

Negotiating NIMBYs: Learning from the Failure of the Massachusetts Siting Law

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Citizens benefit from essential infrastructure like hazardous waste disposal facilities, but they do not want such facilities to be located in their own neighborhood. Local zoning allows communities to keep waste facilities out; as a result, siting them has proven increasingly difficult. Due to the continued need for such infrastructure, states have tried, often unsuccessfully, to combat NIMBYism through preemption of local zoning. In 1981, Massachusetts adopted a siting law designed to use negotiated compensation as a means to overcome the NIMBY phenomenon. Private developers were to bargain freely with communities to establish terms for accepting a facility. The law's subsequent failure to lead to any new disposal sites does not disqualify negotiation as a realistic means of solving or alleviating NIMBYism. In fact, the law's ten year history provides vital insight into the obstacles that prevent parties from successfully negotiating their way around NIMBYism. Wheeler argues that, suitably reformed, the Massachusetts law offers a model way forward for planners and policymakers.

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Introduction

In 1980, Massachusetts adopted an innovative new law to end costly "Not In My Back Yard" ("NIMBY") deadlocks over siting hazardous waste treatment plants. To induce municipalities to accept much-needed treatment plants, the Massachusetts siting law offered host communities compensation. Under the law, the amount and form of compensation was to be decided through a

structured process involving negotiations between the community and the developer. The hope was simple: cities and towns would drop local zoning and regulatory barriers to treatment plants—plants they had always bitterly fought—for a price. Despite its conceptual promise, the Massachusetts law failed in practice to break even a single siting deadlock. This Article argues that the Massachusetts law failed because of the specific way in which it structured compensation negotiation, and not because of the use of negotiation per se. The Massachusetts example should not lead legislators to reject negotiation and compensation schemes; it does, however, provide important caveats for future attempts to find a way out of the NIMBY dilemma through negotiation and host community compensation.

Local opposition to the siting of hazardous waste treatment plants is a specific example of a much larger NIMBY phenomenon. Across the country, citizens who implore elected officials to get tough with crime nevertheless block construction of new prisons in their municipalities. Commuters frustrated with rush-hour traffic lobby for highway expansion—but never through their neighborhoods. Local defiance of projects whose value is widely recognized has become so frequent—and so effective—that “NIMBY” is now standard usage in our political vocabulary. NIMBY problems may arise at both the neighborhood and regional level. But not all opposition to public projects should be classified under the rubric of NIMBYism. There is no problem when citizen groups block costly and dangerous projects that have dubious benefits. In true NIMBY cases, on the other hand, communities affirm the need for a variety of essential public works, but they want it in someone else’s back yard. As a result of the NIMBY problem, if essential facilities do get built, it is only after a long and expensive delay.

As an attempt to overcome the costs of NIMBYism, the Massachusetts siting law was potentially of great significance. If hazardous waste disputes could be resolved through negotiation, then surely other NIMBY deadlocks could be broken as well. Negotiation might solve the troublesome, multi-party prisoner’s dilemma that NIMBYism represents. The Massachusetts law broke new ground by integrating two strategies that were then just emerging in environmental policy-making and regulation: it employed a market mechanism to deal with a problem that had defied standard command-and-control solutions, and it stipulated mediation and arbitration in lieu of the conventional recourse to litigation. The law structured a negotiation scheme in which a targeted community would negotiate for compensation, in any form, with the interested developer. If negotiations failed, state-authorized mediators would intervene; “final and binding” arbitration would occur if mediation failed, with very limited rights of legal appeal. The process established by the statute was both visible and highly participatory, and it was aimed at reaching concrete results in specific target communities. The novelty of the negotiation approach drew

national attention. Several other states enacted their own versions of the legislation.¹

The Massachusetts statute was a conspicuous failure in all seven towns where its negotiation procedure was followed. After a dozen years and tens of millions of dollars spent by state officials, facility developers, and local communities, not one negotiation has succeeded and not a single arbitration hearing has been held. Ironically, the new law became a focal point for community resistance. Residents looked with suspicion at proposed economic incentives and, notwithstanding the threat of adverse arbitration, spurned all offers of compensation. With understandable frustration, Massachusetts environmental officials ultimately urged repeal of the law.

A plausible conclusion to draw from the Massachusetts experience is that there was no bargaining overlap: the maximum in incentives that treatment facility developers could offer was lower than the minimum amount communities were willing to accept to cover perceived costs. While gaps between bargaining positions may occur, this Article argues that there is still hope for negotiation. Negotiation is more than mere economic exchange. At its best, it is a process by which participants give voice to their concerns, define and express their identities, learn about possibilities, and sometimes even reassess their values. The design of the Massachusetts siting process ignored these dimensions of negotiation, which in large part explains its failure.

Part I of this Article examines the origins of NIMBYism and possible strategies for overcoming it. Part II details the problem of hazardous waste facility siting in Massachusetts, the failure of the siting law, and its legislative aftermath. Part III considers how the various stages of the Massachusetts negotiation process exacerbated adversarial behavior and examines basic conceptual flaws in its design. Part IV argues that alternative models of negotiation may still resolve NIMBY conflicts. Finally, a brief conclusion suggests areas for further research on NIMBYism and negotiation.

I. The Nature of NIMBYism

A. *The NIMBY Debate*

Private developers and public officials in charge of siting regional infrastructure are predictably critical of the NIMBY phenomenon, but some prominent environmentalists are also distressed by the consequences of local opposition. While lobbying for substantial cuts in waste production, many state and national environmental organizations have also pushed hard for modern recycling and treatment plants; waste plants like those sought in Massachusetts

1. See, e.g., Minn. Stat. Ann. § 115A (West Supp. 1994).

are intended to reduce soil and ground water pollution. Observers have attempted to understand the NIMBY phenomenon by looking at two potential causes: narrow parochialism and problems of political legitimacy.

1. *Parochialism and the NIMBY Phenomenon*

When it comes to siting waste facilities, the apparent solution to one set of environmental problems may generate another.

If new hazardous waste facilities and landfills cannot be sited, the waste must still go somewhere: to existing, increasingly expensive, and overburdened sites . . . or sometimes to organized-crime fronts, midnight dumpers, or the kind of company that has a driver open the stopcock and drop waste along two hundred miles of rural roads across a dozen counties (a real case in 1978 in North Carolina). And ships and barges full of waste will continue to wander the nation's and the world's waters, looking for places— some legal, others not—to disgorge their cargoes.²

Some local opposition to waste treatment facilities has been well justified, but commentators have pointed to cases in which “the blockage demonstrates a local selfishness and environmental smugness triumphant over broader national values.”³ The local focus of NIMBYism has been condemned as unjustifiably parochial.⁴ National and regional environmental organizations sometimes find themselves in the awkward position of attacking grassroots NIMBY groups for irresponsible buck-passing.⁵

In the eyes of many critics, NIMBYism thus seems like one more discouraging example of rampant selfishness in our society, a single-minded pursuit of parochial interests without regard for the greater good. Communitarians would tell us that the core problem is one of values: we need a new ethic of personal and public decision making that couples individual

2. Frank J. Popper, *LULUs and their Blockage*, in *CONFRONTING REGIONAL CHALLENGES: APPROACHES TO LULUS, GROWTH, AND OTHER VEXING GOVERNANCE PROBLEMS* 13, 19 (Joseph Dimento & LeRoy Graymeyer eds., 1991). Popper coined the term “LULUs”—“locally unwanted land uses.”

3. *Id.* at 19.

4. “It looks at me, myself and mine. We’re losing a sense of community responsibility. There are certain things we generate—waste, traffic and so on—and we have a collective responsibility to deal with these things.” CHARLES PILLER, *THE FAIL-SAFE SOCIETY: COMMUNITY DEFIANCE AND THE END OF AMERICAN TECHNOLOGICAL OPTIMISM* 159-60 (1991) (quoting Ray Brady, an analyst with the Association of Bay Area Governments in San Francisco).

5. PILLER, *supra* note 4, at 165-72.

rights and social responsibilities.⁶ The critics insist that home rule must be exercised in a way that is regionally responsible.

2. *Political Legitimacy*

Other observers are sympathetic to NIMBYism, seeing it as a manifestation of a growing and justifiable distrust of business and government. Daniel Mazmanian and Michael Stanley-Jones warn that:

America appears to be facing a profound crisis of political legitimacy that reaches from the local up through the national level of government. Opposition to LULUs stems often from narrow self-interest or differing perspectives and viewpoints; but possibly most profoundly it stems from a public that does not trust its leaders to make wise decisions.⁷

They contend that the problem goes much “deeper than the need to educate the public better, or to negotiate, or to buy off opposition” through compensation.⁸

Local opponents are often suspicious of the procedures by which siting decisions are made, even when public participation is legally required. For example, the Citizens’ Clearinghouse for Hazardous Waste defines a public hearing as “an event where the public speaks and the officials don’t listen.”⁹ Local opponents harboring that attitude feel no need to play by rules that they think are stacked against them. People who have “little or no faith in dominant institutions” attack the rules themselves and “often try to disrupt official proceedings.”¹⁰

Political alienation can be particularly acute when public health issues seem to be at stake. Some Love Canal residents went so far as to briefly kidnap two federal officials in hopes of getting the government to respond to their relocation demands. Charles Piller notes that “[c]orporate and government officials, scientists, and many environmentalists find this willful unreasonableness chilling, largely because they cannot control or channel it.”¹¹ He concludes: “[S]ociety would do well to stop trying to ‘solve the NIMBY problem’ and to begin exploring ways to make NIMBYism unnecessary. This will require a

6. Richard C. Collins, *The NIMBY Phenomenon: Selfish Interest or a Means to Discussion?*, THE RESPONSIVE COMMUNITY, Fall 1992, 68, 71 (reviewing Denis J. Brion, *ESSENTIAL INDUSTRY AND THE NIMBY PHENOMENON* (1991)).

7. Daniel A. Mazmanian & Michael Stanley-Jones, *Reconceiving LULUs: Changing the Nature and Scope of Locally Unwanted Land Uses*, in *CONFRONTING REGIONAL CHALLENGES: APPROACHES TO LULUS, GROWTH, AND OTHER VEXING GOVERNANCE PROBLEMS* 55, 62 (Joseph Dimento & LeRoy Graymeyer eds., 1991).

8. *Id.*

9. PILLER, *supra* note 4, at 189.

10. *Id.* at 167.

11. *Id.*

radical reappraisal of the relationship between the public and the entire scientific and technological enterprise.”¹²

For some environmentalists, NIMBYism is not justifiable skepticism so much as appropriate policy. NIMBY deadlocks wisely spell a collective BANANA—“build absolutely nothing, anywhere near anything”—or even more strongly, NOPE—“not on planet earth.” In this view, the costs of waste treatment and disposal always exceed benefits. Alternative production technologies and drastically different consumer habits are the only answers; to say “yes” to a treatment facility is to countenance economic behavior that has to be changed. Siting issues are always non-negotiable.¹³

Although the substance of these various assessments of NIMBYism differs, their implications seem consistently bleak. If, on the one hand, NIMBYism stems from fundamental parochialism and selfishness, then fervent pleas for good samaritanism and community sacrifice will fall on deaf ears. If, on the other hand, the real problem is political legitimacy, municipalities will cynically construe the best-intended efforts of the state. Meanwhile, hazardous waste piles up.

B. *The Roots of NIMBYism*

1. *The Economics of Opposition*

For proponents convinced of the need for waste treatment plants and other facilities, and frustrated with the significant social cost of protracted deadlock, local opposition may seem irrational. It is not. Regional recycling and waste treatment facilities generate costs as well as benefits. Strict adherence to government regulations and the best industry practices can reduce, but not eliminate, environmental and public health risks. Dangerous materials must be transported, treated, and stored. The mere presence of such materials may also require expensive monitoring and safety equipment even if no accidents occur.

Such costs may be substantially out-weighed by social benefits both to the environment, in terms of diminished pollution, and to the regional economy, in terms of maintaining the tax base and preserving industrial jobs. However,

12. *Id.* at 195.

13. Richard Gimello, former director of New Jersey’s siting commission, disparages those who would justify their local obstructionism as an indirect way of forcing a “zero-discharge” policy: “People are mixing tactics with policy. When you stop up a toilet, the need to go to the bathroom doesn’t go away.” PILLER, *supra* note 4, at 171.

By contrast, consider the following observation: “Should hazardous-waste disposal problems be viewed conventionally as the unavoidable by-product of ever-expanding industrial production, then the invariable answer is a call for more and more waste-disposal sites. Or simply to send the wastes elsewhere. Alternatively, should it be framed in terms of the physical limits of the earth’s surface to absorb and assimilate hazardous materials or the threat to human health, the past approach of adding landfills and waste facilities will only lead to an eventual policy disaster.” MAZMANIAN & STANLEY-JONES, *supra* note 7, at 56.

the costs and benefits of centralized treatment facilities will necessarily be distributed unequally.

People who think a new facility will leave them much worse off than they would be without it are strongly induced to take action against it; people who each have a little bit to gain from its completion are only weakly motivated to support it. When the losers are few in number and known to each other, they also have the ability to act, while a large number of beneficiaries cannot easily organize themselves to take action. . . . In many cases, therefore, organized local opposition can be expected to prevail independent of the value of the project. The only practical response to this structural "tilt" in favor of local opposition power is to change local motivation to oppose.¹⁴

It is possible that a careful assessment of certain treatment facilities might actually indicate a net reduction of health and environmental risks, particularly if construction of a plant were linked to the clean-up of a previously contaminated site. A carefully monitored plant might pose less risk than the prospect of continued illegal dumping. Typically, however, local residents are skeptical, even hostile, toward such safety claims. Public information campaigns to overcome NIMBY fears have been largely ineffectual. Starting in the 1970s, widespread publicity about hazardous waste problems at Love Canal and other industrial sites heightened fear of health impacts and seriously undermined the credibility of business and government.¹⁵

Even if local citizens can be persuaded of a project's relative safety, however, they are likely to remain concerned about other people's misperceptions. Homeowners may not trust the real estate market to reflect the true risks of a neighboring treatment plant. Citizens may not wish to be thought of as living in the region's dump.

In short, the arrival of a new treatment plant will almost inevitably impose real and perceived costs on its host community: health and environmental risks, added municipal services, and possible loss of property and reputational value. The magnitude of such costs may vary markedly with both the type of facility and the setting in which it operates, but there should be little question about the existence of such costs.

14. MICHAEL O'HARE ET AL., FACILITY SITING AND PUBLIC OPPOSITION 70 (1983).

15. Parts of the New York town of Love Canal had been built on top of a dump containing 22,000 tons of waste chemicals. In 1978 President Carter had declared it a federal disaster area; eventually the government relocated 2500 people and razed a school and 237 homes. See PILLER, *supra* note 4, at 7.

