

ARTICLES

PUBLIC PROPERTY RIGHTS: A GOVERNMENT'S RIGHTS AND DUTIES WHEN ITS LANDOWNERS COME INTO CONFLICT WITH OUTSIDERS

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Private citizen actions may lead to disputes between neighboring governments. Paris' abduction of Helen triggered the Greeks' siege of Troy. As a less momentous example, the private erection of skyscrapers in a central city might impair television reception in one of its suburbs and precipitate angry exchanges between the mayors of the two cities.

This Article examines the possible utility of creating public (*i.e.*, intergovernmental) rights and duties to internalize intergovernmental spillovers of this sort. The Article focuses particularly on cases similar to the examples just given where a government's rights and duties would be *vicarious* in that they would stem from the private behavior, or private suffering, of its citizens. Lawyers and scholars are relatively

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I am publishing a slightly different version of this Article under the title *Public Property Rights: Vicarious Intergovernmental Rights and Liabilities As a Technique for Correcting Intergovernmental Spillovers*, in *ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS* (D. Rubinfeld ed., forthcoming 1980). That collection is Volume 3 of the COUPE Papers on Public Economics Series (G. Peterson general ed.) published by the Urban Institute, Washington, D.C.

familiar with the *proprietary* rights and obligations that may arise from a government's own affirmative activities—for instance, its ownership of public lands, its employment of police, or its operation of a municipal waterworks. Much less familiar is the notion that the government-citizen relationship should give rise to the legal consequence that a government stands (vicariously) in the shoes of its citizens—*e.g.*, that Troy is liable to Greece, assuming both are recognized political units, for Paris' abduction of Helen.

A more extended example, which will be invoked throughout the Article, will help illustrate the possible merits of creating vicarious public rights and duties. Suppose that dozens of private factories situated in Springfield, Massachusetts, dump wastes into the Connecticut River, and that these pollutants flow southward and annoy thousands of residents of the State of Connecticut. In designing an antipollution policy, Massachusetts officials might disregard these cost spillovers because Massachusetts residents do not bear them. Like other externalities, these spillovers might cause both the misallocation of resources and troublesome wealth transfers.

Policy analysts have traditionally emphasized two techniques for internalizing interjurisdictional cost spillovers.¹ Both techniques bring into play a higher-level government whose boundaries encompass both the source of the spillover and the entire geographic area the spillover affects. The first traditional technique requires this higher-level government to regulate the activity in question. In the Connecticut River example, this approach would call for the federal government to regulate those who pollute interstate waterways.² The second traditional technique is for the higher-level government to manipulate its monetary transfers with its lower-level governments so as to induce the lower-level governments to consider spillover effects on neighboring jurisdictions. This technique typically involves: (1) grants-in-aid from higher-level governments in support of lower-level government programs that generate benefit spillovers; and (2) monetary penalties assessed by higher-level governments against political subdivisions that generate cost spillovers. In the Connecticut River example, the federal government would be using this technique if it placed a monetary

I. *See, e.g.*, G. BREAK, INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES 175 (1967).

2. This could involve federal creation of river basin authorities, an often-endorsed approach. *See, e.g.*, E. MILLS, THE ECONOMICS OF ENVIRONMENTAL QUALITY 245-47 (1978); Roberts, *River Basin Authorities: A National Solution to Water Pollution*, 83 HARV. L. REV. 1527 (1970).

figure on the damage Massachusetts' pollutants caused in Connecticut, and deducted that amount from Massachusetts' share of federal revenue-sharing funds.

These two traditional techniques do not exhaust the policy alternatives. As a third technique, the all-encompassing government might carefully define property rights between the private parties involved in the spillover (assuming it was privately engendered) and provide them an enforcement mechanism such as a system of civil courts. An appropriate definition of these private property rights would increase the likelihood that the affected parties would reach an efficient settlement of the dispute through bargaining or litigation. Many intergovernmental spillovers, however, involve large numbers of private parties. In the Connecticut River example, dozens of industrial firms in one state together caused the injury to thousands of residents of another state. As in all large number cases, there would be incentives for individual parties to become holdouts and freeloaders.³ This tendency would greatly increase the costs of, or even obviate, the two sides arranging a settlement. Even if procedural devices such as class actions were made available, the administrative costs involved in the private property rights technique of internalization would often be unacceptable.

As previously mentioned, this Article focuses on a fourth technique, little explored in public finance literature: the creation of vicarious intergovernmental rights and duties designed to internalize privately engendered intergovernmental spillovers. This technique will be called a system of "public property rights." These public property rights are affirmative rights and obligations that a higher-level government creates, not between the private individuals involved in a transboundary spillover, but rather between their lower-level governments. This system may in some situations overcome the large-number problem inherent in the private property rights approach, while still preserving some measure of decentralized enforcement. Dozens of Springfield industrialists cannot readily bargain with thousands of Connecticut residents, but officials of their two states could conceivably negotiate an efficient settlement of the pollution problem along the Connecticut River.

The few commentators who have considered—"touched on" would be more descriptive—affirmative intergovernmental property rights have generally been pessimistic about the utility of this internal-

3. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-07 (1972).

ization technique.⁴ They sometimes support their gloomy assessment by pointing to the unpromising history of interstate air and water pollution compacts in the United States. The thesis of this Article is that the creation of public property rights, although far from being a cure-all for intergovernmental coordination, may have more potential than has previously been recognized.

The first three parts of the Article are mainly concerned with privately engendered *costs* that spill across government boundaries.⁵ Part I⁶ compares the various internalization devices available and identifies the niche where intergovernmental property rights might prove to be a useful policy tool. Part II⁷ outlines some suggested substantive rules of public property. Part III⁸ uses those suggested rules to criticize the small but fascinating body of decisional law that has developed out of international, interstate, and interlocal litigation over cost spillovers. Part III also suggests how legislatures might establish a public property rights system. The Article ends with Part IV,⁹ a short discussion of the use of public property rights to internalize *benefit* spillovers from government programs.

I. THE NICHE FOR INTERGOVERNMENTAL PROPERTY RIGHTS

When a privately created cost spills across a property line, legal analysts have typically focused their attention on structuring the rights and duties of the landowners on either side of the line. Where the property line is also a government boundary, however, the two governments that share the common boundary also become prime candidates for receiving affirmative legal entitlements and obligations.

A party may of course participate in bargaining to ameliorate a cost spillover even when the party has no affirmative rights or duties. Suppose, for example, that a fence on Rancher's land would be a cost-

4. R. POSNER, ECONOMIC ANALYSIS OF LAW § 26.3, at 516-18 (2d ed. 1977); Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1216, 1228 & n.126 (1977); Zerbe, *Optimal Environmental Jurisdictions*, 4 ECOLOGY L.Q. 193, 226-27, 242-43 (1974). For a somewhat more optimistic assessment, see R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 626-27 (2d ed. 1976); R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 610-11 (1st ed. 1973).

5. For a definition of cost spillovers, see text accompanying note 44 *infra*.

6. See text accompanying notes 10-37 *infra*.

7. See text accompanying notes 38-47 *infra*.

8. See text accompanying notes 48-115 *infra*.

9. See text accompanying notes 116-24 *infra*.

effective device for separating Farmer's crops from Rancher's cattle. The familiar Coase analysis suggests that if Farmer has no rights against cattle damage, Farmer will pay Rancher to install the fence.¹⁰ This prediction, however, fails to take account of the possible involvement of the public sector. If Farmer can readily influence his government's officials, it may be cheaper for him to expend resources to persuade them to use public funds to pay Rancher to build the fence. More generally, regardless of the allocation of rights, Farmer might attempt to persuade any organization over which he has influence to do his bidding. In short, even in the simplest of conflicts there are an infinite number of potential bargainers—including all governments.

A government thus can become involved in negotiations over a spillover even when it has no rights and no duties. Realistically, governments are more likely to be drawn into negotiations when they have affirmative rights and obligations. The question thus arises: When should a government have rights against (and duties toward) "foreign" landowners and governments?

A. THE SMALL NUMBER CASE

When Rancher's cattle stray across a government boundary and eat Farmer's crops, is it sensible to entitle *Farmer's government* to collect damages from *Rancher's government*? Generally it would appear not. When there are few private parties on both sides, deterrence and compensation goals can be more cheaply and accurately achieved through private property rights. To make governments concurrent owners of rights and duties with their citizens would increase the number of parties who would have to participate in even the simplest settlement negotiation, and thus add to transaction costs. For example, if Farmer and Farmer's government concurrently owned the same right, Rancher would always have to settle with both; if Farmer alone had affirmative rights, Farmer's government would not necessarily have to become involved in the resolution of the dispute. The creation of affirmative rights and duties *exclusively* in Farmer's and Rancher's governments would also be ill-advised. The goal of compensating Farmer would be met only if Farmer's government passed on its recovery to him. Similarly, the goal of deterring Rancher would be achieved only if Rancher's government passed on its liabilities. Why go through the expense of involving the shortstop and second baseman when a direct throw from third to first will do the job? Moreover, because public

10. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

officials may not act as profit maximizers,¹¹ the substance of an inter-governmental settlement might not be as efficient as Farmer and Rancher (the two most knowledgeable parties) would reach. In sum, exclusively owned rights and obligations are administratively superior to those that are concurrently owned and, in conflicts between a small number of neighboring landowners, any affirmative rights and obligations are best vested in private parties.

B. THE LARGE NUMBER CASE

The optimal legal approach is less clear when the number of individuals involved in a spillover increases. This can happen in several ways: the number of victims, emitters, or both may increase. The discussion here will be restricted to the last of these variations; namely, large numbers of both victims and emitters. (Extensions of the analysis to small versus large or large versus small number cases should be straightforward.)

1. *Some Simplifying Assumptions*

The introduction of this Article identified the four major policy options available to a higher-level government when many private parties on one side of a boundary separating two lower-level governments create cost spillovers that injure a large number of private parties on the other side. The higher-level government may: (1) directly regulate the activity (or activities) involved in the spillover; (2) administer grants-in-aid or fines to internalize these spillover effects to lower-level governments; (3) articulate a set of private property rights between injurers and victims that will reduce the transaction costs of those parties reaching a bargained settlement of the conflict; and (4) articulate a set of public property rights between lower-level governments to reduce the transaction costs of those governments reaching a bargained settlement.

Any comparison of the merits of these four systems, especially the latter two, threatens to become mired in extraneous detail. This Article therefore adopts at the outset three simplifying assumptions that hold constant some potentially varying, but unessential, features of both private and public property rights systems.

First, I assume that under both systems the only remedies available to a victim are either time-to-time or permanent damages, *i.e.*, no form of injunctive relief is ever granted.

11. See text accompanying notes 30-31 *infra*.

In the next subsection,¹² the Article attempts to show the desirability of there being two exclusive bargaining agents in large number cases, one representing the victim group and the other representing the emitter group. My second assumption is that when a public agent is selected to represent victims, a public agent must also be chosen to represent emitters. The selection of governments to represent both sides would produce what might be called a "pure" public property rights system. The Article also discusses cases in which two private agents are chosen, *i.e.*, a pure private property rights approach. The Article does not discuss the other obvious, and perfectly viable, option—"mixed" litigation involving a private representative on one side and a public representative on the other.

