CAN AN APARTMENT BUILDING BE A NUISANCE? AN ESSAY FOR HENRY SMITH

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In 1926, Justice Sutherland asserted in *Village of Euclid v. Ambler Realty Co*. that, in a single-family neighborhood, "apartment houses . . . come very near to being nuisances."[1] The legal issue remains alive. In 2014, a jury in Houston, Texas, awarded damages to homeowners challenging a proposed high-rise condominium tower near Rice University. The issue serves to illuminate the views of Henry Smith, the much-deserved recipient of the Brigham-Kanner Property Rights Prize. In his writings, Henry has addressed many topics, nuisance law among them.[2]

As it happens, my first major article also dealt with nuisance law.[3] There I compared that body of precedent to other systems of land use control, especially municipal zoning. The zoning ordinances of the 1920s, in my view, addressed a genuine problem. A landowner's decision on the use of urban land typically affects the value of adjacent properties. Although private bargaining may internalize some of these externalities, in many cases it will fail to do so.[4] Zoning regulations, if wisely crafted, therefore can raise aggregate property values. A zoning government, however, also can inflict damage on the urban landscape. By the 1930s, local governments increasingly had begun to use zoning as an exclusionary device. Exclusionary zoning segregates urban neighborhoods by social class, and raises the cost of housing.[5] Economists assert that municipal zoning, as actually

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1. 272 U.S. 365, 395 (1926).

2. Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004).

3. Robert C. Ellickson, *Alternatives to Zoning*: *Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

4. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (discussing the possibility of bargaining).

5. *See* Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395 (2021). I plan to incorporate that article into AMERICA'S FROZEN NEIGHBORHOODS, a book that Yale University Press will publish in 2022.

practiced today in the United States, massively damages the national economy.[6] This Essay reveals my disagreement with Henry about how the Texas courts should have decided the recent Houston nuisance case. My pessimism about how local governments actually zone cities may underlie our disagreement.

Henry Smith is a phenom, more than the equal of one of his apparent heroes, the short-lived Wesley Hohfeld.[7] Henry's writings have repeatedly jolted the field of property law. One of his earliest articles, on property rights in medieval open-field villages, shows his strengths as an historian and institutional analyst.[8] Especially early in the twenty-first century, Henry often collaborated with Tom Merrill, then a colleague at Northwestern University School of Law. Their opening salvo, the *Numerus Clausus*, dazzled with its many innovations.[9] Their collaboration includes the brilliantly conceived, and impressively conceptual, Merrill and Smith casebook, now in its third edition.[10] Smith's work apart from Merrill has been prizeworthy in itself. Henry's 2012 manifesto, *Property as the Law of Things*, continues his unrelenting challenge to various intellectual adversaries: the legal realists, Ronald Coase's conception of causation, and proponents of conventional law-and-economics.[11] The American Law Institute's appointment of Smith as the Reporter of the new Restatement of Property positions him to be, flat out, the most influential property law scholar of our time.

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6. *See* Kyle F. Herkenhoff et al., *Tarnishing the Golden and Empire States: Land-Use Restrictions and the U.S. Economic Slowdown*, 93 J. MONETARY ECON. 89 (2018); Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1 (2019); Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* 102 J. URB. ECON. 76 (2017). For a summary of the various findings, see David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 102–03 (2017).

7. Smith's references to Hohfeld include, for example, Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 780–89 (2001) and Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681 (2014).

8. Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000).

9. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 119 YALE L.J. 1 (2000).

10. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (3d ed. 2017).

11. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

I. THE APARTMENT BUILDING AS NUISANCE

Prior to its *Euclid* decision in 1926, the Supreme Court had sustained, against constitutional challenge, limits on the height of buildings and the location of industrial uses.[12] A frontier issue in *Euclid* was whether the village could set aside zones that banned the construction of apartment buildings. Justice Sutherland held that it could, rebuffing a substantive due process challenge. His opinion identified some possible negative spillover effects of multifamily housing. According to Sutherland, in a neighborhood where detached houses are predominant,

> the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes . . . until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.[13]

Come close, but still fail to win a cigar. Prior to *Euclid*, no U.S. case had ever held that an apartment building, as such, constituted a nuisance.[14] Absent extreme facts, such as those in the Houston case that I describe below, U.S. courts continue to remain reluctant to so rule.[15]

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12. Welch v. Swasey, 214 U.S. 91 (1909) (sustaining height limit, of perhaps as little as eighty feet); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (sustaining prohibition of brickmaking facility).

13. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394–95 (1926).

