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Denis J. Brion

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AN ESSAY ON LULU, NIMBY, AND THE PROBLEM OF DISTRIBUTIVE JUSTICE

*Denis J. Brion**

I. INTRODUCTION

The purpose of this Article is to probe two acronyms. It is a phenomenon of our times that we eagerly coin acronyms in order to explain and explore emerging issues. Although this practice no doubt has a variety of functions, coining such labels at least helps to make the matter at issue more familiar and less offputting. It almost seems as if much of the complexity and intractableness of a pressing problem can be dissipated simply by labelling it with a colloquialism. By giving the problem a "handle," so to speak, we thereby "get a handle on it."

This Article explores what lies behind two currently prominent acronyms, lest the pejorative cast that they carry serves too well to mask a problem that is endemic precisely because, as I will argue, the law has failed to account for values important in our political society. A special irony accompanies this failure. Its genesis lies in the commendable introduction of social policy analysis into common law adjudication.

The first acronym refers to the source of the problem—LULUs: "Locally Unwanted Land Uses." Examples in present day society

* B.S., Northwestern University, 1961; J.D., University of Virginia, 1970; Visiting Professor of Law, Boston College Law School. The research for this Article was supported in part by the Frances Lewis Law Center of Washington & Lee Law School, and by the Institute for Environmental Negotiation of the University of Virginia. An earlier version of this Article was delivered on October 5, 1984 at the Conference on Siting Locally Unwanted Land Uses sponsored by the Institute and published by the Institute. Brion, *Private Property and Social Property*, INSTITUTE FOR ENVTL NEGOTIATION, NOT-IN-MY-BACKYARD!: COMMUNITY REACTION TO LOCALLY UNWANTED LAND USE 43 (1985). The author would like to express his gratitude for the helpful comments of Judith A. McMorrow and James R. Repetti, as well as the able research assistance of Mary Deck, Paul Kuhnelt, and Catherine Nesser.

abound: halfway houses for the mentally handicapped, the formerly incarcerated, or the unwed mother; sites for offensive or dangerous processes, such as toxic chemical production, nuclear power generation, or sewage treatment; or disposal facilities for the wastes of such processes.

The second acronym refers to the phenomenon that has turned the problem into an intractable political controversy—NIMBY: “Not In My Back Yard.” We all seem to agree that society needs these facilities. We also seem to agree that we, as individuals, want these facilities to be located somewhere other than close to our own homes.¹ A paradox arises because we also seem to agree that, when we use objective, technologically sound criteria to locate a site for one of these facilities, we must brand those who will be its near neighbors as poor citizens when they cry “NIMBY!”

This Article attempts to trace the roots of NIMBY to a failure of the law. This failure is grounded both in the ultimate weakness of procedural norms as a safeguard for our public decisionmaking and in inadequate judicial consideration of the full range of societal values that ought to determine the definition of, and the constitutional protection to be accorded, rights in property. This Article argues that the NIMBY acronym carries an unfounded pejorative gloss and describes a possible solution to the pressing problems that generate the NIMBY phenomenon.

At stake is not merely the way that we perceive the motivations of certain prominent, if episodic, participants in our processes of public choice.² Rather, we as a political society will continue to fail to understand an urgent and fundamental political question—how a culture committed to technological progress can define and achieve

¹ The cry of NIMBY is, of course, not a phenomenon unique to any particular culture. Indeed, it arose with particular intensity over a nuclear power plant to have been constructed near Krasnodar, a city in southwest Russia near the Black Sea, forcing its cancellation. See N.Y. Times, Jan. 28, 1988, at A1, col. 1.

² Throughout, this Article will use the term “public choice” to denote that process, now inseparably mixed between the public and private sectors, by which we reach the formal public decisions of our political society. See, e.g., C. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 170–213 (1977); Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

The term “public choice” is used as well by a school of thought that advances the normative proposition that a market-like mode ought to govern such decisionmaking. See, e.g., J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962). As the text accompanying *infra* notes 30–35 makes clear, this Article does not accept that proposition because it ultimately leads to what is in effect a property qualification for participation in the political process.

the level of integrity that we are to accord to our natural and social biotic systems. The historian Alpheus Mason posed a fundamental political question, how to maintain heritage and heresy in creative tension.³ Those who cry "NIMBY!" offer a voice that deserves a better hearing in the ongoing debate over this fundamental question.

This Article refers throughout to two principal protagonists involved in a paradigm dispute. On one side of the dispute is Owner, seeking to establish a sensitive land use, a LULU. In our highly complex, late capitalist society, Owner could as well be a governmental entity as a private one. On the other side of the dispute is the adjacent property owner, Neighbor, whose use is primarily residential rather than industrial or commercial, who sometimes acts alone, but who much more often acts as part of a group. Neighbor is crying "NIMBY!" because the LULU threatens the considerable value that her property represents to her.

II. THE PUBLIC CHOICE PROCESS

For years, Boston, like many American cities, has been frustrated in finding acceptable methods for disposing of its solid waste. In 1983, Boston officials decided to locate a solid waste incinerator at a site in South Bay close to the moderate income South Boston area of the city, with construction to begin by the end of 1987.⁴ In the summer of 1987, the politically powerful president of the Massachusetts Senate, whose district includes both South Bay and South Boston, secured senate passage of a bill that would block construction of the incinerator, touching off an acrimonious controversy with the politically powerful mayor of Boston, who also is from South Boston.⁵ In September, the Senate President shrewdly proposed that the incinerator be located at a site in the suburban community of Weston. This site was far superior in terms of such engineering criteria as site size, site characteristics, zoning, and transportation access.⁶ The proposal was politically shrewd because, hardly by coincidence, Weston is a highly affluent community.⁷

³ See Mason, *To Be More Safe: America's Continuing Dilemma*, 45 VA. Q. REV. 545, 553 (1969).

⁴ Boston Globe, July 22, 1987, at 1, col. 4.

⁵ See *id.*, July 16, 1987, at 1, col. 1; see also *id.*, July 23, 1987, at 1, col. 1.

⁶ See *id.*, Sept. 17, 1987, at 1, col. 1.

⁷ Weston boasts the highest average family income in the Commonwealth. See *id.*, Sept. 20, 1987, at 33, col. 5.

High comedy and low politics were the result.⁸ To any casual observer with even the most rudimentary political awareness, there was no doubt that the Weston proposal was utterly unfeasible,⁹ and this was the point. Due to its affluence, Weston was too important a player in the political market not to be able to protect itself.¹⁰ Indeed, by late December, a third political power, the Governor, was well into the process of forging a compromise plan that would establish a recycling facility at the South Bay site.¹¹

The Weston episode is an example of the rather large gap between promise and performance in our political structure of participatory democracy. Our political myth¹² tells us that our public processes are open to all and are responsive to all. Our political experience tells us that the decisions that these processes produce can more often be explained in terms of a perceived hierarchy of power. Affluent communities do not find themselves bisected by elevated highways or fouled by waste disposal facilities; modest communities do. Why do our nominally open processes of public choice respond to so narrow a spectrum of the citizenry?

⁸ *See id.*

[M]any people in Weston suspect Bulger [the Senate president] is up to something other than finding a solution to the trash crisis.

"Basically, he wants to show voters of Boston and his own constituents that he can go screw the rich," said Irmgard Bryant, 57, who lives on Summer Street in Weston, less than a half-mile from the proposed site. "It doesn't take more intelligence than that of a brain-dead earthworm to see what he's up to . . ."

Id.

⁹ For example,

[o]ne longtime observer of Boston politics, Jack Beatty, the Dorchester-born senior editor of *The Atlantic Magazine*, said he sees Bulger's plan as "an inspired social joke. I mean, if you were to back off, if you read this in a novel, and if you knew what Weston was and knew what South Boston was, you would laugh and laugh."

Id.

¹⁰ As the *Boston Globe* explained,

Weston is the kind of town that is able to spend \$75,000 to hire a nationally renowned anti-highway lawyer to fight the Massachusetts Turnpike Authority's plans to add a fourth lane to the Pike between Weston and Natick, suggesting it could keep the incinerator plans in court for years.

Id.

¹¹ *Id.*, Dec. 20, 1987, at 1, col. 5.

¹² As used in this Article, the term "myth" is not meant to carry a pejorative connotation. Rather, it is meant as a necessary process by which we conceptually organize our political life at the level of society. That a myth constitutes an ideal that is not realized in practice is less important than our having an ideal to which to aspire. Although it does carry a pejorative connotation, Roland Barthes's description of mythmaking captures the nature of the idea of myth as used here. See R. BARTHES, *MYTHOLOGIES* 109 (1972). An extended discussion of the American myth is presented in J. ROBERTSON, *AMERICAN MYTH, AMERICAN REALITY* (1980).

A. The Limits of Pluralism

According to the American political myth, our public choice processes do not operate in a top-down fashion, imposing an agenda of political choices determined by a political and technocratic elite.¹³ Rather, those processes operate in a bottom-up fashion, marshalling and implementing the values that people who choose to participate bring to the process.¹⁴ The idea of choosing to participate is a significant element of the myth.¹⁵ In a political society that establishes a system of individual liberties and accords strong protection to individual rights, a strong element of individual responsibility has become an important part of the concept of the autonomous person. Thus, participation in political processes is left to individual initiative. If the substantive choices that the process generates do not reflect the political desires of the citizenry, then the blame must rest with the citizenry for not participating.¹⁶

Indeed, the term "political market" acts as a ready metaphor for our public processes.¹⁷ Just as consumers bring their demands for goods and services to the economic market to be met by competing producers, the citizenry brings its values to the political market to be met by competing producers of political action. With a constitutional structure that establishes only broad constraints on the permissible content of political choice, process dominates, and a pluralism of values generates the substance of political choice. Oliver Wendell Holmes, Jr. captured this concept when he spoke of the right to free speech as the right to compete in the marketplace of ideas.¹⁸

In practice, the concept of the political market tracking the economic market for goods and services is more than a metaphor. Although a strong commitment to the free market forms a substantial

¹³ The notion of top-down and bottom-up political styles is taken from THOMPSON, TO HELL WITH THE TURKEYS! A DIATRIBE DIRECTED AT THE PERNICIOUS TREPIDITY OF THE CURRENT INTELLECTUAL DEBATE ON RISK (Univ. of Md. Center for Phil. & Pub. Pol'y, Working Paper RC-5, 1983).

¹⁴ *Id.*

¹⁵ R. BARTHES, *supra* note 12, at 261.

¹⁶ John Philpot Curran captured the inverse of this notion: "The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime, and the punishment of his guilt." THE OXFORD DICTIONARY OF QUOTATIONS 170 (3d ed. 1980).

¹⁷ For a description of the market model of public choice, see generally Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-57 (1977-78).

¹⁸ See *Abrams v. United States*, 250 U.S. 616, 630 (1919).

part of our political myth, a completely unfettered market would, in operation, simply fail to carry out its function of achieving a competitive, and therefore efficient, balancing of supply and demand. Thus, government necessarily plays a considerable role in the market for goods and services.¹⁹

For these reasons, the line between the political and economic markets is substantially blurred. Because of this blurring, the two markets interpenetrate in their operation. A participant in the political market, for instance, can have as substantial an effect in the goods market by participating indirectly through the political market as participation in the goods market directly would achieve.

The interweaving of the two markets is strongly manifest in the matter of LULUs. Sensitive land uses are often part of the private processes for producing goods and services. They are just as often carried out by government. Even if these LULUs are carried out by private entities, government will typically have had a strong hand in bringing them about. Government subsidy may be involved. Government permission, through licensing, zoning, or other siting controls, will almost always be involved.

The principles that underlie government action in a market economy,²⁰ then, are of considerable relevance to the LULU problem.

¹⁹ Trade beyond the most rudimentary level would, of course, not be possible without an external mechanism protecting the possession by the traders of their goods. Government provides that mechanism by instituting and effectuating a system of property rights. Beyond that, government intervenes in the market or carries out the role of a market producer in order to correct the inevitable failures of a free market, for instance preventing large producers from imposing monopoly prices or maintaining barriers to entry, engaging in such activities as pollution regulation, in order to prevent producers from creating "external bads," and correcting for the under production of "external goods" by engaging in such activities as education and road building and maintenance. Moreover, government engages in a broad range of activities that generate allocations of resources that are often radically different from those that an efficient market would make. Examples include stabilizing the disruptive effects of market-driven resource allocation (farm price supports; "bailing out" the Chrysler Corporation; protective tariffs), integration of rural and urban areas ("postage stamp" utility rates; rural electrification), and the imposition of values (attempts to suppress the production and marketing of marijuana; encouraging the exploitation of domestic energy sources). See generally Reich, *Of Markets and Myths*, COMMENTARY 38 (Feb. 1987) (the choice for organizing economic activity is not between the free market and public control, but is based on the mix of private activity and public intervention). Finally, the pattern of demand in the market is exogenous to the efficiency-seeking function of a smoothly working market. Demand is sensitive to the distribution of wealth among consumers. If government substantially rearranges that distribution, then the pattern of demand in the market will likewise be substantially affected. For example, the government may rearrange distribution by imposing a progressive income tax which tends to narrow the range of distribution, or by financing, say, the Central Arizona Project, which affects the geographical pattern of distribution.

²⁰ This discussion of the standard model of government action and of the nature of its

Just as our political myth is based on open participation and a pluralism of values, our notion of government action follows a standard model. According to this model,²¹ there are three principal actors. Self-interested and rational consumers seek to maximize their utility.²² Likewise, self-interested and rational producers seek to maximize their profits.²³ A neutral, well-informed government oversees their competition for governmental action.²⁴

The reality, of course, is that governmental action departs substantially from what the standard model envisions. There are three causes of this departure. The first is that the standard model is far too simplistic in its description of the mechanism of governmental action. Second, the structure of government acts as a considerable impediment to its ideal function. Finally, the nature of power can lead to substantial distortion of the shape of demand in the goods and public markets.

To see why the standard model is far too simplistic, consider first that government at all levels is not monolithic. Rather, it consists of both vote seekers and bureaucrats.²⁵ Vote seekers gain office, wholly or partly, on the basis of their partisanship. They do not bring a neutral stance to their position, nor are they expected to do so. Indeed, given the tendency of vote seekers to seek to remain in office once they achieve it, they are sure to cater in the most biased possible way to the constituency that elected them.²⁶

Bureaucrats, on the other hand, tend to be politically neutral.²⁷ This does not mean, however, that they are unbiased. It is a recurring phenomenon that bureaucrats exhibit two strong biases—to avoid making controversial decisions and to expand their particular bureaucratic unit.²⁸ These biases are thoroughly rational—as members of institutions for which a means of measuring institutional

breakdown is drawn from R. BARTLETT, *THE ECONOMIC FOUNDATIONS OF POLITICAL POWER* (1973).

²¹ *Id.* at 10.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 18–21, 59–64.

²⁶ Most of what a Member of Congress does amounts to what is euphemistically called “constituent service,” which in reality is giving specific advantages to individuals in the Member’s constituency. The Member quickly develops “an obsession with the parochial interests of his district.” Barnes, *The Unbearable Lightness of Being a Congressman*, *THE NEW REPUBLIC*, Feb. 15, 1988, at 18. See also Easterbrook, *What’s Wrong With Congress?*, *THE ATLANTIC*, Dec. 1984, at 57, 65.

²⁷ R. BARTLETT, *supra* note 20, at 21–22, 70–75.

²⁸ W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 36–42 (1971).

performance is not possible, they adopt these biases in order to maintain the security of their tenure.²⁹

American political pluralism, then, cannot be described accurately as a refereed competition between participating consumers and producers. Rather, the process resembles more closely a melee among four kinds of participants—producers, consumers, vote seekers, and bureaucrats—each of whom possesses strong and distinct biases. It is a melee because those charged formally with refereeing the competition are themselves biased players.

The standard model is far too abstract in another way. The justification for pluralistic democracy is that, with participation open to all, any particular individual will participate in particular forums to the extent of the intensity of her interest in the issues at hand. In theory, any political decision will account accurately for the variety and intensity of the positions of the citizenry on the matter at issue. Absent bribery, the political market will aggregate the demand for political action efficiently.

Here again, reality diverges from concept. Participation requires resources. These resources are of two kinds—those that enable participation, and those that provide the substance of the participation. Resources of the first kind include time, skills at presentation and negotiation, and a sophisticated understanding of the structure and operation of, and interrelationships among, the governmental entities involved in the issue.

These resources can be developed. They can also be purchased. Either way, they are expensive. And herein lies a significant problem. The high cost of participation leads to the classic collective action problem. On a particular issue,³⁰ whether on the basis of one person, one vote or on a summation of the intensity of interest, the consumers' position on one side of an issue will often strongly outweigh, in the aggregate, the position of producers on the other side. Yet, the consumers will not participate individually in the process because the interest of each is so small relative to the cost of participation,³¹ and because there is no mechanism for them to organize their interest.³² There will, however, be producers for whom the

²⁹ R. BARTLETT, *supra* note 20, at 70–72.

³⁰ It is quite likely that, were a plebiscite to have been held among people reasonably informed about the nature of the Central Arizona Project or the Tennessee-Tombigbee Waterway Project, these massive federal expenditures would have been resoundingly defeated.

³¹ R. BARTLETT, *supra* note 20, at 42–58.

³² R. HARDIN, *COLLECTIVE ACTION*, 38–66 (1982); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 5–65 (rev. ed. 1971).

potential gains from a favorable public decision will far outweigh the considerable cost of effective participation. Thus, the participation that does occur will not reflect accurately the constituency of those affected by the issue at hand. Rather, there will be a bias in favor of producers leading to a similar bias in the outcome.³³

Equal in importance to the resources that enable participation are the second kind of resources, those that comprise the substance of the participation. This substance consists not only of advocacy for a particular outcome. In addition, it includes information necessary to an informed decision.

Like nearly every other decisionmaker, public decisionmakers, whether vote seekers or bureaucrats, lack full information on the issue at hand.³⁴ A great many public decisions involve information that producers possess in abundance, but which government and consumers can generate only at high, and often prohibitive, cost.³⁵ Vote seekers and bureaucrats thus tend to rely on producers to supply this information.

When government relies, even in part, on producers for information, a considerable procedural price is involved. There is a strong tendency for the process of communication to fall into an *ex parte* mode,³⁶ to which consumers are peripheral. In addition, this reliance can slip into a position of dependence upon the producers, thereby risking a psychological identification with their purposes. Perhaps most importantly, this reliance makes possible an opportunity for producers to supply the information in a biased way, as advocacy rather than reportage. Outcomes are thereby biased further.

The divergence between political myth and political reality has other causes. The American legislative model is based on a bicameral body with proportional representation.³⁷ In practice, this structure is eminently suited to a logrolling process.³⁸ Thus, though the basis for decision is nominally one member, one vote, in operation the process tends to generate measures which carry the intense support of a small number of members, though each of the other members

³³ In 1984, there were an estimated thirty-seven lobbyists for every Member of Congress. Easterbrook, *supra* note 26, at 75.

³⁴ R. BARTLETT, *supra* note 20, at 59-79.

³⁵ *Id.* at 70-79.

³⁶ See generally Comment, *Ex Parte Communications in Local Land Use Decisions*, 15 B.C. ENVTL. AFF. L. REV. 181 (1987).

³⁷ J. BUCHANAN & G. TULLOCK, *supra* note 2, at 233.

³⁸ *Id.* at 233-81; K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 48-51, 108-09 (2d ed. 1963) (this is the "Arrow Theorem").

of the body is mildly opposed.³⁹ As a result, the dominant mode of legislative business is an ongoing series of compromises that advance the particular interests of individual members.⁴⁰ Outcomes based on a consensus over what best serves the broad public interest are the exception.