The two exclusive bargaining agents may ultimately agree on a monetary settlement, which according to my first assumption is the only available judicial remedy. The issue then arises whether or not the agents will pass on their recoveries and liabilities to individual members of their groups. My third assumption is that private and public property rights systems do not differ in this regard. Both systems are assumed to follow an identical passing-on policy: both recoveries and liabilities are passed on to individual group members,¹³ except where the amounts at issue do not justify the administrative costs of arranging the passthrough; recoveries *not* passed on to individual victims escheat to some appropriate general-purpose government, whose identity does not vary with the type of property rights system in use; liabilities not passed on to individual emitters become the obligations of some other appropriate general-purpose government.

2. *Exclusive Bargaining Agents in Large Number Cases*

a. *Enforcing the rights of a large number of victims:* When many victims suffer damage from a common source, the legal system can expedite settlement of their claims by compelling all of them to use the same exclusive bargaining agent.¹⁴ The desirability of a single bargaining agent is clear when injunctive remedies are available and would be

12. See text accompanying notes 14-23 *infra*.

13. I do not wish to address in this Article the merits of various passing-on policies. Although distributive considerations favor the passing on of both recoveries and liabilities, some economists have argued that, in large number spillover situations, allocative efficiency is enhanced if government recoveries are *not* passed on to actual victims. See, *e.g.*, Baumol, *On Taxation and the Control of Externalities*, 62 AM. ECON. REV. 307 (1972). In addition, passing-on inevitably entails considerable administrative expense.

14. *Cf.* *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) (National Labor Relations Act requires aggrieved minority employees to seek redress from

enforceable by each victim. Strategic behavior by holdouts would then be likely to derail settlements. For example, if individually entitled to injunctive relief, any single Connecticut riparian could thwart a proposed compromise solution to the Connecticut River pollution conflict.

At first glance, this holdout problem would appear to evaporate if damages were made the exclusive remedy. Each individual plaintiff might then be permitted to sever his right to a portion of the damages from the group claim and to enforce it separately. If limited to recovering damages, a single Connecticut riparian would appear not to have the leverage necessary to disrupt a basin-wide settlement supported by most of the involved parties. Several current legal practices reflect this thinking: (1) individual claimants may sever their claims from class actions;¹⁵ (2) the 1976 Amendments to the Clayton Act, which authorize state attorneys general to bring parens patriae actions for antitrust damages, also permit severance of individual claims;¹⁶ and (3) private victims of a public nuisance are entitled to recover individualized compensation as long as their harms are "different in kind" from the public harm.¹⁷

Permitting the severance of individual damage claims initially appears to be warranted because an exclusive bargaining agent may abuse its monopoly power and ignore minority interests. Holdouts remain a problem, however, even when damages are the only remedy, as long as the legal system lacks mechanisms to internalize benefit spill-overs. For example, suppose that the most cost-effective device for mitigating Connecticut River pollution would be an in-stream aeration system constructed just below Springfield. This system would improve water quality to well above the standard to which Connecticut riparians are legally entitled. If they could not recoup the future benefits of the aeration system, the Springfield industrialists might agree to build the system only if *all* Connecticut riparians agreed to waive their rights to recover for past damages. In this situation, if an individual Connecticut riparian could sever his claim, each one would have an incentive to hold out in an attempt to obtain *both* past damages and future above-

discriminatory employer practices through their union, and does not protect them from being fired when they seek to bargain directly with employer).

15. FED. R. CIV. P. 23(c).

16. 15 U.S.C. § 15c(b) (1976). For subsequent developments involving this statute, see note 65 *infra*.

17. See RESTATEMENT (SECOND) OF TORTS § 821C(1) (1979). See generally Bryson & Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241 (1972).

standard water. If there were no single class representative able to use the waiver of *all* past damage claims as a bargaining chip, strategic behavior might bar achievement of the most efficient settlement. Thus, even when damages are the sole remedy, a legal system lacking smoothly functioning benefit-internalization devices should as a rule make a victim class speak with only one voice.¹⁸

There are two prime candidates for exclusive bargaining agent for a victim class: (1) a private attorney (using class action procedures¹⁹), and (2) a government whose citizenry is relatively congruent with the class of victims (using a *parens patriae* action²⁰). Because it is desirable to have but a single agent, only one of these two representatives should be qualified to act in any specific conflict.

b. *Designating an exclusive bargaining agent for a large number of emitters:* Efficiency in resource allocation may also be enhanced if the legal system identifies a single agent with authority to settle the liabilities of a large number of joint tortfeasors. If damages are the exclusive remedy, it is not inconceivable that the total group liability could be split and exclusive portions assigned to each individual polluter; if this were done, each could conceivably settle separately. Whenever a legal system lacks adequate benefit-internalization systems, however, freeloading can become a problem even when exclusive liabilities have been carved out. Suppose, as before, that an in-stream aeration system just below Springfield would be the most efficient way to reduce pollution in the Connecticut River. An exclusive bargaining agent representing the Springfield polluters could make a binding offer to build such a treatment system as part of the settlement of the damage claim. However, if individual polluters could sever their liabilities from the group's, they might attempt to freeload on an aeration system financed by the remainder of the group. Unless there was a mechanism for coercing joint action, the efficient joint enterprise might never be organized.

18. For further discussion of this issue, see note 117 *infra*.

19. See generally Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975); Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969).

20. See generally Note, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROB. 411 (1970). Some creative methods have been suggested for combining public and private resources for enforcement (e.g., government subsidization of notice costs in private class actions). *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1642-44 (1976).

The basic candidates for exclusive bargaining agent for defendants are the same as the ones for plaintiffs. The legal system could permit the designation of a single private attorney through class action procedures, or could designate a government that contained all, or most, of the emitters.

Having a government act as plaintiff for its citizens is not a novel idea—witness *parens patriae* and public nuisance actions. There is scant legal precedent, however, for the imposition on a government of vicarious liability for an outflow of privately caused pollution.²¹ Yet such a rule often makes sense. The host government is a good “cost avoider,” to use Guido Calabresi’s term, because its officials should know that the pollution is occurring and can control it by regulating the private emitters.²² An analogy may be drawn to the rule of *respondeat superior*—an employer’s vicarious liability for damages caused by employee misconduct. This ancient rule has persisted because, among other reasons: (1) an employer can supervise his employees; and (2) an injured party may have severe difficulty in identifying which of a firm’s employees misbehaved in a way that led to his injury. The same considerations support a rule that might be called “*respondeat patria*”—a government’s vicarious liability for damages caused by cost spillovers arising from a large number of private sources located within the government’s boundaries.²³

If established, this governmental liability should be exclusive (*i.e.*, not shared with the private polluters) in order to simplify settlement negotiations.²⁴ I have assumed, however, that the liable government would pass on its liabilities to the private polluters—the “primary wrongdoers” on whom indemnity law would usually ultimately fix the loss—to the same extent that the liabilities would be passed on had a private defendant class been organized.

21. See text accompanying notes 48-50, 66-68, 100-04 *infra*.

22. See G. CALABRESI, *THE COSTS OF ACCIDENTS* 135 n.1 (1970); Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055, 1060 (1972) (losses should be borne by the party “in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made”) (emphasis in original).

23. Other commentators who have endorsed this rule have also felt the urge to express it in Latin. Professor Richard Stewart, who suggests it almost in passing, calls government liability for private pollution the “reverse *parens patriae* principle.” Stewart, *supra* note 4, at 1247-49.

24. This is not a typical feature of vicarious liability; for example, a servant remains liable for a tort for which his master is vicariously liable.

3. *Some Possible Advantages of Using Property Rights Solutions in Large Number Cases*

Both public and private property rights are more decentralized than the competing policy alternatives—regulatory and grant-in-aid programs administered by a higher-level government. When either property rights approach is used, the higher-level government (in our example the federal government) must of course articulate the property rights and provide institutions for their enforcement; but responsibility for initiating enforcement is left to lower-level (subfederal) entities—namely, private attorneys or state or local governments. Current federal anti-pollution statutes generally adopt mandatory, nationally uniform environmental standards. For example, Congress has asked the Environmental Protection Agency to impose detailed air quality standards on Hawaii,²⁵ even though that state is thousands of miles distant from the other states and can only trivially affect those states' air quality. Critics have asserted that these federal environmental standards are inefficient and impair the self-determination of subnational governments.²⁶

These criticisms would be allayed if the federal standards were not mandatory restrictions on private emitters, but rather defined property rights (either public or private) enforceable either by neighboring states or by class action. By decentralizing initiative for enforcement and settlement, the two property rights solutions would better honor regional variations in citizen tastes. In addition, the decentralized approaches would lead to a wider range of environmental outcomes, thus generating more information on the merits of alternative environmental policies than is generated under a regime of uniform federal regulation.²⁷

A federal grant-in-aid or penalty program aimed at redressing environmental spillovers would be somewhat less centralized than the current federal environmental regulations. But even when a higher-level government resorts only to monetary inducements, it still retains sole responsibility for initiating enforcement. This monopoly on enforcement may possibly be exercised in a manner that abuses the inter-

25. See 40 C.F.R. § 52.620-632 (1978) (Environmental Protection Agency finds Hawaii's air quality plan inadequate in several respects).

26. B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER & D. HENDERSON, *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* 317-30 (1974) (criticizing current federal water quality programs) [hereinafter cited as *THE UNCERTAIN SEARCH*]; J. KRIER & E. URSIN, *POLLUTION AND POLICY* 302-45 (1977) (criticizing current federal air quality programs).

27. See Peltzman & Tideiman, *Local versus National Pollution Control: Note*, 62 AM. ECON. REV. 959 (1972).

ests of minority factions that are contained within the higher-level government. For example, if federal environmental officials were to use monetary transfers to improve interstate water quality, they might drag their feet if Massachusetts polluters had more clout in Washington, D.C., than did Connecticut riparians.²⁸ (Judicial review conceivably could root out biased enforcement policies; however, courts give considerable deference to administrative decisions.) By contrast, if the Connecticut landowners were represented by a private attorney, or by the State of Connecticut, those agents would be less vulnerable to counterpressures from Massachusetts polluters. As long as the federal courts, presumably the proper forum for settling interstate disputes, are more insulated from day-to-day political pressures than are federal administrators, the rights and interests of Connecticut residents might be more systematically protected if either of the property rights systems were used. The current Federal Water Pollution Control Act in fact makes *Massachusetts* the frontline enforcer of federal water quality standards within Massachusetts' boundaries;²⁹ this is an odd approach if the reason for federal involvement is the protection of out-of-state residents.

4. *Private Property Rights v. Public Property Rights in Large Number Cases*

What are the relative merits of the two property rights systems? The question is empirical, and the data to answer it are not available. Nevertheless, some a priori speculations can highlight probable differences between the two systems.

a. *The mystery of government behavior*: In analyzing alternative allocations of private rights and duties, most commentators assume that private individuals are utility maximizers and that private firms are managed to maximize the present value of the firm. More specifically, these commentators assume that a private party will trade its rights

28. Internal federal politicking of this type was invited by the early federal air and water quality statutes, which gave the United States Attorney General responsibility for bringing suit to resolve interstate disputes. Water Pollution Control Act of 1948, § 2, Pub. L. No. 80-845, 62 Stat. 1156-57 (superseded by Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 103, 86 Stat. 818-19); Clean Air Act of 1963, Pub. L. No. 88-206, § 5, 77 Stat. 396-99 (1963) (repealed by Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 114(b)(3), 84 Stat. 1688 (1970)).

