5/21/69

First Supplement to Memorandum 69-68

Subject: Study 65 - Inverse Condemnation (Losses Caused by Highway and Street Improvements)

Attached to this supplement is background reading material that is pertinent to the problem of compensation for losses caused by highway and street improvements and also pertinent to the subject of compensation in eminent domain proceedings. The material has been selected with some care and all of it is considered to be valuable background for discussion of Memorandum 69-68 and for future discussions of inverse condemnation and eminent domain. The material is a portion of some material that was distributed for background reading during 1967. We do not plan to discuss the material as such at the meeting, but the information contained in the material will be of substantial assistance to you in making decisions in the inverse condemnation and eminent domain studies.

The material attached consists of the following:

(1) Green pages - Extract from Report of Eminent Domain Revision Commission of New Jersey (recommendations were not enacted in New Jersey as far as we know).

(2) Buff pages - Extract from Spater, Noise and the Law

(3) Pink pages - Extract--Note from Virginia Law Review

(4) Gold pages - Vetoed Connecticut bill and veto message

(5) White pages - Extract--Report of British Columbia Royal Commission on Expropriation

(6) Blue pages - Extract from panel discussion on "Expropriation Procedure and Compensation."

(7) Pink pages - Selected portions of law review article on "The Determination of Benefits in Land Acquisition."

(8) Blue pages - Remainder Parcels

(9) Gold pages - Land Acquisition 1963 Reports (one report on Community effects of remainder parcel valuation).

(10) White pages - An Evaluation of Partial Taking of Property for Right-of-Way

(11) Kanner's comment on "Just How Just is Just Compensation" (previously distributed).

There is a great deal more background material we could provide. However, we have attempted to select portions of material that present a point of view or provide background information that will be of value. A careful reading of the materials will give you general information on matters that we will develop in more detail as we get into particular aspects of the eminent domain and inverse condemnation studies. Despite the fact that the materials are broader than the subject matter of Memorandum 69-68, it is my hope that, at the meeting, we can restrict our discussion to the particular problem dealt with in Memorandum 69-68.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXTRACT

Report of the Eminent Domain Revision Commission of New Jersey
(April 15, 1965)

ARTICLE VI

Elements Which Should be Considered in Fixing Compensation

In the absence of any *constitutional* definition of "just compensation" (and there is none), the determination thereof is a judicial function which is said to be sufficiently elastic to adjust itself to the social needs of the times as they may change from generation to generation. *City of Trenton* v. *Lenzner* (17).

The mere fact that principles of law respecting such compensation have been recognized over a long space of time, is no reason for continued adherence thereto, if the reasons for their adoption no longer exist. This thought has been well expressed in the opinion of our Supreme Court, in *State* v. *Pennsylvania Railroad Co.* (18), as follows:

> "The principle espoused by these cases has stood for over 100 years. Mere antiquity, however, will not save it from the onslaughts being made if it is otherwise barren of reason or logic, equity or justice. Time alone will not suffice to cause its re-embracement. On the

other hand, a firmly fixed and well settled rule should not be changed unless it is proved erroneous or, under present-day conditions, no longer sustains the basic principle of law and justice which originally evoked it."

The cases of *State* v. *Gorga* (21), *City of Trenton* v. *Lenzner* (17), *State* v. *Gallant* (22), and *State* v. *Burnett* (6), are indicative of the awareness of our courts that the basis of just compensation is subject to change and modification whenever the facts and circumstances warrant. Such modifications are not rapid however and are achieved only after long and expensive litigation. These results could and should be effected more promptly through legislative enactment.

In the case of *U. S.* v. *Miller* (23), it is stated:

"The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money for the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

This is a restatement of the rule enunicated in ***Monongahela Navigation Co.*** v. *U. S.* (24).

This principle is again stated in *State* v. *Burnett* (6) at 288, where our court points out that although such phraseology is "a term which speaks more of total indemnity",

"* * * the constitutional requirement is satisfied by a sum of money which fairly represents the transferable value of the property in the market place. *Olson* v. *United States*, 292 U. S. 246, 255 * * * *Kimball Laundry Co.* v. *United States*, 338 U. S. 1 * * *. We deal, then, in most valuation problems, in an evidential construction of a hypothetical sale between a willing and uncoerced seller and a like-minded buyer."

As was pointed out in *City of Trenton* v. *Lenzner* (17) at 476:

> "While it has been pointed out that these concepts are somewhat indefinite, it may well be that their flexibility is the very thing which will best serve to attain the goal in eminent domain proceedings of 'justice and indemnity in each particular case.' "

Notwithstanding the foregoing equitable, fair and idealist principles, the cold hard facts are that the practical application thereof in many cases does *not* afford the full and perfect equivalent for the property taken and the owner is *not* placed in as good position pecuniarily as he would have occupied if his property had not been taken.

The items of non-compensable losses with respect to which most frequent complaints are made are discussed below:

Moving Expenses

The taking of property requires the vacation thereof by its occupants, both owners and tenants. This involves the cost of removal of furniture, fixtures, machinery and equipment, and the re-installation thereof in a new location. Incidental thereto is the damage done to such equipment as a result of dismantling and reconstruction.

Until recently, these items were held to be non-compensable items. However, Federal Aid Highway Act (Title 23, Sec. 133, U. S. C.) has now authorized relocation assistance when such payments were authorized and made by state agencies under state statutes. The maximum allowed is $200 for expenses of an individual and his family and $3,000 for a business. By P.L. 1962, Chap. 221, the State Highway Commissioner was authorized to pay such sums. Other agencies are not authorized to make any payments whatsoever for such costs, and hence do not do so. *Newark* v. *Cook* (8) and *City of Trenton* v. *Lenzner* (17).

The Federal Housing and Redevelopment Agencies are also authorized to make such payments in connection with their projects. (Title 42, U. S. C. A. 1450, *et seq.* as amended, and regulations issued thereunder). These statutes and regulations permit payment of money expenses of $200 to a family and up to $25,000 for businesses moving within an area of 100 miles.

There appears to be no logical reason why owners whose lands are taken by agencies subsidized by federal funds should receive compensation for relocation expenses while owners whose lands are taken by other agencies, financed by sale of securities to the public, are not similarly paid. In both instances, the owner suffers the same loss, and the Commission feels that uniform compensation should be paid therefor.

Our cases have held that such relocation items are not compensable as such. *Newark* v. *Cook, supra* (8), *City of Trenton* v. *Lenzner* (17) *supra, State* v. *Gallant* (22) *supra.* In *State* v. *Gallant* (22) decided July 7, 1964, the looms used in the owner's fabric weaving business could be moved only at great physical risk and at an expense of about 80% of its cost. Recognizing that such losses were not compensable as independent items, the court adopted a rule which may grant the owner relief in another manner. It permitted proof of the value of the real property, both with and without the equipment, and directed that the compensation paid should reflect any enhanced value of the property caused by the fact that the equipment was located and ready for use therein.

This, however, does not meet the problem of the merchant whose *land* is not affected by the installation therein of his store fixtures, but who nevertheless suffers a genuine loss caused by the necessity of removal. Nor does it satisfy the merchant or manufacturer who is a *tenant* in the property.

The Commission therefore, recommends that there be included in the amount of just compensation, the actual

cost of moving and the re-installing machinery equipment, furniture and fixtures within a radius of 25 miles, with a limit of $250 per family in cases of residential moving and $15000 in cases of displaced businesses or non-profit organizations (churches and the like). The attention of the legislature and public is called to the fact that in some instances, these limitations could be unfair. A manufacturer receiving $15000 to compensate him for a $75000 moving cost would be paid only 20% of its cost, but another concern incurring a cost of $15000 would be paid in full. The legislature might consider some other standard of compensation.

These payments (in addition to compensation for property taken) should be made to the occupants of the property who incur the expenditure, whose right to occupancy expire more than 3 years after the taking data. The fact that a lease may bar a tenant from participating in an award to his landlord, should not bar him from this compensation, payable by the condemnor directly to him.

Business Losses

Objection to the inclusion of this item has been made by some members.

The owner of a thriving business, developed after years of toil and effort, located on property taken for public use, may have his business totally destroyed, but will receive no independent compensation for his loss of good will, income, or profits, resulting from the taking; nor will he be compensated for the loss of and interference with his business while the public improvements are being made. The authorities on this subject are collected in the *Lenzner* case (17).

Various reasons are assigned for this omission:—his *land*, and not his *business* has been taken; he can move his business elsewhere; his profits and good will result from his personal acumen and skill rather than the location of his property; no statutory authority exists authorizing

compensation; damages are speculative and subject to exaggeration; improvement costs would increase substantially the cost of acquisition, and other reasons. *State* v. *Gallant* (22) supra.

What is generally overlooked, however, is that if the owner of the business dies, the state finds no difficulty in valuing and taxing his business good will, and many of the reasons for not compensating him for his loss in eminent domain proceedings, vanish into thin air.

This injustice in eminent domain cases, and the necessity for remedy thereof, has found expression in our courts and the legislatures of sister states. *City of Trenton* v. *Lenzner* (17) at 477, our Supreme Court has recognized:

> "* * * the foregoing principles [lack of compensability for business losses] may operate harshly in denying to landowners reasonable compensation for their actual loss resulting from the taking of their property; and although varying justifying theories may be found in the judicial opinions, they seem far from compelling. * * * More significant is the increasing tendency displayed in recent cases of giving fair and weighty consideration to the consequential loss of business as an element of the compensation rightly due to the owner."

Some measure of relief, though slight indeed, has been afforded by permitting proof of business profits to establish that the property being taken is being put to its highest and best use, (*Housing Authority of City of Bridgeport* v. *Lustig* (25); to support the market value of land occupied by a gasoline station (*State* v. *Hudson Circle Service Center, Inc.* (26); and *State* v. *Williams* (27); and to support value of land used for parking purposes, *City of Trenton* v. *Lenzner*, *supra* (17).

On this subject, see enlightening editorial in the 87 N. J. L. J. 68 (January 30, 1964), and an article in 67 Yale Law Journal, p. 61 (1957).

Some members of the Commission feel that the interference with and destruction of a business as a result of a condemnation taking is a loss which entitles the owner to compensation and that the enactment of a statute to that effect is necessary and proper. Others regard the matter debatable.

If this loss is to be compensable, the compensation should be limited to a loss of profits for one year (based upon mathematical average of profits for the three years preceding). Federal tax returns shall be evidential in support and defense of the claim, and failure to exhibit the return shall bar the claim. In Pennsylvania (under a broader constitutional requirement of just compensation) the compensation is arbitrarily measured by the equivalent of the rental value of the business premises for a period not to exceed 24 months (Pennsylvania Statute, P.L. 1964, Act 6, par. 609.)

However, the views of the respective Commissioners are highly divergent on this phase of the Report and therefore no specific recommendation is made.

Consequential Damages

Consequential damages is the term applied to damages sustained by an owner of property as a result of a taking, notwithstanding that no part of his land is actually taken. Such damages are for the most part not compensable in New Jersey, or elsewhere. A glaring example is, ***H. F. Sommer*** v. *State Highway Comm.* (28), in which light and air was shut off from a factory by a high embankment, no part of which was located on the owner's property. No compensation was awarded. Another example is the shutting off or interference with an existing access. ***Mueller*** v. *State Highway Authority* (29), recognizes that compensation for such interference should be made. Change of grades of existing roads, injury to surface support and the like, are other examples of consequential damages.

If these items are to be compensable, there it is our opinion that an owner should be paid compensation for damages resulting to his property within a limited area (200 feet) of an improvement, resulting from change of grade, permanent interference with access, injury to surface support, or vacation of streets whether or not any property of the owner is actually taken. The views of the Commissioners being divergent, no specific recommendation is made on the general subject.

Benefits Resulting from Taking

In cases of partial takings, the remaining land frequently benefits from the improvement. Our present Eminent Domain Act contains no provision for reflecting this benefit in the calulation of compensation, except in the limited situation where an assessment is to be levied, in which case, it may be set off against any award rendered (R.S. 20:1-33). Our cases have uniformly held that *general* benefits may not be considered to reduce damages which an individual owner will sustain from the taking of a portion of his property. *Ridgewood* v. *Sreel Investment Corp.* (30) and cases collected therein. The law is reviewed in an article by Walter Goldberg, Esq., 82 N. J. L. J. 273 (May 28, 1959).

It is our recommendation that in cases of partial taking, special benefits (the *immediate peculiar benefits* accruing to the remaining property as a result of the improvement), shall be considered in determining the value of or damage *to the remaining land.* Such special benefits shall not however affect the compensation for the land actually taken. *General* benefits accruing to the *general* area shall not be considered.

Imminence of Taking

The extent to which the value of property may be affected both favorably and adversely, by public announcements of a proposed taking thereof has been discussed under Article V and is therefore, not repeated in detail. It is mentioned here because it is an element which should be considered in fixing compensation.

EXCERPT

Spater, Noise and the Law, 63 Mich L. Rev. 1373, 1404-1410 (1965)

D. *Two Recent State Court Decisions*

And this brings us to the recent decisions of two state courts involving aviation noises: *Thornburg v. Port of Portland*,[118] an Oregon case decided in 1962, and *Martin v. Port of Seattle*,[120] a Washington case decided in 1964. In Oregon the constitution follows the federal pattern; in Washington the constitution is in the broadened form, containing the words "taken or damaged." Despite the difference in constitutions, both of these states had previously decided that damage from noise alone, in the absence of negligence, did not constitute a compensable injury.[121] These earlier decisions had involved railways. However, when the courts of Oregon and Washington faced the issue of airway noise, the earlier holdings were simply ignored. A four-to-three majority in Oregon and a unanimous court in Washington held that the airway noise was a compensable injury. In each of the cases, persons who alleged that their property had been damaged by the noise of aircraft not shown to have been negligently operated and which did not pass over their property were held to have valid constitutional claims.

In *Thornburg*, the court decided that a "continuing and substantial interference with the use and enjoyment of property" is a taking, and that the issue of whether it is substantial enough to permit recovery will be for the jury to determine.[122] Since the accepted defini-

v. Frontier Telephone Co.,* 186 N.Y. 486, 491, 79 N.E. 716, 718 (1906): "The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly."

119. 233 Ore. 178, 376 P.2d 100 (1962).

120. 64 Wash. 2d 324, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965).

121. See McQuaid v. Portland & V. Ry., 18 Ore. 237, 250, 22 Pac. 899, 904 (1889): "[T]he adjoining lot owner . . . will, doubtless, be obliged to submit to the ordinary inconvenience and consequences which the construction of a railroad track, and the moving of a locomotive and cars thereon, occasion,—be compelled to endure the smoke, noise and screeching which naturally result from the use of that character of vehicles; but they cannot be deprived of the right of ingress and egress to and from their premises, without compensation." For Washington cases, see note 110 *supra*.

122. Thornburg v. Port of Portland, 233 Ore. 178, 194-95, 376 P.2d 100 (1962). On retrial, the jury found there had been no taking. Docket No. 245-004, Cir. Ct. Multnomah County, Feb. 17, 1964. An appeal has been entered.

tion of nuisance is a "substantial" interference with "the use or enjoyment of land,"[123] *Thornburg* would, by this approach, convert every nuisance into a taking, a truly unique doctrine.[124] As the dissent pointed out, "Not a single Oregon case will support the theory that a mere nuisance can be considered a taking, as provided in our constitution, nor does any other jurisdiction where the language of the constitution is similar to ours hold that a mere nuisance can be considered a taking, nor does the majority cite any case so holding."[125]

The court in the *Martin* decision went even further. It decided that the interference did not have to be substantial,[126] and thus held that constitutional protection is afforded against aviation noises that are even below the level required for a nuisance. Indeed, the Washington court rejects the nuisance concept[127] and requires recovery "when the land of an individual is diminished in value for the public benefit. . . ."[128] The court did not even mention its earlier decisions dealing with railroads wherein it had flatly declared that railroad noises which "depreciate the value of adjoining private property" result in damage that "is purely consequential and is not recoverable."[129]

Since neither *Thornburg* nor *Martin* reconciles its holdings with other decisions by the same courts, it is not possible to say what these cases mean. Did the court in *Martin* literally mean that "When the land of an individual is diminished in value for the public benefit, then justice, and the constitution, require that the public pay?" If that is the intent, damages may be recovered in Washington for enacting building restrictions or zoning requirements, for converting a two-way street into a one-way street, for narrowing sidewalks, for constructing neighborhood fire or police stations, or even

123. See 4 RESTATEMENT, TORTS § 822 (1939).

124. For the origin of this fallacious standard, see note 67 *supra*.

125. Thornburg v. Port of Portland, 233 Ore. 178, 207, 376 P.2d 100, 113-14 (1962). However, the dissent suggests (p. 213) that under Oregon law the plaintiffs may have a damage action against the municipality operating the airport "for the creation of a nuisance for the benefit of the public," citing Wilson v. City of Portland,* 153 Ore. 679, 58 P.2d 257 (1936), which involved negligent dumping of garbage in a ravine.

126. Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P.2d 540, 546-47 (1964), *cert. denied*, 379 U.S. 989 (1965).

127. Although not mentioned in the decision, in Washington "nothing which is done or maintained under express authority of a statute, can be deemed a nuisance." WASH. REV. CODE § 7.48.160 (1952).

128. Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P.2d 540, 547 (1964), *cert. denied*, 379 U.S. 989 (1965).

129. Conger v. Pierce County, 116 Wash. 27, 198 Pac. 377 (1921). See also Washington cases cited in note 110 *supra*.

for erecting a new lamppost, as well as for the noise of highways, railways and airways. And we may ask with reasonable curiosity if only land is to be protected by this new rule or whether personal property, which is also covered by the constitution, must be paid for when it has been "diminished in value for public benefit?" When a new bus franchise is authorized in the interest of public convenience and necessity, is compensation to be paid to the other holders of bus franchises and to the competitive rail and airlines who can show a decline in value of their licenses?

If only a small fraction of this is intended to be protected, the principle of socializing losses has been carried by the Washington court beyond anything previously known under American or English law.[130] But is that what is meant? It would not seem unreasonable to expect a court that makes such a drastic change in its constitutional concepts to have said so plainly. That was not done in *Martin*. As to its real meaning, not a clue is given—not a single case dealing with any subject other than aviation is mentioned throughout the entire opinion. Whether the court intended to make a separate rule for aviation but hesitated to say so because of the equal protection clause of the fourteenth amendment,[131] or whether it intended to change its constitutional standards, will presumably remain a mystery until the decision is tested in subsequent litigation in other causes.[132]

Summary

In summarizing the subject of noise caused by the government or by government authorized utilities, I offer these conclusions:

First, *Richards v. Washington Terminal* still represents the federal law. A nuisance resulting from noise made by the government

130. Compare Note, 30 J. Air L. & Comm. 287, 291 (1964): "[T]he Supreme Court . . . is most likely to follow the lead of the Washington court . . . overruling *Batten* in the process."

131. Although the Supreme Court has rejected previous contentions that the equal protection clause was violated by allegedly inconsistent judicial opinions, the cases in which the issue was raised suggest that some logical distinction between the opinions was drawn by the courts or was apparent on the face of the opinions. See, *e.g.*, Marchant v. Pennsylvania R.R., 153 U.S. 380 (1894), holding that equal protection of the laws under the fourteenth amendment was not denied by the distinction drawn by the Pennsylvania courts between a property owner damaged by loss of access (to whom compensation was granted) and a property owner damaged by noise (to whom compensation was denied). Compare Bedi v. Washington,* 369 U.S. 541, 554-55 and dissenting opinion at 563 (1962), also involving a decision of the Supreme Court of Washington.

132. The petition of the Port of Seattle to the United States Supreme Court for a writ of certiorari [denied 379 U.S. 989 (1965)] did not make the equal protection argument.

or by an entity operating pursuant to government authority does not constitute a taking even when it causes a decline in the value of neighboring property. Whether the noise emanates from a railroad, an express highway, an airway, or from a fire engine house makes no difference. To the extent the noise is a necessary incident of an activity sanctioned by law and is free from negligence, there is no right to recover damages.

Second, the preceding paragraph represents the federal rule; it is also the common-law rule and would appear to be the correct interpretation of the state constitutions which follow the federal pattern.[183] The word "taken" as used in the state constitutions, and as used in the ancestors of those constitutions, was not intended to provide recovery of damages for noise.

Third, it has not been possible to examine in full the purpose that each of the individual states may have had when they incorporated the term "damaged" into their constitutions. To the extent this purpose has been discussed in the decisions of those states and in the few constitutional debates that have been referred to, there appears to have been no intention of providing compensation for the damage that may be caused by noise.[184] And surely an interpretation of a statute or constitution must be applied equally to all persons coming before the courts. When this is not done, as for example in *Thornburg* and *Martin*, the result must be condemned as a grave abuse of judicial power.

Obviously it cannot be contended that a court may not correct an erroneous interpretation once it has been shown to be erroneous. Neither can it be contended that constitutional provisions should be regarded as inflexible regardless of changes in economic and social conditions.[185] However, in the aviation cases it is apparent that no new legal problems have been created by changes in economic and social conditions. The legal problems are exactly the same as they have always been: where is the line to be drawn between compensable and noncompensable damage, and who is to draw it?

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183. "[I]t was the common law of England, and consequently of this country, when the constitutions were adopted, that if a private owner suffered necessary damage from a public improvement, but his land was not actually entered on or taken, it was *damnum absque injuria*." 2 NICHOLS, EMINENT DOMAIN § 6.38[1] (rev. 3d ed. 1965).

184. See Wofford, *The Blinding Light—The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

185. See Israel, *Gideon v. Wainright: The "Art" of Overruling*, SUPREME COURT REVIEW 211, 219-29 (1963).

> "Where is the line to be drawn? If property owners on Filbert street may recover, why not those on Arch street, and Race, and so on north and south, east and west, as far as the whistle of the locomotive can be heard, and its smoke can be carried? The injury is the same, it differs only in degree. And it does not stop here. The constitution does not apply to railroads merely. It affects all corporations clothed with the power of eminent domain, including cities, boroughs, counties, and townships; it is applicable to canals, turnpikes, and other country roads. If, by judicial construction, we extend the constitution to all the possibilities resulting from the lawful operation of a public work; to all kinds of speculative and uncertain consequential injures [*sic*], we shall find ourselves at sea, without chart or compass to guide us."[186]

In deciding where the line is to be drawn, consideration should be given to a number of subjects—the first that come to mind are the fairness of one line compared with another as it affects the individuals on whom the loss first falls and the cost to the government of socializing the loss. However, additional considerations are the ease of applying the rule, the importance of avoiding multiplicity of suits, and the ability of property owners and their lawyers to know when and how the rule applies. The common-law concept of physical invasion which was embodied in our constitutions is probably the easiest to apply of all possible choices, assuming that compensation is to be granted at all. The extended controversy over this relatively simple standard illustrates what would happen if a standard like that suggested by *Martin* were adopted.

What is clear is that the line has to be drawn somewhere, and wherever it is drawn there will be some who will argue persuasively that this results in injustice:

> "[A] tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other, it has an arbitrary look."[187]

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136. Pennsylvania R.R. v. Marchant, 119 Pa. 541, 558-59, 13 Atl. 690, 696 (1888), *aff'd*, 153 U.S. 380 (1894). Pennsylvania had previously added the "and damaged" language.

137. This is a statement by Mr. Justice Holmes, but I can no longer remember the source. Similar statements by him appear in Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 41 (1928), and Holmes, *The Theory of Torts*, 44 HARV. L. REV. 773, 775 (1931).

Where the line is to be drawn is considerably harder to answer than who should draw it. Here, it would seem that the line had already been drawn, and that it is only for the courts to determine whether particular cases fall on one side or the other. But even if that were not the case and the problem was solely one of what the rule should be, one might think that courts would be especially reluctant to embark on a novel course in a field involving so many considerations requiring the type of broad factual investigation and analysis characteristic of the legislative rather than the judicial function. The judicial expansion of constitutional language through interpretation is familiar enough, but we must not forget that this is largely either an effort to find a way to carry out the will of the people as expressed through the legislature or an attempt to accommodate a new social or economic fact within the framework of old words of general purport.[138] A court cannot lawfully expand the constitution simply because it disagrees with what the constitution says.

> "Of course we know full well that law must be administered by men, and that human judgment is an inevitable element in the application of law. But it is one thing to act according to one's personal predilections or choice, and a wholly different thing to come to one's own best conclusion in the light of his understanding of the law as it has been established by statute, decision, tradition, received ideals and standards, and all the other elements that go to make up our legal system."[139]

Fourth and finally, the one point on which courts appear agreed, regardless of the form of constitution, is that an injunction will not issue to restrain the government or a government-authorized entity from an activity which creates noise[140] so long as it is a necessary inci-

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138. See Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

139. Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 92 (1960). See also Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949); and Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 775 (1965).

140. See, *e.g.*, Railroads: Osborne & Co. v. Missouri Pac. R.R., 147 U.S. 248 (1893); McClung v. Louisville & N.R.R., 255 Ala. 302, 51 So. 2d 371 (1951); Stetson v. Chicago & E.R.R., 75 Ill. 74 (1874). Pipelines, water and power companies: Transcontinental Gas Pipe Line Corp. v. Gault, 198 F.2d 196 (4th Cir. 1952); Hillside Water Co. v. Los Angeles,* 10 Cal. 2d 677, 76 P.2d 681 (1938); Gurney v. Northern Cal. Power Co.,* 160 Cal. 699, 117 Pac. 906 (1911). Construction of public airports: Jasper v. Sawyer, 3 Av. Cas. 18118 (D.C. Cir. 1953); Warren Township v. City of Detroit, 308 Mich. 460, 19 N.W.2d 134 (1944); State *ex rel.* Heisel v. Board of County Comm'rs, 37 Ohio Op. 58, 79 N.E.2d 698 (1942), *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1948); Atkinson v. City of Dallas, 353 S.W.2d 275 (Tex. Civ. App. 1961). Operation from public airports: Smithdeal v. American Airlines, Inc., 80 F. Supp. 253 (N.D. Tex. 1948); Loma Portal Civil Club v. American Airlines, Inc., 39 Cal. Rptr. 708, 394 P.2d 548 (Sup. Ct. 1964); City of Phoenix v. Harlan, 75 Ariz. 290, 255 P.2d 609 (1953); Brooks v. Patterson, 159

dent of an activity sanctioned by law and is not negligently conducted.[141] The courts will often give other reasons for withholding relief, but the result is that an injunction is regularly denied under these circumstances. If the courts were to adopt any other course, it would constitute an unreasonable interference with legislative authority.

A great service would be rendered potential litigants if the courts in all jurisdictions, federal and state, regardless of the constitutional language, would make the reason for their action clear. Because of the apparent reluctance of courts to state the proposition plainly, the point is constantly being relitigated.[142] It should be unequivocally laid to rest.

So far as I am aware, this is the first attempt to draw together, on a broad scale, the cases dealing with the scope of the immunity of the government and government-authorized entities from legal action for objectionable noises or other nuisances. While I have been led at times to assert with a fair degree of positiveness what the law is or what the law should be, the article is cheerfully offered as a starting point for comment and criticism in this extremely interesting and difficult field.

Fla. 263, 37 So. 2d 472 (1947); Bourland v. City of San Antonio, 347 S.W.2d 660 (Tex. Civ. App. 1961). Operation from military airport: Western v. McGehee, 202 F. Supp. 287 (D. Md. 1962). Sonic boom tests: Causey v. Halaby, 231 F. Supp. 978 (W.D. Okla. 1964). A possible exception is *Dlugus* v. United Airlines Trans. Corp., 53 Pa. D. & C. 402 (C.P. 1944), in which an airline was enjoined from operating flights below one hundred feet not to exceed ten days a year in order to permit plaintiff's land to be farmed. The scope of the injunction in *Dlugus* is described in Anderson v. Souza, 38 Cal. 2d 825, 243 P.2d 497 (1952).

In states requiring compensation to be paid before a taking, an injunction may issue if this procedure has not been followed. See, *e.g.*, Stockdale v. Rio Grande Western Ry., 28 Utah 201, 77 Pac. 849 (1904).

141. See, *e.g.*, Village of Blue Ash v. City of Cincinnati,* 173 Ohio St. 345, 182 N.E.2d 557 (1962) (municipality enjoined from condemning property of another municipality). Squaw Island Freight Terminal Co. v. Buffalo,* 246 App. Div. 472, 284 N.Y.S. 598 (1936), *modified*, 272 N.Y. 119, 7 N.E.2d 10 (1937) (city enjoined from improper discharge of sewage). Pennsylvania R.R. v. Angel, 41 N.J. Eq. 316, 7 Atl. 432 (1886) (railroad enjoined from ultra vires operation of switchyard in front of plaintiff's house). See note 64 *supra*.

142. Consider, for example, the waste in two recent cases where this point was involved: Matthewson v. New York State Thruway Authority, 22 Misc. 2d 410, 198 N.Y.S.2d 212 (Sup. Ct. 1959), *aff'd*, 11 App. Div. 2d 782, 204 N.Y.S.2d 904 (1960), *aff'd*, 9 N.Y.2d 788, 174 N.E.2d 754 (1961) (action to enjoin night operations of trucks on New York thruway); Loma Portal Civic Club v. American Airlines, Inc., No. 259768, San Diego, Cal., Super. Ct., July 5, 1962, *reversed*, 37 Cal. Rptr. 258 (Ct. App. 1964), *rehearing denied*, March 31, 1964, *trial court's denial of injunction affirmed*, 39 Cal. Rptr. 708, 394 P.2d 548 (Sup. Ct. 1964), *petition for rehearing denied*, Sept. 11, 1964 (action to enjoin low flights at San Diego municipal airport).

EXTRACT

Eminent Domain in Virginia--Compensation for damages and Nonphysical takings, 43 Va. L. Rev. 597, 618-619 (1957)

CONCLUSION

It must be recognized that the very nature of the problem involved in sifting deserving from undeserving claims in the eminent domain field renders definitive rules difficult to formulate and sometimes nearly impossible to apply with uniformity. Nevertheless it is only fair that those reaping the benefits of an improvement, the public, should bear the full cost of that improvement, and damages inflicted thereby should be a part of that cost.

The conflicting ends to be met today, as in 1902, are the unimpeded continuance of public improvements through the necessary exercise of the power of eminent domain, on the one hand, and payment for all individual losses resulting from those improvements, on the other.

The possibility of a multiplicity of claims alone should not prevent the payment of damages to the deserving. Although this factor seems to be an underlying impediment to expanded allowance of recovery, the Supreme Court of Appeals, in one of the first cases before the Court after the 1932 constitutional change,[124] quoted a statement made in the English Privy Council in answer to a contention that recovery in a particular case would ultimately result in an immense number of claims: "Suppose it did. Suppose there were 1,000 claims of . . . 1,000 [pounds] each. If they are well founded, . . . 1,000,000 [pounds] of property is destroyed, and why is not that part of the cost of the improvement; and . . . why should not the loser of it receive it?"[125] Similar reasoning should be the paramount guidepost in eminent domain litigation today.

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[124] Tidewater Ry. v. Shartzer, 107 Va. 562, 59 S.E. 407 (1907).

[125] Id. at 574, 59 S.E. at 411.

Yet we find that in grade change cases the courts deny compensation for damages on a mere presumption that such damages had been paid for previously; and, when a street is closed, compensation may be denied even though a free flow of traffic past particular property has been disrupted, thus destroying the business value of that property. When an improvement project is begun and the negligence of public employees inflicts serious damages on nearby property, pleas for compensation may be turned aside with unrealistic statements about the impossibility of a state agent committing negligence within the scope of his employment. Furthermore a landowner who is fortunate enough to have a one-inch section of his land appropriated for public purposes may be compensated for all loss in market value of the remainder of his land, whereas damages to another landowner whose property is missed by one inch may be deemed damnum absque injuria.

The past history of the law of eminent domain shows a slow but constant expansion of the landowner's remedy as state activity in the field of public improvements has increased. It is unfortunate that the law today has fallen behind the times. The fundamental criterion in these cases must be found in social policy, and it is difficult to accept a social policy opposed in any respect to the rightful claims of damaged citizens. If the courts do not feel free to more liberally apply the "damage" concept, the answer should lie in more extensive legislative enactments.

PUBLIC ACT NO. 436

AN ACT CONCERNING ESTABLISHMENT OF PROJECT PLANNING DATES BY CONDEMNATION AUTHORITIES.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

SECTION 1. When, as a result of the construction of a highway or the taking of properties for the construction of a highway or proposed highway, the value of property contiguous to such highway has been substantially impaired in value and there has been no taking of any portion of such contiguous property, the owner of such contiguous property shall have a claim for damages for such impairment of value and may proceed for the recovery thereof as in all other civil actions, provided such action shall be brought within ninety days after receipt of notice in writing from the highway commissioner that the construction of such highway has been completed. The commissioner shall notify all owners of property contiguous to any highway the construction of which is completed after the effective date of this act of the completion of such construction.

