STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

California Inverse Condemnation Law

Arvo Van Alstyne

June 1971

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

STATE OF CALIFORNIA RONALD REAGAN, Governor

CALIFORNIA LAW REVISION COMMISSION
SCHOOL OF LAW—STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
(415) 321-2300, EXT. 2479

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To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study inverse condemnation. See also Resolution Chapter 45 of the Statutes of 1970.

The Commission herewith submits a background study on this subject prepared by the Commission's research consultant, Professor Arvo Van Alstyne. The Commission's recommendations covering various aspects of this subject will be separately published. *E.g., Recommendation Relating to Sovereign Immunity: Number 10—Revision of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801 (1969); *Recommendation Relating to Inverse Condemnation: Insurance Coverage* (October 1970), to be reprinted in 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971). See also Cal. Stats. 1970, Chs. 662 (authority to enter property for survey and tests), 1099 (liability for use of pesticides; liability for damage arising from entry of property). Only the recommendations submitted to the Legislature (as distinguished from the background study) are expressive of Commission intent.

Respectfully submitted,

THOMAS E. STANTON, JR.
Chairman

PREFACE

In 1965, the California Supreme Court decided the landmark case of *Albers v. County of Los Angeles,* 62 Cal.2d 250, 398 P.2d 129, 42 Cal. Rptr. 89, holding that the constitutional requirement of payment of "just compensation" for property "taken or damaged" may apply even where no negligence is established and no right of recovery exists at common law.

The *Albers* decision merely reaffirms a principle stated in previous cases. However, the principle had been obscured by the fact that previously liability had been generally based upon a finding of fault. The clarification of the principle and the size of the judgment—more than five million dollars—caused public agencies to believe that inverse condemnation liability now threatened their financial stability. Moreover, the decision provided public agencies with little indication of the limitations on inverse liability. Hopeful that limitations upon inverse condemnation liability could be stated in a statute, the California Legislature directed the Law Revision Commission to make a comprehensive study of inverse condemnation law.

The Commission retained Professor Arvo Van Alstyne, then of the U.C.L.A. Law School and now at the University of Utah College of Law, to prepare a background study covering the entire field of inverse condemnation law. Professor Van Alstyne is uniquely qualified to prepare this study since he served as the consultant to the Commission on its study of sovereign immunity, a study which resulted in the enactment of what is now commonly called the California Tort Claims Act.

Professor Van Alstyne produced a series of six articles covering various aspects of inverse condemnation law during 1967–1971. These articles, which were published in various California law reviews, are collected and reprinted in this book together with additional material not previously published.

This book has been published primarily so that the background study will be available in a convenient and compact form to the Commission, the Legislature, and the persons and organizations that will review the recommendations of the Commission. The detailed table of contents and the tables of cases and statutes cited give an effective means of access to the text. Although the titles of the original law review articles have been changed in this publication, the text on each page of the book conforms exactly to the text on the comparable page of the law review article from which it was taken. Accordingly, one who has a citation to a page of the law review where an article reprinted in this book was first published can easily find the comparable page in this book (the citation to the page of the original article appears at the bottom of the comparable page in this book).

The Commission is most indebted to Professor Van Alstyne for preparing this study. His intensive analysis and review of existing law and his practical suggestions for its revision or clarification are unique

contributions to law reform in California. The Commission and the Legislature should find the study of great value when considering the desirability of specific statutory provisions concerning inverse liability. It is safe to predict that the bench and bar of California will find the study of equal value in the judicial resolution of inverse condemnation problems.

The last chapter, which discusses significant developments since the earlier chapters were first published, was written by Nathaniel Sterling, a member of the Commission's staff.

Through the cooperation of the Continuing Education of the Bar, the Commission is pleased to be able to make this study available to lawyers who practice in the inverse condemnation field.

John H. DeMoully
Executive Secretary

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INTRODUCTION

Inverse condemnation is one of the most complex and rapidly developing areas of California law. This study undertakes to cover the significant aspects of inverse liability and to appraise and constructively criticize the prevailing rules in light of acceptable policy criteria.

The study was prepared to assist the California Law Revision Commission and the California Legislature to formulate a consistent and predictable statutory inverse liability scheme.[1] Nevertheless, it is likely that important areas of inverse condemnation law will be left to judicial development, either because they lend themselves to case by case development without a major sacrifice of logical consistency or doctrinal symmetry or because enactment of a rational statute covering particular situations may not be politically feasible. Unless and until legislation is enacted, it is hoped that the study will be of some assistance to lawyers and judges in the development of acceptable standards of inverse liability.[2]

Chapter 1 [3] gives an overall view of inverse condemnation. Its constitutional origin and subsequent judicial rather than statutory development are examined in detail. It is concluded that inverse condemnation liability is amenable in significant respects to legislative modification and that statutory changes would be desirable in the interests of predictability and uniformity.

In Chapter 2,[4] a general theory of compensability in inverse law is sought through an analysis of the major cases and an examination of the extensive legal literature, but no universal organizing principles are found. The chapter seeks to isolate acceptable criteria that may be used to identify the line between compensability and noncompensability in specific types of factual situations. Chapter 2 also attempts to classify inverse condemnation claims along practical lines that will permit use of the policy criteria relevant to each class of claims. Five distinguishable classes of claims are identified and are examined in detail in subsequent chapters.

Chapter 3 [5] deals with deliberately inflicted physical destruction or confiscation of property. Matters discussed include denial destruction, summary seizure or requisitioning of private property, destruction of menaces to health and safety, confiscation and destruction as sanctions in the enforcement of regulatory policies, and destruction of private buildings as a means of enforcing building and safety regulations.

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[1] The California Law Revision Commission has been authorized by the Legislature to study whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised (including but not limited to the liability for inverse condemnation resulting from flood control projects) and whether the law relating to the liability of private persons under similar circumstances should be revised. Cal. Stats. 1970, Res. Ch. 45. See also Cal. Stats. 1965, Res. Ch. 130.

[2] *E.g.*, Holtz v. Superior Court, 3 Cal.3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970) ; Sutfin v. State, 261 Cal. App.2d 50, 67 Cal. Rptr. 665 (1968).

[3] This chapter was previously published as *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967).

[4] This chapter was previously published as *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAWYER 1 (1967).

[5] This chapter was previously published as *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968).

Chapter 4 [6] explores and analyzes the law of inverse condemnation liability of public entities for unintended physical injuries to private property. After careful analysis of the significance of the *Albers* case,[7] four major categories of cases are examined:

(1) Water damage cases.

(2) Cases involving physical disturbance of site stability by landslide, loss of lateral support, and like causes.

(3) Cases involving physical deprivation of advantageous conditions associated with land ownership, such as loss of water supply, annual accretions, and water pollution.

(4) Miscellaneous physical damage claims, such as those arising out of concussion and vibration, escaping fire and chemicals, privileged entry upon private property, and physical occupation or destruction by mistake.

Finally, Chapter 4 suggests an approach that would provide a single statutory remedy with adequate scope and flexibility to supplant the uncertain and inconsistent inverse condemnation rules developed by the courts in dealing with unintended physical damage cases.

Chapter 5 [8] examines the extent to which greater consistency, rationality, and social justice can be achieved through modification of prevailing legal rules governing constitutional compensability for intangible detriment imposed upon private property by governmental improvements. Two topics are discussed in detail: (1) losses caused by highway and street improvements and (2) losses resulting from aircraft operations.

Chapter 6 [9] discusses taking or damaging by exercise of the police power. The chapter is directed primarily to three broad categories of recurring situations in which claims of unconstitutional taking or damaging of private property, as a result of regulatory measures, have been repeatedly asserted: (1) cases in which economic loss has been caused by newly imposed regulations of personal activity or by changing an existing pattern of regulatory conditions affecting personal activity, (2) cases in which economic loss has been caused by regulation of the use of privately owned real property, and (3) cases in which economic loss has been caused by the compelled use of private property to serve governmental ends or by compelled contributions, exactions, or expenditures in relation to property.

Chapter 7 [10] reports recent developments that have occurred since the earlier chapters were first published. The implications of the important recent case, *Holtz v. Superior Court*,[11] are discussed, and significant recent developments—both statutory and judicial—in each

[6] This chapter was previously published as *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431 (1969).

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

[8] This chapter was previously published as *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A. L. REV. 491 (1969).

[9] This chapter was previously published as *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 SO. CAL. L. REV. 1 (1971).

[10] This chapter has not been previously published.

[11] 3 Cal.3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970).

of the inverse condemnation areas covered by the earlier chapters are noted. Chapter 7 was written by Nathaniel Sterling, a member of the staff of the Law Revision Commission.

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CHAPTER 1. THE SCOPE OF LEGISLATIVE POWER

Arvo Van Alstyne*

The immunity of public entities from tort liability arising from their "governmental" activities, although judicially extirpated from the law of California in 1961,[1] was partially restored by the California Tort Claims Act of 1963.[2] The new statutory system of public tort responsibility and immunity embodied in the act avoids the sterile and timeworn dichotomy of "governmental" and "proprietary" functions as the key to tort liability of public entities. Recovery under the act obtains only when the proven facts correspond with an applicable statutory basis of liability; and *respondeat superior* is the general principle upon which most of the statutory liabilities are predicated.[3] The act incorporates, however, certain discrete aspects of the pre-1961 decisional law in the form of carefully defined tort immunities.[4] These immunities reflect legislative policy determinations favoring nonliability for torts arising out of specific kinds of public functions or responsibilities.[5] Although not formulated in terms of the kind of injury

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* B.A. 1943, LL.B. 1948, Yale University. Professor of Law, University of Utah. Member of the California Bar.

This Article is based on a research study prepared by the author for the California Law Revision Commission. The opinions, conclusions, and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect those of the California Law Revision Commission or its individual members.

1. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961); *cf.* Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

2. CAL. GOV'T CODE §§ 810–95.8 (West 1966). *See generally* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY (1964).

3. *See* CAL. GOV'T CODE §§ 815, 815.2 (West 1966); VAN ALSTYNE, *op. cit. supra* note 2, §§ 5.6–.11, 5.32–.37. Grounds of statutory liability other than *respondeat superior* include a governmental entity's failure to discharge a mandatory duty, CAL. GOV'T CODE § 815.6 (West 1966), liability for the torts of independent contractors in circumstances where private persons would be held liable, CAL. GOV'T CODE § 815.4 (West 1966), and the tortious operation of motor vehicles by public employees, CAL. VEHICLE CODE § 17001 (West Supp. 1966).

4. The principal basis for statutory immunity under the 1963 legislation relates to "the exercise of . . . discretion" by public employees, "whether or not such discretion be abused." CAL. GOV'T CODE § 820.2 (West 1966) (immunity of public employees); *see* CAL. GOV'T CODE § 815.2(b) (West 1966) (employer public entity enjoys immunity of its employees). Although this immunity, so far as applicable to public employees, appears to restate previous decisional law, *see, e.g.,* Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961); Hardy v. Vial, 48 Cal. 2d 577, 311 P.2d 494 (1957), its exact scope and content are far from certain. *See* VAN ALSTYNE, *op. cit. supra* note 2, §§ 5.51–.57. With respect to similar uncertainties under the comparable language of the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1964), see James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity,* 10 U. FLA. L. REV. 184 (1957); Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception,* 31 WASH. L. REV. 207 (1956).

5. In addition to the discretionary immunity discussed in note 4 *supra,* the California statute contains an elaborate array of specific immunity provisions relating to dangerous conditions of public property, CAL. GOV'T CODE §§ 830.2–31.8 (West 1966); police and law-enforcement activities, CAL.

sustained; they purport to exonerate public entities from liability for injuries to property as well as for injuries to person and to other juridical interests.[6]

The legislature, however, does not possess unlimited authority to enact substantive rules of nonliability of public entities for property losses resulting from governmental action. The law of inverse condemnation, which fulfills constitutional requirements, has long been recognized as a fundamental exception to the general doctrine of governmental tort immunity.[7] Indeed, much of the progressive enlargement of inverse condemnation liability by California decisions during the past three decades appears to be attributable, in significant part, to judicial receptivity to use of inverse condemnation principles as an acceptable detour around governmental tort immunity where destruction or damage to property is involved.[8] It follows, of course, that the same route potentially remains open for avoidance of specific immunities written into the California Tort Claims Act of 1963, so far as claims thereunder fall within the purview of inverse condemnation.[9]

GOV'T CODE §§ 844–46 (West 1966); fire protection and suppression, CAL. GOV'T CODE §§ 850–50.8 (West 1966); and medical, public health, and public hospital functions, CAL. GOV'T CODE §§ 854–56.4 (West 1966). Other general immunities cutting across the entire range of functions of government are likewise provided, many of which are simply specific aspects of the discretionary immunity. *See, e.g.*, CAL. GOV'T CODE §§ 818.2 (failure to adopt an enactment or to enforce the law), 818.4 (injuries resulting from licensing activities), 818.6 (failure to make health or safety inspection) (West 1966). The policy considerations underlying most of these immunity provisions are explained in Cal. Law Revision Comm'n, *Recommendation Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees*, in 4 REPORTS, RECOMMENDATIONS AND STUDIES 801 (Cal. Law Revision Comm'n ed. 1963). For the official statements of legislative intent adopted by the committees in charge of the legislation, see Cal. Senate Comm. on the Judiciary, *Report on Senate Bill No. 42*, CAL. SENATE DAILY J., April 24, 1963, at 1885–95 (Reg. Sess. 1963); Cal. Assembly Comm. on Ways & Means, *Report on Senate Bill No. 42*, CAL. ASSEMBLY DAILY J., June 15, 1963, at 5439–41 (Reg. Sess. 1963). These indications of legislative intent are reproduced in VAN ALSTYNE, *op. cit. supra* note 2, at 481–664.

6. The statutory liabilities and immunities refer uniformly to "any injury." CAL. GOV'T CODE § 810.8 (West 1966) defines "injury" as "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person."

7. *See* Part II-A *infra*. Inverse condemnation has been said to be "in the field of tortious action." Douglass v. City of Los Angeles, 5 Cal. 2d 123, 128, 53 P.2d 353, 355 (1935). For a general survey of inverse condemnation decisions in California, see Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 REPORTS, RECOMMENDATIONS, AND STUDIES 102–08 (Cal. Law Revision Comm'n ed. 1963).

8. The inception of the recent California trend may be traced to House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944), which imposed liability upon the district under circumstances previously regarded as supporting immunity. *Compare* Archer v. City of Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941). The disposition of the courts to enlarge upon inverse liability after *House* is reflected in such decisions as Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 15 Cal. Rptr. 904, 364 P.2d 840 (1961); Bauer v. County of Ventura, 45 Cal. 2d 276, 289 P.2d 1 (1955); Granone v. County of Los Angeles, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (2d Dist. 1965); Ward Concrete Prods. Co. v. Los Angeles County Flood Control Dist., 149 Cal. App. 2d 840, 309 P.2d 546 (2d Dist. 1957).

9. Cal. Gov't Code § 830.6 (West 1966) provides a broadly worded immunity from tort liability for injuries resulting from a dangerous condition of public property consisting of an inherent defect in the plan or design of its construction or improvement where that plan or design was previously approved by responsible public officers acting reasonably. *See* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 6.32 (1964); *cf.* Teall v. City of Cudahy, 60 Cal. 2d 431, 34 Cal. Rptr. 869, 386 P.2d 493 (1963). However, inverse condemnation liability has frequently been im-

This study seeks to determine the availability of avenues for legislative modification of the law of inverse condemnation in California. For present purposes, it is assumed that a rational legislative policy might seek to bring the law of inverse condemnation into greater conformity with the tort policies implicit in the California Tort Claims Act of 1963. In particular, a legislative program might seek to reduce or to eliminate the availability of the inverse remedy as a device for avoiding and thus subverting the statutory immunity policies. Conversely, it might be thought appropriate to amend the Tort Claims Act to conform its provisions, where applicable, to the accepted rules governing inverse condemnation liability in the interest of substantive and procedural uniformity.

At the outset it is apparent that any legislative approach to the problem must necessarily be a limited one, for the statutes must conform to the specific constitutional provisions, found in the organic law of both the state and nation, relating to the taking or damaging of private property for public use. For example, to the extent that article 1, section 14 of the California constitution imposes more rigorous standards of governmental responsibility than the fifth amendment (as made applicable to the states through the fourteenth amendment),[10] realization of the postulated legislative objective may require a state constitutional amendment, without which statutory modifications would be nugatory.[11] On the other hand, to the extent that such state standards represent judicial elaborations of constitutional meaning unaided by legislative interpretation, significant latitude for statutory initiative may exist; one of the most conspicuous features of constitutional law is the disposition of courts to give full effect to statutory measures designed to implement or govern the application of broadly worded constitutional precepts.[12]

This study explores the extent to which public liability in inverse condemnation may, conformably to the United States Constitution, be modified and regulated by state constitutional changes or statutory enactments. The conclusion reached is that a variety of possible courses of constructive legislative action are available within the framework of existing constitutional limitations for improving this branch of the law. A subsequent study will undertake a more detailed assessment of inverse condemnation law in California as it operates in specific factual circumstances and will seek to

posed upon the basis of defectively planned public improvements necessarily exposing private property to a substantial risk of injury. *See, e.g.*, Bauer v. County of Ventura, *supra* note 8 (defectively planned drainage improvement); Granone v. County of Los Angeles, *supra* note 8 (defectively designed culverts).

10. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

11. The interpretation and application of the California state constitutional provision must, of course, conform to federal constitutional standards. *See, e.g.*, Mulkey v. Reitman, 64 Cal. 2d 529, 50 Cal Rptr. 881, 413 P.2d 825, *cert. granted*, 87 Sup. Ct. 500 (1966) (No. 483).

12. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

identify and evaluate legal policy criteria relevant to a possible legislative program.

I. 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 1 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—yet significantly different—requirement: "nor shall private property be taken for public use, without just compensation." This provision, which was originally a limitation only 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.[13] The federal prohibition, it will be noted, refers only to a "taking" of private property, while the California provision explicitly requires compensation when private property is either "taken" or "damaged." As will be explained below,[14] this difference in wording was deliberate. Since the power of eminent domain is regarded as an inherent attribute of sovereignty, the constitutional provisions are not the source of, but limitations upon, that power.[15]

Inverse condemnation and eminent domain suits in California are simply opposite sides of the same legal coin. As the California Supreme Court has pointed out: "The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action."[16] The functional and doctrinal interrelationship between normal 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 condemna-

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13. Griggs v. Allegheny County, 369 U.S. 84 (1962); Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897). *Compare* Barron v. Mayor & City Council, 32 U.S. (7 Pet.) 243 (1833) (fifth amendment "taking" clause not applicable to states prior to adoption of fourteenth amendment).

14. *See* Parts IV-A, B *infra*.

15. *See, e.g.*, Armstrong v. United States, 364 U.S. 40 (1960); People *ex rel.* Dep't of Pub. Works v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959).

16. Breidert v. Southern P. Co., 61 Cal. 2d 659, 663 n.1, 39 Cal. Rptr. 903, 905 n.1, 394 P.2d 719, 721 n.1 (1964); *see* Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943); Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942).

tion proceedings to take property for a freeway 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 his access rights and to determine whether, under the circumstances, their impairment is constitutionally compensable.[17] 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 claims that his right of access has likewise been interfered with to his damage.[18] The legal analysis and consequences—assuming the absence of a controlling statute to the contrary—would normally be the same in both cases.[19]

The historical roots of the principle now known as eminent domain extend back many centuries and are manifested in the law of numerous countries.[20] For present purposes, however, the relevant legal developments in California law are principally those which followed the adoption of section 14 of article 1 as part of the California constitution of 1879—the present organic charter of the state.

The law with which we are concerned is, to a remarkable degree, almost entirely judicially formulated. To be sure, some statutes pertinent to the problems of the study do exist;[21] but, by and large, judicial decisions characterize the development of the presently operative legal norms. This feature of the law of inverse condemnation is undoubtedly a reflection in part of the California view that section 14 is self-executing and does not require legislative implementation or authorization to be recognized as the basis of liability of governmental agencies.[22] In addition, inverse condemnation has been traditionally regarded as a remedy which operates in the field of tortious conduct in appropriate property-injury cases.[23] Indeed, the constitutional remedy often overlaps normal tort remedies and provides an alternative basis of relief.[24] In other instances—especially prior to the

17. *See, e.g.*, People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943) (loss of direct access to highway and easement of reasonable view).

18. *See* Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943) (loss of access to general system of streets because of cul-de-sac).

19. An intimation to the contrary contained in People *ex rel.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 9 Cal. Rptr. 363, 357 P.2d 451 (1960), was dispelled by the later decision in Breidert v. Southern P. Co., 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719 (1964), explaining *Symons* as being limited to its special facts. For discussion of the practical differences between the two types of suits, see text accompanying notes 106–08 *infra.*

20. *See generally* Brown, *Eminent Domain in Anglo-American Law,* 18 CURRENT LEGAL PROBLEMS 169 (1965); Grant, *The "Higher Law" Background of the Law of Eminent Domain,* 6 WIS. L. REV. 67 (1931); Lenhoff, *Development of the Concept of Eminent Domain,* 42 COLUM. L. REV. 596 (1942).

21. *See* Part II-B *infra.*

22. *See* Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943); Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942).

23. *See* Douglass v. City of Los Angeles, 5 Cal. 2d 123, 128, 53 P.2d 353, 355 (1935).

24. *See, e.g.*, Bauer v. County of Ventura, 45 Cal. 2d 276, 289 P.2d 1 (1955) (statutory liability for a dangerous and defective condition of public property and inverse condemnation); Granone v. County of Los Angeles, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (2d Dist. 1965) (negligence, nuisance, and inverse condemnation).

judicial abrogation of governmental immunity in California—it has provided a useful basis for recovery of damages in circumstances where the defendant public entity was otherwise immune from liability.[25]

The pattern of judicial development, largely unaided by legislative enactments, is a natural consequence of the amorphous nature of the practical problems with which the 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. Sometimes, however, an actual appropriation of or substantial damage to private property is neither contemplated nor expected as a feature of the project; yet damage may result in unexpected ways or in ways which, while possibly anticipated by responsible public officers, are deemed remote and unlikely to occur.[26] In other instances, losses of property values from governmental activity are anticipated but are believed to be not a legally recognized basis of liability—a belief often not shared by the injured owner.[27] Again, in emergency situations official action may be taken with full realization of its possible injurious effect on private property but with firm conviction that immediate action is necessary in the interest of the general community welfare.[28] The limitless varieties of such 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.[29]

Judicial action in the area of inverse condemnation has not been entirely satisfactory: most authorities readily acknowledge that the case law is disorderly, inconsistent, and diffuse.[30] 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

25. *See* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY §§ 1.19, 5.9 (1964).

26. *See, e.g.*, Lourence v. West Side Irr. Dist., 233 Cal. App. 2d 532, 43 Cal. Rptr. 889 (1st Dist. 1965) (water seepage from carefully maintained irrigation canals); Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 33 (1st Dist. 1957) (overflow of sewers during unusually large storm).

27. *See, e.g.*, Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (4th Dist. 1963) (approaches to a county airport and overflight of a plaintiff's land); Frustuck v. City of Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1st Dist. 1963).

28. *See, e.g.*, Hunter v. Adams, 180 Cal. App. 2d 511, 4 Cal. Rptr. 776 (1st Dist. 1960) (freeze on building permits in area studied for urban renewal).

29. *See generally* D. MANDELKER, INVERSE CONDEMNATION: THE CONSTITUTIONAL LIMITS OF PUBLIC RESPONSIBILITY 11–22 (1964).

30. *See* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REV. 63; Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954); Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3; Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

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, they permeate the case law.

Beneath the surface abstractions of judicial opinions, however, lurk significant conflicts of policy considerations—sometimes candidly expressed but more often obscured by the process of opinion writing. In California, however, the relevant policy postulates have increasingly been exposed to view by appellate judges as the courts have labored to construct a viable body of consistent principles in recent years.[31] The decisions appear to accept the thought, however, that the effort must necessarily be a tentative and continuing one. The pace of the technological explosion, the steady 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 are matched by a like increase in the size and complexity of government. A collateral effect is the heightened sophistication and pervasiveness with which government functions within the society as a whole.

These developments inevitably tend to increase the frequency and seriousness of governmental mistakes as government programs tend more and more to entail deliberately adopted risks of substantial interferences with private economic resources and expectations.[32] At the same time, the innocent victim's ability to secure effective political redress is diminished by the very size and complexity of the contending forces at work. Assurance of flexibility and adaptability of judicial resources to meet the 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 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 "nonrule"): "[E]ach case must be considered upon its own facts."[33] What the courts appear to mean by this reliance on *ad hoc* prob-

31. For good illustrations of judicial policy evaluations, see Albers v. County of Los Angeles, 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965); Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), *appeal dismissed*, 371 U.S. 36 (1962).

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

33. People *ex rel.* Dep't of Pub. Works v. Russell, 48 Cal. 2d 189, 195, 309 P.2d 10, 14 (1957), quoted with approval in Breidert v. Southern P. Co., 61 Cal. 2d 659, 665, 39 Cal. Rptr. 903, 907,

lem-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 recurring problems, one can perceive a crystallization and hardening of specific rules —the comprehensive-zoning[34] and cul-de-sac[35] 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.[36]

The typical formulation of the interest analysis with reference to inverse condemnation focuses 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 "in any society the fulness 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."[37] This formulation, however, begs the real question: What kinds of legitimate expectations with respect to the allocation and utilization of private resources, both tangible and intangible, are sufficiently important to deserve judicial protection against otherwise legitimate forms of governmental interference?[38]

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394 P.2d 719, 723 (1964). Similar expressions are frequently found in federal inverse condemnation cases. 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, 332 (1949) (no definite standards for just compensation other than "substantial justice").

34. The noncompensability of economic losses due to rational zoning restrictions against particular land uses is well settled. *See* Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926); Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962); Byrne, *The Constitutionality of a General Zoning Ordinance*, 11 MARQ. L. REV. 189 (1927); McQuillin, *Constitutional Validity of Zoning Under the Police Power*, 11 ST. LOUIS L. REV. 76 (1926). The power is, however, not without limits. *See, e.g.*, Goldblatt v. Town of Hempstead, *supra* note 33.

35. California cases recognize that substantial interference or impairment of a property owner's access to the general system of streets resulting from an improvement that makes a cul-de-sac of a street on which his property abuts is a compensable damaging of a property interest. *See* Breidert v. Southern P. 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). Varying results are reached in other jurisdictions. *See* Comment, 18 ALA. L. REV. 315 (1966); 20 SW. L.J. 393 (1966); Annot., 43 A.L.R.2d 1072 (1955).

36. 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 far from clear. *See* Batten v. United States, 306 F.2d 580 (10th Cir. 1962) (denying inverse liability for noise in absence of overflights). *Contra*, Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962). *Compare* Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (4th Dist. 1963), *with* Loma Portal Civic Club v. American Airlines, 61 Cal. 2d 582, 39 Cal. Rptr. 708, 394 P.2d 548 (1964). *See generally* 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).

37. Monongahela Nav. Co. v. United States, 148 U.S. 312, 324 (1893).

38. *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. . . .

As thus rephrased, the basic issue is seen to involve a problem of relativity, rather than classification, of interests. Inverse condemnation epitomizes a struggle between the security of "established economic interests" and "the forces of social change" which cannot be rationally resolved by a mere search for definitions.[39] "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, again, one must approach the subject at hand with an alert and sensitive appreciation that (like private interests) governmental claims are not all of the same order or value. Two significant, but distinct, aspects of governmental behavior can readily be identified to make this clear. First, it is obvious—although too often apparently ignored in judicial decision writing—that government functions to achieve a variety of objectives, all of which may not necessarily imply the same kind or intensity of public interest or importance. For present purposes, it is helpful to note four distinguishable categories of public functions achieving generic objectives.[40]

(1) *Facilitative* activities designed to encourage, assist, or subsidize private economic interests are a common feature of modern governmental promotional programs. Illustrations include the development of publicly owned airports, harbors, markets, warehouses, transit systems, and roads and highways, all of which function to a substantial degree, if not exclusively, to promote private commercial activity. (2) Closely related to and overlapping the facilitative activities of government are its *service* functions, by which a variety of goods, services, and opportunities for comfortable living, individual self-expression, personal development, and cultural enjoyment are provided. Examples include not only public utility systems but also schools, colleges, libraries, parks and playgrounds, art and musical activities, and community beautification programs. (3) *Guardianship* activities of government are commonplace, involving ongoing programs administered by public personnel to provide 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. (4) *Mediatory* activities of government are designed to accommo-

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).

39. The quoted phrases are borrowed from Sax, *supra* note 30, at 40.

40. The scheme of classification of functions of public entities which follows in the text is not proposed as an exhaustive one, although it is believed to embrace many types of functions likely to give rise to inverse condemnation claims. *Compare* Sax, *supra* note 30, at 62–67.

date 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.

These functional categories are to some extent overlapping. For example, the development of a municipal airport may be primarily facilitative in objective, but, obviously, it also is to some extent a service activity. In some instances it may also represent a phase of guardianship policy (that is, police aircraft and helicopter patrol; forest fire suppression through use of tanker aircraft).