29. See 33 U.S.C. § 1342(b) (Supp. 1977) (procedure under which states can assume responsibility for administering permit programs vital to achievement of federal water quality standards).

whenever it will gain from the trade, and that, if it bears a risk of loss, it will take all expense-justified measures to avoid that loss. These basic assumptions of economics have, of course, not gone without challenge. Nevertheless, they have shown considerable predictive power in a wide range of contexts.

Although there is reason to suspect that public entities behave differently than individuals or firms, what motivates public officials remains obscure. If Connecticut were entitled to collect damages for an inflow of pollution, one cannot be sure that state officials would treat that right as a private party would treat the same right. Similarly, if Massachusetts were liable for cost spillovers, one cannot be sure that its officials would concern themselves with reducing the outflow that gave rise to its liability.

For illustrative purposes, two models of government behavior that have been discussed in the recent literature are set forth below. Neither has yet shown sufficient predictive power to win the sort of backing that economists have accorded their basic assumptions about the motivations of individuals and firms.

The model most conducive to the viability of the public property rights approach predicts that government officials pursue the "public interest."³⁰ A government acting in the public interest would make all Pareto-superior moves available to it and arguably might also adopt all programs that have favorable benefit/cost ratios (regardless of their immediate distributional consequences). Governments fitting this model would vigorously enforce all public property rights, and could be expected to adopt efficient internal antipollution programs.³¹ The principal shortcoming of the public interest model is that it does not appear to harmonize with the observed behavior of public officials, who often seem attracted to programs of questionable efficiency and dubious equity.

A more cynical, but (to many) a more plausible, model is that elected officials seek to maximize their chances of reelection, and that nonelected officials (bureaucrats) seek to maximize the budgets of their

30. An impressive attempt to breathe life into this model is Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145 (1977-1978).

31. In fact, a government pursuing the public interest might construe "public" broadly and automatically consider cost spillovers when adopting policy; this version of the model would deny the existence of the problem addressed in this Article.

agencies.³² This second model generally does not respect public sector performance, and thus might seem to favor private, as opposed to public, representation of groups. For public property rights to be a viable candidate as an internalization system, however, one need only assume that financial impacts count *to some extent* in government decisions—that is, if elected officials or bureaucrats can take an action that on balance will result in an increase in the net assets of public treasuries or citizen pocketbooks, they will regard that as a positive feature of the action. This is hardly heroic. Surpluses in public treasuries would tend to increase an incumbent's chances of reelection and give a tenured bureaucrat a better chance of boosting next year's budget. Countless other factors, however, affect election results and budget decisions. Therefore, the cynical model would predict that "public" money means less to a government official than "private" money does to an individual or firm. Nevertheless, there can be little doubt that federal grant-in-aid programs have often led subfederal governments in the direction that Congress wanted to entice them. This last bit of evidence is an indication that public property rights could be a viable internalization system.

If our understanding of government behavior were deeper it might be possible to vary the structure of political units to induce officials to give more heed to fiscal factors. For example, elected officials are apt to have different incentives than appointed—and especially tenured—officials. If so, how Connecticut would value and enforce rights against polluters might depend upon whether enforcement was wholly administrative or whether it had to be ratified by legislative action. If Connecticut relied exclusively on administrators to enforce rights, it might inatter whether the state attorney general's office or the state environmental protection agency had the authority to settle claims. Those two agencies are apt to function in two quite different political environments.

b. *The relative merits of public property rights and private class litigation*: If it is assumed that public and private property rights incorporate identical passing-on policies, both will have similar distributional consequences. The two systems may, however, differ in efficiency. "Ef-

32. See, e.g., W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38-42 (1971); Fiorina & Noll, *Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector*, 68 AM. ECON. REV. PAPERS & PROC. 256 (1978); cf. Note, *An Economic Analysis of Sovereign Immunity in Tort*, 50 S. CAL. L. REV. 515, 522-37 (1977) (developing nine different models of government activity).

iciency" has two aspects in this context. The first is allocative efficiency—whether an internalization system induces polluters and victims to install cost-effective pollution prevention devices. The second is administrative efficiency—the cheapness of the claims settlement process and of the passing-on of awards and liabilities. Allocative efficiency and administrative efficiency frequently are at odds. We shall see that, of the two property rights systems, private class litigation seems likely to achieve greater allocative efficiency, and public property rights, greater administrative efficiency.

(i) *Allocative efficiency*: Private class representatives seem, a priori, more likely than public officials to be vigorous in asserting and defending the interests of clients. Private attorneys should fit fairly well the model of utility maximizers. Their clients will usually negotiate fee arrangements that will spur plaintiffs' attorneys to maximize, and defendants' attorneys to minimize, damage awards. By contrast, the most plausible model of government behavior suggests that public officials might not care much about settlement outcomes in some situations. For example, if a bureau representing a plaintiff government were a budget maximizer, it might not vigorously pursue a claim unless the bureau shared directly in the award. Thus, because vigorous representation is necessary to the achievement of optimal settlements, private class litigation seems more likely than public property rights to lead to allocative efficiency.

Yet public property rights could conceivably be allocatively superior in some ways. Private class litigation inevitably immerses courts deeply into the business of structuring classes and reviewing the substance of proposed settlements.³³ Judges are widely regarded as being poorly suited to this role in environmental cases³⁴ because they lack both adequate technical knowledge and sufficient staff support. A public property rights approach would be less likely than private class litigation to involve judges in orchestrating settlements because specialized administrative agencies of the opposing governments could frequently negotiate settlements without litigation. Nevertheless, on balance, experience should tend to show that allocative efficiency considerations favor the private class litigation device.

33. Judicial supervision is particularly necessary when most class members have only a small interest in the outcome.

34. See sources cited in note 26 *supra*.

(ii) *Administrative efficiency*: In large number cases, public property rights promise to be much cheaper to administer than private property rights. Class actions require the establishment and judicial supervision of "special governments" for the victim and emitter classes. Because attorneys for plaintiffs in class actions are, in effect, self-appointed, the rules of civil procedure currently impose expensive procedural safeguards on the use of the device. For example, the attorney may have to notify class members that an action has been brought,³⁵ and courts may insist on carefully scrutinizing proposed settlements.³⁶ Public property rights, by contrast, are enforced by existing government units. Officials of these governments are already under the discipline of politics—a taskmaster not obviously inferior to trial court judges, and probably far cheaper. In short, using an existing government as a class representative should sharply reduce organization and supervision costs.³⁷

Private class litigation may possibly be cheaper than intergovernmental litigation in some respects. The identification of group members, a task necessary to the extent that passing-on is pursued, is automatically accomplished when private classes are organized. Because trial judges would always approve specific passing-on formulas in private cases, those formulas could not be the target of collateral litigation, as they might be if set administratively. Finally, because private classes more precisely comprehend actual emitters and victims, private litigation can better remedy a conflict. For example, the Springfield pollution might injure Massachusetts riparians as well as those in Connecticut. These Massachusetts riparians could readily be included in a private class of victims but would be left uncompensated if Connecticut were the only plaintiff.

Nevertheless, because ad hoc governments are so expensive to organize, public property rights may on balance prove to have a significant administrative edge on private class litigation. For certain types of conflicts, this advantage in administrative efficiency conceivably could outweigh the likely allocative superiority of private class litigation.

35. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Home Sav. & Loan Ass'n v. Superior Court*, 42 Cal. App. 3d 1006, 1012, 117 Cal. Rptr. 485, 488 (1974).

36. See FED. R. CIV. P. 23(e). But see Bernstein, *Judicial Economy and Class Actions*, 7 J. LEGAL STUD. 349 (1978) (measured by judicial hours per dollar transferred, class actions are not unusually burdensome).

37. Use of a public representative should be especially advantageous when the optimal remedy is time-to-time, as opposed to permanent, damages because it would save the expense of repeatedly organizing private classes.

5. *The Niche for Public Property Rights*

Even if public property rights do prove to be more efficient than private class litigation in some situations, intergovernmental litigation in those same situations may remain inferior to the more centralized internalization systems—namely, regulatory or penalty programs administered by a higher-level government. If they are useful at all, public property rights, *i.e.*, governmental entitlements against other governments, would seem to be most promising when the following conditions are met: (1) A readily identified flow of costs crosses a political boundary (*i.e.*, all governments do not share a common condition that is the undecipherable joint product of emissions on all sides); (2) Large numbers of private parties create the flow, and large numbers of private parties on the other side of the boundary feel its effects; *and* (3) A small number of lower-level governments would rather accurately represent *both* the private sources of the cost spillover, and the outsiders who suffer those costs. All three conditions are met in the Connecticut River example in which Connecticut could be granted an entitlement (protected only by damages) to water of a certain quality for Massachusetts. If public property rights are to work anywhere, they should work in that type of case.

The third condition is quite restrictive. Many types of interjurisdictional spillovers affect many governments. For instance, factories located in several states may combine to pollute a great interstate river to the detriment of residents of several downstream states. In such a situation, the large number of governments involved could make the settlement of interstate claims so administratively expensive that public property rights would be less efficient than a more centralized internalization system.

II. SOME SUGGESTED RULES OF PUBLIC PROPERTY

Assume now a dispute that fits the niche—*i.e.*, a controversy that involves, on both sides, large numbers of private parties and potentially small numbers of governments. What substantive rules of public property might make sense?

A. CHOICE OF LAW

The sovereign whose rules are applicable to a conflict between two lower-level governments could be selected in either of two ways. The first way is to invoke choice-of-law principles (*e.g.*, the “place of the harm”) to decide which lower-level government’s domestic nuisance

law applies.³⁸ This approach seems ill-advised because a government might skew its domestic law to help it in its external disputes. For example, a state in a downstream location on several interstate rivers would have an incentive to adopt excessively strict domestic nuisance rules. The second possible source of applicable law is the government at the next higher level whose boundaries encompass all parties to the controversy. Because it is the most decentralized, yet neutral, source of substantive rules, it seems the preferable choice.

B. SUBSTANTIVE RULES FOR RESOLVING INTERGOVERNMENTAL DISPUTES

In spillover situations, efficiency is enhanced when pre-exchange rights are defined to minimize the sum of (1) deadweight losses remaining after all economically feasible exchanges, and (2) the costs of such exchanges (*i.e.*, transaction costs).³⁹ Generally speaking, this requires allocation of risks of losses to the cheapest cost avoiders—namely, the parties who have the best information about possible losses and how to prevent them and the best ability to act on that information.⁴⁰ In addition, legal rules can promote efficiency by making it easier for cheapest cost avoiders to settle with their potential victims. Although there has been lamentably little empirical work on how to do this, some consensus hunches are that property rights should be *clear* (to reduce uncertainty), *exclusive* (to obviate the organizational complexities that arise from concurrent ownership), and *transferable* (to permit settlements).⁴¹ These are guidelines for a higher-level government to follow in structuring property rights among its lower-level units.

