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**ESTRAGON:** All my lousy life I’ve crawled about in the mud! And you talk to me about scenery! (Looking wildly about him.) Look at this muckheap! I’ve never stirred from it!

**VLADIMIR:** Calm yourself, calm yourself.

**ESTRAGON:** You and your landscapes! Tell me about the worms!

—Samuel Beckett, Waiting for Godot

Public land-use decisions regularly confer substantial benefits on some individuals while imposing significant burdens on others.¹ Landowners become richer or poorer as a consequence of public decisions; values are transferred from one landowner to another, or new values created. The following examples are typical:

*The Zoning Amendment*²—Herbert and Eleanor own iden-
icial, contiguous 10-acre tracts in a rapidly developing suburb. Both are zoned for single-family residential use with a one-acre minimum lot size, and have been so zoned since well before Herbert and Eleanor acquired them. The tracts were acquired for $1000 per acre and are now worth about $2000 per acre for the designated single-family use. The municipality recently determined to authorize a 10-acre development of multiple-family dwellings by a single owner under a planned unit development scheme. After receiving applications from both Herbert and Eleanor, the village council rezoned Eleanor's tract. This action increased the value of her land to $10,000 per acre and reduced the value of Herbert's land to the extent that its original value reflected the probability of rezoning for multiple-family use, and to the extent its utility for single-family use was reduced because of its proximity to the newly authorized development. Eleanor has received a substantial economic benefit for which she has paid nothing except the cost of utilizing the administrative or legislative process.3

The Nonconforming Use4—A municipality decides to adopt comprehensive zoning for the first time, and in so doing chooses a partially developed area for residential designation. The area is nearly all residential now, with the exception of a grocery store. The grocery has thus achieved the status of a local monopoly by having become a nonconforming use not required to comply with the new ordinance. Acting out of zealous regard for the property rights of the individual grocer, the government has conferred substantial economic benefit upon him to the detriment of his customers and of other grocers who might desire to locate in the area.

Overzoning5—Secluded Pines is a partially developed residential locality. Half of its land has been developed with single-family homes on one-acre lots. The other half is owned by developers who wish to develop on a similar basis. The residents limit development by imposing a three-acre minimum lot

3. Unless, under one version of this story, she had to pay someone off for the favorable decision.
size on the undeveloped land, even though their gain from the restriction falls far below the cost (in market value decline) forced on the developers. Moreover, their action imposes additional housing costs on persons residing outside Secluded Pines. Thus the residents, acting through their local government, have redistributed wealth from others to themselves, and in so doing have frustrated the goal of efficiency in the metropolitan housing market.

_Swamp Preservation_—Stanley Flug bought a lot alongside a lake some 10 years ago, hoping to construct a residence on it some day. His neighbors (who have already constructed lakeside residences or own land not bordering directly on the lake) have joined with nearby city dwellers to enact an ordinance that declares Stanley's tract to be "designated wetland." By this law, landfill operations, which are prerequisite to construction on the plot, are banned. Stanley receives no compensation for his lost value, while substantial gains have accrued to his neighbors in the increased values of their lots.

_The Disappointed First User_—Twenty years ago, Ralph Pruitt opened a brickyard on the outskirts of town in an area that was undeveloped and unzoned. Today the brickyard is surrounded by residences, and the owners' complaints about noxious fumes from the brickyard have led the municipality to pass an ordinance forbidding the operation of brickyards in residential areas. The ordinance forces Ralph to close, reducing his land value from $500,000 to $30,000. Ralph receives no compensation, while his neighbors enjoy gratuitous increases in the value of their tracts.

_Aesthetics_—Emily Florale owns a private, detached house in a neighborhood of such houses. She recently decided to paint her house with a coat of purple and orange stripes, only to find that her neighbors objected and complained to the local zoning

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administrator, who informed her that gross nonconformities in exterior style are banned by a local ordinance. Her immediate neighbors would have sustained a 10 percent reduction in the value of their houses had she been permitted to paint in accordance with her stylistic preferences. Emily's friend, a realtor, has told her that she should be happy that her plans were blocked, since the painting would also have reduced the market value of her own house.

Highway Construction—For 20 years Albert Rogle has operated a filling station alongside Old Main Road. Recently his business has collapsed with the completion of the new Superway, an interchange of which happens to be adjacent to the land of Ronald Grood, who has just decided to open a filling station on his plot. Ronald, who paid almost nothing for his lot, has received a windfall gain. Albert, whose land and business have become worthless, receives no compensation.

In each of these typical situations, someone appears to be getting something at the expense of someone else. The benefits received, as well as the burdens imposed, may be reducible to an objective economic measure—change in land value—and may also be expressed in terms of subjective personal reactions of satisfaction or disappointment. In each case, the benefits or burdens are being imposed through government action. The premise of this Article is that government actions that impose significant burdens or confer significant benefits should be taken in accordance with a rational scheme—that there should exist some ethically satisfying criteria to which one can appeal to justify the particular benefits or burdens. It is the goal of this Article to explore and develop an ethical framework for testing land-use regulations.

Part I will examine the theoretical basis for governmental intervention to regulate land use, suggesting that even against a background of private possessory ownership of land, some collective intervention is necessary to cope with the inevitable

conflicts between users of privately owned land. Part I will further suggest that the necessary process of governmental regulation can most aptly be characterized as distribution of a property right which is separate from that pertaining to basic ownership of the land and which I shall call "local environmental control."

Part II will propose a conceptual structure for governmental distribution of local environmental control. Three criteria for distribution will be analyzed—market efficiency, intrinsic merit, and prior appropriation. Part III will examine the roles played by the three suggested criteria in the traditional method of public intervention—post hoc judicial decisions under the common law of nuisance. That section will conclude with a discussion of the failure of nuisance law to further the values ostensibly promoted by its mix of the three criteria. I will suggest that the shortcomings of nuisance law can be overcome only through some form of prospective public allocation of local environmental control.

Part IV will examine the "taking" controversy in order to see how the rules for determining takings (as contrasted with permissible "regulations") have allocated property rights in local environmental control, in order to describe the difference between possessory claims and spillover claims, and, especially, in order to consider the relationship between the taking issue and nuisance law in light of the proposed distributional criteria.

Part V will focus on zoning as the principal method of public allocation of land uses. The same criteria will be investigated in the context of zoning law to compare the value choices made in zoning with those that seemed implicit in nuisance doctrine. I shall conclude that zoning, while it is a necessary form of intervention, has, as currently employed, legitimized gross inefficiency, warped the egalitarian values of nuisance law into a rigid aristocratic hierarchy, and elevated prior appropriation claims to an unwarranted level.

I. LAND-USE SPILLOVERS: THE NEED FOR PUBLIC INTERVENTION

Land uses often make spillover demands on the surrounding environment. If you build a house on your land, you can retain residential peace and quiet only by forcing all of your neighbors to use their land in a similar fashion, even if your neighbors would prefer to build stores or factories. On the
other hand, if you build a store or factory, you are forcing your neighbors to use their land in some way that will not be offended by your noises, odors, or other by-products. Each of these demands amounts to an imposition on neighbors that extends the impact of your property right beyond your territorial borders. The imposition takes the form of a request that your neighbor accept from you a measure of subjection and exclusion—subjection in the sense that your neighbor must accept the burden of your activity to the extent it causes him discomfort (or conform his own activities so as to minimize the discomfort), and exclusion in the sense that you are excluding from your neighbor's range of choices those activities that will be offensive to you. Each party to the land-use conflict is seeking a measure of control over the local environment. The subject matter of land-use regulation is the distribution of this local environmental control.10

If only to avoid chaos, some collective intervention is necessary to choose among competing claimants for local environmental control. Absent collective intervention (or, at a minimum, collective agreement on the appropriate criteria for resolution of the conflicts and on application of those criteria to particular cases), users of land might well be able to establish their claims to environmental control by means of force. Non-intervention would thus amount to a collective decision (non-decision?) to distribute such environmental claims to those who could take them and hold them.

A further justification for intervention comes from market economics. Claims of local environmental control amount to what economists refer to as spillover effects, or "external diseconomies."11 External diseconomies have traditionally been re-

10. Another kind of land-use regulation that should be distinguished from distribution of local control rights is the pervasive variety, where regulations set maximum limits of imposition on common resources such as air quality, water quality, or quiet. This Article will emphasize the local control category, although occasionally touching on common resource problems.

garded as an obstacle to the attainment of what economists call "efficiency." The allocation of resources is efficient when rational, self-maximizing individuals operating through a competitive market structure have reached the point where no further allocation changes will make some individual better off without making someone else worse off. If a firm is imposing an external diseconomy on another firm or consumer under circumstances where the cost imposed by such a diseconomy is not reflected in the first firm's computation of costs, the firm may well, in terms of efficiency, be overproducing, for the true marginal cost of its product, which includes the marginal cost of the external diseconomy, would be higher than the price of the good. 12 To say that the firm should take into account the cost of the external diseconomy in making its output decision is to say that the right to impose the diseconomy should be purchased, like any other factor of production, from some owner of that factor. On the other hand, if the initial property right (the claim on the local environment) belonged to the firm, a reciprocal (though not necessarily identical) 13 solution of efficiency would occur if affected individuals could purchase some or all of


13. If any given distribution of wealth produces a unique efficient allocation of resources, it would seem that since the conferral of the claim on the environment to one activity or another involves a choice between alternative distributions of wealth, that the resultant efficient solution might be different in each case, or at least when the conflicting land users are consumers rather than firms. For some debate on the matter, compare A. Kneese & B. Bower, Managing Water Quality: Economics, Technology, Institutions 87 (1968); Mohring & Boyd, Analysing "Externalities": "Direct Interaction" vs "Asset Utilization" Frameworks, 38 Economica (New Series) 347, 358-60 (1971); and Regan, The Problem of Social Cost Revisited, 15 J. Law & Econ. 427, 432-33 (1972) with Calabresi, Transaction Costs, Resource Allocation and Liability Rules—A Comment, 11 J. Law & Econ. 67 (1968); Demsetz, When Does the Rule of Liability Matter?, 1 J. Legal Studies 13 (1972); and Nutter, The Coase Theorem on Social Cost: A Footnote, 11 J. Law & Econ. 503 (1968).
that property right from the firm through exchange transactions agreeable to all parties.

Economic efficiency, if it is to be achieved through market structure alone, requires exchange transactions, and exchange transactions are contingent on exchangeable property rights. As with other property rights, property rights in local environmental control can only be defined, distributed, exchanged, and protected by means of some collective intervention. While the efficiency rationale may mandate an assignment of rights to local environmental control, that rationale alone offers no guidance as to the appropriate criteria for distribution. In fact, as Ronald Coase suggested in his now-famous article, \(^1\) the question of to whom the rights are initially distributed is irrelevant to whether an efficient allocation of resources will result, so long as bargaining is costless and the parties may engage in exchange transactions. Regardless of who initially receives the right, under this scheme the parties will bargain to the point where efficiency is achieved.

From an efficiency standpoint, then, the important question is whether excessive costs will preclude otherwise favorable exchange transactions. Such costs may include the costs of organizing (where more than one individual is involved on either side), the costs of excluding freeloaders (persons desiring the benefit of the transaction but hoping to get it for nothing), the costs flowing from imperfect information about the nature of the particular spillover effect, and the costs of dealing with holdouts from among the group of would-be sellers. The aggregate of these “transactions” costs creates the danger that the initial assignment of the local environmental control right will be final. \(^2\) To the extent that transactions costs do operate as a serious obstacle to successful exchanges, then the efficiency goal can be best served only if the public decision-making body

\(^2\) See Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1096-98, 1101 (1972); Schmid, Market Failure—Why Externalities Are Not Accounted for in the Market, in C. MEYERS & A.D. TARLOCK, SELECTED LEGAL AND ECONOMIC ASPECTS OF ENVIRONMENTAL PROTECTION 18 (1970). The point is not that transactions costs will always be so high as to preclude the possibility of exchange solutions to land-use conflicts, but that the case for a market solution to such problems, on efficiency grounds alone, is substantially weakened by the potential presence of such costs, with the result that if there are other good reasons for preferring a non-market solution, such arguments cannot be simply answered by an assertion that a market solution would clearly lead to an efficient allocation.
responsible for assigning the rights initially does so in the manner best suited to attaining efficiency.

Subject to the one constraint just mentioned, the efficiency rationale for assignment of local environmental control rights fails to imply any distributional criteria. In addition, the very process of distributing these rights may reflect societal values other than economic efficiency. Each time a conflict between competing land users is resolved, one or the other receives a measure of subjection and exclusion over the adversary. That right amounts to a relative advantage for the land of the winner (or, at least, the land of the winner for a particular use) as against the land of the loser. The relative advantage becomes an increment of land value attaching to the already owned land of the victor, with a corresponding decrease in the value of the loser's land. Thus the public decision to assign a local control right amounts to a public distribution of wealth to those selected as beneficiaries. The question of criteria appropriate for the distribution of these rights, then, seems to involve a larger question of appropriate criteria for the distribution to private parties of publicly owned assets. If achievement of societal goals other than efficiency is sought when a publicly owned asset is distributed to members of the public, resolution of land-use conflicts offers an occasion for achievement of such goals.

To say that, until distributed, local control rights are publicly owned implies not only the necessity of public intervention to resolve the conflicts, but also that previously existing property rights do not already include local control rights. For, if they did, the public distributional role might be limited to legitimizing preexisting local control claims by simply assigning them to the appropriate landowner claimants. The naked fact of land ownership, however, does not seem to resolve the typical land-use conflict that gives rise to the competing claims for extraterritorial control. The most basic of such conflicts involves two landowners; if land ownership alone is to be the basis for resolving the conflict, neither claimant seems preferable. It may be that there is some feature of a particular landowner or land use that supports an appealing claim for a local control right, but such a characterization of the problem returns us to the

16. See Demsetz, When Does the Rule of Liability Matter?, 1 J. Legal Studies 13, 22-25 (1972). Whether, and how much, the loser's land is likely to decline in value will depend upon the extent to which its market value included some discounted probability of receiving the relative advantage.
problem of selecting appropriate criteria, which is the principal subject of the next section.

II. DISTRIBUTING LOCAL ENVIRONMENTAL CONTROL: A THEORETICAL FRAMEWORK

A. THE VALUES TO BE SERVED

If local environmental control rights are to be distributed to landowners, three kinds of rules must be developed. First, the rights to be distributed must be defined and categorized. Second, rules for the distribution of those rights must be established in order to enable decisionmakers to choose among competing claimants. Third, rules for the subsequent management of the distributed rights are needed to facilitate exchange and to resolve conflicts between holders of the previously distributed rights. Before dealing with each of these problems, however, it seems necessary to articulate the values to be served by the entire system of distribution.

17. For a discussion of these questions in the context of the traditional “taking” issue in constitutional law see Part IV infra.

18. Instead of attempting to attribute specific sentences or ideas to specific sources in this section, I offer the following citations as a bibliographic footnote to all of Part II. The list is not intended to be exhaustive, but rather to suggest through my sources the perspective from which I approached this section. The listed items are all ones that I found particularly stimulating, thought-provoking and/or inspiring: O. Davis, The Economics of Municipal Zoning (1960) (unpublished doctoral dissertation, Economics Department, University of Virginia); Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972); Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960); Demsetz, When Does the Rule of Liability Matter?, 1 J. Legal Studies 13 (1972); Demsetz, Wealth Distribution and the Ownership of Rights, 1 J. Legal Studies 223 (1972); Dunham, A Legal and Economic Basis for City Planning, 58 Colum. L. Rev. 650 (1958); Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681 (1973) [hereinafter cited as Ellickson]; Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969); Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165 (1967) [hereinafter cited as Michelman]; E.J. Mishan, Pareto Optimality and the Law, in Welfare Economics, supra note 11, at 225; Mohring & Boyd, Analysing “Externalities”: “Direct Interaction” vs “Asset Utilization” Frameworks, 38 Economica (New Series) 347 (1971); Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971); Tarlock, Toward a Revised Theory of Zoning, 1972 Land Use Controls Ann. 141 (1973); Thurow, Toward a Definition of Economic Justice, The Public Interest, Spring 1973, at 56; Tribe, Policy Science: Analysis or Ideology, 2 Philosophy & Pub. Affairs 66 (1972).
By values I mean those underlying justifications to which the defender of a particular scheme of distribution would appeal. If such a scheme is justifiable, it should be possible to say that those who have received local control rights deserve them. Three notions occur to me as possible bases for making such a claim of desert—efficiency, merit, and prior appropriation.

1. **Efficiency**

I cited efficiency earlier as a sufficient basis for justifying the decision to set up a scheme of distributing local control rights. The efficiency value appeals to the idea that we should make the most out of what we have, given that what we have is limited in quantity. I relied on this idea above to suggest that maximizing the value of land resources compels the distribution of extraterritorial claims to landowners. The question for the moment is whether the efficiency value offers any guidance with respect to the selection of a comprehensive distributional scheme.

In one sense, efficiency is irrelevant to the choice of such a scheme. An efficient allocation of resources can be achieved for any particular distribution of wealth among individuals. All that is necessary is that the individuals be able to express their preferences, backed up by the wealth that each possesses, through exchange transactions with other individuals. If all that is involved in the distribution of local control rights is a distribution of wealth, then the possibility of a subsequent efficient allocation of that resource would not depend on the original basis of distribution. If some individuals received too much or too little of the resource in the initial distribution, exchange transactions would soon reallocate in accordance with wealth-backed expressions of preference.

If, however, there is reason to suspect that exchange transactions will not occur, efficiency becomes much more relevant to the question of initial distribution. To the extent that we fear that initial distribution of a resource will be final, we may prefer to distribute the resource initially through a pricing system, to ensure accurate satisfaction of individual preferences. The more the scheme of distribution facilitates subsequent exchanges, however, the less important the efficiency value will be.

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19. See text accompanying notes 11-16 supra.
in choosing the initial recipients and the easier it will be to promote other values in the initial distribution. More specifically, if the definitional rules and the subsequent management rules can be squared with the demands of efficiency, the distributional rules can be liberated from that constraint.

2. Merit

The merit value suggests that there may be some feature of an individual activity or person, apart from preference expressed through dollars, that makes that activity or person peculiarly deserving of local environmental control rights. It should be recalled at this point that the property right to be distributed arises in a situation of conflict, and, by definition, involves the assignment to the recipient of an ability to subject or exclude other landowners. In exploring the merit value, then, the focus should be on the likely parties to the conflict. One way of characterizing a land-use conflict is individual versus individual. Without more, is Sam Jones or Herb Glork more entitled to an award of the property right? Since the names hardly imply any criteria of desert, we do need to know something more. But what? On an intuitive level at least, the relative niceness of Sam and Herb might serve as a satisfactory index of merit, but could niceness be determined on a scale satisfactory to all concerned? Could anyone be trusted to make that decision? Without belaboring the point, I will suggest that whatever merit criteria are to be found will reside in the kinds of land-use activities involved rather than the personal characteristics of the claimants.

With respect to land-use activities, private land uses may be roughly divided into residences and businesses. Given this dichotomy, three possible conflicts arise—business firm versus business firm, business firm versus resident, and resident versus resident. Conflicts between firms do not suggest any obvious merit criteria for resolution. Firms ordinarily purchase labor, land, and raw materials for their activities, and local environmental control seems easily categorized as another factor of production to be purchased. At any given time, some firms function with a greater or lesser degree of societal approval, but such approval or disapproval is normally expressed through the market in dollar-backed consumer preferences. Some firms (or

20. See text accompanying note 10 supra.
categories of firms) may from time to time be regarded as especially meritorious (as, for example, ones that produce positive externalities), but there is no general principle of inter-firm merit that would support a suitable criterion for initial distribution of local control rights.