This mode of operation further subverts the pluralistic ideal. Because lobbying generates intense member interest, the process places a premium on the ability of constituency members to participate. This ability, as we have seen, lies with the producers. Producer lobbying generates member interest; the logrolling process generates pro-producer outcomes.⁴¹

The final problem is the nature of consumers' *perceived* interests, the positions that they bring, however ineffectively, to the process. Control of resources generates power.⁴² Having power has the immediate consequence of domination in actions and interrelationships involving the powerless. More importantly, having power also enables the power holder to shape the attitudes of the powerless to the structure of power.⁴³ Whether through consumer advertising in the goods market⁴⁴ or through participation in public discourse,⁴⁵ producers are able to shape consumers' attitudes, and to that extent to shape the character of the demand that consumers exhibit in the goods and public markets, all against the interests⁴⁶ of the consumers and in favor of the producers' interests.

It is hardly surprising, then, that our style of public decisionmaking is so strongly at odds with our ideal of a bottom-up political system. As *Federalist No. 10* indicates, one of the most important concerns in the intellectual debate over the form of our political

³⁹ In effect, individual members of the legislative body participate on particular issues on generally the same basis as individual citizens do.

⁴⁰ J. BUCHANAN & G. TULLOCK, *supra* note 2, at 265–81; Easterbrook, *supra* note 26, at 62.

⁴¹ J. BUCHANAN & G. TULLOCK, *supra* note 2, at 283–95.

⁴² As used in the text, power is meant in this way: "A exercises power over B when A affects B in a manner contrary to B's interests." S. LUKES, *POWER: A RADICAL VIEW* 34 (1974).

⁴³ *Id.* at 21–25.

⁴⁴ C. LINDBLOM, *supra* note 2, at 214–21; Atlas, *Beyond Demographics: How Madison Avenue Knows Who You Are and What You Want*, THE ATLANTIC, Oct. 1984, at 49.

⁴⁵ C. LINDBLOM, *supra* note 2, at 201–13. It is hardly an accident that, for instance, the Mobil Oil Corporation runs a prominent and substantial sidebar every Sunday on the second page of the editorial and commentary section of the Washington Post.

⁴⁶ That is, not the interests induced in B through A's power to shape B's attitudes and perceptions, but instead the interests that B would have in a position of autonomy from this dimension of A's power. S. LUKES, *supra* note 42, at 33.

structure was the potential for the repression of individual autonomy, especially majority oppression of minorities in small communities.⁴⁷ A problem that was only barely anticipated⁴⁸ has become a salient feature of our political landscape, the small group capture of government processes at all levels.

B. LULU Siting and Impasse

The Boston solid waste problem is hardly unique. The political furor over sensitive land uses is the stuff of the daily press. Deep controversies arise continually over attempts by private entities to find sites for sensitive land uses. Public entities—from the federal government attempting to find a disposal site for low level radioactive waste to the municipality seeking to establish a landfill—have had little more success than private entities.

Many state legislatures have attempted to address the problem by enacting complex and comprehensive decisionmaking procedures for LULU siting.⁴⁹ These enactments attempt to achieve LULU siting while accommodating the interests of those who will be affected by those facilities. These statutes, however, have met with little success in achieving their goals.

The experience under the Massachusetts Hazardous Waste Facility Siting Act⁵⁰ is both typical and instructive. The Massachusetts statute applies to facilities handling or disposing of hazardous wastes, exempting only radioactive wastes and industrial wastes and sewage controlled by federal water pollution statutes.⁵¹ Massachusetts state government, facing an endemic problem of illegal hazardous waste dumping,⁵² secured the passage of the Act in 1980 in order to provide a mechanism for encouraging industry to establish facilities that would provide safe treatment and disposal of these wastes.⁵³

⁴⁷ THE FEDERALIST No. 10, at 60–61 (J. Madison) (Mod. Lib. ed. 1937) [hereinafter THE FEDERALIST].

⁴⁸ See *id.* No. 51, at 335–41.

⁴⁹ *E.g.*, Waste Management Act of 1980, MINN. STAT. ANN. §§ 115A.01–115A.95 (West 1987 & Supp. 1988).

⁵⁰ MASS. GEN. L. ch. 21D, §§ 1–19 (1987) [hereinafter Hazardous Waste Act].

⁵¹ *Id.* § 2 (definition of “hazardous waste”).

⁵² Boston Globe, Jan. 18, 1982, at 15, col. 4; *id.*, May 23, 1982, at 25, col. 1.

⁵³ *Id.*, July 1, 1984, at 36, col. 3. Under the Act, the Department of Environmental Management (DEM) solicits proposals for the establishment of hazardous waste treatment facilities. MASS. GEN. L. ch. 21D § 3(3) (1987). The Hazardous Waste Facilities Site Safety Council (Site Council): reviews these proposals, *id.* § 4(8); determines whether the proposed project is “feasible and deserving of state assistance,” *id.* § 7; encourages the conclusion of a mutually acceptable siting agreement, *id.* §§ 4(9)–4(12), between the developer and the Local Assess-

To date, there have been five attempts to establish a waste facility under the Act, all of which have failed.⁵⁴ In each case, the failure derived directly or indirectly from strong local opposition. In four of the five cases, the opposition came from local citizens.⁵⁵ In the fifth case, fellow tenants of the industrial park in which the facility would have been located objected.⁵⁶

This experience illustrates the substantial problems that bedevil our public processes. An effective process for achieving the safe disposal of hazardous wastes would almost certainly serve the public interest of Massachusetts. Because of their domination of the state level political process, however, producers, vote seekers, and bureaucrats determined the substance of the Act. The extent of their domination and the nature of their biases are evident in its provisions. As a formal matter, the Act gives no approval power to those who would be affected most directly by the adverse impact of a hazardous waste facility: the site community and its residents.⁵⁷ Rather, once a developer selects a site and satisfies a state level agency that it is qualified to establish and operate the facility properly,⁵⁸ then the only formal issue left is the compensation that the developer will give to the community.⁵⁹ This issue, however, if it becomes contested, is subject to binding arbitration mandated by a state agency.⁶⁰ The overall effect of the Act is to cast the state government in the role of advocate on behalf of the site developer.

The dominant positions of the producers and government at the state level political process led to the intensive local opposition that

ment Committee (LAC); and approves the report required to be submitted by the developer on the environmental, social, and economic impact of the project. *Id.* § 10. The LAC consists of local administrative and elected officials and at least three "residents of the area of the city or town most immediately affected by the proposed facility." *Id.* § 5. If the developer and the LAC cannot reach a siting agreement, the Site Council has the power to order binding arbitration for the two negotiating parties. *Id.* §§ 13-15. The host city or town cannot subject the facility to any local license or permit process if such a process was not required prior to the enactment of this Act. *Id.* § 16. The DEM can exercise the eminent domain power in order to acquire the site on behalf of the developer. *Id.* § 17.

⁵⁴ Boston Globe, Mar. 5, 1985, at 12, col. 1. The facilities were proposed for the towns of Freetown, Gardner, Haverill, Taunton, and Warren. *Id.*

⁵⁵ *Id.*, Mar. 7, 1982, at 24, col. 1 (Gardner); *id.*, Jan. 25, 1983, at 68, col. 1 (Haverill); *id.*, Mar. 9, 1983, at 17, col. 2 (Freetown); *id.*, Mar. 26, 1983, at 36, col. 3 (Warren).

⁵⁶ They "feared the plant's presence would harm their reputations." *Id.*, Jan. 16, 1985, at 23, col. 4 (Taunton).

⁵⁷ Indeed, the Massachusetts legislature explicitly refused to include in the Act the power for a host community to disapprove a facility proposal. *Id.*, Apr. 1, 1980, at 19, col. 3.

⁵⁸ MASS. GEN. L. ch. 21D § 7 (1987).

⁵⁹ *Id.* § 12.

⁶⁰ *Id.* §§ 13-15.

ultimately blocked the five proposed facilities. Local citizens became well aware of, and expressed resentment over, the clear pro-developer bias of the provisions of the Act itself.⁶¹ They also became well aware of, and expressed resentment over, the considerable bias in favor of facility developers shown by state level agencies involved in the siting process.⁶² Indeed, at one point, in the face of citizen hue and cry against facility siting proposals, the Massachusetts Office of Environmental Affairs responded not with a consideration of the concerns being raised but instead with a \$375,000 television advertising campaign extolling the virtues of waste treatment facilities.⁶³

Once organized community opposition arose, citizen activists began to act in the political process with considerable skill. In several cases, these activists brought to light instances of site developers having less than satisfactory records for waste treatment facility operation in other states⁶⁴ and instances of irregularities in the information that the developers supplied to Massachusetts agencies, matters that the agencies ought to have developed easily themselves.⁶⁵ In one case, this led the principal state agency, the Site Safety Council, to reconsider its prior approval of the developer's proposal.⁶⁶

These five imbroglios illustrate the complexity of the public choice process. At the state level, the breakdown in the pluralistic model is manifest. Throughout the course of events, from the Act's initial drafting to the administration of its provisions in specific cases, small group capture of state level processes generated a strong pro-producer bias.⁶⁷

At the site community level, however, the dynamics are considerably more mixed.⁶⁸ To community officials, the principal concerns

⁶¹ Boston Globe, July 1, 1984, at 36, col. 3.

⁶² *E.g.*, *id.*, Oct. 12, 1981, at 22, col. 1; *id.*, May 3, 1982, at 11, col. 2; *id.*, June 15, 1984, at 1, col. 1. In the aftermath of the fight over the facility proposed for Warren, a clergyman who had been active in the citizen opposition observed, "There was something morally, inherently wrong, about a large company and a powerful state trying to impose their will on us out here in Warren." *Id.*, July 1, 1984, at 36, col. 3.

⁶³ *Id.*, Jan. 7, 1982, at 28, col. 4.

⁶⁴ *Id.*, June 26, 1982, at 21, col. 5.

⁶⁵ *Id.*, Mar. 8, 1982, at 17, col. 3; *id.*, Dec. 1, 1983, at 79, col. 3.

⁶⁶ *Id.*, June 26, 1982, at 21, col. 5.

⁶⁷ *Id.*, Aug. 19, 1983, at 19, col. 2; *id.*, Dec. 1, 1983, at 79, col. 3; *id.*, June 15, 1984, at 1, col. 1.

⁶⁸ For a discussion of the mixed nature of the land development process at the local level, in which local government is threatened by capture both by oppressive majorities bent on exclusion and by small groups of developers bent on profit maximization, see Ellickson,

that a hazardous waste facility raises involve matters of governance. These matters include providing police and emergency services to the facility and to its neighbors in the case of an accident, the impact of the facility on traffic patterns within the community, and the control of threats to the general health and safety of the community.

The public officials, however, will see potential gains as well as potential losses. The siting agreement process encourages site developers to provide substantial funds to offset the facility's impact. In addition, the facility will provide increased employment, a commodity prized by local elected officials.⁶⁹ Finally, a hazardous waste facility will often enhance the principal source of local revenue, the property tax base.⁷⁰ It should not be surprising, then, that, in two of the five siting cases, local community officials supported the establishment of the waste treatment facility.⁷¹

The neighbors, however, will be at best in a break-even position, at worst in a losing position. The siting agreement process does not contemplate compensating neighbors as individuals. If this process does not internalize the facility's adverse effects, then the neighbors will bear its immediate impact: perceptible physical externalities such as grit, smoke, dust, or noise; the aesthetic impact of a non-harmonious facility; and the psychological impact of close proximity to a facility that could at any time suffer a catastrophe or, worse, that could quietly emanate toxic vectors that are impossible to detect.⁷²

Even a siting decision by which the developer commits itself to eliminate externalities entirely carries risk. The neighbors must decide whether to acquiesce or whether to engage in the considerable effort required to make their opposition effective.⁷³ They face a

Suburban Growth Controls: An Economic and Legal Analysis, 86 YALE L.J. 385, 405-08 (1977).

⁶⁹ Boston Globe, Mar. 7, 1982, at 24, col. 1; *id.*, Mar. 9, 1983, at 17, col. 2.

⁷⁰ In most cases, the more intensive the use, the greater the market value of the land and improvements and, because property taxes are *ad valorem*, the greater the tax yield. The enhancement of the tax base by the conversion of the site to industrial property will usually offset the loss to the tax base caused by the partial devaluing of the neighboring property.

⁷¹ *Id.*, Mar. 7, 1982, at 24, col. 1; *id.*, Mar. 9, 1983, at 17, col. 2.

⁷² "But how can resistance within a city or town, even if illogical, be overcome. 'Resistance comes from the neighborhood where the plant is proposed,' says McGregor [a lawyer with considerable experience with the siting process]. 'What must be sought is the approval of the community as a whole.'" *Id.*, May 3, 1982, at 11, col. 2.

⁷³ Typically at the level of local government, and often at the level of state government as well, the notion of participatory democracy means no more than holding "public hearings" in order to give the citizen the opportunity to present his views before the decisionmaking body. There is no requirement that the decision be based in any way on the testimony presented at

difficult decision, whether to work now to block the facility in return for promises by the site owner as to how it will establish and operate the site in the future. The neighbors must decide whether to trust the site owner.

What bases, however, did the Massachusetts site community neighbors have for trust? If they had looked to the general performance of American industry, they would have found an appalling record—the Love Canal dump site in Niagara Falls, New York, the poisoned water supply in Malden, Massachusetts, the toxic waste dump in Times Beach, Missouri, the radioactive leaks from the mis-maintained and misoperated Three Mile Island nuclear plant sites. These disasters are graphic examples of entrepreneurial callousness, that is, heedlessness of the effects of dumping hazardous materials, dishonesty in revealing known and substantial dangers, and dogged resistance to accepting liability.

The records of the proposed site developers were little better. One developer had been accused of poor management of waste facilities in other states.⁷⁴ Two developers had submitted conflicting or potentially misleading information to the Massachusetts agencies.⁷⁵ The potential industrial neighbors of one developer feared for their reputations were it to establish its facility.⁷⁶

If the neighbors had looked to the future, the prospects were not promising. They would have a basis for trust only if they knew that they would have an expeditious, certain, and effective means to force compliance with the siting agreement or of the terms of the Site Safety Council approval of the facility proposal. The Hazardous Waste Act, however, contains no provision for either private or public enforcement of these arrangements through the judicial process. To attempt to enforce them through the political process would mean advocating before state level entities that had already exhibited effective capture by the site developers.

What happened, then, in the five attempts to site a hazardous waste facility in Massachusetts was all but inevitable. The producers

these hearings. See MASS. GEN. L. ch. 21D, §§ 4, 8, 14. Contrast the requirements, for instance, for adjudicatory hearings under the federal Administrative Procedure Act, for which the administrative record is “the exclusive basis of decision.” 5 U.S.C. § 556(e) (1982). Since the citizen has no formal power to contribute to the shape of the decision, the only practical use that he can make of his standing is to engage in the political act of organized rhetoric. That is, the process gives him only “rhetorical standing.”

⁷⁴ The Boston Globe, June 26, 1982, at 21, col. 5.

⁷⁵ *Id.*, Mar. 8, 1982, at 17, col. 3; *id.*, Dec. 1, 1983, at 79, col. 3.

⁷⁶ *Id.*, Jan. 16, 1985, at 23, col. 4.

captured the state level political process, procuring a favorable statute and a hospitable attitude on the part of the agencies of state government. The site community citizens, mobilizing at the local level, took the only alternative open to them, "rhetorical standing." At great cost in time and emotion, and at no small financial cost, these citizens won. The public interest, however, lost because, from the point when the need for safe hazardous waste disposal arose as a political issue, the process no longer focused on the public interest, because it was incapable of so doing.

C. Demoralization

The experience under the Massachusetts LULU siting statute seems to belie the preceding prediction of frustration and futility for general participation in the public choice process. An even more telling example might be the environmental movement that began in the late 1960s. Both the Massachusetts experience and the more general experience of the environmental movement saw the emergence of ad hoc groups of lay people who succeeded in changing the kinds of decisions that the public choice process had theretofore been making. An important aspect of these experiences was the fact of those ad hoc groups. The lesson learned was that the atomistic individual could accomplish little in isolation, but could accomplish great things when organized into a group.

Ultimately, however, these experiences illustrate the weakness of the pluralistic process. The argument is not that our system cannot produce broad consensus. The argument is that such outcomes are by far the exception to the typical workings of the process. The Massachusetts experience illustrates the simple explanation—it takes heroic effort to form and sustain an ad hoc group.⁷⁷ Even more important is the nature of the success. In many instances, these experiences show ad hoc groups serving generally to induce and

⁷⁷ The efforts of the residents who fought the toxic waste facility proposed for Warren, Massachusetts serve as an excellent example. The developer for the proposed Warren facility was an entity named IT Corp. *Id.*, Sept. 19, 1981, at 13, col. 2. The efforts of the Warren residents, the author is pleased to report, included an acronymic name for their *ad hoc* group—STOP IT. *Id.*, Oct. 12, 1981, at 1, col. 4. The opposition by the Warren residents is further chronicled in *id.*, Jan. 18, 1982, at 15, col. 4; *id.*, Jan. 26, 1982, at 40, col. 5; *id.*, Mar. 12, 1982, at 22, col. 1; *id.*, Mar. 17, 1982, at 63, col. 4; *id.*, May 3, 1982, at 11, col. 2; *id.*, May 23, 1982, at 25, col. 1; *id.*, June 20, 1982, at 41, col. 1; *id.*, Jan. 18, 1983, at 23, col. 5; *id.*, Mar. 26, 1983, at 36, col. 3; *id.*, Aug. 19, 1983; *id.*, Sept. 28, 1983, at 48, col. 5; *id.*, Dec. 1, 1983, at 79, col. 3; *id.*, May 31, 1984, at 27, col. 2; *id.*, June 15, 1984, at 1, col. 1; *id.*, June 16, 1984, at 19, col. 6; *id.*, June 24, 1984, at 29, col. 2; *id.*, June 28, 1984, at 25, col. 1; *id.*, July 1, 1984, at 36, col. 3; *id.*, July 16, 1984, at 17, col. 1.

mobilize a general public attitude toward preventing the degradation of our important biotic systems and specifically to induce the public choice process to adopt regulatory mechanisms for protecting these biotic systems. To the extent that these groups have achieved this result, they have served the public interest.⁷⁸

More typical, however, is the recent Massachusetts experience. One can look on their success as beating the regular participants—the producers—at their own game. In addition, simply by having achieved their goals, these groups will have brought a broader, and thus more balanced, range of interests to the public process. The fact of having achieved their goals also means that people previously marginal to the processes of power will now have experienced a measure of empowerment.⁷⁹ This must be counted as objectively good because it moves the workings of the process closer to the ideal of broad participation.

There is, however, another way to look at these groups' achievements. When the hue and cry was over, the Act had utterly failed to achieve its goal, the safe disposal of hazardous wastes. However successful these citizen opponents may have been, they accomplished no more than protecting their own particular interests. Despite their participation, the process still did not marshal and effectuate the interests of the rest of the citizens of Massachusetts.

Yet, the crisis that generated the adoption of the Act in 1980 continues. The amount of hazardous waste generated in the state is increasing,⁸⁰ and the consequences of unsafe disposal are becoming more strikingly apparent. In the town of Woburn, for example, medical experts have linked a leukemia rate eight times the national average to a water supply contaminated by industrial waste.⁸¹ Moreover, the Massachusetts experience typifies the methods of a large proportion of the experience of the environmental movement. The principal tactic is delay in every form and forum possible, including the judicial forum. Delay can lead to impasse and immediate defeat for the developer, as happened in the Massachusetts cases.⁸² As

⁷⁸ Opinion polls show an enduring and substantial majority in favor of strong governmental protection for the environment. If nothing else, this majority opinion shows that these groups have wielded the power to shape attitudes of the general public with great effect.

⁷⁹ The elation of the Warren, Massachusetts residents over the developer's abandonment of the proposed hazardous waste facility is discussed in *id.*, June 28, 1984, at 25, col. 1; *id.*, July 1, 1984, at 36, col. 3; *id.*, July 16, 1984, at 17, col. 1.

⁸⁰ *Id.*, Nov. 17, 1987, at 17, col. 1.

