

#36.30

5/26/70

Memorandum 70-55

Subject: Study 36.30 - Condemnation (The Right to Take--Substitute
Condemnation)

One aspect of the "right to take" which should be covered in the Comprehensive Statute dealing with eminent domain is the extent to which a condemnor (A) desiring to condemn B's property should be permitted to also condemn C's property to exchange for the property taken from B. The transaction is called substitute condemnation. The Commission has previously considered this topic and tentatively approved certain draft sections to deal with it. Those sections, with newly drafted commentary, are attached hereto as Exhibit I (pink). Also attached is a copy of a law review note, previously distributed for background purposes, which we expect you will wish to reread at this time (Exhibit II (yellow)).

At the June 1970 meeting we hope Sections 410 through 413 can be approved (with any desired revisions) for inclusion in the Comprehensive Statute. Section 410 is simply a definitional section. Section 411 authorizes substitute condemnation where B's property has been and will be devoted to a public use. One feature of this section--noted in the Comment thereto--is that A in this situation may be permitted to condemn for a purpose that normally would not justify condemnation by either A or B. The staff believes that this anomaly can be justified, but we believe that you will wish to consider the issue. Section 412 authorizes substitute condemnation where "justice requires" it, but B's property has not been and will not be devoted to a public use. See also Comprehensive Statute Section 415 (condemnation to provide access to public road).

Both Sections 411 and 412 refer to the effect of the resolution authorizing the taking under these sections. Assuming the policy reflected in these provisions is unchanged, the staff believes that both these sections can be drafted more artfully and explicitly after the Commission has approved the sections dealing with necessity generally. Section 413 for the time being preserves other statutory sources of substitute condemnation authority. We would expect eventually that Chapter 6 would supersede these other provisions and a note to this effect has been added to this section.

At the June 1970 meeting, we hope that all of these sections can be carefully reviewed and tentatively approved.

Respectfully submitted,

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The Right to Take

Chapter 6. Substitute Condemnation

§ 410. Definitions

410. As used in this chapter:

(a) "Necessary property" means property to be used for a public use for which the public entity is authorized to acquire property by eminent domain.

(b) "Property to be exchanged" means property to be exchanged for necessary property.

Comment. Section 410 provides definitions useful in applying the "substitute condemnation" provisions contained in this chapter. Briefly stated, "substitute condemnation" involves the following type of situation: A decides to condemn B's real property (the "necessary property"). A and B agree that B shall be compensated in whole or in part by other real property (the "property to be exchanged") rather than money. A condemns C's real property (the "property to be exchanged") to compensate B. See generally Note, Substitute Condemnation, 54 Cal. L. Rev. 1097 (1966). The A, B, C model will be used throughout this chapter. See Sections 411 and 412 and Comments thereto.

The Right to Take

§ 411. Condemnation of property to be exchanged for property already devoted to public use

411. (a) A public entity may acquire by eminent domain property to be exchanged if:

(1) The person with whom the property is to be exchanged has agreed in writing to such exchange; and

(2) The necessary property is devoted to or held for some public use and the property to be exchanged will be devoted to or held for the same public use.

(b) If a public entity is required by agreement or by a judgment in a condemnation action to relocate any street, road, highway, railroad, canal, public utility facility, or other property subject to or devoted to public use, the public entity may exercise the right of eminent domain to acquire such property as is reasonably necessary to permit it to comply with such agreement or judgment.

(c) The resolution, ordinance, or declaration authorizing the taking of property under this section shall specifically refer to this section and shall recite a determination by the officer or body adopting the resolution, ordinance, or declaration that the property is necessary for the purpose specified in subdivision (a)

COMPREHENSIVE STATUTE § 411

Staff recommendation

or (b) of this section. The determination in the resolution, ordinance, or declaration that the taking of the property to be exchanged is necessary is conclusive.

Comment. Section 411 authorizes A to condemn C's property (and convey it to B) where B has agreed in writing to such exchange, B's original property was devoted to some public use, and C's property after the exchange will be devoted to the same use. In short, B's property is taken for one public use and C's property for another. Generally speaking, B will have the right of eminent domain to accomplish the same end so that the authority provided here is simply a shortcut to an identical result. See, e.g., Langenau Mfg. Co. v. City of Cleveland, 159 Ohio St. 525, 112 N.E.2d 658 (1953)(relocation of railroad by municipality); Tiller v. Norfolk & W. Ry., 201 Va. 222, 110 S.E.2d 209 (1959)(relocation of state highway by railroad). See generally Note, Substitute Condemnation, 54 Cal. L. Rev. 1097, 1099-1100 (1966).

However, in rare instances, although B's property is devoted to a public use, B will not have the right of eminent domain to replace it. For example, under ordinary circumstances, neither A nor B would have the power to condemn land to be held as "open space." See Govt. Code § 6952. Nevertheless, Section 411 authorizes A to condemn property of C to be held by B as "open space" without being subject to the limitations of Section 412.

Memorandum 70-55

COMPREHENSIVE STATUTE § 411

Staff recommendation

That is, A would not be required to show that "justice requires" the substitute condemnation, C's property would not have to be located immediately near A's project, and so on. Moreover, A's determination that the taking of C's property was "necessary" would be conclusive. Compare Section 411(c) with Section 412(b).

The Right to Take

§ 412. Condemnation of property to be exchanged for property not already devoted to public use

412. (a) A public entity may acquire by eminent domain property to be exchanged if:

(1) The owner of the necessary property has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by the property to be exchanged rather than by money;

(2) The property to be exchanged is to be exchanged for property needed for a public improvement and is adjacent to or in the immediate vicinity of the public improvement; and

(3) Taking into account the relative hardship to both owners, it is not unjust to the owner of the property to be exchanged that his property be taken so that the owner of the necessary property may be compensated by the property to be exchanged rather than by money.

(b) The resolution, ordinance, or declaration authorizing the taking of property under this section shall specifically refer to this section and shall recite a determination by the officer or body adopting the resolution, ordinance, or declaration

that the property is necessary for the purpose specified in this section. The public entity has the burden of proof as to the facts that justify the taking of the property. However, the resolution, ordinance, or declaration creates a presumption that the taking of the property to be exchanged is justified under this section. This presumption is a presumption affecting the burden of producing evidence.

Comment. Section 412 authorizes substitute condemnation where B's property is not devoted to a public use but special circumstances make it just that B be compensated in land rather than money. One more common example of such substitute condemnation is a taking to provide access to a public road from property cut off from access by A's original acquisition. This situation is provided for specifically by Section 415. See Section 415 and the Comment thereto. However, similar situations may arise where private, i.e., nonpublic utility, railroads serving mining, quarrying, or logging operations, belt conveyors, or canals and ditches, are displaced by a public improvement. In the latter situation, Section 412 authorizes condemnation of C's property for exchange for B's property where, taking into account the relative hardship to B and C, justice requires such action. In contrast to the procedure under Section 411, the resolution authorizing the taking under this section is not conclusive, the necessity for the taking is justiciable, and A has the burden of proof of showing that the facts justify the taking of C's property. Compare Section 412(b) with Section 411(c).

The Right to Take

§ 413. Special statutes not affected

413. This chapter does not limit any authority a public entity may have under any other provision of law to acquire property for exchange purposes nor does it limit any authority a public entity may have to acquire, other than by eminent domain, property for exchange purposes.

Note: It is intended at this time that Chapter 6 (Substitute Condemnation) will eventually be the sole statutory authority for substitute condemnation and that all other provisions dealing with the subject will be repealed. The first clause of Section 413 will have accordingly limited, interim significance.

SUBSTITUTE CONDEMNATION

The command of the Fifth Amendment is that "private property" shall not be taken "for public use without just compensation." This means that government cannot take the property of Jones and give it to Smith, as some rulers once did. The purpose of the taking must be "for public use."¹

A decides to condemn *B*'s land; *A* and *B* agree that *B* shall be compensated in land instead of money; *A* condemns *C*'s land and conveys it to *B*. Such a transaction, called substitute condemnation or compensation by substitution,² is authorized by California statute.³ 1965 amendments to the Streets and Highways Code extend the power to condemn substitute land to county boards of supervisors.⁴ Most of these California statutes have not been interpreted by the courts. This Comment considers the circumstances in which substitute condemnation can occur, the limitations on the use of the power, and the relation between substitute condemnation and the California law of eminent domain. For uniformity the transaction described above—*A* as the condemner, *B*, the first condemnee, *C*, the ultimate condemnee—will be used throughout as a model.

