#65 6/21/67

Memorandum 67-42

Subject: Study 65 - Inverse Condemnation

We are sending you herewith a copy of the first part of the second phase of Professor Van Alstyne's study on inverse condemnation. (You will recall that the first phase was a consideration of whether it would be constitutional to spell out rules relating to inverse condemnation liability by statute and the conclusion was that reasonable rules would be held constitutional.)

We believe that the attached part of the study provides valuable background information. However, judging from our experience in discussing similar material on the governmental liability study, we do not believe that it would be profitable to discuss this material in detail at the meeting. The material should be carefully studied so that the various considerations identified in the attached material will come to mind when specific typical and recurring forms of inverse condemnation claims are considered and an attempt is made to determine the rules that should apply to such claims.

The staff suspects that the only feasible way to approach this study is to take up specific typical and recurring forms of inverse condemnation claims, to attempt to formulate rules governing the determination of those claims, and when that task is completed to examine the rules formulated to determine whether any general principles can be formulated. We ultimately determined that this was the only feasible way to approach the governmental liability study. Next, the Commission will have to determine whether all inverse condemnation law

can be codified and, if so, whether immunity from inverse condemnation liability can be provided subject to statutory statements of all instances where inverse condemnation liability will exist. This latter objective is one that is likely to prove impossible of attainment. The relationship and coordination of the statute governing inverse condemnation liability with the governmental tort liability statute and the statutes governing eminent domain (as they now exist and as they will exist when a comprehensive eminent domain statute is prepared) would appear to be the final, difficult task in wrapping up our work on these three separate, but closely related, topics.

The staff suggests that it may be appropriate to adopt the general approach suggested above at this time, recognizing that it may need to be modified as we get further along with the study.

Respectfully submitted,

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Executive Secretary

MODERNIZING INVERSE CONDEMNATION: A LEGISLATIVE PROSPECTUS

The present study undertakes to identify the general policy criteria which are relevant to the formulation of an acceptable and rationally grounded body of statutory law providing for inverse condemnation liability of public entities.[1] These criteria are derived in part from an examination of judicial opinions applying inverse condemnation principles to specific controversies, although they are only rarely articulated in terms in such opinions.[2] To some extent they are reflected in statutory language promulgating legislative standards of inverse liability or immunity; but such statutes are also comparatively rare, and are ordinarily limited in reach to discrete and particularized instances.[3] To a considerable extent they find support by analogy in policy considerations incorporated in prevailing legislation defining the scope and limits of governmental tort liability and immunity.[4] Inverse condemnation, it must be recalled, is in the field of tortious action; it has been, historically, one of the most conspicious techniques for avoidance of traditionally accepted governmental tort immunity, and thus shares many of the substantive and procedural features of governmental tort liability.[5] Finally, relevant policy criteria are adduced, in part, from study of the extensive legal literature examining specific problems of constitutional liability for taking and damaging of private property.[6]

An effort is also made here to assess these policy standards as applied to typical and recurring forms of inverse condemnation claims, in an attempt to evaluate their weight and significance in discrete but realistic situations. To be sure such policy evaluation may sometimes lead to conclusions which are substantively irrelevant because contrary to prevailing judicially declared

constitutional norms.[7] However, as indicated in the preceding study of the scope of legislative authority over inverse liability there are various avenues for statutory modification, even assuming constitutional liability as a basic datum point, which may bring the administration of such liability into closer correspondence with acceptable policy.[8] On the other hand, it is equally possible that objective policy evaluation may indicate that prevailing rules for determining what kinds of property injuries are constitutionally compensable are inadequate or inequitable. If so, a rational legislative program might well include payment, in certain cases, of compensation which is not constitutionally required.[9]

A final phase of this study will undertake to examine the procedural aspects of inverse condemnation litigation and its administration by public entities. Included in that phase will be an evaluation of problems relating to the measure of compensation for property "damage" and property "taking", as well as the need for and desirability of authorizing flexible forms of relief other than, or in addition to, damages.

General Goals of Inverse Condemnation Policy

The generality and ambiguity of the constitutional limitation --that private property shall not be "taken or damaged for public use" without payment of "just compensation"--has been the generating source of an extensive, if not always edifying, judicial gloss.

The central thrust of the decisional law in California has related to the problem of according substantial meaning to the innovative concept of "damaging" for public use. The "damage" clause was added in 1879 with the clear intent of its proponents to expand liability beyond what had been included within the original notion

of 'taking".[10] The problem which has engaged the courts, for the most part, has been how far beyond earlier limits liability can be extended without thereby opening the vaults of the public treasury too widely to inverse claimants.[11] The search for rational limitations upon inverse liability has, accordingly, taken many tortious and inconsistent turns and has motivated judges to advance numerous subtleties of logic and reasoning.[12]

Beneath the often muddled and disorderly array of inverse cases, however, one can readily perceive the primary elements of the conflict. On the one hand is the interest in encouraging the full use of governmental powers for the general public welfare, unimpeded by improvident or crippling financial drains imposed to pay compensation for injuries sustained by owners of private property adversely affected by public programs and activities. The bedrock foundation of this interest is the general conviction that even the most affluent society cannot feasibly assume the costs of socializing all of the private losses which flow from the activities of organized government.[13] It is thus assumed that some uncompensated losses of values identified with property are an inevitable and hence justifiable part of the cost of social progress, or alternatively, that the net long-term increase in community benefits flowing from public enterprises and collective decision-making will ultimately offset or exceed those losses.

On the other hand, there is also a deeply rooted social interest in protection of private property values together with the socially stabilizing influences and entrepreneurial incentives deemed to be associated with such values, from undue impairment by forced contribution of a disproportionate share of the burdens of community progress.[14]

The strength of this interest is underscored by the fact that it is explicitly embodied in the constitutional ethic of the eminent domain clauses themselves.[15]

A preliminary statement of the policy criteria relevant to resolution of this fundamental conflict of interests commences with recognition of the fact that particular governmental claims to freedom from inverse liability are seldom of equal weight or persuasiveness. Familiar decisions illustrate the truism that very substantial losses of property values--even to the point of total destruction--are sometimes held to be non-compensable under constitutional standards.[16] The social interest to be served by a "taking" or "damaging" of private property seemingly may, in certain instances, outweigh the constitutional policy of paying for it. The usual doctrinal formulation of this result is couched in the language of "police power", a rubric for non-compensability whose counterpoint is usually described as "eminent domain power". In effect, eminent domain begins where police power ends.[17] However, to postulate a legal continuum along which "police power" (i.e., noncompensability of resulting property damage) gradually, by degrees, merges into and becomes "eminent domain power" (i.e., compensation must be paid) is to propose not a test for, but a description of results. Moreover, a description which seeks to rationalize holdings of compensability vel non as mere differences of degree is scarcely explanatory and implies the existence of unarticulated decisional factors.[18] It also tends to obscure often significant differences in the qualitative nature of the governmental interests being asserted.[19]

Private interests embodying significant social and economic values likewise assert claims, in the context of inverse condemnation

litigation, which vary in weight and persuasiveness.[20] Here, too, judicial reasoning is characterized by circularity in many instances, with determinations favoring or denying compensation normally expressed as a conclusion that "property" has or has not been taken or damaged. This dependence upon conceptualisms tends to obscure the underlying issue of why the particular private interest should prevail over the public interest to which it is opposed in the circumstances at hand.

The comparative importance to be accorded the claimant's interest presumably reflects a judicial assessment of its economic characteristics and social significance in the hierarchy of accepted community values, discounted in proportion to the countervailing values represented in the public interest at stake. For example, the policy of preserving established geographic interrelationships between the various localities within the community, as based upon time, distance, and ease of transportation, is often assimilated to a private interest of abutting owners in access to the general system of community streets by travel in both directions upon the street on which their property abuts.[21] Thus, in cul-de-sac cases, compensation may be required for impairing such access by "dead-ending" an existing street, thereby limiting the property owners in the cul-de-sac to travel to the general street system in one direction only.[22] Other types of street improvements, such as median barriers, and the adoption of one-way-street traffic regulations, may have precisely the same practical impact upon abutting and nearby property owners as the creation of a physical cul-de-sac; yet, in this context, the claimant's interest is routinely denied constitutional protection.[23]

Although rarely articulated in judicial opinions, disparate results in factually similar cases such as those just cited are

probably best understood as representing a judicial conviction that private interests are more deserving of protection in one instance than the other, that the public interest differs significant y in the two situations, or that the relative significance of the competing interests varies as the facts change. The reasons underlying such felt differences may properly be attributed, generally, to basic considerations of public policy pertinent to the entire field of inverse condemnation. Among these considerations the following may be identified as influential, and occasionally determinative, elements:

First, a substantial degree of legal protection should be given to reasonable reliance by individuals upon the relative permanence of existing resource distribution patterns, and reasonable expectations that existing institutional arrangements conducive to the preseravtion of established values will not be substantially disturbed in the interest of the general welfare without a fair and equitable allocation of costs.[24] The historical reasons for the addition of the "or damaged" clause to state constitution is evidence of the importance of this reliance element in the prevailing conception of inverse condemnation liability.[25]

Yet, it is only those expectations of institutional and distrubutional stability which are "reasonable" that command legal protection most insistently. The law of eminent domain was never intended to prevent necessary changes in resource allocations to further public programs and public policies, but only to impose a rational condition of just compensation as the price for changes which, absent compensation, would appear to consist of arbitrary exploitation.[26] Accordingly, the notion of "reasonable" expectations may be deemed to include an implicit understanding that certain kinds of governmental action

may properly be undertaken without compensation for resulting private economic losses.[27] In others, expectations regarding stability of existing conditions may be qualified by realization that in the event of certain kinds of governmentally caused losses, the constitutional norm of fair and equitable cost allocation does not require payment of pecuniary compensation.[28]

It should also be recognized that the policy of protecting the reliance interests of property owners is generally fully applicable to governmental entities as well as natural persons in their role as owners and users of property.[29] Except, perhaps, where disparities of size or of incidence of political or functional responsibilities may significantly distort the normal relationships between property owners,[30] the reasonable expectations of public entities as to the varieties of uses to which their property may be put without incurring liability to neighboring property owners are presumptively as deserving of legal consideration and protection as the similar expectations of private citizens. Nothing in eminent domain policy suggests that the law should deliberately discriminate in its normative treatment of public as compared with private property owners similarly situated.

