Untangling the Nuisance Knot

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Commentators have long characterized the law of nuisance as a muddled and confusing doctrine, limited to deciding a few land use disputes not already resolved by zoning. In 1992, interest in the doctrine was renewed when the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council* declared nuisance the key to the difficult question of when legislation amounted to an uncompensated taking of real property. It has thus become important to understand both the nuisance doctrine and the confusion surrounding its application. In this article, the author locates the source of the confusion in three problems stemming from the strict liability standard by which land use disputes were originally governed in the English common law of nuisance. First, the application of nuisance doctrine to the land use disputes inevitably accompanying the economic transformation of American society from agriculture to industry called for a modification, though not an abandonment, of strict liability. Second, bench and bar tangled over whether the remnants of strict liability in nuisance could moderate some of the negligence doctrines that weighed most heavily on tort plaintiffs. Third, attempts by the drafters of the Restatement (First and Second) of Torts to rationalize the doctrine with a single rule applicable to the law of both accidents and land use disputes failed. Understanding these three forces may help both judge and practitioner discover a principled understanding of this newly-relevant area of law as they use nuisance to assess takings claims under *Lucas*.
INTRODUCTION

The common law of nuisance has a reputation as a messy and dated doctrine. Said Justice Blackmun: “one searches in vain . . . for anything resembling a principle in the common law of nuisance.” Nor is Justice Blackmun alone in his complaint. Nuisance doctrine is notoriously contingent and unsummarizable. Generations of legal writers expressed their frustration with nuisance doctrine in the most unhappy terms. As early as 1875, when the first American treatise on nuisance was published, its writer Horace Wood already described the doctrine as a “‘wilderness’ of law.” Warren Seavey, the reporter for the nuisance section of the Restatement (First) of Torts, called it a “mystery.” William Prosser, the reporter for the Restatement (Second), adopted Wood’s locational metaphor in calling nuisance law an “impenetrable jungle.” He said it was a “legal garbage can” full of “vagueness, uncertainty and confusion” and told the American Law Institute he considered nuisance a “confused and difficult topic.” The English legal scholar, F.H. Newark, called it a “mongrel” doctrine, “intractable to definition” and “the least satisfactory department” of the law of torts. More recently, two environmental commentators described nuisance, with echoes of Wood and Prosser, as a “quagmire,” while Richard Epstein, though saying it is “much-maligned,” concedes nuisance “does not work on a moral or deductive principle.”

4 Warren A. Seavey, Nuisance, Contributory Negligence and Other Mysteries, 65 Harv. L. Rev. 984, 984 (1952). Indeed, Seavey apparently found nuisance law so mysterious that he entirely omitted a large part of it—public nuisance—from the First Restatement, to the bemusement of William Prosser, the reporter for the Second Restatement. In 1969, Prosser, perhaps in a dig at Seavey, told the American Law Institute: “[o]ne of the mysteries of the First Restatement of Torts to me is: What happened to public nuisance, and why isn’t it in here?” 46 A.L.I. Proc. 279 (1970). I also will omit a discussion of public nuisance from this paper, but only because it is a topic worthy of its own piece, and will be addressed in a companion article.
5 William Prosser, Nuisance Without Fault, 20 Tex. L. Rev. 399, 410 (1942) [hereinafter Fault].
6 Id.
7 Id.
8 46 A.L.I. Proc. 268 (1969). Indeed, resolution of the nuisance section of the Restatement (Second) of Torts seems to have taken longer than any other. See id. at 277–84.
Once the only means of adjusting land use conflicts; nuisance, with its confusions, contingencies and lack of principle, had virtually disappeared from that role in the first quarter of this century, supplanted by tools more suited to large-scale solutions. Zoning is the prototypical regulatory scheme that replaced the case-limited doctrines of the common law. Zoning was followed by a suite of local, state and federal regulations enabling city planning, environmental protection, historical preservation, wilderness conservation, access for the disabled, density restrictions, and many other limitations, restrictions, adjustments, prohibitions, and restraints on land use. The troubled history of nuisance law should thus have been no more than a footnote in any casebook on land use planning or environmental protection. For many years, it was.

But then, in 1992, the U.S. Supreme Court, in an attempt to bring some clarity to the "muddle" of takings law, declared that a landowner who had lost all the value of her property to uncompensated regulation suffered a taking if her legislatively-barred use was one the state's common law would not have considered a nuisance. Thus, nuisance was restored to the agenda of regulators, legislators and planners. But, as noted above, the nuisance knot is hardly less confused than the takings muddle. How did it get to be such a mess?

This article suggests three causes. Judicial attention to the application of doctrine within the context of shared social objectives, namely, economic growth and development, is one. Another is the attempt of lawyers to use the doctrine in ways that are beneficial to their clients, regardless of whether the doctrine initially served that purpose. Finally, and perhaps most damaging to the coherence of the doctrine, has been the effort by legal academics and scholars to rationalize the doctrine and place it within a large-scale and unified framework. It is perhaps the case that any legal doctrine is at various points subject to all three of these processes, but few have suffered as much as nuisance law.

It may well be that the history of any common law doctrine can be set out within these analytic parameters—the way the doctrine changed over years of economic change, the impact of lawyering constraints on the doctrine, and the doctrine's subjection to the analy-

12 Carol M. Rose, Why the Takings Issue Is Still a Muddle, 57 S. Cal. L. Rev. 561 (1984). Fourteen years ago, Rose characterized the takings issue as a muddle, writing that while commentators proposed "test after test to define 'takings,'... courts continue[d] to reach ad hoc determinations rather than principled resolutions." Id. at 562. Her characterization has stuck.

sis of scholars. Nuisance provides a perfect example of the consequences of all three processes. What is at stake here, however, is more important than the creation of an all-purpose model for examining the history of common law doctrine. The U.S. Supreme Court has told us that nuisance—much derided, little studied, hardly used in many decades—may hold the key to the takings puzzle. That is why its history is worth a new examination today. If we are to look at cases decided under the states’ common law of nuisance over the years, it is worthwhile to have a context within which to place those cases; a historical context that may perhaps provide some clues to how that newly-important branch of the common law is to be understood today.

This article begins with a brief look at the use of nuisance doctrine in the *Lucas v. South Carolina Coastal Council* case, in order to contextualize the following discussion of nuisance. Part II includes a discussion of why nuisance has been resistant to definition. Part III addresses judicial attempts to preserve the outlines of a landuse doctrine based upon strict liability in an age when a negligence standard encouraged economic development. Part III sets out two modes of doctrinal fudging adopted by English and American courts respectively. Part IV focuses on lawyers’ attempts to gain the benefit of a strict liability doctrine for their injured clients and the response of common law courts. Part V examines the largely unsuccessful efforts of the drafters of the two *Restatements of Torts* to deal coherently with nuisance. Finally, the article concludes that the confusion about nuisance is probably inevitable, given the variety of roles it was called upon to play in the common law of property. However, those seeking to use common law nuisance cases to determine the constitutional dimensions of a regulatory taking should try to understand the different strands of the nuisance knots. This article attempts only to explain *why* nuisance is confused and saves for the future the attempt to bring some clarity to the doctrine.

I. The *Lucas* Opinion

A. Facts and Holding

In 1986, David Lucas paid almost $1 million dollars for two non-contiguous oceanfront lots on the Isle of Palms, South Carolina. At the time of purchase, both lots were zoned for single-family residential construction. Lucas had not yet built on the lots when, two years later, the South Carolina legislature directed the state agency responsible for coastal zone management, the Coastal Council, to enforce new
baselines and setback lines regulating coastal construction. 14 No houses could be built seaward of those lines. Lucas’s lots were between the new lines and the sea and Lucas could now construct no more than a walkway or small deck. 15

Lucas sued, alleging that the Beachfront Management Act of 1988 (BMA) constituted a permanent and total taking of the value of his property without just compensation. At trial, he prevailed, the court finding a permanent, total taking of private property without just compensation in contravention of the Fifth Amendment of the Constitution of the United States 16 and Article I, Section 13 of the South Carolina Constitution. 17 The Coastal Council appealed. On appeal, the South Carolina Supreme Court held that the BMA was in effect a nuisance abatement measure, passed to prevent serious public harm; thus, Lucas had suffered a noncompensable restriction of his use of the property. 18 Accordingly, there was no “regulatory taking” entitling Lucas to compensation. Lucas appealed this ruling to the U.S. Supreme Court, and the Court granted certiorari. 19

In an opinion written by Justice Scalia, the Court held that “[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” 20 The Court remanded this inquiry to the South Carolina Supreme Court to allow the Coastal Council an opportunity to “identify background principles of nuisance and property law” underlying the BMA that might justify barring Lucas from building houses on his land. 21 The South Carolina Supreme Court then held that no “common law basis exists by which [the Coastal Council] could restrain Lucas’s desired use of his land.” 22

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15 See id. § 48–39–290.
16 U.S. CONST. amend. V. “[N]or shall private property be taken for public use, without just compensation.” Id.
17 S.C. CONST. art. I, § 13. “Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor.” Id.
20 505 U.S. at 1027.
21 Id. at 1031–32.
22 Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992). It remanded the
B. Reasoning and Derivation

Initially, the Coastal Council had argued that, because the BMA was a regulation passed pursuant to the state's police power to prevent harm to the public, David Lucas need not be compensated for the loss of his land's value attendant upon enforcement of the new building requirements. The Coastal Council contended that there was a difference—perhaps not a bright line, but nonetheless discernible—between the state's exercise of its police power to prevent or abate a nuisance, an exercise requiring no compensation for loss of the barred use, and the state's taking of property for a desirable public use, which required just compensation.\(^{23}\)

Writing for the *Lucas* majority,\(^{24}\) Justice Scalia rejected the Coastal Council's reliance on what had been known as the "nuisance exception."\(^{25}\) According to Justice Scalia, there is no coherent distinction between state action to prevent public harm, which requires no compensation to the owner of the offending use, and state action to secure a public benefit by taking private property, requiring compensation to a nonoffending owner.\(^{26}\) What looks like the prevention of harm to a member of the public may look like the securing of a benefit to the affected landowner—nor is there an easy way to tell who is "right."\(^{27}\)

Rather than attempt to distinguish a public harm from a public benefit, Justice Scalia proposed a different inquiry: Is the state proposing to bar an activity or land use that the common law would bar

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23 See *Lucas*, 404 S.E.2d at 899.

24 The majority opinion written by Justice Scalia was joined by Chief Justice Rehnquist, and Justices White, O'Connor and Thomas. Justice Kennedy concurred in the result, but rejected the reasoning of the majority opinion on the ground that "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society." *Lucas*, 505 U.S. at 1035. Justices Blackmun and Stevens each wrote dissenting opinions, and Justice Souter filed a statement to the effect that, in his opinion, the writ of certiorari had been improvidently granted because the record did not provide an adequate factual basis for the conclusion that Lucas had suffered a total deprivation of the value of his land. See id. at 1076.