The power of eminent domain is a power of the sovereign, inherent in and inseparable from the idea of sovereignty.⁵ Constitutions, therefore, do not grant the power;⁶ they limit its exercise.⁷ The United States and California constitutions limit the exercise of eminent domain in two ways: A taking must be for a public use, and just compensation must be paid for the taking.⁸ In any particular condemnation, these issues are justiciable.

¹ DOUGLAS, *A LIVING BILL OF RIGHTS* 57 (1961).

² 2 NICHOLS, *EMINENT DOMAIN* § 7.226 (Rev. 3d ed. 1965); *Herr v. City of St. Petersburg*, 114 So. 2d 171, 174 (Fla. 1959); see Annot., 68 A.L.R. 442 (1930).

³ CAL. STRTS. & HIGHW. CODE §§ 104(b), 104.2; CAL. WATER CODE §§ 253, 255.

⁴ CAL. STRTS. & HIGHW. CODE §§ 943(a), 943.2, 943.4.

⁵ *Kohl v. United States*, 91 U.S. 367, 371-72 (1875); *People ex rel. Dep't of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959); *Gilmer v. Lime Point*, 18 Cal. 229, 251 (1861).

⁶ See authorities cited in note 5 *supra*.

⁷ *Gilmer v. Lime Point*, 18 Cal. 229, 251 (1861).

⁸ U.S. CONST. amend. V, amend. XIV, § 1; CAL. CONST. art. I, § 14. Although neither constitution says specifically that property shall be taken only for a public use, that interpretation is firmly established. See CAL. CODE CIV. PROC. § 1237; *Cole v. La Grange*, 113 U.S. 1 (1885); 2 NICHOLS, *op. cit. supra* note 2, at § 7.1[2]. Due process of law requires that private property be taken under the power of eminent domain only for a public use. *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 158 (1896); *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896). Due process also requires that property cannot be taken without just compensation. *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 671 (1935).

I

PUBLIC USE

In a dispute concerning substitute condemnation, C, the ultimate condemnee, will presumably argue that his land has not been taken for a public use.⁹ Historically, two distinct meanings have been given the phrase "public use."¹⁰ The first involves the use-by-the-public test. According to this view, a use is public if the public is entitled to actively use the property taken.¹¹ The second interpretation is that public use denotes public advantage: If the activity on the land promotes the general welfare of the public, the activity constitutes a public use.¹² The latter test is now used by many courts;¹³ the United States Supreme Court, for example, discarded the use-by-the-public test in 1916.¹⁴ Although California appears to have adopted the public benefit test early in its history,¹⁵ language in some opinions suggests that the use-by-the-public test was also followed.¹⁶ The public benefit test is, however, the view accepted today.¹⁷

⁹ Conceivably, C may argue as well that the taking is not "necessary." One writer has said: "The decision of the administrative agencies or officials includes the determination of the question as to whether an eminent domain action shall be resorted to for the acquisition of the property, the time when the eminent domain action shall be brought, the wisdom or feasibility of the project for which the property is taken, the extent or amount of property to be taken for the project, the nature of the estate to be taken, the kind of property taken, and the choice of the tract or tracts to be taken. These questions may be lumped together conveniently and be called the determination of necessity." Lavine, *Extent of Judicial Inquiry Into Power of Eminent Domain*, 28 So. CAL. L. REV. 369, 371 (1955). C's contention that he must be allowed to argue that the taking is not necessary will be discussed at a later point. See notes 117-18 *infra* and accompanying text. Since C is arguing that his land should not be taken at all, for him the issue of just compensation is irrelevant here.

¹⁰ See 2 NICHOLS, *op. cit. supra* note 2, at §§ 7.2-7.2[3]; Gravelly Ford Canal Co. v. Pope & Talbot Land Co., 36 Cal. App. 556, 178 Pac. 150 (1918).

¹¹ Gravelly Ford Canal Co. v. Pope & Talbot Land Co., *supra* note 10; see 2 NICHOLS, *op. cit. supra* note 2, at § 7.2[1].

¹² Bauer v. County of Ventura, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955): "Public use' within the meaning of section 14 [of Article I of the California constitution] is defined as a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government."

¹³ See 2 NICHOLS, *op. cit. supra* note 2, at § 7.2.

¹⁴ Mt. Vernon Cotton Co. v. Alabama Power Co., 240 U.S. 30 (1916).

¹⁵ See Gilmer v. Lime Point, 18 Cal. 229, 255 (1861), where it is said: "The only test and criterion of the admissibility of the power [of eminent domain] are that the particular object tends to promote the general interest, in its relation to any legitimate object of government."

¹⁶ See, e.g., Gravelly Ford Canal Co. v. Pope & Talbot Land Co., 36 Cal. App. 556, 562-63, 178 Pac. 150, 153 (1918), where the two interpretations of public use are discussed and the stricter applied.

¹⁷ See Housing Authority v. Dockweiler, 14 Cal. 2d 437, 450, 94 P.2d 794, 801 (1939). In Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 803-03, 266 P.2d 105, 122, *cert. denied*, 348 U.S. 897 (1954), it was said: "It might be pointed out that as our community life

II

SUBSTITUTE CONDEMNATION IN OTHER JURISDICTIONS

The cases which have allowed substitute condemnation can be divided into two groups, according to the activity *B* will conduct on *C*'s land. From these groups come two different concepts of substitute condemnation.

A. The Two-Use Doctrine

It is best to begin with cases which fit clearly within traditional notions of public use. In *Tiller v. Norfolk & W. Ry.*,¹⁸ *A* was a railroad seeking to acquire a portion of a state highway. *A* agreed with *B*, the state of Virginia, that *A* would condemn a portion of *C*'s land for the relocation of the highway. *C* argued that no Virginia statute authorized a taking of land which was not for the condemnor's own public use. The Supreme Court of Appeals held that, under certain extraordinary conditions where *B* could be adequately compensated only by an exchange of lands, substitute condemnation was permissible.¹⁹ The court noted, however, that the State could have condemned the property under statutory authority,²⁰ and that a highway is itself a public use.²¹

This rationale for substitute condemnation may be called the two-use doctrine. *B*'s land is taken for one public use, and *C*'s land for another, separate public use. Although the transaction in *Tiller* was cast in the form of compensation, the proposed use of *C*'s land justified a taking by *B* whether or not *A*'s use of *B*'s land was public. Thus it may be postulated: *A*'s taking of *C*'s land to compensate *B* is justified if *B*'s activity on *C*'s land will itself constitute a public use.

This conclusion was expressed by the Supreme Court of Ohio in *Langenau Mfg. Co. v. City of Cleveland*,²² a case where *A* was a municipality and *B* a railroad: "If the city of Cleveland [*A*] does not have

becomes more complex, our cities grow and become overcrowded, and the need to use for the benefit of the public areas which are not adapted to the pressing needs of the public becomes more imperative, a broader concept of what is a public use is necessitated. Fifty years ago no court would have interpreted under the eminent domain statutes, slum clearance even for public housing as a public use, and yet, it is now so recognized."

¹⁸ 201 Va. 222, 110 S.E.2d 209 (1959).

¹⁹ *Id.* at 226, 110 S.E.2d at 213. See also *Foley v. Beach Creek Extension R.R.*, 283 Pa. 583, 129 Atl. 845 (1925) (relocation of a state highway by a railroad); *cf. Rangely v. Midland Ry.*, [1868] L.R. 3 Ch. 306 (C.A.), where a landowner sold land to a railway and agreed that the company might purchase any land adjoining that sold which was required for the purposes of the railway. The Court of Appeal in Chancery held that this agreement allowed the railway to take lands for the relocation of a public footpath, though the company's compulsory powers had expired.

²⁰ VA. CODE ANN. § 33-32 (1950).

²¹ 201 Va. at 229, 110 S.E.2d at 215.