⁸¹ Weisskopf, *Did Water Kill Children in Woburn?*, Washington Post, Apr. 3, 1986, at A3, col. 1; Barr, *Poisoned Well*, THE NEW REPUBLIC, Mar. 17, 1986, at 18.

⁸² The developer for the proposed Warren facility withdrew its plans when it faced expenses

often, it can succeed only in winning some concessions from the developer.⁸³

To engage in the tactic of delay in order to assure that factual issues are explored adequately and legal issues are considered maturely is entirely proper.⁸⁴ To engage in this tactic in order to exhaust the opponent is not proper.⁸⁵ The line between the two is ill-defined and permeable.

The public perception of what our political system does accomplish always tends toward the malodorous because what the system produces best—compromise—is at odds with what our political myth says it is supposed to produce—consensus. By experiencing the system up close, ad hoc groups have this perception strongly reinforced. They may have won at the producers' game. They will sense, however, that this is the wrong game. By participating and winning, they will be left with a perhaps cynical suspicion that they helped to undercut and distort the American political myth.

III. THE REMEDIAL PROCESS

We live in a complex world, not least because we have chosen to create a complex political world. The traditional interpretation of the United States Constitution looks on the powers granted to the federal government as an aspect of our sociality,⁸⁶ our ongoing defi-

of \$3.5 million to complete required environmental studies and estimated that it had no more than a fifty-fifty chance of successfully withstanding judicial challenges to those studies brought by opponents. *Boston Globe*, June 15, 1984, at 1, col. 1. An executive for the corporate developer, in announcing the withdrawal, stated: "No company could be expected to proceed with an investment of this obvious magnitude . . . and substantiate this as a prudent business decision." *Id.*

⁸³ A study of mediation as a mechanism for settling environmental disputes is set out in A. TALBOT, *SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION* (1983). By its nature, mediation will give each side something. If Talbot's case studies are typical, the fact that mediation is the mode of dispute resolution almost always means that the project will go forward in some form without a major change in scope or purpose.

⁸⁴ For instance, a Massachusetts citizen group successfully induced its unit of local government to challenge the validity of the *Hazardous Waste Act*. The challenge did not succeed. *See Town of Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 108, 466 N.E.2d 102, 104 (1984).

⁸⁵ The A.B.A. Model Code of Professional Responsibility provides:

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1984); *see also* STANDARDS OF PROFESSIONAL CONDUCT FOR LAWYERS AND JUDGES 80 (N. Redlich ed. 1984).

⁸⁶ The terms sociality and individuality are taken from Garet, *Communitarity and Existence*:

dition and pursuit of goals that express our conception of ourselves in common.⁸⁷ Under this interpretation, the rights established in such provisions as the Bill of Rights are an aspect of our individuality, the way that we define and pursue goals that express a conception of ourselves as unique persons. This standard interpretation establishes a dichotomy—it accords strong and non-lexical importance to individual autonomy and to social power.

Inevitably, these aspects of our existence come frequently into direct conflict. Because neither aspect holds priority, this dichotomy prevents the development of general rules to determine these conflicts. Thus, the constitutional protection accorded to individual rights must be blurred at the edges if the constitutional structure is not to be rendered lexical. The individual right to property, then, is necessarily indeterminate.⁸⁸ The protection accorded to individual rights in property is less than absolute,⁸⁹ and the definition of a property right is blurred.⁹⁰

The problem with the law, however, is not the blur at the edges that results from the play of incommensurate social values. Rather, the problem is that the play of the two competing domains of constitutional values is both haphazard and unpredictable in result, and proceeds on an incomplete consideration of the full range of socially

The Rights of Groups, 56 S. CAL. L. REV. 1001, 1008, 1012 (1983). Garett argues that to read constitutional principles only in terms of sociality and individuality is inadequate because they do not provide a complete description of human existence. That description, according to Garett, is not complete until "communality" is included. *See id.* at 1002-03. Garett's concept of communality is used to analyze the problem of distributive justice which is the principal concern of this Article. *See text accompanying infra notes 205-32.*

⁸⁷ *See id.* at 1069. "Existence, therefore, gives rise not only to a personal right—the right not to be made into a determined thing—but also to a social right—the right to move out of the history in which we find ourselves and toward the realization of our common humanity." *Id.*

⁸⁸ As stated in the text, the proposition that property rights are indeterminate is meant descriptively, as a consequence of the non-lexical nature of constitutional principles. In addition, however, this Article proceeds on the assumption that this proposition ought to be taken normatively as well, on the further assumption that a non-lexical ordering of basic constitutional values is proper.

⁸⁹ The very language of the takings clause of the fifth amendment, U.S. CONST. amend. V, cl. 5, which forms the basis for strong protection of the individual right to property, itself erodes this protection. As the discussion at *infra notes 161-91* and accompanying text points out, the power of eminent domain amounts to a substantial compromise of individuality for the sake of sociality.

⁹⁰ *Andrus v. Allard*, 444 U.S. 51 (1979), stands for the proposition that society has the legitimate power to prohibit a class of objects from being the subject of a private entitlement. *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972), can be read as saying that certain kinds of land simply cannot be held according to the idea of dominion that underlies the implicit function of property entitlements protected by the takings clause.

prized values. This inadequacy is especially strong when our judicial system resolves disputes that arise when one property owner's use disrupts the use of another. The law addresses these disputes under the rubric of nuisance.

A. *Restatement Nuisance*

As recently as the early twentieth century, nuisance was a variant of the law of harms, a strict liability tort.⁹¹ If the plaintiff showed that defendant's use of her land caused a harmful physical invasion of his land, then plaintiff was entitled to an injunction regardless of the care exercised by defendant.⁹² Beginning in this century, as courts turned more overtly to social policy analysis in settling disputes in the law of harms generally, the law of nuisance also underwent considerable change. The result was an analytical model, now incorporated into the *Restatement of Torts*,⁹³ that attempts to look beyond the contending parties to the social value of the activities of both parties and the social consequence of granting a remedy to the plaintiff.⁹⁴ Though the courts have developed and applied this model with the best of socially determined intentions, the result has been incoherence.⁹⁵

It is useful to review three chestnut cases from nuisance law in order to develop a clear conception not only of the nature of this incoherence but also of its potential for disserving the very public interest that the introduction of social policy analysis was meant to serve. Because these chestnut cases are from different jurisdictions,

⁹¹ *E.g.*, *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (1913); *Arminius Chem. Co. v. Landrum*, 113 Va. 7, 73 S.E. 459 (1912); *Bryant v. Lefever*, 4 C.P.D. 172 (1878-79); *Sturges v. Bridgman*, 11 Ch. D. 852 (1879).

⁹² The legal Latin phrase, *Sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another), captures the nature of the tort. See BLACK'S LAW DICTIONARY 1238 (5th ed. 1979). The requirements for recovery on a private nuisance theory are set out at W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 87, at 622-23 (5th ed. 1984) [hereinafter W. KEETON].

⁹³ RESTATEMENT (SECOND) OF TORTS §§ 822-831 (1982).

⁹⁴ The Prosser Hornbook argues that courts use the negligence standard as a means to determine whether the remedy is to be an injunction or damages. See W. KEETON, *supra* note 92, § 88A at 630-33. As the following discussion shows, however, courts also use a standard of care analysis in order to determine whether there has been a legal wrong. See *infra* notes 96-104 and accompanying text.

⁹⁵ See Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979). Epstein argues that much of the current confusion and indeterminacy in the law of nuisance could be eliminated by returning to its earlier conception as a strict liability tort. See *id.* at 54-55. Epstein's justification is based on the protection of personal freedom and autonomy. See *id.* at 54.

there is the inevitable risk of comparing apples and oranges. The risk of producing nothing but fruit salad is offset by the value to be gained in exploring the consequences of the departure from the strict liability model.

In the early part of this century, Antonia Bove built a prototypical corner store-cum-apartment on the fringe of an industrial area of Buffalo.⁹⁶ Some nine years later, the Donner-Hanna Coke Corporation replaced a grove of trees⁹⁷ across the street from Mrs. Bove with what was judicially determined to have been a state of the art coke plant.⁹⁸ The result for Mrs. Bove was an incessant effusion of steam, dust, and grit over her modest property.⁹⁹

The traditional response to the nuisance action that Mrs. Bove brought would have been an injunction against the effusions.¹⁰⁰ In *Bove v. Donner-Hanna Coke Corp.*, however, the Appellate Division of the New York Supreme Court used newly fashionable social policy analysis to deny all remedy on the grounds that the coke plant contributed substantially to the Buffalo economy,¹⁰¹ that its processes were the most advanced available,¹⁰² that the company operated the plant as reasonably as possible,¹⁰³ and that the general neighborhood was, and had been, industrial in nature.¹⁰⁴ Given that the temporal context of the dispute was the early Depression years, the way that the court appealed to, and weighed, social policy is entirely understandable.

The standard critique of the opinion is no doubt familiar stuff. The court consciously abandoned strict liability by adopting the language of "reasonableness." Had the court done this in order to place nuisance into the mainstream of tort, it would have used "reasonableness" in the context of the quality of the defendant's conduct in light of the foreseeability of its consequences.

The court did not, however, return to the mainstream approach based on standard of care. The court instead applied reasonableness

⁹⁶ *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 38, 258 N.Y.S. 229, 230 (1932).

⁹⁷ *See id.* at 41, 258 N.Y.S. at 233.

⁹⁸ *See id.*

⁹⁹ *See id.* at 38, 258 N.Y.S. at 230.

¹⁰⁰ For example, in *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (1913), the New York Court of Appeals rejected the notion that a nuisance plaintiff ought to be denied an injunction if the advantage to him would be slight and the loss to the defendant manufacturer great.

¹⁰¹ *See Donner-Hanna*, 236 A.D. at 43, 258 N.Y.S. at 235 (1932).

¹⁰² *Id.* at 41, 258 N.Y.S. at 233.

¹⁰³ *Id.* at 38, 41, 258 N.Y.S. at 231, 233.

¹⁰⁴ *Id.* at 41-43, 258 N.Y.S. at 233-35.

analysis in order to determine how well the Donna-Hanna Coke Corporation (Donna-Hanna) went about committing its all too foreseeable tort. It would have been enough of a departure if the court had shielded the coke company from liability because it had operated its processes so as to minimize the damage that it had caused. In *Donner-Hanna*, the court took the further radical step of shielding the defendant from liability simply because it operated its processes in the most profitable way—the coke company was the rational, nonaltruistic economic actor.

Air pollution remains a pernicious problem. Move the scene forward some thirty years and some 250 miles southeast from Buffalo. A similar dispute arises—several residents of an area on the fringe of Albany bring a nuisance action against one of the cement plants in the Albany region on the grounds that its considerable effusion of particulate had harmfully invaded their land. In our second chestnut case, *Boomer v. Atlantic Cement Co.*,¹⁰⁵ the New York Court of Appeals agreed that the neighbors should have a remedy.

The court divided, however, over which remedy was appropriate.¹⁰⁶ The majority held that the neighbors were entitled not to a decree ordering cessation of the pollutants, but instead to a fair measure of damages for the accumulated and anticipated harm caused by the emissions.¹⁰⁷ The majority, expressly grounding its decision on “channel[ing] private litigation into broad public objectives,” reasoned that the cement plant was using the most reasonable process available and, like the Buffalo coke plant, the cement plant contributed to the economic vitality of the Albany area.¹⁰⁸ The dissent, less convinced that the cement plant was doing all it could to reduce its emissions, favored an injunction.¹⁰⁹

Unlike the *Donner-Hanna* plaintiff, the *Atlantic Cement* plaintiffs at least obtained a remedy. Nevertheless, the erosion of nuisance as a strict liability tort is evident. Whether or not the defendant is to be enjoined depends on whether it acted reasonably. Reasonableness, however, is not a matter of foreseeability of harm. Nor is it a matter of taking all available steps to avoid an entirely foreseeable

¹⁰⁵ 26 N.Y.2d 219, 257 N.E.2d 870 (1970).

¹⁰⁶ The principal issue was the matter of remedy—ought the court grant an injunction to the plaintiff even though there is a “disparity in economic consequence,” that is, when the economic loss to the plaintiff is small and the economic value of the nuisance-causing activity is great? *Id.* at 223, 257 N.E.2d at 872. The controlling precedent, *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 6, 101 N.E. 805, 806 (1913), had held that an injunction nevertheless lay.

¹⁰⁷ *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 227–28, 257 N.E.2d 870, 874–75 (1970).

¹⁰⁸ *Id.* at 222, 257 N.E.2d at 871.

¹⁰⁹ *Id.* at 231–32, 257 N.E.2d at 877.

harm. Rather, it is a matter of taking all steps that might avoid or reduce the harm, yet still allow defendant to continue to profit from the harm.

The third chestnut, *Spur Industries Inc. v. Del E. Webb Development Co.*,¹¹⁰ involves two substantial Arizona industries—agriculture and retirement communities. In the late 1950s, Spur Industries (Spur) established a cattle feedlot in the relatively undeveloped Peoria area west of Phoenix.¹¹¹ This exercise in hyperactive caloric intake was producing some 500 tons of wet manure daily and, if not contented cows, at least generation upon generation of contented flies.¹¹²

The flies and the odor apparently caused little problem, however, until Del E. Webb Development Co. (Del Webb) began to construct what has become the large retirement community, Sun City, to the north of the Spur operation. As Sun City developed toward the south, the flies and odor increasingly became a problem. When matters reached the point that Webb was having difficulty in selling more homes, he brought a nuisance action against Spur.¹¹³

The Arizona Supreme Court, appealing to the policy of public health, ordered that the Spur operation be discontinued at that location.¹¹⁴ The court observed, however, that the feedlot was there first and that, in effect, Del Webb “had come to the nuisance.”¹¹⁵ Thus, the court also held that Webb must pay a reasonable share of Spur’s costs of moving or abandoning its feedlot operation.¹¹⁶

The court offered a perfectly sensible explanation, public health, for enjoining the feedlot operation. By granting at the same time, however, a damage remedy to the feedlot operator, the court also held in effect that Spur’s flies owned easements across Sun City which Webb was allowed to take by a judicially-granted power of eminent domain.

1. Caprice

The pattern in which the outcomes of these cases fall raises serious questions about the analytical framework itself that underlies present day nuisance doctrine. Consider the four opinions that were

¹¹⁰ 108 Ariz. 178, 494 P.2d 700 (1972).

¹¹¹ *Id.* at 182, 494 P.2d at 704.

¹¹² *Id.* at 183, 494 P.2d at 705.

¹¹³ *Id.* at 182–83, 494 P.2d at 704–05.

¹¹⁴ *Id.* at 184, 494 P.2d at 706.

¹¹⁵ *Id.* at 186, 494 P.2d at 706–08. For a discussion of the intuitive appeal and the questionable logic of “coming to the nuisance,” see Epstein, *supra* note 95, at 72–73.

¹¹⁶ *Spur*, 108 Ariz. at 186, 494 P.2d at 708.

rendered in these three cases. Each case involved the same paradigmatic dispute: neighboring landowners each held an entitlement to land that carried a claim for judicial protection from the tortious private actions of the other. In each, the defendant engaged in a use of land that was, of itself, lawful. Each use, however, caused a seriously damaging invasion of the plaintiff's land. Presumptively, then, each plaintiff held an entitlement not to be invaded. Because of the continuing nature of the invasion, each plaintiff presumptively held a claim for judicial protection of that entitlement by a decree prohibiting future invasions.

Now consider the three cases from the points of view of what was at stake and what the courts did about it. At stake in each case was an *easement*—the right for some harmful vector (smoke, dust, particulate, flies) emanating from the defendant's land to cross the plaintiff's land. The plaintiff went into each case presuming that he or she held both the entitlement to that easement and a claim for the judicial protection of that entitlement. Similarly, the outcome in each case amounted to a determination of who held the entitlement to that easement and what quality of judicial protection this entitlement ultimately commanded.¹¹⁷ Counting the two opinions in *Atlantic Cement*, these courts used *Restatement* analysis to fashion four different outcomes to this single paradigm:

— According to the *Atlantic Cement* dissent, plaintiff held the entitlement to the pollution easement across his airspace, an entitlement protected with a Property Rule.¹¹⁸ That is, plaintiff held the right to the security of this entitlement; defendant could not divest him of it without his consent.

— According to the *Atlantic Cement* majority, plaintiff held an entitlement to the pollution easement across his airspace, an entitlement protected with a Liability Rule.¹¹⁹ That is, plaintiff was subject to the expropriation of this entitlement by defendant, subject only to the payment of appropriate compensation by defendant.

— According to the *Spur* court, *defendant* held an entitlement to the pollution easement across plaintiff's land, an entitlement protected with a Liability Rule.¹²⁰ That is, defendant was subject to the expropriation of this entitlement by plaintiff, subject only to the payment of appropriate compensation by plaintiff.

¹¹⁷ This taxonomy of entitlement and quality of protection is that developed in Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹¹⁸ *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 228–32, 257 N.E.2d 870, 875–77 (1970).

¹¹⁹ *Id.* at 222–32, 257 N.E.2d at 871–75.

¹²⁰ *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972).

— According to the *Donner-Hanna* court, the *defendant* held an entitlement to the pollution easement across plaintiff's land, and entitlement protected with a Property Rule.¹²¹ That is, defendant held the right to the security of this entitlement. Plaintiff could not divest defendant of this entitlement without its consent.

Let us illustrate this caprice, and its apparently endemic nature, by one more example. An ancient maxim holds that the property owner owns from the center of the earth to the sky.¹²² For most of American judicial history, the courts have applied this maxim by refusing to give to a neighbor a prescriptive easement of light and view.¹²³ The judicial logic was a corollary to the idea of nuisance. A, by enjoying the view across B's land or by enjoying the sunlight coming across B's land to A's land from beyond, does not thereby invade B's land. Not having invaded B's land, A can hardly have a claim to a right in B's land that has ripened into existence by B's long-time tacit acquiescence in A's enjoyment. If A has not harmed B, there are no grounds for B to seek redress. Without an invasion, there can be no harm; without harm, no statute of limitations can begin to run.

Come now the 1970s with a rapid restructuring of energy prices. Solar energy for residences now becomes economically attractive. Under the ancient common law maxim, however, B has no right for his rooftop solar panels to view the sun across A's land unless he purchases an easement from A.

Despite the "well-settled" nature of this doctrine, yet another light and view dispute, *Prah v. Maretti*,¹²⁴ arose recently in Wisconsin when an A undertook to build what apparently was an altogether typical house on a subdivision lot.¹²⁵ Unfortunately, the house,

¹²¹ *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 258 N.Y.S. 229 (1932).

¹²² The legal Latin aphorism is, "Cujus est solum, ejus est usque ad coelum et ad inferos" (He who owns the land owns from the center of the earth to the sky). BLACK'S LAW DICTIONARY 341 (5th ed. 1979).

¹²³ The classic case is *Parker & Edgerton v. Foote*, 19 Wend. 309 (N.Y. Sup. Ct. 1838). More recent cases include *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959) (light) and *International Shoe Co. v. Heatwole*, 126 W. Va. 888, 30 S.E.2d 537 (1944) (view).

¹²⁴ 108 Wis. 2d 223, 321 N.W.2d 182 (1982).

¹²⁵ Prior to *Prah v. Maretti*, the Wisconsin courts followed the traditional doctrine that, absent an express transfer, a landowner does not have an easement of light and air over adjacent land. See *Depner v. United States Nat'l Bank*, 202 Wis. 405, 232 N.W. 851 (1930).

Lest the point in the text be misunderstood, it is the genius of the common law that rules simply do not decide cases. If rules were binding, then Mr. Prah, once having had explained to him the hoary *Parker & Edgerton* doctrine followed in *Depner*, would not likely have embarked on his action. The genius, then, of the common law is that it is constantly renewing

when built, would have shaded the solar panels on B's adjacent house.¹²⁶

The Wisconsin Supreme Court upheld an injunction in B's favor based on the social policy of energy conservation.¹²⁷ Unwittingly or not, however, the court thereby transformed the ancient maxim to something like, "The owner of the soil owns from the center of the earth to the surface of her land, and from the surface of the land to the south to the sky." This may be good policy. It makes, however, for an awkward rule.