SEC. 2. The cause of action provided for in section 1 shall be limited to the following cases:

(a) When a dwelling house located on one acre of land or less contiguous to a limited access highway is, as a result of taking of land for the construction of such highway, abutted on two sides by land taken for such highway and on the remaining sides by other streets or highways.

(b) When any highway is so constructed that any portion or superstructure thereof is of an elevation six feet or more above the elevation of any portion of contiguous land of one acre or less on which is located a dwelling house and such portion or superstructure is located within three hundred feet of such dwelling house.

(c) When the highway commissioner lays out a new route for a proposed highway and has filed a map of the same in the

office of the town clerk in the various towns wherein such highway is to be located and has not, within a period of one year from the date of such filing, taken the property needed for the construction of such highway.

SEC. 3. (a) When property is to be taken by the state by eminent domain, the authority which determines that the project is to be undertaken shall publish, in a newspaper having a general circulation in the location where property is to be taken, a notice stating the date on which such determination was made and therein describing the proposed location of the project. If such authority fails to establish such date, then an alternative date of two years prior to the date of taking shall be established. Compensation for property so taken shall be based upon its value as of the date so established or the date of taking, whichever is higher.

(b) For the purposes of this section with respect to any project undertaken by the state, the date on which such determination is made shall be that made by the agency charged with planning and carrying out the project rather than a basic decision made by the general assembly.

Certified as correct by

_____

Legislative Commissioner.

_____

Clerk of the Senate.

_____

Clerk of the House.

Approved_____, 1963.

_____

Governor.

JOHN DEMPSEY
GOVERNOR

STATE OF CONNECTICUT
EXECUTIVE CHAMBER
HARTFORD

June 28, 1963

The Honorable Ella T. Grasso
Secretary of State
State Capitol
Hartford, Connecticut

Dear Madam Secretary:

I return without my approval Substitute For House Bill No. 4116, Public Act No. 436, "An Act Concerning Establishment of Project Planning Dates By Condemnation Authorities."

This bill would seriously jeopardize the continuation of our State highway construction program. The State Highway Commissioner has supplied the following analysis:

This bill would require the Highway Department to multiply right-of-way acquisition personnel to an extent impossible to estimate without a detailed analysis of all construction projects presently under way or planned. It would require the Highway Commissioner to notify certain owners of property contiguous to highway construction, after construction is completed, that they might bring a civil action against the Highway Commissioner if their property was substantially impaired in value even though no property was taken from said contiguous owner. There would be no Federal Aid participation in such payments.

In the long run most property contiguous to a new highway is not impaired in value but rather its value increases. While it is conceivable that contiguous property might be substantially impaired in value during construction and for a short period of time after construction, to pay for such temporary impairment in value despite the long-range increase in value would unjustly enrich these contiguous property owners.

This bill does not provide any method to settle a dispute if the owner and the State cannot agree on the impairment of value. Neither is there any method provided for approval by a State Referee or court.

In urban areas, where many grade separations are constructed, the dwellings within 300 feet of such structures could be numbered in the hundreds.

Subsection (c) of Section 2 would require the Highway Commissioner to take all property needed for a highway within a year after a map was filed with the town in order not to be liable to contiguous property owners. This provision would be very expensive to administer and, as a practical matter, would be unworkable. It would require a great increase in right-of-way personnel and, procedurally, would not be economical. For all practical purposes, it would be ill-advised to hold a hearing until design was complete, which would make the hearing only a formality and serve no purpose.

Section 3 of this act concerns itself with any authority acting through its eminent domain procedures while Sections 1 and 2 are confined to actions of the Highway Commissioner. There is ambiguous language in subsections (a) and (b) of Section 3 in that subsection (b) refers to carrying out projects initiated by the General Assembly and subsection (a) refers to projects which some other authority decides to undertake.

The last sentence of subsection (a) of Section 3 would require any condemning authority to establish two sets of values for the price of any property taken, i.e., the determination date and the date of taking. It is obvious that this would, for all practical purposes, double appraisal costs which, in a highway construction program of the magnitude under way, would be considerable.

To insure the steady progress of Connecticut's vitally needed highway program, I must withhold my approval of this bill.

Sincerely,

Governor

Dit

EXTRACT

From pages 72-77, 81-84, and 113-119 of Report of the British Columbia Royal Commission on Expropriation (1961-63)

In order to determine the proper basis for compensation it is my view that consideration of the existing law of England, the United States and Canada will be helpful.

I. COMPENSATION IN ENGLAND

Awards of compensation in England now fall under The Land Compensation Act, 1961, a consolidation of the various compensation acts which have been passed since the first major revision of compensation law in 1919. I will outline briefly the evolution of this new English statute because it illustrates the complexity of the problem and the extreme difficulty of framing an effective and comprehensive code of compensation law.

The Lands Clauses Consolidation Act, 1845, as previously mentioned, served as the basis of compensation law and compulsory acquisition procedure for some seventy-five years in England. By the end of the First World War the inadequacy of the 1845 Act was so apparent that the Scott Committee was appointed to study the question of acquisition of land for public purposes and compensation therefor and to make recommendations. As a result of the Scott Committee reports Parliament passed the Acquisition of Land Act, 1919. The most important change affected by this Act was the introduction of statutory rules for assessing compensation. These rules substituted market value in place of value to the

owner concept of compensation evolved by the Courts from the wording of the 1845 Act. In addition, the 1919 Act:

(a) abolished the practice of adding an allowance on account of the acquisition being compulsory.

(b) eliminated any element of value which can be exploited only through statutory powers,

(c) attempted to eliminate the inflated price created by the needs of a particular purchaser,

(d) eliminated any element of value arising from illegal or unhealthful use of the premises,

(e) provided a reinstatement principle for assessing compensation for land "devoted to a purpose of such a nature that there is no general demand or market for land for that purpose", e.g. churches and schools, and,

(f) expressly preserved the right of an owner to compensation for "disturbance or any other matter not directly based on the value of land", i.e. severance and injurious affection.

It is important to remember that the 1845 Act was not repealed in 1919 and is still in force in England. Its scope was greatly limited in that the Acquisition of Land Act, 1919, was made applicable whenever any Government

Department or any local or public authority is authorized by statute to acquire land compulsorily and compensation is in dispute. The private taker to whom the 1845 Act applies appears today to be virtually extinct but the 1845 Act retains importance as the statutory foundation upon which is based the rules for determining compensation for disturbance, severance and injurious affection.[43]

The English rules for assessing compensation appear to have served their purpose fairly well since they were first formulated in 1919. The 1944 Report of the Uthwatt Committee[44] on Compensation and Betterment, indicates that the Committee considered the six rules in the 1919 Act generally satisfactory. Subject to variations in the statutory definition of the market value which have been made in Town and Country Planning legislation since 1919, the six rules have remained substantially unchanged. However, the Town and Country Planning Act, 1959, returned to the market value standard of the Acquisition of Land Act, 1919, and in addition made provision for the following

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43. Rule 6 - of Section 5 of the Land Compensation Act simply provides that "the provisions of (the market value rule for land taken) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land."

44. Cmd 6386, Expert Committee on Compensation and Betterment.

three difficult problems of valuation not previously covered by statute:

(a) whether any effect on land values either caused by or peculiar to the scheme of development should be ignored in determining compensation;

(b) whether any enhancement to the severed remainder where part of the owner's land is taken which is caused by or peculiar to the scheme of development should be set off against the compensation payable for the land taken;

(c) whether any depreciation in value resulting from the "threat of compulsory purchase" should not be taken into account in determining compensation.[45]

With the enactment of the Land Compensation Act, the provisions for determining compensation have once again been consolidated and its predecessors have been repealed (including the whole of the Acquisition of Land Act, 1919) except the Lands Clauses Act, 1845.

It is apparent that the English Parliament has found desirable a comprehensive codification of the law of expro-

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45. These provisions are set out in subsections 2, 3 and 6 respectively of Section 9 of the Town and Country Planning Act, 1959.

priation and has progressively codified that law as the complex problems of compensation policy and valuation practices have become better understood. For this reason I will attempt to analyze all ramifications of this problem and recommend ways of dealing with them by legislation.

Another significant development in England has been the creation of a special Lands Tribunal under the Lands Tribunal Act, 1949. The necessity of creating a special tribunal of experts to replace the official arbitrators (pursuant to Section 1 of the Acquisition of Land Act, 1919)[46] indicates the inherent difficulty involved in determining compensation questions.

Thus in England today questions of disputed compensation are determined by a special statutory tribunal composed of expert lawyers and valuators who apply the fairly

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46. Section 2 (2) of the Lands Tribunal Act, 1949, provides that: "The President shall be either a person who has held judicial office under the Crown (whether in the United Kingdom or not) or a barrister-at-law of at least seven years' standing, and of the other members of the Lands Tribunal such number as the Lord Chancellor may determine shall be barristers-at-law or solicitors of the like standing and the others shall be persons who have had experience in the valuation of land appointed after consultation with the president of the Royal Institution of Chartered Surveyors".

comprehensive statutory rules for assessing compensation. From their decision an appeal lies to the English Court of Appeal on a question of law only.[47]

II. COMPENSATION IN THE UNITED STATES

[Pages 77(portion), 78, 79, 80, and 81(portion) omitted.]

III. COMPENSATION IN CANADA

In British Columbia as I have stated, there is a statute virtually identical to the English Lands Clauses Act governing the compensation awards in expropriation cases. In other Provinces the Courts have evolved a law of compensation from the English Act, and in a majority of Canadian Provinces there are central expropriation statutes or such

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51. An especially excellent treatise on valuation questions is Orgel: Valuation under Eminent Domain, published by The Michie Company, Law Publishers, Charlottesville, Va.

statutes are in the process of being prepared.[52]

The Federal Expropriation Act governs expropriation by the Government of Canada.[53] The right to compensation is expressed in Section 23 of that Act which states:

> "The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportion of amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the cases may be, become and be absolutely vested in Her Majesty."

This Act does not specify the elements which are to be the subject of compensation or the criteria for compensation. Section 27 refers to "Land or property... acquired or taken for, or injuriously affected by, the construction of any public work", and the common law rules of compensation are thus brought into operation.

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52. A complete revised Expropriation Act, designated Bill C-50, was given first reading in Parliament on October 3, 1962. Alberta: Expropriation Procedure Act 1961 S.A. Ch. 30. Manitoba: Expropriation Act 1954 R.S.M. Ch.78. New Brunswick: Expropriation Act 1952 R.S.N.B. Ch.77. Nova Scotia: Expropriation Act 1954 R.S.N.S. Ch. 91. Ontario: Bill 120 (1961 Session) now under study by special legislative committee. Saskatchewan: Expropriation Act 1953 R.S.S. Ch. 52.

53. R.S.C. 1952, c. 106.

The Exchequer Court Act grants the Exchequer Court of Canada exclusive original jurisdiction to hear and determine:

(a) Every claim against the Crown for property taken for any public purpose;

(b) Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

The Federal Expropriation Act permits the Crown to mitigate injury resulting from expropriation. Section 31 provides:

> "Where the injury to any land or property alleged to be injuriously affected by the construction of any public work may be removed wholly or in party by any alteration in, or addition to, any such public work, or by the construction of any additional work, or by the abandonment of any portion of the land taken from the claimant, or by the grant to him of any land or easement, and the Crown, by its pleadings, or on the trial, or before judgment, undertakes to make such alteration or addition, or to construct such additional work, or to abandon such portion of the land taken, or to grant such land or easement, the damage shall be assessed in view of such undertaking, and the Court shall declare that, in addition to any damages awarded, the claimant is entitled to have such alteration or addition made, or such additional work constructed, or portion of land abandoned, or such grant made to him."

This proviso, copied in substance in a number of provincial expropriation statutes, appears to me to offer a useful alternative or a supplementary method of alleviating injury. I, therefore, recommend that a similar provision be included in a new expropriation statute for British Columbia.

Rule 7.

The question of whether compensation should be paid for injury or loss suffered by owners from whom no land is taken raises a number of difficult problems. The law at present provides:

> " If any party is entitled to any compensation in respect of any land or of any interest therein which has been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking have not made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of $250.00, the party may have the same settled either by arbitration or by the verdict of a jury, as he thinks fit;.... and the same may be recovered by him with costs, by action in any court of competent jurisdiction." 71.

The English courts adopted the similar section in their Act as authority for granting compensation for injurious affection where no land is taken, and where the special statute did not give an express right to such compensation. 72.

It is stated in Challies' textbook "The Law of Expropriation" that:

> " The conditions that must be fulfilled to justify a claim for injurious affection, if no land is taken, are well set forth by Angers, J. in Autographic Register System v. C.N.R. 73. thus:
>
> Four conditions are required to give rise to a claim

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71. Section 69 of Land Clauses Act R.S.B.C.(1960)c. 209

72. Cripp's Compulsory Acquisition of Land, 11th ed.

73. (1933) Ex. C.R. 152.

for injurious affection to a property, when no land is taken:

(a) The damage must result from an act rendered lawful by statutory powers of the Company;

(b) The damage must be such as would have been actionable under the common law, but for the statutory powers;

(c) The damage must be an injury to the land itself and not a personal injury or an injury to business or trade;

(d) The damage must be occasioned by the construction of a public work, not by its user." 74.

The rationale of the first two conditions is that an owner whose land has been injured by acts, tortious if done without statutory authority, should be given a right to compensation in place of the right of action removed by the statute. The limitation imposed by these two conditions is, in my opinion, sound. These two conditions, incidentally, introduce the common law of private nuisance with its requirement that injury done must be peculiar to the claimant's land, over and above any general injury suffered by all land in the area. 75.

The third condition comes from the use of the word "land or any interest therein" appearing in section 69 of the British Columbia Lands Clauses Act. The principle

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74. Challies, The Law of Expropriation, 2nd, ed. p. 133.

75. Metropolitan Board of Works v. McCarthy supra @p.263.

underlying this condition was stated in a leading English compensation case:[76.]

> " The damage complained of must be one which is sustained in respect of the ownership of the property - in respect of the property itself, and not in respect of any particular use to which it may from time to time be put; in other words, it must, as I read that Judgment, be a damage which would be sustained by any person who was the owner, to whatever use he might think proper to put the property. Now that, of course, if to be taken with the limitation that a person who owns a house is not to be expected to pull it down in order to use the land for agricultural purposes. That would be pushing the Judgment in Ricket v. Metropolitan Rail Co. to an absurd extend. The property is to be taken in status quo and to be considered with reference to the use to which any owner might put it in its then condition that is, as a house."

In my view, this principle is generally sound since to allow claims for personal and business injury might render the cost of essential public development prohibitive. However, in cases where an owner suffers a loss of profit of a permanent nature which is not fully reflected in a diminished market value of the property, there can be severe hardship inflicted without redress. This occurred in an early Canadian case which I have already cited.[77.] I therefore propose to broaden the scope of the third condition by

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76. Beckett v. Midland Railway Co. (1867) L. R. 3 C.P. 82 @ 92.

77. McPherson v. The Queen (1882) 1 Ex. C.R. 53.

permitting the recovery of compensation for loss of business profits of a permanent nature, subject to a proviso against duplication of compensation awarded for diminished market value of the property.

Subject to this exception, it is my opinion that personal and business injuries must be borne where they fall. They are the unavoidable price of the use of land by the state for essential public purposes.

I am of opinion that the fourth condition does not apply in British Columbia where the authority to award compensation is drawn from section 69 of the Lands Clauses Act. In the Autographic Register case,[78] compensation for injurious affection was being considered under section 23 of the 1927 Expropriation Act of Canada[79] which provided:

> " The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property."

The Exchequer Court also referred to section 17 (2) (c) of the Canadian National Railway Act[80] which provided:

> " The compensation payable in respect of the taking of any lands so vested in the Company, or of interests

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78. (1933) Ex. C.R. 152.

79. R.S.C. 1927 c. 64

80. R.S.C. 1927 c. 172.

> therein, or injuriously affected by the construction of the undertaking or works shall be ascertained in accordance with the provisions of the Railway Act, beginning with Notice of Expropriation to the opposite party."

When the Autographic Register case was decided, the C. N. R. Act had been amended in 1927 by the deletion of a number of provisions dealing with expropriation including section 17 (2) (c) which were replaced by a provision incorporating the provisions of the Expropriation Act into it. However, the court referred back to section 17 (2) (c) in order to satisfy itself that there was a right to compensation for injurious affection at all.

It should be noticed that the fourth condition stated by Challies as a part of the general law is based on those statutes which unlike the Lands Clauses Act contain the word "construction" rather than the word "execution". This distinction, to the best of my knowledge, has been judicially noticed only in Simeon v. Isle of Wight Rural District Council[81] a decision of the English Court of Chancery:

> " The words of section 68 of the Lands Clauses Consolidation Act (section 69 in the B. C. Lands Clauses Act) are not, as in the case of section 6 of the Railways Clauses Act, 'construction of the works', but 'execution of the works'. In my judgment, the latter words are wider than the former and include the exercise, that is the carrying out and the execution of the appropriate statutory powers."

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81. (1937) Ch. 525.

In that case the local authority was authorized by the Health Act to construct and maintain waterworks. In the maintenance of these works the authority drew off water from private lands causing damage and the court ruled that damage resulting from such acts was compensable under section 69 of the Lands Clauses Act since the word "execution" included the carrying out of all the acts for which the authority is authorized by statute.

It is my opinion that the fourth condition does not apply under the existing British Columbia law, and should not be made applicable now in any new statute. I consider there is no rational basis for limiting compensation to injurious affection resulting from the construction of works and not from their maintenance and continued operation. I therefore do not recommend the enactment of this fourth condition in the proposed statute.

I have considered whether the liberalization of the third condition to cover loss of business profits of a permanent nature and the exclusion of the fourth condition may lead to excessive and unreasonable claims for compensation on the part of owners from whom no land has been taken. I am convinced that these changes will not result in such claims being successfully made since the second condition will serve to limit compensation claims to those which are

proper and reasonable. In effect, a claimant will have to prove common law nuisance, and in such regard the House of Lords pronounced in a nuisance action as follows:

> " An occupier may make in many ways a use of his land which causes damage to the neighbouring land-owners and yet be free from liability. This may be illustrated by Bradford Corporation v. Pickles (1895) A.C. 587. Even where he is liable for nuisance, the redress may fall short of the damage, as, for instance, in Colls v. Home & Colonial Stores (1904) A.C. 178, where the interference was with enjoyment of light. A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or, more correctly, in a particular society". 82.

I therefore recommend that the following rule be enacted to provide for compensation in cases where no land is taken:

PROPOSED BRITISH COLUMBIA RULE 7

> " An owner of land which is injuriously affected although no part of the land is acquired by the expropriating body, shall be paid just compensation for all such injurious affection and for loss of business profits of a permanent nature, (after setting off the value of all betterment accruing to that land as a result of acts done by the expropriating authority) which
> (a) are the direct consequence of the lawful exercise of the statutory authority,
> (b) would give rise to a cause of action but for that statutory authority, and
> (c) in the case of injurious affection, result in a decline in the market value of the land.
>
> In applying this rule no separate allowance shall be made for loss of business profits where such loss is also reflected in a decline of the market value of the land."

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82. Sedleigh - Denfield v. O'Callaghan (1940) A.C. 880 at 902.

EXTRACT

Outline of the panel discussion on "Expropriation Procedure and Compensation" at the 1961 Annual Meeting of the Law Society of Alberta, 2 Alberta L. Rev. 76, 81-85 (1962)

II

INJURIOUS AFFECTION

Expropriation statutes usually provide that a person shall be compensated where lands are not taken, but are reduced in value (injuriously affected) by an expropriation.

Where part of the claimant's land has been expropriated, the value of what is left may be reduced. Thus in the *St. Mary*[29] case, the expropriation for a dam took some four sections of a ranch containing 400 sections. The part taken was the heart of the ranch, providing water and winter shelter, so its loss reduced the value of the huge area that was left. Our Appellate Division upheld an award of $76,000 for the land taken and $50,000 for injurious affection to the balance. All allowed 10% more on the first figure but a 3-2 majority refused to add it to the $50,000 for injurious affection. (Had the *Drew*[30] case been decided, it is doubtful whether a percentage would have been added even to the compensation for land taken.)

The basis of compensation for injurious affection is not spelled out in detail. Where part of a parcel of land is taken, and a claim is made for injurious affection to the balance, Challies says the claimant must show that:

(1) the affected lands were held with the land taken,

(2) the damage has arisen from acts done in the land taken, and

(3) the damage must not be too remote.

When this is shown, the claimant is entitled to compensation for loss of business and for injury due to operation as well as construction of the work, according to Anglin J. in *C.P.R.* v. *Albin*,[31] a 1919 decision of the Supreme Court of Canada.

If no property is taken, it is still possible to claim, but the basis of the award is much lower. In the typical case, a road or railway runs near the land and alters the grade so that access to the claimant's property is rendered difficult. Although the Railway Act prescribes full compensation, it is settled that a claimant can get compensation only for reduction in market value and not for loss of profits (*C.P.R.* v. *Albin*, *supra*). In *Autographic Register* v. *C.N.R.*[32] in the Exchequer Court in 1933, the railway had built a subway and the claimant alleged serious depreciation to the value of its building, claiming $50,000. It was found that in many ways the subway improved the value and that the only

[29] Supra, footnote 14.
[30] Supra, footnote 6.
[31] Supra, footnote 7.
[31] (1919) 59 S.C.R. 51, (1919) 49 D.L.R. 618, [1919] 3 W.W.R. 873 (S.C.C.).
[32] [1933] Ex. C.R. 152 (Ex.).

loss was of publicity (a sign became obscured) and slight difficulty of access. Angers J. awarded $1,200. He laid down these rules:

(1) The damage must be for an act rendered lawful by the statutory powers.

(2) The damage must be such as would be actionable at common law.

(3) The damage must be an injury to the land itself and not to business and (or) trade.

(4) The damage must be occasioned by the *construction* of the work, and not its *uses*.

In other words, the exercise of statutory powers may expose property owners to various types of loss that are not compensable.

This fact renders all the more significant the following amendment made in 1960 to the City Act:

> 303a. Notwithstanding any other provision of this Act, where in the exercise by a city of any of the powers conferred on it by this Act the city, in the erection or construction of a city work or structure, causes damage to an owner or other person having an interest in land immediately adjacent to the land upon which the city erects or constructs the work or structure by reason of loss of or permanent lessening of use of the land of that owner or other person, the person sustaining the damage is entitled to compensation therefore and may, at any time after the damage has been sustained and within sixty days after notice has been given in a newspaper of the completion of the work or structure in respect of which the damage is sustained, file with the city clerk a claim for damages in respect thereof, stating the amount and particulars of his claim.

[Compare sec. 299(1).] Section 303a is now under consideration by Milvain J. in connection with a claim for injurious affection in relation to the 105th St. overpass in Edmonton.

The 1961 Act deals with injurious affection as follows:

Crown—An owner of land that is injuriously affected is entitled to due compensation for damages necessarily resulting. (s. 15: also 16 and 18)

Municipalities—Sections 27 and 28 set out the procedure in claims for injurious affection; the City Act[33] [s. 299(1)] and the Town and Village Act[34] [s. 284(1)] provide for due compensation, in terms similar to section 15; the Municipal District Act[35] does not. [Section 267(1) repealed by the new Act did contemplate compensation where part of the owner's land was expropriated but not where no part was.] At the same time, section 309(e) of the City Act still provides for arbitration of a claim for damages incurred by reason of the loss of or lessening of the use of land, by either a Supreme Court judge, District Court judge, or a barrister.

Companies and other Bodies—There is no mention of injurious affection but section 35(2)(e) requires the Public Utilities Board to find the amount payable for incidental damages resulting or likely to result from the construction of the work.

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[33] R.S.A. 1955, c. 42.
[34] R.S.A. 1955, c. 303.
[35] R.S.A. 1955, c. 215.

Question No. 5:

Do you think the judge made rules as to basis of compensatiton (a) where some land is taken, (b) where no land is taken, are sound?

MR. MACDONALD: They are "sound" in the sense that they keep injurious affection cases confined to damage to the land as distinct from loss to the business conducted on the land. However, this principle is hard to reconcile with the "value to the owner" concept.

MR. BROWNLEE: I do not feel that the judge made rules are sound, and I think that Anglin, J. in the *Albin* case took the same view. It does not seem reasonable to me that the owner of land taken who has also suffered injurious affection should be able to claim for loss of goodwill and business, while another owner who suffers injurious affection without having land taken should be restricted to a claim for lessening of the value of his land.

PROFESSOR ANGUS: It is clear that compensation should be awarded in both situations under proper circumstances. However, it is difficult to see why the basis for awarding compensation in the two situations should be different where the nature of the damage is the same. In this respect, the rules for recovery of compensation where no land is taken would seem to be too narrow and restrictive. At the same time, most everyone would agree that there should be some limitations on liability. One is forced to conclude that the judge made rules are in need of reconsideration.

MR. FOOTE: No, I do not! In my view "injurious affection" is an unnecessary and hybrid development of the law, which is full of artificial rules, and produces inconsistencies and inequities. It purports to provide compensation for the following items:

(a) diminution in value of land by reason of severance or amputation (e.g., the *St. Mary*[6] case. This item of damage could just as well be left as a factor in arriving at "value to the owner" without setting up a separate head of damages under the heading "injurious affection".),

(b) damage to the owner by reason of the use to which the expropriated land is put (This applies only in the case of an owner part of whose land is taken and even though the use would not have been actionable at common law.), and

(c) diminution of the value of land by reason of the construction of works if such construction would have been actionable at common law, e.g., a public nuisance, interference with access, vibration, noise, smoke, etc. (This has nothing to do with the law of expropriation and proceeds on entirely distinct principles of common law.)

It is difficult to justify the distinction made in paragraph (b), i.e., damages to an Owner A who has had a portion of his land taken, and no damages to Owner B who has had none taken, if for example the land taken from A was only a splinter to widen a railroad right of way when in fact the construction and use of the right of way for a railroad causes equal damage to A and B who both own land adjoining the right of

[6] *Supra*, footnote 6.

way. In applying paragraph (c), the Courts have held that once I prove that the construction as distinct from the use is actionable at common law, then I'm entitled to recover damages based on the use being made of the property even though the use is not actionable."[37] Since in the new Expropriation Procedure Act a claim for "injurious affection" is limited to those cases where land has been expropriated, it might be implied that no claim for injurious affection would lie with Owner B if works which constitute a public nuisance were constructed on land acquired from Owner A by negotiation without recourse to expropriation.

Question No. 6:

In the new Act "due compensation" is to be given for injurious affection at least in the case of the Crown, Cities, Towns and Villages. Does this phrase embody the judge made rules mentioned in Question No. 5?

PROFESSOR ANGUS: Although the way is open for a creative court to break new ground in determining the meaning of "due compensation" under the new Act, and I hope that one will take up the challenge, it would seem more realistic to expect that this phrase will be interpreted in the light of the judge made rules which are at best familiar.

MR. MACDONALD: As "due compensation" has been interpreted in such Ontario cases as *Re Conger Lehigh and Toronto*,[38] the judge made rules are upheld completely.

MR. FOOTE: I am of the opinion that "due compensation" must be interpreted in accordance with the common law rules.

MR. BROWNLEE: Section 15 of the new Act seems to go farther than the judge made rules in that a landowner who has not been subject to expropriation but whose land has been injuriously affected by an expropriation is entitled to "due compensation for any damages necessarily resulting from the exercise of the power of expropriation . . ." This could include loss of profits, etc., and is therefore an extension of the judge made rules.

Question No. 7:

Does the obligation of companies and other bodies to pay for "incidental damages" cover injurious affection? To what extent?

MR. FOOTE: In my opinion, the omission of any reference to "injurious affection" in the provisions relating to companies does not absolve a company from liability for payment under that heading of damages. If anything, the wording is broader than the common law limitations on assessing damages. I favour retention of the common law position however.

MR. MACDONALD: It is doubtful whether injurious affection is covered by the term "incidental damages". If it is not, the result is unfair in that all bodies should surely be subject to the same rules.

MR. BROWNLEE: I would interpret section 35 (2) (c) as including injurious affection. The words ". . . incidental damages resulting from

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37 *Corporation of the City of Toronto* v. *J. F. Brown Company* (1917) 55 S.C.R. 153, (1917) 37 D.L.R. 532 (S.C.C.); affirming (1916) 29 D.L.R. 618, (1916) 36 O.L.R. 189 (Ont. C.A.).

38 [1934] 1 D.L.R. 376, [1934] O.R. 35 (Ont.).

or likely to result from the construction of the works . . ." are sufficiently inclusive.

PROFESSOR ANGUS: "Incidental damages" are limited by section 35(2)(e) of the new Act to those "resulting from or likely to result from the *construction* of the works". This limitation is the same imposed by case law where the party injuriously affected has no land actually taken. Section 35(2)(e) does not permit recovery for damage occasioned by *uses* of the land expropriated and therefore it does not cover injurious affection to the extent envisaged by the *Albin*[19] case where the injured party is also the person expropriated. In this respect then, the new Act is much narrower than the common law and, I would suggest, is most inadequate.

Question No. 8:

(4) What is the effect of sec. 303a of the City Act[20] on the judge made rules? Is this good?

MR. MACDONALD: There is no language in any Canadian statute like the language in the City Act of section 303a. There are no cases where the measure of "value to the owner" has been applied to injurious affection. The case law to date holds that value in such cases is the value of the property "*as a marketable article employed for any purpose to which it may legitimately and reasonably be put*". To change this judge made rule would increase greatly the cost of overpasses, underpasses, etc. built on public highways for the use of the motoring public.

PROFESSOR ANGUS: Liability of a city for injurious affection is clearly and considerably extended by section 303a. Its operation is not limited to expropriation situations and would seem to place a greater burden upon a city than is otherwise placed upon a private property owner. It is obviously discriminatory unless it can be argued that every property owner should be placed in a similar position.

MR. BROWNLEE: Section 303a of the City Act is, again, an extension of the judge made rules. It does not go as far as section 15 of The Expropriation Procedure Act as it is restricted to damages to land immediately adjacent to the land upon which work is constructed. I think it is probably good.

MR. FOOTE: Section 303a to my mind is far too great an extension of the common law rules. This section would support claims resulting from the conversion of a highway to a one way street. One might then wonder whether rerouting of highways shouldn't give rise to compensation claims. Where should it stop?

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The Determination of Benefits in Land Acquisition†

*Charles M. Haar** and *Barbara Hering***

Freeze, freeze, thou bitter sky,
That dost not bite so nigh
As benefits forgot:
As You Like It, II, vii
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GOVERNMENT as landowner and redistributor is a familiar part of American life today. Such activities always bear legal consequences. A striking example is the 41,000 mile interstate highway system authorized by Congress in 1956, which brings old legal problems of eminent domain compensation under new scrutiny. In a program which may cost more than seven billion dollars, expense for the payment of rights of way figures prominently, especially because of the appraisal puzzle arising out of the nature of a highway taking: properties are often fragmented, leaving the owner with part of the original parcel—a part whose value may be sharply enhanced or depressed as a result of the public improvement. How are these financial effects to be taken into account in the calculation of damages for the taking?

This article, therefore, concerns an aspect of the law of eminent domain which is of increasing importance and perplexity in the expanding area of federal land taking: the deductibility of the value of benefits in computing condemnation awards in takings for highway purposes.[1] Its aim

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[1] As the chief commentator in the field of eminent domain has observed, of all the subtopics, that dealing with compensation and benefits is the most difficult and complex. This view is substantiated by statements in numerous cases. See, *e.g.*, Pickering Hardware Co. v. City of Cincinnati, 149 Ohio St. 275, 282, 78 N.E.2d 563, 566 (1948); State Highway Comm'n v. Bailey, 212 Ore. 261, 319 P.2d 906 (1957) (for discussion see notes 105–06 *infra* and accompanying text); State v. Carpenter, 126 Tex. 604, 610, 89 S.W.2d 194, 197 (1936).

is: (1) to describe the substance of certain aspects of the present law, both federal and state; (2) to propose a critique of that law and of the alternatives to it; and (3) to make recommendations for legislative changes that will cope more effectively with the emerging difficulties, and to produce thereby a framework which will more nearly attain the congressional purpose underlying federal highway legislation.

Land acquisition was long ignored in federal highway construction legislation. Under the early acts, Congress lent financial assistance, which the recipient states could use to pay wages and salaries and to pay for materials and equipment. But the federal funds could not be used to pay for rights of way. Even during that period, however, the subject of acquisition could not have been entirely outside the ambit of federal concern. Since location is an integral part of highway planning, federal officials must necessarily, if obliquely, have considered the acquisition of rights of way in their conferences with state officials to plan highway projects eligible for federal financial participation. In 1940,[2] Congress first authorized federal financial assistance to enable the states to make necessary right of way acquisitions. It was not until 1941 that Congress finally authorized a limited exercise of federal condemnation powers to acquire rights of way for highway purposes.[3] The original enactment was subsequently amended,[4] without, however, much substantive change.