27 The assumption of those who first offered such an indeterminacy critique was that, if the justification for a legislative determination was ambiguous, the appropriate judicial response would be deference to the majoritarian judgment. See, e.g., *Commonwealth v. Perry*, 155 Mass. 117, 124 (1891) (Holmes, J., dissenting).
as a nuisance? In clarifying this proposal, Justice Scalia indicated that, in his opinion, a court would turn to the state's law of private nuisance to learn whether the use could be barred.

According to Justice Scalia, the takings inquiry will "ordinarily entail . . . [what] the application of state nuisance law ordinarily entails." He tied the application of state nuisance law to the Restatement (Second) of Torts, referring to "the degree of harm . . . posed by claimant's proposed activities, . . . the social value of the claimant's activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided through measures taken by the [parties]." Justice Scalia also cited the Restatement to the effect that the longevity of a use may be relevant to the owner's right to maintain it, as may be the similarity of surrounding uses. These are all factors proposed in the Restatement as the basis for judicial resolution of the disputes of competing landowners.

From Justice Scalia's point of view then, the police power, the state's power to abate threats to public health and safety, has the same outlines as private landowners' ability to enjoin harmful neighboring uses. The state's nuisance abatement power is no greater than the ability neighboring landowners have to restrain each other's uses, or to get court-ordered damages due to the depredations of a neighboring use. Where private parties can restrain each other's uses, the state may do so; where private parties can extinguish each other's uses only by purchase, the state too must expend funds. Where a landowner could obtain injunctive relief to stop a neighboring landowner's use, the state too can halt that use; if the first landowner could not enjoin the neighbor's use, but had to buy out the neighbor to stop it, then the state too must compensate in order to end the second use. The state is in the same position as the aggrieved private landowner and its power to abate public nuisance is "complementary" to the power of a landowner to abate private nuisance. The implication is clear: the individual landowner has no duty to the public different in kind from her obligations to neighboring landowners and the state has no power to bar that which the common law of private nuisance would not allow a neighbor to bar. Thus, non-compensable reductions in

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28 Lucas, 505 U.S. at 1031.
29 Restatement (Second) of Torts (1979).
30 Lucas, 505 U.S. at 1030-31.
31 See id. at 1031.
32 See Restatement (Second) of Torts §§ 826-831 (1979).
33 Lucas, 505 U.S. at 1029.
value due to legislative action, at least to the extent of total loss of value, are valid only pursuant to statutes that codify the common law of private nuisance.

The law of nuisance is, however, at least contested, and perhaps confused beyond repair. Examination of both the doctrine and the sources of its confusion is worthwhile to see whether nuisance can in fact be helpful in clarifying the takings muddle or whether it further confounds it. This article undertakes to untangle some of the elements of that confusion and perhaps provide a guide to reading common law nuisance cases; however, it leaves for another day the task of suggesting a crisp understanding of the doctrine.

II. DEFINING NUISANCE

A large part of the difficulty courts and commentators have with nuisance springs from its resistance to a single definition. Although nuisance is often called a noninvasive injury to plaintiff's rights to use and enjoyment of real property, that is a complete definition only of private nuisance. Neither public nuisance nor the private action on a public nuisance are necessarily predicated upon such an injury. The public nuisance action stems from the injury a private use inflicts on public rights, which may occasionally mean harm to real property owned by the public, but is more often an injury to common pool resources, like silence, clean air or water, or species diversity. The private action on a public nuisance is based upon a particular and unshared injury to plaintiff's property or person, arising from some

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34 There is no answer to the question of why total loss of value triggers a different response than near-total loss. See id. at 1019 n.8.
35 For example, the state can legislate to bar the construction of a nuclear power plant on an earthquake fault. See id. at 1029.
37 Blackstone defined nuisance as "anything that worketh hurt, inconvenience or damage, [or anything] done to the hurt or annoyance of the lands, tenements or hereditaments of another." 3 WILLIAM BLACKSTONE, COMMENTARIES *216. That definition is often used, but it is overbroad, for it could include trespass, an invasive injury. RESTATEMENT (FIRST) OF TORTS ch. 40, Invasions of Interests in the Private Use of Land (Private Nuisance), Scope and Introductory Note at 215 (1939).
use of defendant's property that also amounts to an injury to public right.\textsuperscript{40}

What the three branches of nuisance—private nuisance, public nuisance and the private action on a public nuisance—have in common is not injury to rights in property, but injury from some use of property. This definition was current in the early eighteenth century and repeated in the late nineteenth century, though it seems to have gone largely unstated in the twentieth century. Thomas Wood, a precursor of Blackstone, wrote that one was liable for nuisance who did "any thing upon his own ground, to the unlawful hurt or annoyance of his neighbor."\textsuperscript{41} Horace Wood, the author of the first American treatise on nuisance, writing in the last quarter of the nineteenth century, said, "The idea of a nuisance, generally, is associated with, and more commonly arises from the wrongful use of property."\textsuperscript{42}

Dean Prosser, the great tort rationalizer, saw nuisance as a term mistakenly encompassing two entirely different kinds of actions: one was private nuisance, the noninvasive interference with private rights in land; and public nuisance, an infringement of public rights. Both, by an accident of history, came to be called nuisance.\textsuperscript{43} Prosser found that the conflation of public and private nuisance frustrated attempts to bring order to what he viewed as a branch of the law of torts.\textsuperscript{44} Prosser wrote that "[t]he two have nothing in common, . . . and it is in the highest degree unfortunate that they are called by the same name."\textsuperscript{45} Prosser later modified his story somewhat,\textsuperscript{46} adopting the origins tale of the English legal scholar, F.H. Newark. According


\textsuperscript{41} THOMAS WOOD, AN INSTITUTE ON THE LAW OF ENGLAND (9th ed. 1763) cited in Paul M. Kurtz, Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor, 17 WM. & MARY L. REV. 621, 642 n.110 (1976).

\textsuperscript{42} HORACE WOOD, supra note 2, at 20–21.

\textsuperscript{43} See Fault, supra note 5, at 411.

\textsuperscript{44} See id.

\textsuperscript{45} Id. According to the most thorough recent version of the history of nuisance, while private and public nuisance share both a name and the fact of a landowner's use of her own land to interfere with the rights of others, the two had separate creations. See generally Janet Loengard, The Assize of Nuisance: Origins of an Action at Common Law, 37 CAMBRIDGE L.J. 144 (1978). Public nuisance is derived from the criminal action brought to halt and punish depredations against public right and the king's peace. See id. at 157. Private nuisance arose from the assize of nuisance, which barred interference with enjoyment of property. It thus complemented the assize of novel disseisin, which put rightful owners in possession of property. See id. at 158–59. By 1500, plaintiffs were bringing nuisance actions in case rather than relying upon the assize. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 482 (2d ed. 1979) [hereinafter BAKER I].

\textsuperscript{46} See Private Action, supra note 40, at 998.
to Newark, the original common law action had been the assize of
nuisance, which lay for interference with rights in the enjoyment of
land, including interference with private easements like a neighbor's
right of way.47 By a natural process, interference with a public eas­
ment, like a public right of way over private land, correctly called a
purpresture, also came to be known as a nuisance; thereafter any
interference with public rights, whether purpresture or not, was also
denominated a nuisance. “[T]hus was born the public nuisance, that
wide term which came to include obstructed highways, lotteries, un­
licensed stage—plays, common—scolds, and a host of other rag ends
of the law.”48

Unlike Prosser, Newark found the conflation of public and private
nuisance on the basis of a “superficial resemblance” unproblematic.49
Private nuisance was the tort of injury to rights in land; public nui­
sance was the crime causing such injury.50 For Newark, it was not the
assimilation of public and private nuisance that created the problem
of overbreadth, but the addition of the private action on a public
nuisance.51 The fall from grace was the accession of a claim for per­
sonal injuries to nuisance doctrine, effectively removing from nui­
sance the common thread of injury to land. This accession made the
doctrine susceptible to the kind of broad and overinclusive definition
suggested by Thomas Cooley, influential judge and treatise author.52

“[T]he case which set the law of nuisance on the wrong track”53 was
a 1535 action for blocking a public road so as to hinder plaintiff's access
to his own property. There Justice Fitzherbert argued that, contra
the contemporaneous understanding of the law, claims for special or
particular damage on a public nuisance should be allowed. Fitzherbert

47 See Newark, supra note 9, at 482.
48 Id.; see also J.R. Spencer, Public Nuisance—A Critical Examination, 48 CAMBRIDGE L.J. 55 (1989). Spencer attributes the original mistaken conflation of public and private nuisance based upon blocking of public and private rights of way to the 13th century legal writer known as Bracton. See id. at 58. Since Bracton is generally credited with first using the Latin word nocumentum, later translated as “nuisance,” as a term of art meaning an interference with rights in land, as distinguished from other harms, it is a bit unkind to accuse him of the word’s misuse.
49 Newark, supra note 9, at 482.
50 Prosser, too, came to believe this definition was a way of bringing harmony to nuisance doctrine. See 46 A.L.I. PROC. 277 (1970). However, defining public nuisance as always having a criminal character was unacceptable to the A.L.I. Committee working on the Restatement (Second) and it was not adopted, despite Prosser's efforts. See 47 A.L.I. PROC. 291–304 (1971).
51 Newark, supra note 9, at 485–88.
53 Newark, supra note 9, at 483.
agreed that blocking the highway was a criminal matter, an indictable infringement of the rights of the Crown and public. But he added:

[W]here one man has greater hurt or inconvenience than any other man had, ... then he who has more displeasure or hurt, etc., can have an action to recover his damages that he had by reason of this special hurt. As if a man make a trench across the highway, and I come riding that way by night, and I and my horse together fall in the trench so that I have great damage and inconvenience in that, I shall have an action against him who made the trench across the road because I am more damaged than any other man.54

Assuming the damage is equally to man and horse, the harm is not simply to property, let alone to land, but is in fact a personal injury.55

The addition of personal injury to the branch of the common law which ought only to have dealt with harm to real property reduced its doctrinal consistency. Newark claimed the boundaries of nuisance were now becoming fogged.56 Henceforth, only the private nuisance was conceptually limited to interference with rights in land. Public nuisance was actionable both by criminal indictment for interference with public rights and by a private action for the particular damages that might be incurred by a plaintiff in respect to the enjoyment of those public rights, e.g., an injury due to a fall into the trench across the public road.57

With the addition of personal injury claims to the criminal indictment for interference with public rights and the civil action for interference with private rights in land, nuisance came to straddle an intersection of criminal law, real property law, and tort law. These three great categories each had particular forms of liability and nuisance came to partake of all of them. Nuisance in its real property form was judged by a form of strict liability, which required an end to defendant's interference with plaintiff's rights in land, no matter

55 In fact, the action for special damages on a public nuisance due to monetary loss, rather than simply personal injury, did not arise for another century and a half. See Private Action, supra note 40, at 1013 (citing Hart v. Bassett, 84 Eng. Rep. 1194 (K.B. 1681)).
56 See Newark, supra note 9, at 482.
57 See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 493 (3d ed. 1990) [hereinafter BAKER II]. Subsequently, a public nuisance also became subject to abatement by injunction, while restitution was available for damage already done. See, e.g., Board of Health v. Copcutt, 35 N.E. 443 (N.Y. 1893). Thus, public nuisance came to have a civil side, one that sounded in equity.
how carefully created or how useful to the community at large.\textsuperscript{58} Similarly, an interference with the rights of the public or the sovereign could not be allowed to continue on the basis that the interference was the product of defendant's due care; the normal standards of criminal liability applied to an indictment for public nuisance.\textsuperscript{59} The liability standard for the personal injury on account of a public nuisance, however, was governed by negligence. Obviously, the coherence of a single doctrine governed simultaneously by three liability standards was hard to maintain.

