

COMMENTS

Solar Energy and Restrictive Covenants: The Conflict Between Public Policy and Private Zoning

Reawakened interest in using the sun as an energy source is growing.¹ A steadier and more gradual increase has occurred in the utilization of private land use controls.² There are indications of a brewing

1. Interest in solar energy is, of course, nothing new; the history of experiments using the sun's power goes back at least 2500 years. The earliest known use of this gift from the heavens was supposed to have occurred in about 700 B.C. in ancient Rome when the Vestal Virgins lit their alter fire with the 'pure flame' of the sun. And in the third century, Archimedes, using a plane mirror reflector, is said to have set fire to Roman warships with the sun's beams. Much later, in 1621, the Von Tschernhaus burning apparatus, made with convex glass lenses, was melting metals. Still later, a printing press powered by the sun was described—and illustrated—in an article in the Sept. 21, 1882, issue of the British publication, *Nature*

Printing From Solar Power?, Berkeley Monthly, Oct. 5, 1978, at 51, col. 1.

The physical principle of the modern solar water heater was demonstrated by Horace de Saussure, an 18th century naturalist, and in 1891, the first U.S. commercial solar water heater was patented. Butti & Perlin, *Solar Water Heaters in California, 1891-1930*, 15 COEVOLUTION Q. 4 (Fall 1977); D. HAYES, RAYS OF HOPE: THE TRANSITION TO A POST-PETROLEUM WORLD 159-60 (1977) (crediting Nicolas de Saussure with earliest solar demonstration). Thirty per cent of the homes in Pasadena, California had solar heating in 1897. Lovins, *Soft Energy Technologies*, 3 ANN. REV. OF ENERGY 477, 489 (1978), reprinted in ENV'T'L L. INST., SOLAR POLICY FOR THE 80'S 177, 189 (1978). See also Butti & Perlin, *Solar Water Heaters in Florida 1923-1978*, 17 COEVOLUTION Q. 74 (Spring 1978).

"Discoveries of oil fields [between 1920 and 1930] were the end of solar water heaters." 15 COEVOLUTION Q. back cover (Fall 1977). See Butti & Perlin, *Solar Water Heaters in California, 1891-1930*, supra, at 4 (information on turn-of-the-century California solar industry has largely been forgotten, but elderly people remember using solar water heaters 70 years ago).

The resurgence in interest has been very recent. See CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, SOLAR ENERGY IN CALIFORNIA: RESIDENTIAL THERMAL APPLICATIONS I-2 (staff draft report, Feb. 1978) [hereinafter CAL. ENERGY COMM. REP.] ("The oldest of the current generation of California [solar] collectors is only three or four years old"); EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY, SOLAR ENERGY: PROGRESS AND PROMISE 11 (Apr. 1978) [hereinafter CEQ REPORT] ("The number of houses supplemented with solar energy has increased from roughly 30 in 1973 to somewhere in the thousands today"). But see J. KRENZ, ENERGY: CONVERSION AND UTILIZATION 212 (1976) (referring to "a prior period of high interest, the 1950's and the early 1960's"). Present interest in solar energy appears to be very high. See, e.g., *The Coming Boom in Solar Energy*, BUS. WEEK, Oct. 9, 1978, at 88.

2. Hayes, *Restrictive Covenants*, in ENV'T'L L. INST., SOLAR POLICY FOR THE 80'S 309 n.2 (1978) ("many or most single family homes built since World War II" are subject to restrictive covenants creating community associations with authority to disapprove exterior changes to house). See generally, Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976). Although this postwar explosion in the use of covenants has made these

conflict between these two developments, as homeowners who wish to install solar equipment are inhibited by restrictive covenants encumbering their property.³

Scattered examples from across the country indicate that homeowners who seek to install home solar heating systems—which require the use of plate-like solar collectors to absorb the sun's rays⁴—may be restrained from doing so by neighbors unhappy with the collectors' appearance.⁵ These neighbors are able to prevent solar installations be-

schemes a very common mode of private land use control, such use far predates this period. Commentators report that the running of a covenant restricting the use of land has been recognized as early as the thirteenth century. Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes: Two Concepts or One?* 21 HASTINGS L.J. 1319, 1319 (1970).

3. Hayes, *supra* note 2, at 309-10; Thomas, *Solar Energy and the Law*, in ENV'T L. INST., SOLAR POLICY FOR THE 80'S 33, 47 (1978); Hayes, *et al.*, *Solar Access and Land Use*, in ENV'T L. INST., LEGAL BARRIERS TO SOLAR HEATING AND COOLING OF BUILDINGS (1977), reprinted in ENV'T L. INST., SOLAR POLICY FOR THE 80'S 316, 331-32 (1978); Maullin & Sheehy, *Solar Rights in California*, ENV'T COM., May 1978, at 7; R. SHOEN & A. HIRSHBERG, A SOUTHERN CALIFORNIA GAS COMPANY PROJECT SAGE REPORT: UTILIZATION REQUIREMENTS (1978), prepared for the Southern California Gas Company by the Jet Propulsion Laboratory, California Institute of Technology, JPL Publication 77-49 at IV-7 (Jan. 1978); U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, APPLICATION OF SOLAR TECHNOLOGY TO TODAY'S ENERGY NEEDS 176-77 (June 1978) [hereinafter OTA REPORT].

Private land use restrictions contained in property deeds are known by a variety of labels: restrictive covenants, real covenants, equitable servitudes, equitable restrictions, and mutual negative easements. Although the differences in terminology sometimes have been paralleled by differences in substantive rights, the modern trend is to treat deed restrictions as a single category. Stoebe, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 863 (1977). This Comment will refer to all such arrangements as "restrictive covenants."

Restrictive covenants also can be used to promote solar energy development by guaranteeing homeowner access to sunlight. References to the rather extensive literature are collected in SOLAR ENERGY RESEARCH INSTITUTE, SOLAR ENERGY LEGAL BIBLIOGRAPHY 87-108 (Interim Draft Report, Sept. 1978).

4. For a review of current solar technology, including a description of collector design and appearance, see BOOZ, ALLEN & HAMILTON, INC., SOLAR ENERGY UTILIZATION IN FLORIDA at app. A(23) (1975); CALIFORNIA ENERGY COMMISSION, PLANNING FOR SOLAR ACCESS: A PRIMER 29-30 (1978); CAL. ENERGY COMM. REP., *supra* note 1, at pt. I; EXECUTIVE OFFICE OF THE PRESIDENT, SOLAR ENERGY POLICY COMMITTEE, STATUS REPORT ON SOLAR ENERGY: DOMESTIC POLICY REVIEW (Public Review Copy, Aug. 25, 1978) [hereinafter DOMESTIC POLICY REVIEW]; FEDERAL ENERGY ADMINISTRATION, BUYING SOLAR 1-14 (1976) (available from National Technical Information Service, PB-262-134, Report No. FEA/G-76/154); OTA REPORT, *supra* note 3, at 36-40, 245-301.

While there is high interest in "active" solar systems which involve the use of solar collector plates, prospects for an energy supply from "passive" solar use are equally promising and "passive" use is far less subject to the aesthetic conflicts examined here. For a recent definition of passive solar systems, see D. BAINBRIDGE, THE FIRST PASSIVE SOLAR CATALOG 2 (1978).

5. See *Kraye v. Old Orchard Ass'n I*, No. C 209 453 (Cal. Super. Ct. for Los Angeles County, Mar. 1, 1979) (homeowner association decision to prohibit installation of visible solar collectors) (the author participated by contributing to the briefs of both the plaintiff's attorney and the state attorney general as *amicus curiae*); 1 SOLAR L. REP. 9-10, 20-22 (1979) (reporting conflicts in Arizona and Maryland); Hayes, *supra* note 2, at 309 n.1 (reporting conflicts in Anaheim and Palos Verdes, Cal.; Coral Gables, Fla.; Mystic, Conn.; Gaithersburg and Rockville, Md.; Albany, N.Y.; and Hollowell, Mn.). The United States Department of Housing and Urban Development

cause of restrictive covenants contained in the homeowners' deeds. Such covenants sometimes bar "appliances and installations" on roofs (or other property locations desirable as collector sites) if they are visible to neighbors.⁶ Alternatively, they may require that any exterior additions to homes be approved by a homeowners' association or architectural review committee. In several instances such groups have been unwilling to allow solar construction.⁷ Finally, more recently written covenants may impose explicit and severe restrictions upon solar collector placement.⁸

These restrictions are significant because of the importance which recently has been attached to the widespread use of solar energy. Commanding virtually no interest a decade ago, solar energy use now has become the "contemporary holy grail."⁹ One result of this interest in solar energy has been a substantial government effort to speed its introduction as a major energy source through "commercialization" of the presently feasible forms of the new technology—primarily direct solar water heating installations which require solar collector panels.¹⁰

Due to a policy preference for marketplace allocation over direct government involvement, this "commercialization" program has been designed to rely upon consumer choice for effectuation. There are high

considers the covenant obstruction to solar development to be sufficiently serious to contract for proposed guidelines for its solution. DOMESTIC POLICY REVIEW, *supra* note 4, at IV-20.

6. The relevant provision in the *Kraye* case stated: "In addition to the Architectural Control provided pursuant to Article VIII hereof, appliances or installations upon the roofs of structures shall not be permitted unless they are installed in such a manner that they are not visible from neighboring property or adjacent streets." Stipulation of Facts, at 3-4, *Kraye v. Old Orchard Ass'n I*, No. C 209 453 (Cal. Super. Ct. for Los Angeles County, Mar. 1, 1979).

The point of provisions that incorporate the criterion of visibility appears to be strictly a concern with aesthetics. Solar installation requirements such as safety, on the other hand, are more appropriately and likely to be included in building codes. See Mecker, *Building Codes as Barriers to Solar Heating and Cooling of Buildings*, in ENV'T'L L. INST., SOLAR POLICY FOR THE 80's 264, 288-89 (1978); *Environmental Considerations*, in DEPARTMENT OF ENERGY/ENVIRONMENTAL PROTECTION AGENCY, SOLAR ENERGY FOR PACIFIC NORTHWEST RESIDENTIAL HEATING, reprinted in ENV'T'L L. INST., SOLAR POLICY FOR THE 80's 450, 468-73 (1978).

7. See note 5 *supra*.

8. Telephone interview with Mr. Marty Jaffe, Senior Research Associate, American Planning Association (1979).

9. Michael Pertschuk, Chairman of the Federal Trade Commission, *Welcoming Remarks*, in FEDERAL TRADE COMM., THE SOLAR MARKET: PROCEEDINGS OF THE SYMPOSIUM ON COMPETITION IN THE SOLAR ENERGY INDUSTRY 3 (1978). Solar energy has, in the words of none other than the American Petroleum Institute, "eclipsed apple pie and is giving Mom a close race for the title of the most popular platitude of the 'Seventies'." AMERICAN PETROLEUM INSTITUTE, SUPPLEMENTARY ENERGY SOURCES 24 (1978). But see, *No More Apple Pie*, SUN TIMES, Mar. 1979, at 2 ("Once an apple pie and motherhood issue, solar has recently become the brunt of several critical articles and media campaigns").

10. DOMESTIC POLICY REVIEW, *supra* note 4, at IV-2 - IV-3, IV-18 - IV-21. See CAL. ENERGY COMM. REP., *supra* note 1, at preface. See generally R. BEZDEK, *et al.*, ANALYSIS OF POLICY OPTIONS FOR ACCELERATING COMMERCIALIZATION OF SOLAR HEATING AND COOLING SYSTEMS (1977).

barriers to mass consumer acceptance of solar heating systems, however, in the form of high initial costs and lack of a proven performance record.¹¹ Consequently, if a speedy solar commercialization effort is to succeed, consumers with a high income and a willingness to take risks must support the critical initial stages of the program.¹² Such affluent consumers are, unfortunately, the ones most apt to be restrained by the covenants at issue, for restrictive covenants are most common in expensive planned developments where an integrated overall appearance is considered one of the neighborhood's most desirable features.¹³

Because of their impact on the most likely consumers of solar energy, covenants restraining solar development may have an adverse social impact in two ways: first, by causing society to forego the direct environmental and social benefits from reducing depletable energy consumption, and second, by creating impediments to the development of an important transitional market necessary to the solar industry's achievement of scale economies and hence mass solar usage. The California legislature believed the problems sufficiently severe to justify declaring such covenants void.¹⁴ The private conflict thus is imbued with

11. MARYLANDER MARKETING RESEARCH, INC., SOLAR ASSISTED GAS ENERGY: SAGE—EVALUATION OF THE ACCEPTABILITY OF THE SAGE CONCEPT, Study Conducted for Southern California Gas Company Project SAGE, at II-1, II-6 (1977); GEORGE WASHINGTON UNIVERSITY, SOLAR ENERGY INCENTIVES ANALYSIS: PSYCHO-ECONOMIC FACTORS AFFECTING THE DECISION MAKING OF CONSUMERS AND THE TECHNOLOGY DELIVERY SYSTEM, prepared for the U.S. Dept. of Energy under Contract No. EX-76-6-101-2534 (1978). See Bezdek, Hirshberg & Babcock, *Economic Feasibility of Solar Water and Space Heating*, 203 SCIENCE 1214 (March 23, 1979) (solar water heating economically competitive with electricity, but not with natural gas, in some regions of the country). It has been argued persuasively that the primary reason for solar energy's apparent cost disadvantage is the artificially low price of competing energy sources. *Id.*; Lovins, *How to Finance the Energy Transition*, in ENV'L L. INST., SOLAR POLICY FOR THE 80's 27, 29 (1978); CEQ REPORT, *supra* note 1, at 36.