The resident-versus-firm conflict, however, seems to present a case for resolution on the basis of a merit criterion in favor of the resident. If a firm is compelled to purchase local environmental control in order to remain in business, but cannot afford to do so, the hard capitalist fact would seem to be that consumers of the particular product do not care enough to express a sufficient preference (through their expenditures) for that product as opposed to other available products. On the other hand, if residents are required to purchase local environmental control rights and are unable to do so, it is probably because the residents do not command enough personal wealth to outbid the nonresidential claimant for the particular local control right. The result will be residents whose quality of life is curtailed by whatever power of subjection attaches to the nonresidential recipient of the right—smoke, dust, noise, odor, bright lights, or whatever. If we are considering criteria for the initial distribution of these rights, it seems plausible that a value to be served is the enhancement of the quality of residential existence.

The resident-versus-resident conflict seems more similar to that between firm and firm. Differences in residential styles stem from either individual diversity or socioeconomic inequality. The premise of societal commitment to diversity would seem to be that no individual style is to be elevated collectively to a preferred status (subject to the qualification that at some point a particular resident might deviate so far from the activities contemplated by the local environmental control assigned to “residence” as to be impermissibly interfering with that same right in

21. As, for example, where the firm produces localized economic benefits for its neighbors that are not recouped through sales of its own products, with the result that the social gain from the enterprise may well exceed the private gain to the individual firm. Examples cited by Musgrave are the expensive store that may increase real estate values in a neighborhood, or the railroad into new territory that may lead to gains in economic development.

Another sense of positive externality is the good or service that satisfies more generalized or unmonetizable social wants in excess of the individual wants it would satisfy if distributed through the private market. Examples include “merit goods,” such as publicly provided school lunches, free education, or low-cost housing. See R. Musgrave, The Theory of Public Finance 7, 13-14, 45 (1959).
other residents—as the neighbor who practices the tuba all night out on the roof). Similarly, socioeconomic status seems to present no basis for concluding that one kind of residential use is intrinsically superior to another.

In sum, I would suggest that an appropriate merit value to be served by the distribution of local control rights is the distribution of some agreed-upon minimal level of residential environmental amenity.22 The twin notions that form this value are that residential amenity ought to be provided as against the claims of nonresidential land uses, and that such residential amenity should be provided without favoring residential users over one another. Before discussing the third distributional value, I will elaborate on the general argument in support of this position.

Residential amenity might be regarded as a “merit good” the provision of which is likely to produce external benefits for society as a whole—external benefits that would be unrealized without collective provision to the extent that persons would be compelled by circumstance to forego the good.23 More specifically, our societal commitment to equality of opportunity will not be fulfilled except by conferring a minimum of residential amenity, since at some point the disagreeable conditions of one’s environment may have such a destructive impact as to negate any realistic chance of competing for society’s rewards on an equal basis with others who have not experienced such an environment.24 Alternatively, a basic societal obligation to ensure a minimal degree of self-respect and dignity to persons within the society25 may include a minimum requirement of control over one’s immediate environment. To the extent that an increasingly crowded environment denies any possibility of such control without collective intervention to provide it, we may


25. See id. at 983-86; Tribe, supra note 18, at 66, 88-89, 96.
wish to ensure against whatever feelings of helplessness, powerless-
lessness, or dehumanization may follow from a denial of mini-
mum environmental amenities.

Bound up with all of these arguments is the question whether there is a collective obligation to provide for any mini-
mum needs of individuals. Without engaging in the general
debate on that issue,26 I will simply suggest that local environ-
mental control is a fit candidate for provision as a minimum
need. The basic spillover problem associated with land uses
necessitates some form of public intervention to distribute local
control rights.27 As suggested above, such a scheme of distribu-
tion must at least describe the rights to be distributed and select
distributional criteria. Since there is a necessary public role in
distributing these rights, some of the usual arguments against
achievement of wealth distribution goals through regulation
seem less applicable in this context. Since we are presently
considering the relevance of merit criteria to a system for the
initial distribution of these rights, the problem of creating effort
disincentives, with attendant efficiency losses, by forcing persons
to give up accumulated wealth, seems less serious than in a case
of expropriation of vested rights. And the familiar argument
that whatever distributional goals we do wish to achieve should
be realized through direct transfers of income28 seems less per-
suasive here since such an approach would lead to the initial
creation of a public distributional scheme based on criteria other
than residential preference, and the superimposition of another
public scheme for accomplishing the desired distributional goal,
with attendant political and administrative costs.29 Why not do
it right the first time?

26. See, e.g., Grey, Property and Need: The Welfare State and The-
tories of Distributive Justice, 28 STAN. L. REV. 877 (1976); Michelman,
supra note 24; Michelman, Foreword: On Protecting the Poor Through
the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969); Posner, Economic
Justice and the Economist, THE PUBLIC INTEREST, Fall 1973, at 109;
Thurow, Toward a Definition of Economic Justice, THE PUBLIC INTEREST,
Spring 1973, at 56; Reich, The Law of the Planned Society, 75 YALE L.J.
1227, 1267 (1966); Scitovsky, supra note 22; Weisbrod, Income Redistri-
bution Effects and Benefit-Cost Analysis, in PROBLEMS IN PUBLIC Ex-
PENDITURE ANALYSIS 177 (S. Chase ed. 1968); Winter, Poverty, Economic
27. See Demsetz, Wealth Distribution and the Ownership of Rights,
1 J. LEGAL STUDIES 223 (1972).
28. E.g., Ellickson, supra note 18, at 751.
29. See L. Tribe, supra note 22, at 56 & n.10 (1973); Weisbrod, supra
note 26, at 183.
One might argue, of course, that it is unduly paternalistic to assert that individuals would choose residential amenity despite the costs thereby incurred in the acquisition of other goods. Some individuals might prefer to accept a miserable residential environment if by doing so they could ensure goods at a price less than that which might result if the producers were forced to purchase local control rights that they could otherwise have obtained without cost. One response, however, is that we are discussing only the initial distribution of these rights, so that those individuals for whom they are not so valuable may be able to exchange them for more desirable goods. Individuals would thus at least have a chance to express their preferences. Even if exchange possibilities were limited, it seems unlikely that there would be significant deprivation of choice, since the case supposed is one where some individuals would forego a right to environmental amenity in order to hold down the price of some good. Since the price of the good would in all likelihood be held down for all of its consumers, one must assume that some subset of those consumers would forego environmental amenity for the benefit of the whole class of consumers. Since those forced to make the choice, if it were available, would likely be those under the severest constraints of budget, the result of its unavailability would be to deprive some poor people of the chance to sacrifice environmental amenity in order to reduce the price of some good available to rich and poor alike. It may be paternalistic to prevent the sacrifice of environmental amenity under those circumstances, but it seems that if the particular good is important enough to the class that would be put to the choice by force of their initial relative wealth position, that is the appropriate occasion for government intervention to subsidize the good, or to make direct transfers of cash. And if the context is purely local, as where a group of residents would prefer to sacrifice environmental amenity to a neighboring factory in order to preserve their jobs, the exchange should be feasible under any system of distribution (for example, through a system of waiver by majority or two-thirds vote). Finally, I am willing to concede paternalism, by which I mean my supposition that those who would end up worst off under any other scheme would prefer to be guaranteed a measure of environmental amenity, especially if told that the next best way to get it, if they were unable to buy it, would be to strive to achieve through the political process a relatively massive redistribution of wealth. Ultimately, all I can do is appeal to what, on the basis of my
intuition and experience, seems a reasonable candidate for a shared value, and let the matter rest at that.

3. Prior Appropriation

A critic might suggest that the two preceding sections are unrealistic to the extent that they assume that the distribution of local control rights is to be accomplished in a world without existing land uses. In fact, I have referred a number of times to the notion that land-use regulation amounts to an initial distribution of rights, as opposed to a redistribution of such rights. It is time to clarify the concept of “initial” and in so doing come to terms with one of the most difficult issues in land-use regulation—the appropriate status to be conferred on the “first user.” One sense of “initial distribution of rights” is certainly that such rights have never been previously distributed and, by implication, that all the land involved may be owned, but is not currently being used in a manner that asserts any spillover demands. In that narrow sense, a good deal of the relevant world fails to fit the description, since much of it is already in use for residences, stores, farms, and factories; any proposed scheme of land-use regulation ought to take account of that reality. On the other hand, to the extent that I am trying to offer an ethical system for distribution of local control rights for the purpose of testing our methods against that standard and perhaps suggesting directions or goals for change, nothing seems inherently wrong with posing an idealized initial position for the purpose of articulating such a theory.\(^{30}\) An alternative sense of “initial distribution of rights” is that while there are many existing land uses, the law governing distribution of them has so far remained sufficiently ambiguous or elusive as to leave the question of actual distribution in a state of great uncertainty.\(^{31}\) Against that background, it may be that despite the existence of a great number of land uses that assert local control rights, society still needs to develop a method for distributing them authoritatively, since most of the existing claims are tenuous and uncertain.

The present section seeks to investigate the extent to which existing claims may be fairly characterized as tenuous and uncertain, by focusing on the necessary ethical position of the first user. Should the mere introduction of a land use in an area


\(^{31}\) See text accompanying notes 82–88, 139–46, 170–78 infra.
where no competing uses exist, but where the introduced use imposes a spillover on neighboring land that would produce a conflict if neighboring inconsistent uses were present, compel the conclusion that such introduction alone amounts to appropriation of the local control right in question? Some authors have asserted just such a position for the resolution of land-use conflicts.\textsuperscript{32} The first task, then, is to isolate, in order to scrutinize, the value of firstness.

Some ostensible firstness claims reveal upon examination the presence of an additional meritorious basis coupled with the firstness status. For example, in a particular case, to deny a local control right to the first user might be inefficient, in the narrow sense that the objective monetary loss to the first user might be much greater than the objective gain to the preferred newcomer. If the local control right were awarded to the newcomer under circumstances where transaction costs might prevent an exchange that would restore the local control rights to that first user, the net result would be an efficiency loss. But in such a case, the problem is not sequence of land uses, but comparative value. If exchange were feasible, it would make no difference to the efficiency goal that the first user had not been initially awarded the local control right. Thus, it may be that in some cases, or categories of cases, we might wish to confer local control rights on the first user in order to further efficiency goals; but that is quite different from saying that the first user has an inherently better claim to the local control right by virtue of firstness alone. In a case, for example, where a significant number of latecoming but consistent land uses are opposed to a single first user, efficiency might dictate favoring the latecomers. I have already acknowledged that efficiency is an appropriate goal of land-use regulation. That goal does not by itself resolve the firstness problem, however. Similarly, the residence value discussed above might present a basis for conferring local control rights on residential first users, but the reason for doing so would be residence rather than firstness.

The question, then, is upon what basis firstness is to be defended apart from efficiency or residential use. Most defenders support their position by appealing to “expectations.”\textsuperscript{33} The


\textsuperscript{33} E.g., Berger, supra note 32, at 174: “A result of no compensation will seem fair only when the regulated owner could reasonably have
idea is that there is a significant social cost in disappointing previously established expectations, and that in a given case such cost might outweigh the efficiency gains to be derived from awarding the local control right to the latecomer. I suggest that there are two senses in which “expectation” must be considered. The first of these, which, I concede, presents a case for the first user, is that the local control right has already been distributed to the landowner who happens to be the first user. To the extent that previous rules of distribution have operated to confer a local control right upon a particular landowner, who thus may be fairly characterized as already having a property right legitimizing the spillover claim, a subsequent uncompensated redistribution of that right to a latecomer would severely frustrate expectations. Such a redistribution would be equivalent to the actual exclusion of a landowner from the land itself and quite destructive of the basic level of certainty associated with property ownership.

A softer sense of “expectations,” which might also present a claim for the first user, is that although previous rules have not actually distributed the property right to the first user, those rules did permit or encourage the first user to formulate an expectation of receiving the local control right if a conflict ever arose. Here again, I will concede that if the prior rules in fact supported or gave rise to such expectations, we might hesitate before upsetting the rights of first users. On the other hand, if the prior rules were so confusing or uncertain as to prevent the formulation of such expectations, or if the prior rules explicitly reminded the first users that their spillover claims were revocable or at the sufferance of the public decisionmaker, there would be much less of a case for the first user on the basis of rule-generated expectations. The actual character of previous rules of distribution will be investigated later in this Article.

The most difficult question is whether, apart from efficiency, residence, or rule-generated expectations, there is an inherent ethical status associated with firstness in the context of spillover claims. Are there any valid expectations of continuity of spillover-demanding land uses where the rules governing such uses do

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34. See Michelman, supra note 18, at 1213-25, 1233, 1241.
not create them? If the applicable rules clearly denied protection to firstness, for example, it would be difficult to assert the validity of expectations—in the sense used thus far—of continuity. To try to isolate the value, however, let us assume that the rules are neutral. I suggested earlier that, in the absence of rules, conflicts over the distribution of local control rights would likely be settled by assertions of power or by appeals to whatever persuasive ethical arguments the parties could muster. Would an appeal to firstness be persuasive under such circumstances? One value served by firstness is the avoidance of conflict through appeal to an arbitrary but easily applied rule. That value, however, seems just as well served by reliance on a relatively predictable set of rules, and the argument in its favor is more an argument for rules of distribution than it is an argument for the firstness principle.

Another approach is to ask what accounts for the presence of the first user. In a less crowded, wilder world than ours, firstness might be a reflection of the adventuresome spirit or bravery of the particular individual who got there. In such a context, firstness might be rewarded in order to encourage such admirable behavior, out of a feeling that those who exploit their natural endowments through vigorous efforts ought to reap their just rewards. Or preferring the first users under such circumstances might be seen as just another version of the efficiency principle, encouraging those who add value to the societal product. In any event, the modern world fails to fit the description offered. I suggest that in the modern context first users are just as likely to have achieved that status through luck, or, perhaps more likely, through preexisting advantage of power or money.36

Against the background of existing land uses and the intensity of development of our finite land resources, it seems difficult to conclude that the existing pattern of land uses and attendant spillover demands amounts to a just distribution of local control rights. The firstness value, if it is to be recognized, must ultimately rest on the proposition that those who are there, who have asserted spillover claims through use, deserve to be there and therefore deserve to have their spillover demands assigned to them as property rights. To make such a claim is equivalent to saying that the existing distribution of land ownership, compounded as it is by such problems as inheritance from original owners, reflects a just distribution of possessory claims;

that those who own land deserve to have it as against those who do not, or who have less of it. It is one thing to validate existing land ownership as a vested right for reasons of efficiency and certainty in property rights (since we are talking about already distributed rights in that context), but quite another to assume sufficient desert with respect to those rights to justify a corollary distribution of spillover demands. If the firstness value means that it is not simply prior ownership, but the exploitation of prior ownership through use, that justifies the spillover claim, I suggest again that in the modern context the sequence of exploitation is more likely to be a product of wealth and its attendant mobility than of the adventurous spirit of an earlier age. To the extent that the latter point is accurate, the distribution of existing but as yet unlegitimized spillover demands may be largely a function of the existing distribution of wealth generally, which I cannot see as supporting a claim of desert.

On the basis of the preceding discussion, I conclude that the principal value to be served by land-use regulation (or, more narrowly, by the system for distributing local environmental control rights) is the provision of minimum amounts of residential amenity under conditions that promote economic efficiency. To promote both of these values, the system should be designed to the extent possible to prevent conflicts between the efficiency goal and the residential amenity goal. Where such conflicts do occur, trade-offs will be necessary, and those will be discussed at various points later in the text. Prior appropriation, on the other hand, confers no special status with respect to local control rights, except in those cases where a claim based on prior appropriation is accompanied by an efficiency claim or a claim based upon rule-generated expectations.

The next part of this section will trace the roles of these values in designing a scheme for distribution.

B. SELECTING A METHOD OF DISTRIBUTION

1. Defining the Rights

I suggested in Part I that every spillover demand involves the assertion of a measure of subjection and exclusion over neighboring land. If I have a house on my land, my spillover demand amounts to a request that land uses that I perceive as

inconsistent with my residential use be excluded from neighboring land. Such inconsistent uses might be described by categories of activities, or in terms of their particular offensive qualities, such as noises, smells, or ugly sights. The subjection component of my demand amounts to an announcement that land users who perceive my residential use to be inconsistent with their activities will nevertheless be forced to accept my presence in their neighborhood. Any scheme for distributing local control rights must therefore define the activities to be excluded and those to be permitted each time a right is conferred.

In the context of land-use conflicts, then, to say that one land user is imposing a “cost” on another is simply a way of describing an individual's perception that some activity is offensive and adversely affects the victim's enjoyment of his land. Such a perception will be reflected in the price that individual, or one with similar tastes, would pay for land neighboring the particular offensive activity. The universe of spillover demands to be distributed as local control rights is the aggregate of these personal expressions of distaste. If the goal of land-use regulation were simply one of maximizing these individual preferences, an ideal system of distribution would define the rights to be distributed in as many different ways as would be necessary to reflect the varieties of individual taste. Some might prefer residential neighborhoods containing all kinds of residential structures but no commercial or industrial land uses. Others might wish to permit neighborhood stores but to exclude bars and shopping centers, while others might want the bars and shopping centers but not pool halls, bowling alleys, and porno theaters. And some will prefer to limit the kinds of residential structures by category, style, or personal characteristics of the occupants.

For practical reasons alone, the rights must be defined on a level of generality higher than specific individual preferences. For initial distributions of rights, at least, problems of drafting and administration would seem to compel some reduction in the possible categories to be recognized. And while more accurate satisfaction of individual preferences at the outset might serve the efficiency goal, such an approach might subvert the efficien-

cy goal in the long run. If efficiency requires exchange transactions, such transactions require units of exchange that are sufficiently fungible to facilitate transfer. As in real property law generally, there would be a need to control the types of marketable units to achieve sufficient levels of marketability and certainty. In addition, given a finite surface area available for land uses, a great deal of "grouping" will be necessary. And once distributional decisions must be made for "neighborhood" units rather than for individuals, the decisions are likely to be on a level of generality that compromises some individual satisfactions by excluding activities that some would prefer to have available and permitting the introduction of ones that others would prefer to exclude.

The demands of practicality are not the only ones to be satisfied in defining the local control rights. Other societal values, apart from those intrinsic to land-use regulation, may be implicated by the definitional rules. Many individuals would probably prefer a system of distribution that permits them to exclude other individuals on the basis of race, political views, or other personal characteristics. Even if practical problems could be overcome and areas set aside for the various minority groups, our societal commitment to diversity, freedom of expression, and equality of opportunity would hardly be realized. Similar considerations would lead me to deny the power to establish land-use exclusions based on architectural or similar aesthetic criteria.

A much more difficult question is the extent to which the minimum residential amenity value discussed earlier constrains the rights-definition process. The specific question is whether residential users should be able to obtain a local control right to exclude other kinds of residential users. For the purpose of this discussion, I will assume that these rights of exclusion are on a reasonable level of generality, such as single-family homes on large lots versus single-family homes on smaller lots versus two-family homes versus townhouses versus apartment buildings. I will also assume that there is ostensible compliance with the demands of the residential amenity value insofar as sufficient land areas are available for each of the designated residential uses in accordance with current demand for each type, and that those who want a more restrictive local control right will some-

40. See Ellickson, supra note 18, at 735, 749-51; cf. Buchanan v. War-
how be compelled to pay for it. These assumptions, which I regard as minimally necessary for the protection of the residential amenity value, are themselves well beyond the reality of contemporary land-use regulation. Their achievement would certainly improve land-use regulation in the direction of the values I have articulated. Why then, one might ask, do I choose to jump off the deep end? Because my primary goal of offering an ethical account of land-use regulation compels me to scrutinize every aspect of the problem even if in some realms practical defeat is likely.