Far from finding the participants irrational, we are struck by the consistency with which parties in siting disputes act rationally and effectively to serve their interests as they perceive them. Thus, we think the failure of our conventional facility siting process lies in a decision-making and interest-balancing structure that frustrates the desires of the participants to cooperate or compete constructively, rather than in any defect in the intelligence or the character of the participants.¹⁶

When every community acts in its self-interest to avoid costs, there may be no place for facilities that would serve the regional welfare. Viewed in the aggregate, such actions have the paradoxical quality of a multi-person prisoners dilemma: the sum of rational individual decisions can produce an outcome that leaves everyone worse off.

2. *The Tradition of Local Autonomy*

In many respects, NIMBYism represents a predictable outcome of the American tradition of vesting land use control at the municipal level. With the power to determine what can and cannot be built within their boundaries, local boards typically zone out costly uses and promote beneficial ones. Multi-family housing is discouraged, in part, because it brings significant social service costs in the form of schools, fire and police protection. By contrast, research and development parks contribute to the local treasury without the demands of costly residential services. Local zoning has also been used to regulate noxious and risky land uses so as to avoid the unwanted imposition of safety, health and environmental costs on property owners.

If land use control were managed at a regional or state level, the NIMBY problem would be significantly recast. Local residents might still oppose the placement of a proposed facility, but lacking legal recourse, they would have to rely on their political clout and savvy to avoid its costs. A more centralized system of land use regulation conceivably could be established in the United States without encountering constitutional obstacles. Municipal power to zone derives from the police power of the state. The range of zoning options available to communities generally depends on the type of enabling legislation passed by state governments. Theoretically, a state could withdraw powers it had previously chosen to delegate to its cities and towns.¹⁷ The Supreme Court's landmark opinion, *Euclid v. Ambler Realty Co.*,¹⁸ which broadly upheld

16. O'HARE ET AL., *supra* note 14, at 2-3.

17. Even in states which have granted some measure of "home rule" to municipalities, the municipalities' autonomy is typically constrained when matters of broader concern are at stake.

18. 272 U.S. 365 (1926).

zoning, acknowledged “the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.”¹⁹

Courts subsequently have made little of this dicta, however, and the Supreme Court in particular has gone to great lengths to avoid involvement in local-regional battles. In *Warth v. Selden*,²⁰ for example, the Court declined to hear on standing grounds the substance of a claim that the snob-zoning practices of an affluent suburb of Rochester, New York were unfairly burdening the central city.²¹ Regionalization is thus permissible though not constitutionally compelled.

State courts, for the most part, have been equally reluctant to strip communities of what they regard as their zoning prerogatives. An instructive exception to this judicial attitude is the *Southern Burlington County NAACP v. Mt. Laurel*²² decision in which the New Jersey Supreme Court imposed on municipalities an affirmative obligation to accommodate a “fair share” of the regional demand for affordable housing.²³ In essence, the court reasoned that because a municipality’s power to zone derives from the police power of the state, and because that power, in turn, is grounded in the general welfare, local zoning must be exercised so as to promote the general welfare—not merely the parochial interests of one community.²⁴

Though not binding on other jurisdictions, of course, the logic of *Mt. Laurel* could apply to any NIMBY problem. Most courts, however, have declined to construe their state constitutions and enabling acts in this way, deferring instead to their legislatures on these issues.

C. *Strategies to Overcome NIMBYism*

Three broad regulatory strategies have been employed to combat NIMBYism: state preemption of municipal authority, compensation awards, and negotiation.

1. *State Preemption of Municipal Authority*

The clash between local control and broader state welfare is a central dilemma for contemporary land use policy and regulation. This policy gridlock is caused by a difference in scale between local government institutions and contemporary land use issues. Regional institutions have been used with varying

19. *Id.* at 390.

20. 422 U.S. 490 (1975).

21. *Id.* at 518.

22. 366 A.2d 713 (1975).

23. *Id.* at 724.

24. *Id.* at 725.

degrees of success to counteract this problem. Metropolitan transit systems, regional water and sewer agencies, and more recently, special air quality districts can all be seen as devices intended to match institutional reach to the scale of particular environmental or social problems.

Many NIMBY issues, however, are not easily addressed through this kind of regionalization. When infrastructure is located in only a few sites, the apparent absence of common benefits and burdens makes it far more difficult to forge a sense of common regional identity and responsibility. Some states have tried, usually unsuccessfully, to deal with such cases on a site-specific basis, either through preemptory legislation or eminent domain actions.²⁵ Municipalities, however, typically have many environmental and safety regulations in addition to zoning that determined opponents can use to tie up seemingly minor permit requests in prolonged administrative battles.²⁶ Local residents can also use state environmental impact assessment procedures to forestall project approval. If those tactics fail, lawsuits and political lobbying remain options.²⁷ In extreme cases, opponents may resort to civil disobedience and violence.²⁸ Massachusetts enacted its siting law in large part because its attempts to preempt local control had been thwarted by lawsuits, political demonstrations, and special bills to protect targeted communities.²⁹

2. *Compensation Awards*

Conceding the practical realities of local political power, some policymakers have approached siting stalemates as a problem of market failure in which communities bearing the immediate costs of hosting a facility are unable to share in its more broadly distributed benefits. If the NIMBY problem

25. See Lawrence S. Bacow & James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 270-75 (1982).

26. *Id.* at 273.

27. *Id.* at 274

28. In Michigan, local residents put nails and tacks on the highways in order to prevent the state from burying cattle contaminated by polybrominated biphenyls. In other jurisdictions, residents have threatened to dynamite existing facilities, and have taken public officials hostage to vent their anger over policymaking processes that failed to adequately address their concerns.

Id. (citations omitted).

29. In Massachusetts, the siting legislation was motivated by a flurry of activity that followed the leak of an executive agency study of possible waste-disposal sites. Two of the sites were in the districts of powerful legislators, who succeeded in getting laws enacted that forbade the construction of any hazardous waste facilities in those locations. Shortly thereafter, the legislature realized that it had probably created a dangerous precedent: as proposed site communities sequentially demanded similar exclusion, a necessary kind of industrial infrastructure might never be built.

Michael O'Hare & Debra Sanderson, *Facility Siting and Compensation: Lessons from the Massachusetts Experience* 12 J. POL'Y ANALYSIS & MGMNT. 364, 365-66 (1993).

is thus redefined, compensation to the facility's neighbors becomes a way of breaking the impasse.

Compensation is not an entirely new response, either in theory or in practice. It has long been an element of neo-classical economic analysis. Indeed, the Kaldor-Hicks test defines a policy as efficient if beneficiaries still favor it after fully compensating those disadvantaged by its implementation.³⁰

A city or town predisposed to fight a waste treatment plant might actively seek one if the developer were obliged to provide sufficient compensation. This compensation would presumably be funded by the treatment fees from plant users throughout the state. Charging consumer fees that properly capture all external environmental and health costs of a facility could overcome market failure. In effect, the plant operator would become a surrogate for the millions benefitting from its opening but who, as noted above, would be hard to identify and impossible to convene.³¹

By fully internalizing social costs, compensation has the added theoretical virtue of promoting efficiency.³² Profit-maximizing operators would have an incentive to seek sites where adverse impacts and hence compensation awards would be minimal. Moreover, compensation awards might mollify some potential opponents. Just as the prospect of an increased tax base and new jobs can build a local constituency for conventional development, the opportunity to win compensation could spawn local support for a controversial project.³³

In the case of a controversial waste facility, there may be heated debate about how much compensation its neighbors must be paid. While steadfast facility opponents may believe that public health and environmental hazards are beyond pecuniary recompense, some states have experimented with compensating municipalities, although payments have been typically limited either by formula or to direct costs.³⁴ Where mandated compensation has been tried, however, it has at best moderated NIMBYism but not overcome it.

30. See EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 279-80 (1978). In the planning field, this test has been advanced by Donald Hagman. DONALD HAGMAN, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 5 (1978).

31. In some respects, this notion of compensation is not all that different from infrastructure charges, betterment fees, and other kinds of special assessments that developers must often pay municipalities. Even with general property taxes, there is some relationship between what owners pay the municipality and the demands they place upon it.

32. See generally RICHARD B. STEWART & JAMES E. KRIER, ENVIRONMENTAL LAW AND POLICY 103-07 (2d ed. 1978).

33. The NIMBY dynamic may be played out within a municipality, because the particular neighborhood hosting the facility would bear most of the costs, while the rest of the community would share in the compensation. Municipalities may also divide into factions, depending on the adequacy of the award.

34. Bacow & Milkey, *supra* note 25, at 276-79.

3. *Negotiation*

The Massachusetts siting strategy—described more fully in the next part of the Article³⁵—added the significant step of allowing developers and communities to negotiate compensation. Instead of establishing a fixed award or formula, the Massachusetts statute directed affected parties to negotiate the amount and form of payment.³⁶ One community might insist on a fund dedicated to environmental monitoring and mitigation; another might seek a more open-ended block grant.

The political symbolism of letting a municipality decide what constitutes acceptable compensation represents a clear departure from regulatory regimes under which the state merely awards damages to a community chosen to host a facility. Negotiating special compensation packages also offers greater efficiency than does using one-size-fits-all formulas. Proposals not yielding enough compensation to satisfy a community are socially inefficient and should not be built, at least not in the sites proposed.³⁷

The notion that siting disputes could be negotiated was an imaginative and propitious break with earlier attempts to dictate where LULUs (locally unwanted land uses)³⁸ should go. In Massachusetts, negotiation appealed to pragmatists eager for any alternative to the “decide-announce-and-defend”³⁹ character of traditional preemptive approaches. It was also supported by those advocating community empowerment. Negotiated compensation, moreover, was in harmony with a growing interest in environmental dispute resolution in a variety of other settings. It emerged alongside negotiated rule-making, joint fact-finding in impact assessment, and the mediation of lawsuits over grant-making and permitting.⁴⁰

Some NIMBY observers, however, are skeptical about whether the contentious cases really can be negotiated. Perhaps “we are dealing here with deep psychological and social attitudes that may well prove impervious to negotiation, mediation, and incentive strategies.”⁴¹ For critics of negotiation,

35. See *infra* pp. 255-64.

36. “The amount and type of compensation to be paid cannot be determined by a technical analysis, but should be negotiated between the developer and the community in an environment of informed debate and interaction.” O’Hare & Sanderson, *supra* note 29, at 366.

37. Such projects are “turkeys” or “nonstarters” in O’Hare and Sanderson’s lexicon. *Id.* at 364-65.

38. See *supra* note 2.

39. Dennis Ducsik has been credited with this crisp description of the traditional siting approach which is now commonplace in NIMBY literature. O’HARE ET AL., *supra* note 14, at 6 (crediting Dennis Ducsik, *Electricity Planning and the Environment: Toward a New Role for Government in the Decision Process* (1978) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology)).

40. See LAWRENCE BACOW & MICHAEL WHEELER, *ENVIRONMENTAL DISPUTE RESOLUTION* (1983); GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* (1986); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE* (1988).

41. LAWRENCE MANN, *WHEN NIMBYs ARE REALLY ABOUT “DIFFERENT” PEOPLE I* (Lincoln Institute of Land Policy, 1992). Mann made his observation in the particular context of siting social service facilities.

the best solution is to document carefully a controversial project's alleged impacts, and let higher legislative and judicial tribunals decide if overall benefits exceed costs. Neighbors might be awarded compensation, but would not be able to defeat the project.

The failure of the Massachusetts process to site even one waste facility would seem to support the skepticism of these critics. Indeed, two policy analysts who contributed significantly to the drafting of the Massachusetts statute have come to a similarly discouraging conclusion: "The NIMBY problem is, at heart, symptomatic of the pessimistic expectations that citizens, industry, and government all hold of each other and themselves; raising those expectations is not a task that can be accomplished by any legislated decision process."⁴²

Does the Massachusetts experience reveal that no zone of negotiated agreement exists? Perhaps the developers were unable to offer enough to satisfy their opposition. If that occurred, economists might infer that perceived costs outweighed benefits, so that the reservation price of neighbors was higher than that of plant operators.⁴³

This interpretation cannot be conclusively disproved, but this Article argues that such a reading is superficial. First, the existence of a bargaining overlap does not necessarily mean that parties will be able to find it. Transaction costs can prevent buyers and sellers from reaching agreements. The Massachusetts siting law may not have eliminated all the causes of market failure. Second, strategic behavior can stymie mutually beneficial agreement. A party may use commitment tactics that lock it into an unrealistic position. Alternatively, a party may present unreasonably high demands, hoping the other side will "blink first"; meanwhile, the costs of prolonged talks can exhaust the potential for joint gains. Third, as an intensely interpersonal process, negotiation is vulnerable to poor communication, cognitive biases, and raw emotion; agreement may elude people just because they cannot see it.⁴⁴ In short, this Article asserts that the problem in Massachusetts may not have been with siting negotiation per se, but with the particular way it was conceived and implemented under the statute.

42. O'Hare & Sanderson, *supra* note 29, at 375.

43. One economic corollary might be that Massachusetts residents are more hostile to hazardous waste than are people elsewhere. Massachusetts residents should then be willing to pay to export their waste to states whose citizens are more tolerant.

44. Robert Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 238-47 (1993) (cataloging an extensive list of obstacles to agreement).

II. Massachusetts' Efforts to Overcome NIMBYism

A. *The NIMBY Problem in Massachusetts*

By the end of the 1970s, the perceived need for state-of-the-art treatment plants was acute both in Massachusetts and elsewhere. Stricter federal and state regulations in the 1970s had radically reduced the number of licensed landfills and waste plants and had also imposed expensive operating conditions on those that remained open. With limited disposal and treatment options locally, Massachusetts industry bore the increasingly heavy costs of out-of-state shipment. Furthermore, environmentalists were learning that as the costs of waste treatment multiplied, the incentive for midnight dumping also rose. Media reports of illegal disposals poisoning municipal well water in suburban Boston pushed responsible waste treatment policy to the top of the state's environmental agenda.⁴⁵

There was broad agreement that Massachusetts needed several modern waste facilities that were large enough to capture economies of scale. While environmentalists lobbied to require new manufacturing processes and materials that would be less hazardous, most people recognized that even if waste problems were tackled aggressively from the production end, a significant amount of toxic residuals would still require treatment. For example, the same computer industry that was prized for creating jobs and for underpinning the tax base of many Massachusetts cities and towns also used dangerous solvents to clean its chips. Few firms could efficiently treat all the waste generated on site. Treatment was also required for hazardous waste in old dumps and abandoned industrial areas.