Worse, B brought his action in nuisance and the Wisconsin courts undertook to resolve it within the confines of that doctrine. The essence of nuisance,¹²⁸ however, is an *invasion* of B's land generated by A's use of his land. But what was the invasion in *Prah v. Maretti*—a *shadow*, that is *the absence of light*?¹²⁹

B. The Inadequacy of Nuisance Doctrine

The common law is as much process as it is substance. Thus, to find that the outcomes of a particular kind of dispute fall into what appears on the surface to be a capricious pattern is not necessarily a telling criticism. Restatement nuisance represents a conscious appeal to social policy. Thus, if a deeper analysis reveals that these outcomes are grounded in a coherent appeal to social policy, then their surface inconsistency can be explained simply on the basis that the results of such an appeal are strongly sensitive to the necessary variety of the contexts of the particular disputes.

itself, paradigmatically in response to plaintiffs who, having had the law explained to them, conclude that it just isn't just, and then set off, bless their cantankerous hearts, to create landmark rulings. The problem at the edges of this genius, however, is the all too human tendency to fall into the error of making the implicit and untested assumption that renewal and change inevitably equate to progress. Yes, we want always to hold open the possibility of success to every Mr. Prah who storms the courthouse doors. No, we do not want always to accede to their demands.

¹²⁶ *Prah*, 108 Wis. 2d at 224–26, 321 N.W.2d at 184.

¹²⁷ See *id.* at 235–36, 321 N.W.2d at 189.

¹²⁸ Of course, there was a time when one could say, "The essence of nuisance is a strict liability tort." See *supra* notes 91–92 and accompanying text.

¹²⁹ An activity that courts routinely hold to be a nuisance is the funeral home in a residential area, even though it causes no tangible invasion, such as smoke, noise, dust, or light. See, *Brown v. Arbuckle*, 88 Cal. App. 2d 258, 198 P.2d 550 (1948), and extensive citations therein. Epstein argues that, because of the absence of a tangible invasion, the funeral home nuisance falls outside the dominant nuisance paradigm and ought not to be extended. *Epstein, supra* note 95, at 64–65.

Alas, this deeper analysis reveals nothing more than incoherence at another level. Take first the solar cell case, *Prah v. Maretti*.¹³⁰ The Wisconsin court attempted to ground its decision on the social policy of encouraging solar energy in an era of energy shortages. But was this policy served? The dispute involved two parties in conflict over who should hold the entitlement to an easement for light across the Marettis' land. The court concluded that the general public welfare would be better served were the Prahs to hold it. The court did not, however, explain exactly why it should order the transfer.

The Coase Theorem tells us that, in the absence of transaction costs, these neighboring landowners whose uses conflict will engage in mutual trade that will allocate the two parcels to the most efficient combination of uses, regardless of whether the law assigns liability to the Marettis or not.¹³¹ If the court believed that, even in this simple two-party situation, there would be barriers to fair bargaining, then it could have created a judicial power of eminent domain in favor of the Prahs simply by enjoining the Marettis as they did and also by ordering the Prahs to pay appropriate compensation to the Marettis.¹³² Even with compensation thus paid to the Marettis, this would involve a substantial erosion of the Marettis' entitlement.¹³³

Because the court did not order compensation for the Marettis, it may have believed not that there were transactional barriers to mutual trade between the two parties, but instead that the price that the Prahs would have had to pay would render the total cost of

¹³⁰ 108 Wis. 2d 223, 321 N.W.2d 182 (1982), parsed *supra* notes 124-28 and accompanying text.

¹³¹ Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). See *infra* note 135.

¹³² This outcome would be quite similar to the outcome in *Atlantic Cement*, discussed *supra* notes 105-09 and accompanying text. Like the cement company, the Prahs would get their easement across neighboring land; they would, however, have to pay for the easement. For a legislative form of this solution, the private right to condemn an easement of view, see the Iowa Solar Energy Access Act of 1981, IOWA CODE ANN. §§ 564A.1-564A.9 (West 1985). The famous Cedar Rust Case, *Miller v. Schoene*, 276 U.S. 272 (1928), involves, in the context of a claim of a regulatory taking, the judicial ratification of a transfer of an entitlement from one party to another in circumstances in which the problem involved barriers to mutual trade and in which the less expropriative device of a private power of eminent domain would also have solved the problem.

¹³³ This erosion has two aspects. First, the outcome subjects to a private power of eminent domain the security of tenure that presumptively is a strong attribute to an entitlement to land. For further discussion, see *infra* text accompanying notes 162-79. Second, because of the nature of litigation, a damages remedy falls far short of effective compensation. For further discussion, see *infra* text accompanying notes 202-10.

their solar cells uneconomical. In effect, this would amount to a decision that the public interest would be served by a subsidy to individuals using solar cells. The problem is that the subsidy is coming not from the public treasury but instead from the Marettis. Because the two parties were subdivision neighbors and thus were in similar social and economic circumstances, there seems to be no overt basis for preferring one party over the other. The decision of the Wisconsin court amounts to a naked, uncompensated expropriation.

*Bove v. Donner-Hanna Coke Corp.*¹³⁴ involved a substantially different dispute. Here was the classic nuisance—an entrepreneur's use caused a tangible and harmful invasion of the land of a private individual of modest means. The court in *Prah v. Maretti* treated the entitlement to the easement across the Maretti parcel as completely contingent on social policy. If the notion of protection for privately held entitlements to property is not to be completely contingent, then the starting point in analyzing a nuisance case should instead be the presumptive autonomy with which the parties to the dispute are to hold their entitlements.¹³⁵

The *Donner-Hanna* court concluded that the defendant's operation was reasonable.¹³⁶ Although the court did not offer a further explanation, the effect was that it was reasonable for the coke plant to pass part of the costs of its operation onto the plaintiff. If the underlying meaning that the court ascribed to the term "reasonable" was "most profitable," then the coke company's profit was false in

¹³⁴ 236 A.D. 37, 258 N.Y.S. 229 (1932), parsed *supra* notes 96–104 and accompanying text.

¹³⁵ One way of approaching the analysis of nuisance disputes is to say that, from an economic point of view, the harm is caused as much by Mrs. Bove's use being inconsistent with the presence of the coke plant as it is by the coke plant being inconsistent with the presence of Mrs. Bove's store and residence. The Coase Theorem tells us that, in the absence of transaction costs, neighboring landowners whose uses conflict will engage in mutual trade that will allocate the two parcels to the most efficient combination of uses regardless of whether the law assigns liability to the Marettis or not. Coase, *supra* note 131. Thus, it can be argued that there is no point to entertaining nuisance actions on the part of the Mrs. Boves of this world in circumstances in which there will be no transactional barriers to that mutual trade. The problem with such an analysis is that, while the assignment of a liability rule is irrelevant (in the circumstances of no transaction costs) to allocational efficiency, it is quite relevant to the individual wealth positions of the two parties. Moreover, it is relevant to the concern of society generally over disparities in wealth distribution. Richard Epstein rebuts the argument in this way: "The weakness of the position is its failure to recognize that for legal purposes the question of causation can be resolved only after there is an acceptance of some initial distribution of rights." Epstein, *supra* note 95, at 58. Epstein analyzes this problem of "causal nihilism" in *id.* at 57–60.

¹³⁶ For a discussion and critique of the court's concept of reasonableness, see *supra* note 103 and accompanying text.

that it did not account for part of its costs. The economist's label for this situation is a misallocation of resources.

As troublesome as the allocational consequences of the decision is the implicit assumption that the traditional nuisance remedy, an injunction in plaintiff's favor, would disserve the public interest because it would shut down a significant employer during an economic depression. The court implicitly assumed that Mrs. Bove, armed with an injunction, would inevitably exercise the power to act as a hold by demanding an unconscionable price in return for a covenant in favor of the coke company not to enforce her injunction.

Take the more plausible assumption, that the two parties, Donner-Hanna and Mrs. Bove, would have bargained fairly had the court enjoined the coke plant operation.¹³⁷ In such circumstances, Donner-Hanna would have chosen the cheapest of three alternatives—pay Mrs. Bove the value of her (fair) perception of the harm that she is suffering, take effective pollution abatement measures, or shut down its operations at that site. Stated in simple Coase Theorem terms, because there are no significant transaction costs, the two parties will trade entitlements to the extent necessary for them to engage in whatever combination of coke production and retail and residential uses of the two sites that will be the most efficient.¹³⁸

The *Donner-Hanna* court may have implicitly assumed instead that the coke company would not have remained financially viable even if it were required to pay only fair, rather than holdout, compensation to Mrs. Bove and any other potential nuisance plaintiffs who may have come forward in the aftermath of a successful action on her part. Surely there was an element of public benefit in seeking to keep the coke plant operating in Depression Era Buffalo.¹³⁹ The justification, however, for keeping the coke plant operating has to do not with productive efficiency but instead with mitigating the impact of the operation of the market. A smoothly functioning market is a marvelous mechanism for reallocating resources to their most efficient uses. The more effectively the market does this in dynamic circumstances, however, the greater the instability. The effects of this instability fall heavily on workers who may be tied for non-economic reasons to a particular locality, who may not easily be

¹³⁷ "Fairness" is used in the sense of bargaining without overreaching.

¹³⁸ See Coase, *supra* note 131.

¹³⁹ For a discussion of the immediate impact and long-term social, economic, and psychological effects of plant closings, see B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY* 25-81 (1982).

retrainable, or who, during a depression, will have no other work available. Thus, the policy of stabilization provides a justification for society to prevent a reallocation, even though to do so frustrates the market in achieving efficiency.¹⁴⁰

Nevertheless, whether to take stabilization measures is very much an open question. A considerable and growing literature argues that the policy of stabilizing the operation of the market is a response that achieves only short-term and local benefits while risking the viability of the general economy in the long-term.¹⁴¹ Thus, whether any particular situation is one in which society should choose stabilization over efficiency is a question not easily resolvable in the context of a nuisance action. The parties to a private nuisance action have neither the expertise nor the incentive to bring before the fact finder the relevant evidence and testimony on this issue presented from society's viewpoint. Nor is the litigation process well suited to making findings on what amounts to questions of national political choice. A court is simply not a mechanism for marshalling the demand for political action.

Even if, however, the particular case is one in which the balance between the short-term and long-term effects of exempting the nuisance-causing entrepreneur from bearing his full costs yields a net public benefit, this benefit does not come without cost. The coke plant emissions devalued substantially what must have been Mrs. Bove's principal worldly asset. This cost was borne not by the ben-

¹⁴⁰ A present-day example of the stabilization function is the recent bailout of the Chrysler Corporation. As another example, stabilization underlies much of the justification for the considerable system of agricultural price supports. The Chrysler bailout was intended, and turned out to be, a temporary measure. The rationale for agricultural price supports is to smooth out the effects of substantial fluctuations in weather from year to year which would otherwise engender a continual entry and exit of farmers from agricultural enterprise.

¹⁴¹ See generally J. JACOBS, *CITIES AND THE WEALTH OF NATIONS: PRINCIPLES OF ECONOMIC LIFE* (1984). For general arguments that inflexibility in resource allocation lies at the source of the current American economic decline, see B. KLEIN, *DYNAMIC ECONOMICS* (1977); M. OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION AND SOCIAL RIGIDITIES* (1982); R. REICH, *THE NEXT AMERICAN FRONTIER* (1983); L. THUROW, *THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE* (1980). This decline appears to have arisen in considerable part from the problem that the response of a well functioning market to dynamic circumstances is the disruption and instability of the allocation to production of such factors as capital and labor. One response is to slow the reallocative operation of the market. A second is to compensate those, especially workers, who are disrupted from the impact of the disruption. Since most of us, whether as investors or as workers, are risk averse, we prefer stability to instability. See, e.g., Glaberson, *An Uneasy Alliance in Smokestack U.S.A.*, N.Y. Times, Mar. 13, 1988, at F3, col. 2 (a tradeoff of lower pay for job security for labor). The cited literature argues that we have adopted the first response excessively. This Article advocates pursuing the second response when LULUs are involved. See *infra* notes 263-76 and accompanying text.

eficiary, the public, but by a single individual. The effect of using social policy analysis in this manner is to separate Mrs. Bove from society and treat her as being in an adversarial relationship with society.¹⁴² Yet, it is the entrepreneur, Donner-Hanna Coke Corporation, that is the adversary of society when it attempts to profit at the expense both of isolated individuals and of society by shifting part of its costs to others.

Our constitutional principles value individual autonomy highly by establishing a strong system of liberties. Societally sanctioned actions that tend to expropriate the principal wealth of the modest individual, however, undercut individual autonomy. It means little in a practical sense for a person to be entitled to a system of liberties if he does not also have the means to enjoy liberty.¹⁴³ For the judiciary to ratify the entrepreneurial choice of the coke plant despite its negative externalities does not answer the public interest question until the distributional consequences have been analyzed.

By refusing to grant full compensation to Mrs. Bove, the court muddled badly the question of distribution. The effect is to provide an implicit double subsidy. The first is from Mrs. Bove to the coke plant, one that is made without an explicit analysis of whether the plant ought to be subsidized. Even if the entrepreneur ought to receive a subsidy on grounds of broad social policy, to leave the harm where it falls amounts to an implicit subsidy from Mrs. Bove to the public generally.

It is difficult to see how such a subsidy can be justified. Nuisance defendants, because they often are entrepreneurs, tend to be risk takers and thereby tend to be affluent. Nuisance plaintiffs, because they tend to be among the more passive members of society, thus tend to be more risk averse and thereby tend to be less affluent.¹⁴⁴ To the extent that these tendencies hold, the implicit subsidies that nuisance doctrine generates function as a pernicious transfer from the poor to the rich.

Because the dispute in *Boomer v. Atlantic Cement Co.*¹⁴⁵ did not arise in the context of difficult economic conditions, the benefits of a

¹⁴² Frank Michelman makes this point in his analysis of judicial decisions which deny claims of a regulatory taking because the social benefit (read: to the rest of society) of the governmental action outweighs the private cost (to one member of that same society). Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1194-95 (1967).

¹⁴³ See J. RAWLS, A THEORY OF JUSTICE 204-05 (1971).

¹⁴⁴ See *infra* note 200 and accompanying text.

¹⁴⁵ 26 N.Y.2d 219, 257 N.E.2d 870 (1970), parsed at *supra* notes 105-09 and accompanying text.

policy of protecting the cement plant investment are even less evident. Nevertheless, the New York Court of Appeals gave considerable weight to the magnitude of the cement plant investment and its economic benefit to its locality.¹⁴⁶ Unlike the outcome in *Donner-Hanna*, however, the plaintiffs in *Atlantic Cement* did get a damage award. The effect of the decision was to allow the defendants to take an easement for their pollutants by purchasing it, through the damages payment, from the plaintiffs. Because the plaintiffs could not refuse the payment and thereby prevent the easement from arising, the outcome of the case can be described accurately as the grant of a private power of eminent domain to the defendant to take the easement.¹⁴⁷

Even the damage remedy that the plaintiffs did receive, however, is fraught with conceptual problems. One can look at the two possible remedies, damages and injunction, as polar opposites. The injunction is one extreme—it allows the plaintiff to act as a holdout. In theory, the highest rational¹⁴⁸ bid of a defendant in the position of the cement company is just one dollar less than the least of three alternatives—the discounted present value of the operation, the cost of moving or shutting down, or the discounted present value of the capital and operating costs of pollution abatement equipment.

Under the damage remedy, the tactical positions are reversed. In order to recover, the plaintiff has the burdens both of coming forward and of persuasion. The proof process comes down to a battle of the experts, with the advantage lying with the defendant, given its superior knowledge of the financial and technological aspects of its operations, its superior access to experts, and the evidentiary burdens on the plaintiff. And, because the evidentiary process is adver-

¹⁴⁶ See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 225 n. *, 257 N.E.2d 870, 873 n. * (1970). The courts below also picked up on the theme of the side benefits that the cement plant generated. The trial court observed that the company had "expended more than \$40,000,000 in the erection of one of the largest and most modern cement plants in the world" and spoke approvingly of the "defendant's immense investment in the Hudson River Valley, its contribution to the Capital District's economy and its immediate help to the education of the children in the Town of Coeymans through the payment of substantial sums in school property taxes." *Boomer v. Atlantic Cement Co.*, 55 Misc.2d 1023, 1025, 287 N.Y.S.2d 112, 113-14 (Sup. Ct. 1967). The Appellate Division echoed these observations. See *Boomer v. Atlantic Cement Co.*, 30 A.D.2d 480, 481, 294 N.Y.S.2d 452, 453 (1968). See generally Comment, *Involuntary Sale Damages in Permanent Nuisance Cases: A Bigger Bang From Boomer*, 14 B.C. ENVTL. AFF. L. REV. 61 (1986).

¹⁴⁷ The property law term is "easement *in invitum*." 3 R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* § 412 (1987). The dissenting judge expressly recognized this. *Boomer*, 26 N.Y.2d at 229-30, 257 N.E.2d at 876-77 (1970).

¹⁴⁸ In most cases, emotion will cut the bidding off long before this point.

sarial, recovery for subjective harm, such as sentimental value, however much it exists in good faith, is a matter of chance.¹⁴⁹ In practice, the damages remedy is hollow.¹⁵⁰ Because it is hollow, the effect of the *Atlantic Cement* decision is to establish a subsidy to the entrepreneur of the same nature as, though smaller in magnitude than, the subsidy that the *Donner-Hanna* court established.

The decision in *Spur Industries, Inc. v. Del E. Webb. Development Co.*¹⁵¹ is similarly puzzling analytically. In *Spur*, the Arizona Supreme Court enjoined the nuisance, but then took the unusual step of granting damages to the defendant. The *Spur* opinion, however, does not explain successfully the basis for granting this damage remedy.

As a matter of reasoning within the standard rules of the law of harms, the explanation that the court did offer—"coming to the nuisance"¹⁵²—simply did violence to its own statement of the facts. Retirement communities, though not Del Webb's, had come to the area *before* *Spur* began operations.¹⁵³ This explanation also did violence to the law of prescription. In Arizona, the prescriptive period is ten years.¹⁵⁴ *Spur's* flies began to invade what became the southern part of Sun City only seven years before Webb encountered sales resistance to the affected lots.¹⁵⁵

The court offered no policy justification for departing from the law of prescription. This body of law in fact provides a thoroughly adequate framework for analysing the issue of coming to the nuisance. Nuisance generally, and *Spur's* activities specifically, involve an invasion of another's land. For the court to say that *Spur's* operation somehow stamped a certain character on the surrounding land is to

¹⁴⁹ The various elements of subjective value are discussed *infra* notes 162–88 and accompanying text. A discussion of the probability of recovering subjective value in an action tried to a jury is contained at *infra* notes 189–91 and accompanying text.

¹⁵⁰ This is not to say that the plaintiff will never get a substantial recovery. In the sequel to the New York Court of Appeals decision in *Atlantic Cement*, at least one of the plaintiffs did extremely well, receiving permanent damages of \$175,000 for harm to his dairy farm, an amount which reflected a sixty-six percent decrease from its pre-nuisance value. *Boomer v. Atlantic Cement Co.*, 72 Misc.2d 834, 340 N.Y.S.2d 97 (Sup. Ct. 1972). The named plaintiff, Oscar Boomer, asked, in the wake of the New York Court of Appeals opinion, for damages of \$350,000 and settled for an unreported amount, all for damage to what can most charitably be called a junk yard. *Id.* at 836, 340 N.Y.S.2d at 98, 100.

¹⁵¹ 108 Ariz. 178, 494 P.2d 700 (1972).

¹⁵² *Id.* at 184–86, 494 P.2d at 706–08.

¹⁵³ *Id.* at 181–82, 494 P.2d at 703–04.

¹⁵⁴ ARIZ. REV. STAT. ANN. § 12-526 (1982).

