an expensive, ill-prepared, and ineffective law enforcement program. The resulting failure, the authors maintain, is partially responsible for the public's fatalistic attitudes concerning crime and for the current distaste for the issue, two factors that prevent federal, state, and local governments from taking needed, practical steps to combat crime.

THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA. By Abraham S. Brown. Baton Rouge: Louisiana State University Press. 1981. Pp. xi, 104. $12.95. Professor Brown argues that judges should more aggressively assert their power to review guilty pleas and the dismissal or reduction of criminal charges. For too long, he contends, the legal system has asked the prosecutor to be both arbiter of the public interest and scourge of the active criminal. The judiciary, he concludes, is the proper branch of government to reconcile prosecutorial discretion with the dictates of law and the needs of society.

LOOKING AT THE LAW. By Neil Chayet. New York: The Rutledge Press. 1981. Pp. 446. $14.95. This compilation of Mr. Chayet's two-minute radio features is organized, appropriately enough, not by doctrinal area, but instead by the sort of people involved in a given case. The book is a collection of short stories, dominated by unusual characters and twists of plot, in which the law provides the often unsatisfactory resolution.

THE SUING OF AMERICA. By Marlene Adler Marks. New York: Seaview Books. 1981. Pp. 244. $11.95. This book examines the reasons that Americans turn to the courts. Using vivid illustrations from cases involving Hollywood stars and Washington politicians, Ms. Marks shows that litigants bring lawsuits to protest, to harass, to vindicate, to express grief, to achieve social change, and of course, to get money. In a litigious society, she notes, lawsuits are used not only to obtain judgments, but also to attract publicity and to heighten the conflicts of private life in the context of a courtroom drama.

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THE SOCIAL CONSEQUENCES OF COMMON LAW RULES

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In the past decade, commentators applying both economic and historical methods to the study of the classical common law have explicitly or implicitly made sweeping claims for the system's ability to allocate or redistribute substantial shares of wealth. In this Article, Professor Epstein challenges the assumption that the fundamental doctrines of the common law can have a decisive effect on the flow of resources in society. He calls attention to the constraints placed upon the system by the generality of its rules, the prospectively indeterminate alignment of economically interested parties, the expenses of adjudication, and the divergent social beliefs of the judiciary. He concludes that, while certain narrowly focused common law rules may work major economic effects, most interest groups would generally direct their attention to the legislative and administrative arenas, in which far greater gains and losses are to be expected.

I. THE THEME

The past generation of legal scholars has been preoccupied with the social and economic consequences of common law rules. One manifestation of this concern is found in the work of the law and economics movement, which has repeatedly sought to demonstrate that certain common law rules facilitate "efficient" resource use.[1] In a parallel development, some legal historians have insisted that courts have shaped the common law to promote or subsidize industrial growth and development, and hence to advance the interests of certain classes at the expense of others.[2]

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[1] The best known statement of the thesis is in R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977). For a more recent formulation, see Landes & Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981).

[2] L. FRIEDMAN, A HISTORY OF AMERICAN LAW 409-27 (1973); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 67-108 (1977); Gregory,

Both of these arguments assume that a choice between competing common law rules can have a significant effect on the allocation of resources and the distribution of wealth in society. This assumption often rests on the unstated premise that the issues subject to frequent appellate litigation have an institutional importance that equals their intellectual difficulty. But this premise is deeply flawed. Even if these choices do in theory redistribute wealth between social classes or encourage efficient behavior, their actual social impact is minimal.

The central theme of this Article is that the intellectual and institutional constraints on common law adjudication require one to be very cautious in attributing major social and economic consequences to common law rules. Ironically, the doctrinal developments that are offered as proof of the importance of common law adjudication often demonstrate, if anything, quite the opposite. In my view, the prolonged debates over the first principles of tort and contract law remain the subjects of common law adjudication precisely because the stakes are too small to provoke efforts to achieve legislative reversal of the common law outcomes.[3] To focus on appellate litigation is to choose an inaccurate measure of social importance. The introduction of a system of recording for land transfers or chattel mortgages may have great institutional significance even though the operation of such a system will rarely be litigated in the courts. Similarly, although a decision to require proximate causation as part of a plaintiff's tort case may not be the subject of repeated appellate review, such a decision has far greater importance than the choice between the foresight and directness tests of causation — two tests that are the subject of much litigation and scholarly dispute, but that yield the same results in the overwhelming number of cases.

In advancing this thesis, I am not contending that judges — who may well overestimate the importance of their own deliberations — do not seek social ends. Nor do I doubt that influential litigants try to shape the law to their own advantage. My argument is that structural features limit what the manipulation of common law rules can achieve. The more focused and sustained methods of legislation and regulation

Trespass to Negligence to Absolute Liability, 37 VA. L. REV. 359 (1951). A recent explanation of the 19th century English common law of contract concludes more cautiously that, while the rules "were no doubt broadly in the interests of the new commercial and industrial classes," the common law judges were sincere believers in their "dogmas" of the neutrality of the law and were often moved by considerations of the equities of an individual case. P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 389–90 (1979).

[3] *See, e.g., infra* p. 1730.

are apt to have more dramatic effects than does alteration of common law rules and thus will attract the primary efforts of those trying to use the law to promote their own interests.

This view is called into question by Morton Horwitz' assertion that business interests preferred to arrange subsidies through the common law system because adjudication is less politically conspicuous than the legislative process.[4] However, the contention that nineteenth century commercial interests and legislatures shrank from public debates on subsidy issues is questionable simply as a matter of historical fact.[5] Even on theoretical grounds the arguments seem weak. Common law decisions are public, not covert. And even if it were thought that judicial rhetoric could conceal a common law subsidy, commercial interests often have no choice but to do battle in the legislative and administrative arenas, whether their reception is friendly or hostile.[6]

In order to understand better the dominance of the legislative and administrative systems, consider the institutional barriers to effective wealth redistribution through the manipulation of common law rules. Control over the judicial process is divided between courts and litigants; no one group can dictate the case agenda. In addition, most common law rules are not cast in class form; there is no easy one-to-one correspondence between a given rule and the advancement of a particular social class. The ability to work substantial transfers of wealth between social classes is also severely hampered by the demand for public justification by written opinion that lies at the heart of the common law process. The protection that the resulting generality affords is far from absolute, for the degree of generality can vary widely with context: a rule that refers to the rights of *A* and *B* without qualification has greater generality than one referring to promisor and promisee, which in turn is more general than one referring to creditor

[4] M. HORWITZ, *supra* note 2, at 100–01.

[5] The public financing of infant industries was often the subject of controversy. *See* Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1754–55 (1981).

[6] The process does not necessarily cease with legislation, for constitutional challenges may still be brought in the courts. These challenges are beyond the scope of this Article, but it should be briefly noted that they have proven largely ineffective, especially in land use cases, precisely because of judicial deference to legislative action. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980); Miller v. Schoene, 276 U.S. 272 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). This deferential attitude is not a judicial brief for industrial development; environmental protection legislation is analyzed in exactly the same way. *See, e.g.*, Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). With the constitutional avenues foreclosed, the legislative and administrative realms dominate.

and debtor. The systematic demand for formal generality and neutrality in the common law may not guarantee that the proper substantive result will be reached in any individual case, but it does provide one bulwark against the invidious application of legal rules. The easiest way to oppress the poor, or to confiscate from the rich, is by laws directed at the rich and poor as such; the clandestine use of formally neutral principles is a poor second choice, to be used only when political or constitutional obstacles block the direct route. The issue is effectiveness, not motive. The foremost tools of racial and religious oppression have not been the doctrines of tort or contract. By the same token, effective aid to the poor depends on welfare payments or progressive taxation, not the manipulation of general common law rules.

Thus far I have spoken only of the barriers that prevent common law adjudication from being used in the first instance as a means to secure wealth redistribution. Equally formidable obstacles arise as a result of subsequent efforts to defeat the rules. One way in which disadvantaged parties can undo any wealth transfer is by altering their private conduct to minimize the impact of the law. Because judges normally do not have at their disposal an arsenal of administrative remedies, the possibilities of evasion will typically be substantial. A second means to counter the redistributive effect of common law rules is to seek modification of the legal standard by legislation. The greater are the stakes, the more likely it is that the distributive gains will be challenged. The original gain must be discounted by the probable collective response to the common law decision.

Similar difficulties plague efforts to attribute substantial allocative effects to particular common law rules. It is often said that the common law aims to minimize (perhaps within a constraint of justice) the total costs of accidents, accident avoidance, and administration of the legal system.[7] But it is far easier to state this condition than it is to discern a given rule that satisfies it. It is, for example, rarely easy to identify the cheapest cost-avoider or to trace the incentive effects of a given rule. The effort to make the defendant bear the social costs of his own activity will complicate efforts to regulate the plaintiff's conduct. And whatever trade-off is made on the question of incentives will be in systematic tension with the demand to economize on administrative costs, which rise with the sophistication and complexity of the common law liability

[7] *See, e.g.*, G. CALABRESI, THE COSTS OF ACCIDENTS 24–33 (1970).

rule.[8] Without a precise way to measure both the size and the direction of the countervailing costs and benefits, one cannot determine with confidence which rule is preferable, let alone show that the rule finally chosen substantially influences efficiency.