12. GEORGE WASHINGTON UNIVERSITY STUDY, *supra* note 11, at 24-25; S. FELDMAN & B. ANDERSON, PUBLIC UTILITY AND SOLAR ENERGY INTERFACE: AN ASSESSMENT OF POLICY OPTIONS, prepared for U.S. Dep't of Energy Under Contract No. EX-76-5-01-2523, at 258-59 (1976).

13. A. HIRSHBERG & E. DAVIS, SOLAR ENERGY IN BUILDINGS: IMPLICATIONS FOR CALIFORNIA ENERGY POLICY 4-10 (1977).

14. California is the only state to date that has reacted to the problem with specific legislation. The California Civil Code provides that "any covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property which effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable." CAL. CIV. CODE § 714 (West Supp. 1979). The law goes on to except "reasonable" restrictions on solar energy systems, which are defined as those restrictions "which do not significantly increase the cost of the system or significantly decrease its efficiency, or which allow for an alternative system of comparable cost and efficiency." *Id.* This statute is discussed in text accompanying notes 171-77 *infra*.

CAL. CIV. CODE § 801.5(a) (West Supp. 1978) defines "solar energy system" and includes passive solar designs within the scope of the definition. See note 4 *supra*. This has the effect of widening the law's impact beyond the sort of covenants discussed in this Comment. See text accompanying notes 6-8 *supra*. For example, one reported potential application involved a covenant specifying a minimum square footage requirement for first floors. Telephone interview with Greg Wheatland, Staff Counsel, California Energy Commission (Feb. 1979).

broader overtones.

This Comment will examine the appropriate common law resolution of such conflicts,¹⁵ finding that traditional notions of the appropriate judicial role in social policy implementation for the most part preclude private attack on covenants. Although remedial doctrines may grant solar consumers some relief, it is concluded that only legislative action can implement a social policy favoring solar energy by preempting private covenants. A modified version of the California statute is advocated for adoption in other states.

I

THE NATURE OF THE CONFLICT: COMPETING POLICIES

The conflict examined here—between the development of a socially desirable technology and the enforcement of private land use controls—is not new to the common law. It is important, however, that a clear understanding of the competing interests underlying that conflict precede an examination of the legal doctrines needed to resolve it.

A. Public Policy: The Calls for a Solar Age

The widespread interest in solar energy is an outgrowth of the recent "energy crisis."¹⁶ While many disagree over the nature and source of this energy crisis,¹⁷ one widely held viewpoint is that "the diagnosis . . . is quite simple: demand for energy is increasing while supplies of oil and gas are diminishing."¹⁸ The decreasing supply of petroleum products—currently the most widely used and versatile energy source—is thought crucial since it is believed to stem from an irreversi-

Although California is the only *state* that has addressed the covenant problem in legislation, in 1977, the city of Davis, California passed an ordinance annulling restrictive covenants prohibiting clothes lines, in an effort to promote this solar substitute for gas and electric clothes dryers. DAVIS, CAL., CODE § 29-169.1 (1971 as amended).

15. This Comment assumes that the covenants are immune from attack on grounds other than their conflict with the solar policy.

16. Cf. R. NELSON, *THE MOON AND THE GHETTO* 116 (1977) ("The 1965 study *Energy R and D and National Progress*, which was undertaken with the express purpose of identifying sources of concern, reached the conclusion that significant shortages of conventional fuels, or sharply rising costs of extraction, were not likely in this century").

17. For an eloquent and mildly despairing description of this philosophical split, see CAL. ENERGY RESOURCES CON. AND DEV. COMM., 1 BIENNIAL REP.: TOWARDS A CALIFORNIA ENERGY STRATEGY: POLICY OVERVIEW (1977). Compare D. MEADOWS, J. RANDERS, & W. BEHRMANS, *THE LIMITS TO GROWTH* (1972) with *The "Energy Crisis" Explained*, WALL ST. J. May 27, 1977, at 10, col. 1.

18. PRESIDENT'S NATIONAL ENERGY PLAN, reprinted in ENERGY USERS REP. REF. FILE 21:1716 (1977). See also *U.S. Is Guzzling More Gas, Oil Than It Can Replace In A Year*, S.F. CHRONICLE, Apr. 10, 1978, at 9, col. 1.

ble worldwide exhaustion of the resource.¹⁹ Some have also painted a bleak picture for the future availability of natural gas,²⁰ which together with oil accounted for 80% of the total U.S. energy consumed in 1972.²¹

The implications of a reduced oil and gas supply are plain: the energy sources which now fuel the country will be insufficient in the future; the country must develop alternatives. Unfortunately, serious and possibly prohibitive problems accompany every conventional energy supply option.²² As a result, so-called "exotic" nondepletable energy resources like solar radiation have assumed an unprecedented importance in the quest to meet future energy needs.²³

Availability, however, is only one aspect of the "energy crisis." Another is energy self-sufficiency. America's reliance on foreign energy sources, primarily petroleum, has increased gradually since World War II, with a swift acceleration after 1970—the year that domestic

19. The principal oil-exporting countries will not be able to satisfy all the increases in demand expected to occur in the U.S. and other countries throughout the 1980's. . . . Within about four generations, the bulk of the world's supply of oil, created over hundreds of millions of years, will have been substantially consumed. . . . Obviously, high rates of growth of oil consumption simply cannot be sustained.

PRESIDENT'S NATIONAL ENERGY PLAN, reprinted in ENERGY USERS REP. REF. FILE 21:0716 (1977). See also L. Brown, in Forward to D. HAYES, RAYS OF HOPE: THE TRANSITION TO A POST-PETROLEUM WORLD 9 (1977) ("The projected peaking and subsequent decline in the world production of petroleum . . . is only half a generation away"). *Contra*, Karpel, *Ten Ways to Break OPEC*, HARPER'S MAG., Jan. 1979, at 65 (no reputable petroleum economist believes that a physical shortage of oil impends); Metz, *Mexico: The Premier Oil Discovery in the Western Hemisphere*, 202 SCIENCE 1261 (Dec. 22, 1978) (Mexican oil discoveries suggest that conventional wisdom that most of the world's major oil fields have already been discovered may be "spectacularly wrong").

20. PRESIDENT'S NATIONAL ENERGY PLAN, reprinted in ENERGY USERS REP. REF. FILE 21:0716 (1977); CAL. ENERGY RESOURCES CON. AND DEV. COMM., 1 BIENNIAL REP.: TOWARDS A CALIFORNIA ENERGY STRATEGY: POLICY OVERVIEW 56-57 (1977) ("The chances that *all* the supplemental gas projects proposed by the industry or considered necessary to provide an adequate gas supply to California will actually be completed, is nil") (emphasis in original). *But see* Concurrent Brief of the California Energy Commission, at 1-3, 142-90, Cal. Pub. Util. Comm. Case No. 10342 (May 30, 1978); 1001 *Years of Natural Gas*, Wall St. J., Apr. 27, 1977, at 20, col. 1.

21. J. KRENZ, *supra* note 1, at 8.

22. See, e.g., D. HAYES, *supra* note 1, at 15-74 (1977). For this reason, energy conservation has gathered support as one of the most feasible, as well as cost-effective, energy strategies. See, e.g., CAL. ENERGY RESOURCES CON. AND DEV. COMM., 3 BIENNIAL REP.: OPPORTUNITIES FOR ENERGY CONSERVATION (1977).

23. There has been lively debate regarding the extent to which solar and other renewable sources can meet the nation's future energy demand. Solar's potential contribution to national energy needs in the year 2000 has been estimated from 3 to 40 percent. Hayes, *In the Lobby: Reflections on the Domestic Policy Review*, SUN TIMES, Oct. 1978, at 2. The Council on Environmental Quality controversially suggested 25 percent, CEQ REPORT, *supra* note 1, at iv-v, while Energy Secretary James Schlesinger, whom few perceive as a solar advocate, considers 10 to 15 percent a "perfectly plausible" possibility, *Interview with Secretary Schlesinger: "We Are Working on a New Solar Strategy,"* BUS. WEEK, Oct. 9, 1978, at 90, 91. See Robinson, *American Physical Society Gives Long-Term Yes to Electricity from the Sun*, 203 SCIENCE 629 (Feb. 16, 1979).

production peaked.²⁴ The costs and dangers of such reliance became vividly apparent during the 1974 embargo, and have been a source of concern ever since.²⁵ The desire for self-sufficiency creates further interest in energy sources like solar power that do not require any imports.

Along with the energy crisis, the increase in environmental awareness since the early 1970's is the major source of support for solar energy. Although they began independently, environmental awareness and interest in alternative energy sources were soon linked. As the Council on Environmental Quality observed in 1976, "energy production and use are perhaps the most important determinants of environmental quality."²⁶ One year earlier, the Council remarked that the "impact of current energy technologies on the environment is well recognized. Emissions from energy resource extraction, conversion, and end use can and do cause substantial pollution."²⁷ In contrast, "[l]ittle air or water pollution is associated with solar energy and, unlike other energy systems, the reactor is located a safe 93 million miles away."²⁸

For many, then, the central lesson of increased energy and environmental awareness is that the nation "must make a transition from an energy economy based on rapid depletion of a fixed store of fossil fuels or environmentally unsound technology to one based primarily on current flows of energy from geothermal, solar, and other renewable sources used in ways which produce minimum negative impact."²⁹

24. AMERICAN PETROLEUM INSTITUTE, U.S. ENERGY: YESTERDAY, TODAY, AND TOMORROW 6, 8 (1977).

25. See, e.g., The President's Address to Nation on National Energy Plan (Nov. 8, 1977), reprinted in 13 PRESIDENTIAL DOCUMENTS 1735, 1737 (1977) (quoting the Secretary of Defense as stating that "[t]he present deficiency of assured energy sources is the single surest threat . . . to our security and to that of our allies"); Department of Energy Organization Act of 1977, 42 U.S.C.A. § 7111(2) (Supp. 1977); Solar Energy Research, Development, and Demonstration Act of 1974, 42 U.S.C. § 5501(a)(7) (1976); Trans-Alaska Pipeline Act of 1973, 43 U.S.C. § 1651(a) (1976); Energy Reorganization Act of 1974, 42 U.S.C. § 5801(a) (1976). This is one aspect of the energy situation upon which analysis seems to have reached a consensus. See, e.g., *Oil and National Security*, Wall St. J., Dec. 6, 1977, at 20, col. 1.

26. 7 EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP., ENVIRONMENTAL QUALITY 187 (1976).

27. 6 EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP., ENVIRONMENTAL QUALITY 426 (1975).

28. CAL. ENERGY COMM. REP., *supra* note 1, at i. See 8 EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP., ENVIRONMENTAL QUALITY 276, 290 (1977). But see Inhaber, *Risk with Energy from Conventional and Nonconventional Sources*, 203 SCIENCE 718, 720-23 (Feb. 23, 1979) ("nonconventional energy systems can have substantial risk to human health").

29. CAL. ENERGY RESOURCES CON. AND DEV. COMM., 3 BIENNIAL REP.: CALIFORNIA ENERGY TRENDS AND CHOICES 17 (1977). Others, while less sanguine about the speed with which nondepletable sources can be utilized, are nonetheless confident of "the inescapable conclusion that exponential growth of energy supply is coming to an end in the United States." Hayes, *Energy Resources Available to the United States, 1985 to 2000*, 203 SCIENCE 233, 239 (Jan. 19, 1979).

Both the public and the private sectors have responded actively and coherently to this conclusion.

Federal actions have dominated the response, backed by a solar budget estimated at \$718.4 million in the 1979 fiscal year.³⁰ Numerous federal laws have called for solar development. The Solar Heating and Cooling Demonstration Act of 1974³¹ recites the virtues of solar energy³² and states that it is the policy of the United States to "provide for the demonstration within a three-year period of the practical use of solar heating technology."³³ A congressional report on the Act observed that "[t]he purpose of this legislation is to stimulate in the shortest possible time the widespread commercial application of the technology for the solar heating and cooling of buildings."³⁴ Other federal laws subsidize solar investments through tax provisions,³⁵ provide secondary financing and loan insurance for solar energy systems in homes,³⁶ call for the demonstration of solar energy in federal buildings,³⁷ reinforce the commitment to solar research and development as a means of promoting its widespread use,³⁸ and declare a general policy in favor of nondepletable energy sources.³⁹ The commitment to these policies is buttressed by congressional language stressing the seriousness of the nation's energy problems and the consequent high priority to be placed on ameliorative measures.⁴⁰ The present Administration has described solar energy as a "cornerstone" in the solution of the

30. U.S. DEP'T OF ENERGY, FY 1980 BUDGET TO CONGRESS—BUDGET HIGHLIGHTS (1978). For a description of the programs funded, see DOMESTIC POLICY REVIEW, *supra* note 4, at § IV-1-IV-28; FEDERAL TRADE COMM., *supra* note 9, pt. IV, 255-79 (June 1978).