14. *See* Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REG. 91, 110 (2011); Michael E. Lewyn, *Yes to Infill, No to Nuisance*, 42 FORDHAM URB. L.J. 841, 842, 846 (2015); City of Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842, 845 (Ohio 1925) (dictum).

15. After much searching, I have found no U.S. case, other than *Loughhead*, holding that an apartment building constitutes a private nuisance. As Henry has surmised, plaintiffs are more likely to succeed if they assert some sort of physical invasion, perhaps of noise and fumes, across a boundary. *See, e.g.*, Estancias Dallas Corp. v. Schultz, 500 S.W. 2d 217 (Tex. Civ. App. 1973) (affirming injunction against apartment complex's noisy air conditioner). *But*

In *Euclid*, Justice Sutherland's analysis would have supported the Village of Euclid's requirement of mandatory setbacks for an apartment building but not the total exclusion of apartments from almost three-fourths of the area of the city.[16] By demonizing the apartment building, Justice Sutherland may have encouraged cities to engage in harmful exclusionary zoning.

A central issue in nuisance cases is remedy. Should the neighbor of an obnoxious land use be entitled, for example, to enjoin the nuisance, or be limited to the remedy of damages?[17] In one of the classic articles of American property law, Calabresi and Melamed explored these, and other, remedial options.[18] Issues of remedy were central in *Loughhead*, the Houston case that newly poses the possibility that courts might deem an apartment building a nuisance.[19] Houston is famous among property scholars as the only major U.S. city that has declined to enact a zoning ordinance.[20] A zoning ordinance typically includes, among other constraints, a limit on the height of structures. Houston's lack of zoning gave birth to *Loughhead*.

II. THE ASHBY HIGH-RISE CONTROVERSY IN HOUSTON

Locals refer to *Loughhead* as the Ashby high-rise controversy, invoking the name of a street abutting the proposed construction site.[21] The essential facts are these. In 2006, a developer purchased a 1.6-acre lot three miles southwest of downtown Houston and five blocks north of the campus of Rice University. The following year, the developer proposed replacing the two-story apartment building

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cf. Puritan Holding Co. v. Holloschitz, 372 N.Y.S.2d 500 (N.Y. Sup. Ct. 1975) (holding owner of abandoned apartment building liable for nuisance damages to neighbor).

16. Euclid's 1922 zoning ordinance placed 72.6 percent of the area of the village in either U1 or U2, zones that forbade the construction of an apartment building. Author's calculation, part of research for Ellickson, *supra* note 5.

17. The seminal U.S. decision is Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970) (awarding permanent damages, but refusing to enjoin).

18. Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability*, 85 HARV. L. REV. 1089 (1972).

19. The brothers who established the Lockheed aircraft company were originally named Loughead, with a single *h*. The lead plaintiff in *Loughhead* probably pronounces her name as the two brothers did.

20. *See* ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS 643–46 (4th ed. 2013).

21. *See* STOP THE ASHBY HIGH RISE, https://stopashbyhighrise.org/. Discussions of *Loughhead* include Lewyn, *supra* note 14, and John Mixon, *Four Land Use Vignettes from Unzoned(?) Houston*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 166–72 (2010).

on the site with a twenty-three-story mixed-use condominium structure.[22] The proposed project would have roughly quadrupled the number of dwelling units on the site. No building within a half-mile of the site is more than six stories in height, and the great majority are detached houses of three-stories or less.[23] In 2021, the median value of these houses was about $1.6 million.[24] The Boulevard Oaks Historic District lies just to the north. Homeowners near the proposed high-rise mobilized to block the project, and persuaded Houston's mayor to join the opposition.[25] When the City of Houston refused to approve the project, the developer sued the city. In a 2012 settlement, Houston agreed to permit construction of a twenty-one-story multifamily building with restaurants on the ground floor.

In 2013, before construction had begun, Loughhead and twenty-nine other nearby homeowners filed a nuisance action against the developer. They sought both damages and a permanent injunction. The plaintiffs' attorneys introduced evidence that the proposed development would diminish the value of their houses. They claimed that the high-rise would violate the traditional scale of buildings in the neighborhood, increase traffic, cast shadows, and lessen backyard privacy. The trial judge refused to grant a permanent injunction, but submitted the issue of damages to a jury. The jury found that the proposed building would be a nuisance to twenty of the thirty plaintiffs. The judge entered a judgment awarding a total of $1.2 million to the successful plaintiffs.[26] This award, at the time, likely was less than 10% of the market value of their dwellings.[27] In 2016,

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22. Mixon, *supra* note 21, at 168 (asserting that the developer intended condominium units).

