Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions - Avoiding the Chancellor

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During the period between 1789 and 1916 the United States transformed itself from a predominantly agrarian country into an industrial giant. Farming, shipping, and trading were the primary economic activities of 18th-century America; manufacturing was not yet a salient feature. The American economy was characterized by small markets and relatively inexpensive labor. Improvements in economic organization took the form of increased efficiency in shipping, communication, and transportation, rather than in the development of new industries. It therefore is not surprising that economic growth, which is dependent upon the development of new industries, advanced slowly during the

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2. D. North, supra note 1, at 17.

3. Id.

4. Id. at 17-18.
18th century.⁵ By contrast, the 19th century was a period of unprecedented economic growth in the United States.⁶ The driving forces behind this growth were the adoption of more efficient manufacturing and agricultural techniques, an increase in education which made possible the utilization of improved technology, and the availability of a vast national market, making feasible large-scale production.⁷ In 1860, the percentage of national production attributable to manufacturing exceeded that attributable to agriculture for the first time;⁸ by 1889, the United States had become the most economically powerful nation in the world.⁹

This burgeoning of manufacturing in the United States produced an industrial, urban society with concomitant social, political, and economic problems.¹⁰ An increasing native population,¹¹ immigration,¹² and urbanization,¹³ though helping to produce large concentrated markets and pools of resources that aided industrialization, served to crystallize the basic conflict of interest between the developmental entrepreneurs and those who suffered injury from the activities generated by economic growth. A facet of this conflict is reflected in this period's substantive and procedural¹⁴ law of private nuisance.

The traditional rule of the English common law of nuisances, adopted by the colonies and the newly created states, imposed absolute liability for interference with the enjoyment of property.¹⁵ Unlike the modern tort concept under which liability is not imposed absent some wrongful or negligent conduct,¹⁶ the common law rule, as expressed by the maxim

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5. North indicates that the three features of "what makes a society more efficient" are: technology, investment in human capital, and efficient economic organization. Id. at 6. The colonial economy grew at an annual rate of not more than 1.6 percent. Id. at 17.
6. Id. at 31.
7. Id.
8. Id. at 19.
9. Id. at 28.
13. Id.
14. The term "procedural" refers to the law of remedies in this area. See text accompanying note 50 infra.
15. Eighteenth century English law viewed property as an absolute title to a physical entity. Blackstone described property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, Commentaries *2.


17. *Use your own so as not to injure others.*
19. *Id.* at 596.
20. A cynic might assume that industrialization was inevitable and that the opinions of the chancellor in the determination of injunction actions were exercises in sophistry to pave the way toward that inevitability, but this Article will attempt to examine the doctrinal development from a neutral standpoint. Thus, capitalist motives are not necessarily attributed to the chancellor. This can be left to the social historian.

The primary concern of this Article will be the private suit for nuisance injunction, but for comparison and amplification, reference will be made to the public nuisance suit and the private suit for damages. Although the history of suits concerning impairment of franchises, involving one businessman suing another on a theory of impairment of the first's franchise, and suits concerning riparian rights would reflect the same
Economic development in the late 18th and early 19th centuries can be divided into two stages. The first, from 1789 to 1810, was in many respects a continuation of the colonial period. Manufacturing was conducted in small shops by skilled craftsmen; commercial industries (such as iron mills, breweries, and brick yards) showed little change in the period following the revolution. The second period, from 1810 to 1836, was one of gradual development and expansion. The economy grew not by the development of new industries but by the expansion of established ones.

Not surprisingly, the American entrepreneur rarely was subject to a suit alleging a private nuisance during this period. Old relationships between the entrepreneur and his environment continued, though industrial activity increased. Only nine private nuisance suits for injunction appeared in case reports; the courts granted injunctions only twice. The paucity of such suits and the handling given those that were brought are evidence that a suit to enjoin a nuisance was an infrequently recognized part of the American legal consciousness during this period. That trend toward a prodevelopmental attitude on the part of the courts, these cases, controlled by independently developed doctrine, will not be considered in this Article.

The 18th century law of riparian rights was antidevelopmental in awarding absolute dominion to the first appropriator of water. In the 19th century, the law of riparian rights evolved like nuisance law. See Lauer, Reflections on Riparianism, 35 Mo. L. Rev. 1 (1970).

Competitive injury, primarily between owners of newly created and previously established mills was viewed as actionable in damages in 18th-century Massachusetts. Taft v. Sargeants (Mass. 1784), as cited in M. Horwitz, American Legal History 470 (1973) (unpublished teaching materials). Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 419 (1837), aff'g 24 Mass. (7 Pick.) 344 (1830), marked the end of such actionability. Professor Willard Hurst has described Chief Justice Taney's opinion in Charles River Bridge as "the classic statement of policy in favor of freedom for creative change as against unyielding protection for existing commitments . . . ." W. Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States 27 (1956).


22. Id.

23. Ramsay v. Riddle, 20 F. Cas. 212 (No. 11,544) (C.C.D.C. 1806); Quakenbush v. Van Riper, 3 N.J. Eq. 350 (1835); Southard v. Morris Canal & Banking Co., 1 N.J. Eq. 519 (1832); Corning v. Lowerre, 6 Johns. Ch. 439 (N.Y. 1822); Gardner v. Trustees of the Village of Newburgh, 2 Johns. Ch. 162 (N.Y. 1816); Eason v. Perkins, 17 N.C. 40 (1831); Caldwell v. Knott, 18 Tenn. 209 (1836); Beveridge v. Lacey, 24 Va. (3 Rand.) 63 (1824); Wingfield v. Crenshaw, 14 Va. (4 Hen. & M.) 474 (1809). Only in Corning and Gardner were the injunctions granted.
equity had jurisdiction to enjoin a private nuisance generally was not conceded.  

Courts faced with injunction suits in this early period used a procedural analysis that concentrated on the availability of the injunctive remedy. By this method, the early courts avoided application of the prevailing orthodox definition of a nuisance: "[I]f it [the defendant's act] causes either [hurt, annoyance or damage] in the least degree, the person creating it must be answerable for the consequences." This analysis, focusing on the injunctive remedy, mitigated the potentially harsh effects on defendant entrepreneurs.

An analysis of the early decisions reveals how foreign the injunction suit appeared to the judges. For example in Ramsay v. Riddle, the plaintiff sought to enjoin the defendant from converting his warehouse into a bakehouse; the plaintiff claimed that the increased traffic and noxious odors, as well as the heightened danger of fire in the neighborhood because of the bakehouse, would render the defendant's business a nuisance. The federal circuit court refused to grant the injunction before the conversion of the defendant's building but conceded that "... if the house, in fitting up, should not be well secured against danger from fire,

24. Nathan Dane, in the first general abridgement of American law, discussed the remedies for a private nuisance without even alluding to the possibility of injunctive relief in such a case. 3 N. DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 50-52 (1824). Chancellor Kent himself, though he did grant two injunctions in private nuisance cases, see Corning v. Lowerre, 6 Johns. Ch. 439 (N.Y. 1822); Gardner v. Trustees of the Village of Newburgh, 2 Johns. Ch. 162 (N.Y. 1816), warned that the injunction was not a normal remedy in nuisance cases and should be granted only "with the utmost caution." Attorney Gen. v. Utica Ins. Co., 2 Johns. Ch. 371, 379 (N.Y. 1817). In the latter case, Kent implied that there was no jurisdiction at all in courts of equity to enjoin public nuisances. During this period, the English courts clearly recognized the availability of injunctive relief in cases of private nuisance. R. Eden, A TREATISE ON THE LAW OF INJUNCTIONS 222 (Am. ed. 1822). Significantly, however, Eden reported that he "had not been able to find a precedent in which the court has actually interfered to restrain the carrying on of a noxious trade ... ". Id. at 226. In an English case seeking injunctive relief against a manufacturer who was creating a nuisance during this era, counsel for defendant wrote that "if every manufacturer disagreeable to the neighborhood ... is to be treated as a nuisance, however material to the prosperity of the country, the effect will be most important." Attorney Gen. v. Cleaver, 34 Eng. Rep. 297, 298, 18 Ves. 211, 214 (Ch. 1811). English chancery interference in nuisance cases was rare until around 1811. Watrous, TORTS, IN TWO CENTURIES' GROWTH OF AMERICAN LAW, 1701-1901 (1901). However, in the 18th century the suit by a private party for an injunction against a nuisance was not a rarity. See, e.g., Baines v. Baker, 27 Eng. Rep. 105, Amb. 158 (Ch. 1752); Coulson v. White, 26 Eng. Rep. 816, 3 Atk. 21 (Ch. 1743).


26. 20 F. Cas. 212 (No. 11,544) (C.C.D.C. 1806).
it might be the ground of an injunction to prevent the use of it as a bake-house." 27 This same type of refusal to enjoin prospective nuisances became common later in the century.

Similarly, in Beveridge v. Lacey,28 an 1824 decision of the Supreme Court of Virginia, an injunction was denied a private party for a nuisance that could be considered a public one. The defendant shopkeeper was alleged to have caused considerable nuisance to the plaintiff by digging in the public street in front of the plaintiff's house in an attempt to create a smoother slope in the street. Although later in the century, courts conceded that a private party could enjoin a public nuisance if special damages were shown to have been incurred,29 this court, stating that "it is not the province of a Court of Equity, to correct abuses merely public,"30 seemed to imply that there was no equity jurisdiction at all over public nuisances. Moreover, in Southard v. Morris Canal & Banking Co.,31 a plaintiff sought to enjoin as a nuisance the operation of a dam by the defendant canal company. The New Jersey chancery court, basing its decision in part on a showing that the dam had been operated for several years without any objection, declined to grant relief. This reasoning, similar to the doctrine of laches, was quite prevalent later in the century.32

The North Carolina courts used procedural analysis to the fullest extent. In Eason v. Perkins,33 a neighboring, private plaintiff sought to enjoin a defendant from rebuilding a mill that previously had been allowed to deteriorate. He asserted that the flooding and health hazards that would be created by the mill would make it a public nuisance to the community and a private nuisance to him. The court, failing to consider whether there was a nuisance, viewed the problem to be purely procedural. A rudimentary balancing test was invoked by the court, which concluded that "[t]here is nothing in this case but the interest of a single individual to weigh against public utility." 34 To buttress this conclusion, the court pointed to the state's mill act, which limited the plaintiff's recovery in damages. It would be anomalous, the court reasoned, to enjoin the mill when even the damage recovery had been limited by

27. Id.
28. 24 Va. (3 Rand.) 63 (1824).
29. See notes 97-109 infra & accompanying text.
30. 24 Va. at 65.
31. 1 N.J. Eq. 519 (1832).
32. See notes 72-75 infra & accompanying text.
33. 17 N.C. 38 (1831).
34. Id. at 41.
the legislature, the predominant policymaker for the state. This balancing test became the primary device for protecting entrepreneurs later in the century.

Equity courts may have declined to enjoin private nuisances because the suit involved title to real property and therefore should be determined by a law court with a jury, rather than by a nonjury chancery court. The New Jersey chancellor ruled, in *Quackenbush v. Van Riper*, that there could be no injunction against a nuisance if there had been no violation of a "clear or serious right." Presumably, this clear right would have to be shown in a law proceeding. In *Quackenbush*, the plaintiff was a private landowner who was seeking to enjoin as a nuisance the operation of defendant's mill. The evidence showed that there had been flooding of the plaintiff's land. Although a later New Jersey decision seemed to view this case as applying a balancing test, the chancellor apparently was deferring to the law court because of the presence of real property in the dispute. In *Caldwell v. Knott*, a Tennessee farmer sought to enjoin the defendant's operation of his milldam. This equity court was even more explicit in deferring to the law court. "The determination . . . of opposing rights, is purely a legal question and until such a determination a court of chancery will not interfere." Professor William Draper Lewis, reviewing early American chancery decisions, wrote that "down to the end of the first quarter of the nineteenth century, the idea that all cases involving the legal title to real property should be tried by jury in a common law action was firmly embedded in the professional mind." This was apparently true in the nuisance cases as well, and the deference to law lasted even later than 1825.

The only two injunctions granted on private nuisance grounds before 1837 were issued by Chancellor James Kent of New York. The first, *Gardner v. Trustees of the Village of Newburgh*, was a riparian rights case and not properly considered with the purely private nuisance cases; in the second, *Corning v. Lowene*, Kent granted an injunction against the obstruction of a public street. The defendant asserted that this was

35. 3 N.J. Eq. 350 (1835).
37. 18 Tenn. 209 (1836).
38. Id. at 211.
40. 2 Johns. Ch. 162 (N.Y. 1816).
41. 6 Johns. Ch. 439 (N.Y. 1822).
merely a public nuisance, but Kent found that there was a special injury to the plaintiffs "affecting the enjoyment of their property."