Borrowing heavily from my already published views on the optimal structure of rights between private neighbors,⁴² I will now summarize some substantive rules for public property rights. These suggestions should be regarded as speculative because they rest on the not unassailable assumption that the health of public treasuries matters

38. The traditional approach is to apply the local law of the state where the injury occurred. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 147 (1971). This approach was followed in *Dallas v. Whitney*, 118 W. Va. 106, 188 S.E.2d 766 (1936) (Ohio law applied in a suit involving damages to an Ohio building allegedly caused by defendant's blasting in West Virginia).

39. Michelman, *supra* note 30, at 179 n.111.

40. See generally G. CALABRESI, *supra* note 22; Calabresi & Hirschoff, *supra* note 22.

41. For a more complete discussion of the desirability of these features, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.1, at 27-31 (2d ed. 1977).

42. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 722-61 (1973).

to public officials.⁴³

The basic rule suggested is that transboundary losses caused by privately engendered *cost spillovers* should prima facie be borne by the emitting government, not the receiving government. Because spillover effects tend to fan outward, more preventive technologies are usually available at the emitting than at the receiving end. The emitting government is thus typically the cheaper cost avoider of the two because it can better evaluate preventive technologies and better act on that analysis.

What standard should be used to determine whether a "cost spillover" has occurred between governments? An analogy to nuisance law will prove instructive. Nuisance law does not entitle a private landowner to prevent his neighbors from doing everything he would prefer them not to do, but only from conducting "subnormal" or "unneighborly" activities.⁴⁴ These are identified by a test of custom. What is customary at a particular time and place cannot be a nuisance. Customary behavior tends to be cost-justified behavior (especially when transaction costs are low), because bargaining tends to eliminate inefficient practices. To grant a landowner rights to receive above normal treatment would be inefficient because those rights would have to be transferred to permit the efficient outcome of customary behavior. The costs of those transfers are saved when there are no affirmative rights to receive above normal treatment. I suggest a similar rule for public property: a plaintiff government should not be entitled to be free from all externally created pollution, but only from above normal levels of pollution.

I assumed in Part I⁴⁵ that a public property right is protected only by a liability rule—*i.e.*, that damages are the victim government's exclusive remedy. This remedial approach is not inherent in public property rights systems. Injunctive remedies are a possibility whenever small numbers of governments are involved because holdout and free-loader problems are then not severe. A court's injunctive decree might order the government containing the emitters to reduce the pollution outflow to a certain level by a given time. As often happens in school desegregation cases, however, there might be foot-dragging by the defendant government's officials, and thus the inevitable immersion of

43. See text following note 32 *supra*.

44. Reasons for placing liability only on subnormal behavior are more fully elaborated in Ellickson, *supra* note 42, at 728-33.

45. See text accompanying notes 10-37 *supra*.

judges into intrusive supervisory roles. The spirited debate over the relative merits of injunctions and damages is far from over.⁴⁶ In this Article, I am proposing that damages be the exclusive remedy in public property rights cases because this remedial restriction considerably simplifies the present discussion, and is supported by my prior writings on the remedy issue.⁴⁷

The emitting government should only be *prima facie* liable for cost spillovers. Its liabilities should be reduced to the extent that the victims' government was the cheapest cost avoider. This might occur when the victims' government had failed to mitigate its citizens' damages, or when its citizens had suffered an unusual type of damage that it should have known more about than the emitting government should have.

To expedite settlements, public property rights should be exclusive (*i.e.*, preempt all private remedies) and transferable; the procedures for transfer should also be clearly defined.

C. WHICH GOVERNMENTS SHOULD HAVE RIGHTS AND DUTIES?: THE RULE OF THE HIGHEST LEVEL

Courts and legislatures may have heretofore shied away from creating vicarious public property rights because of the difficulty of designating a particular government (or governments) to represent an aggrieved (or cost-emitting) citizenry. The designations are sometimes straightforward, as when the emitters and their external victims are completely separated by a single government boundary. But matters are rarely this simple.

A first type of complication arises when the boundary crossed separates governments at several different levels. For example, a boundary between two states is also a boundary between local governments (*e.g.*, counties) of those respective states. When should state or local units represent the parties on either side? Two possible rules of decision come to mind. The first would confer the rights (or duties) in such a situation on the most localized general purpose units of government, provided that no more than a few governments at that level encom-

46. For a representative sampling of this debate, see Calabresi & Melamed, *supra* note 3, at 1115-23; Ellickson, *supra* note 42, at 738-48; Polinsky, *On the Choice Between Property Rules and Liability Rules* (forthcoming in *ECONOMIC INQUIRY*).

47. Simplification of the exposition is to be desired in part because there is yet another basic remedial option: an injunction against emissions issued on condition that the victim(s) compensate the emitter(s). See sources cited in note 46 *supra*.

passed the affected private class. Suppose, to refer once more to our example, that local government along the Connecticut River in Connecticut is highly balkanized. This rule would then grant affirmative rights to Connecticut (not its political subdivisions) but Connecticut would have these rights against the City of Springfield (which our example stipulated as containing all of the private emitters). This approach best honors decentralized decisionmaking.

The alternative approach when a common boundary demarcating several levels of government is crossed is to vest the affirmative rights and duties exclusively in the highest-level governments on both sides. In our example, these would be the States of Connecticut and Massachusetts. This rule may implicate governments that appear to be larger than necessary. Compared to its alternative, however, this rule (1) is much easier to apply, (2) often involves fewer governments (and can never involve more), and (3) by always designating governments of equal stature to represent the two sides, may promote mutual respect and thus enhance possibilities of settlement. This rule seems preferable to the alternative in most situations. I call it the Rule of the Highest Level.

A second type of complication arises when the same flow of spillovers crosses *in sequence* the boundaries of several different levels of government. For example, suppose pollution from Springfield factories injures not only Connecticut riparians, but also riparians in another Massachusetts municipality, Agawam. It would be possible to entitle both Connecticut and Agawam to vicarious public property rights. For example, Connecticut might be given rights against Massachusetts under federal law, and Agawam might be given rights against Springfield under Massachusetts law. However, a layer cake of public property rights involving several different levels of government in a single environmental dispute would greatly complicate settlement negotiations. Springfield could hardly settle with Agawam, for example, before knowing the impact Massachusetts' settlement with Connecticut would have on Springfield polluters. This suggests that a Rule of the Highest Level also be applied when several boundaries are crossed in sequence. In those situations, public property rights should be created solely at the highest level, where the involved governments will be least numerous, and thus the transaction costs of settlements lowest. Under this approach, Agawam should not have any rights because Springfield's spillovers have interstate impact. By restricting use of the public property rights technique to the highest intergovernmental level af-

fect, the Rule would in effect ask Massachusetts to handle its internal water pollution problems through regulation or emission charges.

III. THE VICARIOUS RIGHTS AND DUTIES OF NEIGHBORING GOVERNMENTS UNDER CURRENT LAW

Whatever their merit, the rules just suggested can be used as a yardstick for assessing current law. In general, the vicarious rights and duties of neighboring governments are now quite poorly defined. To my knowledge, no higher-level government has ever enacted detailed legislation articulating such rights between its lower-level subdivisions. Judges confronted with privately caused intergovernmental disputes therefore have had to develop common law rules. Lacking legislative backing, they have understandably been reluctant to develop public property rights on their own. Perhaps as a result, there have been few reported intergovernmental cases. This part will briefly review the thin body of precedent at the international, interstate, and interlocal levels.

A. INTERNATIONAL PROPERTY RIGHTS

There has been only one significant instance of international litigation over privately created cost spillovers. The *Trail Smelter Arbitration* (United States v. Canada)⁴⁸ involved noxious sulphur dioxide fumes emitted from a private smelter located in British Columbia, Canada, about seven miles from the United States border. The fumes had been inflicting substantial damage to mostly private lands in the State of Washington. The United States and Canada ratified a convention establishing an arbitration tribunal to resolve the dispute according to principles of United States law. The tribunal eventually ordered Canada to pay the United States a substantial sum for past damage inflicted, and also decreed prospective injunctive relief (which it seemed to address directly to the corporation responsible for the pollution). The literature does not indicate whether Canada obtained indemnification from that corporation, or whether the United States distributed any part of the award it received to the injured landowners; both of these sets of private interests were involved in the negotiations,⁴⁹ however, so it is likely that these passthroughs occurred.

48. 3 R. Int'l Arb. Awards 1905 (1941), reprinted in 33 AM. J. INT'L L. 182 (1939), 35 AM. J. INT'L L. 684 (1941).

49. Hoffman, *State Responsibility in International Law and Transboundary Pollution Injuries*, 25 INT'L & COMP. L.Q. 509, 515 (1976); Read, *The Trail Smelter Dispute*, 1 CAN. Y.B. INT'L L. 213, 227-29 (1963).

Several aspects of this remarkable case deserve emphasis. First, the *Trail Smelter* decision adheres to the Rule of the Highest Level. The proper parties were regarded as being the United States and Canada, not, for example, Washington and British Columbia.⁵⁰ Second, the tribunal came to the unprecedented conclusion that Canada was vicariously liable in international law for the conduct of private polluters located within its boundaries—a rule I have endorsed (but only when there are multiple emitters) and termed “*respondeat patria*.” Third, the tribunal awarded damages—my recommended remedy in intergovernmental litigation, but one rarely encountered in case law. Fourth, although the decision did not say that the United States’ rights and Canada’s duties were exclusive, it seems clear that all concerned treated them as such.⁵¹

The *Trail Smelter* decision grew out of a special United States-Canada convention, and thus one should be wary of exaggerating its importance. Nevertheless, some other international pollution disputes have since been settled in accordance with the *Trail Smelter* principles. For example, the United States has agreed to reduce the salinity of the Colorado River at the Mexican border.⁵² Thus, international precedents, sparse though they may be, appear to conform rather well to the suggested rules.

B. INTERSTATE PROPERTY RIGHTS

Congress has never enacted a statute defining property rights between neighboring states,⁵³ however, there is a body of judge-made interstate

50. The Rule seems to be honored generally in international law, where national governments usually bar their political subdivisions from making foreign policy. *See, e.g.,* *Zschering v. Miller*, 389 U.S. 429 (1968) (Oregon statute governing intestate distribution of personal property unconstitutionally intrudes on federal powers over foreign affairs). *See generally* H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 160-76 (2d ed. 1976).

51. Read, *supra* note 49, at 223.

As the *Trail Smelter* involved only one private polluter, making that polluter (rather than Canada) exclusively liable would have been a less circuitous approach; however, apparently no Canadian court would take jurisdiction over a controversy involving injury to lands outside Canada, Hoffman, *supra* note 49, at 514-15, and probably no United States court had personal jurisdiction over the polluter.