¹⁵⁵ *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 182–83, 494 P.2d 700, 704–05 (1972).

make one of two assertions. First, the court might assert that Spur's entomological and olfactory invasion of that land had continued for a long enough period—the prescriptive period—that the owner, whether Del Webb or his predecessor, was now estopped by the statute of limitations that the prescriptive period represents from seeking a remedy. The *Spur* facts, however, cannot support such an assertion.

Alternatively, however, the court might want to assert that policy reasons require a departure from the strict requirements of prescription. In order to produce a complete analysis, it would be necessary for the court to offer two kinds of support. One is a statement of these policy reasons. The second is an analysis of which requirements of prescription are to be relaxed.

As to which requirements of prescription are to be relaxed, an obvious one is the length of the prescriptive period. A less obvious, but no less important, requirement is the matter of harm. Surely Spur cannot be conceived as having cut off the use rights of neighboring landowners from the moment that it began its feedlot. But when were those rights cut off? To say that these rights were cut off at the end of a period shorter than the statutory period is to make a policy determination about the length of the period. But there is another, and distinct, question—when did the period begin? To begin a period of limitation means that a harm was inflicted. As a legal matter, did Spur's harm begin when its flies began to invade neighboring land that was scrubland, range, or irrigation agricultural land, even though that invasion caused no damage to those uses? Or did Spur's harm begin when its flies began to disrupt a use, in this case by preventing the conversion of the land to residential use?¹⁵⁶

As to the policy reasons, the *Spur* court offered none. One justification was available in concept, although it may not have applied especially crisply in the actual case—the redistribution of part of the exchange value that developers tend to capture almost in its entirety when exurban land is bought and redeveloped to urban uses.¹⁵⁷ Nor could the court rely on an implicit “deep pocket” policy. That approach to the law of harms tends to shift the cost of accidents to certain successful defendants whose entrepreneurial activities fac-

¹⁵⁶ For a case involving just this issue, and a more express judicial failure to come fully to grips with it, see *Hunt Land Holding Co. v. Schramm*, 121 So. 2d 697 (Fla. Dist. Ct. App. 1960).

¹⁵⁷ For an illustration of the bias toward the risk taker that judicial doctrine exhibits when land is converted to a more intensive use, see *J. Weingarten, Inc. v. Northgate Mall, Inc.*, 404 So. 2d 896 (La. 1981).

tually, though not legally, cause harm. The general justification is to provide a measure of broad social insurance, the premiums for which amount to a redistribution of wealth from the more affluent to the less affluent.

Spur, however, amounts to an attempt to shift the cost of harms not from the victim to a relatively more affluent harm causer who has not violated the formally applicable standard of care, but instead to the victim who has been harmed by a harm causer who has violated the applicable standard of care. Moreover, the shift is not really to Del Webb's ample pocket. To the extent possible, Webb will shift this cost to his customers.¹⁵⁸ As elderly persons with fixed means, however affluent they might be relative to the general population,¹⁵⁹ they are possessed of pockets the size of which does not make them as little deserving of our sympathy as are Del Webb's. Such a bizarre result, then, would seem to require at least some explicit justification.

What emerges from these four cases amounts to a paradigm of nuisance analysis. Under this paradigm, a plaintiff, harmed by the invasions from a neighboring land use, asks the court for a remedy. The court, in response to this remedial question, analyzes it in terms of whether the allocation of resources that the defendant's invasion-causing use represents serves the public interest. In concluding that the public interest is served, the judicial analysis falls substantially short of thoroughness, in no small part because a civil action is ill suited to such an analysis. In addition, by granting at most a damage remedy, the court in effect allows the defendant to expropriate a substantial part of the plaintiff's wealth, an expropriation that tends to exacerbate the inequality in wealth distribution that prevails in society.

1. The Nature of Neighbor's Loss

Nuisance doctrine fails because the remedial system answers the LULU neighbor's claim for redress by exploring a different question. Neighbor asks for a correction of the LULU's distributional effects. The remedial system explores whether the LULU represents a proper allocation of resources.

Let us look more closely at the nature of the loss that Neighbor suffers from the establishment of a LULU. As a context for this

¹⁵⁸ For a discussion, in the context of zoning exactions, of the ultimate limits on the possibility of a complete shift to customers, see Ellickson, *supra* note 68, at 399-400.

¹⁵⁹ Fairlie, *Talkin' 'Bout My Generation*, THE NEW REPUBLIC, Mar. 28, 1988, at 19.

closer look, assume that Neighbor cannot avoid its presence—she is sufficiently powerless in the political process and the judiciary will not enjoin it. At most, the judiciary will give her an opportunity to prove the value of the harm that the LULU will cause and grant her damages on that basis.

This raises two questions. What are the elements of the harm that she has suffered? What is the likelihood that she will recover, through the litigation process, the monetary value of that harm? Bedeviling the attempt to answer these questions is the fact that limiting Neighbor to a damage remedy converts her nuisance action to a process for determining the value of a “nuisance easement” that the court will create in favor of the LULU owner. The best mechanism for determining a value for an interest in land is the market. Market value, however, is generated by trade. Trade, in turn, depends on the meeting of the minds of a willing buyer and a willing seller.

The problem with the nuisance easement is that there is no trade, only a forced transfer between an inadvertent buyer and an unwilling seller. Neighbor must establish a price for the easement by quantifying the harm that the LULU will cause to her property interest. Certainly there will be tangible elements to this measure of harm, such as avoidance costs¹⁶⁰ and mitigation costs.¹⁶¹ Since these steps will not put her in her pre-nuisance position, however, they will fall short of quantifying the full measure of the harm. In attempting to establish this amount, Neighbor can ultimately offer only her opinion and the opinions of whatever experts she is able to sponsor. In effect, Neighbor must assert a subjective value for this harm.

a. *Elements of Value*

That the value of this harm is subjective does not mean that it is ephemeral. It is both tangible and complex. The first element of this subjective value derives from the traditional “bundle of sticks” concept of property rights. This concept is based on the notion that the owner holds an almost complete dominion over his land.¹⁶² This

¹⁶⁰ For example, if her residence has a cement plant for a neighbor, she might find it necessary to install a sophisticated climate control system in her home.

¹⁶¹ In the same circumstances, she might find it necessary to repaint her house more frequently.

¹⁶² William Blackstone defined property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” 2 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 2 (9th ed. 1783).

dominion empowers the owner to subdivide this interest almost without limit in a considerable variety of ways¹⁶³—temporally,¹⁶⁴ spatially,¹⁶⁵ functionally,¹⁶⁶ or by commonality.¹⁶⁷ This dominion further empowers the owner to hold, transfer, recombine, utilize, and enjoy this variety of subdividable sticks as he sees fit.

Property as dominion is subject in concept to only two limitations. The state holds the power to expropriate his entitlement in full or in part.¹⁶⁸ And, his use of his land must not interfere with the use and enjoyment of the entitlements of others.¹⁶⁹ Dominion is effectuated through the security of tenure. Owner's possession and use are protected against physical trespasses by and harmful invasions from others.¹⁷⁰ Owner's title is protected from expropriation by anyone except the state.¹⁷¹

The nuisance easement represents a substantial erosion of Neighbor's dominion. In terms of the use and enjoyment of the invaded land, the easements that were at stake in the three chestnut cases mattered very much to Antonia Bove, Oscar Boomer, and the potential residents of the southern portion of Sun City.¹⁷² Just as important, however, is the impact of the nuisance easement on the Neighbor's right to security. The elements of the right to security

¹⁶³ This unlimited divisibility is an example of the commoditization of property that is integral to the allocational function of the market system. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 L. & Soc'y REV. 571, 573-75 (1977). Unlimited subdivision allows trade in, and thus reallocation of, property interests to take place with the greatest possible precision.

¹⁶⁴ An owner can create a temporal series of rights to possession and use by utilizing the life estate followed by a remainder and the landlord-tenant relationship.

¹⁶⁵ The residential tract development is a horizontal subdivision of land. The owner can subdivide the land vertically by creating such interests as air rights, rights to timber, and rights to subsurface minerals.

¹⁶⁶ A detailed taxonomy of the ten functional elements of the "liberal concept of ownership" appears in Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A. Guest ed. 1961).

¹⁶⁷ For a discussion of the several ways of holding simultaneous rights in land, see T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 53-55 (2d ed. 1984).

¹⁶⁸ The "right to security," in Honore's taxonomy, "is consistent with the existence of a power to expropriate or divest in the state or public authorities." Honore, *supra* note 166, at 119-20.

¹⁶⁹ Honore's term is "the prohibition of harmful use." *Id.* at 123. This is simply the "sic utere . . ." concept that is the basis of nuisance. See *supra* note 92.

¹⁷⁰ The strength of the concept of security of tenure is demonstrated by the common law aphorism that the very fact of a trespass implies damage. 6A A. CASNER, AMERICAN LAW OF PROPERTY § 28.12 (1954).

¹⁷¹ In practice, certain private entities, such as common carrier public utilities, also hold the eminent domain power. *E.g.*, DEL. CODE ANN. tit. 26, § 901 (1975); IND. CODE ANN. § 8-1-8-1 (Burns 1987); N.J. STAT. ANN. § 48:3-17.6 (West 1969).

¹⁷² See *supra* notes 96-121 and accompanying text.

are contained in the implicit bargain¹⁷³ over property set out in our constitutions—"nor shall private property be taken for public use without just compensation."¹⁷⁴ Government has the power to expropriate property, but only if it gives compensation to the expropriated owner. Only government enjoys that power. And government may exercise the power only if government itself is to use the expropriated property. Otherwise, dominion is absolute.

However much this implicit bargain might remain a viable element of the lay legal myth, the emergence of a mature capitalistic economy has eroded its practical force. Because capitalism requires public regulation and public planning as well as entrepreneurship, the role of government and the consequential impact on private property is necessarily large.¹⁷⁵ The rise of the administrative state has meant that the government's burgeoning regulatory activities can erode the use right of the property owner substantially, and thus erode the effective value of his title security as well.¹⁷⁶ The rise of the activist state, planning, coordinating, and even carrying out substantial entrepreneurial activities, has meant that government may expropriate his title for private uses as well as public.¹⁷⁷

Despite the considerable erosion of the right to security that this role entails, however, security of tenure erodes only when government takes the initiative. The considerable significance of the nuis-

¹⁷³ See F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 12-13 (1985).

¹⁷⁴ U.S. CONST. amend. V. For similar language, see, *e.g.*, CONN. CONST. art. 1, § 11; DEL. CONST. art. I, § 8; N.Y. CONST. art. 1, § 7.

¹⁷⁵ See C. LINDBLOM, *supra* note 2, at 313-29.

¹⁷⁶ This erosion takes place as a "regulatory taking." Judicial practice has ratified substantial erosion of the use right without, however, having solved the seemingly intractable problem of developing a theory that adequately contains it. Only *ad hoc* notions, inadequate for the purposes of theory, have emerged, such as loss of investment backed expectations, loss of the opportunity for economic return, or regulation that goes "too far." *E.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. 1232, 1247 (1987); *MacDonald, Sommers & Frates v. Yolo County*, 106 S.Ct. 2561, 2566 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹⁷⁷ For example, in *Berman v. Parker*, 348 U.S. 26 (1954) the Supreme Court held that the government may validly expropriate for private use if that private use will serve the public benefit. The undertaking challenged in *Berman v. Parker* is prototypical of the activist state—the government of the District of Columbia, in order to eradicate an extensive slum area, proposed to take the entire area by eminent domain, raze it, plan a totally new pattern of uses for it, install the utility and service infrastructure to serve these uses, and then sell off the various parcels to private entities to develop them according to the use plan.

ance easement is that owner's security of tenure erodes at the initiative of private entities as well.¹⁷⁸ The expanded role of government in economic processes has eroded the property owner's security of tenure substantially. The further erosion, at the initiative of private entities, of what remains of security of tenure will be felt especially keenly.¹⁷⁹

If the loss of security of tenure goes to the fact of ownership, a second element of subjective value, the loss of sentimental value, goes to the quality of the property that is harmed. Neighbor's family may have held the property for several generations, the property might have been the site of significant events in Neighbor's life, or the property may possess special attributes that appeal to her idiosyncratic tastes. Alternatively, the fact of possessing that particular property might be central to her self-definition.¹⁸⁰ Whatever the particular ingredients of this sentimental value, for so long as she remains committed to owning that property, the amount that a willing buyer might offer for it will fall short of her valuation of it.

A third element of subjective value, closely connected to the value that arises from security of tenure, is what might best be called psychic value. One aspect of this value is the apparent inertia that comes with ownership. Once an owner becomes committed to holding particular property, reaching the decision to give it up often involves a considerable psychic cost.¹⁸¹ Another aspect of psychic value is captured by the phenomenon that carries the label "hysteresis"—we tend to feel losses more acutely than gains of comparable magnitude.¹⁸²

¹⁷⁸ Because of producer control of the public choice process, private initiative works as well through government to erode the property rights of consumers.

¹⁷⁹ This is entailed by the phenomenon of diminishing marginal value, discussed *infra* notes 184–86 and accompanying text. The reverse of this phenomenon means that, as the level of a particular good falls, further losses are felt even more keenly. Honore has pointed out the consequences of the loss of security of tenure: "From the point of view of security of property, it is important that when expropriation takes place, adequate compensation should be paid; but a general power to expropriate subject to paying compensation would be fatal to the institution of ownership as we know it." Honore, *supra* note 166.

¹⁸⁰ This is captured, in the context of takings doctrine, as "objects . . . closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world." Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

¹⁸¹ An example of this phenomenon is the consistent difference between the "bid" and "ask" prices in the listings of the over the counter securities market that cannot be accounted for by explicit transaction costs like brokerage fees.

¹⁸² R. HARDIN, *supra* note 32, at 64. Hardin derives this notion from David Hume's *A Treatise of Human Nature*. See *id.* at 82.

The explanation for these phenomena comes from the economist's notion of income effects.¹⁸³ Most people exhibit a diminishing subjective value for most goods, including money. The more a person has of a particular good, the less he values an additional amount of that good.¹⁸⁴ Thus, if he is threatened with the loss of a particular good, he will offer less to avoid the loss than he would accept in compensation for the loss.¹⁸⁵ For that reason, two individuals with precisely the same value preferences for a particular piece of property will tend to quote different prices if one of them does not own it and is asked what she would give for it and the other owns it and is asked what compensation he wants for its expropriation.¹⁸⁶ To an objective observer, the second individual is exhibiting "subjective value."

Risk is the final element of subjective value. It is clear that people would not choose to spend their lives at either of the opposite extremes of complete contingency and of complete stability. It is also clear, however, that different people prefer to occupy different positions across the continuum between those extremes. One way of describing the preference of any particular person is in terms of her

¹⁸³ See generally A. ALCHIAN & W. ALLEN, *EXCHANGE AND PRODUCTION: THEORY IN USE* 24 (1969); J. HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 100-01 (1976).

¹⁸⁴ A. ALCHIAN & W. ALLEN, *supra* note 183, at 22-23. Take an individual with a wealth level of \$1000. The drop in his overall level of value were he to lose \$100 of that wealth would be greater than the gain in value that he would experience were his wealth level to increase by \$100. The explanation is this: because of the phenomenon of diminishing value, he values the money between the levels of \$900 and \$1,000 more than the money between the levels of \$1,000 and \$1,100.

¹⁸⁵ Mishan, *Welfare Criteria for External Effects*, 51 *AM. ECON. REV.* 594, 602-03 (1961). That is, because of the phenomenon of diminishing value, he assigns more value to a dollar that he has and must give up than he assigns to a dollar that he does not have and is being offered.

¹⁸⁶ This is an extreme example of the concept:

On issues that make a significant difference to the individual's welfare the difference between the maximum sum he would pay to avoid a certain fate (his view being permanently obscured, or his peace being shattered over a long period) and the minimum sum he would accept for submitting to that fate is likely to be far greater than is habitually suggested by our notions of differences in welfare effect, so frequently assumed negligible in order to reach elegant theoretical results. The current and prospective income and assets of a person form a limit to the maximum he can afford to pay and remain alive, while no such limit restricts the minimum sum he would consent to receive. A man dying of thirst in the middle of the Sahara could offer, for a bucket of water that would save his life, no more than his prospective earnings (above some subsistence level). And this sum would be infinitesimal compared with the sum of money needed to induce him to forgo the bucket of water and fatally reduce his chance of survival.

Mishan, *Pareto Optimality and the Law*, 19 *OXFORD ECON. PAPERS* 255, 272 n.2 (1967).

affinity for, or aversion to, risk.¹⁸⁷ To the extent that an individual is risk averse, then to that same extent she accords value to being immune from expropriation.

These notions are relevant to the discussion at hand because a LULU often is an entrepreneurial enterprise. The term "entrepreneurial" connotes the idea that the enterprise was undertaken as a risk of present capital for the possibility of future profit. Whenever a LULU takes a property interest from Neighbor, this property interest has now been folded into the enterprise and subjected to the same risk. To the extent that Neighbor is typical, that is, risk averse, she will have a less accepting attitude toward risk than the enterprise owner. Thus, to the extent of the property expropriation, she has been forced to accept a degree of risk higher than her preference.¹⁸⁸

b. *Measuring Value*

The second question addresses the likelihood that the litigation process will be an effective mechanism for Neighbor to recover the highly subjective monetary value of the harm that the LULU will cause. The answer, regrettably, is that this likelihood is low. In the first place, the nature of the process works against her. As a civil

¹⁸⁷ The same general phenomenon of diminishing value also underlies the notion of risk. A risk averse person exhibits a declining marginal utility for further wealth; a risk neutral person exhibits indifference between present and potential wealth; and a risk accepting person values potential wealth more highly than existing wealth. The fact that most people exhibit diminishing marginal value indicates that most people are at least mildly risk averse.

¹⁸⁸ This point is made in Calabresi, *The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence?*, in PROC. BRIT. ACAD. 85, 95-96 (1981):

So long as a law imposes an equal risk of loss and gain on groups whose aversion to risk differs, it has significant distributional consequences. It follows that an 'inefficient' law that results in randomly chosen losers and winners may none the less be desirable, because it entails a gamble that is more desired by those we wish to favour on distributional grounds. An efficient law may impose a gamble that has the converse effect, and may, for that reason, be undesirable.

Id. at 96 (footnote omitted). The point being made here is the narrow one of the nature of the loss that the LULU Neighbor has suffered—from the point of view of the Neighbor. As will be discussed below, there are other questions of relevance. One of these has to do with whether it is objectively proper that the Neighbor be allowed to count the risk imposition as a loss that demands compensation. For instance, one might take a social policy viewpoint and say that society is worse off if we allow the risk averse always to stand in the way of the risk accepting entrepreneur. That the common law of tort is biased in favor of the risk acceptor is discussed *infra* notes 253-61 and accompanying text. If, however, one takes the viewpoint of individual rights and liberties, then the subjective preferences of the individual, however much they deviate either from the norm preferences of society as a whole, or from some other societal standard, are to be accorded protection in order for individual rights to have operational meaning.

plaintiff, Neighbor carries the evidentiary burdens of coming forward and of persuasion. Necessarily, then, whatever award she ultimately achieves will be eroded substantially by litigation costs¹⁸⁹ and attorney's fees. Her award will come at a substantial discount.¹⁹⁰

The attitude of the jury will present further problems. The jury is nominally impartial. Up to the point of a judgment notwithstanding the verdict, however, a civil jury has significant leeway in finding the facts and applying the law. Because of the suasive force of the trial's ritualistic aspects, jurors are not likely to take a decision to depart from the judge's guidance lightly. If they do decide to depart, they might do so in either direction. If they are modest landowners like Neighbor, they will want to sympathize with her plight. The potential, however, for adverse effects on the financial viability of a major local employer that a large verdict for plaintiff might cause will not be lost on the typical juror. Jury departures from judicial guidance, then, are likely to be random and thus capricious in their effects.