Second, the concept of "just compensation" assumes that it is constitutionally improper in general, for government to undertake to benefit one citizen at the expense of another.[31] Accordingly, in the absence of persuasive contrary reasons in particular cases or particular categories of cases, the adverse economic impact of public programs and public improvements normally should be distributed over the public at large which is presumably benefitted thereby, and should not be borne in disproportionate degree by individual property owners or discrete and limited groups of property owners. Since many public

activities involve inherent but often avoidable risks of disruption of settled private investments and of reasonable private expectations regarding uses of available resources,[32] this policy favoring normal compensability for resulting harms tends to act as a brake against insensitive or over-enthusiastic administration. It encourages careful planning and more adequately considered choices between operational alternatives.

However, it must be kept in mind that public projects ordinarily tend to confer benefits, albeit intangible and difficult to measure in some cases, as well as to impose burdens.[33] The scope of the cost allocation function which feasibly may be assumed by the law in inverse condemnation should thus take into account the relative incidence of both benefits and burdens. An approximate equivalence of burdens and benefits experienced by a property owner would, for example, suggest absence of net compensable damage.[34]

Third, governmental liability for just compensation for a "taking" of "damaging" of private property must necessarily be subject to rational limitations, so that socially desirable governmental policies and programs are not unduly deterred.[35] The exercise of public power for the public good inevitably impinges with varying effect upon different individuals and their property. Acceptance of full liability for all such property injuries could conceivably multiply governmental liabilities and the costs of their administration to a fiscally crippling degree, discouraging essential as well as merely desirable public improvements and regulatory programs.[36] The goal of a fair and politically acceptable, economically justifiable allocation of public resources thus presupposes the need for confining inverse condemnation liabilities within reasonably clear and ascertain-

able limits. The limits of fiscal acceptability generally should represent the points at which the policy of fairness in cost allocation is outweighed by the need for substantially unimpeded pursuit of governmental objectives. Where those points cannot be ascertained with reasonable economy of effort or defined with reasonable precision, a measure of legislative arbitrariness in prescribing the limits of compensability may well be justified as an approximation of fairness.[37]

Fourth, the need to keep inverse condemnation costs within manageable bounds commensurate with available fiscal resources is minimized to the extent that feasible loss-shifting mechanisms are available.[38] If private costs imposed by governmental action can be readily absorbed elsewhere, and their incidence shifted away from the public fisc to non-tax resources by market forces of other institutional devices, the problem of fairness in cost allocation may be resolved without the inhibiting spectre of governmental paralysis. Loss-shifting alone, however, does not provide an occasion for increased inverse liabilities; it merely enlarges the scope of policy options open to the legislature in formulating rules to govern the indidence and practical operation of inverse liability.[39]

Fifth, the administration of inverse liability should be characterized to the optimum degree by ease of predictability and economy of disposition, so that negotiated settlements are facilitated and litigation reduced or discouraged.[40] Statutory standards should be formulated with an eye to simplicity, clarity and efficiency. The principles of substance and procedure adopted in line with this policy should thus be calculated to provide practical and workable guidelines for claims negotiators and attorneys, recognizing implicitly that the law cannot afford to be unduly particularistic in its application.[41] Moreover, as administrative economies are achieved, public agencies

should be enabled to plan more effectively for the most efficient use of available funds.

Sixth, the particulars of any legislative program relating to inverse condemnation should avoid disturbing existing rules of settled law except where clearly justified by policy considerations of substantial importance.[42] The formulation of novel rules of law, not grounded in familiar principles or their application, tends to create uncertainty and to encourage litigation. Thus, not only should existing statutory and decisional law be the starting point for development of a legislative program, but care should be taken to avoid creation of broad and nebulous new areas of possible inverse liability through use of unduly general statutory language. On the other hand, when existing law tends to work injustice or to frustrate sound considerations of policy, departures therefrom should be readily undertaken.

Seventh, public entities should be accorded the maximum degree of flexibility of administrative action to avoid inverse liability where possible, and to mitigate its extent when avoidance is not feasible. For example, the law should provide ample scope for alternative remedies to damage awards.[43] The funding of inverse liabilities should also be facilitated through a variety of techniques in order to assure payment to the injured claimant and minimize the adverse impact of unexpectedly large judgments.[44]

Classification of Inverse Condemnation Claims

The general policy criteria here suggested obviously do not, in themselves, furnish adequate guidelines for evaluating the adequacy of all aspects of present inverse condemnation law. Indeed, it seems apparent that in attempting to employ this set of criteria as a basis for critical assessment of specific aspects of the present law, internal policy conflicts will inevitably occur. Ultimate determin-

ations and recommendations for a legislative program thus require a careful weighing and balancing of the competing interests reflected in these policy criteria, as applied to recurring and typical factual situations from which inverse claims have been generated historically.[45]

In view of the sterility and circularity of the typical doctrinal approaches to the problem of inverse condemnation, it is believed that, for present purposes, a meaningful analysis can be best developed by a detailed appraisal of a) the objectives and functional characteristics of the various types of governmental activities which generate inverse claims, and b) the qualitative and quantitative aspects of the kinds of "property" injuries which typically ensue therefrom. The former elements are usually assimilated within judicial discussion of the concepts of "taking", "damaging", and "public use"; the latter generally are reflected to one degree or another, in judicial treatment of "property" and "just compensation".[46] Avoidance of the traditional doctrinal terminology, however, should assist in exposing the pragmatic considerations which bear upon the relativity of the competing interests.

For present purposes, inverse condemnation claims may be conveniently classified as arising in one of five distinguishable situations:[47]

1. Physical destruction of private property, or loss of its physical possession and enjoyment for a temporary or permanent period of time, as the result of governmental activity,[48] deliberately conceived or undertaken for that purpose with respect to the property. Illustrations include claims based on summary abatement of public nuisances, destruction of plant or animal pests, demolition of buildings to prevent conflagration, and governmental appropriation or occupation of private property under mistake as to ownership.

2. Physical harm to private property (i.e., by actual invasion, destruction, or appropriation), caused by governmental activity not deliberately calculated (as in category 1) to bring about the result but rather to achieve some other appropriate objective, whether or not the ensuing harm was foreseeable or a product of negligence. Examples include claims involving flooding, erosion, landslides and loss of lateral support, allegedly resulting from the construction or maintenance of public improvements.

3. Financial loss intentionally imposed upon a property owner, with or without physical harm to his property, by governmental compulsion that the owner use his property in a certain manner, or take or submit to prescribed action with reference to the property, without compensation. Examples include claims for the cost of compelled relocation of public utility structures to make way for public improvements, the cost of compliance with orders issued in the enforcement of building and safety codes, and the value of dedications or contributions exacted as the price of subdivision approvals, building permits, and zoning variances.

4. Nonphysical or intangible harm to private property consisting of loss or diminution of value, utility, attractiveness, or profitability, caused by governmental non-regulatory activity, whether or not the harm was a foreseeable or calculated consequence of that activity, or was a product of negligence. Claims based on loss of access light, and air, caused by freeway construction, and claims grounded upon annoyance or interference with enjoyment due to noise or noxious odors produced by governmental activities are typical of this category.

5. Financial loss imposed upon a property owner, ordinarily without physical harm to his property, by government regulatory

prohibition against specified use or development of property. Typical examples include claims based upon restrictive zoning and land-use controls resulting in impairment of market value or loss of anticipated profits from commercial exploitation of the property.

The attractiveness of the classification scheme here suggested lies in its exposure of the functional relationship between the characteristics of the governmental activity which causes the injury and the nature of the resulting injuries sustained. For example, it seems reasonable to anticipate that the policy considerations relevant to compensability of affirmative fiscal burdens deliberately imposed upon some private property owners (e.g., costs of relocation of utility facilities) in connection with the construction of a highway (claims within category 3) may differ in both principle and persuasiveness from those which relate to other private losses (e.g. impairment of access or reduction in traffic flow) unintentionally produced by the same project (claims within category 4). In addition, it is believed, that claims involving tangible or physical damage are likely to involve similarities which may be overlooked or confused if treated together with claims based on intangible losses allegedly reflected in disparagement of market value. Finally, useful analogies and comparisons are deemed more likely to be perceived by discussing like forms of governmental action and private damage together.