The allocative effects of choices between common law rules are, in any event, often small in comparison to what is accomplished by direct government action. Statutory controls can utilize a range of sanctions that are unavailable at common law: taxes, fines, inspections, filing requirements, and specific bans and orders with wide and dramatic effects. Even so simple a matter as placing limitation periods on private actions requires a statute; no common law principle explains why a cause of action valid on one day should be barred the next. Private law remedies are a limited arsenal in comparison;[9] the private law of nuisance and the Clean Air Act are very different modes of social control.

Having thus raised doubts about the assumptions underlying the claims of both schools, how can we measure the social consequences of various common law rules? Enough has been said to show that doctrinal complexity is a poor surrogate for social significance. In principle, the best possible approach is to make some direct estimate of the size of the stakes involved in a choice between rules; unfortunately, this frontal assault requires data that are not available. We can develop simpler tests, however, that may yield useful first approximations.

One such test is whether a legal rule places large numbers of cases within or without the common law system. Often these rules involve issues akin to standing or immunity — such as whether indirect purchasers may sue for injuries sustained from defective products, or whether hospitals are entitled to charitable immunities. These "gatekeeper" rules are presumptively of enormous importance even if their status is but infrequently litigated. Unlike general tort liability standards, these rules gain their effect because they can be directed to specific social classes or groups.

A second measure of the importance of a given decision lies in the willingness of those disadvantaged by the rule to expend resources to persuade a legislature or administrative agency to change it. The lobbying and coalition formation essential to secure legislative or regulatory intervention usually

[8] *See infra* p. 1742.

[9] *See, e.g., infra* pp. 1741–42.

require a major effort, often in the face of determined opposition from those who benefit from the common law status quo. Of course, the absence of such an effort does not necessarily establish the insignificance of a choice of rules, for those who are disadvantaged may lack the economic or political resources to make themselves heard. But when there *is* such an effort to undo common law outcomes, we can have some confidence that the stakes in question are commensurate with the expense incurred.

A third measure of the power of a rule is the extent to which it cuts off private avenues of escape by the parties whom it regulates. Retroactive rules have just this characteristic, and thus should be examined with the expectation that they have substantial social effect. As noted above, it is usually possible to mitigate losses when faced with a known rule of future application. This possibility is foreclosed when a new rule is applied to completed transactions. The creditor who is told that he cannot make a certain class of loans may lament the loss of the profits he could have expected from such loans. But the creditor who is told that he cannot reclaim interest and principal on those same loans when already made is subject to much greater financial loss.

A rule is therefore more likely to work substantial wealth transfers — perhaps, but not necessarily, across social classes — when it has retroactive effect. The direct effect of a retroactive rule on resource allocation is likely to be smaller, because efficiency incentives operate primarily with respect to future transactions. Yet systematic efficiency consequences might result if actors were reluctant to rely on established rules in similar circumstances for fear of retroactive invalidation.

The distinction between retroactive and prospective legal changes does not have absolute force. Even when a rule is wholly prospective in application, its sweep can be so broad that it has dramatic consequences even after efforts to mitigate are taken into account. Rules that require parties to abandon or restructure their standard methods of doing business may have substantial social consequences.[10] The bank that is barred from lending at more than five-percent interest has lost a great deal, even if it is entitled to collect both interest and principal on loans already made.

[10] The use of market outcomes — real or hypothetical — as the baseline against which to measure the quantitative effect of a rule has only descriptive, and not normative, force. In each situation, it is an entirely separate and open question whether the result achieved by the rule is more expedient or more just than the contractual baseline.

To assess the validity of the incautious claims made about the allocative and distributional effects of certain common law doctrines, Parts II and III of this Article examine several doctrinal disputes with an eye not to their proper substantive outcomes, but to their social importance. My treatment is necessarily very selective. But the rules chosen for examination have been the focus of extensive judicial and academic debate, and the analysis applied to them can readily be extended to other areas.

In the law of torts, the persistent tension between negligence and strict liability — a distinction on which great consequences are said to depend — is in my view a matter of limited social effect. The extended academic discussions of the differences between the two standards have not given serious consideration to whether the choice between them is worth the attention lavished on it.[11] Statutory measures such as workers' compensation systems and direct land use controls through zoning have far more telling social consequences, while common law rules directed toward specific groups — employers, manufacturers, or physicians — fall uneasily and unevenly between the two extremes.

In the law of contract, the great colloquy over consideration and allied doctrines primarily concerns the internal logic of the legal system. In contrast to consideration doctrine, the narrowly focused retroactive invalidation of the standard due-on-sale clause[12] has quite dramatic consequences, and the advent of employment discrimination and antitrust laws has wrought massive changes in labor and commercial relations.

II. Tort: Negligence and Strict Liability

It has often been said that the crucial choice for the tort system is that between the rules of negligence and strict liability in cases of accidental harm.[13] The most cursory examination of the numerous cases and scholarly articles on this issue attests to its central position in the elaboration of tort doctrine and in the litigation of disputed cases.[14] Once stated,

[11] *See* sources cited *supra* note 1 & *infra* note 14.

[12] *See infra* p. 1750.

[13] I have said it myself. C. Gregory, H. Kalven & R. Epstein, Cases and Materials on Torts 47 (3d ed. 1977).

[14] The classic treatment is still O.W. Holmes, The Common Law ch. III (1881). For a more contemporary discussion, see Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972); Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972); Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 Ga. L. Rev. 963 (1981).

the chosen rule shapes the preparation, settlement, and trial of cases that come within its capacious boundaries. The professional roles of lawyers and judges require mastery of the legal rules and the ways in which they can be extended, distinguished, and applied. It is to precisely this endeavor that most traditional legal scholarship is quite properly directed.

Yet more has been claimed for this basic choice of the tort system. The negligence rule — which has dominated the scene for the past 100 to 125 years — has been credited on one hand with subsidizing industrial development and on the other with maximizing the efficient use of scarce resources. The first of these assertions — especially in the work of Lawrence Friedman and Morton Horwitz — has been associated with a progressive, not to say radical, critique of the common law.[15] The second, especially in the work of my colleague Richard Posner, has been associated with its conservative defense.[16] My purpose here is not to take sides in this debate, but to show that both sides share the error of attributing to the issue greater significance than it warrants. In dealing with this question, it is not necessary to make any final assessment of the relative redistributive or allocative effects of the negligence and strict liability rules. Indeed, it is quite consistent with the central thesis of this Article to conclude that the common elements of the two rules dominate whatever doctrinal differences exist between them and that any major shifts in wealth or utility attributable to legal rules are apt to result from direct forms of social control, such as statutes and regulations, rather than from the evolution of the common law.

A. Distributional Consequences

The claim that the common law of negligence provided a "subsidy" for industrial development rests upon two separate premises. The first is that a rule of strict liability — the conceptual rival of negligence — constitutes the neutral baseline against which the subsidy is measured. The second is that the negligence rule effected a truly substantial redistribution

[15] See L. FRIEDMAN, *supra* note 2, at 409–11; M. HORWITZ, *supra* note 2, at 99–101. The decisive in-depth historical critique of the Horwitz and Friedman thesis is Schwartz, *supra* note 5. His article, which rests on a comprehensive review of 19th century California and New Hampshire tort cases, *id.* at 1719 & n.14, goes far to make up for the lack of any exhaustive nationwide survey, *see id.* at 1719 n.11, 1774 n.412; *see also* Scheiber, *Regulation, Property Rights, and Definition of "The Market": Law and the American Economy*, 41 J. ECON. HIST. 103, 107–08 (1981) (calling for study of more states).

[16] See R. POSNER, *supra* note 1, § 6.11, at 137–42; Landes & Posner, *supra* note 1, at 873–80; Posner, *supra* note 14.

of wealth into industrial channels. For those who think that a negligence system provides the neutral baseline in tort cases,[17] the question of subsidy cannot arise, no matter how important the distributional consequences of the negligence rule.[18] For those like me[19] and, I believe, Horwitz,[20] who think that the strict liability rule is proper in actions between strangers, a practical demonstration of the subsidy requires only a showing of both substantial and systematic differences in case outcomes. There is, however, reason to doubt that the effects of any general tort rule are either substantial or systematic.

1. Proportion of Cases Affected. — In both property damage and personal injury actions, the doctrinal differences between negligence and strict liability are likely to alter the outcomes only of marginal cases. Under either standard, the plaintiff must establish causation in fact and offer a calculation of damages. The difference between the two regimes therefore goes to the single and doctrinally important issue whether the defendant breached a duty to exercise "reasonable" care. But in practice, if negligence were held legally necessary, it could usually be proved; as a brute fact of nature, most accidents occur because someone has failed to take the elementary precautions needed to prevent them. What gaps remain between the two rules can be and have been bridged by res ipsa loquitur[21] and other evidentiary presumptions.