52. Agreement on Colorado River Salinity, Nov. 16, 1970, United States-Mexico, 21 U.S.T. 2478, T.I.A.S. No. 6988.

53. Several recent federal antipollution statutes authorize any person to sue any other person to prevent violations of the statute. *See, e.g.,* Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1976); Clean Air Act, 42 U.S.C. § 7604 (Supp. 1977). These statutes thus conceivably could provide a basis for suits between states. *Cf. Township of Long Beach v. City of New York*, 445 F. Supp. 1203 (D.N.J. 1978) (New Jersey township has right to enforce federal statute on ocean pollution against New York municipality).

law, primarily cases where one state has sued another for polluting or diverting interstate waters. These cases adopt the sound rule that federal common law, not the law of a state identified through choice-of-law rules, governs interstate disputes.⁵⁴ Interstate property law is clear on little else.

1. *Which Federal Court Has Trial Jurisdiction?*

There is some uncertainty about which federal court would have jurisdiction to try an interstate case like Connecticut's potential lawsuit against Massachusetts. A federal statute confers upon the Supreme Court "original and exclusive jurisdiction" to try cases between one state and another.⁵⁵ Supreme Court Justices, however, have understandably been disinclined to spend their time acting as trial judges. In any given interstate case, they may therefore decide that their original jurisdiction is merely discretionary,⁵⁶ and direct the parties to an appropriate district court.⁵⁷ Yet, if the Connecticut Attorney General first filed his complaint in a district court, the district judge might take the federal statute at face value and conclude that only the Supreme Court had jurisdiction to try the case.⁵⁸ Not a promising start.

2. *What Vicarious Rights Do States Have?*

A more fundamental issue is whether federal common law currently would entitle Connecticut to obtain redress against pollution originating in Massachusetts. The landmark case of *Georgia v. Tennessee Copper Co.*⁵⁹ authorized a state to obtain injunctive relief on behalf of its citizens against a *private* air polluter situated beyond state boundaries. It is also well established that a state may obtain injunctive relief against pollution arising out of an outside government's proprietary activities.⁶⁰

54. *Illinois v. City of Milwaukee*, 406 U.S. 91, 102 (1972); P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL STATUTES* 264-67 (2d ed. 1973). *But see* note 72 *infra*.

55. 28 U.S.C. § 1251 (a)(1) (1976). *See also* U.S. CONST. art. III, § 2, cl. 2.

56. *See, e.g., Arizona v. New Mexico*, 425 U.S. 794 (1976); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971).

57. *See Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

The Court sometimes uses another ploy to avoid exercising its original jurisdiction: it may hold that a state is actually suing to protect citizen interests, not its own sovereign interests. *See, e.g., Pennsylvania v. New Jersey*, 426 U.S. 660 (1976).

58. *See State Water Control Bd. v. Washington Suburban Sanitary Comm'n*, 61 F.R.D. 588 (D.D.C. 1974).

59. 206 U.S. 230 (1907). *See also* Annot., 42 A.L.R. Fed. 23 (1979) (collection of authorities on a state's standing to sue on behalf of its citizens).

60. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

These lines of cases fall far short of constituting an efficiency-enhancing system of interstate property rights. The first problem is that the vicarious state rights established by these cases do not seem to be exclusive. Some precedents would seem to entitle, for example, affected local governments in Connecticut also to pursue their own *parens patriae* actions to enjoin pollution emanating from out-of-state governments.⁶¹ Allowing both Connecticut and its subdivisions to sue not only creates nonexclusive vicarious rights but also violates the Rule of the Highest Level, which permits only states to participate as parties in interstate disputes. In addition, the reported decisions do not indicate whether the federal common law of interstate property rights preempts *private* interstate claims.⁶² Massachusetts can hardly be expected to settle with Connecticut if Connecticut may own its rights concurrently with many others.

The second problem with these lines of cases is that courts have been reluctant to use damages as a remedy. When a state without statutory basis has sought to recover damages on behalf of its citizens from a private defendant for antitrust violations,⁶³ or water-polluting activities that have injured the environment,⁶⁴ most courts have held that the state cannot be accorded that remedy. The rationale courts sometimes give for this outcome is that a defendant would be subjected to double liability if he had to satisfy the claims of both a state and its citizens.

This argument is not sound because double liability can be readily avoided; either the state could be designated as a receiver for private claimants residing within it (and their claims barred), or the state's re-

61. See *Township of Long Beach v. City of New York*, 445 F. Supp. 1203, 1213-14 (D.N.J. 1978) (New Jersey township may invoke federal common law governing interstate water pollution in suit against New York municipality). *But cf.* *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (city is not permitted to intervene in suit when its state is already a party; "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state"). See also *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968) (New Jersey township has standing to attack New York town's change of zoning for area near common boundary); *Byram River v. Village of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975) (Connecticut town, *inter alia*, may sue New York village to stop its water pollution).

62. See note 61 *supra*.

63. See, e.g., *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972); *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1972), *cert. denied*, 412 U.S. 908 (1973). *But see Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970).

64. See, e.g., *State v. Dickinson Cheese Co.*, 200 N.W.2d 59 (N. Dak. 1972); *Commonwealth v. Agway, Inc.*, 210 Pa. Super. Ct. 150, 232 A.2d 69 (1967). *But see Maine v. M/V Tamano*, 357 F. Supp. 1097 (D. Me. 1973); *Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1060 (D. Md. 1972).

covery could be restricted to amounts not recoverable by private litigants. In other words, if the courts were careful to create exclusive rights, they could start using damages as a remedy. In any event, a state's vicarious rights to recover damages for citizen injuries are currently uncertain. This uncertainty could, of course, be rectified by statute.⁶⁵

3. *What Vicarious Duties Do States Owe Their Neighbors?*

The third problem is that current federal common law sheds no light on whether a state is vicariously liable for spillovers caused by private polluters located within its boundaries. To date, a state has been held responsible for impairing the quality of interstate waters only when the impairment arose from its own proprietary activities,⁶⁶ or from the proprietary activities of its local governments.⁶⁷ In other words, interstate common law has yet to incorporate the doctrine of "respondeat patria," which, through the *Trail Smelter* case, was incorporated into international law several generations ago.⁶⁸ Because state responsibilities for private pollution are as yet undetermined, there are few clues about: (1) how state duties would mesh with the duties of local governments⁶⁹ and with the duties of private firms also involved in the same cost spill-

65. In 1976, Congress did attempt to clarify states' rights but only in the antitrust context. 15 U.S.C. § 15c(b) (1976). The Supreme Court emasculated Congress' effort in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), by holding that a state had to qualify as an "overcharged person" under the Clayton Act to be entitled to pursue *parens patriae* antitrust remedies. *Id.* at 733-34 n.14.

66. See, e.g., *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (Minnesota's ditches had allegedly caused North Dakota flooding); *Kansas v. Colorado*, 206 U.S. 46 (1907) (Colorado had allegedly diverted water from the Arkansas River).

67. See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 94-97 (1972) (dictum); *Missouri v. Illinois*, 180 U.S. 208, 241-42 (1901) (Illinois is responsible for acts of the Sanitary District of Chicago).

68. The Supreme Court recently came close to facing the issue of state liability for private pollution. Vermont invoked the court's original jurisdiction to bring an action against New York and the International Paper Company arising out of the company's pollution of Lake Champlain from the New York side. The parties agreed to settle, however, and the Court only had to decide whether the settlement was appropriate. See *Vermont v. New York*, 417 U.S. 270 (1974) (refusing to approve special master's report recommending proposed settlement).

69. The Supreme Court has permitted a state to bring a direct action against the municipality of another state to remedy the latter's proprietary pollution. See *New Jersey v. City of New York*, 283 U.S. 473 (1931). This approach does not violate the Rule of the Highest Level because the pollutants are not arising from multiple sources.

In cases of this type, the Court will apparently give the plaintiff state the option of suing just the city, see *Illinois v. City of Milwaukee*, 406 U.S. 91, 97-98 (1972), or both the city and the state, see *New Jersey v. New York*, 345 U.S. 369, 374-75 (1953). There are no reported cases in which the victim state sued just the state of the polluting city.

overs, and (2) what remedies would be available if a state breached its duty to control private pollution.

4. *What Cost Spillovers Are Actionable?*

The substantive standards the federal courts currently apply in interstate environmental disputes are about as clear as one can expect in common law adjudication. Federal judges generally impose sanctions only against above normal levels of pollution. In this regard, the federal common law parallels the rules proposed in this Article. For example, in 1900 the Sanitary District of Chicago reversed the flow of the Chicago River so that it emptied into the Mississippi River basin rather than into Lake Michigan. Missouri residents immediately began to complain of unhealthful sewage in the Mississippi. Writing for the Supreme Court in the resulting litigation, *Missouri v. Illinois*,⁷⁰ Justice Holmes confronted the question of what Missouri's rights were:

If we are to judge by what [Missouri] itself permits, the discharge of sewage into the Mississippi by cities and towns is to be expected. . . . [S]ome consideration is given to the practical course of events. In the black country of England parties would not be expected to stand upon extreme rights.⁷¹

He concluded that the evidence, as presented, did not entitle Missouri to relief.⁷²

The complexity of pollution problems makes it hard for courts and litigants to determine what "normal" levels are. In the future, federal judges could increase the clarity of the federal common law by applying the traditional tort doctrine that statutes and regulations are evidence of the standard of care. This would permit federal judges to use federal antipollution regulations to help define the quality of incoming water and air to which a state is vicariously entitled.⁷³

5. *Constitutional Constraints*

Two unsung clauses of the federal constitution might possibly impede adoption of an interstate property rights system.

First, a long line of Supreme Court cases holds that the eleventh

70. 200 U.S. 496 (1906).

71. *Id.* at 521-22.

72. *But see* *Illinois v. City of Milwaukee*, 406 U.S. 91, 107-08 (1972):

[A] State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor. There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern.

73. *See also* note 53 *supra*.

amendment⁷⁴ permits a state to seek damages from another state only when the plaintiff state is striving to protect its sovereign interests.⁷⁵ Therefore, federal judges might interpret the eleventh amendment to bar their awarding Connecticut damages against Massachusetts, particularly if they thought Connecticut residents would have viable damage claims under private nuisance law. This poses a problem if, as I have argued, damages is the preferable remedy in interstate litigation.

Second, the compact clause⁷⁶ threatens to increase greatly the transaction costs of some kinds of interstate settlements. An interstate agreement to which the compact clause applies is not binding without congressional approval. The Supreme Court has interpreted the compact clause to apply only to interstate agreements that enhance state power to the detriment of federal supremacy.⁷⁷ This standard is sufficiently ambiguous to cast a cloud of uncertainty over many interstate agreements. For example, Connecticut and Massachusetts might wish to set up an arbitration system or some other administrative apparatus for resolving their future water quality disputes. If Congress had not approved their system, a party aggrieved by its operation could challenge the system as violating the compact clause. Although this challenge would probably not succeed,⁷⁸ it still might delay use of the system for several years.

To forestall this type of litigation, the two states might seek congressional approval of their joint agreement. That avenue, however, is certain to result in other frustrations. Recently, state negotiation and congressional ratification of an interstate compact have together taken an average of eight years.⁷⁹ Congress has contributed to this glacial

74. The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

75. *See, e.g.,* North Dakota v. Minnesota, 263 U.S. 365, 374-75 (1923); New Hampshire v. Louisiana, 108 U.S. 76 (1883).

76. Article I of the United States Constitution provides: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . ." U.S. CONST. art. I, § 10, cl. 3.