²² 159 Ohio St. 325, 112 N.E.2d 658 (1953).

authority to appropriate the land upon which the Nickel Plate [*B*'s] tracks are to be relocated, the railroad has the power to do so.²³ Because the rule for compensation was the same whether *A* or *B* brought the action, the court found that *C* was not prejudiced by the fact that *A*, rather than *B*, initiated the action.²⁴

The two-use doctrine has also been applied to secondary takings of a less conventional nature. In *McLean v. City of Boston*,²⁵ houses removed in the course of a city improvement were relocated on *C*'s land. *A*, the city, then sold *C*'s land in parcels either to the various *B*'s, the former occupants of the houses, or to the public at auction. The court reasoned that since there was an acute shortage of housing, the taking was for a public use.²⁶ Although the result may be understood as an application of the two-use doctrine, *McLean* is unconventional because *B*'s activity on *C*'s land is not normally considered a public use. Emergency conditions may, as the court held, convert a private use into a public use;²⁷ the case might be interpreted as indicating that compensation by substitution was needed if *B* was to be made whole. The taking in *McLean* may therefore be justified under a theory different from the two-use doctrine.

B. The Incident-to Taking

If *B* will not conduct an activity on *C*'s land which itself constitutes a public use, different reasoning is needed to support the taking. In *Pitznogle v. Western Md. R.R.*,²⁸ *A*, a railroad, condemned portions of *B*'s land and *C*'s land, and in the process took a private road which connected *B*'s land with a turnpike. *A* proposed to compensate *B* by providing him with a new road across *C*'s land. The Court of Appeals of Maryland held that:

²³ *Id.* at 534, 112 N.E.2d at 662.

²⁴ *Ibid.* See also *Fitzsimons & Galvin, Inc. v. Rogers*, 243 Mich. 649, 220 N.W. 881 (1928), another case involving the relocation of a railroad. The Michigan Supreme Court reasoned that since it was well settled that a railroad could take land for such purposes, "it can not be said that the power of eminent domain is here being used for the purpose of condemning the property of one person for the private use of another." *Id.* at 662, 220 N.W. at 885. See also *United States v. 10.47 Acres of Land*, 218 F. Supp. 730 (D.N.H. 1962) (acquisition by the United States of a substitute water supply for a town); *Kelmar v. District Court*, 269 Minn. 137, 130 N.W.2d 228 (1964) (relocation of a river channel); *State of Missouri ex rel. State Highway Comm'n v. Eakin*, 357 S.W.2d 129 (Mo. 1962) (relocation of a pipeline); *Rogers v. Bradshaw*, 20 Johns. R. 735 (Ct. Err. N.Y. 1823) (relocation of a turnpike); *Weyel v. Lower Colorado River Authority*, 121 S.W.2d 1032 (Tex. Civ. App. 1938) (relocation of a power line owned by a public utility).

²⁵ 327 Mass. 118, 97 N.E.2d 542 (1951).

²⁶ *Id.* at 121, 97 N.E.2d at 544. See also *Watkins v. Ughetta*, 273 App. Div. 969, 78 N.Y.S.2d 393, *aff'd*, 297 N.Y. 1002, 80 N.E.2d 457 (1948).

²⁷ *McLean v. City of Boston*, 327 Mass. 118, 121, 97 N.E.2d 542, 544 (1951).

²⁸ 119 Md. 673, 87 Atl. 917 (1913).

[T]he condemnation of a part of this land, here sought to be condemned, for a substitute private road or way is *incident to and results from* the taking, by reason of public necessity, of the existing private road for public use, and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution.²⁹

Had another road not been substituted, *B* would not have been able to condemn *C*'s land himself, even though he might have been landlocked.³⁰

Pitznogle thus holds that *A* may use substitute condemnation to compensate *B*, although *B* may be a private individual who lacks the power of eminent domain, if the taking of *C*'s land is "incident to and results from" the taking of *B*'s land.

In *Brown v. United States*,³¹ the federal government proposed to dam the Snake River in Idaho. The reservoir thus created would flood the town of American Falls. Pursuant to an Act of Congress,³² the government condemned *C*'s land on the outskirts of town for a new town site. The Supreme Court held this taking was for a public use: "The acquisition of the town site was so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project that the *public use of the reservoir covered the taking of the town site.*"³³ It was "natural and proper"³⁴ to relocate the town, the Court said, when compensation of those injured was so difficult.³⁵ A town is greater than the sum of its parts. Approving *Pitznogle*,³⁶ the Court based its decision on the connection between the taking of *C*'s land and the use to be made of *B*'s land. It did not discuss the possibilities that *B* could have condemned *C*'s land itself, or that *B*'s use of *C*'s land was a separate public use, but reasoned that the public use of the first taking served the second taking too.³⁷

A similar question had been presented to the Supreme Judicial Court of Massachusetts thirteen years before *Brown*: whether *A*, the State, in condemning land for a highway, could also condemn abutting land which it would sell to private persons.³⁸ In an advisory *Opinion of the Justices*,

²⁹ *Id.* at 679, 87 Atl. at 919-20. (Emphasis added.)

³⁰ *Ibid.*

³¹ 263 U.S. 78 (1923).

³² Sundry Civil Act, 41 Stat. 1367, 1403 (1921).

³³ 263 U.S. at 81. (Emphasis added.)

³⁴ *Ibid.*

³⁵ *Id.* at 82.

³⁶ *Id.* at 83.

³⁷ The Court analogized the taking of the plaintiff's land to a railroad's taking of property which will be used to supply dirt for embankments. In both cases, according to the Court, the condemnor's public use justified the taking of additional land. *Id.* at 81-82.

³⁸ *Opinion of the Justices*, 204 Mass. 607, 91 N.E. 405 (1910). The area which the

the court held that such a purpose was not public,³⁹ even though the activity would incidentally benefit the city and state.⁴⁰ The United States Supreme Court in *Brown* distinguished this *Opinion* by finding the relocation of American Falls to be a "necessary step in the improvement,"⁴¹ and not merely an attempt by the government to reduce costs by land speculation.⁴² Thus *Brown* stands for the proposition that *A's* use of *B's* land, if public, may justify the taking of *C's* land to compensate *B*, if such taking is a "necessary step" in *A's* improvement.⁴³

The Supreme Court treated substitute condemnation again in *Dohany v. Rogers*.⁴⁴ *A*, the State of Michigan, was widening a highway which adjoined a railroad right of way. The right of way was taken, and, as a statute provided,⁴⁵ the railroad was given a portion of *C's* land, which *A* also condemned. The Court held that *C's* land was taken for a public use, but did not decide whether the land was taken for highway or railway purposes: "It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public highway as to be for a public use."⁴⁶ *Brown v. United States* was cited as authority for this proposition.⁴⁷ Although the Court in *Dohany* used the incident-to rationale, the two-use doctrine could have been used with equal facility.⁴⁸

A variation of the incident-to doctrine was used to uphold a substitute condemnation in *Smouse v. Kansas City So. Ry.*,⁴⁹ a case in which

legislature sought to condemn consisted of many odd, irregularly shaped parcels; the legislature proposed to convert it to a trade center, with modern, mercantile buildings.

³⁹ *But cf. McLean v. City of Boston*, 327 Mass. 118, 97 N.E.2d 542 (1951); see notes 25-27 *supra* and accompanying text.

⁴⁰ 204 Mass. at 611, 91 N.E. at 407.

⁴¹ 263 U.S. at 84.

⁴² *Ibid.*

⁴³ The designation "necessary step" should be distinguished from the concept of the necessity of the taking. See notes 117-18 *infra* and accompanying text.

⁴⁴ 281 U.S. 362 (1930).

⁴⁵ Mich. Pub. Acts 1925, ch. 215.

⁴⁶ 281 U.S. at 366.

