENTURY 257 (2d ed. 1914).

110. LEONI, *supra* note 92, at 18. Regarding the potential evils of legislation, he notes,

Legislation may have and actually has in many cases today a negative effect on the very efficacy of the rules and on the homogeneity of the feelings and convictions *already prevailing* in a given society. For legislation may also deliberately or accidentally disrupt homogeneity by destroying established rules and by nullifying existing conventions and agreements that have hitherto been voluntarily accepted and kept.

Id. (emphasis in original).

111. De Alessi & Staaf, *supra* note 15, at 116. Unanimity is further guaranteed by the opportunity to contract around the entire common law *system* by agreeing to alternative court systems through such rivals as arbitration, other state courts, or specialized courts (such as the law merchant). This feature of the common law, as well as the impact of competing court systems on the “efficient” evolution of the common law is discussed in Todd J. Zywicki, *Why Do Judges Follow Precedent? The Lessons of History* (unpublished manuscript, on file with author). For a historical discussion of the operation and development of competing court systems, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

112. De Alessi & Staaf, *supra* note 15, at 110.

113. FULLER, *supra* note 60, at 64; Bruce L. Benson, *The Spontaneous Evaluation of Commercial Law*, 55 S. ECON. J. 644, 648 (1989).

To be legitimized, new rules have to obtain the approval of society at large—not by a formal vote, but by gradually spreading acceptance. . . . [I]t is likely that few endeavours by judges to improve the law have come to be accepted by others unless they found expressed in them what in a sense they “knew” already.¹¹⁴

The judge's role as the voice of a community's underlying consensus gives the common law process an orientation towards unanimity that is lacking in legislative procedures. According to Hayek, the common law judge was the ultimate insider passively responding to changes in the community around him. His task was to find the law, not to make it.¹¹⁵ By comparison, once the legislative process abandons the unanimity benchmark, systemic incentives are created to present proposals that meet with bare majority support, rather than consensus.¹¹⁶

The common law judge holds a unique position to represent everyone in the community, rather than just a transient majority coalition in a legislature. While many legislative proposals will reflect the concerns of outsiders to a given dispute, the common law judge may be in a better position to discern the efficient rule in each case (the rule that meets with a consensus) because he is an insider to the community. A judge may be in a better position to respond flexibly to the needs of a local community than legislators beholden to their electoral coalitions. Judges sensitive to the unique patterns of preferences and constraints facing the members of a community may be better able than any legislative body to fashion consensus for a rule.

114. HAYEK, *LAW, LEGISLATION* 1973, *supra* note 46, at 118. Likewise, Fuller notes that “over much of its history the common law has been largely engaged in working out the implications of conceptions that were generally held in the society of the time.” FULLER, *supra* note 60, at 50.

115. HAYEK, *LAW, LEGISLATION* 1976, *supra* note 46, at 119-21; LEONI, *supra* note 92, at 143.

116. See 3 FRIEDRICH A. HAYEK, *LAW, LEGISLATION & LIBERTY* 4-5 (1979) (suggesting that the legislative process requires legislators to bribe voters in order to achieve the requisite majority); SURI RATNAPALA, *WELFARE STATE OR CONSTITUTIONAL STATE?* 15 (1990) (noting the ability of legislatures to “manipulate electorates” by making promises to the voters in order to build a majority); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 267-78 (1980) (discussing infirmities in the legislative process including participation in the elective process, knowledge and expertise of legislators, and the influence of special interests); Buchanan, *supra* note 49, at 136 (warning of the temptation to undercompensate damaged minorities to make the majority more receptive to proposal).

In practice, the judge's decision-making process will be similar to the cost-benefit analysis as applied to environmental decision-making.¹¹⁷ His mission is comparable to that suggested by Buchanan:¹¹⁸ to develop rules that will meet with the unanimous approval of the relevant community.¹¹⁹ The judge attempts to compare the benefits and the costs for all of the relevant parties. And because he does so as an insider, rather than as an outsider, the judge is able to approximate an efficient outcome.

C. *Dynamic Unanimity: The Importance of Expectations*

As discussed, cost is a prospective concept and efficiency is related to the ability of individuals to see their plans through to completion with minimal disruption.¹²⁰ Thus, there is also a *dynamic* element to the comparison of common law and legislation as institutional approaches to externality issues. For example, the reliability of individual expectations regarding the nature of legal constraints is a feature of the costs of different plans of action. Changes in legal rules will alter the expectations that people have of successfully completing their plans. As a result, attempts to forge a unanimously-accepted change in a law will have to account for its impact on individual planning and individual expectations as well as its impact on current litigants.

As a result of the link between expectations and cost, a rule with long-term durability can be said to be more efficient than one with a shorter expected duration, if all other factors are held constant. A more stable rule will allow for a more accurate estimation

117. See, e.g., MACAULAY & YANDLE, *supra* note 26, at 30-31 (arguing that it costs four times as much to remove the last 15% of waste, as it did to remove the first 85% of waste, but that "the total damage done by these units of waste put into the stream rises exponentially").

118. See *supra* note 54 and accompanying text (discussing a Pareto-optimal proposal).

119. HAYEK, LAW, LEGISLATION 1976, *supra* note 46, at 120. Hayek comments on the judge's role,

If often his "intuition" rather than ratiocination will lead him to the right solution, this does not mean that the decisive factors in determining the result are emotional rather than rational, any more than in the case of the scientist who is normally led intuitively to the right hypothesis which he can only afterwards try to test. Like most other intellectual tasks, that of the judge is not one of logical deduction from a limited number of premises, but one of testing hypotheses at which he has arrived by processes only in part conscious.

Id.

120. See *supra* notes 37-41 and accompanying text (arguing that in a society based on exchange, individuals' plans must be compatible with the plans of other individuals in order to be efficient).

of the future costs confronting a decision-maker. While legislative rules have a high degree of short-run predictability, common law rules have more long-run predictability. Common law change is gradual and occurs at the margin,¹²¹ while legislation can be altered dramatically and relatively suddenly. As a result, the zone of unpredictability around common law rules is small and predictable, thus serving to protect expectations. The common law rule of *stare decisis*, along with the tendency of the common law to follow public opinion, rather than attempting to lead it, imparts stability to the common law that is absent in legislative processes. Legislative rules change as electoral coalitions are formed and broken. The common law derives its legitimacy from a less ephemeral source—the shared traditions and expectations of the community in which it operates.

This section develops the dynamic element of the institutional comparison between the common law and legislation by comparing their relative ability to preserve the ability of individuals to secure their expectations. First, the low long-term predictability of the legislation is discussed. Second, the relative superiority of the common law in preserving expectations is explored. Finally, the section concludes with a discussion of the importance of instructing judges to base their decisions on preserving actual individual expectations as opposed to vague directions for “wealth maximization.”

1. Predictability and Legislation

Due to the precise and technical characteristics of its language, legislative enactments can often announce precise commands of a law in the short-run. Legislation, however, provides little long term guidance to individuals trying to coordinate their plans. As Aranson notes, “Legislation provides instantaneously certain language, but the process of its adoption makes real, long-run certainty a chimeric.”¹²²

121. LEONI, *supra* note 92, at 143 (“Non-legislative law is always changing, although slowly and in a rather clandestine way.”). Another author explains the development of common law:

The unwritten law’s certainty . . . grows out of its appeal to precedent and its limits on the judge’s decisions Change may occur in the common law, but it is always at the margin and often subject to private contractual revision. The body of unwritten law stands largely unchanged. The common law merely confirms ongoing expectations.

Aranson, *supra* note 98, at 673.

122. Aranson, *supra* note 98, at 673.

Because legislation is enacted without unanimous consent, an ambiguity in property rights allocations is created because property can be taken without the owner's consent.¹²³ The potential for majority coalitions to plunder current property rights allocations gives rise to the possibility of the "churning" of property rights. It is practicably impossible for a legislature to bind the hands of its successors. As a result, individuals will always confront the possibility of losing legislatively-granted rights with a change in the dominant electoral coalition.¹²⁴ There is no equivalent to *stare decisis* in the legislature, and the uniform and mandatory nature of most legislative enactments prevents individuals from devising their own rules by forbidding them from contracting-around statutes.¹²⁵ The combination of these factors suggests that legislative rules are likely to be more unstable in the long-run than common law

123. Buchanan, *supra* note 71, at 585-86. Buchanan further describes this ambiguity:

A new and ambiguous set of rights is brought into being by the authorization of governmental action taken without the approval of all parties. Any potentially decisive decision-making coalition[s] . . . possess rights to the nominal holdings of the minority. These rights are, in this instance, ambiguous because they emerge only upon the identification of the majority coalition that is to be decisive with respect to the issue under consideration for collective action. Once identified, however, members of the effective majority hold potentially marketable rights.

Id. at 585-86.

