#65 8/30/66

Memorandum 66-57

Subject: Study 65(L) - Inverse Condemnation

Attached is the portion of the research study on inverse condemnation that is concerned with whether the Legislature can establish substantive and procedural rules in this field of law. Professor Van Alstyne concludes that the Legislature can establish reasonable rules in this field under the Federal and State Constitutions.

Based on Professor Van Alstyne's study, the staff recommends that the Commission go forward with this study and attempt to develop reasonable substantive and procedural rules applicable in inverse condemnation cases. Professor Van Alstyne is now working on the portion of the study that will be designed to assist the Commission in this effort. The staff recommends that we do not propose any constitutional amendment to the 1967 legislative session to deal with inverse condemnation. First, it is not unlikely that we can develop legislation that will be constitutional without any change in the California Constitution. Second, we already are proposing an amendment of the pertinent section of the Constitution to deal with immediate possession and related matters, and we do not believe that this amendment should be jeopardized by introducing the issue of inverse condemnation.

We suggest that you read the attached research study so that you will be in a position to determine what action should be taken with respect to a possible amendment of the California Constitution at the 1967 legislative session to deal with inverse condemnation.

Respectfully submitted,

John H. DeMoully
Executive Secretary

A STUDY RELATING TO INVERSE CONDEMNATION

PART ONE

The Scope of Legislative Power With Respect to Takings or Damagings of Private Property for Public Use

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A STUDY RELATING TO INVERSE CONDEMNATION

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Introduction

The present study is designed to explore possible avenues for legislative improvements in the law of inverse condemnation in the State of California. The general policy of law revision - by hypothesis intended to bring about appropriate changes in existing law - is in this field complicated by the constitutional foundations of the law of inverse condemnation. The relevant constitutional provisions are found in both the California Constitution (Article I § 14, quoted below) and in the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Thus, any legislative approach must necessarily be a limited one, since it must conform to the minimum standards exacted by the specific constitutional clauses referred to, as well as by the general constitutional limitations which condition all legislative action. In addition, conformity to the California Constitution is not enough; for provisions of the state's organic law are themselves invalid if the basic standards of the Federal Constitution are not satisfied.[1]

In light of the somewhat unique nature of the law of inverse condemnation, then, three general topical areas for investigation are seen to emerge:

(1) To what extent, if any, may the State of California, by amendment to the California Constitution, change the existing law of inverse condemnation? (2) To what extent, if any, may the California Legislature, by statute alone, change the existing California law of inverse condemnation? (3) Assuming that some areas for constitutional or legislative enactments are found to exist, in what respects and to what extent are changes in the present California law of inverse condemnation both desirable and feasible?

The present study reaches the conclusion that a variety of possible courses of constructive action are available, within the framework of existing constitutional limitations, for improving the law of inverse condemnation in California. Part One of the study seeks to present the legal basis for this conclusion, and to indicate in general terms the types of measures, and their scope, which are deserving of consideration in this connection. Part Two of the study undertakes an assessment of the existing law in a variety of specific factual contexts of recurring importance, with the objective of identifying and evaluating policy criteria relevant to possible law revision proposals.

The Problem in Perspective

"Inverse condemnation" is the name generally ascribed to the remedy which a property owner is permitted to prosecute to obtain the just compensation

which the Constitution assures him when his property, without prior payment therefor, has been taken or damaged for public use. Its basis is found in Section 14 of Article I of the California Constitution, which provides (in pertinent part):

> Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner . . . .

The Fifth Amendment to the United States Constitution contains a similar--and yet significantly different--requirement:

> . . . nor shall private property be taken for public use, without just compensation.

This last quoted provision, which was originally applicable only as a limitation upon the powers of the Federal Government, is now deemed fully operative as a restriction upon the powers of the several states and their political subdivisions as a substantive aspect of the Due Process of Law which the states are required to extend to all persons within their jurisdictions by the Fourteenth Amendment.[2] The Federal prohibition, it will be noted, refers only to a "taking" of private property, while the California provision explicitly forbids such property to be either "taken" or "damaged". As will be explained below, this difference in wording was deliberate.

Inverse condemnation and eminent domain are thus seen to be simply the converse sides of the same legal coin. As the Supreme Court has pointed out:[3] "The principles which affect the parties' rights in an inverse condemnation

suit are the same as those in an eminent domain action." Moreover, since the power of eminent domain is regarded as an inherent attribute of sovereignty, the constitutional provisions quoted above are deemed not the source of, but as limitations upon, that power.[4] Indeed, the historical roots of the principles now known as eminent domain extend back many centuries, and are manifested in the law of numerous countries.[5] For present purposes, however, the relevant legal developments in California law are principally those which follow the adoption of Section 14 of Article I as part of the California Constitution of 1879--our present organic charter.

The law with which we are here concerned is, to a remarkable degree, almost entirely judicially formulated. To be sure, some statutes pertinent to the problems of the study do exist; but, by and large, judicial decisions characterize the course and development of the legal norms presently operative in the field. This feature of the law of inverse condemnation is, undoubtedly, a reflection in part of the California view that Section 14 of Article I is self-executing, and does not require legislative implementation or authorization to be recognized as the basis of liability of governmental agencies.[6] In this sense, inverse condemnation has been traditionally regarded as a remedy which operates in the field of tortious conduct.[7] Where property injury is the gravamen of complaint, the constitutional remedy often overlaps normal tort remedies and provides an

alternative basis of relief.[8] In other instances--especially so prior to the judicial abrogation of governmental immunity in California by the landmark Muskopf decision[9] -- it provides a useful basis for recovery of damages in circumstances where the defendant public entity is otherwise immune from liability.[10]

The pattern of judicial development, practically unaided (save in a few narrow and discrete areas) by legislative enactments, is a natural consequence of the amorphous nature of the practical problems with which the entire theory of inverse condemnation deals. The necessity for an affirmative eminent domain action is obvious to public officials where actual appropriation and use of physical assets in private ownership is contemplated for a particular public project, be it a freeway, county hospital, irrigation canal, or urban renewal program. If the compensation awarded is insufficient to satisfy the owner, his recourse to normal appellate processes to redress the deficiency is routine. Sometimes, however, an actual appropriation of property is not contemplated as a feature of the project. Damage may result in unexpected ways to private premises, or in ways which, while possibly anticipated, were deemed remote and unlikely to occur. In other instances, losses of property values from governmental activity are fully anticipated, but are believed to be not a basis of legal liability--a belief not shared by the injured owner. Or, perhaps, an emergency situation has arisen, and official action is

taken with full realization of its possible injurious effect on private property but with firm conviction that such action is necessary in the interest of the general community welfare. The limitless varieties of situations in which governmental action, taken in good faith and without previous eminent domain proceedings, may result in property damage to the citizen suggest the range of cases in which the inverse remedy may be invoked to seek the just compensation believed to be due.

The functional and doctrinal interrelationship between affirmative and inverse condemnation suits has meant that the judicial development of the law of inverse condemnation is, in substantial part, found in appellate opinions concerned with affirmative eminent domain proceedings. Identical issues may arise in either type of case. For example, in condemnation proceedings to take property for freeway purposes, the condemnee may assert a claim for severance damages based on impairment of access to his remaining property, thus requiring the court to adjudicate the nature and extent of property owners' access rights and the circumstances in which impairment is constitutionally compensable.[11] The same issue might also be raised in an inverse condemnation suit brought by an owner whose physical property has not been invaded, but who, by reason of the freeway project, claims that his access has likewise been interfered with to his damage.[12] The legal analysis and

consequences in both cases--assuming the absence of a controlling statute to the contrary--would normally be the same in both cases.[13]

Realistically, of course, one might expect certain differences in practical results, depending on whether the owner's claim was made in a normal eminent domain proceeding or in an inverse condemnation suit. In the former type of case, the jury may be instructed to exclude from their verdict any losses attributable to noncompensable factors; but their verdict may, nonetheless, resolve in the condemnee's favor conflicts of testimony as to valuation of compensable factors by intuitive (or even deliberate) appraisal of such noncompensable losses. In the corollary inverse condemnation suit, on the other hand, if the particular claim is for a legally noncompensable loss, the issue can often be taken entirely away from the jury as a matter of law, thus precluding any recovery at all. For the purposes of this study, however, practical differences of this sort can be put to one side. Since the applicable rules of law are the same in both types of cases, both types will be examined and relied upon here.

Regardless of the context in which the issue is litigated, the problems of marking the limits of compensability for governmentally induced property damage have been left largely to the courts, as is true generally of the broader field of torts. The results have not been entirely satisfactory: most authorities readily acknowledge

that the case law of inverse condemenation is disorderly, inconsistent and diffuse.[14] Much of it is characterized by a formal--often circular and unenlightening--discussion of the meaning of the crucial constitutional terms. Is the plaintiff's interest one that fits within the accepted concepts of "property"? If so, has anything legally cognizable been either "taken" or "damaged"? Was the loss visited on plaintiff for a "public use"? How is "just compensation" to be determined, and what elements of loss are included in its computation? Sharp divisions of judicial opinion on questions pitched at this level of inquiry might readily be expected, and, indeed, permeate the case law.[15]

Beneath the surface abstractions of judicial opinions, however, lurk significant conflicts of policy considerations--sometimes candidly expressed, but more often obscured by the opinion writers. In California, as much as in any other jurisdiction, the relevant policy postulates have increasingly been exposed to view by appellate judges in recent years as the courts have labored to construct a viable body of consistent principles.[16] The decisions appear to accept the thought, however, that the effort must necessarily be both tentative and a continuing one. The pace of the technological explosion, the rapid growth of the population, the tendency of people to cluster in massive urban communities, and the seemingly ever-growing and insatiable fund of unfulfilled economic and social aspirations, is accompanied by a like

increase in the size and complexity of government as well as in the sophistication and pervasiveness with which government functions within the society as a whole. Thoughtful observers have noted that this development inevitably tends to increase the frequency and seriousness of governmental mistakes and of deliberately adopted risks of substantial interferences by government with private economic resources and expectations.[17] At the same time, the innocent victim's ability to secure political redress is diminished by the very size and complexity of the contending forces at work. Continued flexibility and adaptability of judicial resources to meet the needs of newly emerging problems of contemporary society--a capacity which the absence of narrowly confined legislative standards has assured in the past--is thus an important general criterion by which the desirability of legislation relating to inverse condemnation matters should be judged.

Another dimension to the problem of inverse condemnation, viewed in its largest perspective, becomes apparent as one seeks to identify the nature of, and evaluate, the competing interests at stake. At once, the investigator is struck by the complexity of factual circumstances represented in the case law, and by the frequency of judicial reiteration of the controlling rule (perhaps better labeled a "non-rule"): "Each case must be considered on its own facts."[18] In more

conventional terms, what the courts appear to mean by this reliance on ad hoc problem-solving is that general principles provide little assistance in weighing the strength of the competing interests in a given case--at least in the absence of a substantial line of similar cases tending to support and institutionalize a particular result. With respect to a few clusters of like problems of recurring nature, indeed, one can already perceive a crystallization and hardening of specific rules--the comprehensive zoning[19] and cul-de-sac[20] cases being prominent examples. Large problem areas still remain open, however, in which the generative processes of case-by-case determination are still at work and predictability is hazardous.[21]

The typical formulation of the interest analysis, with reference to inverse condemnation, focusses upon the concept of "private property" on the one hand, and the concept of "police power" or "general welfare" on the other. Few persons would disagree with the classic statement of Mr. Justice Brewer, more than seventy years ago, declaring that[22]

> . . . in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.

This formulation, however, begs the real questions at stake: What kinds of legitimate expectations with respect to the allocation and utilization of private resources, both tangible and intangible, are sufficiently

important as to deserve judicial protection against at least some forms of governmental interference?[23]

As thus rephrased, the basic issue is seen to involve a problem of relativity, rather than classification, of interests, a struggle between the security of "established economic interests" and "the forces of social change" rather than a search for definitions.[24] "Sufficiently important", as a standard, derives meaning only in relation to other interests also seeking judicial vindication. In the context of inverse condemnation, these "other" interests are often judicially described under the rubric of "police power" or "legislative power to promote the general public health, safety, welfare and morals". Yet, here again, one must approach the subject at hand with an alert understanding that (like private interests) governmental claims are not all of the same order or value. Two significant, but distinguishable, aspects of governmental behavior can readily be identified to make this clear.

First, it is obvious--although all too often apparently ignored in judicial decision writing--that government functions in a variety of capacities, all of which may not necessarily imply the same degree or intensity of public interest or importance.[25] A preliminary analysis of inverse condemnation problems suggests that different qualitative elements may be perceivable in the kinds of public functions which ordinarily impinge on private interests in significant

ways. These functions include at least seven distinguishable categories of activities: 1) The investment of public funds in public improvements conceived as relatively permanent additions to the total fund of community assets. The building of courthouses, jails, public power plants, bridges and dams, are familiar examples. 2) The acquisition, by compelled contribution, of private assets and facilities intended as relatively permanent additions to public resources. Examples include forced relocations of underground utility structures by the owner, compelled elimination of railroad grade crossings, and dedications exacted from subdividers as a condition to approval of subdivision maps. 3) Requisitioning of specific private interests and resources for temporary governmental purposes, emergent or non-emergent. Examples include destruction of specific private property to prevent it from falling into enemy hands during war, summary abatement of health menaces, seizure of factories to prevent work stoppages, and the destruction of private interests through lien foreclosures for tax collection purposes. 4) Facilitative activities designed to encourage, assist or subsidize private economic interests. Illustrations include the development of publicly owned airports and harbors, markets, warehouses, transit systems, and (to some extent) roads and highways, all of which function to a substantial degree, if not exclusively, as instrumentalities of or to promote private commercial activity. 5) Closely

related to, and overlapping, the facilitative activities of government are its service functions, involving the providing of a variety of goods, services, and opportunities for individual self-expression, personal development, and cultural enjoyment. Examples include not only public utility systems, but also schools, colleges, libraries, parks and playgrounds, art and musical activities, and community beautification programs. 6) "Guardianship" activities of government, involving ongoing programs administered by public personnel to give affirmative protection to the community against hazardous, noxious, unhealthy, or otherwise deleterious influences. Familiar illustrations include the operations of the police and fire departments, weed, pest, and other nuisance abatement programs, air pollution control, social welfare administration, and public health programs. 7) Mediatory activities of government, ordinarily manifested in regulations of conduct designed to accommodate and reconcile the conflicting interests of individuals and groups within the community. Zoning and land use controls, limitations upon advertising displays, building and safety regulations, sanitary requirements, and business licensing ordinances are typical examples.

Second, it should be kept in mind that government, in performing its various roles, usually has multiple alternatives available in the pursuit of overlapping objectives. For example, the development of a municipal airport may be primarily "facilitational" in objective

(category 4 above); but, obviously, it also is to some extent both an investment activity (category 1) and a service activity (category 5) and may well be a phase of guardianship (category 6) policy (i.e., police aircraft and helicopter patrol; forest fire suppression through use of tanker aircraft). The techniques available for accomplishing these diverse but compatible objectives usually involve a variety of alternatives, each of which may entail different sets of competing interests. Thus, effective operation of the municipal airport may demand assurance that the take-off and glide paths for aircraft are kept free from obstruction by buildings or other structures. The city might proceed to achieve this protection a) by enacting a prohibition against construction (e.g., airport approach zoning); or b) by so limiting the use of the subject land that structural improvements are unlikely or impossible (e.g., placing the land within a strict agricultural use zoning classification); or c) by purchase or condemnation of an easement for avigation over the land.

Similarly, an objective of securing adequate drainage and flood control might be approached a) by construction with government funds of a system of drainage conduits and flood control works; or b) by imposing penal regulations upon private land owners requiring them to provide certain facilities with respect to the drainage of their land; or c) by development of rules of civil liability relating to damage from storm waters, predicated upon reciprocal

duties and obligations of private owners, leaving enforcement to the fortuities of private litigation. Slum clearance objectives may entail possible choices between a) rigorous invocation of nuisance abatement law, b) strict enforcement of statutory standards for health and safety of existing structures, c) condemnation and razing of offending buildings, or d) various forms of public subsidization of private development of the area (e.g., urban renewal or community redevelopment programs). The identification of objectives and choice of means will be influenced by many factors, including limitations upon legal authority, fiscal realities, and political expediency; but it seems clear that every governmental action with capacity to "take" or "damage" private property involves a choice between rational alternatives as to both ends and means.

The relevant point of the foregoing discussion is, of course, that any interest analysis of inverse condemnation is necessarily a somewhat precarious undertaking in light of the complexity of interests reflected by, as well as the ambiguities inherent in, governmental objectives and the means for achieving them. Judicial development of the law--as some authorities have charged[26] --may have tended to obscure this complexity, and to blur relevant distinctions between significant elements of the overall equation. The judicial process, however, retains a large measure of inherent flexibility for accommodating itself to novel problems as they arise, without major

sacrifice to logical consistency or doctrinal symmetry. Whether the legislative process can develop standards for decision-making which are more precise and a basis of greater predictability than the somewhat nebulous judicial rules presently in effect, and yet which are sufficiently adaptable to the developing needs of the society, remains to be seen. At least, the task will not be an easy one.

On the basis of the foregoing discussion, a preliminary--and pervasive--policy issue can be identified: If it is assumed that constitutional limitations do not preclude the enactment of at least some kinds of statutory standards to govern the application of inverse condemnation law, would the prescription of such standards by legislation be a desirable improvement in the law?

Manifestly, an answer to this question cannot be proposed until the purview of potential legislation, and its exact nature, is defined in some detail. Legislation which merely translates the constitutional mandate into roughly synonymous general precepts is not likely to be much of an improvement.[27] On the other hand, a preliminary assessment of the problem suggests the probability that further investigation would be worthwhile. In certain discrete areas of inverse condemnation law, for example, it may be possible to codify certain well-developed lines of case law (with or without

modifications) in the interest of improving predictability and reducing litigation--surely not irrelevant objectives of law revision. In other areas, the constitutional minimum of "just compensation" as judicially defined may be found to be out of accord with the realities of economic life; and legislation to authorize compensation to be paid for presently noncompensable losses may be deemed appropriate. Procedural aspects of inverse litigation may be found wanting in some respects; while existing statutes may be determined to require clarification or revision in the interest of consistency or fundamental policy. Hopefully, an analysis of current law may even produce policy generalizations capable of being formulated into statutory standards which appropriately interrelate the competing private and public interests in specific factual situations. Since the law of inverse condemnation, viewed broadly and in perspective, seeks to identify the extent to which otherwise uncompensated private losses attributable to governmental activity should be socialized and distributed over the taxpayers at large, rather than be borne by the injured individual, the nature of the issues to be explored do not appear to be greatly different in kind from those which characterize governmental tort liability--a subject already proven to be within the capabilities of the legislative process.[28]

The Current Legal Context of Inverse Condemnation

(1) Relationship to tort liability law

The law of governmental tort liability (or immunity) and the law of inverse condemnation have long been characterized by significant interrelationships. Prior to the abrogation of governmental immunity in California, inverse condemnation, and the concept of nuisance (which originally had its roots in inverse condemnation[29]), were the two principal judicial tools for affording relief for property injuries arising out of an admittedly "governmental" function, where no statute authorized recovery.[30] The inverse remedy had the significant advantage of overriding the traditional classification of public functions into "proprietary" and "governmental" pigeonholes; and it applied to governmental entities of every level.[31] On the other hand, it was limited to claims of injury to "property"--including both realty and personal property[32]--and was not available to redress personal injuries or wrongful death.[33] Its close tie to what were essentially tort concepts, however, is revealed by cases like Granone v. County of Los Angeles,[34] where recovery by a lessee for flooding of crops, as the result of a defectively designed and negligently maintained culvert system, was sustained alternatively on the theories of inverse condemnation, nuisance and negligence. Cases involving dangerous and defective conditions of public property constitute an especially striking illustration of the overlap between inverse condemnation and tort law.[35]

The need for the constitutional remedy may, to some extent, have been reduced by abolition of governmental immunity, and the substitution (by enactment of the Law Revision Commission's legislative program relating to governmental tort liability in 1963) of a statutory framework for adjudication of private injury claims against public entities of all types.[36] The degree to which, if at all, the courts may be disposed to narrow the scope of inverse condemnation in order to give the fullest possible effect to the specific policies embodied in the 1963 legislation, including those relating to immunities and defenses, remains to be seen. No clear indications of any such disposition have been found in post-1963 decisions.