⁴⁷ *Ibid.*

⁴⁸ In *Fitzsimons & Galvin, Inc. v. Rogers*, 243 Mich. 649, 220 N.W. 881 (1928), a case arising out of the same transaction involved in *Dohany v. Rogers*, the Michigan Supreme Court decided the substitute condemnation was valid by means of the two-use doctrine. See also *Feltz v. Central Nebraska Pub. Power & Irr. Dist.*, 124 F.2d 578 (8th Cir. 1942), where *A*, a Federal Power Act licensee with the power of eminent domain, condemned a portion of *C's* land to relocate a United States Highway taken by *A* in the construction of a dam on the North Platte. The Eighth Circuit appeared to follow *Brown*, holding that the taking of *C's* land was "accessory to" and "in conjunction with" the original improvement. *Id.* at 582. The court was not, however, unmoved by the fact that *B's* activity would itself constitute a public use. *Ibid.*

⁴⁹ 129 Kan. 176, 282 Pac. 183 (1929).

A was a railroad and *B* a quartz company. *A* sought to condemn for railroad purposes a portion of *C*'s property which included a pipeline and highway easement owned by *B*. *A* and *B* agreed that *A* would take an additional strip from *C* to compensate *B* for the loss of his easement. *C* complained that this additional strip was taken for a private use, but the Kansas court held that although that part of the taking might have been for a private purpose, the condemnation would not be defeated if the private use was *inconsequential* compared to the public use, or so subordinate to the public use as to be an incident of it.⁶⁰

The court in *Smouse* considered the alternatives open to *A* and found that substitution in kind was the most practical.⁶¹ This issue was raised because *C* alleged that *A*'s officials acted in bad faith in finding it necessary to take the strip. The Kansas statute⁶² provided that a railroad could condemn land deemed necessary for sidetracks and yards, but did not expressly authorize the taking of land for the compensation of another condemnee.

The *Smouse* holding is a variation on the incident-to rationale, as expounded in *Pitznogle* and *Brown*, in that the different character of *B*'s use of *C*'s land was recognized. The court did not hold that *B*'s use of the land taken was itself a public use, or that land taken for the purpose of compensating another condemnee is taken for a public use. These ideas are, however, latent in the opinion. The decision is also important because *A* is allowed, in effect, to condemn substitute land without specific statutory authority. The taking of *C*'s land is justified by *A*'s primary purpose in taking either the land of *B* or *C*: The first public use serves two takings, even though the second taking is not within the letter of the statute.⁶³

⁶⁰ *Id.* at 186, 282 Pac. at 187-88. (Emphasis added.)

⁶¹ *Id.* at 185, 282 Pac. at 187.

⁶² Kan. Laws 1864, ch. 124, § 1, at 256, repealed by Kan. Laws 1963, ch. 234, § 103, at 450.

⁶³ *But see* *Commonwealth v. Peters*, 2 Mass. 125 (1806). *B*, one Abraham Lincoln, had erected a dam on a stream to raise a pond for his mill. Proposed highway alterations would make *B*'s dam worthless. *A* agreed to build a new dam for *B* on land used for that part of the highway which was to be discarded, the title to which was in *C*. The Supreme Judicial Court of Massachusetts held that *B* could be compensated only in money. One Justice also thought that *A* had no title to convey, since it had taken only an easement from *C* which terminated when the land was no longer used as a road.

It appears that *B* was related to the President of the same name through one Samuel Lincoln, their nearest common ancestor, who emigrated from England to Massachusetts in 1637. *B* was a supervisor of the revenue for Worcester County, chairman of the selectmen of the town, and a representative in the State Legislature from 1809 to 1823. He is described as having been fond of fun and given somewhat to practical jokes. *C* in this case was one Anna Bigelow, apparently *B*'s mother-in-law. See LEA & HUTCHINSON, THE AN-

C. Analysis

Cases involving substitute condemnation can be divided into two groups, according to the character of *B*'s activity. *C*, the ultimate condemnee, protests in each case that his land has not been taken for a public use. To decide whether he is correct, the theoretical justifications for substitute condemnation should be considered.

If the condemnation can be valid only if *B* will use *C*'s land in a way that benefits the public, the device is merely a combination of two ordinary condemnations. *B*'s land is taken for one public use and *C*'s land for another. Under the two-use doctrine it is a matter of no concern that *A* rather than *B* condemns *C*'s land.⁵⁴ Since the activity on *C*'s land constitutes a public use, the question of whether *A* can take *B*'s land is, as far as *C* is concerned, irrelevant.⁵⁵

If *B* will not conduct an activity which benefits the public, however, the theory is different. The cases which have validated takings of this kind have held that the second taking is *incident to* the taking of *B*'s land.⁵⁶ The second taking is considered as being part of the first transaction. According to this theory, the taking of *C*'s land is a *means* to an end—the end being the public use to which *A*'s improvement is devoted.⁵⁷ *C*'s land is, in other words, taken for the same purpose for which *B*'s land is taken; the fact that it will be used to compensate *B* means only that the relation to the desired end is indirect.

It cannot be denied, however, that *B*'s use of *C*'s land will be different than *A*'s use of *B*'s land. In an incident-to taking, it is not *B*'s use which justifies the condemnation. The *use* of the land which is beneficial is its use as a means of compensation. Yet this concept of use is novel in that it does not involve activity on the land. Normally, uses of land are considered public if the activity to be conducted there is beneficial.⁵⁸ The incident-to rationale may represent, therefore, an expansion of the idea of use beyond the confines of activity. One court, by distinguishing the taking from the subsequent use, has suggested this result: "The traditional concept of use as the keystone of eminent domain has been en-

CESTRY OF ABRAHAM LINCOLN 137 (1909); W. LINCOLN, HISTORY OF THE LINCOLN FAMILY 169-73 (1923).

⁵⁴ See *Fitzsimons & Galvin, Inc. v. Rogers*, 243 Mich. 649, 220 N.W. 881 (1928); *Langenau Mfg. Co. v. City of Cleveland*, 159 Ohio St. 525, 112 N.E.2d 658 (1953); *Tiller v. Norfolk & W. Ry.*, 201 Va. 222, 110 S.E.2d 209 (1959).

⁵⁵ See *Langenau Mfg. Co. v. City of Cleveland*, *supra* note 54.

⁵⁶ See *Dohany v. Rogers*, 281 U.S. 362 (1930); *Brown v. United States*, 263 U.S. 78 (1923); *Smouse v. Kansas City So. Ry.*, 129 Kan. 176, 282 Pac. 183 (1929); *Pitznogle v. Western Md. R.R.*, 119 Md. 673, 87 Atl. 917 (1913).

⁵⁷ See *Brown v. United States*, *supra* note 56, at 82.

⁵⁸ See, e.g., CAL. CODE CIV. PROC. § 1238.

larged in modern thought and cases. We find it described as public purpose. The variation in the term from 'use' to 'purpose' indicates a progression in thought. The idea is that the taking itself, as distinguished from the subsequent use of the property, may be required in the public interest.⁵⁹

The use of land as a means of compensation can be considered a public use if it is recognized that *C*'s land will fulfill *A*'s obligation to *B*. *A*'s obligation is, of course, to provide just compensation. If *B* can be justly compensated only if he is given *C*'s property, it follows that *A* can discharge his obligation only by taking *C*'s land. If *A* is a public body, *C*'s property is used to discharge a public obligation, a use that does not seem far afield from traditional notions of public use. If *A* is a private body invested with the power of eminent domain, it seems more difficult to conceive the discharge of his obligation as a public use. *A*'s obligation to *B* is, however, no weaker because *A* is a private body. The question in such a case is naked: whether it is more in the public interest that one whose property has been taken for a public use be justly compensated, or whether *C*, the only person from whom just compensation for *B* can be obtained, should be allowed to hold his property inviolate.⁶⁰

The discussion of compensation as a public use implies limitations

⁵⁹ *Schneider v. District of Columbia*, 117 F. Supp. 705, 716 (D.D.C. 1953), *aff'd as modified sub nom.*, *Berman v. Parker*, 348 U.S. 26 (1954). The District Court goes on to say: "That the Government may do whatever it deems to be for the good of the people is not a principle of our system of government. Nor can it be, because the ultimate basic essential in our system is that individuals have inherent rights, and as to them the powers of government are sharply limited. There is no general power in government, in the American concept, to seize private property. Hence it is universally held that the taking of private property of one person for the private use of another violates the due process of law clauses of the Fifth and Fourteenth Amendments." *Ibid.* The court cites *Coolley on Constitutional Limitations*, which states: "The right of eminent domain, it has been said, 'does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer.' It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right." 2 COOLLEY, CONSTITUTIONAL LIMITATIONS 1124-26 (8th ed. 1927). The use of land as a means of compensation does not, it is submitted, run afoul of either of these authorities. If it is accepted that the just compensation of *B* is in the public interest, then the taking of *C*'s property is justified if his land is the only means available of providing just compensation.