In addition, it should be kept in mind that government usually enjoys considerable latitude for choice between alternative methods with which to pursue its overlapping objectives.[41] These alternative techniques 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 located outside the airport boundaries. The city might proceed to achieve this protection by (a) enacting a graduated prohibition against construction over prescribed heights (for example, airport-approach zoning); or (b) so limiting the general use of the subject land that structural improvements are unlikely or impossible (for example, placing the land within a strict agricultural-use zoning classification); or (c) purchasing or condemning an easement for avigation over the land.

Similarly, an objective of securing adequate drainage and flood control might be approached by (a) construction with government funds of a system of drainage conduits and flood control works; or (b) imposition of penal regulations upon private landowners requiring them to provide certain facilities with respect to the drainage of their land; or (c) 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 (for example, urban renewal

41. Useful treatments of the interrelationships between alternative techniques for accomplishing specific governmental objectives in the borderland between eminent domain and police power include Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961); Mandelker, *Notes From the English: Compensation in Town and Country Planning*, 49 CALIF. L. REV. 699 (1961); Sax, *supra* note 30; Comment, *Control of Urban Sprawl or Securing Open Space: Regulation by Condemnation or by Ordinance*, 50 CALIF. L. REV. 483 (1962); Note, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622 (1962).

or community redevelopment programs). Identification of the objectives to be pursued and the choice of means to be used may be influenced by many factors, including limitations upon legal authority, fiscal realities, and political expediency; but it seems reasonable to assume that governmental action which has capacity to "take" or "damage" private property ordinarily involves a deliberate 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 ambiguities inherent in overlapping governmental objectives and the alternative means for achieving them. Judicial development of the law—as some commentators have charged[42]—has 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 differing problems as they arise, without a major sacrifice of 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 differing social needs remains to be seen. At least, the task will not be an easy one.

Before attempting a more detailed investigation of the current legal doctrinal rules, one additional—and pervasive—policy problem should 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 liability, 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 nature and general purview of potential legislation are defined in some detail. Statutes which merely translate the constitutional mandate into roughly synonymous general precepts are not likely to be much of an improvement.[43] On the other hand, a preliminary assessment of the problem suggests the probability that further investigation would be worthwhile. In 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

42. *See* authorities cited note 30 *supra*.

43. *Cf.* D. MANDELKER, INVERSE CONDEMNATION: THE CONSTITUTIONAL LIMITS OF PUBLIC RESPONSIBILITY 26–28 (1964).

authorizing compensation to be paid for presently noncompensable losses may be deemed appropriate. Moreover, procedural aspects of inverse litigation may be found wanting in some respects; existing statutes may be determined to require clarification or revision in the interest of consistency or fundamental policy.

Hopefully, an analysis of current law in California and elsewhere may produce acceptable policy generalizations capable of being formulated into statutory standards which more appropriately interrelate the relevant private and public interests in specific factual situations. 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. In this sense, 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.[44]

II. THE CURRENT LEGAL CONTEXT OF INVERSE CONDEMNATION

A. *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)[45] were the two principal judicial tools for affording relief for property injuries arising out of an ad-

44. Legislation of a comprehensive nature dealing with governmental tort liabilities and immunities has been enacted in recent years in several states. CAL. GOV'T CODE §§ 810–996.6 (West 1966); ILL. ANN. STAT. ch. 85, §§ 1-101 to 10-101 (1966); MICH. COMP. LAWS §§ 691.1401–.1415 (Supp. 1965); MINN. STAT. ANN. §§ 466.01–.17 (1963); NEV. REV. STAT. §§ 41.031–.038 (1965); UTAH CODE ANN. §§ 63-30-1 to 63-30-34 (Supp. 1965); WIS. STAT. ANN. § 895.43 (1966). For the background study and policy evaluations which underlie the California legislation, see Cal. Law Revision Comm'n, *Recommendation Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees*, in 4 REPORTS, RECOMMENDATIONS AND STUDIES 801 (Cal. Law Revision Comm'n ed. 1963); Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 REPORTS, RECOMMENDATIONS AND STUDIES 1 (Cal. Law Revision Comm'n ed. 1963).

45. Although the early California cases adopting the "nuisance" exception to the doctrine of governmental immunity were inexplicit as to its doctrinal basis, *see, e.g.*, Bloom v. City & County of San Francisco, 64 Cal. 503, 3 P. 129 (1884); Davis v. City of Sacramento, 59 Cal. 596 (1881), it was apparently settled before the turn of the century that nuisance liability was simply an aspect of inverse condemnation. *See* Conniff v. City & County of San Francisco, 67 Cal. 45, 7 P. 41 (1885); *cf.* Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895). More recently, however, the nuisance exception has broken away from its theoretical roots, as courts have ignored the earlier rationale and have employed the concept of nuisance as justification for imposing liability for personal injuries. *See* Bright v. East Side Mosquito Abatement Dist., 168 Cal. App. 2d 7, 335 P.2d 527 (3d Dist. 1959); Vater v. County of Glenn, 49 Cal.2d 815, 323 P.2d 85 (1958) (dictum). Personal injuries have been uniformly regarded as not a compensable damaging within the meaning of California inverse condemnation theory. *See* Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App. 2d 306, 114 P.2d 14 (2d Dist. 1941). For a more complete account of the development of the nuisance exception, see Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 493–98 (1963).

mittedly "governmental" function where no statute authorized recovery.[46] These remedies had the significant advantage of overriding the traditional classification of public functions into "proprietary" and "governmental" pigeonholes for tort purposes;[47] and they applied to governmental entities of every level.[48] On the other hand, inverse condemnation (and, until recently, nuisance liability)[49] was limited to claims of injury to "property"—including both real and personal property[50]—and was not available to redress personal injuries or wrongful death.[51] The close ties of these remedies to what were essentially tort concepts is revealed by cases like *Granone v. County of Los Angeles*,[52] where recovery by a lessee for flooding of crops

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46. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 219, 11 Cal. Rptr. 89, 94, 359 P.2d 457, 462 (1961) ("Finally, there is governmental liability for nuisances even when they involve governmental activity"); A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY §§ 1.18–.21 (1964).

47. For a comprehensive collection of, and attempt to classify, the California decisions illustrating the distinction between immune "governmental" and liability-producing "proprietary" activities, see Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 REPORTS, RECOMMENDATIONS AND STUDIES 1, 219–25 (Cal. Law Revision Comm'n ed. 1963). The utter confusion which characterized the pre-1961 decisions in the area of parks and recreational functions is discussed in Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 516–19 (1963).

48. *Compare* Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App. 2d 306, 114 P.2d 14 (2d Dist. 1941) (district, as a public entity created for a "public" or governmental purpose, immune from common-law tort liability), *with* House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944) (same district liable for negligent design of flood-control improvement on inverse condemnation theory).

49. *See* note 45 *supra*.

50. The constitutional provisions, both state and federal, make no verbal distinction between real property and personal property with respect to the requirement of "just compensation." Federal decisions under the due process clause 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 held compensable taking); Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893) (destruction of value of a franchise held a compensable taking). *Compare* United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952) (denying recovery for destruction of real and personal property to prevent enemy seizure).

The California decisions do not distinguish between real and personal property. *See, e.g.*, Patrick v. Riley, 209 Cal. 350, 287 P. 455 (1930) (conceding that just-compensation clause applied to destruction of diseased cattle, but concluding that police power justified such destruction without payment of compensation); Green v. Swift, 47 Cal. 536 (1874) (plaintiff's cattle destroyed by flood allegedly aggravated by public improvement); Affonso Bros. v. Brock, 29 Cal. App. 2d 26, 84 P.2d 515 (3d Dist. 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. 181 (1st Dist. 1965); City of Los Angeles v. Siegel, 230 Cal. App. 2d 982, 41 Cal. Rptr. 563 (2d Dist. 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. *Cf.* Broeder, *supra* note 32, at 248–50. 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), but such language should 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).

51. *See* Brandenburg v. Los Angeles County Flood Control Dist. 45 Cal. App. 2d 306, 114 P.2d 14 (2d Dist. 1941). A respectable argument could be advanced that wrongful death and personal injuries involve a taking or damaging of "property" to the extent that the damages sought include loss of future support, loss of earnings, or loss of assets for payment of hospital and medical expenses. *Cf.* Hunt v. Authier, 28 Cal. 2d 288, 169 P.2d 913 (1946) (wrongful death treated as action for property injury for purposes of survival statute). No case is known to have accepted this position, however.

52. 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (2d Dist. 1965).

resulting from a defectively designed and negligently maintained culvert system was sustained on the alternative theories of inverse condemnation, nuisance, and negligence. Cases involving dangerous and defective conditions of public property constitute another striking illustration of the overlap between inverse condemnation and tort law.[53]

The need for the constitutional remedy may, to some extent, have been reduced by abolition of governmental immunity and by the substitution (by enactment of the California 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.[54] As in the past, many types of property-damage claims now constitute the basis for actions against public entities on alternative theories of inverse condemnation and statutory tort liability.

On the other hand, there is little doubt that, absent major statutory changes, inverse condemnation can be expected to perform a major supplementary role in the future development of governmental tort liability (using the term broadly). The 1963 legislation, for example, contemplates the termination of pecuniary liability of public entities based on common-law nuisance.[55] Specific types of claims, formerly actionable on a nuisance theory, for which governmental immunity was not a defense, are still amenable to tort liability under the new statutory standards for affixing liability, but the plaintiff's evidence must be directed to proving a statutory basis of recovery rather than a basis in traditional nuisance theory.[56] How-

53. *See, e.g.*, Bauer v. County of Ventura, 45 Cal. 2d 276, 289 P.2d 1 (1955).

54. The Public Liability Act of 1923, Cal. Stat. 1923, ch. 328, § 2, at 675 (*formerly* Cal. Gov't Code § 53051 (1955)) imposed liability for dangerous or defective conditions of public property only upon cities, counties, and school districts, thereby excluding the state and numerous special districts. *See* Kambish v. Santa Clara Valley Water Conservation Dist., 185 Cal. App. 2d 107, 8 Cal. Rptr. 215 (1st Dist. 1960); Gillespie v. City of Los Angeles, 114 Cal. App. 2d 513, 250 P.2d 717 (3d Dist. 1952); Barlow v. Los Angeles County Flood Control Dist., 96 Cal. App. 2d 979, 216 P.2d 903 (2d Dist. 1950); Van Alstyne, *Government Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163, 186 (1963). Resort to inverse condemnation as a remedy against the excluded entities in dangerous-property-condition cases was thus a typical feature of pre-1961 law. *See, e.g.*, House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944). The new 1963 Tort Claims Act, however, exposes all public entities of every kind to statutory tort liability for dangerous conditions of public property, thereby reducing the need for reliance upon inverse condemnation theory. *See* CAL. GOV'T CODE §§ 811.2, 830–35.4 (West 1966).

55. *See* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 5.10 (1964).

56. The exact status of nuisance as a basis of governmental tort liability is presently ambiguous. Nothing in the Tort Claims Act of 1963 expressly imposes any nuisance liability as such, and the Senate Judiciary Committee, in its official explanation of the act, pointed out that the basic statutory premise is that "there is no liability in the absence of a statute declaring such liability." Since "there is no section in this statute declaring that public entities are liable for nuisance . . . the right to recover damages for nuisance will have to be established under the provisions relating to dangerous conditions of public property [CAL. GOV'T CODE §§ 830–35.4 (West 1966)] *or under some other statute* that may be applicable to the situation." Cal. Senate Comm. on the Judiciary, *Report on Senate Bill No. 42*, CAL. SENATE DAILY J., April 24, 1963, at 1887 (Reg. Sess. 1963), quoted in A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 497 (1964) (emphasis added). Thus, the problem is still an open one whether nuisance liability may be imposed upon public entities under the general codification of nuisance principles found in CAL. CIV. CODE §§ 3479, 3491, and 3501 (West 1954). In analogous situations, statutory language of like generality, which made no specific reference to public agencies, has been held applicable as a basis of governmental tort liability. Flournoy v. State, 57 Cal. 2d 497, 20 Cal. Rptr. 627, 370 P.2d 331 (1962) (wrongful death statute).

ever, as already indicated, the previous law of nuisance liability of public entities overlapped substantial areas of inverse condemnation law;[57] it thus seems probable that liability on an inverse condemnation theory may today be imposed in some traditional nuisance cases nothwithstanding the legislative abrogation of nuisance liability.[58]

Moreover, the 1963 Tort Claims Act makes a broad range of statutory defenses and immunities available to governmental entities sued in tort.[59] These provisions, however, have no efficacy in inverse condemnation litigation.[60] For example, the statutory immunity for defective plan or design of public improvements[61] and the defense of reasonableness of a flood control district's actions in connection with its culvert system[62] would seemingly have provided no impediment to full liability in the *Granone* case[63] on plaintiff's inverse condemnation theory,[64] although liability on a statutory tort theory (dangerous condition of public property) might well have been precluded. The "discretionary immunity" principle[65] which permeates the 1963 act provides another potentially fruitful incentive for inverse condemnation suits, since "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.[66] In short, to the extent that applicable 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.

The overlapping of the two remedies tends to obscure the fact that inverse condemnation is not merely a counterpart for, or an alternative tech-

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57. *See* note 45 *supra.*

58. Granone v. County of Los Angeles, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (2d Dist. 1965), discussed in text accompanying note 52 *supra*, sustained on alternative theories of nuisance, inverse condemnation, and negligence a judgment for the destruction of growing crops by flooding. Although decided in 1965, the opinion does not discuss the 1963 Tort Claims Act, 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.

59. *See* CAL. GOV'T CODE §§ 830.2–31.8 (immunities), 835.4 (defenses) (West 1966).

60. *See* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY §§ 6.28–.43 (1964).

61. CAL. GOV'T CODE § 830.6 (West 1966); *see* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 6.32 (1964).

62. CAL. GOV'T CODE § 835.4 (West 1966); *see* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 6.29 (1964).

63. *See* note 58 and text accompanying note 52 *supra.*

64. The use of inverse condemnation theory to override limitations upon tort liability is not uncommon. *See* Abend, *Federal Liability for Takings and Torts: An Anomalous Relationship*, 31 FORDHAM L. REV. 481 (1963); Foster, *Tort Liability Under Damage Clauses*, 5 OKLA. L. REV. 1 (1952).

65. *See* note 4 *supra.*

66. *Compare* Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964) (denying liability for damage from discretionary activity constitutional where no taking), *with* House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944) (liability for damages from discretionary determination of suitability of flood-control improvement plan). *See generally* D. MANDELKER, INVERSE CONDEMNATION: THE CONSTITUTIONAL LIMITS OF PUBLIC RESPONSIBILITY 25–26 (1964) and cases cited.

nique for enforcing, tort liabilities. It has had an independent development of its own, and embraces a significant 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. In *Albers v. County of Los Angeles*,[67] for example, total liabilities in excess of five million dollars were affirmed on an inverse condemnation rationale in the face of clear and adequately supported 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.

B. *Statutes Affecting Inverse Condemnation Liability*

Although the law of inverse condemnation has been developed primarily in court decisions applying the broad constitutional language to diverse fact situations, the California 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:

(1) Public improvement projects often require the 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.[68] The legislature, however, has enacted numerous statutes relating to such problems, in some instances expressly requiring payment of relocation costs[69] and in others declaring that such costs shall be payable by the private owner.[70] In ordinary eminent domain proceedings, moreover, the cost of structural removals and relocations is defined generally by statute as part of the recoverable damages available to the condemnee.[71]

(2) 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.[72] In Cali-

67. 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965); *see* Reardon v. City & County of San Francisco, 66 Cal. 492, 6 P. 317 (1885).

68. *See, e.g.*, Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co., 51 Cal. 2d 331, 333 P.2d 1 (1958); Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal. 2d 713, 329 P.2d 289 (1958), *cert. denied*, 359 U.S. 907 (1959).

69. *See, e.g.*, CAL. GOV'T CODE § 61610 (West 1966) (community services districts); CAL. PUB. UTIL. CODE § 25703 (West 1965) (certain transit districts); CAL. WATER CODE §§ 71693-94 (West 1966) (municipal water districts). Other analogous statutory provisions are collected in Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 REPORTS, RECOMMENDATIONS AND STUDIES 1, 80-88 (Cal. Law Revision Comm'n ed. 1963).

70. *See, e.g.*, CAL. PUB. UTIL. CODE § 6297 (West 1965) (relocations by gas and electricity franchise grantees); CAL. STS. & H'WAYS CODE § 680 (West 1956) (structures located under franchise in state highways). Additional statutes are collected in Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 REPORTS, RECOMMENDATIONS AND STUDIES 1, 186-90 (Cal. Law Revision Comm'n ed. 1963).

71. *See* CAL. CODE CIV. PRO. §§ 1248(6), 1248a (West 1955), *as amended*, (West Supp. 1966).

72. *See* Annots., 79 L. Ed. 966 (1935); 98 L. Ed. 62 (1954). *Compare* Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953) (imposition of cost of grade separation upon railroad held permissible), *with* Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) (*contra*).

fornia a statutory procedure has been developed for administrative allocation of such costs between the private and governmental interests concerned.[73]

(3) Private property losses occasioned by commandeering or by preventive destruction in times of emergency or disaster have been thought to raise difficult issues of constitutional liability.[74] These problems have been partially alleviated in California by legislation authorizing compensation to be paid in certain situations.[75]

(4) 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 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.[76] The legislature, however, has authorized limited compensation to be paid to affected property owners in some cases of this sort.[77]

(5) A few miscellaneous statutes may also be found which do not fit neatly into the foregoing categories but which purport either to enlarge upon the liability which would ordinarily flow from specified governmental action[78] or to provide for the allocation and payment of such liability.[79] Under some circumstances, statutes of this type may apply in cases involving inverse condemnation claims.

(6) There are numerous nonsubstantive California statutes which authorize public entities to enter into indemnification or save-harmless agreements by which they may assume liabilities of other entities arising out of certain kinds of public undertakings.[80] Presumably, in some cases at least,

73. *See* CAL. PUB. UTIL. CODE §§ 1202–1202.5 (West Supp. 1966).

74. *See, e.g.*, United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952); United States v. Russell, 80 U.S. (13 Wall.) 623 (1871); Annot., 97 L. Ed. 164 (1953).

75. *See* CAL. MIL. & VET. CODE § 1585 (West Supp. 1966); Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 REPORTS, RECOMMENDATIONS AND STUDIES 1, 77–78 (Cal. Law Revision Comm'n ed. 1963).

76. Miller v. Schoene, 276 U.S. 272 (1928); *see* Annot., 70 A.L.R.2d 852 (1960) (validity of statutes for protection of vegetation against disease).

77. *See, e.g.*, CAL. AGRIC. CODE §§ 207, 239, 264 (West 1954), *as amended*, (West Supp. 1966); Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 REPORTS, RECOMMENDATIONS AND STUDIES 1, 75–76 (Cal. Law Revision Comm'n ed. 1963).

78. *See, e.g.*, CAL. WATER CODE §§ 1245–48 (West 1956), providing that municipal corporations which enter any watershed for the purpose of taking, transporting, or diverting water for municipal purposes are liable for all damages sustained by persons whose property, business, trade, or profession is situated therein, whether such damage is sustained "directly or indirectly."

79. *See, e.g.*, Cal. Stat. 1965, ch. 138, § 41(f), at 441–42, setting up a "reserve for subsidence contingencies" from tideland 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 "[n]othing herein . . . shall constitute a waiver of sovereign immunity . . . ."

80. *See, e.g.*, CAL. WATER CODE §§ 8617–18, 12641–42, 12751, 12828 (West 1956), *as amended*, (West Supp. 1966) (authorizing California public entities to save the United States harmless from damages resulting from federal-aid water projects); Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 REPORTS, RECOMMENDATIONS AND STUDIES 1, 97–101 (Cal. Law Revision Comm'n ed. 1963).

agreements made under these provisions would effectively control the ultimate incidence of inverse condemnation responsibility as well as ordinary tort responsibility.

(7) 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.[81] 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 constititional liability to pay just compensation.[82] Accordingly, a statutory declaration of police power purposes tends to surround a claim of inverse liability with a conceptual cloak conducive to a judicial holding of nonliability,[83] although such a declaration probably would not be regarded as in any sense controlling.[84]

The statutory provisions cited in the preceding paragraphs are intended to be illustrative only, and not an exhaustive review of current legislative provisions. The significant point here is that the legislature has seen fit to act with reference to certain aspects of inverse condemnation law and for the effectuation of diverse purposes. Not only do some of the cited statutes attempt to limit the scope of substantive inverse liability, but others expand that liability beyond constitutional minimums.[85] 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.

C. *Inverse Condemnation and Private Condemnors*

The foregoing discussion of inverse condemnation takes as a point of departure the general assumption that it is the liability of *public entities*

81. *See, e.g.*, CAL. WATER CODE § 39059 (West 1966), declaring that water storage districts possess and may exercise "police and regulatory powers . . . indispensable to the public interest."

82. Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), *appeal dismissed*, 371 U.S. 36 (1962). *See generally* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

83. *See, e.g.*, Patrick v. Riley, 209 Cal. 350, 287 P. 455 (1930); Hunter v. Adams, 180 Cal. App. 2d 511, 4 Cal. Rptr. 776 (1st Dist. 1960).

84. By analogy, statutes declaring that particular functions of public entities are "governmental" were held not conclusive on the courts in applying the pre-1961 rules governing tort liabilities of such entities. *See* Schwerdtfeger v. State, 148 Cal. App. 2d 335, 306 P.2d 960 (1st Dist. 1957).

85. 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* Dittus v. Cranston, 53 Cal. 2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1959) (compensation for fish nets rendered useless by conservation statute); Patrick v. Riley, 209 Cal. 350, 387 P. 455 (1930) (compensation for cattle destroyed in bovine-disease-control program); Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal. 2d 713, 719, 329 P.2d 289, 292 (1958) (dictum) (payment of costs of utility relocations permissible), *cert. denied*, 359 U.S. 907 (1959).

with which the present study is concerned. It should not be forgotten, however, that private persons or corporations 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.[86] Privately owned public utility and railroad companies are familiar examples.[87] However, private powers of condemnation are not limited to public service corporations; section 1001 of the California Civil Code declares that "any person" may acquire private property for any use designated as a "public use" by the legislature by following the procedures outlined in the Code of Civil Procedure.[88] Thus, for example, eminent domain proceedings may be brought by private colleges and universities for expansion purposes,[89] by the owners of private airports open to the general public,[90] or by a mere private property owner for the purpose of connecting his property to a public sewer system.[91] The legislative determination that uses of this type are public uses[92] is entitled to considerable judicial deference, even though not conclusive upon the courts.[93]

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.[94] Prosecution of a cause of action for property damage may be simplified and confusion of issues prevented by using the inverse condemnation remedy where both a public

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86. Moran v. Ross, 79 Cal. 159, 21 P. 547 (1889); University of So. Cal. v. Robbins, 1 Cal. App. 2d 523, 37 P.2d 163 (2d Dist. 1934), *cert. denied*, 295 U.S. 738 (1935).

87. As to exercise of eminent domain powers by railroads, see Central P. Ry. v. Feldman, 152 Cal. 303, 92 P. 849 (1907); CAL. PUB. UTIL. CODE §§ 7526, 7533, 7535–36 (West 1965). As to eminent domain by private public utility companies, see San Joaquin & Kings River Canal & Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924 (1912); CAL. CODE CIV. PRO. §§ 1238(3), 1238(4), 1238(7), 1238(12)–(13), 1238(17) (West 1955), *as amended*, (West Supp. 1966).

88. Specific procedural provisions governing eminent domain proceedings are contained in CAL. CODE CIV. PRO. §§ 1237–72.4 (West 1954), *as amended*, (West Supp. 1966). As to the meaning of "public use," see note 92 *infra*.

89. University of So. Cal. v. Robbins, 1 Cal. App. 2d 523, 37 P.2d 163 (2d Dist. 1934), *cert. denied*, 295 U.S. 738 (1935).

90. *See* 9 OPS. CAL. ATT'Y GEN. 187 (1947).

91. Linggi v. Garovotti, 45 Cal. 2d 20, 286 P.2d 15 (1955). The vesting of eminent domain power in private persons for the special benefit of private property has been sustained as consistent with federal constitutional standards where a rational relationship to general community benefit can be discerned. *See, e.g.*, Clark v. Nash, 198 U.S. 361 (1905).

92. Ascertainment of an adequate definition of the constitutional concept of "public use" for purposes of eminent domain and inverse condemnation law has been a perplexing problem to which no fully satisfactory solutions have been developed. *See* 2 P. NICHOLS, EMINENT DOMAIN §§ 7.2–.4 (rev. 3d ed. 1963). As to the current scope of the term in California statutory law, see CAL. CODE CIV. PRO. § 1238 (West Supp. 1966).

93. *See* Linggi v. Garovotti, 45 Cal. 2d 20, 24, 286 P.2d 15, 18 (1955); University of So. Cal. v. Robbins, 1 Cal. App. 2d 523, 37 P.2d 163 (2d Dist. 1934), *cert. denied*, 295 U.S. 738 (1935); 2 P. NICHOLS, EMINENT DOMAIN § 7.4 (rev. 3d ed. 1963).

94. *See, e.g.*, Breidert v. Southern P. Co., 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719 (1964) (railroad and city properly named codefendants in inverse condemnation suit); Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 37 P. 750 (1894) (*semble*).

entity and a private person, acting jointly, were allegedly responsible for plaintiff's injury.[95]

In evaluating possible legislative changes relating to the inverse condemnation liabilities of public entities, therefore, it must be kept in mind that private rights and liabilities are likely to be affected. Moreover, as the comparable legislative policies reflected in the governmental tort liability legislation of 1963 clearly suggest,[96] it seems probable that the policy considerations relating to private inverse condemnation liabilities may differ in certain situations from those relevant to the analogous inverse liabilities of public entities.

D. *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 one hundred days for claims based on injury to personal property and one year for taking or damaging of real property)[97] applies to these claims.[98] Since the time period for claim presentation begins to run when the cause of action accrues within the meaning of the statute of limitations applicable to comparable private litigation,[99] difficult problems of computation may arise. It may be anticipated, for example, that damage to private property will probably result from a particular public construction project. But the extent of the expected damage may be purely speculative, and the actual incurring of the damage may be contingent on fortuitous circumstances—for example, unusually heavy rains that bring about a flood which, in turn, damages plaintiff's property because of obstructions to drainage caused by a public improvement constructed long before.[100] 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?[101]

95. *See, e.g.*, Valenta v. County of Los Angeles, 61 Cal. 2d 669, 39 Cal. Rptr. 909, 394 P.2d 725 (1964); Breidert v. Southern P. Co., *supra* note 94.

96. *See* Cal. Law Revision Comm'n, *Recommendation Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees*, in 4 REPORTS, RECOMMENDATIONS AND STUDIES 801, 817–18 (Cal. Law Revision Comm'n ed. 1963); Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 So. CAL. L. REV. 161 (1963); Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 468–69 (1963); *cf.* 3 K. DAVIS, ADMINISTRATIVE LAW §§ 25.11, 25.13 (1958); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 210–11 (1963).

97. CAL. GOV'T CODE §§ 905, 905.2, 911.2 (West 1966). These claims requirements do not apply to the University of California. CAL. GOV'T CODE § 905.6 (West 1966).

98. *See, e.g.*, Cramer v. County of Los Angeles, 96 Cal. App. 2d 255, 215 P.2d 497 (2d Dist. 1950). *Compare* Wilson v. Beville, 47 Cal. 2d 852, 306 P.2d 789 (1957) (procedure a matter of statewide concern to which municipal-claims procedures are inapplicable).

99. CAL. GOV'T CODE § 901 (West 1966).

100. 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).

101. Problems of this sort have proven to be a source of difficulty in tort litigation. *See, e.g.*, Natural Soda Prods. Co. v. City of Los Angeles, 23 Cal. 2d 193, 143 P.2d 12 (1943), *cert. denied*,

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 seemingly poses for 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 vindicate that right.[102]

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 condemnation suits must be commenced within six months after rejection of the formal claim by the defendant entity;[103] the claimant must institute his action considerably before the expiration of the normal three-year period allowed for actions for injury to real property.[104] In addition, the plaintiff may be required on demand of the public-entity defendant to post an undertaking for costs in the amount of one hundred dollars or more.[105]

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 a 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.[106]

In an 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."[107]

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321 U.S. 793 (1944); Natural Soda Prods. Co. v. City of Los Angeles, 109 Cal. App. 2d 440, 240 P.2d 993 (1st Dist. 1952).

102. *Compare* Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. Rev. 463, 483-91 (1963) (suggestions offered for modifying the "discretionary immunity" of public officers).

103. Cal. Gov't Code § 945.6 (West 1966).

104. Cal. Code Civ. Pro. § 338(2) (West Supp. 1966).

105. Cal. Gov't Code § 947 (West 1966). A statutory predecessor of this undertaking requirement was held applicable in inverse condemnation proceedings. Rio Vista Gas Ass'n v. State, 188 Cal. App. 2d 555, 10 Cal. Rptr. 559 (3d Dist. 1961).

