

The Meaning of the City: Urban Redevelopment and the Loss of Community

DENIS J. BRION*

INTRODUCTION

In *Planning for Serfdom*,¹ Robin Paul Malloy vigorously argues that the widespread redevelopment of the deteriorated centers of United States cities has destroyed fundamental political values. More specifically, Malloy argues that public-private partnerships,² which have been the vehicle for these large-scale redevelopment projects, function in a manner that radically departs from classic liberal values.³ Classic liberalism, under Malloy's definition, seeks to maximize freedom, individual liberty, and human dignity through capitalism and the free market as counterbalanced by a limited state.⁴ These redevelopment partnerships, by contrast, amount to exercises in "state capitalism" and "urban socialism"⁵ and are part of "ever increasing trends toward central planning, communitarianism, and statism."⁶

Implicit in Malloy's argument is the assumption that classic liberal values carry a political validity that is absent from the values present in these ubiquitous public-private partnerships. Surely this implication is correct. The tenets of classic liberalism reflect the Enlightenment values that formed the basis of late nineteenth century American Revolutionary rhetoric⁷ and continue as a major theme in current political rhetoric. The principles underlying redevelopment partnerships, by contrast, are hierarchical in nature, replacing broadly participatory public decision-making with a decisionmaking coalition limited in practice to the eco-

* Professor of Law, Washington & Lee University. B.S., 1961, Northwestern University; J.D., 1970, University of Virginia. The author gratefully acknowledges the incisive comments of Louise Halper and Aaron Wildavsky, the financial support of the Frances Lewis Law Center of Washington & Lee University, and the research assistance of Patricia M. Hale.

1. ROBIN P. MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (1991) [hereinafter MALLOY, SERFDOM].

2. For a description of how these partnerships contributed to large scale redevelopment projects in five United States cities, see *id.* at 10-15.

3. *Id.* at 14.

4. Malloy describes his concept of classic liberalism broadly. See *id.* at 16-29, 49-52, 79-83. The definition in the text is taken from his more succinct treatment in ROBIN P. MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* 93-98 (1990) [hereinafter MALLOY, LAW & ECONOMICS].

5. MALLOY, SERFDOM, *supra* note 1, at 12.

6. *Id.* at 9.

7. *E.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

nomic and political elite of the local community.⁸ These hierarchical principles are more consonant with those of the autocratic order against which eighteenth century American revolutionaries directed their rhetoric.⁹

In the Prologue of *Planning for Serfdom*, Malloy sets out nine "ideological norms and values" of market theory that define the boundaries of his book's "legal economic" discourse.¹⁰ The market-based economic process functions to achieve the end values of classic liberalism. The second of these norms and values, "the rationality and appropriateness of individual empowerment and decision making,"¹¹ is particularly relevant to the role that demand plays in the interactions of the economic market. This Article argues, however, that Malloy's critique falls short of telling the whole story. Using Malloy's second demand-related ideological norm as a point of departure, this analysis inquires more deeply into its practical implications in order to bring into focus communalism,¹² an alternative world view that also has strong roots in American culture.

Malloy uses urban redevelopment as an exemplar of a wider process of erosion of classic liberal values. The analysis in this Article has two purposes. The first purpose has a broader focus. It seeks to place classic liberal values in a wider critical context by offering a critique of urban redevelopment practice from an alternative set of values. This analysis demonstrates that these alternative values must be incorporated into the political process in order to end the broad erosion of classic liberal values. The second purpose is more narrowly focused. It seeks to demonstrate that these values must be incorporated if the city is to fulfill its potential, both as a desirable physical habitat and as a milieu that catalyzes creative energies throughout the widest spectrum of society.

Central to this analysis are the issues of meaning and power. How do urban buildings and urban spaces come to have meaning? What is the substantive nature of the meanings that arise? Why is it important that the urban fabric have meaning? And, most crucially, if indeed this matrix of meaning is important, who shall have power over the processes by which this meaning arises and over the elements of the urban fabric that are integral to these processes?

8. A member of the Indianapolis economic elite of the private Columbia Club stated, "Anything of importance in this town starts right here It's almost a law." Louise E. Levathes, *Indianapolis: City on the Rebound*, 172 NAT'L GEOGRAPHIC 230, 248 (1987).

9. *E.g.*, *id.*, *passim*.

10. MALLOY, *SERFDOM*, *supra* note 1, at 3.

11. *Id.*

12. The "communalism" that will play an essential role in the argument of this essay differs from Malloy's "communitarianism," which he defines in terms of a "strongly statist ideology." *Id.* at 74. *See also* MALLOY, *LAW & ECONOMICS*, *supra* note 4, at 76-82.

The analysis begins with an illustrative examination of urban redevelopment practice and the ratification of such practices by the judicial system in order more fully to expose the losses that this practice produces. Next, the Article delves into the ubiquitous phenomenon of human beings investing the urban fabric with meaning, thereby creating a conceptual structure that is central to human self-definition. The analysis concludes by arguing that the values of the communal world view must underlie this meaning-creating process if it is to work well.

I. THE PROBLEM

Two urban redevelopment cases — the 1954 decision of the United States Supreme Court in *Berman v. Parker*¹³ and the 1981 decision of the Michigan Supreme Court in *Poletown Neighborhood Council v. City of Detroit*¹⁴ — amply illustrate the workings of hierarchical public-private development partnerships, the physical and psychological consequences of the massive projects that these partnerships typically carry out, and the ratification that the courts have given to the purposes of these projects and the means by which these partnerships carry them out. *Berman v. Parker* involved the redevelopment of a substantial portion of the southwest quadrant of Washington, D.C., an area that, as the opinion abundantly demonstrates with facts and figures, exhibited all of the statistical indicia of a harrowing, neo-Dickensian slum.¹⁵ The vehicle for carrying out the redevelopment project was a prototype of Malloy's public-private partnership. A specially created public entity, the Redevelopment Land Agency,¹⁶ held the power to take title to the project area by eminent domain,¹⁷ raze the entire area,¹⁸ install the service and utility infrastructure required to support the new pattern of uses¹⁹ set out in a redevelopment plan formulated by a separate planning agency,²⁰ transfer these infrastructure facilities and sites for such public uses as schools and fire stations to the appropriate government entities,²¹ and

13. 348 U.S. 26 (1954).

14. 304 N.W.2d 455 (Mich. 1981).

15. *Berman*, 348 U.S. at 30.

16. Congress authorized the redevelopment scheme and established the structure for carrying it out in the District of Columbia Redevelopment Act of 1945, Pub. L. No. 79-592, 60 Stat. 790 (1946) [hereinafter Redevelopment Act]. Section 4 of the Act created the Redevelopment Land Agency.

17. *Id.* § 5.

18. *Id.* § 7(h).

19. *Id.* § 7(i).

20. The National Park and Planning Commission formulates the redevelopment plan, subject to the approval of the public governing body of the District of Columbia, the Board of Commissioners. *Id.* at § 6.

21. *Id.* § 7(a).

sell the rest of the area parcel by parcel to private developers who would establish uses consistent with the plan.²²

Morris, the owner of a presumably modest, but economically viable, department store in the renewal area, challenged the constitutionality of the proposed taking of his property for incorporation into the project.²³ Morris argued that this taking would violate the implicit meaning of the Fifth Amendment to the United States Constitution by taking nonblighted²⁴ property for the purpose of destroying its current use and transferring the land to another private owner for a private use.²⁵ The Court rejected this argument. Adopting an expansive view of the public power of eminent domain, the Court held that a private use which serves the public benefit satisfies the "public use" requirements of the taking clause.²⁶

The Court was similarly expansive in addressing Morris's second argument. Because his store was not in a dilapidated or unsanitary condition, Morris argued that it was not contributing to the problem and taking and destroying it would therefore not serve the public interest. This point posed considerable difficulties for the district court below.²⁷ The district court resolved these difficulties by holding that the government had the authority to take and eliminate slum *structures* by eminent domain,²⁸ and it had the authority to take the *land* underlying these slum structures and transfer it to others for private uses. The district court limited seizure of the land to situations in which "the seizure of the title is necessary to the elimination of the slum"²⁹ or "the proposed disposition of the title may reasonably be expected to prevent the other-

22. *Id.* § 7(b)-(g).

23. The case below, *Schneider v. District of Columbia*, 117 F. Supp. 705 (D.D.C. 1953), consolidated two challenges, one brought by Morris, the owner of a department store, and the other brought by Schneider, the owner of a hardware store. Apparently, only Morris brought an appeal to the Supreme Court. See *Berman v. Parker*, 348 U.S. 26, 31 (1954). The caption to the Supreme Court's opinion styles appellant as "*Berman, et al., Executors.*" *Id.* at 26.

24. *Id.* at 34.

25. See *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55 (1937).

26. *Berman*, 348 U.S. at 33-34. *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403 (1896), enunciated the traditional view. The Nebraska Board of Transportation, having determined that there was insufficient price competition between two grain elevators at a particular station on the railroad, ordered the railroad to provide a site to allow for construction of a third elevator. Though the public benefit of price competition was undisputed, the Supreme Court held that this was an impermissible "taking of private property of the railroad corporation, for the private use of the petitioners." *Id.* at 417.

27. *Schneider v. District of Columbia*, 117 F. Supp. 705 (D.D.C. 1953).

28. *Id.* at 715.

29. *Id.* at 716.

wise probable development of a slum.’’³⁰ The district court held, however, that the government did not have the authority to take *non-slum* property and transfer it for preferred private uses. It held that “Congress, in legislating for the District of Columbia, has no power to authorize the seizure by eminent domain of property for the sole purpose of redeveloping the area according to its, or its agents’, judgment of what a well-developed, well-balanced neighborhood would be.’’³¹

The Supreme Court agreed with the district court that government has the authority to take and transfer land for private use in order to prevent the recurrence of a slum.

The particular uses to be made of the land in the project were determined with regard to the needs of the particular community. The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, and the presence of outmoded street patterns.³²

The *Berman* Court, however, disagreed with the district court on the question of whether government has the authority to take non-slum property and transfer it for preferred private uses.

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.³³

In attempting to understand *Berman*, one must first consider its implications and consequences in terms of the values of classic liber-

30. *Id.*

31. *Id.* at 720.

32. *Berman v. Parker*, 348 U.S. 26, 34 (1954).

33. *Id.* at 33.

alism.³⁴ According to these values a presumption exists that the dominant mechanism for allocating resources to productive use is the free market for goods and services. Governmental intervention in the functioning of this market is viewed as improper unless it is necessary to correct a breakdown in the operation of the market that deserves the values of freedom, individual liberty, and human dignity.

In the mid-1940s, the general physical conditions in substantial portions of Southwest Washington were degraded. Was there, however, a need for governmental intervention in order to improve these conditions? Or, to turn the question around, why was there no private action to put the land to a more valuable use?

The *Berman* opinion does not probe this question. Instead, it simply describes the degraded conditions and concludes that the legislature should determine the proper ends for the exercise of the police power.³⁵ "When the legislature has spoken, the public interest has been declared in terms well-nigh conclusive,"³⁶ and "once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine."³⁷

This short and conclusory chain of reasoning from problem to solution is far too facile. Rather, the failure of a spontaneous correction of the slum conditions might have arisen from any of a number of factors, each requiring a different type of governmental intervention to correct the problem. Only one of these factors, however, requires a *Berman*-style public-private partnership to achieve an efficacious solution.

At the most fundamental level, the absence of private action might simply have been the result of a properly working free market. Residents of the slum area may only have had the economic means to demand the level of quality that actually prevailed, and no other demand may have existed for land use in the metropolitan land market at a higher

34. Perhaps an ultimately unfruitful way to criticize *Berman v. Parker* would be to focus on its most obviously vulnerable point — the seeming paradox of how an admittedly private use can amount to a public use. It is not readily apparent how it can be a public use to replace Morris's Department Store with an upscale boutique or a tourist trap pseudo-seafood restaurant. Then again, it is not readily apparent how Ollie's Barbecue in Birmingham could have been an instrumentality of interstate commerce. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). The Fifth Amendment, by its unavoidable syntax, requires judicial line drawing, and judicial line drawing cannot be an exercise which can be subordinated to objectively rational criteria within the terms of the polar opposites that the syntax establishes. Thus, criticism of *Berman* must proceed on criteria extrinsic to the values that underlie the polar, and non-lexically ordered, opposites that the formal syntax establishes. These criteria, however, are abundantly available.

35. *Berman*, 348 U.S. at 30.

36. *Id.* at 32.

37. *Id.* at 33.

level of economic intensity. If this was the case, there was no market failure.

To the extent that broader public opinion "demands" the elimination of the blight, the rational response by government is not to enter into the large-scale enterprise of a redevelopment partnership with private entrepreneurs. Rather, government and the citizens who are demanding government action face a welfare problem. The proper solution to such a problem is the redistributive transfer of sufficient wealth from the general population to the slum residents, thereby enabling them to demand a level of quality land use acceptable to the citizens who demand action to "clean up the slums." Indeed, not engaging in such a welfare transfer would seem to violate the human dignity value of classic liberalism.

Alternatively, the absence of private action might simply have been the result of "redlining," which is the refusal of mainstream commercial and residential lenders to extend credit in urban neighborhoods with a particular racial or ethnic composition. This practice was widespread in urban areas in the post-World War II period and is not uncommon today.³⁸ In these circumstances, the property owners might have possessed the economic means to improve the physical conditions if credit on the prevailing market was available. This artificial refusal of the market to supply capital frustrates the satisfaction of this demand. The solution here, as well, does not require the substantial governmental effort of a massive renewal project. Rather, government need only devise and enforce properly focused prohibitions on discriminative lending practices.

In addition, an unmet demand by outsiders may have existed in the general metropolitan area for higher quality residential and commercial uses.³⁹ Spontaneous market action to meet this demand might not have been forthcoming because of the free-rider problem.⁴⁰ This form of market breakdown arises from the phenomenon of "neighborhood effects." If A invests in the upgrading of her property, part of the economic consequence — the increase in the fair market value of property — accrues not to A's property but instead to the property of A's neighbor, B.⁴¹ When neighboring owners have no basis for mutual trust, each will

38. E.g., RICHARD P. FISHMAN, *HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE AND PLANNING LAW* 607-19 (1978).

39. Redlining would not necessarily affect the satisfaction of this demand because that practice appears to be as much a discrimination against certain persons as it is against a particular area.

40. The discussion here of the free rider problem and the subsequent discussion of the holdout problem are based on Otto A. Davis & Andrew B. Whinston, *The Economics of Urban Renewal*, 26 *LAW & CONTEMP. PROBS.* 105 (1961).

41. Thus, B's property enjoys a windfall increase in value solely because it is in a better neighborhood, a neighborhood made better by A's investment. *Id.* at 107.

be tempted to eschew investment and attempt to "free ride" on the improvements made by the others, resulting in no improvement.⁴² This problem is not corrected by a massive redevelopment project. Instead, government need only impose and vigorously enforce a building code requiring physical conditions that approximate the level of quality for which there is an economic demand.⁴³ This leaves each landowner no choice but to invest. It requires, however, an investment that redounds to the economic benefit of each landowner.