On the other hand, there is little doubt that inverse condemnation doctrine can be expected to perform a major supplementary role in the future development of governmental tort liability (using the term broadly), absent major statutory changes. The 1963 legislation, for example, contemplates the termination of pecuniary liability of public entities based on common law nuisance, as such.[37] (Specific situations, formerly cognizable in suits grounded in nuisance theory for which governmental immunity was not a defense, are, of course, still amenable to tort liability under the new statutory standards for affixing liability; but the framework of litigation must be directed to proving a statutory basis of recovery, rather than a basis in traditional "nuisance" theory.[38])

However, as already indicated, the previous law of nuisance liability of public entities assimilated substantial elements of inverse condemnation law; and, presumably, liability on an inverse condemnation theory may today be imposed in some traditional "nuisance" cases notwithstanding the legislative abrogation of nuisance liability.[39]

Moreover, the broad range of statutory defenses and immunities available to governmental entities, and clearly intended to restrict their tort liability, appear to have no efficacy in inverse condemnation litigation. For example, the immunity for defective plan or design of public improvements, declared in Section 830.6 of the Government Code, and the defense of reasonableness of the flood control district's actions in connection with its culvert system, as provided by Section 835.4 of the Government Code, would seemingly have provided no impediment to full liability in the Granone case on plaintiff's inverse condemnation theory, although liability on a statutory tort theory (i.e., dangerous condition of public property) might well have been precluded.[40] The "discretionary immunity" principle which permeates the governmental tort liability statutes provides another potentially fruitful source of inverse condemnation suits, for "takings" and "damagings" of private property are often the consequence of an exercise of official discretion by some public officer or employee, and thus not an available source of tort responsibility.[41] In short, to

the extent that immunities and defenses against tort liability are built into the current statutory law of governmental tort liability, injured property owners may be expected to seek redress--and thus circumvent legislative policy--by resort to the self-executing constitutional remedy.

It must also be kept in mind that inverse condemnation is not merely a counterpart for, or an alternative technique for enforcing, tort liabilities. It has had an independent development of its own, and embraces a not insignificant variety of situations in which liability for property damage may be adjudged under constitutional compulsion notwithstanding the absence of any plausible basis for tort liability. The leading example of this aspect of the law is the recent decision of Albers v. County of Los Angeles,[42] where total liabilities in excess of five million dollars were affirmed on an inverse condemnation rationale in the face of clear findings of fact that the defendant county and its officers had not been guilty of any negligence or other wrongful act or omission within the purview of accepted tort principles.

(2) Statutes affecting inverse condemnation liability

Although, as pointed out above, the law of inverse condemnation has been developed primarily in court decisions applying the broad constitutional language to diverse fact situations, the Legislature has not been entirely inactive in the field. Existing statutes do

impinge upon constitutional liability problems in certain respects which are significant for present purposes:

a) Public improvement projects often may require a relocation or removal of existing structures, such as public utility facilities located in public streets and highways, thereby giving rise to issues of "taking" or "damaging" of private property.[43] The Legislature, however, has enacted numerous statutes relating to such problems, in some instances expressly requiring payment of relocation costs[44] and in others declaring that such costs shall be payable by the private owner.[45] Other statutes have been enacted which authorize public entities of various types (principally special districts) to install physical facilities in or across streets, highways, watercourses and the like, but subject to a duty to restore the crossing or intersection to its former state at public expense.[46] In ordinary eminent domain proceedings, the cost of structural removals and relocations is defined, generally, as part of the recoverable damages available to the condemnee.[47]

b) The elimination of grade crossings at intersections of railway lines and public streets, where required by law to be done (in whole or in part) at private expense, involves issues of inverse condemnation law.[48] In California, a statutory procedure has been developed for administrative allocation of such costs as between the private and governmental interests concerned.[49]

c) Private property losses, through commandeering or preventive destruction in times of emergency or disaster, have been thought to raise difficult issues of constitutional liability.[50] To some extent, these problems have been alleviated by California legislation authorizing compensation to be paid in certain situations of this type.[51]

d) In the interest of public health and safety, as well as to protect major economic interests from serious loss, the state often engages in preventive and prophylactic programs involving the destruction of diseased animals, plants, and trees. Although private property is clearly "taken" or "damaged" in connection with these programs, traditional legal doctrine denies any constitutional compulsion to pay just compensation where the claimed necessity for the action taken has factual support and is not unreasonable under the circumstances.[52] The Legislature, however, has authorized limited compensation to be paid to affected property owners in some cases of this sort.[53]

e) A few miscellaneous statutes may also be found, which do not fit neatly into the foregoing categories, purporting to either enlarge upon the liability which would ordinarily flow from specified governmental action[54] or to provide for the allocation and payment of such liability.[55] Under some circumstances, statutes of this type may apply in cases involving inverse condemnation claims.

f) Although not substantive in nature, there are numerous statutes of present interest which authorize public entities to enter into indemnification or save-harmless agreements by which they may either assume, or shift to other entities, liabilities arising out of certain kinds of public undertakings.[56] Presumably, in some cases at least, agreements made under these provisions would effectively control the ultimate incidence of inverse condemnation responsibility as well as ordinary tort responsibility.

g) In connection with statutes authorizing the exercise of particular powers by local public entities--especially limited purpose special districts--the Legislature often employs broad descriptive language declaring that the powers conferred are "police powers", and are intended to be exercised to promote the public health, safety and welfare.[57] It is well settled, of course, that rational exercises of the so-called "police power" may entail a damaging of private property, or even a destruction of practically all of its economic value, without incurring constitutional liability to pay just compensation therefor.[58] Accordingly, statutory declarations of "police power" purposes may tend to place a claim of inverse liability into a conceptual framework tending to support a judicial holding of non-liability,[59] although they probably would not be regarded as in any sense controlling.[60]

The statutory provisions cited in the preceding

paragraphs are intended to be illustrative only, and not an exhaustive review of current legislative provisions. (A detailed analysis of statutory policies will be deferred for subsequent treatment below.) The significant point here is that the Legislature has seen fit to act with reference to discrete aspects of inverse condemnation law, and for the effectuation of diverse purposes. Not only do some of the statutes referred to attempt to limit the scope of substantive inverse liability, but, in cases deemed appropriate to legislative judgment, others expand that liability beyond constitutional minimums.[61] In addition, the statutory pattern suggests the possibilities of developing legislative guidelines for liability-shifting and liability-allocation. The feasibility of similar, or more comprehensive, statutory enactments in the field is at least a tenable inference from the present statutory setting.

(3) Inverse condemnation and private condemnors

The discussion of inverse condemnation set out above takes as a point of departure the general assumption that it is the liability of public entities with which the present study is concerned. It should not be forgotten, however, that private persons also may, under legislative delegation, be vested with powers of eminent domain, provided the "use" for which private property is condemned is a "public" one.[62] Privately owned public utility and railroad companies are familiar examples.[63] However,

private powers of condemnation are not limited to public service corporations; Section 1001 of the Civil Code declares that "any person" may acquire private property for any use designated as a "public use" by following the procedures outlined in the Code of Civil Procedure. Thus, for example, eminent domain proceedings may be brought by private colleges and universities for expansion purposes,[64] or by the owners of private airports open to the general public,[65] or by a mere private property owner for the purpose of connecting his property to a public sewer system.[66] The legislative determination that uses of this type are "public uses"--and Section 1238 of the Code of Civil Procedure so provides--is entitled to considerable judicial deference, even though not conclusive upon the courts.[67]

As between private persons, of course, resort to inverse condemnation as a remedy for unanticipated or inadvertent "takings" or "damagings" is often unnecessary, for no barriers to liability in tort (such as governmental immunity) interfere with the more usual remedies. However, inverse actions may properly name private condemnors as defendants, and the practice of so doing is not unknown to California law.[68] In some circumstances, prosecution of a cause of action for property damage may be simplified, and confusion of issues prevented, by using the inverse remedy where both a public entity and a private person, acting jointly, were allegedly responsible for plaintiff's injury.[69]

In evaluating the possibilities of legislative changes in the law of inverse condemnation, therefore, it must be kept in mind that private rights and liabilities are likely to be affected as well as the rights and liabilities of public entities. Moreover, it seems probable that the interplay of policy considerations governing private inverse condemnation liabilities rationally may be deemed--as the comparable legislative policies reflected in the governmental tort liability legislation of 1963 clearly suggest -- different in certain situations from those which are relevant to the analogous inverse liabilities of public entities.

(4) Inverse condemnation procedure

Like tort actions against public entities, inverse condemnation suits must run a procedural course which, in part at least, may tend to eliminate ill-founded claims and discourage frivolous litigation. The statutory requirement of timely presentation of a claim (within 100 days for claims based on injury to personal property, and one year for taking or damaging of real property[70]) applies to these claims.[71] Since the time period for claim presentation begins to run when the cause of action accrues within the meaning of the statute of limitations which would otherwise be applicable to comparable private litigation,[72] difficult problems of computation may arise. It may be clear, for example, that damage to private property will result from a public construction project,

but the amount of damage may be purely speculative and the actual causing of the damage may be contingent on other circumstances--as, for example, the happening of unusually heavy rains which bring about a flood which, in turn, damages plaintiff's property because of obstructions to drainage caused by the public improvement constructed long before.[73] Should the time period be measured from the date of construction, the date of initial flooding, or the date on which maximum damage was incurred and stabilized?[74]

For present purposes, it is not important to analyze the kinds of issues presented by the time element of the claims procedure or to determine the correct answer in the varieties of circumstances likely to pose such problems. It is important, however, that the procedural element of inverse condemnation litigation be kept in mind as part of the setting of the general problem, for it would seem apparent that some of the potential hazards which this basis of liability presents to public entities may be alleviated--at least in part--by carefully drawn procedural statutes designed to preserve the substance of the constitutional right to just compensation, but narrowly confined to give a remedy to only those property owners who are diligent in seeking to protect that right.[75]

Other procedural aspects of inverse condemnation litigation likewise deserve mention for the same purpose, since they, too, suggest possible avenues for legislative consideration. For example, inverse suits must be commenced within six months after rejection of the formal

claim by the defendant entity.[76] In most instances, this will mean that the claimant must institute his action considerably earlier than the normal three year period allowed for actions for injury to real property.[77] In addition, the plaintiff may be required, on demand of the public entity defendant, to post an undertaking for costs in the amount of $100 or more.[78]

A more subtle procedural dimension to inverse condemnation litigation relates to the institutional dynamics of such suits as compared to affirmative eminent domain actions. In both types of proceedings, the question of compensable damages for an alleged "taking" or "damaging" may be placed in issue. In the normal eminent domain proceeding, however, the condemning entity "affirmatively alleges ownership in the defendants, the contemplated taking and severance, and seeks a determination by the court of the issues confided by the law to the decision of the court and also seeks a determination by the jury, unless one be waived, of the compensation which should be paid to the property owner."[79] In the inverse condemnation suit, on the other hand, the initiative must be taken by the aggrieved property owner, who thus "assumes the burden of alleging and proving his property right and the infringement thereof".[80] In the inverse proceeding, then, the sufficiency of the owner's allegations may be tested on demurrer, and judicial lines drawn to delimit the circumstances in which awards of compensation are legally impermissible. In the affirmative eminent domain

proceeding, however, the same lines are theoretically drawn in the form of instructions to the jury that certain kinds of losses, or certain kinds of injurious consequences of the project, cannot be taken into account in computing the severance damages to be awarded. Not only is it possible that juries may not understand or follow limiting instructions of this sort, but the ambiguities of testimonial evidence as well as the inherent fluctuations of expert judgment as to the valuational significance of legally excludable elements of injury may make such instructions functionally ineffective. Thus, in the context of an eminent domain action, the condemning authority may in fact be required to pay for specific elements of damage (included in a general jury award which is immune from successful appellate review) which in an inverse condemnation suit would be denied as a matter of law on a demurrer to the complaint. Obviously, the converse may equally be true: a jury in eminent domain, when evaluating the condemnee's loss, may eliminate "borderline" compensable elements in the view that the award is already large enough, while another jury concerned solely with an isolated element of inverse damage may be more sympathetic to the property owner's position.

No suggestion is here offered that the possible vagaries of results just suggested are capable of yielding to legislative treatment, or, to the contrary, that legislative treatment would be unavailing. One may conclude,

tentatively, however, that the general purview of potential legislative concern with respect to inverse condemnation problems should not overlook the matter of procedural handling of such claims, nor the possibilities of legislative delineation of more clearly defined rules governing compensable losses and the damages to be awarded therefor.

Due Process and Federal Compulsion to Compensate for a "Taking"

The preceding discussion, it is submitted, warrants two general observations pertinent to the objectives of this study.

First, the development of a rational body of inverse condemnation law by statutory enactment would necessarily involve consideration of complex strands of interwoven policy considerations pulling in diverse directions. Although these policy elements are, in many ways, not unlike those which were reconciled in the formulation of California's statutory law of governmental tort liability, additional factors tend to complicate their evaluation. Prominent among these added factors are a) the existence of constitutional standards inhibiting full freedom of legislative choice; b) applicability of inverse condemnation principles to both public and private condemning authorities; and c) a partial overlap with governmental tort law. Despite these complications, however, the development of a statutory framework for inverse condemnation offers sufficient promise of contributing to stability and predictability of law to justify further study and consideration.

Second, the present law of inverse condemnation is not, as often commonly assumed, entirely a product of judicial decision-making. To be sure, the main doctrinal developments have occurred in the case law. But significant peripheral aspects appear in the form of statutes. These relate

primarily to narrow and discrete aspects of inverse liability, and to governmental tort law and procedure. Statutes of this sort constitute not only a modest beginning to more comprehensive legislative treatment of the subject, but suggest possible avenues for expansion of legislative activity.

If the feasibility of a legislative program is tentatively taken as a valid assumption, its constitutional dimensions remain to be explored. Since it is perfectly clear today that the "just compensation" clause of the Fifth Amendment to the United States Constitution is made fully applicable to the states by the Fourteenth Amendment[81], a survey of relevant decisions of the United States Supreme Court is necessary to ascertain 1) the minimum limits of federal constitutional compulsion upon the states (and their political subdivisions[82]) in inverse condemnation cases, and 2) the extent to which federally established minimum requirements as to compensability for "takings" of private property afford latitude for legislative modification or interpretation. Doctrinal limits, of course, are important as guidelines to legislative policy, for it would obviously be both fruitless and unjust to enact a statute purporting to deny compensation to a property owner whose right to such compensation is clearly secured by the Federal Constitution. However, as will be developed below, the constitutional minimums themselves are somewhat amorphous and undefined, and federal case law intimates that there is a considerable range of legislative discretion for developing more specific statutory standards

within the parameters of existing doctrine.[83]

(1) The doctrinal ambiguity of Federal inverse condemnation law

A value judgment on which nearly all informed commentators appear to be in agreement is that the dimensions of constitutional duty to pay just compensation for takings of private property have been defined by the courts in terms which are both unsatisfactory and vague.[84] The law as declared by the Supreme Court of the United States, it has been charged, is "principally characterized by . . . highly ambiguous and irreconcilable decisions."[85] In view of these ambiguities, "the conceptual basis for substantive inverse recovery has not been adequately developed in spite of a hundred years of appellate litigation."[86] One student, noting the "characteristic ambiguity of the taking cases", concludes that the Supreme Court "has settled upon no satisfactory rationale for the cases, and operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem."[87] Still another, finding that the Court has failed to provide an appropriate structure of inverse condemnation law, refers to its decisions as "a crazy-quilt pattern".[88]

Criticism of this vein--although perhaps justified from the viewpoint of those who seek for a measure of conceptual symmetry and logical pattern in law--sometimes fails to take into account the root of the difficulty. As Professor Dunham cogently observes,[89]

> When a problem that the Constitution itself states in ethical terms, "just compensation," must be answered by the courts with few, if any, guides, it is not surprising that there are floundering and differences among judges and among generations of judges.

The courts have not been conspicuously successful, it may be suggested, in imparting consistent and durable meaning to other not dissimilar ethical imperatives embodied in constitutional language--"due process", "equal protection", "freedom of speech". The pace of social and economic change, and the increasing use of governmental powers to promote the general welfare, suggest that a crystallization--which tends all too often to become a rigidification--of legal doctrine in the judicial administration of broad constitutional precepts of this sort is not entirely desirable. Judicial pronouncements as to the meaning of constitutional language, moreover, tend to have both a generating and restrictive capacity of their own which is inherent in the rule of stare decisis. Where constitutional limitations are being interpreted--and it must be remembered that the "just compensation" clauses are essentially limitations upon and not grants of governmental power[90]--over-specificity of judicial language thus tends to tie the hands of the legislative branch, generality of expression to facilitate (or at least suggest an attitude of hospitality toward) flexible statutory treatment. In this sense, the Court's repeated monition that "No rigid rules can be laid down to distinguish compensable from noncompensable losses"[91] is an encouraging

aspect of the decisional pattern.

The doctrinal content of Supreme Court decisions here under review has concentrated primarily upon the operative language of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation." The crucial terms have been "property", "taken", "public use", and "just compensation". Each of these elements will be examined at this point, the purpose of the present investigation being limited to determining to what extent room for state legislation may exist within the purview of the Federal constitutional limitation. The task is not made easier by the fact--as will be seen--that different conceptual approaches have been utilized from time to time, sometimes within a single case, thereby blurring underlying policy considerations.