23. The primary multifamily buildings nearby are two three-story developments immediately east on Bissonnet Street, and a six-story condominium complex, the Chateau Ten on Sunset, two blocks south.

24. On June 11, 2021, the Zillow website, https://www.zillow.com [https://perma.cc/K8P4-7YGZ], reported that the dozen houses closest to the project site had a median asking price of $1.6 million.

25. Mixon, *supra* note 21, at 169 n.53.

26. Loughhead v. 1717 Bissonnet, LLC., 2014 WL 8774079 (Tex. Dist. Ct. 2014).

27. The damage awards averaged $60,000 per plaintiff in 2014. Twelve of the successful plaintiffs owned detached houses, likely worth well over $1 million each in 2020. The remaining eight owned one of the twelve condominium units in Southampton Estates, a three-story structure built in 1993 on a site just east of the proposed Ashby high-rise. In 2020, the market value of a unit in Southampton Estates was around $700,000–$800,000. *See, e.g.*, *5310 Southampton Estates Houston, TX 77005,* HAR.COM, https://www.har.com/homedetail/5310-southampton-est-houston-tx-77005/3599940?sid=4740958; *5300 Southampton Estates, Houston, TX 77005*, GREENWOOD KING, https://www.greenwoodking.com/real-estate/5300-southampton

the Texas Court of Appeals reversed. The appellate court emphasized that the nuisance in this instance was prospective.[28] It affirmed the trial court's denial of a permanent injunction but held that, because the developer had not built the structure, the damage award had been premature. The appellate court stated that its ruling was "without prejudice to [the plaintiffs'] right to seek damages once a cause of action for an existing nuisance accrues."[29] By July 2020, the developer had razed the two-story apartment building on the site, but had not begun to construct the high-rise.

Henry and I have discussed *Loughhead*. He finds the case intriguing and perhaps worthy of a future mention in his casebook with Merrill. In the end, Henry, unlike me, would not hold the proposed Ashby high-rise to be a nuisance. He and I do agree, however, on many remedial issues. We both think that the Texas courts had rightly denied a permanent injunction, and that the appellate court had been right to hold that the trial court's award of damages had been premature. Nonetheless, I favor, as Henry does not, making the high-rise developer liable for nuisance damages to internalize some of the negative externalities that the Ashby high-rise building ultimately would inflict.[30] Allowing this common law remedy would reduce pressure on Houston to adopt a zoning ordinance. Although a zoning measure may be beneficial, many, as I have noted, in fact worsen the urban landscape.

III. CONTRASTING THEMES IN SMITH'S ANALYSIS OF NUISANCE LAW

Portions of Henry's primary article on nuisance law emphasize the connection between nuisance law and an owner's right to exclude.[31] Its final sentence is, "Nuisance is a governance regime resting on a foundation of exclusion."[32] Many classic nuisances do entail the entry of, for example, sound waves or fumes, into a neighboring

-estates-houston-tx-77005/92021441/31442704. On trends in house prices in the Boulevard Oaks neighborhood, *see Boulevard Oaks Real Estate Trends,* HOUSTONPROPERTIES.COM, https://www.houstonproperties.com/houston-neighborhoods/boulevard-oaks/real-estate-trends.

28. 1717 Bissonnet, LLC v. Loughhead, 500 S.W.3d 488, 496–500 (Tex. Civ. App. 2016).

29. *Id.* at 492.

30. *Cf.* Ellickson, *supra* note 3, at 761–72, 777 (recommending monetary liability to internalize the external costs of unneighborly land uses, including tall buildings).

31. Smith, *supra* note 2, at 970.

32. Smith, *supra* note 2, at 1049.

property.[33] The advantage of an exclusion rule, and a recurring theme in Henry's work, is reduction of information costs when people interact.[34] In the Ashby high-rise dispute, none of the negative externalities that troubled the homeowners would have constituted a physical invasion. Construction of a tower visible to outsiders does not entail the crossing of a private boundary. Nor does an increase in traffic on public streets. Nor does loss of privacy or disruption of community character. Henry's assertion that nuisance is intimately related to the right to exclude undoubtedly inclines him to oppose nuisance liability in *Loughhead*.