106. People v. Ricciardi, 23 Cal. 2d 390, 400, 144 P.2d 799, 804 (1943).

107. *Ibid.*

In an inverse condemnation proceeding, then, the sufficiency of the owner's allegations may be tested on demurrer, and judicial lines may be drawn to delimit the circumstances in which awards of compensation are legally impermissible.[108] In an 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 value of legally excludable elements of injury may make such instructions functionally ineffective. Thus, in the context of an eminent domain action, the condemning authority is more likely to be required to pay for improper elements of damage by a jury award which, being general, is immune from successful appellate review. Obviously, the converse may be equally true: a jury in an eminent domain suit may eliminate "borderline" compensable elements believing that the award is already large enough, while an inverse condemnation jury concerned solely with an isolated element of inverse damage may be more sympathetic to the property owner's position.

E. *General Observations*

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 necessarily involves consideration of complex strands of interwoven policy elements 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,[109] 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 potential 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 commonly assumed, entirely a product of judicial decision-making. To be sure,

108. *See, e.g.*, Linggi v. Garovotti, 45 Cal. 2d 20, 286 P.2d 15 (1955).
109. *See* authorities cited note 96 *supra*.

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.

III. DUE PROCESS AND FEDERALLY REQUIRED COMPENSATION FOR A "TAKING"

If the feasibility of a legislative program is tentatively taken as a valid assumption, its federal constitutional dimensions remain to be explored. 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.[110] A survey of relevant decisions of the United States Supreme Court is thus appropriate to ascertain (1) the minimum limits of federal constitutional compulsion upon the states and their political subdivisions[111] in inverse condemnation cases and (2) the extent to which those judicially declared minimum requirements as to compensability for "takings" of private property afford latitude for state legislative modification or interpretation.

Doctrinal limits, of course, are important as guidelines to legislative policy, for it would 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.[112]

A. *The Doctrinal Ambiguity of Federal Inverse Condemnation Law*

A value judgment on which nearly all informed commentators appear to agree is that the dimensions of the constitutional duty to pay just com-

110. Griggs v. Allegheny County, 369 U.S. 84 (1962); Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

111. The "states" within the meaning of the fourteenth amendment include all levels of political subdivisions and agencies. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (dictum) (city); Griggs v. Allegheny County, *supra* note 110 (county); Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953) (state regulatory agency).

112. In other areas of constitutional law the United States Supreme Court has indicated that reasonable statutory variations from judicially declared constitutional norms are permissible, provided they do not fall short of constitutional minimum standards. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (protection of persons in custodial interrogation from danger of self-incrimination). 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, Inc. v. United States, 379 U.S. 241 (1964) (civil rights in public accommodations).

pensation for takings of private property have been defined by the courts in terms which are both unsatisfactory and vague.[113] 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."[114] 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."[115] One authority, 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."[116] 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."[117]

Criticism of this vein—although perhaps justified from the viewpoint of those who seek 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, "When a problem that the Constitution itself states in ethical terms, 'just compensation,' must be answered by courts with few, if any, guides, it is not surprising that there are floundering and differences among judges and among generations of judges."[118] The courts have not been conspicuously successful in imparting consistent and durable meaning to other, similar ethical imperatives embodied in constitutional language—"due process," "equal protection," "freedom of speech."

The pace of social and economic change and the increasingly sophisticated 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 tend to have both a generating and restrictive capacity of their own which is inherent in the rule of stare decisis.[119] Where constitutional limitations are being interpreted—and it must

113. *See, e.g.*, Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221 (1931); Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596 (1942).

114. Broeder, *Torts and Just Compensation: Some Personal Reflections*, 17 HASTINGS L.J. 217, 228 (1965).

115. Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3, 57.

116. Sax, *supra* note 82, at 45–46.

117. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REV. 63.

118. *Id.* at 105.

119. *See* Smith v. Allwright, 321 U.S. 649, 665–66 (1944) (Reed, J.); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–13 (1932) (Brandeis, J., dissenting); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUPREME COURT REV. 211.

be remembered that the "just compensation" clauses are essentially limitations upon and not grants of governmental power[120]—overspecificity of judicial language tends to tie the hands of the legislative branch, generality of expression to facilitate (or at least to suggest an attitude of hospitality toward) flexible statutory treatment. In this sense, the Court's repeated disclaimer of intent to generalize the law—"[n]o rigid rules can be laid down to distinguish compensable losses from noncompensable losses"[121]—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 for the purpose of 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, occasionally within a single opinion, thereby blurring relevant policy considerations.

B. *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 to determine what takings are for a public use, and its determination is beyond the scope of effective judicial review.[122] "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."[123]

Substantially the same freedom and breadth of scope have been recognized for state determination of the purposes for which interests in private property may be taken or damaged.[124] The most recent occasion on which

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

121. United States v. Caltex (Philippines), Inc., 344 U.S. 149, 156 (1952).

122. *See, e.g.*, United States *ex rel.* Tennessee Valley Authority v. Welch, 327 U.S. 546, 551–52 (1946) ("We think that it is the function of 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"); 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 the project for which the land is sought, then the use is a public one"); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REV. 63, 65.

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

124. *See* Green v. Frazier, 253 U.S. 233 (1920); Jones v. City of Portland, 245 U.S. 217 (1917); Hairston v. Danville & W. Ry., 208 U.S. 598 (1908); Clark v. Nash, 198 U.S. 361 (1905). The state courts have been somewhat more willing to interfere with legislative declarations of public use than have the federal courts. *See* 2 P. NICHOLS, EMINENT DOMAIN § 7.4[1] (rev. 3d ed. 1963).

such 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.[125] Similarly, no recent decision has been found in which inverse condemnation liability has been rejected by the Supreme Court on the ground that the taking was not for a public use.[126] Indeed, the decisions strongly intimate 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.[127]

C. *The "Private Property" Element*

The language of the fifth amendment is uncompromising: no kind of "private property" may be taken for public use without payment of just compensation. Thus, the principles of the just-compensation clause are applicable to takings of interests in both realty[128] and tangible personal property,[129] as well as intangible interests such as contract rights[130] and franchises.[131]

This broad sweep of the clause, although firmly grounded in the case law, is the product of a gradual evolution in judicial attitude. 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.[132] The Court now indicates a willingness to give constitutional compensation for destruction of most of the

125. Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55 (1937). *But see* Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 185–86 (1950).

126. The most recent Supreme Court decision found in which a taking was held noncompensable because it was unauthorized by law and thus not for public use is Hughes v. United States, 230 U.S. 24 (1913). *Compare* Hooe v. United States, 218 U.S. 322 (1910), *with* United States v. North Am. Transp. & Trading Co., 253 U.S. 330 (1920). Since the enactment of the Federal Tort Claims Act, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.), 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 FORDHAM L. REV. 481, 494–99 (1963).

127. *See, e.g.*, Dugan v. Rank, 372 U.S. 609 (1963); City of Fresno v. California, 372 U.S. 627 (1963). *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 126 *supra*, may no longer be authoritative. *See* United States v. Pewee Coal Co., 341 U.S. 114 (1951) (absence of statutory authority for seizure of coal mine ignored); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585, 631–32, 680 (1952) (dictum) (for liability in Court and dissenting opinions, against in concurring opinion). State courts sometimes hold that ultra vires acts of public officers may impose inverse condemnation liability upon the employing public entity where the act is one which, had it been legally authorized, would be for a public purpose. *See, e.g.*, Gidley v. City of Colorado Springs, —— Colo. ——, 418 P.2d 291 (1966).

128. *See* Dugan v. Rank, 372 U.S. 609 (1963) (water rights); Griggs v. Allegheny County, 369 U.S. 84 (1962) (easement for avigation); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) (leasehold interest).

129. *See* note 50 *supra*.

130. Armstrong v. United States, 364 U.S. 40 (1960) (materialmen's liens): Cities Serv. Co. v. McGrath, 342 U.S. 330 (1952); Long Island Water Supply Co. v. City of Brooklyn, 166 U.S. 685 (1897) (termination of water supply contracts).

131. Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893) (franchise to collect tolls).

132. *See* Cormack, *supra* note 113; Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954); Lenhoff, *supra* note 113.

economic values attributable to individual rights, powers, privileges, or immunities which aggregately comprise "full ownership" of property. Alleged takings in whole or in part of various kinds of easements, servitudes, leaseholds, and other interests less than full fee ownership are today routinely found in inverse litigation.[133]

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.[134] This view is predicated on the deviation in the wording of the just-compensation clause from the uniform pattern of language of all other provisions of the fifth amendment: "just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this 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."[135] Under this limited view, losses sustained by property owners are compensable only if reflected in the market value of the property interest taken.[136] Non-compensable consequential damages generally include such expenses as moving and relocation costs,[137] loss of value of assets not taken due to a forced sale caused by the taking,[138] and loss of going-concern value and good will to a business which must be discontinued due to the taking.[139]

The 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.[140] However, denial of relief under similar facts may call forth judicial

133. The leading modern case is United States v. General Motors Corp., 323 U.S. 373 (1945). More recent cases include United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961) (easement of flowage); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) (riparian rights to seasonal overflowing of river); United States v. Dickinson, 331 U.S. 745 (1947) (easement of intermittent flooding).

134. *See* 2 P. Nichols, Eminent Domain §§ 6.44–6.446 (rev. 3d ed. 1963).

135. Monongahela Nav. Co. v. United States, 148 U.S. 312, 326 (1893).

136. 3 P. Nichols, Eminent Domain § 8.6204 (rev. 3d ed. 1965).

137. *See* United States v. Petty Motor Co., 327 U.S. 372 (1946). United States v. General Motors Corp., 323 U.S. 373 (1945), is an exception to the general rule.

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

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

140. United States v. Cress, 243 U.S. 316, 329 (1917); *accord*, 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 Co., 80 U.S. (13 Wall.) 166 (1871).

opinion describing the injury as mere "remote and consequential" damage not amounting to the taking of a property interest.[141]

If the increased water level causes a raising of the water table and thus a waterlogging of agricultural land so that it becomes unfit for farming, the injury can be treated as compensable by describing it as a "servitude" upon the land.[142] But if it causes the loss of a 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,"[143] or as noncompensable, being a mere "privilege or a convenience."[144] Similarly, repeated flights of aircraft at low altitudes over private commercial or residential property which substantially interfere with use and enjoyment of the surface because of excessive noise, smoke, and vibration may be held a compensable taking of an "easement" for flight purposes.[145] 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 are noncompensable incidental damages, since no easement is taken where there are no overflights which invade the owner's property interest in the airspace above his land.[146]

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 the high-water mark of navigable streams. According to Supreme Court doctrine, riparian property interests are necessarily subordinated to this servitude, in the interest of which they may be destroyed or impaired by the Government without compensation.[147]

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

141. Sanguinetti v. United States, 264 U.S. 146, 150 (1924); *see* Jackson v. United States, 230 U.S. 1 (1913); Bedford v. United States, 192 U.S. 217 (1904).

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

143. United States v. Cress, 243 U.S. 316, 330 (1917).

144. United States v. Willow River Power Co., 324 U.S. 499, 509 (1945).

145. Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

146. Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). *See generally* Note, *Airplane Noise, Property Rights, and the Constitution*, 65 COLUM. L. REV. 1428 (1965); Annots., 77 A.L.R.2d 1355 (1961); 90 L. Ed. 1218 (1946).

147. United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961), defines 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 . . . ." *Id.* at 627–28; *see* United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Chicago, M. St. P. & P.R.R., 312 U.S. 592 (1941); Annot., 94 L. Ed. 1288 (1950).

results should not be taken as mere evolutionary or idiosyncratic disagreements as to the nature of property interests. After all, it is obvious—certainly just as much so to the sophisticated judges of the United States Supreme Court and other high appellate tribunals of this land as to nonjudicial observers—that a court opinion ascribing or refusing to ascribe property attributes to a particular interest 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 can be no such recovery. As Mr. Justice Holmes put it more than eighty-five years ago, "Just so far as the aid of the public force is given a man, he has a legal right . . . ."[148] 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 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 will simply be described as the compensable taking of an easement to impose a servitude of noise and vibration.[149]

The courts are often less than candid about the process of weighing, evaluating, and balancing competing policy considerations which presumably determine the ultimate questions of compensability. (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.*[150] is a preeminent exception to the lack of frankness. The power company claimed a substantial economic loss when a federal dam increased the water level of the St. Croix River, a navigable waterway into which 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 supply pool 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 25,000 dollars compensation in an inverse condemnation suit under the Tucker Act.[151]

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148. O. W. Holmes, The Common Law 214 (1881).

149. *See* Batten v. United States, 306 F.2d 580, 586 (10th Cir. 1962) (dissenting opinion); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Supreme Court Rev. 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 a railroad locomotive's smoke 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).

150. 324 U.S. 499 (1945).

151. 24 Stat. 505 (1887) (codified in scattered sections of 28 U.S.C.). For a discussion of the history and interpretation of the Tucker Act as the principal inverse condemnation remedy against

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:

> 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 those only which result from a taking of property.[152]

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 the question to be answered.* Such economic uses are rights only when they are legally protected interests.[153]

The opinion then undertook 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."[154]

Other decisions in which a conscious policy evaluation is reflected in the prevailing opinion may readily be found;[155] many of them will be analyzed in a subsequent study. For present purposes, such cases are significant principally to document a point already obvious: under present law the determination of individual inverse condemnation claims generally represents an ordering of competing interests in light of their relative weight and significance as judicially assessed.

The constitutional concept of "property" for which just compensation must be awarded 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

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the United States, see Abend, *Federal Liability for Takings and Torts: An Anomalous Relationship,* 31 FORDHAM L. REV. 481 (1963).

152. 324 U.S. at 502.

153. *Id.* at 502–03 (emphasis added).

154. *Id.* at 510.

155. *See, e.g.,* United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) (loss of riparian rights as result of reclamation and irrigation project); United States v. General Motors Corp., 323 U.S. 373 (1945) (cost of removing tenant under long-term lease where right of occupancy temporarily taken); Reichelderfer v. Quinn, 287 U.S. 315 (1932) (diminution in value of residential property when fire station built); Miller v. Schoene, 276 U.S. 272 (1928) (destruction of cedar trees for purpose of controlling plant disease).

and economic values. Such a process, in itself, is not unusual—witness the ever-growing number of property interests enjoying legal protection (at least in some circumstances) which have been created by recent judicial decisions.[156] In the eminent domain area, however, it takes on a special dimension in that *governmental* interests—that is, interests which usually transcend individual 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.[157] 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 courts 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 interests of great economic value must yield to public necessity.[158]

The ordering of relative interests in the name of constitutional property rights is not a function which must inherently or necessarily 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 ordering values in at least some relevant situations. For example, a judicial appraisal of interests might well conclude 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.[159] The California Legislature, however, as already noted has agreed with this view of the matter in some

156. *See generally* Berle, *Property, Production and Revolution*, 65 COLUM. L. REV. 1 (1965); Hecht, *From Seisin to Sit-In: Evolving Property Concepts*, 44 B.U.L. REV. 435 (1964); Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

157. This difference was explicitly pointed out by Mr. Justice Jackson, speaking for the Court in United States v. Willow River Power Co., 324 U.S. 499, 505, 510 (1945); *accord*, Kratovil & Harrison, *supra* note 132, at 603–04; Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 610–11 (1942).

158. *See* United States v. Caltex (Philippine), Inc., 344 U.S. 149 (1952) (oil facility blown up to prevent enemy use); Lawton v. Steele, 152 U.S. 133 (1894) (unlawful fish nets seized and destroyed as public nuisance); Bowditch v. Boston, 101 U.S. (11 Otto) 16 (1879) (building destroyed to prevent spread of conflagration); Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962) (value of land destroyed by zoning ordinance).

159. *See, e.g.*, Erie R.R. v. Board of Pub. Util. Comm'rs, 254 U.S. 394 (1921); New Orleans Gas Light Co. v. Drainage Comm'n, 197 U.S. 453 (1905); Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal. 2d 713, 329 P.2d 289 (1958). *But see* Panhandle E. Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613 (1935) (mandatory relocation of facility located in private easement held a compensable taking).

circumstances but not in others.[160] Insofar as the application of the constitutional requirement of just compensation turns upon where in the hierarchy of rights, privileges, and immunities comprising property the particular claimant's interest may properly be located, a legislative ordering of values seems to be at least possible.

On the other hand, it must be kept in mind that the ordering of interests implicit in Supreme Court decisions applying the just-compensation requirement of the fifth amendment imposes minimum standards to which any state legislation 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. In the absence of some overriding federal rule of property, such as the national government's "navigational servitude,"[161] state definitions of property interests will be generally accepted for fifth amendment purposes. Repeated statements to this effect are found in Supreme Court 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."[162] Similarly, 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 a state determination that these injured interests did not constitute compensable property:

> [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.[163]

Again, in affirming compensability for loss of "head" on a nonnavigable 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:

> 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 the lands forming their beds and banks . . . subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation . . . .[164]

160. *See* authorities cited notes 69–71 *supra.*
161. *See* note 147 *supra* and accompanying text.
162. Meyer v. City of Richmond, 172 U.S. 82, 95 (1898).
163. Sauer v. City of New York, 206 U.S. 536, 548 (1907).
164. United States v. Cress, 243 U.S. 316, 319 (1917) (footnotes omitted); *accord,* Armstrong v. United States, 364 U.S. 40 (1960).

The continued vitality of the quoted statements is documented in recent cases emphasizing that "the meaning of 'property' as used in . . . the Fifth Amendment is a federal question, [but] it will normally obtain its content by reference to local law."[165] The judicial disposition to rely on state law as the principal point of reference 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.[166]

It may thus be concluded that state legislation defining property interests for purposes of application of the state constitutional requirement would, subject to outer limits grounded in the fifth amendment, be valid under the federal constitution. Such legislation denying compensability would seem to be most likely to receive favorable judicial treatment in connection with injuries to peripheral interests not yet fully crystallized as "property" by judicial decisions or by long-standing legislation. On the other hand, no reasonable doubt exists as to the federal constitutionality of state legislation which accords to both peripheral and well-established interests manifestly greater protection than required by traditional judicial standards.

D. *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 seriously injured) as easily as by describing the interest affected as something other than "property." The sterility and circularity 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 govern-

165. United States *ex rel.* Tennessee Valley Authority v. Powelson, 319 U.S. 266, 279 (1943) (dictum); *accord,* United States v. Causby, 328 U.S. 256, 266 (1946). There is no constitutional compulsion to follow state law in substantive matters arising in the course of federal condemnation litigation, however, and when abnormal state rules would tend to frustrate a federal program or disrupt desired uniformity of federal policy, the courts have regarded themselves free to shape appropriate federal rules of decision. *See generally* Berger, *When Is State Law Applied to Federal Acquisitions of Real Property,* 44 NEB. L. REV. 65 (1965). Decisions arising in the course of federal condemnation proceedings which reject state rules of property in favor of federal standards, *e.g.,* Nebraska v. United States, 164 F.2d 866 (8th Cir. 1947), are not necessarily opposed to the conclusion that state definitions of compensable property interests will be regarded with considerable deference by federal courts. Such federal standards are generally adopted for reasons of judicial policy rather than constitutional compulsion. *Cf.* United States v. 93.970 Acres of Land, 360 U.S. 328, 332 (1959); Berger, *supra,* at 79–80.

166. *See, e.g.,* 43 U.S.C. 666 (1964); City of Fresno v. California, 372 U.S. 627 (1963); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950). Congress appears to have ample authority, subject to constitutional limitations, to define what constitutes property in federal condemnation proceedings. *See* United States v. Certain Property, 306 F.2d 439, 445 (2d Cir. 1962); *cf.* Nebraska v. United States, *supra* note 165.

ment is not liable."[167] Obviously, here again is a tool of judicial administration possessing the virtues of great flexibility, delusive simplicity, and deceptive vagueness.

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 with respect to the property approach. "Taking" and "nontaking" are simply formal techniques for expressing results grounded on other considerations.[168] It may be helpful, however, without attempting fully to expose and to evaluate the relevant policy elements in typical factual situations, to indicate briefly the range of flexibility inherent in the "taking" concept. In the process, an effort will be made to suggest the kinds of policy considerations which may be relevant to the idea of "taking," and which thus may warrant further investigation.

Early inverse condemnation cases equated taking with a physical invasion, appropriation, or destruction of property.[169] Moreover, they readily accepted the notion that such action may well destroy related intangible values. For example, the interference might make it impossible for a property owner to enjoy further the fruits of contract rights dependent upon continued possession and exploitation of the physical assets taken.[170] Are such contractual benefits taken within the meaning of the fifth amendment under these circumstances? Normally the answer would appear to be affirmative.[171] But if these intangible interests are simply entrepreneurial expectations not firmly rooted in contractual rights[172] or if the contract rights are not closely or directly tied to the tangible assets appropriated,[173] the answer is less clear and seemingly dependent upon policy criteria more particularized than those which support the general rule.[174]

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

168. *See generally* Kratovil & Harrison, *supra* note 132; *cf.* Norvell, *Recent Trends Affecting Compensable and Noncompensable Damages*, in PROCEEDINGS OF THE FIFTH ANNUAL INSTITUTE ON EMINENT DOMAIN 1 (Southwestern Legal Foundation ed. 1963).

169. *See, e.g.*, United States v. Lynah, 188 U.S. 445 (1903); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

170. *See* United States v. Lynah, *supra* note 169; Pumpelly v. Green Bay Co., *supra* note 169; T. SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW 456 (2d ed. 1874); Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221 (1931). For more modern examples, see United States v. Pewee Coal Co., 341 U.S. 114 (1951); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).

171. *See* Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897); Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893).

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

173. *Compare* Armstrong v. United States, 364 U.S. 40 (1960) (destruction of materialmen's liens held a taking), *with* Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) (requisition of steel frustrating performance of production contract not a taking).

174. The need for such a particularized analysis emerges quite clearly in cases involving governmental appropriation of property for temporary use. *See* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. General Motors Corp., 323 U.S. 373 (1945). For a discussion of these cases, see STAFF OF HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 55–58 (Comm. Print 1964).

The inadequacies of this formulation are manifested in numerous decisions reaching results which are not consistent with the physical-invasion approach. To assume that the "taking" requirement is necessarily satisfied where physical invasion or destruction has occurred is too broad a position, for it is abundantly clear that total or partial physical destruction of tangible property is not necessarily a taking.[175] On the other hand, the assumption also seems too narrow. 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 nonphysical (using the term in a nontechnical sense) nature of the invasion.[176]

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. A very substantial, unanticipated, one-time loss resulting from physical forces attributed to governmental action may be deemed noncompensable,[177] while recurring risks of physical damage foreseeable as a continuing limitation upon the profitable use of property (such as a continuing risk of seasonal flooding) may be held compensable.[178]

The inconsistency of these decisions with the language of physical invasion can perhaps 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."[179] The "character of the invasion" test invites consideration of all relevant competing policy aspects of the particular case, rather than confining judicial attention to the narrower issue of whether a property interest has been invaded or destroyed.

On the other hand, there is also a substantial body of Supreme Court decisional law which appears to base compensability in inverse condemnation upon the magnitude of the private property owner's deprivation.[180] Although this approach did not originate with Mr. Justice Holmes, he is generally credited with being its chief promulgator.[181] The classic statement is found in *Pennsylvania Coal Co. v. Mahon*,[182] where a statute banning the mining of coal in such a way as to cause subsidence of the surface

175. *See* cases cited note 158 *supra*.

176. *See* 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).

177. *See* Sanguinetti v. United States, 264 U.S. 146 (1924) (flooding due to inadequate capacity of drainage canal); *cf.* Bothwell v. United States, 254 U.S. 231 (1920) (recovery denied for loss in forced sale of cattle when ranch flooded).

178. *See* United States v. Dickinson, 331 U.S. 745 (1947).

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

180. The leading case is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). An earlier indication of the same approach is found in Manigault v. Springs, 199 U.S. 473 (1905).

181. 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 often than he actually applied it. *Id.* at 37.

182. 260 U.S. 393 (1922).

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.[183]

Although it is easy to read Holmes' words as suggesting that the ultimate test of compensability is a quantitative one as to the degree of deprivation,[184] it seems doubtful that a mind as sophisticated as his would rest on this one aspect of the problem. Indeed, the *Mahon* opinion appears to have conceded that in some situations, total destruction of property to meet an extreme emergency may well be noncompensable.[185] And, in speaking of the quantitative element in *Mahon*, Holmes carefully pointed out that "extent of diminution" is only "one fact for consideration."[186] Finally, he did, 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 quoted, thus probably was not intended to refer exclusively, or even in a controlling sense, to the magnitude of 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 raised in his mind a complex set of interrelated and competing elements of which the amount of the loss was but one.[187]

In *Mahon* Mr. Justice Brandeis pointed out in dissent that a large variety of cases affirming the permissibility of uncompensated losses due to police

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183. *Id.* at 415–16.

184. *Cf.* Sax, *supra* note 181, at 41, 50–54.

185. Holmes suggested 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." 260 U.S. at 415–16.

186. *Id.* at 413.

187. 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); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Erie R.R. v. Board of Pub. Util. Comm'rs, 254 U.S. 394 (1921) (Holmes, J.); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914). 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, L. & W.R.R. v. Town of Morristown, 276 U.S. 182 (1928) (joining in concurring opinion of Brandeis, J.); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (Holmes, J.). That elements other than magnitude of the loss were important to Holmes is made clear by the way in which he distinguished Plymouth Coal Co. v. Pennsylvania, *supra*, in *Mahon*: "But that was a requirement for the safety of employees . . . ." 260 U.S. at 415. Similarly, in Erie R.R. v. Board of Pub. Util. Comm'rs, *supra*, decided the year before *Mahon*, Holmes countered an argument that the compulsory grade-separation liabilities would bankrupt the railroad: "That the States might 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 . . . ." 254 U.S. at 410.

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."[188] 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 generally harmful, dangerous, or obnoxious uses of property supports the view that impairments of property values resulting from such measures are noncompensable.[189] Holmes at no point rejected this view; his difference with Brandeis concerned its application to the facts of the case.

Two special aspects of the *Mahon* case thus take on importance: (1) 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 the right in its conveyances of surface interests to plaintiff's predecessor in title, and (2) the statute in question appeared to have been drawn for the very purpose of destroying this and other like contract and property rights. In this context, Holmes seems to have viewed the Pennsylvania statute as something more than a 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[190] or of livery stables in an urban commercial area.[191] It appears to have constituted, in his view, the deliberate preferential treatment of a particular economic interest by intentional legislative interference with the agreed consequences of a contractual bargain.[192]

It seems reasonably clear that a purely quantitative test of taking would be all too easily subject to manipulation as well as to producing arbitrary results.[193] Even the sophisticated, relative "diminution of value" approach seemingly proposed by Holmes tends to constitute more a description than a determinant of results. The same point can be made of still another line of cases, in which a judicial determination that there has been no taking is, quite transparently, merely a doctrinally satisfying but delusive way of ruling that the governmental action challenged was legally privileged. Illustrations include decisions denying compensation for damages resulting from an exercise of the Government's "navigational servitude"

188. 260 U.S. at 422.

189. Cases cited by Brandeis to support his "reciprocity" proposition include Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ordinance prohibiting brickyards in urban commercial area); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (ordinance banning livery stables in residential areas).

190. Hadacheck v. Sebastian, *supra* note 189.

191. Reinman v. City of Little Rock, 237 U.S. 171 (1915).

192. Holmes' opinion in *Mahon* 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 their risk has become a danger warrants the giving to them greater rights than they bought." 260 U.S. at 416.

193. *See* Sax, *supra* note 181, at 50–54, 60.

on navigable waterways,[194] decisions treating losses of economic expectations caused by the exercise of war emergency powers as noncompensable consequences of the common defense effort,[195] and decisions sustaining the right of states to require uncompensated grade-crossing separations[196] or relocations of private structures and facilities in public ways when necessary to accommodate public improvements.[197] To state, as some of the cited cases do, that the claimants' respective property interests were subject to an implied condition that they might be impaired or even destroyed by the exercise of governmental power may conform to the assumptions of due process of law, which regard private rights as subject to reasonable regulation in furtherance of some overriding public interest. In its bare articulation, however, this approach fails to explain adequately *why* the governmental interest should be ranked as superior to the private. Only occasionally do the judicial opinions seek to grapple directly with that problem.[198] 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 such property can *always* be destroyed by legislative action without compensation. The fifth amendment has not yet been judicially repealed.

Finally, there are several decisions in which want 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.[199] An analogy to tort law, and to the policy determinants underlying the development of the "duty" aspect of tort liability, is here a plain one.

Judicial manipulation of the "taking" requirement often masks the fact that in inverse condemnation cases courts are essentially charged with the responsibility of determining the relative order of competing public and private interests so far as that order bears upon 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[200] strongly suggests that here, too, considerable

194. *See* note 147 *supra* and accompanying text.

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

196. Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953); Erie R.R. v. Board of Pub. Util. Comm'rs, 254 U.S. 394 (1921).

197. Erie R.R. v. Board of Pub. Util. Comm'rs, *supra* note 196; Chicago, B. & Q.R.R. v. Illinois *ex rel.* Drainage Comm'rs, 200 U.S. 561 (1906).

198. *See, e.g.*, Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346, 353 (1953) (discussing grade-crossing separations); United States v. Willow River Power Co., 324 U.S. 499, 502, 510 (discussing navigational servitude).