[17] *See, e.g.*, 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 446–47 (2d ed. 1937); O.W. HOLMES, *supra* note 14, at 92–93; Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908).

[18] Given that one must choose some rule for every case, a neutral baseline is necessary if one is not to say trivially that any distributional consequences of the choice constitute a "subsidy" by definition. Without a baseline, a strict liability rule necessarily confers a subsidy, so defined, upon those who are disadvantaged by a negligence system, and vice versa. Recognizing the existence of a baseline gives the concept of subsidy both moral force and analytic power. Moreover, Horwitz should be eager to accept this step, for one can more easily condemn a subsidy that works against the poor if it is in principle possible to avoid conferring any subsidies at all.

[19] Epstein, *supra* note 14, at 189.

[20] *See* M. HORWITZ, *supra* note 2, at 89 (characterizing 19th century developments as "habits of thought which would undermine the basic presumption of compensation for injury that had been erected over several centuries of the common law"); *id.* at 108 ("[T]hese new doctrines . . . underlined a deep tendency in the application of even conventional doctrine in favor of the active and powerful elements in American society.").

[21] Byrne v. Boadle, 2 Hurl. & C. 722 (Ex. 1863), which first announced the doctrine of res ipsa loquitur, was decided shortly after the negligence standard had gained widespread currency in the cases. For the use of various presumptions similar to res ipsa loquitur, see, for example, Treadwell v. Whittier, 80 Cal. 574, 582–83, 22 P. 266, 268–69 (1889) (unexplained fall of elevator); Emery v. Boston & Me. R.R., 67 N.H. 434, 435, 36 A. 367, 367 (1893) (personal injury presumed caused by sudden

land holdings and plans of firms will differ, interests will inevitably clash and firms will have different experiences with respect to their frequency of alignment as plaintiff or defendant. There are no effective means by which businesses could cooperate to define a common agenda in property damage cases.

These barriers to the redistributive thesis are further strengthened by the fact that many, if not most, property damage suits are likely to set one firm against another, so that any wealth transfer that does occur will be confined within a single class. Industries tend to concentrate in certain regions, if only because of the enormous advantages of being close to customers, suppliers, and even competitors. It may have been coincidental that the plaintiff in *Rylands v. Fletcher*[24] was a miner like the defendant, but there was never any reason to assume that most plaintiffs in the flooding cases would be farmers. All the parties in the two flooding cases[25] that preceded *Rylands v. Fletcher* were miners. Because businesses are concentrated in industrial zones or on land suited to the intended enterprise, property damage actions will commonly be fought by parties in *some*, if not the same, business: flooding cases arose between miners, just as cattle trespass cases arose between neighboring cattle owners.[26]

Finally, the difficulties of attaining subsidies through common law rules are further complicated by the "public good" problem.[27] Let it be supposed that a general rule, whatever its content, provides benefits to a large number of parties who are not before the court. Yet a single firm must bear all the costs of developing the rule in the individual case. What reason is there to expect that any firm will shoulder all the costs when it captures only a tiny fraction of the benefit? If the stakes of an individual case are substantial, the firm's safer and more cost-effective route typically is to concentrate on the facts rather than seeking to persuade the court to champion a novel or controversial doctrine.

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[24] 3 L.R.-E. & I. App. 330 (H.L. 1868).

[25] Baird v. Williamson, 143 Eng. Rep. 831 (C.P. 1863); Smith v. Kendrick, 137 Eng. Rep. 205 (C.P. 1849).

[26] When it was proposed in England in 1953 to convert cattle trespass into a tort of negligence, at least for personal injuries and damage to animals, the proposal was rejected because of the opposition of farmers themselves. Report of the Committee on the Law of Civil Liability for Damage Done by Animals, Cmnd. 8746, at 4, para. 3 (1953) ("This class of liability is of interest only to farmers and landowners[,] and the general public are not affected thereby.").

[27] For the classic statement of the theme, see M. OLSON, THE LOGIC OF COLLECTIVE ACTION ch. 1 (1965).

To avoid all of these difficulties, commentators sometimes say that judges can be counted on to turn the common law to the task of subsidizing industrial development. Even if judges were so inclined, however, they would have to overcome the same problem that stymies individual firms: how to know which rule will advance the aggregate interests of the class they wish to help.

Moreover, there is little historical evidence of a consistent judicial bias in favor of industry. In both strict liability and negligence cases, courts showed a marked hostility to the idea that even statutorily authorized activities, such as railroads and canals, could be immunized from damage actions.[28] And disputes over the more general choice of liability rule reveal that the judiciary has never been of a single mind on the proper foundations of tort liability, possibly because of disagreement on more fundamental issues of social policy. Nineteenth century opinions are notable primarily for their marked divergence on the issue of negligence versus strict liability.[29] Indeed, the dominant view was that nuisance cases were controlled by strict liability principles, which the redistribution theorists regard to be contrary to industrial interests. There was certainly language in the cases that spoke in terms of the "reasonableness" of a defendant's conduct; yet while this formula sometimes referred to the want of negligence, it often — one can probably say most often — referred only to some minimum level of harm necessary to sustain the basic cause of action.[30] The dominant view also inclined toward strict lia-

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[28] *See, e.g.*, Hookset v. Amoskeag Mfg. Co., 44 N.H. 105, 107, 110 (1862) (strict liability); Booth v. Rome, W. & O. Terminal R.R., 140 N.Y. 267, 272 (1893) (negligence). *Contra* M. HORWITZ, *supra* note 2, at 79–80. This hostility is also clearly implicit in Lexington & Ohio Ry. v. Applegate, 38 Ky. (8 Dana) 289, 299–300 (1839) (legislature may not authorize takings for private purposes), on which Horwitz relies. *See infra* pp. 1730–31, 1733. What is obtained is protection against criminal prosecutions, and perhaps against injunctive relief in advance of a showing of particular harm. *See Applegate*, 38 Ky. (8 Dana) at 298, 300. The English courts similarly refused to imply statutory immunities. *See, e.g.*, Powell v. Fall, 5 Q.B.D. 597 (1880) (allowing strict liability actions in tort against railroads that had complied with all statutory requirements; disapproving Vaughan v. Taff Vale Ry. Co., 157 Eng. Rep. 1351 (Ex. Ch. 1860) (requiring proof of negligence in same situation)).

[29] *See* Schwartz, *supra* note 5, at 1737–53, 1758–59. The extreme differences among the social theories apparent in the various speeches delivered by the judges who decided *Rylands v. Fletcher* are exceeded only by the differences in interpretation subsequently put on those divisions by commentators. *Compare* Bohlen, *The Rule in* Rylands v. Fletcher, 59 U. PA. L. REV. 298, 373, 423 (1911) (arguing that block of upper-class judges swung the decision), *with* Molloy, Fletcher v. Rylands: *A Reexamination of Juristic Origins*, 9 U. CHI. L. REV. 266 (1942) (investigation of backgrounds of judges revealed no class-related groupings in the panel).

[30] *See* F. HARPER & F. JAMES, THE LAW OF TORTS § 1.24 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 89, at 596–600 (4th ed. 1971).

In support of this proposition, Horwitz[39] relies upon *Smith v. City of Boston*.[40] The plaintiff, who owned lands abutting a private street, was forced to take a more circuitous route to his properties when a portion of the street was closed, pursuant to a local charter, to make way for a railroad track. Chief Justice Shaw, speaking for the court, rejected the plaintiff's claim for damages. Horwitz's key criticism of the case is that Shaw distorted the traditional threshold test for maintaining a private nuisance action by shifting the inquiry from the degree of harm suffered to its kind. The court thereby, contends Horwitz, dismissed the suit of a landowner who had suffered the type of disproportionate injury that had previously furnished the basis for a private claim. This criticism again ignores the institutional context of the court's decision:

> Upon the question of public convenience, it is the province of the mayor and the aldermen, upon a balance of all considerations bearing upon it, to decide. It is not to be presumed that they will discontinue a highway once laid out unless the considerations in favor of the discontinuance decidedly preponderate.[41]

Moreover, Horwitz overdraws the novelty of the distinction between degree and kind; he fails to note that Shaw continued to recognize exactly the class of harm to property rights traditionally given individual redress — complete loss of access — but denied relief because the plaintiff's land was still accessible by other streets.[42] *Smith* thus adhered to the precise line set out as early as 1535. The involvement of railroad interests in the case had nothing to do with the outcome; if the street had been converted to a playground, the same set of legal principles would have applied. The issue was not the promotion of growth, but the distribution of governmental power.

The institutional demarcation recognized in *Applegate* and *Smith* requires some fixed and definite line to separate legislative and judicial functions. Personal injuries and complete loss of access provide that line; relative changes in property values blur it beyond recognition. The courts can hardly entertain large numbers of individual actions every time a street is closed. In a similar vein, the judges who decided *Applegate* were aware that courts are incapable of controlling overall levels of pollution; they lack the investigative resources to

[39] *Id.* at 77–78.

[40] 61 Mass. (7 Cush.) 254 (1851).

[41] *Id.* at 256.