**The Period 1837 to 1870**

The years 1837 to 1870 witnessed a remarkable change in the American economy. In 1839, agriculture provided almost 70 percent of the value of commodity output of the national economy; manufacturing, mining, and construction together accounted for the remaining 30 percent. By 1870, the share of agriculture was reduced to 50 percent, with the remaining 50 percent being shared by manufacturing, mining, and construction. Obviously, this was a period of rapid industrial growth. Investment in manufacturing increased substantially, and with it a trend toward large-scale industry and the expansion of the factory system.

With this transformation in the economy came increasing friction between the prodevelopmental entrepreneur and his neighbors. During the mid-19th century, courts groped to fit a rule of law to the demands of a new environment. Although few injunctions against entrepreneurs were granted, the case reports and legal literature reflected a shift in attitudes: the injunction suit no longer appeared foreign to the courts, which now focused on the availability of injunctive relief rather than on the existence or nonexistence of a nuisance.

The most striking aspect of this period was the substantial increase in the number of actions for injunctions brought by aggrieved homeowners and property owners against alleged private nuisances; in the early part of the century very few such property owners sought injunctive relief. As an illustration of this change, Nathan Dane's first abridgement of American law, published in 1824, did not even suggest the possibility of injunction as a remedy in private nuisance. On the other hand, Story's *Commentaries on Equity Jurisprudence*, published on the eve of this middle period, in describing the general use of the injunctive remedy stated that "courts of equity now interfere, and effectuate their decrees in many cases by injunctions." He also obliquely acknowledged that nuisance was a fit subject for injunctive relief, warning "it is

42. D. North, supra note 1, at 19-20.
43. G. Fite & J. Reese, supra note 11, at 209.
44. Id.
45. See note 23 supra & accompanying text.
46. See note 24 supra.
47. 2 J. Story, Commentaries on Equity Jurisprudence § 959 (1836).
not every case, which would furnish a right of action against a party for a nuisance, which would justify the interposition of courts of equity to redress the injury, or remove the annoyance." 48 Despite the fact that relatively few injunctions were granted, most courts during this period made at least some effort to rationalize and explain their denial of plaintiffs' claims; no longer was the injunction out of the realm of possibility. Nevertheless, the nuisance injunction gained slow acceptance into the American legal consciousness.49 Until the end of the century, much of the collective energy of the courts was devoted to the definition of the zone of cases in which the grant would be proper.

In addition to the changing judicial attitude toward the availability of the injunctive remedy in private nuisance cases, other factors contributed to the greatly increased amount of litigation. Not only did increased industrialization provide more potential defendants, but this industrialization was of a different quality than that of the earlier period. Increasingly, defendants in this period were railroad builders and factory operators. Although the defendant mill owners of the earlier period clearly had interfered with the private use and enjoyment of property, railroads and factories were making more significant intrusions with more serious consequences. The noise, smoke, and fumes of the factory and the railroad were major, tangible interferences, verging on physical trespasses. Additionally, a broader range of possible plaintiffs was created as railroads stretched on for miles through city and farmland. Unlike a milldam that might overflow and ruin the crops of one or two neighbors, an interference caused by a factory or railroad threatened many "neighbors." The increase in population and the clustering of this population in urban areas heightened both the demands on American industry and the likelihood of conflict between the interests of the homeowner and of the entrepreneur.

Procedure from 1837 to 1870

Because the substantive law of nuisance remained plaintiff-oriented,50 "procedural" or remedial defenses provided refuge for the defendant en-

48. Id. at § 925.
49. By 1865, a treatise writer could state "a very frequent ground of injunction is nuisance." F. Hilliard, The Law of Injunctions 269 (1865). See also 2 R. Eden, A Compendium of the Law and Practice of Injunctions and of Interlocutory Orders in the Nature of Injunctions 267-70 (Waterman ed. 1852); J. Holcombe, An Introduction to Equity Jurisprudence 159 (1846).
50. See notes 110-122 infra & accompanying text.
treprenuer in nuisance injunction suits during this period. In this context "procedural" refers to all doctrines that either denied or delayed injunctive relief without addressing the issue of the existence of a nuisance; courts relying on such procedural grounds then could avoid the plaintiff-oriented substantive law of nuisance.

The courts during this period articulated various formulations of procedural considerations. Some were drawn broadly from historical maxims of equitable jurisdiction, while others were developed with particular reference to nuisance litigation. Traditional expressions of the chancellor's limited jurisdiction—that equity does not interfere if the complainant's rights clearly are not established, nor aid those who sleep on their rights, nor interfere if there is a complete and adequate remedy at law—often were stated. In addition, the entrepreneur defendant utilized two defenses specific to the nuisance field, the public nuisance defense and the harmless building defense. Although these two defenses had their roots in prior case law, both reached their peak between 1837 and 1870.

The most striking procedural development during this period was the sudden realization and acknowledgement on the part of the chancellors that their jurisdiction was something more than a mechanical application of wooden principles. Chancellors openly conceded that their actions depended on a great variety of factors and that the granting of equitable relief was not a matter of right, but of grace. The decisions in the early 19th century never addressed the issue of "entitlement" to equitable relief. Chancellors, though not acting on common law principles, certainly mentioned nothing about the totality of circumstances or the discretion of the court as affecting the exercise of their power. During the period from 1837 to 1870, however, equity courts began to emphasize that the right to an injunction was not automatic. In Ingraham v. Dunnell, 51 the Supreme Judicial Court of Massachusetts, deciding a nuisance suit in which a mill owner sought to enjoin the construction of a printing factory, admitted that "courts of equity are invested with large discretionary powers." 52 In 1862, the Supreme Court of the United States, in Parker v. Winnipiseogee Lake Cotton & Woolen Manufacturing Co., 53 also acknowledged the discretionary powers of the chancellor. "[A] Court of Chancery," the Court stated, "will not, as of course,

51. 46 Mass. (5 Met.) 118 (1842).
52. Id. at 123.
53. 67 U.S. (2 Black) 545 (1862). See also Rosser v. Randolph, 7 Port. 238 (Ala. 1838); Clack v. White, 32 Tenn. 540, 545 (1852).
interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case." 54 In connection with this open acknowledgement of the existence of equitable discretion, the courts often stressed the harshness of the equitable remedies, particularly of the injunction.55 The growing self-awareness on the part of equity courts of the discretionary nature of their power may have been a major cause of the great reliance on procedural doctrines during this period.

Application of the Equitable Maxims

Long and Clearly Established Right

The broad statement made by many courts during this period that the chancellor would protect a complainant only if a long and undisputed right was shown to have been violated was a significant vestige of the extreme reluctance of the earlier period to grant an injunction in a nuisance action. Within the rubric of this maxim, some courts appeared to require a prior judgment at law establishing the rights and violations of these rights,56 but most decisions that applied the maxim merely required either a prior judgment or a clear showing of the existence of the right and of its violation.57 In Porter v. Withan,58 a Maine court stated the maxim in a case in which the complainant was seeking to enjoin a dam as a nuisance: "There can be no doubt that, it would be unjust to destroy property or the use of it before it has been determined by a judicial decision or by lapse of time, that the owner [defendant] can have no such right as he claims and enjoys."59 This willingness to look at the merits was more apparent than real, however, because the chancellor rarely found that a sufficient showing had been made.

54. 67 U.S. at 553.
55. A New York court, in denying injunctive relief in a nuisance case, wrote: "a much stronger case must be presented, and the impending danger more imminent and more impressive than this complaint . . . to justify us in the application of these severe and coercive measures . . ." Drake v. Hudson River R.R., 7 Barb. 508, 551 (N.Y. Sup. Ct. 1849). "[T]he jurisdiction of the Courts of Equity to interfere, by injunction is of recent origin, and is always exercised sparingly and with great caution . . . ." Simpson v. Justice, 43 N.C. 115, 129 (1851).
57. See, e.g., Green v. Oakes, 17 Ill. 249 (1855); Jordan v. Woodward, 38 Maine 424 (1854); Robeson v. Pittenger, 2 N.J. Eq. 57 (1838).
58. 17 Maine 292 (1840).
59. Id. at 294.
Little effort was expended by the courts in explaining the reasoning underlying the maxim. The requirement of a clear, undisputed right made some sense if a case involved a dispute concerning the existence of an easement or prescriptive right. In nuisance actions, however, the plaintiff's right to enjoy his property was absolute, not limited by time. On its face, the substantive law of nuisance protected any use or enjoyment of property regardless of its length or nature. This apparent right, however, was significantly diluted by the reluctance of courts to enjoin those perpetrating nuisances without a showing of clear and undisputed rights. A possible rationalization of this requirement might be protection of the defendant's right to a trial by jury, which he would be denied in the chancery court. This was alluded to in at least some of the cases, but must be contrasted with the great willingness of the courts during this period to enjoin other actions without a previous trial at law.

This procedural device ostensibly was merely a delaying tactic. Presumably, a disappointed equity complainant could become a plaintiff at law and, after obtaining a judgment declaring the defendant's activity to be a nuisance, return to the equity court and procure an injunction. The entrepreneur, however, could receive two benefits by the application of the doctrine that a clear, undisputed right was a prerequisite to equity jurisdiction. On a practical level, he could take advantage of the complainant's weaker bargaining position and force an out-of-court settlement or, alternatively, depend on delays in the law court to discourage the complainant, perhaps inducing him to move or simply desist. Apart from this, the entrepreneur reasonably could expect that even if the complainant were able to obtain a judgment at law he might not be granted an injunction. Although very few complainants actually came back into equity after gaining a law judgment, they hardly could be encouraged by the flat statement of several courts, including the Supreme Court of the United States, that "many cases of private nuisance will

60. Thebaut & Glazier v. Canova, 11 Fla. 143 (1867); Dana v. Valentine, 46 Mass. (5 Met.) 8 (1842); cf. Middleton v. Franklin, 3 Cal. 238 (1853); Coe v. Winnipocceee

61. The third American edition of Eden on Injunctions cites many instances of courts of this period enjoining waste, patent infringement and copyright infringement without a prior hearing at law. See R. Eden, supra note 49. These cases never expressed any qualms concerning the lack of prior jury verdict.

62. In New Albany & Salem R.R. v. Higman, 18 Ind. 77 (1862), the plaintiff already had obtained a judgment at law declaring the defendant to be operating a nuisance and awarding damages to the plaintiff. Injunctive relief was denied on the basis of statutory justification. See notes 144-53 infra & accompanying text.
sustain an action at law which will not justify relief in equity." 63 Another court, in 1849, stressing the recent origin of the injunctive power in nuisance cases, stated that "a much stronger case must be presented, and the impending danger more imminent and more impressive than this complaint... to justify us in the application of these severe and coercive measures..." 64 Thus, the injunctive remedy was foreclosed without even an examination of the possibility of the existence of a nuisance. Courts enunciating this cryptic standard did little to expand or explain the criteria that were applicable to determine which types of nuisance claims did merit injunction.

Some courts used the requirement of a long and undisputed right as a springboard to a more frankly prodevelopmental procedural rule. After stating the maxim, the courts attempted to justify it. In *Wilder v. Strickland*, 65 a complainant landowner sought to enjoin the construction of a mill that allegedly would cause severe flooding and generally unhealthy conditions. After describing the injunction as an extraordinary remedy, the Supreme Court of North Carolina refused to grant it because no injury had been alleged "as will justify the Court in denying to the neighborhood the convenience of a public mill which will grind all the year." 66 Similarly, the Supreme Court of Georgia held in *Harrison v. Brooks*, 67 a suit to enjoin construction of a livery stable alleged to be a nuisance, that equity is "less disposed to interfere, when the apprehended mischief is to follow from such establishments and erections as have a tendency to promote the public convenience." 68 These courts transformed the dilatory device embodied in the original maxim into a mechanism for the permanent denial of injunctive relief. Although this prodevelopmental application of the equity maxim did not amount to the explicit balancing test of a later era, the extreme respect that the chancellor paid to the entrepreneur provided an indication of later developments in the law of nuisance.