31. 42 U.S.C. §§ 5501-5517 (1976).

32. *Id.* § 5501(a).

33. *Id.* § 5501(b).

34. JT. REP. NO. 847, 93d Cong., 2d Sess. 2, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5212, 5213.

35. Energy Tax Act of 1978, Pub. L. No. 95-618, § 101, 92 Stat. 3174 (1978) (to be codified in 26 U.S.C. § 44C).

36. National Energy Conservation Policy Act, Pub. L. No. 95-619, §§ 244-248, 92 Stat. 3206 (1978).

37. *Id.* §§ 544-551, 92 Stat. 3277-80.

38. Solar Energy Research, Development, and Demonstration Act of 1974, 42 U.S.C. § 5551 (1976). See S. REP. NO. 1151, 93d Cong., 2d Sess. 1, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5915.

39. See, e.g., Department of Energy Organization Act of 1977, 42 U.S.C.A. § 7112(6) (Supp. 1977); Energy Conservation Standards for New Buildings Act of 1976, 42 U.S.C. § 6831(b)(2) (1976).

40. See Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751(a) (1976); Geothermal Energy Research, Development, and Demonstration Act of 1974, 30 U.S.C. § 1101(1) (1976); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. § 5901 (1976) (§ 5901(c): "The urgency of the Nation's energy challenge will require commitments similar to those undertaken in the Manhattan and Apollo projects . . ."); Department of Energy Organization Act of 1977, 42 U.S.C.A. § 7111(2) (Supp. 1977).

nation's energy crisis⁴¹—a “problem unprecedented in our history”⁴² requiring the “moral equivalent of war.”⁴³

States have also been active in the solar field. At least 32 states had enacted prosolar legislation as of early 1978.⁴⁴ The more active states, such as California, have matched the vigor of the federal solar effort, given the relative size of their jurisdictions.⁴⁵

Some local governments too have played an unusually active role,⁴⁶ as have some utilities and financial institutions.⁴⁷ Perhaps the most spectacular nongovernmental action was the observance of May 3, 1978 as “Sun Day,” a privately organized demonstration of an estimated 25 million people in 35 countries supporting solar energy.⁴⁸

Spurred by energy and environmental concerns, both traditional government sources of social policy and popular sentiment thus support the development of solar energy. Despite the strength and importance of this policy, however, only California has resolved authoritatively the conflict between solar development and the policy considerations favoring the enforcement of restrictive covenants.⁴⁹

41. L. A. Times, May 4, 1978, at 1, col. 5, at 15, col. 3.

42. The Energy Problem, The President's Address to the Nation (Apr. 18, 1977), *reprinted in* 13 PRESIDENTIAL DOCUMENTS 560 (1977).

43. *Id.* at 561. See also Fact Sheet on the President's National Energy Program, *reprinted in* 13 PRESIDENTIAL DOCUMENTS 573 (1977); The President's Address on Energy to Joint Session of Congress (Apr. 20, 1977), *reprinted in* 13 PRESIDENTIAL DOCUMENTS 566 (1977); The Environment: The President's Message to Congress (May 23, 1977), *reprinted in* 13 PRESIDENTIAL DOCUMENTS 782 (1977); The President's Address to Nation on National Energy Plan (Nov. 8, 1977), *reprinted in* 13 PRESIDENTIAL DOCUMENTS 1735 (1977).

44. See Johnson, *State Approaches to Solar Legislation: A Survey*, 1 SOLAR L. REP. 55 (1979). See also CAL. ENERGY COMM. REP., *supra* note 1, at app. VII-A, 67-93; Electric Power Committee, *The Solar Energy Field*, 11 NAT. RESOURCES LAW. 19 (1978); NATIONAL SOLAR HEATING AND COOLING INFORMATION CENTER, STATE SOLAR LEGISLATION (Jan. 1978).

45. See, e.g., CAL. ENERGY COMM. REP., *supra* note 1; Hill, *California Sees Itself as Leading Country to Era of Solar Energy*, N.Y. Times, May 4, 1978, § B, at 7, col. 2.

46. See, e.g., *Local Level Solar Activity*, in ENV'T'L L. INST., SOLAR POLICY FOR THE 80's 130 (1978); Motley, “The Davis Experience”: *What It is*, in ENV'T'L L. INST., SOLAR POLICY FOR THE 80's 237 (1978).

47. See, e.g., CAL. ENERGY COMM. REP., *supra* note 1, at IV-1 (terming California utilities “solar pacesetters”), at III-31 (describing program of San Diego Federal Savings and Loan Co.); *We're Putting a Lot of Energy Into the Sun*, S.F. Chronicle, May 1, 1978, at 11, col. 1 (advertisement by Pacific Gas & Electric Co.); Letter from J.A. Carrera, Executive Vice President of Bank of America to Governor Edmond G. Brown, Jr. (Sept. 8, 1977) (By “develop[ing] throughout our branch banking service a capability for giving very good service to those seeking solar energy loans . . . , we are attempting to jump over the market shake-out period that usually accompanies a new technology”).

48. Public solicitation letter from Denis Hayes, Chairman of Solar Lobby, received by author (1979). See, e.g., *Energy Plea on Sun Day: Convert Dream to Reality*, N.Y. Times, May 4, 1978, at 1, col. 1.

49. See note 14 *supra*.

B. Restrictive Covenants: The Strengths and Weaknesses of Private Directive Arrangements

Deed covenants limiting the use of property are best understood as a variety of what Hart and Sacks term "private directive arrangements."⁵⁰ That is, they are one of the many ways by which people agree to order their affairs.⁵¹ Such extragovernmental arrangements, the source of most organization in our society, establish ordered regimes of rules over time between the parties concerned.⁵² The common law system places heavy reliance upon private directive arrangements to define a desirable social state.⁵³ As a consequence of this deep seated regard for decentralized ordering, private arrangements are legally valid by presumption.

On a practical level, covenant arrangements are an important means of ordering one aspect of the relationships of neighboring landowners.⁵⁴ The actions of one party (*e.g.*, a homeowner constructs a rooftop solar collector) that have an unfavorable effect upon others (neighbors see the collector and think it is ugly) will usually create disagreement over whether to permit the action.⁵⁵ An authoritative resolution of the conflict creates the right either to produce or to be free from such effects, at least to some degree.⁵⁶ Private covenant arrangements

50. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 124-60 (tent. ed. 1958).

51. See Schelling, *On the Ecology of Micromotives*, 25 *PUB. INTEREST* 59, 68 (1971).

52. See H. HART & A. SACKS, *supra* note 50, at 210-12; L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* ch. 2 (3d ed. 1972). Although the contract is the prototype, see Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353, 363-64 (1978), private arrangements come in many forms: wills, deeds, leases, articles of incorporation, bonds, trusts, etc.

53. The covenant plan, for example, can be viewed as a means by which individual property owners aggregate to gain the desirable but otherwise privately unattainable group benefits of property value protection. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 49-51 (2d ed. 1977). This general deference to private interaction to achieve social goals is also reflected in welfare economics, see, *e.g.*, H. VARIAN, *MICROECONOMIC ANALYSIS* ch. 5 (1978), and characterizes one approach to the economic perspective on legal analysis. See, *e.g.*, Posner & Rosenfeld, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 *J. LEGAL STUDIES* 83, 88 (1977) ("The process by which goods and services are shifted into their most valuable uses is one of voluntary exchange.").

54. This definition of permitted action has been described as determining an *entitlement point*. Polinski, *Controlling Externalities and Protecting Entitlements: Property Right, Liability Rule, and Tax/Subsidy Approaches*, 7 *J. LEGAL STUDIES* 1, 8 (1979).

55. Such effects are known as externalities. See, *e.g.*, W. BAUMOL & W. OATES, *THE THEORY OF ENVIRONMENTAL POLICY: EXTERNALITIES, PUBLIC OUTLAYS, AND THE QUALITY OF LIFE* chs. 1-3 (1975).

56. See Calabresi & Melamed, *Property Rights, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972). While entitlements are most commonly considered in absolute terms, such as a complete bar to solar development or an unfringed right to construct solar devices, intermediate solutions are an important possibility. An example of such a compromise would be to permit collectors, but only if they were suitably camouflaged. See note 72 *infra*. This is one possible interpretation of the California statute, *supra* note 14, which annuls only "unreasonable" covenant restrictions on solar development.

represent one means of accomplishing the necessary definition of land use rights.

Courts uphold consensual definitions of rights both because of a moralistic desire to hold parties to their word and to prevent unjust enrichment,⁵⁷ and because of the utilitarian belief that voluntary agreement enables the attainment of otherwise unobtainable mutual benefits.⁵⁸ Despite these attractive features, however, restrictive covenants have certain congenital weaknesses that generally limit their authority, and which may prove especially troublesome in the context of a new technology like solar usage. Covenants, like all directive arrangements, must "speak from one point of time to another;"⁵⁹ that is, they must attempt to resolve not only current conflicts but also those that will arise in the future. Because foresight is imperfect, information incomplete, and planning costly, arrangements cannot define future land rights in detail for all possible situations.⁶⁰ The difficulty of interpreting such imprecise definitions of rights is compounded by the danger that the written terms may not reliably represent the parties' actual agreement about entitlement definition. The danger is peculiarly large in the case of covenants due to the way they are created. In contrast with the contract paradigm where bargained consent is ensured by each party's participation in the negotiation of terms,⁶¹ the parties bound by a covenant do not write its terms. Instead, its provisions express the preferences of a third party, the property developer.⁶² Also, parties

57. Unjust enrichment is a concern because covenant provisions which reflect the parties' entitlement understanding will influence the price at which the exchange takes place. If a purchaser later appropriates rights that were not included in the original bundle, *e.g.*, the right to develop property that was originally promised to be maintained as a pleasure garden, then the purchaser is unjustly enriched at the expense of the covenant's beneficiary. This was the situation in *Tulk v. Moxhay*, 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848), the groundbreaking English case which established the doctrine of restrictions which "run with the land." See STOEBUCK, *supra* note 3, at 887-90.

58. See *National Soc'y of Professional Eng'rs v. United States*, 98 S. Ct. 1355, 1363 (1978) (private contract law "establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively"); W. SHAKESPEARE, *THE MERCHANT OF VENICE* act III, scene 3, lines 24-31 (stressing the importance of security of exchange). For a discussion of the importance of distinguishing between these two grounds for enforcement, see Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 222-29 (1973).

59. H. HART & A. SACKS, *supra* note 50, at 124-25.

60. For a discussion of this pervasive problem of "bounded rationality" in private arrangements, see O. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 65-67 (1975). See also Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUDIES 119, 157-58 (1977).

61. See Fuller, *supra* note 52, at 363-64.

62. Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area* (pt. 1), 1958 WISC. L. REV. 612, 620-36. For a rather extreme illustration of such property developer expression, see J. MCPHEE, *ENCOUNTERS WITH THE ARCHDRUID* 87-96 (1971). As a result, such previously established provisions may share in some cases the problems which accompany "adhesion

binding themselves to an arrangement regime often do not focus on its terms, since the primary exchange is of the land and fixtures. The covenant terms may be an ancillary, sometimes even ignored, aspect of the property rights transferred.⁶³

Although this concern with *consent*, drawn from contract law, is not the sole consideration determining covenant enforcement,⁶⁴ it is significant in determining the *scope* given to instruments of this nature. Since covenants are interpreted according to the joint intent of the grantors and the grantees⁶⁵ at the time the deed was made,⁶⁶ one can argue that the novelty of solar devices should remove them from a proper interpretation of the covenants' proscription.⁶⁷ The original target of the covenants (*e.g.*, air conditioners, television and radio antennae) all could be placed in alternative locations;⁶⁸ the covenant had a *regulatory* nature. In contrast, the effect becomes *prohibitory* when applied to most solar devices since roofs are frequently the only feasible location for such collectors.⁶⁹ Because such a prohibition increases the burden of the covenant beyond the original expectations of any party, the argument concludes, the covenant ought not be interpreted to proscribe new technologies like solar collectors.⁷⁰

contracts." See Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

Commentators have observed that market forces generally will prompt developers who draft covenants to do so in an efficient manner. *E.g.*, Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 713 (1973). But the same factors which "bound" rationality, see O. WILLIAMSON, *supra* note 60, will attenuate market discipline of the very undefined or disputed details which lead to litigation about restrictive covenants.

63. Note, *Validity Rules Concerning Public Zoning and Private Covenants: A Comparison and Critique*, 39 SO. CAL. L. REV. 409, 434-36 (1966); Consigny & Zile, *supra* note 62.

64. See generally Callaway, *Enforcement of Restrictive Covenants in Tract Developments*, 3 HAST. L.J. 50, 51-57 (1951); Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 VA. L. REV. 951, 972-78 (1942).

65. *E.g.*, *Martin v. Holm*, 197 Cal. 733, 742, 242 P. 718, 722 (1925).

66. *E.g.*, *Gamble v. Fierman*, 82 Cal. App. 180, 182, 255 P. 269, 270 (3d Dist. 1927). See CAL. CIV. CODE § 1647 (West 1973); RESTATEMENT OF PROPERTY § 246 (1940); 2 AMERICAN LAW OF PROPERTY § 8.65 (A.J. Casner ed. 1952).