[42] *Id.* at 255–56.

canvass the alternative measures that might be adopted, the financial resources to implement preferred alternatives, and the plenary coercive power to ensure that the solution is adhered to by the whole class of responsible parties. Indeed, enjoining operation of the railroad in an attempt to reduce air and noise pollution might, under the circumstances, have been counterproductive; as the court noted, the elimination of the railroad would have encouraged the use of substitute modes of transportation that might have been more "pestilent" than the railroad.[43]

The institutional argument about public nuisances extends across all major public choices that ban or restrict certain forms of development. In the context of modern zoning, the critical decision is not whether the operation of a particular factory or apartment house happens on the facts of the case to constitute a nuisance. It is whether the structure may be built at all. Damage suits for nuisance under a negligence standard levy a small, random tax on land use; speaking crudely, the substitution of a strict liability standard merely raises the tax by a small amount. A flat prohibition by zoning, on the other hand, removes the entire expected profit from the preferred use of a parcel of land and may easily reduce the property's value by eighty percent overnight, as did the ordinance involved in *Village of Euclid v. Ambler Realty Co.*,[44] the *fons et origo* of modern zoning law.

These shifts in value are well understood by the public at large; zoning board meetings are well attended precisely because such boards can and do act selectively, creating and destroying stores of wealth.[45] In fact, the whole field of zoning

[43] *Applegate*, 38 Ky. (8 Dana) at 309. Far higher levels of environmental harm had to be tolerated in the 19th century, inasmuch as the direct and opportunity costs of controlling such harm were much higher in the relatively primitive state of contemporary technology. *See* Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974) (noting high levels of pollution tolerated in 19th century English nuisance law). *See generally* Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 101–02 (1979) (discussing inadequacy of 20th century tort remedies as means of controlling pollution); Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126, 1130–37 (discussing inadequacies of modern nuisance law for controlling pollution); Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's* Costs (Book Review), 80 YALE L.J. 647, 667–86 (1971) (arguing that cost internalization is not an effective method of combating air pollution).

[44] 272 U.S. 365 (1926).

[45] The selection may be at the level of subcategories of rights, *see, e.g.*, Newport Assocs. v. Solow, 30 N.Y.2d 263, 283 N.E.2d 600, 332 N.Y.S.2d 617 (1972) (zoning ordinance creates air rights), *cert. denied*, 410 U.S. 931 (1973), or at the level of individual properties, *see, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978) (upholding historical-preservation zoning).

is marked by intensive efforts to influence decisions, to mount constitutional challenges to government action, to advance and beat back legislative proposals.[46] Think of the consequences of transparent devices such as large-lot zoning directed against lower income classes.[47] Such matters are the natural focus of interest group politics. What railroad, what manufacturer would expend resources lobbying on the structure of common law rules of negligence or strict liability when much more urgent issues and more powerful measures are at hand? We should expect attention to be directed to questions such as whether rights-of-way can be acquired, whether competitors can be excluded, and whether high rates can be propped up by state-supported controls.[48] And as a rule, such issues are addressed by statute or regulation rather than through common law adjudication.

(b) Personal Injuries. — In principle, personal injury cases offer a greater opportunity for systematic redistribution than do property damage suits. In most personal injury actions, when a firm is involved, it is as the defendant against an individual plaintiff; thus, many of the information costs and countervailing interests that operated to undermine the redistributive thesis in the property area[49] are not problems in the

[46] *See, e.g.*, William C. Haas & Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

[47] *Compare* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (developing municipality may not zone so as to exclude low-income and moderate-income people), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975), *with* Pascack Ass'n v. Mayor of Washington, 74 N.J. 470, 379 A.2d 6 (1977) (holding *Mt. Laurel* doctrine inapplicable to established communities). For trenchant criticism, see Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1418–23 (1978) (zoning may contribute to "deplorable" segregation along economic and racial lines, inconsistent with tenets of reasonableness and fairness).

[48] The special grants to the Northern Pacific Railroad of alternate blocks of land for the entire length of the road from Lake Superior to Puget Sound and Portland, Oregon were authorized in the Act of July 2, 1864, ch. 217, 13 Stat. 365, as modified and supplemented by the joint resolution of May 31, 1870, 16 Stat. 378. The Supreme Court held that the original statute was converted into a contract by acceptance and completion of the work, United States v. Northern Pac. Ry., 256 U.S. 51, 64 (1921), but later held that the Railway, by its failure to perform, forfeited its contractual right to select certain land, United States v. Northern Pac. Ry., 311 U.S. 317 (1940).

On the creation of the Interstate Commerce Commission as a response to the inability of railroads to maintain their rate structure in the face of increasing competition, see G. KOLKO, RAILROADS AND REGULATION 1877–1916, chs. 1–6 (1965). The issues here dwarf those of tort liability for the use of railroad equipment or lands and must be far more important than the personal injury cases discussed at *infra* pp. 1735–36. The costs of adjusting insurance or self-insurance to any changes in tort liability can hardly compare with the effects of the disintegration of a cartel.

[49] *See supra* pp. 1727–28.

personal injury field. Of course, the convergence of negligence and strict liability[50] makes it probable that any aggregate effect, whether or not redistributive, will not be great. Several other factors, discussed below, raise additional doubts about the relative magnitude of the transfers involved.

(i) Injuries to Strangers. — In the nineteenth century, as in the twentieth, the highway accident cases — in which Horwitz himself locates the origins of the negligence standard[51] — typically involved private parties on both sides. Whatever the precise numbers, any efforts to arrange a subsidy for industrial defendants would have been constrained by the need to develop a set of rules that would also do adequate service between private citizens, some of whom would themselves be well-to-do. The only way to create a powerful subsidy for industry in a common law setting would have been to develop a lower standard of care for firms than for private individuals. Here the analysis of judicial behavior must ultimately rest on empirical evidence. To the extent that variations in the standard of reasonable care can be detected, Gary Schwartz's masterful and exhaustive study of New Hampshire and California cases demonstrates that, in fact, very *high* standards were often expected of institutions — manufacturers, railroads, and electric companies, among others — whose expertise was taken for granted by the courts.[52] In addition, it is not clear that industrialists would have enthusiastically supported such a double standard; no corporate executive could be certain that he would not himself be injured by another firm's defective elevator or brakeless streetcar. Would he have been willing to give up his own right to sue for the resulting loss of his earning power?

Other doctrinal choices support this same view. The redistributive thesis should predict an aggressive expansion of the contributory negligence defense. Of perhaps even greater importance, the thesis should also predict a refusal to adopt strict liability principles in vicarious liability cases, in order to help to insulate the corporation from suits by strangers, for a stringent strict liability standard would let many suits through the gate. Yet these predictions also fail empirically; in neither of these areas do we see a steady, confident progression of the cases to a single end. The nineteenth century judiciary viewed contributory negligence with some ambivalence[53] and applied

[50] *See supra* p. 1725 & note 21.

[51] M. HORWITZ, *supra* note 2, at 88.

[52] *See* Schwartz, *supra* note 5, at 1744, 1749–52, 1757–59.

[53] *See id.* at 1759–63 (describing New Hampshire and California cases).

vicarious liability expansively,[54] notwithstanding the theoretical doubts that many contemporary legal writers entertained about a principle that could hold *A* responsible for the act of *B* without any personal wrongdoing on *A*'s part.[55] Indeed, the nineteenth century doctrinal disputes over the basis of tort liability had a very similar flavor to those that had taken place centuries before in England,[56] or indeed to those recorded in the standard Roman law texts.[57] The uncertain course of judicial decisions over the generations accurately reflects both the difficulty of the subject matter and its marginal economic impact.

(*ii*) *Industrial Accidents.* — At first blush, the redistributive thesis does find support in the field of industrial accidents. But the reason that common law doctrines mattered in this setting is that they were narrowly drawn and functioned as "gatekeeper" rules. In the extensive nineteenth century discussions of employers' liability, the choice between negligence and strict liability was overwhelmed by the enormous disagreement over whether the assumption of risk defense, especially when "implied" from conduct, was sufficient to bar an employee's negligence cause of action.[58]

Employers constitute a (relatively) compact group; both they and employees know their future roles, and — unlike

[54] *See, e.g.*, Limpus v. London Gen. Omnibus Co., 1 Hurl. & C. 526, 158 Eng. Rep. 993 (Ex. 1862) (holding that a master remains responsible for the torts of his servant no matter how emphatically he orders the servant not to engage in the tortious activity).

[55] *See* Holmes, *Agency* (pts. 1 & 2), 4 HARV. L. REV. 345 (1891), 5 HARV. L. REV. 1 (1891). As early as 1876, Lord Blackburn justified vicarious liability on the ground that employers are rich and employees poor. River Weir Comm'rs v. Adamson, 2 App. Cas. 743, 767 (1876). In 1916, Baty attributed the growth of vicarious liability to the desire to ensure that "damages are taken from a deep pocket." T. BATY, VICARIOUS LIABILITY 154 (1916).