### III. Nuisance Law and Economic Development

This section will discuss the aspect of nuisance historically governed by strict liability—the doctrine's use as a common law device to protect the use and enjoyment of one's land. This section explains the ways in which the strict liability standard proved problematic in an age of negligence. Originally, strict liability governed any interference with private rights in the use and enjoyment of property, whether that interference was a product of direct invasion, brought as an action for trespass, or was the indirect consequence of acts a defendant undertook upon her own land, like nuisance, which was brought as an action on the case.\textsuperscript{60} If a neighbor interfered with another's use, she must simply cease the interference. Thus, Blackstone wrote: "[I]f one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance [sic]: for it is incumbent on him to find some other place to do that act, where it will be less offensive."\textsuperscript{61}

\textsuperscript{58} Baker II, supra note 57, at 486–88.

\textsuperscript{59} See id. at 492.

\textsuperscript{60} Though case later came to be thought of as the appropriate action when the basis of liability was negligence, rather than intention, see id. at 481–83, nuisance remained a strict liability exception within case, based upon the traditional common law notion that no interference with rights in land was tolerable, regardless of the actor's state of mind. For a further discussion of the consequences of placing a strict liability label on trespass and a negligence label on case, see E.F. Roberts, Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein, 50 Cornell L.Q. 191 (1965).

\textsuperscript{61} 3 William Blackstone, Commentaries *217–18.
A. Negligence and Strict Liability

For many years, the common law doctrine of nuisance served as an all-purpose tool of land use regulation, "the common law of competing land use." While there may be cross-boundary annoyances in an agrarian economy, where land is wealth, not many land uses conflict. Those that do can be subjected to an "act at your peril" rule of strict liability, without much damage to the economy. A rule of strict liability in regard to interference with land use was functional at the inception of the doctrine and for centuries thereafter, at least insofar as it protected established sources of wealth. Nuisance was thus not a contested doctrine during the period before the Industrial Revolution.

The shift from agriculture to industry meant a vastly wider variety of land uses than had existed before; inevitably, the new uses imposed and impinged upon the old. When the economy expanded beyond the bounds of agriculture, new kinds of active uses, dynamic, voracious and large-scale, came to swallow up land and people. Those uses often, virtually always, conflicted with the old ones. They involved speed and machinery and emissions and smells and discharges and noise and steam and the plethora of other "less salubrious consequences" of industrial and extractive enterprises.

The doctrine of nuisance was readily available for those complaining of the new uses. Thus, in shepherding the transition from a small-scale agrarian and mercantile economy to a great industrial and commercial one, nuisance in effect became a battleground between competing

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64 The classic statement of such liability is from Hull v. Orynge, The Case of Thorns, Y.B. 6 Edw. IV, fo. 7, pl. 18 (1466): "[W]hen someone does something he is bound to do it in such a way that no prejudice or damages are done to others by his action . . . If a man suffers damage it is right that he should be compensated."
66 See id.
67 See Brenner, supra note 62, at 406–07.
land uses. As John McLaren has put it, nuisance law historically mediated "the clash of two very basic interests in land use disputes—the interest in conserving the land and preserving time—honored uses on the one hand, and the interest in productive exploitation of the land and its resources on the other."69

For those whose new and intensive uses were challenged, the strict liability standard of nuisance was anathema, for it meant that the injuries done by a new use must be internalized as part of its cost, thereby diminishing its profits. Thus, negligence was the favored "doctrine of an emerging entrepreneurial class that argued that there should be no liability for socially desirable activity that caused injury without carelessness"70 and strict liability was seen as a burden.71

Certainly a negligence standard for injury to rights in land would have been useful as a subsidy to active uses, uses that inevitably cause some harm, but that are crucial to economic development. A straightforward rule that any use that interferes with a neighbor's rights in land must be abated increases the costs of investment in offending uses, causing a decline in profits, and thus slowing growth and expansion. It would seem inevitable that the liability rule in nuisance would become one of negligence, replacing the older doctrine of strict liability. As David Abraham points out, everywhere "erosion of European medieval conceptions of full or strict liability only weakly hinged to fault was closely connected to the rise of capitalist entrepreneurship and bourgeois conceptions of individual human agency."72

Of course, there already existed a model for negligence liability in service of the American economy. Claims for damages on account of personal injury were judged by a negligence standard, a standard that explicitly subsidized industrial development and economic growth.73

69 Id.
70 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960 124 (1992) [hereinafter TRANSFORMATION II]; see also Abraham, supra note 65, at 291 ("Any excessive burdening of entrepreneurs with liability not manifestly theirs [i.e., strict liability] was both a drag on [commercial] initiative and an invitation to negligence on the part of others.").
71 In the 19th century, as David Abraham points out, "[l]iberal hostility toward landed property and hidebound privilege was deep. Agrarian protectionism in the broadest sense—from strict liability through statist conceptions of property . . . came under sharp liberal attack." Abraham, supra note 65, at 316.
72 Id. at 292.
73 See, e.g., Brown v. Collins, 53 N.H. 442, 450 (1873) (According to Judge Doe, strict liability rules "were certainly introduced in England at an immature stage of English jurisprudence, and an undeveloped stage of agriculture, manufactures, and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits which the spirit of the common law, adapted to all conditions of society, encourages and defends."); Losee v. Buchanan, 51 N.Y.
Whether an “act at your peril” rule had ever existed with respect to personal injuries is a fraught question, but there is no disagreement that by the time of the Civil War, negligence was indeed the rule in personal injury, with *Brown v. Kendall* being the case Holmes chose to illustrate the principle in *The Common Law*. Yet a negligence rule—harm due to the careful operation of a socially-useful undertaking is incalculable—was not formally extended to the injuries to real property that could be the product of the very same undertaking, operated in precisely the same manner. Where a nuisance did harm to a neighbor’s *rights in land*, due care provided no protection from liability for compensation. As Morton Horwitz says, “While other areas of the law were changing to accommodate the growth of American industry, the law of nuisances for the longest time appeared on its face to maintain the pristine purity of a preindustrial mentality.”

The negligence standard that was at the heart of tort law in the late nineteenth century based compensation on a judgment about defendant’s conduct rather than plaintiff’s injury. The reasons why nuisance continued to be governed by strict liability presents an interesting problem.

It may be that across-the-board application of the personal injury due care standard to property harms would simply have changed property rights too significantly. While complete immunity for industry’s injurious activity would have stabilized tort law with a single liability standard for harm to both land and person, it also would have destabilized property law by creating two levels of rights in land.

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476, 484–85 (1873) (“We must have factories, machinery, dams, canals and railroads . . . if I have any of these upon my lands, and are not a nuisance, and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things on his lands.”).


75 60 Mass. (6 Cush.) 292 (1850). Horwitz argues the principle of negligence had already been widely adopted by the time of Brown v. Kendall, and that the case’s preeminence in our historical accounts is in fact a consequence of its adoption by Holmes as the ur-text, rather than its own transformative power. See Transformation I, supra note 74, at 90.


77 See Robert L. Rabin, *The Historical Development of the Tort Principle: A Reinterpretation*, 15 Ga. L. Rev. 925, 946 (1981) (stating that “only slowly, over a period extending well beyond the supposed halcyon days of negligence, were . . . property-dominated principles subordinated to the tort system.”).

78 Transformation I, supra note 74, at 74.
While a negligence standard would have encouraged economic development, it also would have amounted to a declaration that some kinds of land use allowed owners special rights to do injury to the more passive uses of their neighbors. Not only was such a broad declaration unsupported by the common law, but such a declaration threatened the fundamental liberal principle that rights in property are not dependent upon the quantum of property owned. Such rights are not quantitative but qualitative.\(^79\)

Although strict liability was economically costly, and hence a burden to a growing class of investors in active uses and to the expanding capitalist economy it represented, it was nonetheless in some sense profoundly liberal, profoundly necessary to a market economy. Strict liability for interference with uses of real property rested on the principle that property rights are qualitatively equal, that is, that no property owner has greater rights than another by virtue of birth, position or the amount of property owned. As J.E. Penner put it, "What distinguishes ... property right[s] is not just that they are only contingently ours, but that they might just as well be someone else's . . . . [T]here is nothing special about my ownership of a particular car—the relationship the next owner will have is essentially identical."\(^80\)

The notion that rights in real property, indeed in any sort of property, are qualitatively identical among property owners regardless of the owner's birth, character, wealth, creed or ideology, was a powerful

\(^79\) See, e.g., Woodruff v. North Bloomfield Gravel Mining Co., 18 F. Supp. 753, 807 (C.C.D. Cal. 1884) ("If the smaller interest must yield to the larger, all small property rights, and all smaller and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few."); Strobel v. Kerr Salt Co., 58 N.E. 142, 145 (N.Y. 1900) (stating that allowing large-scale uses to impose burdens on their neighbors without compensation "would amount to a virtual confiscation of the property of small owners in the interest of a strong combination of capital"); McLeery v. Highland Boy Gold Mining Co., 140 F. 951, 952 (1904) (cited in Richard A. Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. LEGAL STUD. 49, 74 n.64 (1979) ([Defendant contends] that it is engaged in a business of such extent and involving such a large capital that the value of the plaintiffs' rights . . . is relatively small, and that therefore an injunction . . . would inflict a much greater injury on [defendant] than it would confer benefit upon the plaintiffs . . . . If correct the property of the poor is held by uncertain tenure . . . . [I]t would be declared that private property is held on the condition that it may be taken by any person who can make a more profitable use of it, provided that such person shall be answerable in damage to the former owner to his injury."); Whalen v. Union Paper Bag Co., 101 N.E. 805, 806 (N.Y. 1913) (holding that distinctions based on the scale of ownership of the contending parties are improper: "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.").

tool in freeing the economy from the bonds of what liberals considered an outdated feudal mentality. That principle was egalitarian, at least in respect to those who owned property, and it was opposed to aristocratic privilege. Not only is the notion normatively appealing from an equality standpoint, but it is indispensable if land is to be treated as a commodity that can be freely exchanged. It gives effect to the rule that all must be free to participate in the market, and to deal with each other without ascriptive or prescriptive barriers. The equality of property owners and the absolute nature of their property rights fundamentally separates liberal accounts of property from feudal ones.