The scope of the federal government's present authorization to take private property for highway purposes by eminent domain is delineated by Section 107 of Title 23 of the United States Code, enacted in the 1958 revision of the highway law.[5] It provides, in pertinent part that:

> (a) In any case in which the Secretary of Commerce is requested by a State to acquire lands or interests in lands (including within the term "interests in lands," the control of access thereto from adjoining lands) required by such State for right-of-way or other purposes in connection with the prosecution of any project for the construction, reconstruction, or improvement of any section of the Interstate System, the Secretary is authorized, in the name of the United States and prior to the approval of title by the Attorney General, to acquire, enter upon, and take possession of such lands or interests in lands by purchase, donation, condemnation, or otherwise in accordance with the laws of the United States (including the Act of Feb. 26, 1931, 46 Stat. 1421) if—

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[2] Act of Sept. 5, 1940, ch. 715, § 12a, 54 Stat. 867.

[3] Act of Nov. 19, 1941, ch. 474, § 14, 55 Stat. 765, 769.

[4] Federal-Aid Highway Act of 1956, ch. 462, § 109(a), 70 Stat. 381 (acquisition provided that state agreed with Secretary of Commerce to pay an amount equal to 10% of the costs incurred in acquiring the land or a lesser percentage as determined by statute, as amended, 23 U.S.C. § 107 (1958); Act of Aug. 27, 1958, ch. 1, § 108, 72 Stat. 893, as amended, 23 U.S.C. § 108 (Supp. IV 1963) (a new provision for advance acquisition of rights-of-way).

[5] 72 Stat. 892 (1958), 23 U.S.C. § 107 (1958).

> (1) The Secretary has determined either that the State is unable to acquire necessary lands or interests in lands, or is unable to acquire such lands or interests in lands with sufficient promptness . . . .

Neither section 107, nor the predecessor section[6] says anything about the computation of compensation. The few recorded cases in which the condemnation power conferred by those statutes is involved also do not establish the definitive rule for determining compensation. Its formulation must, therefore, await future legislative or judicial action. But before any judicial determination of the substance of the rule can be had, a court must decide whether federal or state law is controlling. Valid arguments can be made either way.

I

CHOICE OF LAW IN FEDERAL PROCEEDINGS

A. Authority for Federal Law

United States v. Miller[7] unequivocally asserts the exclusive governance of federal laws over substantive issues of condemnation law "such as the measure of compensations."[8] A reasonably recent pronouncement of the Supreme Court, *Miller* constitutes the highest authority for the black-letter rule that matters of compensation—including deduction of benefits—are determined solely by reference to federal law.[9] While neither *Miller* nor any of the authorities it cites for the proposition arose under section 107 or the predecessor law, two cases, not distinguishable on that ground, tend toward the same conclusion.

In the first of these, *United States v. Certain Parcels of Land in Knox County, Tenn.*,[10] the United States had been requested to proceed against land that had been dedicated for cemetery purposes. Under state law, this dedication entitled it to special, preferential treatment, including immunity from involuntary sale, and, by the same token, brought it within the scope of federal condemnatory power under section 107. The sole issue in the case was raised by the owner's argument that the state lacked power to condemn the property and that the federal government could not do what the state could not. In rejecting the argument, the court gave two grounds. The first challenges the major premise. The state lacked not power, but

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[6] Act of June 29, 1956, ch. 462, § 109, 70 Stat. 381, amending ch. 474, § 14, 55 Stat. 769 (1941).

[7] 317 U.S. 369 (1942).

[8] *Id.* at 380.

[9] *Cf.* United States v. 93.970 Acres, 360 U.S. 328 (1959); United States v. 153 Acres, 154 F. Supp. 770 (M.D. Pa. 1957).

[10] 175 F. Supp. 418 (E.D. Tenn. 1959).

[Pages 836-846 concerning choice of law omitted.]

a strong interest. An even more formidable logical obstacle, more formidable because, for one thing, it does not rely on inference, is the avowed legislative intent to avoid state laws preventing condemnation for limited access highways. A court might well regard this as dispositive of the argument that Congress intended generally that state law be followed in federal proceedings.

A last factor in weighing the preponderance of probabilities is the sheer weight of cases applying a federal measure of damages. Even though every case is distinguishable, it is easier to ignore the distinction than to create and apply a deviatory rule without a clear legislative mandate to do so. The balance then would seem to be on the side of applying federal law. But whichever decision the court makes, it must decide what the substantive rules of the applicable body of law are.

II

FEDERAL SUBSTANTIVE LAW

Modern federal law on the deductibility of benefits in condemnation awards really begins in 1829 with the decision in *Chesapeake & Ohio Canal Co. v. Key*.[67] In that case, Mr. Key, in his capacity of owner of real property located in the District of Columbia, sang a quite different song from the one generally associated with his name. The substance of the lyrics was clear and simple. The fifth amendment to the United States Constitution requires just compensation for property condemned for public use. Just compensation means positive, not conjectural compensation. Boiled down, his argument was simply that only money is a just or positive compensation. For, he alleged, the requirement of compensation is not satisfied if the entire award for damages and the value of a partial taking could be swallowed up by a deduction for benefits, instead of being paid in money compensation. Chief Judge Cranch thought otherwise. Although not strictly necessary to his decision, he also stated that even without the express authorization of a charter provision, the jury could have considered benefits as well as damages, "for the Constitution does not require that the value should be paid, but that just compensation should be given."[68]

Doubt was cast upon the status of the *Key* case in decisions handed down during the next few decades in the courts for the District of Columbia.[69] Finally, in *Bauman v. Ross*,[70] decided in 1896 and generally regarded

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[67] 5 Fed. Cas. 563 (No. 2649) (C.C.D.C. 1829).

[68] *Id.* at 564.

[69] District of Columbia v. Armes, 8 App. D.C. 393 (1896); District of Columbia v. Prospect Hill Cemetery, 5 App. D.C. 497 (1895).

[70] 167 U.S. 548 (1896).

as a leading case in federal law on this subject, the question came before the Supreme Court. The opinion reviews past legislation for the District of Columbia and prior decisions, both its own and those of state courts. On the basis of the practice and authority elicited by its review, it approved the language of Judge Cranch and established it as the minimum rule for compensation, by that time applicable not only to the District of Columbia and the federal government, but, by virtue of the fourteenth amendment as construed by the Supreme Court, to the states as well.[71]

The general proposition established by *Bauman v. Ross*, having by now gained the "acquiescence of years,"[72] is probably beyond the pale of serious legal attack. Subsequent decisions, however, reveal considerable obscurity and confusion in the application of the general proposition. The two major categories are (1) questions concerning the type of benefits which may be deducted and (2) questions concerning determination of the amount to be deducted.

A. Type of Benefits Which May Be Deducted

There is, perhaps, more confusion over the question of which benefits are deductible than over any other single question arising under the head of permissible offsets to condemnation damages. *Bauman v. Ross*, though it does not deal squarely with the issue, does touch upon it in language which raises the possibility of a constitutional interdiction against deducting "general" as opposed to "special" damages.

The confusion only becomes rampant, however, on the issue of what constitutes deductible special benefits and non-deductible general benefits. The question arose recently in the case of *United States v. 2,477.79 Acres*[73] in connection with a partial taking for a reservoir on which a part of the remaining property would front. At issue was whether the creation of "lake" frontage constitutes a deductible benefit. The court held that it does, under the rule that "special benefits are those which are direct and peculiar to the particular property as distinguished from the incidental benefits enjoyed to a greater or less extent by the lands in the area of the improvement."[74]

As a test for differentiating special from general benefits, the court's formulation is considerably wanting. "Direct" and "peculiar" convey little, if anything, more than "special." The court rejects exclusivity as an essential characteristic of "special": it is immaterial that "other lands in like

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[71] See, *e.g.*, Jones v. City of Opelika, 316 U.S. 584 (1942); United States v. Hall, 26 Fed. Cas. 79 (No. 15282) (C.C.S.D. Ala. 1871); Barnette v. West Virginia State Bd. of Educ., 47 F. Supp. 251, *aff'd* 319 U.S. 624 (1942).

[72] Judge Benjamin Cardozo's inimitable language.

[73] 259 F.2d 23 (5th Cir. 1958).

[74] *Id.* at 28.

situations are similarly benefited."[75] But it also holds that "if there has been a general benefit . . . as well by reason of the property being in the area of the improvement the amount of the offset would be limited to that part of the increase attributable to the special benefit."[76]

Taken as a whole, the court appears to hold that to create a special or peculiar and direct benefit, the improvement must physically alter the subject property. But read thus, it is hard to understand the court's deprecating reference to *United States v. Alcorn*.[77] *Alcorn* professes satisfaction "that the increase of value to the defendants' property due to its proximity to the great project, while different from that enjoyed by owners of more remote land, is not a special or direct benefit to the land not taken . . . ."[78] But this can hardly have meant, in light of the Supreme Court decision cited in this connection,[79] that *Alcorn* was according weight to the factor of exclusivity rejected in *2,477.79 Acres*. On the other hand, it may well have meant that a physical change, such as the change from upland to riparian land in *2,477.79 Acres*, was essential. For while the government stressed the interrelationship between the location of the subject property and the improvement, the only physical change was that the property would be adjacent to a railroad right of way to be constructed to replace a way that would be flooded by the project proper. The conceded increase in the value of defendant's remaining property was attributable not to the adjacent railroad right of way, but to the demand for residential, business, and industrial sites which the realty market anticipated would be created by the Bonneville Dam, the principal improvement.

The opinion in *2,477.79 Acres* is less readily reconciled with the Supreme Court's decisions in *Brand v. Union Elevated R.R.*[80] and *McCoy v. Union Elevated R.R.*[81] The conflict is not obvious from a reading of the majority opinion in the first case, because that decision appears to rest on unrelated grounds. The dissent, however, takes issue with the majority as sanctioning a test of damage based entirely on the market value before and after the improvement. The vice in such a test was said to be that it "necessarily charges the owner with benefits which this court has repeatedly held could not be done, and makes the owner contribute to a liquidation of special injuries his share of the general benefits derived from the construction and operation of the road."[82]

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[75] *Ibid.*
[76] *Id.* at 29.
[77] 80 F.2d 487 (9th Cir. 1935), *rehearing denied* (1936).
[78] *Id.* at 489.
[79] United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).
[80] 238 U.S. 586 (1915).
[81] 247 U.S. 354 (1918).
[82] 238 U.S. at 598–99.

That the majority indeed sanctioned a formula using before and after market values, became certain with its decision in the *McCoy* case. But the court's verbalization seems unfortunate. It begins by noting that "peculiar and individual" benefits are almost everywhere held deductible. It then upholds the right of a state to go "one step further and [permit] . . . consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages."[83] On its face this would appear to relate only to the significance to be accorded exclusivity: the individual versus the neighborhood. But this interpretation seems doubtful in light of *Bauman v. Ross*, since there the road was held to confer deductible benefits on all the several abutting owners whose property was taken only in part. Another possibility is the one which brings the case into conflict with *2,477.79 Acres*: namely, that the court is saying that the improvement need not effect a beneficial physical change on the property provided it causes an increase in its market value.

This is one instance where clarity might well be gained by tracing the confusion to its source, *Monongahela Nav. Co. v. United States*.[84] There, Justice Brewer in a purely constitutional exegesis wrote that the effect of the fifth amendment in directing compensation "for the property, and not to the owner . . . [is to exclude] the taking into account, as an element in compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated . . . ."[85] *Bauman v. Ross* explains the case as excluding general, as distinguished from special, benefits.

Notwithstanding *Bauman v. Ross* and a host of other decisions embarrassed into explaining or distinguishing *Monongahela*,[86] the Brewer dictum seems much maligned. The general-special dichotomy used, if not introduced, in the *Bauman* case is the real villain. The line drawn in *Monongahela* is not general versus special, but person versus property. The underlying cause may be greater convenience of access, or the like. But in every case the result should be an increase in the present market value. The improvement may also benefit the property owner, or it may benefit the property owner individually, but not the property. This can be illustrated by reference to the factual situation in *McCoy*. The plaintiff

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[83] 247 U.S. at 366.

[84] 148 U.S. 312 (1893).

[85] *Id.* at 326.

[86] See, *e.g.*, Scranton v. Wheeler, 179 U.S. 141, 155 (1900); Isabela Irr. Serv. v. United States, 134 F.2d 267, 270 (1st Cir. 1943); Latvian State Cargo & Passenger S.S. Line v. United States, 88 F. Supp. 290, 292 (U.S. Ct. Cl. 1950); United States v. 9.94 Acres, 51 F. Supp. 479, 481 (E.D.S.C. 1943); United States v. Big Bend Transit Co., 42 F. Supp. 459, 474 (E.D. Wash. 1941).

a hotel owner, like all his guests, and like all the people having convenient access to and occasion to use the new facility—an elevated street railway—benefited by its construction and maintenance in ease of travel. The property benefited by an increase in its market value. *Monongahela* precludes the former from consideration; it sanctions consideration of the latter in determining compensation.

While some federal cases are contrary to the suggested interpretation of this aspect of the *Monongahela* opinion, there are no Supreme Court decisions among them. The rule has the merit of being conceptually simple, and if less simple in practice, at least no more difficult than competing propositions. It has the additional virtue, to those who value consistency, of using parallel rules to determine the logically parallel questions of damage and benefit.

B. Limits of Deductibility—Amount of Benefits Which May Be Deducted

Related to the question of type of benefit, but not at all identical with it, is the question of when the amount of the benefit is to be determined. Discussions of the time of valuation in relatively recent cases have almost invariably been in the context of damages. There the rule is that the crucial date is generally the time of taking.[87]

Public improvements, certainly major ones, come into the public limelight long before the government is in a position to begin the undertaking. There is the inevitable and often quite extended period of debate and amendment between the legislative proposal of a public improvement and approval of the final version by the President. There is additionally some lapse of time between the final approval of the project and the taking of the first formal step to condemn the necessary interests in land. Hence, by the date of taking, the realty market may have discounted the benefits anticipated from the project in the same way as stock market prices herald events in the business world. *United States v. Alcorn*[88] describes one such instance in connection with the Bonneville Dam, constructed in the mid-1930's: land that before public announcement of the project had at most a nominal value of about 100 dollars per acre had, by the date of taking, skyrocketed to a value estimated between 1,500 and 6,000 dollars per acre. The Bonneville Dam takings, probably extreme in degree, but not unusual in kind, illustrate the type of situation which has given rise to the principal exception to the general rule that value is determined as of the time of the taking.

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[87] United States v. Miller, 317 U.S. 369, 374 (1943), citing Shoemaker v. United States, 147 U.S. 282, 304 (1893), and Kerr v. South Park Comm'rs, 117 U.S. 379, 386 (1886).

[88] 80 F.2d 487 (9th Cir. 1935).

The exception, as formulated in *United States v. Miller*[89] is as follows:

> [the owners of] lands [which] were, at the date of the authorizing Act, clearly within the confines of the project . . . were entitled to no enhancement in value due to the fact that their lands would be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken.[90]

The rule as stated seems reasonably clear. It would recoup for the public any appreciation in the value of condemned property subsequent to the date (*quaere*, whether approval or effective) of the act; it would give the owner the benefit of any speculative increase before that date. When, however, the rule is juxtaposed to the facts of *Alcorn* its proper application seems far less clear.

The Bonneville Dam project had its origin in a state proposal appraised and authorized by referendum vote in 1932. It was adopted by the federal government in 1935, when Congress authorized and the President approved an appropriation of twelve million dollars for it. Additional appropriations for the project were voted in 1936 and 1937, and the project was again authorized by Congress in 1937. Alternate routes for the right of way were surveyed in 1936. It is not clear whether any of those routes were located on the respondents' lands which were ultimately condemned. This is one of the sources of confusion. Another is that the cut-off date selected by the trial court, and approved by the Supreme Court, is August 26, 1937, the date of Congress' second authorization.

On the face of the rule, it would seem to justify use of a far earlier date, 1935, when the federal government formally entered the picture and perhaps even 1932. It is impossible to say whether use of the 1937 date means that where a project is made the subject of more than one legislative authorization, only the last one will be given legal significance for valuation purposes, or whether it simply reflects a failure on the part of the government to argue that an earlier date should apply.

In a total taking, the question is simply whether or not the owner is to have the benefit of increments in value subsequent to whatever date is selected for that purpose. The question becomes more complex in the context of a partial taking. There it becomes necessary to decide additionally whether the condemnor shall be given the benefit of the appreciation or whether it should be ignored, which would have the effect of splitting the increment between condemnor and condemnee. The light shed by the *Miller* opinion on the condemnor's rights has a decidedly Delphic cast.

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[89] 317 U.S. 369 (1943).

[90] *Id.* at 379.

The substance of the respondents' argument before the Supreme Court in *Miller* appears to have been that appreciation resulting from announcement of a project is a general benefit, and therefore should not be deducted in computing severance damages. The contention was rejected as lacking in merit "in light of what [had] already been said,"[91] presumably with regard to valuing property actually taken.

The significance of "what had already been said" in *Miller* appears to have escaped the Fifth Circuit, which authored *United States v. 2,477.79 Acres*,[92] one of the rare opinions discussing time of valuation of benefits. There, in addition to two tracts taken for the reservoir purposes previously mentioned,[93] a third tract, forming part of the 2,477.79 acres, was to be used in connection with the expansion of a military fort. The court of appeals ruled that the three tracts, which were held in single ownership, were, in legal contemplation, a single parcel. The question presented was whether the enhancement of the value of the fort tract resulting from the reservoir project ought to have been deducted in computing the award for the reservoir tracts. The argument against the deduction was that the appreciation in value of the fort property occurred when the contour line of the reservoir was established, an event which preceded the simultaneous taking. This is little more than a slightly different statement of the argument rejected in *Miller* that the benefits and damages entering into the computation of a net award for a partial taking were those in existence on the date of taking. While the results are not inconsistent, the bases are, or at least may be. The Fifth Circuit version of the applicable rule is that "it is the creation of the improvement and not the incident of the taking to which we look in determining whether there has been a benefit to neighboring land that is to be reckoned as a factor in measuring just compensation."[94] "Creation of the improvement," the crucial event according to the Fifth Circuit case, is hardly synonymous with the "date of the Act," the Supreme Court's apparent preference in *Miller*.

Integral to the argument of respondents in *Miller* is the interrelation of what and when. Their argument that the appreciation was a general as opposed to special benefit, if it had prevailed, would have eliminated the valuation date as an issue in the case. As reported, respondents phrased the argument thus:

> And to require the exclusion of any increase in value resulting from the announcement of the project in fixing just compensation for the land that

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[91] *Ibid.*

[92] 259 F.2d 23 (5th Cir. 1958). This conclusion seems not unfair in view of the fact that the district court twice cites the *Miller* case, but not in connection with the deductibility of appreciation in computing damages, a question squarely in issue. The conclusion is, moreover, reinforced by a consideration of the court of appeals resolution of the issue.

[93] See note 73 *supra* and accompanying text.

[94] 259 F.2d at 27.

> is later taken for said project is equivalent to allowing an offset for general benefits, common to the community, against the damages suffered by the landowner by such taking.[95]

This language is strongly reminiscent of that of Mr. Justice Day, dissenting in *Brand v. Union Elevated R.R.*,[96] which is not cited. More surprising is respondents' failure to cite *United States v. Alcorn*, which supports their position on strikingly similar facts.

In both *Alcorn* and *Miller*, the major undertaking in the background was a reclamation project in which the central feature was the construction of a huge dam. In both, carrying out the plan would flood railroad rights of way which were to be relocated as an incident of the major project. In both, respondents' land was taken for the incidental, rather than the principal purpose. The resolutions of the two cases, however, take quite disparate paths. In *Alcorn*, the decision rested on the general-specific dichotomy, avoiding thereby any need to fix the date of evaluation. The decision in *Miller*, by contrast, is made to turn on the date of evaluation, while omitting all mention of general versus special.

This fixing on what or when, each to the exclusion of the other as though the two were entirely unrelated, is the typical pattern of judicial decision in this area, a pattern which harks back at least to 1880, and the decision of the Supreme Court in *Kennedy v. Indianapolis*.[97] There the city, some years before the litigation, had made a number of partial takings of property for a navigable canal. The action was brought to quiet title, and turned on whether the city's title, acquired by eminent domain some years earlier, was good. One of the original owners had sought damages for the partial taking of his property. His claim had been dismissed on the ground that any damages were exceeded by the benefit from the projected improvement, a navigation canal. The anticipated benefit never materialized, however, because the project was abandoned before its completion. This fact proved crucial in the later action. The rule of law applied by the *Kennedy* Court was that title to condemned property passes when compensation—which may include benefits—is paid.[98] It held that, because the benefits never accrued to the land in quesiton, title never passed. The application is correct if benefits means existing physical benefits. It may or may not have been correct—the facts stated in the opinion are insuffi-

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[95] 317 U.S. 369 (1942).

[96] 238 U.S. 586, 596 (1915).

[97] 103 U.S. 599 (1880).

[98] Certain state constitutions have been construed as requiring a similar result. See, e.g., KY. CONST. art. 13 (construed in Goodwin v. Goodwin's Executor, 290 S.W.2d 458, 460 (Ky. 1956)); MICH. CONST. art. 13, § 1 (construed in State Highway Comm'r v. Newstead, 337 Mich. 233, 241, 59 N.W.2d 269, 275 (1953)). Here, however, no special language was involved and the rule is stated as simply one of general law.

cient to say—if benefit is defined to mean an increase in market value, either unqualified or one resulting from a projected physical change beneficial to the property.

United States v. River Rouge Improvement Co.,[99] in focusing on one element to the exclusion of the other, follows the *Kennedy* case, but takes the alternative approach of ignoring when and dealing only with what. The case arose under an express legislative direction to deduct for any "special and direct" benefit.[100] Whether a benefit within the meaning of the statute had been conferred was very much in issue. The lands in question all fronted on a river which was navigable only to very small vessels. The projected improvement would make it navigable for the large freighters required by local industry. On these facts the Court found the requisite benefit: "We are of opinion that an increase in the value of the remaining portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, would constitute a special and direct benefit . . . ."[101]

To this point, the opinion is perfectly consistent with the fair market value of benefit theory deducible from *Monongahela*, which, though cited by defendants, is not mentioned in the opinion. But the Court went on to distinguish a special and direct benefit "from a benefit common to all lands in the vicinity . . . ." The possible inconsistency with *Monongahela* arises because the Court did not rest its result only on the underlying facts. Not all property beneficially affected by a public improvement will be affected to the same extent. The appreciation will be greatest as to lands bordering and physically changed by it, gradually vanishing as the outer perimeter of the improvement's impact is reached. But market appreciation, regardless of amount and regardless also of whether physical change is an element, is always an indirect benefit in the sense that it is not created by the improvement itself, but rather by the market's evaluation of the improvement. *Monongahela* permits recoupment by the public of all benefit. Congress, however, may elect to recoup less than the constitutional maximum.[102] In *River Rouge*, it can be argued that Congress made that very election, using the word "direct" in order to limit deductions to property physically changed by the improvement. The logical difficulty is that, from all that appears in the opinion,[103] the improvement was still *in futuro* when

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[99] 269 U.S. 411 (1926).

[100] 40 Stat. 911 (1918).

[101] 269 U.S. at 415.

[102] See discussion at note 65 *supra*.

[103] It is not at all certain from the Court's statement of the facts whether or not the improvement had been made by the date of decision. The consistent use of the future tense in referring to its benefits strongly suggests that, at least as of the time of argument, the project had not been completed.

the amount of the deduction was calculated. Hence there were at the time no "direct" benefits, but only the indirect benefit of increases in property values reflecting the market's judgment that the improvement would be made and have the anticipated economic effect.

The only conclusion which this attempt at synthesis seems to justify is that the law in this area is badly confused. It is, therefore, to be regretted that the Supreme Court by its curt disposition of this issue tendered by respondents in *Miller*, lost an opportunity to shed some badly needed light.

III

STATE LAW

A. A Vertical Cut

On the issues relating to benefits, it would not be unreasonable for federal courts to look to state adjudications for guidance. For various reasons—principally the generally accepted distribution of functions between federal and state governments which allocates to the states the duty of providing many of the necessary public improvements, notably highways—the states have been the more energetic in using eminent domain. Out of repeated opportunities to rethink an issue in a wide variety of factual contexts, and to test solutions, there could come a consensus which would be a generally acceptable precedent. But despite the undoubted excellence of many of the state judges and the apparently careful and extended consideration given those issues in numerous opinions, the result can hardly be described in glowing terms. An attempt to draw finer distinctions in the area of benefits has involved the state courts, like their federal counterparts, in the semantic riddle of general versus special benefits. Every conceivable resolution has its vigorous exponents, but no one resolution is possessed of enough of whatever it takes to still competing voices. Hence conflict and confusion abound.

In some states, a body of reasonably certain rules appears nevertheless to have somehow evolved.[104] In many others, however, the struggle to reach legal nirvana in this area continues. And *State Highway Comm'n v. Bailey*,[105] a recent Oregon decision, indicates that unhappily, the path is hard and progress slow. There, at least as to one of the two major issues—the type of benefit deemed deductible—a comprehensive review of legal precedents produced not the hoped for principle, but "apparent inconsis-

[104] For a detailed exposition of state law, see generally 3 NICHOLS, EMINENT DOMAIN §§ 8.6205–8.6211 (3d ed. 1950); ORGEL, VALUATION §§ 1–10 (2d ed. 1953); Annot., 145 A.L.R. 7 (1943).

[105] 212 Ore. 261, 319 P.2d 906 (1957).

tencies." Confronted by such a situation, courts will sometimes turn it to advantage. Using the confusion as their key to greater judicial freedom, they will decide the case on reason and equity. Not so the Oregon court; it felt constrained by the weight of the past to reject the rule it apparently preferred, in favor of another, which it adopted "reluctantly" and with a gloomy foreboding that it would prove difficult to apply. Thus, after all the soul-searching, the Oregon law remains—concededly—uncertain and unsatisfactory.

Nevertheless, the paths pursued and the alternatives available merit close examination. The object is not to point up the details of the existing confusion, which would serve little purpose. Rather it is to retrace one segment of the relevant legal history in the hope that it will give an insight into where and why one turn rather than another was taken and perhaps even suggest correctives.

State Highway Comm'n v. Bailey is a convenient vehicle for this review because it raises both the issue of which benefits qualify for offset and the extent to which such qualifying benefits may be recouped.[106] Before the improvement, the property in question was suitable only for agricultural use. This was largely attributable to its inaccessibility. The new road to be constructed by plaintiffs would make it economically feasible to subdivide part of the property for residential development and to devote another part to commercial use. For the purposes of the appeal, these facts were treated as established. The controversy concerned the purely legal question of their effect upon the issues presented. Plaintiffs contended that the newly available uses increased the value of the remaining property by about 5,000 dollars. Defendants persuaded the trial court to strike the allegations of benefit and to exclude proof of them on the theory that such benefits were general and not legally deductible under Oregon law. The Oregon Supreme Court affirmed.

Oregon, like most states, started out with the simple, unitary, and common sense rule that the measure of damages in eminent domain was the difference in the fair market values before and after the taking. This was established in *Putnam v. Douglas County*,[107] where the appellant, part of whose property was taken for a county road, had requested the court to charge that benefits from the road might be "offset against consequential damages to the premises, but not against . . . the land."[108] Instead

[106] It is all the more appropriate because the federal government probably had a practical interest in the outcome; it may well have been a partner in the limited access highway for which a part of the defendants' property had been taken. If so, its share of the cost was affected by the jury's verdict of $22,000 for defendants, of which at least $5,000 and possibly up to $10,000 (the amount claimed by defendants in their answer) represented damages to property remaining after the taking.

[107] 6 Ore. 328 (1877).

[108] *Id.* at 329.

the court directed the jury to consider "all special advantages . . . as, for instance, the giving of an outlet to market to said premises, and the enhancement in value of the land taken."[109] Furthermore, the trial court stated that in the event the jury found that appellant's property was not rendered less valuable by the improvement it was to render its verdict for the respondent—which the jury proceeded to do.

The appellate court, one judge dissenting, sustained the judgment below. The majority rested its decision on an ancient canon of judicial construction that a legislature which "borrows" the statute of a sister state is deemed to have also adopted the judicial construction of the statute by the courts of that state. The court noted, with obvious satisfaction, that the market value rule had been adopted by the then far more legally sophisticated triumvirate of Pennsylvania, New York, and Massachusetts. But it gave particular weight to the consonance of the decisions of Indiana, because the constitution and statute of Indiana had been the model for its own.

Putnam v. Douglas County was not, however, fated to become a milestone in Oregon law. The single issue there posed and resolved was transformed into the now familiar dual issues posed in *Bailey*. The substance of the *Putnam* resolution was also modified over the years.

1. *Offset Against Value of Land Taken*

Offsetting benefits against the entire award may well have been the accepted practice for a time after the decision in the *Putnam* case.[110] But the rule appears to have been expressly affirmed in only one subsequent decision—*Re petition of Reeder*.[111] That case, decided in 1924, states that the value of land taken as well as consequential damages may be compensated in benefits other than money payment. Other cases, stretching in a chain from *Putnam* to contemporary decisions, unbroken except for *Reeder*, seem inconsistent with the *Putnam-Reeder* view. They state the "well-settled" rule to be that "in estimating the damages accruing to a land owner from the exercise of right of eminent domain by a railway company the owner of the fee is entitled to recover . . . the fair value of the land actually taken . . . ."[112]

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[109] *Id.* at 329-30.

[110] Thus, in Beckman v. Jackson County, 18 Ore. 283, 22 Pac. 1074 (1890), the jury returned a verdict of "no damage," although the municipality had opened a road through the petitioner's property.

[111] 110 Ore. 484, 222 Pac. 724 (1924).

[112] Harrison v. Pacific Ry. & Nav. Co., 72 Ore. 553, 559, 144 Pac. 91, 93 (1914). See also Keane v. City of Portland, 115 Ore. 1, 12, 235 Pac. 677, 681 (1925); Portland-Oregon City Ry. v. Sanders, 86 Ore. 62, 73, 167 Pac. 564, 568 (1917); Portland-Oregon City Ry. v. Penney, 81 Ore. 81, 85, 158 Pac. 404, 406 (1916).

Several of those cases are arguably distinguishable in that the condemnor was not a public body but a private corporation operating for private profit.[113] Furthermore, the language dealing with deductibility of benefits in most and perhaps all of these cases is merely dictum, since the facts, as stated in the opinions, did not put the question of benefits in issue.[114] Presumably in recognition of this, these cases do not appear to have been urged as authority that no benefits whatever may be considered. Nor should they be authority in cases, such as *State Highway Comm'n v. Bailey*, in which the deductibility of special benefits is conceded and the issue is whether particular benefits qualify as "special."

In this entire line of cases, including, in fact, *Re petition of Reeder*, *Putnam v. Douglas County* was not cited in connection with the issue of deductibility of benefits. *State Highway Comm'n v. Bailey* unearthed the apparently forgotten precedent, only to overrule it. Since the contra-*Putnam* cases cited in *Bailey* were all susceptible to reconciliation by one technique or other, and since on the surface *Putnam* was still a precedent in good standing, its jettisoning would seem to have been the free act of the *Bailey* court. The court, however, disclaimed the power of choice. The opinion states, virtually at the outset, that:

> It is now firmly established by our decisions that such benefits may be set off or employed to reduce the damages to the remainder of the tract not taken, but cannot be used to adversely affect the right of the owner to receive the fair cash market value of the land actually taken . . . for highway use.[115]

One consequence is that the judicial record is barren of any statement attempting to justify the departure from the law of *Putnam v. Douglas County*. On the one hand, the cases which do not recognize its relevance even to the extent of citing it, can hardly be looked to for such a statement. On the other hand, the one case which does recognize its relevance

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[113] See ORGEL, *op. cit. supra* note 104, at 44–45; Annot., 145 A.L.R. 18, 22 (1943), both of which make this distinction. While not conclusive against this argument, it is of some significance that other jurisdictions, for example Pennsylvania, construed just compensation as an objective quantity not dependent on the identity of the payor. See, *e.g.*, Pittsburgh, B.&B. Ry. v. McCloskey, 110 Pa. 436, 1 Atl. 555 (1885).

[114] In this series of cases, it can even be argued that the statements are more debased than ordinary dicta. For in many, the court does not appear to be addressing itself to benefits as a hypothetical issue—the typical context of dicta; it appears perfectly oblivious to the issue. Thus, in Harrison v. Pacific Ry. & Nav. Co., 72 Ore. 553, 559, 144 Pac. 91, 93 (1914), the statement of the measure of just compensation includes only two elements. There is the fair market value of the part taken and there is the "injury to the remainder of the same tract." A more recent case, State Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 412, 281 P.2d 707, 715 (1955), states the rule in virtually identical language. Since neither case involved a legal or factual controversy as to benefits, there was no need for the court to state what the effect would have been had they been present.