⁶⁰ Consider Jeremy Bentham's example: "I possess a piece of land from which I derive a considerable revenue, but which I can approach only by a road running along the edge of a river. The river overflows and washes away the road. My neighbour obstinately refuses me a passage along a strip of land which is not worth the hundredth part of my field. Ought I to lose my all through the caprice or hostility of an unreasonable neighbour? But to prevent the abuse of a principle so delicate, rigorous rules ought to be laid down. I say, then, that forced exchanges ought to be permitted to prevent a great loss, as in the case of a field rendered inaccessible except by a passage through another." BENTHAM, THE THEORY OF LEGISLATION 147-48 (Ogden ed. 1931).

on substitute condemnation. The limitations have not, however, been clearly defined. The taking of *C*'s land has been allowed where it was a "necessary step"⁶¹ in *A*'s improvement and substitution the "best means of making the parties whole,"⁶² where it was an essential part of *A*'s improvement,⁶³ where it was "incident to" the taking of *B*'s land,⁶⁴ where it was "inconsequential compared to the public use,"⁶⁵ and where it was a by-product of *A*'s project.⁶⁶

Generalizing from these holdings, it may be concluded that *C*'s land will be considered to have been taken for a public use when (1) there is a *close factual connection* between the two condemnations, and when (2) because of the exigencies of the factual situation, fairness requires that *B* be compensated in land.

The phrase "close factual connection" is offered as an expression descriptive of the meaning which courts have given the concept "incident to" and its corollaries. In all cases examined, *C*'s land was near *B*'s.⁶⁷ Geographic proximity would thus seem to be an element of the connection. Further, *C*'s land was in each case taken to replace *B*'s. The limitation of a close factual connection would require, therefore, that *C*'s land be in fact taken for the purpose of compensating *B*, and not merely for *A*'s convenience or *B*'s pleasure.⁶⁸

The second conclusion is that "incident-to" substitute condemnation should be limited to situations where fairness requires that *B* be compen-

⁶¹ *Brown v. United States*, 263 U.S. 78, 84 (1923).

⁶² *Id.* at 81.

⁶³ *Dohany v. Rogers*, 281 U.S. 362, 366 (1930).

⁶⁴ *Pitznogle v. Western Md. R.R.*, 119 Md. 673, 679, 87 Atl. 917, 919 (1913).

⁶⁵ *Smouse v. Kansas City So. Ry.*, 129 Kan. 176, 186, 282 Pac. 183, 187 (1929).

⁶⁶ *Luke v. Massachusetts Turnpike Authority*, 337 Mass. 304, 149 N.E.2d 225 (1958).

An easement was taken across the plaintiff's land to provide access to land deprived of its connection with a street by the construction of a highway. The Supreme Judicial Court of Massachusetts said: "If the easement or the private way should be viewed in the abstract, no public purpose would appear. Such an approach, however, would be closing the eyes to reality. The laying out of the turnpike the length of the Commonwealth and the acquisition of numerous sites essential to that object are attributes of one huge undertaking. Procuring an easement and creating a right of way for the benefit of parcels of land incidentally deprived of all or some means of access to an existing way are but a by-product of that undertaking." *Id.* at 309, 149 N.E.2d 228.

⁶⁷ See, e.g., the plats in *Pitznogle v. Western Md. R.R.*, 119 Md. 673, 676, 87 Atl. 917, 918 (1913), and *Smouse v. Kansas City So. Ry.*, 129 Kan. 176, 181, 282 Pac. 183, 185 (1929); cf. *State Highway Comm'n v. Morgan*, 248 Miss. 631, 160 So. 2d 77 (1964), where substitute condemnation was disallowed because the easement to be granted *B* would not connect with any easement of right vested in him, but only with a permissive use across *C*'s land which *C* could terminate at any time.

⁶⁸ For example, in a situation similar to that presented in the *Pitznogle* case, *supra* note 28 and accompanying text, the limitation of a close factual connection would not permit a substitute condemnation of *C*'s beach property in Los Angeles if *A* condemned *B*'s road in San Francisco.

sated in land. Such a suggestion forces a reassessment of the traditional idea that money can, in every case, be a "full and perfect equivalent" of the land taken.⁶⁹ By allowing substitute condemnation, the courts may have implicitly recognized that *C*'s bargaining position would be extraordinary if *B* were compensated in money and was still in need of *C*'s land.⁷⁰ The Supreme Court in *Brown v. United States* stressed the point that compensation in money would have been inadequate, and concluded that "a method of compensation by substitution would seem to be the best means of making the parties whole."⁷¹ Significantly, the Court did not conclude that compensation in money would have been impossible, for obviously compensation in money will be just to the condemnee in any case if the award is large enough. Thus the conclusion that substitution is the best means of making the parties whole would seem to be equivalent to holding that, because of the factual situation, it is more just that *C* receive money than *B*.

D. Compulsory Substitution

From the premise that incident-to substitute condemnation is limited to situations where *B* cannot otherwise be justly compensated, it follows that *B* should be able to compel *A* to take *C*'s land. No court has, however, reached this conclusion.

It is well settled that a condemnor cannot force a condemnee to accept compensation in a form other than money.⁷² The limitation that compensation must be pecuniary should, however, be considered only as a limitation on the condemnor. The rule is that compensation must be "a full and perfect equivalent for the land taken,"⁷³ it does not neces-

⁶⁹ *Monogahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893).

⁷⁰ Although *B* might be awarded the value of the parcel taken plus the damages to the remainder, *C* is under no compulsion to sell at this price. This result is not changed if *B* is awarded the difference between the fair market value of the property before and after the taking. Even if *B* is awarded the amount it would cost to obtain substitute land, *C* may still refuse to take that price. The dilemma results from the fact that *B* is a necessitous buyer and *C* the only seller. Unless *C* is compelled to sell, there can be no justice for *A* or *B*; either *B* will receive an inadequate award or *A* will be forced to pay an amount in excess of the true value of the land taken plus the damages to the remainder. The most equitable solution may be to force *C* to accept a fair price for his land. Substitute condemnation accomplishes this result. See 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §§ 47-65 (2d ed. 1953); 4 NICHOLS, EMINENT DOMAIN §§ 12.2-12.22[2] (Rev. 3d ed. 1965).

⁷¹ 263 U.S. at 82-83. (Emphasis added.)

⁷² See 3 NICHOLS, *op. cit. supra* note 70, at § 8.2.

⁷³ *Monogahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893): "The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import

sarily follow that equivalence may always be measured in dollars. Indeed, if *B* is situated so that substitute condemnation may be used, compensation in money must be inadequate.⁷⁴ *B* should therefore be able to compel *A* to take *C*'s land.

Compulsory substitute condemnation is arguably a breach of the separation of powers. As a power inherent in sovereignty,⁷⁵ eminent domain can be exercised only by the sovereign or his agents.⁷⁶ Were a court to compel the exercise of the power, or the particular manner of its exercise, the court would conceivably be acting as a legislature.⁷⁷ Secondly, it could be argued that "just compensation" denotes payment in money,⁷⁸ and that the cases requiring condemnors to pay money also require condemnees to accept it.⁷⁹

of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just'. There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

⁷⁴ See note 69 *supra* and accompanying text.

⁷⁵ *Kohl v. United States*, 91 U.S. 367, 371-72 (1875); *Gilmer v. Lime Point*, 18 Cal. 229, 251 (1861).

⁷⁶ See *People v. Superior Court*, 10 Cal. 2d 288, 295-96, 73 P.2d 1221, 1225 (1937): "It is a well established legal principle that although the power of eminent domain is inherent in sovereignty, nevertheless neither the state itself nor any subsidiary thereof may lawfully exercise such right in the absence of precedent legislative authority so to do."