Affording large-scale uses a privilege to injure small-scale uses would divide property into two categories, the useful and the less useful, and entitlements and disabilities would attach in greater or lesser degree depending upon the category. Such a split amongst property owners could, in a democracy, imperil the sanctity of property rights and endanger the always uneasy stasis within which property and democracy coexisted. The utilitarian distinction, recognizing entitlements based on the difference in wealth of owners, could have redistributive consequences, consequences the law would be too compromised to prevent. As Richard Epstein warns, "The fundamental weakness of the pure utilitarian point of view is that it fails to explicitly recognize any antecedent or natural rights that the legal system is called upon not to create but to recognize and protect." A utilitarian approach to property rights provides no protection against any course a majority may choose as being useful. The maintenance of a coherent private property regime within a majoritarian context requires at least formal egalitarianism amongst property owners as a guarantee of the continued existence of property rights. A single rule

84 For a discussion of the liberal attack on "feudal" forms of ownership, see Robert Gordon, Paradoxical Property, in Early Modern Conceptions of Property 95, 106-08 (John Brewer & Susan Staves eds., 1995).
85 As Horwitz put it, avoiding redistribution, "coerced economic equality," has consistently been "[t]he fundamental issue of American political thought . . . [in] this most politically democratic country in the world." Transformation II, supra note 70, at 9.
86 Epstein, Nuisance Law, supra note 79, at 74.
must thus govern the consequences of harm to a neighbor's property done by another property use, a rule inaccessible to considerations of the relative utility of the neighbors' uses.

The difficulty remains, however. An "act at your peril" rule renders investment in active ventures substantially riskier than they would be with a negligence rule. As Epstein, no fan of utilitarianism, points out correctly in this context, "Whatever the weakness of utilitarianism as a comprehensive moral philosophy, it takes heroic assumptions (fiat justicia, ruat coelum [let justice be done, though the heavens fall]) to always treat all its consequences as irrelevant."87 Thus, Epstein argues for a certain amenability of natural rights theory to utilitarianism around the edges, at least when economic development is at stake.88 Common law courts faced with the nuisance suits of "smallholders"—the owners of smaller tracts—against large ones adopted this outcome.

Smallholders negatively affected by neighboring large-scale uses sought to enjoin the active uses that disturbed them, citing the Blackstonian wisdom of the common law that an offending use must cease, regardless of its utility. However, economic development was discouraged when fledgling industry was burdened with internalization of those externalities that were the product of careful operation. Courts faced with this dilemma finessed it: without formally abandoning the strict liability standard of nuisance, and the underlying principle of egalitarian property rights, they modified how the standard was applied in practice, and allowed developmental uses to continue. Two approaches were developed, one more popular in England, the other, in the United States, though both were in fact used in each country.

B. The English Rule: The Existence of a Nuisance Is Place—and Time—Dependent

In England, courts faced with the problem of halting development on account of uses that interfered with neighbors generally refused to undertake a balancing of the social utility of active versus passive uses or large versus small uses.89 In the well-known case, Attorney General v. Council of the Borough of Birmingham,90 a farmer plaintiff

87 Id. at 75.
88 Id. at 82, 88.
89 See J.E. Penner, Nuisance and the Character of the Neighborhood, 5 J. Envtl. L. 1, 2 (1993) (In England, "the greater good of the public has almost never been regarded as a factor rendering nonactionable what would otherwise be a nuisance.").
90 70 Eng. Rep. 220 (Ch. 1858). Said the equity judge hearing the application for injunction,
sought to enjoin city drainage operations that prevented the watering of downstream cattle. The city as defendant argued that granting plaintiff the injunction he sought would cause illness and disease amongst its 250,000 inhabitants. But the court said it was "a matter of almost absolute indifference" how many people would be affected by its refusal to allow injury to plaintiff's rights.91 "If, after all possible experiments, they cannot drain Birmingham without invading Plaintiff's private rights, they must apply to Parliament."92 The court would offer no remedy that relied upon balancing the plaintiff's rights against the social utility of their violation.

In actual practice, however, the Birmingham case was exceptional. Courts that refused to balance nonetheless avoided enjoining active uses by defining very narrowly both plaintiffs' rights and what amounted to a nuisance. In particular, English courts adopted the notion of rights varying on the basis of location and on community standards. This notion served as a means of incorporating decisions about what uses served the public good. The English legal scholar, J.E. Penner wrote, "An assessment of the greater public good [was required] as an integral part of assessing the effect of the neighbourhood character rule in nuisance."93 Under that rule, what might be a nuisance in a rural agricultural area was no nuisance in a town or industrial area.94 A plaintiff simply could not expect to obtain the same conditions of life in one place as in the other. "What could be a nuisance in Belgrave Square [an upper-class London neighborhood] would not necessarily be so in Bermondsey [a working-class neighborhood]."95 Where a use was located, rather than what the use was, might determine whether it was a nuisance. Space was differentiated on the basis of the character of the activities that took place; one had differing expectations of ownership depending upon where one was located.

"I am not sitting here as a committee for the public safety, armed with arbitrary power to prevent what, it is said, will be a great injury not only to Birmingham but to the whole of England." Id. at 225.

91 Id.
92 Id. at 226.
93 Penner, supra note 89, at 2.
94 The first reported case of this type was Hole v. Barlow, 140 Eng. Rep. 1113 (C.P. 1858), an action against a brickmaker, in which the jury was advised "that in deciding whether the defendant had caused a nuisance it was legitimate to ask whether he had established his operation in a convenient and proper place." McLaren, supra note 68, at 174. The case went against plaintiff. The holding in the case was subsequently rejected in Bamford v. Turley, 122 E.R. 27 (1862), but its rationale was adopted by Sturges v. Bridgman, 11 Ch.D. 852 (1879). However, Brenner, supra note 62, at 412-13, suggests that the notion of community standards "had been long operating" even before Hole v. Barlow.
95 Sturges, 11 Ch.D. at 865 (emphasis in original).
Thus, English courts, faced with the need to maintain the vitality of the common law in the face of economic expansion, relied upon a very narrow definition of nuisance to restrict the harm small-scale plaintiffs could do to large-scale defendants,96 while they rejected any attempt to balance the relative utility of plaintiff's and defendant's uses. "The rhetoric forbidding balancing of equities in determining injunctive relief remained firm, while the grounds for claiming nuisance slipped away."97

While the notion of community-based ownership expectations developed in England, judges in the United States adopted it as well. Justice Sutherland famously said that a "nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."98 Holmes also based the existence of nuisance liability on community standards. The resemblance to the English rule lies in Holmes' notion of how fault was determined in nuisance, given its strict liability character. The blameworthiness Holmes found in nuisance was not a state of mind determined by examining the individual conscience, but rather the fault attributable to one who violates the norms of the community, regardless of her state of mind.99 Later, community standards as a yardstick for judging the severity of plaintiff's injury became a guidepost for the Restatements as well.100

96 See, e.g., Penner, supra note 89, at 5 (citing Walter v. Selfe, 4 DeG & SM 315, 322 (1851)) (stating that a nuisance must affect the right to "the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living but according to plain, sober and simple notions among English people.").


99 Indeed, this objective standard applied to both the plaintiff and the defendant. A nuisance plaintiff's injuries, unlike those of the tort plaintiff, were judged actionable or not depending upon the standards of the community, rather than the individual character or predilections of the plaintiff. See supra note 94 and accompanying text.

100 See infra notes 165-67 and accompanying text.
C. The American Rule: A Nuisance Will Not Always Be Enjoined

1. Legislative Authorization and the Balancing of Equities

The approach initially adopted in this country was straightforwardly utilitarian: balancing the equities, that is, weighing harm to plaintiff against the social utility of defendant's use. From the inception of their jurisdiction over applications for injunctive relief against activities claimed to be nuisances, American courts of equity took into account the social utility of those activities in the decision as to whether a nuisance existed, something which the common law of nuisance did not on its face allow. The rationale was that because the granting of injunctive relief was always a matter for the discretion of the court, rather than a matter of right, courts could balance the equities. This judicial practice found justification in the doctrine of legislative authorization. Because legislatures granted the privilege of corporate status on a case-by-case basis, resting upon a public interest in the corporation's aims, a corporate use was of necessity not simply private; even if privately owned, it was in the public interest.

101 Nuisances were not subject to injunction until the early 18th century; the first reported English case granting injunctive relief is Bush v. Western, 24 Eng. Rep. 237 (1720) (cited in Brenner, supra note 62, at 406 n.11). McLaren, supra note 68, at 186, says such injunctions were not "regularly" granted in England until the end of the century. They were awarded where damages did not provide adequate compensation or where the interference was continuous or recurring. See id. Paul Kurtz suggests that nuisance injunctions were not available in America until somewhat later. See Kurtz, supra note 41, at 625 n.24, 628.

102 See Kurtz, supra note 41, at 632–33. In England, a statute of 1852 gave equity courts the power to decide legal matters before them. See Provine, supra note 97, at 34 n.5. In the United States, equity courts considered rights in real property matters of law and routinely refused to hear cases raising real property issues until about the same time as the English statute. See Kurtz, supra note 41, at 628. In fact, some states found it necessary to write legislation which gave courts at law and courts in equity equal abilities to deal with nuisance cases. See, e.g., Act of 1901, c. 139 Tenn. Code Ann. § 3403 (1901) (cited in Madison v. Duckworth Sulphur, Copper & Iron Co., 83 S.W. 658, 666 (1904)). Through the Act, an amendment to the Tennessee Code of 1858, "the two courts (law and equity) were put upon a substantial parity in dealing with nuisances, in respect of the granting of final relief in such cases." Madison, 83 S.W. at 666. In Madison, plaintiff-farmers, injured by a mineral extraction operation, were denied injunctive relief against a nuisance and required to accept damages because the industrial operation was a major employer and taxpayer in the region. Id.