If the jury chooses to be impartial, it will tend to see the process of proof as a game between the plaintiff and the defendant. Neighbor logically will try to take into account the full range of subjective considerations in her offer of proof. The jury, however, will perceive her estimates of value as rising from a strategy of overstating her harm—asking for too much in order to end up with the correct amount. The LULU Owner, just as logically, will limit its offer of proof to objective considerations. The jury will perceive this as a strategy parallel to that of Neighbor's strategy. In response, the jury is likely to engage in baby-splitting.

The final problem is the quality of Neighbor's testimony. She will be attempting to articulate what cannot be articulated easily, the elements that make up the considerably subjective value that she attaches to her land. If the jury is impartial, her valuation will appear to be puffing. If the jury is even mildly pro-defendant, she will appear to be grasping.¹⁹¹

¹⁸⁹ A LULU defendant can be much like the prototypical institutional defendant, the insurance company—resource, and thus skills, rich, and a repeat player, with the highest incentive to "litigate tough," perhaps to the point of disserving its interests in the particular case, in order to develop a reputation that could discourage future plaintiffs. For a brief analysis, see C. GOETZ, *LAW AND ECONOMICS: CASES AND MATERIALS* 85–86 (1984).

¹⁹⁰ See *supra* notes 148–50 and accompanying text.

¹⁹¹ In the *Atlantic Cement* litigation, Oscar Boomer was attempting to recover damages for the harm caused by cement particulate to his property, "about 8 acres, on which are situated a garage in which plaintiff conducted a used auto parts business and did auto body and fender work, and two small one-car garages, one metal." *Boomer v. Atlantic Cement Co.*, 72 Misc.2d

C. Conceptions of Existence

This extensive litany, however, has not yet exhausted the notion of subjective value. The preceding discussion of the nature and extent of Neighbor's loss focuses on what in fact is a narrow view of property rights, one that implicitly defines the relationship between Neighbor and her property in terms of dominion.¹⁹² Under this view, we considered her losses in terms of the erosion of her theoretically near-absolute dominion.

Now consider Neighbor's property from a different point of view. Regardless of its particular intrinsic attributes, that property might be located in a neighborhood in which community values are high. The typical example is the ethnic neighborhood.¹⁹³ Here will be found

834, 836, 340 N.Y.S.2d 97, 100 (1972). His testimony on his personal evaluation of the damage offers an interesting case in point:

On cross-examination (p. 48, 49, Vol. 1) Mr. Boomer testified that he arrived at the price of \$350,000 thusly:

"Q. Now, this price that you put on this land of \$350,000, how did you arrive at that figure?

MR. DUNCAN: Your Honor, I object again. The man gave the price as to what he felt it was worth to give to Atlantic. He is taking an old Bill of Particulars from 1964 to impeach him. This is the price the man said he wanted.

THE COURT: Overruled.

A. (Continuing) I have got two small boys that would like to go in the salvage business. The youngest one is 11 years old. Now, between the time he gets to where he can run this salvage business and the time he retires at 65, there is a lot of space in between. \$350,000 falls in there.

BY MR. TRACY (continuing)

Q. That's what you based it on?

A. On my children, yes, sir.

Q. And that is the basis for putting the figure of \$350,000 on it?

A. Yes."

Id. at 839-40, 340 N.Y.S.2d at 103. Is this testimony grasping? It depends on your attitude toward Oscar Boomer.

¹⁹² The basic notion which underlies Honore's concept of full, liberal ownership is dominion. See Honore, *supra* note 166.

¹⁹³ The terms "neighborhood" and "community" are used to denote opposite poles of a spectrum which itself describes a locality with attributes of cohesion and continuity beyond an impersonal, atomized urban residential area or a neighborhood that coalesces ad hoc and *pro tem* around a transient issue (such as the Massachusetts communities that organized to oppose the hazardous waste facilities). As to the end of this spectrum where these attributes are least strong, Jane Jacobs has given a functional definition of the urban neighborhood as an organ of "city self-government or self-management" which provides "webs of public surveillance" and "networks of everyday public life." J. JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 114, 119 (1961). See also A. DOWNS, *NEIGHBORHOODS AND URBAN DEVELOPMENT* 13-19 (1981) [hereinafter *NEIGHBORHOODS*] (defining the urban neighborhood in terms of a combination of geography, social relationships, and expectations about continuation of these relationships); Schoenberg, *Criteria for the Evaluation of Neighborhood Viability in Working Class and Low Income Areas in Core Cities*, 27 *SOCIAL PROBLEMS* 69 (1979) (defining

a milieu of value homogeneity and psychic support. Here also will be found a web of in-kind trade of goods and services¹⁹⁴ that is not possible in an anonymous, transient neighborhood. The value to Neighbor of such a milieu is considerable.

Notice, however, the way in which this value accrues to her. Under the dominion concept of property entitlements, Neighbor has rights *to* the particular property. The sole functioning of this property is instrumental to her as an autonomous person. Under this alternative view, there is a larger tract of property that "contains" a neighborhood with strong communal values. The entitlement that any one member holds to any one portion of that tract, looked at from the point of view of dominion, has little meaning in terms of that community. Because of the existence of the community, the tract has a significance that is greater than the sum of the discrete parcels into which it might be carved.¹⁹⁵

In this alternative sense, what Neighbor holds is not an entitlement *to* property, but instead an entitlement *in* property. Her entitlement performs a function far different from the subordinated, instrumental function of the dominion point of view. Here, her entitlement performs an enabling function, allowing her the opportu-

neighborhood vitality in terms of agreement about public behavior and processes for defining and supporting goals over time).

At the other end of the spectrum is community, which is defined both in terms of a particular spatial setting for social interactions and in terms of the nature and function of these interactions—"normative social interaction and resulting social structure" and "shared collective representations and moral sentiments." A. HUNTER, *SYMBOLIC COMMUNITIES: THE PERSISTENCE AND CHANGE OF CHICAGO'S LOCAL COMMUNITIES* 4 (1974). See also T. BENDER, *COMMUNITY AND SOCIAL CHANGE IN AMERICA* 5-8 (1982) ("social space or network held together by shared understandings and a sense of obligation" in which individuals "are bound together by affective or emotional ties rather than by a perception of individual self interest"); H. GANS, *THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS* 104 (1982) ("an aggregate of people who occupy a common and bounded territory within which they establish and participate in common institutions"); R. SENNETT, *THE USES OF DISORDER: PERSONAL IDENTITY AND CITY LIFE* 31 (1970) ("The bond of community is one of sensing common identity, a pleasure in recognizing 'us' and 'who we are.'"); M. STEIN, *THE ECLIPSE OF COMMUNITY: AN INTERPRETATION OF AMERICAN STUDIES* 22-23 (1960) (an area with "its own peculiar traditions, customs, conventions, standards of decency and propriety, and . . . a universe of discourse . . .").

¹⁹⁴ At its most rudimentary level, the viable neighborhood provides effective policing of common areas and monitoring of children at play. J. JACOBS *supra* note 193, at 119; O. NEWMAN, *DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN* 49-101 (1973). One characteristic of a strong community is the extensive in-kind economy through which the members share their particular talents and surplus goods. For a detailed, albeit fictional, description of such an in-kind economy in a traditional Native American-Hispanic culture, see J. NICHOLS, *THE MAGIC JOURNEY* (1978).

¹⁹⁵ From the standpoint of the community, its conception of the property is almost exactly the opposite of the commoditization, described in Balbus, *supra* note 163.

nity to be part of the community.¹⁹⁶ In this view, the entitlement is mutually instrumental. It is instrumental to her to the extent that she defines herself through the community. At the same time, she is instrumental to the community to the extent that the fact of the community imposes necessary limitations on the unfettered entitlement that the law allows her under the dominion point of view.¹⁹⁷

The dominion concept of ownership fails to capture what in many instances will be the most important aspect of a landowner's existence. The compensation system requires Neighbor to establish objective, market-oriented values for the loss that she has suffered. If, however, Neighbor defines herself in terms of a cohesive community to which her entitlement enables her to belong, then the notion of monetary compensation is peculiarly irrelevant. Market value connotes price; price connotes trade. The value of community cannot be traded, however, to an outsider. The outsider cannot buy into the community. At most, he can hope eventually to become part of it.¹⁹⁸

The concept of communal existence provides a lens for completing our exploration of the loss that a LULU Neighbor suffers.¹⁹⁹ A tacit

¹⁹⁶ "There is a 'we-ness' in a community; one is a member. Sense of self and of community may be difficult to distinguish." T. BENDER, *supra* note 193 at 7-8.

¹⁹⁷ For conceptions of rights in land alternative to dominion, see *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 328, 366 N.E.2d 1271, 1275-76 (1977), *aff'd*, 438 U.S. 104 (1978) (dominion limited by social webs); *Just v. Marinette County*, 56 Wis. 2d 7, 17-18, 201 N.W.2d 761, 767-68 (1972) (dominion limited by biotic webs).

¹⁹⁸ A description of the converse idea, that providing ample money to a poor, traditional community so as to enable its members to satisfy their wants through the cash market and abandon their in-kind market leaves them, in a larger sense, far poorer, is convincingly developed in J. NICHOLS, *supra* note 194. Here is a perhaps extreme example from another culture and involving a far smaller level of detail, of a well-intentioned attempt to help a subsistence farmer in the Third World by giving him a tractor:

And even in a system so near the edge of survival, there is still room for the very poor, by the most thrifty use of all its traditional elements. . . . Cow dung is used for fuel—the slow heat is just right for making curds—and for plastering walls and floors; a little milk from a starveling cow—there cannot be oxen without cows—makes a vast difference to diet, or perhaps a little cash by sale of ghee: how will a tractor replace the dung, the plaster and the milk?

G. HUNTER, *MODERNIZING PEASANT SOCIETIES: A COMPARATIVE STUDY IN ASIA AND AFRICA* 35 (1969).

¹⁹⁹ The exploration of communality which follows is taken from, and draws deeply on, Garet, *supra* note 86. This exploration proceeds on the assumption that constitutional principles ought to be read through the lenses of the three major constituents of the way that we exist, individuality, sociality, and communality. A rather fundamental problem with this assumption, of course, is that it risks committing the naturalistic fallacy—that which is, ought to be. The defense is provided by Alexis de Tocqueville's observation that we tend to judicialize every important political question. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J. Mayer ed. 1969). Thus, should not the law reflect who we are, especially in a system whose myth

conception of dichotomy between individual rights and state power seems to underlie much of our constitutional jurisprudence.²⁰⁰ The structure of the United States Constitution is altogether hospitable to this conception—the text of the Constitution itself consisting of a structured delegation of power to the federal state representing “we the people” and the Bill of Rights forming a structure of protection for the liberty of the autonomous individual. Because this constitutional structure contains no grounds for preferring the people in common over the free individual, then the central problem of constitutional jurisprudence involves a necessary tension between society and individual as distinct and often conflicting foci of power.

Missing from this tacit conception is the small community. As an entity intermediate between society and individual, it also functions as a focus of power in our ongoing political and social world. Despite this real function, however, the community has no formal place in the jurisprudential concept of our political structure.

There are several explanations available for this tacit acceptance of dichotomy rather than trichotomy. An historical explanation places our constitutional experience in the larger development of the post-medieval liberal project—to make real the worth of the individual by sweeping away the medieval conception of the individual as subsumed within society, an organic whole composed of tight and inescapable small communities bound together into a larger, and strongly hierarchical, social body.²⁰¹ In the liberal project, the small community is the symptom of all that was bad in the medieval order.²⁰²

holds that who we ought to be derives from what it is we do, rather than from, say, the dictates of an ascribed hierarchy?

²⁰⁰ Indeed, this was assumed in the discussion *supra* notes 160–92 and accompanying text. In this tacit view, the local community has what amounts to an entirely derivative role, one that bridges the space between these two poles. Community provides a recognized option to the individual for achieving self-definition. Community also provides a vehicle to the powerless autonomous individual to achieve some standing in the ongoing competition of the larger society. Community is not, however, a separate object of concern.

²⁰¹ Robert Nisbet described the conservative conception of society, as contrasted with the modern conception based on the autonomous, though alienated free individual, as a view of man and society that stressed not the abstract individual and impersonal relations of contract but personality inextricably bound to the small social group; relationships of ascribed status and tradition; the functional interdependence of all parts of a society, including its prejudices and superstitions; the role of the sacred in maintaining order and integration; and, above all, the primacy of society to the individual.

R. NISBET, *COMMUNITY AND POWER* 25 (1962).

²⁰² Gerald Frug took this historical approach in order to explain the subordinate and pow-

Within the particular American historical experience, we have rendered the local community powerless in order to prevent it from acting as a force antithetical to the values chosen by the national society.²⁰³ An empowered local community could have frustrated the nineteenth century national economic goal of economic centralization.²⁰⁴ Moreover, an empowered local community could even today frustrate the realization of such societal values as the protection of individual rights and the fostering of equal protection.²⁰⁵

As James Madison's *Federalist No. 10*²⁰⁶ shows, the potential for small communities to engage in oppression by majorities was a significant concern in the intellectual debate over the United States Constitution. It is likely that *Federalist No. 10* is the most familiar of the Federalist Papers because its description of the dark side of community resonates so strongly within our own experience.

Indeed, American writers have captured the American small town in caricature so well that their description itself has become a part of our political and social myth.²⁰⁷ At its best, the American small town is a repository of cohesiveness, mutual support, and stability.²⁰⁸ At the same time, however, it is bigoted, repressive, hierarchical, and hypocritical. Because it is intolerant of heterogeneity, its values

erless status of the local community in American law. See Frug, *The City As A Legal Concept*, 93 HARV. L. REV. 1059 (1980).

²⁰³ *Id.* at 1106.

²⁰⁴ G. FREDERICKSON, *THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF THE UNION* (1965). Frederickson argues that the experiences of Oliver Wendell Holmes, Jr. in the Civil War strongly shaped his thought: "[Holmes's] attempt to find and apply an empirical jurisprudence—a definition of the law which was grounded in the realities of power and history—was the natural enterprise of a man who had grown tired of the millennial expectations and abstract moralism of the war years." *Id.* at 208 (footnote omitted). The congeniality of Holmes's jurisprudential thought with fostering the reallocative power of the American economy is discussed *infra* notes 253–61 and accompanying text.

²⁰⁵ Frug, *supra* note 202, at 1073. Liberal theory tends to replace the simple medieval vision of the world with a vision of a complex world made up of a congeries of dualities. To view political society as a duality between the sovereign individual and the sovereign state is congenial to the larger liberal vision in a way that a trichotomy that includes the local community is not. *Id.* at 1074–76.

²⁰⁶ *THE FEDERALIST*, *supra* note 47, at 60–61.

²⁰⁷ See R. LINGEMAN, *SMALL TOWN AMERICA: A NARRATIVE HISTORY 1620–THE PRESENT* 364–391 (1980). For fictional accounts, see S. ANDERSON, *WINESBURG, OHIO* (1919); H. LEE, *TO KILL A MOCKINGBIRD* (1960); S. LEWIS, *MAIN STREET* (1920); E. MASTERS, *SPOON RIVER ANTHOLOGY* (1915). For a non-fictional account, see T. VEBLEN, *ABSENTEE OWNERSHIP: THE CASE OF AMERICA* 142–65 (1967), an account which begins: "The country town of the great American farming region is the perfect flower of self-help and cupidity standardised on the American plan." *Id.* at 142. See also A. VIDICH & J. BENSMAN, *SMALL TOWN IN MASS SOCIETY: CLASS, POWER AND RELIGION IN A RURAL COMMUNITY* 49–78 (1968).

²⁰⁸ For an account of the myth of the benign small community, see J. ROBERTSON *supra* note 12, at 215–18.

clash strongly with societal notions of a pluralism of values and the equal worth of individuals.²⁰⁹

It can be argued, however, that the language of the United States Constitution does not compel that rights and power have meaning only through the categories of "individual" and "society."²¹⁰ The language of the first amendment, for instance, is not couched in terms of individual rights. Indeed, a rights-holder is mentioned for only one of the three rights set out in that amendment, the right to assemble. And that rights-holder is not the individual but "the people."

Even the tacit view of a dichotomy between individuality and sociality represents a way of reading constitutional language.²¹¹ Under the tacit view, society functions both as a locus of power and as a focus of rights distinct from and often in conflict with the individual. Yet, it is possible to make a rationally powerful argument, grounded in the Enlightenment philosophy that was so congenial to the intellectual thought that underlay the Constitution, that society—"the people"—represents not so much a separate locus of power and rights as a summation of the values of the free and autonomous individuals who make up that society.²¹² Thus, such categories as

²⁰⁹ Complicating our exploration of communality is the problem that communities, taken in the normal meaning of the word as distinguished from the more specialized definitions offered *supra* note 207 come in a variety of forms. Richard Sennett has explored much of the range of possibilities. See generally R. SENNETT, *supra* note 193. Communities in this normal usage that nevertheless contain few or no attributes of communality include the hierarchical small town and the affluent suburb. Examples of the former are discussed in T. VEBLEN, *supra* note 207; A. VIDICH & J. BENSMAN, *supra* note 207; R. LINGEMAN, *supra* note 207. Examples of the latter are discussed in A. DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* 1-25 (1973); J. ROBERTSON, *supra* note 12, at 247-49; R. SENNETT, *supra* note 193, at 68-73. Communities that possess a high degree of communality include, of course, the ethnic neighborhood as described in, for instance, H. GANS, *supra* note 193. They also include what Sennett calls the assimilating community of the "interpenetrated ghetto." R. SENNETT, *supra* note 193, at 53-57. The point is that none of these forms has a monopoly over the worst attributes of the values that the local community, taken in the normal sense, can possess—bigotry, repression, hierarchy, and hypocrisy. These values can arise all across the spectrum of community forms.

²¹⁰ Garet, *supra* note 86, at 1003, 1008.

²¹¹ See *id.* at 1007.

²¹² The argument is set out in R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). See especially *id.* at 1-18, 107-12, 331. The theory of the state upon which this argument is based is quite close to Robert Nozick's minimal state (the "Night Watchman State"). See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 26-27 (1974). It strongly contrasts with the concept of the liberal political order that understands the world "as a series of complex dualities." Frug, *supra* note 202, at 1075. Although the strict compensation theory developed in Epstein's article is altogether congenial to the approach to solving the problem of the effect of LULUs on Neighbors advocated in this Article, the underlying view of individual rights in land which this Article assumes is not congenial to the theory developed

individual and society can properly be deemed structures through which to effectuate the principles that the Constitution establishes. More particularly, they represent structures, both alternative and complementary, of the way we exist as humans.²¹³ To accept the argument that constitutional principles ought to be read through the way that we structure our existence²¹⁴ provides not only a way to

in the Epstein article, in principal part because this Article assumes that individual rights in land ought not to be understood solely as dominion, that individual rights are not lexically prior to social power, and that we ought to interpret our basic principles through the lens of communality as well as through the lenses of individuality and sociality.

There is a line among the fragments of the Greek poet Archilochus which says: 'The fox knows many things, but the hedgehog knows one big thing.' Scholars have differed about the correct interpretation of these dark words, which may mean no more than that the fox, for all his cunning, is defeated by the hedgehog's one defence. But, taken figuratively, the words can be made to yield a sense in which they mark one of the deepest differences which divide writers and thinkers, and, it may be, human beings in general. For there exists a great chasm between those, on one side, who relate everything to a single central vision, one system less or more coherent or articulate, in terms of which they understand, think and feel—a single, universal, organizing principle in terms of which alone all that they are and say has significance—and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way, for some psychological or physiological cause, related by no moral or aesthetic principle

I. BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* 1 (1953) (footnote omitted).

²¹³ Garet, *supra* note 86, at 1002, 1016–17.