The general scope of inverse condemnation claims, as will be seen from the proposed classification scheme itself, is exceedingly broad. The range of judicial decisions discussing the substantive principles of inverse condemnation law is even broader. The reason is that these principles serve three significant but distinguishable purposes in litigation:[49] (1) They are the basis for adjudication

of claims to just compensation predicated upon an alleged "taking" or"damaging" where no affirmative eminent domain proceedings were instituted. (2) They provide a doctrinal foundation for determination of claims that compensation offered to be paid for a conceded "taking" or "damaging" is inadequate or omits compensable elements of value. (3) They comprise the doctrinal setting for judicial review, and either invalidation or authentication, of governmental action which is challenged on the ground that it exceeds the constitutional limits imposed by the eminent domain clauses.

In the last of these roles, the principles of inverse condemnation operate in a somewhat abstract and strictly limited fashion. Such litigation examines challenged governmental action primarily in a prospective way, seeking to determine whether it should be annulled or restrained in the interest of preventing a threatened future taking or damaging of private property. Actual damage often is nonexistent, since the threatened governmental action has not yet been undertaken; or if some actual injury has been in fact sustained, its extent may be either speculative or uncertain in amount. For example, the conclusion, based on principles of inverse condemnation, that a statute forbidding the mining of coal in such a way as to cause subsidence of the overlying land surface is constitutionally unenforceable, is quite a different judgment from one awarding a specified amount of money as "just compensation" for the effective impairment by the statute, of the mining company's right to commercial exploitation of its coal deposits.[50]

Where the pecuniary incidence of the private loss is still largely prospective, restraint against enforcement of the statute will often mitigate the threat of substantial (other than temporary)

loss. Where this is the case, a demand for prospective pecuniary relief[51] may pose problems of judicial policy which are entirely absent from a suit for injunictive relief. A decree that a statute is unenforceable, for example, costs the government treasury little or nothing, apart from losses chargeable to frustration of the statutory objective. A pecuniary award of damages for inverse compensation on the other hand, may vindicate the statutory purpose, but at a heavy cost to the fiscal resources of the public entity. Conversely, a denial of equitable relief should not be assumed to represent precisely the same assessment of policy considerations that would be appropriate to a denial of monetary damages. If a substantial governmental improvement, intended to facilitate important commercial and private institutional arrangements, has been brought into operational activity--for example, a municipal airport--injunctive relief against the continuation of those activities for the reason that they "take" or "damage" private property may well be denied on public policy grounds and the claimant relegated to a monetary remedy.[52]

The underlying differences between a suit seeking to invalidate, annul, or enjoin some type of prospective or uncompleted governmental activity, and one for damages on the ground of inverse condemnation represents primarily considerations of short-range remedial rather than of long-range substantive policy. In the end result, an injunction against the inception or continuation of action which threatens to take or damage private property forces a responsible political choice between termination of modification of the program and use of affirmative eminent domain proceedings to accomplish the ultimate objective without alteration. Functionally, an award of inverse damages ratifies a completed choice between the same alternatives. Accordingly, both

types of cases will be discussed interchangeably herein, insofar as they bear upon the issues of substantive policy. The distinctions between them which are relevent to the shaping of remedies will be discussed separately.

Policy Perspective: Problems of Approach

Before turning to an appraisal of specific types of inverse claims within the suggested classification scheme, two additional preliminary problems require attention.

Overlap with tort liability. First, there is lurking in the background of any contemporary discussion of inverse condemnation law the persistent influence of the discredited doctrine of governmental tort immunity.[53] To be sure, the immunity rule has been abolished in California, and replaced by a statutory regime of qualified liability.[54] Undeniably, however, judicial shaping of inverse condemnation concepts prior to these recent developments was influenced substantially by a judicial disposition to avoid the logical consequences of the former immunity doctrine where rationally feasible to do so.[55] This historical legacy, with its resultant confusion and overlapping of tort and inverse liabilities, tends to exacerbate the inherent difficulties of policy evalution relation to compensability of private losses caused by governmental activities.

The most extensive area of overlap of tort and inverse claims is with respect to nuisance, a ground of tort liability which was generally deemed a partial exception to governmental immunity,[56] but which perhaps because of greater certainty of result, was a frequent basis upon which

claimants predicated inverse condemnation suits.[57] In California, especially, judicial willingness to accept inverse condemnation as a conceptual vehicle for awarding relief from governmentally created private nuisances is important for two reasons. It provides a constitutionally grounded technique for avoidance of the principle, expressly stated in statutory form, that a condition or activity expressly authorized by statute is not a nuisance.[58] And, secondly, it constitutes a defensible (but not necessarily exclusive) theoretical basis of governmental liability for private nuisances, notwithstanding the deliberate failure of the Legislature to include such nuisances as a statutory ground of tort liability in the California Tort Claims Act of 1963.[59]

It follows that, to some extent, an examination of specific inverse condemnation claims will necessarily involve a consideration of policy factors relevant to nuisance liability.[60] To a lesser degree, a similar relationship will be involved in considering problems exhibiting the general characteristics of trespass, although the difficulties of confusion and overlap are minimimized here by the fact that liability for trespass was not generally viewed as an exception to governmental immunity.[61] In addition, many of the California inverse condemnation cases repeat the formula, only recently clarified, that an injurious act of a governmental entity is not actionable on inverse condemnation grounds unless, as between private persons similarly situated, the same injury would be the basis for a private tort action.[62] Although it is now clear that this formula is not to be regarded as a conclusive test or limitation upon the scope of

inverse liability, its historical persistence tends to fog the decisions.

Basically, the doctrinal and conceptual distortions which, as a by-product of sovereign immunity, have crept into the law of inverse condemnation tend to plague the observer by making it difficult to sort out the elements of the factual situations into their tort and inverse components. To a considerable degree, of course, difficulties of this order may be meaningless in a broader view of the extent to which private losses occasioned by governmental activities should be socialized through loss-distributing mechanisms such as damage awards by courts. The danger is that the broad view may be lost in the glare of tort-inverse similarities. It should not be forgotten that liability may be imposed by constitutional compulsion in certain situations - for example, cases lacking in a showing of fault, or cases in which foreseeability of harm is wholly wanting - in which tort principles would preclude any award of damages to the injured property owner.[64] Conversely, over-attention to the tort analogue may beguile the observer into all too ready an acceptance of the view that if tort liability normally would be available as between private persons, inverse condemnation liability is not appropriate. This view, unfortunately, would overlook the possibility that there may be situations in which inverse liability is supported by sound considerations relevant to the constitutional principles of eminent domain, although liability on tort principles may well be denied by the applicable statutes for reasons appropriate to administration of tort law.[65]

Happily, a practical solution to the problem caused by the overlap of tort and eminent domain concepts is readily available for present purposes.

Since the difficulties in question are largely doctrinal in nature, while the present study attempts an essentially policy-oriented analysis to which doctrinal rules are relatively unimportant, the overlap may be ignored as substantively immaterial. In cases where policy suggests inverse compensability for particular harms, the availability of an alternative tort remedy can be independently considered from the viewpoint of remedial policy, a matter to which overlap and duplication are most directly relevant.

Police power v. eminent domain. A second preliminary problem - one which will require more thorough treatment than the first - relates to the traditional conceptual dichotomy of police power and eminent domain power. As already pointed out, the tendency of some courts to employ these two conceptualizations of governmental functions as apparent criteria for deciding issues of inverse compensability is worse than useless.[66] Yet the tendency is so pronounced and its examples so numerous as to suggest the existence of supportive policy considerations, however dimly perceived or intuitively felt by the courts, which militate against compensability of private injuries flowing from "police power" measures and favor compensability when "eminent domain" power is exercised. The effort to identify and describe the characteristic aspects of governmental action affecting private property which justify a judicial ascription of "police power" rather than "eminent domain", and vice versa, has long occupied the attention of both courts and scholars.[67] At least six different views appear to be reflected in the legal literature:

(1) Physical invasion v. regulation. A physical encroachment upon, or use or occupation of, a privately owned asset of economic value is often regarded as characteristic of eminent domain power, while prescription of a regulation of conduct with respect to the use of economic resources is usually classified as a police power measure.[68] In more sophisticated but not essentially dissimilar versions, the distinction is sharpened by introduction of the purpose of the governmental action - protection of the public health, safety, and welfare being a clue to police power, while acquisition or enlargement of the fund of public assets is deemed to be a mark of eminent domain.[69] Or, putting it in engagingly simple terms, police power seeks to restrict property rights out of necessity, while eminent domain seeks to appropriate such rights because they are useful.[70]

It may be readily conceded that this way of looking at the problem of inverse condemnation possesses an undeniable element of usefulness where actual physical occupation or taking over of privately owned land or improvements (i.e., the most obvious forms of "property") is concerned.[71] Compensation is normally awarded in such cases,[72] and the results can usually be verbalized in familiar legal terms as the acquisition by the governmental entity of a typical interest in the land.[73] On the other hand, it fails to provide a useful rationale for identifying or explaining those situations in which compensation for physical destruction or taking over of private property is exceptionally denied.[74] Nor does it draw a meaningful line indicating at what point regulations of conduct or use go so far as to be regarded as a compensable taking notwithstanding the

absence of physical appropriation.[75]

The appropriation-regulation approach has other deficiencies apart from its inability to explain major areas of inverse case law.[76] It assumes that the objectives to be secured by appropriation cannot be obtained through regulation, where in reality appropriation and regulation often are simply alternate techniques for achieving the same result. Protection of airport approaches from avigation hazards, for example, could be secured either by condemnation of servitude or by land use regulation, with identical impact upon the exploitation potential of land beneath the approach areas, but with potentially divergent consequences for compensability of the land owners.[77] In effect, under modern sophisticated notions of the varieties of interests in land that are assimilated within the "property" concept,[78] most regulatory impositions can readily be verbalized as appropriations of property, and the ultimate purposes of many physical appropriations may be accomplished with equal efficacy through carefully tailored regulations.[79] To postudate a difference in conclusions regarding compensability upon the supposed distinction between physical invasions or appropriations and regulations of use is thus to subject such results to the danger of manipulation and inequality of treatment of essentially like claims.