Finally, assuming that an outside demand existed, the inaction might have been the result of another form of market breakdown, the holdout problem. It may have been that the pattern of land ownership in Southwest Washington was highly fragmented and that the nature of the outside demand required larger parcels of land than those parcels held by any one landowner in the slum area. A developer whose project requires a land parcel that is currently under multiple ownership must assemble the parcel by bidding away each of its pieces from the current owner. Without the public power of eminent domain, a developer who does not, or cannot,⁴⁴ proceed in secret faces the potentially severe consequences of a holdout problem.⁴⁵ Government can effectively respond to this frustration of parcel assemblage by entering into a partnership with developers in order to supply the holdout defeating power of eminent domain.⁴⁶

This canvass of the various circumstances in which urban slum conditions might persist demonstrates that only one of these circumstances requires a public-private redevelopment partnership to achieve an effective solution. The other circumstances require either a narrowly-focused regulatory scheme or a simple redistribution of wealth. Indeed, as discussed below, the public-private redevelopment partnership is not only unnecessary to solve the problem in these other circumstances, but it also fails to solve the problem.

42. *Id.* at 108-10.

43. *Id.* at 114-15.

44. Particularly in urban settings, most developers have an acute sense of the demand for land use. With several developers competing to assemble the same parcel, maintaining secrecy (i.e., preventing the current landowners of the fragmented parcel from gaining an understanding of the development potential of the assembled parcel) becomes difficult to achieve.

45. Davis & Winston, *supra* note 40, at 110-11. If the developer proceeds openly, she will almost inevitably find that, as she acquires individual parts of the parcel, it becomes increasingly difficult to acquire the rest. The owner of a remaining piece will see that he can hold out for a high price; for instance, it would be rational for a developer who has already committed to purchasing all the other pieces to pay up to one dollar less than the discounted present value of the anticipated net return from the project to the owner of the last piece required.

46. *Id.* at 115-16.

The *Berman* opinion implies that the holdout problem was the operative cause of the slum conditions in Southwest Washington: "It was important to redesign the whole area so as to eliminate the conditions that cause slums The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers."⁴⁷ Unfortunately, however, the Court did not substantiate this proposition. Rather, the Court did little more than repeat the assertions made by the Redevelopment Land Agency. The opinion did not indicate that the Court required the Agency to substantiate these assertions.

Determining whether the Court's assertions are correct requires consideration of the nature of the process by which the particular redevelopment plan for Southwest Washington arose. A natural division of talent existed between, on the one hand, the planners and administrators in the Redevelopment Land Agency and the Planning Commission, and on the other hand, the area's principal land developers, who would ultimately form the pool of potential purchasers of the cleared and prepared lots in the former slum. Government personnel possessed expertise in formulating physical plans that applied normative principles of function, quality, and aesthetic design. The developers possessed expertise in executing physical plans expeditiously and at minimum cost. More important, however, was their expertise in understanding the demand side of the land market — understanding, that is, which particular principles of function, quality, and aesthetic design could be applied to a project in order to yield the maximum economic return. In other words, they knew what would sell on the market.⁴⁸

Given the division of labor between government and developers, it is highly unlikely that government possessed any aptitude for assessing demand. Because of the politics of the Redevelopment Act, government was under a mandate to eliminate a slum; they had to *do* something, and do it with the participation of private sector developers in a way that allowed the developers to profit. Thus, government was in the position of depending on the developers for an essential element (demand

47. *Berman v. Parker*, 348 U.S. 26, 34-35 (1954). The district court below also seemed to believe that this was the problem. See *Schneider v. District of Columbia*, 117 F. Supp. 705, 714, 719, 721 (D.D.C. 1953).

48. *Berman*, 348 U.S. at 34. An incisive analysis of the dynamics of the market for political action in terms of the rational interests, needs, and opportunities of the several categories of participants (vote-seekers, bureaucrats, producers, and consumers) is set out in RANDALL BARTLETT, *ECONOMIC FOUNDATIONS OF POLITICAL POWER* (1973). Bartlett's analysis includes a revealing discussion of the information assets that producers can offer in this market for political action. *Id.* at 65-75.

in the land market) of the information required for deciding what was to be done.⁴⁹

The government's vulnerability to the developers was particularly acute because of the incentives faced by both government and developers. The most rational general course of action for the members of the Redevelopment Agency and the Planning Commission was the maximization of the security of their position.⁵⁰ This was most successfully achieved through the dual strategy of preserving or expanding the workload of their agencies and making the least controversial decisions possible.⁵¹

With respect to the Southwest Washington mandate, the most sweeping redevelopment project would have resulted in the largest payoff in terms of workload and consequent funding and staffing. The developers, of course, would similarly prefer the most sweeping solution because of the increased opportunities for profit. Moreover, the developers would prefer, again for profit reasons, a solution which incorporates more upscale uses in the redeveloped project area.

Given the overall nature of the slum problem, it is unlikely that a decision could have been implemented that would have satisfied everyone affected and thereby avoided any controversy. The least controversial solution would have been the one that minimally offended those most able to vent their opposition publicly. Determining their identity would not have been difficult. The developers were well organized through their trade group and possessed both the financial means and the skills required to make their views known. Conversely, the impoverished slum residents did not possess the organization, the means, or the skills to participate on the hustings. Elected officials and those members of the general public who placed the slum on the political agenda would find acceptable any measure that would eliminate the Southwest Washington eyesore. Politically, then, government maintained a strong incentive to adopt a redevelopment project preferred by the developers.

In terms of the process, government was vulnerable to the developers. The developers possessed the means to achieve a dominating presence, both in public forums and through lobbying *ex parte* in the complex administrative processes by which the redevelopment plan emerged. This presence was far greater than any other interested individuals or groups could bring to bear.⁵² The developers' means had two aspects. The first aspect was the economic means to purchase the services of enough

49. *Id.* at 27-37, 70-75.

50. *Id.* at 21-22.

51. WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 36-42 (1971). See also BARTLETT, *supra* note 48, at 70-72.

52. BARTLETT, *supra* note 48, at 132-56.

appropriately skilled individuals to maintain sheer presence. The second was the crucial knowledge about land market demand that the government lacked but needed in order to make its determinations; this was the developers' means to use their presence advantageously. Achieving dominating presence is the mechanism by which the familiar phenomenon of "capture" arises, and developers had the opportunity to engage in capture.

Finally, the developers had the opportunity to maximize their profits not only through the scale and economic level of the redevelopment plan, but also through the distribution of costs. A favorable cost distribution could be accomplished through maximizing the government's involvement in implementing the plan physically by inducing the government to administer as many site clearing and site preparation functions as possible and then by minimizing the proportion of the costs of the functions that the government would have otherwise attempted to recapture when selling the cleared and prepared parcels to the developers. The developers possessed a powerful means of influencing this price because of their functional monopoly over demand information. They could manipulate this information by threatening not to participate in the project on the asserted grounds of unprofitability.

From the fundamental nature of the process established by the Redevelopment Act, a basis exists for predicting what sort of redevelopment scheme might emerge. This prediction can be tested by considering the contours of what actually took place in the aftermath of the sweeping blessing of urban renewal that the Supreme Court provided in *Berman v. Parker*. The extensive litigation that the project engendered provides a revealing body of information.

The Redevelopment Land Agency carried out its renewal of Southwest Washington in two principal stages. The *Berman* litigation involved a dispute over the first stage, "Area B."⁵³ According to the judicial opinions that resulted from the *Berman* dispute, the plan for Area B at the time of this dispute called for a renewed area with approximately the same population level as before, but with a mix of low and moderate income residents.⁵⁴ Moreover, the Area B plan called for no construction of welfare housing.⁵⁵ Necessarily, the project as initially planned would have resulted in the displacement of at least some of the low income pre-project population.

The later redevelopment of the larger Area C generated litigation over the question of whether the Agency could change the designated use of one parcel without the approval of the owners of adjacent parcels

53. *Berman v. Parker*, 348 U.S. 26, 30 (1954); *Schneider v. District of Columbia*, 117 F. Supp. 705, 708 (D.D.C. 1953).

54. *Schneider*, 117 F. Supp. at 724.

55. *Id.*

already redeveloped according to the plan.⁵⁶ The judicial opinions generated by this dispute provide further glimpses of what happened to Southwest Washington in the aftermath of *Berman v. Parker*. The developers took advantage of their opportunity to capture both the administrative and the legislative processes. It appears that the developers actually displaced the Planning Commission in formulating the area plan.⁵⁷ In addition, the developers successfully lobbied to prevent the enactment of legislation that would have resolved the Area C dispute in favor of change.⁵⁸ Because of this successful capture, the general approach to the redevelopment of the slum area evolved rather quickly from providing for low to moderate income uses to providing a substantial, if not predominant, proportion of economically upscale uses.⁵⁹ Consequently, there must have been considerable further displacement of the former residents of the renewal area.⁶⁰

The developers also succeeded in controlling their costs. With governmental expenditures in the renewal area nearly equal to private ex-

56. There seemed to have been no challenge to the validity of the plan for Area C in advance of its implementation. After nearly full implementation, however, the residents of an affluent town house development constructed in Area C as part of the renewal project protested the action of the Agency in redesignating an adjacent parcel from semi-public or church use to low and moderate income housing. *Hoeber v. Redevelopment Land Agency*, 412 F. Supp. 211, 212 (D.D.C. 1976), *rev'd sub nom. L'Enfant Plaza Properties, Inc. v. Redevelopment Land Agency*, 564 F.2d 515 (D.C. Cir. 1977). The federal district court held that the Agency was required to take into account the impact on adjacent property of a change in the redevelopment plan and to obtain the written consent of any landowners or lessees adversely affected before implementing the change. *Hoeber v. Redevelopment Land Agency*, 483 F. Supp. 1356 (D.D.C. 1980).

57. The original Area C plan, prepared by the Planning Commission staff, was limited to the rehabilitation of existing structures with the area remaining predominately low income. The final plan, prepared by outside architects, adopted a predominately economically upscale concept of a "new town in the city" because of the "higher" economic potential of the area. *Hoeber*, 483 F. Supp. at 1360-61.

58. Patrick Tyler & LaBarbara Bowman, *The Scars of a SW Housing Struggle*, WASH. POST, January 14, 1980, at A1.

59. *Hoeber*, 483 F. Supp. at 1360-61.

60. The several judicial opinions that the Southwest redevelopment generated are cryptic on the matter of displacement. The Area B plan called for the same population post-redevelopment as pre-redevelopment with, however, a goal of raising the average income level in the area. *Schneider v. District of Columbia*, 117 F. Supp. 705, 724 (1953). Necessarily, there would have been at least some permanent displacement of former Area B residents, particularly the least affluent. The Area C plan, although it included some low income housing, called for a substantial upscaling of the area. *Hoeber*, 483 F. Supp. at 1361. There was permanent displacement of Area C residents as well. It is clear that in 1980 there was a considerable public perception of displacement; the renewal area had become "a synonym for black removal from the center city." Tyler & Bowman, *supra* note 58, at A1.

penditures,⁶¹ there was apparently a considerable shift of the physical work load to government. Moreover, government failed to capture the costs that it incurred, either by selling prepared development sites at a price that recaptured acquisition and preparation expenses⁶² or by recapturing some of these costs through increased property tax revenues.⁶³

These glimpses suggest that the renewal of Southwest Washington conformed closely to what might have been predicted from the structure and dynamics of the renewal process established by the Renewal Act in 1946. The apparent governmental subsidy of the development that occurred strongly indicates that no economic justification existed for the particular, massive role that government played in this renewal. By taking title to the land in the renewal area and clearing and preparing it for development, the Redevelopment Land Agency performed the important initial step of assemblage, thereby eliminating the possibility of a holdout problem. Because the developers enjoyed considerable influence in the planning process, the configuration of the prepared parcels was suitable. Yet, a willing seller of assembled and prepared parcels could not sell them without "writing down"⁶⁴ the acquisition and preparation costs. The developers had an opportunity to manipulate their knowledge of market demand. It is unlikely, however, that they would forgo an opportunity to develop at a profit if they could do so at a purchase price equal to the agency's cost. If the developers could not profit at this price, then clearly no market demand existed for the uses that the redevelopment plan designated for these parcels.

Moreover, it is beyond comprehension that the major financial institutions would have "redlined" the area's major developers. In addition, the examples of Morris and Schneider, as well as an even more compelling example discussed below, indicate that individuals in the Southwest Washington "slum" were willing to invest in the maintenance and im-

61. By 1973, private investment in the redeveloped area of southwest Washington totalled "over \$265 million." Public expenditures totaled "less than \$230 million." *Hoeber v. Redevelopment Land Agency*, 483 F. Supp. 1356, 1367 (D.D.C. 1980).

62. Apparently, the Redevelopment Land Agency normally "wrote down" these acquisition and preparation costs before selling parcels to private developers. *L'Enfant Plaza Properties, Inc. v. Redevelopment Land Agency*, 564 F.2d 515, 519 (D.C. Cir. 1977). It is curious that public expenditures amounted to approximately 87% of private expenditures in an undertaking in which "private enterprise . . . shall be given a preference over any public redevelopment company" in the transfer of development parcels. Redevelopment Act § 7(g).

63. It appears that the *difference* in tax receipts attributable to redevelopment (adjusting 1953 receipts to 1973 dollars) between 1953 and 1973 was approximately \$4 million per annum in 1973. *Hoeber*, 483 F. Supp. at 1367 n.37. This is hardly a bounteous annual return on a total public investment of some \$230 million.

64. *L'Enfant Plaza*, 564 F.2d at 519.

provement of their properties. Thus, it is unlikely that a substantial free rider problem existed in the area.

It was certainly within the realm of possibility that there was a holdout problem in Southwest Washington. Eliminating the possibility of such a problem, as the Redevelopment Land Agency actually did, however, did not alone induce redevelopment in accordance with the pattern of uses that the plan designated. To accomplish this, the Agency found it necessary to subsidize the developers as well. What remains is the conclusion that the cause of the Southwest Washington slum was a lack of demand. No demand existed for any land uses other than the "slum" uses already present. Therefore, the economically proper response was not a public-private partnership engaged in a massive redevelopment project. Rather, it was the transfer of sufficient wealth from the rest of society to the slum dwellers to facilitate demand for politically acceptable land use.

The sweeping and uncritical judicial approval of the Washington, D.C. redevelopment scheme had profound consequences. Given the pattern of uses which the redevelopment plans established, the subsidy that resulted from the "writing down" of the development parcels amounted to a transfer of wealth from the population at large to the affluent. The Supreme Court's ratification of the Redevelopment Act established a hierarchical and antidemocratic redevelopment process, which inevitably led to a perverse subsidy of the affluent.

Because of the pervasive influence that a Supreme Court decision has on other courts, perhaps the most substantial consequence of *Berman v. Parker* flowed from the radical conceptualization of land rights that is implicit in the *Berman* opinion. The Court expressly and consciously stretched the meaning of the Fifth Amendment phrase "public use" to include a private use with a consequent public benefit.⁶⁵ There are, however, two aspects to using governmental power to serve the public benefit: The negative aspect of exercising public power to prevent actions that are harmful to the public good and the positive aspect of exercising public power to take actions that advance the public good.

The district court recognized the considerable conceptual complexity of the "public benefit" and concluded that relevant differences existed between its two aspects. It held that "public use" could properly include a private use with a consequent public benefit, provided that the public benefit was served in a negative way, such as preventing an ongoing harm to the public welfare by eliminating "slum" uses of land.⁶⁶ The district court declined, however, to extend the eminent domain power

65. *Berman v. Parker*, 348 U.S. 26, 33-34 (1954).