²¹⁴ This Article accepts the intrinsic value of community on the basis that Garet advances, that it is an essential constituent of the way that we structure our existence, a "necessary mode of existence," but that it is lexically neither prior to nor subsidiary to the other two ways that we structure our existence. *Id.* at 1066. Perhaps a symptom that the emphasis over the last thirty years on individual rights has taken the notion of the autonomous individual to the limit is the considerable outpouring of legal and philosophical writing either that values communality on a basis identical or similar to that of Garet's, or that advances communality as lexically prior. *E.g.*, M. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* 124, 132 (1985) (for theological reasons, law should be seen as a medium through which we achieve an authentic community); S. FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 305–21 (1980) (meaning is the current determination of the relevant interpretive community); A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 146 (1981) (a neo-Aristotelian argument that moral virtue ought to be realized through the political community as a common project); K. SALE, *HUMAN SCALE* 180–81 (1980) (for genetic reasons, the loss of communal life lies at the heart of the malaise of modern culture); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 150, 173 (1982) (because community is a constituent of the identity of the individual, justice requires that community be a constituent of society); Cornell, *The Problem of Normative Authority in Legal Interpretation*, 54 TENN. L. REV. 327, 330–31 (1987) (meaning in the law is guided by the vision of community that underlies the normative authority of the law, a vision based on the Hegelian concept of a community of mutual recognition); Deutsch, *Law, Capitalism, and the Future*, 28 U. FLA. L. REV. 309, 348–50 (1976) (Mormonism, defined as seeing the social community as the locus within which aspirations to divine perfection are realized, embodies Max Weber's Protestant Ethic most precisely; the law performs the social function necessitated by the Protestant Ethic).

understand more completely the problems of distributive justice caused by the law of nuisance but also, as this Article argues, an approach to solving these problems.

There are three structures of human existence—personhood, communality, and sociality.²¹⁵ Moreover, there is no a priori basis for giving any one of these three structures priority any more than there is in the more traditional view to rank either individuality or sociality over the other.²¹⁶ Any one person sees one or another of these structures as properly dominant in his own existence.

Although communality has no formal status under the traditional constitutional dichotomy, the courts exhibit an uneasy awareness and tacit acceptance of the power of communities and the important role that they play in structuring our existence. The traditional dichotomy, for instance, is not adequate to explain how the United States Supreme Court has resolved particular disputes.²¹⁷ For instance, *Wisconsin v. Yoder*,²¹⁸ in which the Supreme Court allowed Amish and Mennonite communities to be exempted from full compliance with a state compulsory schooling statute, cannot be explained wholly in terms of freedom of association. The outcome strongly protects freedom of association for the parents. Exempting the children from the compulsory schooling statute, however, substantially erodes the practical possibility of freedom of association for the children. The outcome makes eminent sense, however, in terms of communality because the Court allows the Amish community to use communality as a bulwark against the solidarity-threatening dictates of a larger, and alien, society speaking through the state.

In *Santa Clara Pueblo v. Martinez*,²¹⁹ the Court declined to take jurisdiction over a statutory civil rights challenge by a female member of a Native American tribe to a gender-discriminatory tribal membership rule. This is another case that cannot be explained

²¹⁵ "Life not subject to the call of groupness is as difficult for us to imagine as life not subject to the individuating call of personhood or to the sociating call of sociality." Garett, *supra* note 86, at 1070. Individuality, "not being what we are" (as in Jean Paul Sartre's concept of the freedom of existence to choose itself), carries the psychological correlate of dread and the associated right not to be made into a determined thing; sociality, "being what we are not (yet)," carries the psychological correlate of hope, and the associated right to move toward the realization of our common humanity; and communality, "an achievement of the 'we are,'" carries the psychological correlate of celebration and the associated right to be sustained in groupness against external coercion. *Id.* at 1069-74.

²¹⁶ *Id.* at 1065-68.

²¹⁷ The discussion which follows is a recapitulation of the analysis in *id.* at 1029-36.

²¹⁸ 406 U.S. 205 (1972).

²¹⁹ 436 U.S. 49 (1978).

consistently in terms of the traditional dichotomy of individuality and sociality. The outcome is at odds with both the individual right to associate with the group and the interest of society to further equality by repressing gender-based discrimination. Like *Yoder*, however, *Santa Clara* can be explained very satisfactorily as a decision that allows the group to resist the power of general society to impose laws that erode attributes that are basic to the way that the group defines itself.

This reading of *Yoder* and *Santa Clara* demonstrates that the recognition of communality requires an erosion of values associated with both individuality and sociality. Communality is simply dichotomous to them. This cannot, however, count as a fatal flaw. After all, individuality and sociality are themselves mutually dichotomous. If sociality were the principal consideration, our criminal law would undoubtedly be grounded more strongly in the function of finding out the truth. With individuality taken into equal consideration, however, protection of the helpless individual before the mighty engine of public justice erodes substantially the function of truth finding.

It is possible, of course, to read *Yoder* and *Santa Clara Pueblo* in a more limited way. The communities involved in these decisions are marginal in two senses—both remote in style and substance from the American mainstream and far from secure in their prospects for long-term survival. These decisions give deference to the values held by such marginal communities that clash with individual rights and general societal values, excepting them from the norms that mainstream society must follow, only because that deference serves to preserve the heterogeneity that these communities bring to society. Read this way, these two decisions are self-limiting to marginal groups.

In dealing with conflicts over land regulation by local government, however, the Supreme Court has more consistently and less ambiguously accepted communality not as an aspect of marginal communities but of mainstream communities as well. This acceptance was clearly manifest in the Court's first ratification of the zoning power in *Village of Euclid v. Ambler Realty Co.*²²⁰ In *Euclid*, the Village had adopted a zoning ordinance in order to deflect what it foresaw as strong market pressures for commercial and industrial development that would change its residential character.²²¹ In ratifying the

²²⁰ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

²²¹ *Id.* at 379–80. Apparently the zoning ordinance was ineffective in deflecting the economic pressures. Although the Village ordinance restricted the site at issue in the *Euclid* dispute

use of the zoning power to provide a bulwark against these economic forces, the Court did not limit its use to deflecting development of a totally different nature. Rather, the Court made clear that the local community could deflect as well more intensive residential development that would threaten the particular residential character that it possessed:

With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.²²²

By this language, the Court came close to saying that majoritarian local values were an adequate basis to deflect what might perhaps uncharitably be called "people pollution." Some fifty years later, in *Village of Belle Terre v. Boraas*,²²³ the Court all but sang a paean to the "nice" residential enclave: "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs."²²⁴ Although the Court decided *Warth v. Seldin*²²⁵ and *Agins v. City of Tiburon*²²⁶ in the express contexts of standing and open space preservation, these decisions also have the effect of ratifying the exercise of the zoning power in order to prevent subdivision and more intensive development of residential land that would nevertheless continue a dominant residential use.²²⁷

to residential use, the site was subsequently developed for manufacturing use. C. HAAR & L. LIEBMAN, PROPERTY AND LAW 1098 (2d ed. 1985).

²²² *Village of Euclid*, 272 U.S. at 394-95.

²²³ 416 U.S. 1 (1974).

²²⁴ *Id.* at 9.

²²⁵ 422 U.S. 490 (1975) (non-resident minority individuals, two social action groups, and a construction trade association all had no standing to challenge an exclusionary suburban zoning ordinance as violative of first, ninth, and fourteenth amendment rights).

²²⁶ 447 U.S. 255 (1980) (a zoning ordinance that limited, for the purpose of open space preservation, the number of parcels into which a uniquely scenic tract could be subdivided did not, on its face, effect a taking requiring compensation).

²²⁷ The Supreme Court let stand *Construction Industries Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975) (upholding a local zoning plan designed to shift the pattern of new housing construction from single-family to multi-family, shift the location of new construction geographically within the boundaries of the locality, and retard the overall rate of development), *cert. denied*, 424 U.S. 934 (1975) and *Golden v. Planning Board*, 30 N.Y.2d 359, 285 N.E.2d 291 (1972) (upholding a local zoning plan designed to alter the interim pace, but not the ultimate amount, of residential development in order to minimize the cost of providing

The situations in which the Court has rejected the use of the zoning power have been few. The local community cannot use the zoning power for the purpose of establishing barriers against ethnic or racial minorities,²²⁸ the physically or mentally handicapped,²²⁹ or families.²³⁰ Taken together, these decisions contrast rather sharply with state court decisions that flatly reject attempts by local communities to erect barriers against newcomers with lower economic status.²³¹ These decisions, however, not only are consistent with the solicitude for ethnic and cultural heterogeneity that the Court showed in *Yoder* and *Santa Clara Pueblo*, but also extend the solicitude for their value as marginal communities to communities with more mainstream values.²³²

The notion of communality, then, brings out an important distinction, that between community values and the value of community. The values that particular communities hold often clash with important values associated with individuality and sociality. This clash has been so strong that, as a political society, we have tended to render community legally powerless. In so doing, however, we have lost the value that communities bring. They can serve both as a bulwark for the autonomous individual against the often repressive power of the general society and as a milieu in which an individual can achieve a form of definition that is alternative to that of the autonomous

the public facilities infrastructure required to serve that development), *appeal dismissed*, 409 U.S. 1003 (1972).

²²⁸ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977).

²²⁹ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), discussed *infra* notes 242–45 and accompanying text.

²³⁰ *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

²³¹ *E.g.*, *S. Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (*Mount Laurel I*); *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965).

²³² Another area in which courts tend to recognize the defining value of communality is in the area of equitable servitudes. For instance, in *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925), the Michigan court allowed enforcement of a set of restrictive covenants that were highly inadequate at law because “[f]or upward of 30 years the united efforts of all persons interested have carried out the common purpose of making and keeping all the lots strictly for residences, and defendants are the first to depart therefrom.” *Id.* at 232, 206 N.W. at 497. *But see* *Crane Neck Ass’n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984), discussed *infra* notes 239–41 and accompanying text. Courts do not, however, consistently give recognition to communality. The same Michigan court produced a particularly prominent example in *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) by adopting the concept of *Berman v. Parker*, 348 U.S. 26 (1954), that takings for a private use nevertheless are valid under the takings clause if such private benefits are merely incident to a greater public benefit. The Michigan court, however, did not in its analysis of the public benefit, take into account the lost communality values of the ethnic neighborhood that would be destroyed by a taking for a private manufacturing use.

individual. Because community can also serve as a vehicle for the powerless individual to achieve effective power in public processes, community also serves sociality by working to perfect the performance of pluralism as a means for marshalling societal values.

These values, however, are derivative. To accept communality as a structure of existence means to accept it on a coequal basis with individuality and sociality, not because it has derivative value to the other two structures of existence, but because it is intrinsically valuable in itself. It is intrinsically valuable because it is an essential part of the scheme of our existence as human beings.

Completing this scheme of existence reveals the ultimate inadequacy of the normal approach to compensation that our remedial law takes. When a LULU threatens communality, its derivative value both to individuality and to sociality are eroded. The Neighbor can vindicate the loss to individuality. The loss to sociality cannot be vindicated because the proper party, society, acts through the legal process as both fact finder and law giver. Society cannot be party and judge at the same time. Nor is it clear how communality can be represented in the remedial process. Finally, the problems of valuation seem to be as intractable as the problems of representation. If the derivative values of communality fall through the crack of subjectivity, the intrinsic value of communality would seem to be beyond the comprehension of the remedial process.

IV. DILEMMAS

The argument to this point has proceeded from the proposition that it is not possible to understand fully the nature and scope of the values at stake in any conflict over a LULU except through a three-part conception of human existence. In order to understand the significance of this proposition, let us assume a trichotomy of individualism, sociality, and communality and explore a NIMBY conflict in which the LULU is not an acknowledged bad but is, instead, people pollution.

A. Halfway Houses

The smoke-belching factory is the prototypical nuisance of the economic and legal²³³ literature. With the career of federal air pol-

²³³ *E.g.*, W. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS 214-16 (1979); A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 11-14 (1983); R. POSNER, ECONOMIC ANALYSIS OF LAW 54-56 (3d ed. 1986); Coase, *supra* note 131, at 41-42.

lution regulation well into its second decade,²³⁴ however, the courts are seeing a more imaginative variety of complaints. The shadowy invasion that the Wisconsin court suppressed in *Prah v. Maretti*²³⁵ is only one example. In addition, the halfway house is beginning to establish itself in the firmament of prototypical LULUs.

The halfway house, by definition, cannot serve its function unless it is located in a residential area. Also by definition, the residents of a halfway house are different in some overt way from the surrounding residents. This difference almost inevitably generates strong objections from the neighbors. The legal disputes that result illustrate the deep policy paradoxes which the NIMBY reaction raises.

Neighbors have turned to a variety of approaches in order to block halfway houses. The courts have, however, in most cases frustrated their efforts. An attempt to enjoin a halfway house for prison parolees failed in *Nicholson v. Connecticut Half-Way House, Inc.*²³⁶ The Connecticut Supreme Court held that the halfway house was, of itself, a "reasonable" use.²³⁷ In addition, the court summarily dismissed the fears of the neighbors as "speculative and intangible."²³⁸ An attempt to block a halfway house on contract grounds failed in *Crane Neck Ass'n v. New York City/Long Island County Services Group.*²³⁹ Establishing this halfway house, which was to serve mentally retarded adults, clearly violated restrictive covenants controlling the site and the surrounding land.²⁴⁰ The New York Court of Appeals, however, had little difficulty in deciding that enforcement of the covenants would have contravened public policy.²⁴¹

A third approach, capture of the local political process, also failed. In *City of Cleburne v. Cleburne Living Center*,²⁴² neighborhood pressure applied through the local land regulation process resulted in

²³⁴ The present federal regulatory program dates from the Clean Air Act Amendments of 1970, P.L. 91-604, 84 Stat. 1676; (codified as amended at 42 U.S.C. §§ 7401-7418, 7521-7615, 7641-7642 (1982 & Supp. III 1985)).

²³⁵ Discussed *supra* notes 124-29 and accompanying text.

²³⁶ 153 Conn. 507, 218 A.2d 383 (1966).

²³⁷ *Id.* at 510-11, 218 A.2d at 385-86.

²³⁸ *Id.* at 511, 218 A.2d at 386. In 1985, the Arizona Supreme Court, in *Armory Park Neighborhood Ass'n v. Episcopal Community Services*, 148 Ariz. 1, 10, 712 P.2d 914, 923 (1985), upheld the injunction of a community center that provided free meals to the indigent. The circumstances, however, were egregious. The neighbors showed, in graphic detail, the unfortunate activities that those who made use of the center carried out on the neighbors' property. 148 Ariz. at 3, 712 P.2d at 916. Thus, there was no lack of damaging invasions. *Id.*

²³⁹ 61 N.Y.2d 154, 460 N.E.2d 1336 (1984).

²⁴⁰ *Id.* at 159, 460 N.E.2d at 1338.

²⁴¹ *Id.* at 160, 460 N.E.2d at 1339.

²⁴² 473 U.S. 432 (1985).

the denial of a special use permit for a group home for the mentally retarded.²⁴³ The United States Supreme Court held that the group home advanced an important public welfare goal, and that the consequences of locating the facility in a residential area would not “pose any special threat to the city’s legitimate interests. . . .”²⁴⁴ The Court echoed the reaction of the Connecticut Supreme Court by treating the objections of the neighbors as “irrational prejudice against the mentally retarded.”²⁴⁵

The social policy considerations that the courts weighed in these decisions are necessary elements to any adequate analysis of the halfway house dispute. Solicitude for the mentally retarded strongly serves the equal protection principles that underlie sociality. Such solicitude also serves the notions of the dignity and fundamental worth of each individual that underlie individuality. To leave the weak behind is not consistent with the most rudimentary notion of a civilized society.²⁴⁶

When the matter is analyzed from these perspectives, the NIMBY attitude of the neighbors is discomfiting. It is hard to fault people for objecting to the corrosive effects of airborne industrial pollution on person and property. It is somehow different in the case of a halfway house for the physically or mentally handicapped. To ratify their concerns is tantamount to allowing the Neighbors to claim harm by people pollution.

This analysis, however, is substantially incomplete. If individuality requires that the residents of the halfway house be taken into account, then the same consideration is required for the Neighbors. At risk is the value that they give to what most likely is their principal asset, their residence. As the foregoing analysis shows, this value has two bases—the instrumental value that accrues from the legal status of their entitlements as dominion and the derivative value that accrues as social status to the extent that their entitlements attach to property that is part of a community. The harm to the instrumental value accrues as a diminution in the market price of the entitlement.²⁴⁷ The harm to the value derived from commun-

²⁴³ *Id.* at 450.

²⁴⁴ *Id.* at 448.

²⁴⁵ *Id.* at 450.

²⁴⁶ A strong assumption that underlies this Article is that the most basic function of the law is to protect the powerless from the structures of power that inevitably arise in any organized society. In the sense used in the text, civilization, as contrasted with a state of non-civilization, is a circumstance in which things ought to happen on a basis other than might makes right.

²⁴⁷ See *supra* notes 189–91 and accompanying text (market price will not capture all of this value).

ality accrues to the extent that Neighbors move away, eroding the fabric of community.

The analysis in the cases overlooks this risk because of express judicial impatience with the basis of the risk—as the Supreme Court put it, “irrational prejudice.”²⁴⁸ The problem is that the courts have treated non-rationality as something pejorative and impermissible, *irrationality*. Yet, it is a simple fact that the presence of pathology causes psychic harm. It is a psychic harm of exactly the same nature as a psychic harm already recognized by nuisance law, the funeral home.²⁴⁹ And the neighbors of facilities that house pathology bear the immediate brunt of that harm.

Moreover, consider the problem of property devaluation through the concept of sociality. An undercurrent in the judicial opinions is that the Neighbors suffer harm only because of their perceptions of the halfway house residents, perceptions that cannot be given weight because they cast fellow citizens in a pejorative light. That is, the devaluation is the fault of the complaining Neighbors themselves. To cast the blame in that way, however, misunderstands the problem. For the Neighbors to claim that their property has been diminished in value is to claim, at least in part, that there has been a drop in fair market value. That is, the heart of their claim, and the fact that they would have to demonstrate were they to advance a claim for damages, is that they can no longer sell their property for the pre-LULU price that it commanded. The drop in potential selling price, however, does not come from the Neighbors asking for less. It comes from the rest of society *offering* less. In reality, the perceptions that devalue the Neighbors' property are not those of the Neighbors, but those of the society generally.

The cases reveal that the normal judicial analysis is substantially incomplete in terms of individuality and sociality. Now consider communality. Assume that a halfway house for, say, the mentally handicapped is to be located in a residential area that constitutes a cohesive local community. To say that there is a community is to say, principally, that there is a strong homogeneity of values—shared collective representations and moral sentiments.²⁵⁰ If the Neighbors cry “NIMBY!,” it is both unwarranted and pejorative to presume that this reaction proceeds from prejudicial motives that must not be honored because they clash with the political and social values of

²⁴⁸ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985).

²⁴⁹ See *supra* note 129.

²⁵⁰ A. HUNTER, *supra* note 193, at 4.

the larger society. If the neighborhood is a community, then the sudden introduction of a substantial number of strangers will necessarily disrupt that cohesion of values.

If the concept of communality is to have equal status with individuality and sociality, then the opposite presumption is necessary, that the NIMBY reaction is in a particular sense benign.²⁵¹ That is, it must be presumed that Neighbors are not saying to these outsiders, "We don't want you here because of who you are." Rather, they are saying, "We don't want you here because of who you are *not*. And you are not the same as us."²⁵² Both the root concept of the right to associate and the essence of according status to communality mean that the Neighbors have a right to be who they are. Because they realize who they are through their community, that realization is at risk if society thrusts outsiders into their midst.

To the extent that community is disrupted, there is a threefold loss. The Neighbors lose as individuals to the extent that their community defines and sustains them. Society loses as well to the extent that the community enables its members to achieve more effective participation in the ongoing processes of society. These losses are derivative. In addition, if communality is accepted as a coequal mode of existence with individuality and sociality, then there is as well a loss of the intrinsic value of community.

²⁵¹ The argument here is *not* that all neighborhood reaction to outsiders is in fact benign in the sense described in the text. Much of that reaction indeed does proceed from strongly improper motives. The presumption for which the text argues functions in much the same way as the holding in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which is that zoning actions that have the effect of racial exclusion may or may not arise from an impermissible intent to engage in racial discrimination. The judiciary will not intervene, however, unless that intent is evident.