124. See Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1028-29 (1994) ("[A] bargain agreed to today can be broken next year if there is enough turnover or legislative renegeing to disrupt the coalition or legislators that passed the bill.").

125. For instance, an employer and employee may not voluntarily contract to work for less than the minimum wage or in working conditions that do not comply with legal standards.

rules.¹²⁶ Bruno Leoni draws the distinction between the short-term certainty and long-term uncertainty of legislation:

All these [legislative] rules are precisely worded in written formulae that . . . interpreters cannot change at their will. Nevertheless, all of them may go as soon and as abruptly as they came. The result is that . . . we are *never certain* that tomorrow we shall still have the same rules we have today.¹²⁷

Legislators can “lease” the use of property rights to various interest groups, but the rights can never be permanently “sold.”¹²⁸ Having merely leased the rights to a given recipient, the legislature maintains an incentive to appropriate the rents generated from the complementary capital invested in conjunction with the rights.¹²⁹ As a result, long-term capital investments will be lower than optimal because private decision-makers will fear that legislatures will renege on the initial property-right allocation.¹³⁰

If transaction costs are negligible and legislative grants of property rights could be made permanent and transferable, the initial property rights allocation would be irrelevant with regard to the long-term efficiency of the system. Even if the legislative allo-

126. Constitutional rules may also be altered to reduce the effects of legislative churning. See Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111, 161-62 (1993) (concluding that “in attempting to put the Constitution beyond the reach of narrow interest groups, the Founders also put the Constitution beyond the ability of the majority to precommit on substantive matters and to control the agency costs imposed by their representatives in Congress”); Zywicki, *supra* note 124, at 1011-12 (arguing that the Seventeenth Amendment “eliminated institutional arrangements which restrained special-interest groups use of the federal government as a tool for wealth redistribution,” and increased the average tenure of U.S. Senators, thus suggesting that constitutional rules may also be altered to reduce the effects of legislative churning). It is also possible to devise other rules to mitigate the threat of legislative churning, such as internal legislative procedures for legislation and an independent judiciary. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875, 894 (1975) (arguing that “the courts do not enforce the moral law or ideals of neutrality, justice or fairness; they enforce the deals made by effective interest groups with earlier legislatures”). But see Donald J. Boudreaux & A.C. Pritchard, *Reassessing the Role of the Individual Judiciary*, 5 *CONST. POL. ECON.* 1 (1994) (questioning the role of the independent judiciary in enforcing interest group bargains).

127. LEONI, *supra* note 92, at 74-75 (emphasis in original).

128. Staaf & Yandle, *supra* note 71, at 254.

129. Fred S. McChesney, *Rent Extraction and Rent Creation in the Interest Group Theory of Regulation*, 16 *J. LEGAL STUD.* 101, 108 (1987).

130. *Id.*

cation was driven exclusively by rent-seeking rather than efficiency-promoting motives, property rights would move to their highest-valued use through voluntary trade.¹³¹ The potential churning of property rights undermines efficiency independent of rent-seeking considerations. Churning prevents effective individual planning by injecting uncertainty into individual attempts to weigh alternative courses of action. Similarly, uncertainty regarding the rules governing the voluntary exchange of property rights will lead individuals to expend resources to devise precautions to reduce the cost of unpredictability in the legal environment.¹³²

The power of legislation to rearrange property rights interjects an ambiguity into the legal process that disrupts the ability of individuals to coordinate their various plans. The uniform applicability of most statutes makes it impossible for individuals to stabilize their own environments by contracting-around onerous rules. A unanimity requirement for collective action allows individuals to protect their expectations. The possibility of less-than-unanimous collective action threatens to disrupt the dynamic characteristic of unanimity over time by upsetting these legitimate expectations.

2. Expectations and the Common Law

Because the common law is viewed as a part of the ongoing order of society, its evolution is linked to changes in the community as a whole. It is structured by changes in society, even as it influences society's evolution. The common law is a system of reciprocity¹³³ between the members of the community and the judges given the authority to speak for the community.¹³⁴ As Leoni observes, the process of the common law "can be described as a sort of vast, continuous, and chiefly spontaneous collaboration

131. R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 19 (1959); see also Bruce Yandle, *Resource Economics: A Property Rights Perspective*, 5 J. ENERGY L. & POL'Y 1, 10-11 (1983) (discussing the effects of rent-seeking on the transition of public property rights into private property rights).

132. LEONI, *supra* note 92, at 8. For concrete examples of the disruptive effects caused by the unpredictable transformation of rules, see Timothy J. Muris, *Cost of Completion or Diminution in Market Value: The Relevance of Subjective Value*, 12 J. LEGAL STUD. 379, 387 (1983) and Wonnell, *supra* note 15, at 858, which explains Cardozo's view that courts should not be constrained by rules, but "should be free to inquire into the more general needs and purposes of the parties."

133. FULLER, *supra* note 60, at 23-24.

134. *Id.* at 192.

between the judges and the judged in order to discover what the people's will is in a series of definite instances."¹³⁵

This symbiotic relationship between the common law and the community means that the content of the law is structured by the expectations of the community's members even as it is also an input into their expectations.¹³⁶ The common law's reliance on judicial precedent reflects the interrelationship between the common law and society. Judicial precedent permits private decision-makers to form expectations about the possibility of successfully coordinating their actions.¹³⁷ Because judges know that individuals use precedent in forming their expectations, precedent can also be relied on as a guide to the judge as to the expectations already held by the members of the community. By preserving precedent or altering it gradually, the judge preserves the subjective expectations that have grown from the evolved legal rule.

The judge's role is to weigh the expectations of the two parties to the dispute to determine which expectations were legitimately formed.¹³⁸ The law is concerned with expectations—the attempts of individuals to effectively coordinate their plans over time. Thus, the rule that reflects individuals' expectations is the efficient rule because it preserves unanimity by not disrupting the various plans of private individuals. To the extent that individuals disagree with the current rule, they probably will have already voluntarily contracted for a preferred rule. As Hayek comments,

The questions which [judges] will have to decide will not be whether the parties have obeyed anybody's will, but whether their actions have conformed to expectations which the other parties had reasonably formed because they corresponded to the practices on which the everyday conduct of the members of the group was based. The significance of customs here is that they give rise to expectations that guide people's actions, and what will be regarded as binding will therefore be those practices that everybody counts

135. LEONI, *supra* note 92, at 22.

136. *Id.* at 202.

137. See HAYEK, LAW, LEGISLATION 1973, *supra* note 46, at 95 ("The judge is . . . an institution of a spontaneous order. He will always find such an order in existence as an attribute of an ongoing process in which the individuals are able successfully to pursue their plans because they can form expectations about the actions of their fellows which have a good chance of being met.").

138. LEONI, *supra* note 92, at 197.

on being observed and which have thereby become the condition for the success of most activities. . . .

. . . .

The distinctive attitude of the judge thus arises from the circumstance that he is not concerned with what any authority wants done in a particular instance, but with what private persons have "legitimate" reasons to expect, where "legitimate" refers to the kind of expectations on which generally his actions in that society have been based. The aim of the rules must be to facilitate that matching or tallying of the expectations on which generally his actions in that society have been based. The aim of the rules must be to facilitate that matching or tallying of the expectations on which the plans of the individuals depend for their success.¹³⁹

Thus, the common law changes as individual norms and expectations change. The judge assesses the legitimacy of each of the disputants from the knowledge of the interconnecting web of society's expectations. The judge does not render his decision based on the comparative equities of those before him.¹⁴⁰ He attempts to differentiate between the legitimacy of each parties' expectations based on prior precedent,¹⁴¹ not their relative merits.¹⁴² Parties who disagree with the established rule can contract around the common law rule, thus preserving unanimity by freeing such parties from the rules used in the majority of transactions that take place in the society. By merely maintaining the expectations already developed, the judge should not be affecting the final resource allocation of the society. The judge should simply be articulating what all relevant persons already know to be the rule.

Consequently, the relative institutional superiority of the common law to legislation lies in the common law's ability to preserve individual expectations. Reliance on precedent maintains the stability of the common law through time. Furthermore, because common

139. HAYEK, *LAW, LEGISLATION* 1973, *supra* note 46, at 96-98.

140. *See id.* at 101 ("The judge's task will thus be an intellectual task, not one in which his emotions or personal preferences, his sympathy with the plight of one of the contestants or his opinion of the importance of the particular objective, may affect his decision.").

141. *Id.* at 86-87.

142. *See* 2 DAVID HUME, *ESSAYS* 274 (1875) (arguing that the law should not consider characteristics of the person involved or the consequences that may result).

law rules develop concurrently with the evolution of society, the direction and timing of change are fairly predictable. The law responds to the demands of those subject to it.¹⁴³ If the law becomes dysfunctional, increased pressure is brought to bear to reestablish its usefulness because parties will contract around the rule to dilute its negative effects.