Only one court during the period actually adopted an explicit balancing test to determine the propriety of injunctive relief in a nuisance case. In *Grey v. Ohio & Pennsylvania Railroad Co.*, 69 a farmer sought to

65. 55 N.C. 386 (1856).
66. Id. at 391.
67. 20 Ga. 537 (1856).
68. Id.
69. 1 Grant Cas. 412 (Pa. 1856).
enjoin the proposed construction of the railroad. The court, after determining that little damage would be done to the farmer, stated that "under such circumstances the rule in equity requires the court to balance the inconveniences likely to be incurred by the respective parties, by means of the action of the court, and to grant the injunction, or withhold it, according to a sound discretion." 70 It is apparent that the balancing test was framed in Grey in much narrower terms than those in which the courts praised the general value of manufacturing or entrepreneurial investment. The court in Grey focused on the actual harm done to the individual entrepreneur rather than on the value or detriment to the general populace. 71

Equity Will Not Aid Those Who Sleep on Their Rights

Another convenient procedural rationalization that protected the entrepreneur defendant during this period invoked the equitable maxim that the chancellor will not aid those who sleep on their rights. In Dana v. Valentine, 72 Richard Henry Dana and a group of his neighbors sought to enjoin the construction of a soap and candle factory. The defendant, who had operated the business for five years, was planning to rebuild the factory, which recently had been destroyed by fire. The complaint alleged that operation of the business filled the plaintiffs' dwelling houses with "noxious, noxious and offensive vapors, fumes and stenches" and as a consequence the plaintiffs had been unable to sell their houses. Accordingly, the plaintiffs prayed for an injunction against the continuation of the business. After venturing an opinion that the facts proved did not support the allegations, the court rested its decision on the creation of prescriptive rights. The court found that by permitting the use of the defendant's land as a factory, the plaintiffs had, in effect, granted an ease-

70. Id. at 413.
71. Some courts employed a balancing test in public nuisance cases as well during this period. See, e.g., Commonwealth v. Reed, 34 Pa. 275 (1859). But see Works v. Junction R.R., 30 F. Cas. 626 (No. 18,046) (C.C.D. Ohio 1853). For example, the Supreme Court of North Carolina, in an 1844 suit to enjoin the construction of a millpond, wrote that "there is nothing to show us that there is so great a disproportion between the private suffering and the public convenience, as would authorize the court to interfere." Attorney Gen. ex rel. Bradsher v. Lea's Heirs, 38 N.C. 301, 305 (1844). The Supreme Court of Connecticut, in 1845, sending a private plaintiff to state officials so that a public suit might be brought, wrote: "For such an injury it is for the government to interfere, and not a private individual. The court could then look at the rights of the whole community, and not, as in the present case, to those of a single individual." O'Brien v. Norwich & Worcester R.R., 17 Conn. 372, 376 (1845).
72. 46 Mass. (3 Met.) 8 (1842).
ment. This establishment of an easement to create a nuisance was curious, particularly in light of the lack of damage caused by the factory until soon before the action was commenced. The court explained the anomaly by asserting that the plaintiffs previously had been in a position "to maintain an action for the invasion of [their] rights, without proof of damage." The court remitted the plaintiffs to their action at law, which, impliedly, would be adequate.

By permitting an entrepreneur to gain an easement by nuisance after a relatively short period of time, the courts diluted substantially the absolute property rights embodied in the substantive law of nuisance. Furthermore, by determining that the sufferance of noxious fumes and smells created an easement, the court in Dana burdened the complainant with an easement that was a significant disruption of enjoyment of property, rather than a minor physical incursion into his property rights such as might be caused by a pathway or road. It should be noted that, in Dana, the investment of the entrepreneur in the building and equipment was reduced to a negligible factor because of the recent destruction by fire. Thus, the defendant would not have been harmed seriously by the grant of injunction.

Similarly the Supreme Court of North Carolina held laches to bar injunctive relief to a homeowner who contended that a turpentine distillery was a nuisance. The complainant had filed suit immediately upon the erection of the distillery, but, because it took five years for the chancellor to hear the suit, presumably for failure to diligently prosecute, an injunction was denied.

Equity Will Give Relief Only When the Legal Remedy is Inadequate

Another equitable maxim relied upon to deny injunctive relief was that equity jurisdiction was limited to cases in which legal relief would be inadequate. One court's dictum went so far as to state that in private nuisance cases there is always an adequate remedy at law. If this had been adopted as a rule of decision by a significant number of courts,

73. Id. at 14.
75. For other courts during this period applying the laches argument, see Tichnor v. Wilson, 8 N.J. Eq. 197 (1849); Foster v. Norton, 2 Ohio Dec. Reprint 390 (Athens County Dist. Ct. 1860); Warren v. Hunter, 1 Phila. 414 (Pa. C.P. 1853); cf. Coker v. Birge, 9 Ga. 425 (1851).
equitable jurisdiction over nuisances would have been eliminated entirely. In reality, however, though several courts cited this ancient maxim\textsuperscript{77} as authority for denial of injunctive relief, few, if any, discussed its particular relevance in a nuisance case or relied upon it as a sole ground for denial of recovery. An instructive example is \textit{Middleton v. Franklin}.\textsuperscript{78} In that case, the plaintiff, an upstairs tenant, sought to enjoin the defendant from the proposed construction of a steam engine, a furnace, and a boiler in the basement of the house. In addition to the great hazard that assertedly would be created by the small factory, the complainant charged that the great noise and diminution of the value of his leasehold would impair his enjoyment of his leasehold. In a very short opinion, the Supreme Court of California stated that "to entitle a party to an injunction in a case of nuisance, the injury to be sustained must be such as cannot adequately be compensated by damages . . . ."\textsuperscript{79} Without any elaboration or attempt to apply the facts of the specific case to the standard, the court concluded that "the remedy at common law is ample."\textsuperscript{80} Significantly the court did not rely solely on the equitable maxim but asserted also that no injunction would be granted if only a possibility of nuisance in the proposed building existed. Similarly, in \textit{Spooner v. McConnell},\textsuperscript{81} Justice McLean denied an injunction to a property owner seeking to bar the construction of several dams by defendant. The court relied on the availability to the plaintiff of adequate relief in a damage suit at law, but coupled this ground of decision with reliance on the distinction between public and private nuisance.\textsuperscript{82} The claimant, the court held, had not shown special damages sufficient to maintain this action against a public nuisance.

In \textit{Coe v. Winnepiseogee Lake Cotton & Woolen Manufacturing Co.},\textsuperscript{83} the plaintiff sought to enjoin operation of the defendant's dam, which had repeatedly overflowed and flooded the plaintiff's land. The court denied equitable relief, stating: "The destruction of the plaintiff's grass and timber; the deterioration of his land; the throwing it open to cattle, thus rendering additional fences necessary, and the obstruction to

\textsuperscript{77} "Inadequacy of a remedy at law is the foundation stone upon which equity jurisprudence rests . . . ." De Soto Falls Dev. Co. v. Libby, 231 Ala. 507, 508, 165 So. 763, 764 (1936).

\textsuperscript{78} 3 Cal. 238 (1853).

\textsuperscript{79} Id. at 241.

\textsuperscript{80} Id.

\textsuperscript{81} 22 F. Cas. 939 (No. 13,245) (C.C.D. Ohio 1838).

\textsuperscript{82} See notes 97-106 infra & accompanying text.

\textsuperscript{83} 37 N.H. 254 (1858).
the passage of logs... are the usual consequences... for which consequential damages may be recovered, and for which adequate compensation may be given at law. They are not of that ruinous and irremediable character to constitute a case of pressing necessity for arresting them." 84 This reliance on the adequate remedy at law precept is inconsistent with the well established equitable principle that real estate is unique and is not adequately compensated for by recovery of damages. 85 Utilization of this maxim reflected the growing realization by American courts of the 19th century that in some cases property may be fungible, rather than unique. 86 The inadequacy of the damage remedy at law, without removal of the nuisance itself, in most instances should have been obvious: the damages would continue. As one commentator early in the 20th century remarked: "From the very nature of the acts causing the injury, we can hardly imagine a case of nuisance in which an action for damages is an adequate remedy." 87

The failure of the courts to rely on this maxim to any greater extent was an implicit recognition of its weakness. In fact the Supreme Court of Tennessee, in Clack v. White, 88 frankly acknowledged that no adequate legal remedy existed in nuisance suits, noting that property interests, unquantifiable in damages, were always at stake in such cases. The plaintiff in Clack sought to enjoin the obstruction of his right-of-way as a private nuisance; the defendant asserted that the plaintiff had an adequate remedy at law in damages. The Tennessee court rejected the defendant's reasoning, stating: "It is clear, that the remedy at law, for a private nuisance, is imperfect and inadequate, and that a complete and perfect remedy can only be had in a court of equity." 89

Procedural Defenses in Nuisance

The Harmless Building Defense

During the mid-19th century, several courts, citing an early 19th-century decision by Chancellor Kent of New York, 90 denied injunctive

84. Id. at 264.
85. See Kitchen v. Herring, 42 N.C. 190 (1850). Equity adopted this principle "not because [land] was fertile or rich in minerals... but because it was land—a favorite and favored subject in England, and every country of Anglo-Saxon origin." Id. at 192.
87. Lewis, supra note 39, at 289.
88. 32 Tenn. 540 (1852). See also Dennis v. Eckhardt, 3 Grant Cas. 389 (Pa. 1862).
89. 32 Tenn. at 543-44.
90. People v. Sands, 1 Johns. 78 (N.Y. Sup. Ct. 1806). In this case, decided while
relief in nuisance cases on the ground that equity would enjoin only actual nuisances and not prospective ones. The reasoning of the courts was that because equity would enjoin nuisances only “if a private person . . . is in imminent danger of suffering a special injury,” 91 the proposed erection of a building caused no imminent danger. Courts that applied this reasoning, generally in situations in which a factory was to be constructed, developed a dichotomy between per se nuisances and other speculative nuisances. Most decisions held that if a proposed building was to be of particularly noxious quality and would be a nuisance in whatever manner it was operated, it was a per se nuisance and, therefore, enjoinable even before construction or completion. 92 Most suits, however, resulted in findings that the building was not per se a nuisance and its erection, therefore, was nonenjoinable. This prodevelopmental attitude encouraged the construction of buildings. Presumably, the construction itself would confer some economic benefit on the community even if the factory or business as operated proved to be enjoinable as a nuisance.

In Rhodes v. Dunbar, 93 a group of homeowners sought to enjoin the rebuilding of the defendant's planing mill. The mill, which shortly before had been destroyed by fire, previously had produced great amounts of soot, smoke, noise, and dirt. Although apparently conceding that operation of the mill formerly had constituted a nuisance, the court refused to enjoin the rebuilding. The Rhodes court admitted that there were some per se nuisances, such as pigsties and glue factories, the con-

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92. Courts usually cited glue factories, pigsties and similar obnoxious trades as per se nuisances. Cf. Rhodes v. Dunbar, 57 Pa. 274 (1868). The list of per se nuisances, however, was never exactly the same in all jurisdictions. Compare Cheatham v. Shearon, 31 Tenn. 213 (1851) (finding a gunpowder storage house to be a per se nuisance), with People v. Sands, 1 Johns. 78 (N.Y. Sup. Ct. 1806) (finding a similar building not to be a nuisance). The Louisiana court enjoined the construction of a brick kiln, presumably as a nuisance per se, Fuselier v. Spalding, 2 La. Ann. 773 (1847), and the Georgia court enjoined a livery stable, Coker v. Birge, 9 Ga. 425 (1851). Alabama, however, refused to enjoin the construction of a blacksmith shop, Ray v. Lynes, 10 Ala. 63 (1846) and a Pennsylvania trial court, in contrast to the later dicta of its own supreme court in Rhodes v. Dunbar supra, refused to enjoin the proposed construction of a glue factory. Smith v. Cummings, 2 Pars. Eq. Cas. 92 (Pa. C.P. 1851). For other courts applying this device, see Thebaut & Glazier v. Canova, 11 Fla. 143 (1867); Simpson v. Justice, 43 N.C. 115 (1851).
93. 57 Pa. 274 (1868).
struction of which could be enjoined, nevertheless, the court refused injunctive relief because the primary objection of the plaintiffs, the risk of fire, was merely "speculative." The court also recognized that, on the basis of the Rhodes complaint, all industrial construction could have been enjoined since the danger of fire is an inherent risk in the operation of any business enterprise. Given the concern courts of this era expressed for industrialization,94 such a result would be unthinkable. As one court concluded: "[I]f we should establish any other rule we might be compelled to stop much of the business, now safely carried on in the midst of our populous city." 95

At least one court carried the refusal to enjoin a speculative nuisance to its logical extreme. In Dumesnil v. Dupont,96 the Court of Appeals of Kentucky refused a homeowner's bill to enjoin the defendants from operating a powder storage facility unattended. The court conceded that this operation was a great danger and, therefore, a nuisance. It dismissed the plaintiff's bill, however, as speculative on the grounds that there had been no actual damage to the plaintiff; no nuisance could be shown without a physical injury. A broad reading of Dumesnil would have emasculated the substantive law of nuisance.

The Public Nuisance Defense

The common law long had recognized the distinction between a public and a private nuisance97 and traditionally had allowed private individuals to recover damages only if a private nuisance was proved.98 Thus,

94. See notes 123-43 infra & accompanying text.
96. 57 Ky. 637, 18 B. Mon. 800 (1858).
97. Blackstone, writing in 1768, had distinguished between public and private nuisances. He stated that the sole remedy for a public nuisance was an indictment with the exception that "when a private person suffers some extraordinary damage, beyond the rest of the king's subjects', by a public nuisance: in which case he shall have a private satisfaction by action." 3 W. BLACKSTONE, supra note 10 at *220. Professor William Prosser traced nuisance in general back to the time of Bracton and Glanville and public nuisance as a separate, unrelated concept into the 13th and 14th centuries. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 998-99 (1966). For another view of the origins of nuisance law, see Brenner, Nuisance Law and the Industrial Revolution, 3 J. Leg. Stud. 403-08 (1974).
98. See 3 W. BLACKSTONE, supra note 10, at *220. In one of the few private suits for injunction in England during the 18th century, the chancellor denied relief to the plaintiff, asserting that, "if a public nuisance, it should be an information in the name of the Attorney-General, and then it would be for his consideration, whether he would file such an information or not . . . ." Baines v. Baker, 27 Eng. Rep. 105, Amb. 158 (Ch. 1752).
when the injunction became recognized as a possible remedy in nuisance cases, courts generally denied private individuals injunctive relief against public nuisances unless special damage was alleged and proved. The courts, in their willingness to shield the entrepreneur from the injunction, significantly broadened the definition of public nuisance.