103 Initially, incorporation by special charter by the legislature was only permitted for businesses which were involved in a "public utility." James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States, 1780–1970 17 (1970). John Marshall explained the underlying principle of special charters in Dartmouth College v. Woodward, 17 U.S. 518, 537–38 (1819): "The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this
The legislature had authorized the use, and that authorization was relevant to the question of whether a use should be halted.

The doctrine of authorization permitted a case-by-case, rather than wholesale, introduction of negligence liability into nuisance, heretofore governed by a strict liability standard. Legislatures, who were conceptually the authors of incorporation, a privilege granted on the basis of public utility, were understood to have also granted individual uses the privilege of a negligence standard when the charter of incorporation was issued. Courts concluded that such chartered enterprises were legislatively authorized to condemn surrounding uses to sustain the harms imposed upon them by their useful and careful neighbors. Canals, railroads, reservoirs, gas works, new streets, refuse collection, steam boilers, sewer systems, subways, power plants, dams, telegraph lines, and a myriad of other active uses were designated as public utilities. Though undertaken for private profit, they were imbued with the public interest, and for the public good, legislatures could both benefit and regulate them. Among the benefits accorded was the right to cause unrecoverable and indirect injuries to the property of their neighbors, so long as the injuries were a consequence of activities carried out with due care.

Hence, if harm occurred in consequence of careful operation of the chartered use, courts presumed, unless plaintiff provided proof to the contrary, the grant of the corporate charter implicitly authorized such unavoidable harm. The charter was taken to operate as a legislative decision that the social benefit of the use outweighed private harm resulting from careful operation. Consequently, in derogation of the benefit constitutes the consideration, and, in most cases, the sole consideration of the grant [of incorporation]. The requirement of public utility for the granting of a corporate charter continued long into the 19th century. See Hurst, supra, at 17.

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common law, courts recognized a negligence standard of liability for uses under legislative authorization. Courts did not view the grant of a negligence standard as a taking of plaintiff's property, because no property was in fact taken—the rule at the time requiring compensation only in case of confiscation. Courts agreed that by granting a corporate charter, thus deciding that a particular use provided a benefit to the public, the legislature gave that use the privilege to harm a neighbor's property carefully without liability to compensate the neighbor. A prodevelopmental policy that "private interests must yield to the public welfare" justified legislative imposition upon neighbors of a duty to bear nonnegligent harms sans particular compensation. The injured party found his compensation in the general outcome of economic progress. Only if the authorized use operated negligently would injury to a neighbor be compensable.
Even this relatively limited form of statutory authorization as the basis of exemption from strict liability threatened the classical unitary conception of property rights referenced in this article.\textsuperscript{114} It could oust the common law and the judiciary from their role in protecting rights in land, rendering land use controversies a question for the legislature. Allowing the legislature to decide land use controversies would make that area wholly political, with all the attendant uncertainty about the maintenance of rights which the political arena implies. Aside from such apocalyptic possibilities, another practical reason to reject legislative authorization existed. Over time, the privilege to do harm carefully could lock in an old use and, through the grant of the subsidy of a negligence standard, prevent its replacement by a more profitable one. In other words, the cure might prove as bad as the disease.\textsuperscript{115} Courts came to describe legislative authorization as conditional and limited,\textsuperscript{116} and the courts undertook to play a more active role in the nuisance inquiry. They mandated fact-specific investigations into the precise nature of the claimed authorization, the utility of the defendant's use, authorized or not, the character of the area in which it took place, and the benefits plaintiff could be said to derive, in common with others, from the use.\textsuperscript{117} In effect, courts rejected the legislature as the appropriate institution to separate property into that which could do harm carefully and that which could not. They did not, however, forego making those distinctions themselves.

2. Replacing Nuisance Injunctions with Damages

Courts judicialized the project of distinguishing among uses by modifying the remedies available to nuisance plaintiffs. Where previously the Blackstonian doctrine mandated that when a nuisance could be proved, a plaintiff was entitled to its abatement, courts of

\textsuperscript{114} See supra text accompanying notes 81–88.

\textsuperscript{115} See, e.g., Cogswell, 8 N.E. at 537 (noting that the legislative grant on which defendant relied, and which court rejected as not authorizing the specific injury sustained by plaintiff, was almost fifty years old).

\textsuperscript{116} See, e.g., Bohan v. Port Jervis Gas–Light Co., 25 N.E. 246 (N.Y. 1890) (holding that legislative authorization does not amount to grant of power of condemnation).

\textsuperscript{117} See, e.g., Booth v. Rome, W. & O.T.R. Co., 35 N.E. 592, 594–95 (N.Y. 1893) (holding that a use is not a nuisance if it is "a reasonable exercise of the right of property, having regard to time, place and circumstances, ... having regard to all interests affected, [the owner's] and those of his neighbors, and having in view also public policy."). A determined court could make any use a nuisance or no nuisance within such a test.
equity were willing to couple the finding of nuisance with a remedy limited to damages.\textsuperscript{118} Thus, small-scale plaintiffs could have damages by way of compensation for their injuries, but they were denied the power to halt large-scale uses.\textsuperscript{119} Strict liability remained the hallmark of nuisance, but the equitable remedy was submerged in favor of damages awarded by a court of equity.\textsuperscript{120}

The damages remedy did not formally replace injunctive relief. Mandatory damages without the possibility of injunctive relief violated the coherence of the law of property, which could not formally encompass the notion that a diminution in one owner's rights in land at the hands of another landowner could be suffered to continue indefinitely. Judges did not often say that the relief they offered was dependent upon the extent of plaintiff's property rather than plaintiff's injury. Indeed, some courts continued to claim that injunctions were warranted whenever a plaintiff was injured, regardless of the comparative weight of defendant's use and the care taken in conducting it. These courts repeated the traditional doctrinal formula: "[n]uisance does not rest upon the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with the best of care."\textsuperscript{121} Into the twentieth century, legal academic literature denied the existence of the damage/no injunction remedy courts continued to offer, claiming that courts' only alternatives were the nuisance/no nuisance finding regardless of the balance of equities.\textsuperscript{122} Nonetheless, in practice, courts continued to offer, in-

\begin{footnotes}
\textsuperscript{118} See, e.g., Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658 (Tenn. 1904).
\textsuperscript{119} See, e.g., Cogswell, 8 N.E. at 537.
\textsuperscript{120} See, e.g., Westphal v. City of New York, 69 N.E. 369, 370 (N.Y. 1904) (plaintiff seeking injunction had submitted to jurisdiction of equity court and could not contest its damages award, nor demand a jury trial on the issue of damages).
\textsuperscript{121} Melker v. City of New York, 83 N.E. 565, 568 (N.Y. 1908).
\textsuperscript{122} See, e.g., Note, Equitable Relief Against Nuisances, 13 COLUM. L. REV. 635, 637 (1913) (awarding permanent damages and no injunction for a nuisance "is not consonant with the common law methods of protecting property."); Note, The "Balance of Injury" as a Reason for Refusing an Injunction to Restrain a Nuisance, 57 U. PA. L. REV. 396, 398 (1909) (stating that "[t]he weight of authority seems to be that the injury to the defendant or the public cannot be considered.").
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\textsuperscript{118} See, e.g., Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658 (Tenn. 1904).
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Boomer v. Atlantic Cement Co. was a case which in effect awarded damages upon a finding of nuisance, but denied injunctive relief. 257 N.E.2d 870 (N.Y. 1970). When first decided, Boomer was both hailed and attacked as a departure from the norm. See, e.g., A. Mitchell Polinsky, Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damages Remedies, 32 STAN. L. REV. 1075, 1079 n.10 (1980) (citing Boomer as an example of the current "increasing judicial preference" for damage remedies in landuse disputes); Robert Rabin, Nuisance Law: Rethinking Fundamental Assumptions, 63 VA. L. REV. 1229, 1334 n.98 (1977) (placing Boomer
To insist upon,123 damage awards to plaintiffs who rightly complained of injury to the use and enjoyment of their property.

An example of this dual policy of announcing the equality of all forms of property while in fact refusing to implement the consequences of such equality is the well-known case of Whalen v. Union Bag & Paper Company.124 Whalen was the standard cite for the so-called "New York rule" that an injunction would not be denied on the basis of the relative utilities of plaintiff's and defendant's uses.125 In fact, though the Whalen court did, in ringing terms, grant plaintiff farmer an injunction against the defendant factory's continuation of its water pollution,126 the injunction was actually conditional. It was to take effect a year later, and only if defendant refused to pay court-assessed permanent damages.127 In reality, the opinion of the Court of Appeals in that case overturned the Appellate Division's grant of an immediate injunction, instead reinstating the trial court's conditional injunction, a remedy which amounted to a damage award.128

In short, when quarrels between neighboring landowners had consequences for development, a satisfactory judicial resolution under the common law might be one that retained the formal outlines of the common law, but contained a very different substance within. The Whalen injunction is the perfect example of damages in the guise of equitable relief. Obviously, such a deviation between form and substance substantially contributed to the confusion about just what the law of nuisance was. And we must add to this confusion of remedies the adoption of the English rule which made the same use a nuisance in some situations and not in others. The essentially political requirement for maintenance of a strict liability standard for injuries to property had created the concomitant need for judicial flexibility to bend that rule in the interests of continuing growth. The judiciary responded to this need, but the coherence of the nuisance doctrine suffered in the process.

among the earliest cases in which a significant trend to damage awards began to appear); Provine, supra note 97, at 45 (calling Boomer a "strict anti-balancing" case).

123 See, e.g., Westphal, 69 N.E. at 369.
124 101 N.E. 805 (N.Y. 1913).
125 See Boomer, 257 N.E.2d at 872.
126 101 N.E. at 806.
127 See id. at 805, 806.
128 See id.
IV. NUISANCE: TORT AND REGULATION

A. The Bureaucratization of Land Use Decisions

Eventually, the role of nuisance in resolving land use conflicts became less important as the rise of zoning bureaucratized land use issues. The key event which gave the stamp of approval to a process begun at the turn of the century was the U.S. Supreme Court's decision in Euclid v. Ambler Realty Company. In Euclid, the Court held that public authorities could in fact make aggregated nuisance-like decisions on a large scale without triggering a requirement of just compensation. Land use decisions no longer needed to be made on a case-by-case basis, either by courts using the common law or by legislative authorization of a particular developmental enterprise with the concomitant privilege to do harm carefully. Rather, a professional bureaucracy, directed by some political input, would make wholesale decisions as to appropriate land use in cities, towns, suburbs and exurbs. Those decisions, which affected all the residents of an area, created what Justice Holmes called a "reciprocity of advantage" for all who lived, worked and invested within a regime of rationalized land use planning. No inquiry was required into whether one owner or another deserved compensation, and the equitable remedy of injunction was rarely, if ever, appropriate.