Neither the timing nor the direction of legislative change is similarly predictable. Shifts in majority coalitions can be accompanied by upheavals in the legal environment. Indeed, legislation can even be made retroactive in application.¹⁴⁴ The relative strength of interest groups cannot be determined beforehand and are constantly changing over time. The tides of legislative success will reflect the changing tides of interest-group strength.¹⁴⁵ The precision of legislative language does not generate confident expectations because the rule itself may be reversed at any time. Moreover, the more precise the language of a statute, the more rapidly it will become obsolete and have to be replaced by a new law.¹⁴⁶ Thus it is a mistake to see the precise language of legislation as bestowing a greater degree of certainty than the common law:

If the judge here were confined to decisions which could be logically deduced from the body of already articulated rules, he would often not be able to decide a case in a manner appropriate to the function which the whole system of rules serves. This throws important light on a much discussed issue, the supposed greater certainty of the law under a system in which all rules of law have been laid down in written or codified form, and in which the judge is restricted to applying such rules as have become

143. Throughout its history, the common law has changed to incorporate the rules of competing legal systems thus attracting clients not originally a part of its jurisdiction. The threat of competition has forced it to meet the needs of those using it. See Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 647 (1989) (discussing the evolution of "The Law Merchant").

144. See, e.g., *United States v. Carlton*, 114 S. Ct. 2018, 2024 (1994) (holding that due process not violated by retroactive application of amendment to federal estate tax statute).

145. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 372-73 (1983) (presenting a theory of competition among interest groups for political influence); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213 (1976) (describing a Stiglerian model of regulation).

146. See HAYEK, *LAW, LEGISLATION* 1973, *supra* note 46, at 117-18 (explaining that judges fill in the gaps according to a general sense of justice that justifies modifications).

written law. The whole movement for codification has been guided by the belief that it increases the predictability of judicial decisions Although legislation can certainly increase the certainty of the law on particular points, I am now persuaded that this advantage is more than offset if its recognition leads to the requirement that *only* what has thus been expressed in statutes should have the force of law. It seems to me that judicial decisions may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law, than when he is restricted to deriving his decisions only from those among accepted beliefs which have found expression in the written law.¹⁴⁷

By relying on the rudder provided by his status as an "insider" cognizant of the web of expectations embedded in a society, the common law judge can more effectively approach the unanimity benchmark than can a legislative body. The judge is not affected by changes in partisan winds. The judge's authority derives from a sense of the underlying fabric of society that changes much more slowly than legislation. While legislators' time horizons are only as long as the next election, the judge's legitimacy is derived from a consensus that changes gradually. The judge has better access to the expectations that have grown from legal institutions, even those that have pre-dated that judge's career (through precedent). Unlike a legislative outsider imposing his will on the community, the judge derives his authority from the underlying fabric of the order in which the judge operates.

3. Expectations and Ex Ante Consent

Richard Posner has postulated that given limited foresight as to their specific place in a future order, individuals favor legal rules that tend to maximize the overall wealth of a society.¹⁴⁸ From this observation, Posner concludes that judges should actively seek the wealth-maximizing rule in each circumstance.¹⁴⁹ The wealth-maximizing rule minimizes transaction costs by allocating resource

147. *Id.* at 116 (emphasis in original).

148. POSNER, *supra* note 5, at 12-16.

149. *Id.*

rights to their highest valued use, effectively mimicking what would have been the market outcome.¹⁵⁰

Because Posner's model concerns itself almost exclusively with transaction costs, it suggests that in many cases there is a unique wealth-maximizing rule. Ignoring for the moment the transaction cost's subjectivity,¹⁵¹ the emphasis on transaction costs means that the "efficient" rule will be independent of the circumstances under which it is applied. Ex ante consent to the judge's mission to minimize transaction costs—hence, to maximize wealth—will lead all judges eventually to adopt the same rule.¹⁵² The independence of legal rules from situational settings suggests that in many areas of law, a uniform set of rules should be adopted, such as with the Uniform Commercial Code. It is argued that uniform standards in many areas of law would reduce transaction costs by constructing a single rule as opposed to many different rules. These uniform rules are generally considered to be more efficient than the disparate rules they replace.

Posner's command that judges engage in ex ante wealth maximization¹⁵³ ignores the lesson presented in this section. Rather than a blanket instruction to maximize wealth, the unanimity model of the common law suggests that the rule that maximizes individual *utility* will differ according to the community in which it is applied. The local characteristics of the community will structure the search for efficiency. The judge should not seek to maximize wealth, but instead search for unanimity. His baseline is the actual expectations of the community in which he operates, not the abstract standard of ex ante consent postulated by Posner. There is no universal efficient rule for all situations. The efficient rule is that which has developed within the society in response to the local circumstances and preferences of that community. While the legal order must change as expectations change, the same rule will not be proper for all societies at all times. The judge should look for the internal compatibility of new rules with the ongoing order

150. *Id.* at 230.

151. See *supra* notes 23-27 and accompanying text (discussing the factors that influence transaction costs).

152. This tendency towards the evolution of a unique efficient rule was suggested in Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 278 (1974).

153. See Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, in LAW, ECONOMICS, AND PHILOSOPHY, *supra* note 18, at 86 (arguing that wealth maximization should be a factor in judicial decision-making).

before adopting them.¹⁵⁴ Uniform codes should only be adopted if they are compatible with the expectations already in place. If so, they merely codify the relationships already in place. However, explicitly adopting a new rule, rather than merely fitting it into the old system of rules, risks chilling the future evolution of the law if local circumstances depart from the initial conditions for which the rules were appropriate. Like legislation, uniform rules appear to be either redundant or pernicious because they do not account for the diversity of jurisdictions and the unique characteristics of each community to which legal rules are applied.

This analysis suggests that it is inappropriate to instruct judges to maximize wealth in all societies. While undoubtedly important, the value of wealth maximization must be traded-off at the margin with other values that community members consider important.¹⁵⁵ The marginal rates of substitution among these various conflicting preferences will not be the same across all societies. Rather, it will differ across societies, or even across time in a given society. For example, individual tastes will be revealed in the expectations regarding the trade-offs they are willing to make between pollution and economic development. Traditionally, the common law has turned to the judge as the insider to determine the appropriate rule to secure the bundle of goods desired by the community. The judge weighs the trade-offs to the involved community and attempts to realize the rule that approaches a consensus. As a result, a diversity of rules reflect each community's shared values and expectations.

More fundamentally, the subjectivity of cost and expectations casts doubt on the legal realism that underlies the standard law and economics paradigm. While the judge can understand the general norms and expectations of his community, his knowledge of specific transactions is limited. Therefore, it is naive to instruct the judge to choose the wealth-maximizing rule because he will be unable to predict the eventual ramifications of his decisions.¹⁵⁶ The judge's

154. HAYEK, *LAW, LEGISLATION* 1976, *supra* note 46, at 24-26.

155. See Rizzo, *supra* note 57, at 647 (asserting that wealth maximization often is not determinative in predicting the assignment of rights or liabilities).

156. See HAYEK, *LAW, LEGISLATION* 1976, *supra* note 46, at 8-17 (arguing that rules are used only as a means of coping with ignorance, since there would be no need for rules among omniscient actors); Aranson, *supra* note 86, at 84-89 (emphasizing that the judge's lack of knowledge of local conditions leads to less accurate wealth-maximization decisions); Rizzo, *supra* note 32, at 233 (asserting the impossibility of a cost benefit approach to law since the consequences of specific judgments may not always be ade-

lack of knowledge about the unintended consequences that will follow from his decision¹⁵⁷ should lead him to follow precedent in most cases, rather than attempting to fine-tune the legal system by creating a wealth-maximizing rule.¹⁵⁸ Maintaining stability by following precedent will allow individuals to adjust gradually to the course of law, rather than forcing them to cope with drastic dislocations. The wealth-maximizing rule is that which best encourages the coordination of individual plans and expectations.

Legal realists would have judges achieve collective legislative goals through private legal actions to secure preferred policy outcomes. The unanimity conception of the common law is different from legislating by judges. Instead of seeking collective ends, the common law, as seen by Hayek and Leoni, deals with private expectations and the ordering of plans around established rules. Thus, the judge does not directly seek collective goals such as efficiency or redistribution. Instead, the judge seeks to preserve the *private* plans of action that individuals pursue in response to established rules. Hence, the considerations of public policy that animate legal realists are not the legitimate concerns of the common law judge. The common law judge should speak for the will of the community in terms of its norms, customs, and expectations as they enter into the actions of private individuals.

III. INSTITUTIONAL FEATURES OF COMMON LAW AND LEGISLATION

This Part reviews some of the institutional features of the common law that orients it toward the unanimity benchmark from both a static and dynamic perspective. While this overview will necessarily be cursory, it identifies some of the features of the common law and legislation that affect their pursuit of the unanimity standard. The differences between political and externality boundaries and the incentives of individuals under the alternative systems are examined. The common law's alleged tendency to exclude third-parties from its decision calculus is shown to be mitigated by increased incentives for private litigation and the possibility of

quately determined).