Finally, the questionable value of this approach seems to be even further reduced in a jurisdiction where, like California, the constitution requires payment of just compensation for a "damaging" as well as a "taking" of private property. It is clear, historically, that the damage

clauses were introduced precisely for the purpose of enlarging compensability beyond the outer limits seemingly marked by traditional judicial acceptance of physical invasion as the test of a "taking".[80]

The appropriation-regulation approach thus seems to possess very dubious utility as a tool of legal analysis. Its principal significance, perhaps, lies in the implicit suggestion that when a physical invasion, appropriation, or use by government of private assets occurs, a presumption should arise favoring payment of the constitutionally required compensation. This presumption, however, is only a starting point for further analysis. It may be dispelled by other considerations; and its absence in a particular case, because of lack of physical appropriation, does not foreclose compensability in any way, nor even create a contrary presumption. Its analytical worth is, obviously, of exceedingly modest dimensions.

(2) Diminution of value. Another approach, often expressed in judicial opinions,[81] emphasizes the magnitude of the property owner's loss as the key to compensation. Focussing attention not upon the nature of the power being exercised, but upon the quantitative impact of the imposition, this view intimates that large deprivations normally call for compensation to be paid while small ones - those properly assimilated within the idea of the "petty larceny" of the police power - are noncompensable.[82]

Like the physical invasion approach, this one, too, fails to provide an adequate framework for reconciliation of the decisions. It is clear that some types of governmental action may, with impunity,

destroy enormous economic values, while other kinds of relatively minor losses regularly command compensation.[83] Moreover, unless qualified in major respects, a test based solely on diminution of value would have a potential impact upon vast areas of governmental activities to a pervasive degree which finds support neither in decisional law nor acceptable policy.[84] Finally, except as a vague invitation to manipulation and idiosyncratic judgment,[85] the suggested test incorporates no standards for determining at what point the line between compensable and non compensable impositions should be drawn. It is not even clear whether diminution of value is to be taken as an independent or relative standard, or, if the latter, with what basis of comparison the pecuniary impact is to be appraised.[86]

Despite its deficiencies, however, it seems evident that degree of loss is a relevant factor to be taken into account in formulating a consistent body of inverse condemnation practice. On the one hand, the sheer costs of administering a compensation scheme which failed to rule out some claims as de minimis, too speculative, or unprovable might well impose fiscal burdens which impair the general welfare out of all proportion to the more equitable cost allocations that might result.[87] Moreover, in a large variety of situations where private losses are readily identifiable as products of public programs, available techniques of social cost accounting are probably inadequate to strike a meaningful pecuniary calculation of the net extent to which losses are not offset by benefits.[88] Yet there are a number of typically recurring situations in

which the magnitude of private loss from public activities seems compellingly relevant - especially where the extent of private deprivation serves as an index to identification with certainty of those owners who have sustained the burden of the public program in disproportionate degree to their neighbors through obvious frustration of reasonable investment-supported expectations.[89] As with the physical invasion approach, diminution of value may thus be helpful in supporting a determination that compensation should be required in certain instances; but it is wanting in criteria for determining when, despite substantial losses, compensation is not constitutionally required.

(3) Balancing of public advantage against private detriment. Judicial lip-service has probably been paid more often to the process of balancing of the competing interests, as the most feasible approach to disposition of inverse condemnation issues, than to any other.[90] To some extent, this "test" probably is derived from the close analogy which inverse condemnation is deemed to bear to common law nuisance liability, where a similar balancing process is typically urged as the appropriate technique.[91] In a larger sense, of course, it is merely a particular manifestation of the tendency of modern jurisprudence to regard litigation as primarily a process for resolution of conflicts between competing social and economic interests represented by the contending parties.[92] In our present context, the test implies that compensation need not be paid for takings and damagings of private property which are "outweighed" by the social gains resulting from the governmental action under attack.[93]

The balancing process, while superficially attractive and familiar has some obvious inadequacies. It appears to be ethically indefensible if taken to mean that the law will permit the valuable interests of some members of society to be sacrificed, without compensation, for the benefit of others, in the absence of any criteria (other than the purely fortuitous circumstance of ownership is a certain location) for justifying the selection of membership of the two groups.[94] If, however, it is understood to require denial of compensation only when all members of the community, including those specially harmed, have received (or will receive at least) an "average reciprocity of advantage"[95] which fully offsets their losses, some members will ordinarily receive gratuitously valuable special benefits to the disparagement of the egalitarian component of our political and social ethics. As long as general confidence in the integrity and impartiality of public officials prevails, the latter consequence may perhaps be tolerated in view of the likelihood that, in the long run, windfall benefits will be redistributed generally throughout the community by taxation or other economic mechanisms.[96]

A more practical difficulty with the balancing approach lies in its assumption that courts (and juries) are capable of making reasonably accurate quantitative comparisons between the public and private interests assertedly in competition. Identification of what those interests are is not always an easy task in itself.[97] but there is a complete absence of any meaningful calculus for weighing and comparing what are essentially dissimilar factors.[98] Balancing thus, in practice, tends to appear to be unduly subjective and devoid of identifiable bases for predictability of

results except where repeated adjudication has crystalized rules of thumb.

The widespread acceptance of the balancing approach, despite its defects, is accountable in two ways. It appears to provide a rational and (at least on one assumption) not ethically disturbing framework for appraising in a gross and approximate way the extent to which government has visited unnecessary and grievous losses on individuals without commensurate conferring of either economic advantages or community amenities.[99] Presumably the most obvious cases for and against compensability will be exposed by the process; but it is clearly a meat ax rather than a finely honed scalpel. In addition, the flexibility of the balancing approach makes it attractive to appellate courts seeking for an open-ended technique with which to shape gradually the contours of a consistent and pragmatically operable body of law.

(4) Harm prevention and benefit extraction. A thoughtful student of our present problem has suggested that the distinction between a compensable taking and a noncompensable regulation can best be drawn by assessing the purpose of the governmental imposition.[100] If a limitation upon private land uses, for example, seeks primarily to prevent nuisance-like conduct in the interest of protecting the community welfare, compensation should not be awarded; but if the regulation seeks to compel an innocent owner involuntarily to confer a benefit upon the community, payment of compensation should be required in order to distribute more equitably the costs of the benefit thus made available. In this approach, a regulation for harm-prevention purposes normally is

of narrow and particularized dimensions, aimed to elimination of a detrimental use, but leaving a broad area in which private options are available for engaging in other useful but non-harmful activities. A ban on brickyards in a residential area provides an example.[101] Conversely, a regulation designed to confer a benefit tends to impose more comprehensive limitations on private choice, leaving the owner free only to abandon all activities which are economically feasible or engage in the kind of private use which will confer the desired benefit. Limitation of commercially valuable buildable land solely for use as a parking lot[102] or a wildlife sanctuary[103] illustrate situations requiring compensation under this view.

As the principal proponent of this approach has recognized,[104] the harm benefit distinction is not an easy one to apply, for benefit of some sort is normally identifiable in connection with all types of restrictions.[105] As social policy becomes increasingly permissive with regard to the scope of legislative power affirmatively to promote the general welfare, the line between harm-prevention and benefit-extraction becomes blurred, appearing to be more a matter of degree than of qualitative substance.[106] This approach thus tends to be ambiguous and difficult to apply to concrete situations with consistency and assurance.[107] It is far from obvious that a measure limiting the height of structures that may be built in an airport approach zone is a compensable conferring of benefits (as Professor Dunham intimates), rather than the prevention of a use (for tall buildings) which harms safety and amenity by interfering with airport use. Similarly, is it clear that a ban on billboards along highways is calculated to prevent harmful

roadside deterioration and distraction of motorists, rather than to confer a benefit of safety and amenity?