67. Since parties to a covenant probably do not understand the covenant's scope, judicial efforts at determining the "intent of the parties" must rely to some degree on common sense, which asked not "what the parties 'really' meant, but what treatment is appropriate given the purposes that are objectively revealed." Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 671 (1976).

68. Rooftop air conditioners could be window mounted or centrally installed. Antennae could be strung in attics, placed on top of sets, or replaced by cable.

69. In *Kraye v. Old Orchard Ass'n I*, No. C 209 453 (Cal. Super. Ct. for Los Angeles County, Mar. 1, 1979), the parties stipulated that no alternative placements for the solar device were possible. While alternative locations for solar devices might sometimes exist, an urban or a suburban dweller seeking to install solar heating probably will have little choice of location.

70. Two factors limit the persuasiveness of this argument. First, the argument could not be applied to covenants which *specifically* restrict solar devices. Second, an argument based on consumer ignorance could not reasonably apply to purchases made after consumers know about solar

This attempt to interpret away the covenant restrictions fails, however. Solar collectors may create exactly the aesthetic conflict that the covenants were adopted to resolve.⁷¹ To completely discount the aesthetic interests of surrounding homeowners—as occurs if solar development is exempted from covenant restraints—is unfair, especially when inexpensive compromise actions may make it possible to satisfy all parties.⁷² Finally, although covenants regarding roof or yard additions may have had a narrow scope of operation originally, the same is not true of provisions establishing governing homeowners associations or architectural review boards. Since both parties almost certainly understood committee approval provisions as establishing a flexible and democratic means of dispute resolution, even for unforeseen disputes, there is no reasonable complaint against binding the buyer—who purchased property subject to group management of such affairs—to the will of the group, which of course may still decide to permit such uses.⁷³

Restrictive covenants are thus an important private means of settling land use conflicts. While a special sensitivity to potential definitional inaccuracy is warranted generally, novelty of a technology alone is insufficient to overturn covenant provisions.

The provisions are not necessarily immune from attack, however. Judicially recognized public policies have overturned restrictive covenants. The possibility of such a public policy protecting solar development is explored in the following section.

II

THE USE OF SOCIAL POLICY TO ADJUST PRIVATE ARRANGEMENTS: THE PUBLIC POLICY DOCTRINE

One means available to the courts for resolving the conflict between solar development and neighborhood land regulation is the use of the public policy doctrine. Under that doctrine, courts occasionally refuse to enforce covenant arrangements or other private agreements⁷⁴

devices. This Comment does not attempt to assess what consumers can be expected to know at the present time.

71. *Cf., e.g.,* Petersen v. Friedman, 162 Cal. App. 2d 245, 328 P.2d 264 (1st Dist. 1958) (television antennae barred by an existing easement of view although easement was created before television had been invented); La Vielle v. Seay, 412 S.W.2d 587 (Ky. 1966) (existence or nonexistence of technology when covenant created held irrelevant).

72. Depending on property configuration, architectural design, and type of solar technology, the visual impact of solar collectors and related equipment possibly can be reduced. Camouflage measures frequently will be impossible, however. Hayes, *supra* note 2, at 310.

73. *But see* note 147 and accompanying text *infra*.

74. *E.g.,* 6A A. CORBIN, CONTRACTS pt. 8 *passim* (1962); 14 S. WILLISTON, CONTRACTS chs. 48-52 (3d ed. 1972).

that violate some social interest the court finds paramount. For example, on the strength of a nonstatutory policy against restraints of trade, courts have refused to enforce deed restrictions on liquor sales which were part of a scheme to create a monopoly.⁷⁵ This section will examine the way in which courts apply public policy in suits involving private directive arrangements, and will analyze the legitimacy of various sources of public policy. Finally, this section will consider whether the public policy doctrine is useful in resolving the conflict at issue in this Comment.

A. Judicial Application of the Public Policy Doctrine: A Doctrine Without a Theory

No one has ever accused the public policy doctrine of clarity. Judges and commentators have been trying to define concretely the doctrine for a long time, but the results of their efforts are not very satisfying.⁷⁶ These definitional difficulties have resulted in a remarkable number of judicial warnings against the perils of overusing the doctrine.⁷⁷ In the absence of a general understanding of the doctrine's scope, this anxiety is understandable, for without principled limits the

75. *Burdell v. Grandi*, 152 Cal. 376, 92 P. 1022 (1907). Courts have used public policy grounds to void deed restrictions since at least 1641. See Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 83 (1928). More modern and better known examples have overturned racially restrictive covenants, on both constitutional and more general "public policy" grounds. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (constitutional grounds); *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948) (public policy grounds).

76. Corpus Juris Secundum describes public policy as "the principles under which freedom of contract or private dealing is restricted by law for the good of the community." 72 C.J.S. *Policy* 212 (1951); cited in *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (2d Dist. 1959). Story's definition is similar: "By 'public policy' is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." W. STORY, *CONTRACTS* § 546 (2d ed. 1847), quoted in *Safeway Stores v. Retail Clerks Etc. Ass'n*, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953). In essence, both statements say little other than that "public policy means doing the right thing." A factory discharging pollution within legal emission standards and a tacky pink house in an unrestricted but otherwise consistently beautiful neighborhood both may injure the public good, yet no one thinks to attack them on the basis of the public policy doctrine. Similar objections accompany other attempts at a general definition. E.g., E. GREENHOOD, *THE DOCTRINE OF PUBLIC POLICY IN THE LAW OF CONTRACTS, REDUCED TO RULES* (1886). See also Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 MINN. L. REV. 196, 199 (1935) ("A prayerful examination of the cases in an attempt to learn what public policy is [in the conflicts field] has caused this investigator to retire baffled, which seems a not unusual result").

The present analysis will not consider the "public policy doctrine" as it appears in the conflict of laws field, although relevant observations made in that area will be noted. For an insightful analysis of the choice of law/public policy doctrine, see Paulsen & Sovern, "Public Policy" in *the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

77. Any assessment of the possible influence of the doctrine of public policy must take account of the marked reluctance to make use of it which has now become a feature of the English judicial utterance. I do not think that practice altogether accords with protestation. But certainly, so far as protestation goes, the current has been running strongly for over a hundred years.

doctrine creates a potential for unbridled judicial discretion.⁷⁸ As a consequence, "there has been a noticeable tendency to regard public policy as a last resort for molding the law."⁷⁹ Nonetheless, the doctrine is still quite alive today.⁸⁰

Clear definition of public policy is often hampered by the misleading idea that "public policy" is a unitary force which could be represented by a single definition.⁸¹ In actuality, "public policy" stands for a great number of propositions,⁸² so there is not one public policy; there are many. Moreover, as seen above,⁸³ other *policy* considerations favor the usual conflict resolution (*e.g.*, enforcement of the covenant) which would result without the "public policy" doctrine.⁸⁴ Thus, the essential dynamic of the doctrine must be to *balance* the weights of competing policies rather than to search for a policy of "public" status which, once discovered, would immediately trump usual considerations.⁸⁵

C. RADCLIFFE, *THE LAW AND ITS COMPASS* 45-46 (1960). *Cf.* WINFIELD, *supra* note 75, at 91 ("The attitude of the bench in general toward public policy is one of cautious acceptance of it.").

78. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine what is best for the public good and to provide for it by proper enactment. It is the province of the judge to expound the law only . . . not to speculate what is best in his opinion for the advantage of the community.

Egerton v. Brownlow, 4 H.L. Cas. 1 (1853) (opinion of Baron Parke). *See also* Nutting, *supra* note 76, at 198. For an unusually complete collection of warnings, see *National Auto Ins. Co. v. Winter*, 58 Cal. App. 2d 11, 136 P.2d 22 (3d Dist. 1943).

79. Winfield, *supra* note 75, at 98.

80. *See, e.g.*, *Gas Light Co. v. Georgia Power Co.*, 225 Ga. 851, 171 S.E.2d 615 (1969); *Lain v. Rennert*, 308 Ill. App. 572, 32 N.E.2d 375 (1941); *Dixon v. Van Sweringen Co.*, 121 Ohio St. 56, 166 N.E. 887 (1929). *See* notes 74-76 *supra* and note 85 *infra*.

While frequently invoked by litigants, the public policy doctrine is seldom relied upon by courts. *See, e.g.*, *Glickman v. Collins*, 13 Cal. 3d 852, 120 Cal. Rptr. 76, 533 P.2d 204 (1975); *Crail v. Blakely*, 8 Cal. 3d 744, 106 Cal. Rptr. 187, 505 P.2d 1027 (1973).

81. One manifestation of this is that "public policy" is always singular in commentators' discussion of the doctrine. *See, e.g.*, Winfield, *supra* note 75, at 96-97.

82. [R]ightly or wrongly, considerations of public policy have been invoked by English judges in a great many contexts and for a great many purposes. Not to make any exhaustive list, I can bring to mind decisions about the public service and the administration of public affairs, about the inalienability of property, about the benefits arising from crime, about ousting the jurisdiction of the court, about sexual immorality, about stifling criminal prosecutions and newspaper criticisms, about not plowing up farm land, and, for that matter, about holding church services "according to the true time of the sun." And to these one must add the well-known heads, to which Baron Parke refers, of restraints of trade and restraints of marriage.

C. RADCLIFFE, *supra* note 77, at 50. *See also* Winfield, *supra* note 75, at 85-86 ("Public policy, like misery, made some very incongruous bedfellows."). Note that "public policy" also varies over time. *E.g., id.* at 94; C. RADCLIFFE, *supra* note 77, at 41-43.

83. *See* text accompanying notes 50-73, *supra*.

84. *See* H. HART & A. SACKS, *supra* note 50, at 166-67; *RESTATEMENT (SECOND) OF CONTRACTS* § 320 (Tent. Draft No. 12, May 1977).

85. The balancing dynamic may be observed in those individual "public policies" which are of sufficient vintage to be regarded as doctrines in their own right. One example is the public policy against restraints of trade. "Clearly established" in common law by 1711, Winfield, *supra* note 75, at 85, this policy has recognized the importance of competing considerations by reversing only *unreasonable* private arrangements. *See* *Hall v. American Oil Co.*, 504 S.W.2d 313, 318 (Mo.

The public policy doctrine thus is viewed correctly not as a substantive rule, principle, or policy, but rather as *a way of generating a rule* that will control a particular case. It is a rule about rules, or what Hart describes as a "secondary rule."⁸⁶ This secondary rule instructs a judge to balance competing considerations, an activity which is well within the judicial ken.

Why, then, has the doctrine inspired such an unmistakable judicial wariness? First, judges are plagued by the lack of substantive commonality between public policy cases, which means that the force of stare decisis cannot operate in the usual fashion.⁸⁷ And there is a related error of attempting to satisfy the desire for doctrinal limits by reducing the doctrine to a series of substantive rules,⁸⁸ a problem caused by a

App. 1973) (quoting *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 525 (1880)). It thus has been observed that:

in dealing with covenants in restraint of trade the judges have shown themselves willing and competent to balance conflicting social and economic interests, both of the parties and more recently of the public; and to weigh the *reasonableness* of the expectations of the parties, the interests they seek to protect, and the means proposed for doing so.

Shand, *Unblinking the Unruly Horse: Public Policy in the Law of Contract*, 30 CAMB. L.J. 144, 167 (1972) (emphasis in original). See also *Doo v. Packwood*, 265 Cal. App. 2d 752, 71 Cal. Rptr. 477 (5th Dist. 1968). A strikingly similar "unreasonableness" limitation is likewise placed on the ancient policy against restraints on alienation. See, e.g., *Carneal v. Kendig*, 96 Va. 605, 85 S.E.2d 235, 237 (1955).

Less established policies do not explicitly proclaim their balancing nature, but the characteristic is shown by differing results that can only be explained in terms of competition between policies of differing weights. For example, in *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 217 (Mo. 1975), a will provision specifying that a house be demolished was overturned upon the public policy against "senseless destruction serving no apparent good purpose." It seems clear, however, that the homeowner could have accomplished the same destruction—without legal interference—if she had ordered the house razed during her lifetime. The difference in result can only be explained by the greater policy weight in favor of enforcing contracts as compared to the policy of enforcing wills. See H. HART & A. SACKS, *supra* note 50, at 149; Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L.J. 267, 303 (1966).

In applying the public policy doctrine, then, it is important to consider explicitly the force of the opposing considerations rather than to search for a conclusory "public policy". See Shand, *supra* at 157-58, 162, 165; Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 687-88, 690 (1935). See also *The Kensington*, 183 U.S. 263, 269 (1902), quoted in Paulsen & Sovern, *supra* note 76, at 993 (illustration of conclusory reasoning in the conflicts field).

86. H.L.A. HART, *THE CONCEPT OF LAW* 89-96 (1961).

87. See note 82 and accompanying text *supra*. While specific policies with venerable common law roots, such as restraint of trade or restraint upon alienation, have benefited from such typical common law development, see note 85 *supra*, this is not true for newly proposed or rarely invoked policies. Llewellyn implicitly pointed out the weakness of such cases:

[N]o case can have meaning by itself: Standing alone it gives you no guidance as to how far it carries, as to how much of its language will hold water later. What counts, what gives you leads, what gives you sureness, *that is the background of other cases* in relation to which you must read the one. They color the language, the technical terms, used in the opinion. But above all they give you the wherewithal to find of which of the facts are significant, and how far the rules laid down are to be trusted.