Once zoning began the wholesale rationalization of land use, public authorities had only very rarely to appeal to a common law court for approval of the abatement of a public nuisance. Much nuisance prevention was in effect accomplished ante hoc by zoning. Zoning came to be viewed as the wholesale equivalent of legislative authorization and functioned as a defense to nuisance actions based on strict liability just as legislative authorization had. The broad brush of zoning

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130 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

131 In some respects the notion of reciprocity of advantage bears a resemblance to the classic common law nuisance rule that a private injury on a public nuisance must be one that is different in kind from that borne by all members of the public; an injury that is simply more intense in degree will not support a suit by a private party on a public nuisance. That rule was often used to defeat attacks on public improvements like railroads and bridges, whose building might severely impair the light or access of immediate neighbors, but also to a lesser extent that of passersby. See Transformation I, supra note 74, at 76–77.

replaced the more particularized but suspect technique of using legislative authorization to abate nuisances. In short, then, the reasons for maintaining a strict liability standard in nuisance—the conceptual protection of unitary property rights—had disappeared.

B. Lawyers, Liability and Nuisance

With the disappearance of the need for maintenance of a strict liability standard, "nuisance and other pockets of 'act at peril' liability were subjected to severe analytical pressure." The urgency of applying that pressure to eliminate strict liability causes of action in favor of "the liability-restricting tendencies of negligence" is illustrated by the way in which the plaintiffs' bar had taken advantage of the remnant of strict liability which nuisance afforded within the otherwise negligence-dominated ambit of tort law.

To begin that illustration, I must return the reader's attention to the categories of nuisance action. Among them was the private action on a public nuisance, an action that could cover personal injuries, if plaintiff claimed her particular injuries were caused by something that was also an interference with public rights. That action, because it was captioned "nuisance," allowed some personal injuries the benefit of a strict liability standard. Plaintiffs' lawyers were not long in recognizing that describing a client's tort claim as a nuisance could have a major impact on the outcome of the case. Not only would a nuisance caption provide the clear benefit of easier proofs, but it was also a way to avoid the hazard of contributory negligence as a defense to the plaintiff's action. Plaintiffs sought relief from the strictures of a negligence regime which not only refused relief for personal injuries due to defendants' careful, socially-useful activities, but also denied compensation even if defendant had been careless, if defendant could show that plaintiff had also failed to take due care. Thus, if their own contributory negligence might create a bar to recovery, plaintiffs brought personal injury suits as nuisance actions whenever they could. They argued that if defendant's negligence was not at issue in a nuisance action, governed as it was by strict liability,
then neither was plaintiff's. If one need not prove a defendant's failure to take due care, a plaintiff's failure to do so would not be relevant either. Thus, if a plaintiff could sustain a claim that her injuries were the consequence of a nuisance, her chances of recovery increased.

These lawyering efforts provoked a judicial response which at last transformed the nuisance strict liability standard into an explicit tort negligence standard, at least insofar as personal injury was concerned. Faced with precisely the attempt to gain the benefit of a strict liability standard for a personal injury case captioned as nuisance, Justice (then-Chief Judge) Cardozo said, "It would be intolerable if the choice of a name were to condition liability." He undertook to regularize the place of the personal injury action as a public nuisance and assimilate it to the law of torts.

The facts of McFarlane v. City of Niagra Falls were fairly typical of a private action on a public nuisance: a plaintiff, walking at night, stumbled on a city sidewalk, tripping over an irregular outcropping of cement she had often seen during the day, sustaining injuries from her fall. The case could easily have been brought as a standard personal injury case, but because the plaintiff had tripped on a defective public sidewalk, she could also claim damages for a particular injury due to interference with public rights, in other words, a public nuisance. The advantage of suing on a public nuisance was clear. After she sued the municipality, the defendant responded that McFarlane had been contributorily negligent because she had failed to take appropriate care to avoid a hazard of which she was aware. Unlike the ordinary tort plaintiff, she could reply that the concept was inapposite: as nuisance rested upon strict liability, her contributory negli-

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137 See id. The Annotation cites a number of nuisance cases in support of this proposition, including Philadelphia & Rail Road Company v. Smith, 64 F. 679, 680 (3d Cir. 1894), which stated: The doctrine of contributory negligence has no application [to this nuisance case]. One who decisively contributes to bring a mischief on himself may not impute it to another, but he who does hurt to his neighbor cannot escape liability for the damage thereby occasioned by showing that the person he has injured has also sustained other or additional damage of the same character through separate acts or omissions of his own. In such cases, each party is chargeable with the consequences of his own conduct, and neither of them is at liberty to shift his burden to the shoulders of the other. See id. The logic that one cannot harm another and claim immunity because of the other's fault did not apply in the ordinary personal injury action of the time. The necessity to treat all uses of property equally for fear of the destabilizing consequences of utilitarianism resulted in different approaches to injury to property and injury to person.


139 Id. at 391.
gence, if any, was not at issue. The trial court agreed with her and so instructed the jury. The issue of this instruction went to the New York Court of Appeals, the state’s highest court, where it became the subject of one of Cardozo's widely-cited opinions.

Cardozo acknowledged that the “primary meaning [of nuisance] does not involve the element of negligence as one of its essential factors.” But, he continued, as to things not intrinsically dangerous or illegal, “what was lawful in its origin may be turned into a nuisance by negligence.” In other words, where a use is not in itself unlawful or hazardous, negligence is the appropriate liability standard for the injuries attributable to that use. Cardozo cited to legislative authorization cases for his examples of the use of a negligence standard in nuisance, but his point was not that legislative authorization could modify the nuisance standard of liability. Rather, Cardozo was judicially modifying the common law as it applied to nuisance generally, concluding that where a use was lawful, the factfinder should judge not only the defendant's conduct, but the plaintiff's as well, by the rules of negligence. Thus, negligence was recognized as the appropriate standard of liability for all personal injury actions, whether labeled tort or nuisance. Where the nuisance was a consequence of defendant's negligent conduct, plaintiff could “not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance.”

The opinion contained a clue to Cardozo's larger aim, which went beyond simply linking plaintiff's negligence to defendant's. He did not rest with affirming that contributory negligence had a role as a defense against liability for harm done by a lawful use negligently conducted. Sua sponte, he went on to hint that the court might also recognize a defense of contributory negligence even where defendant's use was still governed by strict liability. Where the nuisance was what Cardozo called “absolute,” meaning it was intentional or

140 See id. at 392.
142 Id. at 391. This was rather a convoluted way of saying that common law nuisance was a strict liability cause of action.
143 Id. at 392.
145 McFarlane, 160 N.E. at 392.
itself illegal, the court was "not to be understood as holding by implication that . . . the negligence of the [plaintiff] is a fact of no account. . . . When a case of absolute nuisance shall be here, there will be need to determine whether contributory negligence in any sense is a factor to be weighed in determining liability." Negligence principles, in other words, were not to be barred from any aspect of this tort, although it had hitherto been considered governed by strict liability. The point then was to preserve and indeed enhance the primacy of negligence, with its "liability-restricting tendencies." Henceforth, a suit for personal injury, even if due to some offending property use that also imperiled the public, would be strictly within the tort regime of negligence. Post-McFarlane, nuisance based on personal injury fell wholly within the ambit of negligence. Private nuisance, the cause of action for interference with rights in land, could be resolved by an award of damages. All that remained was the formal assimilation of the liability standard of the private nuisance action for injury to rights in land with the negligence standard that prevailed in the rest of the law of torts. This was the task of the Restatements.

V. NUISANCE IN THE RESTATEMENT OF TORTS

Nuisance, originally assigned to the Restatement of Property and transferred from there to the Restatement of Torts, proved to be one of the most difficult and controversial sections of both Restatements of Torts. Many considered its description in the Restatement (First) inadequate, while the subsequent revision in the Restatement (Second) was the source of great controversy and division. To the extent courts have relied upon these sections of the Restatements to determine when a nuisance exists, this too has been a source of confusion about nuisance doctrine. This article does not rehearse the

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146 Id. at 393–94. Subsequently, the court held, in Delaney v. Philhearn Realty, 21 N.E.2d 507, 509 (N.Y. 1939), that contributory negligence may be no defense in a case of per se nuisance. Other courts, however, found plaintiff's contributory negligence relevant there precisely because there was no negligence on the part of defendant and hence no wrong-doing. In such a case, plaintiff's wrong-doing takes on heightened importance. See, e.g., Curtis v. Kastner, 30 P.2d 26, 28 (Cal. 1934).

147 White, supra note 133, at 129.

148 See supra text accompanying notes 118–28.

149 RESTATEMENT (SECOND) OF TORTS § 821A (Tentative Draft No. 15, 1969) at 6 [hereinafter Draft 15].
somewhat contested history of the Restatement project;\textsuperscript{150} rather, it is concerned with the contribution of the Restatements of Torts to the view of Justice Blackmun and others\textsuperscript{151} that nuisance is entirely unprincipled.

A. The Restatement (First)

When the project of the Restatements began, the chapter on nuisance was assigned to the group preparing the Restatement of Property.\textsuperscript{152} That group did not make much of nuisance and indeed omitted from their consideration public nuisance,\textsuperscript{153} including the personal injury action on account of a public nuisance. The property group only considered private nuisance, that is, the noninvasive interference with the use and enjoyment of land.\textsuperscript{154} "The result was that when the [nuisance] chapter was transferred to the Restatement of Torts, public nuisance was entirely omitted," in respect to interference with both public and private rights.\textsuperscript{155} Nor was the topic added after the shift.\textsuperscript{156} Thus, the work that was to cover the entirety of the common law of torts contained no discussion either of the public's right to be free of injurious property uses or of a plaintiff's suit for personal injury due to an act that was also an interference with public right, the aspect of nuisance most closely allied with tort.\textsuperscript{157} In fact, the tort lawyers and tort professors at work on the Restatement (First) of

\textsuperscript{150} For a variety of views on the history and nature of the Restatements project, see N. E. H. Hull, Restatement and Reform: A New Perspective on the Origins of the American Law Institute, 8 LAW & HIST. REV. 55, 84 (1990) (founding of American Law Institute (A.L.I.) and Restatement project "progressive"); WILLIAM TWINING, KARL LEWELLYN AND THE REALIST MOVEMENT 275–76 (1973) (Restatements "conservative"); G. Edward White, The American Law Institute and the Triumph of Modernist Jurisprudence, 15 LAW & HIST. REV. 1, 3 (1997) (Restatements were an "effort to resist as well as to embrace perceived changes in early twentieth-century American life."). At a minimum, Hull and Twining would probably agree with White that, at least in the minds of those who participated in creating them, the "Restatements were to clarify the meaning and shore up the stature of common law principles by stating them as precisely and categorically as possible." Id. at 23.