66. *Schneider v. District of Columbia*, 117 F. Supp. 705, 715 (D.D.C. 1953).

to include takings of non-slum property for the purpose of advancing the public welfare because "the poor are entitled to own what they can afford."⁶⁷

The Supreme Court's collapsing of these two aspects is doubly radical. First, the traditional concept of strong individual rights in confrontation with public power contemplates a regime of highly determinate property entitlements carrying a strong security of tenure, with the public power of eminent domain functioning as an exceptional circumstance. The root of this traditional concept is individual liberty. The Court's expanded concept of the eminent domain power contemplates a regime of highly contingent property entitlements carrying a security of tenure that is determined only by the momentary, shifting conception of the public good. The root of this alternate concept is social utility. The district court, in rejecting this alternative concept, recognized its radically different nature: "One man's land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well-designed."⁶⁸

The Supreme Court's concept is even more radical in operation. As discussed, the momentary, shifting conception of the public good is strongly a function of the power of the economic elite to capture the policy determining organs of government. The liberty based political philosophy of strong individual rights necessitates an equality of rights.⁶⁹ As John Rawls has recognized, liberty in the abstract is of little value politically without the means to enjoy liberty.⁷⁰ Anatole France depicted the matter ironically: "The majestic egalitarianism of the law . . . forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread."⁷¹ The practical effect of the power of the economic elite to capture government will be a shift of societal wealth to the affluent. The practical realization of equal liberty will be a casualty.

If the most substantial consequence of *Berman* is its radical reconceptualization of the eminent domain power, its most unfortunate consequence is its ratification of a redevelopment process that displaces impoverished residents of the slum. The Redevelopment Act did not require that housing be provided, either in the project area or elsewhere, for those residents whose residences were to be taken and razed.⁷² Clearly,

67. *Id.* at 719-20.

68. *Id.* at 724.

69. JOHN RAWLS, A THEORY OF JUSTICE 243-51 (1971).

70. *Id.* at 204.

71. OXFORD UNIVERSITY PRESS, THE OXFORD DICTIONARY OF QUOTATIONS 217 (3rd ed. 1980).

72. The Redevelopment Act made only two provisions for people who would be

the low and moderate income housing that the redevelopment plan did provide could accommodate far fewer people than the number who were displaced. Many of these people, of course, could afford only "slum" housing. As a result, the project did little more than eliminate the symptoms of the problem, the eyesores in Southwest Washington, without addressing the problem itself — poverty. By displacing people without providing for them, the project could only shift the problem elsewhere.

The experience of one displaced resident of the project area is a microcosm of the impact of the redevelopment on the project area's residents. In 1951, Mayme Riley purchased a residence in Southwest Washington, in what the redevelopment plan called Area B.⁷³ Mrs. Riley gave a down payment of \$300 and executed notes secured by three liens of mortgage on the residence in the face amount of \$9,652. After her purchase, rather than allowing her property to deteriorate, Mrs. Riley spent \$877 on repairs and improvements.

In 1954, when the process of razing Area B reached Mrs. Riley's neighborhood, the Redevelopment Agency instituted eminent domain proceedings against her property. Having spent or incurred obligations in the amount \$10,729, Mrs. Riley received a condemnation award of \$7,000. Because in 1954 she still owed \$8,902 on the three notes, the condemnation action left her with no house, an outstanding balance due on the notes of \$1,902, and nothing to show for the \$1,927 that represented the sum of her down payment, her paydown of the notes, and the cost of the repairs and improvements that she had made.⁷⁴

displaced. It provided that the District of Columbia Commissioners "shall satisfy themselves" at the time of adopting the redevelopment plan that housing would be available in the future for the displaced. Second, it provided that the displaced "shall be given preference" for vacancies in any public housing that might be available. Redevelopment Act § 8. It is clear that these provisions were not adequate. See Tyler & Bowman, *supra* note 58, at 1.

73. The facts of this episode are set out in *Riley v. Redevelopment Land Agency*, 246 F.2d 641 (D.C. Cir. 1957) and STAFF OF HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 86-88 (Comm. Print 1964) [hereinafter COMPENSATION STUDY].

74. Sadly enough, it would seem that the award did reflect the objective fair market value of her property. The fact that this amount fell far short of her outstanding debt and her expenditures can be attributed to the unsurprising fact that she must have paid exorbitant interest rates for her loan. This is a circumstance concealed by the all too common practice of the lender obtaining the usurious portion of the interest up front by forcing "red-lined" credit applicants to make notes in favor of the lender, the face amounts of which substantially exceed the loan proceeds. The astonishing rates by which the lender discounts these notes on the secondary market are a clue that this indeed is the practice. For a discussion of the technique of frontloading excess interest into the face amount of the note, see CHARLES J. GOETZ, CASES AND MATERIALS ON LAW AND

Having lost her economic stake in society, Mayme Riley now faced displacement, with rather diminished prospects of purchasing a new residence.⁷⁵

Here, in stark detail, is the consequence of a judicial doctrine that permits an expansive reach of the eminent domain power. Mrs. Riley faced formidable obstacles, including a commercial finance system that left her to the tender mercies of usurers and a physical milieu in which an individual might reasonably be discouraged from investing. Despite these obstacles, she fully lived up to the ideal citizen of political rhetoric, the strong, self-sufficient individual working hard within the system. The system established by the Redevelopment Act decided, however, that what she was doing was not good enough, that her home should be razed, and her land "sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well-designed."⁷⁶

The classic liberal value system provides a strong basis for criticizing what happened to people like Mayme Riley. An even broader criticism is possible by considering more closely the implications of what was happening in Southwest Washington. Although the complaints of Morris, Schneider, and Riley represent only three parcels out of the extensive redevelopment area, their laments nevertheless suggest a reality far more complex than the utterly bleak portrayal that appears in the *Berman* opinion. These individuals *wanted* to be located there. Given human nature, it is likely that they wanted to be there because other neighbors wanted them to be there.

The point is that the mere recitation of statistics that focus solely on physical condition falls short of fully portraying reality, especially when a substantial component of that reality is psychological in nature. In this case, the psychological component illustrates the emotional attachment Schneider, Morris, and Riley had with their property. Their response to the takings represents their particular stake in a cohesive community. The point, though, is not that this psychological factor was necessarily present in the blighted Southwest Washington renewal area (although some thirty years later, people apparently remembered it as having been a cohesive community).⁷⁷ Rather, the formal record of this

ECONOMICS 213-17 (1984). For a discussion of the large discount rates in the market for credit that Mayme Riley faced, see COMPENSATION STUDY, *supra* note 73, at 86.

75. Mrs. Riley challenged the eminent domain award that the Redevelopment Land Agency offered and brought an appeal of a judgment for \$7,000. The court of appeals set the judgment aside and remanded. *Riley v. Redevelopment Land Agency*, 246 F.2d 641 (D.C. Cir. 1957). The matter was settled, with the award increased by \$850. COMPENSATION STUDY, *supra* note 73, at 86.

76. *Schneider v. District of Columbia*, 117 F. Supp. 705, 724 (D.D.C. 1953).

77. *Tyler & Bowman*, *supra* note 58, at 1.

renewal project indicates that whether a communal milieu existed was not a matter of concern in the long series of public decisions that led to the physical obliteration of the area and the dispersal of its residents.

Especially among the poor, the existence of a matrix of mutually shared values and mutually shared concern and support is a necessary condition, not just to psychic well-being, but to physical survival itself. The wealthy can purchase in abundance all that they need for physical survival. The poor must often depend on a web of mutual support consisting of a nonmonetary exchange of goods and services with each individual contributing to the others whatever meager abundance and special talents he might have. When psychic and service exchanges exist, they can mutually and synergistically reinforce, creating a milieu the value of which far exceeds what the physical reality might suggest. When this milieu is destroyed and its members scattered, it is irretrievably lost.⁷⁸

The failure of the decisionmaking process by which Mr. Schneider's and Mr. Morris's stores and Mrs. Riley's residence were destroyed to take into account whether a community existed in the renewal area had a dual effect. The potentially substantial value of community to its members could not enter into the measure of eminent domain compensation that each received. Schneider and Morris were not compensated for lost "goodwill," and Riley was not compensated for lost "subjective value."⁷⁹ In addition, the existence of a community could not count as a relevant factor in choosing the method of correcting the eyesore, whether by physical destruction and the scattering of the residents or by physical rehabilitation and locational continuity for the residents. Neither the value that a community gives to its members nor the value the rest of society derives from the existence of a community was of relevance.

The issue of community was formally absent in the legislative, administrative, and judicial decisionmaking processes that shaped the fate of Southwest Washington. This issue expressly arose, however, in the extended controversy over a redevelopment project in Detroit that

78. See, e.g., JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 192-95 (1989).

79. An individual faced with the prospect of relocation by another redevelopment project expressed the notion of sentimental value in this way:

I been living in this neighborhood for over forty-six years, and I don't intend to move because you con artists are trying to pull a rip off. Nobody can tell me up to eighty percent of the value of that house, how much that house is worth. To me it is a million dollars. My house has a brand new bathtub and I don't intend to move to a clunker, God-damned, cockroach-infested house that you pick out. I want to live on Kanter and I love every rotten board in that house.

Id. at 63.

took place some thirty years later. In 1981, the Michigan Supreme Court decided *Poletown Neighborhood Council v. City of Detroit*.⁸⁰ The redevelopment in dispute in *Poletown* had its origin in a General Motors Corporation offer to locate an assembly plant for luxury automobiles in Detroit if the city would provide the site. Acting in an environment of economic decline, the city agreed to take a site by eminent domain that met the locational criteria specified by General Motors, to clear the site and install specified transportation and utility infrastructure, and to transfer the site to General Motors for a price that amounted to approximately four percent of the city's anticipated acquisition and site preparation costs of \$200 million. In addition to providing the site on extremely favorable terms, the agreement granted General Motors tax abatement for twelve years.

The site, however, encompassed a substantial portion of "Poletown," a predominantly Polish enclave that straddled the Detroit-Hamtramck border. In response, residents of Poletown formed the Poletown Neighborhood Council, which served as the vehicle for a two-front resistance to the project. The Council engaged in an extended political fight that generated national media attention.⁸¹ The Council also brought a legal challenge to the proposed project that raised two issues on appeal to the Michigan Supreme Court: (1) that the project amounted to an impermissible taking for private use and (2) that the city had impermissibly failed to account for the loss of a cohesive community that the project would cause.⁸²

Relying explicitly on *Berman v. Parker*, the Michigan Supreme Court upheld the validity of the project in a conclusory opinion that is reminiscent of the United States Supreme Court's conclusory and almost eager ratification of the Washington, D.C. project.⁸³ The Michigan Supreme Court's formulation of the issue was all but self-answering:

This case raises a question of paramount importance to the future welfare of this state and its residents: Can a municipality use the power of eminent domain granted to it by the Economic Development Corporations Act . . . to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state?⁸⁴

80. 304 N.W.2d 455 (Mich. 1981).

81. The story of the ultimately unsuccessful citizen resistance is chronicled in WYLIE, *supra* note 78.

82. *Poletown*, 304 N.W.2d at 458, 460.

83. *Id.* at 459. Two justices, however, dissented in strong terms. *Id.* at 460-64 (Fitzgerald, J., dissenting); *id.* at 464-82 (Ryan, J., dissenting).

84. *Id.* at 457 (citation omitted). It is not clear why the court left out mom and apple pie.

In rejecting the contention that the project amounted to an impermissible taking for a private use,⁸⁵ the court engaged in considerably strained reasoning. The court first asserted that "condemnation for a private use cannot be authorized whatever its incidental public benefit."⁸⁶ It then found that the condemnation was for the primary benefit of the public.⁸⁷ Thus, the court held that because the benefit to the private interest was "merely incidental," the eminent domain taking was valid even though, to return to the court's initial assertion, it was for a direct private use, which "cannot be authorized."⁸⁸

The Neighborhood Council used the Michigan Environmental Protection Act⁸⁹ to raise the issue of loss of community. The Act allows citizen actions against public and private entities "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."⁹⁰ The Council contended that, because the project would "have a major adverse impact on the adjoining social and cultural environment which is referred to as Poletown," it would destroy a natural resource in violation of the Act.⁹¹ The court rejected this contention summarily: "Given its plain meaning, the term 'natural resources' does not encompass a 'social and cultural environment.'"⁹²

The *Poletown* opinion is strikingly conclusory. Note the difference between the court's reading of "public use" and its reading of "natural resources." The "plain meaning" of "public use" would seem to be "definitely not a private use." The court, however, engaged in an expansive reading of that term while it engaged in a constrictive reading of "natural resources" without offering an explanation for this analytical difference.

The court was similarly conclusory in considering whether a public benefit flowed from the private use of the Poletown parcel. The court set out a rather rigorous test: "Where, as here, the condemnation power

85. The challenge was brought under the taking clause of the Michigan Constitution, the language of which is nearly identical to that of the Fifth Amendment to the U.S. Constitution: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." MICH. CONST. art. X, § 2 (1963).

86. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458 (Mich. 1981).

87. *Id.* at 459.

88. *Id.*

89. MICH. COMP. LAWS § 691.1201 to -.1207 (1970).

90. *Id.* at § 691.1202(1).

91. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 460 (Mich. 1981).

92. *Id.*

is exercised in a way that benefits specific and identifiable private interests, a court inspects *with heightened scrutiny* the claim that the public interest is the predominant interest being advanced."⁹³ Its "strict scrutiny," however, amounted to this: "If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project. . . . We hold this project is warranted on the basis that its significance for the people of Detroit and the state has been demonstrated."⁹⁴

The dogged, passionate, and well-publicized resistance by the Poletown residents in every possible forum ought to have alerted the Court to the fact that strongly held values were at stake and that some scrutiny of the claimed public benefit was required. The court could have weighed the loss of community as a cost borne by the Poletown residents as members of the public whose benefit was the criterion for judging the project's validity. The court could also have weighed the loss to the public at large of having a cohesive, mutually supportive community in its midst. Instead, the court ignored these values in an opinion that amounts to a bloodless discussion of the paramount legislative and executive roles in determining the public interest and the dominant weight of economic factors in measuring the public interest.

Even if the court had engaged in a scrutiny of the claimed public benefit confined only to economic factors, it would have found much to question. The court *assumed* in its statement of the issue that the project would "promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state."⁹⁵ Yet, jobs add households to a municipality, and households demand municipal services. The principal source of local government revenue is the property tax. The property tax yield from a single residence, except in the case of an affluent household, falls considerably short of paying for the governmental services that the residence consumes. The balance must be made up in taxes on industrial and commercial property. The Detroit-General Motors agreement granted the maximum tax abatement allowable under Michigan statutory law.⁹⁶ Adding to this loss of tax revenues the over \$200 million net cost to the city in procuring and preparing the project site, the net effect of the project on the flow of public revenues, would seem to have been highly questionable.

The *Poletown* opinion clearly demonstrates that the Michigan Supreme Court failed, just as the United States Supreme Court failed in *Berman*, to address the critical issues that these public-private redevelop-

93. *Id.* at 459-60 (emphasis added).

94. *Id.*

95. *Id.* at 457.

96. *Id.* at 470 (Ryan, J., dissenting).

opment enterprises raise. Instead, the Michigan Supreme Court simply added its enthusiastic endorsement to a kind of enterprise that, because it is so strongly shaped at the behest of the economic elite, requires independent judicial scrutiny and not judicial boosterism.

Poletown exemplifies the influence that *Berman v. Parker* had over subsequent judicial responses to challenges of mass-scale urban redevelopment projects. This influence was reminiscent of the impact that the Supreme Court's 1926 decision in *Village of Euclid v. Ambler Realty Co.*⁹⁷ had over the earlier judicial response to the validity of the power of local government to engage in the regulation of private land use. In *Poletown*, as in *Berman*, the judiciary ratified a decisionmaking process that was carried out by a coalition among local political leaders, the economic elite, and the bureaucracy of planning experts who decided on behalf of a substantial segment of the population that the land on which they lived must be put to a more economically intensive use. *Poletown*, as does *Berman*, induces a nagging suspicion about the validity of its assertions that a redevelopment project will generate a large net benefit to the public.⁹⁸ *Poletown* goes further than *Berman* by expressly rejecting what *Berman* impliedly rejected — community as a relevant value in the decisionmaking process.