199. *See, e.g.*, United States v. Sponenbarger, 308 U.S. 256 (1939) (no liability for preventable flooding); Bedford v. United States, 192 U.S. 217 (1904) (damage to downstream lands caused by river-bed improvements).

200. The principal exceptions are Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and (possibly) Griggs v. Allegheny County, 369 U.S. 84 (1962). Conversely, a state determination, based on state statutory or constitutional grounds, that a compensable taking *has* occurred does not even give rise to a substantial federal question. Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965).

latitude exists for rational state legislative standards to be drawn, without substantial hindrance from the fifth amendment, for the purpose of defining when property losses are to be deemed "takings." In addition, the Supreme Court has frequently reiterated its continuing disposition to sustain against constitutional due process attack state legislative regulations of business and property interests when the regulations have a reasonable relationship to legitimate governmental objectives.[201]

E. *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.[202] An attempt by statute to exclude compensable damage from the computation of the award to be paid the condemnee is thus unconstitutional.[203] 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.[204] 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,[205] the Court has freely recognized that "this is not an absolute standard nor an exclusive method of valuation."[206] 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.' "[207] As Mr. Justice Douglas pointed out in a leading decision:

> 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

201. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). The recent demise of the economic due process doctrine is discussed in McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUPREME COURT REV. 34.

202. 3 P. NICHOLS, EMINENT DOMAIN § 8.9 (rev. 3d ed. 1965). The classical statement of the rule is found in Monongahela Nav. 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."

203. Monongahela Nav. Co. v. United States, *supra* note 202. *See also* Seaboard Air Line Ry. v. United States, 261 U.S. 299 (1923), holding inapplicable in a condemnation action the general rule disallowing interest against government in the absence of statutory authorization. The cases are collected in 3 P. NICHOLS, EMINENT DOMAIN § 8.9, at 255 n.83 (rev. 3d ed. 1965).

204. Jacobs v. United States, 290 U.S. 13, 17 (1933); *accord*, Olson v. United States, 292 U.S. 246, 254–55 (1934); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923).

205. *See, e.g.*, United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950); United States v. Cors, 337 U.S. 325, 332 (1949); United States v. Miller, 317 U.S. 369, 374 (1943).

206. United States v. Virginia Elec. & Power Co., 365 U.S. 624, 633 (1961).

207. United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950); *see* Monongahela Nav. Co. v. United States, 148 U.S. 312, 324–26 (1893).

> . . . 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.[208]

Moreover, 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 does not 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.[209] 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 after the date of the government's commitment to the project.[210] Depreciation in market value due to the prospective taking 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 and thus permit official control over the timing of the project to destroy property values to the detriment of private interests.[211] 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.[212]

The variability of the meaning of "just compensation" as it has been used 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.[213] However, 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.[214] Moreover, federal decisions requiring particular elements

208. United States v. Cors, 337 U.S. 325, 332 (1949) (footnotes omitted).
209. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).
210. United States v. Miller, 317 U.S. 369, 376–77 (1943).
211. *See* United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961).
212. *See, e.g.*, United States v. General Motors Corp., 323 U.S. 373 (1945); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REV. 63, 95–98.
213. Constitutional principles declared by the Supreme Court to govern the ascertainment of just compensation are, of course, binding on state courts. *See* Olson v. United States, 292 U.S. 246, 259 (1934).
214. *See* United States v. Commodities Trading Corp., 339 U.S. 121 (1950); United States v. John J. Felin & Co., 334 U.S. 624, 628 (1948) (four Justices, concurring, view OPA prices as a relevant standard; decision on other grounds without a majority opinion).

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.[215] These federal decisional rules relating to ascertainment of just compensation appear to include minimum constitutional standards, certain nonconstitutional elements introduced by the federal courts in the exercise of their supervisory powers over administration of federal eminent domain proceedings, and rules derived from applicable federal statutes.[216] Unfortunately, the distinctions between the sources of the various requirements is often less than clear in the federal inverse condemnation decisions.

On the other hand, in the relatively few decisions in which the Supreme Court has reviewed *state* determinations of just compensation, it has intimated that considerable deference to state law will be accorded, limited only by the minimum requirements of reasonableness, fairness, and equal treatment imposed by the fourteenth amendment. The leading case is *Roberts v. New York City*,[217] in which the Court unanimously rejected a contention that compensation awarded for demolition of an elevated railway spur line was so inadequate that it amounted to an unconstitutional taking. In so holding, Mr. Justice Cardozo stated:

> 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.[218]

The potential purview of permissible state legislation limiting the scope of just compensation will be explored in greater detail in the second part of the present study. It is obvious, however, that consideration might also be given to the desirability of requiring takings of private property to be compensated by awards which are *greater* than required by federal constitutional minimums. The Supreme Court has often recognized that present

215. *See* United States v. 93.970 Acres of Land, 360 U.S. 328 (1959); United States v. Miller, 317 U.S. 369, 379–80 (1943); *cf.* Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275 (1958). In the absence of an applicable federal statute, the federal courts will normally refer to state law as providing the legal norms and decisional rules for federal condemnation proceedings, thereby, in effect, adopting state standards as part of the federal law of eminent domain. *See generally* Berger, *supra* note 165.

216. *See* United States v. Miller, *supra* note 215, at 375–76; Berger, *supra* note 165; *cf.* United States v. John J. Felin & Co., 334 U.S. 624 (1948).

217. 295 U.S. 264 (1935).

218. *Id.* at 277; *accord*, McGovern v. City of New York, 229 U.S. 363 (1913); Appleby v. City of Buffalo, 221 U.S. 524 (1911); Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897); *cf.* Boston Chamber of Commerce v. City of Boston, 217 U.S. 189 (1910).

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.[219] No federal constitutional barrier stands in the way of such additional awards.[220]

F. *Procedural Aspects of Inverse Litigation*

The procedural ramifications of inverse condemnation litigation also seem to be permissible subjects for rational state legislative control. The issues include such significant matters as whether a jury trial or some other method of determination should be employed,[221] the applicable statutes of limitations governing inverse condemnation actions,[222] and the circumstances in which benefits from the taking are to be offset against the burdens.[223] The procedural incidents of inverse condemnation suits may, of course, materially affect their impact upon both private and public interests. In this respect, the Supreme Court seems fully disposed to sustain state policy, as long as it operates fairly and in an impartial manner.[224]

IV. The California Constitution and Statutory Controls Over Inverse Condemnation

The federal decisions reviewed support the conclusion that significant aspects of the law of inverse condemnation are constitutionally amenable to a measure of state statutory regulation, control, and modification. It remains to be seen whether any constitutional barriers to such legislative measures may be found in the California constitution.

A. *Preliminary Observations: State Constitutional Amendments*

Theoretically, there are two distinct aspects of the present problem: First, to what extent would it be possible to change the existing law of in-

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

220. *See* Mitchell v. United States, *supra* note 219, at 345–46; Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 676 (1923); Staff of House Comm. on Public Works, 88th Cong., 2d Sess., *op. cit. supra* note 174, at 88–91; 3 P. Nichols, Eminent Domain § 8.6[1] (rev. 3d ed. 1965); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Supreme Court Rev. 63, 105–06; *cf.* United States v. Gerlach Live Stock Co., 339 U.S. 725, 739 (1950).

221. The Constitution does not require the states to provide a jury trial in condemnation proceedings. *See* Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 244–45 (1897).

222. The determination of the periods of limitations applicable to inverse condemnation actions involves essentially policy considerations rather than matters of constitutional compulsion. *See* United States v. Dickinson, 331 U.S. 745 (1947).

223. States may constitutionally require a deduction of all benefits resulting from partial taking which enhances the value of the remaining property of the condemnee. *See* McCoy v. Union Elevated R.R., 247 U.S. 354 (1918); Bauman v. Ross, 167 U.S. 548 (1897). The law governing allocation of benefits in determining just compensation is chaotic. *See, e.g.*, 3 P. Nichols, Eminent Domain §§ 8.6205–.6211 (rev. 3d ed. 1965); Staff of House Comm. on Public Works, 88th Cong., 2d Sess., *op. cit. supra* note 174, at 69–72; Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 Calif. L. Rev. 833 (1963).

224. *See* cases cited note 218 *supra*.

verse 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 that a state constitutional amendment would be necessary to conform state law to federal law, if that were deemed desirable policy. Section 14 of article 1 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 italicized words mark the principal difference in substance between the two constitutional guarantees.[225] The phrase "or damaged," as will appear below, expands the scope of inverse liability in California somewhat beyond the outer limits of present federal constitutional requirements.

Whether a change in the language of the state constitution would serve any useful purpose, however, depends upon the substantive policy considerations and ultimate objectives of whatever legislative program may be proposed. Whether the desired ends 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. Only if sound policy considerations indicate the desirability of restricting inverse liability below present California constitutional minimums would a constitutional change be necessary. Even then, it may be possible to achieve narrower limits of public responsibility by statutory provisions clarifying and modifying the scope of inverse liability established by court decisions. The judicial interpretation of a constitutional provision is not always the *only* possible valid interpretation. It has frequently been stated by the courts that a 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.[226]

In addition, it must be kept in mind that merely deleting the words "or

225. Other language of § 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. CAL. CONST. art. 1, § 14, also provides that certain public entities may take immediate possession of properties being condemned for right-of-way and reservoir purposes, upon deposit of security for payment of the ultimate judgment and for any damage incident to the immediate taking. In addition, it declares that the taking of private property by eminent domain for logging or lumbering purposes shall make the taker a common carrier.

226. Lundberg v. County of Alameda, 46 Cal. 2d 644, 652, 298 P.2d 1, 6 (1956); Linggi v. Garovotti, 45 Cal. 2d 20, 286 P.2d 15 (1955); Delaney v. Lowery, 25 Cal. 2d 561, 569, 154 P.2d 674, 678 (1944); Kaiser v. Hopkins, 6 Cal. 2d 537, 540, 58 P.2d 1278, 1280 (1936); Samarkand of Santa Barbara, Inc. v. County of Santa Barbara, 216 Cal. App. 2d 341, 347, 31 Cal. Rptr. 151, 154 (2d Dist. 1963).

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 state inverse condemnation liability well beyond federal standards.[227] Indeed, if the bundle of individual rights, powers, privileges, and immunities which comprise "property" ownership is broken into its individual parts, the notions embodied in "taking" and "damaging" become almost indistinguishable; any impairment of a property interest (if defined precisely and narrowly) will also necessarily constitute a taking of that interest to the extent that its owner may no longer fully enjoy its advantages.[228] Consistency of language is thus no assurance of consistency of judicial interpretation of identical state and federal constitutional provisions.[229] Moreover, the Supreme Court has made it 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,[230] subject only to the limitation that the states may not deny compensation where the fourteenth amendment requires it.[231]

Finally, there seems to be no good reason to anticipate that legislative policy based on a rational ordering of appropriate values in relation to specific problems of inverse liability will necessarily 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 broadening the legal standards that apply to the determination of compensability or of just compensation. There is no reason to doubt that the legislature may by statute authorize or require the payment of compensation for property injuries which at present are *not* constitutionally protected.[232]

Accordingly, the discussion which follows is based on the assumption

227. *See* Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Eaton v. Boston, C. & M.R.R., 51 N.H. 504 (1872); *cf.* Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965); Comment, 39 WASH. L. REV. 920 (1965).

228. *See* 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).

229. *See, e.g.*, Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 36 Cal. Rptr. 488, 388 P.2d 720 (1964), *vacated*, 380 U.S. 194, *aff'd on remand*, 62 Cal. 2d 586, 43 Cal. Rptr. 329, 400 P.2d 321 (1965); *cf.* Mazor, *Notes on a Bill of Rights in a State Constitution*, 1966 UTAH L. REV. 326, 330, 336; Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

230. Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487 (1965), dismissed certiorari as improvidently granted where a state court decision, holding an 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.

231. Griggs v. Allegheny County, 369 U.S. 84 (1962).

232. *See* Dittus v. Cranston, 53 Cal. 2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1959); Patrick v. Riley, 209 Cal. 350, 287 P. 455 (1930); Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal. 2d 713, 719, 329 P.2d 289, 292 (1958) (dictum), *cert. denied*, 359 U.S. 907 (1959).

that the means for ultimately achieving legislative objectives are of no immediate concern. 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 immediate interest 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 1?

B. *Historical Background of Section 14*

Nothing in the history of section 14 suggests that it was intended to create a self-executing rule for judicial application wholly free from legislative interpretation or control. The original California constitution of 1849 contained a provision which was obviously based upon the fifth amendment of the United States Constitution and which concluded with its identical words, "nor shall private property be taken for public use without just compensation."[233] Prior to 1879 this language was construed by the California Supreme Court to be limited to actual physical appropriations and invasions of private property; it was held not to impose liability for consequential damages resulting from governmental projects authorized by law and performed in a lawful manner.[234] Like decisions characterized the interpretation of similar constitutional provisions of most of the states of the Union.[235] Although the harshness of this view, which often left a private property owner remediless notwithstanding substantial economic losses occasioned by public improvements, was in some states cured by statute,[236] not all legislatures were sensitive to the problem. Finally, in 1870, Illinois adopted a new state constitution which 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.[237] 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."[238] In *Rigney v. City of Chicago*,[239] decided in 1882, the Illinois Supreme Court, after an exhaustive review of the subject, con-

233. CAL. CONST. art. 1, § 8 (1849).
234. Green v. Swift, 47 Cal. 536 (1874); Shaw v. Crocker, 42 Cal. 435 (1871).
235. *See, e.g.*, Transportation Co. v. Chicago, 99 U.S. (11 Otto) 635 (1878); Rigney v. City of Chicago, 102 Ill. 64 (1882); 2 P. NICHOLS, EMINENT DOMAIN §§ 6.38, 6.4 (rev. 3d ed. 1963); Cormack, *supra* note 228, at 225–31.
236. *See* 2 P. NICHOLS, EMINENT DOMAIN § 6.42 (rev. 3d ed. 1965).
237. ILL. CONST. art. II, § 13. For discussions of the historical background of this change, see Rigney v. City of Chicago, 102 Ill. 64 (1882); 2 P. NICHOLS, EMINENT DOMAIN § 6.44, at 486 (rev. 3d ed. 1963).
238. Transportation Co. v. Chicago, 99 U.S. (11 Otto) 635, 642 (1878) (dictum).
239. 102 Ill. 64 (1882).

cluded 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 . . . ."[240] The United States Supreme Court later pointed out that this change in Illinois' organic law "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."[241] Thus, for example, a property owner whose physical possession was wholly intact but 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.[242]

Other states soon followed Illinois' lead. By the time of the California Constitutional Convention in 1878–1879 similar "damaging" clauses had already 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).[243] In keeping with this trend, section 14, as first proposed by the convention committee charged with drafting the new California bill of rights, contained the "or damaged" language.[244] However, to resolve a dispute as to whether the common-law jury system should be modified, the original proposal, together with other proposed sections dealing with administration of justice, was referred to the convention committee on judiciary.[245] The committee, however, did not limit itself to jury matters, but discarded the first proposal entirely, submitting to the convention a new version which limited liability to cases of private property "taken for public use."[246] In this form, the language of what was to become section 14 continued unchanged throughout most of the convention until, toward the end, a successful motion was finally made to reinsert the phrase "or damaged."[247] The movant, John Hager of San Francisco, pointed out his reasons for wanting the change:

> 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

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240. *Id.* at 80.
241. Chicago v. Taylor, 125 U.S. 161, 168–69 (1888).
242. Rigney v. City of Chicago, 102 Ill. 64 (1882). Impairment of access by construction of improvements creating a cul-de-sac from a previously through street had early been held not to constitute a compensable taking within the meaning of the fifth amendment, as applied to the states through the fourteenth. Meyer v. Richmond, 172 U.S. 82 (1898); *cf.* Chicago v. Taylor, *supra* note 241.
243. 2 P. NICHOLS, EMINENT DOMAIN § 6.44 (rev. 3d ed. 1965).
244. 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 232 (1880).
245. 1 *id.* at 259–60.
246. 1 *id.* at 262.
247. 3 *id.* at 1190.

cut in San Francisco. There the Legislature authorized a street to be cut through, which left the houses on either side high 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, that a man should not be damaged without compensation.[248]

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 case 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.[249]

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."[250] Delegate Horace Rolfe, addressing himself to the merits, argued that the "or damaged" clause might prove to be fiscally imprudent:

[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.[251]

The final rebuttal in the debate was offered by Delegate Morris Estee, who referred again to 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.[252]

The amendment inserting the words "or damaged" into section 14 was then carried by a convention vote of sixty-two to twenty-eight. As thus al-

248. *Ibid.* An almost identical argument was advanced at the previous Illinois Constitutional Convention. *See* 2 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 1577 (1870), quoted in Cormack, *supra* note 228, at 244.

249. 3 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1190 (1880).

250. *Ibid.*

251. *Ibid.*

252. *Ibid.*

tered, section 14 became part of article 1 of the constitution of 1879. In this respect, there has been no subsequent change of language.

The quoted debate constitutes substantially all that was said in the convention proceedings bearing on the "or damaged" clause of section 14. Far more time and energy were expended debating other aspects of eminent domain policy, notably the scope of the rule that compensation must be paid to or into court for the condemnee in advance of a taking, the question whether benefits should be set off against damages, and the extent to which eminent domain powers should be permitted to be exercised by private condemnors.[253] One may surmise that the delegates may not have had any very clear idea of the potential problems of interpretation lurking in the two simple 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.[254] 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," thus leaving it to other agencies of government to apply the rule in specific cases as they arose.[255] Indeed, at one point in the discussion of other features of the eminent domain provision, one delegate (Mr. James Shafter) expressed a philosophy of constitutional drafting which seems to have been generally accepted by the convention:

> I hope that the Convention will retain [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* . . . .[256]

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253. *See* 1 *id.* at 344–53; 2 *id.* at 1024–29.

254. The problem of the "Second street cut" found close counterparts in Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 37 P. 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. *See, e.g.*, Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264, 299 P.2d 347 (2d Dist. 1956), holding diminished property values due to diversion of traffic and consequent loss of business noncompensable.

255. *See* text accompanying note 252 *supra.*

256. 1 Debates and Proceedings of the Constitutional Convention of the State of California 349–50 (1880) (emphasis added).

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" ground of liability were, in the main, unrealized. The courts have perforce 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 appropriations (since they would be embraced already by the concept of "taking") and that compensability was not conditioned by any requirement of fault, the supreme court declared:

> We are of 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 the common law.[257]

This quoted statement is good law in California today.[258] What its broad generalities mean in terms of actual application to specific facts has, for the most part, been elaborated case by case, by judges acting without legislative guidance. Justice Shenk, speaking for the court in the leading case of *People v. Ricciardi*,[259] observed that "[t]he law on the subject [of compensability of takings and damagings of private property] . . . is therefore, in substantial part, case law."[260]

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. They intended 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"; however, no serious effort was made to think through or identify the limits of the new expanded liability. (2) It was anticipated that the legislature would flesh out the bare skeleton of constitutional language with specific statutory details—an expectation which, for the most part, has not been fulfilled.[261]

257. Reardon v. City & County of San Francisco, 66 Cal. 492, 505, 6 P. 317, 325 (1885).

258. *See* Albers v. County of Los Angeles, 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).

259. 23 Cal. 2d 390, 144 P.2d 799 (1943).

260. *Id.* at 396, 144 P.2d at 802. In Albers v. County of Los Angeles, 62 Cal. 2d 250, 269, 42 Cal. Rptr. 89, 100, 398 P.2d 129, 140 (1965), the court stated that the constitutional phrase "just compensation" and its statutory counterpart "value of the property," CAL. CODE CIV. PRO. §§ 1248, 1249 (West 1954), "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."

261. *See* Part II-B *supra*.

(3) The courts have felt constrained to interpret the constitutional mandate in the light of their own judicial notions of constitutional policy. They have, however, expressed a willingness to defer to "a declaration by other competent [legislative] authority" as to the meaning and significance of section 14.[262]

C. *Judicial Recognition of Legislative Authority*

The California courts have indicated repeatedly that statutes may validly regulate the eminent domain liabilities of public entities. Support for this view is found in decisions relating to five significant aspects of the subject. 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.[263]

1. *"Private property."*

In *People v. Ricciardi*[264] the state appealed from a judgment favorable to the owners of a slaughterhouse and meat market in an eminent domain proceeding brought by the state to take part of their land for highway enlargement purposes. The state's principal objections to the judgment related to the inclusion 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 and (b) loss of visibility to and from the highway with respect to the remaining property because highway traffic would pass the property in an underpass. These interests, although their impairment was shown to have injured the market value of the remaining land, 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. The court's opinion observes 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.[265] The legislature had provided no assistance to the courts in their discharge of this function: "Neither in the Constitution nor in statutes do we find any declaration of

262. People v. Ricciardi, 23 Cal. 2d 390, 395, 144 P.2d 799, 802 (1943).
263. *See* text accompanying notes 16–19 *supra*.
264. 23 Cal. 2d 390, 144 P.2d 799 (1943).
265. *Id.* at 395, 144 P.2d at 802.

the incidents of ownership or elements of value which specifically creates or defines or limits the two rights which are involved here."[266] Since no statutory guidance had been provided by the legislature, other than certain general statutory definitions of property found in the Civil Code,[267] 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."[268] Upon an evaluation of the judicial precedents both in California and elsewhere, and of relevant policy factors, the court held that both interests being asserted were protected by section 14 against substantial impairment and affirmed the judgment.

Ricciardi exemplifies the reluctance of the courts to assume responsibility for creating compensable property interests through judicial decision-making. The opinion of Justice Shenk strongly suggests that appropriate legislative guidance would be helpful, even encouraged, by the judges. Other decisions also suggest this view.[269] In a decision affirming the existence of a property right (described as "an easement of ingress and egress") of access to the general street circulation system by way of the street on which an owner's property abuts, the court unapologetically pointed out: "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."[270] None of the reported decisions suggests that the role of the courts in this connection is exclusive or preempts legislative power.

The propriety of legislation declaring the scope and extent of constitutionally protectible property interests is supported also by forthright judicial acceptance of the fact that the determination whether private property has been taken or damaged is essentially a problem of balancing of competing policies. Thus: "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."[271]

Typically in cases where a property owner is asserting damage to an interest not previously adjudicated, one finds the courts struggling with the task of balancing the opposing considerations, conscious of the fact that, in determining the extent of protectible property interests, "the problem of definition is difficult" although identification "of the opposite extremes is

266. *Id.* at 396, 144 P.2d at 802.
267. CAL. CIV. CODE §§ 658, 662 (West 1954).
268. 23 Cal. 2d at 397, 144 P.2d at 802.
269. People *ex rel.* Dep't of Pub. 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).
270. Bacich v. Board of Control, *supra* note 269, at 350, 144 P.2d at 823.
271. *Ibid.*

easy."[272] Subject to judicially declared constitutional standards,[273] policy evaluation and resolution of this sort is the normal course, indeed the very essence, of the legislative function.

2. *"Taking" or "damaging."*

Closely related to the determination 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 well-recognized property values may be substantially impaired by certain kinds of governmental action without payment of compensation of any kind.[274] 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.[275]

In exactly this conceptual framework of conflict between the police power and private property, the California Supreme Court has indicated that legislative balancing of interests would be permissible. For example, in holding that a private public utility company was required to assume the cost of reconstruction and alteration of its understreet facilities where necessary to make way for a sewer line being installed in the exercise of the city's police power, the supreme court reasoned that "[i]n the absence of a [statutory or ordinance] provision to the contrary" the utility's franchise to occupy the street was necessarily subject to this exercise of the city's police power.[276] The court did not stop there, however. In purposeful dictum it went on to state that "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."[277] The same position was taken again, implicitly, in a similar decision four months later, where the issue whether a compensable damaging had occurred to a utility company

272. People *ex rel.* Dep't of Pub. Works v. Presley, 239 Cal. App. 2d 309, 313, 48 Cal. Rptr. 672, 674 (3d Dist. 1966).

273. *See* Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (4th Dist. 1963), giving effect to federal cases such as Griggs v. Allegheny County, 369 U.S. 84 (1962), which recognized recurrent low flights of aircraft as a basis for a taking of an easement for avigation.

274. *See generally* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). Many of the relevant cases are collected in Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962).

275. *See, e.g.*, Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963).

276. Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal. 2d 713, 716, 329 P.2d 289, 290 (1958), *cert. denied*, 359 U.S. 907 (1959).

277. *Id.* at 719, 329 P.2d at 292.

forced to move its underground facilities was held to rest essentially upon the legislative intent as expressed in applicable statutes.[278]

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 through height-limit regulations.[279] 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.[280]

Again, legislative power appears to be ample to determine the alternatives open to public entities in seeking to ensure orderly development of land uses. Assurance of adequate public facilities to serve residents of subdivisions, for example, may be deemed to require authorization either for direct restrictions on use, imposed by local planning bodies and conditioned upon payment of just compensation for private property appropriated,[281] or for requiring an uncompensated contribution of private property (such as dedication of land) as a condition to securing official approval for private development of other property.[282] 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 have occurred.

Finally, since the rules governing what constitutes the kind of damaging for which the California constitution (but not the federal constitution) requires compensation are largely state-developed decisional rules,

278. Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co., 51 Cal. 2d 331, 333 P.2d 1 (1958), holds that the ambiguous statutory language relied upon by the 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. *Id.* at 337, 333 P.2d at 4.

279. *See* Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (4th Dist. 1963). 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.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 9 Cal. Rptr. 363, 357 P.2d 451 (1960) ("mere" impairment of access by creation of cul-de-sac noncompensable), *with* Breidert v. Southern P. Co., 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719 (1964) ("substantial" impairment of access by creation of cul-de-sac compensable).

280. *See* Smith v. County of Santa Barbara, 243 Adv. Cal. App. 126, 52 Cal. Rptr. 292 (2d Dist. 1966) (zoning of land contiguous to airport for nonresidential uses); *cf.* 13 HASTINGS L.J. 390 (1962). *But see* Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (2d Dist. 1958) (zoning must not be subterfuge to reduce condemnation price).

281. *See* Taylor, *Current Problems in California Subdivision Control,* 13 HASTINGS L.J. 344, 350–56 (1962). For an imaginative combination of police power (compulsory dedication of land) and eminent domain techniques as a means for ensuring the setting aside of adequate land for development of public school facilties to serve large subdivisons, see CAL. BUS. & PROF. CODE § 11525.2 (West Supp. 1966).

282. *See* Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Southern P. Co. v. City of Los Angeles, 242 Adv. Cal. App. 21, 51 Cal. Rptr. 197 (2d Dist. 1966); Annot., 11 A.L.R.2d 524 (1950); *cf.* Bringle v. Board of Supervisors, 54 Cal. 2d 86, 4 Cal. Rptr. 493, 351 P.2d 765 (1960).

there may be broader latitude for prescription of legislative standards in this respect than for takings. There is at least some authority 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."[283]

3. *"Public use."*

Section 14 imposes a constitutional duty to pay 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 for which the power of eminent domain may be exercised is well settled. The leading case in point declares:

> 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.[284]

Under this liberal approach to legislative authority, new purposes for which eminent domain powers may be exercised have been introduced by statute in recent years and have been accorded judicial approval.[285] 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 to be employed should not include also the power to declare what uses are *not* public uses for inverse condemnation purposes.

At one time, the supreme court appears to have read the public-use requirement in inverse condemnation cases more narrowly than in affirmative condemnation suits.[286] Later cases, however, have clarified the point.

283. *See* People v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959), quoting from University of So. Cal. v. Robbins, 1 Cal. App. 2d 523, 525, 37 P.2d 163, 164 (2d Dist. 1934), *cert. denied*, 295 U.S. 738 (1935).

284. University of So. Cal. v. Robbins, *supra* note 283, at 525–26, 37 P.2d at 164, quoting from Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 679, 32 P. 802 (1893). The statement was also quoted with approval in Linggi v. Garovotti, 45 Cal. 2d 20, 24, 286 P.2d 15, 18 (1955). In In the Matter of Madera Irr. Dist., 92 Cal. 296, 309–10, 28 P. 272, 274 (1891), the court stated that "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."

285. *See, e.g.*, County of Los Angeles v. Anthony, 224 Cal. App. 2d 103, 36 Cal. Rptr. 308 (2d Dist.), *cert. denied*, 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 (4th Dist. 1958) (water-spreading grounds); City of Menlo Park v. Artino, 151 Cal. App. 2d 261, 311 P.2d 135 (1st Dist. 1957) (parking plazas); Redevelopment Agency v. Van Hoff, 122 Cal. App. 2d 777, 266 P.2d 105 (1st Dist.), *cert. denied sub nom.* Redevelopment Agency v. Hayes, 348 U.S. 897 (1954) (slum clearance). *But see* City & County of San Francisco v. Ross, 44 Cal. 2d 52, 279 P.2d 529 (1955) (taking of property to be leased to private operator).

286. *See* Miller v. City of Palo Alto, 208 Cal. 74, 280 P. 108 (1929) (damage to private property from fire at city dump not taking for public use); McNeil v. City of Montague, 124 Cal. App. 2d 326, 268 P.2d 497 (3d Dist. 1954) (*semble*).