Notwithstanding this unusual consensus between environmentalists, business people, and state officials, efforts to build new treatment plants were repeatedly thwarted at the municipal level. Local residents, afraid for their health and safety, were unmoved by pleas for the greater good and used municipal zoning and environmental lawsuits to kill planned treatment facilities. Like many other states, Massachusetts had the legal authority to preempt local control, but lacked the political will to do so.⁴⁶

State authorities saw advantage in characterizing the waste treatment problem as one of market failure rather than local autonomy. While the net social benefit of new waste facilities was expected to be substantial, the many citizens who would benefit from the resulting environmental and job protection had no direct way to bargain with those communities fearing adverse impacts. With the NIMBY problem recast in economic terms, its apparent resolution lay

45. Bacow & Milkey, *supra* note 25, at 267; Diane Ripstein, *Chemical Waste Beneath a Massachusetts Town*, *BUS. & SOC'Y REV.*, Spring 1982, at 46, 47.

46. See O'Hare & Sanderson, *supra* note 29, at 365-66.

in redistributing the general benefits of waste treatment to communities that were potentially willing to bear the specific costs of hosting treatment facilities. Compensation to neighbors of the project would be the key to breaking the NIMBY impasse.

B. *Design of the Massachusetts Siting Law*

The authors of the siting statute saw their task as one of eliminating barriers that had prevented waste facility developers and municipalities from making deals on their own.

Parties to a siting dispute have good reasons to negotiate a deal, but important obstacles must be overcome before they can do so. These obstacles can be removed, in many cases, by actions on the part of one or another party, or by government in setting the rules of the game.⁴⁷

Industrial developers are often able to reach agreement with municipal regulators and citizen groups even in the absence of formal negotiation rules. In tightly regulated areas, developers may be required to scale down plans or provide supporting roads and sewers. In other situations the local industrial commission may provide financing and other assistance to lure new business. In both instances, regulatory approvals may be tied to issues of infrastructure, property taxes, and conditions of operation.

There were serious obstacles, however, to informal negotiation over the siting of waste treatment facilities. Some problems involved the process of negotiation. Who, for example, would represent the community at the bargaining table? Without legislative authorization, a deal struck with one agency might be attacked by another or by an ad hoc citizen group. Other problems were substantive. Under existing land use law, for example, a community could only require that direct impacts be mitigated. A demand for compensation unrelated to a proposed plant's operation might constitute regulatory extortion and invalidate local ordinances.⁴⁸

To overcome these potential obstacles, the Massachusetts siting law established a formal negotiation process that redefined substantive rights. Working from a rigorous micro-economic conception of negotiation, the authors of the statute created incentives designed to lead parties away from the courthouse and toward the bargaining table. Parties were permitted to negotiate compensation directly; the amount and form of payment would be determined

47. O'HARE ET AL., *supra* note 14, at 98.

48. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

in discussions over the design and operation of the proposed facility.⁴⁹ Negotiations would be initiated by private, profit-seeking waste management firms responding to the growing demand for their services. In a limited respect, this reliance on market forces was a harbinger of other administrative reforms enacted later in the 1980s. Yet the law represents neither “privatization” nor “deregulation” in intent or substance. The authors of the law spoke of promoting general welfare by breaking the siting stalemate—not of getting government off the backs of business.⁵⁰ Likewise, there was no talk of relaxing state or federal environmental and safety standards; these would be fully enforced.⁵¹ Instead the focus was on creating incentives for private industry and local governments to strike mutually advantageous bargains.

The statute and accompanying regulations contained the following provisions:

1. Preemption of local land use authority. Treatment facilities could not be barred from industrial zones: a community could ban such plants only by barring all industrial uses.⁵²
2. Municipal authority to bargain for compensation, even in forms wholly unrelated to a proposed plant.⁵³ A community could insist upon a new athletic facility or funds for its library; in other contexts, these demands would be regarded as illegal exactions.⁵⁴
3. Designation of local assessment committees as municipal representatives, thus preventing disputes over who could speak for a community in negotiations and bind a community to an agreement.⁵⁵
4. Establishment of a fast-track time table, usually triggered by a developer’s filing a notice of intent to build a facility.⁵⁶
5. Creation of a state Site Safety Council to promote the building of treatment plants. The Council was also designed to assess specific proposals and monitor the conduct of negotiations.⁵⁷
6. Community technical assistance grants for assessment of the environmental and other impacts of a proposed facility.⁵⁸

49. See O’Hare & Sanderson, *supra* note 29, at 366.

50. O’Hare and Sanderson were the principal drafters of the law. O’HARE ET AL., *supra* note 14, at 67-87.

51. *Id.*; Bacow & Milkey, *supra* note 25, at 284.

52. MASS. GEN. LAWS ANN. ch. 111, § 150B; ch. 21D, § 16 (West 1981).

53. MASS. GEN. LAWS ANN. ch. 40A, § 9; ch. 21D, §§ 11-12 (West 1981).

54. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

55. MASS. GEN. LAWS ANN. ch. 21D, § 5 (West 1981); MASS. REGS. CODE tit. 990, §§ 8.01-8.07 (1982).

56. MASS. GEN. LAWS ANN. ch. 21D, § 9 (West 1981).

57. MASS. GEN. LAWS ANN. ch. 21D, § 4 (West 1981).

58. MASS. GEN. LAWS ANN. ch. 21D, § 11 (West 1981). MASS. REGS. CODE tit. 990, §§ 9.01-9.10 (1982).

7. Mediation in cases where developers and local assessment committees were unable to agree.⁵⁹
8. “[F]inal and binding” arbitration were mediation to fail, with very limited rights of appeal.⁶⁰

Collectively, these provisions legitimated and formalized negotiation. The law also significantly recast municipal bargaining power. While diminishing the ability of cities and towns to ban treatment plants outright, it greatly expanded their opportunity to win compensation. Furthermore, the prospect of mandatory arbitration in the event of a negotiation impasse was intended to discourage unreasonable bargaining positions, as the statute gave arbitrators wide discretion in fashioning remedies. Cities that turned down a developer’s offer might be forced by the threat of arbitration to accept a less generous award. Likewise, a developer who refused the demands of a community would run the risk of an arbitrator imposing even more stringent requirements.⁶¹

The sponsors also hoped that the statute would prompt communities to compete for treatment plants. For example, if a facility proposed for City A were to expose nearby City B to many of the same environmental risks and traffic impacts, residents of City B might decide to counter-propose an alternative site and compensation package.⁶² The statute also allowed developers to invite communities to “bid” for projects by stating their compensation requirements. Intercity competition would lead developers to locate facilities where perceived costs were minimized, and thus improve the efficiency of siting decisions.

In sum, the law defined who was to be at the bargaining table, what was negotiable, and where the parties would stand if they were unable to make a deal. Although these reforms relied primarily on market forces, the new Siting Council was intended as a resource for plant operators looking for potential sites, as well as for communities seeking guidance through the negotiation process and help in assessing likely environmental impacts.⁶³ Thus the state would actively lubricate the market with both information and financial support.

59. MASS. GEN. LAWS ANN. ch. 21D, § 13 (West 1981); MASS. REGS. CODE tit. 990, § 11.02 (1982).

60. MASS. GEN. LAWS ANN. ch. 21D, § 15 (West 1981). MASS. REGS. CODE tit. 990, §§ 13.01-13.06 (1982).

61. The symmetry is not perfect; a developer could always choose to abandon its proposal if arbitration made it unprofitable.

62. Under the statute, abutting communities can be awarded compensation for direct costs, but these are determined by the state and are not negotiated between the parties. MASS. GEN. LAWS ANN. ch. 21D, § 14 (West 1981).

63. MASS. GEN. LAWS ANN. ch. 21D, § 4 (West 1981).

C. *A Decade of Experience*

More than ten years have passed since enactment of the Massachusetts Hazardous Waste Facility Siting Act. Despite a decade of substantial public and private effort to make the process work, not one treatment facility has been sited in Massachusetts.

Seven proposals were initiated, and all but two drew heavy local opposition from the outset.⁶⁴ The availability of compensation did little to change the tone and content of local debate; in fact, the suggestion of a "bribe" may have exacerbated contention in certain cases.⁶⁵ In some communities project proponents withdrew after realizing that negotiations were not progressing. In other instances state environmental agencies, concerned about the safety of a proposed facility, finally terminated the negotiations. There was not one siting agreement reached between a developer and a municipality.

Most proposals sparked vehement opposition from the start. The city of Haverhill brought suit against the Siting Council.⁶⁶ The town of Warren tried to defy the preemptive statute, invoking its own local ordinance that purported to ban waste facilities, then found itself sued by neighboring Brimfield.⁶⁷ In Gardner, the developer tried to mollify the community by agreeing to abide by the results of a referendum only to see the community vote three-to-one against the project.⁶⁸

Given the dubious reputations of several plant developers, some of this opposition may have been inevitable. The company proposing a treatment project in Haverhill invited some residents to visit its New Jersey facility; only a few days later the facility suffered a serious explosion and fire.⁶⁹ The would-be developer in Warren antagonized local residents and state officials by refusing to reveal what kinds of wastes it intended to treat.⁷⁰ From the outset, the law cast communities in a defensive posture, forcing them to cope with unfamiliar regulations and to respond to proposals which they neither solicited nor desired. Residents and officials in both Haverhill and Warren first learned

64. See DENIS J. BRION, *ESSENTIAL INDUSTRY AND THE NIMBY PHENOMENON* 7-14 (1991) (describing six of these proposals and the reactions they drew); James L. Franklin, *State May Lose \$50m in Waste Cleanup Funds*, BOSTON GLOBE, Mar. 31, 1991, at 24 (describing community reaction to siting proposal in Orange); EMILIE SCHMEIDLER & PETER M. SANDMAN, *GETTING TO MAYBE: DECISIONS ON THE ROAD TO NEGOTIATION IN HAZARDOUS WASTE SITING* 278-88 (1988).

65. Some backlash in this regard was anticipated. As Bacow and Milkey note, "many people object to the concept of putting a price on health or environmental amenities. These people believe that the environment is to be valued for its own sake . . ." Bacow & Milkey, *supra* note 25, at 277 (footnote omitted).

66. *Id.* at 302-03.

67. *Id.*; SCHMEIDLER & SANDMAN, *supra* note 64, at 281.

68. Bacow & Milkey, *supra* note 25, at 302.

69. SCHMEIDLER & SANDMAN, *supra* note 64, at 280.

70. *Id.* at 281.

that they had been targeted for hazardous waste facilities through press conferences the developers held in Boston.⁷¹

Several other cases were somewhat less contentious, at least at the outset, yet similarly produced no siting agreement. A local civic group in Taunton sponsored a forum on waste issues and built some support for the idea of hosting a treatment facility. When a developer floated a specific proposal, however, it was strongly opposed by local industries concerned that monitoring of the new plant might mean stricter scrutiny for their existing activities. The plan was scuttled before the formal process was ever initiated.⁷²

Wary of these early failures, proponents of plants in Freetown and Orange took a different approach. Both developers pledged to pursue projects only in communities that expressed some interest in hosting sites.⁷³ Further, they would not use the siting law to coerce municipalities into negotiations.⁷⁴ These promises leveled the bargaining table to some extent and mobilized advocates of local economic development. Once again, however, doubts about the track records of the companies and concerns about local environmental conditions ultimately killed both proposals.⁷⁵

The law's final failure was a protracted and highly visible attempt to locate an incinerator in Braintree. The State Secretary for Environmental Affairs ended negotiations by ruling that siting a plant in such a densely populated area was inherently inappropriate.⁷⁶ The Secretary's decision was not made until more than three years of the review process had elapsed and after the investment of fourteen million dollars by the proponent, leading some observers to suspect that the decision was as much dictated by local political pressure as by technical assessments of risk.⁷⁷

71. *Id.* at 279-80.

72. *Id.* at 286.

73. *Id.* at 282; *Massachusetts Denies Extension Request for Only Firm with Hazardous Site Hopes*, STATE ENV'T REP., Aug. 19, 1992; See Ross Gelbspan, *State to Rethink Firm for Waste Site*, BOSTON GLOBE, Nov. 10, 1991, at 31; John Glass, *Recontek Courts Small Town with Big Promises*, BOSTON BUS. J., July 23, 1990, at 1.

74. SCHMEIDLER & SANDMAN, *supra* note 64, at 282; *Massachusetts Denies Extension Request for Only Firm with Hazardous Site Hopes*, *supra* note 73; See Gelbspan, *supra* note 73, at 31.

75. SCHMEIDLER & SANDMAN, *supra* note 64, at 282-83; *Massachusetts Denies Extension Request for Only Firm with Hazardous Site Hopes*, *supra* note 73; See Gelbspan, *supra* note 73, at 31.

76. BRION, *supra* note 64, at 14.

77. The density of Braintree's population and the congestion of its roads may have made it an inappropriate site for the proposed facility. These circumstances were apparent from the outset, however. That it took three years for the Secretary to invoke these as justifications suggests that this may be yet another case where the political voices of highly mobilized neighbors were far louder than those of citizens elsewhere who might have received some benefit from the siting of the plant.

The sense of mistrust increased when the state Secretary of Environmental Affairs unilaterally changed the rules (by requiring a ruling on site suitability that was not called for in the legislation) and again when he demanded unnecessary impact analysis beyond the requirements of the scope. Opponents reasonably interpreted these signals to indicate that the siting process was a facade and that the real game was the familiar one of political pressure and threat. We do not think the secretary intended this result, but we think he could have foreseen it.

None of the seven cases saw the kind of negotiation the sponsors of the Massachusetts statute had hoped to promote.⁷⁸ Some of the negotiations were every bit as contentious as previous “announce-and-defend” actions. Even negotiations that began somewhat more amicably never reached the issue of compensation, although it was supposed to be the cornerstone of the new approach. Faced with entrenched opposition, developers either withdrew their proposals or had them terminated by the State. Despite the sponsors’ intentions, no case ever reached arbitration and outside mediators were never enlisted.

It would be a somewhat different story if all the negotiations had failed, and some proposals ultimately had been arbitrated. Instead the entire system broke down.⁷⁹ Although the siting system’s defeat of unsound or dangerous proposals should be regarded as a virtue, the overall record of the Massachusetts statute clearly is a disappointment. Tens of millions of private and public dollars were spent; the hours invested by business people, citizens, and state and local officials are beyond reckoning. Yet no proposals were approved, and the experience of evaluating one project and rejecting it never prompted a community to solicit more attractive alternatives. No abutting communities ever competed for a proposed facility. Projects that were publicly praised as environmentally sound but wrongly located (like the incinerator in Braintree) never found a more suitable home.