As a test for compensability, then, the harm-benefit distinction poses practical problems that greatly reduce its usefulness, although it does afford a cogent clue to the kinds of regulatory measures which can sometimes be enforced without compensation.[108]

(5) Enterprise function v. arbitral function. Closely related to the immediately preceding approach is the suggestion, recently offered by Professor Joseph Sax, that compensability of governmentally imposed losses should be determined by differentiating between governmental acquisition and governmental arbitration.[109] Under this view, if private economic losses are a consequence of governmental action which "enhances the economic value of some governmental enterprise", payment of just compensation is constitutionally required; but if private loss results from governmental activities aimed at a "resolution of conflict within the private section of society", through an exercise of governmental power to arbitrate as between the competing claims and shifting values that comprise "property", compensation is not required.[110] Underlying this approach is a rejection of the view that protection of existing economic values is central to the purposes of the eminent domain clauses; on the contrary, Professor Sax advances the thought that the framers were concerned primarily with preventing the self-aggrandizing propensities of arbitrary and tyrannical government.[111]

Unfortunately, the enterprise-arbitral approach has some of the same

deficiencies as Professor Dunham's harm-benefit theory.[112] The determination whether a particular regulatory measure falls at one end or the other of the conceptual yardstick encounters inherent ambiguities that are characteristically involved in any effort to appraise legislative purpose and effect. The solutions reached when government seeks to reconcile and arbitrate competition between private interests often - indeed, usually - reflect a multitude of shifting and elusive considerations which include some properly regarded as enterprise-enhancing. Moreover, many measures undoubtedly include aspects of both enterprise and arbitral objectives.[113]

For example, an airport approach zoning measure enacted by a city might well reflect (a) an appraisal of both intangible and economic values inuring to the community from encouragement of air transportation facilities, (b) a decision favoring both private and public airport operations generally as against some but not all competing interests in private land development adjacent to airports, and (c) a desire to limit the cost of development of a particular publicly-owned airport or of a projected public park on the periphery of an airport. The first of these objects seems amomalous when judged by the present approach; the second appears to be a mixed arbitral and enterprise decision; and the third is clearly an enterprise-enhancing decision.

Moreover, it seems that application of the approach breaks down in in situations such as this one.[114] The enterprise/arbitral approach cannot be employed intelligently without taking into account the specific ad hoc

application of the measure under consideration. Thus, an airport approach height restriction would, apparently, require payment of compensation if invoked to limit development of private property located adjacent to a publicly operated airport, but not if applied to like property on the periphery of a privately owned and operated airport. In the former situation, its application appears to be enterprise-enhancing; in the latter, it appears to be predominantly arbitral. Yet where the impact upon private resource development is substantially identical and the same public purpose is equally promoted in each case, it is difficult to see why different results are required.[115]

Similarly, in Miller v. Schoene,[116] which Professor Sax characterizes as a "correct" decision,[117] compensation for compulsory destruction of cedar trees was denied, where this measure was deemed essential to protect nearby apple orchards from cedar rust harbored by such trees. It is surely far from clear, however, that mere arbitration of conflicting private uses was at stake.[118] The dominant position of the apple industry in the economy of Virginia surely connotes the existence of indirect public enterprise-enhancement considerations in the background. Can it be safely assumed that the apple industry was exclusively "private", entirely divorced from government involvement in the form of direct and indirect subsidies or controls which, in effect, made that industry to some extent a mixture of public and private enterprise?[119] It is hardly a sufficient answer to problems of this sort to insist that collateral and indirect benefits to public enterprises are to be excluded in applying the test.[120] To so qualify it would introduce the problem of drawing a line

between "direct" and "indirect" benefits, thereby adding to the already formidable ambiguities of the approach.

The enterprise/arbitral approach does appear to offer helpful insight in identifying situations in which the policy of the eminent domain clauses demands payment of compensation. When analysis of a loss-producing measure indicates that government enterprise-enhancement is a substantial result, but that arbitral consequences are minimal, justification for cost-distribution is usually plain. But, this approach fails to point out when compensation may properly be denied, for in the converse situation a withholding of compensation may significantly frustrate the underlying policy of prevention of tyrannical government. The exercise of "arbitral" power, it should be noted, does not always represent an objective and disinterested consideration and adjustment of competing private interests; on the contrary, it may constitute an unmitigated exercise of political clout by dominant private interests seeking to acquire benefits at the expense of impotent private interests - the arbitrary tyranny of the majority. Moreover, even assuming disinterested objectivity, it is difficult to perceive why it is less arbitrary or tyrannical to benefit some members of society at the expense of others merely because the interests being benefited are represented in privately owned rather than publicly owned ("enterprise") resources.[121]

(6) <u>The "fairness" test.</u> In a notable essay exploring the ethical foundations of compensation policy, Professor Frank Michelman has recently concluded that the soundest guide to inverse compensability lies in the philosophical idea of "justice as fairness", as corroborated

by utilitarian social policy.[122] The argument is far too complex to yield to easy summarization. Essentially, the concept of "fairness" is used by Michelman in a specialized sense assuming informed and perceptive actors, a denial of compensation is not deemed to be unfair if a disappointed claimant "ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision."[123] The importance of the claimant's ability to "appreciate" the relative risks reflects the utilitarian theory that loss of optimum productivity is a normal consequence of social demoralization caused by capricious governmental interference with the security of shared expectations relating to resource allocations.[124]

This approach to compensability suggests that private losses should be compensable when the relative magnitude of the harm forced upon specific individuals is great, the compensating social advantages are minimal, and the settlement costs of paying compensation are reasonably bearable.[125] Conversely, the arguments favoring noncompensability tend to be stronger when there are obvious offsetting benefits, or the burdens are relatively slight and widely diffused so that the substantive and procedural costs of compensation would be relatively large in proportion to the social advantage to be secured by payment of such compensation.[126] Circumstantial criteria of this sort are already reflected in the policy considerations postulated above,[127] as guides to analysis of specific types of compensation claims.

Professor Michelman's thesis undeniably provides a useful

theoretical base for analysis of the problems of inverse condemnation. Its generality and nonspecificity, however, make it difficult to apply as a practical test of compensability or as a rule of judicial decision - a conclusion with which its author readily agrees.[128] On the other hand, regarded primarily as a guide to legislative policy, the central idea of the "fairness" test - prevention of apparently capricious redistribution of resources - constitutes a welcomeadjunct to the present study.

FOOTNOTES

1. A previous phase of the study explored the limitations upon legislative power to regulate both substantive and procedural aspects of inverse condemnation. See Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan. L. Rev. 727 (1967).

2. For notable examples of policy discussion in the case law, see Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-16 (1922) (Holmes, J.); Albers v. County of Los Angeles, 62 Cal.2d 250, 42 Cal.Rptr. 89, 398 P.2d 129 (1965); Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943).

3. See Van Alstyne, supra note 1, at 742-44.

4. See Cal. Law Revision Comm'n, Recommendation Relating to Sovereign Immunity: Number 1 -- Tort Liability of Public Entities and Public Employees, in 4 Reports, Recommendations and Studies 801 (Cal. Law Revision Comm'n ed. 1963), for a detailed statement of policy considerations which underlie the present governmental tort liability statutes in California. Cf. Van Alstyne, Governmental Tort Liability: A Public Policy Prospectus, 10 U.C.L.A.L. Rev. 463 (1963).

5. See Van Alstyne, supra note 1, at 738-42.

6. The available periodical literature is too extensive to justify complete citation at this point. Most of the important studies are cited herein, passim. The most significant contributions to policy evaluation are Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. Rev. 3; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964); Dunham, Griggs v. Alleghany County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Supreme Court Rev. 63 (Kurland ed.); and Kratovil & Harrison, Eminent Domain - Policy and Concept, 42 Calif. L. Rev. 596 (1954).

7. It is assumed here that the focus of law reform should be directed primarily to legislative changes. Accordingly, possible constitutional changes to modify the scope or impact of inverse condemnation are not directly considered.

8. See Van Alstyne, supra note 1, at 776-85.

9. Id. at 770.

10. Id. at 771-76.

11. See, e.g., People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943); Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943).

12. This appraisal of the general state of the decisional law is widely shared. See authorities cited supra, note 6.

13. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L. Rev. 1165, 1178-79 (1967); Norvell, Recent Trends Affecting Compensable and Noncompensable Damages, in Proceedings of the Fifth Annual Institute on Eminent Domain 1 (Southwestern Legal Found. ed. 1963).

14. See Michelman, supra note 13, at 1212-18.

15. See Douglas, J., in United States v. Cors, 337 U.S. 325, 332 (1949): "The political ethics . . . in the Fifth Amendment reject confiscation as a measure of justice." Moreover, it is clear that the inverse condemnation remedy extends beyond those situations in which the public entity could have instituted, but did not commence, an eminent domain proceeding to obtain an adjudication of the owner's damages in advance. See Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. Rev. 3, 4-5.

16. See, e.g., United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1953) (total destruction of oil refinery and storage facilities); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (land value reduced from $800,000 to $60,000 by use regulation banning brickyard operation); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342 (1962), appeal dismissed, 371 U.S. 36 (1962) (value of land substantially destroyed by zoning ordinance).

17. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962): "There is no set formula to determine where regulation ends and

taking begins." To the same effect: Kratovil & Harrison, Eminent Domain - Policy and Concept, 42 Calif. L. Rev. 596, 608 (1954); Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596, 612-14 (1942). For a discussion of the historical background of the relationship between eminent domain and police power concepts, see Grant, The "Higher Law" Background of the Law of Eminent Domain, 6 Wis. L. Rev. 67 (1930); Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 378 (1911).

18. See Mandelker, supra note 15, at 46.

19. See Sax, Takings and the Police Power, 74 Yale L. J. 36, 62-64 (1964); Dunham, A Legal and Economic Basis for City Planning, 58 Colum. L. Rev. 650, 664-69 (1958).

20. The variables often produce anomalous results. Compare Griggs v. Alleghany County, 369 U.S. 84 (1962) (noise, smoke and vibration nuisance from overflying planes held compensable) with Batten v. United States, 306 F.2d 580 (10th Cir. 1962), cert. den. 371 U.S. 955 (1963) (similar consequences from nearby flights held non-compensable in absence of actual overflights). For other seemingly paradoxical results, see Michelman, supra note 13, at 1169-70.