²⁵² The distinction being advanced is the rather slippery one between discriminating against (bad) and discriminating in favor of (good). Take, for example, an ethnic neighborhood, say, Italian. The residents will not want a Lithuanian family to move in, not because the Italian residents consider the ethnic and cultural characteristics of the Lithuanians to be bad, but because the Lithuanians are *not* Italian. It is not a matter of goodness or superiority ('Italianness') being distinguished from badness or inferiority ('Lithuanianness'); rather, it is a matter of sameness being distinguished from differentness. Community, by definition, is sameness. See R. SENNETT, *supra* note 193, at 38-40. Taking communality seriously means taking the possibility of this distinction seriously. This is all a paradox because exclusionary attitudes can arise from "bad" discrimination as well and because it is not ultimately possible to tell whether good or bad discrimination is involved in any particular case. The root of the paradox is that individuality, sociality, and communality are incommensurable. Introducing the third mode of existence simply increases the occurrence of clashes in which something valued in one mode or another must give way. Or, to put it yet one more way, dilemmas arise as a consequence of understanding that our world is complex rather than simple. Once more, the author of this Article is a fox, not a hedgehog.

B. The Tension Between Heritage and Heresy

One of the basic tensions that a society must balance is that between heritage and heresy. The risk acceptors will always be pressing for change, lest stagnation stultify its creative energies and economic and cultural decline set in. The risk averse, by contrast, will press for stability lest incessant change cause society to degenerate into chaos, destroying the possibility of the cohesion of values that lies at the heart of social viability.²⁵³

We are in the latter stages of the liberal project. In our particular society, we have tried to achieve this through a system of liberties and a preference for equality of opportunity over equality of result. These two principles give to each member of society the greatest possible control over individual destiny.

The philosopher John Rawls sought to describe the political structure that we would, in ideal circumstances, choose.²⁵⁴ Whether he succeeded in doing that or not, it is clear that, with the system that he did describe,²⁵⁵ he succeeded in capturing the essence of our actual political structure. The structure that Rawls describes gives great weight to substantial equality of wealth and power. Nevertheless, it also has built into it a preference for disparities of wealth and power that will lead not only to a greater level of overall societal wealth but also to a greater level of wealth for the most disadvantaged.²⁵⁶

Most of us most of the time are risk averse. Despite the proportionately small numbers of risk acceptors, it is a further genius of our system that we have been able to institutionalize a considerable bias toward heresy. In our public choice process, it turns out in practice that it takes resources to participate.²⁵⁷ Since there also is

²⁵³ There is a growing literature arguing that this tension has shifted dangerously far in the direction of heritage, with our well documented economic decline caused by growing economic inflexibility. See *supra* note 141.

²⁵⁴ J. RAWLS, *supra* note 143.

²⁵⁵ *Id.* at 302-03.

²⁵⁶ See *id.* at 303. "All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored." *Id.* This difference principle sees a form of real-world application in the continuing political choice of economic growth enlarging the absolute size of each citizen's share of the wealth pie over redistributing wealth in the direction of equalizing the relative size of the slices. See J. GALBRAITH, *THE AFFLUENT SOCIETY* 78-97 (1958).

²⁵⁷ See *supra* notes 30-35 and accompanying text. Note that, of the three categories of those with the realistic possibility of participating in the public choice process (government, bureaucrats, and producers), two are risk acceptors.

a tendency for the more affluent to be risk acceptors,²⁵⁸ then the outcome of the public choice process will shade toward the heretical.

The law of harms tracks the biases of our political order closely. Oliver Wendell Holmes, Jr. captured the bias:

A man need not, it is true, do this or that act,—the term *act* implies a choice,—but he must act somehow. Furthermore, the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.²⁵⁹

In Holmes's day, and well into our own, the entire apparatus of the tort law has worked to insulate the risk taker. Rather than holding him strictly liable for the consequences of his actions, the elaborate structure of standards of care, causation, foreseeability, and assumption of risk have socialized risk taking. For instance, as Learned Hand established in *United States v. Carroll Towing Co.*,²⁶⁰ the standard of care is measured not by what the reasonable average person would do but by what the reasonable entrepreneur would do.

It is easy to argue that the more recent deep pocket approach to tort compensation is merely a veneer over this basic structure. We will continue to reward the risk taker. When, however, he becomes successful, that is, when his pocket becomes deep, he must share his gains with those he harms.

Though the law of nuisance lagged behind, it has shed its strict liability trappings. As *Donner-Hanna*²⁶¹ indicates, whether the harm that the entrepreneur throws onto the neighbor rises to the level of a compensable event depends in important part on whether the harm-causing activity was reasonable. As in tort generally, the reasonableness of one who causes a repeated harmful invasion of his neighbor is measured self-reflexively—is he harming his neighbors just like his fellow entrepreneurs would?

Indeed, this bias is built into our constitutional system. The taking clauses of our various constitutions embody the bargain. Society, through its paramount power to reallocate even land that remains in private hands to other uses, serves heresy. Heritage is served by the requirement that the dispossessed be left in no worse an eco-

²⁵⁸ This is not to say that all risk acceptors are more affluent. Many of them take their risks and fail. Rather, the focus is on the successful risk acceptors.

²⁵⁹ O. HOLMES, JR., *THE COMMON LAW* 77 (1963).

²⁶⁰ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

²⁶¹ See *supra* notes 101–04 and accompanying text.

conomic position, with the promise that the reallocation will benefit every member of society. The criticism throughout this Article has not been with the implicit balance that has been struck between heritage and heresy. The criticism is that we have not lived up to its terms.

V. SOLUTIONS

This Article has argued that the LULU Neighbor finds herself whipsawed by the public choice and remedial processes that are nominally open to her. Because producers, political entrepreneurs, and bureaucrats dominate the public choice process, Neighbor has little chance of bringing her views to bear unless she has the opportunity, and makes the substantial investment of time, money, and emotion, to form a collective action group.

Even if she is successful in the public choice process, however, she faces a judicial challenge by the LULU Owner. Especially if the LULU will serve the disadvantaged, Neighbor will see her initial victory judicially reversed. Worse, in justifying the reversal as a means of more properly achieving the public interest, the opinion might thereby not too subtly suggest that, by her opposition, she has failed to be a good citizen.

If Neighbor turns to the judicial process for compensation for the harm that the LULU will cause her, she is not likely to emerge with anything approaching satisfaction. The compensation that she receives will be based on a narrow view of what counts as a legally cognizable harm. Because much of her claims for compensation will be based on losses that can only be expressed subjectively, it is not likely that the level of her award will approach a level that is compensatory on her scale of values. Worse, whatever award she might receive will come at a substantial discount.

Perhaps worst of all, she will emerge from her experiences with an all too sophisticated understanding of "the way things work" and of the full impact of those workings on her life and fortune. She will have been caught up in the process through which society selects and pursues its goals. She will be left, however, with more than a suspicion that society seeks to achieve these goals on the cheap.

A. Tinkering

The discussion to this point has amounted to an extended treatment of the theme, "Ain't it awful?" Despite this criticism of the public choice and remedial systems as they are now working, there

seems to be little potential for improvement. We have experienced nearly a generation of increasing citizen activism at all levels of government. Because participatory power depends so strongly on the command of material resources, it is likely that further substantial improvement in the breadth of participation can come only through a likewise substantial redistribution of wealth. The political prospects for that would seem to be quite poor. The preference for equality of opportunity over equality of distribution is strongly embedded in our political values.²⁶² Moreover, there is a problem of circularity. To increase the political demand for greater wealth redistribution toward equality would require greater participation of the less well off in the system.

Similarly, there seems to be little promise for improving the functioning of the current compensation system. It is true, of course, that the entrepreneurial bias in our remedial law is a matter of judicial choice. However embedded that choice might be, it is always subject to judicial change. What remains daunting, however, is the intractability of the factual questions surrounding the valuation of communal and subjective harm.

B. The Neighborhood District

The quarrel is not with the heretical nature of the decisions by which LULUs come into existence. Rather, it is with the failure of the system to socialize the cost of these socialized allocational choices. These costs are now falling in quite particular patterns. Because of the nature of land costs, less affluent areas, all other things being equal, are more attractive candidates for LULU sites than more affluent areas. Thus, the less affluent tend to be the victims of LULUs. In addition, community is a more likely phenomenon in a less affluent area simply because the values that communities provide are more desirable at lower levels of affluence.²⁶³ Wealth is a strong substitute for these values.²⁶⁴ Thus, the victims of LULUs are as often members of cohesive communities as they are atomistic, powerless individuals.

If the problem is the adverse distributional consequences that result from the establishment of LULUs, then the solution ought to

²⁶² See *supra* note 16.

²⁶³ See R. SENNETT, *supra* note 193, at 52-53.

²⁶⁴ Indeed, affluence seems to allow what has been called a "myth of purified community," an abstract image of community solidarity that not only belies an atomized experience but also functions to allow people *not* to interact in a communal way. *Id.* at 30-49.

have two purposes. The immediate purpose would be to provide an accessible and effective vehicle for individual Neighbors to form a collective action group. The nature of this immediate purpose is empowerment, to provide the Neighbors an effective means to achieve recompense that the workings of the public choice and judicial processes now deny them. The ultimate purpose would be to compensate the Neighbors entirely on their terms, however subjective this might be. This ultimate purpose would be entirely remedial. It would proceed on, and fulfill, the implicit bargain of the takings clause. The public choice process makes the allocation decision; those who are expropriated receive just compensation.

1. The Concept

A model for such a mechanism to achieve these two purposes is readily available, that is, the special district.²⁶⁵ The special district is extensively used as a vehicle for undertaking a wide variety of local improvements, from flood control²⁶⁶ to water supply,²⁶⁷ from agricultural land drainage²⁶⁸ to schools and fire protection.²⁶⁹ When it is used for these purposes, the special district functions as a collective action group to overcome barriers to providing public goods.²⁷⁰ Adapted for the NIMBY problem, the concept might be

²⁶⁵ The special district is a mechanism to organize the capture of a benefit with significant, but local, public goods aspects, taxing the cost proportionately to all properties benefited. It has found wide use because it is an effective device for avoiding state constitutional and statutory limitations on the debt level and taxing power of local government. See 4 C. SANDS & M. LIBONATI, LOCAL GOVERNMENT LAW § 24.20 (1982). Something of this neighborhood district approach has found use in the Washington, D.C. metropolitan area in the wake of the construction of a regional rail mass transit system. In low-density residential areas around new stations, for which the market creates strong pressure for more intensive residential and commercial uses, residents have attempted to form consortia to allow them to deal with developers as a group in order to maximize their share of the increase in land values associated with this market pressure. For an example, see Washington Post, Sept. 8, 1986, at D1, col. 4.

²⁶⁶ *E.g.*, CAL. WATER CODE §§ 8110–8165 (West 1971) (flood control); CONN. GEN. STAT. ANN. § 25-104a (West 1975) (soil and water conservation); VA. CODE ANN. §§ 21–21.112 (1983 & Supp. 1987) (soil conservation).

²⁶⁷ *E.g.*, CAL. WATER CODE §§ 20,500–29,975 (West 1984) (irrigation); IOWA CODE ANN. §§ 357A.1–357A.20 (West 1983 & Supp. 1987) (rural water supply); TEX. WATER CODE ANN. §§ 58.011–58.836 (Vernon 1988) (irrigation).

²⁶⁸ *E.g.*, ILL. ANN. STAT. ch. 42, §§ 1-1–12-24 (Smith-Hurd 1976 & Supp. 1987-88) (drainage); MINN. STAT. ANN. §§ 111.01–111.82 (West 1987) (drainage and flood control).

²⁶⁹ *E.g.*, IND. CODE ANN. §§ 36-8-11-1–36-8-11-21 (Burns 1981 & Supp. 1987) (fire protection); VA. CODE ANN. §§ 21-112.22–21-140.3 (1983 & Supp. 1987) (sanitation).

²⁷⁰ Government intervenes into the price decision in this way—on the advice of Government, LULU Developer enters into a contract with the Neighborhood District for the price that Government is willing to pay. Government then condemns LULU Developer's position in the

reborn as the "neighborhood district." It would function as a collective action group to provide a barrier to wealth transfers.

Several relatively simple ground rules would govern the functioning of the district. There would be a prohibition on the district from participating in any administrative or judicial proceeding in order to oppose the LULU. The district could prevent the establishment of the LULU only if its demands for compensation are unmet.²⁷¹ Both the decision to form the district and all internal decisions would be made by a supermajority voting rule.²⁷² Such a rule would prevent one or a few holdouts from frustrating the formation of the district or blocking its internal decisions.²⁷³

In order to insure that the members receive compensation on their terms, the property within the district would be protected by a Property Rule.²⁷⁴ It would be immune from the eminent domain power of government. It also would be protected from the effective expropriation that would result were its property protected from nuisance only by a damages rule. Rather, it would be accorded an injunction against any LULU that might affect the value of its constituent properties.

contract. The generous attitude of *Berman v. Parker*, 348 U.S. 26 (1954), allowing takings that will serve the public benefit although they will not be for a public use, makes this feasible.

²⁷¹ The concept would be similar to the supermajority voting rules required for major decisions for condominiums, those affecting how the entity is constituted. *E.g.*, FLA. STAT. ANN. § 718.110(1)(a) (West 1988) (two-thirds); ILL. ANN. STAT. ch. 30, § 327(a) (Smith-Hurd 1987) (two-thirds); MASS. GEN. LAWS ANN. ch. 183A, §§ 5(b) (unanimity), 17(b) (three-quarters), 18(b) (three-quarters) (West 1977); MICH. STAT. ANN. § 26.50(190)(2) (Callaghan 1984) (two-thirds).

²⁷² A question involving considerable difficulty is the geographical extent of the district. Were the boundaries to be drawn too inclusively, an individual located too remotely to feel any physical effects from the LULU and in a neighborhood without any communality values could coat-tail and receive compensation without having been harmed. One solution might be a two-level approach to boundaries. On the first level would be only those parcels abutting the LULU or within sight or reach of its external effects and all those parcels abutting such parcels. On the second level would be those parcels that would be included were a community to exist—either those parcels within an identified neighborhood with natural boundaries or those parcels within a sociological definition of community, for example, the six criteria set out in A. DOWNS, *supra* note 193, at 14. If the Neighbors defined a district with an extent beyond the first level, they would be protected by a presumption that communality exists over this range. Government, the LULU owner, or dissenting Neighbors, however, would have standing to rebut this presumption.

²⁷³ The principal internal decision would be the determination of the amount and distribution of the compensation payment. This is, of course, no small decision. If the voting rule does not set a high enough level, there could be considerable oppression of minorities. If it is set too high, the decisional process could become paralyzed. There should be a mechanism to prevent decisional paralysis from frustrating the LULU developer. Whether the problem of internal decisionmaking can be worked out will determine the practical viability of the Neighborhood District concept.

²⁷⁴ For a definition of "Property Rule," see Calabresi and Melamed at *supra* note 117.

Finally, the district would be empowered to demand compensation from a LULU in any form, provided only that the LULU is a single facility likely to produce external effects.²⁷⁵ This would include the entrepreneurial LULU, such as the toxic waste treatment facility with its physical and aesthetic externalities. It would also include the social service LULU, such as the halfway house with its psychic externalities.²⁷⁶

2. The Justification

The Neighborhood District would clearly have a considerable impact on the Neighbors in terms of the modes of existence of communality and individuality. If the Neighbors are located in a cohesive community, the district mechanism will function to monetarize the derivative value of that community to the Neighbors. Unless, however, the compensation is not forthcoming, the district can operate as a limitation on the community to the extent that it will prevent the exercise of whatever power the community may theretofore have had to block the LULU through the political process.

The bulwark function of the Neighborhood District is most evident in the case of the atomistic individual. In a mass society, most people fall into that mode. Because most people are risk averse, most are not entrepreneurs. Because of the circumstances of mass society, or perhaps because of choice,²⁷⁷ most people do not find themselves in a cohesive community. The structure of our political system works from there to render the atomistic individual powerless—our system of individual liberties and our pluralistic, participatory democratic process engender the consequence that who we are is what we do. A further consequence is that the political acceptance of risk entails the shielding of the risk takers from the side effects of their actions. Since, however, not everyone can be empowered, the system in practice disenfranchises a large core of people. The Neighborhood

²⁷⁵ The basic idea is strongly analogous to the point source concept, as contrasted with the non-point source concept, of pollution under the Federal Clean Water Act. See respectively, 33 U.S.C. § 1311(e) (1982); *id.*, § 1314(f).

²⁷⁶ As there is with the problem of what territory can be included in the Neighborhood District, there is a significant problem in defining what constitutes a LULU against which the District is to be allowed to organize. Illustrative of the problem is the "people pollution" specter raised in *Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926). A facility or a complex of facilities, such as a public housing project with its class and density externalities, would seem to satisfy the "point source" concept of LULU. A pattern of zoning changes and public subsidies designed to increase the development of housing for income classes far lower than the norm in a particular suburb perhaps ought not to satisfy the concept.

²⁷⁷ The choice, of course, is a function of the operation of our national myth of rugged individualism.

District provides a ready made ad hoc community,²⁷⁸ a mechanism for overcoming the substantial transaction costs that the individual must otherwise face in organizing to avoid the wealth loss generated by the expropriative LULU.²⁷⁹

The ramifications of the Neighborhood District for society are equally significant. The notion of nuisance on which this concept is based is considerably expanded. It necessarily includes the aesthetic component of the impact of an entrepreneurial LULU as well as the psychic impact of a social service LULU. It necessarily erodes the notion of sovereign immunity which government in many jurisdictions, including the federal, enjoys. It necessarily expands the range of compensation.

The concept, however, tends to leave intact the current power of entrepreneurs, working through the public choice process, to dominate the selection of allocational choices. Further, the Neighborhood District would function to remove transaction costs from the process of establishing LULUs. As a result, the concept uses compensation, rather than a damping of the operation of the allocational market, as the preferred mechanism for accounting for the disruptive effects of market choices.²⁸⁰

Finally, by giving LULU Neighbors a bulwark, the Neighborhood District concept works to embed the notion of communality as a way of effectuating constitutional principles. On the one hand, to the extent that it forces, for a price, communities to accept the presence of those who are different, the concept can operate to generate a bribe to Neighbors to do what our societal values say they should do anyway. On the other hand, the concept works to undermine the present state of affairs, a systematic and pernicious transfer from the poor to the rich, all with the pious blessing of a process of societal choice manipulated by the affluent.

²⁷⁸ Anthony Downs calls this the "community of limited liability." A. DOWNS, *supra* note 193, at 14.

²⁷⁹ The function of the Neighborhood District is not to empower the atomistic individual in the public choice process so that he now has a measure of influence over the substance of the LULU siting decision. Rather, the function is instead to provide a shield against the wealth distributional consequences of siting the LULU. Contrast the empowerment approach in Michelman, *Property As a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112 (1981) (the core of the principle of strong constitutional protection for individual rights in property is to prevent expropriations of that property which functions as "an essential component of individual competence in social and political life").

²⁸⁰ To the extent that the Neighborhood District concept expands the amount of compensation that Neighbors otherwise might have received, it tends also to shift from the LULU entrepreneur's hands the considerable gain in market-measurable value that typically accompanies the conversion of land to more intensive uses.

VI. REPRIZE

In recent decades, we have moved, however imperfectly, toward protecting the crucial ingredients of the natural biotic systems that have survived the depredations of humankind. So far, however, we have failed to understand the wise observation of Lewis Thomas—“We are now the dominant feature of our own environment.”²⁸¹ This failure translates into an insensitivity to the analogous subsystems of our human environment. Until we accommodate these subsystems, our efforts to establish and carry out sensitive land uses will continue to be marked by political gridlock, citizen demoralization, and the continued ruin of our natural and social systems.

²⁸¹ L. THOMAS, *THE LIVES OF A CELL* 105 (1974).