\textsuperscript{151} See supra text accompanying notes 1–11.

\textsuperscript{152} Draft 15, supra note 149, at 6.

\textsuperscript{153} The charge to the drafters of the Restatement (Second) notes that "tort liability for public nuisance . . . is entirely ignored by the present Restatement." RESTATEMENT (SECOND) OF TORTS § 821A (Tentative Draft No. 15, 1969), QUESTIONS FOR TENTATIVE DRAFT No. 15 SUGGESTED FOR DISCUSSION AT ANNUAL MEETING at xi.

\textsuperscript{154} See id. § 821A, SCOPE AND INTRODUCTORY NOTE at 7.

\textsuperscript{155} Id. § 821A, NOTE TO INSTITUTE at 6.

\textsuperscript{156} "This Chapter . . . does not deal with interests in which a person may be legally protected as a member of the public, such as interests in the use of public highways and public parks." RESTATEMENT (FIRST) OF TORTS ch. 40, SCOPE AND INTRODUCTORY NOTE at 215 (1939).

\textsuperscript{157} See id. § 822, cmt. f, on clause (a).
Torts treated nuisance as though it were solely an issue of interference with private property rights, that is, an invasion of interests in the private use of land.\textsuperscript{158} Courts and litigators dealing with cases of nuisance as personal injury were referred, insofar as they consulted the Restatement of Torts, to rules developed in cases about competing land use, though the two sets of cases were "not at all closely related," in the words of Dean Prosser, the original reporter for the Restatement (Second) of Torts.\textsuperscript{159} Obviously the potential for confusion and ill-considered decisions was immense.

Inappropriate reference to the law of competing land use was not, however, the only source of confusion in the Restatement (First). Its explication of nuisance liability was itself a hodgepodge of all the available techniques for avoiding strict liability. The nuisance section began with the declaration that strict liability was no longer applicable: "[t]here is no general rule of law that one acts at his peril in respect to interferences with another's use or enjoyment of his land."\textsuperscript{160} The drafters noted that this was a break with the common law standard of nuisance liability, but stated, with no further explanation, that "[a] change has occurred."\textsuperscript{161}

According to the Restatement, not every interference with private rights in land was actionable; rather, relief was appropriate only when the interference was substantial:

Life in organized society, and especially in populous communities, involves an unavoidable clash of individual interests . . . . It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference, and must take a certain amount of risk in order that all may get on together . . . . Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.\textsuperscript{162}

In this respect, the Restatement cautioned that nuisance was to be distinguished from trespass, though the reason for the distinction went unexplained.\textsuperscript{163} Trespass was liability-producing regardless of the degree of harm the invasion caused, while nuisance required

\textsuperscript{158} Invasions of Interests in the Private Use of Land was indeed the title of the first Restatement's chapter on nuisance.
\textsuperscript{159} Draft 15, supra note 149, § 821A Scope and Introductory Note at 10.
\textsuperscript{160} RESTATEMENT (FIRST) OF TORTS § 822 cmt. m (1939).
\textsuperscript{161} Draft 15, supra note 149, § 822 cmt. b (1969).
\textsuperscript{162} RESTATEMENT (FIRST) OF TORTS § 822 cmt. j.
\textsuperscript{163} See Draft 15, supra note 149, § 821D at 47.
substantial harm as a liability threshold. 164 Moreover, substantiality was to be measured by the standards of "normal persons in the community and not [by] the standards of the individuals who happen to be using or occupying ... [the] land at a particular time."165 This also differed from the ordinary common law tort approach that defendant must take the plaintiff as she found him.166 In nuisance, according to the Restatement, the defendant was allowed to claim that, because plaintiff's situation was particularistic, peculiar and singular, he was not entitled to relief. In effect, this amounted to the adoption of the English inquiry into community standards.167

A use was a nuisance if unreasonable, however. In the case of an unintentional nuisance, the Restatement (First) required proof of negligence, recklessness or conduct of ultrahazardous activities, all forms of unreasonable behavior.168 With regard to an intentional invasion, the reasonableness inquiry measured whether the gravity of harm to plaintiff's interest outweighed the utility of defendant's use.169 If the scales were out of balance in this respect, defendant was at fault and the harm due to the use compensable. Otherwise, the Restatement (First) expected plaintiffs to bear uncompensated harms that might, for them, be quite severe, if the utility of the defendant's conduct to society at large was great enough.

164 Restatement (First) of Torts ch. 40 Scope and Introductory Note at 225.
165 Id. § 822 cmt. g.
166 "[A] defendant who is negligent must take existing circumstances as he finds them, and may be liable for consequences brought about by his acts, even though they were not reasonably anticipated." William L. Prosser, Handbook of the Law of Torts 299–300 (3d ed. 1964).
167 See supra text accompanying notes 93–97.
168 Restatement (First) of Torts § 822(d)(ii) (1934). What the Restatement called "ultrahazardous" activity was governed by a form of strict liability, derived from the English case of Rylands v. Fletcher. L.R. 3 H.L. 330 (1868). In Rylands, the court found the defendant liable for the injuries consequent on activities, which, even when conducted with great care, involved extreme risk. Id. Rylands had a checkered career in the United States, with some arguing that it was simply a subset of nuisance doctrine's strict liability for injury to a neighbor's use and enjoyment of land. See, e.g., William Prosser, The Principle of Rylands v. Fletcher, in Selected Topics on the Law of Torts 135, 185 (1953). Others claimed it was a unique kind of liability based upon the particularly dangerous character of certain activities. See, e.g., Seavey, supra note 4, at 985–86.

Likening Rylands to nuisance liability allowed Prosser to conclude that an "unreasonableness" component was included within all nuisance liability, whether based on negligence or on "ultrahazardous" Rylands-type activities. In the latter case, the severity of the threat consequent on the activity itself made its injurious consequences ipso facto unreasonable and therefore liability was fault-based. William L. Prosser, Handbook on the Law of Torts 336, 395 (2d ed. 1955).

169 See Restatement (First) of Torts § 826 (1934). If the consequences of defendant's activities were not foreseeable, then reasonableness meant defendant had used due care, given the nature of the activity; that amounted to a negligence standard. See id. § 822(d)(ii).
So, in addition to the English policy of consulting the standards of the neighborhood rather than the condition of the individual plaintiff in order to decide whether a use was a nuisance, the *Restatement (First)* adopted as well the parallel American approach of balancing of equities, in the statement that “[r]egard must be had not only for the interests of the person harmed but also for the interests of the actor and for the interests of the community as a whole.” The process measured relative values, and was a comparative evaluation of conflicting interests. That evaluation was explicitly based upon “[h]ow much social value a particular type of use has in comparison with other types of use.” Obviously, such a test favored large-scale uses arguably benefiting large numbers of people over small-scale uses.

When the *Restatement (First)* spoke of “the utility” of defendant’s conduct, its drafters made clear that they meant its social value—that is, whether “the general public good is in some way advanced or protected by the encouragement and achievement of [the defendant’s] purposes.” If a defendant so advancing the public good could not correct the situation offensive to plaintiff without incurring “expense or hardship of such magnitude that it would be considerably less profitable to continue ... the invasion [was] not practically avoidable,” and would be allowed to continue despite its consequences to plaintiff. In effect, the existence of fault leading to liability was a social decision. Thus, the *Restatement (First)* articulated a two-part inquiry to determine liability for invasion of private rights in land: first, the harm was compared to the community standard to assess the substantiality of the interference; and second, a determination as to the reasonableness of the interference was made. Such reasonableness was based upon a balance of the equities between the harm to plaintiff and the social value of the defendant’s conduct.

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170 *Id.* § 826 cmt. b.
171 See *id.* at § 826 cmt. a.
172 See *id.* § 826 at cmt. b.
173 *Restatement (First)* of Torts § 827 cmt. e (1934).
174 *Id.* § 828 cmt. d.
175 *Id.* § 828 cmt. g.
B. The Restatement (Second)

When the Restatement (Second) was in contemplation, the reliance on community standards embodied in the Restatement (First) was a primary target.\(^{176}\) However, Dean Prosser, the first reporter for the American Law Institute's project to revise the Restatement of Torts, did not propose to change the view of fault as a combination of violation of community standards and lack of social utility. Professor Fleming James, with the support of other members of the torts advisory group,\(^{177}\) wrote a long, heavily-cited memorandum challenging Prosser on the liability issue.\(^{178}\) James argued that fault had not been part of the nuisance inquiry in the common law, which imposed strict liability where a nuisance existed.\(^{179}\) He noted that the Restatement (First) had required fault, either in the form of negligence, intent or participation in abnormally dangerous activities.\(^{180}\) But when intent was the basis of liability, common where defendant was likely to know in advance the probable effects of its enterprise on the surrounding neighborhood, the Restatement (First) said defendant’s conduct would not be considered faulty unless unreasonable, and would not be considered unreasonable where socially useful. Said James:

This line of reasoning is, of course, quite in keeping with the late nineteenth and earlier twentieth century urge to reduce all tort liability to terms of fault . . . . But this reasoning unduly simplifies the matter by leaving out of account a basis of liability without fault the recognition of which gives greater flexibility to the law of nuisance and better explains some lines of cases than the Restatement’s procrustean insistence on fault.\(^{181}\)

The “lines of cases” to which James referred were those withholding injunctive relief, but allowing a damages remedy.\(^{182}\) James argued that instead of forcing the liability standard to change in order to encompass decisions about social utility, the Restatement (Second) should explicitly approve the damages remedy courts had already

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\(^{178}\) See RESTATEMENT (SECOND) OF TORTS § 840F app. A at 132 (Tentative Draft No. 16, 1970) [hereinafter Draft 16].

\(^{179}\) See id.

\(^{180}\) See id.

\(^{181}\) Id. at 134 (citations omitted).

\(^{182}\) See, e.g., supra text accompanying notes 118–28.
fashioned. "[W]here the actor is also the beneficiary of the conduct, the law may render his privilege incomplete; it may make him pay for the actual harm caused by its exercise. This, it is submitted, is the proper explanation of liability in some cases of nuisance."183 A faultless defendant whose worthwhile use injured another should be held liable for damages, but not enjoined. In that case, "[the] defendant's . . . 'fault' lies in failure to pay for what he does rather than in doing the thing itself," wrote James.184 He went on to adduce many cases which had ordered and approved of a damages-no injunction remedy after a finding of nuisance.185 That remedy, according to James, required neither the Restatement (First)'s reversal of the traditional strict liability standard in nuisance, nor the unpalatable alternative of halting a profitable use which benefitted the community.