Early English common law decisions characterized public nuisance as a low-grade criminal offense that generally encompassed the blocking of a public highway or a navigable stream. Underlying the public nuisance doctrine was the belief that, because the entire community was harmed by the obstruction of the public way, representatives of the public should seek the remedy. Of course, everyone in the community would not use any particular road at one time, so the damage was more theoretical than actual. But because each member of the public had the right to use the road or stream, a nuisance had been committed by the impairment of that right. Even at classical common law, however, a private party showing "greater hurt or inconvenience than any other man" could maintain an action for damages at law.

During the mid-19th century, American courts, armed with hornbook law requiring special damages to be shown for a private party to be entitled to relief against a public nuisance, began imperceptibly to expand the class of public nuisances. For example, in Bigelow v. Hartford Bridge Co., heavily cited by other courts, the complainant asserted that his land would be inundated in rainy weather if a bridge were rebuilt. Without questioning this allegation, the court pointed to the assertion in the complaint that several other properties in the area similarly would be flooded to show that the nuisance, if any, was a public

99. See, e.g., O'Brien v. Norwich & Worcester R.R., 17 Conn. 372 (1845); Bigelow v. Hartford Bridge Co., 14 Conn. 565 (1841); Alden v. Pinney, 12 Fla. 348 (1868); Allen v. Board of Chosen Freeholders, 13 N.J. Eq. 68 (1860); Zabriskie v. Jersey City & Bergen R.R., 13 N.J. Eq. 314 (1861); Higgins v. the Mayor & Common Council, 8 N.J. Eq. 309 (1850); First Baptist Church v. Utica & Schenectady R.R., 6 Barb. 313 (N.Y. Sup. Ct. 1848); Frizzle v. Patrick, 59 N.C. 354 (1863). In Dover v. Portsmouth Bridge, 17 N.H. 200 (1845), the court invoked the public nuisance defense on behalf of the defendant against a municipality, which was held to be the improper representative to bring suit against a public nuisance. See also Mayor v. Alexandria Canal Co., 37 U.S. (12 Pet.) 91 (1838).

100. Prosser, supra note 97, at 999.

101. 3 W. Blackstone, supra note 10, at *220. This principle was accepted in American law as well. See Abbott v. Mills, 3 Vt. 521 (1831); Burrows v. Pixly, 1 Root 362 (Conn. 1792).

102. 14 Conn. 565 (1841).
nuisance not remediable by a private party without a showing of special damages.

The facts of *Bigelow* were quite different from the usual facts in public nuisance suits in which a public road or stream was being blocked. Unlike typical nuisance actions that involved interference with the rights of every member of the public, *Bigelow* involved litigation concerning merely an aggregation of several private nuisances. The court added together these several private nuisances and concluded that they constituted one public nuisance. Of course, under this theory the defendant progressively improved his defenses to litigation by inflicting more damage over a wider territory. Similarly, the Supreme Court of North Carolina, in *Frizzle v. Patrick*, 103 refused to enjoin a defendant whose millpond was, after construction, likely to flood the land of several adjoining land owners. The court, rather than relying on the speculative nature of the nuisance, simply described it as a public nuisance and implied that no private party, under *any* circumstances, could seek relief against it. 104

The transformation of the definition of a public nuisance was recognized implicitly by the Supreme Judicial Court of Massachusetts in 1866. In *Wesson v. Washburn Iron Co.*, 105 the plaintiff sought damages in nuisance for the defendant's operation of a triphammer near plaintiff's home. The defendant asserted the public nuisance defense, claiming that because many other individuals in the immediate area would suffer the same kind of damage, this was a public nuisance. The court recognized that there were two types of public nuisance. The first, which was not remediable by a private party without special damages being shown, was an injury to a common right, like the use of a highway or canal. This was the traditional type of public nuisance recognized by the common law of England. The second category of public nuisance was an injury to the enjoyment of private property or private health, remediable by private parties, though within the authority of public officials as protectors of the aggregate health. An injury to the health or property of an individual "is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause." 106 The court here, perhaps unknowingly, was pointing out

103. 59 N.C. 354 (1863).
104. Id.
105. 95 Mass. (13 Allen) 95 (1866).
106. Id. at 103.
the great expansion that had occurred in the definition of public nuisance by courts eager to protect the entrepreneur.

By requiring that actions to enjoin public nuisances be brought by governmental officials, the courts helped the entrepreneur: prospective plaintiffs would have a political gauntlet to run in order to urge government officials to bring suit. Even if a plaintiff could convince local officials to seek injunctive relief, the court very well might require state officials to bring the action. This was precisely the case in Mayor v. Alexandria Canal Co. The Supreme Court of the United States held that the mayor and councilmen were improper representatives of the citizens of a town seeking to enjoin an aqueduct asserted to be a nuisance. One reason to require the state officials to bring the action would be to present to the court an opportunity to balance the rights and good of the public against any private injury. As one court wrote: "For such an injury it is for the government to interfere, and not a private individual. The court could then look at the rights of the whole community, and not to those of a single individual." 108

A notable reluctance to find special damages typified court decisions of this period. In Alden v. Pinney the defendant was prepared to build an ice house that partially would block access to plaintiff's home. The court, noting that the defendant proposed to erect the structure in shoal water, declared that it was, at worst, a public nuisance and that the plaintiff had not shown special damages sufficient to warrant the issuance of an injunction.

Substantive Law from 1837 to 1870

Remnants of the 18th Century

Although formulated almost a century earlier in a predominantly agrarian society, Blackstone's definition of nuisance heavily influenced American courts of the mid-19th century. An actionable nuisance, in Blackstone's words, "signifies anything that worketh hurt, inconvenience, or damage." 110 A private nuisance, he continued, is "anything done to the hurt or annoyance of the lands, tenements, or hereditaments in the possession of another." T. Wood, An Institute of the Laws of England (9th ed. 1763).
of another." American courts viewed this definition as a mere particularization of the general doctrine of the maxim *sic utere.* In formulation as well as in application, the traditional definition of nuisance was strict both from the plaintiff's and the defendant's point of view.

For the plaintiff, the strict formulation of the traditional doctrine meant that any injury or inconvenience, unless limited by a standard of *de minimis non curat lex,* would be actionable. Thus, in *Cooper v. Randall,* the Supreme Court of Illinois stated that even if smoke entered a plaintiff's house from the defendant's flour mill, or caused the plaintiff inconvenience one day each year, an actionable nuisance existed. The courts entertained no thought of balancing the interests of defendant and plaintiff to define an actionable harm to the plaintiff. No comparison was required of the small degree of harm caused to the plaintiff with the great deal of harm or cost that would be inflicted on the defendant upon a finding of nuisance. Even if some minimal physical intrusion could be demonstrated, so that the issue could be addressed as one of physical trespass, courts viewed the case in a nuisance framework.

The traditional definition imposed strict liability, ignoring any consideration of the care and caution that the defendant, using and exercising his own property rights, was expending. In *Scott v. Bay,* for example, a homeowner sued a defendant for the damage caused by rock quarrying activities conducted near the plaintiff's home. The plaintiff's complaint was framed in both trespass and case, because not only had the quarrying caused noise and commotion, but also some of the defendant's rocks had been thrown onto the plaintiff's property. The defendant requested jury instructions that would release him from liability "if . . . proper precautions were used in working the quarries . . . ." The language was rejected by the court, which asserted that such care and precaution provided "no vindication" for the defendant's conduct in causing the nuisance to the plaintiff. Adoption of the defendant's assertion would have imported into the law of nuisance a negligence standard attractive to the entrepreneur; such a standard, however, was not imposed until the late 19th century.

111. 3 W. Blackstone, supra note 10, at *216.
112. See note 17 supra & accompanying text.
113. 33 Ill. 24 (1869).
114. 3 Md. 431 (1853).
115. An action on the case was the traditional remedy at common law for damages based on nuisance. See 3 W. Blackstone, supra note 10, at *220. This English remedy was transported early into American law. Nichols v. Pixly, 1 Root 129 (Conn. 1789); Burrows v. Pixly, 1 Root 362 (Conn. 1792).
116. 3 Md. at 445.
Only one court during this period purported to adopt a standard of nuisance liability based on fault. In 1851, the Supreme Court of Connecticut held that a defendant could be held liable for a nuisance only if he were at fault.\textsuperscript{117} In applying a fault standard to the facts of the case, the court found a defendant blacksmith liable, holding that fault was demonstrated by his incorrect choice of place to conduct his business.\textsuperscript{118} This was not the kind of negligence standard for which the entrepreneur had hoped; rather, he had sought to be held blameless for damage or interference caused while operating his business in the most reasonable manner possible in the light of current business practice and scientific technology applicable to the trade.

The strict substantive law of nuisance during the years 1837 to 1870 hardly could have provided much encouragement to the entrepreneur seeking to avoid the chancellor’s iron hand. However, the cases in which the courts laid down the traditional strict formulation of nuisance law were suits for damages. Although successful damage suits could be annoying, the entrepreneur could spread the cost of litigation, as well as of the judgments themselves, among investors or consumers, without suffering any permanent interruption of business operations.

Few courts considering anti-entrepreneurial injunction suits announced and applied the traditional strict substantive law of nuisance. The use of the \textit{sic utere} maxim in a few isolated cases can be explained by extraneous factors. In \textit{Brower v. Mayor},\textsuperscript{119} the court warned that “the great injunction of the law, addressed to all proprietors of real estate is ‘so use your own, as not to injure another’ . . .”\textsuperscript{120} This was an unusual case: New York City, defendant in its proprietary capacity, was attempting to construct an immigration receiving station in the midst of a predominantly residential section of the city. Although the grant of the injunction halted construction, the city was not cast in the role of the entrepreneur. In \textit{Wolcott v. Melick},\textsuperscript{121} the Blackstone definition was used but the court was swift to deny the injunction on procedural grounds because of a lack of showing of irreparable injury by the plaintiff. Two other courts used the \textit{sic utere} formulation while deciding injunction suits between two entrepreneurs.\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{117} Whitney v. Bartholomew, 21 Conn. 213 (1851).
\item \textsuperscript{118} \textit{Id.} at 217-18.
\item \textsuperscript{119} 3 Barb. 254 (N.Y. Sup. Ct. 1848).
\item \textsuperscript{120} \textit{Id.} at 257.
\item \textsuperscript{121} 11 N.J. Eq. 204 (1856).
\item \textsuperscript{122} Coker v. Birge, 9 Ga. 425 (1851); Burditt v. Swenson, 17 Tex. 489 (1856).
\end{itemize}
Thus, though the courts defined nuisance strictly, they often avoided application of substantive nuisance law in suits seeking an injunction against an entrepreneur. Apparently, in actions for injunctions a different type of thinking operated to determine the existence of a nuisance than in damage suits.

Substantive Law in Injunction Suits

Because the Blackstone definition was part of the legal orthodoxy of the period, courts were loath to articulate separate rules for determining the existence of a nuisance in suits for injunctions and in suits for damages. Most of these courts, therefore, when considering anti-entrepreneurial injunctions, simply ignored the traditional definition. *Sic utere*, if mentioned at all, was invoked solely for purposes of disparagement. In 1854, the Court of Appeals of New York, in *Auburn & Cato Plank-road Co. v. Douglass* stated: “While, therefore, *sic utere tuo, etc.* may be a very good moral precept, it is utterly useless as a legal maxim . . . .”124 Similarly, two years earlier, a New York court, in *Hertz v. Long Island Railroad Co.*,125 had warned that if the maxim “should be applied literally, it would deprive us to a great extent of the legitimate use of our property, and impair, if not destroy its value.”126 Pronouncements like these were hardly startling and rather predictable when uttered by the highest court in a burgeoning, industrialized state. A relaxation of the substantive law of nuisance in favor of the entrepreneur, however, was not limited to the industrial Northeast.

The Court of Appeals of Kentucky, in *Lexington & Ohio Railroad v. Applegate*,127 issued the frankest acknowledgment of the special consideration the entrepreneur received in the determination of the existence of a nuisance in injunction suits. Suit was brought by 43 homeowners and shopowners in Louisville to halt the operation of a newly constructed railroad that, as the court hastened to point out, carried about 550 passengers daily at a price much less than the fare normally charged for the cabs of the town. The railroad had been erected pursuant to authority in a charter granted by the state legislature. Though the court could have relied on this statutory authority as a defense to the injunction action,128

123. 9 N.Y. 444 (1854).
124. Id. at 445. A cynic might suggest that the reason the rule was considered useless was that it led, in the court’s mind, to the wrong result.
125. 13 Barb. 646 (N.Y. Sup. Ct. 1852).
126. Id. at 658.
127. 38 Ky. (8 Dana) 289 (1839).
128. See notes 144-53 infra & accompanying text.
it purposefully sought more fundamental grounds to justify a denial of the injunction.