⁷⁷ In holding that the necessity of a taking was not a justiciable issue, the California Supreme Court cited as examples of questions of necessity "the questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, [and] the necessity for taking particular property, rather than other property, for the purposes of accomplishing such public improvement . . ." *People ex rel. Dep't of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959). These questions were held to be exclusively for the legislature. *Ibid*; see notes 117-18 *infra* and accompanying text.

⁷⁸ *United States v. Miller*, 317 U.S. 369 (1943). In *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923), it was said: "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. . . . It rests on equitable principles, and it means substantially that the owner shall be put in as good a position pecuniarily as he would have been if his property had not been taken." See also *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 315 (C.C. Pa. 1795): "No just compensation can be made except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained. It is not only a sign which represents the respective values of commodities, but an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is, that land or any thing else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him." Compensation in land was in this case to be forced on *B*, not required of *A*.

⁷⁹ See *Chicago, M. & St. P. Ry. v. Melville*, 66 Ill. 329 (1872). See also *Railroad Co. v. Halstead*, 7 W. Va. 301 (1874), where jury awards which included duties on condemnors to build or maintain objects for the benefit of condemnees were overturned on the theory that the condemnor was obliged only to pay money. In *Hill & Aldrich v. The Mohawk & H.R.R.*, 7 N.Y. 152 (1852), an award to the defendants in a condemnation action brought by a railroad included an easement. There the court held that "privileges of this kind must de-

Despite these arguments, however, a denial of substitute condemnation will prevent *B* from being made whole, even if, by definition of the words, he is "justly compensated" when paid. It would be inconsistent to allow substitute condemnation where fairness requires it but not to compel it if *A* refuses. A court might be driven to perform an admittedly legislative function if the condemnor refuses to act.⁸⁰

III

SUBSTITUTE CONDEMNATION IN CALIFORNIA

A. Public Use

The power to designate what uses are public is vested in the California Legislature.⁸¹ For the power to be exercised, therefore, there must exist a legislative declaration that a proposed use is public.⁸² Whether a use is *in fact* public is ultimately decided by the courts,⁸³ although the legislative declaration is given great respect; any doubts are to be

pend upon the agreement of the parties. The [jury of] appraisers . . . [has] no color of authority in the premises. They could neither compel the corporation to make the grant, nor the owners to accept it." *Id.* at 157. In *Chicago, S.F. & C. Ry. v. McGrew*, 104 Mo. 282, 15 S.W. 931 (1891), the condemnor's proffered evidence that it had tendered a use of land to the condemnee was held to have been rightfully excluded: "[S]uch a reservation must have been by consent of both parties; neither could have been required to grant or accept them." *Id.* at 298, 15 S.W. at 935. See also *In re Morse*, 35 Mass. (18 Pick.) 443 (1836), where it was said that although damages could be awarded only in money, a ratification by the condemnee would validate an award in land.

⁸⁰ *But cf.* STAFF OF THE HOUSE COMM. ON PUBLIC WORKS, 87TH CONG., 1ST SESS., BACKGROUND OF NEED FOR REVIEW OF PROCEDURES IN, AND COMPENSATION FOR, REAL PROPERTY ACQUISITIONS 10 (Comm. Print 1961): "The suggestion that instead of compensating a person in dollars, for property taken, we should either provide a substitute or physically relocate his existing improvements, has heretofore been considered contrary to our basic concepts, with no duty on the Government to replace in kind that which it must take for public use. The Government's obligation to relocate facilities has been confined to roads and utilities, the continuance of which are in the public interest."

⁸¹ *Kern County High School Dist. v. McDonald*, 180 Cal. 7, 13, 179 Pac. 180, 183 (1919).

⁸² *People v. Superior Court*, 10 Cal. 2d 283, 295-96, 73 P.2d 1221, 1225 (1937); *Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, 32 Pac. 202 (1893). It has been recognized that, as a practical matter, condemnation must be left in the hands of agents of the state. See *Linggi v. Garovotti*, 45 Cal. 2d 20, 286 P.2d 15 (1955); *Moran v. Ross*, 79 Cal. 159, 160, 21 Pac. 547, 548 (1889). California has provided that private persons may, without further legislative action, as "agents of the state," exercise the power of eminent domain for the uses set forth in § 1238 of the Code of Civil Procedure. CAL. CIV. CODE § 1001; see *Linggi v. Garovotti*, *supra*.

⁸³ *Lindsay Irr. Co. v. Mehrtens*, *supra* note 82; *City of Menlo Park v. Artino*, 151 Cal. App. 2d 261, 267, 311 P.2d 135, 140 (1957); *University of So. Cal. v. Robbins*, 1 Cal. App. 2d 523, 37 P.2d 163 (1934), *cert. denied*, 295 U.S. 738 (1935); see *County of Los Angeles v. Anthony*, 224 Cal. App. 2d 103, 36 Cal. Rptr. 308, *cert. denied*, 376 U.S. 963 (1964).

resolved in favor of validity.⁸⁴ Courts are hesitant to disagree with the legislature because whether a particular use is public is largely a matter of political judgment, an area judges are loath to enter.⁸⁵ Thus the scope of review for the issue of public use is limited—confined, perhaps, to extreme cases.⁸⁶

Although California courts will examine the nature of a proposed use, they will not examine the necessity of a taking by the state, even if fraud, bad faith, or abuse of discretion is alleged.⁸⁷ According to the California Supreme Court, the legislature is the sole judge of necessity.⁸⁸

B. Statutory Authority for Substitute Condemnation

Several California statutes provide that land may be taken for the purpose of compensation by substitution. These statutes may be divided

⁸⁴ *In re Madera Irr. Dist.*, 92 Cal. 296, 309-10, 28 Pac. 272, 274 (1891); *accord*, *University of So. Cal. v. Robbins*, *supra* note 83.

⁸⁵ See, e.g., *Stockton & V. R.R. v. City of Stockton*, 41 Cal. 147, 168, 169-70 (1877): "Public use,' 'public purpose,' and 'public policy'—the policy upon which governmental affairs are conducted for the time being—is legislative policy in the main, and 'public use' and 'public purpose' are largely dependent on this policy—notoriously varying in our country, from time to time, with the accession to power of political parties, differing from each other as to the system of measures best adapted to promote the interest of the State. The resolve of a legislative body, by which a tax is imposed, or private property taken, is, therefore, necessarily a legislative determination, that a public use is to be promoted by the tax, or the taking directed; and such a determination is the determination of a merely political question by the political department of the Government. . . . A case might, indeed, be presented in which it might appear, beyond the possibility of a question, that a tax had been imposed, or the property of a citizen had been taken for a use or purpose in no sense public; or, in the language of Chancellor Walworth . . . 'where there was no foundation for a pretense that the public was to be benefited thereby,' and in such a case it would be our duty to interfere and afford relief. But should we interfere in any other than such a case, we would but substitute a policy of our own for the legislative policy in the conduct of the affairs of the State, and substitute our will for that of the representatives of the people."

⁸⁶ See *City of Santa Ana v. Harlin*, 99 Cal. 538, 542, 34 Pac. 224, 226 (1893); *County of Los Angeles v. Anthony*, 224 Cal. App. 2d 103, 106, 36 Cal. Rptr. 308, 310, *cert. denied*, 376 U.S. 963 (1964).

⁸⁷ *People ex rel. Dep't of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959). California Code of Civil Procedure § 1241 provides that when a taking is deemed necessary by the board of directors of various administrative districts, or by the legislative body of a county, city and county, or an incorporated city or town, such a determination is conclusive evidence of the public necessity of the improvement and that the property taken is necessary for such improvement, if the property taken is within the territorial limits of the political or administrative subdivision. In *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 (1923), the United States Supreme Court held that this statute did not violate the due process clause of the fourteenth amendment. The resolutions of the California Highway Commission and the California Water Commission are given similar conclusive effect. CAL. STREETS & HIGHW. CODE § 103; CAL. WATER CODE § 251.

⁸⁸ *People ex rel. Dep't of Pub. Works v. Chevalier*, *supra* note 87, at 307, 340 P.2d at 603; *Sherman v. Buick*, 32 Cal. 241, 253 (1867).

into two groups: (1) those which allow substitute condemnation between bodies in charge of different public uses; and (2) those which simply grant the power of substitute condemnation to governmental agencies.