D. *The Legislative Aftermath*

In 1990, shortly after the Secretary’s intervention in Braintree, he and the Commissioner of the Department of Environmental Protection jointly convened a special Siting Policy Task Force to recommend improvements in the siting process.⁸⁰ By the end of the year, the Task Force recommended scrapping the siting law, concluding that it “has proven to be unsatisfactory to project proponents, local communities, regulators and environmentalists. It has forced

O’Hare & Sanderson, *supra* note 29, at 371. Both authors were involved in the drafting of the siting law and the latter counseled Clean Harbors, Inc., the developer in the Braintree case.

78. The posturing and positioning that did take place can be understood in terms of classic bargaining theory. See generally THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* (1980). Threats, preemptive moves, and the imposition of costs were de rigueur, while evidence of a mutual gains or win-win approach was conspicuously absent.

79. Several years after the law was in place, Bacow and Milkey noted:

The intense criticism of the first three proposals filed under the Massachusetts statute should not be interpreted as an indictment of the Massachusetts approach. . . . [It] does not attempt to ignore local opposition but rather to incorporate it into the siting process. If the costs of a proposal outweigh its benefits, then it should be defeated by local opposition.

Bacow & Milkey, *supra* note 25, at 304.

80. Siting Policy Task Force Final Report on Hazardous Waste Facility Siting Process Improvements (Dec. 6, 1990) (on file with the author) [hereinafter Task Force Report]. See also O’Hare & Sanderson, *supra* note 29, at 367-69 (describing the Braintree case).

everyone who has participated in the Siting Process to spend substantial time, money, energy and resources needlessly."⁸¹

The Task Force recommended "total overhaul" of the legislation, abolition of the state Site Safety Council, and creation of a new Hazardous Waste Development Board. This new Board would play an "advocacy" role, and actively promote the siting of new facilities. The Task Force also urged the State to implement a broad waste management plan, make a stronger case for the need for treatment plants, and promulgate general standards for site suitability.

The Siting Council itself subsequently convened a working group which recast the recommendations into proposed legislation, but did not make any major substantive changes.⁸² The Governor's office eventually endorsed the package, and it was introduced in the state legislature in early 1993,⁸³ but no action has been taken and the original siting law remains on the books.

The proposed legislation seeks to resolve policy and technical issues at a general level, rather than case by case. Under the new plan, for example, the State would issue a nonsite-specific "Request for Proposals" (RFP) from private operators. These proposals would then be reviewed to determine which best met the State's waste management needs.⁸⁴ The State would also examine the operator's and project's finances. Once the State approved a proposal, the operator would select a specific site meeting the previously issued criteria.⁸⁵ The operator would then file a "Notice of Intent" (NOI) with the relevant city or town. Instead of initiating a negotiation process, the NOI would freeze zoning regulations; waste facilities would be permitted in any land zoned for industry.⁸⁶

Under this new approach, the State would essentially handle all environmental review of the project. The State would review specific impacts and ensure that the project was consistent with the general RFP. Local Citizens Advisory Committees could participate in the scoping and commentary phases of this assessment process, but would apparently lack decision-making power. The only local control would be exercised by the municipal Board of Health,

81. Task Force Report, *supra* note 80, at 1.

82. Somewhat surprisingly, this review process sparked little public attention and debate; in spite of the wide dissatisfaction with the present statute, there seems to be little enthusiasm for any alternative.

83. H. Res. 4815, Mass. Gen. Sess. (1993).

84. The original statute allowed nonsite-specific proposals. MASS. GEN. LAWS ANN. ch. 21D, § 9 (West 1981). That provision was not really used by developers, though the companies which ultimately proposed facilities in Freetown and Orange asked a large number of communities to respond to their inquiries.

85. "In most instances, the RFP should not specify a location for the facility or the precise technology to be utilized by the candidate operator. Responses to the RFP should also not specify a proposed site, unless the candidate is willing to proceed only at a particular site." Task Force Report, *supra* note 80, at 5.

86. The NOI would also "trigger an entitlement on the part of the site community and any affected community to technical assistance grants paid by the project proponents." The size of a grant would be determined by a formula "based on the estimated costs of the project." *Id.* at 7.

which would issue a “site assignment.” However, the Board would apply the standards of the state Department of Environmental Protection (DEP), not its own regulations.⁸⁷

This recommended process represents a sharp break with the existing system: negotiation has been all but scrapped. The Task Force did note that “a facility developer is free to offer communities additional compensation beyond what is specified under such a formula in exchange for an agreement by such communities not to appeal the DEP licensing decision or the site assignment.”⁸⁸ Unfortunately, nothing in the proposal specifies how such agreements might be reached. Instead of providing for mediation or even arbitration, the new process simply assumes that disgruntled parties will file administrative or legal appeals.

In short, the key elements of the new policy would be: preempting local land use power, giving the state a stronger leadership role, and making a better public case for the need for modern waste treatment. Collectively, the three seem very much like a return to “announce and defend.”

Is the proposed legislation justified by the evident failure of the existing siting law? For many, negotiation has been given more than a fair test. The persistence of the siting stalemate is *prima facie* evidence that these issues simply cannot be settled at the bargaining table. Hard decisions have to be made, and some communities will have to live with the consequences, whether they like them or not.⁸⁹

But “announce and defend” also has a failed past. “In fairness,” the Task Force warned, “the Commonwealth should not ask communities to accept hazardous waste facilities unless it is prepared to articulate clearly why the development of a particular facility addresses an important need of the Commonwealth as a whole.”⁹⁰ It is hardly obvious, however, why statements of general benefit will convince communities to embrace facilities that they currently oppose. Indeed, the Task Force itself concedes that:

87. *Id.* at 8.

88. *Id.*

89. There are ironies in recommending abandonment of a negotiated approach; the most obvious is the apparent willingness to resurrect an “announce-and-defend” system that was deemed unworkable more than ten years ago. There is also irony in the fact that in winning battles under the negotiation statute, communities like Braintree may ultimately lose the home-rule war if a new law further strips them of their power. Moreover, even as the Task Force made its recommendation to abandon negotiation, evidence of successful negotiation surfaced. For example, the Massachusetts Water Resources Authority negotiated agreements with a community to accept waste from newly constructed sewage treatment facilities. These were the result of ad hoc negotiations, not statutorily mandated processes, but they did include compensation. Interview with Paul Levy, Former Executive Director of the Massachusetts Water Resource Authority (May 3, 1994); See Monica Gupta, *The Fore River Shipyard and MWRA: NIMBYism and Negotiations* (May 24, 1993, unpublished manuscript on file with the author).

90. Task Force Report, *supra* note 80, at 2.

Despite improvements in regulation over the past decade, it is impossible to guarantee the neighbors of a proposed facility that there will be no increase in public health, safety or environmental risk from the facility, or that regulatory mechanisms are in place and adequately funded to ensure perpetual compliance with state-of-the-art controls on the facility's operation.⁹¹

Under such circumstances, a better approach is to examine the failure of the siting law in more detail. Its reform may prove more effective than its replacement.

III. Why Did the Massachusetts Siting Law Fail?

With hindsight it is possible to identify specific mistakes in the design and implementation of the Massachusetts Hazardous Waste Facility Siting Act. Section A describes practical problems with the negotiation process, from a developer's initial filing to the specter of final arbitration. Section B reviews the fundamental design flaws underlying these practical difficulties.

A. *Specific Problems of Implementation*

1. *The Notice Of Intent Process*

Most negotiated transactions begin with one party seeking the other out. The Massachusetts siting law stipulated that a negotiation began when a developer filed a NOI to construct a facility at an identified site. To communities, a NOI filing, which simultaneously froze local zoning and started the procedural clock ticking, seemed more like a preemptive strike than an invitation to negotiate. Consequently, local officials never engaged in the cost/benefit analysis envisioned by the law's sponsors, choosing instead to view NOIs as an assault on self-determination. For example, when officials in Haverhill first learned that the city had been targeted for hazardous waste facilities through a press conference held by the developer in Boston,⁹² they responded with a law suit against the Siting Council.⁹³

Launching negotiations preemptively may incur enormous political costs, but informal inquiries also entail risk. Would-be developers may face

91. *Id.*

92. SCHMEIDLER & SANDMAN, *supra* note 64, at 279-280.

93. *See supra* note 25, at 302-03.

disadvantageous zoning changes before a formal NOI is filed.⁹⁴ In addition, determining how much of a development plan should be revealed—and to whom—is an unavoidably awkward exercise. Presenting a full-blown plan may appear preemptive; less developed proposals may lead to local suspicion of information-withholding or a perception of poor planning.

Despite these pitfalls, informal approaches in Freetown and Orange produced better results than the statute's more formal procedures. In Freetown, the developer filed a general NOI without naming a site, stating that it would proceed only in a location nominated by a town. After five communities responded to this invitation, State environmental officials eliminated two as technically inappropriate. The developer chose to deal with Freetown from the remaining three, and astutely made the announcement with town officials.⁹⁵

In the second case, the developer simultaneously contacted many communities, stating that it would file a formal proposal only where there was genuine willingness to negotiate appropriate conditions and compensation. The company promised it would not try to initiate a project where one was not wanted; unreceptive communities could simply ignore the inquiry instead of fighting a NOI. Fifteen municipalities did express interest, and the developer chose Orange from a short-list of three, keeping the others as fall-back options.⁹⁶

The developers in Freetown and Orange could have exercised their statutory rights and begun the siting process by filing formal NOIs. Yet by seeking volunteers, they skillfully changed the political symbolism of the negotiations. Elected officials were already on record as having an interest, albeit guarded, in the projects. Instead of being cast as the vanguard of a town's defense against hazardous waste, local assessment committees were transformed into potential agencies of economic development.

In spite of these more auspicious beginnings, however, talks broke down in both cases. Opposition in Freetown deepened when residents learned that the proposed site was over a large aquifer. Prospects worsened after the selectmen returned from the developer's Pennsylvania facility with the report that no grass grew around it. A subsequent town referendum overwhelmingly rejected the proposal, which the developer, in the face of this resistance and apparently concerned about profitability, then withdrew.⁹⁷ The Orange process ran

94. This dilemma often arises in other regulatory settings. For example, subdividers of land sometimes believe it is necessary to preserve their rights (and their leverage) by filing a plan that maximizes currently allowed density. With their fallback thus covered, they feel that they can safely start a negotiation over possible cluster zoning or some other more imaginative use of the land. What the developer regards as simple self-protection, however, is often read by neighbors and officials as a heavy handed threat, carrying the implicit message: "I will stick you with everything I can, if you do not rezone me."

95. SCHMEIDLER & SANDMAN, *supra* note 64, at 282-283. The statute gives developers the option of identifying a specific site or filing a general notice of intent in which they essentially solicit proposals. MASS. GEN. LAWS ANN. ch. 21D, § 9 (West 1981).

96. See Glass, *supra* note 73, at 1.

97. SCHMEIDLER & SANDMAN, *supra* note 64, at 283.

somewhat longer, but similarly encountered growing opposition as citizens learned about safety problems the developer was having with another facility. State officials finally forced withdrawal of the proposal.⁹⁸

2. *Certifying Feasible Proposals*

The Massachusetts law was designed to filter out proposals lacking engineering or environmental merit. Within just fifteen days of a NOI filing, the Siting Council was obligated to screen the proposal to determine whether it was "feasible and deserving."⁹⁹ Although this procedure was intended merely as a threshold to be crossed before the agency could award technical assistance to a community, the unfortunate choice of statutory language made the "feasible and deserving" designation seem like a hasty endorsement of the proposal.¹⁰⁰ In two instances, the Council insisted on meeting the fifteen day deadline despite local requests to wait until detailed environmental studies were conducted.¹⁰¹ In other cases, controversy over "feasible and deserving" status continued long after the original ruling. For example, the Council initially hesitated when Haverhill petitioned for revocation of the "feasible and deserving" determination in the wake of an explosion at the developer's New Jersey facility. As a result of this preliminary determination, communities believed, virtually from the outset of the siting process, that the Council harbored a pro-developer bias.¹⁰²

Although public distrust of the Siting Council became apparent early on, it was never adequately addressed.¹⁰³ Had the "feasible and deserving" procedure not been mandated by statute, the Siting Council could have screened out fly-by-night-operators by requiring a substantial filing fee.¹⁰⁴ As it turned out, the Siting Council did not press for statutory change, perhaps because it feared that the legislature might wilt under pressure from increasingly agitated communities and make wholesale changes in the role that the State and its agencies played in the siting process.

98. *Massachusetts Denies Extension Request for Only Firm with Hazardous Site Hopes*, *supra* note 73.

99. MASS. GEN. LAWS ANN. ch. 21D, § 7 (West 1981).

100. "[M]any participants incorrectly interpreted that decision as giving a green light to construction of the facility itself, not just continuation of the siting process." O'Hare & Sanderson, *supra* note 29, at 371. O'Hare and Sanderson attribute such misunderstandings to the "pervasive atmosphere of mistrust in Massachusetts politics," though as argued here the design of the siting process itself may well have exacerbated municipal hostility to the state. *Id.*

101. Bacow & Milkey, *supra* note 25, at 302-03.

102. Revocation of the Haverhill developer's "feasible and deserving" status was on and off the Council's agenda, but before it was acted upon, the Governor asked the company to withdraw from the siting process and it ultimately did so. SCHMEIDLER & SANDMAN, *supra* note 64, at 280.

103. *See Id.*

104. *Id.* In essence the Siting Policy Task Force proposed a similar approach.

3. *Scoping Impacts*

A related problem was coordinating the new siting process with pre-existing impact analysis procedures required by the Massachusetts “baby NEPA” statute. In the decade preceding enactment of the Massachusetts siting law, impact analysis had already become a catalyst for many environmental disputes. Opponents of proposed highway programs, new power stations, and other projects routinely went to the courts to compel impact assessment before construction commenced. After construction began, these same opponents challenged the scope and adequacy of the impact assessment.

While it was recognized that such challenges could derail the carefully structured negotiation process, the political climate barred any relaxation of impact assessment requirements. Accordingly, the drafters of the Massachusetts law took impact assessment as it had been practiced and awkwardly knitted it into the new siting law. Specifically, the statute required the project proponent to file a Preliminary Notification Form (PNF) that would encompass both environmental and socio-economic issues.¹⁰⁵ After a twenty day public comment period, the Council was to determine the appropriate scope of the developer’s next submission, a more complete study called a Preliminary Project Impact Report with a Socio-Economic Appendix.

The authors of the law hoped that the reports would be “the basis for negotiations between the developer and the host community.”¹⁰⁶ Once the precise project impacts were carefully identified, the parties supposedly could bargain over appropriate mitigation and compensation. The Siting Council and the Executive Office of Environmental Affairs would approve a final impact report only after the developer and the community had reached a negotiated agreement.