Reviewing the substantive law of nuisance, the court broadly stated that "even though some persons owning property on the railroad street, may be subjected to some inconvenience, and even loss, by the construction and use of the road, yet—if the use made of the road be consistent with the purpose for which the street was established, and also consistent with the just rights of all—such persons have no right, either to damages, or to an injunction . . . ." 129 Although this was not the explicit interest-balancing analysis that courts later in the century would adopt, the opinion was favorable to the entrepreneur.

To justify its analysis, the Kentucky court wrote, "the onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times, and will be made or modified by them . . . railroads and locomotive steam cars—the offsprings, as they will also be the parents, of progressive improvement—should not, in themselves, be considered as nuisances, although, in ages that are gone, they might have been so held, because they would have been completely useless, and therefore more mischievous." 130 That a court in a rural state like Kentucky was willing to state openly so pro-entrepreneurial an interpretation of the substantive issue indicates that this same instrumental viewpoint of the law must have influenced other courts of this period.

Although no other decision admitted its bias and loosened the strict law of nuisances as openly as Applegate, a separate standard of decision,

129. 38 Ky. at 301. By rejecting any possibility of damages, the court made it clear it was deciding the case on substantive grounds.
130. Id. at 309. One court during this period did apply a frank balancing test in a trespass case. Writing for the Supreme Court of Georgia, Justice Joseph H. Lumpkin stated:

Under these circumstances . . . seeing the state in which the law appears to stand, without, however, expressing any opinion upon it, and considering that by granting the injunction, I shall be stopping the working of a mine, a thing which of all others this Court is most averse to do; (though it may, under certain circumstances, be compelled to do it;) considering, also, the great expense which has been incurred, and the great injury which, if the Court should turn out to be wrong, would be inflicted on the party claiming the right to work the mine; and, on the other hand, the nature of the injury, which the plaintiff may sustain, if he turns out to be right, I have to determine whether—balancing the question between these two parties, and the extent of inconvenience likely to be incurred on the one side and on the other—it is the most proper exercise of the jurisdiction of the Court to grant the injunction or to withhold it.

or at least a different judicial attitude, that weighed the value of industrialization, was being applied to the anti-entrepreneurial injunction suit. In *Ross v. Butler*, the New Jersey chancellor, ruling on an action brought by two homeowners seeking to enjoin the operation of a pottery, weighed the relative value of the defendant's business against the detriment to the community of that activity, asking whether it would be, "in that neighborhood, and to these complainants, a nuisance." Notably the court enjoined the entrepreneur, despite the espousal of a less strict definition of nuisance. In injunction suits, the courts seemed much more anxious to view the nuisance in its surrounding context than to concentrate on the injury being suffered by the plaintiff. Blackstone had written that a person whose business caused injury should move, despite the public worth of his occupation. *Ross* implicitly rejected Blackstone's thesis, noting that "it is a question of great practical importance in this state, where manufactures flourish, and are on the increase, whether such business can be permitted in the neighborhood of dwelling-houses ...." The courts were quick to consider the general benefits to the community of industrialization. In a suit to enjoin the construction of a railroad and a wharf, in 1859 the Supreme Court of Florida, in *Geiger v. Filor*, posed the following rhetorical question: "What would be the position and situation of Key West, an island in the great ocean, without her admirable and convenient wharves, giving free ingress and egress to her citizens and strangers from all parts of the world and affording almost unequalled facilities for loading and unloading vessels of the greatest burthen?" Predictably, the court found no nuisance.

These references show that courts of this era were conscious of the role of the entrepreneur in the expansion of the American industrial

131. 19 N.J. Eq. 294 (1868).
132. Id. at 297.
133. It is a nuisance "if one's neighbor sets up and exercises any offensive trade; as a tanner's, a tallow chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, *sic utere tuo, alienum non laedas*: this therefore is an actionable nuisance." 3 W. BLACKSTONE, supra note 10, at *217. Viner's abridgement of English law criticized the decision, unpublished elsewhere, in Rankett's Case. In that case, the court held that the "needfulness" of candlemaking would excuse the obnoxious odor it produced. The Abridgement stated: "Whatever Necessity there may be that candles be made, it cannot be pretended necessary to make them in a town." 16.C. VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 23 (1743).
134. 19 N.J. Eq. at 298.
135. 8 Fla. 325 (1859).
136. Id. at 332.
economy. The inclusion of such abundant praise in suits to enjoin the operations of various entrepreneurs indicates that special consideration was being given the defendant’s status as entrepreneur. Even where there was no praise, some courts simply yielded to the inevitability of industrialization. In *Kirkman v. Handy*, the Supreme Court of Tennessee stated that although “a livery stable in a town . . . is, under any circumstances, a matter of some inconvenience” and an interruption in the enjoyment of some property, this also would be true of many other buildings that were indispensable and necessary in towns. These courts did not rely, as they could have, on procedural reasons for the denial of injunctions, rather, they held entrepreneurs blameless by generously applying the law of nuisance. Later in this period some courts extended to damage actions this more tolerant attitude toward nuisance law.

A considerable residue of the traditional thinking about nuisances continued despite the rejection of the Blackstonian and *sic utere* formulations by the courts. For example, the New Jersey chancellor, after speaking of the great importance of manufactures to his state the year before in an injunction case, granted a partial injunction against a gas light factory in *Cleveland v. Citizens Gas Light Co.* He wrote that “any interference with our neighbor in the comfortable enjoyment of life, is a wrong which the law will redress.” Although doubting that

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137. 30 Tenn. 406 (1850).
138. Id. at 409.
139. See notes 50-109 *supra* & accompanying text.
140. See, e.g., *Pottstown Gas Co. v. Murphy*, 39 Pa. 257 (1861), a damage action in which the court approved, in dicta, the lower court’s instructions to the jury, which stated that a certain amount of offensive odor is unavoidably incident to the business of producing gas and must be endured by the public. In the same year, the Supreme Court of Ohio, in a damage action for nuisance against a utility company, required that a material interference, in light of the experience of a “normal” person, was a requirement for liability. *Columbia Gas Light & Coke Co. v. Freeland*, 12 Ohio St. 392 (1861).

During the 1860’s, English courts began to use a much more defendant-oriented standard in the determination of the existence of a nuisance. For example, in *Bamford v. Turnley*, 122 Eng. Rep. 27, 3 B. & S. 66 (Ex. 1862), the court wrote “those acts necessary for the common and ordinary use of land . . . may be done, if conveniently done, without subjecting those who do them to an action.” Id. at 33, 3 B. & S. at 83. *See also* *St. Helen’s Smelting Co. v. Tipping*, 11 Eng. Rep. 1432, 11 H.L. Cas. 642 (H.L. 1865). The entire story of the transformation of nuisance law in England, which is similar to the American experience, is told in Brenner, *supra* note 97.

142. 20 N.J. Eq. 201 (1869).
143. Id. at 205.
the defendant actually could operate the factory without it being a nuisance, the chancellor refused the remainder of the injunction in order to give the defendant such an opportunity.

To avoid the debilitating effects of the prohibitory injunction, the entrepreneur could depend on unarticulated favorable treatment in the determination of the existence of a nuisance. Most courts, believing that industrialization was either a positive social good or an inevitable force, would consider the defendant's status as an entrepreneur. Although the entrepreneur was helped, to some degree, by this groping for a separate standard for the industrialist, a more valuable aid to the entrepreneur was a specific substantive defense that was developed by courts during this period: statutory justification.

**Statutory Justification as a Defense**

Statutory justification\(^{144}\) was the major substantive defense available to the entrepreneur in injunction suits during the mid-19th century.\(^ {146}\) Typically, it would be asserted in a homeowner's suit for injunction against a railroad.\(^ {146}\) The gravamen of the plaintiff's bill usually would

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\(^{144}\) This phrase was coined by Professor Morton J. Horwitz of Harvard Law School. See M. Horwitz, *supra* note 20, at 330.


Statutory justification, as a concept, was not peculiar to this period. It was asserted in an American case as early as 1789. In that case a defendant who had constructed a gristmill that operated as a nuisance to his neighbor, asserted that the license he had obtained to operate the mill was sufficient to protect him from any damage judgments. The Connecticut court rejected this defense, writing: "the license, however it may estop the town from proceeding against the dam as a common nuisance, it can be no excuse or justification for an injury done to private property." Nichols v. Pixly, 1 Root 129, 130 (Conn. 1789). In Chancellor Kent's last opinion he invoked the statutory justification defense to protect the builders of the Champlain Canal against an action for trespass. Jerome v. Ross, 7 Johns. Ch. 315 (N.Y. 1823). For other early applications of the statutory justification defense, see Stevens v. Proprietors of the Middlesex Canal, 12 Mass. 466 (1815); Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694 (1832).

be that a defendant was operating, or was about to operate, a nuisance that interfered with plaintiff's comfortable and peaceful enjoyment of his property. Because the railroad had been constructed pursuant to the authority granted by the state or local authorities, the defendant would contend that such a statutory creation could not be declared a nuisance.

An instructive decision is *Williams v. New York Central Railroad Co.*,¹⁴⁷ in which a landowner coupled a damage claim with an injunction action. The damage claim alleged that there was an unconstitutional taking of the plaintiff's property without compensation; the injunction complaint alleged that the defendant operated a nuisance that not only diminished the enjoyment and comfort he derived from his property, but also seriously impaired the value of the property. The defense stated succinctly: "Where the sovereign law grants the franchise and specifies how it may be enjoyed, the right conferred is absolute, and the only obligation imposed is not to do any unnecessary injury to another."¹⁴⁸ The court, after determining any injury suffered by the plaintiff to be consequential rather than direct,¹⁴⁹ stated the essence of the statutory justification defense: "that which is authorized by an act of the legislature cannot be a nuisance."¹⁵⁰ The court continued, "the annoyances of which the plaintiff complains, are such as are frequently experienced by the dwellers in populous towns and cities, from these and other analogous causes; they are incident to their condition, and they must be endured without redress . . . ."¹⁵¹

Thus, when legislative action implemented industrial activity, the entrepreneur successfully employed statutory justification to erect a "reasonable use" or negligence defense, replacing the strict liability standard of the traditional nuisance law. The courts either implicitly or explicitly held that the behavior of the defendant, which would have been a nuisance at common law, was excused because the state or sovereign had authorized it.

The most vivid example of such deference to the legislature was found in mid-19th century litigation before the Supreme Court of the United States. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*,¹⁵² Pennsyl-

¹⁴⁷. 18 Barb. 222 (N.Y. Sup. Ct. 1854).
¹⁴⁸. Id. at 241.
¹⁵⁰. 18 Barb. at 245.
¹⁵¹. Id. at 247.
¹⁵². 54 U.S. (13 How.) 518 (1851).
nuisance, acting in its proprietary capacity, sought to enjoin the construction of defendant's bridge. The state, having built several railways and canals at public expense, claimed it would suffer irreparable harm if the defendant's bridge were erected; the relatively low height of the bridge would render the Ohio River almost nonnavigable so that ships could not reach Pennsylvania transportation facilities further up the river. Treating the complaint as one sounding in nuisance, the Court enjoined the work as a private nuisance to Pennsylvania in its corporate capacity and ordered the bridge to be built at a higher elevation. In 1854, three years after the original decree, the bridge was blown down by a storm. When the proprietors proposed to rebuild it according to its original specifications, the state again sought an injunction. The Supreme Court denied the application for a new injunction on the grounds that an intervening act of Congress authorized construction of the bridge at the original height. Thus, the Court accepted the statutory justification as authority to build what already had been declared a common law nuisance.

The statutory justification defense had two major implications for the entrepreneur. It immediately protected him from an injunction if he was operating under statutory authorization. Perhaps more important, however, use of the negligence standard in cases based on statutory justification made a negligence standard more acceptable to courts, and may have led to the general acceptance of that standard later in the century.

The Period 1871 to 1916

The period between 1871 and 1916 witnessed the most remarkable economic growth in American history; by 1889, the United States had become the world's leading industrial nation. Not only were old industries expanded, but also new industries, like mining and oil drilling, were developed. For the first time, the value of manufactured goods exceeded income from farm products. Immigration and urbanization increased; as the population center moved westward, natural resources were used more extensively, and transportation became easier as the nation was crossed by an expanded railway system.