It now appears settled that if the construction or maintenance of a public project is designed to serve the interests of the community as a whole, any property damage caused by the project or by its operations as deliberately conceived is for a public use and is constitutionally compensable.[287] On the other hand, "[d]amage resulting from negligence in the routine operation having no relation to the function of the project as conceived" is not within the purview of section 14.[288] 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 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 resolved by judicial review through interpretation of the relevant statutory language.[289] In an inverse condemnation suit, however, the public entity ordinarily has made no intentional exercise of condemnation authority, but has, in a manner often unexpected and unanticipated, caused injury to the plaintiff's property. The question of public use in this context 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 to show is that the damage resulted from an exercise of governmental power while seeking to promote "the general interest in its relation to any legitimate object of government."[290] 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 light of the prevailing decisional law, it seems that legislative power to regulate inverse condemnation liability through the devising of standards of public use is probably somewhat narrow at best. However, it is conceivable that restrictive statutory rules could be developed for determining when a public use exists, with the practical objective of shifting, to some extent, the injured party's remedies from inverse condemnation to tort.[291] Ordinarily, certain forms of relief—such as a recovery of posses-

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

288. Bauer v. County of Ventura, *supra* note 287, at 286, 289 P.2d at 7 (dictum).

289. *See* text accompanying notes 106–07 *supra*.

290. Bauer v. County of Ventura, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955); *accord*, House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944); Ward Concrete Prods. Co. v. Los Angeles County Flood Control Dist., 149 Cal. App. 2d 840, 309 P.2d 546 (2d Dist. 1957).

291. 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* Part II-A *supra*.

sion of property physically taken[292] or an injunctive decree, either mandatory or prohibitory, which restores the *status quo ante*[293]—are not available in inverse litigation. Judicial refusal to grant such relief where a public use has attached to private property through the actions of a governmental authority "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."[294]

On the other hand, once the action is divorced 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.[295] 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.

4. "*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 California test.[296] However, it is not the exclusive test, and other methods for determining what damages are appropriate may be devised for special situations to which the before-and-after value approach seems inapplicable.[297] Here again, of course, there can be no exclusion of elements of damages which are constitutionally required as just compensation.[298] On

292. Public policy against discontinuance of a public use which has been commenced ordinarily militates against specific relief or recovery of the property itself. *See* Wilson v. Beville, 47 Cal. 2d 852, 856, 306 P.2d 789, 791 (1957).

293. Injunctive relief is seldom available in inverse condemnation situations, either because the injury is too remote or speculative, *see* Rose v. State, 19 Cal. 2d 713, 726, 123 P.2d 505, 513 (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 (1938); Frustuck v. City of Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1st Dist. 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 avaliable. *See* Enos v. Harmon, 157 Cal. App. 2d 746, 321 P.2d 810 (4th Dist. 1958).

294. Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 588–89, 394 P.2d 548, 552 (1964). The case denied an injunction to prevent planes from flying over residential property at such low altitudes and with such frequency as to impair substantially its peaceable use and enjoyment (remedy by way of inverse condemnation suit for damages). The court pointed out, however, that the plaintiffs were not precluded from seeking damages.

295. *See* Cothran v. San Jose Water Works, 58 Cal. 2d 608, 614, 25 Cal. Rptr. 569, 573–74, 375 P.2d 449, 453–54 (1962), *cert. denied*, 372 U.S. 938 (1963).

296. *See, e.g.*, Rose v. State, 19 Cal. 2d 713, 737, 123 P.2d 505, 519 (1942).

297. *See* Citizens Util. Co. 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 (1st Dist. 1965); Frustuck v. City of Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1st Dist. 1963).

298. *See* Citizens Util. Co. v. Superior Court, *supra* note 297; Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 15 Cal. Rptr. 904, 364 P.2d 840 (1961).

the other hand, damage factors which are not recognized as constitutionally compensable may be authorized to be paid by statute.[299]

The scope of legislative control with respect to the measure of damages and with respect to the methodology to be followed in computing damages in inverse condemnation actions is treated in the recent and important case of *Albers v. County of Los Angeles.*[300] 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) the fair market value of water lines destroyed by the slide, (b) 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 water lines. 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: "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.*"[301]

In addition, the court allowed, as a compensable item of damages, substantial expenditures voluntarily 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."[302] After a review of case law elsewhere and a careful evaluation of relevant policy considerations, the court concluded that such damages should be awarded, since it could perceive "no overriding public policy" to the contrary.[303] Implicit in the entire discussion is the idea that the ultimate determination whether such damages were includable was one of policy, not of absolute constitutional compulsion, and that a legislative standard would (unless wholly arbitrary) be given effect.

5. *Inverse condemnation procedure.*

It is well settled that section 14 of article 1 is a "self-executing" constitutional provision which, in itself, authorizes suit to be brought against

299. *See* Town of Los Gatos v. Sund, 234 Cal. App. 2d 24, 44 Cal. Rptr. 181 (1st Dist. 1965) (dictum) (costs of relocating business held noncompensable in absence of authorizing statute); authorities cited note 232 *supra.*

300. 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965).

301. *Id.* at 267–68, 42 Cal. Rptr. at 99, 398 P.2d at 139 (emphasis added).

302. *Id.* at 269, 42 Cal. Rptr. at 100, 398 P.2d at 140 (emphasis added).

303. *Id.* at 272, 42 Cal. Rptr. at 102, 398 P.2d at 142.

public entities in inverse condemnation.[304] 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.[305] 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,[306] statutes of limitations,[307] and the statutory rule that the plaintiff in suing a public entity must post an undertaking for costs in the event the defendant prevails.[308] 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.[309]

Procedural regulations, of course, may not be as effective as direct legislative controls upon substantive rights. However, carefully worked out procedures which balance private against public interests may serve significantly to solve the problems of inverse condemnation liability, facilitate out-of-court settlements, and discourage unfounded claims.[310]

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 enacted. Such legislation necessarily must conform to minimum constitutional limitations embodied in section 14 of article 1 of

304. *E.g.*, Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942).

305. *Id.* at 725, 123 P.2d at 513; *see* Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943). In Powers Farms, Inc. v. Consolidated Irr. Dist., 19 Cal. 2d 123, 126, 119 P.2d 717, 720 (1941), the courts aid: "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."

306. Bellman v. County of Contra Costa, 54 Cal. 2d 363, 5 Cal. Rptr. 692, 353 P.2d 300 (1960); Powers Farms, Inc. v. Consolidated Irr. Dist. 19 Cal. 2d 123, 119 P.2d 717 (1941); Bleamaster v. County of Los Angeles, 189 Cal. App. 2d 274, 11 Cal. Rptr. 214 (2d Dist. 1961).

307. *Compare* Frustuck v. City of Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1st Dist. 1963) (inverse condemnation actions relating to real property subject to five-year period of Cal. Code Civ. Pro. §§ 318, 319 (West 1954)), *with* Ocean Shore R.R. v. City of Santa Cruz, 198 Cal. App. 2d 267, 17 Cal. Rptr. 892 (1st Dist. 1961) (applying the three-year period of Cal. Code Civ. Pro. § 338(2) (West 1954), but noting that case law divided). Since 1963 it has been clear that inverse condemnation actions against public entities are governed generally by the six-month period allowed for commencement of suit following rejection of a claim by Cal. Gov't Code § 945.6 (West 1966). *See* A. Van Alstyne, California Government Tort Liability § 9.5 (1964).

308. Stafford v. People *ex rel.* Dep't of Pub. Works, 195 Cal. App. 2d 148, 15 Cal. Rptr. 402 (2d Dist. 1961), *cert. denied*, 369 U.S. 877 (1962); Vinnicombe v. State, 172 Cal. App. 2d 54, 341 P.2d 705 (1st Dist. 1959).

309. *See* People *ex rel.* Dep't of Pub. Works v. Chevalier, 52 Cal. 2d 299, 340 P.2d 598 (1959), sustaining validity of statutory provision, Cal. Code Civ. Pro. § 1241(2) (West 1954), which makes an official resolution of public necessity for a taking conclusive evidence thereof.

310. *Cf.* Cal. Law Revision Comm'n, *Recommendation Relating to Sovereign Immunity: Number 2—Claims, Actions and Judgments Against Public Entities and Public Employees*, in 4 Reports, Recommendations and Studies 1001, 1008–20 (Cal. Law Revision Comm'n ed. 1963) (policy considerations supporting procedural provisions recommended for California Tort Claims Act).

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 involves considerations amenable in significant respects to legislative control.

Whether specific legislation would be desirable, the precise form it might take, and its capacity to survive judicial scrutiny in any given factual situation are matters which can only be evaluated after a careful assessment of the particular policy considerations relevant to each such situation, viewed in the light of the pertinent authorities. An effort to make such an examination, in typically recurring inverse condemnation cases, will be undertaken in the second part of this study.

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CHAPTER 2. INVERSE CONDEMNATION GOALS AND POLICY CRITERIA*

Arvo Van Alstyne**

The constitution of California[1] and the due process clause of the fourteenth amendment[2] impose constitutional obligations upon the state to pay "just compensation" to property owners injured as a result of certain kinds of governmental action.[3] Despite its constitutional origins, persuasive reasons exist for believing that this form of liability for private injuries—typically referred to as "inverse condemnation" liability—is amenable in significant respects to legislative modification and that statutory changes would be desirable in the interests of predictability and uniformity.[4] Formulation of a

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The present article is the second instalment of the author's background investigation of inverse condemnation being conducted for the Law Revision Commission. The first instalment was published in April, 1967, as Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967).

** B.A. 1943, LL.B. 1948, Yale University. Professor of Law, University of Utah. Member of the California Bar.

1 CAL. CONST. art. I, § 14.

2 The due process clause makes applicable to the states the constitutional principle of the 5th amendment: ". . . nor shall private property be taken for public use, without just compensation." Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

3 The scope of inverse liability under the California constitution is broader than under the due process clause of the fourteenth amendment, since the former, unlike the latter, requires payment of just compensation when private property is either "taken" *or* "damaged" for public use. *See* Reardon v. City & County of San Francisco, 66 Cal. 492, 6 P. 317 (1885). *Cf.* Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965). Approximately half of the states have constitutional clauses that require compensation for "damagings" as well as takings. 2 P. NICHOLS, EMINENT DOMAIN § 6.1[3] (3d rev. ed. 1963).

4 *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967).

rational legislative program, however, presupposes a measure of general agreement upon premises and goals that are consistent with practical experience, the needs of the public administration, and the broad values of the legal system. In an effort to identify such common ground, the present study seeks to explore the theoretical aspects of inverse condemnation liability and to articulate, in the light of prevailing theory, acceptable policy criteria that could serve as guidelines to the evaluation of proposed statutory provisions addressed to specific aspects of the subject. Subsequent articles[5] will undertake detailed analysis of discrete phases of inverse condemnation law and attempt to appraise and constructively criticize the prevailing rules in light of these policy criteria.

The search for acceptable policy criteria for legislative reform is, at best, a hazardous one beset with unresolvable doubts; the results are thus advanced with diffidence. The criteria here set forth are derived in part from an examination of judicial opinions applying the rules of inverse condemnation to specific controversies, although they are rarely articulated in terms in such opinions.[6] To an additional extent they are also reflected in statutes presently in effect promulgating legislative standards of inverse liability and immunity; but these statutory provisions are comparatively rare and are ordinarily limited in reach to highly particularized problems unlikely to support helpful generalizations.[7] To a considerable degree, these criteria also have roots in analogous policy considerations incorporated in legislation defining the scope and limits of governmental tort liability.[8] Inverse condemnation functions in the field of tort liability and has been, historically, one of the most conspicuous techniques for avoidance of the traditional doctrine of governmental tort immunity. It thus shares many of the substantive and procedural features of governmental tort liability. Finally, policy criteria have

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5 Additional phases of the present study, likewise under the auspices of the California Law Revision Commission, are in preparation. As completed, they will be submitted for publication in law reviews affiliated with California law schools. It is anticipated that the California Law Revision Commission will, after completion of the entire study, collect and republish all phases together as part of its REPORTS, RECOMMENDATIONS AND STUDIES.

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

7 *See* Van Alstyne, *supra* note 4, at 742-44.

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

been adduced, in part, from study of the extensive legal literature examining specific problems of constitutional responsibility for taking or damaging of private property.[9]

Preliminary identification of acceptable policy standards is regarded as a highly desirable, if not indispensable, basis for formulation of proposed statutory rules that are responsive to the specific practical problems represented in recurring patterns of inverse condemnation claims, and which, at the same time, do not unduly hobble the effective administration of the public business. To be sure, policy evaluation may sometimes suggest conclusions of seemingly academic interest only, since they are contrary to settled constitutional norms as declared by the courts.[10] As indicated in the preceding instalment of the present study, however, there are several avenues for statutory reform, even assuming constitutional liability as a basic datum point, that may bring the administration of such liability into closer correspondence with acceptable policy.[11] Moreover, it is equally possible that objective policy analysis may indicate that prevailing rules denying compensability for certain kinds of property losses or for losses in specified types of factual circumstances are inadequate or inequitable. If so, a rational legislative program might well include a requirement that compensation be paid, in certain cases, notwithstanding absence of constitutional compulsion to do so.[12]

CLASSIFICATION OF INVERSE CONDEMNATION CLAIMS

Discussions of the law of inverse condemnation are all too often blurred by a failure to distinguish clearly between fundamentally different categories of circumstances in which inverse claims are advanced.[13] Moreover, the most thoughtful and constructive contri-

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

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

11 *See* Van Alstyne, *supra* note 4, at 776-85.

12 *Id.* at 770.

13 Legal scholarship has traditionally focused upon doctrinal developments. *See, e.g.*, Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 605-15 (1942); Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE

butions to the legal literature, like the leading court decisions, often tend to concentrate upon relatively discrete aspects of the general problem, thereby tending somewhat to distort and overemphasize special characteristics at the expense of a broader perspective.[14] The natural tendency of litigants to construct legal arguments upon the doctrinal framework of the applicable constitutional terminology, couched mainly at a conceptual level, has also tended to produce a mass of obtuse decisional law that is only occasionally relieved by judicial common sense, pragmatism, and candor.[15]

Understanding of the nature of the problem of legislative reform, and enhanced probability of defensible statutory proposals relating to inverse condemnation, would be promoted by frank recognition of the fact that the broad constitutional words upon which inverse liability rests constitute an intentional delegation to the courts of a limited power of judicial legislation.[16] The operative terms are sufficiently indefinite to provide considerable flexibility to judges—and, therefore, to the legislature—in assigning varieties of meanings to the constitutional command that "just compensation" be paid for private "property" that is "taken" or "damaged" for "public use."[17] Ideally, the significance attached to these terms ought to reflect a carefully deliberated assessment of social, economic, and fiscal implications of the actions of the public entity that caused the injury in question, as well as the like implications for the claimant and other property owners similarly situated and exposed to the same risks. These competing interests, which approx-

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L.J. 221 (1931). More recently, helpful studies that explicitly take into account the practical complexities of the problem have appeared. *See*, especially, Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3; Kratovil and Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954).

14 Useful studies of discrete aspects of inverse condemnation policy are plentiful. *See, e.g.*, STAFF OF HOUSE COMM. ON PUBLIC WORKS, STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS, 88th Cong., 2d Sess., 499-512 (selected bibliography, Comm. Print 1964).

15 *See* Broeder, *Torts and Just Compensation: Some Personal Reflections*, 17 HASTINGS L.J. 217, 228 (1965) (concluding that case law is "principally characterized by . . . highly ambiguous and irreconcilable decisions"); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REV. 63 (describing decisional law as a "crazy-quilt pattern").

16 That the delegation was intentional is shown by the legislative history of the constitutional language. *See* Van Alstyne, *supra* note 4, at 771-76. Moreover, the courts have acknowledged that the development of inverse condemnation law has been almost entirely the product of judicial legislation. *See, e.g.*, People v. Ricciardi, 23 Cal. 2d 390, 395, 144 P.2d 799, 802 (1943); Bacich v. Board of Control, 23 Cal. 2d 343, 350, 144 P.2d 818, 823 (1943).

17 The current doctrinal flexibility of these terms is discussed in Van Alstyne, *supra* note 4, at 749-68, 776-83. *See also*, Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3.

imate the interests identifiable with cause and effect relationships, are central to the effectuation of eminent domain policy in the inverse context. They thus constitute a logically appropriate basis for organizing the factual data, drawn from reported decisions, illustrative of recurring circumstances that have historically generated inverse liability claims. Awareness of the diversities of fact situations from which inverse liabilites and immunities have typically emerged in the past should help to anchor the search for sound policy in experience as well as theory.[18]

It is thus believed that a meaningful legislative prospectus can best be developed by a detailed appraisal of a) the objectives and related functional characteristics of governmental activities that tend to produce inverse liability claims, and b) the qualitative and quantitative impact of the kinds of property injuries that generally ensue therefrom. The traditional doctrinal terminology in which most of the literature is phrased should be avoided, wherever possible, in this investigation, since the object is to expose the practical considerations that bear upon the relativity of the competing interests and thus elucidate relevant policy criteria. Accordingly, for the purposes of the present study, factual situations tending to generate inverse condemnation claims will be classified along practical lines that underscore the significance of the dichotomy of cause and effect but still accord primary importance to the nature of the governmental action involved. Five distinguishable classes of cases may be identified from this viewpoint:[19]

1. Physical destruction or confiscation of private property by government officers in the course of official action[20] deliberately conceived and undertaken for that purpose with respect to that prop-

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18 The methodology here recommended is closely analogous to that employed by the California Law Revision Commission in its investigations and deliberations leading to the proposals that were enacted as the California Tort Claims Act of 1963, CAL. GOV'T CODE §§ 810-95.8 (West 1966). *See* Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 REPORTS, RECOMMENDATIONS AND STUDIES 1-538 (Cal. Law Revision Comm'n ed. 1963); Cal. Law Revision Comm'n, *Recommendation Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees,* in 4 REPORTS, RECOMMENDATIONS AND STUDIES 801-32 (Cal. Law Revision Comm'n ed. 1963).

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

20 The term "official action," and its synonyms, are here employed to refer to any form of action by a public entity, state or local, in the pursuit of any authorized public function or responsibility, whether facilitative, service, guardianship, or mediatory in nature. As to the scope of the last-mentioned terms, *see* Van Alstyne, *supra* note 4, at 735-36.

erty. Illustrations include the abatement of plant or animal pests,[21] demolition of buildings to prevent the spread of a conflagration[22] or for enforcement of health and safety standards of building codes,[23] and confiscation and forfeiture of property as a sanction to induce compliance with police regulations.[24]

2. Physical harm to private property (i.e., by actual invasion, destruction, or appropriation), caused by governmental activity not deliberately calculated (as in category 1) to bring about the result but rather to achieve some other appropriate objective, whether or not the ensuing harm was foreseeable or a product of negligence. Examples include claims involving flooding, erosion, landslides and loss of lateral support, allegedly resulting from the construction or maintenance of public improvements.[25]

3. Financial loss intentionally imposed upon a property owner, with or without physical harm to his property, by governmental compulsion that the owner use his property in a certain manner, or take or submit to prescribed action with reference to the property, without compensation. Examples include claims for the cost of compelled relocation of public utility structures to make way for public improvements,[26] and for the value of dedications or contributions exacted as the price of subdivision approvals, building permits, and zoning variances.[27]

4. Nonphysical or intangible harm to private property consisting of loss or diminution of value, utility, attractiveness, or profita-

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[21] *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928) (destruction of red cedar trees to eradicate rust disease harmful to nearby apple orchards); Graham v. Kingwell, 218 Cal. 658, 24 P.2d 488 (1933) (destruction of beehives and bees to eradicate foulbrood disease).

[22] *See, e.g.*, Bowditch v. City of Boston, 101 U.S. 16 (1879); Surocco v. Geary, 3 Cal. 69 (1853); Hall and Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 ILL. L. REV. 501 (1907).

[23] *See, e.g.*, Albert v. City of Mountain Home, 81 Idaho 74, 337 P.2d 377 (1959); McMahon v. City of Telluride, 79 Colo. 281, 244 P. 1017 (1926). *Cf.* Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (1957).

[24] *See* Lawton v. Steele, 152 U.S. 133 (1894) (seizure and destruction of fish nets as means for enforcing fish and game regulations); Note, *Forfeiture of Property Used in Illegal Acts*, 38 NOTRE DAME LAW. 727 (1963).

[25] *See* Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965) (landslide); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944) (flooding).

[26] *See, e.g.*, Southern California Gas Co. v. City of Los Angeles, 50 Cal. 2d 713, 329 P.2d 289 (1958) (relocation of gas lines to make way for sewer pipes in public street).

[27] *See, e.g.*, Bringle v. Board of Supervisors, 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960) (dedication of strip for widening of street as condition to grant of zoning variance); Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949) (dedications of land as condition to approval of subdivision map). *See generally*, Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

bility, caused by governmental non-regulatory activity, whether or not the harm was a foreseeable or calculated consequence of that activity, or was a product of negligence. Claims based on loss of access, light, and air, caused by freeway construction,[28] and claims grounded upon annoyance or interference with enjoyment due to noise[29] or noxious odors[30] produced by governmental activities are typical of this category.

5. Financial loss imposed upon a property owner, ordinarily without physical harm to his property, by government regulatory prohibition against specified use or development of property. Typical examples include claims based upon restrictive zoning and land-use controls resulting in impairment of market value or loss of anticipated profits from commercial exploitation of the property.[31]

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

The general scope of inverse condemnation claims, as will be seen from the proposed classification scheme itself, is exceedingly broad. The range of judicial decisions discussing the substantive principles of inverse condemnation law is even broader. The reason is that these principles serve three significant but distinguishable

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[28] *See, e.g.*, Breidert v. Southern Pac. Co., 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943). *See generally*, R. NETHERTON, CONTROL OF HIGHWAY ACCESS (1963).

[29] *See, e.g.*, Griggs v. Allegheny County, 369 U.S. 84 (1962). *See generally*, Spater, *Noise and the Law*, 63 MICH. L. REV. 1373 (1965).

[30] *See* Hassell v. City & County of San Francisco, 11 Cal. 2d 168, 78 P.2d 1021 (1938); Bloom v. City & County of San Francisco, 64 Cal. 503, 3 P. 129 (1884).

[31] *See, e.g.*, Consolidated Rock Prod. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), *appeal dismissed*, 371 U.S. 36 (1962). *See generally*, Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

purposes in litigation:[32] (1) They are the basis for adjudication of claims to just compensation predicated upon an alleged "taking" or "damaging" where no affirmative eminent domain proceedings were instituted.[33] (2) They provide a doctrinal foundation for determination of claims that compensation offered to be paid for a conceded "taking" or "damaging" is inadequate or omits compensable elements of value.[34] (3) They comprise the doctrinal setting for judicial review, and either invalidation or authentication, of governmental action which is challenged on the ground that it exceeds the constitutional limits imposed by the eminent domain clauses.[35]

In the last of these roles, the principles of inverse condemnation operate in a somewhat abstract and strictly limited fashion. This kind of litigation examines challenged governmental action primarily in a prospective way, seeking to determine whether it should be annulled or restrained in the interest of preventing a threatened future taking or damaging of private property. Actual damage often is nonexistent, since the threatened governmental action has not yet been undertaken; or if some actual injury has been in fact sustained, its extent may be either speculative or uncertain in amount. For example, the conclusion, based on principles of inverse condemnation, that a statute forbidding the mining of coal in such a way as to cause subsidence of the overlying land surface is constitutionally unenforceable, is quite a different judgment from one awarding a specified amount of money as "just compensation" for the effective impairment by the statute, of the mining company's right to commercial exploitation of its coal deposits.[36]

Where the pecuniary incidence of the private loss is still largely prospective, restraint against enforcement of the statute will often mitigate the threat of substantial (other than temporary) loss. When this is the case, a demand for prospective pecuniary relief[37] may

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32 *See* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REV. 63, 71-73.

33 This is the typical proceeding known as "inverse condemnation." *See* Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965); Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942).

34 The contention that additional compensation should be paid is often asserted in connection with demands for additional severance damages in formal eminent domain litigation. *See, e.g.*, People *ex rel.* Department of Pub. Works v. Symons, 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960); People *ex rel.* Department of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960).

35 *See, e.g.*, Colberg, Inc. v. State *ex rel.* Department of Pub. Works, 67 A.C. 410, 432 P.2d 3, 62 Cal. Rptr. 401 (1967) (declaratory relief). *Cf.* Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964) (injunction).

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

37 The fact that the bulk of the damages sought are prospective in nature is not

pose problems of judicial policy that are entirely absent from a suit for injunctive relief. A decree that a statute is unenforceable, for example, costs the government treasury little or nothing, apart from losses chargeable to frustration of the statutory objective. A pecuniary award of damages for inverse compensation on the other hand, may vindicate the statutory purpose, but at a heavy cost to the fiscal resources of the public entity. Conversely, denial of equitable relief should not be assumed to represent precisely the same assessment of policy considerations that would be appropriate to a denial of monetary damages. If a substantial governmental improvement, intended to facilitate important commercial and private institutional arrangements, has been brought into operational activity—for example, a municipal airport—injunctive relief against the continuation of those activities for the reason that they "take" or "damage" private property may well be denied on public policy grounds and the claimant relegated to a monetary remedy.[38]

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

POLICY PERSPECTIVE: APPROACHES TO COMPENSABILITY THEORY

The range and diversity of inverse claims embraced by the proposed classification scheme suggests the desirability of seeking to identify a comprehensive theory of compensability for takings and damagings with a sweep adequate to embrace all such claims. The two most prominent features of the inverse condemnation cases that

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necessarily an impediment to present adjudication and award, provided there is a rational and non-speculative basis for determination of their effect upon present value. *See* 4 P. NICHOLS, EMINENT DOMAIN § 14.241 (3d rev. ed. 1962).

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

might be regarded as potential foundations upon which a broad theoretical structure could be erected appear, unfortunately, to be inadequate for the purpose.

The first feature is the persistent influence, in the background of the judicial development of inverse liability, of the now discredited doctrine of governmental tort immunity.[39] The use of inverse condemnation as an "escape" from the immunity defense, which was available only in tort litigation,[40] produced a close similarity, and often a direct overlapping, of tort and inverse doctrine; judicial shaping of the rules governing the latter basis of liability was undoubtedly influenced substantially by a judicially felt need to temper the rigors of governmental immunity.[41] The recent abolition of governmental immunity in California, and its replacement by a statutory regime of qualified liability,[42] has left the legacy of immunity-inspired case law as a continuing gloss upon the law of inverse condemnation.

The overlap with tort liability concepts, however, can scarcely be regarded as a smoothly articulated or logically consistent legal pattern; its characteristics are patchwork and expediency. The inherent limitation of inverse theory to property losses, for example, has restricted its utility as a technique for by-passing governmental immunity.[43] The most extensive area of overlap relates to nuisance, a basis of tort liability that previously was regarded as a partial exception to governmental immunity[44] but which, probably because of greater predictability, was often assimilated within the purview of

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[39] The demise of the immunity doctrine has recently accelerated. For a survey indicating that it has been largely discredited or abandoned in over one-third of the states, *see* Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919.

[40] Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942). *Cf.* Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App. 2d 306, 114 P.2d 14 (1941).

[41] *See* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 1.18, 1.19 (1964). *See also*, Foster, *Tort Liability Under Damage Clauses*, 5 OKLA. L. REV. 1 (1952); Comment, 15 BAYLOR L. REV. 403 (1963); Comment, 38 WASH. L. REV. 607 (1963).

[42] CAL. GOV'T CODE §§ 810-95.8 (West 1966). *See generally*, A. VAN ALSTYNE, *supra* note 41.

[43] Inverse condemnation, for example, is not available as a remedy for personal injuries or wrongful death. Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App. 2d 306, 114 P.2d 14 (1941). Moreover, no recovery can be had unless the plaintiff can establish that an interest recognized as private "property" has been taken or damaged. *See* Colberg, Inc. v. State *ex rel.* Department of Pub. Works, 67 A.C. 410, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

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

inverse condemnation litigation.[45] Today, paradoxically, the nuisance phase of inverse condemnation law is important for two entirely different reasons. It provides initially a constitutionally grounded technique for avoidance of the rule, expressed by statute, that a condition or activity expressly authorized by statute is not a nuisance,[46] thus limiting the power of the legislature to authorize, and concurrently immunize from liability, governmental projects that would otherwise be actionable nuisances.[47] Secondly, it constitutes a defensible (but not necessarily exclusive) basis for imposing liability upon governmental entities for nuisance-type injuries, notwithstanding the deliberate refusal of the California Legislature to include nuisances within the scope of cases for which governmental tort liability was authorized by the California Tort Claims Act of 1963.[48] In these two respects, then, prevailing theories of tort liability are opposed to, rather than supportive of, established inverse condemnation law.