[115] 212 Ore. at 277, 319 P.2d at 914.

treats the question as settled by prior cases, which precludes reason from any role in the determination of the case at bar.[116]

2. Special versus General Benefits

The distinction between general and special may have been known to the court that decided *Putnam v. Douglas County* in 1877. Indeed, its reference to "special advantages" in its instruction pertaining to the assessment of benefits suggests rather strongly that it was. But it is a distinction which can be greatly blurred if not entirely obliterated by the before and after market value measure of damages. In *Beekman v. Jackson County*[117] the distinction comes into sharper focus. There, too, a road had been laid out over the plaintiff's property, but he was denied a verdict by the jury which found that his property was no less valuable after the taking. Chief Judge Thayer reversed, quite clearly because he differed from the jury's conclusion. Thus, he stated that plaintiff's lands "are already accessible to a public road, which answers their necessities in that particular, and the benefit to them by the opening of the road in question is evidently remote and speculative."[118] If the opinion had said no more, it could be read as applying precisely the same law as *Putnam*. The opinion, however, says more, and in doing so adds confusion. Thus, the court stated that it was not clear from the record whether the jury had in view a peculiar benefit to appellant's premises, or some general benefit which he would receive in common with others,[119] and at another point, that for a benefit to be legally cognizable the land must "gain some peculiar advantage."[120]

The confusion was heightened by two condemnation proceedings brought in 1916—*Portland-Oregon City Ry. v. Ladd Estate Co.*,[121] and *Portland-Oregon City Ry. v. Penney*.[122] Although both cases were brought by the same party within a single year, there is an interesting difference of approach in the opinions. The *Ladd* case, which was decided first, was approached as an ordinary condemnation case governed by the general

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116 The regret voiced by the *Bailey* court applied only to its resolution as to the type of benefits that were deductible. This reluctance may have sensitized the court to the diversity, distinctions, and conflict on which it commented. These characteristics seem hardly more marked in this area of legal evolution than in the development of the law governing the extent to which non-money compensation might be given for property taken or damaged by eminent domain, an area which is not so described by the court.

117 18 Ore. 283, 22 Pac. 1074 (1890).

118 *Id.* at 286, 22 Pac. at 1075.

119 *Id.* at 285, 22 Pac. at 1075.

120 *Id.* at 286, 22 Pac. at 1076.

121 79 Ore. 517, 155 Pac. 1192 (1916).

122 81 Ore. 81, 158 Pac. 404 (1916).

principles enunciated in the *Beekman* case. *Penney*, which was decided only three months later, has a quite different tenor, although it cites *Ladd* and is perfectly consistent in result. In *Penney*, the court emphasized a special statute, which precluded the deduction of benefits, applicable to private corporations condemning for railway purposes, but not to a county condemning for highway purposes. Furthermore, although pursuing the same road as *Ladd*, *Penney* "follows it with unwilling feet . . . ."[123]

The quite clear tendency in this line of cases was toward restricting the benefits that could be classified as special and deductible. *Re petition of Reeder*, although in accord with *Putnam v. Douglas County* on the extent to which benefits can be deducted,[124] would seem to complete the break from the view probably taken in *Putnam* on the issue of which benefits qualify for deductions. The instructions to the jury in *Reeder*, on appeal, taught that, to be deductible, benefits had to be "founded on some increased use and useable value . . . as well as the market and saleable value of the land, and not such as increases the market and saleable value alone."[125]

These cases are the milestones in the development reviewed by *State Highway Comm'n v. Bailey*. If the *Bailey* court objectively sought the guiding light of authority, and not merely authority consonant with its own views, it is hard to see why it did not read *Re petition of Reeder* as continuing the trend which had set in almost before the ink was dry on the opinion in the *Putnam* case.[126] The *Bailey* court, however, did not view *Reeder* in this light and did not so evaluate the trend. It distinguished

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[123] *Id.* at 86, 158 Pac. at 406.

[124] See notes 107–12 *supra* and accompanying text.

[125] 212 Ore. at 297–98, 319 P.2d at 924.

[126] This seems clear enough from the formulation of the applicable legal rules in those cases. But it is heavily underscored by the facts. Special benefits in the *Penney* case were alleged by way of three counterclaims. One set forth that because of the coming of the railroad for which the right of way was being condemned, a convenient modern highway would be constructed to replace the steep, unimproved road which was then the defendant's only means of getting from his land to the main highway for the general area. While this may be dismissed as an attempt to recoup betterment value not yet in existence and to be created by another agency, this is not true of the other two claims. They alleged benefits in enhancement of the value of the land (1) in terminating its inaccessibility which had hitherto prevented its profitable use and (2) in the construction of a freight and passenger depot.

In the *Ladd* case, the special benefits claimed were again transportation facilities to an underdeveloped area. Counsel for the railroad attempted to counter the charge of general or community benefits by arguing that the mile-long tract to be traversed was lined by two additions, both owned by the defendant, and that there was no "community" to reap the benefits which were, thus, peculiar to defendant's land. To this the court made two replies. First, both additions had in large part been sold. Second, that "any benefit accruing to defendant thereby which is greater than that of its remote neighbors is merely a question of degree rather than class." 79 Ore. at 521, 155 Pac. at 1194.

the *Penney* case as resting heavily on a statute, which was inapplicable to highway condemnations, and distinguished both *Penney* and the *Ladd* case as condemnation by private rather than public corporations.[127] Out-of-state authority was also consulted, and found to be no more satisfactory.[128]

B. A Horizontal Cut

Nevertheless, the *Bailey* court did adhere to the special-general distinction, declaring, however, that special benefits should not be narrowly construed. Two facts are of special note in this resolution. First, the court professed reluctance to adopt it. Second, its reason for acting contrary to its own inclination was its respect for Justice Holmes and his admonition that "The life of the law has not been logic, it has been experience." The court then sums up the relevant experience: "it appears that the earlier practice which set off both general and special benefits against damages has lost ground and is now retained in only one state, Indiana."[129] The accuracy of this statement is highly questionable.[130] But its peculiar interest derives not from that, but from the fact that Indiana is the state whose case law had been given added weight by the Oregon court in *Putnam v. Douglas County*, on the strength of the still respectable canon of construction that a legislature in borrowing a statute is deemed to also borrow the judicial construction given it.

The *Bailey* court's avowed distaste for its solution is not packaging calculated to give it a wide appeal in other jurisdictions. Furthermore, the court seems to have been quite moderate in its appraisal. This, however, is not conclusive of whether other courts would do well nevertheless to follow the same path as the Oregon court, assuming they have freedom of choice. That requires a relative evaluation of the Oregon rule, to the extent that it can now be gauged, against other alternatives.

1. Special Benefits—Oregon Style

The Oregon law, per *Bailey*, is committed to the rule of *Hempstead v. Salt Lake City*.[131] It qualifies as special any benefits which pass the test

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[127] While these differences do exist, it is perhaps an interesting insight into the judicial process that this possible distinction is not mentioned in connection with whether land taken had to be paid for in money, although equally relevant to that issue.

[128] No principle of selection is articulated by the court. The quotations appear, however, to be marks of approval for the views expressed rather than a representative sampling of different views.

[129] 212 Ore. at 305, 319 P.2d at 927.

[130] See note 134 *infra*.

[131] 32 Utah 261, 90 Pac. 397 (1907).

of whether they add anything to the convenience, accessibility and use of that property is contradistinction to benefits arising incidentally out of the improvement and enjoyed by the public generally.[132] This sort of generality could mean all things to all people. The court indicates by a list of specific items what it understands to be within the scope of the rule: an improved outlet to the market; suitability for a higher and better use, specifically for residential or commercial subdivision; frontage on a better road; and improved modes of access[133]—provided, always, the benefits are not shared by non-abutting lands.

The greatest difficulty with the Utah rule, or, more accurately, with the rule as annotated by the Oregon court, is its seeming inconsistency. For example, the court specifically declares newly created suitability for subdivision to be a special benefit. Yet it would seem that such a benefit might well be shared by non-abutting land in only slightly lesser degree than the abutting lands. An area may, for example, be separated from a large, central city by a mountainous ridge. While the route between them is poor and circuitous, the difficulty of commuting renders the outlying area unsuitable for development as a suburb of the city. A road tunnelled through the ridge removes the commutation obstacle to the area generally. Land abutting the new road is forthwith suitable for subdivision. But so are nearby, non-abutting lands. The construction of a modern highway, of even ten miles—a short commute in our automobile age—especially through mountainous terrain, is probably beyond the financial resources of any subdivider, and probably not economically feasible for private enterprise. This is by no means true as regards a secondary road leading into the main road. In fact, in Levittowns of today, which are increasingly the rule rather than the exception in the pattern of development, construction of such secondary roads connecting the subdivision with the world outside it are a commonplace. On this analysis, the special quality of the benefits singled out for the inclusion by *Bailey* is reduced to insignificance, if, indeed, it is not eliminated entirely. Prevision of difficulties of this nature appears to have been responsible for the Oregon court's Cassandra-like conclusion. Nevertheless, it casts aside as even less acceptable, two other alternatives: (1) to lump all benefits in a single category, without regard to general and special, and (2) to disregard benefits as such and look only to the value put on the property by the market. The objection voiced to treating all benefits alike, without regard to whether they are special or general, is of wide applicability but doubtful validity. It is, purely and simply, that no state does so, with the single exception of

[132] 212 Ore. at 306, 319 P.2d at 926.
[133] *Id.* at 307, 319 P.2d at 928.

Indiana.[134] Every other state—except, of course, Indiana—could with equal accuracy make the same objection. But on this kind of reasoning man would never have progressed past thinking the world was flat and the center of the universe.

2. *Market Value*

Although the Indiana rule may be unique in its formulation, it is not unique in its effect. A rule which looks to market value before and after, without adjustment for general benefits, should arrive at the same quantum of damage as the Indiana rule. The Oregon court does not regard the market value measure in this light. It views market value, not as an alternative rule, but as a manifestation of confusion which has entered the cases in this area because of the different ways in which the question may arise: the same court which distinguishes general from special in instructing the jury on benefits and damages will allow in evidence the testimony of real estate experts as to appreciation in value which makes no such distinction.

While this theory can probably be documented, the quotations contained in the *Bailey* opinion point in quite another direction. Thus, it quotes the holding of a South Carolina court that "certainly, to the extent that the benefits accruing to those who own land on the highway exceed those of their neighbors whose lands are off the highway, they are special."[135] This is tantamount to saying that there must be a difference in degree of the participation of abutting and non-abutting land; that non-abutting lands must be excluded from any participation whatever. The relative nature of the benefits is further emphasized by the court's statement that they "usually find concrete expression in a comparatively greater increase in the value of such [benefited] lands . . . ."[136] If the South Carolina view was caused by confusion, the effect, nevertheless, is clarity. Its definition substitutes for vague generalities the concrete money measure of the market place. Rather ironically, if this analysis has any merit, the Oregon court cites a decision of North Carolina[137]—another market value jurisdiction—as specific authority on the effect of availability for new uses.

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[134] In fact, present Indiana law does distinguish between general and special benefits (see, *e.g.*, State v. Ahaus, 223 Ind. 629, 63 N.E.2d 199 (1945); Renard v. Grande, 29 Ind. App. 579, 64 N.E. 644 (1902)), although earlier the law appears to have offset all benefits. See, *e.g.*, Renard v. Grande, *supra*; Hagaman v. Moore, 84 Ind. 496 (1882). Moreover, some other states do hold the view erroneously ascribed in *Bailey* to Indiana. See NATIONAL ACADEMY OF SCIENCES, SPECIAL REP'T NO. 59, PUB. NO. 805, CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES (1960).

[135] Wilson v. Greenville County, 110 S.C. 321, 326, 96 S.E. 301, 303 (1918).

[136] 212 Ore. 299, 319 P.2d 925 (1957) (quoting from Wilson v. Greenville County, 110 S.C. 321, 326, 96 S.E. 301, 303 (1918)).

[137] Phifer v. Commissioners of Cabarrus County, 157 N.C. 150, 72 S.E. 852 (1911).

3. Special Benefits—Variations on the Theme

Other attempts to distinguish general from special on some principle which would afford guidance in various factual contexts have produced somewhat different results. *Backer v. City of Sidney*,[138] a 1958 Nebraska decision, dealt with improved drainage, achieved by the construction of an underpass. The original decision holds that as a matter of law no special benefits were conferred thereby, because the drainage of lands, no part of which was taken, was also improved. On rehearing, however, the court modified its views, resulting in the question of benefits being submitted to the jury.[139]

The *Backer* rule tests benefits by whether they arise from the fulfillment of the public object—in which case they are general—or are merely incidental to it—in which case they are special. The court does not say to what the jury should be directed to look in applying the new test. The implication, however, would seem to be that, notwithstanding the oft-reiterated judicial refusal to pry into legislative motive,[140] the issue is being made to turn on precisely that elusive factor. Presumably the jury is to be instructed in the case of an improvement such as the underpass in *Backer*, to first ascertain the legislative "purpose." If the project was initiated in order to improve the drainage in the area, no deduction could be made; if, however, the underpass was inspired by traffic considerations, then the improved drainage is to be treated as a special benefit and, contrary to *State Highway Comm'n v. Bailey*, an offset even though nonabutting lands are also benefited. A grey area situation would seem to be in the offing should an improvement be undertaken for one purpose, but the particular form it assumes be determined by secondary purposes.[141]

An interesting situation under the *Backer* rule would be posed by an

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[138] 165 Neb. 816, 87 N.W.2d 610 (1958).

[139] Backer v. City of Sidney, 166 Neb. 492, 89 N.W.2d 592 (1958).

[140] Compare Appalachian Elec. Power Co. v. Smith, 4 F. Supp. 6 (W.D. Va. 1933); Glass v. City of Fresno, 17 Cal. App. 2d 555, 62 P.2d 765 (1936); Grand Trunk Western R.R. Co. v. Detroit, 326 Mich. 387, 40 N.W.2d 195 (1949); Hood v. New York Guar. Trust Co., 270 N.Y. 17, 200 N.E. 55 (1936).

[141] Thus, in the *Backer* case, the legislature may have been primarily concerned to eliminate a dangerous traffic intersection. The alternatives discussed could have included, in addition to the underpass which was actually undertaken, an overpass; regulation, as to making the two streets one way; perhaps installation of traffic lights; a modification of the width or alignment of the streets; improving an alternate road, and perhaps others. To sharpen the issues we may assume that it is concluded that the underpass and overpass are equally good solutions to the traffic problem, and that both are far better solutions than any of the other possibilities considered. It seems a curious twist that if, as between those two, the legislature chooses the underpass because it will serve the secondary purpose of correcting a drainage problem, the public forfeits the right to recoup therefor, whereas if it makes the same choice for esthetic reasons, bad reasons, or even no reason except the necessity of choosing, then the public may recoup the value of the benefit in question.

improvement such as the Bonneville Dam, involved in *United States v. Alcorn*.[142] If the legislative purpose in improving a river is navigation or power, *Backer*, although not *Alcorn*, would permit deduction for appreciation in the market value of land in anticipation of an increased general potential of the area, including increased demand for land. If, on the other hand, the project were undertaken as an anti-depression measure or to bring about the economic development of an isolated, backward, and depressed area, then *Backer* would seem to point in the opposite direction like *Alcorn* and numerous other decisions which declare that deductions may not be made for increases in general prosperity resulting from the improvement.

Other judicial expositions thus seem to invite difficulties at least as formidable as may await the rule of *State Highway Comm'n v. Bailey*. Although common, such difficulties are not the inevitable consequence of adhering to the special-general distinction in defining benefits. The New York courts, for example, have demonstrated in a series of cases one means of retaining the distinction, while surmounting or avoiding the usual incidents of it.

The Rapid Transit Acts passed in New York at the end of the 19th century gave rise to innumerable claims of damage to the property along the railroads' rights of way. While many of these came before the courts, the rights and liabilities of the property owners and the railroad were fairly well charted by a trilogy consisting of *Bohm v. Metropolitan Elevated Ry.*,[143] *Becker v. Metropolitan Elevated Ry.*,[144] and *Bookman v. New York Elevated Ry.*[145] To appreciate the results of those cases, it is helpful to first look at the opinion in a slightly earlier litigation arising out of the same type of improvement, a railroad.[146] There, both before and after the event, the plaintiff's property was devoted to a mixture of residential and commercial use. Despite evidence that the advent of the railroad had increased the value of the commercial use by more than it had decreased the value of the residential use, the trial court had ruled that in assessing damage the jury might not take the benefits into consideration. The reversing opinion attempts to draw the line which has proved in other states to be so fraught with difficulty. No deduction could be made for "the increase of value resulting from the growth of public improvements, the construction of railroads and improved means of transit . . ." since they "accrue to the public benefit generally, and the general appreciation of property consequent upon such improvements belongs to the prop-

[142] 80 F.2d 487 (9th Cir. 1935), *rehearing denied* (1936).
[143] 129 N.Y. 576, 29 N.E. 803 (1892).
[144] 131 N.Y. 509, 30 N.E. 499 (1892).
[145] 147 N.Y. 298, 41 N.E. 705 (1895).
[146] Newman v. Metropolitan Elev. R.R. Co., 118 N.Y. 618, 23 N.E. 901 (1890).

erty owner."[147] But damages assessed against the road were to be reduced by the amount of "special and peculiar advantages which property receives from the construction and operation of the road, and the location of the stations . . . ."[148] This approach, very much the conventional one, commands very little assent from *Bohm*, in which the court of appeals very nearly junks the distinction in its entirety: "I confess I have been and am wholly unable to see the least materiality in the distinction between what are termed special and general benefits to the property left, or whether such benefits have been caused by the defendants."[149] Given a free rein, the court indicated that it would have limited the inquiry to the actual result in terms of market value upon the remainder of the land. Although the opinion purports to stop short of this, the margin by which it does is certainly not great. It finds that the increase in market value was caused by the defendant and holds that such an increase is a special benefit:

> Whether the increase is common to every other owner . . . and is greater in proportion with some owners of property in the side streets than with the plaintiffs, are matters of no importance. The plaintiffs are not damaged because their neighbors are benefited to an even greater extent than they are by the defendants' road.[150]

The *Becker* opinion, written by the same judge (Peckham J.) in the same year, reaches a contrary result by what may have been a retreat toward the more conventional approach of the prior law. The *Bookman* opinion, however, is persuasive in its reading of the two Peckham decisions as entirely consistent on the law, but differing in their facts. The New York rule (in this regard) is clarified by the *Bookman* decision. Its reconciliation of the two decisions rests on the different state of development of the two areas affected. In the *Bohm* case the neighborhood in question was substantially vacant before the coming of the road, which, therefore, could reasonably be viewed as causing the development that followed in its wake. While *Becker* could have gone either way, the area in question there was largely built up before the construction of the railroad. In such a situation, according to *Bookman*, the previous rate of growth should be determined and if it is found that the rate after the improvement is less than before and less also than that enjoyed by the side streets, it would be legally permissible to infer that the railroad depreciated the value of abutting properties. By the same token, commencement or acceleration of growth after the construction of the improvement could be attributed to it. The ascertainable appreciation is classed as a special benefit, and is measured by the increase in the market value of the property.

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[147] *Id.* at 628, 23 N.E. at 903.
[148] *Ibid.*
[149] 129 N.Y. at 592, 29 N.E. at 806.
[150] *Id.* at 595, 29 N.E. at 807.

IV

EVALUATION

A. In General

One general conclusion which emerges from the foregoing discussion is that the law—federal and state—started out on a fairly sound basis. A second conclusion is that the original foundation has been eroded by subsequent decisions, until today in almost every jurisdiction it is far weaker than it was at the outset. The simple market value test has been greatly complicated by various niceties and distinctions—actual use value versus market value; incidental benefit versus benefit contemplated by the improvement; individual benefit versus community benefit; benefits conferred by the improvement versus benefits accruing from increased prosperity originating in the improvement—which are employed to differentiate deductible benefits, usually labeled special, from non-deductible benefits, usually labeled general.

These refinements have immeasurably complicated the task of the courts in contested takings for public use. They have also complicated, even if probably to a lesser extent, the task of administrative officials in attempting to negotiate voluntary purchase and sales. Doubtless there were valuation difficulties under the original, uncorrupted market value rule.[151] Experts (in every place and at every time) appear to have in common the ability to rationalize widely varying conclusions deduced from a given set of facts. No matter how simple the formulation of the rule, if the valuation proof consists of the expert for the plaintiff testifying to one value and the expert for the defendant to a vastly divergent value, all other things being equal, a basis for objective, impartial, and rational decision is lacking.

While such proof is all too common in condemnation proceedings, the difficulty has not been obviated by the various departures from the pure market value rule. To the extent that market value remains part of the

[151] In a comparative policy evaluation, the market value rule might be criticized as resting on a not wholly true assumption. In forcing an owner to accept for his property an amount of money that would put hypothetical buyers and sellers into equilibrium—a somewhat simplified definition of market value—the law assumes that any piece of property is reasonably fungible, both with money and with other real property. Unquestionably this assumption is false for many individuals in our society, at least as to their homes, but the assumption is not unique to market value measure of compensation. Moreover, it is probably true for our society as a whole and certainly accords with the market economy that characterizes it. If the assumption is, therefore, warranted, then the rule can fairly be said to relieve property owners from any undue burden falling on them as a result of any improvement made for the good of the general public. By the same token, it can be said to recoup the betterment value from property owners for redistribution on whatever principle is deemed politically desirable by that same general public.

equation, the evidentiary problems are unchanged. But that is true even to the extent that market value is eliminated from the original equation. Where, for example, the deduction is measured by the increase in actual use value, it must still be translated into money value, usually proved by "expert" testimony.

Thus, the various refinements have left the old difficulties virtually intact; at the same time they have introduced new ones. Inordinate amounts of time and energy are squandered in hair-splitting controversy as to whether a particular fact complex falls within or without the rule as formulated in a given jurisdiction.

Conceivably, additional administrative and judicial difficulties could be justifiably assumed to advance policy considerations. That, however, does not appear to be the case. This is not to say the modifications which have taken place over the years were not policy inspired. The contrary is probably true; certainly many judicial opinions touching this subject are replete with policy arguments. It is to say that, notwithstanding arduous and sustained efforts at a more perfect justice, progress has certainly not been notable. The results in some cases even raise the suspicion that the effect has been not progress but regression.

B. The Problem of Diversity

On the national level, the paramount consideration pertinent to this evaluation is diversity. Under the present law, whether one owner of property located near a projected highway will fare better or worse than another may be influenced by one or more of several factors. Assuming a highway traversing two states, the law of one state may be more favorable to property owners than that of the other. The law of either or both states may be more favorable than federal law. State law may be relatively more favorable to property owners in one geographic relation to the project than to others. Thus, the amount of an award will depend on the state in which the subject property is located, whether it is condemned by the state or federal government, and whether it is a partial or total taking.

The coexistence of more than one legal rule applicable to factually similar situations is a commonplace under our legal system. A certain amount of diversity is doubtless inevitable, but even for us it is rare to have such a kaleidoscope of rules pertaining to so narrow a subject as the various rules pertaining to the deductibility of benefits from condemnation awards.

In most areas of law, competing rules can be adequately described and classified by the majority-minority rule dichotomy, so beloved of hornbook writers. By contrast, in this area the rules require at least five pigeon holes. The present classification of rules, based on special versus general benefits and on value of property taken versus damage to property

remaining after a partial taking, is as adequate today as when it was devised shortly before the turn of the century.

To the extent that this classification creates any misleading impression, it is in picturing less, rather than more, diversity than actually exists, since it looks only to legal rules. But the legal rules of two jurisdictions may be phrased the same, yet lead to quite different results in awards. In a state that defines "special" benefits restrictively, to isolate one example, fewer deductions will be permitted than in a jurisdiction which defines the same term more broadly.

If diversity of rule is measured not simply by verbal comparison, but application as well, it has more probably waxed than waned with the passing years. As new technologies and concepts emerge, the possible factual combinations become more numerous. And as the factual variables increase, so too does the chance of divergent results from the application of identical general propositions of law.[152]

A finding that legal diversity exists is not necessarily the equivalent of an unfavorable value judgment. Conceivably, it may in the long run even rebound to the general good. If each jurisdiction regards itself and other jurisdictions as legal laboratories, the result could be the evolution of a "best" set of rules uniformly applied throughout the nation. Or diver-

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[152] Nor is legal diversity always reflected in the non-legal facts affecting community life. One point of refraction at which distortion can occur is in determining factual connotations, such as the meaning of special and general, which figure so importantly in the rules of many jurisdictions. Another, at least as important, is in the decisional process itself. A facilitating condition in condemnation cases is the tremendous discrepancy in the evidence on every valuation issue, so that a very great range of verdict can be supported on the record. And rightly or wrongly, juries are widely believed to take advantage of that latitude in returning verdicts reached by tempering the law as charged with a lay view of justice in the particular case. Judges doubtless can better rationalize their results, but beneath the legal jargon may lie the same extra-legal motivation. At least, there is room to suspect that that may be the explanation of cases such as Iriarte v. United States, 157 F.2d 105 (1st Cir. 1946). The government's position was that the property could best be used for low-cost housing and was worth approximately $7,300. Defendant valued the same property at more than $200,000, based on a highest and best use for industrial, waterfront purposes. Two facts were incontrovertibly established: (1) the condition of the harbor ruled out present industrial use, and (2) that condition would be remedied by the harbor improvements planned by the government. The controversy was whether the expense of making the improvement would be prohibitive for private enterprise. The award in the trial court was far less than defendant asked, but about four times more than petitioner offered. On the record alone, it would almost certainly have been sustained on review. The trial court, however, filed a supporting opinion in which it rested its conclusion on a federal "policy" of aiding commerce by improving navigable waters without cost to property owners.

While practical realities probably play a larger part in determining damages, United States v. Causby, 328 U.S. 256 (1946), there is no reason to suppose that the calculation of benefits is insulated from their influence. Thus, whatever the legal formula for "special" benefits, it is not hard to imagine the straining to find a legal "benefit" from an improvement which clearly and unquestionably increases the market value of a property.

sity of rule may be relatively neutral. Because of the immobility of real property, legal rules concerning it are generally thought to have only a local impact. Hence, little if any significance is attached to the fact that neighboring jurisdictions may have different and even conflicting rules.

Goals are the litmus that makes legal diversity meaningful and enables an evaluation of its social impact. Rules are only better or worse as they serve or disserve the ends they are intended to advance. The rules in this area have relevance to several possible goals—for example, national defense, equality, and economy. The evaluation is not necessarily the same or even consistent as to all of these goals.

When the purpose of constructing a particular highway is the defense of the nation, the principal concern would seem to be getting the road built. Because a nation's resources are never unlimited and because other defense needs compete with roads for the tax dollar, cost is a factor, but only secondarily. Under the stress of war-time emergency such as existed in the early 1940's, the normal order of priorities becomes greatly accentuated; cost consciousness diminishes virtually to the point of complete obliteration. Other values—fairness and reasonableness, for example—which in more normal periods are highly esteemed, are sometimes sacrificed in the effort at self-preservation. The need to accomplish the task at hand, adequately and in the shortest possible time, overshadows all factors. If deductions for benefits were equalized and maximized, some property owners would be hurt; the taxpayer would have a somewhat lighter burden. It can perhaps be argued in justification that defense measures are taken for the benefit of the nation as a whole, not for the property owners who may receive some wholly incidental benefit. The mere fact that the benefit is incidental to, rather than the principal purpose for, the activity does not make it any the less real nor necessitate making a gift of it.

If deductions for benefits were equalized and maximized, property owners adversely affected by the change would almost certainly know of it. While patriotism would again tend to weaken opposition, it might not be enough to eliminate it entirely. This could, if unchecked, result in serious delay under state procedures which make possession contingent upon payment of the final condemnation award. Assuming state and federal cooperation, however, the problem in such states could be circumnavigated by use of federal law and forum under the present section 107. While some savings might be affected, the goal of national defense in time of peril might well be better served by minimizing friction, ignoring the diversity, and conserving national energy for the major task.

Economy is probably the simplest goal by which to evaluate diversity. The rule which produces the lowest cost is the best rule and any deviation from that rule is bad precisely to the extent that it increases cost. Unques-

tionably, rights of way costs may be a very significant element of total costs, as in the widening of a Detroit street, where that single item accounted for ten of the eleven million dollars spent on the project.[153] On the face of it, this would seem to point unequivocally toward a nationally uniform rule that would permit maximum deduction. The difficulty is that things are not always what they seem to be. Reduced awards might result in fewer settlements, and increased litigation conceivably could offset reduction in awards. So, too, could the feeling that a small group—property owners—was being made to bear too large a share of the burden of public improvements. In the past, this has led to numerous modifications in state laws intended to equalize the burden. If changing the rule to effect a reduction in net awards caused a recurrence of that feeling, it could find an outlet in more generous verdicts for damages, again offsetting any increase in deductions for benefits.

To other goals—increased employment, promotion of commerce, and mobility—diversity per se among rules governing benefits that may be offset has at most a very nominal significance. Its significance is that some of those differences result in higher net awards than would otherwise be the case. To that extent, the rule disserves each of the goals in varying degrees. Thus, a higher cost of land acquisition does not directly aid employment or any other of the goals. On the other hand, it is certainly possible that it will reduce the amount available for construction, and thereby the number of road miles that can be built, directly and adversely affecting jobs, commerce, and mobility.

The goal of equality, from the federal viewpoint, has two dimensions. One is common both to the federal government and the states, namely, equality among groups: abutting landowners, non-abutting landowners in the area, propertyless residents in the area, and the community as a whole. The other is equality among differently located segments of the same group, for example, abutting landowners in New York, New Jersey, and California.

Equality, as it will be used here, is not a mathematical concept, but an equitable concept, or, if you will, a moral one. The principal criterion of judgment is fairness. This still leaves the question of scope. Is the goal satisfied by equality among owners whose property is condemned? Should it be broadened to take in all property owners affected by the improvement? Should it go the whole way, striving for an equality which comprehends the entire community?

An eloquent commentary on the difficulty of the search for the rule which would best achieve equality is the number of different rules that it has produced. For although a type of benefit which may be set off under

[153] LEVIN, LEGAL ASPECTS OF CONTROLLING HIGHWAY ACCESS 19 (1945).

one rule may not be deductible under another, and although the extent to which an award may be reduced may be more or less under one rule than another, the choice, when judicial, appears to have been animated principally by considerations of fairness.

This consideration, for example, was the focus of *Bauman v. Ross*,[154] which put the United States Supreme Court's imprimatur on the definition of constitutional "just compensation" as the sum of (1) the value of land actually taken, and (2) damages to the remainder after deduction of benefits. This rule was chosen because, according to the Court, "to award [the property owner] . . . less would be unjust to him; to award him more would be unjust to the public."[155] The principle does not, as interpreted by Mr. Justice Day, authorize the deduction of all benefits, but only special benefits. It is clear from his dissent in *Brand v. Union Elevated R.R.*[156] that his objection was that an abutting property owner would be paying for something which the rest of the community received free, although all benefited alike.

The special-general distinction and the various tests for distinguishing one from the other have evoked similar utterances. The consensus appears to be that it is unfair to deduct general benefits, however defined, but not special benefits, again however defined. Nichols, who agrees with that view, states in justification that general benefits "are very difficult to assess accurately, and as they usually arise from an increase in population or business prosperity expected to follow the improvement, they will never be received if the results hoped for do not follow."[157]

This seems short of persuasive, for two reasons. Neither the uncertainties nor the difficulties of assessment are significantly greater than those encountered in estimating the market value of property taken or damaged, or the value of "special" benefits.[158] It may be admitted that the anticipated benefits may prove to be ephemeral. But this possibility is

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[154] 167 U.S. 548 (1897).

[155] *Id.* at 574.

[156] 238 U.S. 586, 596 (1915).

[157] 3 NICHOLS, EMINENT DOMAIN § 8.6205, at 58 (3d ed. 1950).

[158] In United States v. River Rouge Improvement Co., 269 U.S. 411 (1926), it was within the absolute power of the government to bar the property owners from further enjoyment of the benefits in question at any time in the future. But this was held to be simply one fact to be weighed in assessing the value of the benefit; as a matter of law, however, the benefit was held to nevertheless have some value. A similar view was expressed on the somewhat different facts of Reichelderfer v. Quinn, 287 U.S. 315 (1932). There the condemnation for park purposes and the offset for benefits were past history. The litigation was commenced because the government had indicated its intention to terminate the beneficial use and devote the property to another public use less beneficial to property values in the vicinity; the Court upheld the government's freedom of action, reiterating that the contingency which there came to pass was always a possibility that should have been taken into account in assessing the value of the benefit.

merely one of the elements in the market value calculus. While increases in general prosperity and therefore realty values in an area may be conjectural in the extreme, that is insufficient reason for a general rule of exclusion, for at other times they may be susceptible of clear and incontrovertible proof. Certainly in *United States v. Alcorn*[159] the increase in value of the remaining property was clear beyond dispute and very substantial. The point is that there is no necessary and precise relation between market value and speculation and remoteness. Hence, if the purpose is to exclude speculative and remote benefits from the calculation, as is certainly desirable, a rule would serve better that was phrased in those terms, rather than general benefit or market value, which may be neither speculative nor remote.