II. CONSEQUENCES

The foregoing discussion performs several functions. It abundantly supports the thesis of *Planning for Serfdom* which asserts that the practice of urban redevelopment amounts to a hierarchical reality operating within a social context in which the rhetoric of classic liberalism dominates the style of political discourse.⁹⁹ Within this hierarchical reality, the economic elite deploy their power to capture the organs of government. This capture enables the economic elite to operate behind a facade of governmental regularity to achieve private profit at the cost of the integrity of the classic liberal values that underlie the formal structure of our polity.

In addition, the foregoing discussion reveals that, even accepting the validity of a political-economic system formed on hierarchical lines,

97. 272 U.S. 365 (1926).

98. New jobs mean new residents, but these residents cannot be taxed enough to cover their demand for public services. Thus, the industrial and commercial activity that accompanies them must make up the difference. Ironically, however, the industrial activity is brought by tax concessions. The result is a downward fiscal spiral in which government offers fewer services, followed by socioeconomic downscaling as the more affluent workers flee to "nicer" areas nearby.

99. For a contrast between rhetoric and reality in Indianapolis, see MALLOY, SERFDOM, *supra* note 1, at 12.

substantial reasons exist for questioning the integrity of the performance of that system. The justification for a hierarchical system is founded on the theory of division of labor and reward. This theory holds that certain members of society are more capable than others of directing the political-economic system to achieve the most efficient allocation of society's resources. Because the material wealth of society is a strongly held value, those people who increase society's wealth should wield power and enjoy economic rewards in proportion to their managerial talents.

As the facts of the Southwest Washington and Detroit disputes suggest, the most likely economic effects of these two projects were an economically inefficient subsidy of private enterprise and a substantial subtraction from the flow of public revenues. Moreover, the justification of a hierarchical order, by positing that some members of society are better than others at wielding power, implicitly assumes that these elite will wield their power for the benefit of society. If "society" means an organic whole, then these projects disserved the economic good of society. If, alternatively, "society" is defined in terms of each of its members, then these projects impoverished a substantial number of society's members, particularly those who were already at the lower end of the economic scale.

The previous discussion further reveals the importance of the judiciary in the process of urban redevelopment. The foregoing reconstruction of what occurred in Washington and Detroit comes almost entirely from the information contained in the judicial opinions that disposed of challenges to these projects. The courts, necessarily aware of the actual and potential harm that these projects entailed, nevertheless unequivocally and enthusiastically rejected these challenges. The doctrines that the judiciary thereby deployed to support their decisions embedded in the law a legitimacy for a hierarchical order that facilitated the further development of hierarchical institutions and more securely embedded them into the structure of the political order.

This emergent law of urban redevelopment is typical of the shape of judicial doctrine generally. Gerald Frug, for example, has brought into sharp focus the hierarchical conceptualization that dominates corporate and administrative law and governs our principal structures of private and public collective action.¹⁰⁰ Frug has also demonstrated that our cities themselves are not the principal structures of collective action. Despite the power that the governments of Washington and Detroit wielded over the unfortunate inhabitants of the redevelopment areas, under United States law, cities are largely powerless creatures of the state. In these redevelopment episodes, the city governments clearly acted

100. Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) [hereinafter Frug, *Ideology*].

as functionaries implementing the purposes of the larger economic order. Had these cities possessed greater power, the possibility existed that they might have functioned in a more communal manner, as vehicles for achieving the collective aspirations of all of their citizens. What actually took place, however, is consistent with Frug's argument that the law, in rendering the city powerless, has facilitated the "evolution of liberalism . . . as an undermining of the vitality of all groups that had held an intermediate position between what we now think of as the sphere of the individual and that of the state."¹⁰¹

Finally, the foregoing discussion shows that Malloy's strong focus on the values of classical liberalism makes a further consequence of the practice of urban redevelopment less visible, the gratuitous destruction of the physical locus of vibrant local communities and the displacement of their members by scattering them beyond the possibility of reforming their communal bonds. Indeed, in lamenting the "ever increasing trends toward central planning, communitarianism, and statism,"¹⁰² Malloy seems to reject community either as a phenomenon of value to, or as a source of positive values for, our political order.

The foregoing discussion has tried to bring into focus what Malloy deems to be irrelevant. The discussion that follows presents the argument of this essay and takes as its point of departure not the consequent erosion of the individualist values of classic liberalism, but the consequent loss of community. It shows that the way we go about rebuilding and renewing the cores of our cities is destructive of community and that the courts reject the proposition that this destruction ought to carry weight in disposing of the challenges to the validity of redevelopment projects. In a political culture in which rhetoric is dominated by classic liberal values, the obvious response to this focus is, of course, the "So what?" question. Even granting that there is something of value to community that is not accounted for in the classic liberal cosmology, why does it matter that these projects destroy communities? Isn't this loss, after all, nothing more than the necessary and bearable cost of having a polity that our "founding documents" seem to specify? This polity is founded on strong principles of individual rights, individual autonomy, and *ex ante* social justice that continually acts out the liberal project of the Enlightenment.

The short answer to this question, one that the ensuing discussion will attempt to develop in detail, is that community is a symptom of a process that is politically, and therefore constitutionally, important on

101. Gerald Frug, *The City As A Legal Concept*, 93 HARV. L. REV. 1059, 1088 (1980) [hereinafter Frug, *The City*].

102. MALLOY, SERFDOM, *supra* note 1, at 9.

two counts. First, this process is derivatively important because it is both necessary to the realization of the individualist values of classic liberalism and necessary to the attenuation of the impact of the hierarchical values that inevitably arise in political society. Second, this process is directly important, both in the value of the function that it can perform in the ongoing workings of political society and in the substantive values that it can generate, because it is a necessary element of the makeup of the polity.

Before proceeding with a development of this answer, it is helpful to engage in a brief definitional exercise. Implicit in the forgoing discussion is that a sharp dichotomy exists between two modes of existence, the communal on the one hand, and the societal on the other hand. An individual whose existence is marked by the communal mode lives in a milieu that is intimate in scale and in which interpersonal interactions are marked by a mutuality of concern. Values tend to be homogeneous and appear to arise from "below," that is, from the interactions of the community members themselves. The rhetoric of justice in this milieu tends toward the *ex post*.

In the societal mode, by contrast, the milieu is large and impersonal in scale, a milieu in which interpersonal interactions are transactional and consist of autonomous individuals pursuing their own interests and goals with little regard for the interests of others beyond a mutual commitment to the rules of fair play. Values tend to be heterogeneous and appear to come from "above" in a hierarchical manner that provides little scope for influence by any one individual. The rhetoric of justice in this milieu tends toward the *ex ante*.

In reality, of course, an unbroken spectrum of possibilities exists between the polar alternatives of community and society, with most individuals finding themselves in a mixed milieu that exhibits characteristics of both the modes. In order to sharpen the distinctions that the ensuing analysis attempts to make, however, it will proceed on the assumption that the milieus in which people actually exist tend to cluster around one pole or the other of the communal-societal spectrum.

III. THE MEANING OF THE ENVIRONMENT

The answer to the "So what?" question begins by examining the phenomenon that people invest physical objects with meaning. More particularly, throughout history and across a wide range of cultures, we do not trust our physical environment simply as a passive, accidental, and neutral context whose particular characteristics are a receded background to the existence that we act out. Cultures as diverse as the ancient Greeks and contemporary Native Australians construct through their natural environment the meaning that lies at the heart of what is culturally sacred.

Many of the familiar Greek myths recount how prominent features of the natural landscape came into being through the actions and interactions of the gods and heroic mortals who peopled mythical times. Myth, however, embodies the cultural consciousness. "A myth is a way of making sense in a senseless world. Myths are narrative patterns that give significance to our existence."¹⁰³ These particular stories define the natural environment as an essential component of Greek cultural meaning.

The Songlines of the Native Australians are functionally identical stories about the Australian landscape, stories that are also set in a mythical time, and that also transform the landscape,

the desert, which Europeans experience as a dreary, trackless waste, an environment filled with exciting, meaningful physical features, populated with invisible spirits, and crisscrossed with the meandering tracks of ancestral beings. Where Europeans find a dead landscape, the Aborigines live in a theater of energy. They are never bored in the desert. . . . For the Aborigines, any journey in the desert must resemble the excitement of devout pilgrims visiting the holy places in Jerusalem.¹⁰⁴

The meaning of the environment to the Native Australians is the substance of their cosmology.

This human habit of investing meaning is not limited to the natural environment. We invest the built environment with meaning as well, from the private residence where the significant family events occur to the public building where the significant community events occur. For example, a particular church where many Poletown residents had worshiped for most of their lives became the center of the resistance campaign for the Detroit-General Motors project. Even after the surrounding neighborhood had already been demolished, the resistance continued with Poletown residents occupying the church up to the moment that its demolition began.¹⁰⁵

Because the built environment is, by definition, constructed rather than given, this meaning and the processes by which it arises are abundantly complex. When we experience an architectural artifact, we become involved in an interactive process.¹⁰⁶ The first element of this process comes from the fact that the architect designed the building and the

103. ROLLO MAY, *THE CRY FOR MYTH* 15 (1991).

104. EUGENE V. WALTER, *PLACEWAYS: A THEORY OF THE HUMAN ENVIRONMENT* 137-38 (1988).

105. WYLIE, *supra* note 78, at 153-91.

106. See Umberto Eco, *Function and Sign: Semiotics of Architecture*, in *STRUCTURES IMPLICIT AND EXPLICIT* 131 (James Bryan & Rolf Sauer eds., 1973).

builder built it for use. Through a powerful connotative process, the building thereby conveys to the observer an ideology that is implicit in its function and that this function is normatively proper.¹⁰⁷ To say that a building connotes an ideology of function — to say that it is “built” — is to say that this connotative meaning is aesthetic in nature in the strong sense of enlightenment as distinguished from pleasure.¹⁰⁸ A building, that is, “can give new insight, advance understanding, and participate in our continual remaking of the world.”¹⁰⁹

Simultaneously, however, the building is malleable, giving rise to the second element of this interactive process. We, as “readers” of the building, have the power to attribute a meaning to it which is not necessarily a consequence of the building’s function.¹¹⁰ This attributed meaning can reinforce the functional ideology that the building connotes, it can be entirely independent of it, or it can be strongly in contention with it.¹¹¹ The meaning that the reader experiences arises out of the interaction of the connoted meaning of functional ideology and the meaning that the reader attributes. This experienced meaning is necessarily aesthetic as well. Apart from the substance of this complex, interactive aesthetic meaning is its impact. A building, because of its sheer physical presence, necessarily alters our environment. It “bulks large.” Because of this, this aesthetic meaning bulks large as well. Indeed, it can “inform and reorganize our experience.”¹¹²

Closely connected to the meaning of buildings is the meaning of the interior and exterior space that buildings create. Here, the meaning arises more directly from the individual’s activities in that space, although the architectural configuration, by determining the possibility of these activities, can shape this meaning indirectly.

A place has no feelings apart from human experience there. But a place is a location of experience. It evokes and organizes memories, images, feelings, sentiments, meanings, and the work of the imagination. The feelings of a place are indeed the mental projections of individuals, but they come from collective experience and they do not happen anywhere else. They belong to the place.¹¹³

In turn, this experience in the space created by a built environment, and its meaning, can shape the individual, just as the meaning of a

107. *Id.* at 135-36.

108. Nelson Goodman, *How Buildings Mean*, 11 *CRITICAL INQUIRY* 642, 652 (1985).

109. *Id.*

110. Eco, *supra* note 106, at 136-37.

111. Goodman, *supra* note 108, at 643.

112. *Id.* at 652.

113. WALTER, *supra* note 104, at 21.

building can shape the individual. The ancient Athenian agora provides a compelling example. According to Lewis Mumford, the "best definition of the city in its higher aspects is to say that it is a place designed to offer the widest facilities for significant conversation."¹¹⁴ The most important such facility in ancient Athens was the agora, whose "oldest and most persistent function was that of a communal meeting place."¹¹⁵ The function of the conversation that defined the city was "the making and remaking of selves."¹¹⁶ "In any generation, each urban period provides a multitude of new roles and an equal diversity of new potentialities. These bring about corresponding changes in laws, manners, moral evaluations, costume, and architecture, and finally they transform the city as a living whole."¹¹⁷

Thus, the built environment, whether buildings or space, can serve two powerful, interpenetrating functions. It can appear to us as a matrix that expresses our fundamental values, while it can also serve as a vehicle of value creation. Because these interpenetrating functions are intimately involved with the individual's fundamental values, this interaction between self and place is crucial to the individual's self-identity, functionability, and emotional state.¹¹⁸ One Poletown resident, for example, faced with the reality of relocation upon receiving some government literature describing the eminent domain process, committed suicide.¹¹⁹ Thus, the meaning of the built environment functions as a powerful connection between the values of the individual and place.

Underlying classic liberalism, and its exaltation of the individual, is a paradox. Classic liberalism gives "paramount value" to freedom, individual liberty, and individual autonomy,¹²⁰ yet the individual is a social construct. An individual's values do not arise *sua sponte*. Rather,

114. LOUIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* 116 (1961).

115. *Id.* at 148.

116. *Id.* at 116.

117. *Id.*

118. Kevin Lynch, *Reconsidering 'The Image of the City,'* in *CITIES OF THE MIND: IMAGES AND THEMES OF THE CITY IN THE SOCIAL SCIENCES* 151, 153-155 (Lloyd Rodwin & Robert Hollister eds., 1984).

119. WYLIE, *supra* note 78, at 62. The suicide rate in the midwest farm belt during the financially troubled 1980s was substantially above the national average. *E.g.*, VANCOUVER SUN, Oct. 16, 1991, at A16; WASH. POST, Nov. 18, 1990, at A18. Much of this can be attributed to the shame of being perceived as a failure. *See, e.g.*, THE DAILY TELEGRAPH, May 3, 1989, at 13. Much can also be attributed to the strong meaning that the farmer ascribes to the land: "Your sense of identity and self-worth is tied up in the land." Guy Gugliotta, *Down on the Farm: The Other Depression in Rural America*, WASH. POST, Nov. 18, 1990, at A18.

120. MALLOY, *LAW & ECONOMICS*, *supra* note 4, at 95-96.

they arise through an interactive process with the social world. A social world can function communally when the individual participates mutually with others in the creation and internalization of values. Alternatively, it can function hierarchically as a world in which the individual internalizes values that appear to be anonymously created and imposed from outside and above the immediate environment. The meaning of the built environment can arise in either of these modes because the physical structure of the built environment can arise either communally or hierarchically. If the built environment — its physical configuration, its aesthetic style, and its intended and permitted functions — arises communally, the individual experiences it in a participatory way, with an acute understanding that her function is meaning investing as well as meaning consumption. In a communal mode, a place is what we make of it.

If the mode is hierarchical, the individual experiences this environment in a detached way. Her only function is to consume an imposed meaning. Because this meaning, whether it arises communally or hierarchically, connects an individual's values with place, how a place arises is intimately involved with who a person is.