K. LLEWELLYN, *THE BRAMBLE BUSH* 49 (1951) (emphasis in original).

88. See Furmston, *supra* note 85, at 308 (many public policy cases have an unquestionable result, but are unconvincingly explained, partly because commentators have overgeneralized—

judicial misapprehension of the doctrine as a product rather than a process. But these problems, while important, only hint at the basic issue raised by the doctrine: the definition of the appropriate role for the judiciary in the determination and application of social policy.

B. Limits of the Public Policy Doctrine

Traditional definitions of public policy assign judges the problem of deciding when private arrangements "violate some statute, or [are] contrary to judicial decision, or [are] against public health, morals, safety or welfare, or [are] in some form injurious to the public good."⁸⁹ This is a tall order. A doctrine giving courts free rein to make decisions about the "public good" raises an obvious question of appropriate limits.

The belief that the determination and implementation of most social policies is a "legislative" function, hence inappropriate for courts, lies at the heart of much of the judicial disquiet surrounding the public policy doctrine.⁹⁰ The problem is to distinguish between improper

and thus oversimplified—the effect of these cases); Shand, *supra* note 85, at 158-59. Observe that the full title of an elderly hornbook on the topic is E. GREENHOOD, *THE DOCTRINE OF PUBLIC POLICY IN THE LAW OF CONTRACTS, REDUCED TO RULES* (1886). In this light, consider the remark of Paulsen & Sovern, *supra* note 76, at 1162, that the "principle vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development."

89. *Dixon v. Van Sweringen Co.*, 121 Ohio St. 56, 166 N.E. 887 (1929).

90. See Winfield, *supra* note 75, at 89. The idea that courts should not engage in "legislative" activities is comparatively recent. Although medieval monarchs did make laws and while much of the early common law was founded on statute, policymaking in the sense of conscious decision about and implementation of collective goals was not a dominant activity of either courts or other branches of government in medieval times. Rather, judicially determined standards of morality dominated the settlement of private controversies. Shand, *supra* note 85, at 150, 154. Though the Revolution of 1688 more fully assured that Parliament spoke with authority equal to that of the courts, Winfield, *supra* note 75, at 89, courts long continued to regard legislative expressions with hostility as intrusions upon judicial authority, as illustrated by the rule that statutes in derogation of the common law were to be construed strictly. See Landis, *Statutes and the Sources of Law*, in *HARVARD LEGAL ESSAYS* 217 (1934).

The rise of the modern legislature radically revised this view by "at least nominally [relegating judges] to the role of interstitialists" who work the occasional area left untrod by the active lawmaking assembly. Gellhorn, *supra* note 85, at 579. According to at least one observer, this shift has been fundamental, turning primary judicial attention away from common law sources towards a preoccupation with the supplementary elaboration of statutes. M. SHAPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES* 23 (1969). This increasing legislative deference has clashed with the historically open-ended breadth of the public policy doctrine, causing it to be delimited by an increasingly cautious rhetoric. See Winfield, *supra* note 74, at 83-84, 86.

Ironically, judicial acknowledgment of the subservience and limitation of the judicial role has coincided with the rise of an activist and policy-conscious American judicature, see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 30 (1977), a rise which today appears to be accelerating. See D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 19-20 (1977); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Nevertheless, the modern "nonlegislative" concept of the judicial role certainly serves to some degree as a self-imposed constraint on the behavior of courts.

"legislative" and proper judicial actions. While it may be easy to agree that at *some* point the public policy doctrine can expand the judicial role unacceptably, there has been no accord on this appropriate limit.

The extent of controversy is illustrated by the diversity of commentators' opinions. One view of the limit of "acceptable" use of the doctrine is that *any* use of policy—in the sense of "guarding and forwarding the material interests of society"—should be forbidden.⁹¹ The opposite opinion is that the doctrine appropriately represents a frank "principle of judicial legislation or interpretation founded on the current needs of the community"⁹² to be gathered from the opinions of judges as "men of the world, as distinguished from opinions based on legal learning."⁹³ Such disagreement is not surprising, since opinions on this matter reflect larger views about the appropriate social and political role of the judiciary. Unless one consistent perspective can be made to dominate this perennially debated area, then, little accord can be expected to greet any particular grand view of the public policy doctrine.

This does not mean that judicial receptivity to solar commercialization under the public policy doctrine is unpredictably reliant on capricious personal opinions. Disagreements on abstract jurisprudential planes can be accompanied by accord on particular questions. In order to determine if the use of the solar policy is within such a realm, one must examine past policies employed under the public policy doctrine for relevant consistencies.

Although "typologies of policy issues are almost as numerous as the writers about them,"⁹⁴ one common feature of the policies invoked under the public policy doctrine is their *moralistic* nature.⁹⁵ Prohibition of government conflict of interest contracts,⁹⁶ animosity towards agreements "in derogation of marriage,"⁹⁷ and hostility to contracts leading to "fraud, prostitution, crime, oppression, and infidelity"⁹⁸ all

91. C. RADCLIFFE, *supra* note 77, at 63-64.

92. Winfield, *supra* note 75, at 92.

93. Rodriguez v. Speyer Bros., [1919] A.C. 59, 79, *quoted in* Winfield, *supra* note 75, at 97. *Cf.* Holmes, *Common Carriers and the Common Law*, 13 AM. L. REV. 609, 630-31 (1879) ("The very considerations which the courts most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned."). For a review of attempted distinctions between "acceptable" and "unacceptable" policies, see Gellhorn, *supra* note 85, at 683.

94. D. HOROWITZ, *supra* note 90, at 57.

95. See, e.g., C. RADCLIFFE, *supra* note 77, at 65-66.

96. Halliday v. Norfolk & W. Ry., 44 Ohio L. Abs. 208, 213-14 (1945) ("It is contrary to good morals and public policy to permit a municipal officer to enter into contractual relations with a municipality of which he is an officer.").

97. 6A A. CORBIN, CONTRACTS § 1474 (1951).

98. E. GREENHOOD, *supra* note 76, at 136.

have an unmistakable moral tone.⁹⁹

A similar moralistic approach has appeared when recent commentary has sought to distinguish between those cases that are properly within the judicial role and those that are not. Drawing on the seminal statement of Hart and Sacks,¹⁰⁰ Professor Ronald Dworkin makes a distinction between *principles* and *policies*. Dworkin defines a *principle* as "a standard to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."¹⁰¹ Thus "arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right."¹⁰² In contrast, a *policy* is "that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community"¹⁰³ Correspondingly, "arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole."¹⁰⁴

Dworkin distinguishes between justifications based on morality and those based on efficiency as a prelude to arguing that only the former are acceptable for adjudication. He looks to morality for *principles* which indicate that a party has a *right* to win a law suit. Decisions justified by principles neither require assessments of "the nature and intensity of different demands and concerns distributed throughout the community,"¹⁰⁵ nor are liable to unfairly surprise the losing party.¹⁰⁶ Principle-based adjudication, therefore, is essential to ensure that judi-

99. The one great common law public policy that appears to be an exception to this moralistic orientation is the policy against restraints of trade, which seems concerned with economic efficiency. An examination of this doctrine, however, indicates that it "originated not with notions of competition and protection of the free market, but rather in support of 'fair' commercial activity and of crumbling guild customs." E. GELLHORN, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 4 (1976).

100. See H. HART & A. SACKS, *supra* note 50, at 159. Hart and Sacks noted the distinction but largely failed to make anything of it. *Id.* at 160-68. See also Pound, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324, 328-32 (1940).

101. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977).

102. *Id.* at 82. See also Wellington, *supra* note 58, at 256.

103. R. DWORKIN, *supra* note 101, at 22.

104. *Id.* at 82. In making this same distinction, Wellington, *supra* note 58, implies that the defining characteristic of *policy* justification is its reliance upon *instrumental* reasoning. *Id.* at 223-24. Instrumental reasoning is the "selection of efficacious means to previously given ends" or "that form of rationality which seeks to discriminate among alternative actions by assessing their comparative tendency to advance or retard the achievement of the actor's goals or values." Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 SO. CAL. L. REV. 617, 618 (1973) (emphasis deleted).

105. R. DWORKIN, *supra* note 101, at 85.

106. *Id.* at 86.

cial decisions are fair¹⁰⁷ and consistent.¹⁰⁸

Judicial judgments based on instrumental policy justifications, on the other hand, are not necessarily fair to the parties before the court; aimed at achieving the best for the community, they may benefit the whole at the expense of some of the members. If the application of a policy must involve such give and take, then Dworkin asserts that those making such amoral goal-oriented decisions ought to be accountable. Therefore, judges should leave such issues to the legislature.¹⁰⁹

As noted above,¹¹⁰ sound economic, political, and environmental reasons lie behind the large recent commitment to solar development. But it is social policy¹¹¹ rather than a moral judgment of right and wrong that motivates the commitment.¹¹² Consequently, if one accepts Dworkin's reasoning, a judicial abrogation of a private directive arrangement on the grounds that it interfered with the achievement of this collective social goal would appear indeed to be an unacceptably "legislative" judicial action. This view is consistent with judicial application of the public policy doctrine, since there is no precedent for its application in support of the kind of amoral socio-economic judgments inherent in a policy favoring solar development.¹¹³

107. Wellington shares this concern for fairness. He reasons that courts have a high relative competence to determine principles (which stem from society's conventional morality), and that fair judicial reasoning usually must proceed from moralistic principles just as judicial interpretation of documents must proceed from the document. Wellington, *supra* note 58, at 243-49. *But see* *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661, 672-74 (Black, J., concurring).

108. R. DWORKIN, *supra* note 101, at 88. *See* Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14-15 (1959). *But see* O.W. HOLMES, *THE COMMON LAW* 35-36 (1881).

109. *See* R. DWORKIN, *supra* note 101, at 85.

110. *See* notes 16-28 and accompanying text *supra*.

111. *See* text accompanying notes 16-29 *supra*. The "instrumental" justification for judicial action in the present context is straightforward. Even if it is assumed that all individuals appreciated the benefits of shifting to a nondepletable source of energy, property owners in a planned development may still prohibit local installation of solar collectors which entail a perceived aesthetic injury. This happens because the burden, though perhaps tiny compared to solar benefits, is borne exclusively by the neighborhood, while benefits accrue at an unrelated scale (e.g., reduced air pollution, perhaps located far from the area; increased national security; an improved social legacy to future generations). A "free rider" problem is created; the neighborhood has no incentive to endorse solar energy since it will be able to enjoy the large-scale advantages resulting from the sacrifices of other locations. Under such circumstances, reliance on a decentralized decision-making system will insure socially irrational choices. To obtain socially sensible results, total social costs must be balanced against total social benefits. Legislative or judicial intervention might be a means to such a properly balanced choice.

112. While prosolar rhetoric can approach moral dimensions, *see* note 9 *supra*, arguments of an instrumental nature dominate both sides of the issue.

113. It is tempting to treat the principle/policy distinction as a path to a *general* theory of the public policy doctrine, since that doctrine clearly needs a general unifying and delimiting rationale. The distinction, however, proves too plastic for such general reliance, since principles and policies can be recast fluidly in each other's terms. *See* Dworkin, *supra* note 101, at 22-23, 82 n.1; Wellington, *supra* note 58, at 223-25. A general theory which accepts principles but rejects poli-

As seen, however, reversal of covenants on these grounds is unacceptably "legislative" not because the policy is amoral, but rather because the court lacks an accountable *source* for the amoral policy. Should such a source exist, it would enable a court to apply amoral policy without exceeding this definition of the legitimate bounds of the judicial role.¹¹⁴ The California statute is one explicit source of such an

cies as admissible public policy considerations must first classify candidate considerations. This effort is thwarted because few considerations fit exclusively into one category. For example, many morality rules are economically efficient and thus desirable for reasons of policy. See National Soc'y of Professional Eng'rs v. United States, 98 S. Ct. 1355, 1367 (1978) ("Ethical norms may serve to regulate and promote this [policy in favor of] competition . . ."); Alchian & Demsetz, *Production, Information Costs and Economic Organization*, 62 AMER. ECON. REV. 777, 790-91 (1972); Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Non-Market Allocation*, in JT. ECON. COMM. 91ST CONG., 1ST SESS., THE ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURE: THE PPB SYSTEM 47, 69 (Jt. Comm. Print 1969); Schelling, *supra* note 51, at 65. Attempts to solve this problem by determining the "dominant" nature of the consideration are, in many instances, artificial and unconvincing. *E.g.*, Wellington, *supra* note 58, at 229-33.

Further, because the distinction between principles and policies represents one opinion about the appropriate limits of the judicial role, acceptance of the distinction thus is a matter of personal political and jurisprudential outlook. Opinions which hold a goal of principle-based adjudication to be less feasible or compelling may not find the distinction to be a sensible foundation for the public policy doctrine. See note 132 and accompanying text *infra*.

Even those who generally share a goal of principle-based adjudication may find that the distinction fails to isolate the essential characteristics of unacceptable "judicial legislation." See Coleman, Book Review, 66 CALIF. L. REV. 885, 904-13 (1978). If perceived judicial role limits are reached in fact only when the proposed policy consideration is insufficiently "well-entrenched," *id.* at 906, or raises too many "questions of judicial competence," *id.* at 908, then the distinction's proscription of judicial policy usage fails as a general guide due to its overbreadth. See M. SHAPIRO, *supra* note 90, at 45-46, 52-54. That the solar policy is apt to fail even these narrower criteria, see notes 1 and 16 and accompanying text *supra*; notes 128-31 and accompanying text *infra*, simply yields a narrower explanation of why the present solar policy is too "legislative" for judicial use in resolving the covenant conflict.