157. See HAYEK, *LAW, LEGISLATION* 1976, *supra* note 46, at 23 (describing "rules" as equipment for "unknown contingencies").

158. See Ronald A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227, 234 (1986) (arguing that uncertainty due to the imperfect use of information leads to inappropriate decision-making).

class-action suits. Next, the role of the common law jury in aiding in the pursuit of unanimity is discussed. The legislative process is then criticized, both for its inability to satisfy the unanimity standard and for its tendency towards special-interest legislation that allows minorities to undermine even the majority standard.

A. *Private Action and Class-Action Suits*

Use of private litigation and class-action suits represent means of securing unanimity while still maintaining the benefits of the essentially individualistic nature of the common law. The individualistic nature of the common law is preferable to collective action because it extends the one-to-one correlation between costs and benefits that characterizes private market activity. Indeed, Leoni suggests that there is more than an analogy between a market economy and the common law.¹⁵⁹ Standing to sue requires proof of actual harm traced to an identifiable source. As a result, there is no fear of including in the litigation those with only an attenuated relationship to the conflict. But at the same time, the common law allows *everyone* who has actually suffered harm to sue. Allowing anyone to sue who can prove injury, eliminates the problem of third-party exclusion by abolishing the notion of third parties. Recipients of the externality would become actual parties to a new and different transaction: the forced transaction between themselves and the polluter. Industrial producers would have to find buyers for both their market production as well as the pollution produced. Bringing third parties into the negotiations eliminates the free-rider problem of each individual lacking an incentive to sue.

A property rule maintains subjective value.¹⁶⁰ The use of contingency contracts can mitigate the hold-out problems that potentially accompany the presence of a property rule. By forcing negotiations before the externality is actually produced, contingency contracts can create a setting for effective bargaining. If the prospective producer of the externality is operating in a competitive input market, then bargaining should be efficient. If the prospective victims of the externality own a unique resource that would allow them to draw rents from the prospective user, bargaining may not

159. See LEONI, *supra* note 92, at 22 (contrasting the interrelationship of a market economy and the common law with the relationship between a planned economy and legislation).

160. See Calabresi & Melamed, *supra* note 16, at 1106 (examining the necessity for liability rules in society).

be efficient. Such a scenario, however, is unlikely because of the probability of enough alternative sites to create a competitive market. Furthermore, the existence of appropriable rents by one party to the transaction may be accompanied by the same potential by the other side.¹⁶¹ Contingency contracts remove the possibility of post-contractual opportunism by eliminating appropriable quasi-rents once the producer is in place.¹⁶² Thus, if property rights are clearly specified and no market power is present, hold-out problems should be relatively minor, due to the prospective nature of agreements.

If desired by the community, potential hold-out problems can be mitigated by forced transactions through either a takings with just compensation¹⁶³ or liability rules that allow ex post compensation.¹⁶⁴ On the surface, these rules appear to threaten the replacement of subjective cost by an objective cost standard, thus violating the principle of unanimity. If, however, ex post compensation rules were agreed upon unanimously as an ex ante constitutional rule, then such rules may be seen as a package that is more acceptable than the individual rule standing alone.¹⁶⁵

The availability of class-action suits also mitigates the perceived bias of the common law against third parties. Under class-action suits, all parties similarly situated to a nuisance gain standing to sue. Class actions can overcome the free-rider problem caused by the lack of incentive for one individual to bear the burden of bringing suit against polluters. As a result, differences between private and third-party effects can be internalized directly.¹⁶⁶ Class actions can combine the effects on many dispersed individuals by creating an economy of scale in litigation.

161. For example, specialized natural resources and specialized labor complementary to the resource may accompany each other in a given area. Thus, both parties will have some leverage in negotiations that may simply cancel out.

162. See Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 302-03 (1978) (offering long-term contracts instead of vertical integration as a solution to post-contractual opportunistic behavior).

163. See generally EPSTEIN, *supra* note 53, at 26-50 (examining the historical development of takings cases).

164. See James M. Buchanan & Roger L. Faith, *Entrepreneurship and the Internalization of Externalities*, 24 J.L. & ECON. 95, 97 (1981) (discussing the increased bargaining position of a damaged party under liability rule protection since enforceable claims can be filed ex post); Calabresi & Melamed, *supra* note 16, at 1107-10.

165. Buchanan, *supra* note 42, at 157-59.

166. KRIER, *supra* note 79, at 226-27 (explaining that class actions can make lawsuits more effective internalizers of the external costs of pollution).

As with the potential of greater individual action, class-action suits may also increase the ease and frequency of bargaining that will avoid the dead-weight loss of litigation. The formation of a class of injured parties will allow for less-costly bargaining with a polluter as compared to bargaining among many dispersed individuals. Without class actions, each individual would be required to sue independently, or bargain separately with the polluter. This creates high transaction costs that may prevent bargaining or a lawsuit. If one person is given the authority to represent all of those damaged, bargaining between the polluter and the representative of the class becomes easier.¹⁶⁷ Thus, again the alleged underrepresentation of third parties to common law disputes is mitigated by their inclusion in the actual transaction at hand.¹⁶⁸

B. *Unanimity and Trial by Jury in the Common Law*

Probably because efficiency is rarely considered from within a unanimity framework, the important role of the civil jury in the common law has been ignored. The civil jury plays two important roles in the common law's relationship to unanimity. First, it reinforces the static efficiency of the common law through the unanimity voting rule on which it operates. Second, it maintains the dynamic efficiency of the common law by differentiating legitimate from illegitimate expectations of behavior in the community where the dispute arises.

Historically, trial by jury has reinforced the unanimity of community collective action by subjecting all disputes to a final unanimous check at the point of its implementation. Thus, even if the law on which an action is based was passed by less than unanimity, the requirement of a trial by jury effectively gives an opportunity to yield a unanimous veto of the law by obstructing its enforcement in a given factual context.¹⁶⁹ The unanimous consent of

167. See *id.* (describing how one or a few individuals can afford to bring a suit on behalf of others); see also James M. Buchanan, *The Institutional Structure of Externality*, 14 PUB. CHOICE 69, 77 (1973) (explaining that when a single agent represents the group, efficient outcomes can be expected).

168. Proper incentives to sue can also be created by privatizing the ownership of public resources, thereby investing the owner with the incentive and opportunity to sue. See Bruce Yandle, *Escaping Environmental Feudalism*, 15 HARV. J.L. & PUB. POL'Y 517, 530-31 (1992) (discussing how privatization provides for the creation of different remedies).

169. See *id.* at 528-29 (explaining the rule of unanimity-governed jury decisions); see also Lysander Spooner, *An Essay on the Trial by Jury*, reprinted in LET'S ABOLISH GOVERNMENT 1, 7 (1972) (stating that people must consent before the government can exer-

several members of a local community, chosen at random, is necessary to enforce the law against individuals. Random sampling from the local community, combined with the right to exercise peremptory challenges, eliminates the possibility of sampling bias, as the characteristics of the jury are supposed to be representative of the community as a whole. If these criteria are met, the jury can be assumed to speak for the whole of the community in its decision. The requirement of unanimous consent by the jury for a law to be enforced serves as a proxy for the implied unanimous consent of the community as a whole.¹⁷⁰ Because unanimity in the passage of the law is unlikely, the trial by jury preserves some measure of unanimity in its enforcement.¹⁷¹

Under the Magna Carta, juries were empowered to decide upon questions of law as well as questions of fact.¹⁷² The jury could control not only how a law was applied, but also the content of the law itself. Therefore, those connected only by political boundaries were unable to alter the rules spawned by the norms of the local community.¹⁷³ Laws were given substance by the local circumstances in which they were applied.

Drawing both the judge and the jury from the local community provided a mutually reciprocal check. The judge was valued for his technical expertise in finding the law in the underlying consensus of the community and applying it in an orderly fashion; the jury spoke for the community as a whole in applying the law in a particular factual setting. The form of the law given by the judge and the content of the law given by the jury are complementary.¹⁷⁴ Both had to agree for the law to operate.

cise any power).

170. Spooner, *supra* note 169, at 132-33.

171. *See id.* at 218 (describing the jury as representative of the whole whose "consent shall stand for the consent of the whole").

172. *See generally id.* at 63-122 (discussing ancient common law juries, oath of jurors, oath of judges, and the rights of jurors to fix sentences).

173. Arthur Hogue notes that under the common law, Royal Judges were constrained to apply the laws and norms of the local community when they conflicted with those proclaimed by London. *See* ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 141-56 (1985) (discussing the general structure of the Royal courts in medieval England).