Different modes exist by which the meaning of the built environment arises, and a politics of meaning is bound up with the alternative roles available to the individual in the built environment. These roles can be described in terms of a spectrum. At one end of the spectrum is the environment that arises in a purely communal mode. The ready example is the economically modest, but vibrant, urban neighborhood, which is a bounded, named place with shared agreements about public behavior and established processes for reaching these agreements. Such a neighborhood is also an organizational structure that has linkages to sources of necessary outside resources and an enduring process for resolving internal conflict.¹²¹

Farther along this spectrum is the environment that exists in a state of tension between the communal and hierarchical modes. The ready example is the regional shopping malls of the 1970s before the proliferation of malls resulted in their falling into a hierarchy catering to different socioeconomic levels. When, for any particular area, there was only "the mall," it became an inchoate latter day agora and was the central meeting place for the entire community, where Lewis Mumford's

121. SANDRA SCHOENBERG & PATRICIA ROSENBAUM, NEIGHBORHOODS THAT WORK: SOURCES FOR VIABILITY IN THE INNER CITY 31-48 (1980). For a description of Boston's North End in the late 1950s as just such a viable urban neighborhood, see JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 8-12 (1961) [hereinafter JACOBS, DEATH]. Jacobs defines the characteristics of a successful neighborhood in terms of a single principle: "[A] most intricate and close-grained diversity of uses that give each other constant mutual support, both economically and socially." *Id.* at 14.

function of significant conversation clashed with the hierarchically imposed function of retail commerce. Similarly, during the brief span of China's Democracy Revolution, the use of Tiananmen Square in Beijing was in tension with the hierarchical function for which the central government had designed and built it.

Today, of course, Tiananmen Square is the exemplar of the hierarchical space. The Acropolis, the center for the rituals celebrating the official cosmology of ancient Athens, functioned in substantial contrast to the agora. As mall owners strive to keep their spaces hermetically sealed from the disorder of the outside world and, on the inside, free from any taint of political exchange in order to foster a tension-free environment of consumption, these spaces will also become hierarchical.

The opposite end of the spectrum is reached through a phenomenon that is all too common in the United States, the dichotomous and neutral hierarchically imposed space. Modern buildings typically focus on inner space as the dimension of moral value.¹²² The exteriors of these buildings, by their neutral, meaning-rejecting design, connote an ideology that rejects "the outside as a dimension of diversity and chaos,"¹²³ a dimension that bears no moral value.¹²⁴ These buildings turn inward away from the possibility that the exterior space that they create is a locus of meaningful human activity. This meaningful activity is reserved only for those people who have access to the interior, an access that often is available only to the privileged few. The outside space around the large shopping mall, the downtown sports arena,¹²⁵ and the high-rise slabs of the massive urban public housing project exemplify this ultimately dysfunctional, pathologically charged space.¹²⁶

Viewing these various modes of space along a spectrum facilitates understanding of the significance of community. Each point along the spectrum represents an ideology of function. It stands for a distinct way in which the individual might take part in social life and a way that can be intimately participatory, transactional, or hierarchical. Moreover,

122. RICHARD SENNETT, *THE CONSCIENCE OF THE EYE: THE DESIGN AND SOCIAL LIFE OF CITIES* 19 (1990).

123. *Id.*

124. "What we make in the urban realm are therefore bland, neutralizing spaces, spaces which remove the threat of social contact: street walls faced in sheets of plate glass, highways that cut off poor neighborhoods from the rest of the city, dormitory housing developments." *Id.* at xii.

125. "Who are they bringing the city back for? Not us," said Ted French, an Indianapolis job setter. "I pay a tax on restaurant food and beverages in the city to help finance the Hoosier Dome, but I've never been in it." Levathes, *supra* note 8, at 241.

126. For a compelling analysis of how the physical design of these projects causes them to be dysfunctional, see OSCAR NEWMAN, *DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN* (1973).

the particular values that the individual holds are strongly determined by this way of taking part in social life and political society. Shall the individual be a mere consumer of values that others determine and impose, doubtlessly in the service of their own interests? Or, shall a person participate creatively in the determination of the values that one ultimately internalizes?

Clearly, the built environment is intimately involved in the processes of politics of the highest order. When a particular built environment is the locus of a vibrant urban community, its destruction is a matter of political moment. The members will lose the value that the community gives to them in terms of material and psychic support, and they will also face the threat that their particular values, which evolved through the community, will now erode. Society at large will see that a loss as well because a mechanism through which some of its members achieved self-definition will no longer exist. Finally, an ideology of function will have been lost — a communitarian ideology that is alternative to and necessarily subversive of the ideology of hierarchy.

IV. INDIVIDUALITY AND COMMUNITY

The analysis to this point contains three assertions. First, the values that an individual holds are bound up with the built environment in a complex way. The meaning that the individual ascribes to the environment is a function of that individual's values. These values, being socially determined, are a function of the mode, hierarchical or communal, by which the individual takes part in social life and in political society, and the built environment serves as a vehicle for the social determination of those values. Second, hierarchically imposed redevelopment projects can destroy communal processes of meaning that simultaneously are a function of, and determine the shape of, the built environment. Finally, the destruction of these communal processes both impoverishes their participants materially and psychically and eliminates a practice of values that can be subversive of hierarchy.

Taken together, however, these assertions do not amount to a complete argument for the protection of community and communal processes from destruction. After all, individuality values are likewise subversive of hierarchy. Moreover, it is the values of individuality and not of communality that the Declaration of Independence and the Bill of Rights of the United States Constitution express so fully. Judicial doctrine ratifies the fundamental dichotomy of individual rights and state power that these documents express by declining to recognize, and consequently empower, the community. The implication that underlies doctrine is that community as a value is alien to, and thus subversive of, the privileged value of individualism.

More is needed before we have an answer to the "So what?" question, a justification for the judicial protection of communal values and the empowerment of communities. The purpose of the discussion which follows is to provide that justification. It will offer both direct and derivative arguments. The direct argument will justify communality as an independent locus of values that command judicial protection. The derivative argument will demonstrate that community provides values that not only are not subversive of the constitutionally privileged values of individuality but also are indeed necessary for the realization of such values.

The derivative argument begins with the familiar story of the evolution of political and economic society in the United States from the time of the late eighteenth century Revolutionary period. The Declaration of Independence captured the dominant Revolutionary rhetoric that embraced the cause of political liberty for the individual and resistance to the British political structure of hierarchy. The Constitution, in its 1791 form, embraced a dichotomy of strong individual rights and the limited, structured power of the federal state.

The social milieu at this period for most people was the small scale rural or town community.¹²⁷ This communal milieu, however, was not necessarily characterized by egalitarian reciprocity. From the beginning, the United States people subscribed to two different sets of cultural values — the Puritanism of the North and the Cavalier individualism of the South. Within these value systems, the social pattern of hierarchical community evolved in the North and the social pattern of the hierarchical plantation system evolved in the South.¹²⁸ For as long as the frontier remained open, the West provided a haven for those who sought an individualist way of life.¹²⁹

In the South, the oligopolistic plantation system dominated economic life. Manufacturing, which increasingly dominated economic life in the North, began in conditions of atomized competition. By the end of the nineteenth century, however, Northern productive enterprise had come to dominate the national economy. Moreover, it had substantially concentrated into large vertically and horizontally integrated capitalistic

127. ANNE NORTON, *ALTERNATIVE AMERICAS: A READING OF ANTEBELLUM POLITICAL CULTURE* 21, 99-105 (1986).

128. *See id.* at 19-199. In the South, the large plantation was, of course, a strongly hierarchical structure. In the larger society, there was also a strict hierarchy of large planter, middling planter, subsistence farmer, and slave. For a trenchant description of this hierarchy in Virginia, see EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975).

129. NORTON, *supra* note 127, at 203-18.

organizations¹³⁰ in which a mass national market of standardized consumer goods began to emerge.¹³¹

The wrenching disorder that accompanied this evolution of productive enterprise generated a political reaction that led to a radical structuring of American life.¹³² Public regulatory bodies began to emerge in order to mitigate the effects of this disorder and to involve government in the wielding of the considerable economic power now concentrated in the hands of the new economic elite.¹³³ With the concurrent organization of workers into large, integrated labor unions, economic society by the New Deal period had evolved into a structure of countervailing power, big business, big government, and big labor.¹³⁴ Simultaneously, an increasingly educated and increasingly professionalized middle class emerged to enter into a tacit bargain within this structure. In return for an ordered and hierarchical economic society, the new professional class obtained a favored, though not exalted, position as the cadre of experts whose task was implementing this new political and economic order on behalf of the rest of the populace but at the direction and behest of the economic elite.¹³⁵

Today, what might accurately be termed state capitalism has become institutionalized as the representatives of productive enterprise have in-

130. *E.g.*, MATTHEW JOSEPHSON, *THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS, 1861-1901*, 253-89, 375-403 (1962); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967). *See generally* MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS* (1988); ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* (1982).

131. *E.g.*, MICHAEL STROPER & RICHARD WALKER, *THE CAPITALIST IMPERATIVE: TERRITORY, TECHNOLOGY, AND INDUSTRIAL GROWTH* 88, 206-07 (1989).

132. For a general account of this period, one which argues that the Progressive Movement achieved the mitigation of the disorder that accompanied enterprise concentration through the hierarchical restructuring of economic and political life, see WIEBE, *supra* note 130.

133. *See* SKLAR, *supra* note 130; WIEBE, *supra* note 130 (providing general accounts of the emergence of the involvement of government in productive enterprise).

134. A general description of this evolution into a structure of large clusters of economic and political power is presented in JOHN K. GALBRAITH, *AMERICAN CAPITALISM: THE PROBLEM OF COUNTERVAILING POWER* (rev. ed. 1956); ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* (1958). Thorough descriptions of the resulting enterprise structure are presented in JOHN K. GALBRAITH, *THE NEW INDUSTRIAL STATE* (2d rev. ed. 1971); CHARLES N. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977).

135. For an argument that the Progressive Era amounted to the working out of this tacit bargain, see WIEBE, *supra* note 130. For a detailed description of the process of emergence of this hierarchical order, particularly the role of the professional class at the level of the small city, see JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* 47-83 (1980); SALLY M. GRIFFITH, *HOME TOWN NEWS: WILLIAM ALLEN WHITE AND THE EMPORIA GAZETTE* (1989).

creasingly captured the legislative and administrative organs of government.¹³⁶ Economic and public life are now organized into large scale, bureaucratic, hierarchical entities. The economic experience of most people takes place at the more powerless levels of productive and administrative bureaucracies and as atomized consumers in mass markets for goods and entertainment. Similarly, most people experience little political power, having only the opportunity to vote in elections for candidates who will, once in office, almost invariably respond only to interest groups.

With a majority of the population now located in suburban areas,¹³⁷ most people find themselves in a physical milieu that makes difficult the formation of intimate communities that are broadly inclusive across all the various gamuts of age, economic status, ethnicity, and religious and political persuasion. Instead, our social experience tends to take place fragmented among narrow clusters within these various gamuts. Those who do live a more general communal experience, one that is inclusive at least across a physical locality, are for the most part, members of the occasional, well-knit, typically ethnically homogeneous, often economically modest urban neighborhood or the members of socially peripheral religious groups such as the Amish and the Mennonites.¹³⁸

In political life, because of the endemic interest group capture of most levels of legislative and executive government, most people experience a substantial degree of powerlessness, reduced to voting in periodic elections for candidates who will be largely unresponsive to them once in office. This same experience of powerlessness takes place in their role as consumers in the mass, standardized markets for goods and services. In their role of producers in economic life, their experience tends to take place at the lower, more powerless levels of a hierarchical bureaucracy. Most people, then, tend to experience substantial elements of atomized subordination in a life that tends toward fragmentation rather than integration among its social, political, and economic aspects. Cultural experience has evolved a considerable distance from the Founding

136. The fact and mechanisms of legislative and administrative capture are discussed in BARTLETT, *supra* note 48; JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1965); NISKANEN, *supra* note 51; *THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS* (Roger G. Noll & Bruce M. Owen eds., 1983); Julius Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357 (Julius Q. Wilson ed., 1980); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285-95 (1988).

137. John R. Stilgoe, *The Suburbs*, AM. HERITAGE, Feb. - Mar. 1984, at 20, 21.

138. The particular communal characteristics of the Old Order Amish are incisively discussed in MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS* 102-25 (1982).

era with its intimate, integrated physical milieu and the heady experience of the first flush of success in incorporating the ideal of the liberty-endowed strong individual into political culture.

As we have seen, the shape of legal doctrine strongly mirrors cultural experience, conceptualizing the polity in terms of a dichotomy of the individual and the state, giving little recognition to the community as a discrete bearer of rights and responsibilities.¹³⁹ Moreover, in practice the law ratifies the exercise of economic and political power through a strongly hierarchical structure,¹⁴⁰ accepting the increasing synergy between the hierarchists of bureaucratic productive enterprise and the hierarchists of bureaucratic government. As a result, the law ratifies the subordinated, powerless status of the theoretically liberty-endowed, rights-bearing individual. *Berman v. Parker* and *Poletown Neighborhood Council v. City of Detroit* serve as telling examples of the extent to which economically and socially modest individuals find themselves to be largely at the mercy of a hierarchy of economic and political power.

Robin Paul Malloy decries the phenomenon of present-day American political culture as the antithesis of the classic liberal values that he champions. What this essay advances, however, is the argument that, antithetical as state capitalism might be to these values, it is, perhaps ironically, an inevitable development from classic liberal values. To understand and explore this argument, we can draw on cultural theory,¹⁴¹ an emerging conceptualization of the complex values that can arise in political and social culture, and the dynamics that political and social processes follow as these values evolve over time.

Standard political and social theory, like legal doctrine, tend to recognize only a dichotomous world of individualism and hierarchy.¹⁴² Cultural theory, by contrast, offers a more complex description of the world by focusing on the choices that the individual must make in order to function in an uncertain world. In particular, cultural theory seeks to describe the greater diversity of values that an individual might adopt and the ways of life to which different sets of values lead. It also offers to explain how these values, and their corresponding ways of life, arise and why they both persist and change.

139. Frug, *The City*, *supra* note 101.

140. Frug, *Ideology*, *supra* note 100.

141. The principal works on cultural theory on which the following discussion is based are MARY DOUGLAS, CULTURAL BIAS 34 (1978); Mary Douglas, *Introduction to Grid-Group Analysis*, in *ESSAYS IN THE SOCIOLOGY OF PERCEPTION* 1-8 (Mary Douglas ed. 1982) [hereinafter Douglas, *Introduction*]; MARY DOUGLAS, NATURAL SYMBOLS: EXPLORATIONS IN COSMOLOGY (1973) [hereinafter DOUGLAS, NATURAL SYMBOLS]; MICHAEL THOMPSON ET AL., CULTURAL THEORY (1990).

142. THOMPSON, *supra* note 141, at 3, 21.

Cultural theory starts from several interrelated ideas: (1) an individual's values do not arise *sua sponte*, but instead are the result of a process of interaction between individual and society; (2) these values determine how the individual understands the world; and (3) this understanding of the world determines the way of life that an individual leads.¹⁴³ A way of life is a viable combination of cultural bias; a particular pattern of shared values, beliefs, and social relations; and a particular pattern of relating with others, which reciprocally react in a mutually reinforcing way.¹⁴⁴ Thus, a way of life is the acting out of a way of thought.¹⁴⁵

We are, however, ultimately uncertain about the true nature of the world.¹⁴⁶ Is nature, for instance, benign, an almost unlimited source of plenty to be exploited by skills developed through trial and error? Or is it tolerant of exploitation, but only up to a point, so that only those with uncommon expertise should manage resource exploitation? Or, yet again, is nature fragile, so that exploitation of it must occur only within extremely narrow bounds in order to avoid ecological calamity? Or, even further, is nature wholly capricious, with life nothing more than a lottery?¹⁴⁷

It is clear that a set of values, and a corresponding viable way of life, can proceed from any of these four assumptions about nature.¹⁴⁸ Further, it is not possible to disprove any one of them, nor does any one of them fully capture the nature of the physical world.¹⁴⁹ If, then, we are ultimately uncertain about the nature of the world, we are also uncertain about how we should exist in it. In this state of uncertainty, we must choose among a variety of cultural biases from which we can determine a pattern of social relations.