77. United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978). *See generally* Engdahl, *Characterization of Interstate Agreements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63 (1965).

78. *See* United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

79. 2 F. GRAD, ENVIRONMENTAL LAW § 7.01[2], at 7-5 to -7 (2d ed. 1978).

A review of interstate water pollution compacts may be found in 1 F. GRAD, *supra*, § 2.03[5][b], at 2-358 to -369. For an insightful analysis of the results of the compact that created the Delaware River Basin Commission, see THE UNCERTAIN SEARCH, *supra* note 26.

pace by declining to rubberstamp interstate agreements, and instead insisting on undertaking its own review of the merits of each agreement. For example, in the late 1960's when it was in the process of amending the Clean Air Act, Congress refused to approve several interstate air pollution compacts pending before Congress.⁸⁰ As long as congressional approval is needed (or even arguably needed), the property rights of states can be transferred only with great difficulty. Ready transferability is, of course, an essential attribute of a viable property rights system.

6. *A Possible Statutory Definition of Vicarious Interstate Property Rights*

Commentators are correct in observing that in the past, states have had great difficulty using compacts to implement efficient programs to combat regional air and water pollution.⁸¹ But this history of failure does not conclusively prove the futility of the public property rights technique of internalizing intergovernmental spillovers. It only supports some old hunches: that bargaining is difficult when rights and duties are unclear, concurrently owned, and hard to transfer. In light of the multitude of current legal problems, it should hardly be surprising that Connecticut and Massachusetts would have trouble negotiating an agreement that would efficiently remedy the pollution of the Connecticut River.⁸²

Even if reformulated, interstate property rights can at best play only a rather limited role in the pollution context. Many pollutants can travel hundreds of miles, *e.g.*, D.D.T. in the water or sulfates in the air. In addition, for some types of pollution sources (like automobile emissions), national regulation may enable achievement of significant economies of scale. Decentralized regulation of these aspects of environmental problems holds little promise. On the other hand, many environmental conditions are relatively localized—*e.g.*, concentrations

80. *E.g.*, Illinois-Indiana Air Pollution Control Compact, IND. CODE ANN. §§ 13-5-7-1 to -4 (Burns 1973) (repealed 1977); Mid-Atlantic States Air Pollution Control Compact, N.Y. ENVIR. CONSERV. LAW §§ 21-1501 to -1513 (McKinney 1973). See 1 F. GRAD, *supra* note 79, § 3.03[5], at 3-312 to -314; Zimmerman, *Political Boundaries and Air Pollution Control*, 46 J. URB. L. 173, 186-88, 191-97 (1969).

81. See THE UNCERTAIN SEARCH, *supra* note 26, *passim*; Green, *State Control of Interstate Air Pollution*, 33 L. & CONTEMP. PROB. 315, 323-30 (1968); Zerbe, *supra* note 4, at 226-27, 242-43.

82. In fact, both states are members of the multistate New England Interstate Water Pollution Control Compact. CONN. GEN. STAT. ANN. §§ 25-67 to -68a (West 1975); MASS. GEN. LAWS ANN. ch. 21 app., §§ 1-1 to -5 (West 1973). This Compact created a commission and authorized it to adopt water quality standards, which the member states are to enforce within their own boundaries. The commission itself lacks enforcement powers.

of particulates in the air or shortages of dissolved oxygen in the water. Federal specification of a state's vicarious rights to receive a certain quality of air and water in these respects might prove to be more efficient than the current federal statutes that set nationally uniform mandatory standards.

Most experts believe, and the current federal common law indicates, that interstate environmental disputes are poorly suited to judicial resolution.⁸³ In addition, the Supreme Court has hinted that it would welcome a statutory recasting of the federal common law of interstate relations.⁸⁴ The contours of such a statute are easy to draw. Invoking its powers under the commerce clause,⁸⁵ Congress could establish a specialized agency called the Board on Interstate Environmental Disputes. The Board would be delegated two major responsibilities. First, it would be asked to specify substantive standards for levels of interstate spillovers that are of the type susceptible to decentralized adjustment. These standards would then define the vicarious rights and duties of neighboring states. To make them exclusive, Congress should indicate that these standards, which obviously could be considerably more specific than general nuisance principles, would preempt the federal common law⁸⁶ and all other transboundary public and private property rights. Second, the Board would be given primary jurisdiction to adjudicate a dispute between states when the violation of Board standards was at issue. Board rulings would be appealable to the federal circuit court of appeals for the region in question, and thereafter to the Supreme Court.⁸⁷

Although a federal statute cannot sweep away constitutionally derived impediments to public property rights, the Supreme Court does give congressional enactments deference when it engages in constitu-

83. THE UNCERTAIN SEARCH, *supra* note 26, at 219-20; KRIER & URSIN, *supra* note 26, at 33-34.

84. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972) (implying federal statute may someday preempt federal common law of nuisance); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971) (interstate pollution cases are currently awkward for the Court to manage).

85. The commerce clause empowers Congress to create interstate property rights. *United States v. Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968). See also Stewart, *supra* note 4, at 1228, 1248.

86. *Cf. Illinois v. City of Milwaukee*, 47 U.S.L.W. 2716 (7th Cir. 1979) (Federal Water Pollution Control Act of 1972 does not preempt federal common law remedies); *People v. City of Milwaukee*, 366 F. Supp. 298 (N.D. Ill. 1973) (same).

87. For more detailed suggestions on the structuring of intergovernmental rights, see text accompanying notes 39-47 *supra*.

tional interpretation.⁸⁸ Some scholars have concluded that the eleventh amendment only restrains judicial initiatives;⁸⁹ if this interpretation is correct, Congress by statute could readily establish damages as the usual remedy in interstate environmental disputes. The compact clause, perhaps, is not so easily rendered innocuous. That clause, however, has been construed as being designed to prevent states from increasing their power to the detriment of federal supremacy; therefore, were Congress and the President to declare (by statute) that they do not want to review certain types of agreements between states, the federal courts would probably defer to the congressional and Presidential conclusion that federal supremacy interests were not in jeopardy.

C. INTERLOCAL PROPERTY RIGHTS

A fresh hypothetical will facilitate analysis of possible rights and duties of local governments. Suppose that the City of Los Angeles zones for industrial use a multiblock area adjacent to the City of Beverly Hills. The several dozen business firms that own land in the multiblock area subsequently develop their individual parcels, creating a major industrial complex on the Los Angeles site. This complex generates noise, traffic congestion, and aesthetic blight, which annoy Beverly Hills residents whose houses lie just across the common municipal boundary. Like the Connecticut River example, this hypothetical involves large numbers of private parties on both sides of the conflict.

Policy analysts usually recommend that intermunicipal spillovers of this type be internalized through a shift of regulatory responsibility to a higher-level government. Thus, article 7 of the Model Land Development Code uses the term "development of regional impact" for land uses that have pervasive effects, and suggests that state governments issue rules to govern their location.⁹⁰ Article 7 does not authorize neighboring municipalities to agree to an adjustment of the state rules on development of regional impact when officials of all affected cities conclude that their constituents would gain from such an adjustment. The Code thus ignores the possible role of public property rights and may therefore recommend an unnecessarily centralized ap-

88. See generally Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971).

89. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-37, at 139-43 (1978). See also Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978).

90. MODEL LAND DEVELOPMENT CODE §§ 7-101 to -504, accompanying notes, commentary on art. 7 at 248-54 (1976). The Code delegates to local governments, under threat of state review, the responsibility for enforcing these state rules. *Id.* § 7-204.

proach.⁹¹

1. *The Current Case Law of Intermunicipal Rights*

A few intermunicipal lawsuits have grown out of disputes like the hypothetical one between Beverly Hills and Los Angeles. These cases have perplexed the courts. Thus, the case law of interlocal property rights is now terribly confused. The only solidly established rule is that disputes between a state's local governments are to be resolved according to the law of that state rather than federal law or local ordinance.⁹²

a. *Does a municipality have vicarious rights against its neighbors?: Borough of Cresskill v. Borough of Dumont*⁹³ is the leading case holding that a municipality must consider the interests of outsiders when it zones land situated near its boundary. In that case, the New Jersey Supreme Court also had an opportunity to decide to whom this municipal duty ran. The plaintiffs included both neighboring boroughs and private parties who owned land just beyond the defendant borough's boundary. The court concluded that the outside landowners had standing to enforce the defendant's regional obligations; it therefore did not reach the issue of whether the neighboring governments also had standing. Since *Borough of Cresskill*, state courts have rather consistently granted *private* outsiders standing to challenge the rezoning of border areas,⁹⁴ but more often than not have refused to confer standing on outside governments.⁹⁵

91. Observe also that the Code overlooks the possible role of state-administered grants-in-aid or penalties in disciplining municipal handling of development of regional impact.

92. *Committee for Jones Falls Sewage Sys. v. Trani*, 539 F.2d 1006 (4th Cir. 1976); *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972); *City of Boston v. Massachusetts Port Auth.*, 320 F. Supp. 1317 (D. Mass. 1971).

93. 15 N.J. 238, 104 A.2d 441 (1954).

94. *See, e.g., Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972); *Allen v. Coffel*, 488 S.W.2d 671 (Mo. App. 1972).

95. *See Annot.*, 49 A.L.R.3d 1126 (1973) (collection of conflicting cases).

The trend in recent cases favors government standing. *See, e.g., Forestview Homeowners Ass'n v. County of Cook*, 18 Ill. App. 3d 230, 309 N.E.2d 763 (1974); *Borough of Roselle Park v. Township of Union*, 113 N.J. Super. 87, 272 A.2d 762 (1970); *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973). *But see Town of North Hempstead v. Village of North Hills*, 38 N.Y.2d 334, 342 N.E.2d 566, 379 N.Y.S.2d 792 (1975) (statute construed to deny a town standing to challenge zoning ordinances).

Interlocal litigation has erupted over conflicts other than the rezoning of border areas. In some of these instances, the defendant has failed to raise the issue of standing, and the courts have reached the merits of the case. *See, e.g., City of Carmel-By-the-Sea v. Monterey County Bd. of Supervisors*, 70 Cal. App. 3d 84, 139 Cal. Rptr. 214 (1977) (city challenges county's handling of environmental impact report); *Borough of Neptune City v. Borough of Avon-By-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972) (city and two of its residents challenge neighboring city's beach use fees).