Henry has affirmed, however, that property law is not entirely about exclusion.[35] In his article on nuisance and other work, he asserts that property law at times adopts a governance regime to supplement the exclusion strategy.[36] Governance rules, according to Henry, "pick out uses and users in more detail, imposing a more intense informational burden on a smaller audience of duty holders."[37] In the Ashby high-rise case, in my view, nuisance liability, but not injunctive relief, would have been cost-justified. A damage award, if properly calculated, would have internalized the negative externalities that the structure would have inflicted. Nuisance liability in *Loughhead* would certainly add to the informational burdens of Houston homeowners, developers, and judges. A benefit-cost analyst nevertheless might

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33. *See* Richard A. Epstein, *Nuisance Law, Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 57 (1979) (linking nuisances to physical invasions).

34. After Ronald Coase published *The Problem of Social Cost*, *supra* note 4, legal analysts typically used the phrase *transaction cost*, not *information cost*, to describe a barrier to negotiation. Remarkably, thirty-five of Henry's articles include both phrases. *Information costs* has the advantage of being less technocratic, but the disadvantage of being less complete. Outlays that negotiators make to travel to a joint meeting place are hardly information costs. *See* Robert C. Ellickson, *The Case for Coase and Against 'Coaseanism*,*'* 99 YALE L.J. 611, 615–16 (1989). On July 17, 2020, I conducted a WestLaw search of secondary sources. Prior to the year 2000, *transaction cost* appeared over thirty times more frequently than *information cost*. After 2010, the ratio had decreased to four to one. Henry's efforts to promote *information costs* may have had some success.

35. He has stated that "Exclusion is not the most important or 'core' value because it is *not a value at all*." Smith, *supra* note 11, at 1705 (emphasis in original). Instead, the virtue of entitling an owner to exclude is to reduce the information costs of interpersonal interactions.

36. Smith, *supra* note 2, at 975–76, 990–91, 993, 996; *see also* Henry E. Smith, *Exclusion and Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002); MERRILL & SMITH, *supra* note 10, at 31–32. Tom Merrill, in his many previous writings, had never drawn this distinction. The idea seems to have been Smith's. The first reference to it appears in 2001 in Merrill & Smith, *supra* note 7, at 791.

37. Smith, *supra* note 36, at S455.

conclude that nuisance liability in this instance would generate net gains. The benefits of internalizing the high-rise's externalities might exceed any resulting increase in information costs.

Katrina Wyman has analyzed the writings of the "New Essentialist" property theorists, a group in which she places Henry Smith, Tom Merrill, and James Penner.[38] Wyman's central claim is that the New Essentialism is more malleable than its proponents admit, and, in practice, commonly fails to offer hard-edged rules of property rights. Instead, according to Wyman, Smith and the others turn to "an informal, intuitive cost-benefit analysis" to resolve complex questions.[39] The federal government uses benefit-cost analysis as one of its primary methods of policy analysis.[40] Philosophers describe the approach as rule utilitarianism.[41] Many practitioners of law-and-economics are utilitarians. A staple in the teaching of Property is the famous Harold Demsetz article that explicitly assumes that property rights evolve to internalize externalities, generally in a cost-effective manner.[42]

My analysis of *Loughhead* is essentially utilitarian. Henry is less of a utilitarian than I am, and less than Wyman has asserted. He claims that judges in nuisance cases seldom engage in an explicit benefit-cost calculus.[43] Henry has criticized the balance-of-utilities approach to defining a nuisance.[44] He also has written skeptically about recognition of aesthetic nuisances.[45]

As a judge in a retrial of *Loughhead*, I would rule that a six-story building would *not* have constituted a nuisance. The city is Houston, after all, and two or three blocks south of the Ashby site are two existing six-story structures.[46] The developer, however,

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38. Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183 (2017).

39. *Id.* at 186; *see also id.* at 202.

40. *See* Exec. Order No. 12,866 § 1 (1993), 3 C.F.R. 638–40 (1994).

41. *See* Wyman, *supra* note 38, at 212 n.83.

42. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347 (1967).

43. Smith, *supra* note 11, at 1716.

44. Smith, *supra* note 2, at 984. *See also* J.E. Penner, *Nuisance and the Character of the Neighbourhood*, 5 J. ENVTL. L. 1 (1993) (criticizing balancing utilities in nuisance cases).

45. Smith, *supra* note 2, at 1000.

46. The two are a medical clinic and Chateau Ten on Sunset, a condominium building. A height of six stories may be emerging as a focal point. New Zealand has enacted a statute that requires its largest cities to allow buildings of up to six stories in their central areas and near mass transit. Michael Hayward, *Christchurch Skyline Could be Transformed as Building*

ultimately proposed a twenty-one-story building, utterly out of scale in a neighborhood of houses.[47] Texas courts properly could impose nuisance liability for the *incremental* damage that a building of more than six stories would have inflicted. I suspect that the benefits of internalizing the tower's negative externalities likely would exceed the increase in information costs that this expansion of Texas nuisance liability would cause. In *Loughhead*, the risk of nuisance liability *ex post* would have encouraged the parties to agree to a compromise on height *ex ante*. Imposing liability for damages also would have reduced the pressure on Houston to adopt a zoning ordinance, a path that has commonly led to government overregulation.