Because of the incompleteness of each available cultural bias, any one, if adopted, will act as "the normally invisible screen through which culture" allows the individual to perceive the choices that life presents.¹⁵⁰

143. *Id.* at 21-23.

144. *Id.* at 1.

145. Douglas, *Introduction*, *supra* note 141, at 5.

146. *See id.* at 10, 26.

147. *Id.* at 26-29. The same may be said of human nature. Are people invariably self-seeking and thus not malleable? Or are they completely unpredictable? Yet again, are they born sinful, though they are redeemable by good institutions? Or are they born good, but corruptible by evil institutions? *Id.* at 33-36.

148. *Id.* at 1-18.

149. *Id.* at 83-100.

150. Douglas, *Introduction*, *supra* note 141, at 7. *See* THOMPSON, *supra* note 141, at 22.

A set of values is a way of seeing, and "a way of seeing is always a way of not seeing."¹⁵¹

Anything whatsoever that is perceived at all must pass by perceptual controls. In the sifting process something is admitted, something rejected and something supplemented to make the event cognizable. The process is largely cultural. A cultural bias puts moral problems under a particular light. Once shaped, the individual choices come catalogued according to the structuring of consciousness, which is far from being a private affair.¹⁵²

What are the available choices of ways of life? Cultural theory generates a set of alternatives through a matrix that measures two facets, or dimensions, of the individual's relationship with the social context.¹⁵³ These dimensions carry the labels "grid" and "group." Grid is a measure of the degree to which an individual sees her life as circumscribed by externally imposed prescriptions. Group is a measure of the extent to which an individual finds herself incorporated into bounded units, a measure of the extent to which she owes group allegiance.¹⁵⁴

A matrix of these two facets of sociality describes a set of ways of life that are already familiar from this discussion. The low-grid, low-group *individualist* owes no allegiance to groups and is not bound by a strong network of prescriptions.¹⁵⁵ The high-grid, high-group *hierarchist* seeks out the bounded group with differentiated roles and a strong network of prescriptions which are generated both within the group and from outside.¹⁵⁶ The low-grid, high-group *egalitarian* owes allegiance to a sharply bounded group, one which, however, does not define differentiated roles or a network of prescriptions.¹⁵⁷ Cultural theory denominates these as the three "engaged" ways of life.¹⁵⁸ It also defines a fourth way of life, the high-grid, low-group *fatalist*, who exists in a context of atomized subordination, strongly subject to a network of prescriptions but owing no group allegiance.¹⁵⁹

151. THOMPSON, *supra* note 141, at 24 n.7 (quoting KENNETH BURKE, PERMANENCE AND CHANGE 70 (1935)).

152. Douglas, *Introduction*, *supra* note 141, at 1.

153. THOMPSON, *supra* note 141, at 5-11; Douglas, *Introduction*, *supra* note 141, at 3-5.

154. THOMPSON, *supra* note 141, at 5, 11; Douglas, *Introduction*, *supra* note 141, at 3.

155. THOMPSON, *supra* note 141, at 7, 46-48.

156. *Id.* at 7, 44-46.

157. *Id.* at 6, 44.

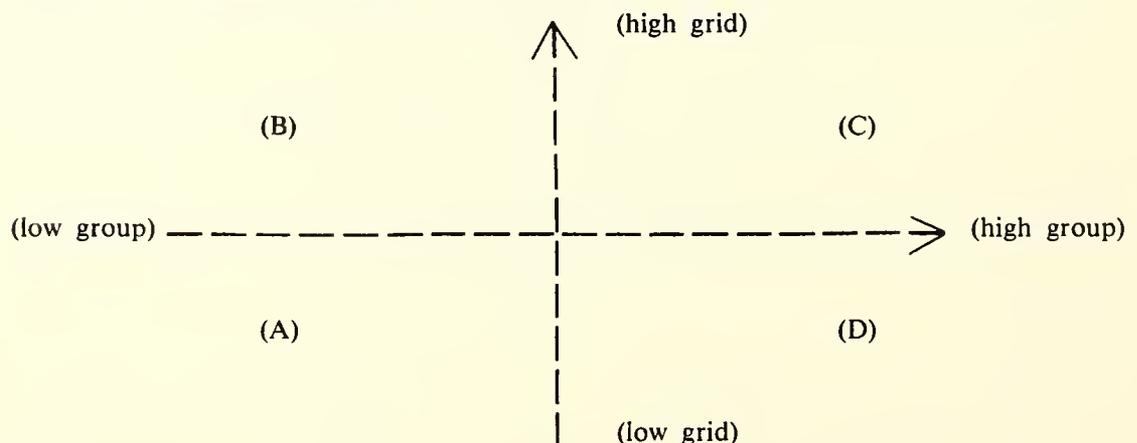
158. *Id.* at 88.

159. *Id.* at 6, 43, 93-96. There is a fifth way of life, that of the *hermit*, which

Each of us must have a set of beliefs about the world, a cosmology, in order to function. Cultural theory describes the principal alternative cosmologies available for choice. Although the social world tends to appear to the individual as a given, it is individuals who construct ways of life in interaction with their social milieu. Thus, cultural theory is not a theory of determinism.¹⁶⁰ It does posit that the choices of ways of life are limited. It holds the individual responsible, however, for making the choice. Cultural theory presents an explanation of the social construction of individual values:¹⁶¹ "society is a human product," a product of the cosmologies that individuals have constructed. "Man is a social product," the product of the cosmology that the individual adopts, whether by choice or by default.¹⁶²

Because each of these ways of life, or cosmologies, is incomplete in the sense that it does not fully capture the world, it is an ideology — "a way of seeing is always a way of not seeing."¹⁶³ Because of this incompleteness, each cosmology is incapable of anticipating and responding effectively to some situations.¹⁶⁴ Individualists are innovative in exploiting resources, but tend not to react to ecological limits. Hier-

will not be discussed further in the analysis which follows. The hermit's way of life is "one in which the individual withdraws from coercive or manipulative social involvement altogether." *Id.* at 7. A graphical representation might be helpful in understanding how grid and group generate these ways of life, or cosmologies, and how they interrelate:



A = Individualist

B = Fatalist

C = Hierarchist

D = Egalitarian

For similar diagrams, see *id.* at 8; Douglas, *Introduction*, *supra* note 141, at 4.

160. Douglas, *Introduction*, *supra* note 141, at 7.

161. THOMPSON, *supra* note 141, at 55-66.

162. *Id.* at 23 n.4 (quoting PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 61 (1967)).

163. *Id.* at 24 n.7 (quoting KENNETH BURKE, *PERMANENCE AND CHANGE* 70 (1935)).

164. *Id.* at 93.

archists are skillful at anticipating ecological limits, but are not innovative in devising ways of pushing these limits back. Egalitarians live effectively within a given level of technology, but tend not to capture the opportunities that technological innovation offers.

Because of this incompleteness, a society in which all of its members hold the same cosmology could not generate social institutions capable of maintaining societal viability in the long term. A society composed entirely of individualists would tend toward lawless violence.¹⁶⁵ A society composed entirely of hierarchists would tend toward despotism and stagnation.¹⁶⁶ A society composed entirely of egalitarians would tend to have no institutions capable of generating societal cohesion and would be subject to incessant fissuring and reforming of small subgroups.¹⁶⁷ Thus, each of the active cosmologies requires the others in order to make up deficiencies, to define itself against, or to exploit.¹⁶⁸ The fatalists, of course, are the most ready target of exploitation.¹⁶⁹

Cultural theory does not simply provide a matrix for understanding society synchronically and structurally. More importantly, it provides a way of understanding society diachronically as well, particularly the evolution of patterns of cosmologies over time. Cultural theory predicts that a society, in order to maintain its viability as it encounters changing exogenous circumstances over time, must maintain the opportunity for the three active cosmologies to emerge and will experience the combination and recombination of tacit alliances between particular active cosmologies.¹⁷⁰

165. *Id.* at 87.

166. *Id.* at 88. "Hierarchy once instilled develops self-reinforcing moral arguments that enable more unequal steps in status to be tolerated." Douglas *Introduction, supra* note 141, at 6.

167. THOMPSON, *supra* note 141, at 87-88. The endemic problem of the egalitarian community is fissure because without grid to supply a basis for internal cohesion, the community enjoys cohesion only as long as there is a homogeneity of particular values and tastes among its members. When these become heterogeneous, as they will tend to do over time, the community faces two choices. Either the cosmology of its members must move up-grid toward a more accepting attitude toward hierarchy, or if they are to maintain their cosmology, they must fracture into homogeneous subgroups, which then engage in intergroup line drawing as the only way available for the necessary task of defining group identity. For discussion of the fissure alternative, see THOMPSON, *supra* note 141, at 19-20; DOUGLAS, *NATURAL SYMBOLS, supra* note 141. For an example of the alternative of fissure, see Dennis E. Owen, *Spectral Evidence: The Witchcraft Cosmology of Salem Village in 1692, in ESSAYS IN THE SOCIOLOGY OF PERCEPTION, supra* note 141, at 275. For an example of the alternative of moving up-grid, see ALBERT HUNTER, *SYMBOLIC COMMUNITIES: THE PERSISTENCE AND CHANGE OF CHICAGO'S LOCAL COMMUNITIES 178-97* (1974).

168. THOMPSON, *supra* note 141, at 83-97.

169. *Id.* at 93-96.

170. *Id.* at 83-100.

The particular cultural evolution of the United States is altogether consistent with cultural theory. The constitutional framework adopted the cosmology of individualism in the Bill of Rights and the cosmology of hierarchy in the state-federal political structure that underlies the unamended text of the Constitution. The period from the late eighteenth century, when American culture was largely divided between individualists and hierarchists, to the middle years of this century, saw a long process of evolution among the cosmologies that cultural theory describes. When, as was inevitable during this two century period, only some individualists were economically successful, competition forced the relatively large number of the unsuccessful out of the individualist cosmology. Their movement was "up-grid" toward fatalism because their discomfort with high-group values made the high-group cosmologies of hierarchy and egalitarianism even less satisfactory alternatives than fatalism. As some of the successful individualists, because of their success, moved toward hierarchy as a highly effective vehicle to institutionalize their success, economic and political power settled into a tacit coalition of the hierarchists and the successful individualists,¹⁷¹ leaving the displaced individualists in a condition of subordinated and powerless fatalism subject to the exploitation of the individualists and hierarchists.¹⁷²

The counterculture of the 1960s appears to have developed as an escape from the powerlessness and alienation of fatalism, the selfishness of individualism, and the suffocating structure of hierarchy to the empowering solidarity of the egalitarian community. The recent "communal turn" in the larger society¹⁷³ is quite likely the consequence of the spread of these egalitarian ideas outward from the counterculture to tempt the large numbers of fatalists who, still imbued with the individualist ideals of political rhetoric, now sense that a move down-grid toward a realized, successful individualist way of life is no longer possible.¹⁷⁴ The problem,

171. This is the "stable diagonal." David Ostrander, *One- and Two-Dimensional Models of the Distribution of Beliefs*, in *ESSAYS IN THE SOCIOLOGY OF PERCEPTION*, *supra* note 141, at 14, 26-27. Alternatively, in more general parlance, it is "the establishment." THOMPSON, *supra* note 141, at 88.

172. For a penetrating study of the unfolding of this process in a particular geographical locality, see GAVENTA, *supra* note 135.

173. There is emerging a vast literature on this phenomenon. The most prominent early study is ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

174. The associated phenomenon is the erosion of the middle class, which is the subject of another emerging vast body of literature. For a prominent and detailed description of the phenomenon, see KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* (1990). *See also* ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM* 196-224 (1991).

however, is that it is difficult to realize the egalitarian way of life because the law is so dismissive of the egalitarian community as a collective action form capable of bearing rights and responsibilities.

This is, again, consistent with cultural theory. Egalitarianism need not pose a threat to the individualist cosmology.¹⁷⁵ As long as the structure of Bill of Rights protections remains intact, those who successfully live the individualist way of life will enjoy economic reward and wield power almost regardless of the mix of a culture's cosmologies. Moreover, the core function of the egalitarian community is the drawing of a sharp boundary between who is in and who is out.¹⁷⁶ The purpose of collective action for the egalitarian community, however, is not necessarily to exploit those on the outside. Rather, it seeks to demarcate between those who are to enjoy the mutual benefits that take place within the group and those who are not, to protect its members from the power of those on the outside, and to seek its fair share of the benefits that accrue from the collective action of the larger society that takes place through the general political system.

In addition, individualism is not a threat to hierarchy. The individualist way of life requires the presence of hierarchy to provide a system of protection for rights to property and claims arising out of bargain.¹⁷⁷ Without a structure for regulating interpersonal relations that only a high-grid cosmology will seek to establish, a predominately individualist culture would continually risk anarchy and disintegration.

Egalitarianism is, however, a threat to hierarchy. If a large number of fatalists were to embrace the egalitarian cosmology, the hierarchists would quite simply have fewer fatalists available for exploitation. Moreover, the hierarchists would now have to share economic and political power with the newly emerged egalitarian communities made up of the former fatalists. In addition, with the share of power of the hierarchists now attenuated, there would be an opportunity for some of the remaining fatalists to move down-grid to become successful individualists, further decreasing the number of fatalists available for exploitation and further shifting power away from the hierarchists.

For these reasons, it would strongly serve the interests of the hierarchists for the rhetoric of political discourse to embrace as exclusively as possible the principles of individualism, particularly those that cluster around the concept of classic liberalism. It would also strongly serve their interests for the law to place practical barriers in the way of

175. See THOMPSON, *supra* note 141, at 90.

176. See generally DOUGLAS, NATURAL SYMBOLS, *supra* note 141.

177. THOMPSON, *supra* note 141, at 87.

achieving egalitarian communities capable of exercising power on the political and economic hustings. It is certain that the hierarchists have the means to take steps toward serving these particular interests by shaping the substance of public discourse and by shaping the substance of legal doctrine.¹⁷⁸ It is also certain that hierarchists speak strongly in public discourse in the language of individualism,¹⁷⁹ thereby helping to create a normative context within society that discourages communalism. It surely is no accident that there is, as well, a legal context that discourages communalism.

Cultural theory thus explains what has in practice happened in the United States — that a society that values individualism highly nevertheless can readily evolve into one with a substantial element of hierarchy as well. When this happens, moreover, there is likely to emerge a tacit power coalition of individualists and hierarchists, leaving the mass of society to a position of atomized, alienated subordination and systematic exploitation. The result is a society that in concept values individual liberty highly while in practice is made up largely of powerless individuals. This contradiction is intolerable if the commitment to the values of individualism is to remain intact.

It is typical to think of communitarianism as being the antithesis of individualism. Cultural theory reveals, however, that egalitarian communalism can act as a leaven within society in a way that derivatively serves individualist values. The potential that this leavening power offers provides the judiciary with the justification for facilitating, rather than preventing, the emergence of egalitarian communities.