James' position was also that of Page Keeton and Clarence Morris, who had earlier argued in an influential article186 against the balancing of equities to deny relief in nuisance cases. Instead, they suggested that when a useful enterprise harmed a particular plaintiff, the plaintiff should be allowed damages but no injunction.187 The Keeton/Morris take on the problem was an interesting one. Although injunctions might look like "poor man's justice"188 (and they were often so described by courts),189 they were really a form of extortion and could drive socially-useful industries out of business. Keeton and Morris suggested letting a factfinder decide what the plaintiff's injury was worth, even if defendant had acted intentionally. A factfinder would assess the extent of defendant's liability, rather than leaving it to a plaintiff armed with an injunction and motivated to exact the highest possible price for it.

In discussions of the revision of the nuisance section for the new Restatement, Keeton suggested that it include the explicit statement:

184 Id. at 135.
185 Id. at 135–38.
187 The drafters of the Restatement (First), while disclaiming any intention to discuss the standards for granting injunctions, nonetheless said that, on occasion, damages should be granted to provide compensation for the harm done by a use too important to enjoin. That point was not embodied in black letter, but was part of the Scope and Introductory Note to Chapter 40. See Restatement (First) of Torts ch. 40 (1939).
188 Keeton & Morris, supra note 186, at 423–25.
189 See id. at 423–25 n.29.
[e]ven though one's conduct is reasonable in the sense that its social utility outweighs the harms and risks it causes, he is subject to liability\textsuperscript{190} for a private nuisance if the resulting interference with another's use and enjoyment of land is greater than it is reasonable to require the other to bear under the circumstances without compensation.\textsuperscript{191}

Over Prosser's "vigorous dissent," a majority of the American Law Institute (the "Institute") voted at its May 1970 meeting to adopt what were called the "James-Keeton Proposals."\textsuperscript{192} That summer Prosser resigned for reasons of health,\textsuperscript{193} to be replaced by John Wade, who undertook to revise the nuisance chapter in the direction suggested by James and accepted by the Institute.\textsuperscript{194}

Although the Institute voted to adopt them,\textsuperscript{195} the James-Keeton Proposals did not make it into the final version of the Restatement (Second). Instead, an addition was made to § 826, "Unreasonableness of Invasion," which provided that a use that did substantial harm was unreasonable if the offending use could compensate its neighbors for substantial harm without going out of business.\textsuperscript{196} With time running short, Wade also convinced the Institute in a close vote that the utility-harm balance Keeton suggested could better be explained as a comment demonstrating a specific application of a general principle, rather than in the black letter itself.\textsuperscript{197}

In the end, then, the Restatement (Second) did not substantially modify the Restatement (First)'s account of the liability decision in private nuisance cases claiming injury due to an ongoing industrial use. Nor did the Restatement (Second) succeed in easing the difficul-

\textsuperscript{190} The version actually voted on by the Institute included here the words "for damages, but not for an injunction." \textit{Restatement (Second) of Torts} (Tentative Draft No. 17, 1971), James-Keeton Proposals [hereinafter James-Keeton Proposals].


\textsuperscript{192} Robert Keeton, \textit{supra} note 177, at 600 n.9; \textit{see also} 47 A.L.I. Proc. 309–25 (1970).

\textsuperscript{193} \textit{See} Robert Keeton, \textit{supra} note 177, at 607.

\textsuperscript{194} \textit{See id.} at 600.

\textsuperscript{195} \textit{See id.}

\textsuperscript{196} John W. Wade, \textit{Environmental Protection, The Common Law of Nuisance and the Restatement of Torts}, 8 \textit{Forum} 165, 171 (1972). Wade's formulation, now part of the Restatement (Second), seems to lead to the corollary that a use that cannot afford to compensate its neighbors for substantial harm should be allowed to continue free of the burden of paying damages and without exposure to injunction. That view is currently considered unacceptable, at least to the extent that internalizing externalities is taken to be an aim of common law actions regarding competing uses. \textit{See}, e.g., David R. Hodas, \textit{Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm}, 16 \textit{Ecology L.Q.} 883, 889 (1989); Bryson & MacBeth, \textit{supra} note 10, at 274.

\textsuperscript{197} Wade, \textit{supra} note 196, at 171; \textit{see also} James-Keeton Proposals, \textit{supra} note 190, at 31.
ties of determining whether a remedy was available when there was injury on one side and utility on the other. Instead, it retained the Restatement (First)'s two-step inquiry into substantiality and reasonableness. An intentional nuisance is actionable when two circumstances exist: (1) the harm caused is substantial, and (2) the gravity of the harm outweighs the utility of the defendant's enterprise and makes its continuance unreasonable. The utility of the defendant's conduct includes both its utility to the community and its utility to defendant, thereby retaining the Restatement (First)'s implicit decision that a large investment should be more firmly protected against internalizing its costs than a small one.

As to the question of compensation, the Restatement (Second)'s position was apparently designed to keep a damages action from turning into a de facto injunction by threatening the continued existence of defendant's operation. Nonetheless, it had the effect of requiring plaintiffs and the community to bear the externalized costs of an operation when defendant could not afford to internalize. In exchange, one imagines, the community is able to retain the jobs which would otherwise be lost by the closing of the offending use.

In the last analysis, said the Restatement (Second), throwing in the towel on the attempt to give a tight account of nuisance liability, "the unreasonableness of intentional invasions is a problem of relative value to be determined by the trier of fact in each case in the light of all the circumstances of that case." A contemporaneous commentary concludes that, in regard to nuisance, it is "virtually impossible to state with surety what principles the Restatement (Second) embodies." The law professor who has tried to use the Restatement (Second) to teach nuisance to her torts or property class, and the practitioner who pulls it off the shelf for an introduction to the doctrine, would both agree.

There is a curious epilogue to the story of the Restatements. The unhappiness of some torts scholars and members of the Institute with the nuisance sections of the Restatement (Second) did not end with its publication or indeed with Dean Prosser's death. Subsequently, Page Keeton, a leading critic of Prosser's position on nuisance, edited

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198 See Restatement (Second) of Torts § 826 (1979).
199 See Keeton & Morris, supra note 186, at 423–24.
201 Bryson & MacBeth, supra note 10, at 272 n.148.
the first posthumous revision of Prosser's classic handbook with Robert Keeton, Daniel Dobbs and David Owen. Although most of the substance of the earlier edition was left untouched, the sections on nuisance were completely revised to comport with Page Keeton's views. According to the new editors, this was done because the earlier nuisance sections had "produced much confusion and some erroneous results."\(^{202}\) A reviewer comparing the fifth edition of the handbook to its predecessors says, "The chapters on nuisance and strict liability provide . . . dramatic instances of revisions based principally on differences of opinion between Prosser and [his] revisers."\(^{203}\)

In fact, the nuisance sections of the fifth edition of *Prosser and Keeton on Torts* are in substantial and direct disagreement with the *Restatement (Second) of Torts*. Two courts, each trying to decide whether liability for common law nuisance exists on the same set of facts, one relying on the authoritative handbook, *Prosser and Keeton on Torts*, and the other on the no less authoritative *Restatement (Second)*, could easily reach opposite opinions as to the commands of the common law. They would in such cases be better advised to turn directly to the common law of the relevant state.

**CONCLUSION AND A CAVEAT**

Nuisance both served and obstructed a variety of public and private needs at least in the period prior to the bureaucratization of land use. That very process of bureaucratization, culminating in the congeries of state and federal statutes and regulations that today govern land use, was in some measure a reaction to the inability of nuisance law to provide fully for a resolution of the land use conflicts which arose in a developed economy. Its land use dispute resolution function lost to regulation, nuisance then came mostly within the tort ambit, where its strict liability birth and subsequent history made it a cuckoo in the nest.

Attempts to rationalize the doctrine were, as we have seen, unavailing, because of the inherent conflict between the systemic necessity for strict liability as a protector of rights in property, and the utilitarian and intellectual concern about the inflexibility of the liability rule. Nuisance then fell into disuse. Consequently, *Lucas'* attempt to revive

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it must contend with this difficult history. In actuality, it is the courts that must apply *Lucas* that will have to contend with this sordid legacy.

In trying to untangle some of the strands that have contributed to the nuisance knot, this article cannot claim completion. In particular, what is omitted from this discussion is the difference between nuisance actions brought by private plaintiffs and those litigated by public plaintiffs. This is a topic so significant as to warrant a separate piece, particularly in light of *Lucas*. That case, though it calls for the application of nuisance law to the takings problem, virtually ignores public nuisance, the branch of nuisance doctrine most relevant to the inquiry about the common law’s understanding of the relationship of private property and public right. Rather than deal with that defect in *Lucas*, this article has attempted to explain the sources of confusion about nuisance doctrine, and to unpack some elements of that confusion.

The three factors identified as contributing to the current perception of nuisance as unprincipled—economic development, lawyering, and attempts at rationalization—are not of course unique to this doctrine. Indeed, one might say that they are always at work when the common law changes. Nuisance made its appearance in America in a form already somewhat less than clear because of its historical origins as a doctrine simultaneously partaking of elements of the criminal law, the law of real property, and the law of personal injury. Then, because the underlying doctrine itself was called upon to play such an important role in resolving land use conflicts during the transition from an agrarian to an industrial economy, the strains placed on it were perhaps more intense than those that economic development generally placed on the common law. Later, because of the odd formations left behind by these English and American historical forces, the doctrine was subjected to judicial responses to lawyering efforts on behalf of clients for whom nuisance law could help achieve successful litigation outcomes. Finally, the attempt to find an explicit consensus among lawyers and law professors about the shape and attributes of the doctrine created yet more confusion about its meaning and its content.

Thus, three strands—economic development, lawyering and conscious attempts at reconstruction—have all contributed their particu-

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lar piece to confusion over nuisance law. From the attempt to maintain the sanctity of rights in property against social encroachment came a de facto, but not de jure, damage remedy for injuries to rights in land otherwise abatable by injunction. The attempts of private plaintiffs' lawyers to find a place for strict liability in the law of torts gave rise to a judicial reaction declaring nuisance in cases of private injury to be wholly within the ambit of the tort standard of negligence, but without examination of the consequences of that declaration for the invasion of property rights. Lastly, the drafters of the Restatements produced an intellectually unsatisfactory consensus attempt to resolve both problems.

What this article has set forth is, all in all, not a pretty sight—the doctrine of nuisance, too contested to rationalize, too useful to abandon, is a mess, a muddle, a knot. It is, however, our current guide to the law of takings. This article at least provides court and litigator with a way to read the mass of nuisance cases that a search will turn up, a mass of cases that appears internally contradictory and, as Justice Blackmun says, devoid of "anything resembling a principle." Principles there are, but they are principles that have been both maintained and subverted.