Against this background of economic growth, the number of private suits for nuisance injunctions increased, a phenomenon that did not go

154. D. North, supra note 1, at 28.
155. G. Fite & J. Reese, supra note 11, at 296.
156. Id. at 307, 311.
unnoticed by contemporary commentators.\textsuperscript{157} The increasing industrialization and urbanization of the country contributed to the greater frequency of these actions; more potential plaintiffs were created by a greater concentration of population. Moreover, an increased probability of success encouraged more plaintiffs to sue. Another factor contributing to the greater number of suits was the increasingly dominant role of state legislatures in the regulation of industry. The greater assertion of the police power by state legislatures created an atmosphere in which anti-entrepreneurial suits became more attractive. A tangible result of the great legislative output of the period was a large amount of statutory litigation against public nuisances. Most of the legislation was aimed at moral vice, such as drinking, gambling, and bawdy houses, and threats to physical health, such as slaughter houses and hospitals for the contagiously ill. Although few of the parties regulated by these enactments properly could be called entrepreneurs, the increased litigation resulting from such legislation probably earned greater legitimacy for injunctions directed against entrepreneurs. Although the injunction action based on nuisance became more prevalent during this period, the effectiveness of both the statutory justification defense and the public nuisance defense diminished. The defenses were weakened by changing judicial attitudes and the increased availability of other means to avoid injunctions.

The late-19th and early-20th centuries were not, however, an era in which most entrepreneurial defendants were enjoined in nuisance cases. The denial of injunctive relief remained the norm throughout this period. Moreover, the vague pro-entrepreneurial focus of earlier periods became crystallized as nuisance law became increasingly defendant-oriented. Rather than sidestepping the substantive definition of a nuisance, courts changed the law, often imposing a negligence standard for liability. In addition, a new substantive defense, the industrialization defense, was developed.

Procedurally, a formal balancing test replaced the earlier ambiguous standard for determining the propriety of an injunction. This balancing test weighed the probable effect on the defendant of the grant of the injunction against the probable effect on the plaintiff of denial. Those few courts that openly rejected any balancing test invariably applied a

\textsuperscript{157} "The cases in which nuisances were enjoined were not frequent before the middle of the last century, but since that time they have become very numerous, covering a wide variety of states of fact." J. Pomeroy, A Treatise on Equitable Remedies 869 (3d ed. 1905).
loose definition of nuisance. Consequently, the entrepreneur usually
defended himself successfully.

**Diminishment of the Statutory Justification and Public Nuisance**

**Defenses from 1871 to 1916**

**Statutory Justification**

Legal orthodoxy continued to proclaim legislative hegemony for
authorizing activity, by statute or charter, which at common law would
be actionable as a nuisance.\(^{158}\) Thus, in a suit brought in New York in
1872, the conviction on a public nuisance indictment of a defendant that
asserted its actions to be authorized by state charter was overturned.\(^{159}\)
The court assumed that the legislature took into consideration the welfare
of the people, and declared that "the power of the legislature is omnipo-
tent, within constitutional limits . . . if unauthorized by statute, these acts
would be a nuisance."\(^{160}\) Similarly, in a case decided in Iowa in 1895, a
homeowner sought to enjoin the operation of a municipal stockyard that
was injurious to the health of the community.\(^{161}\) The court, however,
refused to grant any injunctive relief because the city was operating the
market pursuant to a valid authorization by the state. So long as the
market was being operated within the terms of the state statute the court
was powerless to interfere. Some states went further and legislated statu-
tory justification protection for their entrepreneurs.\(^{162}\)

There were, however, indications that legislative authorizations were
no longer to be interpreted as broadly as before and that statutory justi-

\(^{158}\) Transportation Co. v. Chicago, 99 U.S. 635 (1878); City of Pasadena v. Stimson,
91 Cal. 238, 27 P. 604 (1891); Bacon v. Walker, 77 Ga. 336 (1886); Vason v. South
Carolina R.R., 42 Ga. 631 (1871); Chicago N. Shore St. Ry. v. Payne, 192 Ill. 239,
61 N.E. 467 (1901); Miller v. Webster City, 94 Iowa 162, 62 N.W. 648 (1895); People v.


\(^{160}\) Id. at 70.

\(^{161}\) Miller v. Webster City, 94 Iowa 162, 62 N.W. 648 (1895).

\(^{162}\) See, e.g., CAL. CIV. CODE § 3482, discussed in City of Pasadena v. Stimson, 91
Cal. 238, 27 P. 604 (1891).

\(^{163}\) 122 N.Y. 18, 25 N.E. 246 (1890).
against all actions that did not claim and prove negligence. The court specifically rejected this defense and granted the injunction, despite an assumption that the defendant was not negligent. The court held that statutory justification gave the defendant neither the right of eminent domain nor any prescriptive rights.

In *Woodruff v. North Bloomfield Gravel Mining Co.*, a California homeowner sought to enjoin a mining company from causing debris to fall onto his land. As mining interests were important to the economy of California, the invocation of statutory justification would have been expected to provide immunity. A federal circuit court, however, granted the injunction despite the assertion of that defense. The court gave little weight to statutory justification and did not even make a finding on the negligence issue, traditionally a prerequisite to entrepreneurial liability under the statutory justification defense.

In *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*, a damage action for nuisance brought by a church against a railroad, the Supreme Court of the United States refused to accept the statutory justification defense. The church alleged that the noise, cinders, and dust created by the operation of the railroad constituted a nuisance that interfered with its conduct of services and halved the value of its property. Despite the charter granted by the state and the necessary creation of noise by the operation of the railroad, the Court upheld an award of damages to the church.

**The Public Nuisance Defense**

Just as the efficacy of the statutory justification defense was vitiated during this period, so the public nuisance defense also became less powerful, though courts still warned plaintiffs that they could not seek remedies for public nuisances without showing they had suffered special damages. Therefore, in *Gates v. Kansas City Bridge & Terminal Railway Co.*, a plaintiff sought to enjoin the construction of a stone pier by a defendant railroad company. The Supreme Court of Missouri accepted the defendant's characterization of its behavior as a public

164. 18 F. 753 (C.C. Cal. 1884).
165. 108 U.S. 317 (1883).
166. See, e.g., Vail v. Mix, 74 Ill. 127 (1874); Pfingst v. Senn, 15 Ky. L. Rptr. 325 (1893); Dudley v. Kennedy, 63 Maine 465 (1874); Gates v. Kansas City Bridge & Terminal Ry., 111 Mo. 28, 19 S.W. 957 (1892); Esson v. Wahier, 25 Ore. 7, 34 P. 756 (1893).
167. 111 Mo. 28, 19 S.W. 957 (1892).
nuisance and refused injunctive relief to the plaintiff for failure to show any kind of special damage different in quality from that suffered by the public. Similarly, in Vari v. Mix, a plaintiff was denied injunctive relief against the reconstruction of a mill. While the Supreme Court of Illinois conceded the allegation that the reconstruction of the mill would create conditions hazardous to the neighborhood, relief was denied on the strength of the public nuisance defense. The plaintiff was directed to seek assistance from the state attorney general’s office; the mere flooding of his land was not sufficient damage to confer standing to seek injunctive relief for a public nuisance.

A discernable change in the definition of public nuisance and in the special damage required to confer individual standing, however, appeared in the decisions of this era, diluting the public nuisance defense. More courts came to rely on the distinction that had been offered in Wesson v. Washburn Iron Co. between two classes of public nuisance, only one of which required some kind of unique injury to confer individual standing. For example, in Roessler & Hasslacher Chemical Co. v. Doyle, the plaintiff sought damages and an injunction against a chemical manufacturer for fumes and other disturbances caused by the production of sodium cyanide. The defendant, asserting that any damage it might be inflicting also was suffered by many of the plaintiff’s neighbors, sought to invoke the public nuisance defense. The court summarily rejected this contention and adopted the Wesson rationale that a defendant could not plead the public nuisance defense merely because many people were injured by the same nuisance.

A similar weakening of the public nuisance defense was reflected in a damage action brought against a tannery that rendered a private home uninhabitable because of the boiling of putrid animal matter. Rejecting the assertions that this was a public nuisance, the court wrote: “The idea that if by a wrongful act a serious injury is inflicted upon a single individual a recovery may be had therefore against the wrongdoer and that if by the same act numbers are so injured no recovery may be had by anyone, is absurd.” Courts were no longer permitting defendants to aggregate individual private nuisances to create an immunizing public nuisance.

A broader definition of special damage enabled plaintiffs of this period

168. 74 Ill. 127 (1874).
169. See notes 82-83 supra & accompanying text.
170. 73 N.J.L. 521, 64 A. 156 (1906).
171. Francis v. Schoellkopf, 52 N.Y. 152 (1873).
172. Id. at 154.
to obtain injunctive relief. In *Reyburn v. Sawyer*, the Supreme Court of North Carolina granted an injunction against a commercial fisherman who had used fish nets to block a publicly navigable waterway near the plaintiff's land. It was not alleged that the plaintiff had any specific interest in the waterway, but relief was granted because the defendant obstructed the free use of property. On identical facts, courts in an earlier period routinely would have denied individual relief.

Finally, in *City of Texarkana v. Leach*, a private homeowner sought to enjoin a city from closing a street running in front of his house. The Supreme Court of Arkansas found it unnecessary to determine whether there was any special damage and enjoined the city "notwithstanding it would affect many others in the same manner." Clearly, plaintiffs more easily satisfied the special damage requirement during this period.

**Procedural Law of Injunctions from 1871 to 1916**

**The Balancing Test**

In the late-19th and early-20th centuries, courts finally articulated a clear standard for determining if an injunction would be granted in nuisance litigation. The vast majority of courts applied a balancing test to determine the propriety of injunctive relief, which weighed the

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173. 135 N.C. 328, 47 S.E. 761 (1904).
174. For a fact situation similar to *Reyburn* in which the Supreme Court of Errors of Connecticut, 59 years earlier, refused injunctive relief, see O'Brien v. Norwich & Worcester R.R., 17 Conn. 372 (1845).
175. 66 Ark. 40, 48 S.W. 807 (1898).
176. Id. at 42, 48 S.W. at 807.
177. See, e.g., Goggans v. Myrick, 131 Ala. 286, 31 So. 22 (1901).
probable effects on the plaintiff, the defendant, and the public of granting or denying relief. The applicability of this test was not limited expressly to suits against businessmen, but by its nature it was relevant only to defendants who had made some major investment. Therefore, the balancing approach served as a device to protect the entrepreneur.

The first American court explicitly to adopt a balancing test to protect the interests of an entrepreneur was the Supreme Court of Pennsylvania in Richard's Appeal. In this 1868 suit, the plaintiff was a homeowner seeking to enjoin the operation of an iron works that produced great amounts of dust, soot, and noise. The defendant's use of bituminous coal was conceded by the court to "materially operate to injure the dwelling-house as a dwelling . . . ." The issue of nuisance itself was apparently decided in favor of the plaintiff. The court, however, hastened to point out that it was a serious mistake to assume that "whenever a case is made out of wrongful acts on the one side and consequent injury on the other, a decree to restrain the act complained of, must as certainly follow, as a judgment would follow a verdict in a common-law court." This statement was neither remarkable nor unique, as many courts previously had enunciated a distinction between the availability of equitable and legal remedies. The Pennsylvania court, however, announced the major consideration that it would use in applying the general standard: "[T]he chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing . . . ." Significantly, the court cited no case to support this approach and made no reference to any generally accepted rule of decision.

Analyzing this new standard, the court recited the great investment in capital machinery and payroll made by the defendant; the defendant's $500,000 investment and employment of more than 800 men were deemed sufficient to outweigh whatever small damage the claimant had incurred. The Richard's court merely weighed the injuries suffered by the respective parties. No overt reference was made to the public interest in receiving the products of defendant's iron works or in a thriving economy. The court, however, was sensitive to the important role played by iron in the state's economy, asserting the defendant's enterprise to be "amongst the most [extensive] . . . of any of [its] kind in the Commonwealth." A more complete formulation of the balancing test appeared

179. 57 Pa. 105 (1868).
180. Id. at 111.
181. Id. at 113.
182. Id. at 113-14.
183. Id. at 111.
in *Demarest v. Hardham*. As stated by Vice Chancellor Van Fleet of New Jersey, "the court is bound to compare consequences. If the fact of an actionable nuisance is clearly established, then the court is bound to consider whether a greater injury will not be done by granting an injunction, and thus destroying a citizen's property and taking away from him his means of livelihood, than will result from a refusal, and leaving the injured party to his ordinary legal remedy..." Fully expressed, the balancing test weighed not only the interests of plaintiff and defendant, but also those of the community and the general public.

*Richard's Appeal*, cited by courts long after it was ostensibly overruled in its own jurisdiction, quickly became recognized as a leading case. Although it appeared in the mid-19th century, the decision represented the thinking of courts into the 20th century. The rule was of obvious value to the entrepreneur who was starting with almost a presumption in his favor. The entrepreneur's expenditures were surely to be significant, particularly in comparison with those of a private homeowner. Even if he were unfortunate enough to be subject to the jurisdiction of a court applying the traditional plaintiff-oriented law of nuisance, an entrepreneur still could rely on the balancing test to protect himself from an injunction. Although a few cases applying the balancing rule granted anti-entrepreneurial injunctions, the overwhelming majority denied injunctive relief. The entrepreneurial defendant also benefited when the procedural balancing test was transmuted by some courts to a test to determine the existence of a nuisance, not simply to assay the applicability of injunctive relief.