21. See Breidert v. Southern Pacific Co., 61 Cal.2d 659, 39 Cal.Rptr. 903, 394 P.2d 719 (1964); Valenta v. County of Los Angeles, 61 Cal.2d 669, 39 Cal. Rptr. 909, 394 P.2d 725 (1964).

22. Breidert v. Southern Pacific Co., supra note 21; 2 P. Nichols, Eminent Domain § 6.32[2] (rev. 3d ed. 1963).

23. People ex rel. Dept. of Public Works v. Ayon, 54 Cal.2d 217, 5 Cal. Rptr. 151, 352 P.2d 519 (1960); R. Netherton, Control of Highway Access 53-58 (1963).

24. See Michelman, supra note 13, at 1203-12; Kratovil & Harrison, supra note 17, at 612-15. Perhaps the most striking examples of reliance interests are found in the cases dealing with constitutional protections accorded to nonconforming uses. See, e.g., Graham, Legislative Techniques for the Amortization of the Nonconforming Use: A Suggested Formula, 12 Wayne L. Rev. 435 (1966); Comment, 14 U.C.L.A.L. Rev. 354 (1966).

25. See Van Alstyne, supra note 1, at 771-76.

26. E.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 416 (1922): "The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (Holmes, J.)

27. For example, there is probably a fairly widespread general understanding that governmental action to eliminate nuisances and other

menaces to health and safety are permissible noncompensable exercises of the "police power". See Michelman, supra note 13, at 1236; Annot., 14 A.L.R.2d 73 (1950). Destruction of private property to prevent the spread of a conflagration, see Bowditch v. City of Boston, 101 U.S. 16 (1879), or to preclude it from falling into enemy hands during wartime, see Annot., 97 L.Ed. 164 (1953), are also widely understood to be noncompensable. See Dunham, Griggs v. Alleghany County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Supreme Court Rev. 63, 77-80.

28. At least two situations appear to exist where noncompensability of private losses seems generally acceptable as not unfair from the viewpoint of equitable cost allocation. First, where compensating benefits are fairly obvious, or private losses are either relatively trivial or widely shared throughout the community, individualized claims for damages generally are not advanced. This assumption appears to be at the root of the distinction, widely recognized, between noncompensability of "consequential", and compensability of "special", damages in inverse condemnation litigation. See Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596, 612-13 (1942); 4. P. Nichols, Eminent Domain §§ 14.1, 14.1[1], 14.4 (rev. 3d ed. 1962). In the oft-quoted expression by Justice Holmes, "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Secondly, private owners may, upon occasion,

deliberately assume the risk of detrimental governmental action for speculative investment pruposes, as where a land developer buys scenic land along a freeway in the planning stage at a market discounted price because of the widely known risk of imposition of development restrictions, or an individual purchases a residence in the approach zone of an existing airport at a price which reflects the market assessment of its attendant noise problems as well as the expectation of rezoning for industrial use. See Michelman, supra note 13, at 1237-38.

29. The concept of reasonable expectations necessarily takes into account the anticipated range of permissible activities in which other property owners are privileged to engage. Thus, numerous decisions affirm the rule that a public entity, as a property owner, incurs no liability for using its property in a manner in which private persons similiarly situated could use theirs without incurring liability. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., 56 Cal.2d 603, 15 Cal. Rptr. 904, 364 P.2d 840 (1961); Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941). But see Albers v. County of Los Angeles, 62 Cal.2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965).

30. Governmental functions, because of their scope and volume, may often expose private property owners to risks unlike those normally attendant upon private activities, and of a magnitude which greatly exceeds the foreseeable consequences of privately caused harms.

In such cases, one might well expect the development of a special body of law relating to inverse condemnation liability which does not rest upon private tort analogies. See e.g., Albers v. County of Los Angeles, 62 Cal.2d 250, 42 Cal. Rptr. 89. 398 P.2d 129 (1965) (destruction of millions of dollars worth of residential properties by landslide induced by county road construction project); Reardon v. City & County of San Francisco, 66 Cal. 492, 6 Pac. 317 (1885) (injury to private buildings caused by shifting of unstable soil as result of city street project). See also, Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897 (1950) (flooding caused by diversion of natural stream flow in connection with construction of major flood control project).

31. See, e.g., Bacich v. Board of Control, 23 Cal.2d 343, 350-51, 144 P.2d 818, 823 (1943): " . . . the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements. . . . 'The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. . . .' ." (Quoting from T. Sedgwick, Statutory and Constitutional Law 462-63 (2d ed. 1874); Michelman, supra note 13, at 1180-81.

32. Avoidance techniques generally involve choices between alternate means for promoting the same basic goals. For example, the risk of creating a compensable disruption of residential tranquillity through airport development, see Griggs v. Alleghany County, 369 U.S. 84 (1962), may be minimized by location selection, runway layout and design, advance acquisition of adequate avigation easements in lands beneath projected approach areas, coordination of zoning and land-use planning with airport development, and enforcement of noise abatement programs in the course of actual airport operations. See House Committee on Interstate & Foreign Commerce, Special Subcommittee on Regulatory Agencies, 88th Cong., 1st Sess., Investigation and Study of Aircraft Noise Problems 27-28 (H.R. Rep. No. 36, 1963). For available techniques of damage avoidance and reduction in highway planning, see, e.g., Mandelker, Planning the Freeway: Interim Controls in Highway Programs, 1964 Duke L. J. 439 (1964); Waite, Techniques of Land Acquisition for Future Highway Needs, Highway Research Record, No. 8, p. 60 (1963). Cf. Ward Concrete Co. v. Los Angeles County Flood Control Dist., 149 Cal. App. 2d 840, 847-48, 309 P.2d 546, 551 (1957), stating that "in the absence of any compelling emergency or the pressure of public necessity, the courts will be slow to invoke the doctrine of police power to protect public agencies [from liability in inverse condemnation] in those cases where damage to private parties can be averted by proper construction and proper precautions in the first instance."

33. See 3 P. Nichols, Eminent Domain §8.62 (rev. 3d ed. 1965). The generally favorable impact of freeway development upon land values is discussed in Hess, The Influence of Modern Transportation on Values - Freeways, Assessor's J. 26 (Dec. 1965).

34. The statement in the text assumes, of course, that no part of the owner's land has been taken. Where there is a partial taking, "special" benefits are routinely considered as an offset against severance damages accruing to the remainder of the parcel. Cal. Code Civ. Proc. § 1248(3). See, generally, Harr & Herring, The Determination of Benefits in Land Acquisition, 51 Calif. L. Rev. 833 (1963); Gleaves, Special Benefits: Phantom of the Opera, 40 Cal. S. B. J. 245 (1965).

35. Compare Bacich v. Board of Control, 23 Cal.2d 343, , 144 P.2d 818, 825 (1943), "We do not fear that permitting recovery in cases of cul-de-sacs created in a municipality will seriously impede the construction of improvements, assuming the fear of such an event is real rather than fancied" (majority opinion), with id. at , 144 P.2d at 839, "The cost of making such improvements may be prohibitive now that new rights are created for owners of property abutting on streets . . ." (Traynor, J., dissenting).

36. See Bacich v. Board of Control, 23 Cal.2d 343, , 144 P.2d 818, 839 (1943) (Traynor, J., dissenting). Total "settlement costs" should include not only the actual outlays necessary to settle compensation

claims, but also the "dollar value of the time, effort, and resources that would be required" to reach appropriate settlements in both the particular claims under consideration and others arising from the same or like circumstances. See Michelman, supra note 13, at 1214.

37. See Michelman, supra note 13, at 1253-56; Staff of House Comm. on Public Works, 88th Cong., 2d Sess., Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs 113, 130-34 (Comm. Print 1964). Cf. Note, 3 Harv. J. Legis. 445 (1966).

38. Cf. Van Alstyne, Government Tort Liability: A Public Policy Prospectus, 10 U.C.L.A. L. Rev. 463, 500-13 (1963) (loss-shifting policy relative to government tort liability).

39. In one sense, the administration of inverse condemnation is primarily concerned with the problem of incidence rather than extent of liability. The losses caused by governmental activity necessarily fall upon someone and constitute a charge against the total resources of the community, except to the extent they may be shifted to persons outside the community. Since the bulk of such losses will ordinarily be locally absorbed, loss-shifting policy appears to involve an assessment of alternative methods for distributing the burdens accompanying governmental activity.

40. See, e.g., Spater, Noise and the Law, 63 Mich. L. Rev. 1373, 1408 (1965). Cf. Van Alstyne, A Study Relating to Sovereign Immunity,

in 5 Reports, Recommendations and Studies 311-30 (Cal. Law Revision Comm'n ed. 1963).

41. Authorization of flexible administrative adjustment of claims against various federal agencies has successfully reduced the volume of litigation under the Federal Tort Claims Act. See Gellhorn & Lauer, Federal Liability for Personal and Property Damage, 29 N.Y.U. L. Rev. 1325 (1954); Holtzoff, The Handling of Tort Claims Against the Federal Government, 9 Law & Contemp. Prob. 311 (1942); McLeod, Administrative Settlement of Claims, JAG J. 5 (Feb. 1953). Another technique which has proven helpful is the statutory authorization of administrative payments, with fixed limits, for designated kinds of private losses caused by government programs. See U. S. Advisory Comm'n on Intergovernmental Relations, Relocation: Unequal Treatment of People and Businesses Displaced by Governments 111-14 (1965).