174. *See* Barnett, *supra* note 46, at 622-23 (explaining that society needs both the rules of law given by the judge and the justice given by the jury). The synergistic relationship between the "form" and the "content" of the historic common law coincides with Randy Barnett's observations on the compatibility of the formal precepts of the rule of law with certain substantive aims of the law. *See* Randy E. Barnett, *Foreword: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses*, 12 *HARV. J.L. & PUB. POL'Y* 611, 620-24 (1989) (discussing legal evolution and the rule of law).

The jury could also provide information in gauging the relative merit of the conflicting sets of expectations held by the two parties in dispute. As members of the community, their expectations have been formed by the same influences as the litigants. They can be counted on to more accurately weigh the various elements of the mix of goods desired by the individuals in the community than could an outsider.

Juries were explicitly conceived to be a means of maintaining a veto against undesirable legislation. It was realized that communities could control their own representatives with some effectiveness, thus the trial by jury was not so important when the laws they passed were applicable only to themselves. These legislators were insiders and thus, to a large extent, could be relied upon to speak the consensus opinion.¹⁷⁵ The importance of the trial by jury as a "palladium" of liberty¹⁷⁶ was as a protection against encroachment by sources of authority *outside* the community. The trial by jury ensured that outsiders could not pass laws affecting the local community without its consent.¹⁷⁷ Indeed, the Antifederalists insisted upon the enshrinement of the civil jury as a constitutional right so as "to guard against unwanted legislation passed by a misguided national legislature."¹⁷⁸ Allowing for local interpretation of statutes by jurors drawn from the community provided protection from tyranny by the national legislature.

The advocates of the use of the trial by jury to block legislation by non-unanimous factions anticipated recent criticisms of the

175. This argument was suggested by James Wilson at the Pennsylvania Convention on the Ratification of the Federal Constitution. See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 487-88 (Jonathan Elliot ed., 1901).

176. See THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Samuel Spencer, *Remarks in the North Carolina Ratification Convention*, reprinted in THE ANTIFEDERALISTS 413 (Cecelia N. Kenyon ed., 1966) (stating that "[j]uries are called the bulwarks of our rights and liberty").

177. See Spooner, *supra* note 169, at 217 (explaining that the trial by jury ensures that laws reflect the consent of the entire community).

178. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 664 (1973).

[T]he antifederalists were not arguing for the institution of civil jury trial in the belief that jury trials were short, inexpensive, decorous and productive of the same decisions that judges sitting without juries would produce. The inconveniences of jury trial were accepted precisely because in important instances, through its ability to disregard substantive rules of law, the jury would reach a result that the judge either could not or would not reach.

Id. at 671.

dominance of the legal system by class interests.¹⁷⁹ Because the unanimous agreement of a jury is intended to represent the unanimity of the community, the equal weight of all members of a jury can prevent the exploitation of the weaker members of society by the more powerful.¹⁸⁰ The necessity of protection against the possible machinations of political elites under the federal Constitution led Richard Henry Lee to write of the importance of the trial by jury:

[The trial by jury] is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department. To hold open to them the offices of senators, judges, and offices to fill which an expensive education is required, cannot answer any valuable purpose for them; they are not in a situation to be brought forward and to fill those offices; these, and most other offices of any considerable importance, will be occupied by the few. The few, the well born, &c. as Mr. Adams calls them, in judicial decisions as well as in legislation, are generally disposed, and very naturally too, to favour those of their own description.

The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other.¹⁸¹

Lee anticipated some modern critiques of the political system, and looked to the jury trial to prevent alleged exploitation by the pow-

179. See, e.g., Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 588-92 (1983) (discussing criticisms and the reinvention of democracy to promote an empowered democracy).

180. See Spooner, *supra* note 169, at 215 (explaining that "the trial by jury . . . gives the weaker party [a] veto upon the power of the stronger").

181. Richard H. Lee, *Observations of the System of Government Proposed by the Late Convention* (1787), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 315-16 (Paul L. Ford ed., 1971).

erful members of society. The decline in the authority of juries to interpret the law may be a source of the problems perceived by modern commentators.

The traditional common law jury was an important source of unanimity in law-making. It reinforced the judge's search for the law in the community's standards by serving as a randomly selected proxy for the community as a whole. As the voice of the community, the jury provided insight into the expectations that guided the members of the community in their decision-making. As such, the trial by jury was an important input into the common law quest for unanimity.

C. Legislation and Rent-Seeking

The institutional features that contribute to the common law's orientation towards unanimity differ dramatically from the pressures on legislative bodies. Where common law institutions lead towards unanimity, legislative realities lead away. Indeed, not only does legislation seem to be driven by non-unanimous forces, but even by minority influences.

The special-interest or rent-seeking models of government suggest that legislation ostensibly passed by majority rule may not actually represent a majority, much less a consensus.¹⁸² As mentioned above, political action severs the one-to-one relationship between costs and benefits that characterizes private market activity. In the market, individuals pay for what they want. In political activity, individuals pay for what is produced through collective action, whether or not they favor the chosen policy. Furthermore, the individual rarely has any real influence on the results generated by the collective process because his vote is trivial compared to the large number of other voters. As a result, individuals have little incentive to vote, or even become informed, about the political procedure. As the political system becomes more labyrinthine, the incentive to vote or to even become informed falls. Indeed, it is in the interest of those to be monitored—politicians and bureaucrats—to increase the complexity of the political system for this very reason.

182. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 141-46 (1971) (discussing how special interest groups can pressure legislators and effectively override majority will).

The disincentives to becoming politically aware lead to the concept of "rational ignorance" on the part of voters. Individuals recognize that they have little to gain from becoming knowledgeable about the political process because the costs of obtaining information far exceed the benefits to be gained. Well-organized interest groups, however, do have an incentive to be organized because they can capture valuable legislation accruing to their benefit. As a result, most legislation is passed to reward a minority coalition of special interests. The possibility of special-interest legislation leads to deviations not only from unanimity but even majority rule.

The empirical evidence supporting the view that much legislation is passed to favor special interests at the expense of the public at large is overwhelming and will not be reviewed here.¹⁸³ Attempts to secure public regulation in cases of externalities have also not been immune to perversion by private interests. With regard to pollution, inter-regional competition through regulation,¹⁸⁴ intra-industry competition,¹⁸⁵ and interest-group explanations¹⁸⁶ have been offered. All of them are united, however, by the conclusion that environmental regulation in practice has not been characterized by policies to internalize externalities, but instead have been turned to the ends of special-interest groups. The social costs of inefficient pollution legislation have been large.¹⁸⁷ Legislation appears to be an inefficient institutional structure for

183. For reviews of empirical case studies of the effects of government regulation, see Bernard H. Siegan, *Empirical Studies of the Cost of Government Regulation*, in *ECONOMIC LIBERTIES*, *supra* note 32, at 300. For a review of recent judicial responses to special-interest legislation, see Aranson, *supra* note 86, at 63-80.

184. See *supra* notes 91-95 and accompanying text (discussing a hypothetical example of inter-regional competition through regulation between the residents of Maine and New Mexico).

185. See B. Peter Pashigian, *The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares*, 27 *J.L. & ECON.* 1,3 (1984) (measuring the effects of environmental regulation on the size distribution of plants and on the distribution of factor shares); Myles S. Wallace et al., *Environmental Regulation: A Financial Markets Test*, 28 *Q. REV. ECON. & BUS.* 69, 69 (1988) (noting that "there were also concerns that enforcement of environmental rules could be used as a vehicle to reduce the competitiveness in affected industries"). See generally Michael T. Maloney & Robert E. McCormick, *A Positive Theory of Environmental Quality Regulation*, 25 *J.L. & ECON.* 99 (1982) (discussing environmental quality regulation as a means of wealth redistribution within an industry).

186. James M. Buchanan & Gordon Tullock, *Polluters' Profits and Political Response: Direct Controls Versus Taxes*, 65 *AM. ECON. REV.* 139, 143 (1975); Robert Quinn & Bruce Yandle, *Expenditures on Air Pollution Control Under Federal Regulation*, 16 *REV. REGIONAL STUD.* 11, 11-15 (1986).

187. See CRANDALL, *supra* note 94, at 32-57.

solving externality problems both in theory and in practice. The ideal of policy making through unanimous agreement gives way in reality to rule by small, influential minorities.

IV. CASE STUDIES ON THE COMMON LAW AND POLLUTION

This Part presents case studies that illustrate the effectiveness of the common law as an institutional approach to the large-number externalities of environmental pollution. Contrary to conventional wisdom, the common law will be revealed as an effective means for forming a consensus opinion on resolving large-number externalities. Common law judges have explicitly considered the expectations of the parties before them, as structured by the standards of the community. Judges also consider the exigencies of the situation and location that are relevant to the specific community in question. While sometimes deciding on wealth-maximizing criteria, judges also consider other values and norms unique to the community in question. The correct decision at one time or place is not necessarily so at others. In the following cases, the judges appear to have explicitly considered the interests of third parties and the community at large when appropriate. The cases illustrate that the institutional structure of the common law system permitted it to deal adequately with questions presented by large-number externalities.