184. 34 N.J. Eq. 469 (1881).
185. Id. at 473.
186. In *Evans v. Reading Chem. Fert. Co.*, 160 Pa. 209, 28 A. 702 (1894), the Supreme Court of Pennsylvania affirmed, *per curiam*, a lower court decision granting an injunction in a nuisance case. The lower court had written, in discussing *Richard's Appeal*, "none [of the cases] nor all of them, can be authority for the proposition that equity, a case for its cognizance being otherwise made out, will refuse to protect a man in the possession and enjoyment of his property because that right is less valuable to him than the power to destroy it may be to his neighbor or to the public." Id. at 223, 28 A. at 709. In *Becker v. Lebanon & M. Ry.*, 188 Pa. 484, 41 A. 612 (1818), the court returned to the balancing test delineated in *Richard's Appeal*.
187. Some courts in this era retained the traditional substantive nuisance law. See note 216 infra.
Although all entrepreneurs might have benefitted from the application of the balancing test, it was especially beneficial to those engaged in the extraction of natural resources. For example, in *Bliss v. Anaconda Copper Mining Co.*,\(^{190}\) a Montana farmer complained of interference with the use of his property. Although the court found that the plaintiff's $4,000 investment was rendered virtually valueless by the defendant's smelting operations, it nevertheless denied relief on the basis of three critical facts. First, it found that the defendant had several million dollars invested in its plant and was operating at peak efficiency. Second, the court took notice that Montana was primarily a mining area. Finally, it stressed the manifest congressional policy in favor of the economic development of the area by mining interests. The court predicted a general area-wide depression if it were to enjoin the defendant.

The invocation of the public interest on behalf of the defendant made injunction suits easier to defend. In *Madison v. Ducktown Sulphur, Copper & Iron Co.*,\(^{191}\) a group of farmers sought to enjoin the operation of the defendant's ore reduction plant, which created great quantities of dirt and smoke. The court conceded that the property of the plaintiffs had been "badly injured." The crops formerly cultivated no longer could be grown and the farmland timber was largely destroyed. After examining the entrepreneur's capital investment, the court laid stress on the great damage to the community that would be inflicted by the grant of a prohibitory injunction; over half of the community's tax base would vanish and virtually all of the 12,000 residents would lose their jobs if such relief were granted. Thus, the public interest provided support for the denial of relief against the defendant's operation. In fact, the court, in a reversal of the normal course of argument on the issue of eminent domain, accused the plaintiffs of attempting to take the defendant's property without just compensation.\(^{192}\)

The courts did not require that the economy of the community be totally dependent on the entrepreneur for him to invoke the public interest as a factor to be weighed in his favor. In *Dorsey v. Allen*,\(^{193}\) a homeowner sought to enjoin the construction of a single cotton gin. Although no indication was given that this was the only cotton gin available in the town, the court denied injunctive relief against the nuisance, writing:

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191. 113 Tenn. 331, 83 S.W. 658 (1904).
192. The same plant later was enjoined by the Supreme Court of the United States in a proceeding brought by the state of Georgia. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1906).
193. 85 N.C. 358 (1881).
"[I]t would be an unwise exercise of power . . . for the court to interpose and prevent its being carried out, with its promises of substantial and lasting benefits to a community, because of the discomfort and inconvenience a single family or a small number of persons may experience from its presence in their vicinity, so inconsiderable when weighed in the scale with the public interests." 194 The Supreme Court of Iowa wrote in 1883 that "the inconvenience and annoyance must yield to the public good in so far as the interposition of equity is concerned." 195

Commentators reacted variously to the widespread adoption of the balancing test to determine the availability of injunctive relief. Professor Henry McClintock, writing in 1928, strongly endorsed the balancing concept, including consideration of the public interest as an important factor in the calculation. "It would seem to be clear that the court can and ought to refuse an injunction where to issue it would cause an injury to the public interests out of all proportion to the injury which is caused to the plaintiff by the tort he seeks to enjoin." 196 McClintock, who insisted that the proper term for the process was "balancing the hardships" rather than "balancing the equities," 197 described the procedure as "wise social engineering." A student commentator warned that a contrary rule, which would require an injunction on a mere showing of the existence of a nuisance, "would lead to great hardship, extortionate claims, and economic waste." 198 An author, in the American Law Register, confidently wrote early in the 20th century that "[i]t is surely evident that the general belief and impression in the profession is that courts of equity will weigh the effect of their decrees before making them and that the balance of injury is a most important factor in determining the advisability of . . . action on their part." 199 An even more favorable attitude toward the entrepreneur was expressed by Professor Spelling: "[T]he importance of manufacturing and industrial pursuits generally and the general favor

194. Id. at 361.
196. McClintock, Discretion to Deny Injunction Against Trespass and Nuisance, 12 MINN. L. REV. 565, 573 (1928).
197. Balancing the equities, according to McClintock, was a much broader test, including an examination of motives and the existence of "clean hands." See McClintock, supra note 196.
199. Note, Balancing Injuries in Determining the Right to an Injunction, 54 AM. L. REG. 245, 250 (1906). The author also stated that "[t]he doctrine that every man is necessarily entitled to an injunction . . . when his rights are encroached upon, finds but few precedents in the decisions." Id. at 246. See also Slaymaker, The Rule of Comparative Injury in the Law of Injunction, 60 CENT. L.J. 23 (1905).
with which they are viewed would be sufficient reason for withholding relief by total suppression by injunction except in extreme cases . . . ." 200

Not all the writers favored the new development. Fairly early in the period, in the first American treatise devoted solely to nuisance law, Horace Gay Wood wrote that: "where the right is clear, and the nuisance is established, an injunction will always be granted . . . . When the right and its violation by a continuous . . . act is established, an injunction may fairly be said to be a matter of right." 201 Because Wood wrote early in the period, when the balancing principle was still in its formative stage, he was not forced to address or distinguish the many balancing decisions of the period. Writing in 1905, at the height of the balancing era, however, Professor Pomeroy recognized that the question "has received considerable attention from the courts," 202 but severely criticized the rule. As for balancing the interests of the two parties, Pomeroy stated that "it is anomalous to deny the equitable relief in a case where the legal wrong and the inadequacy of the legal remedy are established." 203 Pomeroy also criticized the courts that used a balancing test that took the public interest into account. "The refusal of the injunction . . . leaves the plaintiff to suffer an admitted legal wrong and to obtain his only redress by an admittedly inadequate remedy." 204 Dismissing as dicta most of the judicial language endorsing the balancing test, he added that if the public interest demanded such use of the defendant's property, then legislative use of the eminent domain power was appropriate. 205

Judicial Opposition to the Balancing Approach

Some courts did not adopt a balancing test on the injunction issue. An outstanding example of this approach is Susquehanna Fertilizer Co. v.

200. T. SPELLING, INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES § 380 (2d. ed. 1901). Spelling added: "In cases of private nuisances a court of equity will balance the inconvenience likely to be incurred by the respective parties in exercising its discretion to grant or withhold relief; and where greater harm would result from enjoining than from refusing to enjoine, the injunction will be refused." Id. at § 417. Cooley, though not advocating a balancing test, pointed out that there were many cases in which damages were proper and a prohibitory injunction was not. T. COOLEY, ELEMENTS OF TORTS (1st ed. 1895).

201. H. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES § 774 (1st ed. 1875).


203. Id. at 906.

204. Id. at 910.

205. Id. at 907 n.155, 907-10. A student writer in 1901 suggested that "it seems best for the courts to allow an injunction whenever a legal right appears and leave any changes necessary to legislation." 14 HARV. L. REV. 458, 459 (1901).
Malone. The plaintiff in *Malone*, a homeowner and hotel keeper, sought damages and an injunction against the defendant whose fertilizer factory emitted noxious fumes and produced great amounts of noise. Pointing to the great amount of money invested in the factory and the public interest in its continued operation, the defendant urged the court to adopt a balancing test. The court specifically rejected the defendant’s argument, stating that “no one has the right to erect... a nuisance... and then say he has expended large sums of money in the erection... while the neighboring property is comparatively of little value.”

The courts rejecting balancing generally explained that the denial of injunctive relief to injured plaintiffs amounted to a taking of property by the defendant. In *Evans v. Reading Chemical Fertilizing Co.*, the Supreme Court of Pennsylvania upheld the decision of a lower court confronted with the many balancing cases: “None [of the cases], nor all of them, can be authority for the proposition that equity, a case for its cognizance being otherwise made out, will refuse to protect a man in the possession and enjoyment of his property because that right is less valuable to him than the power to destroy it may be to his neighbor or to the public.” The antibalancing rule was applied by some courts in riparian rights cases. The most significant case in this group was *Whalen v. Union Bag & Paper Co.*, in which the Court of Appeals of New York held that “[a]lthough the damage to the plaintiff may be slight as compared with the defendant’s expense of abating the condition, that is not a good reason for refusing an injunction.” This holding, though on its facts confined to riparian rights cases, later was alleged to have established an antibalancing rule in nuisance injunction cases.

Entrepreneurs faced with a judicial refusal to balance interests on the injunction issue would have been in serious trouble if these courts had

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207. 73 Md. at 282, 20 A. at 902.


209. *Id.* at 223, 28 A. at 709.


211. 208 N.Y. 1, 101 N.E. 805 (1913).

212. *Id.* at 5, 101 N.E. at 806.

applied the traditional plaintiff-oriented substantive law of nuisance. Courts that rejected the balancing test, however, invariably applied a defendant-oriented substantive law of nuisance. Thus, although these courts were more likely to grant anti-entrepreneurial injunctive relief, they often would not reach the issue of damages, finding no nuisance to be present.

**Substantive Law of Nuisance from 1871 to 1916**

Although the entrepreneur was protected from injunctions by the procedural law of the late-19th and early-20th centuries, he also was aided considerably by a change in the substantive law of nuisance. Although in earlier periods the law clearly was plaintiff-oriented, courts during this period significantly altered the standards used to define a nuisance. Probably the most drastic departure from Blackstone’s orthodoxy was a tendency of courts to define nuisance relative to the effects on the total community and to the interests of the parties and the neighborhood. Although few courts actually adopted a balancing test to define a nuisance, the focus in nuisance law was no longer solely on the plaintiff’s injury. The behavior of the defendant, as well as public interests, were used to determine the existence of a nuisance. The entrepreneur benefitted here directly; not only could antidevelopmental injunctions be avoided, but so could damage judgments. In addition to the relativistic definition of nuisance, the imposition of a negligence standard by some courts, the requirement of material injury, and the introduction of the industrialization defense were advantageous to defendants.

**General Loosening of the Definition of Nuisance**

Most courts during this period moved away from Blackstone’s definition of nuisance. In the earlier periods, courts had considered only the rights of the individual parties in nuisance actions. By the turn of the

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214. See notes 216-51 infra & accompanying text.

215. The Supreme Judicial Court of Massachusetts, for example, in a suit to enjoin the ringing of a factory bell, wrote: “with the increase of population in a neighborhood, and the advancement and development of business, the quiet and seclusion and customary enjoyment of homes are necessarily interfered with, until it becomes a question how the right which each person has of prosecuting his lawful business in a reasonable and proper manner shall be made consistent with the other right which each person has to be free from unreasonable disturbance in the enjoyment of his property.” Sawyer v. Davis, 136 Mass. 239, 240-41 (1884). See also Robinson v. Baugh, 31 Mich. 289 (1875); McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907).
century, however, the focus had widened and courts had begun to take into account a broader range of factors. Considerable attention was paid to all the circumstances, and the relative nature of nuisances was stressed repeatedly. For example, in *McCarty v. Natural Carbonic Gas Co.*, the Court of Appeals of New York, which had rejected the balancing test on the injunction issue, described the law of private nuisance as "a law of degree [which] usually turns on the question of fact whether the use is reasonable *under the circumstances.*" Thus, though there would not be any special consideration to the entrepreneur if the propriety of an injunction were at issue, a question concerning the existence of a nuisance would be resolved by viewing all the surrounding circumstances.

Other evidence of the general loosening of the substantive law of nuisance was the willingness of the courts to criticize plaintiffs who insisted on extreme or technical rights when seeking anti-entrepreneurial injunctions. The traditional definition was rejected flatly by some courts and ignored by most. In *Eller v. Koehler*, the Supreme Court of Ohio, in a suit for damages, reversed a lower court for giving the Blackstone definition in its charge to the jury. Condemning this as "a too literal interpretation of a very old definition of nuisance," the court declared that the issue of nuisance was to be determined by an examination of all of the surrounding circumstances.

Some courts moved close to an explicit balancing test on the merits in an attempt to resolve the dilemma posed by a New Jersey chancellor in 1887: "Is an occupation which is absolutely essential to the welfare of society to be condemned by the courts, to be classified with nuisances, and to be expelled from localities where all innocent and innoxious trades may be carried on?" In *Pennsylvania Coal Co. v. Sanderson*, a plaintiff sought damages from a mining company that had totally destroyed the water supply on the plaintiff’s farm. The court concluded that the plaintiff’s “mere private personal inconvenience . . . must yield

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217. See notes 211-12 *supra* & accompanying text.