Section 104.2 of the Streets and Highways Code is an example of the first group. It provides that if *A*, the Department of Public Works, condemns for state highway purposes land which under *B* is devoted to some other public use, *A* may, with *B*'s consent, condemn *C*'s land for *B*. *C*'s land will thus be used by *B* for its public use, and *A* will use *B*'s land for a state highway.⁸⁹

Section 104(b) of the Streets and Highways Code is representative of the second group of statutes. It allows *A*, the Department of Public Works, to acquire real property which the Department considers necessary for the purpose of exchanging it for other real property to be used for rights of way.⁹⁰ *A* may, in other words, condemn *C*'s land for *B*, whose property has been taken for a state highway.⁹¹

The statutes authorizing substitute condemnation have not been interpreted by the California appellate courts.⁹² It would appear, however, that the statutes of the first group pose no public use problems. They authorize takings which can be classified under the two-use doctrine.⁹³ *B*'s activity will constitute a public use of *C*'s land, and *A*'s use of *B*'s land will be public. *C* cannot complain, therefore, that because of substitute condemnation his land has not been taken for a public use, although he can object that *B*'s use of his property will not be public.⁹⁴ Since the fact that his land is taken through the process of substitute condemnation is for *C* irrelevant, it would seem that the rules which normally

⁸⁹ See also California Streets and Highways Code §§ 943.2, 943.4, enacted in 1965, which grant to county boards of supervisors similar powers with respect to county highway purposes and California Water Code § 255, which grants to the Department of Water Resources the power to condemn land for purposes of exchange with another person or agency in charge of a public use.

⁹⁰ See also California Streets and Highways Code § 943(a), which provides that a county board of supervisors may "acquire any real property or interest therein for the uses and purposes of county highways, including real property adjacent to property being condemned for the purpose of exchanging the same for other real property to be used for widening county highways." California Water Code § 253(b) grants the Department of Water Resources similar powers.

⁹¹ California Streets and Highways Code § 102 and California Water Code § 250 provide that the Department of Public Works and the Department of Water Resources, respectively, may exercise the power of eminent domain for any property they are authorized to acquire.

⁹² California Streets and Highways Code § 104.2 was discussed in a recent case, *People ex rel. Dep't of Pub. Works v. Garden Grove Farms*, 231 Cal. App. 2d 666, 42 Cal. Rptr. 118 (1965), but the issue was not properly before the court. *C*, the appellant, raised the issue of compliance with § 104.2 only in his closing brief, and the court thus disregarded the question.

⁹³ See discussion at notes 18-27 *supra* and accompanying text.

⁹⁴ See note 21 *supra* and accompanying text.

govern condemnation proceedings should be applicable to takings authorized by these statutes.

The statutes of the second group,⁹⁵ also uninterpreted, may be more troublesome. They authorize substitute condemnation but do not require that *B*'s use of *C*'s property be a separate public use. The statutes apparently contemplate takings of the type approved in *Brown v. United States*⁹⁶ and *Pitznogle v. Western Md. R.R.*⁹⁷

As suggested earlier in this Comment, this type of substitute condemnation should be restricted to cases where (1) there is a close factual connection between the two takings, and (2) because of the factual situation, fairness requires that *B* be compensated in land.⁹⁸

Perhaps some support for this conclusion may be found in a 1939 amendment to section 104(b) of the Streets and Highways Code. The amendment deleted the former second sentence, which read: "Real property may be acquired for such purposes only when the owner of the property needed for a right of way [B] has agreed in writing to the exchange and when in the opinion of the commission, an economy in the acquisition of the necessary right of way can be effected thereby."⁹⁹ This amendment may mean that the use of substitute condemnation merely to reduce costs is no longer approved by the legislature. That result is in any event required by *Brown v. United States*, where the Supreme Court found the taking of *C*'s land to be a "necessary step" in the improvement itself and not merely an attempt to "reduce costs by land speculation."¹⁰⁰ If substitute condemnation cannot be used merely to reduce costs, it follows that the statutes are restricted in their application to situations where, as in *Brown*, substitution is the best means of making the parties whole.¹⁰¹

Although the California Supreme Court has held that any exercise of the power of eminent domain must be preceded by a legislative declaration that the use for which the property is taken is public, a governmental agency empowered to take land for specific uses may also have the implied power to take property for the purpose of compensating its condemnees.

⁹⁵ CAL. STATS. & HIGHS. CODE §§ 104(b), 943(a); CAL. WATER CODE § 233.

⁹⁶ 263 U.S. 78 (1923); see note 31 *supra* and accompanying text.

⁹⁷ 119 Md. 573, 87 Ad. 917 (1913); see note 28 *supra* and accompanying text.

⁹⁸ See notes 66-67 *supra* and accompanying text.

⁹⁹ Cal. Stats. 1939, ch. 686, § 1, at 2201. (Emphasis added.) Although the first part of the amendment omits the requirement that *B* agree to the substitution, it would seem that, as a constitutional matter, his consent is required. See note 72 *supra* and accompanying text.

¹⁰⁰ 263 U.S. at 84.

¹⁰¹ *Id.* at 83.

Earlier it was suggested that substitute condemnation be approached with the distinction between the uses of *B's* and *C's* land in mind.¹⁰² Courts have, however, conceived the second takings as being for the same purpose as the first, with one use serving both condemnations.¹⁰³ Under such a theory an agency authorized to exercise the power of eminent domain could perhaps take substitute lands without express statutory authority.¹⁰⁴ The California Legislature has, however, granted two agencies the power to take substitute lands; this designation is perhaps good evidence that in California other agencies were not intended to have it.

C. Analogies

The California courts have not dealt with substitute condemnation directly. An instructive analogy to the problem can, however, be drawn from a recent urban renewal case. *Redevelopment Agency v. Hayes*¹⁰⁵ concerned the condemnation of blighted areas in San Francisco. The district court of appeal held that in the presence of compelling community economic need, the power of eminent domain could be used to take such areas for redevelopment.¹⁰⁶

The court adopted the reasoning of the federal district court in

¹⁰² See notes 57-60 *supra* and accompanying text.

¹⁰³ See *Dohany v. Rogers*, 281 U.S. 362, 366 (1930); *Brown v. United States*, 263 U.S. 78, 81-82 (1923); *Feltz v. Central Neb. Pub. Power & Irr. Dist.*, 124 F.2d 578 (8th Cir. 1942); *Benton v. State Highway Dep't*, 111 Ca. App. 861, 865, 143 S.E.2d 396, 400 (1965); *Smouse v. Kansas City So. Ry.*, 129 Kan. 176, 282 Pac. 183 (1929); *Pitanogle v. Western Md. R.R.*, 119 Md. 673, 87 Atl. 917 (1913).

¹⁰⁴ *Cf.*, e.g., *George D. Harter Bank v. Muskingum Watershed Conservancy Dist.*, 53 Ohio App. 325, 4 N.E.2d 996 (1935), where a public corporation sought to condemn a right of way for the relocation of a railroad. The substitute condemnation was authorized by statute, but the Ohio court said: "Even if such power of eminent domain were not expressly granted . . . we are of the opinion that it would still be a lawful exercise of that power as a necessary incident to the execution and accomplishment of the official plan for which the district was organized." *Id.* at 330, 4 N.E.2d 999. *But cf.* *Wheeler v. Essex Pub. Rd. Bd.*, 39 N.J.L. 291 (Ct. Err. & App. 1877), where defendant road board condemned the plaintiff's dam and built another for him on land owned by a third person. When the dam broke it was held plaintiff had no cause of action for damages because defendant had no power to build a substitute dam. "[T]he proper and only course to have been taken in this exigency was, to have the damages occasioned to the plaintiff by the removal of the dam and the appropriation of the land upon which it stood to the public use, ascertained and paid for in the mode prescribed. The defendant had no shadow of authority to substitute, in lieu of payment, the erection of a new dam in the place of the one demolished." *Id.* at 294. The Attorney General of California has apparently concluded that it is not a necessary incident of redevelopment that redevelopment agencies obtain substitute housing for the condemnees in an urban renewal project. See 37 OFF. CAL. ATT'Y GEN. 190 (1961); note 115 *infra* and accompanying text.