In other respects, also, the relationship between tort and inverse concepts is somewhat strained. A privileged trespass upon private property, nonactionable on a tort theory, may, for example, be the basis for an inverse condemnation judgment.[49] Again, past decisions have often repeated the formalistic rule that an injurious act of a governmental entity is not actionable on inverse condemnation grounds unless, as between private persons similarly situated, the same injury would be a valid basis for a private tort action.[50] It is

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

[46] Cal. Civ. Code § 3482 (West 1954) ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance") has been construed narrowly, so that general statutory authority to engage in a particular activity will not be deemed to constitute authority to create a nuisance, or a defense to liability for so doing. *See, e.g.*, Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 33 (1957). Although no decision has explicitly so stated, it is probable that this interpretation reflects judicial understanding that the underlying rationale of the nuisance liability of public agencies, at least where property damage is concerned, is grounded upon inverse condemnation. *See* Van Alstyne, *supra* note 45. Moreover, it seems self-evident that a statute cannot immunize a public entity from liability imposed by constitutional compulsion. *See* Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942); 2 P. Nichols, Eminent Domain § 6.33 (3d rev. ed. 1963). Hence, cautious counsel suing upon a statutory tort cause of action will often, where tenable, join therewith a count in inverse condemnation. *See, e.g.*, Granone v. County of Los Angeles, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965).

[47] 2 P. Nichols, Eminent Domain § 6.4433 (3d rev. ed. 1963).

[48] *See* A. Van Alstyne, *supra* note 41 at §§ 5.9-.10.

[49] *Id.* at §§ 1.22, 1.26. Trespass, however, was actionable on an inverse condemnation theory in appropriate cases. *See* Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986 (1923).

[50] *See, e.g.*, Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); Clement v. State Reclamation Bd, 35

now clear that this formula was inaccurate and an oversimplification, and is not to be taken as either a conclusive test or limitation upon the scope of inverse liability.[51] Its historical persistence, however, still tends to fog the case law.

These theoretical and conceptual discrepancies that, as a by-product of sovereign immunity, have been introduced into the law of inverse condemnation suggest that any effort to construct a viable theory of inverse compensability upon the tort analogue would be unproductive. The existing inconsistencies, for example, plague analysis by making it difficult to distinguish and sort out the elements of overlapping factual circumstances into their respective tort and inverse condemnation components. To a considerable degree, of course, difficulties of this order may be meaningless in a broader view of the extent to which private losses occasioned by governmental activities should be socialized through loss-distributing mechanisms such as damage awards by courts. The danger is that the broad view may be lost in the glare of tort-inverse similarities. It should not be forgotten that liability may be imposed by constitutional compulsion in certain situations—for example, cases lacking in a showing of fault, or cases in which foreseeability of harm is wholly wanting—in which tort principles would preclude any award of damages to the injured property owner.[52] Conversely, over-attention to the tort analogue may beguile the observer into all too ready an acceptance of the view that if tort liability normally would not be available, as a matter of law, as between private persons on like facts, inverse condemnation liability must also be inappropriate. This view, unfortunately, overlooks situations in which inverse liability may be supported by sound considerations relevant to the constitutional principles that inform the law of eminent domain, although tort liability may be withheld by applicable statutory law for reasons appropriate to the administration of tort law.[53]

It seems evident from the preceding discussion that the principal significance of government tort law to a policy analysis of inverse

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Cal. 2d 628, 220 P.2d 897 (1950); Archer v. City of Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941).

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

52 *Id. See also*, Reardon v. City & County of San Francisco, 66 Cal. 492, 6 P. 317 (1885).

53 In a variety of situations, the same facts will support a claim based upon inverse condemnation concepts, as well as a statutory claim for injury resulting from a dangerous condition of public property. *See, e.g.*, Bauer v. County of Ventura, 45 Cal. 2d 276, 289 P.2d 1 (1955). The statutory provisions which govern the latter claim, however, establish a number of immunities and defenses which would not necessarily be applicable to the inverse condemnation claim. *See* A. VAN ALSTYNE, *supra* note 41 at §§ 6.28-.43.

condemnation is not in the realm of theory, but at the level of remedial policy. When payment of compensation for property injuries is indicated as sound policy, the availability of an adequate tort remedy may suggest that a duplicating inverse remedy is unnecessary; conversely, if a tort remedy is presently denied, a choice may be necessary between liberalization of the tort law and implementation of the inverse condemnation route to adjudication. In the latter situation, also, where governmental tort immunity still prevails, the need for a particularly searching appraisal of policy criteria relevant to inverse liability is at its maximum, not only because policy considerations relevant to tort liability have presumably already been resolved against liability, but because a similar resolution opposing inverse liability will leave the injured claimant without an effective remedy.

A second potential premise for the elaboration of a theory of constitutional compensability relates to the oft-observed distinction between governmental exercise of the "police power" as distinguished from the "eminent domain" power. The tendency of some courts to emphasize this conceptualized duality of governmental functions as a framework for deciding issues of inverse compensability is so pronounced and its examples so numerous[54] as to suggest the possibility that it represents general theoretical considerations, however dimly perceived or intuitively felt by judges, that militate against reimbursement for injuries sustained from "police power" actions and favor compensability when "eminent domain" is used. A review of the relevant legal literature, however, discloses that efforts to identify and describe the essential characteristics that distinguish the two kinds of governmental powers subsumed by the distinction have produced much in the way of dilemma and disagreement and little, if anything, that can be described as basic consensus.[55]

At least six different levels of analysis are reflected in the scholarly discussions:

(1) *Physical invasion v. regulation.* A physical encroachment upon, or use or occupation of, a privately owned asset of economic value is often regarded as characteristic of eminent domain power, while prescription of a regulation of conduct with respect to the use

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[54] *See* Comment, *Distinguishing Eminent Domain from Police Power and Tort,* 38 WASH. L. REV. 607 (1963); Kucera, *Eminent Domain Versus Police Power—A Common Misconception,* in PROCEEDINGS OF THE 1959 INSTITUTE ON EMINENT DOMAIN 1 (Southwestern Legal Foundation ed. 1959).

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

of economic resources is usually classified as a police power measure.[56] In more sophisticated but not essentially dissimilar versions, the distinction is sharpened by introduction of the purpose of the governmental action—protection of the public health, safety, and welfare being a clue to police power, while acquisition or enlargement of the fund of public assets is deemed to be a mark of eminent domain.[57] Or, putting it in engagingly simple terms, police power seeks to restrict property rights out of necessity, while eminent domain seeks to appropriate such rights because they are useful.[58]

It may be readily conceded that this way of looking at the problem of inverse condemnation possesses an undeniable element of usefulness where actual physical occupation or taking over of privately owned land or improvements (i.e., the most obvious forms of "property") are concerned.[59] Compensation is normally awarded in such cases,[60] and the results can usually be verbalized in familiar legal terms as the acquisition by the governmental entity of a typical interest in the land.[61] On the other hand, it fails to provide a useful rationale for identifying or explaining those situations in which compensation for physical destruction or taking over of private property is exceptionally denied.[62] Nor does it draw a meaningful line indicating at what point regulations of conduct or use go so far as to be regarded as a compensable taking notwithstanding the absence of physical appropriation.[63]

The appropriation-regulation approach has other deficiencies apart from its inability to explain major areas of inverse case law.[64] It assumes that the objectives to be secured by appropriation cannot be

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56 *See* 1 P. NICHOLS, EMINENT DOMAIN §§ 1.42, 1.42[2] (3d rev. ed. 1964).

57 *See* Comment, *Distinguishing Eminent Domain from Police Power and Tort*, 38 WASH. L. REV. 607 (1963).

58 *See* Note, *Freeways and the Rights of Abutting Owners*, 3 STAN. L. REV. 298, 302 (1951).

59 *See* 2 P. NICHOLS, EMINENT DOMAIN §§ 6.2-.23[3] (3d rev. ed. 1963).

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

61 *See* MICHELMAN, *supra* note 55, at 1187.

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

63 *Compare* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), *with* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *Cf. In re* Clinton Water Dist., 36 Wash. 2d 284, 218 P.2d 309 (1950) (regulation forbidding recreational use of reservoir held a compensable damaging of riparian rights). Obviously, to deny compensation solely because there has been no physical invasion would be preposterous. *See* Sax, *supra* note 55, at 47-48.

64 *See generally*, Michelman, *supra* note 55, at 1226-29.

obtained through regulation, where in reality appropriation and regulation often are simply alternate techniques for achieving the same result. Protection or airport approaches from avigation hazards, for example, could be secured either by condemnation of a servitude or by land use regulation, with identical impact upon the exploitation potential of land beneath the approach areas, but with potentially divergent consequences for compensability of the land owners.[65] In effect, under modern sophisticated notions of the varieties of interests in land that are assimilated within the "property" concept,[66] most regulatory impositions can readily be verbalized as appropriations of property, and the ultimate purposes of many physical appropriations may be accomplished with equal efficacy through carefully tailored regulations.[67] To postulate a difference in conclusions regarding compensability upon the supposed distinction between physical invasions or appropriations and regulations of use is thus to subject such results to the danger of manipulation and inequality of treatment of essentially like claims.

Finally, the questionable value of this theoretical approach seems to be even further reduced in a jurisdiction where, like California, the constitution requires payment of just compensation for a "damaging" as well as a "taking" of private property. It is clear, historically, that the damage clauses were introduced precisely for the purpose of enlarging compensability beyond the outer limits seemingly marked by traditional judicial acceptance of physical invasion as the test of a "taking."[68]

The appropriation-regulation approach thus seems to possess very dubious utility as a tool of legal analysis. Its principal significance, perhaps, lies in the implicit suggestion that when a physical invasion, appropriation, or use by government of private assets occurs, a presumption should arise favoring payment of the constitutionally required compensation. This presumption, however, is only a starting point for further analysis. It may be dispelled by other considerations; and its absence in a particular case, because of lack of physical

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[65] Legislative recognition of police power and eminent domain as alternate techniques is illustrated by the airport approach zoning law. *See* CAL. GOV'T CODE §§ 50485.2 (police power), 50485.13 (eminent domain) (West 1966).

[66] *See* Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938); RESTATEMENT OF PROPERTY, Introductory Note, Ch. 1 (1936).

[67] *See* Waite, *Governmental Power and Private Property*, 16 CATHOLIC U. L. REV. 283, 284-85 (1967); Michelman, *supra* note 55, at 1185-87. *Cf.* Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221 (1931).

[68] Chicago v. Taylor, 125 U.S. 161 (1888); Reardon v. City & County of San Francisco, 66 Cal. 492, 6 P. 317 (1885); Rigney v. City of Chicago, 102 Ill. 64 (1882); Van Alstyne, *supra* note 4, at 771-76; Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596 (1942).

appropriation, does not foreclose compensability in any way, nor even create a contrary presumption. Its analytical worth is, obviously, of exceedingly modest dimensions.

(2) *Diminution of value.* Another theoretical approach, often expressed in judicial opinions,[69] emphasizes the magnitude of the property owner's loss as the key to compensation. Focussing attention not upon the nature of the power being exercised, but upon the quantitative impact of the imposition, this view intimates that large deprivations normally call for compensation to be paid while small ones—those properly assimilated within the idea of the "petty larceny" of the police power—are noncompensable.[70]

Like the physical invasion approach, this one, too, fails to provide an adequate framework for reconciliation of the decisions. It is clear that some types of governmental action may, with impunity, destroy enormous economic values, while other kinds of relatively minor losses regularly command compensation.[71] Moreover, unless qualified in major respects, a test based solely on diminution of value would have a potential impact upon vast areas of governmental activities to a pervasive degree that finds support neither in decisional law nor acceptable policy.[72] Finally, except as a vague invitation to idiosyncratic judgment,[73] the suggested test incorporates no standards for determining at what point the line between compensable and non-

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69 1 P. NICHOLS, EMINENT DOMAIN § 1.42[7] (3d rev. ed. 1964).

70 This approach is generally attributed to Justice Holmes. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (majority opinion); Tyson v. Banton, 273 U.S. 418, 445-46 (1925) (dissenting opinion); Bent v. Emery, 173 Mass. 495, 53 N.E. 910 (1899) (Holmes, C. J.). The "petty larceny" phrase also is Holmes'. 1 HOLMES-LASKI LETTERS 457 (Howe ed. 1953). Whether Holmes himself fully accepted the diminution-of-value approach is open to question. *See* Michelman, *supra* note 55, at 1190 n.53; Van Alstyne, *supra* note 4, at 761-62.

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

72 *See* Bent v. Emery, 173 Mass. 495, 496, 53 N.E. 910, 911 (1899) (Holmes, C.J.) (dictum) ". . . [W]e assume that even the carrying away or bodily destruction of property might be of such small importance that it would be justified under the police power without compensation. We assume that one of the uses of the convenient phrase, police power, is to justify those small diminutions of property rights, which, although within the letter of constitutional protection, *are necessarily incident to the free play of the machinery of government*." (Emphasis added.) *See generally*, Spater, *Noise and the Law*, 63 MICH. L. REV. 1373 (1965).

73 *See* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REV. 63, 75-81; Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 50-53 (1964).

compensable impositions should be drawn. It is not even clear whether diminution of value is to be taken as an independent or relative standard, or, if the latter, with what basis of comparison the pecuniary impact is to be appraised.[74]

Despite its deficiencies, however, it seems evident that degree of loss is a relevant factor to be taken into account in formulating a consistent body of inverse condemnation practice. On the one hand, the sheer costs of administering a compensation scheme which failed to rule out some claims as de minimis, too speculative, or unprovable might well impose fiscal burdens which impair the general welfare out of all proportion to the more equitable cost allocations that might result.[75] Moreover, in a large variety of situations where private losses are readily identifiable as products of public programs, available techniques of social cost accounting are probably inadequate to strike a meaningful pecuniary calculation of the net extent to which losses are not offset by benefits.[76] Yet there are a number of typically recurring situations in which the magnitude of private loss from public activities seems compellingly relevant—especially where the extent of private deprivation serves as an index to identification with certainty of those owners who have sustained the burden of the public program in disproportionate degree to their neighbors through obvious frustration of reasonable investment-supported expectations.[77] As with the physical invasion approach, diminution of value may thus be helpful in supporting determination that compensation *should* be required in certain instances; but it is wanting in criteria for determining when, despite substantial losses, compensation is *not* constitutionally required.

(3) *Balancing of public advantage against private detriment.* Judicial lip-service has probably been paid more often to the process of balancing of the competing interests, as the most feasible approach to disposition of inverse condemnation issues, than to any other.[78] To

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[74] *See* Michelman, *supra* note 55 at 1191-93.

[75] *See* Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 611 (1954); note 72, *supra*. Remote and speculative damages are normally nonrecoverable. 4 P. NICHOLS, EMINENT DOMAIN § 14.241 (3d rev. ed. 1962).

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

[77] *See* Michelman, *supra* note 55, at 1233.

[78] *See* Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965); Kratovil & Harrison, *supra* note 75, at 626-29; Comment, *Dis-*

some extent, this "test" probably is derived from the close analogy which inverse condemnation is deemed to bear to common law nuisance liability, where a similar balancing process is typically urged as the appropriate technique.[79] In a larger sense, of course, it is merely a manifestation of the tendency of modern jurisprudence to regard litigation as primarily a process for resolution of conflicts between competing social and economic interests represented by the contending parties.[80] In our present context, the test implies that compensation need not be paid for takings and damagings of private property which are "outweighed" by the social gains resulting from the governmental action under attack.[81]

The balancing process, while superficially attractive and familiar, has some obvious inadequacies. It appears to be ethically indefensible if taken to mean that the law will permit the valuable interests of some members of society to be sacrificed, without compensation, for the benefit of others, in the absence of any criteria (other than the purely fortuitous circumstance of ownership in a certain location) for justifying the selection of membership of the two groups.[82] If, however, it is understood to require denial of compensation only when all members of the community, including those specially harmed, have received (or will receive at least) an "average reciprocity of advantage"[83] which fully offsets their losses, some members will ordinarily receive gratuitously valuable special benefits to the disparagement of the egalitarian component of our political and social ethics. As long as general confidence in the integrity and impartiality of public officials prevails, the latter consequence may perhaps be tolerated in view of the likelihood that, in the long run, windfall benefits will be redistributed generally throughout the community by taxation or other economic mechanisms.[84]

A more practical difficulty with the balancing approach lies in its assumption that courts (and juries) are capable of making reasonably accurate quantitative comparisons between the public and pri-

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tinguishing Eminent Domain from Police Power and Tort, 38 WASH. L. REV. 607 (1963).

79 *See* Kratovil & Harrison, *supra* note 75, at 611-12.

80 *See* 3 R. POUND, JURISPRUDENCE ch. 14 (1959); C. AUERBACH, L. GARRISON, W. HURST, & S. MERMIN, THE LEGAL PROCESS 66-148 (1961); Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).

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

82 *See* Michelman, *supra* note 55, at 1195.

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

84 *See* Michelman, *supra* note 55, at 1196.

vate interests assertedly in competition. Identification of what those interests are is not always an easy task in itself,[85] and there is a complete absence of any meaningful calculus for weighing and comparing what are essentially dissimilar factors.[86] Balancing thus, in practice, tends to appear to be unduly subjective and devoid of identifiable bases for predictability of results except where repeated adjudication has crystallized rules of thumb.

The widespread acceptance of the balancing approach, despite its defects, is accountable in two ways. It appears to provide a rational and (at least on one assumption) not ethically disturbing framework for appraising in a gross and approximate way the extent to which government has visited unnecessary and grievous losses on individuals without commensurate conferring of either economic advantages or community amenities.[87] Presumably the most obvious cases for and against compensability will be exposed by the process; but it is clearly a meat ax rather than a finely honed scalpel. On the other hand, the flexibility of the balancing approach makes it attractive to appellate courts seeking for an open-ended technique with which to shape gradually the contours of a consistent and pragmatically operable body of law.

(4) *Harm prevention and benefit extraction.* A thoughtful student of our present problem has suggested that the distinction between a compensable taking and a noncompensable regulation can best be drawn by assessing the purpose of the governmental imposition.[88] If a limitation upon private land uses, for example, seeks primarily to prevent nuisance-like conduct in the interest of protecting the community welfare, compensation should not be awarded; but if the regulation seeks to compel an innocent owner involuntarily to

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[85] *See* Kratovil & Harrison, *supra* note 75, at 610; Comment, *Distinguishing Eminent Domain from Police Power and Tort*, 38 WASH. L. REV. 607, 616-17 (1963). As to the evolving and changing nature of acceptable police power purposes, *see* Miller v. Board of Pub. Works, 195 Cal. 477, 484-85, 234 P. 381, 383 (1925).

[86] *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 41-46 (1964); Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Subdivision Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1127 (1964); Ribble, *The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation*, 16 VA. L. REV. 689, 692 (1930). *Cf.* Comment, 11 KAN. L. REV. 388 (1963). Some cases intimate that "emergency" or "pressing necessity" must characterize the public interest in order to justify denial of compensation, but are uninformative as to the standards for identifying the presence or absence of these elements. *See, e.g.*, Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943); Rose v. State, 19 Cal. 2d 731, 123 P.2d 505 (1942).

[87] *See* Michelman, *supra* note 55, at 1235.

[88] Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958). *See also*, Dunham, *Property, City Planning, and Liberty*, in LAW AND LAND 28 (C. Haar ed. 1964); Dunham, *City Planning: An Analysis of the Content of the Master Plan*, 1 J.L. & ECON. 170 (1958).

confer a benefit upon the community, payment of compensation should be required in order to distribute more equitably the costs of the benefit thus made available. In this approach, a regulation for harm-prevention purposes normally is of narrow and particularized dimensions, aimed to elimination of a detrimental use, but leaving a broad area in which private options are available for engaging in other useful but non-harmful activities. A ban on brickyards in a residential area provides an example.[89] Conversely, a regulation designed to confer a benefit tends to impose more comprehensive limitations on private choice, leaving the owner free only to abandon all activities that are economically feasible or engage in the kind of private use which will confer the desired benefit. Limitation of commercially valuable buildable land solely for use as a parking lot[90] or a wildlife sanctuary[91] illustrate situations requiring compensation under this view.

As the principal proponent of this approach has recognized,[92] the harm-benefit distinction is not an easy one to apply, for benefit of some sort is normally identifiable in connection with all types of restrictions.[93] As social policy becomes increasingly permissive with regard to the scope of legislative power affirmatively to promote the general welfare, the line between harm-prevention and benefit extraction becomes blurred, appearing to be more a matter of degree than of qualitative substance.[94] This approach thus tends to be ambiguous and difficult to apply to concrete situations with consistency and assurance.[95] It is far from obvious that a measure limiting the height of structures that may be built in an airport approach zone is a compensable conferring of benefits through enhancement of airport service, rather than the prevention of a use (for tall buildings) which threatens the safety of airport users and neighbors.[96] Similarly, it is not en-

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

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

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

92 Dunham, *A Legal and Economic Basis for City Planning*, 50 COLUM. L. REV 650, 664 (1958).

93 *See* Mandelker, *Notes From the English: Compensation in Town and Country Planning*, 49 CALIF. L. REV. 699, 703 (1961).

94 Comment, 45 TEXAS L. REV. 96, 106 (1966).

95 *See* Michelman, *supra* note 55, at 1197-1200, pointing out that "harmful" uses tend to be a shifting component of space, time, and community development patterns.

96 The dual purpose of airport approach zoning is underscored by the California Legislature's declaration of purpose which prefaces the Airport Approaches Zoning Law. CAL. GOV'T CODE § 50485.2 (West 1966) states that ". . . an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity . . . [but, in addition, also] in effect reduces the size of the area available for the landing, taking off and maneuvering of the aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein." To the same effect, *see* ILL. STAT. ANN. ch. 15 1/2, § 48.11 (1963).

tirely clear that a ban on billboards along highways is calculated to prevent harmful roadside deterioration and distraction of motorists, rather than to confer a benefit of beauty, recreational amenity, and preserved public investment.[97]

As a test for compensability, then, the harm-benefit distinction poses practical problems that greatly reduce its usefulness, although it does afford a cogent clue to the kinds of regulatory measures which can sometimes be enforced without compensation.[98]

(5) *Enterprise function v. arbitral function.* Closely related to the immediately preceding approach is the suggestion, recently advanced by Professor Joseph Sax, that compensability of governmentally imposed losses should be determined by differentiating between governmental acquisition and governmental arbitration.[99] Under this view, if private economic losses are a consequence of governmental action that "enhances the economic value of some governmental enterprise," payment of just compensation is constitutionally required; but if private loss results from governmental activities aimed at a "resolution of conflict within the private section of society," through an exercise of governmental power to arbitrate as between the competing claims and shifting values that comprise "property," compensation is not required.[100] Underlying this approach is a rejection of the view that protection of existing economic values is central to the purposes of the eminent domain clauses; on the contrary, Professor Sax advances the thought that the framers were concerned primarily with preventing the self-aggrandizing propensities of arbitrary and tyrannical government.[101]

Unfortunately, the enterprise-arbitral approach has some of the same deficiencies as the harm-benefit theory.[102] The determination whether a particular regulatory measure falls at one end or the other of the conceptual yardstick encounters inherent ambiguities that are characteristically involved in any effort to appraise legislative purpose and effect. The solutions reached when government seeks to reconcile and arbitrate competition between private interests often—indeed, usually—reflect a multitude of shifting and elusive considerations which include some properly regarded as enterprise-enhancing.

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97 *Compare* CAL. BUS. & PROF. CODE § 5288(a) (West Supp. 1966): "The regulation of advertising structures adjacent to any state highway . . . is hereby declared to be necessary to promote the *public safety*, health, welfare, convenience and enjoyment of public travel, to *protect the public investment* in such highways, to *preserve the scenic beauty* of lands bordering on such highways . . . ." (Emphasis added.)

98 Michelman, *supra* note 55, at 1235-45.

99 Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

100 *Id.* at 67.

101 *Id.* at 53-60.

102 *See* Michelman, *supra* note 55, at 1200-01.

Moreover, many measures undoubtedly include aspects of both enterprise and arbitral objectives.[103]

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

Moreover, it seems that the enterprise-arbitral approach cannot be employed intelligently without taking into account the specific *ad hoc* application of the measure under consideration. Thus, an airport approach height restriction would, apparently, require payment of compensation if invoked to limit development of private property located adjacent to a *publicly* operated airport, but not if applied to like property on the periphery of a *privately* owned and operated airport. In the former situation, its application appears to be enterprise-enhancing; in the latter, it appears to be predominantly arbitral. Yet where the impact upon private resource development is substantially identical and the same public purpose is equally promoted in each case, it is difficult to see why different results are required, let alone permitted.[104]

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103 *See* Comment, *Distinguishing Eminent Domain from Police Power and Tort*, 38 WASH. L. REV. 607 (1963). A good example is provided by the railroad grade crossing elimination cases. *See, e.g.*, Atchison, Topeka & Santa Fe R.R. Co. v. Public Util. Comm'n, 346 U.S. 346 (1953), sustaining imposition upon railroad of substantial share of cost of construction of highway underpass. Under the "enterprise-arbitral" approach, the entire cost of such construction should be borne by the public entity requiring the grade separation to be built, since the result is enterprise-enhancing in the sense that grade separations increase the value of utility of public streets. *See* Sax, *supra* note 99, at 70. However, Professor Sax does not explain why these cases cannot, with reason, be regarded as essentially arbitral, in that the policy of requiring grade separations appears to represent an adjustment promotive of public health and safety as between the competing demands of railroad users (carriers and shippers) and highway users (motorists, truckers, shippers by truck). In addition, it seems apparent that grade separations also enhance the value and utility of railroad trackage, a factor which would seem to justify shifting part of the fiscal burden to the benefited railroad.

104 Sax, *supra* note 99, at 69, concludes that compensation should be paid in airport approach zoning cases, since such zoning unambiguously is intended, and in fact operates, to enhance the value of the public airport. *But see* note 96, *supra*. The argument, however, overlooks the fact that such zoning regulations ordinarily are general in application, and thus operate for the advantage of competing public and

Similarly, in *Miller v. Schoene*,[105] which Professor Sax characterizes as a "correct" decision,[106] compensation for compulsory destruction of cedar trees was denied, where this action was deemed essential to protect nearby apple orchards from cedar rust harbored by such trees. It is surely far from clear, however, that mere arbitration of conflicting private uses was at stake.[107] The dominant position of the apple industry in the economy of Virginia surely connotes the existence of indirect public enterprise-enhancement considerations in the background. Can it be safely assumed that the apple industry was exclusively "private," entirely divorced from government involvement in the form of direct and indirect subsidies or controls which, in effect, might have made that industry to some extent a mixture of public and private enterprise?[108] It is hardly a sufficient answer to problems of this sort to insist that collateral and indirect benefits to public enterprises are to be excluded in applying the test.[109] To so qualify it would introduce the problem of drawing a line between "direct" and "indirect" benefits, thereby adding to the already formidable ambiguities of the approach.

The enterprise-arbitral theory does appear to offer helpful insight in identifying situations in which the policy of the eminent domain clauses demands payment of compensation. When analysis of a loss-producing measure indicates that government enterprise-en-

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private airports, and to the detriment of both *publicly* and privately owned land in the approach areas. Moreover, at another point, *id.* at 74, Professor Sax appears to concede that benefits realized by governmental enterprises which operate in competition with private interests that are likewise benefited by regulatory measures may be deemed "incidental" and thus not an occasion for requiring compensation. It is not clear why airport zoning benefits are not "incidental" under this latter view.

The problem suggested in the text could be minimized if it were agreed that governmental "enterprise" includes private resource utilization activities that are devoted to public service functions (*e.g.*, public utility companies and private transportation businesses) and have the statutory power of eminent domain. *Cf.* CAL. CIV. CODE § 1001 (West 1954); CAL. CODE CIV. PROC. § 1237 (West 1955). Value enhancement to such enterprises, including private airports, from regulatory measures would thus require compensation to be paid. Professor Sax, however, makes no claim to such an expanded application of his test; to adopt it would raise difficult collateral problems of definition, loss allocation, and regulatory policy.

105 276 U.S. 272 (1928).

106 Sax, *supra* note 99, at 69.

107 *See* Comment, 45 TEXAS L. REV. 96, 104-05 (1966).

108 The Virginia state government has long been actively engaged in programs designed to promote and stimulate the sale of Virginia agricultural products, including apples. *See* VA. CODE §§ 3.1-685-88 (Repl. Vol. 1966), *formerly* §§ 1250-53 (1924) (state promotion of marketing of agricultural products); VA. CODE § 3.1-635 (Repl. Vol. 1966) (promotion of Virginia apple industry through State Apple Commission). The apple industry has long been a major feature of Virginia's economy. *See* Miller v. State Entomologist, 146 Va. 175, 135 S.E. 813, 814 (1926), *aff'd sub nom.* Miller v. Schoene, 276 U.S. 272 (1928). *See generally*, 3 AM. JUR. 2d, *Agriculture* §§ 16-47 (1962).