For a number of reasons, I believe that the basic value of residential amenity is ill served by the segregation of residential land uses. The criteria for separation seem inherently demeaning to those excluded. It is a reasonable assumption that higher-density residential users have no particular desire to exclude lower-density ones. The very scheme of definition operates to tell succeeding categories of higher-density users that they are unwelcome in the lower-density setting. Given at least a rough correspondence between wealth and power and those who are doing most of the excluding, and since the principal victims will be those who by force of circumstance are unable to buy in at the more exclusive level, the message to the excluded is that they are unfit, or, in the classic phrase of Justice Sutherland, "a pig in the parlor instead of the barnyard." 41 If the value of minimal residential amenity is thought to buttress feelings of self-respect or dignity, or to promote equality of opportunity, as suggested earlier, the message of exclusion does precisely the opposite. Alternatively, it may be said, relying on an apt analogy, that "separate but equal" cannot ever be equal so long as some persons are imposing the fact of separation on those who would prefer not to be separated. The problem is one of imposition by wealth and power on those without choice; the evil is the implicit insult. 42 And, more specifically, the insult seems directed to the particular personal characteristics of those excluded that are the basis for the exclusion.

The current movement to provide separate public facilities for smokers and nonsmokers 43 might be regarded as presenting a similar problem, since the nonsmokers are the ones telling the people for which the new facilities are designed that they cannot use them as they wish. The moral issue is the same: Are some people to be treated as if they were in possession of characteristics they do not possess, causing harm to them as a result? If the same basic value is not served by the separation of residential land uses, then it probably is not served by the separation of public facilities.

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43. See, e.g., Minnesota Clean Indoor Air Act, MINN. STAT. §§ 144.411-.417 (Supp. 1975).
smokers to keep out of their areas. But the basis of exclusion is nothing more than the fact of smoking, which is something largely within the control of the excluded individual, not based on economic circumstances beyond the control of the smoker, and something that the smoker can accept as reasonably offensive to the nonsmokers. That seems quite different from telling the apartment dweller that the environmental conditions that he is compelled to accept as a way of life are sufficiently offensive to justify his isolation from others with power to acquire better conditions. Finally, I would suggest that, given the realities of political power, to permit segregation of residential uses would make it far less possible to achieve the assumptions with which I began this discussion. The history of zoning in the United States indicates that it is difficult to prevent separation from turning into denial of sufficient minimum areas for higher-density uses.\footnote{See text accompanying notes 165-70, 175 infra.}

A minimum level of generality, then, seems to be required by the residential amenity value, constraints of practicality, and other societal values. When these demands have been satisfied, however, the generalizing process should cease, since the more general the categories chosen, the more individual preferences will be unsatisfied and the less successful the whole scheme will be in achieving the efficiency goal.

2. **Distributing the Rights**

Once the appropriate levels of generality have been selected and the rights have been defined, it becomes necessary to choose a procedure for distribution. The priority rules suggested earlier provide that the rights be distributed so as to guarantee minimum levels of residential amenity, promote efficiency (subject to accomplishment of the first goal and without unnecessary conflict between these two goals), and recognize the rights of first users where dictated by efficiency or where required because of prior distributions or existing rule-generated expectations. Given compliance with these guidelines, the question arises as to which rights attach to which land.

Two paradigms of distribution technique are case-by-case adjudication of conflicts and prospective public allocation of land use. The case-by-case approach, exemplified by nuisance law, would seek in each case to further the values of land-use regulation by awarding the local control right to the more de-
serving of the conflicting parties. The award would be a right described with a sufficient level of generality to satisfy the requirements of the preceding section. It would also have the advantage of reasonable specificity, inasmuch as it would, if adjudicated in normal common-law fashion, be tied to the facts of the particular conflict.\(^4\) Even apart from the administrative expense of the ongoing conflict resolution process, however, the case-by-case approach might well produce so much uncertainty with respect to initial locational decisions that costly interactions would occur simply because both sides were willing to gamble on the eventual receipt of the local control right at issue.\(^4\) The problem is heightened by the fact that many land-use decisions are practically irreversible over significant periods of time. Thus relocation costs and dismantling costs result if one's guess turns

45. The relationship between the two modes of intervention is more that of points along a continuum than a strict dichotomy. Any scheme of case-by-case resolution will involve some locational guidance through announced criteria of decisionmaking. As the scheme moves away from strict generalized standards, however, the level of certainty decreases. Cf. Michelman, Book Review, 80 Yale L.J. 647, 663–65 (1971).

46. Alternatively, development may be retarded by uncertainty. See Munby, Development Charges and the Compensation-Betterment Problem, 64 Econ. J. 87, 90–92 (1954). There has been some recent debate on the likelihood of conflict-producing locational decisions amidst the uncertainty of nonregulation. Bernard Siegan has written an entire book in praise of "nonzoned" Houston, citing, on the locational issue, such facts as industrial users seeking land near major transportation facilities, and car dealers locating along major thoroughfares. See generally B. Siegan, Land Use Without Zoning (1972). But there are few instances of such hard data in his work, and his views are somewhat weakened by the extensive system of private restrictive covenants in Houston, in itself a vast scheme of regulation. On restrictive covenants, see note 52 infra. Other observers have commented a good deal less favorably on the results of Houston's lack of zoning. See R. Babcock, The Zoning Game 25 (paperback ed. 1966); J. Deafons, Land-Use Controls in the United States 81–82 (1962).

Other studies have suggested that zoning classifications of harm may not accurately reflect individual perceptions of external costs, i.e., that some activities thought to produce external costs do not in fact do so. But both studies involved contexts where the number of such presumably noxious activities was regulated by ordinance, suggesting that numerical control may be desirable in lieu of total exclusion for some uses, as, for example, the grocery store in the residential neighborhood. See J. Ukeles, The Consequences of Municipal Zoning 42–43 (1964) (citing W. Hunter, Jr., The Effects of Zoning Regulations Upon Real Estate Values in Contiguous Districts (1957) (unpublished M.B.A. thesis, University of Pennsylvania)); Crecine, Davis & Jackson, Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning, 10 J. Law & Econ. 79 (1967). But see T.N. Tideman, Three Approaches to Improving Urban Land Use 40–49 (1969) (unpublished doctoral dissertation, University of Chicago) (suggesting that the effects of inconsistent uses are significant, but highly localized).
out to be wrong.\textsuperscript{47} Further uncertainty arises from the very interdependence of land uses, which makes it difficult, if not impossible, for individuals to make locational decisions that take into account the probable behavior of numerous other individuals.\textsuperscript{48}

Prospective public allocation, exemplified by zoning laws, employs what has been termed a "separate facilities" solution to minimize the frequency of costly interactions by directing individuals to designated areas in advance of locational disputes. Such a solution is superior to any that can be achieved to resolve an existing conflict, since by separating the land uses that would otherwise have conflicted, the approach awards local control rights without actually interfering with other land uses.\textsuperscript{49} One objection to the efficiency of this approach is that its technique of creating generalized categories of harmful interaction tends to interfere with and overrule individual preferences that might differ from the generalized standards.\textsuperscript{50} I suggested earlier that for reasons of practicality alone any scheme of distribution must define the local control rights on a level of generality that is out of line with some individual preferences. The question is whether the prospective allocation technique will be likely to deviate further from such preferences than a case-by-case scheme. If prospective allocation can be made more responsive and sensitive to individual preferences (or at least to those we are willing to recognize) than it has been,\textsuperscript{51} there seems to be no reason to


\textsuperscript{50} Often, the regulatory scheme will explicitly override individual preferences, as where such preferences conflict with collective ethical judgments. See E.J. Mishan, Reflections on Recent Developments in the Concept of External Effects, in Welfare Economics, supra note 11, at 180, 187; cf. G. Calabresi, The Costs of Accidents: A Legal and Economic Analysis 97-101 (1970).

suppose that case-by-case resolution, with its drawbacks of administrative costs and locational mistakes, is more likely to achieve efficiency gains.

A more serious objection to prospective allocation is the danger that those with sufficient power to implement the regulations will, if the process is relatively inexpensive, regulate even to secure minor gains for themselves that impose great costs upon others. While this is a serious problem, I suggest that the difficulty is more one of the values reflected in particular schemes of prospective allocation than an inherent feature of the technique, and that realization of the values I have offered as a basis for public distribution can be accomplished, if at all, only through some form of prospective allocation.

Once the distributional technique is chosen, there remains the matter of applying eligibility criteria at the point of initial distribution. Four kinds of claims will be asserted—prior appropriation claims based on vested rights, prior appropriation claims based on efficiency, pure efficiency claims, and residential amenity claims. The first category comprises claims based on prior appropriation, accompanied by claims of previous distribution of the rights in question or rule-generated expectations with respect to those rights. In either case, the claimants would seem to have a good argument for receipt of the right on the basis of desert alone, and therefore free of charge. A conflict between members of this category would, by definition, be impossible, since either one or the other claimant (in a two-party conflict) would be wrong as to the legitimacy of reliance on the prior rules, or the prior rules would have been so ambiguous that no valid rule-generated expectations could have been created. In the former case of conflict, the winner could be determined; in the latter, the parties would be dropped from the category, thereby forcing them to appeal to some other criterion of distribution.

Where a prior appropriation claim is based on efficiency alone, there seems no reason to prefer one or the other claimant on the basis of personal desert, since it is the societal value of efficiency that is being served. In such a case, the goal is to award the right to the party who would have ended up with it, regardless of initial distribution, in a world of costless bargain-

ing. The problem is that the right must be first distributed if it is to be exchanged, and if impediments to exchange are feared, it must be distributed to the right party at the outset. But neither the fact that it must be distributed, nor the goals associated with that distribution, imply that one or the other party should be favored with a conferral of wealth. All of this leads me to conclude that wherever practically possible the right should be sold to the highest bidder. If neither party deserves the conferral of wealth, it might as well be retained by the public. If efficiency is best served by exchange transactions, then an exchange transaction should be employed to award the right in the first place. Thus, I would suggest that whenever efficiency is the only goal to be served by a particular distribution, the local control rights should be awarded through a price-distribution system.

One problem of a pricing system is the relative permanence of price-distributed rights. Where local control rights have been distributed to purchasers, those purchasers join the category of prior appropriators to whom the control rights have already been distributed, and any subsequent redistribution would have to recognize their preferred status. The more permanent the right conferred, the more difficult will be future exchange transactions with respect to those rights if bargaining is not costless, and the less likely will be the realization of efficiency goals in the long run. If covenants are given greater latitude than zoning laws in terms of the kinds of “nuisance costs” legislated against, I fear an abdication of collective responsibility for setting levels of tolerable harm and for defining the content of locational amenity subject to private appropriation. Under existing law, covenants usually are permitted to go much further than zoning ordinances. See, e.g., Gaskin v. Harris, 82 N.M. 336, 481 P.2d 698 (1971) (covertant restricting building style of residences to “Old Santa Fe” or “Pueblo-Spanish” held violated by a swimming-pool enclosure in oriental style); West Hill Colony, Inc. v. Sauerwein, 138 N.E.2d 403 (Ohio App. 1956) (upholding decision of a homeowners’ association under a covenant scheme that all residences must be “Colonial” or “Western Reserve” style and painted white). Although limitations on aesthetic zoning have been relaxed in recent years, they still have a long way to go. See J. Delafons, LAND-USE CONTROLS IN THE UNITED STATES 77-79 (1962). On the other hand, if covenants are to be regularly

52. Robert Ellickson recommends that greater use be made of the traditional restrictive covenant as a device for distributing what I have characterized as local control rights. Ellickson, supra note 18, at 713-19. Ellickson’s own criticisms of covenants are so persuasive, however, that his overall treatment of the subject leaves me with the feeling that he is less than enthusiastic, and perhaps ambivalent at best. See id. If covenants are given greater latitude than zoning laws in terms of the kinds of “nuisance costs” legislated against, I fear an abdication of collective responsibility for setting levels of tolerable harm and for defining the content of locational amenity subject to private appropriation. Under existing law, covenants usually are permitted to go much further than zoning ordinances. See, e.g., Gaskin v. Harris, 82 N.M. 336, 481 P.2d 698 (1971) (covertant restricting building style of residences to “Old Santa Fe” or “Pueblo-Spanish” held violated by a swimming-pool enclosure in oriental style); West Hill Colony, Inc. v. Sauerwein, 138 N.E.2d 403 (Ohio App. 1956) (upholding decision of a homeowners’ association under a covenant scheme that all residences must be “Colonial” or “Western Reserve” style and painted white). Although limitations on aesthetic zoning have been relaxed in recent years, they still have a long way to go. See J. Delafons, LAND-USE CONTROLS IN THE UNITED STATES 77-79 (1962). On the other hand, if covenants are to be regularly
rights in time units, as with leases of real property, on the assumption that the pricing system would reflect lesser degrees of permanence. For undeveloped land, such a procedure would facilitate response to changing conditions and preferences. For developed land, the market might reveal that for some kinds of more practically irreversible locational decisions, longer terms would have to be offered if no purchasers bid for the shorter terms. That the problem is not insuperable is suggested by contemporary markets for leases of real property; lessees do make substantial investments in improvements despite the relative uncertainty of less-than-fee ownership.

Another problem of a pricing system is grouping of uses. If one of a group of neighboring landowners purchases a local control right, neighbors will be subsequently bound by whatever level of subjection and exclusion was validated by the particular right. Those neighbors might prefer to acquire a local control right inconsistent with the one previously purchased by the individual. The market mechanism would offer this opportunity if the group were willing to buy back the right previously purchased and purchase the desired right from the public. But the opportunity would never be realized if transactions costs peculiar to group decisions operated to block the exchange. Familiar examples of such costs are the freeloaders who cannot be excluded and holdouts (where there is more than one prior owner of the right). The likelihood of these impediments to bargaining suggests the employment of voting schemes for area purchase decisions. The analogy is to the purchase of public goods for localized areas through majority-preference consent.

scrutinized, we might simply be transferring review of substantive content from the legislature to the courts.

A more serious problem with covenants is their potential for giving rise to "prevention costs," in the form of restrictions on mobility of poor persons, greater than the nuisance costs they are eliminating. Ellickson recognizes this problem, and answers it with the suggestion that perceptions of possible upward mobility will allay the displeasure of the poor at being forced to bear these costs, and the further point that covenants tie up only a small amount of land for a few decades. Ellickson, supra note 18, at 715. For one thing, the abolition of zoning might well lead to a rampant increase in the acreage subject to covenants (see, with respect to the Houston experience, note 49 supra and sources cited therein), and it is less than clear, except where there is a statutory limit, e.g., Minn. Stat. § 500.20 (1974), that covenants are easily extinguished. See, e.g., St. Lo Constr. Co. v. Koenigberger, 174 F.2d 25 (D.C. Cir. 1949); Wolff v. Fallon, 44 Cal. 2d 695, 284 P.2d 802 (1955). Earlier in his article Ellickson discussed the imposition of costs on lower-income persons as one of the serious side-effects of zoning. Ellickson, supra note 18, at 703-05,
schemes, as is often the case where local improvements, such as streets or sidewalks, are undertaken and financed by special assessment. Of course, there will be some efficiency losses through the employment of such procedures, since to the extent that prices must be determined objectively, or through consensus, accuracy in reflection of individual preferences will be lost.

The market mechanism seems the most appropriate for handling both prior appropriation claims based on efficiency alone and pure efficiency claims. That leaves the residential amenity claims to be distributed. The easy answer in terms of the values I have suggested is the automatic initial distribution of an agreed-upon content of residential amenity to all landowners, without charge. The agreed-upon content should reflect contemporary shared values as to the minimum quality of residential existence, excluding ostensibly residential uses that are actually inconsistent with residential use (such as the tuba player on the roof at night), and including ostensibly nonresidential uses that are regarded as consistent with residential amenity (for example, neighborhood shops, which might be permitted in residential districts if landowners are willing to purchase the rights under the approach suggested above for nonresidential uses). A further problem stems from the previously discussed question of whether residential users should be permitted to segregate themselves from one another. Subject to the argument advanced earlier, I would suggest that those who wish to acquire greater levels of residential amenity than offered by the minimum should, if the system is going to offer that option, be required to pay a premium for the privilege. The basic principle again is that market mechanisms should be employed to distribute local control rights unless those who claim the rights can be said to deserve them in accordance with acceptable ethical principles.

3. Protecting and Exchanging Rights

The final objective for a distributional scheme is to develop methods of protecting previously distributed rights from subse-
quent interference and to develop ground rules for subsequent consensual exchange of those rights. Protection issues arise when a user otherwise displaced by the exclusion component of the previously distributed right nevertheless seeks to locate in the area subject to that exclusion. What remedies will be available to the holders of the local control rights as against the intruder? Three choices present themselves—public command, private injunction, or private damages.

The public command approach would simply order the intruder to depart upon a finding that the intrusive activity was in fact inconsistent with the particular local control right. This approach would treat the violation as a "public wrong," so that once the public official in charge decided to press the claim, holders of the right affected would have no opportunity to waive the right or settle with the newcomer. The public command approach would be similar to techniques used to enforce housing codes, or traditional zoning ordinances, with the actual order to comply backed by threats of publicly imposed force or fines to guarantee obedience.

The second remedial possibility would be that represented by the traditional injunction in nuisance cases. The remedial process would be initiated by the complaining parties and would be subject to their control with respect to exchanging the asserted right for some payment from the intruder. The key feature of this approach, which has been characterized as a "property rule" for protecting entitlements, is that sale of the right to the intruder would occur, if at all, only on terms entirely satisfactory to the sellers.

The third possibility would be the traditional damage action, with the rightholders free to seek damages from the intruder for interference with their local control rights. The amount of the award would be set by a third party applying some objective formula. This approach has been termed a "liability rule" and seems the most appropriate one for conflicts not involving residential land users. The major purpose of distributing nonresidential local control rights is to facilitate efficiency goals, the only exception being for those rights already distributed under a prior system of distribution. Protection for the latter category might be claimed according to expectations of protection that accompanied initial distribution of the right.

Since one of the great dangers in any system of distribution is that the rights will be defined too generally to accommodate actual individual preferences, the public command approach seems undesirable. It provides no opportunities—other than relatively unpredictable ones flowing from prosecutorial discretion—for checking the generalized standards against the actual preferences of the rightholders. And if the task of blunting the generality of the rules is left to such discretion, it may well be accomplished arbitrarily, or for reasons of individual preference not recognized by the basic distributional system. The injunctive approach seems unnecessary for protection of nonresidential local control rights. Its principal advantage is that it preserves for the rightholder the choice of whether to sell and on what terms and thus permits him to attempt to capture through sale whatever subjective value his right has over and above an objective measure of its value. If there are no significant subjective values to be protected, however, there is no need for the extra protection of such an approach, since it imposes severe transaction costs in the form of impediments to transfer of the right. If the goal is efficiency, and the rights involved are easily monetizable, the damages approach seems most appropriate. The prices of nonresidential local control rights, which will be initially distributed through a market mechanism, will certainly reflect whatever degree of permanence or impermanence, certainty or uncertainty, that accompanies the rights conferred.