Secondly, under any rule deductible benefits are calculated in terms of market value. It is never the physical fact that is the benefit but the market's consensus of its worth. If some misanthropic property owner were attached to a slum view, which was eliminated by the creation of a park, his property would still be held to benefit because average buyers and sellers have a different scale of values from that potential seller. If the same park were created in a rural area not likely to be urbanized in the foreseeable future, it might very well not have any impact at all on real property values in the neighborhood.

In addition to the argument raised by Nichols, fear that adjacent properties might be treated disparately has also played a role in the tendency to disregard benefits in computing condemnation awards.[160] If two properties received exactly the same benefit, but only one suffered a taking, that one would pay for the benefit, while his neighbor enjoyed the same benefit free.[161] But, as one court has pointed out,[162] if a property owner is receiving full value for what he is giving up, there is no reason why he should be heard to complain that someone else is getting a greater bargain or paying less than fair value.

Even the law, with its vaunted tolerance of differences among reasonable men, might well ponder the absence of a consensus among opinions. The explanation seems to be that although all were striving to reach the just result, one that would be fair to all affected by it, the means— the

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159 80 F.2d 487 (9th Cir. 1935), *rehearing denied* (1936).

160 *In re* Water Front in City of New York, 190 N.Y. 350, 83 N.E. 299 (1907).

161 Carried to the next logical step, this line of reasoning would seem to preclude even the reduction of damages for benefits received from a taking. One property may be only slightly damaged and greatly benefited by a public improvement, while another is greatly damaged but only slightly benefited by the same improvement. Still another may be benefited without being damaged at all. Here, too, the situation is inequitable as between owners.

162 See Young v. Harrison, 17 Ga. 30 (1855). See also McCoy v. Union Elevated R.R., 247 U.S. 354 (1918).

treatment of benefits—was not and is not adequate to the task. Whatever standard is adopted, some individual or group gets favored treatment relative to another. If reformulation of the rule governing offsets is to be the sole tool, something less than perfect justice must be accepted as inevitable. Realistically, the law can only aspire to minimize the inequity and to place its burden on a rational basis.

The extent to which existing differences should, if possible, be eliminated, depends upon which of the competing value judgments are chosen. Underlying the entire problem is the fact that, theoretically at least, the whole of a public improvement is larger than its parts. The undertaking of an improvement entails numerous categories of cost, only one of which is for land taken or damaged. If the improvement succeeds in its objective, those costs will be transmuted into benefits in at least that amount, but hopefully far exceeding it. Thus, if the value (at the valuation date) of the land taken for highway purposes is X, and the value of labor and materials to construct the road is Y, the value of the highway according to that theory will not be X + Y, but X + Y + Z. The issue this raises is: What shall be done with Z?

One possibility is that all of it should go to the owners of the property which has been taken in part or whole or that is beneficially affected though not taken. Another possibility is that all of it should go to the creating agency. Still another is that it should be shared by the creating agency and the affected property owners. Unfortunately for any resolution, the issue is not of the black or white variety which admits of only one view by right thinking men. Thus, the first view is embodied in Mississippi law,[163] the second was sustained under the challenge of the two *Union Elevated* cases,[164] and the third is sanctioned by most rules, which, however, differ as to ratio. With such a wide divergency, there is no objective basis for adjudging one view "right" and the others "wrong."

The conclusion of this paper is that, in general, the law should aim at recouping all of Z, the surplus value, for the public. Property owners have no better claim to it than the general public, with whom they would share under a rule of recapture. Moreover, reductions in the cost of individual projects might result in a larger number of projects being undertaken. If so, and if each results in a Z product, or surplus value, the production of value and with it the material well-being of the general community is maximized.

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[163] See, e.g., Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940); State Highway Comm'n v. Buchanan, 175 Miss. 157, 166 So. 537 (1936); Meridian v. Higgins, 81 Miss. 376, 33 So. 1 (1902).

[164] McCoy v. Union Elevated R.R., 247 U.S. 354 (1918); Brand v. Union Elevated R.R., 238 U.S. 57 (1915).

This approach to the problem is suggested as exposing a weakness in one argument which is sometimes made against market value measurement of compensation. The gravamen of this argument is that the public purpose of improvements intended to increase the general prosperity of a particular area would be frustrated by a rule, such as market value, that would cream off all benefits.

Compensating a property owner only to the extent of a diminution in the market value might just possibly have this effect. Now and then a public investment may be ill-advised. In such cases the value of the benefit produced by it falls more or less short of its cost. In the extreme cases the benefits may fall as low as, or even below, the cost of the land (including in that item, damages and cost of acquisition). If, in that case, the property owner is charged with all the benefit conferred on his property, as a property owner he is in the same financial position as before the improvement. But the frustration of public purpose comes not from the rules of compensation, but from the failure of the undertaking. Where the improvement attains its minimal objective of creating benefits of equal value to costs, the property owner may still be better off financially than he would be without the improvement. The benefit, *ex hypothesi*, is equal to total costs—and land is only one of the raw materials which, with capital and labor, comprise total cost. While no hypothetical general apportionment could possibly be accurate, it seems not improbable that abutting landowners will frequently be benefited by more than their damages, *i.e.*, the cost to the public of their land. It follows that since the worst that may befall an owner in a pure condemnation proceeding is a verdict of no damage, in all those cases he will derive a net advantage—as property owner—from the improvement.

But it is by no means clear, assuming the intent attributed to the public is the correct one, that it would be frustrated even by a rule which did cream off all benefits. The intent, as stated, is to increase general prosperity. It would be the rare case indeed where all residents of an area, or even those most in need of public assistance, would also be landowners in the area. Rules that modify the market value measure so as to leave the property owner with a greater share of the benefits may thus, much more than the market rule, impede the redistribution of wealth anticipated from the improvement.

None of this applies in toto to condemnations by virtue of authority delegated to public service corporations or semi-public bodies and the like. The sole exception is the corporation regulated as to rates and profits. By such regulation, the public can control the redistribution of wealth without departing from the general law as to compensation in condemnation cases. In all other cases, however, that is not true. And if there is

little reason for landowners as a class to profit at the expense of the general public, there is even less reason to weight the scales against the public where the beneficiary is the owner of a private enterprise operated for private profit, however much the public may need the particular improvement.

But even the market value rule does not recapture the betterment value from non-abutting landowners. Here again the early legislation had an answer. Statutes frequently provided that the cost, or part of it, was to be assessed against the properties benefited in proportion to the benefit received regardless of whether or not the benefited property had also been injured. These doubtless did not mete out perfect justice; in *Bauman v. Ross*, for example, the act contained such a provision. For some unexplained reason, however, the scheme of the statute called for deducting from any award the entire value of the benefit received by the property, but taxed benefited property only to the extent of one-half the benefit. Thus, even though owners of injured properties were given a deduction in the amount of the tax, the effect was to charge them with the whole of the benefit received, half again as much as their more fortunate neighbors.

While assessments are still used to raise funds for public improvements, it is a technique which may be discouraged by the state-federal partnership in highway construction. Judging by its utility as a financing device, the assessment would appear to be a valuable tool on every level of government. Traditionally, however, its use has been largely confined to municipal corporations, including non-governmental, special function districts such as park and sewer districts. On the federal level, outside the District of Columbia, the national government has used other means of financing public works sponsored by it. Hence, as road building becomes less a matter of city streets and more a matter of state and national highways, built by the states or by the states in cooperation with the national government, the special assessment, for all its merits, may fall into greater disuse.

Another method of recoupment is excess condemnation.[165] And it may be that if costs of improvement continue to rise, partly because benefits are not recouped in measuring condemnation awards, states will be forced to resort more and more to that expedient. As an exclusive device, however, it is clearly inadequate, although as another tool in the arsenal it can undoubtedly help toward achieving the goal of cost minimization.

When one leaves the realm of abstraction for concrete situations, practical considerations become more important. For example, even if everyone is agreed that condemnation awards should not include any Z or sur-

[165] On excess acquisition, see HAAR, LAND-USE PLANNING 467–69 (1959).

plus values, in practice that may be hard to isolate and hard to value. There is also the concern that the anticipated benefits may never materialize, in which event the defendant will never receive value for the property which he was coerced into "selling."

Whatever the merits of these qualms, they would seem to apply equally to the computation of damages. The difficulties of valuation are as great and the chance that anticipated damage will never occur are as good. If market value can do rough justice on the issue of damages, it is hard to see why it cannot function with equal efficiency on the issue of benefits.

There is an additional consideration which leads to this same conclusion. Under *United States v. Miller*,[106] the award for land actually taken is its market value at the time of taking, less any increment in value resulting from the improvement. The effect apparently intended by that rule is to protect the public from having to pay for value which it created. But the other side of the coin is that the condemnee whose entire property is taken is denied a share of the newly created wealth. His situation is no better or worse than that of the property owner none or only part of whose property is taken if, but only if, all the value of the benefit conferred on the property by the public is paid to the public. Otherwise, such property owners are given favored treatment relative to that accorded the first group, whose entire property is taken in connection with the improvement.

This reasoning cannot, however, quiet apprehension of possible hardship. If the calculation results in a net benefit, the owner may not have the means of discharging the resulting debt. Such a negative award is not possible where the only means of recoupment is to offset benefits. But some might characterize as an unfair hardship the situation in which a person's income is reduced by the taking of part of the property from which he derives his livelihood. His loss is immediate and out of pocket; his offsetting gain in the market value of the remainder is also immediate, but before he can have it in pocket, he must sell the remainder, which may not be a subjectively acceptable expedient or even practicable.

CONCLUSION

It is suggested that the ideal legislation governing federal participation in highway construction programs would recoup to the public substantially all the benefit conferred by public improvements on land within its sphere of influence. This could be accomplished by means of a special assessment alone. It could be accomplished most efficiently, however, by coordinating the assessment provisions with those governing compensation

[106] 317 U.S. 369 (1943).

in condemnations. The measure of damages recommended is the net market value increase or decrease—a measure that appears to have achieved the best results in the crucible of controversy.

This conclusion might be objected to on the ground that the vast majority of jurisdictions, which did formerly use that measure, modified it for one reason or another. However, that trend has halted and is in the process of reversal. As a New Mexico court ably states:

> The trend throughout the nation is toward considering *all* benefits in the determination of damages in condemnation cases. This trend is nurtured by the policy of the state in trying to bring down excessive cost of rights-of-way so as to make the money appropriated and available for roads and other public improvements go as far as possible. It is possibly due also to some extent to a gradually changing concept of the sacred character of real property ownership which thus gradually is altering the basic theory of "just compensation" in condemnation cases.[167]

This picture, purportedly of what is, may be colored by the court's view of what ought to be. But if not perfectly descriptive, it does seem predictive of the developing trend. If so, less resistance on the part of the states may be anticipated to the substance of the proposed rule.

In adopting such a general rule, exceptions may be deemed desirable or expedient in specific areas. The rule might, for example, be limited in application to those roads more than 50 per cent of whose cost is borne by the federal government. While such a limitation has only the expediency of compromise to recommend it, special treatment for developed residential areas may arguably be justified on more concrete grounds. Commercial and industrial parcels are in an economic sense fungible to a fairly high degree. Benefits conferred on portions of such parcels remaining in private ownership after partial condemnation can be expected to be practically realizable, even if not in fact realized. The benefit to a home owner, on the other hand, may be equally realizable in theory, but only in theory because so many other very real and important values are often tied in with the concept of "home." The probabilities are, however, that the value of benefits conferred on developed residential areas will not be a very significant factor in the land acquisition picture and that the value of benefits conferred on present or future sites for industry and commerce will be a very substantial element in the cost picture. If economic data substantiates this hypothesis, the proposed measure would have a built-in adjustment mechanism which would take care of the problem. But even if not, exceptions could take care of it without unduly complicating the rule or its administration.

[167] Board of Comm'rs of Dona Ana County v. Gardner, 57 N.M. 478, 483, 260 P.2d 682, 685 (1953).

In phrasing such exceptions, if made, and the provision generally, care should be taken that the special and general distinction, ejected through the front door, does not return through the back, as in valuation evidence. This danger is underscored by the confusion which has marked the application of the before and after market value and various of the compensation measures phrased in terms of special and general.

Two considerations have been given greatest weight in selecting the measure of net change in market value. One is that this measure would maximize equality of treatment of residents of the area, without regard to whether they are propertied or propertyless. The other, extremely practical consideration is that this measure would cream off what is commonly referred to as "general" benefits, which, however denominated, may well be the only benefit having a substantial enough value to warrant any real effort at recapture.

To recoup benefits to property not involved in condemnation proceedings, a complementary device is needed, such as a special assessment.[168] The assessment would be levied by the state and would thus in the first instance swell state revenues. Either the state would retain the funds in addition to receiving its full federal contribution, or the amount of the assessment would be counted as part of the federal government's statutory percentage. Which possibility is selected seems relatively unimportant. Either level of government, unlike the individual property owner, may be expected to use additional funds to further the general welfare.

Although these are innovations in national law governing the federal-state highway building partnership, they are not without analogous precedent. The unemployment insurance legislation provides some guidance. There the federal government accomplished its objective by making it relatively costly for a state not to enact desired legislation. The same principle could be employed here. The federal government could deduct from the state's contribution for land acquisition costs that part of costs which it would have recouped had it enacted necessary legislation. An exception might perhaps be made, at least for a time, in those states having constitutional limitations preventing the statutory changes necessary to accomplish that result. Furthermore, there is analogous precedent within the present highway law. Certain state expenditures are limited by federal statute to a percentage of cost.[169] The state may pay more if it wishes, but it may only

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[168] Another possible avenue of recoupment is through taxation; federal and income taxes (including capital gains taxes), and local property taxes. Taxation, however, takes only a percentage of gain. The guiding principles, particularly as to certain aspects of taxation, have little relevance to condemnation problems. And, perhaps most importantly, it confuses the accounting picture of the improvement without any compensating advantages.

[169] 72 Stat. 892 (1958); 23 U.S.C. § 106(c) (1958).

look to the federal government for reimbursement up to the specified maximum.

A compromise with the ideal, or an evolutionary stage in the transition, but still a gain over present practices, would be federal legislation deferring the attempt to recoup benefits where no part of the property is taken, and simply making market value the measure of condemnation awards for both state and federal proceedings. Another intermediate step might be to put the rule into effect only as to industrial and commercial, but not residential property. The rule of law would still be an innovation on the federal level. The probabilities are that no constitutional obstacle would be raised against it.

With respect to federal legislation looking to changes in state law itself, further compromises could be made. For example, the few states which do not now offset any benefits might be induced to deduct special benefits. It is extremely doubtful, however, whether, from a practical viewpoint, it would be worth the effort entailed. As Judge Parker pointed out back in *James River & Kanawha v. Turner*,[170] the chief benefit to be anticipated by property owners by reason of adjacency to a public improvement is an increase in the market value of the property.[171] Many decisions since then indicate the correctness of his view. If this "general" appreciation is not to be taken into the calculation, the other elements combined probably do not represent a large dollars-and-cents value. It certainly does not seem large enough to justify possible federal-state conflict or the expenditure of administrative energy to overcome congressional resistance, which the legislative history of enactments in this area indicates would be aroused.

It is undeniable that enacting the rule proposed in this article may cause some political anguish, if only because of the force of inertia and because any change is bound to collide with some vested interests. But the federal government has a duty to be in the vanguard of reform. This legal change should bring in its wake very sizeable returns. The time and effort now expended by appraisers, lawyers, judges, and juries in the multitudinous distinctions between those benefits that are general and those to be classified as special, and the hair-splitting to which they have given rise, will be swept away. In their place will be a rule that is not only simple—simple to understand, simple to administer, simple to adjudicate—but one that will come much closer to meeting current needs and current notions of justice. Lastly, it will reduce the cost of improvements—thereby enabling more effective use of funds available for such improvements or other public welfare objectives.

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[170] 36 Va. 313 (1838).

[171] *Id.* at 329.

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Community Effects on Remainder Parcel Valuation

BAMFORD FRANKLAND
Headquarters Right-of-Way Agent, California Division of Highways

•EACH YEAR the California Division of Highways completes more than 8,000 separate appraisals of real property needed for highway rights-of-way. About half of these appraisals are made in instances where only a portion of a whole property is needed, leaving the remainder in private ownership. For each partial acquisition two appraisals must be made: one of the property "before" removal of the portion needed and one reflecting its value "after."

Ordinarily a before valuation presents little problem—especially in the case of residential properties. The appraiser searches the immediately surrounding area for recent sales of similar properties. The comparable sales are adjusted for minor differences in time of sale, improvement, and neighborhood influence. If an appraiser is familiar with the area in question, the appraisal can often be accomplished in as little as one day. The choice of comparables which are near in both time and location insures that the economic influences which bear on value will be similar and obviates the necessity for any extensive market or community research.

The after valuation presents an entirely different problem. This appraisal must reflect the effect on a property of the removal of a portion and of the construction of the highway facility immediately adjacent. Theoretically the methodology of the after appraisal could be exactly the same as that used to determine the value before. However, a search of the immediate area for recent sales of similarly affected properties will almost always yield no result. This is understandable because in more than 10 yr of freeway construction in California, less than 40,000 remainder parcels have been created in the entire State; it has been estimated that far fewer than half of these have been sold, while still fewer represent valid and useable sales.

There is, of course, a next best solution. Sales from other areas, which are neither timely nor near in location, might provide some indication of freeway effect from which an appraiser could form an opinion of value. However, the courts have been understandably reluctant to admit as evidence sales which are not near in time or location and appraisers are reluctant to use substantiating data which will not be accepted in court. Their logic is clear; value is a function of time and location and any comparison of properties in different areas or sold at different times is error prone.

Despite the reluctance of the courts to admit sales of remainder parcels as evidence, they still remain the only factual documentary evidence of freeway effect. They are useable in a few specific instances and their usefulness could be extended if a means were found to document the necessary adjustments for time and location. For these reasons the California Division of Highways some years ago began a systematic investigation of every valid remainder parcel sale occurring along every California freeway. To date, approximately 1,000 such remainder parcel sales have been collected, tabulated and analyzed. Information collected includes appraised values of the whole property, of the part required for right-of-way, and of the remainder; eventual sales price; control data to permit time adjustments; physical changes in property; and physical data regarding property location, acquisition, and construction of the highway facility.

The objectives of the mass data collection were the determinations of the possible pattern development, of the relation of key variables, and of similarities. A range of effect might be determined on the basis of values and physical characteristics so that

Paper sponsored by Committee on Indirect Effects of Highway Improvements.

an appraiser could, with reasonable confidence, form an opinion in any similar instance. Unfortunately, careful correlation and analysis have as yet produced no discernable patterns. Neither the physical characteristics of the takings, of the highway construction, nor of any minor geographic benchmarks provide keys to the use of the sales examples. In many cases, the investigation of these features and their correlation revealed diametrically opposed effects in situations of almost exact physical comparability. The appraiser with complete access to all gathered sales can find examples to support either damages or benefits in almost any case, depending on his own pre-formed opinions.

Because physical variables seemed to provide no clue to measurement of freeway effect, evidence of other variables was sought in the literature. A comprehensive study which concerned itself with only the possible effect of freeway construction and not that of severance suggested one approach to the problem. This study, of value trends among whole properties in residential tracts containing 22,396 homes, was completed by the Division of Highways in March 1957 (1). Sales among 1,697 homes constructed adjacent to freeways were compared with the sales prices of homes away from immediate freeway influence. Two significant conclusions of this study were that (a) "... factors inherent in the entire tract, such as the livability and physical appeal of the houses in one tract as opposed to another, or the social and economic status of the residents, have a greater influence on the price trend than a freeway, school, or some other nonresidential use adjoining a small percentage of the homes in a particular subdivision," and (b) "The annual trend in resale prices among subdivision homes adjoining freeways follows a pattern consistent with the price trend of comparable homes."

A conclusion that relative demand in an area might outweigh any possible detrimental physical influence from a highway would seem to follow logically. This is, of course, a well-known fact in the case of commercial or industrial properties affected by freeways. Many examples have been gathered in these latter categories which show fantastic price increases for parcels whose shape has been virtually mangled and where nearly any other potential use has been precluded. In these cases, demand has clearly outweighed any physical detriment imposed by either right-of-way acquisition or freeway construction.

No such clear-cut factors are involved in residential property price changes. But inasmuch as measurable physical and geographic factors provide no clue to the wide variations in freeway effect among residential properties, it could be assumed at this point that relative demand in a residential area is also the major variable which ought to be measured. Unfortunately, the remainder parcel analyses made to date do not contain any data that would permit the measurement of relative demand levels or their effect on the parcels involved.

If the assumption is correct that relative demand levels in a residential area are responsible for the presence or absence of damages, an intensive large-scale study must be undertaken to provide the supporting data needed.

Before this could be done, a pilot study had to be completed which would strongly indicate that the effort would be justified. A recent study of remainder parcel sales in San Diego County was aimed at providing the necessary supporting data. The objective of the study was to relate subsequent sale prices to community economic trends. If the analyses among similar properties in dissimilar communities gave indication that properties tended to be unaffected or benefited in a strong demand area, the premise of the pilot study would be confirmed.

Efforts were concentrated in two suburban communities; La Mesa and El Cajon, about 15 mi east of the San Diego central business district (Fig. 1). They are reached from downtown San Diego by traveling two nearly parallel freeways which join into one at the eastern edge of La Mesa. The two communities have a common border, La Mesa being closer to San Diego. El Cajon is the last suburban community along this transportation corridor that is undergoing any intensive urbanization at the present time. Beyond El Cajon, most of the residential development is in the nature of ranches and small estates.

A freeway was completed through La Mesa to the El Cajon city limits early in 1957. The sales investigated in La Mesa are located along a portion of Calif. 194 which con-

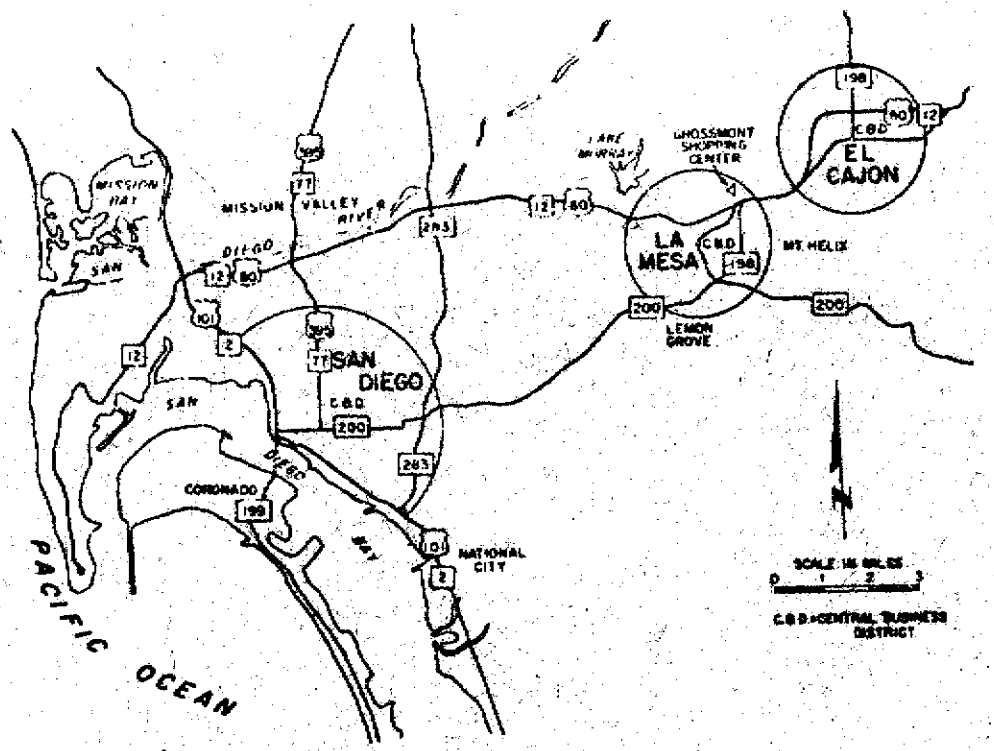

Figure 1. San Diego urban area.

nects Calif. 200 and 12. Calif. 12 was completed through El Cajon late in 1961. The orientation of the pilot study was toward solving an appraisal problem. Data on the remainder parcel sales followed a typical appraisal approach. Field research in the communities was primarily interview and observation because these are the tools most readily used by an appraiser. Reliance was on interview with local real estate salesmen and brokers who had worked in the communities for an extended period of time. Statistical data gathered were of the simplest type, i.e., population, retail sales, assessed valuation, and building permits. No attempt was made to correlate mathematically trends in these areas with trends in the real estate market, because most real estate appraisers do not have the facilities for extensive mathematical analysis. As a result, data relating to the communities of El Cajon and La Mesa are presented in the narrative fashion of an anthropological monograph with a limited statistical profile. There is a possibility of some distortion of image, but this possibility exists to a degree in all community studies, regardless of approach, technique, and sophistication.

REMAINDER SALES DATA

The after value of a remainder is an appraised value at the time of the highway acquisition. Freeway effect, in a specific instance, can be measured by adjusting this value to the time of study by use on a trend basis of sale prices of properties not physically affected by the freeway. Freeway effect is then the difference between the adjusted value and the actual sale price. For instance, if property in the area increased 5 percent during a year lapse, then the after value of the subject was increased in like percentage. The difference between this adjusted price and the actual sale price indicates the amount and degree of damages and benefits to the individual parcels.

Obviously, this adjustment, as well as the appraised after value, is subject to some error because the appraised after value relies to some extent on the judgment of the appraiser. For the sake of convenience, and in hope of canceling some of this potential error, the effects on these parcels were summarized by averages.

TABLE 1

LA MESA REMAINDER SALES[a]

Sale	After Value ($)	Adjusted Value ($)	Sale Price ($)	Net Change ($)
1	19,400	20,662	21,500	+ 738
2	10,548	10,754	11,250	+ 491
3	10,548	11,708	13,000	+ 1,292
4	11,256	12,484	14,500	+ 2,008
5	10,730	12,447	13,900	+ 1,453
6	10,730	13,091	15,000	+ 1,909
7	13,144	14,590	14,800	+ 210
8	24,698	27,904	30,000	+ 2,096
9	11,720	11,837	11,500	- 337
10	14,625	17,404	16,000	- 1,404
11	13,011	13,663	12,500	- 1,163
12	13,011	13,793	13,300	- 493
13	13,011	14,442	13,950	- 493
14	14,706	15,288	15,000	- 288
15	13,726	14,086	14,000	- 86
16	13,951	13,990	13,950	- 40
Avg.	13,549	14,885	15,258	+ 368

[a] [illegible]

La Mesa

After limiting consideration to residential parcels, there were 16 valid sales in La Mesa (Table 1). Generally, this group has experienced a net benefit of 2.5 percent more than the general price rise in the immediate area.

Sales 11, 12 and 13 are three sales of one property, with sale 11 being the earliest, 12 the next and 13 the last. These sales are summarized in Table 2. Sale 9 and 5 are two sales of one property, sale 9 being the earliest. The first feature apparent is that the amount of damage may change through time. In addition, as Table 2 shows, the degree of damage (shown as a percent of sales price) changes through time. All other things being equal, the degree of damages should be a constant percentage of all subsequent sale prices. This theoretical constant does not bear out in the case of the market in La Mesa.

The two parcels which appear to be most severely damaged have something in common, i.e., isolation. For the sake of convenience Sales 11, 12 and 13 are designated parcel A, and Sale 10, parcel B. In the before condition, parcel A was a corner parcel. The freeway taking left a triangular parcel, the freeway being the base of the triangle and two city streets terminating at the freeway being the two sides. The apex of the triangle, the corner of the two city streets, was the point farthest from the freeway. In the after condition, parcel A is rather like an island, surrounded and exposed on all sides. It is, in a sense, physically isolated from all its neighbors.

Parcel B, also, is isolated in the after condition, but in a unique manner: it is situated on a street that was to some degree stratified in the before condition. At one end of the street were fine new homes, ranging from $14,000 to $50,000. The other end of the street was older, containing frame bungalows built in the 1920's and a chicken farm. There was, then, a "best" end and a "worst" end of the street. Parcel B would, in the before condition, be considered as part of the best end of the street, the improvement being worth at the time approximately $12,000. The construction of the freeway, however, separated the two ends of the street—the best end on one side of the freeway and the worst end on the other. Parcel B was left on the worst end. This itself may not have been enough to create damage, but it is now the only new improvement located on this street; it stands isolated from the neighborhood of which it was once part.

The social and physical isolation of these two parcels are the only two instances where damages can be explained in a context of an apparent benefit of 2.5 percent. The other damaged parcels apparently are not unique, and on any project it would be expected that there would be a range of effect from damages to benefits because of the inconstancy of demand. Physically comparing them with the benefited parcels, no variables would be

TABLE 2

SALE HISTORY OF ONE REMAINDER IN LA MESA[a]

Sale	Date	Adjustment Factor	Adjusted Value ($)	Sale Price ($)	Damage	
					Indicated ($)	% of Sale
11	9/14/57	1.048	13,668.00	12,500	1,168	9.4
12	8/8/57	1.06	13,795.00	13,300	493	3.7
13	5/10/56	1.11	14,443.00	13,950	493	3.53

[a] [illegible]

found to facilitate prediction. On the average, however, properties in La Mesa show a strong tendency toward being benefited by the freeway.

TABLE 3

EL CAJON REMAINDER SALES[a]

Parcel	After Value ($)	Adjusted Value ($)	Sale Price ($)	Net Change ($)
1	7,945	7,613	9,000	+ 1,387
2	14,000	14,154	14,750	+ 596
3	9,127	9,455	8,700	- 755
4	10,048	12,185	12,500	+ 315
5	11,296	12,127	10,981	- 1,146
6	11,884	12,522	8,500	- 4,022
7	13,345	13,805	13,500	- 306
8	13,245	13,898	13,900	+ 98
Avg.	11,411	11,986	11,479	- 507

El Cajon

Sales in El Cajon reveal a contrary pattern. As Table 3 shows, three of the eight parcels show a benefit and the rest show a damage.

The average difference in sales price of the remainders, compared to a similar area, is -4.23 percent. It is interesting to note that of the eight sales, four are abutting the freeway, and four are not. The portion of the nonabutting parcels acquired was for a frontage road or city street widening. Of the four freeway abutting parcels, three are the benefited parcels. All nonabutting parcels show a damage.

In contrast to La Mesa, there is a possibility that the El Cajon parcels in the vicinity of the freeway may be rezoned sometime in the future—most likely to multiple residential. If there is rezoning, the superior identification features of the parcels abutting the freeway would most likely bring an increment to those parcels. For this reason, these parcels may have some speculative value and this may be reflected in a relative benefit.

The sales investigations in the two communities admittedly provide only the slimmest documentation of benefit in one community and damage in the other. It is rare, however, to find as many as 16 roughly similar remainder properties which have sold in a single community; therefore, the data were considered to be sufficient evidence for the purposes of this pilot study. To give credence to the initial assumption, it was necessary to examine, with the limited tools available, the relative demand structure in the two communities.

COMMUNITY ANALYSIS

La Mesa and El Cajon are not actually communities as the term has been defined (2); they are primarily segregated aggregates (3). As a result, the character of these communities has changed somewhat in the last 10 yr, and will probably continue this change (4). The change is primarily attributed to the urbanization of California and the suburbanization of pre-existing communities. The consequent change in population has had significant impact on the normal indicators of community exchange activities. Both El Cajon and La Mesa in recent years have become increasingly dependent, both economically and socially, on the San Diego urban area. A complete analysis of their characters as communities would of necessity include an extensive consideration of the San Diego urban area and the interdependencies that have developed in the last several years. However, such a project is beyond the scope of this paper at the present time.

Between the city limits of the two communities is the unincorporated area of Grossmont. The Grossmont residential area generally follows the configuration of Mt. Helix and is considered to be one of the prime prestige neighborhoods in San Diego. Most Grossmont homes are on view sites. The proximity of Grossmont, as well as topography (Fig. 2), has had significant effect on the development of both communities and may be primarily responsible for the differences between them.

La Mesa

The topography of La Mesa is primarily rolling and hilly. The old city developed in a bowl between the hills and along the old highway. Residential development extended into the hills south and east of the city in a spotty manner, becoming increasingly more deluxe in the direction of Grossmont. Downtown La Mesa was primarily a conglomeration of small shops extending for several blocks along the old highway (US 80). The old town is caricatured as a quiet village composed of retired businessmen and doctors tending small lemon or avocado groves.