¹⁰⁵ 122 Cal. App. 2d 777, 266 P.2d 105, cert. denied, 348 U.S. 897 (1954).

¹⁰⁶ *Id.* at 793, 266 P.2d at 116.

*Schneider v. District of Columbia*¹⁰⁷ that the taking of property itself, as distinguished from the subsequent use of that property, may be required in the public interest.¹⁰⁸ As suggested earlier, this distinction is important in assessing substitute condemnation, since the public use for which C's land is taken is its use as a means of compensation.¹⁰⁹ *Hayes* is therefore at least collateral authority for the proposition that the use to which C's land is to be put need not be an activity.¹¹⁰

After redevelopment, the property in *Hayes* was to be returned to private owners. This fact did not, however, determine whether the use was public: "[T]he fact that [the property] is later to be returned to private ownership subject to restrictions protecting the public use, does not make it any the less a public use."¹¹¹ Although this determination did not originate with *Hayes*,¹¹² it provides theoretical support for substitute condemnation. That B will own C's land does not detract from the public use to which C's land is put. *Hayes* also required, however, that the land be returned to private persons subject to restrictions protecting the public use.¹¹³ It would seem that this requirement is not applicable to substitute condemnations, since after B has been compensated there is no public use to protect. The restrictions requirement contemplates a continuous public interest in the land—in redevelopment, that slums and blight do not reappear.

Hayes also provides the rubric of "compelling community economic need" as the test of state power to use eminent domain.¹¹⁴ To say that

¹⁰⁷ 117 F. Supp. 705 (D.D.C. 1953), *aff'd as modified sub nom.*, *Berman v. Parker*, 348 U.S. 26 (1954).

¹⁰⁸ *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 790, 266 P.2d 105, 114, *cert. denied*, 348 U.S. 897 (1954).

¹⁰⁹ See notes 57-58 *supra* and accompanying text.

¹¹⁰ See notes 58-59 *supra* and accompanying text.

¹¹¹ 122 Cal. App. 2d at 803, 266 P.2d at 122.

¹¹² See *University of So. Cal. v. Robbins*, 1 Cal. App. 2d 523, 37 P.2d 163 (1934), *cert. denied*, 295 U.S. 738 (1935). See also *Housing Authority v. Dockweiler*, 14 Cal. 2d 437, 94 P.2d 794 (1939); *County of Los Angeles v. Anthony*, 224 Cal. App. 2d 103, 36 Cal. Rptr. 308, *cert. denied*, 376 U.S. 963 (1964). In *Anthony* appellant offered to prove that the Hollywood Motion Picture and Television Museum, for which his land had been condemned, was to be operated at a profit. This evidence was held to have been properly excluded. That the museum operators would make a profit did not destroy the public character of the enterprise. *Id.* at 106-07, 36 Cal. Rptr. at 310.

¹¹³ 122 Cal. App. 2d at 803, 266 P.2d at 122. See also *City & County of San Francisco v. Ross*, 44 Cal. 2d 52, 57, 279 P.2d 529, 532 (1955), where it was held that the power of eminent domain could not be exercised to acquire a site for a parking garage when the proposed lease between the city and the garage operators lacked controls "designed to assure that [the] use of the property condemned [would] be in the public interest."

¹¹⁴ 122 Cal. App. 2d at 793, 266 P.2d at 116. For a discussion of "compelling community economic need," see Siegel, *Memorandum on New Development Techniques*, in APPENDIX TO THE REPORT ON HOUSING IN CALIFORNIA 369 (1963).

in every case the compensation of *B* is a compelling economic need is to strain the analogy.¹¹⁵ Yet situations can be conceived where substitute condemnation would be necessary to avoid great economic loss.¹¹⁶ In such a case, "compelling community economic need," as used in *Hayes*, could be precedent for upholding the taking of *C*'s land.

D. Should the Necessity of the Taking Be a Justiciable Issue?

There are two concepts of necessity in eminent domain: (1) the necessity of the exercise of the power; and (2) the necessity of the particular manner of its exercise. The first concept involves the question of whether the condemnor must use his power of eminent domain to accomplish given ends. If he must exercise the power, the question involved in the second concept is whether he must take a particular estate or a particular parcel. It is submitted that one who questions whether land has been taken for a public use in a substitute condemnation must also be allowed to question whether in either sense the taking is necessary.

In an ordinary condemnation, the questions of necessity and public use are separable.¹¹⁷ Whether a taking is necessary depends on political judgments of choice.¹¹⁸ Whether the land has been taken for a public use

¹¹⁵ See 37 Ops. CAL. ATT'Y GEN. 190 (1961), where the question was presented whether legislation empowering a redevelopment agency to acquire property by eminent domain and make this land available to persons displaced as the result of the redevelopment would be constitutional. The Attorney General of California concluded that such a taking would not be for a public use. Compare *McLean v. City of Boston*, 327 Mass. 118, 97 N.E.2d 542 (1951), discussed at note 25 *supra* and accompanying text; *Watkins v. Ughetta*, 273 App. Div. 969, 78 N.Y.S.2d 393, *aff'd*, 297 N.Y. 1002, 80 N.E.2d 457 (1948).

¹¹⁶ Consider, for example, the facts of *Clark v. Nash*, 198 U.S. 361 (1905): Nash sought to condemn a right of way across Clark's land for the purpose of widening a ditch which would carry water from a creek in which Nash owned riparian rights to Nash's arid land, which without irrigation would be unproductive. By state statute Nash had the power to condemn a portion of Clark's land for such a purpose. Affirming the Utah Supreme Court, the United States Supreme Court held that such a taking was for a public use. Significantly, Nash's land was absolutely valueless without irrigation. The proposed ditch would be thirty inches wide. If no statute had existed declaring such use to be public, and if Nash had previously had a ditch which *A* took by eminent domain, it is suggested that Nash would have had a good cause of action for a substitute condemnation of a ditch across Clark's land. In such circumstances a compelling community economic need exists.

¹¹⁷ *People ex rel. Dep't of Pub. Works v. Chevalier*, 52 Cal. 2d 299, 306, 340 P.2d 598, 602 (1959); see *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 708-09 (1923).

¹¹⁸ See *People ex rel. Dep't of Pub. Works v. Chevalier*, note 117 *supra* at 307, 340 P.2d at 603; note 9 *supra*. In *Rindge Co. v. County of Los Angeles*, *supra* note 117, at 709, it is said: "The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment."

depends on the activity to be conducted there. The determinants of the two issues, the judgments of choice and the activity on the land, are not the same.

In a substitute condemnation, however, the questions of public use and necessity are inseparable. Whether land has been taken for a public use in a substitute condemnation will depend on whether fairness requires that *B* be compensated in land and whether there is a close factual connection between the taking of *B*'s and *C*'s land. Whether it is necessary to exercise the power of eminent domain—the first concept of necessity—will turn on whether *B* can be fairly compensated only in land. Whether it is necessary to take *C*'s property—the second concept—depends on whether there is a close factual connection between the two takings. To argue that *C*'s land has not been taken for a public use is to dispute the necessity of the taking, because the determinants of the two issues are the same. Necessity should therefore be justiciable. It is not suggested that the issues of public use and necessity are indistinguishable, but rather that, in substitute condemnations, they are so entwined that *C* must be allowed to dispute both.

CONCLUSION

The state of the law in California regarding the condemnation of substitute lands remains uncertain. The legislature has not made clear the extent of the authority granted the Department of Public Works, the Department of Water Resources, and county boards of supervisors. The courts will be forced to determine rules for such takings.

As the concept of public use has expanded, the meager precedent for substitute condemnation has become more relevant. Although the device should not be used simply to allow *B* to speculate in land and *A* to cut costs, related California cases may be interpreted to permit its use when substitution is the best means of making whole the parties to the transaction. If *B* will not conduct an activity which benefits the public, the taking of *C*'s land is significantly different from an ordinary condemnation. To ensure in such a case that the property has been taken for a public use, necessity should be a justiciable issue.

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