109 Sax, *supra* note 99, at 69 n.154.

hancement is a substantial result, but that arbitral consequences are minimal, justification for cost-distribution is usually plain. But, this approach fails to point out when compensation may properly be denied, for in the converse situation a withholding of compensation may significantly frustrate the underlying policy of prevention of tyrannical government. The exercise of "arbitral" power, it should be noted, does not always represent an objective and disinterested consideration and adjustment of competing private interests; on the contrary, it may constitute an unmitigated exercise of political clout by dominant private interests seeking to acquire benefits at the expense of impotent private interests—the arbitrary tyranny of the majority. Moreover, even assuming disinterested objectivity, it is difficult to perceive why it is less arbitrary or tyrannical to benefit some members of society at the expense of others merely because the interests being benefited are represented in privately owned rather than publicly owned ("enterprise") resources.[110]

(6) *The "fairness" test.* In a notable essay exploring the ethical foundations of compensation policy, Professor Frank Michelman has recently concluded that the soundest guide to inverse compensability lies in the philosophical idea of "justice as fairness," as corroborated by utilitarian social policy.[111] The argument is far too complex to yield to easy summarization. Essentially, the concept of "fairness" is used by Michelman in a specialized sense. Assuming informed and perceptive actors, a denial of compensation is not deemed to be unfair if a disappointed claimant "ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision."[112] The importance of the claimant's ability to "appreciate" the relative risks reflects the utilitarian theory that loss of optimum productivity is a normal consequence of social demoralization caused by capricious governmental interference with the security of shared expectations relating to resource allocations.[113]

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110 *See* Michelman, *supra* note 55, at 1201.

111 Michelman, *supra* note 55.

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

113 *Id.* at 1212-13.

This approach to compensability suggests that private losses should be compensable when the relative magnitude of the harm forced upon specific individuals is great, the compensating social advantages are minimal, and the settlement costs of paying compensation are reasonably bearable.[114] Conversely, the arguments favoring noncompensability tend to be stronger when there are obvious offsetting benefits, or the burdens are relatively slight and widely diffused so that the substantive and procedural costs of compensation are relatively large in proportion to the social advantage to be secured by payment of such compensation.[115]

The fairness test, properly understood, provides a somewhat abstract and illusive theoretical base for analysis of specific problems of inverse liability. Even its author readily agrees that its generality and nonspecificity make it difficult to entertain as a practical test of compensability or as a rule of judicial decision.[116] Yet, regarded primarily as a guide to legislative policy, the central idea of the fairness test is a useful adjunct to the formulation of policy criteria. That idea, briefly stated, is that eminent domain law, and its remedial feature of inverse condemnation liability, are primarily concerned with preventing apparently capricious redistributions of community resources through the consequences of governmental decision-making.

Inverse Condemnation Goals and Policy Criteria

It is clear from the scholarly literature as well as the decisional law that no consensus presently exists as to how, and by what standards, a viable line can be best drawn to mark the boundary between compensable and noncompensable property injuries resulting from government action. The issue, it is submitted, is still at a point of development where it is more readily amenable to *ad hoc* pragmatic analysis than to conceptually symmetrical generalization.

Individualized consideration of recurring aspects of the inverse problem has been the principal responsibility of the courts, as case after case has been presented for decision over the years. The judicial line has not always been an unwavering one marked by exceptional consistency or clarity of thought. Decisional law, however, provides substantial resources, in the form of judicially formulated statements of the goals of inverse condemnation policy, that serve to help identify the broader criteria relevant to legislative improvement. These

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114 *Id.* at 1223.
115 *Id.*
116 *Id.* at 1245-53.

goals, and the related policy criteria associated with them, are the product of nearly a century of litigation in which the nature of the contending interests and the persuasiveness of the competing arguments have been repeatedly reviewed and tested. They surely deserve a respectful hearing.

The central thrust of the decisional law in California has related to the problem of according substantial meaning to the innovative constitutional concept of "damaging" for public use.[117] The "damage" clause was added in 1879 with the clear intent of its proponents to expand liability beyond what had been included within the original notion of "taking."[118] The problem which has engaged the courts, for the most part, has been how far beyond earlier limits liability can be extended without thereby opening the vaults of the public treasury too widely to inverse claimants.[119]

Beneath the often muddled and disorderly array of inverse cases,[120] one can readily perceive the primary elements of the conflict. On the one hand is the interest in encouraging the full use of governmental powers for the general public welfare, unimpeded by improvident or crippling financial drains imposed to pay compensation for injuries sustained by owners of private property adversely affected by public programs and activities. The bedrock foundation of this interest is the general conviction that even the most affluent society can-

[117] The principal highpoints in the case law development, following the adoption of the "or damaged" clause as part of the Constitution in 1879, can be traced through Reardon v. City & County of San Francisco, 66 Cal. 492, 6 P. 317 (1885). (The following cases are listed in order of decision.) Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895); Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917); McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139 (1931); Archer v. City of Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941); Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943); People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944); Bauer v. County of Ventura, 45 Cal. 2d 276, 289 P.2d 1 (1955); People *ex rel.* Department of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519 (1960), 5 Cal. Rptr. 151; People *ex rel.* Department of Pub. Works v. Symons, 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960); Consolidated Rock Prod. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), *appeal dismissed*, 371 U.S. 36 (1962); Breidert v. Southern Pac. Co., 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964); and Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

[118] *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 771-76 (1967).

[119] *See*, especially, People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943). *But compare* Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965) (greater ability of county treasury to absorb and redistribute losses from landslide triggered by construction of county road treated as significant reason for imposing inverse liability upon county).

[120] This appraisal of the decisional law is widely shared. *See* authorities cited *supra*, note 15.

not feasibly assume the costs of socializing all of the private losses which flow from the activities of organized government.[121] It is thus assumed that some uncompensated losses of values identified with property are an inevitable and hence justifiable part of the cost of social progress, or alternatively, that the net long-term increase in community benefits flowing from public enterprises and collective decision-making will ultimately offset or exceed those losses.

On the other hand, there is also a deeply rooted social interest in protection of private property values together with the socially stabilizing influences and entrepreneurial incentives deemed to be associated with such values, from undue impairment by forced contribution of a disproportionate share of the burdens of community progress.[122] The strength of this interest is underscored by the fact that it is explicitly embodied in the constitutional ethic of the eminent domain clauses themselves.[123]

A preliminary statement of the policy criteria relevant to resolution of this fundamental conflict of interests commences with recognition of the fact that particular governmental claims to freedom from inverse liability are seldom of equal weight or persuasiveness. Familiar decisions illustrate the truism that very substantial losses of property values—even to the point of total destruction—are sometimes held to be noncompensable under constitutional standards.[124] The social interest to be served by a "taking" or "damaging" of private property seemingly may, in certain instances, outweigh the constitutional policy of paying for it. The usual doctrinal formulation of this result is couched in the language of "police power," a rubric for noncompensability whose counterpoint is usually described as "eminent

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121 *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1178-79 (1967); Norvell, *Recent Trends Affecting Compensable and Noncompensable Damages*, in PROCEEDINGS OF THE FIFTH ANNUAL INSTITUTE ON EMINENT DOMAIN 1 (Southwestern Legal Found. ed. 1963).

122 *See* Michelman, *supra* note 121, at 1212-18.

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

124 *See, e.g.*, United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952) (total destruction of oil refinery and storage facilities); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (land value reduced from $800,000 to $60,000 by use regulation banning brickyard operation); Consolidated Rock Prod. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), *appeal dismissed*, 371 U.S. 36 (1962) (value of land substantially destroyed by zoning ordinance).

domain power."[125] In effect, eminent domain begins where police power ends.[126] However, to postulate a legal continuum along which "police power" (i.e., noncompensability of resulting property damage) gradually, by degrees, merges into and becomes "eminent domain power" (i.e., compensation must be paid) is to propose not a test for, but a description of results. Moreover, a description which seeks to rationalize holdings of compensability *vel non* as mere differences of degree is scarcely explanatory and implies the existence of unarticulated decisional factors.[127] It also tends to obscure often significant differences in the *qualitative* nature of the governmental interests being asserted.[128]

Private interests embodying significant social and economic values likewise assert claims, in the context of inverse condemnation litigation, which vary in weight and persuasiveness.[129] Here, too, judicial reasoning is characterized by circularity in many instances, with determinations favoring or denying compensation normally expressed as a conclusion that "property" has or has not been taken or damaged. This dependence upon conceptualisms tends to obscure the underlying issue of *why* the particular private interest should prevail over the public interest to which it is opposed in the circumstances at hand.

The comparative importance to be accorded the claimant's interest presumably reflects a judicial assessment of its economic characteristics and social significance in the hierarchy of accepted community values, discounted in proportion to the countervailing values represented in the public interest at stake. For example, the policy of preserving established geographic interrelationships between the various localities within the community, as based upon time, distance,

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125 *See* text accompanying notes 54-55, *supra*.

126 *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962): "There is no set formula to determine where regulation ends and taking begins." To the same effect: Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 608 (1954); Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 612-14 (1942). For a discussion of the historical background of the relationship between eminent domain and police power concepts, *see* Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931); Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 378 (1910).

127 *See* Mandelker, *supra* note 123, at 46.

128 *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62-64 (1964); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 664-69 (1958).

129 The variables often produce anomalous results. *Compare* Griggs v. Allegheny County, 369 U.S. 84 (1962) (noise, smoke and vibration nuisance from overflying planes held compensable) *with* Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. den.* 371 U.S. 955 (1963) (similar consequences from nearby flights held noncompensable in absence of actual overflights). For other seemingly paradoxical results, *see* Michelman, *supra* note 121, at 1169-70.

and ease of transportation, is often assimilated to a private interest of abutting owners in access to the general system of community streets by travel in both directions upon the street on which their property abuts.[130] Thus, in cul-de-sac cases, compensation may be required for impairing such access by "dead-ending" an existing street, thereby limiting the property owners in the cul-de-sac to travel to the general street system in one direction only.[131] Other types of street improvements, such as median barriers, and the adoption of one-way-street traffic regulations, may have precisely the same practical impact upon abutting and nearby property owners as the creation of a physical cul-de-sac; yet, in this context, the claimant's interest is routinely denied constitutional protection.[132]

Although rarely articulated in judicial opinions, disparate results in factually similar cases such as those just cited are probably best understood as representing a judicial conviction that private interests are more deserving of protection in one instance than the other, that the public interest differs significantly in the two situations, or that the relative significance of the competing interests is regarded as altered by the change in facts.

The judicial calculus that produces variations in results on these bases is not likely to be explainable by any single set of policy postulates. The preceding discussion strongly implies that the factual elements in the equation are variables in both a quantitative and qualitative sense, and that the policy considerations against which they are assessed are themselves subject to differences of emphasis and persuasiveness in different settings. The desirability of statutory guidelines to improve predictability is obvious; the historical evidence, however, suggests that such guidelines should, like the decisional law, reflect the lessons of experience and practical realities as much, or more, than the demands of logical consistency.

The experience disclosed in the case law, together with its distillation in the scholarly studies reviewed above, suggest certain generalities about inverse condemnation policy that should be useful in appraising existing law as well as proposals for legislative change. To be sure, these policy criteria cannot take into account all of the variables that affect their usefulness and reliability in particular situ-

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

131 Breidert v. Southern Pac. Co., *supra* note 130; 2 P. NICHOLS, EMINENT DOMAIN § 6.32[2] (3d rev. ed. 1963).

132 People *ex rel.* Department of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960); R. NETHERTON, CONTROL OF HIGHWAY ACCESS 53-58 (1963).

ations. Their utility is derived chiefly from the fact that they constitute an agenda of salient considerations that are relevant to the devising of a rational body of inverse condemnation law. The following criteria are deemed significant in this respect:

First, a substantial degree of legal protection should be given to reasonable reliance by individuals upon the relative permanence of existing resource distribution patterns, and reasonable expectations that existing institutional arrangements conducive to the preservation of established values will not be substantially disturbed in the interest of the general welfare without a fair and equitable allocation of costs.[133] The historical reasons for the addition of the "or damaged" clause to state constitutions is evidence of the importance of this reliance element in the prevailing conception of inverse condemnation liability.[134]

Yet, it is only those expectations of institutional and distributional stability which are "reasonable" that command legal protection most insistently. The law of eminent domain was never intended to *prevent* necessary changes in resource allocations to further public programs and public policies, but only to impose a rational *condition* of just compensation as the price for changes which, absent compensation, would appear to consist of arbitrary exploitation.[135] Accordingly, the notion of "reasonable" expectations may be deemed to include an implicit understanding that certain kinds of governmental action may properly be undertaken without compensation for resulting private economic losses.[136] In others, expectations regarding stability of existing conditions may be qualified by realization that in

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133 *See* Michelman, *supra* note 121, at 1203-12; Kratovil & Harrison, *supra* note 126, at 612-15. Perhaps the most striking examples of reliance interests are found in the cases dealing with constitutional protections accorded to nonconforming uses. *See, e.g.*, Graham, *Legislative Techniques for the Amortization of the Nonconforming Use: A Suggested Formula*, 12 WAYNE L. REV. 435 (1966); Comment, 14 U.C.L.A. L. REV. 354 (1966).

134 *See* Van Alstyne, *supra* note 118, at 771-76.

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

136 For example, there is probably a fairly widespread general understanding that governmental action to eliminate aggravated nuisances and other serious menaces to health and safety are permissible noncompensable exercises of the "police power." *See* Michelman, *supra* note 121, at 1236; Annot., 14 A.L.R.2d 73 (1950). Destruction of private property to prevent the spread of a conflagration, *see* Bowditch v. City of Boston, 101 U.S. 16 (1879), or to preclude it from falling into enemy hands during wartime, *see* Annot., 97 L. Ed. 164 (1953), are also probably understood to be noncompensable. *See* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REV. 63, 77-80.

the event of certain kinds of governmentally caused losses, the constitutional norm of fair and equitable cost allocation does not require payment of pecuniary compensation.[137]

It should also be recognized that the policy of protecting the reliance interests of property owners is generally fully applicable to governmental entities as well as natural persons in their role as owners and users of property.[138] Except, perhaps, where disparities of size or of incidence of political or functional responsibilities may significantly distort the normal relationships between property owners,[139] the reasonable expectations of public entities as to the varieties of uses to which their property may be put without incurring liability to neighboring property owners are presumptively as deserving of legal

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137 At least two situations appear to exist where noncompensability of private losses seems generally acceptable as not unfair from the viewpoint of equitable cost allocation. First, where compensating benefits are fairly obvious, or private losses are either relatively trivial or widely shared throughout the community, individualized claims for damages generally are not advanced. This assumption appears to be at the root of the distinction, widely recognized, between noncompensability of "consequential," and compensability of "special," damages in inverse condemnation litigation. *See* Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 612-13 (1942); 4 P. NICHOLS, EMINENT DOMAIN §§ 14.1, 14.1[1], 14.4 (3d rev. ed. 1962). In the oft-quoted expression by Justice Holmes, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Secondly, private owners may, upon occasion, deliberately assume the risk of detrimental governmental action for speculative investment purposes, as where a land developer buys scenic land along a freeway in the planning stage at a market discounted price because of the widely known risk of imposition of development restrictions, or an individual purchases a residence in the approach zone of an existing airport at a price which reflects the market assessment of its attendant noise problems as well as the expectation of rezoning for industrial use. *See* Michelman, *supra* note 121, at 1237-38.

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

139 Governmental functions, because of their scope and volume, may often expose private property owners to risks unlike those normally attendant upon private activities, and of a magnitude which greatly exceeds the foreseeable consequences of privately caused harms. In such cases, one might well expect the development of a special body of law relating to inverse condemnation liability which does not rest upon private tort analogies. *See, e.g.*, Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965) (destruction of millions of dollars worth of residential properties by landslide induced by county road construction project); Reardon v. City & County of San Francisco, 66 Cal. 492, 6 P. 317 (1885) (injury to private buildings caused by shifting of unstable soil as result of city street project). *See also*, Clement v. State Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950) (flooding caused by diversion of natural stream flow in connection with construction of major flood control project).

consideration and protection as the similar expectations of private citizens. Nothing in eminent domain policy suggests that the law should deliberately discriminate in its normative treatment of public as compared with private property owners similarly situated.

Second, the concept of "just compensation" assumes that it is constitutionally improper, in general, for government to undertake to benefit one citizen at the expense of another.[140] Accordingly, in the absence of persuasive contrary reasons in particular cases or particular categories of cases, the adverse economic impact of public programs and public improvements normally should be distributed over the public at large which is presumably benefited thereby, and should not be borne in disproportionate degree by individual property owners or discrete and limited groups of property owners. Since many public activities involve inherent but often avoidable risks of disruption of settled private investments and of reasonable private expectations regarding uses of available resources,[141] this policy favoring normal compensability for resulting harms tends to act as a brake against insensitive or over-enthusiastic administration. It encourages careful planning and more adequately considered choices between operational alternatives.

However, it must be kept in mind that public projects ordinarily tend to confer benefits, albeit intangible and difficult to measure in

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140 *See, e.g.*, Bacich v. Board of Control, 23 Cal. 2d 343, 350-51, 144 P.2d 818, 823 (1943): ". . . the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements. . . . 'The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. . . .' " (Quoting from T. SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW 462-63 (2d ed. 1874); Michelman, *supra* note 121, at 1180-81.

141 Avoidance techniques generally involve choices between alternate means for promoting the same basic goals. For example, the risk of creating a compensable disruption of residential tranquillity through airport development, *see* Griggs v. Allegheny County, 369 U.S. 84 (1962), may be minimized by location selection, runway layout and design, advance acquisition of adequate avigation easements in lands beneath projected approach areas, coordination of zoning and land-use planning with airport development, and enforcement of noise abatement programs in the course of actual airport operations. *See* HOUSE COMMITTEE ON INTERSTATE & FOREIGN COMMERCE, SPECIAL SUBCOMMITTEE ON REGULATORY AGENCIES, INVESTIGATION AND STUDY OF AIRCRAFT NOISE PROBLEMS, H.R. REP. No. 36, 88th Cong., 1st Sess., 27-28 (1963). For available techniques of damage avoidance and reduction in highway planning, *see, e.g.*, Mandelker, *Planning the Freeway: Interim Controls in Highway Programs*, 1964 DUKE L.J. 439; Waite, *Techniques of Land Acquisition for Future Highway Needs*, HIGHWAY RESEARCH RECORD, No. 8, p. 60 (1963). *Cf.* Ward Concrete Prod. Co. v. Los Angeles County Flood Control Dist., 149 Cal. App. 2d 840, 847-48, 309 P.2d 546, 551 (1957), stating that "in the absence of any compelling emergency or the pressure of public necessity, the courts will be slow to invoke the doctrine of police power to protect public agencies [from liability in inverse condemnation] in those cases where damage to private parties can be averted by proper construction and proper precautions in the first instance."

some cases, as well as to impose burdens.[142] The scope of the cost allocation function which feasibly may be assumed by the law in inverse condemnation should thus take into account the relative incidence of both benefits and burdens. An approximate equivalence of burdens and benefits experienced by a property owner would, for example, suggest absence of net compensable damage.[143]

Third, governmental liability for just compensation for a "taking" or "damaging" of private property must necessarily be subject to rational limitations, so that socially desirable governmental policies and programs are not unduly deterred.[144] The exercise of public power for the public good inevitably impinges with varying effect upon different individuals and their property. Acceptance of full liability for all such property injuries could conceivably multiply governmental liabilities and the costs of their administration to a fiscally crippling degree, discouraging essential as well as merely desirable public improvements and regulatory programs.[145] The goal of a fair, politically acceptable, and economically justifiable allocation of public resources thus presupposes the need for confining inverse condemnation liabilities within reasonably clear and ascertainable limits. The limits of fiscal acceptability generally should represent the points at which the policy of fairness in cost allocation is outweighed by the need for substantially unimpeded pursuit of governmental objectives. Where those points cannot be ascertained with reasonable economy of effort or defined with reasonable precision, a measure of legislative arbitrariness in prescribing the limits of compensability may well be justified as an approximation of fairness.[146]

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[142] *See* 3 P. NICHOLS, EMINENT DOMAIN § 8.62 (3d rev. ed. 1965). The generally favorable impact of freeway development upon nearby land values is discussed in Hess, *The Influence of Modern Transportation on Values—Freeways*, ASSESSOR'S J. 26 (Dec. 1965).

[143] The statement in the text assumes, of course, that no part of the owner's land has been taken. Where there is a partial taking, "special" benefits are routinely considered as an offset against severance damages accruing to the remainder of the parcel. CAL. CODE CIV. PROC. § 1248(3) (West Supp. 1966). *See generally*, Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 CALIF. L. REV. 833 (1963); Gleaves, *Special Benefits: Phantom of the Opera*, 40 CAL. ST. B.J. 245 (1965).

[144] *Compare* Bacich v. Board of Control, 23 Cal. 2d 343, 354, 144 P.2d 818, 825 (1943), "We do not fear that permitting recovery in cases of cul-de-sacs created in a municipality will seriously impede the construction of improvements, assuming the fear of such an event is real rather than fancied" (majority opinion), *with id.* at 380, 144 P.2d at 839, "The cost of making such improvements may be prohibitive now that new rights are created for owners of property abutting on streets . . ." (dissent) (Traynor, J.).

[145] *See* Bacich v. Board of Control, 23 Cal. 2d 343, 380, 144 P.2d 818, 839 (1943) (Traynor, J., dissenting). Total "settlement costs" should include not only the actual outlays necessary to settle compensation claims, but also the "dollar value of the time, effort, and resources that would be required" to reach appropriate settlements in both the particular claims under consideration and others arising from the same or like circumstances. *See* Michelman, *supra* note 121, at 1214.

[146] *See* Michelman, *supra* note 121, at 1253-56; STAFF OF HOUSE COMM. ON

Fourth, the need to keep inverse condemnation costs within manageable bounds commensurate with available fiscal resources is minimized to the extent that feasible loss-shifting mechanisms are available.[147] For example, the private losses that may result from the destruction of a building to create a fire break that will contain a conflagration will, in most instances, be absorbed by fire insurance which has already distributed the risk among property owners in the form of premiums.[148] Similarly, the inverse condemnation liabilities resulting from excessive noise and vibration of jet aircraft[149] may, at least in part, be shifted to airport users in the form of fees and charges rather than spread over the taxpayers in general.[150] If the private losses imposed by governmental action can be readily absorbed elsewhere, and their incidence shifted away from the public fisc to non-tax resources by market forces or other institutional devices, the problem of fairness in cost allocation may be resolved without the inhibiting spectre of governmental paralysis. Loss-shifting alone, however, does not provide an occasion for increased inverse liabilities; it merely enlarges the scope of policy options open to the legislature in formulating rules to govern the incidence and practical operation of inverse liability.[151]

Fifth, the administration of inverse liability should be characterized to the optimum degree by ease of predictability and economy of disposition, so that negotiated settlements are facilitated and litigation reduced or discouraged.[152] Statutory standards should be formulated with an eye to simplicity, clarity and efficiency. The principles

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PUBLIC WORKS, STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS, 88th Cong., 2d Sess., 113, 130-34 (Comm. Print 1964). *Cf.* Note, 3 HARV. J. LEGIS. 445 (1966).

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

148 Standard form fire insurance policies in California are required to include coverage for losses sustained as the result of the acts of civil authorities involving "destruction at the time of and for the purpose of preventing the spread of fire," with some exceptions. CAL. INS. CODE § 2071 (West 1955).

149 *See* cases cited, note 129 *supra*.

150 *See generally*, Dygert, *An Economic Approach to Airport Noise*, 30 J. AIR L. & COM. 207 (1964).

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

152 *See generally*, Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 REPORTS, RECOMMENDATIONS AND STUDIES 311-30 (Cal. Law Revision Comm'n ed. 1963).

of substance and procedure adopted in line with this policy should be calculated to provide practical and workable guidelines for claims negotiators and attorneys,[153] recognizing implicitly that the law cannot afford to be unduly particularistic in its application.[154] Moreover, as administrative economies are achieved, public agencies should be enabled to plan more effectively for the most efficient use of available funds.

Sixth, the particulars of any legislative program relating to inverse condemnation should avoid disturbing existing rules of settled law except where clearly justified by policy considerations of substantial importance.[155] The formulation of novel rules of law, not grounded in familiar principles or their application, tends to create uncertainty and to encourage litigation. Thus, not only should existing statutory and decisional law be the starting point for development of a legislative program, but care should be taken to avoid creation of broad and nebulous new areas of possible inverse liability through use of unduly general statutory language. On the other hand, when

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153 Authorization of flexible administrative adjustment of claims against federal government agencies has been a successful feature of the Federal Tort Claims Act, tending to reduce court litigation. *See* Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325, 1358-62 (1954); McLeod, *Administrative Settlement of Claims*, JAG J. 5 (Feb. 1953). By recent statutory amendment, dollar maximums upon administrative tort settlements by federal agencies have been repealed, although settlements exceeding $25,000 require the approval of the Attorney General. 80 Stat. 306 (1966), U.S. CODE CONG. & AD. NEWS, 89th Cong., 2d Sess. 346 (1966). *See* Note, 11 ST. LOUIS L.J. 117 (1966). The California Tort Claims Act of 1963 likewise authorized considerable flexibility of administrative adjustment and disposition of small tort claims. *See* CAL. GOV'T CODE §§ 935.2-35.6 (West 1966); VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 8.44 (1964).

154 Substantive policy may, in some cases, approve payment of compensation that is not constitutionally required under prevailing judicial interpretations. Experience suggests that fixed, albeit arbitrary, statutory limits upon the amount of compensation payable under these authorizations may be helpful by narrowing the range of fiscal dispute and negotiation. *See* CAL. AGRIC. CODE § 239 (West 1954) (limiting statutory indemnity for slaughter of tubercular cattle); Patrick v. Riley, 209 Cal. 350, 287 P. 455 (1930) (indemnity program held constitutionally valid, and not a gift of public funds, on ground it tended to promote effective administration of disease eradication objective, even though uncompensated slaughter of cattle would also be constitutionally permissible). Recent legislation authorizing payment of relocation expenses for persons displaced by state highway right-of-way acquisition and clearance activities includes statutory limitations upon the relocation assistance legally payable. CAL. STS. & HWYS. CODE §§ 135.1, 135.2 (West Supp. 1966). *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENTS 111-14 (1965).

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

existing law tends to work injustice or to frustrate sound considerations of policy, departures therefrom should be readily undertaken.

Seventh, public entities should be accorded the maximum degree of flexibility of administrative action to avoid inverse liability where possible, and to mitigate its extent when avoidance is not feasible. For example, the law should provide ample scope for alternative remedies to damage awards.[156] The funding of inverse liabilities should also be facilitated through a variety of techniques in order to assure payment to the injured claimant and minimize the adverse impact of unexpectedly large judgments.[157]

The task of critical application of these policy criteria (and, as well, of others that reflection may discover) to the bewildering varieties of inverse condemnation claims is indeed formidable.[158] It constitutes, however, a worthy challenge to legislative statesmanship that, met effectively, will bring the reality of law in action closer to its constitutional ideals.

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[156] *See* Note, *Eminent Domain—Rights and Remedies of an Uncompensated Landowner*, 1962 WASH. U.L.Q. 210; *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1063-64 (1965).

[157] To a considerable extent, adequate options are presently available to California public entities for funding of liabilities in inverse condemnation. *See* CAL. GOV'T CODE §§ 970.6 (West 1966) (installment payment of judgments), 975-978.8 (bond issues to fund judgments); VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY §§ 9.15-.17 (1964). The "catastrophe judgment" problem, especially in its impact upon relatively small public entities, needs attention, however. *See generally*, Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 REPORTS, RECOMMENDATIONS AND STUDIES 308-11 (Cal. Law Revision Comm'n ed. 1963); Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A.B.A.J. 747, 751-52 (1934).

[158] It can readily be argued, of course, that "policy-balancing" is a fruitless exercise in semantics unless accompanied by agreement upon fundamental standards by which to assign qualitative values to the policies perceived as relevant in specific cases. It is deemed unlikely, however, that agreement could readily be achieved as to the philosophical purposes of the compensation system or as to how these purposes should best be translated into practical policy. *But cf.* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). The problem, however, does not appear to be of crucial importance for the purposes of the study of which this article is a part. That study seeks to examine existing compensation practices with an eye to practicable statutory improvements in current law. Accordingly, the most relevant policy criteria are those which are likely to appeal or be persuasive to legislators collectively. In this context, pragmatic assessments of what is feasible, appropriate, and politically acceptable are necessarily more important influences than basic philosophical or economic postulates. A modest but "workable" program of law revision, based upon "practical" wisdom, may, after all, be preferable to an "ideal" program that is unattainable. Law revision, like politics, must be regarded as the art of the possible.

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CHAPTER 3. DELIBERATELY INFLICTED INJURY OR DESTRUCTION

Arvo Van Alstyne*

A person reading for the first time the unqualified language of the just-compensation clause of the fifth amendment, or of its counterparts in state constitutions, cannot but be impressed with its forthrightness. The mandate that "private property [not] be taken for public use, without just compensation," on its face looks absolute.[1] In modern, urbanized society, with its increasingly pervasive techniques for organizing and controlling community resources, the potentially adverse impact of governmental activities upon property rights is apparent to all. It is reassuring, therefore, to learn that the "political ethics" embodied in the just-compensation clauses "reject confiscation as a measure of justice."[2]

The assurance, however, is misplaced. It is grounded upon the naive notion that constitutional language means what it seems to say. In fact, government actions may cause many property losses, including some of substantial economic value, without giving rise to a government obligation to pay compensation of any kind, just or unjust.[3] The underlying principle of the constitutional commands—that government should be barred "from forcing some people alone to bear public burdens which, in all fairness and

* B.A. 1943, LL.B. 1948, Yale University. Professor of Law, University of Utah. Member of the California Bar.