114. See R. DWORKIN, *supra* note 101, at 107-10. The presence of such an accountable policy source also eases judicial strain caused by the functional limitations of courts. Most significantly in the present context, an accountable and competent policy judgment reduces the need for courts themselves to consider and draw conclusions from a range of legislative facts. See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03 (1958). For example, a key determination in the present dispute is a judgment about the importance to society of beginning to rely on nondepletable energy resources. Such a judgment would entail determining the extent of remaining fossil fuel sources, their likely extraction timing and cost, the likely growth of future energy demand, the capability of nondepletable sources to meet this demand, etc. See note 17 and accompanying text *supra*. Determination of such factual matters would certainly tax the traditional factfinding methods of adjudication. See, e.g., Boyer, *Alternatives to Administrative Trial-Type Hearings For Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 114-20 (1972); Schultze, *The Public Use of the Private Interest*, HARPER'S MAG., May 1977, at 43, 61. *Contra*, Wellington, *supra* note 58, at 240. Cf. Polsby, *Policy Analysis and Congress*, 18 PUB. POL'Y 61, 66-68 (1969) ("In short, Congress in the normal course of events gathers great amounts of information, processes this information according to reasonably well-known criteria, and matches what it learns against goals. That is, it conducts a tremendous amount of policy analysis.").

Other common capacity limitations are not as serious here, however, due to the nature of the covenant dispute. For example, another frequent complaint is that adjudication tends to narrow disputes between parties to the resolution of a single controlling issue. In contrast, a planning

accountable balancing of the conflicting interests.¹¹⁵ But a statute need not resolve a controversy in *specific* terms to fulfill this accountability function. Both courts and commentators have argued that statutes may serve as sources of law beyond their precise strictures.¹¹⁶ Thus, for covenant conflicts outside of California, this inquiry about the legitimacy of judicial intervention must consider whether existing statutes supply a sufficient basis for courts generally to protect solar development.¹¹⁷

C. *The Sufficiency of Present Solar Legislation as a Source of Accountability*

According to the viewpoint just explicated, a court should not overturn private arrangements to implement an amoral collective goal like solar development unless an institution competent to make the required value and interest trade-offs, *i.e.*, the legislature, has determined the goal to be sufficiently important. Thus, while solar legislation need not overrule covenants explicitly, there must be some evidence that the legislative policy resolution embodied in a particular statute considered and resolved this conflict in favor of solar policy. If there is no such evidence, this perspective holds that the court lacks an accountable source for making the determination itself.

attitude which instead emphasizes the search for and evaluation of alternative policy solutions often is observed to be more appropriate in judging matters of social policy. *E.g.*, D. HOROWITZ, *supra* note 90, at 284; M. SHAPIRO, *supra* note 90, at 63, 73-91. This difficulty can be avoided in the present dispute. A judge could shift the search for alternative resolutions onto the litigants by conditioning any holding favoring solar energy on the lack of a showing by the covenant beneficiary that measures of reasonable cost were possible to reduce the collectors' aesthetic impact. While such a procedure would require a determination of "reasonable cost," that is a problem whenever a range of camouflage measures is possible. *See* note 32 *supra*. This balancing of the "reasonableness" of alternatives may be difficult, but it is a task more related to the judicial role than is discovering alternatives.

Another area in which courts may be institutionally ill-suited to deal with questions of public policy is in the administration of remedies. In many policy roles, *e.g.*, school desegregation, courts find that the policy solution requires an affirmative decree. The judiciary's weaknesses in formulating effective affirmative remedies, in forecasting likely responses to their decrees, and in overseeing remedial administration and implementation have been amply documented. *See, e.g.*, D. HOROWITZ, *supra* note 90, at 92, 253, 262, 264. *But see* Wellington, *supra* note 58, at 240-41. These management problems are avoided here because covenants establish entitlements which, once defined, tend to be policed by the private parties themselves.

115. *See* note 14 *supra*.

116. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) ("the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts"); United States v. Atlantic Mut. Ins. Co., 343 U.S. 236, 245 (1952) (Frankfurter, J., dissenting).

Using admiralty wrongful death decisions as an example, James Landis severely criticized common law inattention to basic policy considerations which motivated specific legislative action in 1934. *See* Landis, *supra* note 90, at 222 (1934). Thirty-five years later, his arguments about judicial neglect of statutory sources of law were vindicated in *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 388-93 (1970). *See* text accompanying notes 118-25 *infra*.

117. *See* notes 32-40 and accompanying text *supra*.

An illustration is helpful. In *Moragne v. State Marine Lines, Inc.*,¹¹⁸ the United States Supreme Court reviewed a claim by the family of a seaman killed on duty within territorial waters. The basis of the cause of action was unseaworthiness, which was barred at common law when, as there, no statute specifically granted such a right. Because the older admiralty tort exemptions had been the subject of widespread legislative reversal, however, the Court was confronted with a conflict between the shipowner interests in traditional liability exemption and the seaman interest in recovery, an interest that had received widespread legislative endorsement.

Two federal statutes were relevant but did not control the case. The Jones Act¹¹⁹ granted a negligence action to the survivors of seamen, but did not create an *unseaworthiness* cause of action. Such a right *was* provided by the Death on the High Seas Act¹²⁰ *except* when death occurred within territorial waters, as had happened in *Moragne*. Thus, the plaintiff had no claim if the statutes were limited to their express provisions.

The Court noted that common law had refused to create such causes of action in general, but that "legislatures both here and in England [early on] began to evidence unanimous disapproval of the rule against recovery for wrongful death."¹²¹ Although no specific statute created a right of wrongful death action for maritime law, the "legislative establishment of policy [in favor of wrongful death actions] carries significance beyond the particular scope of each of the statutes involved."¹²² The Court saw its problem as determining "whether Congress has given such a direction in its legislation granting remedies for wrongful deaths in portions of the maritime domain."¹²³

By examining the conflict between liability and exemption which the Death on the High Seas Act had resolved, the Court decided that Congress had *not* intended to preclude the unseaworthiness claim within territorial waters. The extraterritorial limitation was explainable, not as a judgment that seamen should be limited in their allowable causes of action when within territorial limits, but by the fact that the state remedies which were left as controlling in these waters were "generally the same as—and in some respects perhaps more favorable than—that imposed by federal maritime law"¹²⁴ at the time of the statute's enactment. Thus, Congress had "legislated only to the three-mile

118. 398 U.S. 375 (1970).

119. 46 U.S.C. § 688 (1976).

120. *Id.* §§ 761-768.

121. 398 U.S. at 389.

122. *Id.* at 390.

123. *Id.* at 393.

124. *Id.* at 399.

limit because that was the extent of the problem,"¹²⁵ not because it had determined that seamen's rights versus shipowners' rights should be different when closer to shore. The Court concluded that later judicial developments which made the federal unseaworthiness claim a *more* attractive remedy than the previously preferable state negligence claims also should apply within territorial waters.¹²⁶

In observing the Court's reasoning about the larger policy resolution embodied within the specific terms of the Death on the High Seas Act and the companion laws, it is important to see that extension of the statute's authority goes beyond its direct language but nevertheless stays within the more general trade-off between seamen's and shipowner's rights which Congress *had already settled*.¹²⁷ The judicial problem was not one of deciding "how strong" a particular policy is and therefore how far the court should extend it, but rather of deciding whether the prior legislative resolution of the conflict at issue gave the plaintiff a *right*.

This analysis applies to measuring the solar statutes as an accountable policy source. The issue is whether any present statute directly or inferentially makes the policy choice to grant the solar enthusiast a solar construction *right* that preempts any restrictive covenant.

The present answer at the federal level is no. Federal bills certainly demonstrate a strong federal commitment to research, development, and demonstration of solar energy, and to a subsidization of some of its private costs.¹²⁸ They do nothing, however, to resolve any property use conflicts that might arise.¹²⁹ In the one instance where the laws make any reference to property rights at all, it is to suggest that such rights are to be preserved rather than overruled.¹³⁰ Thus, while

125. *Id.* at 398.

126. When the Death on the High Seas Act was enacted in 1920, recovery under the unseaworthiness claim "was an obscure and relatively little used remedy." *Id.* at 398, quoting G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 315, 361 (1957). This was altered in 1944, however, when *Mahnich v. Southern S.S. Co.*, 421 U.S. 96 (1944), changed the standard for unseaworthiness from due diligence to strict liability, thus making it a more attractive cause of action.

127. See R. DWORKIN, *supra* note 101, at 109, 111 n.1; Landis, *supra* note 90, at 220, 224-25.

128. See text accompanying notes 32-40 *supra*.

129. The decision to spend tax revenue for any purpose *does* represent a resolution of the conflict between expenditure for that purpose and for all other possible purposes. This certainly is the resolution of a policy conflict, but it is not the conflict facing the court in the covenant case. A judge cannot reason that since the legislature spent money on solar research rather than on defense, for example, it has resolved the conflict of covenant enforcement and solar development. Unless the court can find in a legislative action the resolution of the specific policy conflict it faces, the court cannot use the legislature as an accountable authority for that dispute.

130. The Solar Energy Research, Development, and Demonstration Act, 42 U.S.C. §§ 5551-5566 (1976), directs the Chairman of the Solar Energy Policy Coordination and Management Program to "develop and carry out a general plan for inventorying all forms of solar energy resources associated with Federal lands and (where consistent with property rights) non-Federal lands." *Id.* at § 5554(b)(1) (emphasis added). While the legislative history does not provide any

the situation may change with new legislation, there currently exists no federal authority sufficient to refuse restrictive covenant enforcement on the grounds of the public policy doctrine. With the exception of the California statute, the same situation prevails at the state level.¹³¹

In conclusion, despite a strong legislative commitment to solar energy, the accountable value resolution at the core of this policy is insufficient to justify judicial covenant annulment in terms of Dworkin's concept of adjudication. While other theories of adjudication may concede more instrumental reasoning and thus permit judicial definition and implementation of social goals—like that supporting solar energy—to a greater degree,¹³² case law generally is consistent with

insight into this rather ambiguous phrase, it evidently is intended to protect rather than abrogate existing property rights. This attitude is consistent with another provision of the bill that directs the Chairman to study "incentives to promote broader utilization and consumer acceptance of solar energy technologies." *Id.* at § 5557(b). The latter provision was a conference substitute for a House amendment that would have established a solar energy incentives task force, *inter alia*, to research and investigate "social, legal, and common barriers to public acceptance and use of solar energy." [1974] U.S. CODE CONG. & AD. NEWS 5915, 5930. The concern with *incentives* implies a desire to promote voluntary acceptance of solar energy rather than a judgment that rapid development requires the involuntary submission of other interests.

131. See notes 14 and 44 *supra*.

A related point is whether other state courts should use an extrajurisdictional policy decision like the California statute as an accountable source. Commentary supports this idea. Gellhorn, *supra* note 85, at 691. Some decisions also support the possibility. *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 390 (referring to the universal state passage of wrongful death statutes when determining whether a federal wrongful death action exists); *Eyerinan v. Mercantile Trust Co.*, 524 S.W.2d 210, 217 (Mo. 1975) ("In the absence of guidance from authorities in its [sic] own jurisdiction, courts may look to the judicial decisions of sister states for assistance in discovering expressions of public policy.").

To be persuasive, however, this source would seem to require an overwhelming showing of a trend in extrajurisdictional policy. The *Moragne* court, for example, relied on unanimous passage of wrongful death actions at the state level and on two quite closely related—though not controlling—statutes at the federal level. Additionally, it would be important for a court to ascertain whether significant reasons prevented the policy's adoption in the home jurisdiction. See *Moragne*, 398 U.S. at 398 (concluding that statutory omission of the area in question was not caused by legislative desire for weaker rights in that area but because the area covered "was the extent of the problem"). Thus, the lone California statute seems to have too little force to serve as a policy source for a non-California court in presently resolving the conflict between restrictive covenants and solar development.

132. Wellington, for example, accepts the use of policy in adjudication, but considers it "legitimate only if two conditions are met: The policy must be widely regarded as socially desirable and it must be relatively neutral." Wellington, *supra* note 58, at 236. He allows such uses only grudgingly, however, since he finds even policies satisfying his conditions to "tax the judicial process." *Id.* at 242.

Other viewpoints may find less danger in or alternative to policy-based adjudication. These perspectives presumably would be more willing to evaluate instrumentally the social importance of solar development, and perhaps to view the solar conflict itself in frankly political terms. For example, the dispute might be seen as a clash of lifestyles, with solar support typifying a self-consciously "progressive" or "environmentally concerned" class, and with opposition stemming from groups of different persuasions. The judicial result of a more political view of the conflict can push in different directions, depending on the political values which are invoked to resolve it,

Dworkin's postulated role boundary. For predictive purposes this suggests that (except in California) homeowners restrained by restrictive covenants will have a low probability of obtaining judicial relief under present statutory provisions.