A. William Aldred's Case (1611)

*William Aldred's Case*¹⁸⁸ presents an early example of common law courts providing flexibility in the law by deciding cases within the context of local characteristics. The case concerned a nuisance created through the building of a pig-stye on a piece of property where odor affected those on neighboring lands. The defendant claimed that the economic activity generated by the hogs was necessary to his living and "the building of the house for hogs was necessary for the sustenance of man: [sic] and one ought not to have so delicate a nose, that he cannot bear the smell of hogs."¹⁸⁹ The judge found that the necessity of earning a living outweighed the plaintiff's claim to the loss of comfort engendered by the nuisance.¹⁹⁰ The reciprocal nature of the externality is

188. 77 Eng. Rep. 816 (K.B. 1611).

189. *Id.* at 817.

190. *Id.* at 822.

clear, the neighbor would not be bothered if the pig-stye were enjoined; but there would also be no nuisance if no one lived within range of the stye's externality effects.

In weighing the claims of the parties, the judge considered that what is appropriate at one time and place may not be at another. The judge explained that

the building of a lime-kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it. So if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a glover sets up a lime-pit for calve skins and sheep skins so near the said water course that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it.¹⁹¹

Thus, as early as 1611, common law judges were confronted with cases involving environmental externalities. The judge in *William Aldred's Case* considered the expectations of the local community in which the externality occurred, and decided in favor of the plaintiff, thus enjoining the nuisance. Such a result, however, has not always been the case, as different local situations have generated a different balancing of claims. Although *William Aldred's Case* does not explicitly consider the relevance of third parties, later cases do.

B. *Pennsylvania Coal Co. v. Sanderson (1886)*

*Pennsylvania Coal Co. v. Sanderson*¹⁹² represents an early example of the consideration of the effects of pollution on third-parties not actually before the court. The Pennsylvania Coal Company used high-pressure hydraulic drills to mine coal in Lackawanna Valley, near the city of Scranton.¹⁹³ The run-off water from the procedure ran down into a small tributary of the Lackawanna river known as the Meadowbrook, thus polluting the water.¹⁹⁴ Rights to

191. *Id.* at 821.

192. 6 A. 453 (Pa. 1886), *overruled by* Commonwealth v. Barnes & Tucker Co., 319 A.2d 871 (Pa. 1974).

193. *Id.* at 454.

194. *Id.*

mine coal by the hydraulic procedure conflicted with the rights of Mrs. Sanderson and the other riparian owners of the brook.¹⁹⁵

The court weighed the lawsuit's costs and benefits within the confines of the Scranton industrial community. The decision turned on the question of the legitimate expectations of the citizens moving into the community. The appropriate decision for an industrial community is not what is appropriate for a rural community. Consequently, the judge tailors the efficient decision to the standards of the local community. Individuals incorporate expectations of future development into their plans to settle in different locales. The judge's role is to determine which expectations are legitimate in the sense of what could be legitimately expected when moving into the community, not which expectations are based on superior equitable values.

The court explicitly weighed the consequences of alternative property rights arrangements on the community as a whole, noting "that 30,000,000 of [sic] tons of anthracite and 70,000,000 of bituminous coal are annually produced in Pennsylvania. It is therefore a question of vast importance, and cannot, on that account, be too carefully considered."¹⁹⁶ The court recognized that its decision would have a dramatic impact on the mining industry and the jobs it generated throughout the state. Therefore, the court weighed the economic needs of the community against its environmental needs, relying on an implicit unanimity benchmark and weighing the alternative needs and expectations of all concerned.¹⁹⁷ The court drew on the notion of opportunity or subjective cost to demonstrate that in this case the citizens of the community were the lowest cost avoiders of the nuisance. After considering the various mitigating actions available to each of the parties involved, the court concluded that the damages created by the coal company were significantly less than the benefits generated by continued mining activity. The

195. *Id.* at 455.

196. *Id.*

197. *Id.* at 457. The Court stated that

[t]he discharge of the water is practically part and parcel of the process of mining; and, as it can only be effected through natural channels, the denial of this right must inevitably produce results of a most serious character to this, the leading industrial interest in the state. The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned.

Id.

court exhibited not only a highly sophisticated cost-benefit analysis, but also incorporated the standards of the local community into its calculus. The local situation determined the relative costs and benefits of the externality-producing activity, as well as the different actions that could have been taken to minimize the impact of the nuisance. Thus, the correct decision will vary according to community circumstances. The court wrote,

We do not say that a case may not arise in which a stream, from such pollution, may be regarded as a public nuisance, and that the public interests, as involved in the general health and well-being of the community, may not require the abatement of that nuisance. This is not such a case. It is shown that the community in and around the city of Scranton, including the complainant, is supplied with abundant pure water from other sources. There is no complaint as to any injurious effects from this water to the general health. The community does not complain on any ground. The plaintiff's grievance is for a mere personal inconvenience; and we are of opinion that mere private personal inconveniences, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the necessities of a great community.¹⁹⁸

While the court's dismissal of the plaintiff's case may appear harsh, it does point to the strength of the community's needs compared to the plaintiff's concerns. Because pure water is "abundant" from other sources, the plaintiff's claim should yield.¹⁹⁹

Moreover, some pollution is expected when one moves to a mining area. Environmental standards in industrial and mining areas are expected to be lower, but the community good is furthered by this diversity of standards. The court observed,

The population, wealth, and improvements are the result of mining, and of that alone. The plaintiffs knew, when

198. *Id.* at 459.

199. As the court notes, however, if pure water was less plentiful and therefore more valuable, the court's decision might have been different. *Id.*

they purchased their property, that they were in a mining region. They were in a city born of mining operations, and which had become rich and populous as the result thereof. They knew that all mountain streams in that section were affected by mine water, or were liable to be. Having enjoyed the advantages which coal mining confers, I see no great hardship, nor any violence to equity, in their also accepting the inconveniences necessarily resulting from the business.²⁰⁰

Those moving into the Scranton area should have expected that the mining operations might cause run-off problems into some waterways. Because the mining company followed the "ordinary" procedures for mining coal in the region,²⁰¹ the company had a legitimate expectation to be able to mine in the area. Furthermore, by using the "usual mode of mining," the coal company remained within the bounds of the community's standard expectations. The court implies, however, that novel or highly destructive mining techniques would not be tolerated. Everyone benefited from the mining operations, and they knew where those benefits came from—including those damaged in this particular circumstance.

The court incorporated local expectations and needs in its decision. The nature of the community and the geographical contingencies of the area were both considered. A non-industrial area, or one with fewer sources of water might have a different trade-off between the parties in question. *Pennsylvania Coal* demonstrates the institutional flexibility of the common law that allows the judge to weigh the needs of the community and third-parties in his decision. Those who lived in Scranton were aware that it was a mining city, and therefore should have expected some environmental purity to yield to economic considerations.

C. *Versailles Borough v. McKeesport Coal & Coke Co. (1935)*

*Versailles Borough v. McKeesport Coal & Coke Co.*²⁰² arose during the Great Depression. The poor economic conditions of the time suggested that people in the Pittsburgh area would be willing to sacrifice some amount of environmental quality for the assurance that their jobs would remain intact. In finding for the coal compa-

200. *Id.* at 464-65.

201. *Id.* at 457.

202. 83 Pittsburgh Legal J. 379 (Pitt. Co. Ct. 1935).

ny, the court did consider the community's depressed economic conditions.²⁰³ The court realized that continued production would perpetuate the nuisance, but weighed this right against the negative economic impact on the community of a judgment against McKeesport Coal.²⁰⁴

The court decided that the existence of the nuisance (the presence of flammable "gob" piles that result as a by-product of coal mining) was a necessary part of the operation of the coal plant,²⁰⁵ and that there was no alternative mining procedure that would eliminate the gob by-products.²⁰⁶ The right to be free of the nuisance caused by the burning gob piles was weighed against the economic benefits of continuing the mining activity that generated the nuisance.²⁰⁷

Judge Musmanno considered the impact of an injunction on the community as a whole, not just those in the immediate vicinity of the nuisance. Enjoining the nuisance would have the "external" effect of throwing several hundred people out of work; thus, while admitting that a nuisance is present, Musmanno concluded that the harm done by enjoining the nuisance would exceed the harm permitted by its continuance. He wrote,

That the plaintiffs are subjected to annoyance, personal inconvenience and aesthetic damage by the burning of the gob pile, is not seriously disputed

. . . .

. . . [W]e cannot believe that one's health would improve by living close to the gob fire, and we cannot believe, despite testimony advanced by defendant's witnesses to the contrary, that there is no physical discomfort or annoyance caused to residents of that vicinity, by the burning mountain. In fact, our decision in this case is not based on the assumption that the people living close to the gob fire suffer no annoyance, but that the annoyance which is theirs is trivial in comparison to the positive harm and damage that would be done to the community, were the

203. *Id.* at 383.