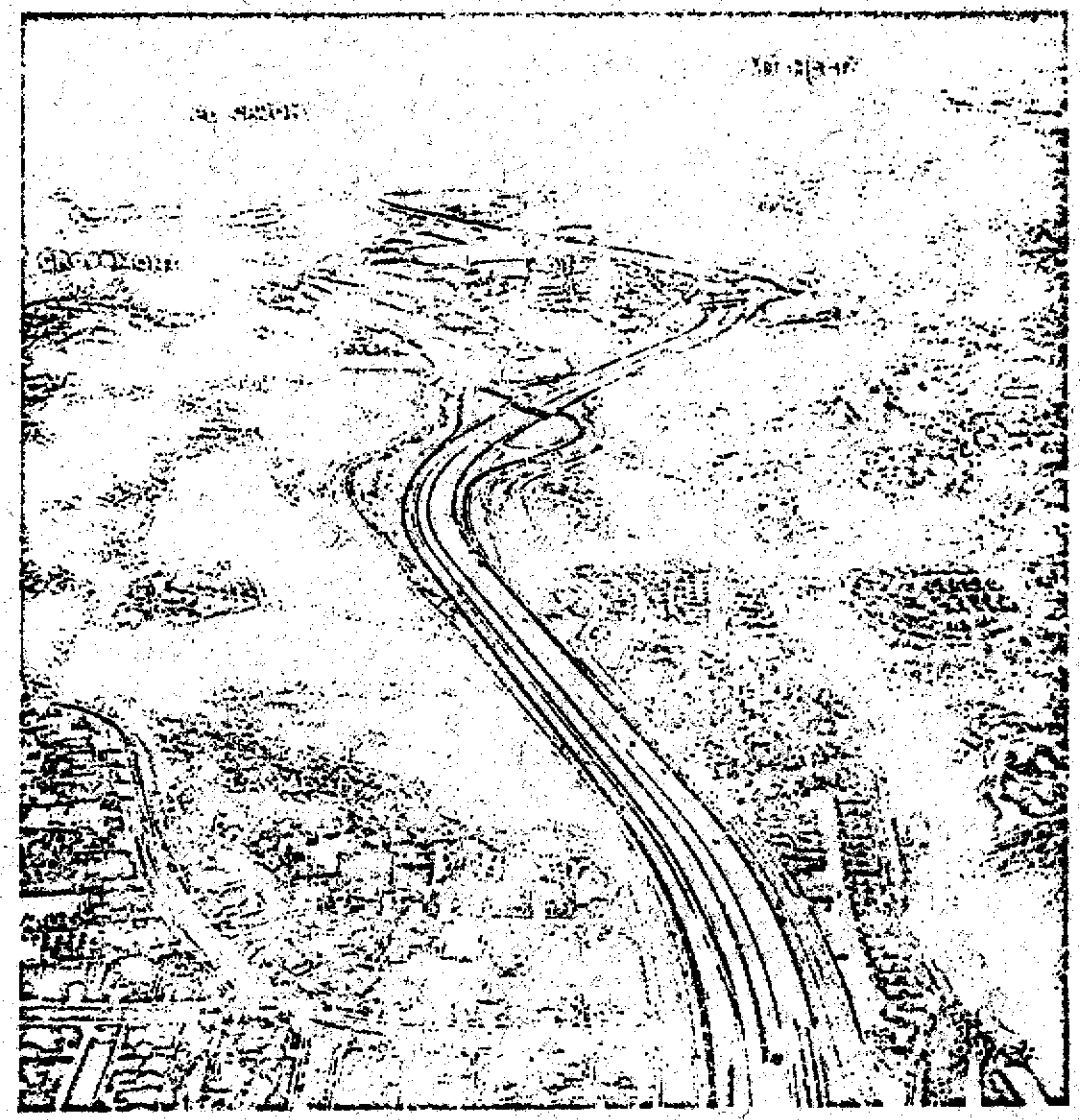

Figure 2. La Mesa-El Cajon-Grossmont area, showing freeways.

La Mesa, today, has become a typical middle-class bedroom community. The hills to the north are covered with homes: custom homes, tract houses and apartments. The hilly terrain with its view lots, combined with a warm climate, modern transportation, and proximity to Grossmont made La Mesa a natural residential suburb in the path of the San Diego boom. Today La Mesa has a large shopping center—Grossmont Shopping Center—on a plateau overlooking the old town, which draws its customers from all over the eastern San Diego urban area. It competes successfully with other established and larger, shopping centers in surrounding communities. Retail sales in La Mesa in the last five years have doubled—from $26 million in 1957 to $54 million in 1962 (5). Population nearly tripled between 1950 and 1960—from 10,946 to 30,441 (6).

El Cajon

El Cajon is situated mainly on the flat floor of a fairly broad valley. This difference has several implications in the development of the community. For example, because

tial areas cannot emulate Grossmont with its rolling hills and view lots. The flat land of El Cajon, by reducing land development costs, reduced the cost of marketing a residential improvement, and consequently, attracted customers who desired lower-priced homes. If it were feasible to construct a scale of residential neighborhood desirability for the San Diego area, Grossmont would be at the top of the scale, La Mesa would be slightly above the middle, and El Cajon would be about one-quarter of the way to the bottom of the scale (excluding the residential section of the community located in the vicinity of Fletcher Hills in rolling terrain and adjacent to Grossmont). Of course, such a scale would be purely subjective, and the rating of the communities on this basis is not based on any factual material. But then, any scale which might indicate relative degrees of desirability must, by definition, be subjective.

Before the construction of the freeways, La Mesa and El Cajon most likely would have been approximately equal in terms of a desirability scale. Each was sparsely settled; each had a rather wide range of house types and values represented in their respective limits; each was characterized as being semi-rural and suburban.

MARKETING CHANGES

El Cajon, before the era of urban expansion, was a minor marketing center for the surrounding area. For example, in 1957 retail sales in El Cajon were 50 percent greater than in La Mesa ($40 million as against $26 million). In 1957, per capita retail sales (all outlets) were $1,850 in El Cajon but only $1,140 in La Mesa. In San Diego County as a whole, per capita sales were approximately $1,100. The El Cajon marketing area undoubtedly included parts, if not all, of La Mesa. The construction of improved transportation facilities reduced the space-time ratio to the major marketing center of the urban region and ultimately changed the character of El Cajon. In 1962, just 5 yr and two freeways later, per capita sales (all outlets) were: San Diego County, $1,050; El Cajon, $1,430 (off $420); and La Mesa, $1,660 (up $520). Total retail sales increased 40 percent in El Cajon during this period (from $40 million to $57 million), but the community's role as a marketing area declined as competition from other areas increased with the expansion of the San Diego urban area.

This change of character becomes especially vivid when per capita sales are broken down into categories. For example, in La Mesa, general merchandise (department stores, etc.) increased from $29.50 in 1960 to $362.00 in 1962. This reflects the opening of the Grossmont Shopping Center and marks the beginning of a new era for La Mesa. But it marks the end of an old one for El Cajon. La Mesa has progressed at the expense of El Cajon. The location and environment in La Mesa, in connection with the merging of two freeways, made it a much more desirable location for a modern shopping center, and this one feature alone was enough to end the retail domination of El Cajon in the local area. El Cajon has a shopping center, but it is primarily a community shopping center and is not designed to attract customers from the surrounding areas.

In the future, it is most likely that these two communities will diverge even more. For example, the topography and location of El Cajon make it a fairly good prospect for future industrial development, and, in fact, the city has adopted a policy of encouraging industry. An area known as El Cajon Industrial Park has been set aside on the north of the community; light industry has developed to some extent along the freeway at the west of the city, and it seems likely that this trend towards an industrial orientation will continue. Because of topography, this sort of development is not feasible in La Mesa. If diversification of tax base were the primary goal of city government, El Cajon would make better progress than La Mesa.

Ecology and local government decisions have dictated a divergent course for La Mesa and El Cajon. Probably the freeway system played a major role in this development; its role of improving accessibility, reducing the space-time ratio, and reducing transportation costs most likely accelerated the suburbanization of both La Mesa and El Cajon. In neither case can the divergent roles be wholly attributed to the freeway; if a pre-existing propensity to develop in this manner is assumed, it may be concluded that the role of the freeway was to, at most, reinforce or strengthen that trend.

SUMMARY AND CONCLUSIONS

There is, then, a strong desire and hence, market for La Mesa homes that is absent in El Cajon. This fact, when coupled with the earlier approximation of a tendency toward benefit in La Mesa and toward damage in El Cajon would seem to substantiate the basic premise of the pilot study and provide justification for further efforts to develop a means of measuring relative demand so that adjustments can be made for location, as well as for time.

Aside from the major conclusion of the study, at least two significant warning signs were noted: (a) even in an area of generally beneficial influence a property may be severely damaged if it is isolated from other like properties which tend to generally support values, and (b) even in an area where demand is generally weak a property may be benefited if the possibility of a zone change to permit a more compatible and higher and better use exists. Each before and after appraisal should carefully note the possibility of either of these occurrences.

The pilot study utilized a monograph technique which is a method entirely unsuited to the presentation of evidence in court proceedings. The court would prefer the submission of sales evidence with sound documentation as background for any adjustments. Much data collection remains before such an adjustment can be made with confidence. It is suggested that two additional bits of information about each remainder sale might help significantly in the development of a measure of relative demand: (a) the original asking price for the subject property, and (b) the length of time that it was listed for sale. To be able to relate this period for purposes of measurement, however, some index of relative demand in the surrounding area must be provided. This could be accomplished by the development of an average listing period for control properties. A comparison of the listing period of the subject property with the average listing time in the area should permit an index of relative demand levels to be constructed.

It was mentioned earlier that many examples exist of properties which have enjoyed substantial special benefits. These properties are, almost without exception, those where an obvious change to a higher and better use has occurred as a result of the properties peculiar relationship with the adjacent highway. The relative demand index need not be developed in these cases. The problem properties are mainly in the residential class where no obvious reason exists for benefits or where damage amounts might be more than ordinary because of depressed demand in the surrounding area.

The investigations conducted during this pilot study clearly showed that damage-benefit appraisal is an art still in its infancy. The fact of damages or benefits is established in the market place as is the value of property in general but, unfortunately for the damage-benefit appraiser, this market place is nearly always an environment different from that in which he is working. The appraiser must exercise more than ordinary care in every partial acquisition situation to insure adherence to the concept of just compensation. In these instances, more than ordinary care would envisage a complete market analysis until such time as additional documentation can definitely establish a pattern of effect in the different market environments in which the appraiser must form his opinions.

REFERENCES

1. Kelly, J. F., "Residence and Freeways." Calif. Highways and Public Works, 36 (3, 4) (March-April 1957).
2. "Community Benefits—A Suggested Method of Analysis." Calif. Div. of Highways (April 1963).
3. Arensberg, C. M., "The Community as Object and as Sample." Amer. Anthropologist, 63 (2) (April 1961).
4. "La Mesa—A Study of Its Future." Public Affairs Res. Inst., San Diego State Coll. (Nov. 1959).
5. Reports of Calif. Board of Equalization.
6. Reports of Calif. Dept. of Finance, Budget Div., Financial and Population Res. Sect.

An Evaluation of Partial Taking of Property for Right-of-Way

BY THE
ECONOMIC RESEARCH DIVISION
BUREAU OF PUBLIC ROADS

Reported[1] by **GEORGE V. BRODERICK**, Economic Statistician, and **FLOYD I. THIEL**, Economist

Contrary to general public opinion, the partial taking of property for highway right-of-way usually has beneficial effects on the remaining property, according to the findings of the study of severance case records in the Bureau of Public Roads' files (bank). The information on the effects of the partial takings presented in this article is expected to be helpful to those concerned with the acquisition of right-of-way for highways—appraisers, negotiators, courts, and affected property owners.

As much background information as possible is needed to provide the basis for establishing a fair price for the purchase of right-of-way. To obtain this information, most State highway departments are conducting severance study programs and publishing the findings. Studies available and the effects of many partial takings reported to Public Roads by the States have been analyzed by the authors. From this analysis, it has been concluded that most property owners benefit from their encounter with highway departments.

Introduction

A MAJOR job facing builders of modern highways today is the equitable and timely acquisition of right-of-way. For several reasons, this task may be growing even more complex.[2] Controlled-access features of modern highways are placing more limits on abutters' rights. There is increasing competition for space, particularly in urban areas. And the problem is intensified by modern highway facilities needing wider rights-of-way.

Whether the task of acquiring right-of-way for highways is growing more difficult, there can be no doubt about the magnitude of this task. For the National System of Interstate and Defense Highways alone, a million and a half acres of land costing about $6.5 billion will be required by the completion date in 1972. Right-of-way acquisition in which the Federal Government participates is currently costing about $750 million a year—proposed State right-of-way programs for 1963, $685 million; for 1964, $757 million; for 1965, $870 million.

Severance Studies

To help assure that this money is being spent wisely, increasing use is being made of severance studies—case study analyses of the effect of taking part of a property for highway right-of-way. Such studies have been completed or are underway in 46 States, of which two-thirds have supplied information for inclusion in a central file or bank of cases that was established about 2 years ago (1961) in Public Roads. The States have supplied more than 1,200 case studies for this central file. The States have issued more than 1,500 individual case study reports, many of these are narrative reports or were made on State forms rather than on Public Roads forms.

Severance studies are intended to provide the information that will permit equitable payments to be made for property taken. By recording and analyzing the effect of partial taking of property for right-of-way in the past, severance studies make it possible to determine with more certainty the present and future effect of partial taking of properties for right-of-way. As more is learned about what happens to properties after part is taken for right-of-way, especially factors or characteristics that affect value, considerable savings in costs are expected to be realized. But severance studies obviously are not intended simply to reduce costs of right-of-way acquisition. Inadequate payments for right-of-way are fully as alarming to conscientious highway builders as excessive payments.

Summary

The findings presented in this article are tentative; they are only typical of the cases analyzed and are not representative of *all* cases. The tentative findings may change when more cases become available for analysis.

The high cost of right-of-way, more than a billion dollars a year, and the need at the same time to provide just compensation when acquiring right-of-way, provide a strong momentum for examining past experience to learn what general truths might be useful for right-of-way acquisition in the future. By organizing and making available in usable form the experience gained in highway acquisition, severance studies offer a way of correcting certain overpayments as well as the relatively few underpayments for highway right-of-way. Many State highway departments are now enjoying this benefit as the result of their own severance studies. In addition to this use of severance studies, which must be regarded as their primary purpose, findings from analyzing a collection of cases can be expected to provide some guidelines for right-of-way acquisition in the future. Although information in the Public Roads' bank of cases does not now permit formulas to be developed to predict the experience owners will have with their remainder parcels, some tentative observations can be made, as follow:

(1) The recovery rate for cases in the Public Roads' bank tends to be more than 100 percent, the median is 138 percent.

(2) Certain characteristics tend to be associated with a higher-than-average recovery rate. These include: nearness to an interchange, a sale after some period of time (e.g., more than a year) after the taking, a vacant rather than a residential land use before the acquisition, and full visibility of the highway from the remainder.

(3) When the simultaneous effect of several factors acting in combination was analyzed by multiple regression, the most influential factors were: a change in land use, time elapsing from acquisition to sale, travel distance to new highway, type of remainder, and nearness to an interchange.

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[1] Presented at the 43d annual meeting of the Highway Research Board, Washington, D.C., January 1964, under the title of *Highway Severance Damage Studies—Some General Findings.*

[2] For a brief discussion of the growing complexity of right-of-way acquisition, see *An Editorial*, Right-of-Way, vol. 10, No. 4, October 1963, p. 6.

(4) The owner is being made whole in four out of five cases.

(5) Property owners who lost generally had lost very little. Gains ranged from small amounts to fantastically large gains.

(6) Owners of residential properties are more likely to experience losses than owners of land in other uses. Gains are often associated with vacant remainders.

(7) Damage payments made to owners of vacant parcels often are unrealistically high. Experience suggests that high damage payments for vacant properties partially taken should receive close scrutiny in the future.

Benefits of Severance Studies

Many of the benefits to be derived from severance studies are already being realized. These studies help assure the proper spending of tax money for right-of-way purposes; they make available information relevant to the takings. This information is needed by appraisers and negotiators, the courts, and affected property owners, if the State's purpose to buy right-of-way property at a fair price is to be accomplished.

Analysis to supply experience in similar situations—the purpose of individual severance studies—is the traditional approach employing data for comparable situations, which has been used successfully by appraisers. Ordinarily, the best sources for comparable information in taking situations are studies completed within the State, and most States do rely on data obtained from such cases. For unusual situations—takings involving special purpose properties—the Public Roads' bank can be searched for comparable takings. The procedure for requesting a search is described on page 93 of the *Manual for Highway Severance Damage Studies*, and the type of data that can be obtained is shown in table 1.

A fairly common result of severance investigations shows that (1) after a partial taking for right-of-way, the adverse effect on remaining land parcels is often much less drastic than feared or (2) the remainder parcel receives a significant benefit. Thus, these studies can be useful in keeping affected individuals and the general public informed.

Collection of cases

Collecting severance cases offers opportunities for analyzing these cases. Although the data reflected in the bank of cases cannot be considered typical for all highway takings, the data that can be assembled permit some interesting and perhaps valuable comparisons. Although there are now about 1,250 cases in the bank, cases are not usable for analysis until they have been edited and checked. The number of usable cases for different comparisons varies. For example, more than 900 cases can be used to compare the per acre value at the time of the highway taking with the per acre value of the remainder that is sold, and the 650 cases in the bank for which the entire remainder has been sold provide a good indication of the extent to which the *owner was made whole* or, in a very general way, whether just compensation was provided.

Recovery Rate Experience

The recovery rate for a highway-severed parcel is obtained by dividing the value per acre (or per square foot) of part or all of the remainder that has been sold by its value at the time of the taking. A recovery rate of more than 100 percent means that the remainder has increased in value. As the recovery rate can be determined when any part of a remainder is sold, this type of comparison ordinarily can be made for a case as soon as any portion of the remainder has been sold.

Because of the extremely high recovery rates for some remainder parcels, simple arithmetic averages may not be a satisfactory summary measure of the typical recovery rate for severed parcels in the bank at the present time (1963). Median values provide another way of summarizing the overall recovery rate. As a median is a middle value with half of the cases above and half of them below, those remainder parcels having extremely high recovery rates do not have such a noticeable effect on median values as on average values. The median recovery rate for cases in the bank at the end of 1963 was 138 percent. About 75 percent of all cases showed a recovery rate of more than 100 percent, as shown in figure 1. Some 7 percent of the cases showed a recovery rate of more than 1,000 percent, and 25 percent of the cases showed a recovery rate of less than 100 percent.

In addition to considering recovery rates reported for all cases in the bank, rates have been compared according to (1) time of the sale, (2) land use before the taking, (3) type of highway involved, (4) visibility from remainder parcel, and (5) location of the parcel in relation to an interchange.

Table 1.—Comparison of principal characteristics of property and comparable property

Item	Subject parcel	Comparable sale
Land use before	School	Elementary school.
Land use after (expected)	(School)	Retail.[1]
Size before	20 acres	11 acres.
Size after	8 acres	8 acres.
Highway characteristics	Interstate	Interstate.
Value before	$70,000	$69,000.
Value of portion acquired	$20,000	$18,000.
Estimated benefit (+) or damage (−)		−$15,000.
Estimated remainder value		$36,000.
Sales price of remainder		$69,000.
Effect of taking		+$36,000.

[1] Although the elementary school was expected to continue as a school, the use changed to retail soon after the taking. In this case, which is recorded in the Bureau's bank, dollar amounts have been rounded to the nearest hundred.

Time of sale

Whether the time at which a remainder parcel sells has any effect on the recovery rate has been the subject of considerable speculation. The effect of time is of interest because it has a bearing on the validity of the comparison between before values and after values. If a sale occurs soon enough after the taking, the highway effect is revealed by simply comparing the before value with the value shown by the sale.

The effect of time on recovery rates of cases in the bank is very noticeable. Remainder parcels that are sold a year or more after the time of the taking tend to have higher recovery rates. As can be seen in figure 2, parcels that were sold within a year's time had a lower rate of recovery. A third of the parcels that were sold within the first year had a recovery rate of less than 100 percent. For parcels sold more than 3 years after the highway taking only 12 percent had a recovery rate of less than 100 percent. Nearly 60 percent of the land parcels that were sold more than 3 years

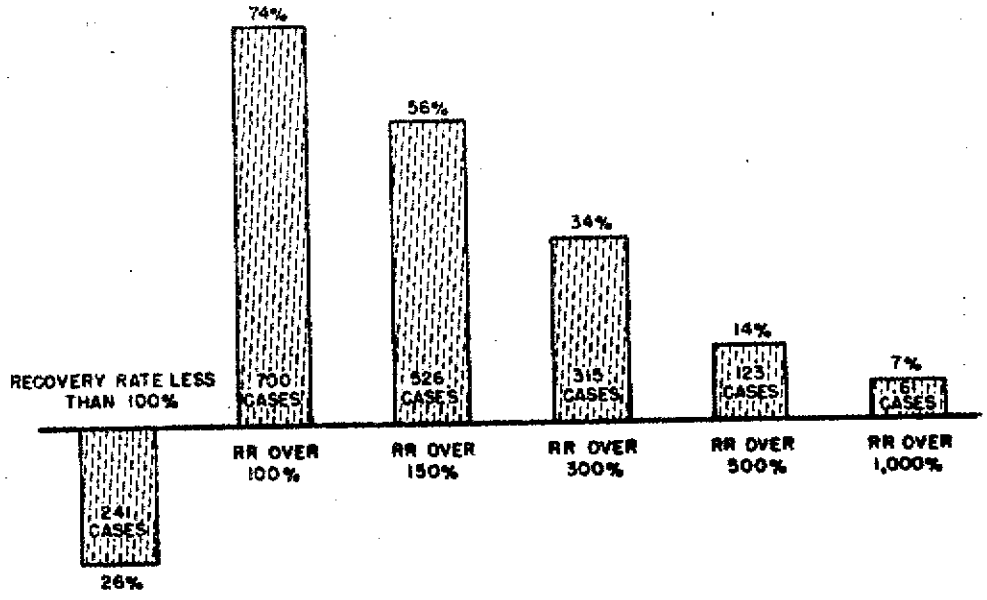

Figure 1.—Land value recovery rates—overall recovery rates by number and percentage of cases.

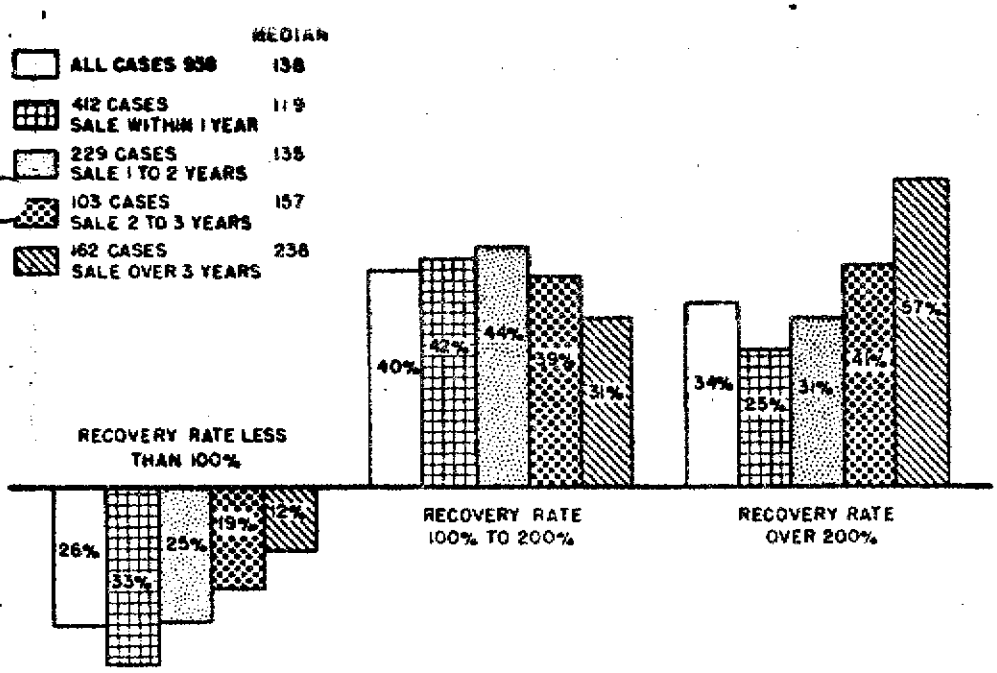

Figure 2.—Land value recovery rates by time from acquisition to sale—unadjusted for general land value changes.

after the highway taking had a recovery rate of more than 200 percent, and about 15 percent had a recovery rate of 1,000 percent or more. In contrast, only about 25 percent of the land parcels that were sold within the year of the taking had a recovery rate of more than 200 percent; 4 percent had a recovery rate of 1,000 percent or more.

The median recovery rates for parcels sold at different lengths of time after the highway taking emphasize the effect of time. The median recovery rate for property sold within 1 year was 119 percent; for property sold between 1 and 2 years after the taking, 135 percent; for property sold between 2 and 3 years after the taking, 157 percent; and for property sold more than 3 years after the taking, 238 percent. This is shown in figure 2. These median recovery rates adjusted for general land value increases (an average annual increase of 7 percent was used) are still spectacular: 115 percent, 121 percent, 129 percent, and 155 percent, respectively. Thus, it appears that land values of affected parcels tend to appreciate in value considerably faster than is true for land values generally. Eventually, when enough cases are available for analysis, it may be possible to limit the comparison to cases where the remainder is sold very soon after the acquisition. Such a comparison would generally exclude the general land value increase occurring over a period of time and leave only the highway effect. With such a simple before and after comparison, the effect of characteristics other than time (e.g., type of land use, type of highway system) should become more easily distinguished.

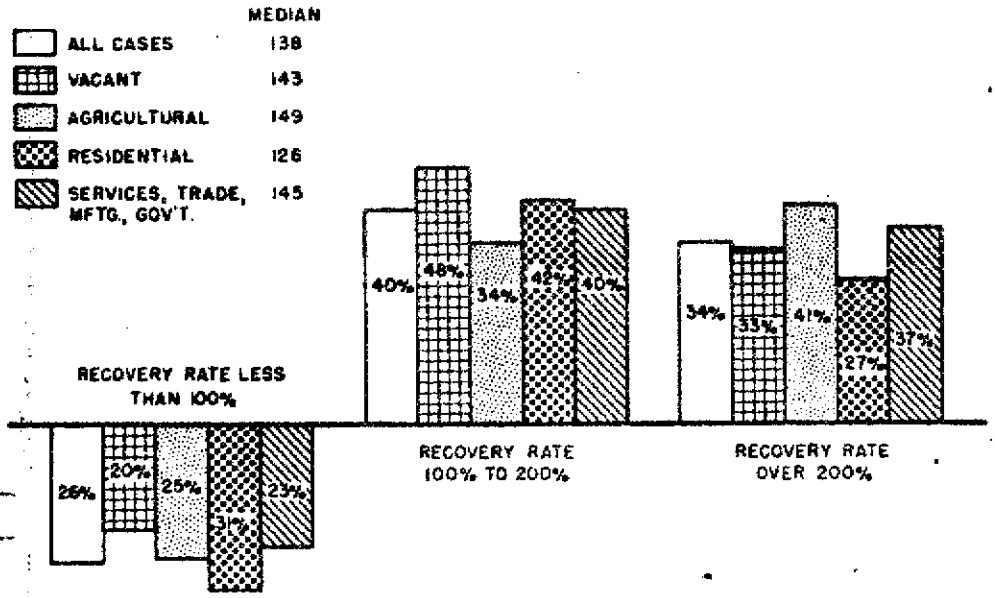

Figure 3.—Land value recovery rates by land use at the time of acquisition.

Another characteristic that appears to have an effect on the recovery rate is the use that the land was put to at the time of the highway taking (fig. 3). The median recovery rate for residential property, for example, is about 126 percent compared with a median recovery rate for all cases of 138 percent. The other land uses—vacant, agricultural, and a combination of services, trade, manufacturing, and government—had recovery rates of 143 percent, 149 percent, and 145 percent, respectively. The relatively poorer recovery rates for residential property is highlighted by the bar charts in figure 3. For example, only 27 percent of the residential property remainders had a recovery rate of 200 percent or more, and 31 percent of the residential property had a recovery rate of less than 100 percent.

Type of highway system

Another comparison, by type of highway system, shows some differences that may be attributable to whether the remainder parcel was located on an Interstate highway, a Federal-aid primary highway, or a Federal-aid secondary road. The median recovery rate for remainder parcels along Interstate routes is about 140 percent, slightly higher than the median recovery rate (138 percent) for all cases in the bank. The recovery rate is about 132 percent along Federal-aid primary highways, and about 135 percent along Federal-aid secondary roads.

In addition to somewhat higher recovery rates, for remainder parcels along the Interstate System more large gains and more losses have been experienced than for parcels along other highway systems. As shown in figure 4, about 35 percent of the remainder parcels located along Interstate Highway Systems have had recovery rates of more than 200 percent. This is a slightly larger portion of parcels than the remainder parcels located along Federal-aid primary systems and Federal-aid secondary systems. At the same time, about 30 percent of the remainder parcels located along the Interstate System have had recovery rates of less than 100 percent, compared with about 24 percent of the remainders along the Federal-aid primary system and 26 percent of the remainders along Federal-aid secondary systems, which had recovery rates of less than 100 percent. Whether the recovery rates along Interstate routes will continue at the same level when more cases are available to analyze is not clear. Perhaps the overall recovery rates for remainder parcels along Interstate routes will be more spectacular than for remainder parcels located along other types of highway systems.

The higher-than-normal recovery rates along Interstate routes might be expected, but it may be that recovery rates for many parcels located along the Interstate route will be lower than for parcels located on other types of highway systems because of the lack of direct access to the Interstate System. However, the contrast between Interstate and non-Interstate recovery rates is sharper

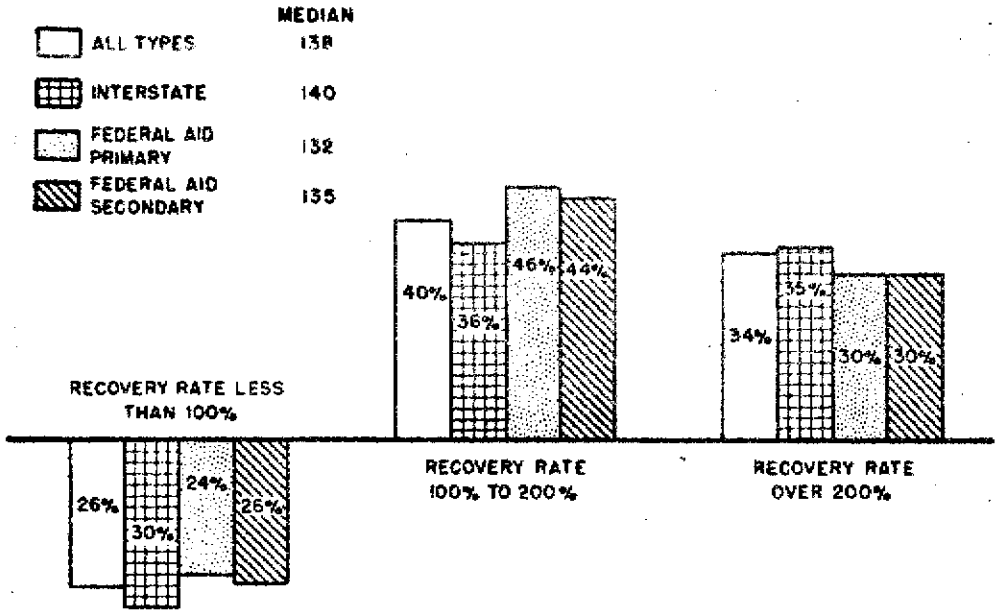

Figure 4.—Land value recovery rates by type of highway system.

at the upper range of recovery rates than it is at the lower end. Thus, the recovery rates along the Interstate System are distinguished from those for other highways primarily by the high recovery rates; when recovery rates are low along the Interstate System, the rates are only slightly different from those along other types of roads.

Visibility from the remainder

The States that are sending severance cases to the Public Roads' bank are providing information as to whether the highway is visible from the remainder parcel. Most of the time full visibility means that the property is also visible from the highway. Tentative analysis of the recovery rates by visibility shows some interesting differences, though it is not now possible to tell just how significant these differences are. The median recovery rate for parcels from which the highway is fully visible, for example, is 145 percent, compared with a recovery rate of 133 percent for parcels from which the highway was partially visible, and 117 percent for parcels from which the highway could not be seen. This is shown in figure 5, along with the median recovery rate for all cases—138 percent. Also, 37 percent of those remainder parcels from which the highway could be seen fully had a recovery rate of more than 200 percent, but only about 21 percent of the remainder parcels from which the highway could not be seen had such a high recovery rate.

As noted earlier, the significance of the recovery rates cannot be fully discerned at this time; however, the claims that are oft made about the undesirable appearances ar effects of modern highway improvemen have seldom been substantiated. Apparent the market does not discount the value property from which the highway can be see On the contrary, property from which th highway can be seen appears to fare bett in the market place than property from whi the highway is not visible.