III

REMEDIAL COMPROMISE OF THE COMPETING INTERESTS: COVENANT ENFORCEMENT THROUGH DAMAGES RATHER THAN INJUNCTIONS

The preceeding analysis has led to the conclusion that courts are not likely to use the solar policy to overturn covenant enforcement rights presently enjoyed by covenant beneficiaries. There remains the issue of *how* such rights are to be enforced. Covenants are typically enforced by injunction,¹³³ which completely bars the infringing land use. Some recent commentary has criticized universal employment of this remedy, however, on that the grounds that it can lead to inefficient resolutions of land use disputes.¹³⁴ From this perspective, the award of money damages may be a preferable solution because it would permit solar installation when the homeowner was willing to pay neighbors, homeowners associations, or other covenant beneficiaries for their judicially assessed injury. This section will examine the opportunity for and desirability of such remedial accommodations to the solar policy.

Classically, a court awards money damages whenever a plaintiff demonstrates a legally cognizable injury or invasion of rights. The equitable remedy of injunction, to restrain installation or to remove the "invasion," is *not* similarly automatic, however, in that it depends upon the discretion of the court. In exercising their discretion, courts of equity have viewed injunctive relief as an "extraordinary" remedy available only under certain conditions.¹³⁵ The courts "balance the conveniences" to the respective parties and issue an injunction only after finding that its resulting benefits outweigh its consequential bur-

e.g., hostility to attitudes considered unconventional versus the desire to promote causes perceived as progressive.

133. Newman & Losey, *supra* note 2, at 1344; Stoebuck, *supra* note 3, at 887.

134. See Ellickson, *supra* note 62; Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 389, 509-11 (1977). But see *Agins v. City of Tiburon*, 23 Cal. 3d 605, 591 P.2d 514, 153 Cal. Rptr. 224, *modified*, 24 Cal. 3d 266, — P.2d —, — Cal. Rptr. — (1979); Polinski, *supra* note 62.

135. H. McCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 22, at 47 (2d ed. 1948). Although injunctions to enforce covenants are "today routinely available on the theory that the legal remedy is inadequate to prevent future injury to unique property interests," Stoebuck, *supra* note 3, at 887, it would be erroneous to conclude that modern courts give injunctions as matters of right. See *Yakus v. United States*, 321 U.S. 414, 440, 442 (1944); *Hecht Co. v. Bowles* 321 U.S. 321, 328, 331 (1944).

dens.¹³⁶ This balancing is relevant in the present context because courts have long stated that they "go much further to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."¹³⁷

The "in furtherance of the public interest" logic could favor a damages remedy since this could increase the use of solar energy by facilitating the purchase of solar installation rights by homeowners from their neighbors, either individually or through a homeowners association. In a theoretical world where individuals always could agree costlessly to undertake mutually beneficial transactions, enthusiastic homeowners should be able to convince mildly disapproving neighbors to sell their covenant enforcement right *irrespective* of the remedy with which it would be enforced.¹³⁸ In a realistic setting, however, the choice of remedies might have a very significant impact on the success of such attempted bargains through the allocation of transaction costs and bargaining risks. If a court enjoins covenant violation, the potential solar *consumer* must assume the costs of reaching agreement with all of the relevant participants in the neighborhood covenant plan. Additionally, the solar consumer must bear the risk of bargaining breakdowns due to "strategic behavior" by the parties. Covenant enforcement by means of the damages remedy avoids these problems by in effect "forcing a bargain" between the parties; the court permits installation by refusing the injunction, and it sets the contract price by assessing the level of money damages owed to the neighbors.¹³⁹ By assuring that *some* bargain will be reached and by shifting some negotiation cost away from the homeowner, one can conjecture that the damage remedy will lead to more solar construction than the injunction case, where the homeowner must bear all bargaining breakdown risks and negotiation costs.¹⁴⁰

To counter this public interest argument in support of a damages

136. See, e.g., *Eccles v. People's Bank*, 333 U.S. 426, 431 (1948); *Di Giovanni v. Camden Fire Ins. Ass'n*, 296 U.S. 64, 70-71 (1935).

137. *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515 (1937). See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 645 & n.1 (1977) (Stevens, J., dissenting).

138. See Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). This assumes that the level of damages would be set to reflect accurately the neighbors' level of injury.

139. A declaratory judgment action decided prior to actual construction will present the solar enthusiast with the court's determination of the appropriate level of compensation owed to neighbors; the homeowner may then decide to pay or to forego the installation. If the action is brought *after* the collector is installed, the solar enthusiast will either have to pay or *remove* the collectors.

140. From a solar policy perspective, the most important effect of legal rules will be their effect on the private settlement of disputes, since very few controversies will reach litigation. It is difficult to predict such effects, but it may be that hostile neighbors are more willing to compromise with potential solar consumers if it is certain that the covenant can be enforced only to assess damages, based on the neighbors' ability to demonstrate an "objective" injury. See notes 142-47 and accompanying text *infra*.

remedy, the neighbors and the homeowners association are likely to claim that this remedy is inadequate to protect their unique property interests.¹⁴¹ Taken literally, this argument seems implausible, since it is difficult to believe that anyone would find the view of a solar collector so repugnant as to make no sum of money—no matter how large—sufficient to make one willingly accept the injury. The argument seems more reasonably understood as pointing to the evidentiary problem of *valuing* the injury. In the present context, this problem would stem both from the lack of an authoritative market test of “objective” injury and from the possible presence of additional “subjective” injury.

An “objective” valuation of the aesthetic injury caused by installation of a nearby solar collector could be obtained from the resulting change in market value of the victim’s property.¹⁴² Unfortunately, this is easier said than done. The only way *actually* to determine this market value is through sale of the property. This is usually an impractical solution even if the victim is willing to sell at a price which attracts a buyer, since it requires two observations—market value before and after the installation. Courts generally will have to resort to property assessors’ value estimates, which are less reliable and pose the problem of conflicting testimony.¹⁴³ Nevertheless, while the problem is real, it does not seem intolerable, since the law relies upon a factfinder’s ability to sort out conflicting injury estimates on matters such as personal injury, which are even less susceptible to monetary valuation.

The second evidentiary problem is the valuation of “subjective”

141. See Stoebeck, *supra* note 3, at 887.

142. Market valuation is not strictly “objective” since it relies upon the subjective tastes and preferences of marginal consumers. Nonetheless, if markets are workably competitive, they represent a more reliable and verifiable means of valuing damage than does the possibly self-serving property owner testimony.

In reality, if a solar installation increases the value of the installers own property, this may benefit neighboring property values in the same manner that the deterioration of one’s property can drag down surrounding land prices. While this would be a question for resolution in a particular case, some general predictions can be ventured about the property value effect on the target property. First, the value of many solar homes should increase simply because they have *two* heating systems, including the conventional back-up system. This difference probably will prove more important than solar’s higher purchase and installation cost as compared to conventional systems’ higher operating costs, although this difference also should tend to increase the value of a solar-installed house. Additionally, popular demand for solar-equipped residences may put a premium on these houses. See Marylander Marketing Research, Inc., *supra* note 11, at II-3: “A majority of both professionals and consumers felt that SAGE [Solar Assisted Gas Energy] would enhance the sales potential of a residential structure. This perceived additional value associated with SAGE could be used for marketing both to builders and consumers.” See also Thayer, *Eyesore or Ideal? The Visual Ecology of Solar Architecture*, presented at the HELIOSCIENCE INSTITUTE ALTERNATIVE ENERGY CONFERENCE 11-12 (Apr. 10, 1978) (“rapidly growing status” of solar devices may lead to imitation solar devices).

143. Property value estimates aimed at assessing the impact of a new technology like solar heating may be particularly inaccurate. As experience is gained with the technology, the problem should diminish.

aesthetic injury. Short of sale, there is no accurate method for determining the extent to which an assertedly ultrasensitive neighbor actually suffers from the collector view beyond the "average" estimate of injury which is incorporated in the market valuation.¹⁴⁴ While one may sympathize with a property owner who is forced to undergo an unconsented and uncompensated injury, the sympathy is undercut when the harm exceeds such "average" levels for several reasons. Most obviously, the only evidence of the asserted injury comes from the individual with incentives to invent or magnify such a claim. Perhaps more broadly, there is a concern about the reasonableness of restraining land use on the basis of personal opinions that can be neither verified in fact nor bounded in scope. Nuisance law, for example, seeks to protect individuals of ordinary sensibilities only.¹⁴⁵ Similarly, when covenants require approval of alterations by a body such as a homeowners association,¹⁴⁶ a court will enforce the discretionary result of such a provision only if it is reasonable and in good faith.¹⁴⁷ Hence, this argument for using injunctions and not damages also seems weak, though plausible.

In this context, the traditional equitable attention to the public interest might be decisive, since the solar policy represents a strong "public interest" concern.¹⁴⁸ There is doubt, however, about the doctrinal possibility, jurisprudential acceptability, and policy adequacy of resolving the present conflict by limiting covenant enforcement to an award of money damages.

First, it is not certain that a court has the power alternatively to enforce a subdivision covenant by granting a damages remedy, since the question has not been considered often. Injunctions have been the preferred remedy in covenant suits, and neither side generally has had an incentive to rebut the traditional arguments about the inadequacy of legal remedy in such situations. Consequently, covenant suits usually have involved only disputes over whether to grant or to withhold an injunction and not over whether an injunction is the appropriate remedy for a valid claim.

Theoretical analysis of the question fails to offer a definitive an-

144. This is similar to the valuation problem for public goods. See H. VARIAN, *supra* note 53, at 197-203.

145. See, e.g., *Carter v. Johnson*, 209 Cal. App. 2d 589, 26 Cal. Rptr. 279 (2d Dist. 1962); *Ellickson*, *supra* note 62, at 733-36, 739-40.

146. See note 7 *supra*.

147. See, e.g., *Hannula v. Hacienda Homes, Inc.*, 34 Cal. 2d 442, 447, 211 P.2d 302, 305-06 (1949); *Donoghue v. Prynwood Corp.*, 356 Mass. 703, 707, 255 N.E.2d 326, 329 (Mass. 1970); Annot., 40 A.L.R.3d 864, 879 (1971). The court, of course, determines the meaning of "reasonable." *Seligman v. Tucker*, 6 Cal. App. 3d 691, 697, 86 Cal. Rptr. 187, 191 (2d Dist. 1970). Cf. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 249 (1977) (private industry self-policing standards must be "reasonable").

148. See notes 9-48, 111 and accompanying text *supra*.

swer because the law has become confused. Covenant law developed in two historically distinct strains—legal and equitable¹⁴⁹—with the damages remedy probably confined to covenants of the former type.¹⁵⁰ While these two forms once had distinct origins and theoretical traditions, modern courts have blurred the two doctrines¹⁵¹ for want of a substantive policy reason for adhering to the arcane distinctions.¹⁵² Probably the most accurate summary of the case law is that while precedent does not offer clear support for an exclusive damage remedy for subdivision covenant violation, neither does it offer a significant barrier to a court convinced of the wisdom of such a course.¹⁵³

Assuming that courts have the power to award damages when enforcing restrictive covenants, there is a further question of whether courts legitimately can use their discretion to act in the "public interest" as a means of choosing the remedy most favorable to amoral policies like solar development. The earlier discussion suggesting that the use of the public policy doctrine to support such policies would be inappropriate¹⁵⁴ also suggests that treatment of instrumental policies as "public interest" factors affecting equitable discretion similarly should offend notions of legitimate behavior by courts.

Surprisingly enough, examination of the cases shows that the

149. Stoeck, *supra* note 3, at 865-918. See Reno, *supra* note 64.

150. Stoeck, *supra* note 3, at 906.

151. See, e.g., Lettau v. Ellis, 122 Cal. App. 584, 588, 10 P.2d 496, 497 (1st Dist. 1932) ("In many, if not all, of the cases dealing with changed conditions, the terms [conditions, covenants, and mere restrictions] have been used with apparent disregard of the niceties of differentiation, and the reasons advanced would have application to a resulting situation, regardless of the means of its creation."). While this language has been termed "loose," Note, *Covenants: Inapplicability of Section 1468 of the Civil Code of Covenants Contained in Grants*, 28 CALIF. L. REV. 769, 770 (1940), the California Supreme Court later quoted it with approval in Fairchild v. Rains, 24 Cal. 2d 818, 151 P.2d 260 (1944) (Traynor, J., concurring). See also Richardson v. Callahan, 213 Cal. 683, 686, 3 P.2d 927, 929 (1931). Some modern commentators stress the importance of understanding the legal and equitable doctrines as analytically independent, yet concede that abandonment of distinctions has nearly come to pass. See, e.g., Stoeck, *supra* note 3, at 863, 919-21; Newman & Losey, *supra* note 2, at 1345.

Statutory provisions governing covenant enforcement do not seem to have affected the courts' traditional equitable approach in this area. See, e.g., Anthony v. Brea Glenbrook Club, 58 Cal. App. 3d 506, 130 Cal. Rptr. 32 (4th Dist. 1976). See also Arrache, *Covenants: California's New Legislative Approach to Covenants Running With the Land*, 9 SANTA CLARA LAW. 285 (1969) (note that subsequent statutory amendments incorporated suggestions presented in *id.* at 295-97).