Residential amenity rights, however, demand more protection than would be offered by the prospect of an action for damages. The public command approach may not be warranted, since some check on the efficiency of the residential rights is desirable, but the availability of injunctive relief seems essential. The assumption is that there is some significant component of "subjective value" associated with residence that would remain uncompensated if the right could be vindicated solely by a damage action. Suppose a gas station opened up next door to a residence. There are three ways one could measure the impact of the gas station, with its attendant noise, traffic, fumes, and the like, on the residential amenity of its neighbor. First, we could try to figure out the difference between what a hypothetical purchaser would pay for the residence before and after the gas station moved in. This is the market value test. Second, we might determine what the resident would pay to bribe the gas station to move away, on the assumption that the amount of the bribe will reveal the resident's perception of loss from the pres-
ence of the gas station. Third, we might ask the resident how much compensation he would demand from the gas station before permitting it to remain. The difference between the second approach and either of the other two is that method two assumes that the local control right was initially conferred upon the gas station rather than the resident. I inserted it to underscore one of the reasons for assigning the local control right to residents in the first place—to minimize the influence of wealth effects. The value of ensuring minimum residential amenity for all cannot be achieved if the availability of such amenity turns on the personal wealth of the resident, and it is that wealth that limits what an individual could offer under the second test.

Although the first and third approaches seem to be based on factors other than the personal wealth of the resident, the first actually compromises individual preferences associated with enjoyment of residential amenity. The market value computation is a hypothetical, a construct used in circumstances where value computations are necessary, and one that concedes the impossibility of measuring precise individual preferences. The first approach is appropriate, however, in circumstances, such as eminent domain proceedings, where transactions costs (particularly, the problem of holdouts) might prevent the exchange from ever taking place. In that sense, efficiency is served. But in the sense of accurately reflecting individual preferences in the surest way, through an individual’s asking price for a good, efficiency is ill served by the objective market value approach. Thus there must be a trade-off between promoting the possibility of exchange transactions in the long run and maximizing individual preferences with respect to residential amenity. The psychological and social values of residence that support its special value at the outset would seem to support protecting it from intrusion in a manner calculated to insulate those values. Moreover, the objective market value approach again makes availability of residential amenity a function of wealth to the extent market value reduction from a given intrusion may vary directly with the value of the residence. Thus I would opt for some version of the third approach to protect residential local control rights.

55. See Dolbear, On the Theory of Optimum Externality, 57 Am. Econ. Rev. 90, 91 (1967); E.J. Mishan, THE COSTS OF ECONOMIC GROWTH 60-62 (1967). Mishan’s ultimate example is the difference between what a man dying of thirst in a desert would pay for a drink of water and what the same man would be willing to accept to forego that drink. Id. at 68.
The efficiency loss generated by the third approach is in the deterrence of otherwise likely exchange transactions. How much loss would this be? For one thing, under the proposed scheme, nonresidential local control rights can be obtained in advance through the market system, which should operate to reduce locational uncertainty and promote the grouping of uses that would be offensive in residential environs. Second, an exchange transaction is more likely to occur where an incompatible user enters an area that is designated residential but not yet developed, since the undeveloped land is likely to be held in larger tracts and important subjective values have not yet been realized. It is only when the intruder decides to invade a developed residential area that transactions costs may interfere with and prevent the exchange. Some compromise might be achieved along the lines suggested earlier for nonresidential rights, by permitting exchanges to take place when some percentage (probably more than a majority) of affected landowners is willing to accept an offer from the intruder. While such a procedure would compromise some subjective values, it would provide one means of testing the efficiency of the residential local control right.

The same considerations that apply to protection of residential control rights would apply to their exchange. Exchanges should be made possible only to the point where the procedure does not impinge significantly on subjective values associated with residence. The procedure would be similar to that where a party who has invaded and will be enjoined unless the plaintiffs can be bought off negotiates to avoid the injunction. Here, however, negotiations and transfer of rights could take place prior to the actual invasion. The availability of such a procedure would probably minimize the number of post-location conflicts.

In the remainder of this Article, I will attempt to apply the theoretical structure just offered, with a view to illustrating some of its more abstract or ambiguous points by imposing it as a critical tool on a number of traditional topics encompassed by land-use regulation—nuisance law, the taking-regulation issue, and zoning.

III. PRIVATE NUISANCE LAW

Prior to the twentieth century, private nuisance law was the principal means of resolving localized spillover conflicts between
landowners. As early as 1306, a reported case dealt with a landowner who complained that his neighbor had planted a grove of trees producing so much shade that the complaining party's corn could not ripen. The major doctrine of nuisance law, *Sic utere tuo ut alienum non laedas* ("so use your land as not to injure that of your neighbor"), is little more than a land-use version of the Golden Rule and, by itself, offers no guidance as to which of two competing spillover demands is to be preferred. I will review the development of nuisance doctrine in nineteenth and twentieth century American case law with a view toward suggesting that through its resolution of conflicts between landowners, nuisance law sought to promote the values I have offered as intrinsic to a system of distributing local control rights. That it failed in this task is attributable not to the values themselves, but to the virtual impossibility of reconciling the demands of efficiency and residential amenity in the context of post hoc, case-by-case conflict resolution.

A threshold requirement for judicial intervention in nuisance cases is the existence of a "substantial harm"; the claimed "annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities." While courts have occasionally intervened to resolve a conflict based on widely held fears, most nuisance cases involve objectively demonstrable conflicts evidenced by the presence of odors, noises, dust, or smoke. And despite the presence of serious personal harm, as evidenced by illness, courts have declined to find a legally significant level of harm where the particular claim is idiosyncratic to the plaintiff.

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58. E.g., *Kellerhals v. Kallenberger*, 251 Iowa 974, 980, 103 N.W.2d 691, 694 (1960); see W. PROSSER, supra note 57, § 87, at 577-80, § 89, at 593, 595 & n.69.

59. E.g., *Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (1910) (fear of infection from proximity of tuberculosis hospital to plaintiffs' residences). *But see McCaw v. Harrison*, 259 S.W.2d 457 (Ky. 1953) (fear of contamination from proximity of cemetery to plaintiff's farm). The most frequent instance of judicial willingness to recognize harm based on attitudes at least akin to fear has been in the funeral home cases. See, e.g., *Powell v. Taylor*, 222 Ark. 896, 263 S.W.2d 906 (1954); *Gunderson v. Anderson*, 190 Minn. 245, 251 N.W. 515 (1933). Apart from these instances, courts in nuisance cases have been reluctant to find harm based on aesthetic considerations alone. See W. PROSSER, supra note 57, § 87, at 577 & n.69.
and therefore fails to satisfy the objective test of "ordinary sensibilities."\(^{60}\)

This objective test of harm serves the efficiency value discussed earlier in at least three ways. The threshold harm requirement defines the content of the local control rights awarded by nuisance law. While the requirement does not by itself determine which of the parties will receive the local control right, it does at least enhance the likelihood that in cases where the offensive activity ends up as the one excluded or limited, the costs of exclusion or limitation do not exceed the costs reduced for the complaining party.\(^{61}\) This is especially true in nuisance cases (as opposed to prospective forms of land-use regulation), since the conflicting uses are already in place and a decision to exclude or limit will involve relocation costs or at least practical or monetary restrictions on a functioning enterprise. And to the extent that damage awards are insufficient to protect the subjective values of residence (where the complaining party is a resident), there is all the more reason to ensure that the offensive conduct is a sufficiently serious affront to residential amenity to justify enjoining the defendant. Finally, the practical necessity of land-use "groupings" seems to compel harm standards based on a level of generality that will facilitate groupings, with their inevitable compromises to achieve common denominators of amenity.

A satisfactory claim of harm, however, is not enough to resolve the case. Given a conflict, still to be resolved is the question of which of the competing parties is to receive the local control right and with what level of protection. Traditional answers to these questions reveal the irony of nuisance law as a method of land-use regulation. The ostensible values sought to be achieved could not be realized without causing efficiency losses for which the judges refused to assume responsibility. A number of courts, especially in nineteenth century cases, took the approach of automatically conferring the local control right on residential users as against the claims of nonresidential users who were causing "substantial harm" to the residential community. The courts in those cases regarded themselves as guaran-

\(^{60}\) E.g., Rogers v. Elliott, 146 Mass. 249, 15 N.E. 768 (1888) (convulsions caused by ringing of neighborhood church bell).

\(^{61}\) A higher harm threshold may also serve to keep down the administrative costs of managing and resolving nuisance conflicts by reducing their frequency and ensuring that they are of sufficient severity to warrant the administrative costs involved.
tors of residential amenity. A typical judicial expression of that idea is the familiar doctrine that "the rights of habitation are superior to the rights of trade, and whenever they conflict, the rights of trade must yield to the primary or natural right." Other courts expressed their concern for residential amenity through the use of emotionally loaded terms in characterizing the interest of the complaining resident as the "sanctity of the home," or the "well-being, comfort, repose, and enjoyment" of one's home. This special solicitude has also been evoked by describing the injury facing the defendants from an injunction as merely economic, "whereas the material interference with the rights of the plaintiffs is in the day to day use and comfort of the places where they live." Implicit in these expressions is the recognition of important subjective values associated with residential amenity—values whose monetary equivalents may be difficult or impossible to ascertain.

These dual notions— elemental ethical primacy of residential amenity and the inherent nonmonetizable or subjective character of the value of such amenity—may be regarded as significant reasons for the traditional reliance on injunctive relief in nuisance cases. The granting of an injunction not only con-

62. E.g., American Smelting & Ref. Co. v. Godfrey, 158 F. 225, 229 (8th Cir. 1907); Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 379, 173 N.W. 805, 807 (1919); see 1 H. Wood, NUISANCES 709 (3d ed. 1893).

63. Rhodes v. A. Moll Grocer Co., 231 Mo. App. 751, 763, 95 S.W.2d 837, 843 (1936). The court went on to include in its opinion two pages of poetic excerpts in praise of the home. Id. at 763-64, 95 S.W.2d at 843.


66. See Barrier v. Troutman, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949); Adams v. Snouffer, 88 Ohio App. 79, 82, 87 N.E.2d 484, 486 (1949) ("It is this disturbance of their right of normal living in the community in which they reside which has been invaded and which is not susceptible of measurement in money damages."); Developments in the Law—Injunctions, 78 HARV. L. REV. 994, 1003 (1965); cf. Gavigan v. Atlantic Ref. Co., 186 Pa. 604, 606, 40 A. 834, 835 (1898) (analogizing to damages for pain and suffering in personal injury actions).

67. See Edwards v. Allouez Mining Co., 38 Mich. 46, 50-51 (1878); "No man holds the comfort of his home for sale, and no man is willing to accept in lieu of it an award for damages. If equity could not enjoin such a nuisance the writ ought to be dispensed with altogether, and the doctrine of irreparable mischief might be dismissed as meaningless." See also Adams v. Snouffer, 88 Ohio App. 79, 82, 87 N.E.2d 484, 486 (1949); cf. Shipley v. Ritter, 7 Md. 406, 416 (1855); Czipott v. Fleigh, 87 Nev. 486, 489 P.2d 681 (1971); Wilson v. City of Mineral Point, 39 Wis. 160, 164 (1875).
fers the right of residential amenity on the successful plaintiff, but does so by awarding a property right that can be sold only through the individual's conscious choice, and then only on terms agreeable to the seller—terms that will presumably reflect the full subjective value associated with retention of the right.  

Another key feature of the injunction in protecting residential amenity is its role as an equalizer. The remedy confers on residents generally—without regard to wealth or the market value of the actual loss—a minimum amount of residential amenity. Judicial recognition of injunctions as devices for guaranteeing minimum residential amenity rights to poorer as well as to richer persons has been most evident in cases where defendant firms argued that to enjoin their operations would cause losses exceeding the monetary losses to the plaintiffs:

Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich.

It seems to us that to withhold relief where irreparable injury is, and will continue to be, suffered by persons whose financial interests are small in comparison to those who wrong them is inconsistent with the spirit of our jurisprudence. It is in effect saying to the wrongdoer, "If your financial interests are large enough so that to stop you will cause you great loss, you are at liberty to invade the rights of your smaller and less fortunate neighbors."

Smoke, noise, or bad odors, even when not injurious to health, may render a dwelling very uncomfortable, so as to drive from it any one not compelled by poverty to remain. If the citizen has no protection against such annoyances, the comfort and value of his home can be destroyed by any one that may choose to erect such annoyance near it, and no one, not rich enough

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Important subjective values may often be destroyed through eminent domain takings, where the choice is collective rather than individual, and the compensation is objectively determined market value. But, given the impracticality of accomplishing worthwhile public projects other than by collective, rather than individual, choice, and one's own participation in that choice through the political process, I do not think that tolerance of such government intervention undermines the case for protecting residential amenity against private intrusion through property rights. Whether nuisance law can accomplish the task without unduly hindering other societal goals is another question.


70. Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 204, 100 P. 465, 470 (1909).
to buy all the land around him from which he could be so annoyed, could be safe. . . . I find no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying out their trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders, or intolerable noises, even if the inhabitants are themselves artisans, who work at trades occasioning some degree of noise, smoke, and cinders. . . . There is no principle in law, or the reasons on which its rules are founded, which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer, and their families, the fewer and more restricted comforts which they enjoy.\textsuperscript{71}

In a state of society the rights of the individual must to some extent be sacrificed to the rights of the social body; but this does not warrant the forcible taking of property from a man of small means to give it to the wealthy man, on the ground that the public will be indirectly advantaged by the greater activity of the capitalist. Public policy, I think, is more concerned in the protection of individual rights than in the profits to inure to individuals by the invasion of those rights.\textsuperscript{72}

Despite the glowing rhetoric of these and other cases, the courts found themselves too constrained by the efficiency value to deliver on the promise. The basic problem was the lack of locational guidance provided by nuisance law's case-by-case approach. Too many nuisance cases presented a conflict between the need for protection of subjective values of residential amenity and unwillingness to reverse expensive locational decisions where reversal would produce large, measurable economic losses. A few courts granted the injunctions anyway, apparently willing to tolerate wasteful dislocations.\textsuperscript{73} Others retained the

\textsuperscript{71} Ross v. Butler, 19 N.J. Eq. 294, 298, 305-06 (Ct. App. & Err. 1868). For cases explicitly endorsing the egalitarian spirit expressed in Ross, see Huribt v. McKone, 55 Conn. 31, 39-40, 10 A. 164, 167 (1887); Hennessy v. Carmony, 50 N.J. Eq. 616, 621, 25 A. 374, 380 (Ch. 1892). See also Krocker v. Westmoreland Planing Mill Co., 274 Pa. 143, 117 A. 669 (1922).


rhetoric of the "automatic-injunction-to-protect-residential-amenity" approach, but failed to follow through on the rhetoric when a difficult choice appeared. In some of the very cases that contain the most promising language the courts found ways to avoid following through—by finding that the plaintiffs had delayed in bringing their action and hence were not entitled to otherwise available injunctive relief,74 or by finding the defendant's minimal efforts to abate the nuisance sufficient to render it no longer actionable.75 Other courts decided that the character of the area was such that the residential users were the ones who were mislocated,76 or preceded a decision for the residents with a finding that the area in question was in fact residential.77

The "character of the area" determination amounts to the explicit imposition of an efficiency constraint on the "residence always wins" doctrine. The paradigm case for application of this doctrine to deny relief to a residential claimant is the single residence in an area occupied by numerous large and expensive industrial operations.78 While an injunction would not necessarily close the factories, since the plaintiff might be willing to negotiate, the opportunities for realizing extortionate sums in excess of any actual subjective value of the residence are, given the numerous defendants or potential defendants, many. The character-of-the-area doctrine may also be seen as judicial recognition of the need to avoid conflicts in the first place by guiding land users to locate in areas appropriate for their activities. As such, the doctrine turns nuisance law into "judicial zoning" and, at the least, warns subsequent land users that they will be

77. See, e.g., Kellerhals v. Kallenberger, 251 Iowa 974, 103 N.W.2d 691 (1960); Robinson v. Westman, 224 Minn. 105, 29 N.W.2d 1 (1947); Rhodes v. A. Moll Grocer Co., 231 Mo. App. 751, 95 S.W.2d 837 (1936).
appropriately or inappropriately located if they choose to settle in an area that has previously been the subject of litigation.79 On the other hand, the inherent limitations of the doctrine, applied as it is, after the fact, suggest the advantages of prospective land-use allocation decisions. In any event, modern nuisance law has for the most part accepted the character-of-the-area approach, and the ancient doctrine that “the rights of habitation are superior to the rights of trade”80 reappears as “[t]he rights of habitation in residential districts ordinarily are superior to the rights of trade or business therein, particularly where the business may be defined as nonessential and not dependent upon a fixed location.”81 And still other courts have discovered that the character-of-the-area limitation is not enough to prevent inefficient results and have, most typically in actions against gigantic industrial enterprises, abandoned any pretense of an automatic injunction rule, preferring instead to resolve the right to injunctive relief under a “comparative injury” rule. This approach measures the economic loss to the defendant against the objective economic loss to the plaintiffs, limiting the plaintiffs to a damage remedy when the balance of losses is against them.82

While American courts have at least tried to promote the residential amenity value, they have overwhelmingly rejected prior appropriation as a basis for claiming local spillover rights. As I suggested earlier, there seems to be no inherent ethical basis for favoring claims of prior appropriation unaccompanied by efficiency claims or claims that the rights in question were previously distributed or that prior distributional rules created expectations tantamount to those associated with prior distribution itself. Nuisance cases are consistent with this view. Thus,

80. See note 72 supra and accompanying text.
the character-of-the-area doctrine, reflecting efficiency goals, sometimes confers the spillover right on the first user, but often confers it on the newcomer when the prior user has failed to retain dominance of the area. Stark assertions of claims based on firstness are usually rejected.

The nuisance law analogue of the previously-distributed-right type of firstness claim is the now repudiated "coming to the nuisance" doctrine. This doctrine gave rise to a concept of previously distributed right only through a misplaced analogy to prescriptive easement law. Under prescriptive easement doctrine, one who regularly and continuously, without license from the owner, makes affirmative use of neighboring land gains an easement to continue such use if the unpermitted use is maintained for the appropriate limitations period. Typical cases involve rights-of-way, where the hostile use amounts to a regular vehicular or pedestrian invasion of the neighboring land. The kind of hostile use that normally results in a prescriptive easement is a trespassory one—an interference with the core property right of territorial exclusion—rather than interference with a spillover demand of the owner through assertion of an inconsistent demand. On the reasonable assumption that anyone who owns land should become aware and offended enough by hostile territorial invasions to perceive such activity as inconsistent with

83. E.g., Rhodes v. A. Moll Grocer Co., 231 Mo. App. 751, 95 S.W.2d 837 (1936) (prior resident, subsequent grocery, residential area); Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (prior residents, subsequent factory, residential area, but plaintiffs limited to damages remedy); Clark v. Wambold, 165 Wis. 70, 160 N.W. 1039 (1917) (prior farmer, subsequent resident, agricultural area).


the basic fact of ownership, it may make sense to say that an owner who has permitted a regular and continuing physical invasion of property will lose the right to exclude an adverse user after a sufficient period of time. That assumption, however, seems inapplicable to the case of the mere spillover demand. Where the continuous spillover demand is asserted against land not then being used inconsistently, as is true of the coming-to-a-nuisance case, it is more difficult to conclude that there was anything hostile to the subjected land in the fact of such use, for it is only in the context of conflict that actual spillover demands are asserted. To apply the prescriptive easement rationale is to say that an owner should have been vigilant, during the statutory period, on behalf of any or all potential uses of his land that might be undertaken in the future and would if undertaken be inconsistent with the existing neighboring use. The more appropriate analogy seems to be to those cases rejecting claims of prescriptive easement where the claims, such as those for easements of light or air, were essentially negative spillover demands that indicated no conflict in advance of the asserted contrary use.88

Given its rejection of first-user claims and its unconditional surrender to the demands of efficiency, nuisance law has failed to produce any concrete expectations with respect to continuity of spillover demands. The only certainty of the residential user under nuisance law is that he can rely on enjoying the local control right of a resident unless his adversary’s land use is now or becomes dominant in the area, and, even if it does not, his subjective values may be destroyed in a proceeding that compels him to sell his right to his adversary for its objective market value. For nonresidential users who have not acquired spillover rights by purchase, the level of certainty is as low or lower than that attached to residence. If the values of nuisance law are to be better achieved, the force of the efficiency constraint must be blunted by minimizing the locational uncertainty that makes so many nuisance problems intractable. In Part V, I will examine zoning, which is a technique for reducing locational uncertainty, but one which produces difficulties of its own in terms of the basic distributional values. Before doing that,

however, I will examine the “taking-regulation” issue insofar as it relates to localized spillover conflicts, since it is in that doctrine that zoning law is inextricably linked to its nuisance heritage, and because it is that doctrine that serves to limit the power of government to deny spillover claims to landowners who assert them.