The derivative argument for egalitarianism, that egalitarianism serves the constitutionally privileged cosmology of individualism, also suggests a direct argument which is based on how a community functions. The homogeneous values that a cohesive community generates provide a powerful matrix in which the individual member can engage in self-definition. The solidarity of the community acts as a shield to protect the individual member from the power of those on the outside. This solidarity simultaneously allows the community to act as a collective action group in the economic and political markets, thereby enabling

178. Perhaps this explains why corporations (hierarchists) argue so vigorously for being treated as natural persons, especially for purposes of exercising First Amendment rights of expression. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

179. A prominent recent example is the controversial advertising by the cigarette manufacturer Philip Morris on the theme of the two hundredth anniversary of the Bill of Rights. E.g., Kim Foltz, "Lemon Awards" Given for Ads Deemed Sour, N.Y. TIMES, Dec. 11, 1990, at D21; Bruce Horovitz, *Cigarette Ad Ploys Spark More Protests*, L.A. TIMES, June 25, 1991, at D1; Tony Mauro, *Philip Morris TV Ads Assailed*, USA TODAY, Nov. 27, 1989, at 4A.

the individual member to enjoy a positive measure of power through the community. Thus, the egalitarian community provides to the individual consigned to the atomized subordination of fatalism an alternative cosmology which offers in abundance what the fatalist lacks, self-definition, empowerment, and protection from the individualists and hierarchists who tend to comprise the economic and political power elite.¹⁸⁰

The constitutional structure gives privileged status to the individualist cosmology through the Bill of Rights, with particular emphasis on the principles of a pluralism of values and freedom of association. To the extent that the law discourages the empowerment of the egalitarian community, it perhaps paradoxically, undercuts these principles by making it difficult for the powerless individual from acting out the consequences of the communal turn that is becoming an increasingly palpable phenomenon in current society. This frustration prevents the fatalist from exercising an associational choice, one which is capable of generating distinctive, powerful, and empowering values.

The motto of the United States, *e pluribus unum*, provides a way of encapsulating the arguments from cultural theory. The implicit goal, the cohesive general society of the *unum*, cannot exist if a large proportion of the body politic is made up of alienated, powerless individuals. They can become a participating, empowered part of the *unum* only if there is, on the plane of reality, a functioning *pluribus* that includes a sufficiently rich diversity of the active cosmologies.

V. THE CITY AND THE RENEWAL OF DOCTRINE

Two steps remain. One is to return the focus of the argument to the context of the city. The other is to suggest, within the context of the redevelopment of urban land, what contours judicial doctrine might

180. The argument of this essay is not that the social and political ills of the United States will magically vanish if only the current communal turn will cause egalitarianism to emerge as the dominant cosmology of our culture. Cultural theory tells us that a culture dominated by the egalitarian cosmology can simultaneously tend toward instability and hierarchy, just as a culture dominated by the individualist cosmology can simultaneously tend toward hierarchy and fatalism. Moreover, the literature confirms that in practice, the small community can exhibit its dark side, tending toward hierarchy and oppression and generating an appalling vacuity and venality of values. For factual depictions, see GAVENTA, *supra* note 135, at 47-83 (Middlesboro, Kentucky); GRIFFITH, *supra* note 135 (Emporia, Kansas); HUNTER, *supra* note 167, at 178-97 (Chicago). See generally THORSTEIN VEBLEN, *ABSENTEE OWNERSHIP: THE CASE OF AMERICA* 142-65 (1967). "The country town of the great American farming region is the perfect flower of self-help and cupidity standardised on the American plan." *Id.* at 142. For fictional depictions, see SHERWOOD ANDERSON, *WINESBURG, OHIO* (1919); HARPER LEE, *TO KILL A MOCKINGBIRD* (1960); H. SINCLAIR LEWIS, *MAIN STREET* (1920); EDGAR LEE MASTERS, *SPOON RIVER ANTHOLOGY* (1915).

take to incorporate the principles that comprise the high-group communal cosmology. Because of the extended nature of the discussion to this point, this further discussion will provide only a general sketch.

A. *The Meaning of the City*

We have explored how we, as humans, ascribe meaning to the built environment — buildings and spaces that, because of this meaning, become intimately bound up with human action, containing it, shaping it, and becoming shaped in return. The title of this essay, however, is "The Meaning of the City." This points to an entity that is different in scale and complexity from the built environment itself. The city is in part a large, complex built environment capable of bearing complex meaning. It is also in part a locus of people and the complex functions that they carry out within that locus.

The meaning of the city in United States culture has always, it seems, derived from a mixture of avoidance and fascination. The ancient legal principle, "city air makes men free," reveals a path from the servitude of the rural manor to freedom.¹⁸¹ It also reflects, however, the pestilential nature of the medieval city. From ancient times as well, the freedom that the city bestowed on those who came often enough degenerated for many of them into the status of a proletariat or worse.

Avoidance was manifest early in our colonial history. The colonial era Virginia legislature repeatedly enacted legislation requiring its counties to establish ports and towns before they began to emerge.¹⁸² The Virginian Thomas Jefferson is noted for his faith in a social system based on husbandry, a faith that had its roots in his fear of the cities that would inevitably develop from a manufacturing economy: "The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body."¹⁸³ Historically, however, the city has also been the glittering mecca for our restless and creative youth eager to escape the stultifying dullness of the rural and small town life that dominated the American experience until well into this century.

181. See Frug, *The City*, *supra* note 101, at 1084.

182. Act V, June 1680 Sess., 2 WILLIAM W. HENING, STATUTES AT LARGE 471 (1823); Act VIII, April 1691 Sess., 3 WILLIAM W. HENING, STATUTES AT LARGE 53 (1823); Act XLII, Oct. 1705 Sess., 3 WILLIAM W. HENING, STATUTES AT LARGE 404 (1823). For an analysis of the nature of the resistance to towns and to the circumstances that led to their eventual emergence, see MORGAN, *supra* note 128, at 283-88; DARRETT B. RUTMAN & ANITA H. RUTMAN, A PLACE IN TIME: MIDDLESEX COUNTY, VIRGINIA, 1650-1750, 204-33 (1984).

183. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 165 (William Peden ed., 1955). See generally Alfred Kazin, *Fear of the City: 1783 to 1983*, AM. HERITAGE, Feb. Mar. 1983, at 14.

The historical pattern of the urban population reveals much about this complex cultural attitude. From the late 1700s to the end of the nineteenth century; there were two large patterns of migration. One was westward toward the frontier, fueled both by the population of the eastern United States and by immigration.¹⁸⁴ The other migration was to the eastern cities which transformed, as a consequence of the Industrial Revolution, from small centers of trade and small scale manufacturing to industrial centers.¹⁸⁵ These cities drew originally from their rural hinterlands and then from immigration.¹⁸⁶

The twentieth century has seen a continuation of, and an increased complexity in, the pattern of urban change that began with the Industrial Revolution. Once the frontier closed, a further migration from the rural areas began and extended well into the post-World War II period as the cities became centers of finance and corporate control.¹⁸⁷ Concurrently, a migration began from the urban center to the periphery, first by the affluent elite and then by the descendants of those who came to the city in the nineteenth century.¹⁸⁸ For the latter, the city has turned out to have been little more than a way station, a place from which to escape, the immigrants having developed no intergenerational commitment to a milieu of tenements and slums.¹⁸⁹ Taking their places in the city were the African Americans who began their migration from the rural south in the 1930s¹⁹⁰ and the later Latino and Asian immigration, both legal and illegal, that continues today.

A typical pattern characterizes the present day United States city. The core has decayed as retail trade and manufacturing follow the earlier

184. Lewis Mumford, *The Fourth Migration*, in *PLANNING THE FOURTH MIGRATION: THE NEGLECTED VISION OF THE REGIONAL PLANNING ASSOCIATION OF AMERICA* 55, 57-58 (Carl Sussman ed., 1976). Writing in 1925, Mumford described four migrations — to the frontier, from rural areas and from abroad to the new centers of manufacturing, from rural areas and small cities to the new centers of finance and corporate control, and at that time incipient, from the urban core to the suburbs. *Id.* at 55-64.

185. MARK GIROUARD, *CITIES & PEOPLE: A SOCIAL AND ARCHITECTURAL HISTORY* 301-18 (1985); JEAN GOTTMANN, *MEGALOPOLIS: THE URBANIZED NORTHEASTERN SEABOARD OF THE UNITED STATES* 186-98 (1961); Mumford, *supra* note 184, at 58-59.

186. *E.g.*, TAMARA K. HAREVEN & RANDOLPH LAGENBACH, *AMOSKEAG: LIFE AND WORK IN AN AMERICAN FACTORY-CITY* 13-22 (1978).

187. GIROUARD, *supra* note 185, at 318-24; GOTTMANN, *supra* note 185, at 199-210; Mumford, *supra* note 184, at 59-61.

188. HENRY C. BINFORD, *THE FIRST SUBURBS: RESIDENTIAL COMMUNITIES ON THE BOSTON PERIPHERY, 1815-1860* (1985); GOTTMANN, *supra* note 185, at 210-13; KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); JOHN R. STILGOE, *BORDERLAND: ORIGINS OF THE AMERICAN SUBURB, 1820-1939* (1989).

189. For a description of the New York and Chicago tenement areas, see GIROUARD, *supra* note 185, at 311-13, 316-19.

190. NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991).

residential outmigration of the middle class. The immigration from other countries continues. It is accompanied, however, by the newer phenomenon of gentrification, as the more affluent professional classes abandon the suburbs and restore once upscale core residential areas that had fallen into decay during the period of massive suburbanization. Often enough, the city attempts to restore its decayed core with a "monumental" redevelopment project — the sports arenas of Indianapolis and the Renaissance Center office towers of Detroit are examples. In some cases, accompanying these redevelopment projects has been the transformation of the core economy to the post-twentieth century form of heavy industry, information processing.¹⁹¹ It is on the periphery of the typical metropolitan area, however, where the information processing seems to prefer to locate. Here grow the "edge cities," office complexes clustering around shopping malls, breaking the sprawling pattern of low-density, residential development and strip commercial development that has characterized the first wave of suburbanization.¹⁹²

It is clear that there really has never been a time when the cities have not been a scene of dynamism not only in terms of both physical and spatial configuration but also in terms of population pattern. In the abstract, dynamism is a positive value, in contrast with its opposite, stagnation. What is not clear, however, is whether in practice this dynamism amounts to anything more than an incessant churning that dampens the core urban function of innovation and creativity rather than being a symptom of healthy urban function.

The redevelopment of Southwest Washington and of Poletown seems to amount to little more than churning. In neither case is there any evidence that the lot of those who were displaced by the projects did anything but deteriorate. In neither case is there any evidence that the general public saw a net fiscal benefit from these projects. In neither case is there any evidence that the destruction of the current uses led to new uses that were aesthetically or technologically innovative. In the Poletown case, for example, there is nothing technologically innovative about just another assembly plant for a domestic automotive industry

191. A prominent example is Pittsburgh, which has generated an information processing economy in the aftermath of the collapse of the steel industry from which it originally grew. For a description, see Peter Miller, *Pittsburgh: Stronger Than Steel*, NAT'L GEOGRAPHIC, Dec. 1991, at 125. For a more general description of this process, see JOHN H. MOLLENKOPF, *THE CONTESTED CITY* (1983). For the proposition that information processing is the industry with the greatest future level of economic reward, see REICH, *supra* note 174, at 81-97.

192. The "edge city" phenomenon is described in JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1991).

that is eroding precisely because it is no longer innovative.¹⁹³ In short, there is nothing to suggest that either project did anything other than subordinate the urban fabric to the interests of the non-innovative economic elite for their substantial economic benefit.

The ambivalence toward the city that is embedded in our cultural myth has seemed to mask the extraordinary importance of the city from the general consciousness. Even in the United States, the ancient function of the city as the crucible of cultural definition remains intact. Moreover, we are beginning to understand that the national economy may be little more than an artificial construct made up of the successful economies of particular metropolitan areas.¹⁹⁴ In addition, it is a well-known fact that most of us live in metropolitan areas, yet it simultaneously seems to be a little-understood fact. With our cultural consciousness continually fixed on the rural countryside, we deny psychically the physical reality that the city is our home.

The core process of the city is synergy.¹⁹⁵ The city successfully carries out its cultural and economic functions by attracting and facilitating the interaction among individuals with a diversity of talents, ambitions, and values. This interaction generates innovation, which is a measure of the success of the city's economic and cultural functions.

As we have seen, however, values arise either communally or hierarchically. If the city's functions are organized hierarchically, they will tend to generate their own almost invariably homogeneous values. By their nature, hierarchically-organized functions tend to discourage innovation.¹⁹⁶ Moreover, the power of these economic and cultural hierarchies will erode the heterogeneous values that diverse individuals bring to the city, replacing them with the homogeneous values that these hierarchies generate. If, by contrast, the city's economic and cultural functions allow free play to individualist and egalitarian cosmologies, then the diversity of particular egalitarian communities that will inevitably emerge will generate a diversity of values. The competitive drive of the individualists will, in this rich milieu of heterogeneous values, generate innovation.

193. BROCK YATES, *THE DECLINE AND FALL OF THE AMERICAN AUTOMOBILE INDUSTRY* (1983).

194. JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS: PRINCIPLES OF ECONOMIC LIFE* (1984) [hereinafter *JACOBS, CITIES*]; STROPER & WALKER, *supra* note 131.

195. *JACOBS, CITIES*, *supra* note 194, at 29-44; JANE JACOBS, *THE ECONOMY OF CITIES* 49-202 (1970); *JACOBS, DEATH*, *supra* note 121, at 143-238; MUMFORD, *supra* note 114, at 568-76.

196. BURTON H. KLEIN, *DYNAMIC ECONOMICS* 140-212 (1977); ROBERT B. REICH, *THE NEXT AMERICAN FRONTIER* 117-39 (1983). See generally MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982).

The built environment of the city, its physical reality, is a crucial ingredient in the city process. Structurally, it is a strong determinant of physical liveability, and consequently of the power of the city to attract a diversity of individuals to it. The built environment can also function as a powerful vehicle for determining the values which, in turn, determine its meaning. Thus, the built environment and the way in which it arises, are symptoms of the dominant cosmology of the city. It is the dominant cosmology of the city that will determine whether, in the long run, it will be able to maintain its viability in performing its basic functions as a crucible of economic and cultural innovation.

B. Renewing Judicial Doctrine

This Article argues that judicial doctrine, when confronting disputes over the development of urban land, should account for communality. In the context of this argument, "accounting for communality" means that the courts ought to support the viability of the low-grid, high-group community that, in cultural theory, embodies the cosmology of egalitarianism. In particular, courts ought, by the way that they resolve these disputes, both protect these groups from exploitation by those who now wield economic and political power and enable these groups to come into being, to maintain their form, and to function as an empowered collective action group in the markets for economic and political action. It also means that courts ought to account for the meaning that people ascribe to urban land through the values that they derive from a communal existence.

To argue that judicial doctrine should account for communality in this way is, of course, to argue for a substantial shift in the contours of judicial doctrine. It is in applying to particular disputes what is desirable in concept, of course, that the complexities of a doctrinal shift become evident. A brief consideration of three relevant doctrinal areas — eminent domain, the regulatory taking, and the right of association — will illustrate these complexities.

In the law of eminent domain, the fact that the land to be taken contains a community would be relevant to two basic questions. The first is the question whether the land should be taken. Under the traditional law of eminent domain, as long as the land was to be put to a direct public use, the two principal issues were the amount of land to be taken, and the amount of the compensation that the expropriated landowner was entitled to receive.¹⁹⁷

197. See DONALD G. HAGMAN & JULIAN C. JUERGENSMAYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 590-626 (2d ed. 1986).