The refusal of most state courts to create vicarious municipal rights stands in contrast with the willingness of the federal courts to hear *parens patriae* suits brought by states. The state court position is difficult to fathom. If the state courts are willing to allow a multitude of outside landowners to obtain injunctive relief against a municipality's breach of its regional obligations, bargaining over settlements will be plagued by a large number of parties. Adding outside governments to the list of potential plaintiffs would not substantially complicate matters. In fact, entitling governments to sue may reduce the costs of organizing a plaintiff class. Alternatively, if damages are to be the exclusive sanction against municipal wrongdoing, and many private owners of external land have been harmed, public property rights may be the most efficient internalization system.⁹⁶

On the other hand, the reluctance of state court judges to create vicarious intermunicipal rights fits into a larger pattern. The common law of intergovernmental property rights is now best defined at the international level (if one believes the precedential value of the *Trail Smelter* decision⁹⁷), and worst defined at the interlocal level. It seems that the weaker the legislative authority at a given governmental level, the more likely judges at that level are to act on their own to create public property rights. In other words, courts have been more likely to take the initiative to coordinate intergovernmental relations when no other institution could. Because state governments have plenary power (unlike the United States and the United Nations, both of which have limited powers), state court judges may understandably be more reluctant than judges on "higher" courts to create intergovernmental property rights.

b. *Remedies for interlocal conflicts*: Because courts normally use injunctive remedies in land-use cases,⁹⁸ they can be expected to resort to this same remedy whenever they do venture to recognize intermunicipal rights. I have argued elsewhere that the remedy of dam-

The results have been mixed, however, when the defendant government has contested the plaintiff city's standing. See, e.g., *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) (city has standing to challenge federal Department of Transportation's failure to prepare federal and state environmental impact reports); *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972) (city has standing to attack airport noise); *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1976) (en banc) (city lacks standing to attack federal disbursement of special revenue sharing funds to city's suburbs).

96. See text accompanying notes 30-37 *supra*.

97. See notes 48-52 and accompanying text *supra*.

98. See, e.g., cases cited in note 105 *infra*.

ages is more accurate and less intrusive in most land-use cases.⁹⁹ To the extent that courts and legislatures do create any type of intermunicipal rights, they should ordinarily enforce these rights exclusively with damages.

c. *A municipality's vicarious liabilities*: Under current law, municipalities are rarely held liable for failing to control their residents. For example, a local government is not vicariously liable at common law for failing to abate a private nuisance whose source lies within its borders.¹⁰⁰ Illustrative is *Breiner v. C & P Home Builders, Inc.*,¹⁰¹ where a borough was held to owe no duty to persons whose lands outside the borough were flooded as a result of private improvements located in borough subdivisions. This municipal immunity from liability is defensible when the nuisance arises, as it did in *Breiner*, from only one or a few private sources, because those sources can themselves be held responsible.¹⁰² As explained above, however, there is a strong case for holding a government vicariously liable under a rule of "respondeat patria" when *many* of its residents contribute to a common flow of cost spillovers.¹⁰³ State courts may of course be justified in leaving the creation of a "respondeat patria" rule to their legislatures. There is at least one forerunner of legislation of this type: the Mob Violence Statutes, through which some states make a municipality liable for having failed to control a riot that municipal officials knew (or should have known)

99. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 490-93 (1977).

I have not found a case where a municipality was awarded damages for cost spillovers arising from a neighboring municipality but judges do not seem completely hostile to the idea. See *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972) (district court wrongly dismissed plaintiff city's action to recover damages occasioned by noise emanating from defendant city's airport); *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968) (New Jersey township's complaint seeking damages and injunctive relief against New York town that rezoned area near their common boundary stated cause of action); *Valley County v. Thomas*, 109 Mont. 345, 97 P.2d 345 (1939) (County A should be entitled to obtain damages from County B if evidence shows that County B wrongly licensed automobiles otherwise taxable by County A).

100. See, e.g., *Jaines' Adm'r v. Trustees of Harrodsburg*, 85 Ky. 191, 3 S.W. 135 (1887) (city is not liable for failing to suppress private blasting that led to plaintiff's injury); *Ricketts v. Allegheny County*, 409 Pa. 300, 186 A.2d 249 (1962) (county is not liable to trespassing minor injured in abandoned private building). But see *Hansen v. City of St. Paul*, 298 Minn. 205, 214 N.W.2d 346 (1974) (city is liable for damages when domestic dogs, known by the city to be roaming the streets, bit plaintiff); cf. *State v. Corporation of Shelbyville*, 36 Tenn. 112, 4 Sneed 176 (1856) (state can indict municipality for public nuisance when municipality allows operation of private slaughterhouse).

101. 536 F.2d 27 (3rd Cir. 1976).

102. See text accompanying notes 10-11 *supra*.

103. See text accompanying notes 21-23 *supra*.

was taking place.¹⁰⁴

d. *Measuring municipal duties: the shortcomings of the "regional welfare" test:* Several leading state supreme courts have recently held in cases brought by private plaintiffs that local governments must consider the regional welfare when making land-use policy.¹⁰⁵ These state supreme courts examined the total effects of a local policy, *i.e.*, its costs and benefits, both internal and external. A court adopting a regional welfare test in its most extreme form would deem a local policy that injures outsiders invalid whenever the policy's total costs exceeded its total benefits.¹⁰⁶

Such a judicial doctrine forces a suburb to give some account to the cost spillovers that might arise from its affirmative policies. For several reasons, however, this legal approach does a poor job of structuring property rights. First, cases of this type entitle a multitude of private parties to enforce a municipality's regional obligations by injunction. These decisions thus not only fail to create exclusive rights, but also provide the wrong remedy—namely, injunctions in large-number cases. Second, because they insist on granting injunctive relief, these courts are forced to employ an efficiency calculus (the regional welfare test) to measure a municipality's regional obligations; the calculus is made necessary to ensure that the benefits of injunctive relief outweigh its costs.¹⁰⁷

By contrast, if the state supreme courts were to enforce regional

104. See Annot., 26 A.L.R.3d 1142, 1198 (1969); Note, *Municipal Liability for Riot Damage*, 81 HARV. L. REV. 653 (1968).

105. See, e.g., *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975). In these cases, the local governments were not being sued vicariously on the basis of their citizens' misconduct but rather directly for their own official actions.

The Supreme Court has not provided any constitutional base for the federal common law the Court has developed to govern interstate relations. Congress therefore could readily change interstate property rights by statute. The state court cases just cited, however, ground a municipality's regional obligations on constitutional doctrine, not common law principles. A state statute changing intermunicipal property rights could thus potentially be vulnerable to constitutional attack.

106. The case that comes closest to adopting this rule is *Borough of Allendale v. Township Comm. of Township of Mahwah*, 169 N.J. Super. 34, 404 A.2d 50 (1979). See also *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 189-92, 306 N.E.2d 155, 160-62, 351 N.Y.S. 2d 129, 137-39 (1973) (Breitel, J., dissenting) (local ordinance does not deserve presumption of validity when it is attacked by neighboring town).

107. The extreme version of the regional welfare test requires a cost-benefit analysis of the type used in the Learned Hand test for negligence. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). See generally Calabresi & Hirschhoff, *supra* note 22.

obligations only through damages, they would not have to do a cost-benefit analysis of a local policy but could impose strict liability whenever a municipality (or its citizens) caused cost spillovers. Actionable spillovers would be defined as cost-engendering departures from normal land usage (as in nuisance law). Strict liability tests are generally easier to administer than negligence tests. For example, an adjudicator could more easily decide whether a Los Angeles industrial complex was a below-normal neighbor for Beverly Hills than it could decide whether, from a regional standpoint, the Los Angeles site was an inefficient location for industry. In sum, because the state supreme courts have opted for the wrong remedy (*i.e.*, injunctions), they have been forced to use an undesirable substantive standard for identifying actionable cost spillovers.

This analysis suggests that a better set of rules to constrain a municipality's parochial land-use policies would: (1) create exclusive rights defined by a normal land-usage standard; (2) enforce those rights only with damages; and (3) designate exclusive bargaining agents whenever there are large numbers of rightholders. Whether these bargaining agents should be neighboring governments or private attorneys would turn on considerations of allocative and administrative efficiency.¹⁰⁸ It is conceivable that an optimal plaintiff to challenge a suburb's exclusionary zoning is the central city of the relevant metropolitan area.

2. *The Creation of Interlocal Rights by Statute*

Although they are clearly the best institutions to undertake the job, state legislatures have rarely articulated affirmative intermunicipal property rights of any kind. There have been a few exceptions. A remarkable Illinois statute once provided that if a pauper moved from Town *A* to Town *B*, Town *B* could recover from Town *A* any reasonable expenditures made to support the pauper.¹⁰⁹ The Michigan Environmental Protection Act¹¹⁰ authorizes any party (including political subdivisions) to sue any other party (including political subdivisions) to obtain declaratory or equitable relief against pollution or impairment of natural resources. At least three of the first 119 cases in which this

108. See text accompanying notes 30-37 *supra*.

109. The statute, repealed long ago, is described in *Town of Elm Grove v. Town of Pekin*, 305 Ill. App. 80, 26 N.E.2d 995 (1940).

110. MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (West Supp. 1978). See also Minnesota Environmental Rights Act, MINN. STAT. §§ 116B.01-.13 (1977). Both are discussed in Bryden, *Environmental Rights in Theory and Practice*, 62 MINN. L. REV. 163 (1978).

statute was invoked were actions between local governments.¹¹¹ Michigan's intermunicipal property rights, however, appear to be little more than an incidental byproduct of an ambitious piece of environmental legislation. Note also that the Michigan act unfortunately creates universally owned environmental rights, and neither authorizes the award of damages nor establishes the rule of "respondeat patria." It is thus not a promising model for public property rights legislation.¹¹²

A city in the position of Beverly Hills is thus currently unlikely to have any vicarious rights against Los Angeles under statutory or common law. The California legislature could of course readily alter this situation. The present analysis suggests the possible utility of a statute making Los Angeles strictly liable to Beverly Hills for pervasive damages caused by the cumulative impact of multiple subnormal private land uses in Los Angeles. If created, these rights and duties should be exclusive—that is, should supplant all affirmative transboundary private property rights. A body such as the State Land Planning Agency envisioned in the Model Land Development Code¹¹³ could be delegated the tasks of specifying these intermunicipal rights, and trying cases where they are at issue.

3. *The Limited Potential of Interlocal Property Rights*

In general, public property rights will probably prove to be less useful as an internalization device at the interlocal level than at the interstate

111. See Hayes, *Michigan Environmental Protection Act in Its Sixth Year*, 53 J. URB. L. 589, 685 (1976).

112. A few state statutes have created interlocal procedural rights such as the right of a municipality to receive notice that a neighboring municipality is considering approving land-use changes near their common border. See, e.g., CAL. GOV'T CODE § 66453 (West Cum. Supp. 1978) (processing municipality must give neighboring municipality a chance to make recommendations on subdivisions proposed in area near common boundary); *id.* § 65305 (similar procedure for changes in "general plan").

Twenty states have statutes authorizing municipalities to exercise extraterritorial zoning, and 32 states authorize municipalities to approve subdivisions near, but outside, municipal boundaries. D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 446-48 (1977). Ordinances passed to implement statutes of this type can create significant municipal rights against outsiders. For example, Beverly Hills' plight would be eased if it could prohibit industrial uses in nearby Los Angeles. Current statutes, however, only grant cities extraterritorial powers over *unincorporated* lands, and thus do not affect intermunicipal relationships.

A state could of course authorize its municipalities to veto any land use project no further than, say, one mile from municipal borders. But this response to the phenomenon of cost spillovers would be ill-advised. The simultaneous regulation of border lands by two or more governments would create nonexclusive rights and add greatly to the red tape involved in land development. If the government injured by an external project could only collect damages, and not enjoin the project, matters would proceed more expeditiously.