IV. THE “TAKing” ISSUE

In Part II, I offered a framework of values to be furthered by a system for distributing local environmental control rights to landowners. In Part III, I attempted to show that the particular mix of values offered in Part II was hardly novel and, in fact, seemed implicit in at least the rhetoric of traditional nuisance doctrine. In the present section, I will examine those values in the context of the constitutional law of private property. It is not my intent to persuade anyone that my conception of the values associated with land-use regulation is or ought to be enshrined in federal constitutional law. It may be that for institutional reasons the merits of these decisions will be relegated to government agencies other than the courts or at least to state rather than federal courts. My specific goal for the present section is to check the consistency of my views with some of the leading constitutional cases, and with some of the prior doctrinal analyses. I will also attempt to apply to some of the recurring problems in this area my conception of the legitimate expectations of private landowners.

The United States Constitution, through the fifth amendment, prohibits the taking of private property for public use except upon payment of just compensation. The recurring


91. U.S. CONST. amend. V: “[N]or shall private property be taken for public use, without just compensation.”
question is whether government action has so interfered with the claims or expectations of private landowners as to be deemed a "taking" within the meaning of the clause. Since the subject of this Article is spillover demands with respect to use of land, I should distinguish at the outset between those taking cases that involve spillover demands and those that do not. As suggested earlier, every spillover demand involves a measure of subjection and exclusion asserted over neighboring property. At some point, however, the particular measure of subjection or exclusion asserted transcends the domain of spillover demands and becomes tantamount to an assertion of territorial ownership of the neighboring property. Thus one whose peace and quiet requires the total absence of any human activity or presence within a radius of two miles asserts an exclusion claim amounting to territorial control over neighboring land. Similarly, one whose subjection claim is some use that is uniquely obnoxious to all other land users, and hence incompatible with any neighboring activity, also effectively asserts territorial control. These cases, along with those where an actual physical occupation by the public or by other private individuals is legitimized by government action, as where a landowner is informed that his land has been declared a public park, belong in the "physical invasion" category of taking cases.

I join other writers in regarding those cases as involving government interference with a core concept of property ownership. I argued earlier that mere ownership of land does not legitimize any particular spillover demands with respect to that land, since the spillover demands of one landowner must meet and conflict with those of others. Claims that do not involve spillovers at all, however, do seem implied by the mere fact of ownership, and it is those claims with their associated expecta-

92. See Michelman, supra note 18, at 1226-29; Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, 162-65 (1971). Michelman suggests that psychological values of property ownership are threatened by "the stark spectacle of an alien, uninvited presence in one's territory." Michelman, supra note 18, at 1228 (footnote omitted). Thus I suggest that at the point of physical invasion a denial of compensation becomes such a denial of the basic expectations of private land ownership that it is tantamount to a denial of private ownership altogether. A similar emphasis on the core values associated with private ownership may be seen in those physical invasion cases where the analysis relies much more on the "private" than the "ownership" component of private ownership, that is, where the issue is explicitly regarded as one of personal liberty. See Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965),
tions that are protected from physical invasions. While, as with all legal distinctions, cases will arise that cannot easily be assigned to either category,\textsuperscript{93} I do think that there are minimal notions of territorial exclusion and personal occupation of land that are basic to the concept of private ownership, and that those minimal notions are reflected in the "physical invasion" taking cases.\textsuperscript{94} The remainder of this section will deal only with those taking cases that may be properly characterized as involving spillover demands.

Landowners often assert that a taking has occurred when government activity deprives them of some spillover demand with respect to their land. The government may intervene to terminate spillover demands asserted through current use, as when a landowner is directed to close a brickyard that is inconsistent with neighboring residential uses,\textsuperscript{95} or told to stop making alcoholic beverages because of their impact on the public at large,\textsuperscript{96} or deprived of trees that are inflicting a plague on the trees of other landowners.\textsuperscript{97} The government activity may also take the form of a prospective denial of spillover demands that landowners might have asserted but for the regulation, as when landowners are directed not to build stores or factories in designated areas where such land uses would be inconsistent with anticipated residential uses,\textsuperscript{98} or told to refrain from mining that would be inconsistent with the enjoyment of surface land users,\textsuperscript{99} or prevented from constructing buildings beyond a height designated for the landowner's district so as not to impose

\textsuperscript{93} See Michelman, \textit{supra} note 18, at 1184–90 (especially his discussion of the airport cases).

\textsuperscript{94} Another distinction between the physical invasion cases and the spillover cases is illustrated by the kinds of justifications used by courts to uphold what would otherwise be physical invasions. Such physical invasions, when validated, are usually upheld on the basis that they were consensual, in that the landowner voluntarily gave up a claim, or waived it, or abandoned it, or on the basis that they were already or at least simultaneously compensated through receipt of a benefit. Thus, instead of justifying the landowner's loss in terms of some larger public purpose, it is justified by denying that anything has in fact been "taken" or by showing that the "taking" has been cancelled out by something received. For some examples of this kind of reasoning, see the cases collected in G. LEFCOE, \textit{AN INTRODUCTION TO AMERICAN LAND LAW} 138–61, 190–95 (1974). Similar reasoning supports subdivision "exaction." See authorities cited in note 188 infra.

\textsuperscript{95} Hadacheck v. Sebastian, 239 U.S. 394 (1915).

\textsuperscript{96} Mugler v. Kansas, 123 U.S. 623 (1887).

\textsuperscript{97} Miller v. Schoene, 276 U.S. 272 (1928).

\textsuperscript{98} Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

\textsuperscript{99} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
a danger on the community at large,\textsuperscript{100} or prohibited from selling the land to persons of a particular race so as to prevent an imposition on the majority race within a district.\textsuperscript{101} Finally, government may proceed to deny a spillover demand by physical occupation rather than regulation, as where government as landowner moves in next door to you and operates an airport\textsuperscript{102} or sewage treatment plant.\textsuperscript{103}

Since every denial of a spillover demand involves a reciprocal conferral of the local control right elsewhere, it is important to note that these government denials also amount to conferrals on others. In some cases the beneficiaries will be other private landowners;\textsuperscript{104} in others the single beneficiary will be the public at large;\textsuperscript{105} and in others there will be a mix of private and public beneficiaries.\textsuperscript{106} I will develop the point further be-

\begin{footnotes}
\textsuperscript{100} Welch v. Swasey, 214 U.S. 91 (1909).
\textsuperscript{101} Buchanan v. Warley, 245 U.S. 60 (1917).
\textsuperscript{102} E.g., Batten v. United States, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963); Louisville & Jefferson County Air Bd. v. Porter, 397 S.W.2d 146 (Ky. 1965). For cases where a complaining landowner has been held entitled to compensation if he shows sufficient decrease in the value of his property, see, e.g., Alevizos v. Metropolitan Airports Comm'n, 296 Minn. 471, 216 N.W.2d 651 (1974); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962). For a recent survey of the cases, see Russell, Aircraft/Airport Noise: Current Legal Remedies and Future Alternatives, 42 Ind. Couns. J. 92 (1975).
\textsuperscript{104} See, e.g., Hartzler v. Town of West Haven, 151 Conn. 689, 202 A.2d 134 (1964) (discharge of water from a drainage pipe); Rodgers v. Kansas City, 327 S.W.2d 478 (Mo. 1959) (setting of experimental fires on public property); Pharr v. Garibaldi, 252 N.C. 803, 115 S.E.2d 18 (1960) (minimum security prison); City of McAlester v. King, 317 P.2d 265 (Okla. 1957) (erection of water tower).
\textsuperscript{106} See, e.g., Mugler v. Kansas, 123 U.S. 623 (1887). See the discussion of the "common resource" cases at text accompanying notes 154-60 infra. The "airport nuisance" cases also fall in this category, along with the other government facility cases. See authorities cited in notes 101 and 102 supra, and text accompanying notes 147-53 infra.
\textsuperscript{107} See, e.g., Welch v. Swasey, 214 U.S. 91 (1909) (discussed in text accompanying notes 159 and 160 infra). In one sense, the public should be the beneficiary whenever government takes action with respect to a spillover claim, since if the government action promotes efficiency, it should increase the total value of the social product. In the sense of pri-
\end{footnotes}
low, but I do suggest for the moment that the question whether a particular denial amounts to a taking may depend upon the size and identity of the beneficiary class—that the issue of "takings" may also be one of "givings."

Judicial responses to claims of taking in cases of spillover denial may be roughly divided into two categories. In one category of cases, the spillover demand is denied regardless of the value impact on the asserting landowner's property. For example, in *Mugler v. Kansas* the owner and operator of a brewery challenged a state constitutional provision that banned the manufacture and sale of intoxicating beverages. State law declared the places and equipment for the manufacture of such beverages to be public nuisances. The owner claimed that he had entered the brewery business when it was legal to do so, that he had invested $10,000 in the brewery, and that the effect of the state's action was to deprive him of nearly all the value in his property by rendering it worthless yet failing to compensate him. The Supreme Court rejected the brewer's claim, basically saying that the state could decide that alcoholic beverages were a kind of public nuisance, offensive to health and morals, and that by analogy to traditional nuisance law, it was within the power of the state to outlaw the offensive activity. Although that case involved a pervasive rather than a localized harm, it did establish the principle that when a state merely wishes to terminate a nuisance, it need not compensate the offending landowner. *Hahcheck v. Sebastian* did involve a localized spillover demand.

vate benefit that I am suggesting, however, such action, even if efficient, might nevertheless be regarded as having private beneficiaries to the extent that private individuals are treated as the conduits for public efficiency gains, especially where such gains are realized in the form of discernible land value increases. In my view, then, the only true public benefit situations are those where the gain is realized for a publicly held resource or facility, and the criterion, efficiency, that justifies the public action, will not be sufficient to justify resultant private benefit. Some other principle of desert must explain the good fortune of the recipients in order to satisfy disappointed losers.

107. See text accompanying notes 138-39, 152, and 158-60 infra.
108. This discussion is limited to cases where the government action is assumed to be a valid one, for a legitimate public purpose, and the only question is whether compensation is required or not. There is of course a third category of government actions denying land-use spillover claims where, because of conflicts with values other than property ownership expectations, the action is held invalid, regardless of willingness to compensate. See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917) (racial discrimination).
110. 239 U.S. 394 (1915).
The challenged ordinance in that case required the immediate termination of the operation of a brickyard that had preceded other development in its area but was now in a residential neighborhood. The economic impact on the brickyard owner was a reduction in the value of the bed of clay surrounding the brickyard from $800,000 to $60,000. The Supreme Court, relying on the nuisance analogy, upheld the regulation.

In a second category of cases, the validity of the government intervention seems to depend upon whether the landowner is left, after rejection of the particular spillover demand, with some reasonable value in the land. Under this view, particular denials are valid or invalid depending on how catastrophic their market value impact may be. Pennsylvania Coal Co. v. Mahon is often regarded as such a case. Pennsylvania had enacted a statute prohibiting mining wherever such mining would cause the subsidence of a structure used as a human habitation. The problem that had led to the statute was that many homeowners in Pennsylvania owned only surface rights in the land upon which their homes were built. These rights had been purchased from coal companies by deeds such as one described in the opinion, which "conveys the surface, but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal." The statute also prohibited such mining under public property, inasmuch as the public had also acquired only surface rights in a number of instances. The coal companies complained that the statute effectively destroyed their property rights in the minerals underneath the surface and that such destruction of rights could not be accomplished without payment of just compensation. The Supreme Court agreed, ostensibly on the theory that some government regulations limiting property rights simply go too far; the statute at issue had destroyed all value in the minerals by making mining impossible.

Many commentators and subsequent cases have derived from Pennsylvania Coal the principle that land-use regulations must stop short of depriving a landowner of all reasonable value in the land. The principle seems to explain the difference

111. 260 U.S. 393 (1922).
112. Id. at 412.
between two of the Supreme Court's early zoning decisions, *Village of Euclid v. Ambler Realty Co.* and *Nectow v. City of Cambridge*.

In *Euclid*, the Court upheld a comprehensive zoning ordinance against a landowner's claim that the portion of its land classified as residential had been depreciated by the ordinance from $10,000 per acre to $2500 per acre. In *Nectow*, the Court invalidated a zoning ordinance to the extent that it applied a residential designation to land worthless for such use. More recently, in *Goldblatt v. Town of Hempstead*, the Court refused to strike down an ordinance that prohibited mining of a gravel pit below the water table. The Court held that the complaining landowner had failed to show that the ordinance was unreasonable because, among other things, the landowner had not shown "[i]n terms of dollars or some other objective standard . . . how much, if anything, the imposition of the ordinance would cost."  

What accounts for the difference between the two categories of cases? How does one determine whether a case falls into one or the other? And is there any general theory of fairness that offers guidance as to when denials of spillover demands should give rise to compensation claims and when they should not? Of the many commentators who have dealt with this issue, two have offered what seem to be the most persuasive and thoughtful analyses of these issues. Joseph Sax, rejecting the neat dichotomy he had offered to explain the same problem
in an earlier article,\textsuperscript{119} recently presented a new synthesis in his \textit{Takings, Private Property and Public Rights}.\textsuperscript{120} He begins with a distinction between land uses that involve spillover demands on other land and those that do not. His basic contention is that where government activity limits land use over and above any spillover demand made by the landowner, compensation will be required, but that where government is merely denying a spillover claim, compensation will generally not be required. Where competing landowners seek to use their land in a manner that involves some imposition on neighboring land, according to Sax, neither one is a priori entitled to prevail, and therefore government may curtail the use of one or the other without triggering the taking clause.\textsuperscript{121}

He offers two exceptions to this general principle of non-compensation. Compensation will still be required in cases of “governmental discrimination,” which Sax regards as the “equal protection dimension of compensation law.”\textsuperscript{122} A claim of discrimination arises when government, in seeking to accommodate conflicting interests, chooses to impose a burden on some, but not all, of a class of similarly situated parties. The only example he offers is that of a government decision to impose open-space obligations by requiring a one-quarter acre vest pocket park on every 10 acres of center-city land. If there is no observable reason to impose the requirement on one owner rather than another, compensation of those selected will be required.\textsuperscript{123} Sax would not require compensation, on the other hand, if the regulation applied to some general class of land users, such as all strip miners. The other limitation on legislative regulation that Sax offers is the “risk of excessive zeal,” suggesting that “the judiciary may intervene at the extremes to hold a resolution of competing claims to be so misguided as to be beyond the bounds of the police power.”\textsuperscript{124} He later amplifies the point by characterizing such cases as those “in which the court is satisfied that the legislative determination is sufficiently distorted as to constitute an abuse of the police power; that the legislature has subordinated a judgment about maximization of social benefits to advancement of private gain.”\textsuperscript{125} Thus Sax,

\begin{itemize}
  \item \textsuperscript{119} See Sax, \textit{Takings and the Police Power}, 74 \textit{Yale L.J.} 36 (1964).
  \item \textsuperscript{120} 81 \textit{Yale L.J.} 149 (1971).
  \item \textsuperscript{121} \textit{Id.} at 161.
  \item \textsuperscript{122} \textit{Id.} at 169.
  \item \textsuperscript{123} \textit{Id.} at 169-70.
  \item \textsuperscript{124} \textit{Id.} at 171.
  \item \textsuperscript{125} \textit{Id.} at 176 (footnote omitted).
\end{itemize}
beginning with the proposition that land ownership alone fails to imply any expectation with respect to spillover demands, concludes that, subject only to his two "exceptions," there is no ethical theory governing their distribution. The balancing of social gains and losses in particular cases, he argues, is a job for the legislature in its pursuit of efficiency.

Frank Michelman, in his Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, links the question of when compensation is required to general ethical principles with respect to property rights and associated expectations. From the perspective of utilitarian property theory, he suggests that compensation is required whenever the particular government activity imposes excessive "de-moralization costs" on affected landowners or their sympathizers. From the alternative perspective of John Rawls's "justice as fairness" theory, Michelman suggests that the key variable is whether a disappointed landowner is able "to appreciate how such [government] decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice . . . suggested by the opposite decision."

Michelman's analysis suggests two criteria as most significant for determining entitlement to compensation—discrimination and defeat of expectations. The discrimination theme is apparent where he suggests that

the "evil" supposedly combated by the constitutional just compensation provisions [is the] capacity of some collective actions to imply that someone may be subjected to immediately disadvantageous or painful treatment for no other apparent reason, and in accordance with no other apparent principle, than that someone else's claim to satisfaction has been ranked as intrinsically superior to his own.

The "defeat of expectations" notion is made explicit by Michelman's suggested judicial rule that compensation, in other than physical invasion cases, is due only when there has been "a nearly total destruction of some previously crystallized value which did not originate under clearly speculative or hazardous conditions."

For Sax, the simple answer to Michelman's concern with expectations is to distinguish between land uses that involve

126. 80 HArv. L. Rev. 1165 (1967).
127. Id. at 1214-16.
128. Id. at 1221-23.
129. Id. at 1224-25.
130. Id. at 1250.
spillover demands and those that do not. Sax seems to be saying that since there are no a priori grounds for favoring one or the other party to a spillover conflict, no legitimate expectations are defeated by denial of such claims. His willingness to concede a discrimination constraint, however, brings him much closer to Michelman's analysis, since he does seem to recognize a generalized expectation of consistent treatment. In the remainder of this section, I shall attempt to relate these ideas of expectation and discrimination to the conceptual scheme I offered in Part II, in the context of recurring categories of controversies out of which the "taking" issue has arisen.

Before exploring the judicial responses in taking cases, I must subdivide the conflicts themselves into two categories. The first category is that which served as a model for my analysis in Part II—the localized dispute. In the purely localized dispute, epitomized by the traditional private nuisance case, the award of the local control right to one or the other party results in an imposition only on the losing party and not on the public at large. While there may be public interest in the outcome, reflected in the values of residential amenity, efficiency, and prior appropriation, the spillover demand itself is asserted against only the opposing party. Many taking cases, however, involve an additional element—assertion of a spillover demand not only against a competing landowner, but also against a public resource. For example, in a conflict between a relatively clean factory and a resident, a decision for either side will have no physical impact on any resource other than that of the other party. Whatever public values are to be served by the decision are adequately represented through the claims asserted by the contestants. In a conflict between a particularly smoky factory and a resident, however, a decision for the factory may involve imposition not only on the aggrieved resident, but also on the general level of air quality, a public resource. In such

131. One of the difficulties that I have with the analysis in Sax's later article, supra note 120, is that he seems to treat all cases of spillover demands as within what I call the "common resource" category. I find more difficult ethical questions raised by my "localized spillover" category, where the only occasion for intervention is to choose one or another private claimant.

132. The distinction between "localized spillover" cases and "common resource" cases is illustrated by a comparison of the majority and dissenting opinions in Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), where the majority seemed to regard the case as the former, while the dissent treated it as the latter.
a case, there is more at stake than simply which of two competing landowners will be awarded a local control right; there is an additional question of the maximum level of spillover to be tolerated with respect to the public resource involved. Since such cases frequently involve limits on the use of previously “free,” or, at least, “unpriced” goods, such as air, water, or public highways, setting maximum levels of imposition involves a direct interference with the result that would have been achieved through a normal test of market efficiency. While market tests may be used in some circumstances to distribute to individuals their public resource spillover rights, the ultimate level to be set will reflect our societal notion of the worth of the particular resource, which may be unquantifiable. In such cases, I will later suggest, the discrimination aspect of restrictions on takings becomes most significant. I will discuss first, however, the application of the taking rules to localized conflicts.