Unfortunately, the attempt to link siting negotiation and impact assessment was poorly conceived. First, reliance on standard environmental review procedures meant that the Massachusetts siting process was saddled with many of the political problems that had bedeviled impact assessment. If would-be plant operators produced anything less than a catalog of worst case scenarios, they risked community accusations of bad faith and deception. Moreover, a fair list of potential disasters would likely destroy all community support. The dilemma was particularly acute because developers were supposed to bargain next with critics who inferred the worst motives from any errors or omissions in the environmental study.

Second, by making the Siting Council responsible for determining the scope of a developer’s studies, the impact assessment procedures further

105. Submission in most cases was due after the ninety day comment period that followed the Council’s “feasible and deserving” determination. *Id.* at 277.

106. Bacow and Milkey, *supra* note 25, at 283.

compromised the Council's desired neutrality. The comment period that followed the submission of the developer's PNF was almost certain to produce demands for expanding the geographic area and range of issues to be studied. Skeptics could interpret Council denial of any such requests as further evidence of pro-developer bias.

Third, the law's approach betrayed a stilted view of negotiation, which assumed that formal impact assessment would identify a list of issues to be jointly resolved. Although nothing barred negotiations from beginning earlier, they were not encouraged to commence until after the Council had approved the PNF.¹⁰⁷ By not supporting earlier developer-community negotiations over the scope and method of impact analysis, the statute increased the risk that developers would polarize issues and damage their credibility by making unilateral determinations. The authors of the law may have hoped that the Siting Council's ruling on the scope of subsequent studies would narrow the negotiating agenda. Yet it seems unrealistic to assume that citizens and municipal officials who publicly assailed a developer's proposed studies would then accept the Council's verdict as to scope and placidly go on to negotiate compensation.

Some of these difficulties might have been tempered by encouraging developer-community negotiation of the scope and method of environmental reviews. Joint determination of the geographic area to be studied, the kinds of impacts to be identified, and how they would be measured could have given the findings more credibility. That mutual exercise might also have served as a first step in establishing a more constructive negotiating relationship.¹⁰⁸ The sponsors of the Massachusetts statute hoped to avoid the "announce-and-defend" pitfalls of site selection, but created exactly the same dynamic with the impact assessment procedure.

4. *The Use of Technical Assistance*

Concerned that most siting negotiations would involve small, semi-rural communities lacking in engineering expertise, the state authorized provision of technical assistance grants to local assessment committees. Municipalities, it was thought, would use these funds to hire independent, reliable experts, who would objectively assess developers' information and analysis. "Notice that when a party to negotiations is buying information to form his own position in the negotiations, he has no incentive to deceive himself or to obtain

107. O'HARE ET AL., *supra* note 14, at 184.

108. It has been suggested that the sharing of information and ideas might even produce more reliable scientific data. BAČOW & WHEELER, *supra* note 40, at 76-103.

propaganda. He wants as nearly correct a reading of the situation as he can obtain."¹⁰⁹

This optimism was not borne out: communities regularly used the money for adversarial studies.¹¹⁰ The belief that communities would invest in dispassionate studies derived from an exchange view of negotiation which posits that a party will weigh an offer against the likely consequences of nonagreement; success depends on a shrewd weighing of costs and benefits. Communities had a different view of negotiation. Intent on blocking proposed treatment plants, they used the grants to hire friendly expert witnesses. Why underwrite an "objective" assessment if you suspect the other side of twisting the facts to favor its self-interest? If a court or arbitrator is expected to split the difference between the parties' claims, moderation earns no reward.¹¹¹ The same logic held true when communities lobbied the Siting Council, other state agencies, and the governor for relief. Dire forecasts make good headlines.¹¹²

The Siting Council could have moderated this behavior by conditioning technical assistance grants on local willingness to have a community's consultants share information and agree on a common methodology with a developer's experts. Granting a different State agency funding discretion might have lessened the appearance of developer bias by the Council. Instead, the Council found itself in an increasingly adversarial relationship with communities requesting ever more technical aid.

5. *Absence of Effective Mediation*

The Council's own regulations authorized an independent mediator if, among other things, the Council determined that negotiations were "not progressing in a satisfactory manner."¹¹³ Notwithstanding repeated stalemates, however, outside mediation was never attempted, even in the most contentious

109. O'HARE ET. AL., *supra* note 14, at 172. This assumption may be valid in other situations. For example, a prospective buyer of a house should want an inspection that identifies the true nature and costs of necessary repairs before making a bid; an erroneous list of problems could scare the buyer away from otherwise attractive property.

110. "For example, Braintree received several hundred thousand dollars in *technical assistance grant* money from the state, foreseen in the legislation as a source of consulting expertise to empower the community in negotiations. It used these funds instead to hire lawyers to oppose the project and obstruct the process . . ." O'Hare & Sanderson, *supra* note 29, at 369.

111. Technical reports that alleged environmental problems might also be used to substantiate permit denials from local boards of health. Under a parallel portion of the siting legislation such agencies retained jurisdiction over some technical issues. MASS. GEN. LAWS ANN. ch. 111, § 150B (West 1981).

112. A negotiation analyst might question the logic of killing a proposal without studying its consequences. If time and money were not constrained, there would be strategic advantage in keeping two sets of impact books: one public, for litigation and lobbying; and a second confidential, to evaluate the desirability of possible deals. In the real world, however, resource scarcity forces consideration of different research investments before their relative value becomes clear. In an emotionally charged atmosphere, few public officials will fund studies that might produce unpopular results.

113. MASS. REGS. CODE tit. 990, § 11.02(2)(b) (1986).

cases. This failure may have been due to institutional politics, but it may also reflect too narrow a conception of mediation.

The regulatory language suggests that mediation was meant to give the parties a last chance for agreement before arbitration intervened. Such a notion would be akin to conventional collective bargaining in which a neutral party is called in to avert a strike. Some traditionalists in the field of labor relations believe that parties become serious about negotiation only when the specter of a strike or lock-out looms.¹¹⁴ The hard choices and decisions necessary for parties to resolve a dispute are unlikely to be made until all sides realize disaster is imminent.¹¹⁵

Commentators have challenged the appropriateness of the crisis intervention model of mediation, even for labor disputes.¹¹⁶ In any event, the collective bargaining model offers a poor analogy to siting decisions.¹¹⁷ Even in bitter labor disputes the parties usually share a common past and future that dampens extreme behavior. Experienced negotiators may threaten a plant shut-down, yet privately recognize the high costs of impasse. Siting negotiators have no such common history from which to draw guidance.¹¹⁸ Even more importantly, siting negotiators do not necessarily share a future: the paramount goal of some local citizens is to make sure that they never have a waste facility in their neighborhood. Such people will feel no obligation to create a constructive working relationship. The project proponent may have a longer view, but will lack credibility with local parties. These strangers must nonetheless cope with difficult engineering, public health, and financial issues in an unfamiliar regulatory context. Saddling them with the added burden of managing a complex, multi-party negotiation may well have asked too much.

The failure even to try independent mediation might seem surprising given the simultaneous use of innovative consensus-building techniques in other environmental disputes.¹¹⁹ Indeed, in 1987 Massachusetts actually created the State Office of Mediation to promote such approaches.¹²⁰ Part of the reason why mediation was not pursued more actively was political. Despite the drafters'

114. *E.g.*, JOHN T. DUNLOP, DISPUTE RESOLUTION: NEGOTIATION AND CONSENSUS BUILDING 15-16 (1984).

115. *Id.*

116. CHARLES HECKSCHER, THE NEW UNIONISM (1988).

117. Lawrence Susskind and Alan Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 331, 334-36 (1980).

118. One exception in Massachusetts was the Clean Harbors proposal in Braintree. The company had operated an incinerator in that community for more than a decade.

119. BINGHAM, *supra* note 40. *See also New State Offices of Mediation Bring Total to 12*, CONSENSUS (MIT-Harvard Public Disputes Program, Cambridge, Mass.), Apr. 1993, 1, 5 (announcing the creation of two state mediation offices to promote nontraditional conflict management techniques).

120. There are critics of this trend. *See* Douglas Amy, *Environmental Dispute Resolution: The Promise and the Pitfalls*, in ENVIRONMENTAL POLICY FOR THE 1990s 211, 221-32 (Norman Vig & Michael Kraft eds., 1990).

intentions to establish the Siting Council as an explicitly neutral entity,¹²¹ numerous stages of the negotiation process, especially certifying feasibility and controlling limited technical assistance funds, undermined this essential objective. With the Siting Council widely perceived by communities as a hostile, pro-developer force, the prospects for effective mediation by the State were severely constrained.

6. *Arbitration Procedures*

In the event of impasse, the Massachusetts siting statute required “final and binding arbitration” of siting agreements.¹²² The statute empowered the Siting Council to declare a stalemate as early as sixty days after approval of the preliminary project plan, although the agency did have discretion to postpone such a finding on the joint request of the developer and the local assessment committee to prolong the negotiations.¹²³ Council oversight and the short time frame were intended to spur the parties to serious bargaining.

The design of the arbitration procedure undermined much of the political legitimacy and scientific credibility of the siting law. Notwithstanding the engineering, scientific, economic, and ethical complexities of hazardous waste facility siting, the statute vested almost unbridled discretion in the arbitrator, merely instructing him or her to “resolve the issues in dispute between the local assessment committee and the developer.”¹²⁴

Detailed regulations would seemingly have been an invitation to lawsuits by disgruntled parties claiming that the arbitrator had deviated from the provisions. But the absence of standards meant that important siting decisions were seemingly left to a flip of a coin.¹²⁵ Unelected and unaccountable to the public, the arbitrator was virtually insulated from all judicial review.¹²⁶ Some supporters of the law extolled this capriciousness as a virtue.

If the parties fear that the arbitrator will (inevitably) understand the issues imperfectly and will not be sensitive to either party's interest

121. Under the siting law, the Massachusetts Department of Environmental Management was given responsibility for attracting potential developers of treatment plants. In turn, the Department of Environmental Quality Engineering—since renamed the Department of Environmental Protection—would enforce regulations and grant permits. It was precisely because these two agencies were publicly perceived as prodevelopment and proenvironmental respectively that the statute authorized a new entity, the Site Safety Council, to oversee the negotiation process and play a facilitative role. O'HARE ET. AL., *supra* note 14, at 183.

122. MASS. GEN. LAWS ANN. ch. 21D, § 15 (West 1981).

123. MASS. GEN. LAWS ANN. ch. 21D, § 15 (West 1981).

124. *Id.*

125. See generally Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 970 (1979).

126. Indeed, the statute played legal brinkmanship with established principles of administrative law, notably limits on delegation, but survived a test challenge. *Warren v. Hazardous Waste Facility Site Safety Council*, 466 N.E.2d 102 (Mass. 1984).

as well as the parties' representatives themselves, then the threat of arbitration should provide an incentive to negotiate. To put it another way, the parties may settle merely to avoid the "roll of the dice" . . .

¹²⁷

Arbitration thus was intended, in part, to serve as a doomsday device so unpredictable and dangerous that the negotiators would seldom, if ever, resort to it.

Such a prescription is consistent with the game theoretic, microeconomic orientation of the siting law. Negotiation analysts have long been fascinated by so-called chicken contests. In the same spirit, the Massachusetts siting process was designed to make the parties act like pedestrians handcuffed together in the path of an on-coming vehicle: they could avoid a collision with the arbitrator only by mutually deciding which way to jump.

In the abstract, this black box form of arbitration may have given the Massachusetts siting process a certain perverse elegance, but more than ten years of stalemated negotiations presents strong evidence that such a device does not work. If anything, negotiators were apparently quite willing to stand firm in the face of arbitration and wait for the other side to capitulate. As it happened, no one blinked.

To make matters worse, the negotiation compelled by the statute was not truly symmetrical. A private developer would propose and build a new plant only if it seemed potentially profitable. The firm could drop out of the process any time the costs of pursuing approvals further seemed likely to outweigh expected benefits.

By contrast, communities, having lost their sovereignty over land use, ostensibly were given little choice but to negotiate.¹²⁸ Arbitration might offer some refuge if a developer offered too little compensation, but here too, risks and burdens were not symmetrical. If an arbitrator ordered too generous a benefits package, the developer could simply elect not to build the facility.¹²⁹ Yet if the arbitrator erred in the other direction by awarding too little, the municipality would have to swallow the result.¹³⁰ The municipality might conceivably still pursue administrative appeals of any permits awarded by state

127. O'HARE ET. AL., *supra* note 15, at 170.

128. This asymmetry is in contrast to collective bargaining, in which extreme behavior on the part of both labor and management is typically constrained by a common interest in the economic health of the business. In siting disputes there is no underlying sense of a shared fate.

129. Doing so would mean swallowing the considerable sunk costs of negotiation and permit processing, although those costs should not bear on the economic wisdom of further investment. The municipality would incur negotiation costs, too.

130. Bacow and Milkey do not see the asymmetry as being so stark. "Similarly, an arbitration award is not binding on a host community because the community can subsequently attempt to withhold the site assignment permit or challenge the state's grant of a construction and operation license." Bacow & Milkey, *supra* note 25, at 289 (footnote omitted).

and environmental agencies, or lobby fiercely for legislative relief, but these actions would be thin reeds on which to cling.¹³¹

The Massachusetts statute was intended to be a departure from the old “announce and defend” approach to siting, but arbitration still cast the threatening shadow of state preemption. Intent on forcing an end to stalemate, the architects of the new process seemingly overlooked how people’s passions about local autonomy would poison the atmosphere for negotiation. Instead, formal economic analysts simply stipulated arbitration and assumed that rational actors would seek to maximize their welfare accordingly. In practice, however, many communities refused to accept either the legitimacy of arbitration in particular, or the siting process in general. Accordingly, they acted to subvert both. This was hardly irrational, even in the economic sense: communities who wanted to stymie the state and vindicate their autonomy were successful.

B. *Design Flaws in the Massachusetts Siting Process*

The failure of the Massachusetts siting law is not an indictment of siting negotiation per se. In light of the foregoing experience, it is possible to identify three fundamental flaws in the statute’s design: first, the requirement that communities negotiate; second, the needlessly adversarial nature of the bargaining process; and third, an insufficiently neutral state role in mediation and facilitation. These reflect an overarching error: an insistence on conceptualizing negotiation in narrow economic terms and a concomitant lack of attention to process considerations. Had these problems not existed, stalemate might still have occurred; but with these problems, it was virtually inevitable.

1. *The Paradox of Mandatory Negotiation*

Negotiation is usually thought of as a consensual process in which parties are free to make a deal or walk away from one. By contrast, the Massachusetts siting law compelled cities and towns to negotiate.¹³² The Massachusetts mandate was backed up by the prospect of “final and binding arbitration” in the event of impasse. Some legislators insisted on this provision in the belief

131. In assessing the Massachusetts approach, three closely-involved analysts concluded, “[W]e think its most likely mode of failure will be that neighbors of *some* proposed facilities will not believe that a negotiated settlement could be a more useful strategy for them than fighting tooth-and-nail; the community that fights tooth-and-nail will probably succeed in deflecting new development.” O’HARE ET. AL., *supra* note 14, at 171.