204. *Id.* at 383.

205. *Id.* at 387.

206. *Id.* at 387-88. The court stated, "[T]o enjoin the use of the gob pile, we must enjoin the operation of the mine." *Id.* at 381.

207. *Id.* at 381.

injunction asked for granted.²⁰⁸

An externality exists, but the gain to the community by continuing the mining is greater than the welfare loss caused by enjoining it. Those damaged by the flaming gob piles could more easily move away from the externality than the coal company creating it.

Indeed, the court suggested that those who desire to live in Pittsburgh should be willing to accept a reasonable amount of pollution.²⁰⁹ The court did not impose an arbitrary decision from outside the community, forcing the people to adjust to it. The court protects the expectations of those living in the city. It is unreasonable to expect to endanger a leading business in the community in order to have perfectly clean air.²¹⁰ The court did not use an external wealth maximization standard. Nor did it use a criteria or rhetoric of individual rights. The court distinguished between the legitimate and illegitimate expectations of those in the community. Those seeking to enjoin the nuisance are confronted by the coal company's legitimate claim to be able to mine their property in the standard manner. The court is trying to distinguish legitimate from illegitimate expectations on the bases of the community standards in which the two parties find themselves.

The existence of an externality is not sufficient to order an abatement of the nuisance. Indeed, the court suggests that the gob piles may in fact be a Pareto-irrelevant externality because the plaintiffs themselves have voluntarily assumed some of the responsibility for the external effects by locating themselves near the mining property.²¹¹ Thus, while admitting the existence of an

208. *Id.*

209. *Id.* at 384.

210. *Id.* The court stated,

If the coal mine of the defendant had been sunk in the midst of a residential district, utterly free of factories and mills, and devoid of all of those transportation facilities which create smoke, dust, dirt and grime, the complaint of the plaintiff's might have some force and effect, but the defendant's property is in the very heart of one of the most industrialized districts of Allegheny county. . . . The inhabitants of this district were cognizant of the industrialization of the community when they moved into it. They voluntarily took up abode in this territory, and can scarcely with consistency now be heard to voice a protest about the smoky atmosphere. One who voluntarily goes to war should not complain about cannon smoke.

Id.

211. *Id.* at 385.

externality, the judge noted that there were also benefits generated to the suing parties:

The plaintiffs are subject to an annoyance. This we accept, but it is an annoyance they have freely assumed. Because they desired and needed a residential proximity to their places of employment, they chose to found their abode here. It is not for them to repine; and it is probable that upon reflection they will, in spite of the annoyance which they suffer, still conclude that, after all, one's bread is more important than landscape or clear skies.²¹²

The proximity to the externality is incorporated into the salaries of those working in the mines. Cleaning up the gob piles will necessarily force a reduction in the wages of all workers. Indeed, employees living near the plant will benefit more than those living far away, as they will gain the pecuniary and non-pecuniary benefits of cleaner air at their residences, while the costs will fall equally on all employees.

To avoid the windfall redistribution that would accrue to those living near the plant, the judge relies on the long-standing expectations of the community as a whole. Musmanno describes the court's mission as follows:

[The Court] must look at the customs of the people, the characteristics of their business, the common uses of property and the peculiar circumstances of the place wherein it is called upon to exercise the power The people who live in such a city or within its sphere of influence do so of choice and they voluntarily subject themselves to its peculiarities and its discomforts for the greater benefit they think they derive from their residence or their business there "You must look at it," said Lord Cranworth, "not with a view to the question whether abstractly that quantity of smoke was a nuisance, but whether it was a nuisance to the persons living in the town."²¹³

Values and expectations do not only differ across communities, they can differ from time to time in the same community as well. A decision during a crisis such as the Great Depression will not necessarily be the proper decision at another time. Likewise, the

212. *Id.*

213. *Id.* (quoting *Huckenstine's Appeal*, 70 Pa. 102, 106-07 (1872)).

court maintains long-range expectations by making it clear that exceptions will only be made during the extent of the economic crisis confronting the community. It would not be wise for individuals to expect current rules to outlast current situations. The restoration of economic prosperity will be accompanied by the restoration of traditional rules. For the time being, however, the court and the community should recognize the crisis at hand:

Much of our economic distress is due to the fact that there is not enough smoke in Pittsburgh and the Pittsburgh district. The metropolis that earned the sobriquet of the "smoky city" has not been living up to those vaporous laurels. The economic activity of the city that was known as "the workshop of the world," has decreased in proportion as its skies cleared of smoke. While smoke *per se* is objectionable and adds nothing to the outer aesthetics of any community, it is not without its connotational beauty as it rises in clouds from smokestacks of furnaces and ovens (and even gob fires) telling the world that the fires of prosperity are burning,—the fires that assure economic security to the workingman, as well as establish profitable returns on capital legitimately invested

. . . .

. . . [W]e cannot give Mediterranean skies to the plaintiffs, when by doing so, we may send the workers and breadwinners of the community involved to the Black Sea of destitution.²¹⁴

Given the crisis of the Great Depression, the value of economic prosperity to the community became evident. The expectations of the community and the court were altered by the crisis; economic prosperity must be maintained. After the depression passed, however, the premium on preserving jobs may yield to other values.

McKeesport Coal shows how the common law can be tailored to the exigencies of local community standards. While this does not mean that judges have universally considered third-parties in reaching their decisions, it does present evidence that they could have. This suggests that the common law was competent institutionally not only to deal with the external effects of pollution, but

214. *Id.* at 383-84, 394.

also to understand the common will that underlay the activities of the community.

D. *Waschak v. Moffat (1954)*

*Waschak v. Moffat*²¹⁵ provides an example of the common law's emphasis on distinguishing between legitimate and illegitimate sets of expectations. Decided nineteen years after *McKeesport Coal*, it is notable for the dissent by now-State Justice Musmanno in which he seems to reverse his position from *McKeesport Coal*. As his opinion makes clear, however, his position has not changed—only the circumstances of the nuisance have changed. Musmanno takes his colleagues to task for not recognizing the differences between the situations of the two cases and for applying the previous decision to one in which the premium on economic development has passed. What was efficient given the locale and situation of the 1935 decision is not applicable to a changed situation. Thus, even though he writes in dissent, his change of position demonstrates the flexibility of the common law.

Again, the nuisance resulted as a by-product of coal mining.²¹⁶ In this case, a technique known as the Menzies treatment was used to separate coal from other impurities.²¹⁷ The other impurities—slate, rock, and coal with sulphur—were hauled away as refuse.²¹⁸ In time, hydrogen sulfide formed and emitted a terrible stench from the pile of refuse and its fumes were destructive of neighboring property.²¹⁹ Those living in the vicinity of the refuse pile sought to force the company to remove the nuisance.²²⁰ The majority of the court rejected their claim but Musmanno dissented.

Musmanno's dissent turned on his belief that, unlike *McKeesport Coal*, the externalities produced by the hydrogen sulfide piles were greater than could have been *expected* when moving into the community. While some pollution is to be expected when living in an industrial city, Moffat's externality was far greater and offensive than the norm.²²¹ Furthermore, Musmanno argued that alternative means were available for the firm to dispose of its

215. 109 A.2d 310 (Pa. 1954).

216. *Id.* at 315.

217. *Id.* at 318.

218. *Id.*

219. *Id.*

220. *Id.* at 318-19.

221. *Id.* at 322.

waste, implying that the firm is the least cost avoider of the nuisance.²²² It is unreasonable for the firm to expect to use their land to create such a nuisance when alternative measures are readily available. The plaintiffs held legitimate expectations to use their land free from the degree of nuisance created by Moffat. The community, Musmanno insisted, found itself in a different situation from the Great Depression era decision in *McKeesport Coal*.

The court's duty, according to Musmanno, is to distinguish among the conflicting expectations of the parties before it. While the plaintiffs could expect some degree of inconvenience as the price for living in an industrial community, this does not provide a blank check for the supremacy of industrial concerns over all others. There is a point where the legitimacy of externality-producing activities ends. Musmanno wrote,

The plaintiffs in this case do not question that the defendants have the right to mine coal and process it, but is it a natural and reasonable use of land to deposit poisonous refuse in residential areas when it can be deposited elsewhere? Certainly the defendants may lawfully operate a breaker in Taylor, and whatever noises, dust and commotion result from the breaker operation are inconveniences which the plaintiff and other Taylor inhabitants must accept as part of the life of a mining community. But the disposition of the poisonous refuse of a mining operation does not fall within the definition of lawful and normal use of land.²²³

Because of the danger and offensiveness of the externality, this case presents different circumstances from the *McKeesport Coal* case: "The health of the town of Taylor is being imperiled."²²⁴ The nuisance in this case is more severe, leading him to a different conclusion from *McKeesport Coal*:

[T]here is a vast difference between smoke which beclouds the skies and gas which is so strong that it peels the paint from houses. I did say in the Versailles case, "One's bread is more important than landscape or clear skies." But in the

222. *Id.* at 323.