(2) The "public use" requirement

Insofar as the Fifth Amendment limits compensability to takings for public use, judicial control of governmental action is minimal. Where Congress is acting within the general scope of its powers, it possesses broad legislative discretion as to what type of taking is for a public use, and its determination is beyond the scope of effective judicial review.[92] "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."[93]

Substantially the same freedom and breadth of scope has been recognized for state determination of the purposes

for which governmental action will be exercised.[94] The most recent occasion on which an exercise of legislative power was judicially invalidated by the Supreme Court as not being for a permissible public purpose occurred some thirty years ago.[95] Similarly, no recent decision has been found in which inverse condemnation liability has been rejected by the Supreme Court on the federal ground that the taking was not for a public use.[96] Indeed, every indication is that where a taking has occurred, or is alleged to have occurred, the Court is disposed to construe the applicable constitutional and statutory provisions liberally to find an authorized exercise of power and thus potential compensability.[97]

(3) The private "property" element

The language of the Fifth Amendment is uncompromising: no kind of "private property" may be taken without payment of just compensation. This means that "Whatever property the citizen has the Government may take."[98] Thus, the principles of the just compensation clause are applicable to takings of both realty and tangible personal property[99], as well as intangible interests such as contract rights[100] and franchises.[101]

This broad sweep of the clause, although firmly grounded in the case law, is the product of a gradual evolution in judicial attitude.[102] The early concept of property as being limited for Fifth Amendment purposes to assets capable of seizure and appropriation in a physical sense gradually gave way to a more sophisticated approach. At least since

1871, the Court has indicated a willingness to give constitutional protection against destruction of some--but not all--economic values attributable to individual rights, powers, privileges or immunities which, taken in the aggregate, comprise "ownership" of property.[103] Alleged takings in whole or in part of various kinds of easements, servitudes, leasehold interests and other interests less than full fee ownership are today routinely found in inverse litigation.[104]

On the other hand, the Court has never departed from the idea that the compensation required to be paid is only for the "property" taken, and not for all losses sustained by its owner as a consequence of the taking. This view is predicated on the fact that the just compensation clause departs from the uniform pattern of language of all other provisions of the Fifth Amendment:[105]

> . . . just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in the Fifth Amendment is personal . . . [but in this one] the personal element is left out and the 'just compensation' is to be a full equivalent for the property taken.

Under this limited view, losses sustained by property owners are compensable only if reflected in the market value of the property interest taken. Noncompensable consequential damages generally include such expenses as moving and relocation costs[106], loss of value of assets not taken due to a forced sale caused by the taking[107], and loss of going concern value and good will to a business which must be discontinued due to the taking.[108]

These two corollary ideas--that a "property" interest must be taken, and that compensation is constitutionally required only for losses of "property"--readily lend themselves to judicial manipulation to reach disparate results. Where a substantial governmental interference or destruction of economic values has occurred, Supreme Court decisions affirming compensability of the loss routinely describe it in terms of a "taking" of a "property" interest. For example, intermittent flooding of land, as a consequence of a government dam or flood control improvement, may be said to constitute a compensable taking of an "easement in the United States to overflow" plaintiff's land.[109] However, denial of relief under analogous facts may call for a judicial opinion describing the injury as mere "indirect and consequential" damage not amounting to the taking of a property interest.[110] If the increased water level causes a raising of the water table and thus a water-logging of agricultural land so that it becomes unfit for farming, the injury may be held to be compensable by describing it as a "servitude" upon the land.[111] But if it causes a loss of water power head, thereby diminishing the value of a mill or power plant built along the stream to capitalize on the kinetic energy of falling water, the loss may be treated either as compensable by describing the claimant's interest as a "right to have the water flow unobstructed . . . as an inseparable part of the land"[112], or noncompensable as a mere "privilege or a convenience".[113] Similarly, flight of

aircraft repeatedly and at such low altitudes over private commercial or residentail property as to substantially interfere with use and enjoyment of the surface, due to excessive noise, smoke and vibration, may be held to be a compensable taking of an "easement" for flight purposes.[114] But if the flights are not directly over the claimant's land, a court insistent upon denying liability may readily conclude that injurious consequences of like nature and magnitude to nearby land are noncompensable incidental damages, since no easement is taken where there are no actual overflights which invade the owner's property interest in the airspace above his land.[115] Perhaps the most notable judicial use of the property right approach as a means of denying inverse liability for destruction of substantial economic values is the frequent invocation of the Federal Government's "navigational servitude" which extends to high water mark of navigable streams--a servitude to which, according to Supreme Court doctrine, riparian property interests are necessarily subordinated and in the interest of which such riparian interests may be destroyed or impaired by the Government without payment of compensation.[116]

The flexibility inherent in the property right approach to inverse condemnation claims has undoubtedly endowed that approach with considerable utility as an instrument of judicial policy. The examples used above to illustrate the ease with which courts may achieve seemingly inconsistent results should not, however, be taken as mere evolutionary or

idiosyncratic disagreements as to the nature of property interests. After all, it is obvious--and certainly just as obvious to the sophisticated judges of the United States Supreme Court and other high appellate tribunals of this land as to non-judicial observers--that a court opinion ascribing or refusing to ascribe "property" connotations to a particular interest being asserted by a litigant represents a fundamental policy choice. The property ascription is synonymous with a legal right to recover just compensation (assuming there has been a "taking"); a refusal to so describe the interest means there is no such right. As Holmes put it more than 85 years ago, "Just so far as the aid of the public force is given a man, he has a legal right."[117] Thus, for example, a court which, on policy grounds, determines that governmental liability should attend substantial interferences with enjoyment of residential property due to noise, smoke and vibration from jet planes taking off and landing at a nearby public airport will have not the slightest difficulty with the absence of overflights which invade the surface owner's superadjacent airspace. The owner's losses are simply described as the compensable taking of an easement to impose a servitude of noise and vibration.[118]

The courts are often less than candid about the process of weighing, evaluating and balancing of competing policy considerations which presumably determine the ultimate conclusion of compensability vel non. (The word, "presumably", is here intended to exclude the cases, hopefully rare, in

which judicial deliberations consciously function solely at the arid level of pure conceptualism.) United States v. Willow River Power Co.[119] is a preeminent exception. The power company here claimed a substantial economic loss in that a federal dam had increased the water level of the St. Croix River, a navigable waterway into which the spent waters leaving the turbines of its riparian power plant were discharged. This diminution of "head"--the difference in elevation between the water level in the power company's water supply pool (derived from a non-navigable tributary of the St. Croix) and the newly heightened water level of the St. Croix--diminished the mechanical energy of the falling water and thus the plant's capacity to produce electricity. The Court of Claims awarded compensation in the sum of $25,000 in an inverse condemnation suit under the Tucker Act. Reversing, the Supreme Court, in an opinion by Mr. Justice Jackson, commented meaningfully upon the nature of the issues stirred by the power company's assertion that its "property" had been taken:[120]

> The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but only those which result from a taking of property. . . .

Turning to the specific claims of the power company, he continued:

> But not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. . . . We cannot start the process of decision by calling such a claim as we have here a "property right"; whether it is a property right is really a question to be answered. Such economic uses are rights only when they are legally protected interests. (Emphasis added.)

The opinion then goes on and makes a careful and penetrating analysis of the competing policy considerations at stake in light of the particular facts of record, concluding that the power company's interest was subordinate to the Government's interest in freely exercising its function of improving navigation on the St. Croix. Hence "the private interest must give way to a superior right [in the Government], or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all."[121]

Other decisions in which conscious policy evaluation is reflected in the prevailing opinion may readily be found; many of them will be analyzed in Part Two of this study. For present purposes, such cases are significant principally to document a point already obvious: the determination of individual inverse condemnation claims necessarily represents an ordering of competing interests in light of their relative importance.

The constitutional concept of "property" for which just compensation is awardable on a taking for public use thus invokes not a fixed set of settled categories, but a fluid and dynamic process of adjustment of social and economic

values. This, in itself, is not unusual--as witness the ever-growing list of newly recognized interests enjoying legal protection (at least in some circumstances) which have been created by recent judicial decisions.[122] In the eminent domain area, however, it takes on a special dimension in that governmental interests--that is, interests which usually transcend individual personal claims and assimilate widespread values embraced by such rubrics as "general welfare"--are generally in competition with private economic values. (Even the interests represented by private condemnors are, by definition--in light of the public use requirement--more than merely proprietary.) The balance struck when purely private claims are at stake may thus, quite rationally, differ from that which prevails in the competition between governmental and private claims.[123] The need for public improvements to provide services to the public justifies assigning a generally greater value to the governmental interest than to a like private one; indeed, all the cases recognize that some interferences with private interests must go entirely uncompensated in the interest of preventing the stifling of public progress. In some instances, even the total destruction of substantial private assets of great economic value must yield to public necessity.[124]

This judicial ordering of relative interests in the name of consitutional "property" rights is not a function which is inherently or necessarily one that must be committed solely to the courts. Indeed, an assumption of representative

self-government is that the ordering of legal values is primarily a legislative responsibility. Although the national and state legislatures have, for the most part, defaulted in this area, it is clear that statutes are capable of defining the appropriate relativity of values in at least some situations. For example, a judicial appraisal of interests might conclude (as many courts have[125]) that the interest of a franchise occupier of a public street is subordinate to the interest of the government in utilizing the same location for public improvements.[126] The California Legislature, however, as already noted above, has agreed with this view of the matter in some circumstances but not in others.[127] Insofar as the application of the constitutional requirement of just compensation turns upon where in the hierarchy of interests known as "property" the particular claimant's interest may properly be located, a legislative ordering of values seems to be functionally possible.

On the other hand, it must be kept in mind that the Fifth Amendment--and, of course, the ordering of interests implicit in Supreme Court decisions applying the just compensation requirement of that Amendment--imposes minimum standards to which any state legislation seeking to define compensable property interests must conform. The question thus arises: would state statutes of this type have any operative effect, or would they be deemed an unconstitutional incursion upon the judicial power to interpret and apply the constitutional mandate?

The answer seems to be reasonably clear. A state determination to give effect to a particular interest, and to treat its impairment as a compensable taking of "property", does not even give rise to a federal question where clearly posited upon state constitutional or statutory premises.[128] Conversely, with very few exceptions[129], the Supreme Court has generally declined to interfere with state determinations that property has not been taken in a constitutionally compensable sense.[130] State determinations denying compensation in inverse condemnation litigation have generally been sustained.[131]

The normal inference from this experience--that, in the absence of some overriding "property" interest vested in the Federal Government, such as its "navigational servitude"[132], state definitions of property interests will be generally accepted for Fifth Amendment purposes--is reinforced by repeated statements to the same effect found in the Supreme Court's opinions. Thus, in denying compensation for losses due to an improvement which changed the street abutting plaintiff's property into a closed cul-de-sac, the Court declared: "If under the Constitution and laws of Virginia whatever detriment [plaintiff property owner] suffered was damnum absque injuria, he cannot be said to have been deprived of any property."[133] In denying compensation for loss of light and air, and for depreciation of value due to noise, dust and fumes, caused by construction of a viaduct in the street abutting plaintiff's premises, the Court accepted

the state determination that these injured interests did not constitute compensable "property":[134]

> [E]ach state has . . . fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. . . . [T]his court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various states to a uniform rule which it shall announce and impose.

Again, in affirming compensability for loss of "head" on a non-navigable stream as a result of a federal dam, the Court relied heavily upon the fact that, under state law, the interest destroyed was deemed a "property" right:[135]

> The states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of lands forming their beds and banks . . . subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation. . . .

The continued vitality of the quoted statements is documented in recent cases emphasizing that "Though the meaning of 'property' as used in . . . the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law."[136] Moreover, Supreme Court decisions affirming the compensability of various kinds of takings continue to rely upon state law as the principal point of reference for the constitutional definition of private property interests.[137] The judicial disposition to do so has been matched by a Congressional policy determination, expressed in various statutes, that state property law is to be applied in determining the legal consequences flowing

from disturbances of economic interests made necessary by federal or federally assisted improvements.[138]

It may thus be concluded that state legislation defining property interests and rights to just compensation for purposes of application of the state constitutional requirement would, in the main and subject to outer limits grounded in the Fifth Amendment, be valid under the Federal Constitution. Such legislation, moreover, would seem to be most likely to receive favorable treatment at the hands of the federal courts a) in connection with peripheral interests which are not fully crystallized as property by judicial decisions or by long-standing legislation, and b) where the legislation gives specific interests manifestly greater protection than required by federal minimum standards.

(4) The requirement of a "taking"

The opposite side of the "property" coin bears the legend, "taking". A constitutional duty to pay just compensation can be avoided by conceptualizing the injury as not involving a "taking" (even though an admitted "property" interest has been injured) as easily as by describing the interest affected as something other than "property" (even though a taking is conceded). The sterility of the traditional formulation is apparent on its face: "If, under any power, . . . property is taken for public use, the government is liable; but if injured or destroyed by lawful action, without a taking, the government is not liable."[139] Obviously, here again is a tool for judicial administration

possessing the virtues of great flexibility, delusive simplicity, and deceptive vagueness of content.

No useful purpose would here be served by a full-scale analysis of the cases which appear to emphasize the "taking" test as the key to compensability; the conclusions would be substantially the same as those expressed above with respect to the "property" approach. "Taking" or "non-taking" are simply formal techniques for expressing results grounded on policy considerations.[140] However, without attempting, at this point, to expose and evaluate the relevant policy elements in typical factual situations, it should be helpful to review briefly the range of flexibility inherent in the "taking" concept, and seek to place the decisions into a frame of reference which suggests the kinds of policy considerations that may warrant further and more detailed investigation.

In the early inverse condemnation cases, it was readily accepted that a permanent physical invasion, appropriation, or destruction of tangible assets was well within the constitutional meaning of a "taking" of property.[141] Later cases, however, presenting more subtle variations of facts, called for more sophisticated treatment. For example, a physical appropriation of tangible assets may well destroy related intangible values, making it impossible, for example, for a property owner to enjoy further the fruits of contract rights dependent upon continued possession and exploitation of the physical assets taken. Are such contractual benefits

"taken" within the meaning of the Fifth Amendment under these circumstances? Normally the answer would appear to be affirmative.[142] But if these intangible interests are simply entrepreneurial expectations not firmly rooted in contractual rights[143], or, if contract rights, are not closely or directly tied to the tangible assets appropriated[144], the answer is less clear and seemingly dependent upon more particularized policy criteria than those which support the general rule.[145]

Moreover, to regard the "taking" requirement as necessarily satisfied where physical invasion or destruction has occurred is too narrow a position, for it is abundantly clear that total or partial physical destruction of tangible property by government is not necessarily a "taking" which requires payment of compensation.[146] On the other hand, it also seems too broad; for example, invasions of property by recurrent imposition of excessive noise, vibration, and smoke--sources of annoyance and discomfort which do not necessarily destroy the physical attributes of land or buildings--may constitute a "taking", despite the non-physical (using the term in a non-technical sense) nature of the invasion.[147]

Temporary and partial disruptions of the use and enjoyment of property have presented still a further strain upon the logic of the physical invasion approach. Even a very substantial unanticipated one-time loss resulting from physical forces attributed to governmental action may be deemed non-compensable[148], while recurring risks of physical

damage foreseeable as a continuing limitation upon the profitable use of property (e.g., a continuing risk of seasonal flooding) may be held compensable.[149]

Perhaps the seeming inconsistency in the decisions employing the language of physical invasion or destruction can best be viewed as indicative of a more general view that "it is the character of the invasion, not the amount of damage resulting from it, . . . that determines the question whether it is a taking."[150] The "character of the invasion", in this sense, invites consideration of all relevant competing policy aspects of the particular case, rather than confining judicial attention to the narrower issue whether a property interest has been invaded or destroyed.

On the other hand, there is a substantial body of Supreme Court decisional law which appears to postulate compensability in inverse condemnation upon the magnitude of the private property owner's deprivation. Although this approach did not originate with Holmes[151], he is generally credited with being its chief promulgator.[152] The classic statement of this position is found in Pennsylvania Coal Company v. Mahon[153], where a statute banning the mining of coal in such a way as to cause subsidence of the surface was held to constitute an unconstitutional "taking" of the coal company's property:

> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the

> desire by a shorter cut than the constitutional way of paying for the change.

Although it is easy to read this language as suggesting that the ultimate test of compensability is a quantitative one as to the degree of deprivation[154], it seems doubtful that a mind as sophisticated as Holmes' would rest on this one aspect of the problem. Indeed, the Mahon opinion appears to concede that in some situations, total destruction of property to meet an extreme emergency may well be noncompensable.[155] And, in speaking of the quantitative element of the facts in Mahon, Holmes carefully points out that "extent of diminution" is only "one fact for consideration".[156] Finally, the opinion does, in fact, take into account other aspects of the situation before the court, including the assessment of the relative values to be assigned the competing claims of the state and the coal company. "Too far", in the language above quoted, thus probably was not intended to refer exclusively, or even in a controlling sense, to the magnitude of the deprivation as the test of a compensable "taking", although it clearly was a significant factor in Holmes' view. Other cases of claimed inverse condemnation liability in which Holmes participated tend to verify the impression that the balancing of private and public interests invoked, in his mind, a complex set of interrelated and competing elements of which the amount of the loss was but one.[157]

In Mahon, Justice Brandeis pointed out in dissent that a large variety of cases, affirming the permissibility of

uncompensated losses due to police regulations, found justification in a form of "reciprocity of advantage", which he characterized as "the advantage of living and doing business in a civilized community".[158] Put more directly, this seems to mean that the advantage of living in a society in which government is capable of exercising its police power to protect the public against harmful, dangerous or obnoxious uses of property supports the view that impairments of property values resulting from such measures are non-compensable.[159] Holmes at no point rejected this view; his difference with Brandeis was with respect to its application to the facts of the case. Two special aspects of the Mahon case thus take on importance: a) the coal company was vested, under traditional contract and property law concepts, with the legal right to cause subsidence of the surface by a mining of its underground coal deposits, having reserved such right in its conveyances of surface interests to plaintiff's predecessor in title; and b) the statute in question appeared to have been drawn for the very purpose of destroying this, and other like, contract and property rights. Holmes seems to have viewed this as mere general regulation of property use grounded upon presumptively impartial and objective legislative weighing of public and private interests--as, for example, the banning of brickyards in an urban residential area[160], or of livery stables in an urban commercial area[161]; it appears to have constituted, in his view, a form of preferential treatment of a particularized economic interest

by deliberate legislative interference with the agreed consequences of a contractual bargain.[162]

For present purposes, the relevant point of the immediately preceding discussion is that the "diminution of value" approach to a definition of "taking" is, like the physical invasion approach, entirely delusive, and tends to constitute more of a description than a determinant of results. The same point can be made of still a third line of cases, in which a judicial determination that there has been no taking is, quite transparently, merely a doctrinally satisfying way of ruling that the governmental action being challenged was legally privileged. Included in these cases are the long line of decisions denying compensability for damages resulting from an exercise of the Government's "navigational servitude" on navigable waterways[163], decisions treating losses of economic expectations caused by the exercise of war emergency powers as noncompensable consequences of the common defense effort[164], and decisions sustaining the right of states to require uncompensated grade-crossing separations[165] and relocations of private structures and facilities in public ways when necessary to accommodate public improvements.[166] To hold, as these decisions do, that the injured property interests were held subject to an implied condition that they might be impaired or even destroyed by the exercise of governmental power comports with traditional concepts of conditional interests, but in its bare articulation, this approach fails to explain

adequately why the governmental interest should be ranked as superior. Only occasionally do the judicial opinions seek to grapple directly with that problem.[167] Yet it is really the basic question to be decided. After all, private property is universally held subject to the exercise of the legislature's "police power"; but, as Mahon and other cases point out, this doesn't mean that property interests can always be destroyed by legislative action. The Fifth Amendment has not been judicially repealed.