[56] *See* C.H.S. FIFOOT, *supra* note 36, ch. 8 (1949) (interpreting the early forms of action to be negligence-based); Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth-Century Law of Torts*, 128 U. PA. L. REV. 361 (1979) (detailing the confused early relationship between trespass and case, and generally interpreting both as forms of strict liability); Winfield, *The Myth of Absolute Liability*, 42 LAW Q. REV. 37 (1926) (negligence interpretation).

[57] *See, e.g.*, F. LAWSON, NEGLIGENCE IN THE CIVIL LAW (1950). The Roman sources discussed by Lawson are largely drawn from the Lex Aquilia, which has overtones of both negligence and strict liability.

[58] The fellow servant rule, announced in England in Priestley v. Fowler, 3 Mees. & W. 1, 150 Eng. Rep. 1030 (Ex. 1837), and then adopted in the United States in Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49 (1842), was the most extreme form of the assumption of risk doctrine. Even in this form, the extent of redistribution is unclear, given the possibility that employees received increased wages to offset the greater risk to which they were subject. The court in *Farwell* explicitly relied upon the possibility of wage adjustments in approving the fellow servant rule. *See* 45 Mass. (4 Met.) at 57.

landowners and victims of plummeting elevators — neither are plagued by conflicting interests. These differences in the original positions of the interested groups may explain the considerable legislative efforts in the nineteenth century to modify common law rules governing liability for industrial accidents. Some statutes abolished the common employment defense;[59] others removed the assumption of risk defense;[60] still others imposed specific statutory duties on employers for the benefit of their workers and of third parties.[61]

But it comes as no surprise that major structural changes in the treatment of industrial accidents, changes that did not occur until the early twentieth century, resulted from legislation. The revolution was, of course, the adoption of comprehensive workers' compensation laws, which — because of their complex administrative provisions and detailed benefit rules — could not have been introduced by judicial decision. Although one must not discount the importance of ideological causes of the change, the economic stakes involved are indicated by the willingness of all interested groups to bear the substantial expenses of organizing coalitions, testifying, lobbying, and drafting and passing legislation.[62]

[59] Railway workers were the chief beneficiaries of the movement. *See* Act of Mar. 5, 1856, Pub. L. No. 103, § 3, 1855–56 Ga. Laws 155, 155; Act of Apr. 8, 1862, ch. 169, § 7, 1861–62 Iowa Acts 197, 198; Act of Feb. 26, 1874, ch. 93, § 1, 1874 Kan. Sess. Laws 143, 143. To measure the impact of abolishing the rule, one should in principle be able to compare both accident and wage rates between jurisdictions that did and did not abolish the common employment defense during the 19th century. A study of this sort would demand that the investigator hold constant all relevant variables (such as age, composition of workforce) and would be extraordinarily difficult, but only such a study could resolve the issue.

[60] *See, e.g.*, Act of Feb. 23, 1897, ch. 56, 1897 N.C. Priv. Laws 83, *construed in* Coley v. North Carolina R.R., 129 N.C. 407, 409–10, 40 S.E. 195, 196–97 (railway liability act is "unconditional abrogation" of the defense), *aff'g in relevant part after reh'g* 128 N.C. 534, 538–41, 39 S.E. 43, 44–46 (1901).

[61] *See, e.g.*, Safety Applicance Act of 1893, ch. 196, 27 Stat. 531, *amended by* Act of April 1, 1896, ch. 87, 29 Stat. 85 (compelling railroads to equip all cars in interstate commerce with automatic couplers and continuous brakes, and abolishing assumption of risk defense for cases of employee injury on nonconforming equipment). The expense of the modifications required was so great that railroads were granted extensive periods of time in which to comply. The great movement to workmen's compensation acts in the early 20th century, *see infra* p. 1738 & notes 63–65, was preceded by a number of 19th century employers' liability acts. *E.g.*, Act of May 14, 1887, ch. 270, 1887 Mass. Acts 899; Employers' Liability Act, 1880, 43 & 44 Vict., ch. 42.

[62] It can been argued that workers' compensation acts did not have a substantial redistributive effect; although they made some level of compensation almost automatic for most work-related accidents, the acts also accommodated employers' interests by limiting the size of the award for each accident. *See* Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Laws*, 16 GA. L. REV. (forthcoming). However, the acts clearly did have an enormous impact on the treatment of industrial accident claims.

The introduction of these laws, first in England[63] and thereafter in the United States,[64] usually followed extensive legislative debate — exemplified by the Report of the Wainwright Commission[65] in New York — over the soundness of the common law rules. But throughout this debate, legislative attention was never focused on the choice between negligence and strict liability. That lack of interest was not due to any failure of legal professionals to raise the issue: workers' compensation was challenged constitutionally — with some initial success — on the ground that it imposed "liability without fault,"[66] and Jeremiah Smith in his famous attack upon the novel system knew so little of its internal operations that he wholly mischaracterized it as a return to the strict liability principles of the year 1400.[67] In fact, the new "arising out of and in the course of employment" formula bore no relationship to the traditional common law strict liability rules, because it dispensed with the requirement that liability rest upon specific acts or omissions of the employer. Self-inflicted harm to employees was fully compensable; only willful misconduct barred a claim. The legislative solution had discarded the entire tort liability system in the field of industrial accidents and started anew.

(iii) Class Definition: Actions and Actors. — Other examples of the far greater distributive impact of carefully targeted liability rules — whether in the common law or the legislative realm — are numerous. As noted above, the common employment rule had great importance because it flatly barred entire classes of claims. The privity rule of *Winterbottom v. Wright*[68] was understood from its inception to have the same function and hence the same significance. Lord Abinger, in

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[63] Workmen's Compensation Act, 1897, 60 & 61 Vict., ch. 37.

[64] *E.g.*, 1910 N.Y. Laws ch. 674.

[65] The full title is *Report to the Legislature of the State of New York by the Commission Appointed Under Chapter 518 of the Laws of 1909 to Inquire into the Question of Employer's Liability and Other Matters*. J. Mayhew Wainwright was the chairman of the Commission.

[66] Ives v. South Buffalo Ry., 201 N.Y. 271, 309–11, 94 N.E. 431, 445–46 (1911) (holding the New York workmen's compensation law unconstitutional under federal and state constitutions). The New York Constitution was promptly amended, in 1913, to overrule the state constitutional aspect of *Ives*, N.Y. CONST. of 1894, art. I, § 19 (now art. I, § 18), and the state legislature immediately passed a new workmen's compensation scheme, 1913 N.Y. Laws ch. 816, *reenacted by* 1914 N.Y. Laws ch. 41. Subsequently, the Supreme Court upheld the new law against federal constitutional challenge. New York Cent. R.R. v. White, 243 U.S. 188 (1917).

[67] Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1913).

[68] 10 Mees. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

announcing the rule, noted that it was necessary in order to prevent the "infinity of actions" that might follow in its absence.[69] And the modern expansion of products liability law is best understood not in terms of a shift from negligence to strict liability, but in terms of the far more important shift to a prohibition of contracting-out of liabilities otherwise demanded by tort law[70] and the subsequent imposition of extensive common law duties designed to protect individual plaintiffs from the risk of third-party harms or from their own misconduct.[71] In products liability law, as in the law of industrial accidents, the existence of a definable and limited class of defendants increases the possibility of systematic biases in the rules. The law of medical malpractice shares the same characteristic. Yet the true measure of the shifts lies not in the language of the appellate opinions, but in the well-known increases in the premiums demanded for both medical malpractice and products liability insurance that mark the onset of this new legal order.[72] Predictably, the dramatic rise in

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[69] *Id.* at 113, 152 Eng. Rep. at 404.

[70] *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (en banc) (holding manufacturer liable in personal injury claim for breach of express and implied warranties); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (striking down various contractual limitations on liability on ground that they had been unfairly obtained). *Greenman* emphasized that the strict liability of the manufacturers

> is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make [sic] clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701 (citations omitted).

[71] *See, e.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) (imposing on manufacturer a duty to use reasonable care in designing for crashworthiness, in order to avoid unreasonable risk to user); Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973) (en banc) (manufacturer's "overpromotion" of a product while "watering down" hazards may be evidence in products liability action); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976) (obviousness of defect not absolute defense). These decisions do not involve a movement from negligence to strict liability, but the creation of some new affirmative duty where previously no duty existed — a gatekeeper phenomenon. Once the imposition of duty is settled, little turns on how it is formulated. For a fuller statement of the argument that the difference between negligence and strict liability means relatively little in the design defects cases, see R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 76–91 (1980).

[72] None of the cases most celebrated for having established the trend towards strict liability, from MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), through Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (en banc), and Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), to Greenman v. Yuba Power Prods., Inc. 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), was followed by any real rise in premiums. Insurance rates began to take off only around 1975. *See* INTER-AGENCY TASK FORCE ON PRODUCT

insurance rates was quickly followed by an intense demand for legislative reform at both the state[73] and the federal[74] level.