Berman v. Parker extended the reach of the eminent domain power by ratifying the taking of land for uses that serve the public interest even though these are directly private uses.¹⁹⁸ This had the effect of increasing the complexity of the question whether the land could be taken by introducing the issue of the public interest. To incorporate the consideration of communality would further increase the complexity of this inquiry because the public interest issue would now cut two ways.

“Incorporating the consideration of communality” requires the adoption of two presumptions. The first presumption would be that the community members themselves benefit from the fact of community. Because they make up part of “the public,” the loss of community occasioned by the taking would cut against that taking being in the public interest. The second presumption would be that the community serves the interests of the rest of the public as well because democratic political society is better off having in its midst individuals who, by reason of their community membership, have a stronger stake in society and enjoy empowerment in the political realm. The loss to the rest of the public that the taking would occasion would also count against that taking being in the public interest.¹⁹⁹

The immediate effect of *Berman v. Parker* was to expand in concept the reach of the eminent domain power beyond takings for direct public uses to include takings for ultimately private uses that serve the public interest.²⁰⁰ Moreover, the Court extended the practical reach of the eminent domain power even further by the extreme deference it showed to the legislative determination of whether the taking served the public interest, a deference that was tantamount to a “no scrutiny” test. Further, the public interest inquiry, by implication, focused only on the effects of the new use for which the land was expropriated.

198. See *supra* notes 24-34 and accompanying text.

199. See Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112-13 (1981) (property that is essential to its owner's competence to participate in social and political life ought to be immune from public expropriation); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 978-79 (1982) (property that is essential to its owner's self-definition ought to enjoy more stringent legal protection).

200. Duncan Kennedy notes that the distinction in the law between the public sphere and the private sphere has become illusory, suggesting that it is a distinction that cannot be made. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction* 130 U. PA. L. REV. 1349 (1982). In concept, however, in a polity founded on individual rights, it would seem that this distinction should be made. In practice, of course, that the barrier has collapsed is in large part a symptom of the capture of the organs of public power by the economic elite, making it possible for the equating of their actions and their interests with the public interest. When this happens, then nothing is private, including, as we have seen, the supposedly private property of the powerless.

Incorporating a consideration of communality, however, tends to diminish this broad reach of the eminent domain power. It broadens the focus of the public question to include the effects of the loss of the use that the expropriation will destroy. In addition, eminent domain takings would no longer involve a simple dichotomous clash of individual rights and state power. Because they would now also involve a distinct claimant of rights, a community, it would be more difficult for a court credibly to exercise extreme deference to the determinations of the legislature.²⁰¹

Assuming, however, that a court finds that, on balance, the taking would be in the public interest, the second basic eminent domain question involves the compensation the displaced community members should receive. Incorporating the consideration of communality into the compensation issue would require an accounting of the value that the community brought to the expropriated owners. This value would, of course, be an amount in addition to fair market value. These various determinations involve such further complex issues as how to determine whether a community exists and how to measure the value that a community brings to the public and to its members.²⁰²

To account for communality in eminent domain doctrine involves the limitations on the power of government to participate in urban redevelopment. A separate matter is the power of government to limit or shape the right of landowners to engage in the private redevelopment of their urban land. This involves the already difficult area of the regulatory taking. The dispute that arose over the development of the air rights over Grand Central Terminal in New York City in the *Penn Central*²⁰³ case provides a paradigm example of the issues of communality and meaning that are the focus of this essay. In *Penn Central*, an organ of city government, the Landmarks Preservation Commission, had expressed the importance that the public had come to ascribe to the architectural value of the Terminal by giving official landmark status to it. When the Commission later refused to allow the owner to develop the air rights over the Terminal in a way that would disrupt that value, the owner challenged the denial of development permission as an uncompensated, and thus an unconstitutional, regulatory taking.

The Supreme Court took the standard approach to the dispute by conceptualizing the owner's interest in the Terminal as the right of

201. For example, the presumption of efficiency in the market for political action is undermined in a milieu of almost blatant producer capture of the legislative process.

202. For an exploration of how these issues can be determined, see SCHOENBERG & ROSENBAUM, *supra* note 121.

203. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

dominion over it,²⁰⁴ by casting the dispute in terms of a dichotomous clash of individual rights and state power,²⁰⁵ and by applying the ends-means test to reach a resolution.²⁰⁶ In holding that there was no taking, the Court gave little attention to the difficult matter of meaning bound up in the question of whether the end of the regulation was legitimate. Instead, it gave considerable attention to the matter of the loss of the owner's economic value bound up in the question of whether the means were reasonable.²⁰⁷ The Court held that this erosion of value was not excessive and that the regulation as applied was constitutionally permissible.²⁰⁸

As with eminent domain, accounting for communality would generate considerable complexity in regulatory taking doctrine. It would, for example, substantially broaden the purposes for which government may restrict the use of land. *Penn Central* involved regulation imposed to prevent a private owner from destroying the values that the public had ascribed to its property in its current form. If values generated by the common action of the general public are deserving of protection, then the processes by which these values arise are deserving of protection.

Indeed, this is the most fundamental function of accounting for communality — facilitating a fully participatory process by which the built environment takes on meaning. Thus, government would also have authority over the form that a private owner's property might take. Government, that is, would have the legitimate power to prevent a landowner from engaging in the kind of development that produces dysfunctional buildings and spaces, and built environments that are disruptive of the participatory meaning-creation process, thereby precluding the creation of meaning by the public who uses those buildings and spaces.

This complexity goes beyond the matter of the reach of government power over private property. It goes to the basic conceptualization of property itself. By taking the standard approach, the *Penn Central* Court simply deferred to the legislative and administrative determinations that led to the recognition of the architectural value of the Terminal. Under

204. *See id.* at 122 (assuming that a historic landmark can be of itself fully private property).

205. *Id.* at 123-24.

206. *Id.* at 128-29.

207. *Id.* at 135-36.

208. *Id.* at 136-38. The opinion thus simply replicates the line drawing "too far" test of the fountainhead regulatory taking case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). This approach was incapable of development into a coherent theory precisely because it proceeded from a dichotomous conceptualization of these disputes in terms of individual rights and state power which are incommensurate.

this approach, the Court gave its principal attention to the property right as a limitation on governmental action. If the taking doctrine were instead to account for communality, then a court would have to confront directly both the ascription of meaning that arises from communal action and the viability of the processes by which this arises, because the power of that communal action would now function as a limitation on the property right.

When William Blackstone described the right to property as "that sole and despotic dominion which one man claims and exercises over the external things of the world,"²⁰⁹ he captured the thrust of the liberal project to liberate the individual from a status of being tied to the land to a status of autonomy and power through the right to hold dominion over land. In the liberal conception, the individual enjoys rights *to* property.

Accounting for communality requires a blurring of this dominion-based conceptualization of rights to land toward a participation-based conceptualization of rights *in* land. It cannot, of course, simply undo the liberal project by replicating the hierarchical order of the medieval manor by which the rights that the individual held in the land of the manor determined that person's status. If communality is to advance the liberal project, a participatory conceptualization of rights in land must be non-hierarchical and reciprocal. The rights that an individual holds in a particular piece of property, however, would necessarily be subject to the webs of meaning that the public ascribes to the environment of which that property is a part.²¹⁰

Such a reconceptualization of the property right surely would involve a radical shift in taking doctrine. What is interesting, however, is that it may not involve a shift to a *more radical* doctrine. After all, current judicial doctrine, in disputes involving the clash of enterprise with property, allows the often uncompensated expropriation of rights in land if this will serve the economic interests of productive enterprise.²¹¹ This

209. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

210. In *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972), the Wisconsin Supreme Court held, more by implication than expressly, that the public held an interest in certain biotic functions (those that occur in freshwater wetlands and lands adjacent to natural lakes and streams) of the land, an interest that is paramount to any ownership that an individual might hold in land on which those biotic functions occur. The New York Court of Appeals, in the decision that was the subject of the petition for certiorari to the United States Supreme Court in *Penn Central*, tried to capture this notion and apply it to urban social functions by treating the value of the Terminal as arising from public supply and consumer demand as much as from private producer supply. *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1275-76 (1977), *aff'd*, 438 U.S. 104 (1978).

211. Denis J. Brion, *Rhetoric and the Law of Enterprise*, 42 SYRACUSE L. REV. 117, 119-42 (1991).

doctrine, because it shifts away from a structure of antecedent and determinate rights to a structure of rights based on the current measure of economic utility, is already radical in terms of the values of protected individualism that the Bill of Rights establishes. Indeed, it arguably would be far less radical for property rights to be contingent instead on the play of the broadest range of societal values generated through a fully participatory process than a system of rights contingent on the play of values generated hierarchically in the far narrower interests of the economic elite.

Perhaps the most sensitive area of doctrine involves the right of association. The First Amendment to the United States Constitution establishes a broad freedom of association that conflicts with the principle of equal protection of the Fourteenth Amendment. The product of this conflict is a body of law that strongly limits the exercise of the associational freedom in ways that exclude on such bases as race, gender, and age.²¹²

The core function of the community, however, is line drawing — to draw and maintain as sharp a boundary as possible between who is included and who is not. Thus, to incorporate into the law strong protection for the egalitarian cosmology creates a paradox. We cannot undercut hierarchy without at the same time undercutting the hard-won principle of equal protection. Nor can we resolve the paradox by appealing to underlying principles. Equal protection is oriented more strongly to the process-based value of *ex ante* justice. Communitarity is oriented more strongly to the substance-based value of *ex post* justice.

The paradox arises in part, however, precisely because economic and political action, and derivatively, social action, have for such a considerable period, followed a hierarchical mode. For a racial majority to exclude a racial minority renders the minority powerless. For an elite economic minority to exclude the majority renders the majority powerless. In hierarchical circumstances, the matter of values is necessarily a matter of hegemony. Recent debates over values — the counterculture of the 1960s, the feminist movement, the movement for freedom of sexual orientation, the movement for the right to reproductive privacy — have been particularly bitter. They have been so bitter because they are carried out in a political milieu of doing things hierarchically. In such a milieu, it is entirely expectable that the contending sides implicitly assume that only a zero-sum outcome is possible from any particular conflict of values; either your values “win” or mine “win.”

What is possible, at least in concept, is a positive-sum mode that achieves the accommodation of different values in a non-hegemonic way.

212. *E.g.*, Fair Housing Act, 42 U.S.C. § 3601 (1988); CAL. CIV. CODE § 51 (West 1982 & Supp. 1991).

The outcome of any particular value conflict would be one by which no particular set of values becomes dominant. Achieving a true pluralism of values is indeed one strong and strongly possible function of the low-grid cosmology of egalitarianism as contrasted with the high-grid cosmology of hierarchy.

In hierarchical circumstances, practice of one's values is always at risk if they are not hegemonic values. Thus, one is reduced to intolerance of other values precisely because of their potential to gain hegemony. If, however, there is only a pluralism of values, then one no longer runs a risk by becoming more tolerant of the practice of different values because communities that cluster on particular patterns of value will not threaten her. The argument for a relaxation of the equal protection principle in order to protect and encourage the egalitarian cosmology consequently derives from the validity, in fully pluralistic circumstances, of the aphorism, "Good fences make good neighbors." Moreover, though particular communities would now have the power to erode one's right to nondiscrimination, this empowering of communities can derivatively empower one to escape falling into the status of powerless fatalism by opening up the opportunity for one to achieve power and fulfillment by successfully following the individualist cosmology or by joining one's own boundary-maintaining community and achieving power and definition through it.

What this discussion has tried to show is that accounting for communality would involve a considerable shift in the way that courts conceptualize disputes over the redevelopment of urban land. The standard approach posits a dichotomy which conceptualizes these disputes in terms of individual rights and state power. Accounting for communality amounts to accounting for the three engaged cosmologies that cultural theory describes by conceptualizing these disputes in terms of a far more complex trichotomy of individuality, hierarchy, and communality.²¹³ Furthermore, it offers a purpose for this more complex conceptualization — to reduce the ranks of those who hold the default, disengaged cosmology of powerless fatalism.

VI. CONCLUSIONS

Robin Paul Malloy's *Planning for Serfdom* raises urgent questions about the way that we redevelop our cities. Casting his arguments in terms of legal economic discourse, he offers an analysis that is compelling

213. For an exploration and development of the trichotomous conception of individuality, sociality, and communality as normatively valuable modes of existence thereby worthy of the protection of the law, see Ronald Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

because its premises, grounded in the ideology of classical liberalism, resonate so strongly with the dominant theme of our political rhetoric. This Article proceeds from the assumption, congenial with Malloy's premises, that the thrust of legal doctrine should protect and advance the values of individualism embodied in our founding documents because they constitute a salient episode in the still unfolding liberal project.

This Article has focused, however, on how it is that our culture, across its political, social, and economic facets, has developed strongly hierarchical characteristics despite an enduring dominance of the rhetoric of individualism in our political discourse. To cast the argument in terms of Malloy's legal economic discourse, this essay has probed the concept of demand, a fundamental element of market theory, which itself is a fundamental element of Malloy's classical liberalism. What this essay has tried to argue is that the substantive content of demand is exogenous to the market, and that demand is not something that "just naturally happens."

In classical liberal theory, a well-functioning market takes demand as a given and proceeds to achieve efficiency through the market-clearing actions of suppliers. What this market model does not seem to recognize, however, is that demand, because it proceeds from the values that market consumers hold, is manipulable to the extent that these values are manipulable. These values are manipulable when they arise through hierarchical societal structures. Moreover, the market creates a hierarchy of wealth distribution because it differentially rewards the various activities that derive from the various talents that individuals possess. This hierarchy of wealth distribution creates the power for some to manipulate the values of others, introducing enough circularity and artificiality into the market function to undercut its usefulness as an open, competitive, and neutral process.

Cultural theory provides a model of human interaction that opens the crucial impact of the way in which we redevelop our cities to analysis. What the built environment means, and how that meaning arises, determines whether the city is capable of carrying out its functions of economic and cultural innovation successfully. It is clear that hierarchical public-private redevelopment projects are the symptom of a substantial breakdown in the fundamental economic and cultural functions of the city.

We do in concept have open political and economic systems. In that sense, we are getting the cities that we deserve. If we want better cities, we must learn to love the city. That we do not love the city is manifest in our flight to the suburbs and hinterlands and in our failure to resist the predominance in the urban built environment of dysfunctional architecture that rejects public urban space as a potential locus of moral value. The city can no longer be an object of fear to be left to those who will manipulate it to their own ends. Instead, we must welcome it

as a centering place in which we actively seek to participate in its ongoing creation and development.

E.M. Forster's story, *The Machine Stops*, describes the collapse of a dysfunctional futuristic world in which the built environment made it possible for, and encouraged, people to be cut off from face-to-face contact with their fellow humans.²¹⁴ In our culture, we are tending to build cities that are marvelously effective mechanisms for reducing face-to-face contact to the most impersonal transactional level. There is little doubt that there are thoroughly plausible explanations for the evolution of this state of affairs, rooted in the reasons why those of us who make up our dominant culture, and their ancestors, came to this continent.

Whatever the cause, the result is the massive reduction of most of us to a condition of atomized, alienated powerlessness, a result that is hardly what the long struggle of the liberal project has sought to achieve. We must learn to develop our cities as mechanisms for bringing us together communally so that, perhaps paradoxically, we can become more fulfilled and empowered as individuals. We should, that is, reach for the *unum* through a properly understood emphasis on the *pluribus*.

214. E.M. Forster, *The Machine Stops*, in *THE ETERNAL MOMENT AND OTHER STORIES* 3 (1928).