Finally, there are several decisions in which lack of a "taking" is equated, either explicitly or implicitly, with the absence of a duty to take affirmative action to protect the complaining property owner against the loss.[168] The analogy to tort law, and to policy determinants underlying the development of the "duty" aspect of tort liability, is here a plain one.

As in the case of the "property" element of inverse condemnation liability, the "taking" requirement often masks the fact that in this aspect of their activities, courts are essentially charged with the responsibility of determining the relative ordering of competing public and private interests to determine the extent to which private losses should be socialized in the interest of the public good. The scarcity of decisions invalidating state determinations that compensation is not constitutionally required[169] strongly suggests that here, too, considerable latitude exists for rational state legislative standards to be drawn, without substantial

hinderance from the Fifth and Fourteenth Amendments, for the purpose of defining when property losses are to be deemed "takings". The Supreme Court has frequently reiterated its continuing disposition to sustain, as against constitutional Due Process attack, state legislative regulations of business and property interests which have a rational basis with reasonable relationship to legitimate governmental objectives.[170]

(5) The rule of "just compensation"

The traditional view of eminent domain--and inverse condemnation--regards the ascertainment of "just compensation" as a judicial and not a legislative question.[171] An attempt, by statute, to exclude compensable damage from the computation of the award to be paid the condemnee is thus unconstitutional.[172] The possibility of valid legislative enactments relating to, and governing, just compensation is not, however, foreclosed by these general propositions.

The decisions of the United States Supreme Court make it abundantly clear that "just compensation", under constitutional compulsion, is necessarily "comprehensive and includes all elements" necessary to produce for the owner a full equivalent of the value of the property taken.[173] But what constitutes this full equivalent of value is a problem beset with substantial difficulties in many situations. Thus, although the market value of the interest taken is generally said to be the preferred test of just compensation[174], the Court has freely recognized that "this is not an absolute

standard nor an exclusive method of valuation."[175] The constitutional standard is simply that which is encompassed by the word, "just", in the Fifth Amendment--a term which "evokes ideas of 'fairness' and 'equity'."[176] As Mr. Justice Douglas pointed out in a leading decision:[177]

> The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics represented in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined. . . . The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. . . . But it has refused to make a fetish even of market value, since it may not be the best measure of value in some cases.

The general statement that "just compensation" is exclusively a judicial question must, in light of these authoritative pronouncements, be taken to mean simply that the issue, in the last analysis, is a federal question on which the Supreme Court necessarily has the last word. Legislative prescriptions as to the rule or elements of compensation, in other words, must survive constitutional scrutiny; but this is not to say that reasonable legislative provisions will be utterly without operative significance. On the contrary, the Supreme Court itself has given substantial effect to governmentally promulgated price control regulations as a prima facie standard for determining "just compensation" for foodstuffs commandeered during World War II.[178] Moreover, the Court has made it clear that the elements of economic loss which must be included in the determination of

constitutional compensation are variables which depend to some extent upon the special facts of the particular situation. Thus, the award to which the property owner is entitled ordinarily is deemed not to include special values attributable to the owner's idiosyncratic attachment to the property nor values derived from the peculiar fitness of the property for the taker's purposes.[179] Likewise, increases in value due to speculation based on the probability that certain land will be included within the area of a proposed government project must be excluded from the date of the government's commitment to the project.[180] Depreciation in market value because of the prospective taking of the land by the government must likewise be excluded, for otherwise the government's commitment to the project could, in itself, bring about a much more favorable price when the subsequent taking actually occurred, thus permitting official manipulation of the timing of the project to destroy property values to the detriment of private interests.[181] In other unusual circumstances, the Court has also required inclusion or exclusion of elements of value which would not normally be assimilated within the bare "market value" approach.[182]

The variability of the meaning of "just compensation", as it has been explicated in Supreme Court decisions, suggests the existence of latitude for statutory guidelines. To be sure, such statutory rules could not validly deny compensation, or substantially curtail it, where constitutionally required.[183] However, federal decisions requiring particular

elements of value to be included in a compensation award, or extending judicial approval to particular methods of determining the value of property taken, are not necessarily binding on the states. Where the eminent domain power of the United States is being exercised, the legal principles which apply are federal principles: state rules of law apply only to the extent that Congress so determines.[184] The federal decisional rules relating to ascertainment of just compensation thus appear to contain elements of minimum constitutional standards as well as non-constitutional elements imposed by the Supreme Court in the exercise of its supervisory powers over federal administration of justice, together with rules derived from federal statutes sometimes applicable.[185] Unfortunately, the distinctions between the sources of the various requirements is not often made clear in the federal inverse decisions, there being no need to do so.

On the other hand, in the relatively few decisions in which the Supreme Court has judicially reviewed state determinations of just compensation, the Court has intimated that considerable deference to state law will be accorded, limited only by the minimum requirements of reasonableness, fairness and equal treatment enjoined by the Fourteenth Amendment. The leading case is Roberts v. City of New York[186], in which the Court rejected, unanimously, a contention that compensation awarded for demolition of an elevated railway spur line was so low and inadequate to amount to an unconstitutional taking. In so holding, Mr. Justice Cardozo stated:[187]

> A statute of New York in force at the taking of the spur directs the court to "ascertain and estimate the compensation which ought justly to be made by the City of New York to the respective owners of the real property to be acquired.". . . Such a system of condemnation is at least fair upon its face. . . . In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. . . . To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action.

The potential purview of permissible state legislation governing the determination of "just compensation" will be explored in detail in Part Two of the present study. It is obvious, however, that one area which might be considered is the desirability of requiring takings of private property to be compensated by awards which are greater than the federal constitutional minimums. The Supreme Court has often recognized that present judicial interpretations of the constitutional requirement may result in excluding items of noncompensable "consequential damage" and thus in considerable personal hardship; but if so, the remedy lies in legislation authorizing additional compensation to be paid.[188] No federal constitutional barrier stands in the way of such additional awards.[189] Other aspects of the matter, including whether a jury trial or some other method of determination shall be employed[190], the applicable statutes of limitations governing inverse condemnation actions[191], the determination of the time as of which the property taken shall be valued[192], and the circumstances in which benefits from the taking are to be offset against the burdens[193], also seem to be

permissible subjects for rational state legislative control. The procedural incidents of inverse condemnation suits may, of course, materially affect their impact upon both private and public interests; and in this respect, the Supreme Court seems fully disposed to sustain state policy, as long as it operates fairly and in an impartial manner.[194]

The California Constitution and Statutory Controls Over Inverse Condemnation

The foregoing analysis of federal decisions supports the conclusion that significant areas of the law of inverse condemnation are legally susceptible to a measure of state statutory regulation, control, and modification without violating the United States Constitution. It remains to be seen whether there are any constitutional barriers to such legislative measures to be found in the California Constitution, or in its history or interpretation. To that subject we now turn.

(1) Preliminary observations: state constitutional amendment

The scope of the topic now under investigation should be carefully noted. Theoretically, there are two distinct aspects of the problem: First, to what extent would it be possible to change the existing law of inverse condemnation liability by amending the California Constitution? Second, without a state constitutional amendment, to what extent, if any, would statutory enactments seeking to regulate inverse condemnation liability--assuming full conformity with Federal Constitutional limitations--be valid and enforceable under the California Constitution?

On the first aspect, the difference in wording of the California eminent domain provision and its Fifth Amendment counterpart in the United States Constitution immediately suggests the possibility of a state constitutional amendment as a means of conforming state law to federal law, if that were deemed desirable policy. Section 14 of article I of the California Constitution states, so far as here relevant:

> Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner . . . (Emphasis added.)

The emphasized words, "or damaged", mark the principal difference in substance between the two constitutional guarantees. (Other language of Section 14, important for certain subsidiary purposes, also distinguishes California from Federal constitutional requirements, and likewise would be subject to possible alteration through the amending process.)

Whether a change in the language of the state constitution would serve any useful purpose, however, depends upon substantive policy considerations which deserve objective evaluation on their merits, and upon the ultimate objectives of legislative action which may be proposed. Whether those objectives can be achieved by legislation alone, or only by a combination of statutory and constitutional provisions, is a problem of means that should be reserved until the ultimate legislative objectives are determined. The additional phrase, "or damaged", found in Section 14, as will appear, merely expands the scope of inverse liability somewhat beyond the outer limits of present federal requirements. Only if sound policy considerations indicate the

desirability of curtailing that expanded liability would a constitutional change be necessary--and, even then, only if such narrower limits of public responsibility could not be realized by statutory provisions permissibly clarifying the scope of liability as established by judicial interpretations made without the aid of legislative guidelines. The judicial interpretation of a constitutional provision is not always the only possible valid interpretation; hence it has frequently been stated by the courts that the construction placed upon constitutional language by the Legislature--especially where that language is relatively general and uncertain of meaning--is to be accorded persuasive, although not controlling, significance.[195]

In addition, it must be kept in mind that merely deleting the words, "or damaged", from the California Constitution would not necessarily bring the law of California into conformity with federal law. There is adequate room for judicial interpretation of the concept of "taking" to expand inverse condemnation liability well beyond federal standards.[196] Indeed, if the bundle of individual rights, powers, privileges and immunities which comprise "property" ownership is dissected with a sharp enough knife, the notions embodied in "taking" and "damaging" become almost indistinguishable, for any impairment of a property interest (if defined narrowly enough) will also, by definition, constitute a taking of that interest to the extent that its owner may no longer fully enjoy and exercise it.[197] Consistency of language is thus no assurance of consistency of judicial interpretation of identical state and federal constitutional provisions. And the

Supreme Court has made it completely clear that the states have complete discretion to adopt their own views as to what constitutes a compensable "taking" of property, without regard for such interpretations as may have been placed upon the Fifth Amendment by the federal judiciary[198]--subject only to the limitation that the states may not deny compensability where the Due Process Clause requires it, that is, where the state rule fails to conform to the minimum standards imposed by the Fifth and Fourteenth Amendments.[199]

Finally, there seems to be no good reason to anticipate in advance that sound legislative policy, based on rational ordering of appropriate values in relation to specific problems of inverse liability, will conclude that the "or damaged" clause of Section 14 imposes liabilities which should be abrogated or curtailed. In the abstract, it would seem at least equally possible that the focus of legislative policy determination might well be upon improving the legal standards that apply to the determination of compensability or of just compensation, or clarifying the procedures that govern their determination, within the contours of established state constitutional interpretations. There is no doubt, for example, that the Legislature may, by statute, authorize or require the payment of compensation for property injuries which are <u>not</u> constitutionally protected.[200]

Accordingly, the discussion which follows is based on the assumption that the means for achieving ultimately determined legislative objectives are of no immediate concern, whether they be by state constitutional amendment or by statute. The extent

to which the "or damaged" clause of Section 14 raises the minimum threshold for legislative regulation of inverse condemnation liability above federal requirements is thus of interest for present purposes only insofar as it may bear upon the second theoretical aspect of the subject of this study: does legislative authority exist to enact meaningful statutory provisions which would be accorded validity under Section 14 of article I? (If such authority does exist, the form and scope of proposed legislation in specific factual contexts would, of course, take into account any prevailing differences between the state and federal limitations in the light of applicable policy factors. Such matters can best be deferred for more detailed treatment below, in Part Two.)

(2) Historical background of Section 14

Nothing in the historical background of Section 14 suggests that it was intended to create a rule for judicial application wholly free from legislative interpretation or control. The original California Constitution of 1849 contained a provision (section 8 of Article I) which was obviously based upon the Fifth Amendment of the United States Constituion, and which concluded with its identical words, "nor shall private property be taken for public use without just compensation." Prior to 1879, this language had been construed by the California Supreme Court to be limited to actual physical appropriations and invasions of private property, and did not contemplate any liability for consequential damages resulting from governmental projects authorized by law and performed in a lawful manner.[201] Like

decisions characterized the interpretation of similar constitutional provisions of most of the states of the Union.[202] Although the harshness of this rule, which often left a private property owner remediless notwithstanding substantial economic losses occasioned by public improvements, was often cured by statute[203], not all states were sensitive to the problem. Finally, in 1870, Illinois adopted a new state Constitution which, in terms, required payment of just compensation not only where there was a "taking" of private property, but also where such property was "damaged" for public use.[204] Illinois thus pioneered the path which California was to follow.

The addition of the damage clause, it was readily conceded by the courts, was "an extension of the common provision for the protection of private property."[205] In Rigney v. City of Chicago,[206] decided in 1882, the Illinois Supreme Court, after an exhaustive review of the subject, concluded that the change of language had "enlarged the right of recovery [in inverse condemnation] by extending its provisions to a class of cases not provided for under the old constitution." As the United States Supreme Court later pointed out, with respect to the Illinois innovation, "Such a change in the organic law of the State . . . would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former Constitution."[207] Accordingly, in Rigney, a property owner whose access to an adjoining street had been substantially impaired by construction of a viaduct

by the city, resulting in a diminution of the value of his property by two-thirds, was held to have sustained a compensable "damaging" of his property.

Other states soon followed Illinois' lead. By the time of the California Constitutional Convention in 1878-79, similar "damaging" clauses had been added to the constitutions of West Virginia (1872), Arkansas (1874), Pennsylvania (1874), Alabama (1875), Missouri (1875), Nebraska (1875), Colorado (1876), Texas (1876), and Georgia (1877).[208] In keeping with this trend, Section 14, as first proposed by the convention committee charged with drafting the new bill of rights, contained the new "or damaged" language.[209] However, in an effort to resolve a debate as to the extent to which the common law jury system should be modified, the original proposal was referred to the convention committee on judiciary, together with other proposed sections dealing with administration of justice.[210] When the provision was again brought to the convention, it appears that the latter committee had not limited itself to jury matters, but had discarded the first proposal entirely, substituting a new version which limited liability to cases of private property "taken for public use".[211] In this form, the language of what was to become Section 14 continued unchanged throughout the convention until, toward the end, a successful motion was made to insert therein the phrase, "or damaged".[212] The proponent, Judge Hager of San Francisco, pointed out his reasons for wanting the change:[213]

> In some instances a railroad company cuts a trench close up to a man's house, and while they do not take any of his property, it deprives him of the use of it

> to a certain extent. This was brought to my notice in the case of the Second street cut in San Francisco. There the Legislature authorized a street to be cut through, which left the houses on either side high up in the air, and wholly inaccessible. It was destroyed, although none of it was taken or moved away. There are many such cases, where a man's property may be materially damaged, where none of it is actually taken. So I say, a man should not be damaged without compensation.

Delegate Wilson opposed the motion on prudential grounds:

> I think it would be dangerous to change this provision in this respect. . . . Now, to add this element of damage is to enter into a new subject. It is opening up a new question which has no limit. You take the question of street improvement, and this question of damage will open up a very wide field for discussion. . . . I regard it as very dangerous to undertake to enter into a new field.

Judge Hager responded by citing the Constitutions of Illinois and Missouri as examples of identical language then in effect in other states. Mr. Wilson thought "that the fact that it is found in the recent Constitutions is no argument in its favor", for, in his opinion, "these new Constitutions . . . are simply untried experiments." Delegate Rolfe, addressing himself to the merits, pointed out that the "or damaged" clause could have unwise effects:

> [M]any reasons [may be] urged why these words should be left out. A man's property might be damaged, when he would be entitled to no compensation. A man might have a public house on a public highway, and the highway might be changed for some good cause or other. The value of his property would be lessened by reason of the travel being diverted, and yet he would not have a just right to claim damages. He would be damaged by reason of a public use. I think it would be dangerous to insert such a provision as this.

The last sally in the debate was offered by delegate Estee, who referred again to Judge Hager's example:

> Take, for instance, the Second street cut. The property there is absolutely destroyed, and yet not a foot taken. The houses on either side are in absolute danger of sliding off into the street below. I know that what the gentleman from San Francisco [Mr. Wilson] says about this being an untried experiment, is true, but it strikes me that the justice of it is apparent; that when a man's property is damaged it ought to be paid for. I am in favor of the amendment. I think it is the best we can get.

The amendment, inserting the words, "or damaged", into Section 14 was then carried by a convention vote of 62 to 28. As thus altered, Section 14 became part of the Constitution of 1879. In this respect, there has been no subsequent change of language (although other features of Section 14 have been amended or added since 1879).

The discission which has been reviewed actually constitutes substantially all that was said in the convention proceedings bearing on the "damaged" clause of Section 14. Far more time and energy was expended debating other aspects of eminent domain policy, notably the scope of the rule that compensation had to be paid to or into court for the condemnee in advance of a taking, the question whether benefits should be set off against damages for a taking, and the extent to which eminent domain powers should be permitted to be exercised by private condemnors.[214] One may surmise that the delegates did not have any very clear idea of the potential problems of interpretation lurking in the words which they were inserting into the state's organic document. At the same time, one is struck by the accuracy with which the participants in the discussion focused upon specific problems which were, in later years, to trouble

the courts.[215] Moreover, the concluding remarks of Delegate Estee suggest that it was felt that "the best we could get" was a general statement of a principle of "justice", leaving it to other agencies of government to apply the rule in specific cases as they arose. Indeed, at one point in the discussion of the eminent domain provision, relating to a somewhat different aspect, one delegate (Mr. Shafter) expressed a philosophy of constitutional drafting which seems to have been generally accepted by the convention:[216]

> I hope the Convention will retain the section [i.e., Section 14] precisely as it comes from the Committee on Judiciary . . . .
>
> The rule adopted in the formation of our earlier Constitution was to confine its provisions to a general declaration of principle, leaving all that related to their execution to the Legislature. In case of simplicity of object and expression, the Constitution often executed itself, and in other cases . . . elaborate provisions were inserted providing for all the details necessary to the accomplishment of the general principle. This latter course, it seems to me, is only to be justified in case of actual necessity. It is an open attack upon and assumption of the purely legislative function. . . .
>
> This section presents a feature quite common here--a general declaration of a principle--an attempt at inserting executory provisions but half accomplished, and leaving to the Legislature the task of finishing up the work . . . .