B. Efficiency

A recognition of the major difficulties of the subsidy hypothesis clears the way for an examination of its rival social explanation, the view that the adoption of the negligence system maximizes the wealth of society at large. Many of the arguments developed in the previous section also apply to the efficiency thesis. For example, if a shift from negligence to strict liability — or vice versa — does not have a significant impact on the outcome of cases, it can hardly be expected to cause major allocative effects.[75] Rather than simply rehearse the preceding points in this context, however, the following section examines briefly the two factors generally thought to measure the efficiency implications of common law rules: incentive effects and administrative costs.

1. Incentives. — The law and economics approach lays great stress on the incentives for cost-minimizing behavior that legal rules are said to create.[76] The supposed beauty of the negligence system is that it requires defendants only to take cost-justified precautions, because greater precautions produce

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LIABILITY, U.S. DEP'T OF COMMERCE, FINAL REPORT at VI-11 to -24 (1978). The deviation from the previous contractual norm made possible by *Greenman* and *Henningsen* acquired real force only when it been supplemented with other, more focused duties laid upon product manufacturers by the courts. *See, e.g.*, cases cited *supra* note 71.

[73] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-551, -681 to -686 (1978) (placing limits on products liablity actions); MODEL UNIFORM PRODUCT LIABILITY ACT (1979), *reprinted in* 44 Fed. Reg. 62,714 (1979); Dworkin, *Product Liability Reform and the Model Uniform Product Liability Act*, 60 NEB. L. REV. 50 (1981). A much revised version of the Uniform Act is now under consideration at the federal level. For a review of recent developments in state legislation, see Vandall, *Undermining Torts' Policies: Products Liability Legislation*, 30 AM. U.L. REV. 673 (1981); *see also* Note, *Insurance Solution or Tort Reform? — Iowa Joins the Nationwide Examination of Proposed Product Liability Legislation*, 29 DRAKE L. REV. 113 (1979–1980) (Iowa experience).

[74] *See* Product Liability Risk Retention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949 (to be codified at 15 U.S.C. §§ 3901–3903); INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, *supra* note 72, at VII-154 to -167 (1978); Schwartz, *The Federal Government and the Product Liability Problem: From Task-Force Investigation to Decisions by the Administration*, 47 U. CIN. L. REV. 573 (1978).

[75] *See supra* p. 1725 & note 21.

[76] *See, e.g.*, G. CALABRESI, *supra* note 7, at 26–31; R. POSNER, *supra* note 1, at 10–12. Calabresi has expressed some doubt that common law adjudication, with its many moral imperatives, is the best means of achieving efficient results. G. CALABRESI, *supra* note 7, at 297–99.

net social losses.[77] Yet the strict liability regime demands no more; whatever liability rule governs, some accidents that are too costly to prevent will occur. Strict liability simply requires the defendant to compensate those harmed by such accidents.

It is sometimes urged that negligence achieves different — and better — results than strict liability, because the defenses of contributory negligence and assumption of risk spur prospective plaintiffs to avoid accidents that they could prevent more cheaply than could prospective defendants.[78] The effect of these financial incentives is difficult to determine, particularly in personal injury cases in which the plaintiffs' inherent instincts of self-preservation play a central role. But even if it is established that such incentives make a difference in plaintiffs' conduct at the margin, there is nothing in a strict liability system to preclude the adoption of robust defenses, be they cast in the form of assumption of risk, contributory negligence,[79] or, as I have suggested elsewhere, contributory causation.[80]

Other factors also militate against the efficiency thesis. Under the negligence regime, standards may be set incorrectly; thus, parties subject to these standards may be led to take inadequate or excessive measures for accident prevention. In addition, a common law court is limited in accident cases to making some assignment of the plaintiff's losses between the parties before it. There is no possibility of awarding the plaintiff multiple damages to take into account the likelihood that a tortfeasor will escape apprehension, and there is no way to compel the defendant to make his damage payments to an unrelated third party — a point of no little importance if one hopes to influence the defendant's behavior without altering that of the plaintiff.[81] Private tort remedies also work fitfully,

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[77] *See, e.g.*, Buchanan, *In Defense of Caveat Emptor*, 38 U. CHI. L. REV. 64, 70–72 (1970); Posner, *supra* note 14, at 32–38.

[78] R. POSNER, *supra* note 1, at 127–28 (advocating the use of assumption of risk).

[79] *See* Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974). *But cf.* Note, *Assumption of Risk and Strict Products Liability*, 95 HARV. L. REV. 872, 881–82, 884–87 (1982) (criticizing the use of classical assumption of risk both as an independent defense and as a limitation on the use of a properly tailored contributory negligence defense).

[80] *See* Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 493–94 (1979); Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 70–73 (1979).

[81] On this point, see Tullock, *Negligence Again*, 1 INT'L REV. L. & ECON. 51, 57–58 (1981), in which the suggestion (attributed to Earl Thompson) is stated, only to be rejected as "bizarre."

if at all, for the protection of resources not owned by any private party.[82]

2. Administrative Costs. — Incentives, moreover, are not the only issue. To be efficient, the liability rules must take administrative costs into account. But the negligence rule burdens every case with additional issues of categorization and proof, which naturally add expense to the process. In the end, as Landes and Posner have suggested, this burden might be worth bearing if the negligence standard takes considerable numbers of accident cases out of the legal system.[83] In the absence of useful data about the extent to which the negligence rule reduces the frequency of suit and increases the administrative costs of actions that are brought, however, all one can say a priori is that the two effects tend to cancel each other out. Moreover, the frequency and expense of litigation may be determined less by substantive standards than by procedural rules. For example, frequency of suit must surely be influenced strongly by the rule of costs adopted, although it is unclear whether the American rule (each party pays his own) or the English rule (winner is reimbursed) stirs up more litigation.[84] To make any confident predictions about the efficiency of substantive tort rules in isolation from procedural rules is to push the evidence beyond its decent limits.[85]

3. Motivation. — Assume, however, that the tort system is a powerful instrument for social control. What group of individuals would have the power and the will to use it to secure allocative advantages? Litigants are not promising candidates for this role; we have not, merely by virtue of moving from redistribution to allocation, banished the public good problem, which undermines any self-interested litigant's incentive to pursue broad social benefits.[86] To be sure, both parties to an action will want (within the applicable financial constraints) to make the most attractive arguments for their positions, but there is little reason to believe the advocates will stress the economic arguments (which appear only sporadically in the cases) in ways that will generate stable and systematic results.

Nor are judges likely to carry out this program on their own initiative, given their own clash of views on the substantive issues.[87] A single vision of an efficient system cannot emerge from such a haphazard and decentralized process.[88] Academics are prone to fall into a carefully set trap of their own making by treating subsidy and efficiency as the only possible choices. But surely the wellsprings of decision are more numerous. A sense of the proper judicial role and of collegial decorum, respect for stare decisis, and deference to the legislative branch may all play a part in the decision of cases. Taken together, these other factors are strong enough to warn us against too hastily reading our own views of legal problems and social pressures into the common law.

Finally, as was demonstrated in the critique of the redistribution theory, direct regulation is more likely than is the

[82] Thus, common law remedies are often insufficient to deal with common-pool problems. *Compare* Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457, 467–68 (1979) (suggesting the creation of a tort right of action in fishermen for poisoning of fish by oil spill), *with* Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, *supra* note 80, at 502 (pointing out that fishermen will thereby only be moved to overfish stocks in which they have no property interest and that environmental groups or the government are the real parties in interest, but cannot be brought in by the common law). *Cf.* Sweeny, *Market Failure, the Common-Pool Problem, and Ocean Resource Exploitation*, 17 J.L. & ECON. 179 (1974) (government regulation of ocean resource exploitation unnecessary, because economic common-pool problems are absent).

[83] Landes & Posner, *supra* note 1, at 875–80.

[84] *See* Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 59 (1982).

[85] Certainly, the law and economics school does not neglect the study of administrative questions. *See, e.g.*, Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975). What is needed, however, is a general analysis that intergrates both substantive and procedural issues.

[86] *See supra* p. 1728.

[87] To give one historical example, a great judicial debate arose in England between Lord Esher, M.R., and Bowen, L.J., over the question whether the assumption of risk defense was preserved in the Employer's Liability Act of 1880. In Thomas v. Quartermaine, 18 Q.B.D. 685 (1887), Bowen wrote an opinion that virtually guaranteed the defendant a directed verdict in all industrial accident cases attributable to patent defects. Later the same year, in Yarmouth v. France, 19 Q.B.D. 647 (1887), Lord Esher was able to narrow that decision when Bowen was not on the appellate panel. Esher's approach was vindicated in Smith v. Charles Baker & Sons, 1891 A.C. 325, over the dissent of Lord Bramwell, a staunch believer in the assumption of risk defense. The difference in orientation is not attributable to any change in material or social conditions, but to the clash of two very different and very well-formed views of employment relations. The important early American cases on the assumption of risk defense exhibit similar conflicts. *See, e.g.*, St. Louis Cordage Co. v. Miller, 126 F. 495 (8th Cir. 1903); *id.* at 514 (Thayer, J., dissenting).