The cases of true localized conflicts seem most analogous to traditional private nuisance cases. In Hadacheck v. Sebastian the Court simply upheld a city’s decision to accomplish by ordinance what a court could have accomplished by judicial decision under nuisance principles. A brickyard in a residential area certainly met the threshold test of substantial interference. The brickyard operator had no previously distributed spillover right over the neighboring land, and the decision to close the brickyard reflected a public affirmance of the residential amenity value. The only value possibly ill served by the Supreme Court’s approval of the local legislative decision was that of efficiency, since a court in a traditional nuisance case might have been unwilling to conclude that the subjective values of the residents were sufficient to overcome the objective economic loss to the brickyard. As I suggested earlier, the efficiency criterion is at best difficult to apply to such cases, and while it might have been better (in terms of efficiency) had the residents and the brickyard been directed to different neighborhoods at the outset, they were not. Thus, in a localized conflict between residential and nonresidential claimants, taking doctrine should not prevent the award of local control rights to the residential claimants

133. See, e.g., J.H. Dales, Pollution, Property & Prices 77-100 (paperback ed. 1968).
134. See Freeman, Book Review, 60 Minn. L. Rev. 870 (1976), where I offered some comments on this issue in the context of forest policy.
135. 239 U.S. 394 (1915).
where there is reasonable certainty as to the existence of a genuine conflict and where no legitimate prior appropriation rights are being taken away.

Where the parties to a localized conflict are both nonresidential users, I have suggested that, subject only to situations involving prior appropriation rights, there is no principle other than efficiency to be served by the resolution of the conflict. Miller v. Schoene\(^{136}\) seems to be such a case, inasmuch as it involved a conflict between agricultural land users.\(^{137}\) The conflict seems to have been genuine—cedar trees infected with cedar rust passed the disease by spores to apple trees within a radius of two miles, causing destruction of both fruit and foliage of the apple trees. The Supreme Court recognized that “the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity.”\(^{138}\) Given the relative aggregate values of apple trees and ornamental cedar trees, the state seems to have made the right choice on efficiency grounds—if the matter had been put to a market choice, the apple tree owners would have likely outbid the cedar tree owners for the spillover right in question. Nothing, in the sense of defeated legitimate expectations, seems to have been “taken” from the cedar tree owners. In terms of the values I have suggested, and their mode of realization, the case raises a serious question not because the state took anything from the losers, but because the state chose to “give” the right to the winners without charge. To say that one or the other party must win does not imply that the winner deserves to receive the right for free, as in the residential amenity cases, or even that efficiency values will be well served in the long run by substitution of legislative judgment for market judgment. Miller thus regarded is a classic case not of taking, but of questionable giving. The evil in such cases is that associated with the discrimination problem—resentment on the part of the cedar tree owners at the state’s decision to make a gift to an already large and powerful industry. The decision on the merits in Miller makes sense in terms of the values I have offered only if the apple industry as claimant can be regarded as sufficiently deserving of a public subsidy.

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136. 276 U.S. 272 (1928).
137. See Sax, supra note 120, at 165. Nothing in the opinion seems inconsistent with this characterization.
138. 276 U.S. at 279.
In neither Hadacheck nor Miller did the Court seem particularly concerned with the degree of economic impact on the losing claimant. In some taking cases, the question of degree of harm (or the complementary question of economic value remaining for the disappointed claimant) seems more significant. Pennsylvania Coal Co. v. Mahon,\footnote{139} often regarded as the source of this doctrine, was a localized spillover case\footnote{140} in which the Court struck down the state statute, holding for the party denied the spillover right. The difference between Pennsylvania Coal and the other two cases is that those relying on the spillover rights awarded by statute in Pennsylvania Coal would not have had even an arguable common-law nuisance claim against the coal companies. It is the rare kind of private nuisance conflict where the rights sought by the claimants are ones previously distributed to their adversaries. While many surface owners were involved in the conflict, the case amounted to no more than an aggregate of individual surface claims asserted by owners who, at the time of purchase (by themselves or their predecessors in title), had specifically awarded the spillover right in question to the subsurface owners. Thus, Justice Holmes characterized the statute as “purport[ing] to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs.”\footnote{141} Similarly, he concluded: “So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.”\footnote{142}

\footnote{139. 260 U.S. 393 (1922).}  
\footnote{140. Justice Brandeis, dissenting in Pennsylvania Coal, 260 U.S. at 416-22, offers a clever brief in support of a common resource characterization of the case. His analogy to Welch v. Swasey, 214 U.S. 91 (1909), seems flawed because Welch did involve protection of the interests of third parties whose rights had not been previously distributed (the neighboring landowners exposed to the risk of fire), while the very risks being reallocated by the statute in Pennsylvania Coal are those between surface and mineral owners. Brandeis's argument based on the fact of public ownership of some of the surface interests protected by the statute, 260 U.S. at 421-22, again fails to answer the point of previous distribution, since his argument seems to be that the public as landowner acquires a greater title than a private party would acquire to the same land and simply because the public has purchased it. See text accompanying notes 150-51 infra.}  
\footnote{141. 260 U.S. at 414.}  
\footnote{142. Id. at 416.}
It may be that even previously distributed rights must yield in cases where there is a question as to the legitimacy of their initial acquisition, or where their consequences were unanticipated at the time of their creation, or where they impinge on a public resource apart from the claims of the parties to the conflict. But Pennsylvania Coal was not such a case. The decision seems to have been no more than a recognition of private ownership of land, with its associated notions of security of ownership rights, offering little guidance for the vast majority of cases where spillover rights have not been authoritatively distributed.

Thus, while Justice Holmes wrote about the degree of imposition on the coal companies, that principle does not seem to explain the case when it is compared with Hadacheck and Miller. When, if ever, is it relevant to inquire into the value remaining to a claimant whose spillover demand has been denied? The inquiry has been undertaken most frequently in zoning cases, especially where zoning classifications separate land uses that might never have opposed one another in a traditional nuisance case. In an attempt to anticipate land-use conflicts and prevent them by directing users to respective separate locations, zoning must be effectuated before the conflict arises. In lieu of the litigated fact of substantial conflict presented in nuisance cases, zoning offers only a legislative categorization of land uses supposed to conflict with one another. The further the legislative classifications deviate from traditional categories of nuisance conflict, the greater will be the risk that the statutes are separating land uses that might never have been separated. The risk is one of inefficiency—imposition of unnecessary travel costs between land uses, or loss of economic potential from unexploited land resources. In this context, invalidation of public restrictions that leave landowners without reasonable value may be regarded as a crude judicial check on the efficiency of the categorization process. It is one way of expressing the idea that spillover demands arise in conflict and need not be awarded or denied where no actual conflict does or would ever exist. If the cost of advance generality is substantive uncertainty, the reasonable-value limitation is one way of holding down that cost. This view of the doctrine suggests that it need not be a constitutional taking rule. Rather, it is but

143. See authorities cited in note 113 supra.
144. See Ellickson, supra note 18, at 683-89, 706-07.
another way of recognizing the efficiency value, which might also be recognized through stricter review of initial category
decisions, or greater flexibility in application of categories, or
greater reliance on market mechanisms to check the efficiency of
advance decisions. To the extent alternative efficiency checks
are developed, there seems to be no reason to retain the reasona-
ble-value limitation as a feature of taking law. A corollary
proposition, already reflected in the distinction between “nuis-
ance” taking cases (Hadacheck, for example) and the zoning,
or “quasi-nuisance” cases (Euclid and Nectow, for example) is
that where the particular categorization does reflect a substantial
land-use conflict, there need not be any reasonable-value con-
straint. In these terms, the refusal by the Court to strike down
the ordinance in Goldblatt145 because of insufficient evidence of
both the actual harm attributable to the regulated activity and
the cost imposed on the regulated party suggests that the Court
did not know which category the case belonged in and that the
burden was on the landowner to show both the insignificance of
the conflict supporting the restriction and the value impact of
the restriction itself. The Court’s own citation146 of both Penn-
sylvania Coal and Hadacheck evidences its uncertainty as to the
appropriate category.

Thus, for localized spillover conflicts between private par-
ties, the basic principles I have advanced seem to offer a consist-
ent approach to taking doctrine. There remains to be discussed,
however, one final category of localized conflicts—those be-
tween private claimants and the government as landowner and
user, exemplified by the airport cases such as United States v.
Causby.147 In Causby, the government asserted a spillover
demand through frequent and regular overflights of neighboring
private land by military aircraft at low altitudes. The Court
held the landowner entitled to compensation on the theory that
the government through its use had taken an “easement of
flight.”148 Causby seems to have been decided on a physical
invasion theory. Justice Douglas noted for the majority:

The superadjacent airspace at this low altitude is so close to the
land that continuous invasions of it affect the use of the surface
of the land itself. We think that the landowner, as an incident
to his ownership, has a claim to it and that invasions of it are
in the same category as invasions of the surface.149

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146. Id. at 592, 594.
147. 328 U.S. 256 (1946).
148. Id. at 261-62.
149. Id. at 265.
Causby thus appears consistent with the earlier suggested principle that some spillover demands involving subjection over neighboring land may be so obnoxious as to be tantamount to actual territorial invasion. That the extreme case represented by Causby may be treated as a physical invasion case does not, however, provide a resolution of the less extreme cases that seem more analogous to traditional nuisance cases. Causby merely serves as a reminder that some spillover demands do impinge on core concepts of ownership, however difficult it may be to find the precise crossover point for characterization. For cases that do fall short of actual physical invasions, the question remains what difference does it make that the spillover is asserted by government rather than by a private neighboring landowner.

Where the specific spillover challenged by the aggrieved landowner involves local control rights previously distributed to that landowner, the fact of prior distribution would seem to place the case in the same category as the physical invasion cases. Government, in attempting to supersede that claim through its own inconsistent land use, is not saying that the landowner’s claim is intrinsically hostile to the interests of the public at large, as it might in a common resource case, but merely that it would be more convenient for the public to go ahead with its project without the annoyance of compensation. The argument of convenience would be equally applicable to any eminent domain case where compensation would normally be required. The worthiness of the public project, however, seems no more sufficient a basis on which to justify avoidance of compensation in these cases than it does where the prior right is taken because another private landowner’s right conflicts with it and public efficiency goals would be better served by the transfer. In another sense, to say that the prior right may be revoked merely on a showing of subsequent public advantage is to say that it was never distributed in the first place. And while we may wish to limit or condition the duration of such rights in many cases, where the specific right has previously been distributed and no conditions imposed on its enjoyment or duration are invoked to support the current government action, the mere worthiness of the public project does not seem sufficient to override the security of expectations associated with that right. The discrimination principle also seems implicated by these

150. See text accompanying notes 154-60 infra.
151. See Michelman, supra note 18, at 1193-96, 1234-35.
cases, since to the extent previously distributed rights are otherwise recognized, only the happenstance of physical proximity to a conflicting government use would explain the denial.

In many cases, however, government will assert its spillover demand against a private landowner to whom the conflicting right has not been previously distributed. In such cases, it seems necessary again to distinguish residential from nonresidential claimants. To the extent that the expectation of residential amenity is regarded as part of the core of ownership expectations, the analysis suggested above for previously distributed rights is equally applicable to conflicts between residential and government land uses. In addition, the special discrimination principle reflected by the goal of conferring minimum amounts of residential amenity on all residents would be violated by the creation of a special exception for those residents who happen to find themselves next door to airports or sewage treatment plants. Could such particularized denials of residential amenity be justified to the losers on the ground that they are simply being asked to give up a right available to all other residential land users for the greater public good represented by the particular project? I think not.

To say that the residential amenity right should be recognized as against claims asserted by government as landowner does not fully resolve the problem, since there remains the question of mode of protection. On this issue, some compromise seems appropriate. I have suggested that the normal mode of protection for residential amenity should be at least modeled on injunctive relief, which provides maximum protection for subjective values and blunts the impact of wealth effects. In the case of conflicts with government activities, however, otherwise socially desirable activities might be unduly inhibited by a requirement of full compensation for subjective values of residents. The likely danger is holdout price claims by the few individual residents remaining after their neighbors had voluntarily sold their rights to the government. The few might thus have the power to block a worthy public project. These problems suggest adoption of the approach normally used in eminent domain cases, where the basis of compensation is an objectively determined market value. There seems no reason to give residential amenity claimants greater compensation rights than are conferred upon those whose residences are physically occupied by the public,
The final and most difficult version of this problem is the conflict between government and nonresidential landowner. Under my approach, a nonresidential landowner asserting a spillover right has, absent previously distributed rights, no expectation of being permitted to continue such an assertion as against a later, conflicting claim. In fact, the only expectation is that of an opportunity to bid for the right against others. Against that background, all that a landowner loses when government acquires the spillover right for itself through its own land use, is the chance to bid for the right. The payment requirement seemed to be the only approach that would provide consistent treatment for landowners where the only basis for distribution of the spillover right is realization of efficiency goals. The two relevant principles, then, are consistency and efficiency. Under the consistency principle, nonresidential land users may assume that their entitlement to spillover rights will depend on the relative value of competing claimants' activities. In addition, they may assume that spillover rights will not be conferred on claimants whose activities cannot be regarded either as intrinsically worthy of such conferral or as worthy on the basis of dollar-backed expressions of preference. On the basis of consistency alone, conflicts between nonresidential and government land users seem distinguishable from conflicts between nonresidential users only, because of the inherent worthiness of the particular government activity. So long as no other private nonresidential claimants are receiving spillover rights on other than a market basis, those who conflict with government activities will lack a persuasive claim of unfair treatment. Two key assumptions inhere in this analysis, however.

The first is that spillover rights will not be distributed to undeserving landowners. Government land-using activities frequently confer spillover benefits on neighboring land. A typical example is the highway interchange that greatly enhances the economic potential of undeveloped farmland by making it a likely location for motels, restaurants, and gas stations. To the extent that such windfalls are mere by-products of an otherwise defensible government locational decision, it cannot be said that government in such cases is purposefully distributing spillovers at all. Where the potential for such windfalls is great, however, and the locational choice is not compelled (at least among a number of equally suitable alternatives), one might at least suspect that the decision-making process will be manipulated by those who will gain from a particular choice. In such cases, the
spillover conferral will be, or at least will be perceived as, a purposeful distribution on the basis of no satisfying criteria. Even where the integrity of the decision-making process is not open to question, the consistency principle seems assaulted by the fact of substantial consequential spillover benefits. On the basis of result alone, the benefits conferred would seem to offer a focus of resentment for those who are told they will not be compensated for the loss of opportunities to acquire spillover rights. As far as consistency is concerned, then, the “taking” issue in these cases seems to be more of a “giving” issue, and I would conclude that, wherever practically possible, consequential benefits conferred on landowners by public improvements should be recouped by the public.\textsuperscript{152}

The other key assumption is that efficiency gains to be derived from the government activity will in fact exceed the opportunities foreclosed by denying the spillover right to the private landowner. Even assuming the inherent worthiness of the public activity, the lack of any compensation requirement may lead to a sloppy locational choice. On the other hand, a compensation requirement might, other things being equal, persuade decisionmakers to choose the location that will necessitate the lowest payment. The need for such an efficiency check would vary with the availability of satisfactory criteria, other than the likelihood of compensation, for choosing the location. Where alternatives are available, however, some efficiency check seems desirable, although practically difficult to implement. One approach would be to compensate disappointed landowners on the basis of the lost opportunity to bid against the government for the spillover right, with the lost right valued by taking into account the probability that the claimant would have successfully competed against the government under normal market conditions.\textsuperscript{153} Another approach would be to require the government agency in charge of the locational decision to compute the dollar losses imposed on landowners for all sites under consider-


\textsuperscript{153} One available analogy is to the practice of permitting landowners, when they can show a probability of rezoning for a more valuable use, to claim higher awards in eminent domain proceedings than would be appropriate for the land use authorized by a current zoning designation. See Annot., 9 A.L.R.3d 291, 309-13 (1966); Limerick, The Effect of Zoning on Valuation in Eminent Domain, 53 Ill. Bar. J. 956 (1965).
ation, thereby providing at least a paper check on the efficiency of the decision.

The cases involving nonlocalized spillover conflicts are perhaps the most difficult of all. Many regulations of land use reflect a greater goal than simply distributing local spillover rights among landowners. Such regulations are those that protect common public resources by setting maximum levels of private imposition on air, water, highways, parks, and even public morality. Given the generalized public interest in the particular resource involved, these cases may accurately be viewed as the category that presents genuine conflicts between private claims and public rights. In the context of such conflicts, private claims based on previously distributed rights, efficiency, or even residential amenity may have to yield to the paramount public interest in protecting the common resource.

Previously distributed rights will rarely amount to an explicit and unconditional right to impose on a public resource. In fact, such an unconditional grant might be regarded as a violation of the state's duty to refrain from bargaining away the police power. And where the right previously distributed is in the form of a spillover demand against neighboring land, it would not seem to entail a claim against public resources generally so as to preclude later regulation for the benefit of the common resource. Efficiency also seems a weaker value in the face of public resource protection, since there will often be no satisfactory criteria for assessing the efficiency of the public restriction. Public decisions as to the maximum levels of imposition on common resources may be based on moral, aesthetic, or other ideological or unquantifiable grounds. Apart from denials of spillover demands that amount to deprivations of personal liberty or government action so absurd as to fall under the


156. As, for example, a first amendment case. But see Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2449 (1976): The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material pro-
deferential rational basis standard of due process review, there seems to be no general principle of security of expectations that would insulate private spillover demands from restrictions that protect public resources. Even residential amenity claims seem subject to this general principle, since the maximum imposition levels will amount to no more than a societal decision as to the currently available level of minimum residential amenity.

When, if ever, should the denials of spillover demands for the sake of public resource protection be regarded as “takings” of private rights? The most important principle for resolving this question seems to be consistency, or prevention of discrimination. Where a generally applicable regulation distributes compliance burdens widely, and produces reciprocal, or at least widely distributed, benefits, there seems little cause for individual complaint. It is only where the regulation is local rather than general, or the burdens or benefits too narrow and not reciprocal, that a justifiable basis for resentment on the part of the losers seems to appear. To explore this principle, I will examine two cases—one involving a generally applicable regulation, the other involving a localized one.

*Mugler v. Kansas* serves as a paradigm for the generally applicable regulation to protect a common resource. While the resource in that case was public morality and health, its principles seem equally applicable to more modern controversies involving physical environmental resources. *Mugler* involved a spillover conflict between individual land users who manufactured alcoholic beverages, and the public at large. No legitimate expectation was defeated by the regulation, unless it can be said that any spillover demand manifested by current use is insulated against a subsequent public decision that that use imposes unduly on a public resource. Such a principle of insulation would amount to adoption of a general principle of prior appropriation of spillover rights. If that principle is inappropriate in the context of conflicts between private claimants, as discussed earlier, it would seem even less appropriate where one of the claimants is the public. Is there any other basis for feeling that *Mugler* was wrongly decided? It may be that from

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158. 123 U.S. 623 (1887).
a contemporary perspective the prohibition of alcoholic beverages was itself a silly enterprise, and that it was therefore not worth the cost—in economic loss to brewers such as Mugler—to attempt to achieve an unattainable and misguided goal. The modern version of the problem, however, may be the smoke-generating factory that has been operating for some years and is suddenly (as a result of new scientific knowledge) identified as producing a carcinogen in its smoke. Is there any ethical basis for concluding that the factory has a right, backed up by a claim for compensation, to continue producing the noxious substance, even if the only available means of compliance will result in severe curtailment or cessation of the factory’s activities?