IV. NON-UTILITARIAN VALUES

In an important article in the *William & Mary Law Review*, Merrill and Smith emphasize that a legal system must base its property rules, if they are to function successfully, on a morality that most individuals accept.[48] The authors state that they doubt that utilitarianism underlies that morality.[49] *Loughhead* poses the possible relevance of a particular non-utilitarian value: distributive justice. A ruling that an apartment building might be a nuisance would hand yet another weapon into the hands of NIMBY (Not In My Backyard) forces, such as the homeowners near the proposed Ashby tower. Michael Lewyn has invoked this reasoning to criticize the trial court's handling of *Loughhead*. Lewyn worries that holding a multifamily project to be a nuisance will boost housing prices, especially for poorer households.[50]

Rules Relaxed, STUFF.COM (July 24, 2020, 7:30 PM), https://www.stuff.co.nz/the-press/news/122241812/christchurch-skyline-could-be-transformed-as-building-rules-relaxed.

47. Daniel Herriges is a skeptic of criticizing structures based on their scale. *See* Daniel Herriges, *Is This Development "Out of Scale"?,* STRONG TOWNS.ORG (July 22, 2020), https://www.strongtowns.org/journal/2020/7/21/is-this-development-out-of-scale. The height of the Ashby high-rise, however, definitely helped trigger neighborhood opposition, and likely influenced the jury's damage awards.

48. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

49. *Id.* at 1850–51; *see also* Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 974 (2009).

50. Lewyn, *supra* note 14, at 864–66. Even in a locality with zoning, compliance with zoning is not an ironclad defense in a nuisance case. *Id.* at 842 n.4.

Henry might regard distributive justice to be a relevant consideration in *Loughhead*.[51] In several of his writings, however, he has defended "modular," or specialized, approaches to legal problems. This avoids what he calls the fallacy of division, the notion that all parts of a complex system have to promote the same values.[52] Distributive justice issues centrally concern legislators when they engage in designing both tax systems and the welfare state. A modular analyst possibly might conclude that distributive justice considerations therefore should not influence most rules of property law, including nuisance cases such as *Loughhead*.[53]

CONCLUSION

Prior to again praising our deserving honoree, I note another minor disagreement. The title of *Property as the Law of Things* implies that the ownership of human capital falls outside the field of property.[54] Henry took my introductory property course in the spring of 1995. I included in the course materials *Commonwealth v. Aves*, a leading case on the legality of slavery. In 1836, the Supreme Judicial Court of Massachusetts held that the bringing of a slave child from Louisiana to Massachusetts had emancipated the child.[55] In conjunction with *Aves*, I observed in class that human capital represents 70 percent or more of American wealth—vastly more than real estate, personal property, intellectual property, and financial capital in combination. Although slavery thankfully is in deep decline around the world, property scholars, in my view, should feel free to use their analytic tools to point out the numerous advantages of self-ownership of labor.[56]

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51. *See* Smith, *supra* note 49, at 973 (stating that "it is an open question whether the amount of redistribution we'd collectively like would be best handled in some modules than others . . . ."). Wyman notes that none of the new essentialists is reflexively opposed to redistribution. Wyman, *supra* note 38, at 204–05, 215–17.

52. Smith, *supra* note 49, at 968–73; Smith, *supra* note 11, at 1701–02, 1719.

53. On this contested issue, *see, e.g.*, Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); Smith, *supra* note 49, at 973 n.71.

54. *But cf.* MERRILL & SMITH, *supra* note 10, at 210–38 (on body parts and the "right of publicity," aspects of human capital).

55. 35 Mass. 193 (18 Pick.) (1836) (Lemuel Shaw, J.).

56. *See also* Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 ECON J. WATCH 215, 219 (2011).

Despite occasional differences, I salute Henry's many contributions. He has done as much as anyone to show the influence of information costs on the shape of property institutions.[57] The fee simple, the principal form of U.S. land tenure, is, as its name implies, simple. Henry has repeatedly shown why this is a huge advantage.

57. This is one of Henry's recurring themes. *See, e.g.*, Smith, *supra* note 11, at 1691.