218. 189 N.Y. at 40, 81 N.E. at 549 (emphasis supplied).

219. 68 Ohio St. 51, 67 N.E. 89 (1903).

220. Id. at 55, 67 N.E. at 90.


222. 113 Pa. 126, 6 A. 453 (1886).
to the necessities of a great public industry, which although in the hands of a private corporation, subserves a great public interest.” 223 Because Pennsylvania Coal was a suit for damages, this balancing was done on the merits of the existence of a nuisance and was not influenced by fears that the defendant’s business would actually be shut down if the plaintiff were successful. Powell v. Bentley & Gerwig Furniture Co. 224 came close to elaborating an explicit balancing test on the merits. Powell was a suit to enjoin the operation of a furniture factory as a nuisance. The court asserted that “public policy and general convenience require that . . . something more shall be conceded to useful and beneficial work than to useless and idle amusements . . . extreme rights are not enforceable rights.” 225 These courts were applying the same considerations on the substantive issue of nuisance as the majority of courts were applying on the procedural issue of the availability of injunctive relief.

The secondary sources also evidence the development of a less rigid test of nuisance. Pomeroy, one of the strongest opponents of use of the balancing test to determine the propriety of an injunction, 226 justified his opposition by assuming that the balancing test would be applied on the underlying substantive issue. If a nuisance were alleged to be caused by noise, vibration, or pollution of the air, “a balancing of injury . . . [would be], of course, an essential factor in the decision whether any nuisance exist[ed] or not.” 227 In his treatise on the law of nuisance Joyce prefaced a chapter on trades and businesses with the assertion: “what constitutes a nuisance with reference to the carrying on of a trade or business is a question of fact which is not easy to determine.” 228

Several specific manifestations of the relaxation of the harsh standards of Blackstonian nuisance law appeared in the decisions of this period. Virtually all courts required a material injury to be demonstrated by the plaintiff. In addition, some courts moved toward a negligence standard for the imposition of liability. Finally, many courts adopted a new substantive defense of “industrialization.”

223. Id. at 149, 6 A. at 459.
224. 34 W. Va. 804, 12 S.E. 1085 (1891).
225. Id. at 809-10, 12 S.E. at 1087.
226. See notes 202-05 supra & accompanying text.
227. 5 J. Pomeroy, supra note 157, at 903.
228. J. Joyce & H. Joyce, Law of Nuisances § 85 (1906). It is instructive to compare the authors’ relativistic attitude toward business with their general treatment of balancing on the merits of nuisance: “[T]he law will not undertake to balance conveniences or estimate the difference between the injury sustained by the plaintiff, and the loss that may result to defendant from having its trade or business found to be a nuisance . . . .” Id. at § 483.
Material Injury

In contrast to the earlier conception of interference actionable as a nuisance, courts of the late-19th and early-20th centuries required that the plaintiff demonstrate either material or substantial impairment of his rights in property. In *Campell v. Seaman*, for example, the plaintiffs were a group of homeowners seeking to enjoin the defendant’s brick-making, which was demonstrated to be a health hazard. The Court of Appeals of New York, though finding a nuisance to exist and enjoining further operation of the brickyard, warned that the standard it was applying was different from the earlier *sic utere* formulation. Claiming that the maxim “could not be enforced in civilized society,” the court outlined a new test of nuisance: “To constitute a nuisance, the use must be such as to produce . . . injury to neighboring property . . . such as to render its enjoyment specially uncomfortable or inconvenient.”

In *Owen v. Phillips*, a group of homeowners sought to enjoin the operation of a flour mill. The trial judge had added the words “materially and essentially” to the plaintiff’s requested charge, which recited Blackstone’s definition verbatim. The Supreme Court of Indiana upheld this refusal to give the traditional charge and the requirement of material damage to the plaintiff. “If it were otherwise,” the court explained, “all mills and manufactories might be stopped at the demand of those to whom they caused annoyance, even though the injury complained of might be slight and trivial.” Although there traditionally had been a minimum amount of injury required to satisfy the *de minimis non curat lex* standard, earlier courts never had required substantial or material injury as a predicate to nuisance liability. By 1875, however, at least one court, though purporting to apply Blackstone’s definition, had subtly transformed it to state that “everything that disturbs *in an unreasonable degree* the quiet enjoyment of a home or dwelling-house is a nuisance.”

Commentators concurred in this revised definition. Joyce defined nuisance as that which “causes a substantial injury to another either as to his personal or property rights.” Wood, in defining how courts

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229. 63 N.Y. 568 (1876), aff'g 2 Thomp. & Cook 231 (N.Y. Sup. Ct. 1873).
230. *Id.* at 577.
231. *Id.* (emphasis supplied).
232. 73 Ind. 284 (1881).
233. *Id.* at 288.
should behave in the declaration of nuisances, said that courts should "never declare a business a nuisance, except there be such essential injury and damage that the act or thing cannot be justly tolerated without doing great violence to the rights of individuals." 236

By requiring a greater showing of injury on the part of the plaintiff, courts were aiding directly the cause of the defendant entrepreneur. As the courts were handling more and more anti-entrepreneurial nuisance litigation, the substantive law was becoming more defendant-oriented. No longer favorable to plaintiffs, nuisance law was transformed, first proving increasingly advantageous to defendant entrepreneurs; this transformation eventually infused all nuisance law. 237

**Negligence**

Courts also examined the conduct of the defendant to qualify the previously accepted standard of absolute liability for nuisances. During the earlier period liability was absolute, inasmuch as anything done by a defendant that caused actionable nuisance to the plaintiff's property was remediable. Therefore, the courts made no inquiry into the reasonableness of the defendant's use of his property. A negligence standard of liability generally was not recognized in nuisance law, being applicable only to a defense of statutory justification: the defendant was liable for injuries occurring in the course of operations within the statutory authorization only if these activities had been conducted negligently.

The reasonable use defense previously pleaded by defendants in statutory justification became a device frequently used by entrepreneurs. Although many courts still rejected any overt adoption of a negligence standard, 238 other courts accepted a negligence standard in the analysis of the defendant's conduct. In *Windfall Manufacturing Co. v. Patterson*, 239 the plaintiff sought to enjoin the digging of a gas well within 50 yards of his home. The court, defining actionable conduct, stated that the plaintiff could "insist that a business in any degree offensive or dangerous . . . shall be carried on with such improved means and appliances as experience and science may suggest or supply . . . ." 240 Thus, the

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237. A nuisance is a wrong "producing material annoyance, inconvenience, discomfort, or hurt." 66 C.J.S. *Nuisance* § 1 (1950).

238. *See, e.g.,* Pennoyer v. Allen, 56 Wis. 502, 511, 14 N.W. 609, 613 (1883).

239. 148 Ind. 414, 47 N.E. 2 (1897).

240. *Id.* at 421, 47 N.E. at 4.
standard was not whether the defendant was acting to cause injury to the plaintiff but rather whether the defendant was acting as a reasonable man. In *Green v. Lake*, the Supreme Court of Mississippi refused to find a nuisance in the operation of a gristmill, holding that the defendant had a right to operate it if done "without inflicting unnecessary and reasonably avoidable injury on others or their property."  

Even courts that relied on other grounds to deny injunctive relief referred to the negligence standard as a supportive rationale. In *Phillips v. Lawrence Vitrified Brick & Tile Co.*, the Supreme Court of Kansas, after applying a procedural balancing test to affirm a denial of an injunction, noted that "modern methods and appropriate appliance were used by the defendant in the manufacture of the brick and there was no negligence in the operation of the plant." The absence of negligence, according to traditional doctrine, was irrelevant to a determination of the existence of a nuisance. Nonetheless, lack of negligence was cited by many courts to support their refusal to find a nuisance. Joyce, though ostensibly rejecting negligence as a standard to determine if a defendant's behavior constituted a nuisance, wrote "[a business] may, however, be so negligently conducted as practically to become a nuisance, in which case negligence must be shown to entitle a plaintiff to recover damages."  

*The Industrialization Defense*

One outgrowth of the use of surrounding circumstances to define nuisance was the development of a new substantive defense for the industrial entrepreneur. Relying on a decision by the House of Lords, American courts announced the industrialization defense. The substance of this defense was that a defendant, though creating what otherwise would be considered a nuisance in regard to a particular plaintiff, would be shielded from liability if he could show that the general geographical

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241. 54 Miss. 540 (1877).
242. Id. at 547 (emphasis supplied).
243. 72 Kans. 643, 82 P. 787 (1905).
244. Id. at 643, 82 P. at 787.
area in which the defendant was situated had been given over to industrial or nuisance-producing pursuits. The first American court to apply this rule was the Supreme Court of Michigan in a decision written by Justice Cooley, *Gilbert v. Showerman.* The plaintiff, a private homeowner, sought to enjoin the defendant's steam-driven flour mill as a nuisance. Conceding that there was annoyance to the plaintiff and his family, the court nevertheless concluded that because the area already was industrialized there was no enjoinable nuisance. The court wrote that "all that can be required of the men who shall engage in [the most offensive trades] is that due regard shall be had to fitness of locality." 

Although *Showerman* did not render damages unavailable to the plaintiff, courts quickly broadened the defense. In *Bowman v. Humphrey,* the Supreme Court of Iowa declined to award the plaintiff damages because one who lives in an industrial area "may be called upon to submit to some inconveniences arising therefrom ...." Otherwise, the court pointed out, factories and other industrial enterprises only could be built far from human habitation. Similarly, in 1871 the Supreme Court of Pennsylvania wrote that "the people who live in ... a city ... do so of choice, and they voluntarily subject themselves to its peculiarities and its discomforts, for the greater benefit they think they derive from their residence ... there." The entrepreneur had added another weapon to his ever burgeoning arsenal.

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247. 23 Mich. 447 (1871).
248. Id. at 455. The court used a concept akin to Chief Justice Shaw's commonwealth idea. O. Handlin & M. Handlin, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861 (1947). His biographer stated that the commonwealth idea was "one of the major themes" of Shaw's life work. L. Levy, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 305 (1957). As Levy described it, the commonwealth idea was "essentially a quasi-mercantilist concept of the state within a democratic framework. In Europe where the state was not responsible to the people and was the product of remote historical forces, mercantilism served the ruling classes who controlled the state. In America men put the social-contract theory into practice and actually made their government. The people were the state; the state was their 'Common Wealth'. They identified themselves with it and felt that they should share, as of right, in the advantages that it could bring to them as a community. The state was their means of promoting the general interest."

Id. Cooley in *Showerman* relied heavily on Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851), one of Shaw's outstanding decisions outlining the police power in the state.

249. 124 Iowa 744, 100 N.W. 854 (1904).
250. Id. at 745, 100 N.W. at 855.
251. Huckenstine's Appeal, 70 Pa. 102, 107 (1871). See also Hurlbut v. McKone, 55 Conn. 31, 10 A. 164 (1887); Meigs v. Lister, 23 N.J. Eq. 199 (1872); Hafer v. Guynan, 7 Pa. Dist. R. 21 (1897).
Summary

In the period from 1789 to 1836, few plaintiffs sought to enjoin entrepreneurs, despite recognition in England during the 18th century of the injunction as a possible remedy against private nuisance. Those few courts that did consider such suits almost invariably rejected the claim for injunctive relief, refusing to grant nuisance injunctions on procedural grounds and declining to address themselves to the strict substantive law of nuisance.

Between 1837 and 1870, a greater number of nuisance injunction suits were brought as the remedy became a more legitimate part of American law. Entrepreneurs defended themselves by asserting the impropriety of injunctive relief, rather than the nonexistence of a nuisance. The substantive law of nuisance continued to favor plaintiffs despite the unspoken special consideration given to the entrepreneurial defendant. During this period, entrepreneurs asserted also the public nuisance defense, the harmless building defense, and the statutory justification defense to avoid prohibitory injunctions.

From 1871 to 1916, a greater number of injunction suits were brought as the United States became an industrialized power. Although injunctions were granted slightly more often, entrepreneurs gained a greater doctrinal protection. The procedural analysis during this period was characterized by an explicit balancing of the interests of the private homeowner and the entrepreneur, often with the consideration of the public interest, to the entrepreneur's benefit. Additionally, the substantive law of nuisance, at least in cases involving entrepreneurs, increasingly protected defendants. This change protected entrepreneurs not only against the injunction but also against the damage suit.

Although it is not the intent of this Article to assign a causal relationship between legal doctrine and social change, the striking congruity in the 19th-century United States between industrial growth and the development of a nuisance doctrine that increasingly favored the entrepreneur cannot escape notice. As quickly as economic growth magnified the potential for conflict between landowner and businessman, new legal doctrine developed to enable the American entrepreneur to avoid the debilitating effects of the prohibitory injunction. For better or worse, the evolving substantive and procedural law of private nuisance presented few obstacles to continued economic expansion.