132. The National Labor Relations Act similarly compels labor and management to negotiate in “good faith,” and there has been much litigation over the years about the operational meaning of this phrase. See, e.g., *NRLB v. American Nat’l Ins. Co.*, 343 U.S. 395 (1952). In the labor context, however, the parties are under no compulsion to come to a resolution. Nonagreement does not necessarily mean bad faith. While the government can declare temporary cooling off periods in certain instances, as a general matter it cannot order binding arbitration.

that merely compelling people to come to the table was not enough. The goal, after all, was to site new waste treatment facilities. If negotiation failed, some fall-back supposedly was necessary.

From a strictly utilitarian perspective, the compulsion to negotiate might not seem to matter; parties should rationally weigh the proposals on the table against the consequences of nonagreement, whether parties are bargaining on their own accord or under the force of law. To act otherwise would be "irrational."¹³³ As a matter of politics, however, people reacted negatively not only to proposed projects, but also to a perceived lack of power to block them. The compulsory aspect of the process became a lightning rod for deeply held views about home rule and local autonomy.¹³⁴

Many of the sponsors of the siting statute were surprised by the political backlash that it provoked. They had created the negotiation process, after all, as an alternative to outright preemption of local land use control. Communities were to be given a chance to influence the design and operation of a facility and to win compensation.

In practice, however, most communities saw matters very differently. Stripped of their traditional zoning and land use authority and ordered to the bargaining table, small cities and towns targeted for waste treatment plants did not feel empowered by the new siting statute. Distrustful of the State's motives and threatened by the cocked gun of arbitration, they were forced to play by rules they had had no hand in writing. Mandatory negotiation thus compounded feelings of political alienation. The compulsory nature of the negotiations may also have aggravated communities' environmental and health concerns. Individuals and groups strongly resist involuntary risks, yet willingly tolerate greater risks that are voluntarily assumed.¹³⁵

133. This term carries a pejorative connotation. As Bacow and Milkey note, "consumers do not always conduct the rational risk-benefit analysis that is attributed to them by economists." Bacow & Milkey, *supra* note 25, at 277. Sometimes "irrational behavior" reveals not an inadequacy on the part of decision-makers, but a failure of an economic model to capture all the pertinent considerations.

134. Braintree tried to "withdraw" from the siting process at one point, though it had no legal right to do so. The city returned to the bargaining table only when the state threatened to award its technical assistance grants to two abutting communities. A year later the local assessment committee again defied the law by withdrawing and refusing to disband. New ad hoc groups of citizens took its place. O'Hare & Sanderson, *supra* note 29, at 368.

135. For example, people resist involuntary risk exposure more keenly than voluntary risk exposure. . . . Willingness to tolerate risk is also related to the perceived balance between beneficiaries and cost bearers. This is possibly more a matter of the perceptions of "justice" than risk; the greater the symmetry between the costs and benefits, the more willing are people to tolerate risks for themselves and others. Finally, people are more prone to accept the risks associated with new technologies when they are clearly linked to new jobs, economic growth, and an increased standard of living.

Mazmanian & Stanley-Jones, *supra* note 7, at 57.

To make matters worse, of course, the adversary politics of siting risky facilities can encourage parties to exaggerate or understate the supposed dangers of a project. However, Jack Kartez notes that collaborative negotiation may allow for a more constructive resolution of highly technical disputes, provided that differences in perceptions are squarely acknowledged and people learn to reframe problems. Jack Kartez, *Rational Arguments and Irrational Audiences: Psychology, Planning, and Public Judgment*, 55 J. AM. PLAN.

Thus provoked by the heavy-handed aspects of the siting process, local residents never saw negotiation as the “win-win” opportunity the sponsors had envisioned.¹³⁶ While orthodox decision analysts might label the behavior of these residents as “irrational,” such condemnation is probably unwarranted.¹³⁷

The political costs of compulsion may have seemed unavoidable to the law’s sponsors; their goal, after all, was to prevent parochial responses to the siting of facilities needed by the State.¹³⁸ Consensual negotiation must have appeared to be an unlikely substitute for the bitter siting battles of prior years. But experience in the Freetown and Orange cases suggests that negotiation need not have been compelled and that preemption of local land use control was perhaps unnecessary.¹³⁹ Although the Freetown and Orange proposals were eventually rejected like the rest, they suggest that negotiation may take place not only in spite of a lack of compulsion but because of it.

Moreover, the years after enactment of the siting statute witnessed some encouraging cases of successful environmental negotiation. Paradoxically, even as there were repeated failures under the siting law, the Massachusetts Water Resource Authority (MWRA) was able to negotiate compensation agreements with two different municipalities over storage and treatment of sludge from newly constructed sewage facilities. The MWRA experience has yet to be formally documented, but the apparent parallels and contrasts with the cases under the siting law are quite provocative.¹⁴⁰ Both sets of cases involved conflicts between regional needs and local costs, and both governing agencies saw compensation as a key to unlocking any impasse. However, the MWRA’s negotiations were entirely ad hoc, with none of the formalities or obligations dictated by the siting law.¹⁴¹ Those who advocate negotiation should ponder the

Ass’N 445, 451 (1989).

136. It may be a long way from laboratories and classrooms to the real world of public policy, but researchers at Cornell have concluded that students who play prisoner’s dilemma and similar games become more selfish and competitive after having studied microeconomics. Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, J. ECON. PERSP., Spring 1993, at 159.

137. “The [negotiation] game is simply that which the parties act as if it is.” James K. Sebenius, *Negotiation Analysis: A Characterization and Review*, 38 MGMT. SCI. 18, 31 (1992).

138. Not long before the siting law was enacted, several municipalities that had been under active consideration for hazardous waste facilities had successfully lobbied for special state legislation that exempted them from further consideration as sites. Bacow & Milkey, *supra* note 25, at 273.

139. See BRION, *supra* note 64, at 12; Glass, *supra* note 73, at 1; SCHMEIDLER & SANDMAN, *supra* note 64, at 282-83.

140. Interview with Paul Levy, former Executive Director of the Massachusetts Water Resource Authority (May 3, 1994); see Gupta, *supra* note 89. As an independent government authority, the MWRA could marshal state resources, tangible and political, that would be beyond the reach of a private developer. Also, its treatment facilities may have been perceived as less threatening, although they certainly prompted opposition. Perhaps most importantly, the community that agreed to deal with the MWRA was also a beneficiary of its harbor clean-up and new infrastructure activities.

141. The authors of the original siting law should not be faulted for failing to learn from negotiations which then had not taken place, but it is curious that much later the Task Force that recommended scrapping the negotiation strategy took no apparent notice of the MWRA’s success in reaching agreements with communities. Other kinds of NIMBY disputes may provide important lessons as well. Affordable housing issues are different from waste treatment concerns, although not necessarily less controversial, but these cases

fact that where it was mandated, it failed; but where it was improvised, it succeeded. This scant evidence does not support a broad conclusion that it is futile to formalize negotiation, but it does suggest that mandating negotiation can backfire.

2. *Adversarial Nature of the Process*

By establishing gun-point negotiation, the siting law imparted a strong adversarial cast to the resulting encounters. The statute permitted open-ended offers, like those that developed into the Freetown and Orange proposals, but most would-be facility developers apparently felt that it was enough to comply with the letter of the law and start the negotiation process with a notice of intent. By taking that initial step, developers sparked disputes that could only escalate.

The law sent local officials and private citizens a decidedly mixed message: it asked them to negotiate creatively with the facility developer while implicitly encouraging them to arm in case of arbitration. In retrospect, the siting statute did not adequately take into account the significant differences between dispute resolution and deal-making.¹⁴² In transactional cases, the parties seek to create and distribute gain, yet are free to abandon the bargaining table if there is little prospect of an attractive deal. In disputes, by contrast, the parties are locked together, often in a struggle to decide who must swallow a loss. Deprived of control, disputants can easily fall into the trap of blaming each other for their own misfortune. Honest mistakes are read as malice, and ad hominem attacks can dominate the debate. If constitutional rights or moral principles are invoked, the stakes will likely escalate and adversarial behavior will be virtually assured.

Had the siting statute not required impasse arbitration, and if communities had consequently been free to walk away from the bargaining table, local assessment committees would have had far less reason to spend the Siting Council's technical assistance grants on lawyers and partisan studies. As it was, local representatives had a strong incentive to exaggerate possible negative impacts in the hopes of inflating an arbitrator's compensation award.

similarly involve public agencies, citizen groups, and abutting communities. Some private developers and non-profit housing groups have learned to use Massachusetts' "anti-snob zoning" procedure as a vehicle for multi-party, multi-issue negotiation. In the event of local deadlock, the State Appeals Committee encourages mediated settlements. These cases not only offer some insight into what is required to resolve waste facility disputes, but over time may also have created a modest local constituency for a negotiated approach to NIMBY problems generally. See Michael Wheeler, *Regional Consensus on Affordable Housing: Yes in My Backyard?*, 12 J. PLAN. EDUC. & RES. 139 (1993).

142. A Gresham's Law of Negotiation can also apply in these types of situations: when value-creating and value-claiming impulses are intertwined, competitive bargaining impulses may drive out cooperative ones. DAVID LAX & JAMES SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 156-57 (1986).

Communities realized that arbitration was a win-lose game; they should hardly be faulted for taking this fact into account during their negotiations.

Unwittingly, the authors of the Massachusetts siting law replicated the same kind of disputes they had sought to avoid. Several key factors, including the compulsory nature of the negotiation, the developer's preemptory notice of intent, and the specter of binding arbitration, conspired to put communities on the defensive. People reacted to the developer's filing not as an invitation to negotiate, but as the first salvo in a battle to defend their autonomy.

3. *Problems of State Neutrality*

As originally conceived, the Siting Council was intended to "encourage and facilitate negotiations among the developer, the host community, abutting communities, and any person interested in proposals for . . . hazardous waste facilities on particular proposed or suggested sites."¹⁴³ In the course of legislative debate, however, different interest groups demanded a place on the Council, and by enactment, membership had grown to an unwieldy twenty-one.¹⁴⁴ Often unable to reach consensus internally, the Council was seldom effective as a broker between communities and developers and between state agencies with competing agendas.

Some of the Council's other responsibilities, such as ruling on "feasible and deserving" status and technical assistance requests, compromised its claimed neutrality and further hampered its capacity to mediate. This problem almost certainly worsened over time; the longer the list of proposals the Council blessed became, the more its credibility with communities shrunk.

As one municipality after another successfully forced developers to withdraw proposals, the political importance of producing an operating waste facility increased. Such conspicuous pressure probably further eroded local confidence in the Council's neutrality.¹⁴⁵ Even as the political stakes got higher, however, the Council may have resisted relinquishing its mediating function to independent neutral bodies over whom it would have had limited control.

The string of failures also compounded the Council's problems by stimulating opposition. Cities and towns did not want the dubious distinction of hosting facilities rejected elsewhere. When a new developer filed a notice of intent, local citizens were savvy enough to contact counterparts in cities that had already defeated siting proposals. They learned through this network how to confront and confound the Siting Council, not how to collaborate with it. Even if the parties in a siting negotiation had had the help of a trusted mediator

143. MASS. GEN. LAWS ANN. ch. 21D, § 4(10) (West 1981).

144. Interview with Lawrence S. Bacow, Professor, Department of Urban Studies and Planning, Massachusetts Institute of Technology, Cambridge, Mass. (Sept. 19, 1992).

145. See generally Charles Wolf, *A Theory of Non-market Failures*, PUB. INTEREST, Spring 1979, at 114.

from the start, they would have faced a daunting assignment. Given that parties negotiated without such assistance, it should not be surprising that difficult issues became insurmountable and that parties painted themselves into corners.

Moreover, the State's incentives to play an activist role in the siting process may have been overestimated by the law's drafters.¹⁴⁶ The law was enacted through a rare and effective alliance between state industry and environmental lobbies. Unfortunately, once the statute was in place, neither of these constituencies mobilized to make it work. Although a pressing need for modern treatment facilities was acknowledged in the abstract, the political costs of supporting a particular proposal in a particular place apparently seemed too great. Whatever gubernatorial support existed for the new siting process was not transferable to specific siting proposals. According to one former Council member, neither the King nor the Dukakis administration was willing to risk the political heat that might result from promoting a project in a particular community. "In this respect, the State's macro policy of encouraging the siting of additional facilities was at odds with the political establishment's reluctance to expend political capital to resolve the problem."¹⁴⁷

4. *Narrow Economic Frame*

The siting law's most fundamental flaw was its establishment of an excessively narrow negotiating agenda focused on financial compensation. Compensation was intended as an inducement, a way of tilting the economic scales so that neighbors who would otherwise regard a proposed treatment plant as a serious loss might come to see it as a possible gain. This strategy backfired. Many local residents construed the compensation offer as a bribe and responded accordingly. Tendering a bribe not only demeans the offeror ("only a crook would propose such a thing"), but insults the offeree ("and how dare they think we would take it!").

The emphasis on financial compensation may also have heightened local concerns about environmental and health hazards. The Siting Council and other officials labored hard to persuade communities that proposed facilities would have to meet all state and federal safety standards. But those pledges were undercut by promises of compensation, since a safe project would presumably not require it.

146. O'Hare and Sanderson attribute some of this absence of leadership to the nature of the process they themselves helped design: "We believe its principal liability is that it offers two fatal temptations: to public officials, it appears to offer an alternative to taking leadership risks; and to frightened citizens, it appears to offer a way to avoid, rather than confront and control, physical risks and anxiety." O'Hare & Sanderson, *supra* note 29, at 375. Once the law was in place, State officials could simply adopt a "hands-off" posture that would ostensibly respect a community's right to negotiate as it saw fit.

147. Interview with Bacow, *supra* note 144.

Moreover, the narrowness of the Massachusetts process reinforced communities' already strong inclination to be self-regarding. With NIMBYism defined as market failure and negotiated compensation as its answer, siting was reduced to bargaining over how much a developer might have to pay a city or town to embrace an otherwise unacceptable project. We should not wonder that communities looked only to their own parochial interests; nothing in the law or the process encouraged them to take a broader view of public welfare. Yet there were many potential beneficiaries of successful negotiation: municipalities elsewhere that would be protected from illegal dumping; companies that would now be able to comply with waste management regulations more efficiently; and, eventually, consumers who would purchase these companies' products. But none of these beneficiaries was represented at the bargaining table. While the compensation received by the host community can be linked to treatment fees charged by a facility and, in turn, to the balance sheets of businesses, municipalities, and citizens whose welfare would be advanced, actual participants in the Massachusetts negotiation process should not be faulted for regarding the process as no more than horse trading.