[88] Some theorists do contend that efficient legal rules can emerge from the unconcerted actions of numerous individual litigants. The account posits a kind of natural selection, by which inefficient rules invite frequent relitigation and breed themselves into extinction. For the original hypothesis, see Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 53 (1977); for a slightly different version, see Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977). It is doubtful that any of these forces, even if they existed, could act rapidly enough to account for some of the actual shifts observed in common law rules, especially when judicial ideology is also involved. *See supra* note 87. A critique of the Rubin/Priest thesis concludes that the issues can be resolved only by detailed empirical investigation. *See* Cooter & Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980).

common law to create dramatic incentives. Suppose, for example, that a planner of highways were given his choice between two instruments of social control: first, he could determine highway design, speed limits, stop signs and red lights, suspension of licenses for repeated offenses, fines and imprisonment for drunk driving, and the like; his other option would be to determine the applicable rules of tort liability for those accidents that in fact did occur. Can there be any doubt which alternative he would choose? The direct form of regulation would strongly influence driving patterns; one need think only of the countless local battles over whether a stop sign should be installed near a schoolhouse or a stoplight at a busy intersection. The matter of liability rules would appear in contrast almost as a detail, relevant perhaps to the disposition of individual cases. Indeed, it is not surprising that virtually all nonlawyers are ignorant of the doctrinal dispute between negligence and strict liability and do not know to which system they refer when they appeal in everyday language to "fault" as a criterion of liability. The stakes simply are not high enough to spur individuals to master common law rules before the occurrence of an accident. Yet efficiency theorists continue to base their disputes over the desirability of the Hand formula[89] on the presupposition that fundamental tort decisions are made wholly in a common law context. In truth, explicit statutes and regulations play a central part in many tort cases; if they do not dictate the result, they surely constrain the analysis.

III. CONTRACT

The basic themes of the previous discussion recur in the law of contracts. Here too the constant temptation is to ascribe social importance to any doctrine that commands close attention by the courts. But again, intensive judicial involvement proves only that it is doctrinally difficult to apply a particular rule to marginal cases. Consider the attention lavished on offer and acceptance by post, a point with little conceivable social or economic impact, which nevertheless generated a large body of nineteenth century case law and produced an outpouring of scholarly controversy.[90] Similarly, few decisions

[89] Posner, for one, considers the Hand formula, *see* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), so fundamental — a "unifying perspective in which to view all tort law," R. POSNER, TORT LAW 3 (1982) — that he devotes the opening chapter of his new casebook to its exposition. *Id.* ch. 1 (1982).

[90] *See, e.g.*, materials collected in F. KESSLER & G. GILMORE, CONTRACTS 267–90 (2d ed. 1970).

will turn on the differences between the objective and subjective theories of contract, however much the conceptual niceties of the topic may have divided Williston and Corbin.[91]

Treatment of the basic doctrine of consideration illustrates this tendency to inflate the social importance of common law rules. As a measure of contract formation, consideration is often set in opposition to promissory estoppel. The central doctrinal dispute is whether a promise not grounded in a bargain should be enforced when the promisee relies to his detriment. Another key academic debate concerns inadequacy of consideration, a doctrine that refers to the willingness of a court to set aside or otherwise adjust manifestly one-sided agreements and that Horwitz has credited with the traditional function of ensuring the "substantive equality of the exchange."[92]

A. Consideration and Estoppel

Much of the internal logic of contract law is devoted to defining appropriate spheres for the operation of strict consideration doctrine and promise-based reliance. The debate has great intrinsic fascination, for it provides a window on important questions of jurisprudence. Consideration is a narrow, cautious doctrine reflecting the legal system's determination to define and control a class of enforceable agreements. It has been called "[t]he balance-wheel of the great machine"[93] and has been ranked with offer and acceptance as part of the "indivisible trinity" of doctrines that organize contract law.[94] Promissory estoppel, on the other hand, is characterized by its advocates as a welcome, if belated, recognition and mitigation of the undue harshness and uncompromising technicality that consideration imposes on the common law.[95]

There are again two threshold questions relevant to an assessment of claims that a given rule is economically efficient or that it benefits a dominant social class. First, what proportion of transactions are treated differently by the two principles? Second, what potential does the choice of rules have to enhance overall output or to redistribute wealth? It is not

[91] *See* G. GILMORE, THE DEATH OF CONTRACT 57–65 (1974) (discussing the split between Williston and Corbin, with particular reference to the *Restatement*).

[92] M. HORWITZ, *supra* note 2, at 167.

[93] G. GILMORE, *supra* note 91, at 18.

[94] Hamson, *The Reform of Consideration*, 54 LAW Q. REV. 233, 234 (1938); *see also* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 823 (1941) (linking consideration with "the principle of private autonomy").

[95] G. GILMORE, *supra* note 91, at 17–34, 64–77.

my purpose to take sides in this perennial debate, but to counsel that the stakes involved in the choice of rules are so small that it is pointless to convert the doctrinal dispute into an essay on distributional or allocative programs.[96]

Whether or not the doctrine of promissory estoppel is accepted, the requirement of consideration will be satisfied as a matter of course in nearly every contractual transaction.[97] Consideration is built into the definition of most standard contracts. A sale is defined, for example, as a transfer of ownership of goods in exchange for a money consideration — the price. Contracts for hire, for barter, for employment, for a loan with interest, for insurance, or for partnership necessarily import consideration. Indeed, human self-interest is so persistent that most promises falling outside these well-established categories will also be supported by consideration; true gifts are not often made outside family or charitable settings. The doctrine of promissory estoppel, therefore, is relegated to influencing marginal family arrangements — in which

[96] Atiyah is one of many scholars who assert that the general reliance principle reflects larger social and economic trends:

> Reliance-based liabilities are still more hostile to the values of free choice. As soon as liabilities come to be placed upon a person in whom another has reposed trust or reliance, even though there is no explicit promise or agreement to bear that liability, the door is opened to a species of liability which does not depend upon a belief in individual responsibility and free choice. Not only is the party relied upon held liable without his promise, but the party relying is relieved from the consequences of his own actions. The values involved in this type of liability are therefore closely associated with a paternalist social philosophy, and redistributive economic system. This book is not the place for a full exploration of these questions, but it claims at least to offer some explanations for the origins of the present traditional approach to promissory and contractual obligations.

P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 6–7 (1979).

The passage seems odd in at least one respect. The traditional forms of promissory estoppel were designed to expand the scope of contractual liability beyond the point at which the doctrine of consideration had left it. In that regard, the doctrine is best understood as an expansion of freedom of contract, against which consideration is an implicit limitation. The larger implications hinted at by Atiyah follow only if reliance removes the need for a promise. But then one would be talking about not the inner workings of contract law, but a total repudiation of the contract principle. This shift would be similar to elimination of the causation requirement in tort, a massive change beyond the boundaries of traditional common law debates.

[97] Promissory estoppel is not available at all in fully executory contracts; in this important class of cases, therefore, the consideration tests must always be satisfied. For this reason alone, Gilmore errs in his assertion that the "contradictory propositions" of consideration and reliance cannot comfortably coexist: "in the end one must swallow the other up." Gilmore, *supra* note 91, at 61. Atiyah also seems reluctant to enforce fully executory agreements. P. ATIYAH, *supra* note 96, at 1–7, 754–64. For a criticism of the logical problems in Atiyah's division of the types of contracts and in the arguments based on that division, see Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 785 n.121 (1982).

the law of wills and its demands for formality exert a heavy influence — and some fringe commercial transactions. Without the corrective of promissory estoppel in these borderline cases, the insistence upon consideration might introduce a jarring element into contractual relations, and the variance between legal doctrine and commercial practice might set traps for the unwary. Even here, however, promissory estoppel may be less significant than social pressures in influencing commercial behavior. How often, for instance, would a bank try to collect a forgiven interest payment, stating as its sole reason the want of consideration?

The consideration debate is also of little consequence from the perspective of wealth redistribution and allocative efficiency. This point is amply demonstrated by the potential for evasion. Suppose, for the moment, that the rules of contract formation are of vital social concern. What is the real bite of a consideration requirement? In most cases, a simple insertion of nominal consideration, or an elementary restructuring of contractual terms, allows the parties to escape whatever restrictions the law may impose. Parties can, as it were, contract out of most of first-year Contracts. Consideration has, for just this reason, been viewed as a matter less of judicial regulation than of "form," like the requirement of a writing or seal.[98] It therefore follows that parties involved in any important, recurrent contractual arrangement will practice the standard evasions as a matter of course, at a miniscule cost per transaction.

One must thus conclude that the two rules of contract formation differ chiefly in matters of style and nuance. These contrasts are hardly sufficient to achieve substantial social or economic impact. In the commercial context, the rules' effect on efficiency is apt to be dwarfed by a host of other institutional characteristics, such as the degree of cohesion, custom, and trust between persons and within industries. The English have maintained a thriving commercial system for many years without fully endorsing the doctrine of promissory estoppel[99] or, for that matter, even a doctrine clearly permitting actions

[98] For a discussion of the relative importance of the substantive and evidentiary aspects of the doctrine, see Fuller, *supra* note 94.