113. MODEL LAND DEVELOPMENT CODE § 8-101 (1976).

level. Local government is much more balkanized, and thus a particular dispute is more likely to involve large numbers of governments. If the City of Cicero is lax in controlling its criminal element, or the Village of Arlington Heights pursues exclusionary zoning, scores of other cities in Cook County, Illinois, may suffer. In addition, by one count, thirty-two metropolitan areas spill across state lines;¹¹⁴ in these areas, interlocal disputes may also be interstate ones.¹¹⁵ Nevertheless, some interlocal disputes—like zoning changes near common boundaries—may fit the niche where public property rights are the best internalization device available. If so, the Model Land Development Code, in choosing preemptive state regulation as the sole corrective for intermunicipal cost spillovers, has opted for an unnecessarily centralized form of decisionmaking.

IV. SOME THOUGHTS ON BENEFIT SPILLOVERS

The redefinition of property rights to facilitate intergovernmental bargaining is also a possibility when a government (or its citizenry) exhibits above-normal behavior and thereby confers benefits on its neighbors. Just as a government could be made liable for cost spillovers, it could be entitled to obtain restitution—preferably partial restitution¹¹⁶—when it confers benefits.

A large number of private actors may conceivably combine to produce a flow of benefit spillovers. For example, dozens of Springfield industrialists might jointly agree to build an in-stream aeration system for the Connecticut River that would not only bring pollution down to normal levels, but also clean the waters to such a degree that the river would become one of the recreational jewels of New England. A pure private property rights approach to internalizing these benefits would involve a class action for restitution brought by the industrialists against the class of benefited riparians. A pure public property rights approach adhering to the Rule of the Highest Level would call for Massachusetts to have rights against Connecticut.

The passthrough issue would have been faced if either a private or

114. G. BREAK, *supra* note 1, at 192.

115. For instances of litigation between units of local government situated in different states, see note 61 *supra*. If the spillovers at issue in these cases had multiple private sources and victims, the Rule of the Highest Level would create affirmative rights and duties only in state governments.

116. The benefits are being forced on unconsenting outsiders who may value them at less than the market-clearing price. *Cf.* Ellickson, *supra* note 42, at 735-37 (because nuisance activities result in forced exchanges, a damage award in a nuisance case should be greater than the diminution in the market value of the plaintiff's land).

public property rights system were used.¹¹⁷ The relative merits of the two systems would depend primarily on their allocative and administrative efficiency. The use of either would also require development of substantive rules of restitution, including ones to aid identification of the "cheapest benefit initiator." Similar to placing liabilities on cheapest cost avoiders, granting rights to restitution to cheapest benefit initiators reduces the transaction costs of settlements and/or the number of deadweight losses arising from failures in the exchange process. For reasons presented in the prior discussion of cost spillovers, the potential advantage of using property rights systems, as opposed, say, to grants-in-aid, to internalize benefits is decentralization of enforcement.

The above hypothetical involving an industrialist-financed in-stream aeration system is rather fanciful. The dynamics of freeloading usually prevent large numbers of private individuals from combining to produce a flow of benefits. Consequently, public goods are mostly produced by governments. Therefore, most problems of pervasive benefit spillovers can be expected to arise from government regulatory and proprietary programs—*e.g.*, mosquito abatement, the provision of parks or libraries, and national defense.

When a private party bestows benefits on a person who has not asked for them, current law rarely entitles the private party to recover restitution for their value.¹¹⁸ Given this situation, it should not be surprising that courts and legislatures have not heretofore created restitu-

117. The rules developed in benefit spillover cases may affect the optimal legal rules in cost-spillover cases. A prior discussion based the need to create exclusive bargaining agents in large number cost spillover cases on possible freeloader and holdout problems that would arise, even when damages is the exclusive remedy, when the legal system lacks mechanisms to internalize benefit spillovers. See text accompanying notes 15-23 *supra*. If benefit internalization mechanisms were created, and benefits were also passed through to individual benefactors and liabilities to individual beneficiaries, an individual plaintiff (or defendant) could be permitted to sever its claim (liability) from the group litigation in large number cost spillover cases.

The exhumation of a prior example will help illustrate this point. Suppose that some Springfield industrialists were considering financing a fabulous in-stream aeration system that would both cure past pollution and confer future benefits on Connecticut riparians. Their ability to recoup future benefits would mean that they would not worry about a riparian who severed his damage claim and adopted a holdout strategy because they could set off future benefits conferred on him against their liabilities to him for past damage.

Similarly, if restitutionary recoveries are passed through to individual benefactors, incentives to freeload would be less powerful and less likely to prevent industrialists from participating in a joint venture. Actual participants would be compensated for future benefits conferred, while non-participants would not. Because incentives for group action would be present, there would be less need to compel all industrialists to use the same exclusive bargaining agent.

118. See RESTATEMENT OF RESTITUTION § 106 (1937); Dawson, *The Self-Serving Intermediary*, 87 HARV. L. REV. 1409 (1974).

tionary rights between governments. For example, international lawyers would be dumbfounded if the United States sued Canada to recoup benefits conferred by United States' expenditures on national defense.

As with cost spillovers, the niche where public property rights would be the optimal internalization system for benefit spillovers is probably small. The governmental activities most likely to deserve the conferral of a right to restitution from another government would be ones involving the production of impure public goods when: (1) a large number of individual outsiders benefit from the activity; (2) it would be administratively expensive to impose user fees on these individual outsiders; and (3) the individual outsiders happen to reside within the boundaries of a few general purpose units of government. All three conditions would be met if Massachusetts (a more realistic sponsor than the Springfield industrialists) installed a fabulously effective in-stream aeration system in the Connecticut River just above the Connecticut border. In such a case it might possibly make sense to entitle Massachusetts to partial restitution from Connecticut for the benefits conferred upon Connecticut residents.

Another example at the local government level may prove instructive. The small City of Santa Monica, California, has a wonderful ocean beach of great appeal to the nearly three million residents of the surrounding City of Los Angeles. To prevent outsiders from freeloading on its beach services, Santa Monica might feel compelled either to exclude nonresidents from its beach, or to charge nonresidents more than residents for beach use. Both approaches would require the city to take on the considerable administrative burden of checking the identity of all beach users. The city could avoid that particular burden by imposing uniform user fees on all entrants. The administrative costs of collecting uniform user fees, however, might be very high, and might exceed the allocative gains the fees achieve by ending freeloading by outsiders.

Suppose, however, that a California statute entitled Santa Monica, whenever outsiders used its beach facilities, to obtain partial restitution from the general purpose local governments in which those outsiders resided. Santa Monica could then occasionally sample beach users to determine their home cities and seek reimbursement from those governments. Eventually Los Angeles and Santa Monica might reach a

permanent cost-sharing agreement.¹¹⁹

A cost-sharing agreement between Los Angeles and Santa Monica might be negotiated, of course, even if Santa Monica did not have rights to restitution.¹²⁰ When only a few informed parties are involved, the Coase Theorem indicates that the definition of rights will not severely affect allocative outcomes.¹²¹ Nevertheless, even in small number cases, the proper structuring of intergovernmental restitutionary law to identify the cheapest benefit initiators may reduce both transaction costs and the likelihood of failure in the exchange process.

If experience showed public property rights to be a useful internalization system for interlocal benefit spillovers, a state could enact legislation entitling its local governments to collect partial restitution in all "niche" situations—which an administrative agency might be asked to help define. This comprehensive statutory entitlement would then permit the repeal of current ad hoc state grant-in-aid programs for local facilities like parks and libraries which sometimes benefit many residents of a few neighboring municipalities.

There may be few, if any, niche situations. Because a government can often readily impose user charges on individual outsiders who are beneficiaries of its programs, the second niche condition is seldom met. For example, a state-supported university can charge tuition for out-of-state students at low administrative expense. Therefore, it would make little sense for Congress to entitle a state to obtain partial restitution from other states whose residents use the first state's university.

The third niche condition, which requires that individual outside beneficiaries be residents of few governments, will also often limit use of the public property rights approach. Benefit spillovers are often pervasive (especially when governments provide pure public goods). When benefits are widespread, many governments would have to be made defendants, and transaction costs would rapidly multiply. For example, if North Dakota took steps to keep its air as pure as it now is,

119. The Santa Monica situation would fit the niche only if most outsiders using the beach resided in a few outside cities. This is probably not the case.

120. In fact, both the County of Los Angeles and the State of California have agreed to subsidize operation of Santa Monica's beach. In 1949, Santa Monica deeded the dry sand area of its beach to the state in return for the state's promise to acquire land for parking areas. The city still operates the beach. The state allows the city to keep all parking-fee revenue to help defray the city's operating costs. The county provides lifeguard services at no cost to the city. Telephone interview with Donald Arnett, Director of Recreation and Parks, City of Santa Monica, California (June 21, 1978).

121. See Coase, *supra* note 10.

many states to its east might benefit. Federal grants-in-aid to reward North Dakota would therefore seem a better system than the creation in North Dakota of restitutionary rights against its neighbors.¹²²

The problem of multiple governmental beneficiaries would often be especially severe at the local level. Suppose that a small New England town could become a deepwater port for crude oil tankers. If it did, refineries and other heavy industrial facilities would inevitably be constructed within the town. Suppose further that all the environmental costs of these facilities would be internal to the town but that the benefits of the facilities (*i.e.*, lower energy costs) would redound to all of New England. Unless these external benefits could be internalized in some way, the town could be expected to decline to become an oil transshipment center. The benefits of cheaper energy would be so widespread in this case that public property rights would seem to hold little promise. As in the North Dakota example, the optimal internalization system might be federal or state grants to reward the town for sacrificing itself.¹²³ This would appear to be a more flexible, and distributionally just, system than preemptive state or federal regulation of utility siting—the approach many states have recently been adopting.¹²⁴

CONCLUSION

The object of this Article is modest: to show that the proper definition of property rights between neighboring governments may occasionally help alleviate the misallocations and redistributions of resources that can arise from interjurisdictional spillovers. Vicarious intergovernmental property rights have the most promise in the narrow set of cases in which large numbers of private parties are involved in both creating a flow of spillovers and feeling their effects, *and* relatively few governments happen to be ready-made representatives for the private classes on both sides of the flow.

122. The current approach to this type of problem is, as usual, higher-level regulation; the Federal Clean Air Act sets limits on the degradation of air quality in pristine areas. 42 U.S.C. §§ 7470-7479 (Supp. 1977).

123. *Cf.* O'Hare, *'Not on My Block You Don't': Facility Siting and the Strategic Importance of Compensation*, 25 PUB. POL'Y 407 (1977) (suggesting scheme for compensating local governments impacted by facilities that are locally noxious but beneficial to regional economy); Silverman, *Subsidizing Tolerance for Open Communities*, 1977 WIS. L. REV. 375 (proposing federal subsidies payable to both a local government and its residents if the local government agrees to accept new lower-income residents).

124. N. ROSENBAUM, *LAND USE AND THE LEGISLATURES* 44 (1976) (identifies 22 states with some form of utility-siting legislation).

Property rights between neighboring governments currently tend to be vaguely and improperly defined. A legislative clarification and reformulation of these rights would expedite intergovernmental bargaining over spillovers, and offer an alternative to centralized regulation. Public property rights warrant the test of experience in those limited situations where they might possibly prove to be useful.