Interchange effects

What happens around interchanges is d picted in figure 6. Approximately one-four of the 900 plus cases used in this analys were located within a half mile of an inte change, a distance often used to distinguis between interchange and noninterchange are The recovery rate of parcels located within half mile of an interchange is generally bett than the recovery rate for parcels locate farther away from an interchange. For e ample, the median recovery rate for parce located near interchanges was about 164 pe cent compared with 131 percent for parce located away from the interchange. Als more of the interchange properties had hig recovery rates than was true for parcels l cated away from the interchange. Near half of the parcels located within a half mil of an interchange had recovery rates of mor than 200 percent.

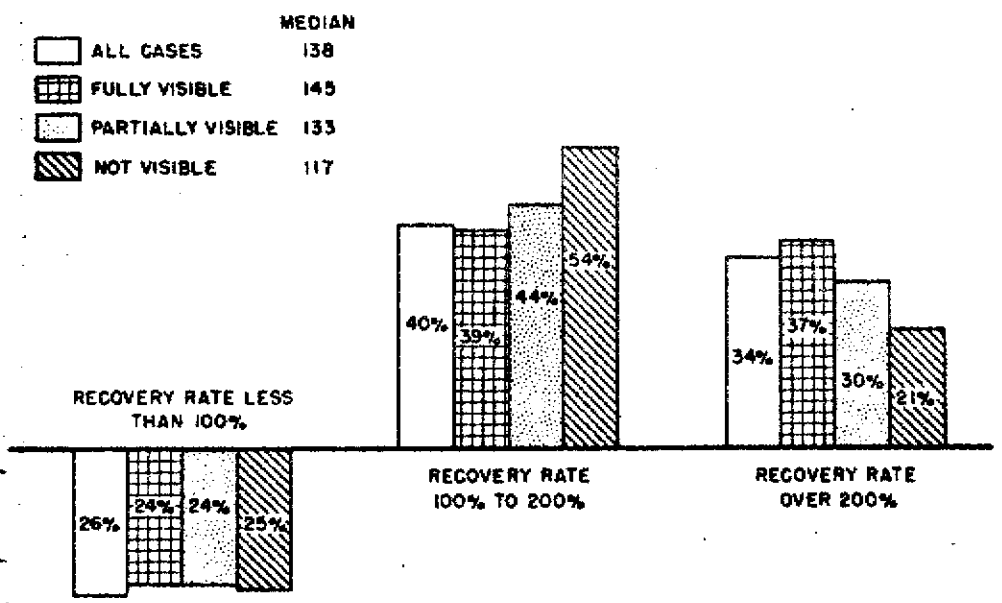

Figure 5.—Land value recovery rates by visibility of highway from remainder.

Multiple Regression Analysis

In analysis of the recovery rates of highway severed remainders, an examination of the in fluence of several factors taken one at a tim generally has been relied upon. In the inve tigation described here, a start has been mad to determine the simultaneous effect on th recovery rate of several factors, acting in com bination, and to measure the relative strengt of each of the factors. For this analysis, th technique of multiple regression has been use

When the simultaneous effect on the recov ery rate of several factors acting in combina tion was studied, the most influential factor were (1) change in land use, (2) time elapsin from acquisition to sale, (3) travel distance t the new highway, (4) type of remainder (land locked, isolated, or separated), and (5) near ness to interchange. For one of the groups c cases studied, a coefficient of multiple correla tion of 0.86 was obtained, indicating that 7 percent of the total variation in the recover rate was explained by the combined effect o the several independent factors used in th analysis. Additional and more refined ana ysis of this kind is planned for the future.

Are Public Roads' Cases Typical

As many of the States supplying informa tion about remainder parcels do not report o all remainder parcels in the State or on representative sample of them, some questio may exist as to whether the cases in the Pub lic Roads' bank are typical of partial takin in general. Although there appears to be n definitive test that would answer this que tion, a check can be made to compare th findings from the bank as a whole with th

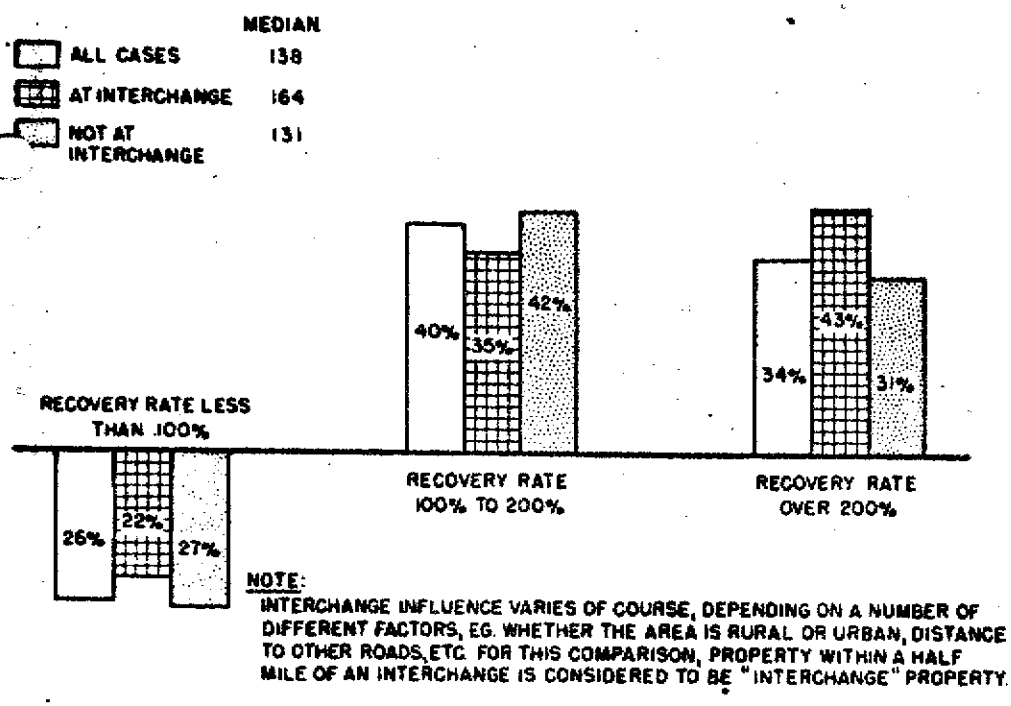

Figure 6.—Overall land value recovery rates by nearness to interchange.

findings from a State that is supplying information about all remainder parcels that have been sold. This has been done. Findings for all cases in the bank have been compared with those of the approximately 400 California cases, which are in the bank.

The findings for all cases compare fairly closely with those based solely on California cases. For example, the median recovery rate reported for California cases is about 142 percent compared with 138 percent for the entire bank. The comparison was made between findings from California cases and all cases, rather than between findings from California cases and all non-California cases, primarily for convenience. It seems fairly obvious that the differences between data in California and non-California cases would be slightly greater than those between California cases and all cases. Properties located within a half mile of an interchange had a median recovery rate in California of 166 percent, compared with a recovery rate of 164 percent for the bank as a whole. The percentage of cases reported by California for which the property was located within a half mile of an interchange—about 25 percent—agrees generally with the percentage of all bank cases in which the property was near an interchange—about 29 percent. Thus, it appears that there are similarities in the effects reflected by the California cases and the total effects reflected by those in the bank, except that the recovery rates in California are slightly higher than the recovery rates in other States.

Extent to which the Owner is Made Whole

Whether the owner is made whole can be determined by comparing before and after property values. When a State takes part of an owner's property for highway right-of-way, and then after a period of time the owner sells the entire remainder, it can be said that all the results are in for that owner and for that property. The appraised value of the entire tract before the taking is known; the payments made by the State to the owner for the property taken, as well as for any expected damages to the remainder, are known; and the sale price of the entire remaider is known. It is then possible to determine whether the owner was damaged or benefited, and the extent of the damage or benefit can be determined.

A before and after examination of the 650 cases in the Public Roads' bank in which the entire remainder was sold reveals the extent to which owners of property partially taken for highway right-of-way were made whole—that is, whether affected property owners were placed in as good a financial position as they would have been had their property not been taken. To measure the effects of the partial taking of property for each of the 650 cases selected, the value of the entire property (including improvements) before the taking was compared with the total amount the owner received from the property; that is, for the property taken, for damages to the remainder, and from the sale of the entire remainder.

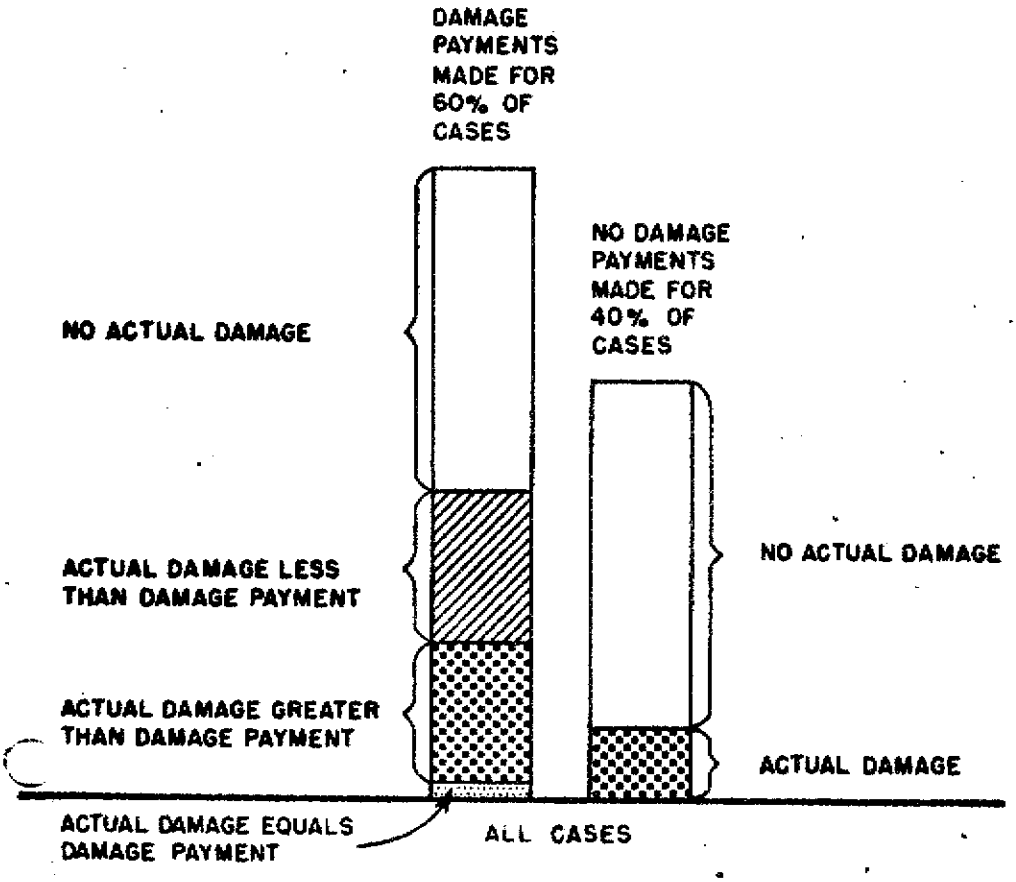

Figure 7.—Comparison of damage payments with actual damages.

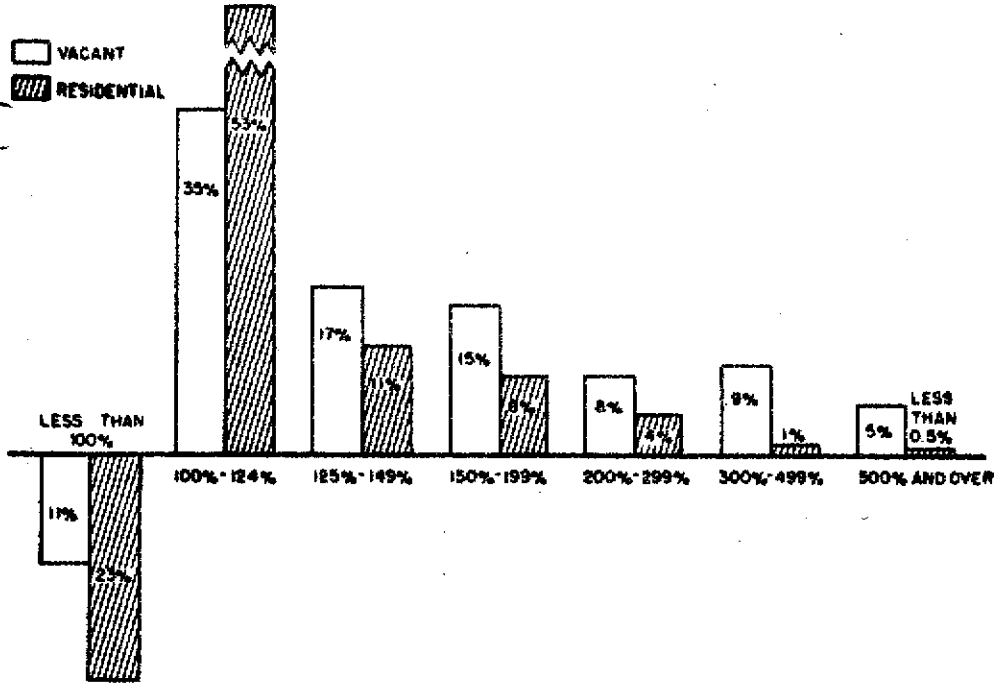

Figure 8.—Percentage distribution of value received as percent of value by before land use, vacant and residential.

APPRAISED BEFORE VALUE ENTIRE TRACT (INCLUDING IMPROVEMENTS)	$14,977,800
PAYMENT FOR PROPERTY TAKEN (EXCLUDING DAMAGES)	4,011,600
PAYMENT FOR DAMAGE TO REMAINDER	1,563,600
TOTAL PAYMENTS BY STATE	5,575,200
SALE PRICE OF ENTIRE REMAINDER	15,311,500
TOTAL RECEIPTS OF PROPERTY OWNERS	$20,886,700

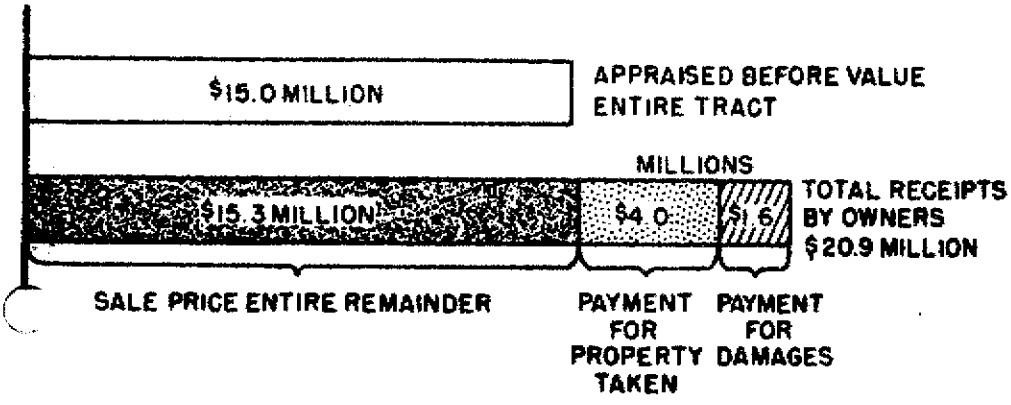

Figure 9.—Comparison of total appraised value before with total payments received by owners.

For the cases analyzed, four out of five property owners received either adequate compensation or more. The remaining 20 percent of the property owners ended up with less money after the highway taking than they had in property before the highway improvement. The median value that the entire group of 650 property owners received was 112 percent of the before value of their property.

Damages—Estimated and Actual

For the 650 cases analyzed, damage payments were made to the owners of 60 percent of these properties; the remaining 40 percent received no payments. Examination of the experience of owners receiving damage payments revealed that half of the recipients actually sustained no damage at all, and one-fourth of the recipients of damage payments suffered less actual damage than they were paid for. A fifth of all recipients of damage payments received less in damage payments than the cost of damage they actually sustained. Of the owners who received no damage payments, more than four-fifths experienced no actual damage and the remaining fifth suffered actual damage. Thus, for both groups, about one owner in five suffered a loss as the result of an under payment of damages or the nonpayment of damages. Highway officials are, of course, just as concerned about property owners receiving inadequate compensation as they are about apparent overpayment of damages: The goal is to make the owner whole. A comparison of these findings is presented in figure 7.

Damage Payments Compared to Total Payments

It is of interest to compare the proportion of total State payments accounted for by damage payments for selected categories of partial taking cases with total combined payments for all cases. Using total combined payment figures, damage payments accounted for 28 percent of total payments made by the States for right-of-way acquisition. However, for vacant land nearly half the cost of acquisition was accounted for by damage payments.

Why damage payments are so high for vacant land remainders in contrast to the higher-than-average recovery rates for vacant property is somewhat perplexing. The result is that owners of vacant land have been treated better than owners of other types of property. For example, owners of vacant land had receipts amounting to 129 percent of the before value of their property compared with 107 percent for owners of residential properties. This contrast in value received as a percent of before value as between vacant parcels and residential parcels is highlighted by figure 8. Owners of vacant parcels had fewer losses than residential property owners (11 percent versus 23 percent). And, a much higher proportion of owners of residential than of vacant properties experienced relatively small gains over the before value. It

s clear that owners of vacant properties generally fared better than residential land owners.

At least a partial explanation of the more favorable after-taking experience of owners of vacant land is given by still another finding from the bank. A comparison of the uses of remainder parcels at the time they were sold, with their uses at the time of the taking, revealed that nearly a third of those parcels vacant at the time of taking had shifted to higher uses by the time the parcel was sold. By contrast, less than a tenth of residential parcels had shifted to higher uses by the time they were sold. In view of these findings, it appears that the acquisition of vacant land offers a good chance for improvement in the pursuit of the goal of making the owner whole.

Total Values Compared

The experience of individual owners following the partial taking of their property for highway right-of-way has been examined and presented in the form of frequency distributions, percentage distributions, and medians. Now, the total experience of affected owners, obtained from examination of the entire bank of partial taking cases in which the entire remainder was sold, and the experience of different groupings of these owners is discussed. The total of the appraised before values of the properties of the 647 owners was $15 million. The owners of these properties were paid a total of $4 million for property taken (exclusive of damage payments) and $1.6 million in damage payments. Finally, these owners sold their remaining property for a total of $15.3 million (fig. 9).

If these figures are adjusted for the general increases occurring in land values, the expected total market value is $10.2 million. A comparison of this very rough estimate of the expected total market value of the remainders at the time of sale with the actual total sale price gives a rough idea of the extent of land value increases and/or overpayments for damages. Remainders that might have been expected to sell for $10.2 million were sold for $15.3 million. This is an oversimplification because some State laws do not permit the use of benefits to offset the cost of taking or against damages to the remainder. Thus, even after considering a general increase in land values, the total receipts of affected owners were considerably higher than the total before value of their property.

This finding of large total receipts, of course, should in no way be understood to imply that severance damages should not be paid. Two out of five affected owners did actually suffer damage. One of these received either insufficient payments or no damage payments. In fact, the only purpose served by this kind of total analysis is to indicate the outside theoretical limits of the improvement that might be made in the awarding of damages to owners of highway-severed properties. However, it appears that very careful consideration should be given to the offsetting of benefits against damage payments where appropriate, and to the offsetting of benefits against payments for property taken where appropriate and where State law permits.

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"JUST HOW JUST IS JUST COMPENSATION?"

(A Critical Comment On The California Law Revision Commission's Inverse Condemnation Study)

by

GIDEON KANNER

FOREWORD

This note has been written in response to a three-part study of inverse condemnation made for the California Law Revision Commission by Prof. Arvo Van Alstyne,[1/] as well as to certain Commission staff memoranda on this subject. The scope of this note is limited to examining certain ground rules of the study, and to reviewing certain aspects of [inverse] condemnation law particularly as applied to freeways, from the point of view of the damaged property owner seeking compensation. I find myself in fundamental disagreement with certain of Prof. Van Alstyne's views expressed in his inverse condemnation study. This note can properly be characterized as an open letter to the California Law Revision Commission on this subject.

The Limits of Power: Yes, Virginia, There is a Constitution

The Commission, judging from its materials, has undertaken its study of inverse condemnation because of an admitted need for improvement in this field. I agree that the need for change exists. But I am somewhat startled at the direction of the proposed change seemingly suggested in the study. At the very outset of Prof. Van Alstyne's study for the Commission,[2/] the reader is greeted with the reminder that the legislature's power to act in this field is limited by the inhibitions of the constitutional just compensation and due process clauses. Therefore, we are reminded, the legislative approach must be limited, lest it fall below the minimal constitutional guarantees of just compensation and due process of law. Sadly, there is implicit in this caveat a suggestion that the legislature must watch these constitutional shoals in its assumed journey toward the implicit goal of minimizing just compensation.

My uneasiness is further reinforced by Prof. Van Alstyne's serious discussion of the deletion of the "damaged" clause of California Constitution, Art. 1, §14 at p.63 of Part One of his study. I find little comfort in his observation[3/] that the deletion of the "damaged" clause is no guarantee that the courts would not reinterpret

the concept of "taking" so as to "expand inverse condemnation liability well beyond federal standards". And to one who, like myself, believes that the "damaged" clause was put into the Constitution as an expression of principle, and a limitation on future legislation,[4] it is even more disturbing to note Prof. Van Alstyne's apparent indifference to any a priori impact of the "damaged" clause on contemplated legislation.[5]

Such thoughtful ruminations are the prerogative of a scholar, and I readily acknowledge Prof. Van Alstyne's credentials as such. It might be profitable to suggest, however, that even an ambitious effort by the Commission should fall short of any serious consideration of deletion of the "damaged" clause. The short shrift given by this state's electorate to the last attempt at relaxing the constitutional restraints on eminent domain[6] should be kept in mind as suggesting a pragmatic boundary of the projected efforts of the Commission. The tremendous and increasing number of condemnations in recent years[7] has undoubtedly hardened the public attitude against the process of eminent domain. An insight into this attitude is provided by the increasing phenomenon of veniremen who refuse to serve on condemnation juries, either on principle or because of the harsh experience of a friend or relative. And, to add a personal judgment, I submit that some avenues of approach, such as tinkering with this state's organic declaration of rights, should be rejected out of hand, not because they are abstractly invalid, but because they

are fundamentally, morally wrong.

As it is, the compensation now available to damaged property owners is too often a meager and chancy thing. Putting aside the procedural traps and hurdles thrown in their way by the Claims Act, the substantive case law is unrealistic: substantial and economically devastating damages are pooh-poohed by the courts as "mere personal annoyance". It is contradictory: after stern pronouncements that the liability of the government is the same as that of private citizens, damages are denied for the very same governmental acts for which private parties are routinely held liable. Rules of exquisite technicality are laid down: the government may escape liability altogether, in spite of admitted damage proximately caused by its acts, when these acts take place a few feet beyond an imaginary line which once marked the boundary of the owner's land.

These matters are more fully dealt with below, but they are touched on here because they highlight the need for legislative reform liberalizing the right to compensation for damages actually suffered. All the talk about financial burdens on government, and the inability to get liability insurance misses the mark. For it presupposes damage inflicted by governmental acts, and merely quibbles with the mechanics of providing compensation or propagandizes for denying compensation altogether. Implicit in the inquiry into sources of compensatory funds is the admission that something compensable has happened.

In this connection I note a city attorney's handwringing, at p.3 of Commission Memorandum 67-73, over the "proliferation" of actions "under the guise" of inverse condemnation, which - we are told - "presents the taxpayer with a burden far greater than any other theory of liability since most insurance companies will not underwrite this risk". Could it be that the "proliferation" of inverse condemnation lawsuits and their economic "burden" are causally connected to an even greater proliferation of damage inflicted by burgeoning public works constructions? And are we seriously being told that the concept of just compensation, a basic constitutional guarantee, is to be subordinated to insurance companies' profit expectations?

Therefore, at the risk of uttering a banality, I submit that one must bear in mind that the Constitution's command is that <u>just</u> compensation be paid. I have yet to hear of a concept of justice acceptable to right-thinking men, which is reconcilable with the notion that an actor can inflict damage for his own benefit, and then escape liability because he finds it economically inconvenient to make amends. I submit that if one accepts the validity of the preceding statement, then it is not undermined by pinning the label of "government" on the actor. I submit that the Commission's speculation about a statutory limit on constitutionally decreed inverse condemnation liability, except as, if and when the legislature specifically enacts liability,[8/] is not likely to lead to a workable solution of the problems before the Commission. Similar legislative

wishful thinking with regard to nuisance non-liability[9] has been properly criticized as ineffective.[10] Because of the [inverse] condemnation roots of governmental nuisance liability, the legislature lacks the power to abrogate such liability.[11] This federal constitutional limitation on the legislature's power is not removed by amending the state constitution. As the U.S. Supreme Court put it:

> "The legislative authorization [of nuisance] exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."[12]

In a later case the Supreme Court explained the constitutional basis for that rule:

> "...the legislation we are dealing with must be construed in the light of the provision of the Fifth Amendment - 'nor shall private property be taken for public use without just compensation' - and is not to be given an effect inconsistent with its letter or spirit. The doctrine of the English cases has been generally accepted by the courts of this country, sometimes with scant regard for distinctions growing out of the constitutional restrictions upon legislative action under our system. Thus, it has been said that 'a

railroad authorized by law and lawfully operated cannot be deemed as a private nuisance'; that 'what the legislature has authorized to be done cannot be deemed unlawful', etc. These and similar expressions have at times been indiscriminately employed with respect to public and private nuisances. We deem the true rule, under the Fifth Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such character as to amount in effect to a taking of private property for public use."[13/]

So, like Prof. Van Alstyne, I too posit at the outset the principle that the legislature's power to create substantive [inverse] condemnation law is limited by the California Constitution (Art.I, §14) and the U.S. Constitution (5th and 14th Amendments).[14/] But these limitations are faced only if the legislature chooses to move in the direction of denial of compensation to damaged owners.[15/] No such restrictions exist if the legislature sets out to correct the inequities which now plague damaged owners. There is nothing in the constitutions which prevents a state from enacting into its laws a more enlightened standard of justice.[16/]

The words of Mr. Justice Bell of the Pennsylvania Supreme Court express a helpful observation which should be kept in mind by the Commission in its present study:

> "We shall start with the Constitution - strange to say, the legislature, attorneys and courts in most of the cases in this field have been so engrossed with the interpretation of the pertinent statutes that they have completely overlooked or ignored the Constitution, which of course is paramount."[17/]

The Responsibility of Power: Where Does The Buck Stop?

Next, I wish to offer a word of disagreement with the suggestion of Prof. Van Alstyne in Part 2 of his study[18/] and adopted verbatim in the Commission's Memorandum 67-73, p.7, as Item 8,[19/] that the changes in inverse condemnation law to be made by the Commission should "avoid disturbing existing rules of settled law except where clearly justified by policy considerations of substantial importance."

It seems to me that the Commission can perform a valuable service to the people of this state, and to its administration of justice by clearing a few cobwebs with which this field is replete. If the result of the Commission's effort in the field of inverse condemnation

is to be a transfer of "existing rules of settled law" from court report books into code books, then I submit that little purpose will have been served. Indeed, the Commission would then be acting as a codification body, not as the Law Revision Commission.

I feel that this point is of pivotal importance. It goes to the rationale of the Commission's work. I urge as strongly as I can, that the Commission pursue its study to the end that rational new laws are formulated; laws which balance the competing interests and achieve substantial justice. Whether or not the decisional status quo is preserved in the process should not be a controlling criterion. As Mr. Justice Brandeis put it:

> "... the doctrine of stare decisis does not command that we err again when we have occasion to pass upon a different statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken."[20/]

The above words, uttered in the context of decisional law, are even more compelling when applied to the legislative process since the legislature is not even theoretically bound by precedent (other, of course, than precedent expounding constitutional limitations).

There is much more at stake here than just an abstract question of how the Commission's objectives should be delineated. A highly pragmatic problem is involved. When the legislature fails to act in a field of the law in which the courts have spoken, the courts in turn equate legislative inactivity with legislative approval.[21/] This is especially so when the legislature acts in a particular field, but fails to enact legislation changing the decisional law in that field.[22/] Thus, if the Commission fails to recommend any significant departures from decisional inverse condemnation law, this will be interpreted as approval of the decisional status quo.

Yet, "the status quo suggestion" embraces current decisional law not because it is consciously approved by the study. On the contrary, Prof. Van Alstyne states that "... most authorities readily acknowledge that the case law of inverse condemnation is disorderly, inconsistent and diffuse."[23/] The reason offered for the apparent willingness to largely codify such unsatisfactory case law is the professed objective of avoiding "uncertainty" and "litigation".[24/] Is this objective worth the price of perpetuating the "disorderly, inconsistent and diffuse" case law? I submit that on principle the answer is: no. Moreover, few things are as conducive to uncertainty and litigation as inconsistent law - whether statutory or decisional.

Thus a foundation is being laid here for a situation where the courts look to the legislature, the

legislature looks to the courts, and the law continues in its present, admittedly undesirable state.

I submit also that "the status quo suggestion" gains no added force from its professed abhorrence of the "creation of broad and nebulous new areas of possible liability through the use of unduly general statutory language." Indeed, the above-quoted language hints of a straw man. Nowhere does the study material indicate that anyone has suggested the creation of "unduly general" statutory language or has come out in favor of "nebulous" areas of "possible" liability. The Commission's proposed statutes can both embody new approaches which are desirable, and can also achieve precision. Statutory improvement and vagueness of expression are hardly synonymous.

I am not oblivious to the final sentence of "the status quo suggestion".[25/] It seems to me, however, that the relegation of correction of injustices to a kind of an "on the other hand" afterthought, hardly formulates a proper goal for the Commission. At the risk of sounding naive, I submit that correction of injustices should head - not trail - the Commission's agenda.

In short, the Commission should seek just solutions to real and admittedly troublesome problems, rather than limit its thinking by a priori positing of conformance whenever possible, to admittedly "disorderly, inconsistent and diffuse" decisional law as a goal of its efforts.

The Impact of Power: When is an Invasion of Property Mere Inconvenience? or, Symons Says ...

Moving from the general to the particular, I strongly urge the Commission to give its attention to a serious [inverse] condemnation problem which is daily growing more aggravated. I refer to the impact of the urban freeway on its neighbors.[26/]

Urban freeways impinge directly and severely upon their neighbors. Their greater traffic density constitutes a direct and serious interference with adjacent homeowners' use and enjoyment of their property. Moreover, the number and mileage of urban freeways is rapidly increasing. In Los Angeles County alone there are several freeways currently in the process of construction and right of way acquisition. Additional freeway routes have been adopted through densely populated areas. For example, the Whitnall Freeway is now slated to cut through the heart of the heavily populated "bedroom" of Los Angeles, the San Fernando Valley. In this connection, see the discussion of certain broader aspects of this problem by Gunzburg, "Transportation Problems of the Megalopolitan", 12 UCLA Law Rev. 809-810.[27/]

Beyond the general problems touched on by Mr. Gunzburg, there is the reality which faces those unfortunates whose homes wind up in the immediate proximity

to an urban freeway. The judicial decisions which have come close to this problem (none have really considered it), have taken refuge in semantic devices by referring to the problem in terms of "inconvenience" to the owners, usually preceded by the belittling adjective "mere". This choice of language conceals a massive failure on the part of this State's judiciary to address itself to a pressing issue.

The reality is that private residences located immediately next to a freeway are generally transformed into a kind of personal hell. The stench, dust, [28/] vibrations, interference with radio and television reception, and incessant roaring noise of the freeway traffic constitute a severe burden. Add to that the inevitable falling of some debris from the freeway onto adjoining back yards, plus the ever-present danger of trucks dumping their loads, [29/] or of a car coming down the embankment, and one gets a more realistic appreciation of what is inflicted upon the persons who are thus forced to live in the excretions of a freeway. [30/] These factors directly and severely diminish the market value of such residences. The opinions which have chosen to overlook these realities of life under the rubric that noise, dust, etc., are "mere" personal inconveniences to the owners for which there is to be no compensation, turn their back on an urgent social problem.

The principal judicial offender in this regard is People v. Symons (1960) 54 C 2d 855. I submit that it deserves careful attention from the Commission. I urge

the Commission that the Symons "rule" be legislatively consigned to oblivion.

I have used quotation marks when referring to the Symons rule, because the opinion contains within its four corners a basic contradiction which undermines its reasoning and creates a serious doubt as to whether there is a clear-cut Symons rule. Moreover, the contradiction suggests that the Supreme Court had not considered the implications of its opinion when it wrote Symons.