As a practical matter, reliance on private compensation may have meant that there were not enough horses to trade. Fees charged by a plant operator would be unlikely to capture all external benefits of waste treatment. For example, residents of other neighborhoods might unknowingly enjoy a lower risk of illegal dumping. Even if such benefits were made known, these communities would have a strong incentive to free ride. In addition, conventional discounting techniques might well trivialize the value of reduced dumping to future generations.¹⁴⁸

Could compensation have been sweetened to take such factors into account? The State itself would seem an obvious source of supplementary compensation, especially in the prosperous 1980s.¹⁴⁹ For a variety of political and institutional reasons, however, no state initiatives were forthcoming. At least one Council member lobbied energetically for bundling a solvent reprocessing facility with a highly sought state-sponsored Microcomputer Center.¹⁵⁰ Such a policy would have linked the economic benefits of the computer sector to the negative impacts of its production technology, but nothing came

148. See generally MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* (1988).

149. The amount of State compensation, of course, should not exceed the social benefit generated by a successful siting, or more specifically, the net benefit not captured by the operator's fees. The magnitude of that benefit and, hence, the maximum size of the appropriate compensation would surely be debatable. Given the market imperfections, however, it would be folly to read the lack of a bargaining overlap between a private developer and a community as a signal of inefficiency.

150. Interview with Bacow, *supra* note 144.

of this effort.¹⁵¹ Other benefits could have been similarly linked. If funds for refurbishing state parks are limited, for example, why not put a municipality that has accepted a hazardous waste facility first in line for such aid? If several new community colleges are to be built, why not give credit to cities or towns that have helped their neighbors? Better still, if old industrial sites are targeted for environmental clean-up, why not tie that state effort to the creation of a new treatment plant?¹⁵²

State subsidization of compensation packages would have added far more than money to the negotiation ledger. Provision of state aid would have visibly and symbolically expressed the substantial public benefit of new waste treatment plants. Moreover, had the scope of the negotiation agenda been thus expanded, the role of the Siting Council as perceived by local residents might have been transformed from nemesis to powerful ally in efforts to win state aid.

Exclusive reliance on private compensation doomed the Massachusetts statute. The bargaining range was narrowly defined by the developer's expected profit and the community's parochial needs. Any municipality that agreed for a price to host a facility would stigmatize itself as the lowest and perhaps most desperate bidder.¹⁵³ Private dealmaking offered no apparent reward for doing right by one's neighbors. In fact, communities had good reason to fear that by saying yes to a facility today, they would get stuck with worse tomorrow.¹⁵⁴ A "fair share" policy that would have exempted host communities from subsequent regional obligations could have helped alleviate this understandable fear. As it was, the handful of communities where treatment plants were proposed felt unjustly singled out, particularly when there was no legal assurance that their neighbors would be called upon to assume comparable burdens.

151. Analogous strategies were being instituted for other land use problems. The Boston Redevelopment Authority adopted a "parcel-to-parcel" linkage program requiring bidders for lucrative downtown development sites to assume responsibility for specific projects in disadvantaged neighborhoods. Similarly, Executive Order 215 disqualified municipalities that failed to provide a threshold amount of affordable housing from receiving any discretionary State grants. Exec. Order No. 215, 304 Mass. Reg. 28 (1982).

It is not clear how effective these policies have been. The affluent communities that practice exclusionary zoning (another form of NIMBYism) are the least hungry for state aid. Even if the order has limited fiscal reach, however, it does carry some moral suasion. The State refuses to subsidize communities that subvert general policy.

152. PILLER, *supra* note 4, at 191-93.

153. The costs of being stigmatized as the "region's dump" may be capitalized in diminished real estate prices. Bacow & Milkey, *supra* note 25, at 268. See generally DAPHNE A. KENYON, *THE ECONOMICS OF NIMBYS 2-4* (Lincoln Institute of Land Policy, 1991) (summarizing six empirical studies on the effect of NIMBYS on surrounding property values).

154. Walpole, Massachusetts recently fought a proposed sludge facility in part because it felt it was already doing its share of the state's dirty business in hosting a maximum security prison.

IV. Reconciling Local and Regional Needs

Although the Massachusetts negotiation experiment has come and gone, the problem of siting modern waste treatment facilities persists. NOPE-school environmentalists may regard continued NIMBYism over new waste treatment facilities as the best of all possible worlds, but the status quo poorly serves communities at risk of further illegal dumping or the loss of hazardous waste-producing industries.¹⁵⁵ Indeed, other environmentalists recognize that the local siting impasse may simply displace the waste problem to poorer states or countries. Long distance transportation may actually increase overall risk.¹⁵⁶

The long-term availability of out-of-state sites, moreover, is not guaranteed. While the South Carolina legislature recently agreed to keep its Barnwell waste facility open for another eighteen months in return for \$90 million in fees, public opinion surveys show strong popular support for shutting it down.¹⁵⁷ Even when communities are compensated for accepting hazardous waste, a growing number of observers contest the justice of imposing risks on people with little economic or political leverage.¹⁵⁸

Thus the Massachusetts cities and towns that successfully fought off hazardous waste sites may ultimately lose the NIMBY war. If the State does muster the political will to implement a preemptive strategy, Massachusetts communities will have little say in who bears the local costs of siting and how much affected municipalities will be compensated. Alternatively, the State's efforts may fail and municipalities will remain stuck in a recurring multi-party game of prisoner's dilemma, thus blocking badly needed regional infrastructure. This outcome is not only inefficient but immoral.¹⁵⁹

155. In 1993 Governor Weld reiterated (largely in economic development terms) the need to break the siting stalemate.

Massachusetts exports over 100,000 tons of hazardous waste each year, and has no in-state treatment and disposal facilities for these wastes. As a result, Massachusetts businesses pay higher costs for waste shipping and disposal than their counterparts in other states. Moreover, as other states seek to limit imports of hazardous waste, waste management options to Massachusetts businesses may become limited in the future. In addition, our state is viewed negatively by other states since we are the fourth largest net exporter of hazardous waste, and we take no responsibility for managing it here.

Letter from William Weld, Governor of Massachusetts, to the Massachusetts House of Representatives and Senate (Mar. 31, 1993) (accompanying the Governor's proposed H.R. 4815).

156. The Massachusetts Water Resource Authority will pay \$1,250,000 a year simply to reserve space in a Utah landfill for sewage sludge. Transportation costs will add to the expense. Scott Allen, *Bay State Ships Out Its Waste Problems*, BOSTON GLOBE, Feb. 16, 1994, at 20.

157. *Id.* Seventy-one percent of the state's residents want to close Barnwell to outsiders, even though doing so would reduce waste fees. By contrast, residents of Barnwell itself are said to favor continued operation. Unless Congress specifically authorizes states to bar or differentially tax the importation of waste, such restrictions would violate the Commerce Clause.

158. See, e.g., Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495 (1992).

159. "To successfully loot society of its benefits without bearing its costs--in particular, by contriving to live in an artificial Eden walled in by zoning laws and a willingness to picket and sue--is no victory, but rather something to be ashamed of." MICHAEL O'HARE, RISK ANTICIPATION AS SOCIAL COST 15 (Lincoln Institute

Is this the best we can do? Must we resign ourselves to the conclusion that siting issues are not negotiable? The remainder of this Article argues that a reconceptualized negotiation process can avoid the practical problems that undermined the Massachusetts siting law. Indeed, in some cases, negotiation has already provided a partial answer to NIMBYism.

A. *Reframing the Negotiation Process*

Negotiation is the best means for resolving the problem of siting hazardous waste facilities. However, the negotiation process needs to be reframed. The narrow economic view and focus on private compensation that shaped the present statutory framework for negotiations reinforced communities' already strong inclination to be self-regarding. Instead of leading the parties to the bargaining table, the use of economic incentives raised serious questions about the legitimacy of the prescribed process and repeatedly triggered adversarial behavior.

A different kind of negotiation can result from conceptualizing NIMBYism not simply as market failure, but as a manifestation of traditional municipal autonomy and widespread political alienation.¹⁶⁰ If NIMBYism is driven predominantly by parochialism, then a solution must underscore community interdependence and reciprocity. Further, to the extent that NIMBYism reflects political alienation, siting policy must be fashioned more directly by those who have to live with its consequences.

A redesigned negotiation process, instead of concentrating on the stalemate between one facility developer and a particular community, should focus on the regional siting deadlock among municipalities. By redefining the interested parties and relevant issues, states could transform negotiation into an intermunicipal treaty-making process in which communities determine their own siting principles and standards. The central issue in this intermunicipal negotiation would be: "How should we decide for ourselves an equitable allocation of responsibility for activities we collectively need but which nobody wants to host?"

Framing the problem in these terms could stimulate a very different kind of public debate. Its key terms—"equitable," "responsibility," and most important, "we"—resonate in a way different from that of "market failure," "inefficiency," and "compensation." A regional fair-share negotiation could prompt dialogue over critical issues currently ignored: "If not here, then where? If not this project for your neighborhood, then what other facility will you host? And, if you will not do your share, why should others?"

of Land Policy, 1992) (footnote omitted).

160. See *supra* pp. 9-10.

Such questions might prompt a wide range of NIMBY solutions, perhaps including direct compensation for facility hosts. Moreover, other important concerns would likely emerge. Should lemons and plums be paired, so that communities hosting waste facilities are first in line for important benefits? Alternatively, could a community that had done its fair share by accepting a treatment plant obtain binding assurances that it would be exempt from other regional responsibilities?

Cities and towns would still be expected to bargain hard so as to maximize their own benefit and minimize cost, but such negotiation might be constructively bounded by a greater sense of how their interests are intertwined. With the negotiation process reoriented around regional responsibility, municipalities would be encouraged to see themselves as part of a larger network of relationships. New York City, with its disparate boroughs and neighborhoods, has successfully fashioned a "fair share siting policy" to spread responsibility for its prisons, AIDS-hospices, homeless shelters, and even waste treatment facilities throughout the entire municipality.¹⁶¹ Skeptics may doubt whether all public and private decisions involved in the vast catalog of siting decisions can ever be coordinated to achieve "fairness," or whether the general principle of reciprocity can ever decide particular cases. Nevertheless, the mere existence of the new policy casts the issues in a different light.

If affected communities could collectively agree on the need to break siting deadlocks and allocate NIMBYs according to fair share principles, whatever specific decisions that resulted would enjoy enhanced legitimacy.¹⁶² Compliance would undoubtedly improve if cities and towns were pushed to recognize their interdependence. A community's temptation to oppose a particular project would have to be balanced against jeopardizing what it stood to lose if the larger bargain were to unravel. Under the existing Massachusetts system, by contrast, a city that fights a proposed project does not violate any promises to its neighbors, nor does it jeopardize reciprocal pledges.

A better negotiation process is just one part of the solution to the waste facility siting problem. Better science, sounder projects, and more coherent state policy are also necessary ingredients. Political leaders must recognize that the absence of modern treatment facilities is costly for both business and the environment. Nevertheless, even with better science, projects, and political leadership, legitimate procedures will still be needed to determine who gets burdened with what.

161. PILLER, *supra* note 4, at 193; see also Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS'N 288, 293 (1992) (discussing fair share principles as they apply to the siting of human service facilities).

162. See generally Note, *Zoning for Regional Welfare*, 89 YALE L. J. 748 (1980). This analysis of exclusionary zoning barriers to affordable housing easily could be extended to other regionally desirable, but locally opposed, facilities.

Could an intermunicipal negotiation actually be convened? Designing the process raises a host of difficult legal, political, and ethical issues. Would all municipalities in a state participate, or would economic or geographic considerations justify different boundaries? Should we rely on existing regional agencies and councils of government or are new fora needed to signal a clear break from the past?¹⁶³ Who would speak for a community, and what would constitute a binding agreement? Would a unanimity requirement give communities an incentive to hold out for unfair advantage or to free ride? Participants would surely realize that answers to such questions are not merely procedural, but fundamentally determinative of bargaining power and political identity.

B. *Alternative Models of Regional Siting Negotiation*

Explicit intermunicipal negotiation is not a mere flight of fancy; it already operates successfully in a variety of forms. No single one of these forms may be wholly appropriate for siting waste facilities, but collectively they offer a set of diverse ways of thinking about and encouraging negotiation. This section sketches three models of regional collaboration: special fora that allow municipalities to coordinate regional policies; systems that allow communities to reallocate regional mandates; and pooling arrangements whereby the costs and benefits of development are more equitably shared.

Connecticut adopted the first approach—the creation of policy fora—in 1988 by enacting a statute authorizing the negotiation of “fair share housing compacts” between central cities and their suburban neighbors.¹⁶⁴ In two pilot regions, mayors or their designees hammered out agreements on regulatory reform, increased investment, and other new programs intended to defeat NIMBYism over low income housing. These agreements, in turn, were ratified by 82 percent of the participating communities. Midway through the term of the compacts, construction of new housing has actually been ahead of schedule.¹⁶⁵

163. In theory, the conventional legislative process should be a surrogate for an intermunicipal convention, but the Massachusetts statute did not provide for any bargaining among the cities and towns of the commonwealth. Given the choice between state preemption of local land use authority or a negotiated approach, many legislators may well have viewed the latter as a safer vote, yet not have had any real commitment to it. They could claim credit for taking action on a serious social problem, but at the same time assume a hands-off attitude in particular cases because of the very nature of private developer-community negotiation.

164. Wheeler, *supra* note 141.

165. “The staff and public officials who serve on the Capitol Region Council of Governments feel that bringing 26 diverse communities together to negotiate and approve this Regional Housing Compact is, in itself, a significant accomplishment.” 1992 CAP. REGION COUNCIL OF GOV'TS FAIR HOUSING COMPACT ANN. REP., *quoted in* Wheeler, *supra* note 141, at 148.

This effort would likely not have succeeded without legislative blessing. State housing agencies and regional councils of government worked together with independent mediators to create a setting in which communities could recognize a shared interest in producing more affordable housing. The cities and towns in both participating regions unanimously volunteered for the process, undoubtedly contributing to its success. Unlike Massachusetts, Connecticut did not mandate negotiation, nor did it threaten arbitration in the event of impasse. There was heated debate on many issues, but parties were freed from a need to position themselves for possible legal battles. As a result, they were able to fashion solutions that met their various needs.

A second approach—the creation of a burden shifting system—is illustrated by New Jersey’s strikingly different response to similar housing issues. After years of controversial litigation over local responsibility for housing, the State legislature created an administrative agency to determine each municipality’s obligations.¹⁶⁶ Moreover, it authorized communities to lower their affordable housing burden by up to one-half if they could persuade other municipalities to absorb more than their quota.