Whatever hopes or expectations the delegates may have had that the Legislature would provide adequate statutory guidelines for the application of the new "or damaged" basis for just compensation liability were, in the main, unrealized. The courts, however, have wrestled with the problem to the present day, with mixed success. In the first California decision to interpret the new constitutional requirement, it was given a liberal judicial gloss. Pointing out that, in context, the

word "damaged" must mean more than invasion or spoliation (since they would be embraced already by the concept of "taking"), the Court declared:[217]

> We are of the opinion that the right assured to the owner by this provision of the constitution is not restricted to the case where he is entitled to recover as for a tort at common law. If he is consequently damaged by the work done, whether it is done carefully and with skill or not, he is still entitled to compensation for such damage under this provision. This provision was intended to assure compensation to the owner, as well where the damage is directly inflicted, or inflicted by want of care and skill, as where the damages are consequential, and for which damages he had no right of recovery at common law.

This quoted statement is still good law in California today.[218] What its broad generalities mean in terms of actual application to specific facts has, for the most part, been elaborated case by case, on policy grounds, by judges. As Mr. Justice Shenk, speaking for the state Supreme Court in the leading case of People v. Ricciardi[219], observed:

> Not every depreciation in the value of the property not taken [in eminent domain proceedings] can be made the basis of an award of damages. In the absence of a declaration by other competent authority the courts have been called upon to define rights claimed to be infringed in violation of section 14, article I, of the Constitution; also to place limitations on the extent of those rights and to declare when and under what circumstances recovery may be had by the property owner for a violation thereof. . . . The law on the subject . . . is therefore, in substantial part, case law. (Emphasis added.)

This brief survey of the history of Section 14 supports three general conclusions here relevant: 1) The delegates to the constitutional convention deliberately left the language of Section 14 broad and general in form, intending to expand

the scope of liability for private property injuries resulting from public improvements well beyond what was then implicit in the requirement that compensation be paid for a "taking", but without thinking through or identifying the limits of the new liability. 2) It was anticipated that the Legislature, by implementing statutes, would flesh out the bare skeleton of constitutional language with specific details--an expectation which, for the most part, has not been fulfilled. 3) The courts have felt constrained to interpret the constitutional mandate that just compensation be paid in the light of their own judicial notions of sound public policy, although they have expressed a willingness to defer to "a declaration by other competent [legislative] authority" as to the meaning and significance to be accorded to Section 14.

(3) Judicial recognition of legislative authority

The California courts have indicated repeatedly that statutes may validly regulate the eminent domain powers and liabilities of public entities. Support for this view is found in cases dealing with at least five significant aspects of the subject, here discussed. It should be noted that cases dealing with affirmative eminent domain actions and with inverse condemnation actions are cited interchangeably, in the belief that both types of decisions are equally relevant to the problem of legislative regulatory authority. As already noted, the courts have indicated that the substantive rules which apply to both forms of proceeding are the same.[220] Furthermore, the issue here being investigated is whether reasonable scope exists

for legislative activity; no attempt is here made to determine specific policy considerations or to propose actual legislative recommendations.

"Private property". In People v. Ricciardi[221], the state (condemnor) appealed from a judgment favorable to the owners of a slaughter house and meat market in an eminent domain proceeding brought to take part of their land (excluding any structures) for highway enlargement purposes. The state's principal objections to the judgment related to the inclusion therein of severance damages based on a) substantial impairment of direct access from the remaining property to the highway formerly abutting it, due to the construction of a highway underpass and service road as part of the project, thereby affording access and ingress between the highway and the property only by an indirect and more circuitous route, and b) loss of visibility to and from the highway with respect to the remaining property, due to the fact that highway traffic would pass the property in an underpass. These interests, although shown by the evidence to have injured the value of the remaining land of the condemnees, were, according to the state's contentions, noncompensable "inconveniences" of the kind which property owners often sustain in the interest of the general welfare when the police power is being exercised by the state.

In a candid opinion, the Supreme Court, speaking through Justice Shenk, rejected any attempt to decide the problem before it by simply invoking formal labels. Pointing out that "in the absence of a declaration by other competent authority", the

courts were necessarily placed in the position of declaring and defining the existence of "rights" protected by Section 14 from taking or damaging.[222] With respect to the facts, the court pointed out that: "Neither in the Constitution nor in statutes do we find any declaration of the incidents of ownership or elements of value which specifically creates or defines or limits the two rights which are involved here."[223] After quoting general statutory definitions of property found in the Civil Code, the conclusion was reached that since no statutory guidance had been provided by the Legislature, it became "necessary for this court to determine whether the claimed items are, or shall be, included among the incidents or appurtenances of real property . . . for which compensation must be paid when the same is taken or damaged for a public use . . .".[224] Upon an evaluation of the judicial precedents both in California and elsewhere, and of relevant policy factors, the court held both interests being asserted to be protected by Section 14 against substantial impairment, and affirmed the judgment.

Ricciardi exemplifies the reluctance of the courts to assume the role of creating property interests through judicial decision-making. The opinion of Mr. Justice Shenk strongly suggests that appropriate legislative guidance would be helpful, even encouraged, by the judges. Other decisions have taken the same view.[225] In one case, affirming the existence of a property right of a land owner ("an easement of ingress and egress to and from his property") to obtain access to the general street

circulation system over the street on which his property abuts, the Court pointed out that: "The precise origin of that property right is somewhat obscure but it may be said generally to have arisen by court decisions declaring that such right existed and recognizing it."[226] None of the reported decisions suggests that the role of the courts in this connection is exclusive or preempts legislative power.

Further support for the view that legislation declaring the scope and extent of constitutionally protectable interests would be perfectly proper is found in the open recognition by the courts that the determination whether private property has been taken or damaged is essentially a problem of balancing of competing policies. As Justice Carter, speaking for the Court in Bacich v. Board of Control[227], pointed out:

> If the question [of extent or character of a claimed property right] is one of first impression its answer depends chiefly upon matters of policy, a factor the nature of which, although at times discussed by the courts, is usually left undisclosed.

A number of leading California decisions, especially in recent years, have openly disclosed the kinds of policy elements deemed relevant to such an evaluation and the reasons for the relative weights assigned to them.[228] Especially in cases where there are no precedents directly in point, and a property owner is asserting damage to an interest not previously adjudicated, one finds the courts struggling with the task of balancing the competing considerations, conscious of the fact that in determining the extent of protectable property interests, "the problem of definition is difficult" although identification

"of the opposite extremes is easy".[229] Subject to judicially declared constitutional standards,[230] policy evaluation and resolution of this sort is, of course, the essence of the legislative function.

"Taking" or "damaging". Closely related to the determination of whether a "property" interest is at the root of an inverse condemnation claim, and sometimes simply another way of looking at the same basic policy problem, is the question whether there has been a "taking" or "damaging" within the purview of the constitutional rule. It is beyond question today that significant property values, grounded in well-recognized "rights" normally incident to property ownership, may be substantially impaired by governmental action without payment of compensation of any kind.[231] Such cases normally are explained as situations in which the policy values implicit in an exercise of "police power" outweigh the policy values inherent in stability and preservation of economic interests.[232] It is in exactly this conceptual framework of a conflict between the police power and private property that the Supreme Court has indicated that legislative balancing of interests would be permissible. In Southern California Gas Co. v. City of Los Angeles [233], the Supreme Court ruled that a private public utility company was required to assume the cost of reconstruction and alteration of its underground facilities to make way for installation of a sewer line in the exercise of the city's "police power", since "in the absence of a provision to the contrary" the utility's franchise to occupy the street was accepted subject

to this exercise of the city's police power. The court did not stop there, however. In purposeful dictum, it went on to state "there would appear to be no basic principle that would prohibit [the state from] granting a utility a right to compensation for relocating its lines as part of its franchise although such right would not otherwise pass. This view finds support in cases holding that the Legislature may provide for such compensation. [Citing cases.]" The same position was taken again, implicitly, in a similar decision four months later, where the issue of whether a compensable "damaging" had occurred to a utility company forced to move its underground facilities was deemed to rest essentially upon the legislative intent as expressed in applicable statutes.[234]

Manifestly, the legislative power to prescribe when an infliction of economic loss is or is not to be treated as a constitutional "taking" or "damaging" is subject to judicially declared constitutional minimum standards. For example, the Legislature could not validly authorize a public entity to destroy property rights in superadjacent airspace of existing owners near airports by simply appropriating them by height limit regulations for use by aircraft taking off and landing there.[235] However, reasonable land use controls imposed as part of a comprehensive zoning plan for the community may be authorized, even though the impact on land located near airports may be favorable to airport development by eliminating the probability of erection of hazards to air navigation or of surface uses which will be drastically impaired by overflights of aircraft.[236]

Again, legislative power appears to be ample to determine the alternatives of action open to public entities in seeking to control orderly development of land uses--authorizing either affirmative action by the public entity on condition of paying just compensation for private property appropriated for the project, or authorizing the entity to exact an uncompensated contribution of private property (e.g., dedication of land) as a condition to giving of official approval for private development of the balance of the particular private parcel under consideration.[237] This power to prescribe alternatives, in a realistic sense, is the power to determine legislatively and by general rule when a compensable taking or damaging of private property interests shall be deemed to have occurred.

Finally, since, as already pointed out, the rules governing what constitutes a "damaging" for which the California Constitution (but not the Federal Constitution) requires compensation are almost entirely decisional rules[238], there may be broader latitude for prescription of legislative standards in this respect than for "takings". There is some authority, at least, for the view that only the two issues of "public use" and "just compensation" are fundamentally judicial ones in cases involving eminent domain concepts, and that "all other questions" are "of a legislative nature".[239]

"Public Use". Section 14 imposes a constitutional duty to make just compensation only when the "taking" or "damaging" of private property is for a public use. In affirmative eminent domain proceedings instituted by either public or private

condemnors, the discretion of the Legislature to determine what is a "public use" is well settled. The leading case in point declares:[240]

> "The legislature must designate, in the first place, the uses in behalf of which the right of eminent domain may be exercised, and this designation is a legislative declaration that such uses are public and will be recognized by courts; but whether, in any individual case, the use is a public use must be determined by the judiciary from the facts and circumstances of that case." [Citation.] "If the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court." [Citation.]

Under this modern and liberal approach to legislative powers, new purposes for which eminent domain powers can be exercised have been introduced by statute in recent years, and have been given judicial approval.[241]

On first impression, there would seem to be no good reason why the legislative power to declare what constitutes a "public use" for purposes of permitting eminent domain powers to be employed should not include also the power to declare what uses are <u>not</u> public uses for the purpose of requiring compensation to be paid in inverse condemnation suits. Although at one time the Supreme Court seemed to have regarded the "public use" requirement, so far as invoked in inverse cases, as a different standard from affirmative condemnation suits[242], later cases have clarified the point; it now appears to be settled that if the construction or maintenance of a public project is designed to serve the interests of the community as a whole, such construction or maintenance is deemed a "public use" so that

property damage caused by the project or its operations as deliberately conceived is constitutionally compensable.[243] On the other hand, "damage resulting from negligence in the routine operation having no relation to the function of the project as conceived" will not be deemed within the purview of Section 14.[244] As thus explained, the general rules relating to the meaning of "public use" would appear to be substantially the same in direct and inverse condemnation suits.

One difference, however, is apparent between the two ways in which the question may arise. In an affirmative eminent domain proceeding commenced by a condemnor, the question whether the plaintiff is legally authorized to take the condemnee's property for the particular purpose alleged can readily be raised by demurrer, and the issue is resolved by judicial review and the relevant statutory interpretation of language.[245] In an inverse condemnation suit, however, the public entity ordinarily has made no intentional exercise of condemnation authority, but has, in some manner--often unexpected and unanticipated--caused injury to the plaintiff's property. The question of "public use" in this event does not depend upon a showing that there is statutory authority in the defendant entity to exercise affirmative eminent domain powers to accomplish the same result; all that is necessary is that the damage resulted from an exercise of lawful authority while seeking to promote "the general interest in its relation to any legitimate object of government."[246] Thus, in inverse actions, the question of "public use" is far less significant than in affirmative eminent domain, for the

general power of the defendant public entity to engage in the particular activity which caused the damage ordinarily is beyond serious question.

In practical effect, then, legislative power to regulate inverse condemnation liability through the devising of standards of "public use" is probably somewhat narrow at best. However, it may be possible to develop statutory rules for determining when a "public use" exists, which may serve to shift the injured party's remedies from inverse condemnation to tort remedies.[247] Once the action is removed from the eminent domain context of "public use", the limitation of the property owner's remedy to one for just compensation would no longer obtain, so that other alternative forms of relief--ordinarily not available in inverse condemnation--could be awarded, such as a recovery of possession of property physically taken[248] or an injunction, either mandatory or prohibitory, which restores the status quo ante.[249] The usual denial of injunctive or other specific relief in inverse condemnation litigation, where a public use has intervened through the actions of a condemning authority with respect to private property, "is based upon the policy of protecting the public interest in the continuation of the use to which the property has been put, not upon any dilatoriness by a property owner in asserting his rights, nor upon a justification that the property rights were subject in any event to condemnation."[250] On the other hand, where the facts fail to show that plaintiff's property has "been so devoted to a public use by the defendant that plaintiffs' ordinary remedies

[such as an action for injunctive relief or damages in tort] are not available to them", an action on the theory of inverse condemnation will not be entertained.[251] Within the limits previously indicated--that is, subject to the ultimate test of judicial approval as to applicability in specific fact situations--it would seem to follow that legislative rules governing the availability of alternative remedies, depending upon the degree to which a "public use" has attached to the plaintiff's property, would be both legally permissible and feasible.

"Just compensation". The general standards governing the determination of damages in inverse condemnation suits have, like other aspects of the subject, been largely of judicial creation. As in the federal cases, a diminution in value after the alleged injurious action, as compared with value beforehand, is the preferred test.[252] However, it has frequently been observed that it is not the exclusive test, and that other methods for determining what damages are appropriate may be devised for special situations to which the before and after value approach seems inapplicable.[253] Here again, of course, the judicial rules cannot exclude any elements of damages which are constitutionally required as "just compensation".[254] On the other hand, elements of additional damage which are not recognized as part of the constitutionally required compensation may be authorized to be paid by statute.[255]

The scope of legislative control with respect to the measure of damages and the methodology to be followed in computing them is suggested in Albers v. County of Los Angeles.[256] In discussing

the damages awarded to a water company for losses sustained by it as a result of a gradual landslide triggered by a county road project, the court sustained an award which included a) amounts representing the fair market value of water lines destroyed by the slide, b) amounts representing the fair market value of water lines rendered useless, and c) sums expended for extraordinary repair and maintenance during the period of gradual destruction while the slide was continuing. It denied, however, any recovery for the cost of replacing the ruined parts of the water system with surface waterlines. Referring to Section 1248(6) of the Code of Civil Procedure (requiring removal and relocation costs to be included in eminent domain awards), the court stated:[257]

> Judgment having been given for the fair market value of the water system . . . it would constitute double recovery to allow in addition the cost of constructing a substitute water system. Plainly, the code section does not contemplate such a result.

In addition, the court allowed, as a compensable item of damages, expenditures made by property owners in seeking to determine the cause of the landslide and prevent further damage through appropriate corrective action. In so holding, it significantly pointed out that "neither the relevant constitutional nor statutory provisions expressly forbid the type of recovery here sought."[258] Upon an evaluation of case law elsewhere, and based on policy considerations explored at length, the conclusion was reached that such damages should be awarded, since the court could perceive "no overriding public policy" to the contrary.[259] Implicit in the entire discussion

is the idea that the ultimate determination whether such damages were includible was one of policy, not of absolute constitutional compulsion, and that a legislative standard would (unless wholly arbitrary) be given effect.

Inverse condemnation procedure. It is well settled that Section 14 is a "self-executing" constitutional provision which, in itself, authorizes suit to be brought against public entities in inverse condemnation.[260] However, as the leading case so holding made clear, the constitutional right "is not exempt from reasonable statutory regulations or enactments", provided, of course, that the regulations do not "abrogate or deny" the substance of the right.[261] It has thus been held that inverse condemnation suits are subject to a variety of reasonable procedural regulations, including the operation of claims presentation requirements[262], statutes of limitations[263], and the statutory rule that the plaintiff, in suing a public entity, must post an undertaking for costs in the event the public entity defendant prevails.[264] Another area of undoubted legislative competence with respect to inverse litigation is in the formulation of rules of evidence and allocation of burden of proof.[265]

Procedural regulations, of course, are not as effective as direct legislative controls upon substantive rights; but carefully worked out procedures, which balance private against public interests may serve significantly to ameliorate the problems of inverse condemnation liability, facilitate out-of-court settlements, and discourage unfounded claims.

Summary and Conclusion

It is submitted, on the basis of the foregoing survey of both federal and state law, that significant areas exist in which state regulatory legislation pertaining to the constitutional liabilities of public entities to pay just compensation may be validly enacted. Such legislation necessarily must conform to minimum constitutional limitations embodied in Section 14 of Article I of the California Constitution, and in the Fifth and Fourteenth Amendments to the United States Constitution. The courts, however, have indicated repeatedly that the essentially policy-balancing process of delineating the meaning of those provisions, and of applying that meaning in myriad fact situations, entails considerations amenable to legislative consideration.

Whether specific legislation would be desirable, and if so, whether it would survive judicial scrutiny in any given factual situation, however, can only be evaluated after a careful examination of the particular policy considerations relevant to each such situation, weighed in the light of the pertinent authorities. An effort to make such an examination, in typically recurring inverse condemnation cases, is the general purpose of Part Two of the present study.

(End of Part One)

Footnotes

1. See, e.g., Mulkey v. Reitman, 64 Cal. 2d _____, 50 Cal. Rptr. 881, 413 P.2d 825 (1966), holding unconstitutional on Federal grounds Section 26 of Article I of the California Constitution.

2. Griggs v. Allegheny County, 369 U.S. 84 (1962); Chicago, Burlington & Quincy Ry. Co. v. City of Chicago, 166 U.S. 226 (1897).

3. Breidert v. Southern Pacific Co., 61 Cal. 2d 659, 663 n. 1, 39 Cal. Rptr. 903, 394 P.2d 719 (1964). See also, to the same effect, Rose v. State of California, 19 Cal. 2d 713, 123 P.2d 505 (1942); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).

4. People v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598 (1959).

5. See, generally, Grant, the "Higher Law" Background of the Law of Eminent Domain, 6 Wis. L. Rev. 67 (1930); Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596 (1942); Brown, Eminent Domain in Anglo-American Law, 18 Current Legal Problems 169 (1965).

6. Rose v. State of California, 19 Cal. 2d 713, 123 P.2d (1942).

7. Douglass v. City of Los Angeles, 5 Cal. 2d 123, 53 P.2d 353 (1935).

8. See, e.g., Dauer v. County of Ventura, 45 Cal. 2d 276, 289 P.2d 1 (1955), alternative remedies for flooding from overflowed drainage channel include statutory liability for defective condition of public property and inverse condemnation; Granone v. County of Los Angeles, 231 Cal. App.2d 629, 42 Cal. Rptr. 34 (1965), negligence, nuisance, and inverse condemnation.

9. Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

10. See Van Alstyne, California Government Tort Liability §§ 1.19, 5.9(C.E.B. 1964).

11. See, e.g., People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943), award of damages in eminent domain action, including amounts attributable to loss of direct access to highway and loss of easement of reasonable view, affirmed.

12. See Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943), reversing judgment dismissing inverse condemnation action for damages for loss of access to general system of streets by reason of creation of cul-de-sac.

13. An intimation to the contrary contained in People ex rel. Department of Public Works v. Symons, 54 Cal.2d 855, 9 Cal. Rptr. 363, 357 P.2d 451 (1960) was, in effect, dispelled by the later decision in Breidert v. Southern Pacific Co.,

61 Cal.2d 659, 39 Cal. Rptr. 903, 394 P.2d 719 (1964), explaining Symons as being limited to its special facts.

14. See Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. Rev. 3; Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Supreme Court Review 63; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964); Kratovil and Harrison, Eminent Domain - Policy and Concept, 42 Calif. L. Rev. 596 (1954).

15. Ibid. See also, Calif. Law Revision Commission, A Study Relating to Sovereign Immunity 102-08 (1963), for a collection of California cases.

16. Further discussion of relevant policy considerations in specific factual contexts will be found in Part 2 of the present study. For a good illustration of judicial policy evaluation, and disagreement on weight and relevance of particular circumstances, see the majority and dissenting opinions in Albers v. County of Los Angeles, 62 Cal.2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965) and in Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), appeal dismissed for want of a substantial federal question, 371 U.S. 36 (1962).

17. See, e.g., Broeder, Torts and Just Compensation: Some Personal Reflections, 17 Hastings L.J. 217 (1965).

18. People v. Russell, 48 Cal.2d 189, 195, 309 P.2d 10 (1957), quoted with approval in Breidert v. Southern Pacific Co., 61 Cal.2d 659, 665, 39 Cal. Rptr. 903, 394 P.2d 719 (1964). Similar expressions are frequently found in federal inverse condemnation cases. See Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962): "There is no set formula to determine where regulation ends and taking begins"; United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958): "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. Cf. United States v. Cors, 337 U.S. 325 (1949), indicating that there are no definite standards for determining what constitutes "just compensation" other than the general standard of "substantial justice."

19. The noncompensability of economic losses due to rational zoning restrictions against particular land uses is well settled. See, e.g., Consolidated Rock Products Co. v. City of Los Angeles, 62 Cal.2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965), appeal dismissed for want of a substantial federal question, 371 U.S. 36 (1962). But compare Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

20. A substantial interference or impairment of an abutting owner's access to the general system of streets, through creation of a cul-de-sac out of the street on which his

property abuts, is a compensable damaging of a property interest. See Breidert v. Southern Pacific Co., 61 Cal.2d 659, 39 Cal. Rptr. 903, 394 P.2d 719 (1964); Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943).

21. For example, the full implications of the Supreme Court's decisions affirming the compensability of losses due to overflight of aircraft, Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946), are still not entirely clear. See Spater, Noise and the Law, 63 Mich. L. Rev. 1373 (1965); Note, Airplane Noise, Property Rights, and the Constitution, 65 Colum. L. Rev. 1428 (1965).

22. Monongahela Navigation Co. v. United States, 148 U.S. 312, 324 (1893).

23. Compare the statement of Mr. Justice Jackson: "But not all economic interests are 'property rights;' only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others . . . to compensate for their invasion . . .. We cannot start the process of decision by calling such a claim as we have here a 'property right;' whether it is a property right is really the question to be answered." United States v. Willow River Power Co., 324 U.S. 499, 502-03 (1945).

24. The quoted phrases are borrowed from Sax, Takings and the Police Power, 74 Yale L. J. 36, 40 (1964).

25. The scheme of classification of public entity functions which follows in the text is not intended to be exhaustive, although it is believed to embrace all, or nearly all, kinds of functions likely to give rise to inverse condemnation claims. Compare Sax, op. cit. For case documentation, see Part 2 of the present study.

26. See references cited note 14, supra.

27. See Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility 26-28 (multilith, 1964), discussing statutory codifications of inverse condemnation principles in other states.

28. See Calif. Govt. C. §§ 810 - 996.6 (1963), based upon Calif. Law Revision Commission, Recommendation Relating to Sovereign Immunity (1963). These statutory provisions and their background are discussed at length in Van Alstyne, California Government Tort Liability (C.E.B. 1964).

29. See Calif. Law Revision Commission, A Study Relating to Sovereign Immunity 225-230 (1963), and cases there cited.

30. Compare Traynor, J., in Muskopf v. Corning Hospital District, 55 Cal.2d 211, 219, 11 Cal. Rptr. 89, 359 P.2d 457 (1961): "Finally, there is governmental liability for nuisances even when they involve governmental activity."

31. Compare Brandenburg v. Los Angeles County Flood Control District, 45 Cal. App.2d 306, 114 P.2d 14 (1941), holding district immune from tort liability, with House v. Los Angeles County Flood Control District, 25 Cal.2d 384, 153 P.2d 950 (1944), holding same district liable for negligent plan or design of flood control improvement on inverse condemnation theory.

32. The constitutional provisions, both State and Federal, make no verbal distinctions between real property and personal property with respect to the requirement of "just compensation." Federal decisions have repeatedly applied inverse condemnation principles in cases involving both personalty and intangibles. See, e.g., Armstrong v. United States, 364 U.S. 40 (1960), destruction of materialmen's liens on boats under construction held compensable "taking"; Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), destruction of value of a franchise to collect tolls for river traffic through a lock held a compensable "taking" of private property. Compare United States v. Caltex (Philippines) Inc., 344 U.S. 149 (1953), applying inverse condemnation analysis in denying recovery for destruction of both real and personal property to prevent it from falling into enemy hands during World War II. The California decisions appear to be in accord with this view. See, e.g., Green v. Swift, 47 Cal. 536 (1874), applying inverse condemnation principles and denying recovery, on ground no "taking" had occurred, where plaintiff's cattle had been destroyed

32. (cont'd)

by a flood allegedly aggravated by public improvement; Patrick v. Riley, 209 Cal. 350, 287 Pac. 455 (1930), conceding that "just compensation" clause applied to destruction by State of diseased cattle, but concluding that police power justified such destruction without payment of compensation; Affonso Bros. v. Brock, 29 Cal. App.2d 26, 84 P.2d 515 (1938), semble. The applicability of inverse condemnation principles to personal property, of course, is not impaired by decisions holding that loss of value, or cost of removal, of personal property used in business is noncompensable incidental damage when the real property in which the personalty was employed is taken for public use but the personalty is left in private ownership. See, e.g., Town of Los Gatos v. Sund, 234 Cal. App.2d 24, 44 Cal. Rptr. 131 (1965); City of Los Angeles v. Siegel, 230 Cal. App.2d 982, 41 Cal. Rptr. 563 (1964). In any event, the state courts would necessarily have to yield to federal constitutional requirements in this regard, and, as noted above, takings of personalty are clearly compensable under the Due Process Clause. See Broeder, Torts and Just Compensation: Some Personal Reflections, 17 Hast. L. J. 217, 248-250 (1965). To the extent that California decisions sometimes speak of inverse condemnation as applying only to a taking or damaging of real property, see, e.g., Albers v. County of Los Angeles, 62 Cal.2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965), such language must therefore be regarded as inadvertent and as referring solely to the facts of the particular case (i.e.,

the only damage claims under consideration were, in fact, to land).

33. Brandenburg v. Los Angeles County Flood Control District, 45 Cal. App.2d 306, 114 P.2d 14 (1941).

34. Granone v. County of Los Angeles, 231 Cal. App.2d 629, 42 Cal. Rptr. 34 (1965).

35. Ibid. See also, Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955).

36. See Govt. C. §§ 810 et seq; Van Alstyne, California Government Tort Liability (C.E.B. 1964).

37. See Van Alstyne, California Government Tort Liability § 5.10 (C.E.B. 1964).

38. The Senate Judiciary Committee, in its official explanation of the 1963 tort liability legislation, pointed out that one of its principal concepts was that "there is no liability in the absence of a statute declaring such liability", and that "there is no section in this statute declaring that public entities are liable for nuisance. . .. Under this statute, the right to recover damages for nuisance will have to be established under the provisions relating to dangerous conditions of public property or under some other statute that may be applicable to the

situation." Calif. Legislature, Senate J. 1808 (1963 Reg. Sess., April 24, 1963), quoted in Van Alstyne, op. cit., at 497.

39. See, e.g., Granone v. County of Los Angeles, 231 Cal. App.2d 629, 42 Cal. Rptr. 34 (1965), sustaining judgment for destruction of growing crops by flooding on alternative theories of nuisance, inverse condemnation, and negligence. This opinion, however, does not discuss the 1963 government tort legislation, for the plaintiff's cause of action accrued prior to 1963, and the case was tried and briefed on the assumption that the pre-1963 law was applicable.

40. Ibid.; see Van Alstyne, op. cit., §§ 6.29, 6.30, 6.32. The use of inverse condemnation theory to override limitations upon tort liability is not uncommon. See Foster, Tort Liability Under Damage Clauses, 5 Okla. L. Rev. 1 (1952); Abend, Federal Liability for Takings and Torts: An Anomalous Relationship, 31 Ford. L. Rev. 481 (1963).

41. Compare Leavell v. United States, 234 F.Supp. 734 (E.D. So. Car. 1964), denying liability for damage resulting from discretionary activity, where no "taking" resulted within meaning of 5th Amendment, with House v. Los Angeles County Flood Control District, 25 Cal.2d 384, 153 P.2d 950 (1944), liability in inverse condemnation affirmed, even though based on discretionary determination as to suitability and effectiveness of flood control improvement plan. See, generally, Mandelker, Inverse Condemnation: The

Constitutional Limits of Public Responsibility 25-26 (1964), and cases cited.

42. Albers v. County of Los Angeles, 62 Cal.2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965); Reardon v. City & County of San Francisco, 66 Cal. 492, 6 Pac. 317 (1885).

43. See, e.g., Los Angeles County Flood Control District v. Southern California Edison Co., 51 Cal.2d 331, 333 P.2d 1 (1958); Southern California Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 329 P.2d 289 (1958).

44. See, e.g., Govt. C. § 61610 (community services districts); Pub. Util. C. § 25703 (transit districts); Water C. §§ 71693-71694 (municipal water districts). Other statutes are collected in Calif. Law Revision Comm., A Study Relating to Sovereign Immunity 30-38 (1963) (herein cited as Sovereign Immunity Study).

45. See, e.g., Pub. Util. C. §§ 6297 (relocations by gas and electricity franchise grantees), 7912 (street railway franchise grantees); Sts. & Hwys. C. § 680 (structures located under franchise in state highways). See Sovereign Immunity Study at 188-190.

46. See, e.g., H. & S. C. § 6516 (sanitary districts); Pub. Util. C. § 12808 (municipal utility districts); Sts. & Hwys. C. § 27260-27261 (bridge and highway districts); Water C. § 55377 (county waterworks districts). Other similar statutes

are collected in Sovereign Immunity Study at 91-96.

47. See Code Civ. Proc. §§ 1240(6), 1240a.

48. Compare Atchison, Topeka & Santa Fe Ry. Co. v. Public Utilities Comm., 346 U.S. 346 (1953), imposition of cost of grade separation upon railroad held permissible, with Nashville, Chattanooga, & St. Louis Railway v. Walters, 294 U.S. 405 (1935), contra. See Annotation 79 L. Ed. 966 (1935); 98 L. Ed. 62 (1954).

49. See Pub. Util. C. §§ 1202-1202.5.

50. See, e.g., United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952); United States v. John J. Felin & Co., 334 U.S. 624 (1948); United States v. Russell, 80 U.S. (13 Wall.) 623 (1871). See Annotation 97 L. Ed. 164 (1953).

51. See, e.g., Mil. & Vet. C. § 1585; Sovereign Immunity Study at 77-78.

52. Miller v. Schoene, 276 U.S. 272 (1928). See Annotations, 3 A.L.R. 67 (1920) (constitutionality of statute or ordinance providing for destruction of animals); 70 A.L.R.2d 852 (1960) (validity of statutes for protection of vegetation against disease or infection).

53. See Sovereign Immunity Study at 75-76.

54. E.G., Water C. §§ 1245-1246, providing that municipal corporations which enter any watershed for the purpose of taking, transporting or diverting water for municipal purposes is liable for all damages sustained by persons whose property, business, trade or profession is situated therein, whether such damage is sustained "directly or indirectly".

55. See, e.g., Stats. 1st Ex. Sess. 1964, ch. 138, pp. 441-442, setting up a "subsidence fund" from tidelands oil revenues to pay claims arising from subsidence of lands in the Long Beach area because of oil development operations under lease of city tidelands, but declaring that "nothing herein shall constitute a waiver of sovereign immunity".

56. See statutes collected in Sovereign Immunity Study at 97-101.

57. See, e.g., Water C. § 39059 (water storage districts declared to possess and exercise "police and regulatory powers . . . indispensable to the public interest."); Sovereign Immunity Study at 199-205.

58. Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), appeal dismissed for want of a substantial federal question, 371 U.S. 36 (1962). See, generally, Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

59. See, e.g., Hunter v. Adams, 180 Cal. App.2d 511, 4 Cal. Rptr. 776 (1960); Patrick v. Riley, 209 Cal. 350, 287 Pac. 455 (1930).

60. By analogy, statutes declaring that particular functions of public entities are "governmental" were held not conclusive on the courts in applying the pre-Muskopf rules governing tort liabilities of such entities. Schwerdtfeger v. State of California, 148 Cal. App.2d 335, 306 P.2d 960 (1957). Cf. Sovereign Immunity Study at 199-205.

61. It seems to be well settled that a statute authorizing or requiring the payment of compensation for private losses sustained under circumstances in which no constitutional duty to compensate exists is not a prohibited gift of public funds if there is a rational basis for a legislative determination that such payments would serve a legitimate public purpose. See Southern California Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 719, 329 P.2d 289 (1958) (dictum; payment of costs of utility relocations would be permissible); Patrick v. Riley, 209 Cal. 350, 287 Pac. 455 (1930) (compensation for value of cattle destroyed in bovine disease control program). See also, Dittus v. Cranston, 53 Cal.2d 294, 9 Cal. Rptr. 314, 347 P.2d 671 (1959) (compensation paid to fishermen whose nets were rendered useless by fish conservation statute).

62. Moran v. Ross, 79 Cal. 159, 21 Pac. 547 (1889); University of Southern California v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934), cert. denied 295 U.S. 738 (1935). Cf. People v. Oken, 159 Cal. App.2d 453, 324 P.2d 58 (1958).

63. As to exercise of eminent domain powers by railroads, see Pub. Util. C. §§ 7526, 7535, 7536; Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 92 Pac. 849 (1907). As to eminent domain by private public utility companies, see Code Civ. Proc. §§ 1238(3), 1238(4), 1238(7), 1238(12), 1238(13), and 1238(17); San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson, 164 Cal. 221, 128 Pac. 924 (1912).

64. University of Southern California v. Robbins, supra note 62.

65. See 9 Ops. Cal. Atty. Gen. 107 (19).

66. Linggi v. Garavotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

67. Ibid.; see also, University of Southern California v. Robbins, supra note 62.

68. See, e.g., Breidert v. Southern Pacific Co., 61 Cal.2d 659, 39 Cal. Rptr. 903, 394 P.2d 719 (1964), railroad and city held properly named as co-defendants in inverse condemnation suit; Eachus v. Los Angeles Consolidated Electric Ry. Co., 103 Cal. 614, 37 Pac. 750 (1894), semble.

69. E.g., Breidert v. Southern Pacific Co., supra note 68; and see Valenta v. County of Los Angeles, 61 Cal.2d 669, 39 Cal. Rptr. 909, 394 P.2d 725 (1964).

70. See Govt. C. §§ 905, 905.2, 911.2, 945.4. These claim requirements do not apply to the University of California. See Govt. C. § 905.6.

71. See, e.g., Cramer v. County of Los Angeles, 96 Cal. App.2d 255, 215 P.2d 497 (1950). Compare Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957), holding that inverse condemnation procedure was a matter of statewide concern as to which municipal charter or ordinance claims procedures were thus inapplicable.

72. Govt. C. § 901.

73. Under some circumstances, flooding caused by public improvements is a basis of inverse liability. See Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955).

74. Problems of this sort have proven to be a source of difficulty in tort litigation. See, e.g., Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12 (1943); Natural Soda Products Co. v. City of Los Angeles, 109 Cal. App.2d 440, 240 P.2d 993 (1952).

75. The possibility of similar procedural regulations in respect to governmental tort liability litigation was discussed in Sovereign Immunity Study 250-260, 313-330.

76. Govt. C. § 945.6.

77. Code Civ. Proc. § 338(2).

78. Govt. C. § 947. The statutory predecessor of this undertaking requirement has been held applicable in inverse condemnation proceedings. Rio Vista Gas Assn. v. State of California, 188 Cal. App.2d 555, 10 Cal. Rptr. 559 (1961).

79. The quoted passages are from the Supreme Court's opinion in People v. Ricciardi, 23 Cal.2d 390, 400, 144 P.2d 799 (1943).

80. Ibid.

81. Griggs v. County of Alleghany, 369 U.S. 84 (1962); Chicago, Burlington and Quincy R. Co., 166 U.S. 226 (1897).

82. The "states," within the meaning of the Fourteenth Amendment, include all levels of political subdivisions and agencies. See Griggs v. County of Alleghany, supra n. 81 (county); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (city); Atchison, Topeka & Santa Fe R Co. v. Public Utilities Commission, 346 U.S. 346 (1953) (state regulatory agency).

83. In other areas of constitutional law, the United States Supreme Court has indicated that reasonable state variations from judicially declared constitutional norms are permissible, provided they do not fall short of constitutional minimum standards. See, e.g., Miranda v. State of Arizona, 384 U.S. 436 (1966) (intimating that statutory modifications of judicial rules governing protection of persons in custodial interrogation from danger of self-incrimination would be permissible). Similarly, reasonable legislative measures designed to strengthen or implement constitutional policies are ordinarily given sympathetic judicial treatment. See Katzenbach v. Morgan, 384 U.S. 641 (1966) (voting rights); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (civil rights in public accommodations).

84. See, generally, Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596 (1942); Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L. J. 221 (1931).

85. Broeder, Torts and Just Compensation: Some Personal Reflections, 17 Hast. L. J. 217, 228 (1965).

86. Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. Rev. 3, 57.

87. Sax, Takings and the Police Power, 74 Yale L. J. 36, 45-46 (1964).

88. Dunham, Griggs v. Alleghany County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Supreme Court Review 63 (Kurland ed.).

89. Id. at 105.

90. See Armstrong v. United States, 364 U.S. 40 (1960); United States v. Jones, 109 U.S. 513 (1883).

91. United States v. Caltex (Philippines), Inc., 344 U.S. 149, 156 (1953).

92. See, e.g., United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546, 551-52 (1946): "We think it is the function of the Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority." Cf. Old Dominion Land Co. v. United States, 269 U.S. 55 (1925); Barnidge v. United States, 101 F.2d 295, 298 (8th Cir. 1939): "If the Federal Government, under the Constitution, has power to embark upon a project for which the real property is sought, then the use is a public one." See also, Dunham, op. cit. n. 88 at 65.