Even if the regulation in Mugler did not defeat legitimate expectations, it is necessary to inquire whether it raised issues of discrimination. Since the regulation was generally applicable, there is no problem of some persons being exempted from its provisions and receiving without charge the very spillover right taken away from those burdened by the regulation. Such cases would seem to create a basis of resentment to the extent that the exempted cannot be distinguished in any satisfactory basis from the burdened. Even regulations without exemptions may be perceived as discriminatory if there is some basis for regarding them as having been enacted to serve the interest of a narrow beneficiary class. This notion too seems inapplicable to Mugler, where the beneficiary class presumably included at least all those who, through the majoritarian political process, had imposed prohibition by constitutional amendment and implementing statutes. There is a sense of discrimination that may arise even in a case where the regulation is generally applicable and the beneficiary class is large. Despite the generality of its application, the actual burden of compliance with the regulation will fall primarily on those currently engaged in the now-prohibited activity. Only those whose businesses related to alcoholic beverages suffered the immediate monetary losses in Mugler. The answer to such complaints in the Mugler context is that the regulation picked on the group whose activities were in fact offensive to public morality, and that any other currently legitimate activity remained exposed to the same risk of later changes in public standards of resource imposition.

There may be cases, however, where the class of persons burdened by a generally applicable regulation possesses some identifiable trait other than that of engaging in the prohibited
activity. For example, if in the pursuit of public aesthetic notions a regulation is promulgated banning outdoor clothes drying, it might be perceived as discriminatory to the extent that it imposes on those who cannot afford automatic clothes dryers. While the regulation might be regarded as serving the goal of residential amenity by establishing minimum standards, its effect would be to undermine the goal of equalizing residential amenity by forcing poorer persons to sacrifice in order to buy clothes dryers, to accept the additional cost in time or money of going to laundromats, or to suffer a loss in residential amenity by drying their clothes inside. In such circumstances, the goal of equalized residential amenity might be better served by subsidizing the availability of clothes dryers than by banning the offensive activity. A similar approach would support programs for aiding employees of factories that are closed to stop air pollution.

For the most part, the generally applicable common resource regulations are unlikely to present serious problems of discrimination. Where the regulations are locally applicable, however, or where they deny to some a spillover right simultaneously conferred on others, serious discrimination issues arise. If the common resource is itself localized, a lake, for instance, no discrimination problem arises from the mere fact that the regulation applies only to those whose spillover claims may impinge on the resource. But where some are denied and some are granted the same spillover right against the same public resource, the principle of consistency would seem to demand some justification for the differential treatment. Such problems arise frequently with respect to zoning ordinances, which are promulgated on a local rather than a statewide basis and which apply differentially throughout the jurisdictions that enact them. While these issues will be covered extensively in the next section, I will present one further case now to complete the inventory of taking problems.

Welch v. Swasey\(^{159}\) serves as a doctrinal bridge between nuisance law and zoning and illustrates the potential for discrimination when public resources are protected on other than a generalized basis. Welch involved Massachusetts statutes regulating the heights of buildings in the City of Boston. The statutory scheme divided Boston into two districts, District A, the majority of the buildings in which were currently devoted to commercial use, and District B, the majority of the buildings in

\(^{159}\) 214 U.S. 91 (1909).
which were devoted to residential use. Landowners were authorized to construct buildings to a height of 125 feet in District A, but buildings in District B were limited to a height of 80 feet. A complaining District B landowner challenged the differential height rules. Since the complainant conceded the validity of the basic 125-foot limit, the focus of the case was on the differential rules applicable to the two districts. The United States Supreme Court upheld the scheme as one designed to protect against fire. As such, the scheme may be regarded as limiting imposition on the common resource of public safety, or as limiting the burden of firefighting.

To the extent the statute based district designations on existing uses, the case may be regarded as a traditional nuisance case. The Court assumed that fire danger would be greater in residential neighborhoods than commercial ones, given less likelihood of fireproof construction in the former and the risk to sleeping residents. So viewed, the case seems to involve a fair principle of differentiation, since the danger to public safety arose only from the existence of a spillover conflict between residential and nonresidential users, which conflict was not present in the nonresidential areas. There was thus no reason to impose the stricter limitation on landowners whose property did not impose a spillover demand on residents. Under traditional nuisance principles, it would be inappropriate to deny the spillover right to landowners not currently in conflict with residents. But the case also went beyond traditional nuisance law to the extent it involved prospective distribution of spillover rights. The undeveloped portions of the city became designated as “A” or “B” under the ordinance. A landowner located in an undeveloped area of District B, and therefore not currently in conflict with any residences, was nevertheless subjected to the District B height restriction, whereas a landowner in an undeveloped area of District A remained free to build to the maximum permitted height. Efficiency goals may be well served by such a scheme, since locational uncertainty is reduced and costly dislocations need not be confronted. On the other hand, landowners in the undeveloped areas of Districts A and B seem similarly situated, inasmuch as neither one is involved in a current spillover conflict and the need for some boundaries does not itself imply choice of any particular boundaries. The more undeveloped the area, the more difficult it will be to persuade those denied the

160. With a few exceptions, See id. at 92-95 n.1.
spillover demand that it has been awarded to others on a satisfactory basis, especially if the land of both classes is intrinsically suitable for either designation. The Court in *Welch* rejected the landowner's argument that the stricter limit imposed in District B amounted to a taking, and also rejected the same landowner's claim that the limit amounted to an equal protection violation. *Welch* itself may not have involved a true discrimination problem to the extent that its after-the-fact determination was analogous to nuisance law. But where the distribution of spillover claims becomes prospective in order to achieve efficiency goals, such claims may be distributed on a basis that fails to satisfy any ethical criteria. The problem in *Welch*, if it is regarded as a case of prospective distribution, was not that the disappointed landowner was restricted for the sake of residential amenity, but that the fortunate landowners in District A received permission to build to the maximum limit for no other reason than they happened to be located in the district chosen for that designation. Here again the problem seems to be one of "giving" rather than taking; the discrimination problem arose because the winners were simply given what they should have paid for.

V. ZONING

Zoning seeks to avoid or at least to minimize the costs of spillover conflicts over land use by designating in advance particular uses for particular parcels of land. The basic method is simple. Select and prepare a list of categories of land uses, grouping similar ones within categories and placing those supposed to conflict with one another in different categories. Then take the list and apply its scheme to a map of the area in question, designating districts for the chosen categories. Such a procedure gives advance notice to landowners of what may be done in their designated districts (subjection spillover rights) and what may not be done (exclusion spillover rights). Two other techniques are basic to zoning. Through nonconforming use doctrine, prior existing land uses are insulated from subsequent changes of designation. And through a range of procedural devices, including variances, conditional uses, and rezonings, changes in designation are permitted over time. Traditional zoning practice relegates these determinations to local government discretion, with the power conferred on the local governments by the state. The spillover rights bestowed on landowners by the zoning process are not marketed, but conferred
initially by legislative decision. Subsequent changes are accomplished through a combination of legislative and administrative techniques. By awarding or withholding spillover rights, zoning decisions enhance or depreciate market value of designated tracts of land. The present section will investigate the extent to which the values of efficiency, residential amenity, and prior appropriation are reflected in the zoning process.

The principal efficiency gain thought to be produced by zoning is the avoidance of locational uncertainty and the consequent avoidance of unnecessary and costly interactions between conflicting land uses.\footnote{161} An ideal zoning scheme would, after categorizing on some minimal basis of generality, allot just enough land for each category of use, given contemporary demands for different kinds of land uses. In a number of ways, however, zoning, in its ostensible pursuit of efficiency goals, produces contrary results. For one thing, the categorization technique is not a satisfactory substitute for the actual conflict standard of nuisance law. The selected categories may often separate land uses more rigidly than they would have been if left to nuisance litigation.\footnote{162} This likelihood is enhanced by the failure of zoning to offer any subsequent market check on the accuracy of the chosen categories. Once established, zoning designations can be changed only through the political process, which will not necessarily result in a change even though market transactions would likely have produced it. Another counter-efficient aspect of zoning is its initial availability on an unpriced basis. Those who regulate can appropriate spillover benefits to themselves without any check on the efficiency of their choices.\footnote{163} Thus, if a group of landowners who have the power to zone themselves and others wish to employ a particularly exclusive designation that reflects their own level of amenity, they may be able to do so even if the designation chosen imposes costs in excess of the gains realized.\footnote{164} Here again, the lack of

\footnote{161. See, e.g., M. Clawson, Suburban Land Conversion in the United States 169-78 (1971); J.H. Dales, Pollution, Property & Prices 72-73 (paperback ed. 1968); E.J. Mishan, Pareto Optimality and the Law, in Welfare Economics, supra note 11, at 225.}

\footnote{162. See Ellickson, supra note 18, at 705-07.}

\footnote{163. See J. Delafons, Land-Use Controls in the United States 81-82, 97-98 (1962); F. Hayek, The Constitution of Liberty 351 (1960); Tarlock, Toward a Revised Theory of Zoning, 1972 Land Use Controls Ann. 141, 144 (1973).}

\footnote{164. For an excellent analysis, see Note, Large Lot Zoning, 78 Yale L.J. 1418, 1421-29 (1969).}
any subsequent market test further reinforces and insulates the rigidity of the original decision, since any subsequent political test of the decision will force the minority again to contend with the selfish majority that imposed it in the first place.

Zoning does promote residential amenity, but what is promoted is the residential amenity of the few at the expense of the many. The roots of this problem go back to the Euclid case\(^{165}\) and the origins of contemporary zoning. The principal rationale of Euclid was the notion that nuisance law could be extended to the prospective prevention of nuisances on a categorical basis. But Euclid went far beyond nuisance law\(^{166}\) in its affirmation of the idea that apartment houses in single-family districts could be regarded as tantamount to nuisances and categorically treated as such.\(^{167}\) It was a sure step from that notion to the proposition that density of population could be regulated through devices such as minimum lot sizes and minimum floor spaces, without regard to whether actual nuisance impacts would be prevented by the regulation in question.\(^{168}\) This scheme of residential separation again illustrates the efficiency problems noted above with respect to category choices, and the lack of any cost check on particular decisions to designate areas. But the residential separation aspect of zoning also implicates the residential amenity value. Instead of being a scheme for protecting residential amenity generally against con-

\(^{167}\) 272 U.S. at 395.

Babcock suggests that such ordinances are based primarily on "social" motivation. See R. Babcock, The Zoning Game 31, 37-38 (paperback ed. 1966). The realities of local government finance give rise to what is called "fiscal" zoning, through which costs are imposed outside the jurisdiction. See Frieden, Housing and National Urban Goals: Old Policies and New Realities, in The Metropolitan Enigma—Inquiries into the Nature and Dimensions of America's "Urban Crisis" 159, 193-94 (J. Wilson ed. 1968); Garber, The Real Property Tax and Exclusionary Zoning, in Policy Implications of the Real Property Tax (J. Keene ed. 1972).
flicting nonresidential uses, as nuisance law had been, zoning became a scheme for protecting from all other residential uses the highest level of residential amenity that can command political power in a regulating community.

Zoning therefore offers a hierarchical approach to the protection of residential amenity, with those who are politically able aggregating to themselves, at the expense of others without such power, disproportionate amounts of residential amenity. The disproportionate results do not follow from the mere fact of residential separation. Zoning could, in theory, allocate sufficient areas to every variety of residential use otherwise available through the market and award to each its requisite level of residential amenity. I argued above that separation alone probably ill serves a goal of equalized residential amenity. But even assuming that separation might be consistent with the residential amenity value, separation combined with the availability of greater-than-minimal amounts of amenity on an unpriced basis produces disproportionate results. The spillover rights involved are of the exclusion variety. If those who desire to exclude in order to attain a higher level of residential amenity for themselves can do so without paying for the privilege, they are likely to acquire as much as is politically feasible. If those who acquire the greater quantities of residential amenity rights are also those who already possess greater quantities of wealth and power, the burden of their acquisition is likely to fall upon relatively poor and powerless segments of the community. Neither the efficiency value nor the residential amenity value is served by permitting the acquisition of such rights. In fact, those who receive exclusive residential amenity rights are receiving a windfall from the public under circumstances the distributional basis of which fails to satisfy any criteria of desert.

If efficiency is ill served and residential amenity turned inside-out, how does zoning deal with prior appropriation? Zoning raises two kinds of prior appropriation issues—claims by individuals and claims by political units. The first arises when a landowner claims to have acquired a spillover right through an initial land use in an otherwise undeveloped area. With respect to such claims by individuals, zoning has generally refused to recognize spillover rights based solely on prior appro-

169. See text accompanying notes 40-42 supra.
170. See D. Harvey, Social Justice and the City 67 (1973); W. Hirsch, Urban Economic Analysis 423-24 (1973); Davis, Economic Ele-
priation through either previous use or previous receipt of a zoning designation authorizing such use. The cases are replete with statements to the effect that one does not receive a vested right to the continuation of a particular zoning designation.\textsuperscript{171}

One exception to this approach is the nonconforming use doctrine, which does legitimize, under severe constraints,\textsuperscript{172} existing land uses not unlawful when initiated. I suggested above that this practice, since it seems based largely on considerations of efficiency, does not represent a significant deviation from nuisance law and that it does not represent adoption of a prior appropriation principle. Given the uncertainty of zoning's category choices, efficiency goals might be ill served by the forced termination of a prior use that might not be perceived as hostile by later users who comply with the zoning designation. The efficiency problem is underscored by the lack of any market check, since zoning normally either legitimizes the prior use or orders it out, without opportunity for market negotiations over the question of its remaining. Courts have not hesitated to uphold the termination, without compensation, of nonconforming uses that do present a genuine conflict with later authorized land uses.\textsuperscript{173}

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\textsuperscript{171} See generally R. Anderson, \textit{American Law of Zoning} \textsection{}4.27 (1968, 1975 Supp.).

\textsuperscript{172} The constraints include a threshold requirement that the use be sufficiently well established before it is entitled to insulation from subsequent zoning changes. See, e.g., Hawkinson v. County of Itasca, 231 N.W.2d 279 (Minn. 1975). In addition, recognized nonconforming uses typically are subject to restrictions, such as prohibitions on expansion or improvement of the activity, limits on the right to rebuild after catastrophic destruction, or periods of "amortization" in which the nonconforming use must be phased out. See generally R. Anderson, supra note 171, \textsection{}6.30-.71.

The nonconforming use doctrine may also serve efficiency goals in another way. Many uses excluded from a particular area, such as stores excluded from a residential zone, might produce a conflict if there were too many of them in relation to the number of residences. Such conflict simply fails to materialize, however, except perhaps in the most localized fashion (next door?), if the number is restricted to one or two. The single store in a residential area may be perceived as a great convenience to neighboring residents. Given the hostility of most courts to the explicit use of zoning to limit the number of any class of commercial activities in a designated area, nonconforming use doctrine provides a per se rule (prior use) that achieves an equivalent result. As an economic matter, however, whether the first user is recognized under nonconforming use doctrine or issued an administrative monopoly under a numerical scheme, a market restriction has been imposed that enhances the competitive position of the recipient as against others in the same business. If it is not an ethical claim based on firstness, but merely a consideration of efficiency, that distinguishes the case of the nonconforming use recipient, there seems to be no justification for conferring the windfall of localized monopoly on the nonconforming user without exacting a charge for the privilege.

The most serious version of prior appropriation authorized by zoning is not at the landowner level but at the jurisdictional one. By conferring the regulatory power on individual municipalities, zoning law authorizes them to appropriate spillover rights as against other communities. With the power residing in jurisdictional entities, the practical power will reside in those with political control within those entities. And since a key feature of zoning is the power to designate areas that will receive spillover rights of exclusion, local regulation permits the acquisition of such claims by those who happen to reside in the par-

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particular community when it enacts its zoning ordinance. Such an ordinance may well succeed in preventing the enlargement of the community to include those who might control the political process for other goals, or perhaps at least in limiting entry to those likely to agree with the goals of the existing community.

What I have just characterized as prior appropriation of local control rights is frequently hailed as local autonomy or community control, supposedly a recognized societal value. Prior appropriation alone, I suggested earlier, is no basis for the award of spillover claims. Can the two concepts be reconciled? The values associated with community control and local autonomy would seem to be those associated with individualism and personal autonomy—control over one's life, freedom from outside interference. But to confer power over residential amenity on the basis of local jurisdictional organization is to permit appropriation of such rights as against persons in other communities. With a fixed stock of residential amenity ultimately limited by the available land area, to give control to some is to take it away from others. Those who have the first opportunity to set their own minimum level of amenity will be able to deprive others of the chance to acquire increased levels of such amenity. If there is no persuasive ethical case for permitting individuals to acquire spillover rights on the basis of prior appropriation alone, there seems to be no case for permitting groups of individuals to acquire those rights on that basis.

Any recognition of personal autonomy usually involves the possibility of spillover problems. Others may be offended or imposed upon by the exercise of the individual rights within the assigned sphere of autonomy, as with constitutional rights of privacy or first amendment rights. In such cases, our


notion of individual liberty leads to the conclusion that the particular subject matter is within the scope of individual discretion, despite its spillover effects. So long as local regulation leads to the acquisition of spillover rights in a way that deprives others of similar opportunities, a personal autonomy defense of the practice would have to explain why the autonomy of some residents is more significant than others. The only explanation for the differential would again be prior appropriation, which, as I have argued, fails. In fact, to the extent that principles of autonomy are thought to reflect our societal notions of self-worth, self-respect, or personal liberty, the applicable principle for distribution of residential amenity would seem to be the distribution of minimum levels of residential amenity to all residents.

That residential amenity principle would require a substantive sharing of such amenity in order to achieve the distribution of minimum amounts, and any procedural decision to permit regulation on a local autonomy basis seems fundamentally inconsistent with such a principle. If local regulation is to continue, the residential amenity principle can be satisfied only if the power to regulate is granted upon conditions that limit its substantive potential, as by specifying the maximum levels of amenity that can be achieved through regulation by a particular regulating entity. The very process of delegating regulatory power is a method for distributing local environmental control rights to the recipients of that power. Under current law, subject only to judicial limitations in cases of gross inefficiency or egregious appetite for maximum levels of amenity, such distribution is made primarily on the basis of prior appropriation.

The aggregate impact of traditional zoning has thus been to permit the appropriation of much greater than minimal spillover rights of exclusion by regulating communities in a position to preserve such a level of amenity. The result has been that possibilities for achievement of residential amenity by other communities or individuals are reduced and land market efficiency goals thwarted. Litigation directed at exclusionary zoning sought (and is still seeking) to blunt these effects, but, with one notable exception, \textsuperscript{178} even the favorable judicial decisions\textsuperscript{179}


\textsuperscript{179} E.g., Kavanewsky v. Zoning Bd., 160 Conn. 397, 279 A.2d 567 (1971); Honeck v. County of Cook, 12 Ill. 2d 257, 146 N.E.2d 35 (1957); Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964); Chris-
have not challenged the basic values reflected in local zoning. And recent contrary developments, to be discussed below, seem designed more to support than weaken the counter-efficient and prior appropriation features of zoning. These contrary developments involve the use of zoning to protect common resources, both physical and financial.