Negotiations are wholly voluntary: a community that does not want to accept more than its requirement can simply shut the door. This freedom not only fosters a more constructive atmosphere, because no one is negotiating at gunpoint, but may also relieve a community’s worry that saying “yes” to one LULU will make it more vulnerable to future projects.

The New Jersey law has been in place only half as long as the Massachusetts siting statute, yet it has already prompted more than two dozen successful negotiations, some involving transfer payments totaling more than 64 million dollars.¹⁶⁷ A state agency serves as a clearinghouse and lubricates the market with information, but the legislation does not prescribe a formal negotiation process.

Like Massachusetts, New Jersey has deliberately created a market for facilities that communities normally reject. The intended inducement in both states, moreover, is negotiated compensation. Unlike Massachusetts, however, New Jersey took a macro approach by stipulating a universal standard of responsibility which communities then had some latitude to modify. In effect, a State agency set the floor of obligation from which communities could bargain. By requiring every municipality to meet at least half its originally

166. N.J. STAT. ANN. §§ 52:27D-301 - 52:27D-328 (West 1986).

167. Harold A. McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMP. L.Q. 665, 689 n.176 (1987). There have been successful affordable housing negotiations in Massachusetts as well, though only on specific projects within a given community. Even if one municipality were willing to pay another to accept its obligation, there is no legislative blessing of such transactions.

stipulated obligation, the law underscores regional interdependence; no one city or region gets stigmatized.¹⁶⁸

A third regional approach—the use of pooling arrangements—may not necessarily stimulate explicit negotiation, but it can dampen competitive behavior among municipalities. Under special state legislation,¹⁶⁹ cities and towns in metropolitan Minneapolis/St. Paul share incremental property taxes for new commercial and industrial development. A community that hosts a new project gets a portion of its revenue, but the balance goes into a common pool.¹⁷⁰ The system is intended to stop bidding wars between neighboring communities that would otherwise compete for new projects by offering ever fatter infrastructure and economic development incentives. Development still yields new revenue for a host community, but other cities and towns nonetheless share in the benefit.¹⁷¹

The Minnesota system is a response to a very different kind of siting problem, one in which communities are actively pursuing new facilities, not opposing them.¹⁷² However, a counterpart to the Minnesota system to facilitate the siting of unattractive developments is not hard to imagine. All communities in a region would be assessed a NIMBY tax, the proceeds of which would then be used to compensate communities that agreed to take responsibility for

168. It is fair to ask whether the experiences of Connecticut and New Jersey in intermunicipal negotiations are applicable to the siting of hazardous facilities. Opposition to affordable housing can be bitter, but hazardous waste may well rank higher on the hierarchy of NIMBY horrors.

There are more subtle problems, as well. Most communities can be persuaded to see a need for more affordable housing. Even in high income suburbs there is typically concern about housing public employees and the elderly. In New Jersey the state courts have clearly stated "fair share" principles, and although these were controversial, they have become a distinct feature of the political landscape. By contrast, the sponsors of the Massachusetts waste treatment process were only looking for a handful of sites. There was no compelling reason why a facility should be placed in any particular community; however, the nature of the technology and economics prevent dividing up the actual responsibility to all municipalities. One possible solution to this problem of reciprocity would be to broaden the intermunicipal agenda to include other environmental management and clean-up issues involving more communities. General linkage to state investments and industrial policy might help in this regard as well.

169. MINN. STAT. ANN. §§ 473F.01-473F.13 (West 1977).

170. The host community gets 60 percent of the new revenue with the balance going into the common pot. Steve Keefe, *Twin Cities Federalism: The Politics of Metropolitan Governance*, in STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT: POLICY ISSUES AND PRACTICAL CONCERNS 81, 102 (Douglas C. Porter ed., 1992).

171. The regional council sometimes serves as informal mediator and helps municipalities negotiate side agreements when impacts from development in one community are felt by its neighbors.

The most common local system disputes occur, for example, when a proposed shopping center would provide tax base to one community but result in traffic congestion and surface water runoff in an adjacent community. In those circumstances, the council has helped work out agreements that mitigate the immediate impacts on the adjacent community and that protect the future rights of both communities to develop across the border from each other in a way that balances impacts.

Id. at 103.

172. In fact, the regional system currently in place in Minnesota has not adequately resolved the NIMBY problem, though some progress has been made in siting privately operated solid waste facilities. *Id.* at 129-132.

treatment plants, prisons, or other needed facilities.¹⁷³ A properly calibrated tax system might better reflect the overall benefits and costs of siting.¹⁷⁴ Like the Massachusetts siting strategy, such a tax arrangement would manipulate a municipality's financial incentives, but would go significantly further by symbolizing the interdependence of participating communities. Cities or towns could decide for themselves whether they would rather pay into the pool—by saying no to proposed LULUs—or draw funds out by saying yes.

A NIMBY tax might be just one element in a hybrid siting strategy. For example, the imposition of such a tax might create a floor for intermunicipal trades, just as the imposition of “fair-share” housing obligations has done in New Jersey.¹⁷⁵ A regional forum on the Connecticut model might synthesize an array of specific initiatives into an overarching siting policy.

Although structurally different, the strategies of Connecticut, New Jersey, and Minnesota share three important attributes. First, each leaves municipalities with significant authority and discretion; none of these states simply preempts local land use power.¹⁷⁶ While the New Jersey and Minnesota laws create obligations to provide affordable housing and to share new tax revenue respectively, cities and towns can still accept or refuse specific projects. The policies of the three states do not trump local power so much as coordinate its exercise.

Second, each of the three strategies is legislatively authorized and buttressed by new facilitating agencies. The enabling statutes address problems of procedure, power, and legitimacy in somewhat different ways. The Connecticut law, for example, defines who will sit at the bargaining table and establishes a timetable for negotiation. The New Jersey statute shifts bargaining power in favor of affordable housing developers and gives municipalities the right to trade obligations. Minnesota's system fundamentally alters the taxing

173. See generally Michelle J. White, *Suburban Growth Controls: Liability Rules and Pigovian Taxes*, 8 J. LEGAL STUD. 207 (1979) (providing an economic analysis of such a system, in the context of zoning issues).

174. Other analysts have suggested a lottery to determine which community would have to host a new facility in return for a stipulated amount of compensation. Once the short straw was drawn, however, other communities could “bid” to accept the facility for less. Howard Kunreuther & Paul Portney, *Wheel of Fortune: A Lottery/Auction Mechanism for Siting Noxious Facilities*, 117 J. ENERGY ENGINEERING 125 (1991). By contrast, the Massachusetts system was predicated on the hope that treatment fees would be large enough to cover both profit and community compensation.

175. In much the same spirit of the tax system sketched here, Frank Popper has proposed a regional point system that “would allow open trading of proposed LULUs between neighborhoods of a city, cities in a region, or counties in a state.” Popper, *supra* note 2, at 24. He believes that such a system would assure communities that by accepting some facilities they would be spared others. Determining what kinds of projects are commensurate would be a daunting task: how many trailer parks equal a coal-fired-power plant? Perhaps even this could be negotiated out among the participating communities, although a tax system has the virtue of fungibility.

176. In theory, regional preemption and centralized planning could moot NIMBYism, but as Frank Popper has observed, this is seldom a realistic politically. “Every state is a home-rule state. Every state will essentially remain so. Most federal or state attempts to preempt land use localism, to blunderbuss it into the service of resolving LULU blockage, are likely to fail.” *Id.* at 23-24 (footnote omitted).

power of communities. Although the institutional tactics adopted in the three states differ, they all serve to create new sets of regional relationships and responsibilities.¹⁷⁷

Third, the three statutes all promote siting negotiation, albeit in intriguingly different ways. Connecticut's law establishes a multilateral policy-making forum, while New Jersey encourages bilateral deals between communities. Minnesota's tax sharing formula changes each municipality's payoffs when it seeks to woo private developers, thus dampening costly competition within the metropolitan region. Yet a common central goal remains: the promotion of rapid, equitable, mutually acceptable siting negotiation. In short, negotiation of regional siting issues is alive and well, but in a variety of forms quite distinct from the process attempted in Massachusetts.

C. *Is Hazardous Waste Different?*

Can procedural models designed for affordable housing and economic development break NIMBY deadlocks over hazardous waste facilities? The technical complexity and political volatility of waste issues are certainly daunting. Yet recent experience in California offers at least some grounds for optimism.

In the late 1970s California was under the same pressure as Massachusetts to site new hazardous waste disposal and treatment facilities.¹⁷⁸ Local opposition to proposed facilities was similarly fierce; legislative attempts to preempt local land use authority were conclusively beaten back.¹⁷⁹ But in 1982 the California legislature took a different tack with the creation of a broadly-based Hazardous Waste Management Council.¹⁸⁰ Representatives from state and local government, industry, environmental groups, and academia were given two years to reach a consensual solution to the siting problem.¹⁸¹

The initial meetings of the Hazardous Waste Management Council saw predictable posturing, but over time there was movement toward a shared understanding of the issues.¹⁸² Agreement was eventually reached, in large part because the Council broadened its agenda so that "[s]iting per se was no longer the priority, but only one (albeit important) option for the long-term management of hazardous waste in the state."¹⁸³ On the Council's

177. The current policy on military base closing—which involves an up-or-down vote on a wide package of decisions—may also be instructive. Districts that are tempted to fight to spare their pet projects now must balance the risk of jeopardizing all of the spending cuts. Packaging the cuts also tempers any implication that one area has been singled out for sacrifice or retribution.

178. Mazmanian & Stanley-Jones, *supra* note 7, at 67.

179. *Id.*

180. *Id.* at 68.

181. *Id.*

182. *Id.*

183. *Id.*

recommendation, the legislature enacted a new law requiring counties to engage in a similar consensus-building process to develop intercounty “fair-share” plans that would meet waste treatment and disposal needs for at least a decade.

Whether concrete agreements can be reached at the county level is uncertain, but the California effort is noteworthy in several respects. First, consensus on state policy was reached by a broadly representative group, which included local government officials.¹⁸⁴ Second, the Council circumvented the adversarial nature of conventional administrative processes by developing a set of rules allowing participants to reframe issues, expand agendas, and devise new solutions. “The forums foster an environment where leaders learn non-adversarial modes of policy making and begin to view themselves as part of a policy-making community”¹⁸⁵ Third, and probably as a result of this cooperative atmosphere, the Council arrived at a “fair-share” principle that gives fresh emphasis to responsibility and reciprocity.

Although California is still a long way from solving its waste problems, it appears to have made a constructive start. In unhappy contrast, Massachusetts is no closer to solving its NIMBY problem than in 1980 when the Hazardous Waste Facility Siting Act was enacted. Indeed, the dismal history of the last decade has led the political search for a credible policy to be all but abandoned in favor of continued shipment out-of-state.

Conclusion: The Challenge for the Future

For all the conceptual imperfections of the Massachusetts siting law, it possessed considerable virtues. The siting strategy broke important ground by acknowledging the futility of state preemption of local land use control. Moreover, although “compensation”, “mitigation”, and “linkage” are now familiar terms in our political vocabulary,¹⁸⁶ in 1980 it was audacious to build policy around the concepts they represent. Furthermore, the law wisely addressed potential procedural obstacles to agreement by defining who would serve on local assessment committees and authorizing these committees to bind

184. Notwithstanding the support of the Associated Industries of Massachusetts and the Environmental Lobby, the consensus behind the Massachusetts siting statute proved illusory. Those groups represented the interests of neither the communities that would have to bear the costs of hosting treatment facilities, nor those who supposedly would benefit from a successful siting. As it happened, these lobbying organizations avoided involvement in any of the subsequent proposals; although their interest in breaking the NIMBY stalemate was genuine, the cost of being associated with any particular siting controversy apparently was too great.

185. Mazmanian & Stanley-Jones, *supra* note 7, at 73-74.

186. That compensation is a mainstream notion was conclusively demonstrated by a 1993 episode of *The Simpsons* in which the cartoon community of Springfield had to decide how to spend millions of dollars received as reparations for illegal dumping of hazardous waste. (The townspeople squandered the money on a shabby monorail project; Homer got to drive.) *The Simpsons* (Fox television broadcast, Jan. 21, 1993.)

communities to agreement. The implementing regulations also foresaw possible impasse; professional mediation was made available, although never used.

These positive elements should be components of any viable new strategy. Unfortunately, the Massachusetts siting law's long record of failure will probably deter policy makers from salvaging them. Indeed, its history may be misread as proving that siting issues are nonnegotiable.¹⁸⁷

The Massachusetts siting policy defined negotiation too narrowly. Specifically, a diagnosis of NIMBYism as market failure led to a correspondingly cramped conception of negotiation as mere economic exchange between developer and host community. The resulting policy exacerbated parochialism instead of tempering it.

The obstacles to encouraging a different kind of negotiation are considerable. But as long as cities and towns insist on their home rule prerogatives, siting stalemates can only be broken by fostering regional consensus on how local rights and responsibilities can be more equitably exercised and respected. Such agreements must be negotiated by those who must live with their consequences.

NIMBY controversies over waste facilities offer a rich and challenging problem for negotiation scholars and practitioners. Such cases inevitably involve many parties and issues. Stakeholders have few, if any, long-standing relationships on which they can build, and little experience of public-private negotiation. Even determining who sits at the bargaining table can prove controversial. Technical complexity exacerbates friction: a wide variety of engineering and public health issues must be addressed in the context of overlapping (and sometimes contradictory) local, state, and federal environmental regulations. Even experts can reasonably disagree about the appropriateness of different solutions. Political heat is hard to dissipate. People care passionately about the environment, the safety of their children, the value of their property, the availability of jobs, and the strength of the tax base. Much is at stake substantively—how risks and benefits are distributed—and in terms of the political implications of how decisions are made.

187. It is important to remember that only a handful of waste facilities have been sited anywhere in the United States in recent years; it is hard to make a case that any particular state's process is demonstrably superior. "Although occasional new facilities have been sited in remote or highly industrial, thinly populated locations in the Southwest, the consistent national pattern—of many different policies in many states—is failure to succeed with this challenge. Siting processes based on command-and-control, engineering analysis, and consensus mechanisms have all run aground on local opposition, even when statewide political commitment to development of these facilities is strong." O'Hare & Sanderson, *supra* note 29, at 365.

It is worth noting that while Massachusetts was experiencing failure, Rhode Island enjoyed at least one modest success with a similar process. The different outcome may be attributed to the small scale of the project and the pronounced extent of prior illegal dumping. Richard J. Crenca, *Little Warwick Makes Hazardous Waste History*, WASTE AGE, Mar. 1987, at 90.

Negotiating NIMBYs

Hazardous waste problems are not simply economic, but also legal, political, scientific, and ethical. NIMBY disputes will only be resolved through a negotiation process that is designed and implemented to address all these facets of the siting impasse.