42. Compare the legislative determination, in formulating the California Tort Claims Act of 1963, to predicate the principal statutory immunities of public entities upon the settled body of case law relating to the "discretionary" immunity of public officers. See Cal. Law Revision Comm'n, Recommendation Relating to Sovereign Immunity: Number 1 -- Tort Liability of Public Entities and Public Employees, in 4 Reports, Recommendations, and Studies 801, 812, 814-19 (Cal. Law Revision Comm'n ed. 1963).

43. See Note, Eminent Domain -- Rights and Remedies of an Uncompensated Landowner, 1962 Wash. U. L. Q. 210; Developments in the Law - Injunctions, 78 Harv. L. Rev. 994, 1063-64 (1965).

44. To a considerable extent, adequate options are presently available to California public entities for funding of liabilities in inverse condemnation. See Calif. Gov't Code §§ 970.6 (installment payment of judgments), 975-978.8 (bond issues to fund judgments); Van Alstyne, California Government Tort Liability §§ 9.15 - .17 (1964). The "catastrophe judgment" problem, especially in its impact upon relatively small public entities, needs attention, however. See generally, Van Alstyne, A Study Relating to Sovereign Immunity, in 5 Reports, Recommendations and Studies 308-11 (Cal. Law Revision Comm'n ed. 1963); Borchard, State and Municipal Liability in Tort - Proposed Statutory Reform, 20 A.B.A.J. 747, 751-52 (1934).

45. It can readily be argued, of course, that "policy-balancing" is a fruitless exercise in semantics unless accompanied by agreement upon fundamental standards by which to assign qualitative values to the policies perceived as relevant in specific cases. It is deemed unlikely, however, that agreement could readily be achieved as to the philosophical purposes of the compensation system or as to how these purposes should best be translated into practical policy. But cf. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967). The problem, however, does not appear to be of crucial

significance for present purposes. Our object in the pages which follow is to examine existing compensation practices with an eye to legislative improvement in the current law. Hence, the relevant elements of policy evaluation are those which would be regarded as persuasive to legislators collectively. In this context, pragmatic assessments of what is feasible, appropriate, and possible in the legislative context are surely more important influences upon statutory reform than basic philosophical or economic postulates. Accordingly, emphasis will be here placed upon an effort to employ the "practical" wisdom incorporated in the suggested policy criteria to suggest avenues of reasonable and "workable" reform which might be included in an acceptable legislative program.

46. For a discussion of the current doctrinal handling of these concepts, see Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan. L. Rev. 727, 749-68, 776-83 (1967).

47. The classification of inverse condemnation claims here suggested is proposed as a useful but necessarily imperfect one. The diversities of factual elements comprising potential inverse claims are such that overlapping of the classifications is unavoidable to some extent. Assignment of particular types of claims to specific categories thus reflects, in part, the author's views as to the most fitting analysis for present purposes.

48. The term, "government activity", is here employed to refer to any form of action by a public entity, state or local, in the pursuit of any authorized public function, whether facilitative, service, guardianship, or mediatory in nature. See Van Alstyne, supra note 46, at 735-36.

49. See Dunham, Griggs v. Alleghany County in Perspective: Thirty Years of Expropriation Law, 1962 Supreme Court Review 63, 71-73.

50. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

51. The fact the bulk of the damages sought are prospective in nature is not necessarily an impediment to present adjudication and award, provided there is a rational and non-speculative basis for determination of their effect upon present value. See 4 P. Nichols, Eminent Domain § 14.241 (rev. 3d ed. 1962).

52. See Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, 39 Cal. Rptr. 708, 394 P.2d 548 (1964).

53. The demise of the immunity doctrine has recently accelerated. For a survey indicating that it has been largely discredited or abandoned in over one-third of the states, see Van Alstyne, Governmental Tort Liability: A Decade of Change, 1967 U. Ill. L. F. _____.

54. Cal. Gov't Code §§ 810-95.8 (West 1966). See generally A. Van Alstyne, California Government Tort Liability (1964).

55. Id. §§ 1.18, 1.19. See also, Foster, Tort Liability Under Damage Clauses, 5 Okla. L. Rev. 1 (1952); Comment, 15 Baylor L. Rev. 403 (1963); Comment, 38 Wash. L. Rev. 607 (1963).

56. See Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 219, 11 Cal. Rptr. 89, 94, 359 P.2d 457, 462 (1961), pointing out that under the regime of governmental immunity, "there is governmental liability for nuisances even when they involve governmental activity".

57. See Van Alstyne, Governmental Tort Liability: A Public Policy Prospectus, 10 U.C.L.A. L. Rev. 463, 493-98 (1963).

58. Cal. Civ. Code § 3482 ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance") has been construed narrowly, so that general statutory authority to engage in a particular activity will not be deemed to constitute authority to create a nuisance, or a defense to liability for so doing. See, e.g., Ambrosini v. Alisal Sanitary Dist., 154 Cal.App.2d 720, 317 P.2d 33 (1957). Although no decision has explicitly so stated, it is probable that this interpretation reflects judicial understanding that the underlying rationale of the nuisance liability of public agencies, at least where property damage is concerned, is grounded upon inverse condemnation. See Van Alstyne, supra note 57. Moreover, it seems self-evident that a statute cannot immunize a public entity from liability imposed by constitutional compulsion. See Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505 (1942);

2 P. Nichols, Eminent Domain §6.33 (rev. 3d ed. 1963). Hence, cautious counsel suing upon a statutory tort cause of action will often, where tenable join therewith a count in inverse condemnation. See, e.g., Granone v. County of Los Angeles, 231 Cal.App.2d 629, 42 Cal. Rptr. 34 (1965).

59. See A. Van Alstyne, California Government Tort Liability §§ 5.9 --.10 (1964).

60. See Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. Rev. 3, 13-17.

61. Van Alstyne, op. cit. supra note 59, §§ 1.22, 1.26. Trespass, however, was actionable on an inverse condemnation theory in appropriate cases. See Jacobsen v. Superior Court, 192 Cal. 319, 219 Pac. 986 (1923).

62. See, e.g., Youngblood v. Los Angeles County Flood Control District, 56 Cal.2d 603, 15 Cal. Rptr. 904, 364 P.2d 840 (1961); Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897 (1950); Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941).

63. Albers v. County of Los Angeles, 62 Cal.2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965).

64. Ibid. See also, Reardon v. City & County of San Francisco, 66 Cal. 492, 6 Pac. 317 (1885).

65. In a variety of situations, the same facts will support a claim based upon inverse condemnation concepts, as well as a statutory claim for injury resulting from a dangerous condition of public property. See, e.g., Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955). The statutory provisions which govern the latter claim, however, establish a number of immunities and defenses which would not necessarily be applicable to the inverse condemnation claim. See A. Van Alstyne, California Government Tort Liability §§ 6.28 - .43 (1964).

66. Supra, p. .

67. The major contributions in the legal literature and cases are collected and critically discussed in Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964). Basic philosophical assumptions of inverse condemnation policy are explored in Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).

68. See 1 P. Nichols, Eminent Domain §§ 1.42, 1.42[2] (rev. 3d ed. 1964).

69. See Comment, Distinguishing Eminent Domain From Police Power or Tort, 38 Wash. L. Rev. 607 (1963).

70. See Note, Freeways and the Rights of Abutting Owners, 3 Stan. L. Rev. 298, 302 (1951).

71. See 2 P. Nichols, Eminent Domain §§ 6.2 - .23[3] (rev. 3d ed. 1963).

72. E.g., Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597 (1947) (temporary occupation to store construction materials; Granone v. County of Los Angeles, 231 Cal. App.2d 629, 42 Cal. Rptr. 34 (1965) (flooding).

73. See Michelman, supra note 67, at 1187.

74. Familiar examples include Miller v. Schoene, 276 U.S. 272 (1928) (destruction of cedar trees to protect apple orchards from cedar rust); Lawton v. Steele, 152 U.S. 133 (1894) (destruction of fishnets which were unlawful to use under existing regulations). See also, Brown, Eminent Domain in Anglo-American Law, 18 Current Legal Problems 169 (1965).

75. Compare Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), with Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Cf. In re Clinton Water Dist., 36 Wash.2d 284, 218 P.2d 309 (1950) (regulation forbidding recreational use of reservoir held a compensable damaging of riparian rights). Obviously, to deny compensation solely because there has been no physical invasion would be preposterous. See Sax, supra note 67, at 47-48.

76. See generally, Michelman, supra note 67, at 1226-29.

77. Legislative recognition of police power and eminent domain as alternate techniques is illustrated by the airport approach zoning

law. See Cal. Gov't. Code §§ 50485.2 (police power), 50485.13 (eminent domain).

78. See Philbrick, Changing Conceptions of Property in Law, 86 U. Pa. 691 (1938); Restatement, Property, ch. 1, Introductory Note (1936).

79. See Waite, Governmental Power and Private Property, 16 Catholic U. L. Rev. 283, 284-85 (1967); Michelman, supra note 67, at 1185-87. Cf. Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L. J. 221 (1931).