An assumption of traditional zoning law, which, I suggested earlier, served as one efficiency check on regulations, has been that whenever regulation goes beyond the control of an activity that would be regarded as a traditional nuisance, the landowner may be regulated up to the point where the land retains some reasonable value, but no further. This assumption has now been called into question in, at least, Wisconsin by language in its supreme court's decision in Just v. Marinette County. The case involved a state program for regulating use of shorelands. Under the statutory scheme, the owner of land designated as "wetland" under the statute could not fill in the land without first obtaining a permit from the local government. Owners of designated land who commenced fill-in operations without having sought such a permit were charged with a violation of the statute. In upholding the statute the court announced a new view of landowner expectations, saying that one does not necessarily have the expectation of exploiting one's land for its economic value, where exploitation would necessarily involve changing the land from its natural state. Government programs like that upheld in Just are a product of increasing awareness of the subtle and often disastrous impacts of human activities, especially land development, on the surrounding human and natural environment. This increasing awareness may be viewed as a more sophisticated kind of nuisance law; with greater scientific knowledge our concept of harm changes.

Along with greater scientific knowledge has come an increasing appreciation of the risks that may follow any change in the natural environment, risks not only to plant and animal life, but risks to people as well. While these changing perceptions may justify extreme regulations to protect natural resources—regulations that are consistent with the view that no landowner has a valid expectation of imposing a spillover demand on a common resource—such regulations may also operate to insulate and enhance the residential amenity of some, while further reducing the possibilities of amenity for others.

The regulations in *Just* were conceived at the statewide level, and, as such, may be regarded as common resource protection for the public generally. Other cases, however, have involved the same goal, protection of local environmental resources, implemented by local decision alone. Steel Hill Development, Inc. v. Town of Sanbornton, for example, involved a small rural town in New Hampshire, a town with a basic population of 1000 that increased to 2000 in the summer because of its attractiveness as a summer resort. A developer had purchased a large amount of land in the town with a view toward constructing summer homes for about 500 families. At the time of purchase, the land was zoned for minimum lot sizes of three-fourths of an acre. As a result of a public outcry against the developer's plan, the town rezoned the entire tract, placing 70 percent of the land in a new "Forest Conservation Zone," with a six-acre minimum lot size requirement, and the remainder in an "Agricultural Zone," with a three-acre minimum lot size. The environmental fears of the townsfolk included water pollution, interference with smelt spawning, increased traffic, and air pollution. They also generally feared destruction of the rural character of the town. There was little or no data offered to back up these fears, but the court nevertheless upheld the ordinance, concluding that there was enough basis for concern to justify an interim program of restrictions (the ordinance

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182. 469 F.2d 956 (1st Cir. 1972).
had been in effect nearly two years at the time the case was
decided) to enable the town to explore the anticipated environ-
mental problems. Here again there was a significant shift away
from the requirements of nuisance law, inasmuch as the town
regulated not merely to prevent demonstrable harm, but to give
itself a chance to assess the possibility of harm. Regulatory
schemes such as that upheld in Steel Hill amount to prior
appropriation of physical environmental resources by the citizens
of the regulating locality. To permit a town to set the maximum
level of imposition on its resources is equivalent to saying that
the current residents of that town own the public resource as
against would-be participants from elsewhere in the state or
country. And the particular technique upheld—large-lot zon-
ing—is traditionally associated with the worst exclusionary zon-
ing.

The principles of Steel Hill have received support from the
United States Supreme Court in its decision in Village of Belle
Terre v. Boraas.183 There, presented with its first opportunity
in 45 years to review the Euclid decision, the Court upheld the
right of a small residential town to use extreme measures to
preserve its established character and way of life. The town was
zoned exclusively for single-family residential use on minimum
acreage lots. The zoning ordinance went on to define “family”
for purposes of its ordinance as any size group of persons related
by blood, marriage, or adoption, and a group of no more than
two unrelated persons. The ordinance was applied to prevent a
single person owning a large house from renting out the house to
a group of six graduate students from a nearby university.
Despite claims by the students and the affected landowner that
the ordinance infringed on their constitutional rights of privacy
and freedom of association, the Court upheld the ordinance as a
valid means of regulating density in the community. In very
strong terms, Justice Douglas's majority opinion recognized the
right of the town to preserve its quiet residential way of life—in
effect, to seal itself off from outside population or economic pres-
sures. The message again, at least in terms of federal constitu-
tional law, is that the physical environment of a locality belongs
to those who have it, and they can regulate to keep it.184

184. Compare the contrary theme expressed in commerce clause
cases involving state attempts to appropriate local natural resources as
against the claims of other states or citizens of other states. See, e.g.,
Similar recent developments have recognized prior appropriation of local financial resources. Zoning law decisions have traditionally struck down explicit "fiscal zoning," that is, zoning to keep down the amount of local property taxes, which is usually achieved by excluding high-density residential uses supposed to demand more from local budgets than they contribute in taxes and by encouraging the entry of "clean" industries that will contribute more than they demand. Now, however, under the guise of "managed growth" or "growth control," explicit fiscal zoning has achieved legitimacy.

In the leading case, Golden v. Planning Board,\textsuperscript{186} the New York Court of Appeals upheld the so-called "Ramapo plan" for "phased development," which extended the basic zoning technique of allocating land uses over territorial space to allocation of land uses over time. Under the scheme, the town announced its capital improvement plan for the next 18 years, with respect to services such as sanitary sewers, drainage facilities, public parks or recreational facilities, roads, and firehouses. It implemented a regulation that withheld from any developer permission to subdivide land until the land had been provided with a sufficient level of those services, even if that meant waiting anywhere up to 18 years for the privilege. The only alternative under the scheme was to assume personally the cost of providing the requisite level of services, rather than waiting to have them


provided through general taxation, a cost that would in most cases be prohibitive.\(^{187}\) The principle affirmed in *Golden* is that a town can regulate the amount of development by regulating the level of services that it is willing to provide and by limiting the amounts it is willing to tax itself for providing them. In short, a town owns its taxable wealth, which it may appropriate for its current residents as against claims of those who wish to locate in the community.\(^{188}\)

Thus far, I have characterized zoning as a means of distributing spillover claims to serve prior appropriation values and discriminatory residential amenity values, both of which seem inconsistent with the goals of land-use regulation that I set forth earlier in this Article. In addition, I have suggested that efficiency goals are also ill served by contemporary zoning practice, inasmuch as tests of efficiency are absent from the process. A further aspect of zoning must now be considered, for in some respects zoning results in the distribution of valuable spillover

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Closely related to, and often accompanying, the growth control technique is subdivision exaction, whereby developers are required to contribute land or money for such purposes as schools or recreation areas as a precondition to receipt of development permission. Where the technique is applied to facilities or services normally provided through general taxation rather than special assessment, the assumption seems to be, as with growth control or local environmental zoning, that the current residents of the regulating jurisdiction “own” their present level of fiscal or environmental amenity and can therefore charge newcomers for the privilege of joining the community. To the extent that costs associated with development are successfully passed along to the developers or new residents, the previous residents avoid any dilution of their previously acquired amenity level. The leading case is *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 634 P.2d 606, 94 Cal. Rptr. 630 (1971). For other cases upholding an expansive power of subdivision exaction, see *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 272 A.2d 880 (1970); *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 305 N.Y.S.2d 294 (1966); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965).
rights without any rational basis at all. Both at the point of initial designation, and again whenever any zoning change is
authorized, zoning decisions affect land values by conferring or withholding spillover rights. Even an ideal system of zoning,
one that allocated areas sufficient for the full range of land uses
currently demanded by the market, would confer valuable premiums on some areas, so long as some land uses are regarded as more profitable than others. To the extent that significant amounts of land are topographically suitable for a wide range of land uses, designation of land for a use that is particularly valuable will confer a great benefit on the fortunate landowner as compared with owners of similar land not designated for equally profitable uses. That zoning must designate land uses in advance to avoid the locational uncertainty of nuisance law does not justify the selection of particular landowners for the more valuable uses. The basic problem is one of "givings." And where the land uses designated are ones for which an insufficient area has been designated generally—an insufficiency likely to result from the prior appropriation and perverse residential amenity features of zoning—the value differentials are likely to be much greater, as where the overwhelming single-family suburb designates a small area for apartment construction in the face of a large market demand for such residential accommodations.

The economic basis of these "givings" may be regarded as a combination of value transfer\(^{189}\) and supply restriction\(^{191}\) ef-


\(^{190}\) See Expert Committee on Compensation and Betterment, Ministry of Works and Planning, Final Report, Presented by the Minister of Works and Planning to Parliament by Command of His Majesty, September 1942, Cmd. 6386, at 14-16; Turvey, Development Charges and the Compensation-Betterment Problem, 63 Econ. J. 295 (1953).

\(^{191}\) See W. Alonso, Location and Land Use 117 (1964); A. Schmid,
The value transfer effect derives from the notion that a particular tract of undeveloped land carries with it both a present use value (for example, agricultural) and a component of value equivalent to the discounted value of future development for a particular more intensive use. Each tract carrying the potential for more intensive development would then carry a fraction of the total value of one tract developed for the more intensive use. A decision to permit development of one of the tracts for the more intensive use would have the effect of removing the now-reduced or eliminated potential value from the tracts not granted development permission, while at the same time conferring the total of the fractional values on the site designated for development. Even a relatively efficient scheme of zoning would have this effect, since it is the mere selection of one among many competing sites for development that produces the transfer effect, even if the existing consumer demand is for one site only.

The supply-restrictive effects of givings derive both from practical features that would be associated with any scheme of zoning and from some of the worst exclusionary and prior appropriation features of contemporary zoning. To the extent that development permission is granted at a slower rate than the consuming market demands, the value conferred on the selected parcels will have a monopoly component. To some degree, this effect seems both inevitable and even desirable. Existing consumer preferences may fail to take into account problems of future generations, especially with respect to environmental resources. Such consumer preferences might well lead, if unchecked, to more intense consumption of land for the present than would be desirable if the interests of the future were taken into account. In such a setting, those sites selected for development are likely to reap an additional component of value, reflecting the real but not-to-be-satisfied demands. The same effect would flow from a decision to hold back land supplies released for development until a sufficient level of certainty appeared with respect to the desired use, since the practical irreversibility of many land-use decisions might lead to a conclusion that error on the side of overdevelopment for particular uses would be more destructive of community goals. In fact, a more generalized view of this phenomenon might lead to the conclusion

that any costs of development not perceived as such by the consuming public but nevertheless taken into account by public decisionmakers are likely to be reflected in the values of sites released for development. Other supply-restrictive effects are likely to result from human error in computing needs at a particular time. If advance designation is deemed desirable to avoid the problems of nuisance law, some error seems inevitable.

The worst supply-restrictive effects and, consequently, the most extreme potentials for "givings" would seem to result from the most unchecked and restrictive features of zoning practice. The more that communities and individuals can appropriate for themselves a higher degree of amenity, or a greater quantity of spillover rights of exclusion, the less area will remain for more intensive uses that are excluded. The smaller the area available for such uses, the greater the potential premium for the lucky landowner who receives the favorable designation. While it is difficult to justify the conferral of values on the few lucky developers permitted to develop for otherwise excluded uses, their good fortune is simply a by-product of the basic exclusionary scheme.

Similar value-conferral problems are produced by the impacts of public improvements on the value of neighboring land. Land development for particular purposes depends largely on the availability and proximity of public improvements and services—highways and roads, sewers, parks, schools, police and fire protection, and utilities. These value effects, too, occur both when public improvements are efficiently provided (in the sense that services are provided at an adequate rate to accommodate demands for land having those services available) and when they are undersupplied. If efficiency is assumed, the effect will again be largely a transfer effect, in that prior to the production of a particular improvement, numerous tracts carried

a component of potential value discounted for the probability of timely provision of the particular public good (assuming of course that the capitalized value of the service would exceed the capitalized value of any taxes imposed in connection with its provision). A decision to provide the service thereby localizes the formerly diffuse potential value. Supply-restrictive effects are also likely to occur, since for a number of reasons the provision of services may not keep up with actual demands for developable land. This may be the result of time lags in the political process through which capital improvement decisions are made, or the result of a single locality's unwillingness to provide services to satisfy demand on the part of would-be migrants to the local community from elsewhere in the area. It may also be the result of the hesitancy of individuals to impose additional taxes upon themselves. Such supply-restrictive effects further amplify the value increases that may be attributable to the provision of public services.

With respect to both broad categories of value effects—those derived from regulatory decisions and those derived from public improvements—there are reciprocal burden effects. These burdens need not always equal the benefits created or accompany every instance of value conferral. In the regulation setting, the decreases are likely to be a product of loss of potential value or, to the extent inefficiencies are present, a product of exclusion from the restricted supply. In the public-improvements setting, the value reductions will stem from the fact that the new public improvement may be a substitute for, or be in competition with, a previous public improvement that had been capitalized into the value of other land, but whose prospective abandonment will eliminate or reduce the former value or produce a consumer shift away from previous public goods that are now perceived as inferior. Or the new public good itself may create practical restrictions on development for a valuable use, as when a sewage treatment plant is built next door, or an airport is located nearby, or partial highway access is substituted for complete access.

All of these value reductions represent disappointed expectations with respect to continuity of spillover rights. Whether such burdens should be regarded as compensable losses would depend upon the legitimacy of the expectations that have been defeated. I have previously discussed these issues, and I need repeat here only that whenever the burden, or denial, of spillover rights interferes with previously distributed rights, causes a de-
crease in residential amenity below the minimum standard, or produces concededly inefficient results, the burden cannot be regarded as legitimately imposed on the loser. In the case of inefficiency, the loser deserves a chance, if practically possible, to demonstrate the inefficiency of government choice. But apart from those cases where the loser has a legitimate claim with respect to the spillover denial, the losers may be regarded as having never acquired the right to continuation of the claim in the first place. In some of those cases, however, a separate ethical problem is presented by the conferral of the value increase, without charge, on some other lucky landowner while the disappointed loser looks on.193

The problem of “givings” is a serious one. The awesome potential for benefit from planning and allocation of land uses must inevitably corrupt the process. One need not be overly cynical to assume that this potential will have an impact on the regulatory process. Persons seeking to achieve gain and avoid loss will undertake to protect their interests, even if only by persuading decisionmakers to favor their tracts. But if, as seems typical, there are often equally plausible alternatives for decisionmakers to choose among, devices beyond rational argument are likely to appear. The larger and more frequent the value-creating impact of the decision, the more likely that individuals will use extralegal or illegal means to achieve favored status. Zoning has often been criticized for its tendency toward corruption,194 but how could it possibly operate otherwise? And to the extent that its decisions are the product of wealth and power, reinforcement of existing inequality is likely to result.

Is there, then, any justification for failure to recoup the land-value benefits conferred by government regulatory and locational decisions? One obvious category where recoupment would not be mandated is where the impossibility or impracticality of recoupment is at a level where the particular action, be it regulatory or public improvement, could not be undertaken if

193. From a psychological perspective alone, the problem is one of envy, which may be enough in itself to give rise to a serious social problem. See E. Becker, ESCAPE FROM EVIL 12 (1975). To the extent that the choice of particular beneficiaries cannot be justified, even though the system that produces the benefits and burdens can be, the psychological phenomenon—envy—may become an ethical one—resentment. See J. Rawls, A THEORY OF JUSTICE 530-41 (1971).

recoupment were required. Such might be the case where the benefits are widely dispersed throughout society, or largely non-
monetizable (we cannot practically tax the future for current environmental regulation, for example), or so minimal with
respect to each benefited individual that the cost of recoupment would exceed the amount recouped. The line drawn by cur-
rent land-use law seems to fall far short of the limits of practi-
cality. In occasional eminent domain cases and in a number
of recurring zoning situations, government action is struck down because of the presence of inappropriate private benefit. The usual test is whether the action in question has been taken for
the sole or dominant purpose of conferring a private benefit.

Typical zoning cases in which this issue is raised are those involving spot zoning, where a previously barred, more inten-
sive use is authorized for a small area of land in an area
otherwise restricted to less intensive uses; or "negative" spot
zoning, where a small area is restricted to less intensive use
than permitted in the surrounding area, usually under circum-
stances where the owners of the surrounding land will receive
economic benefit from the restriction imposed on the compla-
ining landowner. A more generalized version of the second type
of case occurs where the ordinance is attacked as being con-
sciously designed to limit competition in a particular endeavor to
benefit those currently engaging in it. It is easy to understand

195. For some suggestions on extending recoupment practice up to
the limits of practicality, see, e.g., M. CLAWSON, SUBURBAN LAND
CONVERSION IN THE UNITED STATES 165-86 (1971); Hagman, Windfalls for
Wipeouts, in THE GOOD EARTH OF AMERICA 109 (C.L. Harriss ed. 1974);
Costonis, Development Rights Transfer: An Exploratory Essay, 83 YALE
L.J. 75 (1973); Wexler, Betterment Recovery: A Financial Proposal for

196. E.g., Port Authority v. Groppoli, 295 Minn. 1, 202 N.W.2d 371
(1972); Denihan Enterprises, Inc. v. O'Dwyer, 302 N.Y. 451, 99 N.E.2d
235 (1951).

197. See VAN ALSTYNE, TAKING OR DAMAGING BY POLICE POWER: THE
SEARCH FOR INVERSE CONDEMNATION CRITERIA, 44 SO. CAL. L. REV. 1, 19-23
(1971).

198. E.g., Damick v. Planning & Zoning Comm'n, 158 Conn. 78, 256
A.2d 428 (1969); Smith v. County of Washington, 241 Ore. 380, 406 P.2d
545 (1965); Pierce v. King County, 62 Wash. 2d 324, 382 P.2d 628 (1963);
see Annot., 51 A.L.R.2d 263 (1957).

199. E.g., Brandau v. City of Grosse Pointe Park, 5 Mich. App. 297,
146 N.W.2d 695 (1967); Pearce v. Village of Edina, 263 Minn. 553, 118
N.W.2d 659 (1962); Vernon Park Realty, Inc. v. City of Mount Vernon,

200. E.g., Ex parte White, 195 Cal. 516, 234 P. 396 (1925); Wyatt v.
City of Pensacola, 196 So. 2d 777 (Fla. Ct. App. 1967); Suburban Ready-
Mix Corp. v. Village of Wheeling, 25 Ill. 2d 548, 185 N.E.2d 665 (1962);
see 1 R. ANDERSON, AMERICAN LAW OF ZONING § 7.28 (1969).
judicial intolerance for the private benefit in these cases, inasmuch as such blatant abuses of collective resources strike directly at the very premises of collective action, presenting a situation of exploitation of the many by the few.\textsuperscript{201} The difficult question is whether the private benefit left unrecouped in cases where it is incidental to public benefit can be ethically distinguished from the cases of "pure" private benefit.

Should society in general or, more significantly, individuals who are disappointed by government failure to confer valuable spillover claims on them be willing to accept the conferral of valuable spillover rights on others? If those rights are conferred according to criteria of desert, such acceptance should be readily obtainable. The criteria of desert that I have outlined would support conferral without recoupment only to promote minimum residential amenity. Otherwise, payment by beneficiaries would be required where the only goal to be realized by regulation was efficiency. Apart from the minimum residential amenity goal and the limited recognition of prior appropriation claims that I have suggested, the rationale for public intervention does not justify the distributive results of that intervention.\textsuperscript{202}

\textsuperscript{201} Cf. Michelman, supra note 18, at 1169 n.5, 1216-18.

\textsuperscript{202} One basis for justifying distribution of benefits outside the criteria of desert would be an assumption of randomness in the conferral of benefits. The analogy is to the factors that increase land value and are not themselves the product of collective intervention, such as changes in public taste, topographical features of the land, population, and migration decisions of individuals—in short, the ordinary market risks of land ownership that tend to benefit some landowners and burden others. To satisfy this model, however, government intervention would have to be relatively unpredictable and beyond the control or influence of affected landowners. But it seems difficult to imagine that even the land-use intervention process is so perfectly irrational and intractable as to satisfy such criteria.