93. Berman v. Parker, 348 U.S. 26, 33 (1954).

94. See Green v. Frazier, 253 U.S. 233 (1920); Jones v. City of Portland, 245 U.S. 217 (1917); Hairston v. Danville &

Western R. Co., 208 U.S. 598 (1908); Clark v. Nash, 198 U.S. 361 (1905).

95. Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937). But see Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 185-86 (1950) (apparently contra).

96. The most recent Supreme Court decision found, in which a taking was held noncompensable because it was unauthorized by law and thus was not for public use, is Hughes v. United States, 230 U.S. 24 (1913). See also, Hooe v. United States, 218 U.S. 322 (1910). Cf. United States v. North American Transportation and Trading Co., 253 U.S. 330 (1920). Since the enactment of the Federal Tort Claims Act in 1946, of course, unauthorized official action amounting to a taking may, in some cases, be the basis of a tort action against the United States. See Abend, Federal Liability for Takings and Torts: An Anomalous Relationship, 31 Ford. L. Rev. 481 (1963).

97. See, e.g., Dugan v. Rank, 372 U.S. 609 (1963) and City of Fresno v. State of California, 372 U.S. 627 (1963), construing reclamation project statutes to authorize taking without institution of legal proceedings, subject to Tucker Act suit for just compensation in Court of Claims. See, generally, Marquis, Constitutional and Statutory Authority to Condemn, 43 Iowa L. Rev. 170 (1958). The older rule denying inverse condemnation liability for

takings without statutory authority, see note 96, supra, may no longer be authoritative. Compare United States v. Peewee Coal Co., 341 U.S. 114 (1951) (absence of statutory authority for seizure of coal mine, although argued in Government brief, ignored in Court's opinion holding seizure to be compensable taking) with Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585, 631-32, 680 (1952) (dictum both ways).

98. United States v. General Motors Corp., 323 U.S. 373, 382 (1945).

99. Dugan v. Rank, 372 U.S. 609 (1963) (water rights); United States v. Peewee Coal Co., 341 U.S. 114 (1951) (temporary possession of coal mine); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) (leasehold); United States v. Cors, 337 U.S. 325 (1949) (tugboats); United States v. General Motors Corp., supra note 98 (temporary occupancy of long term leasehold); United States v. Russell, 80 U.S. (13 Wall.) 623 (1871) (steamboats).

100. Armstrong v. United States, 364 U.S. 40 (1960) (materialmen's liens); Cities Service Co. v. McGrath, 342 U.S. 330 (1952) (obligation represented by corporate debenture); Long Island Water Supply Co. v. City of Brooklyn, 166 U.S. 685 (1897) (water supply contracts).

101. Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

102. The turning point in this development was Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 166 (1871). See Kratovil & Harrison, Eminent Domain - Policy and Concept, 42 Calif. L. Rev. 596 (1954); Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596 (1942); Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L. J. 221 (1931).

103. The leading modern case is United States v. General Motors Corp., 323 U.S. 373 (1945). See also, in addition to cases cited in note 99, supra, Griggs v. County of Alleghany, 369 U.S. 84 (1962) (easement for flight); United States v. Virginia Electric & Power Co., 365 U.S. 624 (1961) (easement of flowage); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) (riparian right to seasonal overflowing of river); United States v. Dickinson, 331 U.S. 745 (1947) (easement of intermittent flooding).

104. United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).

105. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

106. See United States v. Petty Motor Co., 327 U.S. 372 (1946). But compare United States v. General Motors Corp., 323 U.S. 373 (1945) (exception to general rule).

107. See Bothwell v. United States, 254 U.S. 231 (1920) (forced sale of cattle due to flooding of plaintiff's ranch).

108. See Mitchell v. United States, 267 U.S. 341 (1925); United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943). But compare Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) (exception to general rule).

109. United States v. Cress, 243 U.S. 316, 329 (1917). See, to the same effect, United States v. Dickinson, 331 U.S. 745 (1947); Jacobs v. United States, 290 U.S. 13 (1933); United States v. Lynah, 188 U.S. 445 (1903); Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 166 (1871).

110. Sanguinetti v. United States, 264 U.S. 146, 150 (1924). See also, Jackson v. United States, 230 U.S. 1 (1913); Bedford v. United States, 192 U.S. 217 (1904).

111. United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).

112. United States v. Kelly, 243 U.S. 316, 330 (1917).

113. United States v. Willow River Power Co., 324 U.S. 499 (1945).

114. Griggs v. County of Alleghany, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

115. Batten v. United States, 306 F.2d 580 (10 Cir. 1962), Cert. Den. 371 U.S. 955 (1963). See, generally, Note, Airplane Noise, Property Rights, and the Constitution, 65 Colum. L. Rev. 1428 (1965); Annots. 90 L.Ed. 1218 (1946), 77 A.L.R.2d 1355 (1961).

116. See United States v. Virginia Electric & Power Co., 365 U.S. 624, 627-28 (1961), defining the Government's navigational servitude as "the privilege to appropriate without compensation which attaches to the exercise of the 'power of the government to control and regulate navigable waters in the interest of commerce' . . . [but which] only encompasses the exercise of this federal power with respect to the stream itself and the lands beneath and within its high water mark . . ."; United States v. Kansas City Life Ins. Co., supra note 111; United States v. Willow River Power Co., supra note 113; United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 312 U.S. 592 (1941). See Annot., 94 L.Ed. 1288 (1950).

117. Holmes, The Common Law 214 (1881).

118. See Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Batten v. United States, 306 F.2d 580, 586-87 (10 Cir. 1962) (Murrah, Ch. J., dissenting); Dunham, Griggs v. Alleghany County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Supreme Court Review 63, 87.

A closely analogous position was taken by the Supreme Court in a decision more than fifty years ago involving substantial annoyance and interference with enjoyment of property caused by smoke from a railroad locomotive which was mechanically exhausted from a tunnel upon plaintiff's adjoining premises. Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (held a compensable taking of a servitude).

119. 324 U.S. 499 (1945).

120. Id. at 502-03.

121. Id. at 510. The policy considerations which were advanced in support of this conclusion are not directly relevant here, and will be examined in Part Two.

122. See, generally, Berle, Property, Production and Revolution, 65 Colum. L. Rev. 1 (1965); Reich, The New Property, 73 Yale L. J. 733 (1964); Hecht, From Seisin to Sit-in: Evolving Property Concepts, 44 Boston U. L. Rev. 435 (1964); Philbrick, Changing Conceptions of Property in Law, 86 U. Pa. L. Rev. 691 (1938).

123. This difference is explicitly pointed out by Jackson, J., speaking for the Court in United States v. Willow River Power Co., 324 U.S. 499, 505, 510 (1945). See also, to the same effect, Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596, 610-11 (1942); Kratovil and Harrison, Eminent

Domain - Policy and Concept, 42 Calif. L. Rev. 596, 603-04 (1954).

124. United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1953) (oil refinery and storage facility blown up to prevent it from falling into enemy hands); Lawton v. Steele, 152 U.S. 133 (1894) (unlawful fish nets seized and destroyed as public nuisance); Bowditch v. City of Boston, 101 U.S. (1880)
(11 Otto) 16/(building and contents destroyed to prevent spread of conflagration); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), appeal dismissed for want of a substantial federal question, 371 U.S. 36 (1962) (economic value of land, limited to sand and gravel supply, destroyed by zoning ordinance).

125. See, e.g., Passaic Water Co. v. Board of Public Utility Commissioners, 254 U.S. 394 (1921); New Orleans Gaslight Co. v. Drainage Commission, 197 U.S. 453 (1905); Annots. 98 L.Ed. 62 (1954), 79 L.Ed. 966 (1935). Cf. Southern California Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 329 P.2d 289 (1958). But compare Panhandle Eastern Pipeline Co. v. State Highway Commission, 294 U.S. 613 (1935) (mandatory relocation of facility located in private easement held a compensable taking).

126. The leading California cases are State of California v. Marin Municipal Water District, 17 Cal.2d 699, 111 P.2d 651

(1941) and Southern California Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 329 P.2d 289 (1958).

127. See statutes cited, supra, notes 44-46; Sovereign Immunity Study 78-97.

128. Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965) (airport approach height regulation).

129. The principal exceptions are Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and (possibly) Griggs v. Alleghany County, 369 U.S. 84 (1962). The latter case, however, appears to be one in which the state court conceded the probability that there was a "taking", but held that even so, the defendant county was not the party responsible therefor and was thus not liable. Griggs v. Alleghany County, 402 Pa. 411, 168 A.2d 123 (1961). Occasionally, a lower federal court determination that there has been no taking by a state agency has been reversed. See, e.g., Delaware, Lackawanna & Western R. Co. v. Town of Morristown, 276 U.S. 182 (1928).

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

131. Recent examples include Goldblatt v. Town of Hempstead,

369 U.S. 590 (1962); Nelson v. City of New York, 352 U.S. 103 (1956); Atchison, Topeka & Santa Fe R. Co. v. Public Utilities Commission, 346 U.S. 346 (1953). See also, Roberts v. City of New York, 295 U.S. 264 (1935).

132. See authorities cited, supra, note 116.

133. Meyer v. City of Richmond, 172 U.S. 82, 95 (1898). Other contemporary decisions to the same effect include Eldridge v. Trezevant, 160 U.S. 452, 468 (1896); Chicago, Burlington & Quincy R. Co. v. City of Chicago, 166 U.S. 226, 251-52 (1847).

134. Sauer v. City of New York, 206 U.S. 536, 548 (1907). Accord: Chicago, Burlington & Quincy R. Co. v. Illinois ex rel. Grimwood, 200 U.S. 561 (1906); West Chicago Street R. Co. v. Illinois, 201 U.S. 506 (1906).

135. United States v. Kelly, 243 U.S. 316, 319 (1917).

136. United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266, 279 (1943). To the same effect, see United States v. Causby, 328 U.S. 256, 266 (1946).

137. Examples may be found in Armstrong v. United States, 364 U.S. 40 (1960) (rights enjoyed under state materialmen's lien law); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) (property right to unobstructed drainage recognized by state law). See also, United States v. Petty Motor Co., 327 U.S. 372, 380 (1946) (rights of lessees).

138. See, e.g., the statutory provisions analyzed in Dugan v. Rank, 372 U.S. 609 (1963), City of Fresno v. State of California, 372 U.S. 627 (1963), and United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), relating to the California Central Valley Project; federal statutes relating to acquisition of flight easements pursuant to state law, cited in Griggs v. Alleghany County, 369 U.S. 84 (1962). Congress appears to have ample authority, subject to constitutional limitations, to define what constitutes "property" in federal condemnation proceedings, independent of and narrower than state law. See United States v. Certain Property, Etc., 306 F.2d 439, 444-45 (2d Cir. 1962). Cf. State of Nebraska v. United States, 164 F.2d 866 (8th Cir. 1947).

139. Omnia Commercial Co. v. United States, 261 U.S. 502, 510 (1923).

140. See, generally, Kratovil and Harrison, Eminent Domain - Policy and Concept, 42 Calif. L. Rev. 596 (1954).

141. See Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 166 (1871); United States v. Lynah, 188 U.S. 445 (1903); Sedgwick, Statutory and Constitutional Law 456 (2d ed. 1874); Cormack, Legal Concepts in Cases of Eminent Domain, 42 Colum. L. Rev. 596 (1942). For more modern examples, see United States v. Peewee Coal Co., 341 U.S. 114 (1951); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).

142. Long Island Water Supply Co. v. City of Brooklyn, 166 U.S. 685 (1897); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

143. See, e.g., Mitchell v. United States, 267 U.S. 341 (1925); United States v. Petty Motor Co., 327 U.S. 372 (1946).

144. Compare Armstrong v. United States, 364 U.S. 40 (1960) (destruction of materialman's lien held a taking) and Cities Service Co. v. McGrath, 342 U.S. 330 (1952) (double liability upon debenture said to be a taking) with Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) (requisitioning of steel to be produced under private contract, rendering its performance impossible, held a mere frustration of contract, and not a taking of contract rights).

145. The need for such a particularized analysis emerges quite clearly in Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) and United States v. General Motors Corp., 323 U.S. 373 (1945). See discussion of these cases in U. S. Cong., House Committee on Public Works, Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs 55-58 (88th Cong. 2d Sess., Dec. 22, 1964) (Committee Print No. 31). (This report is herein cited as House Committee Study.)

146. Cases cited note 124, supra.

147. Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922); Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

148. Sanguinetti v. United States, 264 U.S. 146 (1924), flooding of land due to inadequate capacity of drainage canal held non-compensable; see also, Bothwell v. United States, 254 U.S. 231 (1920), denying recovery for loss of prospective profits caused by forced sale of cattle when ranch was flooded.

149. United States v. Dickinson, 331 U.S. 745 (1947), taking of "easement for intermittent flooding" held compensable.

150. United States v. Causby, 328 U.S. 256, 266 (1946).

151. See, e.g., Brown, J. In Manigault v. Springs, 199 U.S. 473 (1905); Brandeis, J. in Calhoun v. Massie, 253 U.S. 170 (1920).

152. Sax, Takings and the Police Power, 74 Yale L. J. 36, 37 (1964). Significantly, Professor Sax concludes that Holmes paid lip service to the theory more than he actually applied it.

153. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-416 (1922). Note also Holmes' famous description of noncompensable takings as products of "the petty larceny of the police power". Holmes-Laski Letters 457 (Howe ed. 1953).

154. Cf. Sax, supra note 152, at 50-54.

155. Holmes suggests that "exceptional cases, like the blowing up of a house to stop a conflagration" enjoy historical support, but perhaps "as much upon tradition as upon principle". Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

156. Id. at 413.

157. Holmes, for example, joined in several decisions sustaining the validity of regulatory measures causing substantial economic losses without compensation. See Miller v. Schoene, 276 U.S. 272 (1928) (destruction of cedar trees); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (property values greatly impaired by zoning restrictions); Erie Railroad Co. v. Board of Public Utility Commissioners, 254 U.S. 394 (1921) (compulsory elimination of 15 grade crossings, at cost to railroad of over $2,000,000); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (value of land diminished by 80% by use of restriction); Plymouth Coal Co. v. Pennsylvania, 232 U.S. 532 (1914) (loss of coal due to regulation

requiring pillars of coal to be left in place in mine as bulwark against flooding). On the other hand, he also joined in decisions in which relatively insubstantial impairments of economic values were held to be compensable takings of property. See, e.g., Delaware, Lackawanna & Western R. Co. v. Town of Morristown, 276 U.S. 182 (1928) (regulation requiring private driveway in front of railroad station to be open for use as a public taxicab stand held an unconstitutional taking of private property); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (repeated firing of coastal artillery guns over plaintiff's property, as part of artillery practice range, held a compensable taking of servitude). That other elements than magnitude of the loss were deemed important to Holmes is made clear by the way in which he distinguished the Plymouth Coal Co. case, supra, in Mahon: "But that was a requirement for the safety of employees . . .". Pennsylvania Coal Co. v. Mahon, supra note 153, at 415. Similarly, in Erie Railroad, supra, decided the year before Mahon, Holmes countered an argument that compulsory grade separation liabilities would bankrupt the railroad by saying (254 U.S. at 410): "That the states may be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it . . .".

158. Pennsylvania Coal Co. v. Mahon, supra note 153, at 422.

159. Examples include Reinman v. City of Little Rock, 237 U.S. 171 (1915) (ordinance banning livery stables); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

160. Hadacheck v. Sebastian, supra, note 159.

161. Reinman v. City of Little Rock, supra, note 159.

162. Holmes' opinion in Mahon, supra, note 153, at 416, concludes by stating: "So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that this risk has become a danger warrants giving to them greater rights than they bought."

163. See authorities cited supra, note 116.

164. See United States v. Central Eureka Mining Co. 357 U.S. 155 (1958); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).

165. Atchison, Topeka & Santa Fe R. Co. v. Public Utilities Commission, 346 U.S. 346 (1953); Erie R. Co. v. Board of Public Utility Commissioners, 254 U.S. 394 (1921).

166. Passaic Water Co. v. Board of Public Utility Commissioners, 254 U.S. 394 (1921); Chicago, Burlington & Quincy R. Co. v. Illinois ex rel. Grimwood, 200 U.S. 561 (1906).

167. See, e.g., United States v. Willow River Power Co., 324 U.S. 499 (1945) (discussing navigational servitude); Atchison, Topeka & Santa Fe R. Co. v. Public Utilities Commission, 346 U.S. 346 (1953) (discussing grade crossing separations).

168. See, e.g., United States v. Sponenbarger, 308 U.S. 256 (1939) (Government has no duty to construct entire flood control project at once, and thus is not liable for a "taking" due to flooding which could have been prevented had higher protective works been built to protect plaintiff's lands); Bedford v. United States, 192 U.S. 217 (1904) (in improving river bed in interest of erosion control, Government is not liable for consequential damage caused to lands downstream due to increased velocity or changed direction of stream flow within natural channels). Compare Reichelderfer v. Quinn, 287 U.S. 315 (1932), holding that Congress was authorized to use park lands fronting on plaintiff's property for a fire station, even though consequence was reduction in property values attributable to original creation of park by Government.

169. See text, supra, at note 129.

170. See Ferguson v. Skrupa, 372 U.S. 726 (1963); Day-Brite Lighting Co. v. Missouri, 342 U.S. 421 (1952); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.,

335 U.S. 525 (1949). Cf. McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 Supreme Court Review 34.

171. The classical statement of the rule is found in Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893): "The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." See also, 3 Nichols, The Law of Eminent Domain § 8.9 (Rev. 3rd ed. 1963), and cases there collected.

172. Ibid. See also, Seaboard Air Line R. Co. v. United States, 261 U.S. 299 (1923).

173. Jacobs v. United States, 290 U.S. 13, 17 (1933). To the same effect, see Olson v. United States, 292 U.S. 246, 255 (1934); 3 Nichols, The Law of Eminent Domain § 8.6 (Rev. 3rd ed. 1963).

174. United States v. Commodities Trading Corp., 339 U.S. 121 (1950); United States v. Cors, 337 U.S. 325 (1949); United States v. Miller, 317 U.S. 369 (1943).

175. United States v. Virginia Electric Power Co., 365 U.S. 624, 633 (1961).

176. United States v. Commodities Trading Corp., supra note 174, at 124. See also, Monongahela Navigation Co. v. United

States, 148 U.S. 312, 324-26 (1893).

177. United States v. Cors, 337 U.S. 325, 332 (1949). See also, United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. Miller, 317 U.S. 369 (1943).

178. United States v. Commodities Trading Corp., supra note 174. See also, United States v. John J. Felin & Co., 334 U.S. 624 (1948) (four justices concurring in view that O.P.A. prices were a relevant standard; decision on other grounds without a majority opinion.)

179. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Miller, 317 U.S. 369 (1943); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

180. United States v. Miller, 317 U.S. 369, 375 (1943).

181. United States v. Virginia Electric & Power Co., 365 U.S. 624 (1961).

182. See, e.g., United States v. General Motors Corp., 323 U.S. 373 (1945); Dunham, Griggs v. Alleghany County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Supreme Court Review 63, 90-105.

183. United States v. Miller, supra note 180, at 380. In this sense, principles declared by the United States Supreme Court as governing the ascertainment of just compensation are, of course, binding on state courts. Olson v. United States, 292 U.S. 246, 259 (1934).

184. United States v. 93.970 Acres of Land, 360 U.S. 328 (1959); United States v. Miller, supra, note 180. Cf. Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958) (federal statute held applicable and valid under federal standards, although state court had ruled to contrary).

185. See, e.g., United States v. Miller, supra note 180 at 375-76, and the federal statutes cited therein at n. 21. Compare United States v. John J. Felin & Co., 334 U.S. 624 (1948) (price control regulations).

186. 295 U.S. 264 (1935).

187. Id. at 277. To the same effect, see McGovern v. City of New York, 229 U.S. 363 (1913); Appleby v. City of Buffalo, 221 U.S. 524 (1911); Chicago, Burlington & Quincy R. Co. v. City of Chicago, 166 U.S. 226 (1897). Cf. Boston Chamber of Commerce v. City of Boston, 217 U.S. 189 (1910).

188. United States v. Willow River Power Co., 324 U.S. 499 (1945); Mitchell v. United States, 267 U.S. 341 (1925).

189. Joslin Mfg. Co. v. City of Providence, 262 U.S. 668 (1923); 3 Nichols, The Law of Eminent Domain § 8.6 (Rev. 3rd ed. 1963); Dunham, op. cit. supra, note 182, at 105-06. Compare Atchison, Topeka & Santa Fe R. Co. v. Public Utilities Commission, 346 U.S. 346 (1953) (administrative order assigning part of cost of building grade crossing separation to railroad held valid, where, on facts, entire cost could have been imposed on railroad).

190. A jury trial is not required by the United States Constitution in eminent domain litigation. Chicago, Burlington & Quincy R. Co. v. City of Chicago, 166 U.S. 226 (1897).

191. The rules governing limitations of inverse condemnation actions are essentially matters of policy, not of constitutional compulsion. See United States v. Dickinson, 331 U.S. 745 (1947).

192. The variations in state rules relating to the timing of the date of valuation are summarized in 3 Nichols, The Law of Eminent Domain § 8.5 (Rev. 3rd ed. 1963).

193. States may constitutionally require a deduction of all benefits resulting from a partial taking, which enhance the value of the remaining property of the condemnee from which the parcel taken was derived. McCoy v. Union Elevated R. Co., 247 U.S. 354 (1918). Cf. Bauman v. Ross, 167 U.S. 548 (1897). The law governing allocation of benefits in

determining just compensation is chaotic. See, e.g., Haar and Hering, The Determination of Benefits in Land Acquisition, 51 Calif. L. Rev. 833 (1963); House Committee Study 69-72; 3 Nichols, The Law of Eminent Domain §§ 8.6210 et seq. (Rev. 3rd ed. 1963).

194. Cases cited supra, note 187. See also, Nelson v. City of New York, 352 U.S. 103 (1956) (city's acquisition in lien foreclosure proceedings of valuable real property worth far more than amount of debt secured by lien, held valid and not an unconstitutional taking, where state foreclosure procedures provided for fair and adequate notice, with opportunity to recover surplus value of land above amount for which foreclosed).

195. Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). See also, Lundberg v. County of Alameda, 46 Cal.2d 644, 298 P.2d 1 (1956); Delaney v. Lowery, 25 Cal.2d 561, 154 P.2d 674 (1944); Kaiser v. Hopkins, 6 Cal.2d 537, 58 P.2d 1278 (1936); Samarkand of Santa Barbara, Inc. v. County of Santa Barbara, 216 Cal.App.2d 341, 31 Cal.Rptr. 151 (1963).

196. See Eaton v. Boston, Concord & Montreal Railroad, 51 N.H. 504, 12 Am. Rep. 147 (1872); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962). Cf. Martin v. Port of Seattle, 64 Wn.2d 324, 391 P.2d 540 (1964), cert. den. 379 U.S. 989 (1965); Comment, Inverse Condemnation in Washington--Is The Lid Off Pandora's Box?, 39 Wash. L. Rev.

920 (1965); 2 Nichols, The Law of Eminent Domain § 6.38 (3d Rev. ed., 1963).

197. Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L. J. 221, 246-48 (1931). Some of the Fifth Amendment cases can be explained most easily on this rationale. See, e.g., United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); Jacobs v. United States, 290 U.S. 13 (1933).

198. Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965), dismissing certiorari as improvidently granted where state court decision, holding airport approach height limit regulation to be an invalid "taking", was based on an adequate independent state interpretation of the Indiana Constitution and thus failed to present a substantial federal question.

199. Griggs v. Alleghany County, 369 U.S. 84 (1962).

200. Dittus v. Cranston, 53 Cal.2d 284, 9 Cal. Rptr. 314, 347 P.2d 671 (1959); Southern California Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 329 P.2d 289 (1958); Patrick v. Riley, 209 Cal.350, 287 Pac. 455 (1930).

201. Shaw v. Crocker, 42 Cal. 435 (1871); Green v. Swift, 47 Cal. 536 (1874). See also, Reardon v. City & County of San Francisco, 66 Cal. 492, 6 Pac. 317 (1885)

(discussing pre-1879 law).

202. Northern Transportation Co. v. City of Chicago, 99 U.S. 635 (1879), and cases there cited; Rigney v. City of Chicago, 102 Ill. 64 (1882); Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L. J. 221, 225 et seq. (1931); 2 Nichols, The Law of Eminent Domain §§ 6.38, 6.4 (Rev. 3d ed. 1963).

203. 2 Nichols, The Law of Eminent Domain § 6.42 et seq. (Rev. 3d ed. 1963).

204. Ill. Const. (1870), art. 2, § 13. The background of this change is reviewed in Rigney v. City of Chicago, supra, note 202. See also, Cormack, op. cit. supra note 202, at 244-47; 2 Nichols, id. § 6.44.

205. Northern Transportation Co. v. City of Chicago, supra note 202, at 642.

206. 102 Ill. 64, 80 (1882).

207. City of Chicago v. Taylor, 125 U.S. 161, 169 (1888).

208. 2 Nichols, The Law of Eminent Domain § 6.44 (Rev. 3d ed. 1963).

209. 1 Debates and Proceedings of the Constitutional Convention of the State of California 232 (1880).

210. Id. at 259-60.

211. Id. at 262.

212. 3 Id. at 1190. (Except as otherwise noted, all statements and quoted remarks taken from the constitutional record in the paragraphs immediately following are from page 1190 of volume 3.)

213. Ibid. An almost identical argument was advanced at the Illinois Constitutional Convention. See 2 Debates of the Constitutional Convention of the State of Illinois 1577 (1870), quoted in Cormack, op. cit. supra note 202, at 244.

214. See 1 id. 344-53, 2 id. 1024-29.

215. The problem of the "second street cut" found a close counterpart in Eachus v. Los Angeles Consolidated Electric Ry. Co., 103 Cal. 614, 37 Pac. 750 (1894) and in Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943), in which substantial impairment of access was held a compensable damaging. The hypothetical problem of diversion of traffic has been exemplified in many cases, including, e.g., Blumenstein v. City of Long Beach, 143 Cal.App.2d 264,

299 P.2d 347 (1956) and People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943), holding diminished property values due to diversion of traffic and consequent loss of business non-compensable.

216. 1 Debates and Proceedings of the Constitutional Convention of the State of California 349-350 (1880) (Delegate Shafter).

217. Reardon v. City & County of San Francisco, 66 Cal. 492, 505, 6 Pac. 317 (1885).

218. See Albers v. County of Los Angeles, 62 Cal.2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965), citing and quoting from Reardon, supra note 217, approvingly. Cf. Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943).

219. People v. Ricciardi, 23 Cal.2d 390, 395-96, 144 P.2d 799 (1943).

220. See text and authorities cited, supra, notes 3, 13.

221. 23 Cal.2d 390, 144 P.2d 799 (1943).

222. Ibid. at 395.

223. Ibid. at 396.

224. Ibid. at 224.

225. People ex rel. Department of Public Works v. Symons, 54 Cal.2d 855, 9 Cal. Rptr. 363, 357 P.2d 451 (1960); Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943).

226. Bacich v. Board of Control, 23 Cal.2d 343, 350, 144 P.2d 818 (1943).

227. Ibid.

228. See, e.g., Breidert v. Southern Pacific Co., 61 Cal.2d 659, 39 Cal.Rptr. 903, 394 P.2d 719 (1964) (right of access to general street system in urban community); Valenta v. County of Los Angeles, 61 Cal.2d 669, 39 Cal.Rptr. 909, 394 P.2d 725 (1964) (right of access to general road system in rural area); People ex rel. Department of Public Works v. Ayon, 54 Cal.2d 217, 5 Cal.Rptr. 151, 352 P.2d 519 (1960) (claimed right to undiminished traffic flow past business property).

229. People ex rel. Department of Public Works v. Presley, 239 A.C.A. 328, 331-32, 48 Cal.Rptr. 672 (1966).

230. Sneed v. County of Riverside, 218 Cal.App.2d 205, 32 Cal. Rptr. 318 (1963), giving effect to federal cases, e.g.,

Griggs v. Alleghany County, 369 U.S. 84 (1962), recognizing recurrent low flights of aircraft as a basis for a taking of an easement for avigation.

231. See Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342 (1962), and cases there cited.

232. Ibid. See, generally, Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

233. 50 Cal.2d 713, 719, 329 P.2d 289 (1958).

234. Los Angeles County Flood Control Dist. v. Southern California Edison Co., 51 Cal.2d 331, 337, 333 P.2d 1 (1958), holding that ambiguous statutory language relied upon by utility company merely "constitutes legislative recognition that the district is not obligated to pay for utility relocations . . ." except to the extent required by constitutional standards.

235. Sneed v. County of Riverside, supra, note 230. The constitutional standards themselves, however, may imply the existence of differences of degree with respect to which legislative judgments may be judicially acceptable. Compare People ex rel. Department of Public Works v. Symons, 54 Cal.2d 855, 9 Cal.Rptr. 363, 357 P.2d 451 (1960) (mere

fact of deprivation of access, where abutting street is changed into cul-de-sac by construction of freeway, held non-compensable) with Breidert v. Southern Pacific Co., 61 Cal.2d 659, 39 Cal.Rptr. 903, 394 P.2d 719 (1964) (contra, where substantial impairment of access results).

236. Smith v. County of Santa Barbara, 243 A.C.A. 126, _____ Cal.Rptr. ____ (1966) (zoning of land contiguous to airport for uses other than residential). But see Kissinger v. City of Los Angeles, 161 Cal.App.2d 454, 327 P.2d 10 (1958) (zoning must be in good faith and not a subterfuge to reduce condemnation price).

237. Southern Pacific Co. v. City of Los Angeles, 242 A.C.A. 21, 51 Cal.Rptr. 197 (1966). Cf. Bringle v. Board of Supervisors, 54 Cal.2d 86, 4 Cal.Rptr. 493, 351 P.2d 765 (1960); Ayers v. City Council of Los Angeles, 34 Cal.2d 31, 207 P.2d 1, 11 A.L.R.2d 503 (1949).

238. Cf. Albers v. County of Los Angeles, 62 Cal.2d 250, 269, 42 Cal.Rptr. 89, 398 P.2d 129 (1965): the constitutional phrase, "just compensation" and its statutory counterpart, "value of the property" (Code Civ. Proc. §§ 1248, 1249), "serve primarily as points of departure for a case-by-case development of the law governing recovery for direct and inverse condemnation in this state."

239. People v. Chevalier, 52 Cal.2d 299, 304, 340 P.2d 598 (1959).

240. University of Southern California v. Robbins, 1 Cal.App.2d 523, 525-26, 37 P.2d 163 (1934), quoted with approval in Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

241. See, e.g., Los Angeles County v. Anthony, 224 Cal.App.2d 103, 36 Cal.Rptr. 308 (1964), cert. den. 376 U.S. 963 (1964) (taking for motion picture and television museum); Orange County Water Dist. v. Bennett, 156 Cal.App.2d 745, 320 P.2d 536 (1958), appeal dismissed 376 U.S. 783 (1958) (water spreading grounds); City of Menlo Park v. Artino, 151 Cal.App.2d 261, 311 P.2d 135 (1957); Redevelopment Agency v. Hughes, 122 Cal.App.2d 777, 266 P.2d 105 (1954) (slum clearance). But see City & County of San Francisco v. Ross, 44 Cal.2d 52, 279 P.2d 529 (1955) (taking of property for construction of parking garage to be leased to private operator for private profit-making business, where city failed to retain control of garage operations, held for an impermissible private use).

242. See Miller v. City of Palo Alto, 208 Cal.74, 280 Pac. 108 (1929) (damage to private property caused by fire spreading from city dump in which burning refuse from city incinerator was deposited, without taking adequate fire precautions, held not a taking for public use); McNeil v. City of Montague, 124 Cal.App.2d 326, 268 P.2d 497 (1954) (semble).

243. Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955). See also, Granone v. County of Los Angeles, 231 Cal.App.2d 629, 42 Cal.Rptr. 34 (1965); Ambrosini v. Alisal Sanitary District, 154 Cal.App.2d 720, 317 P.2d 33 (1957).

244. Bauer v. County of Ventura, supra, note 243, at 286, distinguishing Miller and McNeil (supra note 242) as examples of negligence in routine operations.

245. See, e.g., Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

246. Bauer v. County of Ventura, 45 Cal.2d 276, 284, 289 P.2d 1 (1955). See also, House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950 (1944); Ward Concrete Products Co. v. Los Angeles County Flood Control District, 149 Cal.App.2d 840, 309 P.2d 546 (1957).

247. Inverse condemnation and tort liabilities substantially overlap one another under present law, where a basis exists for a determination that the "public use" element is present. See Bauer v. County of Ventura, and other cases cited, note 243, supra (recovery supportable alternatively on tort and inverse condemnation theories).

248. Public policy against discontinuance of a public use which has been commenced ordinarily militates against specific

relief or recovery of the property itself. See Cothran v. San Jose Water Works, 58 Cal.2d 608, 25 Cal.Rptr. 569, 37 Cal.Rptr. 449 (1962); Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957).

249. Injunctive relief is seldom available in inverse condemnation situations even when promptly sought, either because the injury is then deemed too remote or speculative, see Rose v. State of California, 19 Cal.2d 713, 726, 123 P.2d 505 (1942), or because a public use has intervened. See Hillside Water Co. v. City of Los Angeles, 10 Cal.2d 677, 76 P.2d 681 (1958); Frustuck v. City of Fairfax, 212 Cal.App.2d 345, 28 Cal.Rptr. 357 (1963). Where the theory of inverse condemnation does not apply, however, as in a case where no "public use" element is present, relief by injunction is readily available. See Enos v. Harmon, 157 Cal.App.2d 746, 321 P.2d 810 (1958).

250. Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, 588-89, 394 P.2d 548 (1964), denying injunction to prevent planes from flying over residential property at such low altitudes and with such frequency as to substantially impair peaceable use and enjoyment; remedy by way of inverse condemnation suit for damages deemed open as alternative.

251. Cothran v. San Jose Water Works, 58 Cal.2d 608, 25 Cal. Rptr. 569, 375 P.2d 449 (1962) sustaining dismissal of action on demurrer, where plaintiff insisted on pleading solely on inadmissible theory of inverse condemnation for confiscation of property, yet facts alleged showed at most only a temporary tortious interference with beneficial use.

252. See, e.g., Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505 (1942).

253. Citizens Utilities Co. of California v. Superior Court, 59 Cal.2d 805, 31 Cal.Rptr. 316, 382 P.2d 356 (1963); Pacific Gas & Elec. Co. v. County of San Mateo, 233 Cal. App.2d 268, 43 Cal.Rptr. 450 (1965); Frustuck v. City of Fairfax, 212 Cal.App.2d 345, 28 Cal.Rptr. 357 (1963).

254. See, e.g., Citizens Utilities Co. of California v. Superior Court, supra note 253; Youngblood v. Los Angeles County Flood Control District, 56 Cal.2d 603, 15 Cal.Rptr. 904, 364 P.2d 840 (1961).

255. Town of Los Gatos v. Sund, 234 Cal.App.2d 24, 44 Cal.Rptr. 181 (1965), moving expenses and costs of relocating a going business held non-compensable in absence of statutory authority. See also, cases cited supra, note 200.

256. 62 Cal.2d 250, 42 Cal.Rptr. 89, 398 P.2d 129 (1965).

257. Ibid. at 267-68.

258. Ibid. at 269.

259. Ibid. at 272.

260. Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505 (1942).

261. Ibid. at 725. See also, Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943). In Powers Farms v. Consolidated Irrigation District, 19 Cal.2d 123, 126, 119 P.2d 117 (1941), the court said: "Although the Constitution grants the right to compensation, it does not specify the procedure by which the right may be enforced. Such procedure may be set up by statutory . . . provisions, and when so established, a failure to comply with it is deemed to be a waiver of the right to compel the payment of damages."

262. Powers Farms v. Consolidated Irrigation District, supra note 261; Bellman v. County of Contra Costa, 54 Cal.2d 363, 5 Cal.Rptr. 692, 353 P.2d 300 (1960); Bleamaster v. County of Los Angeles, 189 Cal.App.2d 274, 11 Cal.Rptr. 214 (1961).

263. Frustuck v. City of Fairfax, 212 Cal.App.2d 345, 28 Cal. Rptr. 357 (1963), concluding that inverse condemnation suits relating to real property are subject to five year period of limitations, Code Civ. Proc. §§ 318, 319; Ocean Shore R. Co. v. City of Santa Cruz, 198 Cal.App.2d 267, 17 Cal.Rptr. 892 (1962), applying three year statute of limitations, Code Civ. Proc. § 338(2), but noting that case law is divided as to which statutory period applies. Compare Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957). At present, of course, inverse condemnation actions against public entities are governed generally by the six months period for suit allowed after rejection of a claim. See Govt. C. § 945.6.

264. Stafford v. People ex rel. Department of Public Works, 195 Cal.App.2d 148, 15 Cal.Rptr. 402 (1961), cert. den. 369 U.S. 877 (1962); Vinnicombe v. State of California, 172 Cal.App.2d 54, 341 P.2d 705 (1959).

265. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959), sustaining validity of statute making official resolution of public necessity conclusive evidence (Code Civ. Proc. § 1241(2); Linggi v. Garovotti, 45 Cal.2d 20, 27, 286 P.2d 15 (1955), pointing out that burden of proof and other evidentiary rules applicable in private condemnor's suit require "a somewhat stronger showing . . . than if the condemnor were a public or quasi-public entity."