The proposition for which Symons is frequently cited by condemnors, is that there is no compensation for noise, dust, fumes, etc.[31/] This result is arrived at supposedly because such elements of damage are said to be a "mere infringement of the owner's personal pleasure or enjoyment", whereas to get compensation "the property itself must ... be rendered intrinsically less valuable by reason of the public use".[32/] The opinion, however, chooses to overlook uncontroverted evidence that Mr. Symons' property was indeed "rendered intrinsically less valuable" to the tune of over 30% of its value in the "before" condition.[33/] Moreover, the above-quoted reasoning is fallacious; is it not ovious that where residential property is subjected to conditions which infringe upon the inhabitants' "personal pleasure and enjoyment", the market value of that property will plummet? To obvert Polly Adler's notorious dictum, a home is not a house. There is more to a home than mere shelter from the elements, and the market reflects it.

But even overlooking the above faulty premise of the opinion, the reader of Symons is also presented with a rule that the state is liable for its injurious activities where an adjoining private owner would be liable for like activites.[34] Thus Symons contradicts itself: surely, it is not open to question in California that if a private owner were to undertake on his own land an activity giving rise to dust, noise, fumes, vibrations, etc., unreasonably interfering with his neighbors' use and enjoyment of their land, he would be liable in damages for nuisance[35] which is an invasion of rights in land - property rights, to use the "right" label.[36]

Just take a look at Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 C 2d 265, where the Supreme Court finds no difficulty at all in holding that "fumes, vapors, dust, dirt", etc., generated by plaintiff's neighbor are a compensable interference with property rights.

> "It appears to us that the discomfort and annoyance suffered by plaintiffs is an injury directly and proximately caused by defendant's invasion of their property and that such damages would naturally result from such invasion."[37]

Note well that when the fumes, vapors, dust, dirt, etc., come from a private owner's land, the Court sees nothing "mere" about them or about the "discomfort and annoyance"

caused by them. They are an "invasion of ... property", no ands, ifs or buts; damages "naturally result". How then are fumes, dust, dirt, etc., coming from a freeway different? What makes their impact "mere"? If Mr. Kornoff became the neighbor of a freeway instead of a cotton gin, why would his "discomfort and annoyance" cease to be compensable?

Thus, we wind up with the peculiar "rule" that when the State does the very same things as did the private defendant in Kornoff (plus vibrations, noise, danger, etc.), Symons tells us that there is no liability, supposedly because the State's liability is no greater than a private party's!

The difficulty in understanding Symons is further compounded by the Supreme Court's more recent decision. In Albers v. County of Los Angeles (1965) 62 C 2d 250, the Court embraces the rule that where damage to private property results from a governmental public works activity, the government is liable regardless of whether or not a private owner would be liable under like circumstances. Thus, Albers rejects as superfluous the criteria which Symons supposedly made controlling.[38/]

The Supreme Court's disclaimer in Albers[39/] where the Court unobtrusively brushes aside the Symons standard of governmental liability, exemplifies what Prof. Van Alstyne must have meant when he termed case law in this field "disorderly, inconsistent and diffuse". One cannot avoid the conclusion that Symons was buried in the Potter's

Field of Albers, with only a footnote marking its passing. Regrettably the Supreme Court failed to drive a stake through the heart of its interred progeny by an express overruling. Thus, we find Symons' ghost haunting the law-books.[40/]

The confusion in decisional law described above, comes from a basic shortcoming of the cases. Although there is in this State a well developed body of law of nuisance, both with regard to nuisance committed by private persons and nuisance committed by governmental entities, the courts have simply failed to take cognizance of this body of law when dealing with freeway condemnation (direct or inverse) for an express recognition of the concept of nuisance.[41/]

Compounding the problem is the arbitrary rule (honored in Symons and disregarded in Albers) that a condemnor is liable for activities occurring on land taken from the complaining owner, but the same condemnor may conduct the same activities and inflict the same damage with impunity, if such activities are conducted on land taken from others. This rule is simple and totally irrational. If a home adjoining a right-of-way is subjected to a nuisance originating from the freeway, what conceivable difference does it make whether the source of the nuisance is twenty feet away (land taken from the owner) or twenty-five feet away (land taken from others)? It is a rule without a reason. Would it not be more rational to use the impact on the neighbors as the criterion of compensability?

Shouldn't one leave some room for balancing the competing interests of the damaged owner against those of the motoring public, instead of ignoring damages to innocent persons by a line arbitrarily drawn on a map?

By the time the objectionable activities take place on the right-of-way, the State is the owner thereof, and by what chain of title it acquired that ownership is manifestly irrelevant to the question of whether its activities as owner of the right-of-way interfere with the use and enjoyment of the land of others.

A rational solution to the above peoblems is to recognize that when the State by building and operating a freeway generates noise, vibrations, fumes, hazards and the like, which unreasonably interfere with the use and enjoyment of adjacent properties, [42/] the acts of the State constitute a nuisance which is amenable to legal analysis and redress by the settled and familiar rules of nuisance law. For a forthright and effective approach to the problem see U.S. v. Certain Properties, etc. (1966) 252 Fed Supp 319.

Pragmatically, the problem is amenable to solution by legislation to the effect that the perpetrator of activities constituting a nuisance is not relieved from liability by virtue of its governmental status or by virtue of the fact that the nuisance originates from public works. [43/] Such legislation would bridge the gap between the case law of nuisance for which the government has always been liable

in California,[44] and the law of [inverse] condemnation as applied to freeways.

Such nuisance-oriented legislation would not create any "broad and nebulous new areas of possible liability". On the contrary, it would return to the historical path of legal development. Whenever in the past new modes of transportation impinged unreasonably upon the rights of their neighbors, just compensation had to be paid to those damaged.[45] This was the case with railroads and electric street cars.[46] Compensation was held to be payable to the neighbors of New York's "El" in the celebrated New York Elevated Railway cases.[47]

When still newer modes of transportation came upon the scene, and men in noisy machines started flying over the heads of their neighbors, just compensation had to be paid for the resulting damage.[48] It is reassuring to observe that since Causby at least some courts have junked the medieval notion of trespass under the usque ad coelum concept and have addressed themselves to physical realities.[49] Significantly, California courts experience no difficulty in weighing the impact of noise on condemnation damages when it comes to airports.[50] Paying just compensation did not inhibit the railroads, streetcars or air transportation.

What is it then that makes a freeway so special? I submit that the answer is: nothing.

I respectfully urge the Commission to make the question of compensation to immediate neighbors of freeways,

an item of the highest priority on its agenda. Such priority is deserved.

The Ethics of Power: You Pays Your Money and You Gets Your Public Improvement

There is one more major point which I feel must be discussed before concluding. I am, of course, not unaware of the fact that the construction of public improvements costs money, and that a significant portion of this money must be spent compensating owners for the takings and damagings inflicted upon them in order to acquire the land necessary for public improvements. I am likewise very much aware of the line of argument which calls upon the courts to construe the just compensation command of the constitutions strictly and narrowly against the owner. It is said that unless the courts do that, "an embargo upon the creation of new and desirable roads" will descend upon us.[51/]

While that assertion has found its way into some opinions, it has most recently been expressly rejected by the Supreme Court after explicit consideration.[52/] And rightly so. For that argument does not withstand either economic, or constitutional, or moral scrutiny.

First, the economic standard. It is basic economics that by reducing compensation to the damaged

owners, not one penny is deducted from the ultimate, total cost of the public project. All that happens is that the burden of the cost is redistributed, and a greater portion of the cost is forced upon the shoulders of the landowners who have been damaged.

It is this economic principle which brings into focus the constitutional objection. The theoretical socio-political concept inherent in the just compensation clauses is that the cost of public works should be evenly distributed among the members of the public which benefit from the improvement.[53/] Therefore, the constitutional commands of just compensation have been construed as prohibiting the forcing of some people to bear a disproportionate share of the cost of public improvements. This view has been expressly embraced both by the United States Supreme Court[54/] and the California Supreme Court.[55/]

> "... the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged."[56/]

Finally, there is the question of justice and of the morality implicit in that word. It must never be forgotten that the constitutions command that <u>just</u> compensation be paid. The framers were not satisfied with merely requiring "compensation" which strictly speaking would have been sufficient, as "compensation" presupposes a full <u>quid pro quo</u> for what is taken.[57/] The word "just" was added

for emphasis.

"The word 'just' in the Fifth Amendment[58] evokes ideas of 'fairness' and 'equity'..."[59]

It seems to me that one cannot, therefore, escape the task of asking: are the results of the application of any rule of condemnation law (whether direct or inverse) just?[60]

The granting or withholding of justice tests the morality to which our society subscribes. I would like to believe that ours is a moral society which abhors confiscation.[61] And I submit that confiscation does not become morally palatable when called by a different name, or when "justified" on the ground that it is expensive to be moral.[62]

Yet we find the courts invoking the incantation that not all of the damages suffered by an owner are compensable, as a foundation for ignoring damages. Notwithstanding the literal correctness of that observation, this is not a helpful way to deal with the problem, because it tells us what the law isn't, rather than what it is. Nevertheless, this phrase can become a kind of a condemnor's deus ex machina which can be plucked out of the blue by a court which decides to deny compensation for damages admittedly suffered. With its aid an owner can be economically destroyed, in the name of just compensation. Our courts turn their eyes skyward and deplore the harshness of the law which they, as the law's mere servants, must apply even

though they regret the unfortunate consequences.[63] They forget in the process that the harsh rules they explicitly or implicitly deplore were judicially created in the first place.[64]

This is a phenomenon which forcefully brings to mind the words of Mr. Justice Cardozo:

> "Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it nonetheless, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the Gods of Jurisprudence on the altar of regularity ... I suspect that many of these sacrifices would have been discovered to be needless if a sounder analysis of the growth of law, a deeper and truer comprehension of its methods, had opened the priestly ears to the call of other voices."[65]

All the talk about logic, law, morality, and policy must not obscure the fact that ultimately human beings are made to suffer in the name of the freeways, Let me illustrate.

I have recently become aware of the case of a couple with six children. They live in a very modest two-bedroom home. They have been unable to sell this obviously

inadequate dwelling, because it was known for years that the freeway was coming. As a result no real estate broker would list the property, and rightly so: for if he concealed the imminence of the freeway he would be courting a lawsuit for fraud, and if he made a disclosure to prospects, who would buy?

Unable to sell, the owners decided to add a room to provide some relief for their overcrowded family. But the local municipality refused to issue a building permit. The reason? The freeway was coming, and the house was to be taken. Therefore, the local officials, apparently acting on a theory that any improvements would have to be paid for by the State when it took the house for the freeway, denied the permit.

For over three years the family was thus forced to live in the overcrowded quarters. Finally, the great day arrived: the highwaymen came! The end of the overcrowding was in sight, whatever the price. But alas, the hossannahs were premature. After traipsing through the house and yard countless times, the right-of-way agent delivered the blow: the house was not be taken. Was the home to be spared? Could the owners finally add on that badly needed room? Not exactly. The freeway builders, in their infinite and unreviewable wisdom decided to wrap a freeway off-ramp around the home. To accomplish this feat, at least half of the none-too-big back yard is being taken. The take line cuts diagonally across the backyard, coming

within one inch of the corner of the house. In addition, the house is to be deprived of street access along its street frontage in front of the garage.

Nor is this all. The lady of the house is a severe asthmatic. She is unable to live in a dusty environment. What is she to do when the air darkens with dust inevitably rising from the construction of the freeway? And, if she lasts that long in that house, how is she to go on living after the freeway goes into operation?

"Mere" inconvenience? "Mere infringement of the owner's personal pleasure or enjoyment"? "Mere" anything?

What does one tell these people? Can any right-thinking person face them and utter the condemnors' disingenuous prattle about inconveniences which in our modern society must be suffered by members of the general public as "the price of progress"?[66/] Or do we tell them "Symons says ..." and hide behind the Supreme Court's skirts?

There is more at stake here than the witnessing of an outrage, which is bad enough. When all is said and done, when tempers cool, and the passage of time blurs the memory of these events, what will be the legacy of it all? Respect for government? Respect for law? Hardly. And can you blame them?

If we can somehow close our eyes to such needlessly inflicted human suffering and speak in abstractions, then in the final analysis, the economic-constitutional issue

boils down to the question of whether or not our society can afford all the public works that we may wish for. Unquestionably, we can afford a great deal; our surroundings are irrefutable evidence of our affluence. But, as with private individuals, the desire for still more affluent surroundings does not imply that the means for fulfilling the desire are readily at hand. If a governmental entity cannot afford to pay for what it desires, then it is no answer to confiscate the economic substance of innocent neighbors. And it is also no answer to repeal or undermine the constitutional guarantee of just compensation for damaging.

I note Prof. Van Alstyne's statement that "even the most affluent society cannot feasibly assume the cost of socializing all of the private losses which flow from the activities of organized government."[67] But is that not merely another way of saying that society is not affluent enough to translate all of its collective aspirations into immediate reality, if it has to pay for what it gets? I experience difficulty in accepting the proposition that our society aspires to get "something for nothing". Moreover, if legitimate economic interests of individuals are to be sacrificed in the name of "activities of organized government", to prevent the reaching of the bottom of the public purse, then why must they be <u>solely</u> the interests of the injured, neighboring property owners? If such sacrifices are truly indispensable to the functioning of

government, they should also be borne by those who benefit from the construction of public works.

Conceptually, I posit a scale of values flowing from the creation of public works, constructed like a thermometer, i.e., with a "zero" point corresponding to a set of economic values enjoyed by a local societal group unaffected by any public works. The introduction of a public project into such a group causes the values enjoyed by some of its members to rise above the postulated "zero" point, and simultaneously to depress the values enjoyed by others into the "below zero" region.

The arguments for denial of compensation to injured adjacent neighbors (the "below zero" group) in the name of solvency of the public treasury, are based on the theory that the currently fashionable types of revenues are the only source of compensatory funds. A discussion of alternative sources of compensatory funds is beyond the scope of this note but it should be observed that such a theory is myopic. User taxes are another alternative. Also, it has been noted that land in the general vicinity of public works (as opposed to residential property immediately next to public works) often increases in value. For example, the owner of commercially exploitable land served by a new freeway may find himself the beneficiary of rapid appreciation of his property.[68/] It has been suggested that such unearned increments of value should be taxed, as another source of revenues.[69/]

Therefore, I urge that the Commission turn a deaf ear to the governmental lamentations about the threadbare public purse. If that purse is indeed as threadbare as suggested in condemnors' more graphic lamentations, one should question whether the construction of public works should continue at the present furious pace. And if such construction is mandatory in the face of inadequate public funds (a highly doubtful premise), then the Commission should consider new, alternative ways of providing compensatory funds. It seems fundamentally wrong to perpetuate a situation where it is said that there are no funds to compensate the "below zero" group, while the "above zero" group enjoys its favorable position, and the general public enjoys its new public works. It is bad public policy for the many to abuse the few.

I have couched the above discussion in terms favorable to the public works builders. I have personified society and government as rational and benign entities. Generally, in our system in the long run they tend to be. But it is a fact that when it comes to specific public improvements, it cannot be said that they are always rationally planned and designed. It is a bitter fact that the statutory incantation of "greatest public good and least public injury" has been reduced to just that: an incantation.[70] With the courts precluded from inquiry into these criteria[71] the freeway builders can do exactly as they please, no matter what the consequences. And that includes adverse economic consequences to the public purse.[72] In the hands

of the highway engineers rest not only technical considerations, but also enormous powers with far-reaching ethical, social and economic consequences. Their efforts are - as a matter of fact - not subject to meaningful administrative supervision.[73] And the impact of their work is not reviewable by the courts, even where there is fraud, bad faith, and abuse of discretion.[74] Since the freeways are often designed without a thought to the economic impact on their immediate neighbors, the freeway builders should not be heard to say that they should be able to escape the economic consequences of their own acts. They are possibly the only government officials in this country with absolute, unreviewable power to act.[75] As an absolute moral minimum our society should require payment to those damaged by the exercise of such unbridled power.

The California Law Revision Commission can arrive at a just and rational legislative scheme of inverse condemnation if it gives recognition to the principle of constitutionally founded morality, that the compensation to those damaged by the construction of public works must be just. And justice cannot be achieved by forcing the homeowners adjacent to the freeways to subsidize the motoring public.

Any introduction into the criteria of just compensation of a suggestion that justice is to be molded to the shape of the public purse, undermines the socio-political ethics of the Constitution. The logical end of

the reasoning implicit in such a suggestion, would tell us that where a governmental entity is poor it should be able to take land for nothing. The logical converse of that suggestion is equally absurd. Are we to accept the proposition that where a governmental entity has a lot of money, it should pay for damages not suffered by the owner? The criterion is what has the owner lost, and not what has the taker gained. A fortiori it is not how much does the taker have to pay for what it gains, or how fat the taker's purse. 76/

Perhaps the best, and certainty the most succinct way in which the foregoing considerations were expressed, is found in the phrase of Mr. Justice Holmes:

> "We are in danger of forgetting that a strong 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." 77/

1. An article by Prof. Van Alstyne, based on the first part of his study has been published as "Statutory Modification of Inverse Condemnation: The Scope of Legislative Power", 19 Stanford Law Rev. 727.

2. Van Alstyne, "A Study Relating to Inverse Condemnation", (hereafter cited as "Inverse Condemnation") Part 1, p.1.

3. Id., p.63.

4. See Reardon v. San Francisco (1885) 66 C 482.

5. Van Alstyne, "Inverse Condemnation", Part 1, pp. 64-65.

6. See Statement of Vote, General Election of November 4, 1958, Proposition 10, wherein the voters rejected by over 2 to 1 a constitutional amendment which would have expanded condemnors' rights to immediate possession.

7. The Annual Report of Administrative Office of the California Courts, Judicial Council of California, 1967, Table 15 (Superior Courts), indicates that during the fiscal year 1965-1966, 8496 condemnation cases were filed in California,

of which 4226 were in Los Angeles County. A condemnation case typically names several parcels with several owners having different interests in each parcel. Some condemnors usually name as many as 50 or more defendants in a single case. Thus, it is safe to say that tens of thousands of persons annually feel the impact of condemnation lawsuits in Los Angeles County alone. And it must be borne in mind that a vast majority of governmental land acquisitions are made under threat of condemnation, but without actually filing suit.

8. See pp. 4-5 of Commission Memorandum 67-73.

9. See Comment following West's Government Code §815, pp. 119-120.

10. Van Alstyne, "Government Tort Liability", C.E.B., 1964, §5.10, p.126.

11. See Note 15, infra.

12. Baltimore & P.R. Co. v. Fifth Baptist Church (1883) 108 US 317; 27 L Ed 739, 745.

13. Richards v. Washington Terminal Co. (1913) 233 US 546, 552-553; 58 L Ed 1088, 1091.

14. See People v. Lynbar, Inc. (1967) 253 CA 2d ____, 253 ACA 969.

15. "Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute." Seaboard Airline R. Co. v. U.S. (1923) 261 US 299, 304; 67 L Ed 664, 669. "... 'what cannot be done directly because of constitutional restriction, cannot be accomplished indirectly by legislation which accomplishes the same result'...". Macallen Co. v. Massachusetts (1925) 279 US 620, 629; 73 L Ed 874, 880.

16. See Joslin Mfg. Co. v. Providence (1923) 262 US 668, 676-677; 67 L Ed 1167, 1175.

17. Rosenblatt v. Pennsylvania Turnpike Commission (1959) 157 Atl 2d 182, 194.

18. Van Alstyne, "Inverse Condemnation", part 2, p.10, item Sixth.

19. That suggestion is hereafter referred to as the "status quo suggestion".

20. DiSanto v. Pennsylvania (1927) 273 US 34, 42; 71 L Ed 524, 529 (dissent).

21. People v. Hallner (1954) 43 C 2d 715, 719 [3].

22. Cole v. Rush (1955) 45 C 2d 345, 355 [9].

23. Van Alstyne, "Inverse Condemnation", Part 1, pp. 7-8. And see Id., Part 2, p.3, where current case law is referred to as a "muddled and disorderly array".

24. Id., Part 2, p.10.

25. "On the other hand, when existing law tends to work injustice or to frustrate sound considerations of policy, departures therefrom should be readily undertaken." Commission Memorandum 67-73, p.7.

26. There are, of course, other specific problems, worthy of the Commission's attention. However, the freeways in addition to giving rise to frequent and severe problems, also exemplify much of what is wrong with [inverse] condemnation law in its present state. I submit that there is little to be gained by attempting to pigeonhole problems by type of public works or governmental activity. Legislation which is sound in principle will cut

across many factual situations and largely obviate the need for narrowly drawn "freeway statutes", "airport statutes", "drainage statutes" and the like.

27. Also see Bigart, "U.S. Road Plans Perilled by Rising Urban Hostility", New York Times, November 13, 1967.

28. I am told that the inhabitants of such dwellings are subjected to rubber dust as a product of tire wear, along with the usual variety. One attribute of the rubber dust is that it cannot be wiped off like ordinary household dust. Instead it adheres, leaving black smudges.

29. Newspapers have recently reported flaming gasoline, cattle and ammonia. And for variety, as this is being written, the media have just reported 38,000 pounds of hot, molten chocolate which turned into solid fudge under the fire department's hoses.

30. What the subtle or long-term effects of living next to a freeway may be, one can only guess at. See Getze, "Freeway Fumes May Reduce Driver Ability, Official Says", Los Angeles Times, February 11, 1968, p.3, reporting that in neighborhoods bordering on urban freeways atmospheric carbon monoxide contamination sometimes reaches levels whose biological effects impair judgment.

31. 54 C 2d at 858.

32. Id.

33. See superceded Court of Appeal Opinion: People v. Symons (1960) 5 Cal Rptr 808, 811-812.

34. 54 C 2d at 861-862 [7].

35. NOISE AND VIBRATIONS: Gelfand v. O'Haver (1948) 33 C 2d 218; Wilms v. Hand (1951) 101 CA 2d 811; McNeil v. Reddington (1944) 67 CA 2d 315; Fendley v. City of Anaheim (1930) 110 CA 731.

DUST, SOOT, AND FUMES: Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 C 2d 265; Dauberman v. Grant (1926) 198 C 586; Wade v. Campell (1962) 200 CA 2d 54; Centoni v. Ingalls (1931) 113 CA 192; Williams v. Bluebird Laundry Co. (1927) 85 CA 388; McIntosh v. Brimmer (1924) 68 CA 770.

SMELL: Johnson v. V.D. Reduction Co. (1917) 175 C 63; Carter v. Johnson (1962) 209 CA 2d 589; Cook v. Hatcher (1932) 121 CA 398.

36. See Prosser, "Private Action for Public Nuisance", 52 Virginia Law Rev. 997, at 997-998 (1966).

37. 45 C 2d at 272 [4]. Also see 45 C 2d at 273-275 [7].

38. Compare Symons, 54 C 2d at 861-862, with Albers 62 C 2d at 259, and 262, footnote 3.

39. 62 C 2d at 262, footnote 3.

40. See People v. Presley (1966) 239 CA 2d 309, and People v. Elsmore (1964) 229 CA 2d 810. Of even greater concern is Symons' extreme and wholly unwarranted impact on the question of what constitutes compensable impairment of access - a question beyond the scope of this note, but one worthy of the Commission's attention.

41. This gap in judicial application of the nuisance doctrine apparently obtains only with respect to freeways. Other damaging government activities have been dealt with by applying nuisance law. See Van Alstyne, "Inverse Condemnation", Part I, p.18, and cases cited therein. Also see notes 12 and 13, supra, and note 44 infra, and the associated discussion.

42. While private homes are emotionally most appealing, other devastating situations should not be overlooked. For example, our office represents a manufacturer of precision space-age components which must be assembled in totally dust-free "clean rooms". The product is so vulnerable to airborne contaminants that in spite of elaborate air filtration,

the numbers of rejects increase measurably when a nearby farmer plows his field. A freeway is now coming - right next door.

43. See Mandelker, "Inverse Condemnation: The Constitutional Limits of Public Responsibility", 1966 Wisc. Law Rev. 3, 29.

44. As early as 1884, this principle was so well established that in Bloom v. City and County of San Francisco, 64 C 503, the Supreme Court disposed of a claim of governmental nonliability for nuisance in a brief per curiam opinion. In 1885, the Supreme Court declared that legislation purporting to authorize the creation of a nuisance by the government was null under the state constitution. Coniff v. City and County of San Francisco, 67 C 45, 49. The principle of governmental liability for nuisance has been upheld in many other cases: Lind v. San Luis Obispo (1859) 109 C 340, 343; Peterson v. Santa Rose (1897) 119 C 387; Adams v. Modesto (1901) 131 C 501, 502-503; Richardson v. Eureka (1892) 96 C 443; Phillips v. Pasadena (1945) 27 C 2d 104, 106; Mulloy V. Sharp Park Sanitary District (1957) 154 CA 2d 720, 726; Hassell v. San Francisco (1938) 11 C 2d 168, 171; People v. Glenn-Colusa Irrigation Dist. (1932) 127 CA 30, 36; Bright v. East Side Mosquito

Abatement Dist. (1959) 168 CA 2d 7, 11-12; Behn v. Santa Cruz County (1959) 172 CA 2d 697, 711. As the Supreme Court put it in surveying the area of governmental liability of pre-Muskopf days: "Finally, there is governmental liability for nuisances even where they involve governmental activity". Muskopf v. Corning Hospital Dist. (1961) 55 C 2d 211, 219.

A fortiori, that liability is no less after the death of sovereign immunity. See Van Alstyne, "California Government Tort Liability", CEB (1964) §1.20, pp. 21-22.

45. Baltimore & P.R. Co. v. Fifth Baptist Church, 108 U S 317; 27 L Ed 739.

46. Fairchild v. Oakland etc. Ry. (1917) 176 C 692.

47. Story v. New York Elev. R. Co. (1882) 90 NY 122; Lahr v. Metropolitan Elev. R. Co. (1887) 104 NY 268. In this connection it is useful to bear in mind that the various electric urban railways served the same function in their day as freeways serve today. See Faus v. Los Angeles (1967) 67 C 2d ___, 67 AC 350, 359 [3a].

48. U.S. v. Causby (1946) 328 US 256; 90 L Ed 1206.

49. See Martin v. Port of Seattle (1964) 391 P 2d 540.

50. Fresno v. Hedstrom (1951) 103 CA 2d 453; Sneed v. County of Riverside (1963) 218 CA 2d 205. Also note that when that judicially-created everyman - the private owner conducting a nuisance on his own land, by whose liability we supposedly measure the state's liability - runs an objectionable airport, the courts find no difficulty in giving him short shrift at the behest of aggrieved neighbors. Anderson v. Souza (1952) 38 C 2d 825, 839-841 [15].

And even where a non-enjoinable, public service type of operation is involved, the right to recover damages is expressly preserved to adjacent owners subjected to the nuisance. Loma Portal Civic Club v. American Airlines (1964) 61 C 2d 582, 591.

51. People v. Symons, supra, 54 C 2d at 862. This colorful judicial expression pales when placed next to the jeremiads of condemnors. I am currently involved in an inverse condemnation case in which the State has solemnly informed the court that if the court allows compensation to admittedly damaged neighbors of a freeway, the State will be forced to close "many existing roads" rather than "pay tribute". "Urban self-strangulation" was darkly predicted, and the end of "urban civilization" foreshadowed. I submit that the fact that an agency of this enlightened state feels free to peddle such utter fatuity to the courts should of itself be cause for concern to the Commission when it examines inverse condemnation law.

52. See Albers v. County of Los Angeles, supra, 62 C 2d at 262.

53. A member of the public assumes his proper share of the cost of public improvements when he pays his taxes. See Louisville etc. Bank v. Radford (1935) 295 US 555, 602; 79 L Ed 1593, 1611.

54. Armstrong v. U.S. (1960) 364 US 40, 49; 4 L Ed 2d 1554, 1561.

55. Clement v. State Reclamation Board (1950) 35 C 2d 628, 641..

56. Albers v. County of Los Angeles, supra, 62 C 2d at 263. Note that this is the same policy principle found in litigation among private parties: where an instrumentality which is the cause of damage, generally constitutes a benefit to someone, the economic burden is spread among those who benefit from the cause of the injury. This is the case in defective product liability (Greenman v. Yuba Power Products (1963) 59 C 2d 57), medical malpractice (Clark v. Gibbons (1967) 66 C 2d____, 66 AC 409, 429), the exercise of constitutionally protected freedom of the press (Curtis Publ. Co. v. Butts (1967) ___US___, 18 L Ed 2d 1094,1106), and in the field of equitable liens (Pacific Ready Cut Homes v. Title Insurance & Trust Co. (1932) 216 C 447, 452).

57. "com·pen·sā'tion, ... that which is given as an equivalent for...loss"
"com'pen·sāte, ... to give equal value to..."
Webster's New 20th Century Dictionary (Unabridged), 2nd Ed., p.370.

58. The "just compensation" command of the Fifth Amendment is, of course, binding on the states through the due process clause of the 14th, as a constitutional guarantee of a "fundamental nature". (See Gideon v. Wainwright (1963) 372 US 335, 341-342; 9 L Ed 2d 799, 803-804). Indeed, the case so holding was the first instance of the incorporation doctrine (Chicago B. & Q. R. Co. v. Chicago (1897) 166 US 226, 238-239; 41 L Ed 979; 985); it was explicitly embraced by California decisions (See Marin Municipal Water District v. Marin etc. Water Co. (1918) 178 C 208, 314).

59. U.S. v. Virginia P & E Co. (1961) 365 US 624, 631; 5 L Ed 2d 838, 846.

60. See People v. Lynbar, Inc. (1967) 253 CA 2d___, 253 ACA 969, 978 and 981; U.S. v. Citrus Valley Farms, Inc. (1965, 9th Cir.) 350 F 2d 683, 688.

61. See U.S. v. Cors (1949) 337 US 325, 332; 93 L Ed 1392, 1398.

62. "...it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." Watson v. Memphis (1963) 373 US 526, 537; 10 L Ed 2d 529, 539.

63. I once had a judge say to me: "I know, it's very unjust to your client, but that's all she can get as just compensation".

64. For example: "... but it is not for us to change the established law". Los Gatos v. Sund (1965) 234 CA 2d 24, 28.

65. Cardozo, "The Growth of the Law", p. 66, Yale University Press, 1924.

66. Having heard this trite platitude ad nauseam, I must record here my observation that those who habitually intone it, get to enjoy the progress without having to pay the price.

67. Van Alstyne, "Inverse Condemnation" Part 2, p.3.

68. Typically, this occurs where undeveloped land winds up near an interchange, or where a whole suburban area is connected to the city and thus becomes suitable for commercial subdivision. For an illuminating example of such phenomena, see Jordan, "Our Growing Interstate Highway System", 133 National Geographic, 195, 210-214, (Feb. 1968)

69. Similar schemes heve been experimented with in Britain. See Mandelker, "Controlling Land Values in Areas of Rapid Urban Expansion", 12 UCLA Law Rev. 734 (1965).

70. People v. Chevalier (1959) 52 C 2d 299. It is worthy of note that other jurisdictions have made the statutory criterion of greatest public good and least public injury meaningful, with direct and favorable economic consequences to the state, albeit achieved over the state's objections. See State Highway Commission v. Danielson (1965) 146 Mont 539, 409 P 2d 443. I cannot resist observing that Montana's big sky did not fall following Danielson's holding that the highway builders are required to obey the law rather than merely being required to say that they obeyed the law.

71. People v. Chevalier, supra, 52 C 2d at 307.

72. See People v. Nyrin (1967) 256 CA 2d ___, 256 ACA 308, 318-319.

73. See Houghteling, "Confessions of a Highway Commissioner", Cry California, Spring 1966, p.29.

74. People v. Chevalier, supra 52 C 2d at 307 [7]. In this connection I also experience difficulty in perceiving how a carte blanche for governmental "fraud, bad faith and abuse of discretion" can be made compatible with the fundamental notion of fairness embodied in the Constitution, or serve any legitimate governmental purpose.

75. The enormity of the power vested in the California Highway Commission is brought into sharp focus when one bears in mind that the acts of the President of the United States to avert a national catastrophe in a wartime emergency are judicially reviewable. See Youngstown Sheet & Tube Co. v. Sawyer (1952) 343 US 579; 96 L Ed 1153. (To say nothing of our own Governor purporting to act in defense of the fisc. See Morris v. Williams (1967) 67 AC 755). Incredibly, the vast, unchecked power bestowed on the Highway Commission is largely unexercised by those to whom it has been entrusted. Instead, it appears to have been usurped by those whom the Highway Commission is supposed to supervise. This harsh judgment has been candidly expressed by a Highway Commissioner: "What actually exists is a condition wherein the inmates run the asylum,..." Houghteling,

op. cit., p.29. (italics, the author's). I urgently commend Mr. Houghteling's article in its entirety to the reader - it provides an insight into the ways in which the Highway Commission operates, which can only be described as frightening.

76. See Boston Chamber of Commerce v. Boston (1910) 217 US 189, 195; 54 L Ed 725, 727.

77. Pennsylvania Coal Co. v. Mahon (1922) 260 US 393, 416; 67 L Ed 322, 326.