80. Chicago v. Taylor, 125 U.S. 161 (1888); Reardon v. City and County of San Francisco, 66 Cal. 492, 6 Pac. 317 (1885); Rigney v. City of Chicago, 102 Ill. 64 (1882); Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan. L. Rev. 727, 771-76 (1967); Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596 (1942).

81. 1 P. Nichols, Eminent Domain § 1.42[7] (rev. 3d ed. 1964).

82. This approach is generally attributed to Justice Holmes. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (majority opinion); Tyson v. Banton, 273 U.S. 418, 445-46 (1925) (dissenting opinion); Bent v. Emery, 173 Mass. 495, 53 N.E. 910 (1899) (Holmes, C. J.). The "petty larceny" phrase also is Holmes'. 1 Holmes-Laski Letters 457 (Howe ed. 1953). Whether Holmes himself fully accepted the diminution-of-value approach is open to question. See Michelman,

supra note 67, at 1190 n. 53; Van Alstyne, supra note 80, at 761-62.

83. See Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), appeal dismissed 371 U.S. 36 (1962), reviewing the cases. On the other hand, minor pecuniary losses for actual takings of negligible portions of private parcels of real property are fully compensable, even though the benefits to be realized from the public improvement and to be reflected in enhanced value of the parts not taken will clearly exceed the most generous estimate of the value of what was taken. See Cal. Code Civ. Proc. § 1248(3) (as amended by Cal. Stat. 1965, ch. 51, § 1, p. 932); Contra Costa County Water Dist. v. Zuckerman Constr. Co., 240 Cal. App.2d 908, 50 Cal. Rptr. 224 (1966).

84. See the dictum of Holmes, C. J., in Bent v. Emery, supra note 82, at 496, 53 N.E. at 911: " . . . we assume that even the carrying away or bodily destruction of property might be of such small importance that it would be justified under the police power without compensation. We assume that one of the uses of that convenient phrase, police power, is to justify those small diminutions of property rights which, although within the letter of constitutional protection are necessarily incident to the free play of the machinery of government." (Emphasis supplied.) See generally, Spater, Noise and the Law, 63 Mich. L. Rev. 1373 (1965).

85. See Dunham, Griggs v. Alleghany County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Supreme Court Rev. 63,

75-81; Sax, Takings and the Police Power, 74 Yale L. J. 36, 50-53 (1964).

86. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1191-93 (1967).

87. See Kratovil & Harrison, Eminent Domain - Policy and Concept, 42 Calif. L. Rev. 596, 611 (1954); note 84, supra. Remote and speculative damages are normally nonrecoverable. 4 P. Nichols, Eminent Domain § 14.241 (rev. 3d ed. 1962).

88. The inadequacies in social cost accounting techniques helps to explain the usual judicial insistence that compensation is constitutionally available only for "special" but not for "general" damage, see Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596, 612-13 (1942); Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317 (1885); City of Los Angeles v. Geiger, 94 Cal.App.2d 180, 210 P.2d 717 (1949), and that only "special" benefits are to be credited against severance damages in computing just compensation. See Harr & Herring, The Determination of Benefits in Land Acquisition, 51 Calif. L. Rev. 833 (1963).

89. See Michelman, supra note 86, at 1233.

90. See Albers v. County of Los Angeles, 62 Cal.2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965); Kratovil & Harrison, supra note 87, at 626-29; Comment, 38 Wash. L. Rev. 607 (1963).

91. See Kratovil & Harrison, supra note 87, at 611-12.

92. See 3 R. Pound, Jurisprudence ch. 14 (1959); C. Auerbach, L. Garrison, W. Hurst, & S. Mermin, The Legal Process 66-148 (1961); Fuller, American Legal Realism, 82 U. Pa. L. Rev. 429 (1934).

93. See, e.g., Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), appeal dismissed, 371 U.S. 36 (1962). Cf. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958).

94. See Michelman, supra note 86, at 1195.

95. The divergent meanings which may be attached to this phrase are emphasized in the dissenting opinion of Mr. Justice Brandeis, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922).

96. See Michelman, supra note 86, at 1196.

97. See Kratoril & Harrison, supra note 87, at 610; Comment, Distinguishing Eminent Domain From Police Power or Tort, 38 Wash. L. Rev. 607, 616-17 (1963). As to the evolving and changing nature of acceptable police power purposes, see Miller v. Board of Public Works, 195 Cal. 477, 484-85, 234 Pac. 381, 383 (1925).

98. See Sax, Takings and the Police Power, 74 Yale L. J. 36, 41-46 (1964); Heyman & Gilhool, The Constitutionality of Imposing Increased

Community Costs on New Subdivision Residents Through Subdivision Exactions, 73 Yale L. J. 1119, 1127 (1964); Ribble, The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation, 16 Va. L. Rev. 689, 692 (1930). Cf. Comment, 11 Kan.L. Rev. 388 (1963). Some cases intimate that "emergency" or "pressing necessity" must characterize the public interest in order to justify denial of compensation, but are uninformative as to the standards for identifying the presence or absence of these elements. See, e.g., Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943); Rose v. State of California, 19 Cal.2d 731, 123 P.2d 505 (1942).

99. See Michelman, supra note 86, at 1235.

100. Dunham, A Legal and Economic Basis for City Planning, 58 Colum. L. Rev. 650 (1958). See also, Dunham, Property, City Planning, and Liberty, in Law and Land 28 (C. Haar ed. 1964); Dunham, City Planning: An Analysis of the Content of the Master Plan, 1 J. L. & Econ. 170 (1958).

101. See Hadacheck v. Sebastian, 239 U.S. 394 (1915).

102. Vernon Park Realty Co. v. City of Mt. Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954).

103. Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).

104. Dunham, supra note 100, at 664.

105. See Mandelker, Notes From the English: Compensation in Town and Country Planning, 49 Calif. L. Rev. 699, 703 (1961).

106. Comment, 45 Texas L. Rev. 96, 106 (1966).

107. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1197-1200 (1967), pointing out that "harmful" uses tend to be a shifting component of space, time, and community development patterns.

108. Id. at 1235-45.

109. Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

110. Id. at 67.

111. Id. at 53-60.

112. See Michelman, supra note 107, at 1200-01.

113. See Comment, 38 Wash. L. Rev. 607 (1963). A good example is provided by the railroad grade crossing elimination cases. See, e.g., Atchison, Topeka & Santa Fe R. Co. v. Public Utilities Comm'n, 346 U.S. 346 (1953), sustaining imposition upon railroad of substantial share of cost of construction of highway underpass. Under the "enterprise/arbitral" approach, the entire cost of such construction should be borne by the public entity requiring the grade separation to be built, since the result is enterprise-enhancing in the sense

that grade separations increase the value of utility of public streets. See Sax, supra note 109, at 70. However, Professor Sax does not explain why these cases cannot, with reason, be regarded as essentially arbitral, in that the policy of requiring grade separations appears to represent an adjustment promotive of public health and safety as between the competing demands of railroad users (carriers and shippers) and highway users (motorists, truckers, shippers by truck). In addition, it seems apparent that grade separations also enhance the value and utility of railroad trackage, a factor which would seem to justify shifting part of the fiscal burden to the benefited railroad.

114. Sax, supra note 109, at 67, concludes that compensation should be paid in airport approach zoning cases, since such zoning unambiguously is intended, and in fact operates, to enhance the value of the public airport. The argument, however, overlooks the fact that such zoning regulations ordinarily are general in application, and thus operate for the advantage of competing public and private airports, and to the detriment of both publicly and privately owned land in the approach areas. Moreover, at another point, id. at 74, Professor Sax appears to concede that benefits realized by governmental enterprises which operate in competition with private interests that are likewise benefited by regulatory measures may be deemed "incidental" and thus not an occasion for requiring compensation. It is not clear why airport zoning benefits are not "incidental" under this latter view.

115. The problem suggested in the text could be avoided if it were agreed that governmental "enterprise" includes private resource utilization activities which are devoted to public service functions, such as public utility companies and private transportation businesses, and have the statutory power of eminent domain. Cf. Cal. Civ. Code § 1001; Cal. Code Civ. Proc. § 1237. Value enhancement to such enterprises, including private airports, from regulatory measures would thus require compensation to be paid. Professor Sax, however, makes no claim to such an expanded application of his test; to adopt it would raise difficult collateral problems of definition, loss allocation, and regulatory policy.

116. 276 U.S. 272 (1928).

117. Sax, supra note 109, at 69.

118. See Comment, 45 Texas L. Rev. 96, 104-05 (1966).

119. See Va. Code §3.1-635 (repl. vol.) (powers of Virginia State Apple Commission). See generally, 3 Am. Jur.2d, Agriculture §§ 16-47 (1962).

120. Sax, supra note 109, at 69 n. 154.

121. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1201 (1967).

122. Michelman, supra note 121

123. Id. at 1223. The "risks" to be compared under this test are defined in sophisticated fashion. One, which may result from liberal compensation practice, is that overall costs will be so great as to require discontinuance of desirable government projects, with a consequent general diminution in the total output of social benefits which would otherwise be shared by the claimant. Another, associated with less liberal compensation practice, is that the claimant will bear such a concentrated and uncompensated loss as to preclude him, either wholly or in part, from sharing in the general social benefits emenating from government projects in general. See id. at 1222-23.

124. Id. at 1212-13.

125. Id at 1223.

126. Ibid.

127. See pp. , supra.

128. Michelman, supra note 121, at 1245-53.