[99] *See* Jorden v. Money, 10 Eng. Rep. 868, 882 (H.L. 1854) (establishing rule that estoppel applies only given misrepresentation of an existing fact); *see also* Maddison v. Alderson, 8 App. Cas. 467, 473 (1883) (later statement). *See generally* M. FURMSTON, CHESHIRE & FIFOOT'S LAW OF CONTRACT 89–91 (9th ed. 1976) (summarizing the law).

by third-party beneficiaries of contracts.[100] Nor does the articulation of principles for marginal cases yield distributional consequences; most commercial transactions and nearly all family transactions are between parties of the same class. However one tries to spin a story about the larger social consequences of this persistent doctrinal tension, it will remain a story, and no more.

B. Adequacy of Consideration

It is important at the outset to clarify the nature of the doctrinal dispute about the need for adequate consideration. No one has ever contended that all contracts should be enforced simply because parties entered into them. At issue, rather, are the precise grounds on which enforcement or rescission of a contract should be ordered. Historically, all courts have agreed that it is improper to take advantage of infants or obvious incompetents and that the presumption of consent in a contract with a competent person is vitiated by duress, fraud, and, in many contexts, simple misrepresentation. The only issue with respect to adequacy of consideration is whether, apart from particular proof of these grounds, an agreement may be set aside because of the gross disparity between the value of the thing contracted for and its price.

Invalidation of contracts on the ground of inadequate consideration might be regarded as an important aspect of contractual doctrine, because it authorizes judicial limitations on the process of voluntary exchange by demanding that bargains meet independent standards of fairness. It is this theme to which the writings of Horwitz and Atiyah refer.[101] But what percentage of commercial transactions would be affected by adoption of a rule that permitted investigation into the adequacy of consideration as such? Surely all transactions made in organized markets at competitive prices must go unquestioned, for to hold one of these exchanges suspect would be to strike down all identical transactions. Even standard monopoly practices — especially those authorized by the state — are beyond challenge by any doctrine requiring adequacy of consideration. Strict threshold conditions must be satisfied before inadequacy even becomes a litigated issue. Cases involving seamen, dependent widows, and rapid fluctuations in market

[100] Tweddle v. Atkinson, 121 Eng. Rep. 762, 764 (Q.B. 1861) ("[N]o stranger to the consideration can take advantage of a contract, although made for his benefit."). *See generally* M. FURMSTON, *supra* note 99, at 436–38.

[101] *See* P. ATIYAH, *supra* note 96, at 167–77; M. HORWITZ, *supra* note 2, at 161–67.

prices due to wartime conditions contain serious intrinsic difficulties, but do not begin to touch the bulk of commercial transactions.[102]

The dispute over the adequacy-of-consideration doctrine is better understood as an honest difference of opinion on how best to tackle the twin problems of fraud and incompetence in the contracting process. Those who assert that inadequacy of price is not a ground on which to refuse enforcement of a contract do not necessarily deny that such inadequacy is evidence of fraud; in the absence of indications of donative intent, disparity in exchange may well signal that something has gone amiss in the process of contract formation. While refusal to inquire into the adequacy of consideration may increase the likelihood that some fraud will escape detection, adoption of the inadequacy doctrine increases the risk that some legitimate agreements will be set aside. There is no definitive balance to be struck between these two types of error, and the vacillation in the case law, both within and across historical periods, is but a reflection of the delicate judgments that must be made.[103] It is doubtful that either rule has any strong allocational advantages over the other, and it is quite improbable that the uncertain course charted in the cases provides evidence of any major historical transformation. The common elements of the two approaches predominate over their differences; there is simply no systematic distinction from which social consequences could flow.

[102] Horwitz quotes a passage from John Adams' *Autobiography* as evidence of the 18th century position that it is "natural, immutable Law that the Buyer ought not to take advantage of the sellers Necessity, to purchase at too low a Price." M. HORWITZ, *supra* note 2, at 166. However, Adams' illustration — a man who must sell his worldly possessions to one possible buyer in order to stay out of jail — is hardly the stuff of routine commercial transactions.

[103] Professor Simpson demonstrates that divisions of opinion on the proper approach to inadequacy of consideration predated the nineteenth century and persisted during it. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 561–62 (1979). This historical finding is consistent with the claim that choosing an adequacy-of-consideration rule does not necessarily reflect a profound ideological stance. *See also* P. ATIYAH, *supra* note 96, at 169–77 (noting that, while courts would sometimes ignore the issue of adequacy of consideration, general trend in 18th century was toward examining substance of bargain); *id.* at 171–72 (neither equity courts nor the legislature would tolerate contracts by "unscrupulous speculators" who preyed on "common sailor[s]"); Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 304 (1975) (advocating setting aside certain municipal bond purchases entered into by prisoners recently returned from the Vietnam War); *cf.* Eisenberg, *supra* note 97, at 754–63 (excepting marine salvage, medical rescue, and similar distress cases from the general rationales offered in support of enforcing contracts to the full, and advocating the application of unconscionability doctrine to reduce awards). Commentators starting with very different ideological assumptions thus reach the same results in similar individual cases.

C. Direct Controls

In contract law, as in the law of torts, the impact of a rule will often depend on its specificity of reference. A broad common law doctrine of unconscionability that proceeds on a case-by-case basis is not of major significance. No matter how attractive the precept of unconscionability is as a jurisprudential matter, the number of transactions that can be reached and controlled is too small to have social impact, and the reluctance of courts to review countless agreements is too strong. A more focused judicial intervention, however, can have substantial effects. Thus, when a court invalidates or upholds a due-on-sale clause in a standard residential mortgage, in effect it decides whether a lender is entitled (albeit only upon sale) to cut the enormous losses that have resulted from long-term, low-interest mortgages during recent years of sustained, but unanticipated inflation. To analyze the decision's possible redistributive results, one must, of course, determine whether individual homeowners and bank shareholders are drawn from the same social class. Similarly, inquiry into allocative effects must ask whether the devices available to lenders in future transactions — shorter loan periods, variable-rate interest, shared-appreciation mortgages — will allow them to protect themselves against the perceived hazard without losing their natural markets. Although such an empirical inquiry lies outside the scope of this essay, this example illustrates that a single decision on a narrow question of law addressed to a determinate class of firms may have profound consequences that far exceed the doctrinal subtlety of the subject.

As in the field of tort law, the greatest allocative and distributional effects can be expected from legislative and regulatory intervention — especially intervention that operates in derogation of freedom of contract. Antitrust laws, if strictly enforced, can impose major restrictions upon the freedom to enter certain kinds of contracts: sale of a business to a competitor, price-fixing agreements, and many types of arrangements with customers and franchisees, including tie-ins and exclusive dealing relationships. The stakes in this area of the law are so high that the subject has generated its own specialized bar and individual court decisions become focal points for major legislative initiatives.[104] Similarly, antidiscrimination laws mark an enormous departure from the traditional common law principle that employment contracts are formed at will. Today, the process of hiring, promoting, and firing is no longer constrained solely by business needs and the employer's interest in maintaining a good reputation among potential employees. Modern employment decisions must be tested against a "for cause" standard that bars consideration of such factors as race, sex, national origin, and age.[105] The ability to contract out of this social norm is decisively barred by statute: no mere peppercorn will do. Yet what firm will choose to go out of business to escape the sting of regulation? Instead it will establish new hiring standards, new personnel offices, and a vastly expanded legal department, none of which would be required if consideration were jettisoned tomorrow.

[104] *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (denying standing to indirect purchasers attempting to sue to recover passed-through costs resulting from antitrust violation). Legislation to overturn the *Illinois Brick* result and to provide a cause of action was immediately introduced in both houses of Congress. *See* S. 1874, 95th Cong., 2d Sess. (1978); H.R. 11,942, 95th Cong., 2d Sess. (1978). Neither of these bills was enacted, and a similar measure proposed to the following Congress, *see* S. 300, 96th Cong., 1st Sess. § 2 (1979), also failed. California did pass a statute affirming the existence of a cause of action for indirect purchasers under state antitrust law. *See* CAL. BUS. & PROF. CODE § 16750(a) (West Supp. 1982).

[105] The foremost restriction is, of course, that of title VII. *See* Civil Rights Act of 1964, § 703, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2 (1976)). The litigation under title VII has applied the standard widely. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 348 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

IV. CONCLUSION

In the course of this Article, I have examined a number of common law rules solely to determine whether their social and economic consequences are a fruitful subject for further investigation. Based on this examination, I have concluded that they frequently are not, and that legal scholars of whatever persuasion must exercise considerable care in choosing suitable objects for their inquiries. The point here does not go to the merits of any issue. One may regard large nineteenth century industrialists as the architects of a golden age, as simple robber barons, or perhaps as a bit of both. But whatever view ultimately prevails, the general common law rules of tort and contract constituted only a tiny portion of the legal turf over which their battles, or those of any generation, were fought.

My argument is not that the common law does not have enormous intrinsic worth both as a system of thought and as a *minimum* condition for social order. The true lesson is that the legal points so troublesome to both judges and lawyers in a common law setting need not mirror the pressing issues of society at large.