152. Ellickson, *supra* note 62, at 715, finds the rationale for the judicial distinctions "unfathomable." See Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 44 (1978) ("Property lawyers and teachers are accustomed to jibes from their colleagues about how outworn relics of the past still govern the law of property. . . . But otherwise discredited epithets still have some justification in the law on covenants running with the land.").

153. Statutory clarification of the courts' power to award damages for covenant violation would be an appropriate action for a legislature anxious to encourage solar installations but unwilling to follow the vigorous California approach. See notes 167-78 and accompanying text *infra*. The mildest course would be simply to authorize a damage award under such circumstances, while stronger action would preclude remedies other than damages.

154. See notes 100-09 and accompanying text *supra*.

"public interest" concerns voiced in the equitable balancing process *are* often of an amoral, instrumental, and goal-oriented nature. Such concerns include, for example, the importance of implementing a flood control plan,¹⁵⁵ constructing a railroad beside a street,¹⁵⁶ forcing a municipality to construct a secondary sewerage treatment plant,¹⁵⁷ determining the optimal location for railway depots,¹⁵⁸ developing the George Washington Memorial Parkway,¹⁵⁹ avoiding exposing subdivision residents to noxious odors,¹⁶⁰ promoting the peaceable settlement of labor controversies,¹⁶¹ and protecting the "national economy from the disruptive influences of inflation in time of war."¹⁶²

The instrumental nature of such judicial reasoning is in tension with the rhetoric about role limitation and the goal of principle-based jurisprudence described earlier.¹⁶³ It is superficial to attempt a reconciliation by arguing that here policy-based reasoning deals merely with remedies rather than rights, since the meaning of a right is determined by the remedy available to enforce it. Nonetheless, it is the courts, whose role-based limitations are largely self-imposed, who evidently have not believed it improper to consider the impact of their choice of remedies upon the achievement of goal-oriented collective objectives similar to the solar policy. While the difference in attitude can be understood in terms of the traditionally broad scope allowed to the exercise of equitable discretion,¹⁶⁴ an historical explanation does little to reconcile such "legislative" action with the role-conscious rhetoric of modern merged courts. This aspect of remedial design proposals should concern the proponents of principle-based jurisprudence and should trouble courts asked to tailor remedies on the basis of their evaluation of the importance of the solar policy.

The final doubt about the "damages only" resolution is that it simply may be ineffective in promoting much additional solar use. Because remedial manipulation assists only potential installations where the homeowner's private solar demand exceeds combined neighborhood opposition, it does not reach the certainly larger number of instances where the relevant private benefits are outweighed by the

155. *Cubbins v. Mississippi River Comm'n*, 204 F. 299, 305-08 (1913).

156. *D. M. Osborne & Co. v. Missouri Pac. Ry.*, 147 U.S. 248, 259-60 (1893).

157. *City of Harrisonville v. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-41 (1933).

158. *Beasley v. Texas & Pac. Ry.*, 191 U.S. 492, 497-98 (1903).

159. *Greathouse v. Dern*, 289 U.S. 352, 359-61 (1933).

160. *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972).

161. *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 552 (1937).

162. *Yakus v. United States*, 321 U.S. 414, 440, 441 (1944); *Hecht Co. v. Bowles*, 321 U.S. 321, 329-31 (1944).

163. See note 90 and text accompanying notes 100-09 *supra*.

164. "Langdell once argued that, although there are rights at law, there is no such thing as 'a right in equity.' This is because, he contended, courts of law are bound by rules, while courts of equity proceed by discretion." Fuller, *supra* note 52, at 370 (footnote omitted).

competing private costs, even though a social calculus might support a solar installation.¹⁶⁵ Consequently, this policy may still result in too few solar installations. In fact, if potential solar consumers are typically willing to pay a maximum which is less than the typical minimum required by neighbors for adequate compensation, then from a solar policy standpoint the "damages only" resolution is a very small improvement upon flat injunctive covenant enforcement.

Remedial manipulation initially may appear attractive as a means of compromising competing policies.¹⁶⁶ After examining this particular compromise, however, it is hard to develop much enthusiasm for it since it strains against the previously identified limitations on the judicial role in order to achieve policy ends of dubious practical significance. Adequate resolution of the issue demands legislative action.

IV

THE NEED FOR LEGISLATIVE RESOLUTION OF THE CONFLICT

The preceding analysis has demonstrated that constraints on the judicial role are apt to prevent courts from effectively overcoming the barrier to solar policy presented by restrictive covenants. Even the most active judicial role simply would limit covenant enforcement to damages. This compromise still will result in too few solar installations from the viewpoint of society as a whole, since private arrangements will not take into account solar energy's external benefits.¹⁶⁷ Uncertainty about the parties' respective legal rights¹⁶⁸ and the high costs of neighborhood-wide transactions to annul the covenant may prevent solar installations even where the lone homeowner's personal demand for solar heating outweighs total neighborhood opposition or injury. A legislative resolution thus is required to give effect to the goal of shifting to a nondepletable energy base.

The legitimate reliance interest in covenant enforcement merits

165. See note 111 and text accompanying notes 11-14 *supra*. This disparity is offset to the extent that social subsidies are effective in increasing the private demand for solar energy, by means of solar tax credits, government subsidization of industry research and development costs, etc.

166. Cf. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 Nw. U.L. REV. 750 (1964) ("when reason can produce no other conviction it ought to produce compromise"). If a damage remedy is found attractive, its administration would be aided by some procedural safeguards. A homeowners association which represents a neighborhood should be joined in the litigation even if it was not previously involved in the particular dispute. Also, notice should be given to all parties in the neighborhood who may be affected. Other rules for the administration of class action recoveries should not prove necessary in such disputes, however, since the damaged parties form a relatively small and identifiable class.

167. See note 111 and text accompanying notes 11-14 *supra*.

168. See text accompanying notes 149-53 *supra*.

some recognition in a fair legislative solution. But an equitable compromise should discount completely most solar injuries provided that the solar enthusiast takes whatever aesthetically ameliorative measures are possible at reasonable cost.¹⁶⁹ Further, while it is socially desirable to encourage innovation in solar technology, a reasonable legislative accommodation could require homeowners to avoid those varieties which are particularly offensive to neighbors.¹⁷⁰

The California legislation provides one such compromise.¹⁷¹ By voiding any covenant which "effectively prohibits or restricts the installation or use of a solar energy system," except "reasonable restrictions" which "do not *significantly* increase the cost of the system or *significantly* decrease its efficiency, or which allow for an alternative system of cost and efficiency,"¹⁷² the legislation seeks to balance the importance of the solar policy with recognition of neighborhood covenant interests.

This compromise reflects a legislative belief that some type of solar installation reasonably can be accommodated in every neighborhood. Where aesthetic restrictions seek to reduce a system's visual impact at a low dollar or efficiency cost (for example by placing collectors flush with a roof or hiding them with landscaping) the legislation permits such restrictions to be enforced. But requirements which drastically reduce the efficiency of a system (for example, by requiring that collectors be placed on the north side of a roof) or which require significant additional expense (for example, by demanding that a roof be rebuilt to conceal collectors) are unenforceable under the terms of the law.

The apparent stringency that every neighborhood permit solar installations is mitigated by the law's definition of "comparable alternative" requirements as permissible "reasonable restrictions." This should allow neighborhoods to protect their views by forbidding atypical or experimental types of solar systems which are unusually ugly. Judicial interpretation of this provision should sanction "comparable alternative" restrictions designed to preclude garage monstrosities or experimental test facilities so long as such restrictions do allow for more typical types of solar installations.

In general, this legislative compromise is admirable.¹⁷³ By leaving

169. See note 72 *supra*.

170. For example, tracking collectors, OTA REPORT, *supra* note 3, at 246-48, and "reflector collectors," *id.* at 261-83, are technologically advanced systems which some day might be used in residential installations. In many areas, however, their potentially large aesthetic impact could justify a legislative decision to insist on more traditional and less noticeable collectors.

171. See note 14 *supra*.

172. CAL. CIV. CODE § 714 (West Supp. 1978) (emphasis added).

173. The legislation does raise possible constitutional questions concerning the contracts clause of the United States Constitution and, in most states, a taking of property without just

the term "significantly" undefined, however, the legislature creates a substantial degree of uncertainty about its exact resolution of the conflict, uncertainty which requires judicial interpretation for clarification.

One might react in two ways to such a lack of statutory specificity. First, one can view the statute as a legislative request that courts develop a new attitude towards covenants which, except in "extreme" cases, generally discounts their importance when they conflict with solar developments. The statute would not be a final policy resolution so much as an assignment of the balancing function to courts for fair case-by-case resolution, in the manner of delegation to an administrative agency. Lack of statutory specificity thus would not be a particular weakness since it would not disturb the law's main effect, that of negating stare decisis constraints and informing the judiciary of the new importance of solar development.

From a contrary perspective, the statute's generality raises two significant problems. The first concerns the statute's effectiveness in attaining its solar development goal. If legal uncertainty about the right to install a solar heater is resolved only after litigation in each particular case, this will create crippling transaction costs for most solar installations. The statute thus hinders efficient private resolution of individual conflicts by failing to clearly define entitlements.¹⁷⁴

A vague statute poses a separate problem regarding the integrity of government institutions. If legislative failure to specify an exact policy trade-off stems more from a desire to avoid confronting the conflict than from a concern to retain necessary flexibility in the application of the statute, then this dodging of an essentially legislative trade-off definition may be considered irresponsible.¹⁷⁵

Both of these objections are met by defining the "reasonableness" of a restriction in clear quantitative terms, *e.g.*, reasonable restrictions are those which do not increase the total cost of a solar energy system by more than ten percent.¹⁷⁶ While a similar quantitative definition of reasonable *efficiency* compromises may not be so simple, every effort should be made to indicate the approximate *weight* of the policy trade-off.¹⁷⁷ Such action would add to the statute's credibility as well as its

compensation. *See* Southern Cal. Edison Co. v. Bourgerie, 9 Cal.3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973). Both of these possible defects appear to have been avoided by the nature of the problem and the legislation's concern with mandating only reasonable solutions. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242-44, 250 (1978); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123-38 (1978).

174. *See* note 50 *supra*.

175. *Cf.* A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 178-80 (2d ed. 1970) (explaining need for flexibility in outlawing "unfair methods of competition").

176. Such legislation could cover all expenses of this nature within any solar tax incentives offered by the state. *See, e.g.*, CAL. REV. & TAX. CODE § 17052.5 (West Supp. 1978).

177. Efficiency compares the total solar energy available to a system with the amount actually

effectiveness.

While legislatures may devise other strategies,¹⁷⁸ the California approach—particularly with the suggested modifications—currently provides the most equitable and effective means of implementing the solar policy. It thus merits the attention of other states.

CONCLUSION

Shifting energy reliance to nondepletable and benign sources may be critical for a nation which has exhausted a significant portion of the planet's energy resources in a blink of geologic time. Yet, if self-imposed judicial restraints are to be observed, this goal presently has received insufficient legislative clarification for courts to overturn covenant enforcement rights hindering its achievement. In contrast, and to some extent contrary to such limitations, courts *have* been willing to further important instrumental goals by means of their choice of remedies to enforce private rights that conflict with the achievement of those goals. This limited judicial effort to accomplish collective ends may represent the most satisfactory solution where state legislatures have not yet addressed the covenant problem, but it places courts in an uncomfortable role in order to achieve a compromise of dubious practical significance.

The need for legislative action is plain. California's approach of voiding unreasonable restrictions, modified to define reasonability in clear quantitative terms, provides a fair policy trade-off designed by an accountable body.

The immediate setting of this conflict between public policy and private arrangements may be relatively transient. At some point the retrofit of solar systems on existing buildings will be surpassed by their construction as part of new buildings, where marginal architectural efforts may greatly reduce the aesthetic problem. Future collector designs perhaps may become aesthetically more acceptable as the industry continues to advance beyond the garage enthusiast stage. Basic aesthetic attitudes may change. In a larger sense, however, the

consumed. See J. KRENZ, *supra* note 1, at 213-31. In practice, however, the quantitative measurement of changes in efficiency caused by particular camouflage measures would be complicated, even for the simpler active solar systems. See, e.g., OTA REPORT, *supra* note 3, at 303-26; CAL. ENERGY RESOURCES CON. AND DEV. COMM. ALTERNATIVES DIV., GUIDELINE FOR CERTIFICATION OF SOLAR ENERGY EQUIPMENT 16, 38-39 (June 15, 1978). While not impossible, it is more difficult to measure efficiency for passive solar systems, because such measurement involves an analysis and prediction of the thermal characteristics of building design. These difficulties mean that any insistence upon measures requiring engineering calculations will create counterproductive transactions costs. Nevertheless, a quantitative percentage definition of "reasonable" based on *estimated* effects would still be useful in quantifying the extent of enforceable aesthetic restrictions.

178. See note 154 *supra*.

problem is more permanent, due to the widespread and detailed use of private arrangements of all types and the ever more comprehensive nature of government policy concerns. These forces will require sensitivity from both courts and legislatures to means of compromise that not only strike an appropriate balance between the competing considerations but also result in an acceptable definition of the judicial role.

*John Wiley**

* A.B. 1975, University of California, Davis; third-year student, Law & Economics Program, Boalt Hall School of Law - University of California, Berkeley; Note & Comment Editor, *California Law Review*.