223. *Id.* at 322.

224. *Id.* Compare *McKeesport Coal*, 83 Pitt. Legal J. at 381.

preservation of human life, even bread is preceded by water, and even water must give way to breathable air For decades Pittsburgh was known as the "Smoky City" and without that smoke in its early days Pittsburgh indeed would have remained a "pretty village." But with scientific progress in the development of smoke-consuming devices, added to the use of smokeless fuel, Pittsburgh's skies have cleared, its progress has been phenomenal and the bread of its workers is whiter, cleaner, and sweeter²²⁵

Justice Musmanno admitted the apparent inconsistency between his opinions in this case and *McKeesport Coal*. They are not inconsistent, however, when considered by the standards and expectations of the community. As noted above,²²⁶ what is articulated in black-letter law is only an approximation of the unarticulated set of norms that guide the community. Musmanno gives careful attention to the nonarticulated "law" of the community's shared expectations to support his rejection of the black-letter rules that guide his colleagues. While seemingly inconsistent with the rules established in *McKeesport Coal*, Musmanno's seemingly inconsistent positions can be reconciled on this more fundamental level:

It is because of the many fluctuating factors in the cases themselves that the decisions do not seem uniform. In point of juridical history, however, they do follow a pattern of wisdom and justice. No one will deny that the defendants are entitled to earn profits in the operation of their breaker, but is it reasonable that they shall so conduct that business as to poison the very lifestream of existence? Is it not reasonable to suppose that if hydrogen sulfide emanating from culm banks can strip paint from wood and steel that it will also deleteriously affect the delicate membranes of the throat and lungs?²²⁷

It is irresponsible, he insisted, for the court to apply the same rule to dissimilar situations. Indeed, it may be that the court has misread the early decision to incorporate only its conclusions without adopting the reasoning that generated it. The court's duty is to

225. *Id.*

226. *See supra* notes 146-47 and accompanying text (discussing the unpredictability of legislation and the constraints it imposes on the common law).

227. *Waschak*, 109 A.2d at 324.

respond to and articulate public expectations, rewarding those that are legitimate. Law serves a social function,²²⁸ it is not a completely self-enclosed system. Thus, it is given continuity by the community in which it operates, not just through the rationalization of the legal system devoid of its social context. The norms and expectations of the community, not precedent itself, remains the source of the judge's authority to decide cases. Written precedent is a useful guide to understanding community expectations, but it only imperfectly reflects expectations. When the articulated decisions seem to conflict to accepted norms and expectations, it should yield to the unarticulated premises for which it tries to speak.

Waschak does not present a mere "trifling inconvenience" such as *Pennsylvania Coal* that suggests that the community would unequivocally value industry over the injunction. In *Pennsylvania Coal*, damages were mitigated by the existence of numerous alternative sources of clean water. In *Waschak*, however, there was no way to easily escape the nuisance; its effects were pervasive. Musmanno describes it,

[H]ere we are not dealing with trifling inconveniences. We are dealing with a situation where in effect the inhabitant of Taylor, Pennsylvania, awakens each morning with a basket of rotten eggs on his doorstep, and then, on his way to work finds that some of those eggs have been put into his pocket. No matter how often he may remove them, an invisible hand replaces them. This can scarcely be placed in the category of trifling inconveniences.²²⁹

Because the nuisance intensely affects everyone in the community far beyond what they could have expected in moving to that industrial community, Musmanno argued that the externality should be enjoined. As in *McKeesport Coal*, Musmanno appealed to the standards of the community and weighed the needs of all of its members. This demonstrates the flexibility with which the common

228. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 295-305 (1986) ("The concept of rights or entitlements is a social one whose principal function is to specify boundaries within which individuals may operate freely to pursue their respective individual ends and thereby provide the basis for cooperative interpersonal activity.").

229. *Waschak*, 109 A.2d at 324.

law could deal with pollution problems and their impact on third parties and the community as a whole.

E. Summary

Even without using class-action suits, common law courts have considered the expectations and needs of the community as a whole in deciding the case before it. The four cases discussed cast doubt upon the prevailing opinion of the common law's institutional incapacities for dealing with questions of large-number externalities. Courts have long relied on the norms of the community to judge the expectations of the private parties before them. They have rarely been concerned with issues of public policy, except for when unusual circumstances called forth changes in community demands. Because individuals in the community could be expected to favor different rules for similar crisis situations, responsible courts must yield to these changes in community standards. The passing of the crisis should result in a return to long-standing norms. A belief in the justice of exceptions to permanent rules in a crisis would seem to be a reasonable part of any long-standing set of standards.

In a sense, courts tried to replicate the outcome to which the community would have unanimously agreed if voluntary negotiation and side-payments were possible. This contrasts with the rent-seeking process that marks environmental legislation, as well as admonitions for judges to maximize wealth. Judges did not attempt to alter property rights arrangements by deliberately creating public policy. They viewed their role as protecting legitimate expectations that allow individuals to arrange their own plans with a high chance of success. In doing so, they preserved the unanimity standard better than subsequent legislative approaches have.

V. CONCLUSIONS

The twentieth century has seen an increasing trend toward legislative regulation of large number externalities. This Article has argued that when measured by the unanimity standard, the common law may be more effective than legislative approaches in dealing with the difficulties presented by large-number externalities, such as environmental pollution. This suggests that institutional incapacities of the common law alone do not explain the trend towards greater legislative regulation of pollution. In turn, this implies that efficiency considerations do not explain the displacement of the common

law by legislation in many other fields of law. What then accounts for the displacement of common law remedies with legislative solutions during this century? While a detailed answer goes beyond the scope of this paper, the displacement of common law by legislation may have resulted from two possible sources: poor decisions by some judges or, alternatively, from special-interest motives.

The push for legislation may have arisen from a response to inefficient common law *decisions* even if the institutional *process* was sound. Judges may simply have misread the demands of their communities. The majority of the court disagreed with Musmanno in *Waschak*. Judges may have erred in tabulating the costs and benefits of alternative rules, and legislation was demanded to rectify the situation. While acting properly to try to weigh the costs and benefits, the judges may have operated the scales incorrectly. Thus, legislation may have been necessary to correct undesirable lines of precedent in the common law.²³⁰ Legislation may have been a means of rearranging an undesirable allocation of property rights.

But the rearrangement of property rights could have also been generated from rent-seeking or special-interest motives. Legislation stands in a superior hierarchical position to the common law. Legislation can override common law rules, but common law rules cannot explicitly displace legislative rules.²³¹ This suggests that the common law may maintain jurisdiction over a range of activities only at the pleasure of legislative bodies. The legislature could privatize for itself the rents generated from resources by taking away this authority. If the rents to be generated exceed the costs of obtaining and administering the goods in question, then the legislature should be expected to act. This suggests that two factors will affect the tendency of legislatures to appropriate resources previously administered by common law rules. First, the value of the resource increases dramatically in value—in other words, a free resource becomes valuable. Second, the resource must be obtainable at a low cost; in other words—no one has an established property right to the stream of rents generated by the resource that would

230. See HAYEK, *LAW, LEGISLATION* 1973, *supra* note 46, at 88-89 (1976) ("The development of case-law is in some respects a sort of one-way street: when it has already moved a considerable distance in one direction, it often cannot retrace its steps when some implications of earlier decisions are seen to be clearly undesirable," therefore legislation may be needed to correct such situations.).

231. Yandle, *supra* note 168, at 532.

cause complaints if it were taken away. The combination of these two factors may explain why environmental law has developed differently from other valuable resources such as housing and private automobiles. Increasing population and industry have increased the value of previously free resources such as air and water. Conflicts over their use have been quite recent; previously, there was plenty to go around. The recent evolution of these property rights has also made existing rights tenuous and ambiguous, making it easy for the legislature to appropriate them in order to draw the rents that they generate.

This Article should not be read as an invitation for judges to engage in unguided judicial activism. The common law framework discussed rests on a consensus of values and expectations in society. To the extent that judicial decisions affect larger groups of individuals, this consensus will deteriorate. In such circumstances the push and pull of a pluralistic legislature may provide the only acceptable outcome. In many instances, however, a common law judge conscious of his role in an ongoing system, may be better at finding and articulating any latent consensus that exists than would a legislature driven by majority rule.

Thorough investigations of the historical evolution of property rights to environmental resources will have to await another occasion. This Article has been content to show that the long-standing bias in favor of using legislative approaches to deal with large-number externalities should be reexamined. Consequently, as an institutional approach, the common law may be a more efficient means of dealing with pollution and large-number externalities than previously thought.