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1. Twenty-five state constitutions not only forbid the taking of property without compensation, but also require compensation when private property is "damaged" for public use. 2 P. NICHOLS, EMINENT DOMAIN § 6.44 (rev. 3d ed. 1963). The California version provides: "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 . . . ." CAL. CONST. art. I, § 14 (emphasis added).

2. United States v. Cors, 337 U.S. 325, 332 (1949) (Douglas, J.).

3. *See, e.g.,* Armstrong v. United States, 364 U.S. 40, 48 (1960) (dictum): "It is true that not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense. . . . [Many cases] reveal the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable 'takings' and what destructions are 'consequential' and therefore not compensable." Justification for a holding of noncompensability is ordinarily expressed either in terms of subordinating private-property interests to the necessities of the police power or in terms of definitional limitations inherent in the wording of the just-compensation clauses. *See generally* Kratovil & Harrison, *Eminent Domain—Policy and Concept,* 42 CALIF. L. REV. 596 (1954); Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility,* 1966 WIS. L. REV. 3; Sax, *Takings and the Police Power,* 74 YALE L.J. 36 (1964).

justice, should be borne by the public as a whole"[4]—has produced a disorderly and frequently inconsistent array of judicial decisions on the compensability of claimed losses.[5] Efforts by claimants in inverse condemnation litigation to stretch the purview of the constitutional language to its semantic limits, efforts often stimulated by the unavailability of a tort remedy under the discredited doctrine of sovereign immunity,[6] have been opposed with significant success by pleas of public officials urging overriding public necessity and danger of fiscal collapse as grounds for judicial restraint.[7]

Conceding that the duty to compensate for governmentally caused property losses may, in some instances, be properly subordinated to other considerations of legal policy, one might still anticipate that intentionally planned confiscations and destructions of private tangible assets, deliberately undertaken to promote duly considered and approved public policy, would be compensable by constitutional compulsion. Even in these cases, however, vast quantities of different kinds of private property are today, in each of the United States, subject to wholly uncompensated destruction under precisely these circumstances.[8] Indeed, statutory authority and administrative practice in this regard are in some states (notably California) so widespread that uncompensated official seizures and destructions are at least as conspicuous a feature of the legal milieu as are compensated losses.

This Article will examine typical situations in which, under present statutory provisions and judicial decisions, deliberate destruction or confiscation of physical assets of private persons is generally regarded as not calling for payment of compensation. The Article will seek to isolate and assess the underlying policy considerations that may be urged in support of the existing law, and to advance suggestions for legislative treatment in the interest of greater predictability, improved procedural fairness, and increased protection against arbitrary or abusive use of official power. In order to maintain a manageable scope the Article will concentrate primarily on California law, although the underlying considerations are applicable to all jurisdictions.

4. Armstrong v. United States, 364 U.S. 40, 49 (1960).

5. *See generally* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

6. *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 728, 738–42 (1967). An unmistakable trend toward abolition, or at least substantial modification, of the traditional tort immunity of governmental entities has been developing during the last 10 years. *See* Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919. No noticeable shift in the scope of inverse condemnation liability has yet emerged, however. *But cf.* Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

7. *See, e.g.*, United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952). *See generally* Mandelker, *supra* note 3.

8. "[W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." Miller v. Schoene, 276 U.S. 272, 279–80 (1928).

I. Deliberately Inflicted Injury or Destruction

A. *Denial Destruction*

Under the exigency of impending disaster, public officials may order the selective destruction of private property to protect the greater community from widespread and calamitous loss. Despite the magnitude of the particular private loss, discretionary decisions of this kind do not subject the officer to personal tort liability. In the early California decision of *Surocco v. Geary*,[9] for example, a city official who commanded the destruction of a private building to prevent the spread of a conflagration was held immune from liability to the owner.[10] The same result would follow today under the pertinent provision of the California Tort Claims Act of 1963.[11] The general policies urged in support of the statutory immunity for exercises of official discretion seem to be fully applicable in such a case: Fear of possible personal liability should not be permitted to deter vigorous official action deemed essential to the safety of the community.[12]

But it is not clear that the same considerations[13] justify the usual extension of immunity to the public entity.[14] Destruction of private property to prevent it from falling into enemy hands in wartime or to deny its combustible elements to a raging fire—the typical instances of "denial destruction"—has all the earmarks of a taking of private property for public purposes, surely a legitimate and therefore compensable public "use" within constitutional standards. As an early court held, "those for whose supposed benefit the sacrifice was made, ought, in equity and justice, to make good the loss which the individual has sustained for the common advantage of all."[15] Thus, where just compensation is denied, one would expect to find overriding reasons for disregarding the literal application of the constitutional mandate.

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9. 3 Cal. 69 (1853).

10. *Accord*, Dunbar v. Alcalde of San Francisco, 1 Cal. 355 (1850); *see* 1 F. Harper & F. James, The Law of Torts § 2.42 (1956).

11. Cal. Gov't Code § 820.2 (West 1966) (public employee not personally liable for discretionary acts); *see* A. Van Alstyne, California Government Tort Liability § 7.29 (1964).

12. The California statutory provisions granting broad immunity to firefighting officials, Cal. Gov't Code §§ 850–50.4 (West 1966), were predicated upon this policy rationale: "[F]iremen should not be deterred from any action they may desire to take in combatting fires by a fear that liability might be imposed if a jury believes such action to be unreasonable." Cal. Law Revision Comm'n, *Recommendation Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees*, in 4 Reports, Recommendations, and Studies 801, 862 (Cal. Law Revision Comm'n ed. 1963).

13. *Cf.* Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961); Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. Rev. 463, 483–91 (1963). The existing statutory tort immunity of public entities would not preclude liability on an inverse condemnation theory where mandated by constitutional provision. *See* Rose v. State, 19 Cal. 2d 713, 720, 123 P.2d 505, 510 (1942).

14. *See, e.g.*, Cal. Gov't Code §§ 850–50.4 (West 1966) (public entity granted immunity for failure to provide adequate fire protection). *But see, e.g.*, Mass. Ann. Laws ch. 48, § 5 (1966); Tex. Rev. Civ. Stat. art. 1070 (1963); Va. Code Ann. §§ 27–20 to –22 (1964).

15. Bishop v. Mayor of Macon, 7 Ga. 200, 202 (1849).

Courts generally have found no constitutional duty to compensate for property losses inflicted by combatant activities on the field of battle (so-called "battle damage"),[16] although a few cases of Civil War vintage intimate that military denial destruction committed away from the actual scene of battle must be paid for.[17] Other decisions have found no liability of public entities for denial destruction inflicted to check the spread of fire.[18] None of these cases undertook an adequate theoretical discussion, apart from expressions of judicial reluctance to impose unforeseeable and potentially enormous liabilities upon public entities.

In 1952, in *United States v. Caltex (Philippines), Inc.*,[19] the United States Supreme Court faced the problem of denial destruction directly, but with little doctrinal success. Certain oil companies had sued to recover compensation for their Manila oil terminal facilities, destroyed in December 1941 to prevent them from falling into the hands of the invading Japanese forces. The Court of Claims awarded relief to the claimants.[20] Reversing this judgment, the Supreme Court relied heavily upon the common-law doctrine that "in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved."[21] The claimants' losses were thus of the kind that, in wartime, "must be attributed solely to the fortunes of war, and not to the sovereign."[22]

The *Caltex* decision, unfortunately, sheds little light on the murky area of denial destruction. Some of the language of the opinion suggests that the Court construed the record as depicting a form of noncompensable battle damage. The majority emphasized the fact that demolition of claimants' oil depots had taken place as the Japanese armies were actually entering Manila and that seizure of the depots by the enemy had been imminent. Thus, *Caltex* may set forth merely a broad concept of "battle" that the Court deems appropriate in the context of modern "total" war. Similar demolition, if long planned as a matter of military strategy and not undertaken as an urgent tactical move, might not necessarily be accorded the

16. *See, e.g.*, Juragua Iron Co. v. United States, 212 U.S. 297 (1909); Annot., 97 L. Ed. 164 (1953); *cf.* United States v. Pacific R.R., 120 U.S. 227, 234 (1887) (dictum).

17. *E.g.*, Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1852) (dictum); Grant v. United States, 1 Ct. Cl. 41 (1863). The opinion of Judge Loring, dissenting in *Grant*, is printed at 2 Ct. Cl. 551.

18. Surocco v. Geary, 3 Cal. 69 (1853) (dictum); Russell v. Mayor of New York, 2 Denio 461 (N.Y. Ct. Err. 1844); Keller v. City of Corpus Christi, 50 Tex. 614, 32 Am. R. 613 (1879); *see* 1 P. NICHOLS, EMINENT DOMAIN § 1.43 (rev. 3d ed. 1964).

19. 344 U.S. 149 (1952).

20. Caltex (Philippines), Inc. v. United States, 100 F. Supp. 970 (Ct. Cl. 1951). The claimed losses related to (1) permanent buildings, fixed equipment, and other terminal facilities; (2) movable equipment; and (3) supplies of petroleum products. The United States voluntarily paid compensation for destruction of items (2) and (3); payment was refused and liability contested only with respect to items in category (1). *Id.* at 973.

21. 344 U.S. at 154.

22. *Id.* at 155-56. *See also* United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

same treatment. Such demolition would be similar, functionally, to the commandeering or summary requisition of material and supplies—a kind of taking for which *Caltex* concedes that just compensation is constitutionally required.[23]

Because of the ambiguity of the case law on denial destruction, and the Supreme Court's statement in *Caltex* that "[n]o rigid rules can be laid down to distinguish compensable losses from noncompensable losses,"[24] clarification by statute would be appropriate.

Cases of wartime denial destruction are of little importance to state legislatures, although peacetime analogies of state interest are not difficult to imagine; in the context, for instance, of a hotly fought urban riot, destruction of a privately owned inventory of guns and ammunition in a sporting goods store might be regarded as essential to prevent bloodshed at the hands of looters. On the other hand, demolition of property in the course of firefighting, as well as in the prevention of flood damage, is very much a matter of concern to the states.

Several arguments opposing state compensation for these types of damage are frequently heard. One such argument is that firefighting losses are already adequately distributed through the community by fire insurance premiums, and that further redistribution of the same losses by taxation is unwarranted.[25] However, not all denial destruction is covered by existing standard-form fire policies.[26] Moreover, most fire insurance policies cover substantially less than the value of the insured property. Thus, since denial destruction ordinarily entails total loss, it visits a substantial and unanticipated fiscal detriment upon even insured property owners. If the loss is to be distributed among the community, compensation is necessary.

A further argument against accepting general liability for denial destruction emphasizes that the scope of the public entity's potential liability is entirely unpredictable, and concludes that decisions to compensate are best left to the descretion of the legislative body, to be made on an ad hoc

23. Much of the Supreme Court's *Caltex* opinion is an elaboration of the Court's reasons for rejecting the argument that the Government's action in taking the terminal facilities for denial-destruction purposes was a form of requisitioning that required compensation. The conclusion of the majority was that the facts of record indicated that the claimant's property "was destroyed, not appropriated for subsequent use," 344 U.S. at 155, and that the requisitioning cases, cited note 17 *supra*, were thus inapplicable. Significantly, the British House of Lords, in a case comparable to *Caltex*—involving denial destruction by British forces of oil facilities in Burma—refused to apply the battle-damage rule, and held that the private losses in question were required to be made whole by the Crown under common-law principles. Burmah Oil Co. v. Lord Advocate, [1965] A.C. 75; *see* Note, *The Burmah Oil Affair*, 79 HARV. L. REV. 614 (1966).

24. 344 U.S. at 156.

25. *Cf.* Cal. Law Revision Comm'n, *supra* note 12, at 828.

26. The standard-form fire insurance policy in California exempts the insurer from liability for losses caused by "order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, *provided that such fire did not originate from any of the perils excluded by this policy* . . . ." CAL. INS. CODE § 2071 (West 1955) (emphasis added). Excluded perils include, *inter alia*, fires caused by "rebellion," "usurped power," and neglect of the insured to use "all reasonable means" to preserve the property when endangered by fire in neighboring premises. *Id.*

basis after the event.[27] This argument has considerable appeal as applied to wartime cases, but local instances of denial destruction are unlikely to command the serious attention of legislators, and victims may be left to suffer uncompensated harm.

Finally, it is argued that denial destruction involves a discretionary decision by public officials, under circumstances of practical urgency, that should not be influenced by the possibility of pecuniary liability. The feared inhibiting effect, however, seems speculative and unsubstantiated by experience. Preclusion of personal liability, already provided by existing case law and indemnification practices,[28] serves to minimize the impact of the suggested deterrence.[29] In addition, both this and the previous objection can be greatly minimized by a realistic rule of damages, limiting the owner's recovery to the value of the destroyed property as measured in light of the circumstances existing at the moment of destruction. Thus, the compensation for a private home that, in imminent danger of being consumed by flames, was destroyed to check the fire would not be very great.[30] This rule of damages also would give appropriate practical recognition to the variations in time and degree that characterize the denial-destruction cases. When destruction is ordered despite the fact that loss from natural forces is not imminent (although it presumably is fairly anticipated), the jury's damage award could reflect its judgment about how much the danger and extent of natural loss would have been discounted by prudent sellers and buyers under the circumstances.

An alternative means of valuation would be to limit compensation to the value of the portion of the destroyed property that, in the exercise of ordinary care, would have been preserved had denial destruction not been ordered.[31] Either formulation would accord to private interests at least a minimum level of protection against the danger of a needless or premature demolition order by a zealous but overly apprehensive public official, and

27. *See* Note, *The Burmah Oil Affair*, 79 HARV. L. REV. 614 (1966). Sophisticated plans for implementation of the insurance principle in advance of actual loss, however, seem feasible even as applied to war-damage, including battle-damage, situations. *See* Hirshleifer, *Compensation for War Damage: An Economic View*, 55 COLUM. L. REV. 180 (1955).

28. *See, e.g.*, CAL. GOV'T CODE § 850.4 (West 1966) (immunity of firefighting personnel for injuries caused in fighting fires); ILL. ANN. STAT. ch. 85, § 5-103 (Smith-Hurd 1966) (same). Indemnification by the state of public employees against personal liabilities is authorized, *inter alia*, by CAL. GOV'T CODE § 825 (West 1966) (all public employees); CONN. GEN. STAT. ANN. § 7-308 (Supp. 1966) (firemen, except for liabilities arising from willful or wanton acts); WIS. STAT. ANN. § 270.58 (Supp. 1967) (public officials generally, except when acting in bad faith).

29. *But cf.* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 223-24 (1963).

30. In *Caltex*, for example, had the Supreme Court recognized the recoverability of just compensation, it could have reached substantially the result it did by a rule limiting damages to the value at the moment of destruction, an amount surely little more than nominal. *Cf.* Dillon v. Twin State Gas & Elec. Co., 85 N.H. 449, 163 A. 111 (1932) (damages for wrongful death depend on life expectancy of decedent at time of death).

31. The Virginia statute, after generally authorizing the owner of a building that was destroyed to prevent the spread of fire to recover the "amount of actual damage which he may have sustained," VA. CODE ANN. § 27-21 (1964), limits that recovery by declaring that its authorization "shall not enable any one to recover compensation for property which would have been destroyed by the fire . . . but only for what could have been saved with ordinary care and diligence . . . ," *id.* § 27-22.

yet would avoid substantial recovery for loss of property that was doomed in any event.

B. *Requisitioning*

In an emergency the government may summarily seize, requisition, or commandeer private property it requires to carry out its responsibilities. Such takings are usually compensable,[32] although the problem of ascertaining what amount of compensation is "just" has been a source of judicial dispute.[33] Since legislative and administrative practice has ordinarily been consistent with the understanding that requisitioning involves a compensable taking, there is relatively little decisional law exploring the outer limits of the rule. Two areas of uncertainty in the law, however, are identifiable.

The first is the shadow area between noncompensable destruction and compensable requisitioning. In the *Caltex* case, for example, the United States voluntarily accepted financial responsibility for destruction of transportation equipment and unused petroleum supplies at the claimants' oil terminals, but disclaimed liability for destruction of the physical properties of the terminals.[34] The former properties had been requisitioned by the Army as potentially useful in conducting military operations against the invading Japanese Army, and were destroyed only to the extent they could not actually be removed and employed for that purpose.[35] The fixed installations, on the other hand, were taken over by the military solely for the purpose of denial destruction, and not for military operations. Yet all the private assets were destroyed as part of the same demolition program to prevent the enemy from acquiring them; the sacrifice of both types contributed to the general welfare in precisely the same way. Loss-distribution policy tends to support a rule of compensability in both instances, since the emphasis on contemplated use as a distinguishing feature of requisition overlooks the fact that deliberate destruction is simply another way of using tangible property.[36]

Second, in certain circumstances the aims of requisitioning may be

32. United States v. Peewee Coal Co., 341 U.S. 114 (1951). *See generally* Marcus, *The Taking and Destruction of Property Under a Defense and War Program* (pts. 1–2), 27 CORNELL L.Q. 317, 476 (1942).

33. *See, e.g.*, United States v. Commodities Trading Corp., 339 U.S. 121 (1950) (effect of government price controls upon value of requisitioned commodities); United States v. John J. Felin & Co., 334 U.S. 624 (1948) (same); United States v. Cors, 337 U.S. 325 (1949) (artificial inflation of market value caused by heavy government requisitioning program).

34. *See* note 20 *supra*.

35. United States v. Caltex (Philippines), Inc., 344 U.S. 149, 150–51 (1952).

36. In some contexts courts have accepted the notion that destruction is a taking and public use of the destroyed property within the meaning of the just-compensation clauses. *See, e.g.*, Griggs v. Allegheny County, 369 U.S. 84 (1962) (destruction of habitability of residence by continuous aircraft noise); Armstrong v. United States, 364 U.S. 40 (1960) (destruction of valid materialmen's liens by government takeover of contract on contractor's default); United States v. Dickinson, 331 U.S. 745 (1947) (destruction of riverbanks by erosion). Mr. Justice Holmes made the point explicitly: "A right may be taken by simple destruction for public use." Duckett & Co. v. United States, 266 U.S. 149, 151 (1924). To the same effect see United States v. Welch, 217 U.S. 333, 339 (1910) (Holmes, J.).

achieved as well by apparently noncompensable means. For example, during World War II the Government could have freed much-needed manpower from nondefense industries such as goldmining either by requisitioning all mining facilities and laying off the employees, or by directing termination of goldmining operations. Accepted legal principles would have required payment of compensation had the first technique been employed;[37] by following the alternate route the Government succeeded in avoiding liability entirely.[38] Such a system is manifestly unfair.[39] The consequences to the property owner, rather than the means employed, should determine the right to compensation.

Application of such a test to state emergency-requisitioning statutes suggests other problem areas that also need clarification. The California Disaster Act, for example, requires the state to "pay the reasonable value" of private property requisitioned by the Governor in a declared state of extreme emergency or disaster.[40] The statute fails to provide, however, for those situations that do not meet the technical definitions of either a "state of extreme emergency" or a "state of disaster."[41] Nor is it clear whether, or how extensively, the Governor can delegate his authority to requisition,[42] or whether that authority can be validly delegated in advance of a declaration of a state of emergency or disaster. Finally, the statute does not indicate the extent of the state's liability when private property is utilized in an emergency and subsequently returned to the owner either undamaged or damaged but still in salvageable condition.[43]

Statutes such as California's would be fairer and clearer if they acknowl-

37. *See* United States v. Peewee Coal Co., 341 U.S. 114 (1951).

38. United States v. Central Eureka Mining Co., 357 U.S. 155 (1958). *See also* Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) (loss of profits due to frustration of contract rights by governmental action for military-defense-procurement purposes held noncompensable).

It is clear that the formal manifestations of the kind of power being asserted can affect the owner's right to compensation. *See* Waite, *Governmental Power and Private Property*, 16 CATHOLIC U.L. REV. 283 (1967). *See also* Marcus, *supra* note 32, at 318–21. *But cf.* Delaware, L. & W.R.R. v. Town of Morristown, 276 U.S. 182 (1928): "The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, *whatever the purpose or means employed to accomplish it*, the owner is entitled to compensation for what is taken from him." *Id.* at 193 (emphasis added).

39. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 HARV. L. REV. 1165 (1967).

40. CAL. MIL. & VET. CODE § 1585 (West Supp. 1967).

41. *See id.* § 1505. The definitions of "state of extreme emergency" and "state of disaster" overlap substantially; each includes both natural calamities (*e.g.*, fire, flood, earthquake, and epidemic) and riots, but the former additionally encompasses conditions of extreme peril from enemy attack or threat of attack.

42. *Id.* § 1585 authorizes the Governor to commandeer or utilize private property "deemed by him" necessary to carry out "the responsibility . . . vested in him" by the California Disaster Act. Although the Governor has broad power during an emergency or disaster to promulgate rules and regulations for the protection of life and property, *id.* § 1581 (West 1955), the code does not expressly provide for delegation of authority to commandeer. There is, however, a general statutory power for deputies to perform the duties of the public officers under whom they serve. *Id.* § 7.

43. *Cf. id.* § 1587, which imposes liability upon the state for damage to or destruction of local-government equipment used by the state for emergency or disaster purposes beyond the local entity's territorial limits, but expressly withholds any duty of the state to compensate the local entity for rental value or ordinary wear and tear.

edged the public entity's responsibility to compensate whenever an emergency required the use of private property. The statutes would then encompass situations often not covered under present law, such as the commandeering of a private automobile by a police officer to chase a suspected felon.[44] Moreover, the owner's right to reimbursement for the reasonable use of his property and for consequential damages could be defined in advance, thus avoiding uncertainty and potential litigation over the scope of compensation.[45] Finally, a statute that emphasized the loss to the citizen would avoid those situations in which a court denies compensation because the official who took the property, although acting in good faith, exceeded his legal authority.[46]

C. *Destruction of Menaces to Health and Safety*

In a leading California decision sustaining inverse condemnation liability for damage resulting from a negligently planned flood-control project, the supreme court purposely distinguished situations in which, "under the pressure of public necessity and to avert impending peril," the state may, within the legitimate exercise of the police power and without incurring liability for compensation, inflict not only avoidable damage to but also avoidable destruction of private property.[47] "In such cases calling for immediate action," the court observed, "the emergency constitutes full justification for the measures taken to control the menacing condition . . . ."[48] Illustrations cited by the court include "the destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized."[49]

The California statutes, however, do not confine to emergency situa-

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44. *See* Blackman v. City of Cincinnati, 140 Ohio St. 25, 42 N.E.2d 158 (1942) (no liability to compensate where commandeering of car by policeman deemed ultra vires), *criticized in* Broeder, *Torts and Just Compensation: Some Personal Reflections*, 17 HASTINGS L.J. 217, 249-50 (1965). Authorizing compensation for property losses in cases like *Blackman* would be a counterpart to the existing California law that brings private persons within the purview of workmen's compensation for the purpose of redressing injuries sustained while engaged in assisting law-enforcement officers. *See* CAL. LABOR CODE §§ 3366, 4458.2 (West Supp. 1967).

45. The constitutional duty to pay just compensation already encompasses, under some circumstances, reimbursement for incidental, conditional, and collateral losses. *See, e.g.*, Cities Serv. Co. v. McGrath, 342 U.S. 330 (1952); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924).

46. *See, e.g.*, Hughes v. United States, 230 U.S. 24 (1913); Hooe v. United States, 218 U.S. 322 (1910); Blackman v. City of Cincinnati, 140 Ohio St. 25, 42 N.E.2d 158 (1942). California courts have interpreted broadly the scope of an employer's liability for the unauthorized torts of its employees. *See, e.g.*, Ruppe v. City of Los Angeles, 186 Cal. 400, 199 P. 496 (1921) (city held liable for assault by employee in violation of explicit instructions). An equally broad view seems fully justified for purposes of inverse condemnation liability for commandeering or requisitioning. The citizen is in no position to question the authority of the requisitionng officer. Nor can he hold the officer personally liable where the decision to requisition is an exercise of discretion, even if that discretion is abused. *See* CAL. GOV'T CODE § 820.2 (West 1966). A narrow view could conceivably result in denial of compensation both on tort and on inverse condemnation grounds, leaving the injured property owner without a remedy.

47. House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 391, 153 P.2d 950, 953 (1944).

48. *Id.*

49. *Id.*

tions the uncompensated destruction of private property deemed to pose a threat to public health, safety, or welfare.[50] Under current statutory patterns the existence of an emergency is largely irrelevant to the issue of compensability; existing legislation authorizes, in a variety of circumstances, uncompensated destruction of private property that is admittedly not diseased, rotten, or infected.[51] Courts generally predicate the validity of such practices on the police power to eliminate "public nuisances" and other conditions deemed inimical to the public welfare.[52] Such a rationale, however, is circular, since the real issue is whether there is a proper use of the police power—that is, whether public or private interests should predominate.[53] An examination of current statutory schemes is useful in assessing the interests at stake.

1. *The California statutes.*

California statutes presently authorize in many instances destruction of animals, plants, or agricultural products found to be affected by specified conditions that threaten public health and safety or the productivity of agriculture. These provisions appear to have been enacted in piecemeal fashion, with little consistency of either substance or procedure. For convenience, they may be classified into five groups.

First. The greatest number of statutes authorize some form of summary destruction. Under some of these provisions, a general quarantine or other equivalent proclamation may precede destruction of the affected property,[54] and under a few an *ex parte* court order is a prerequisite.[55] In general, how-

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50. *E.g.*, CAL. HEALTH & SAFETY CODE § 26586 (West 1967) (90-day period allowed for institution of abatement action following seizure and quarantine of adulterated foods). In People v. 2,624 Thirty-Pound Cans of Frozen Eggs, 224 Cal. App. 2d 134, 36 Cal. Rptr. 427 (2d Dist. 1964), contaminated frozen eggs were held in quarantine for 4 years before destruction was ordered.

51. *E.g.*, CAL. AGRIC. CODE §§ 43031–41 (West Spec. Supp. 1967) (fruits, nuts, and vegetables not conforming to legal standards relating to grading, packing, and labeling).

52. The leading decisions are Miller v. Schoene, 276 U.S. 272 (1928); Adams v. City of Milwaukee, 228 U.S. 572 (1913); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

53. A specific legislative definition of particular circumstances as constituting a nuisance may help to define the critical issues for judicial consideration, but is of little use in determining this ultimate question: whether, in light of the facts in evidence, abatement constitutes a reasonable exercise of the police power. *See* 1 P. NICHOLS, EMINENT DOMAIN § 1.42[15], at 146–47 (rev. 3d ed. 1964).

The term "nuisance" has no concrete or fixed content. *See* W. PROSSER, TORTS § 87, at 592 (3d ed. 1964). Accordingly, the defining of conditions considered in law to constitute nuisances is primarily a task for the legislature. People v. Lim, 18 Cal. 2d 872, 118 P.2d 472 (1941). However, even if a legislative definition on its face meets due process standards, the constitutionality of its application to particular facts is open to judicial review. City of Bakersfield v. Miller, 64 Cal. 2d 93, 410 P.2d 393, 48 Cal. Rptr. 889, *cert. denied*, 384 U.S. 988 (1966). The mere legislative determination that a particular condition constitutes an abatable nuisance cannot make a nuisance of that which, as a matter of judicial judgment, is not a nuisance. Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1870); City of Evansville v. Miller, 146 Ind. 613, 45 N.E. 1054 (1897); Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810 (1923). The crucial issue is the propriety of the balance struck between the competing public and private interests at stake. *See* Miller v. Schoene, 276 U.S. 272 (1928).

54. *E.g.*, CAL. AGRIC. CODE §§ 5761–63 (West Spec. Supp. 1967) (proclamation of pest-eradication area prerequisite to summary destruction of premises, host plants, and things infested or infected with designated pest).

55. *E.g.*, CAL. AGRIC. CODE § 28121 (West Spec. Supp. 1967) (contaminated egg products declared public nuisances that "may be seized . . . and by order of . . . court . . . shall be condemned or destroyed"). Although the statutory language is ambiguous, the courts have intimated

ever, these statutes authorize public officers to seize and destroy private property having potential economic value[56] without notifying the owner and without providing an opportunity for a prior hearing (either administrative or judicial) with respect to the factual justification for the action taken.[57]

Second. A number of California statutes authorize official destruction of described health menaces without prior adjudication, but require that some notice be given to the owner, often by seizure or specific quarantine of the offending property, before actual destruction.[58] Occasionally the statutory procedure authorizes appeal to an administrative board from the initial decision to abate the condition;[59] more often, however, the initial decision of the enforcing officers is final. Typically the owner is told to abate the nuisance by either destroying the property, treating it (where possible), or (in some cases) removing it from the state. Official destruction follows the owner's failure voluntarily to terminate the nuisance within the time allowed.[60] The preliminary notice, however, gives the owner time to petition the court to enjoin the impending destruction of his property,[61] and thereby

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that only an *ex parte* court order is necessary as a prelude to destruction. *Cf.* People v. 2,624 Thirty-Pound Cans of Frozen Eggs, 224 Cal. App. 2d 134, 36 Cal. Rptr. 427 (2d Dist. 1964) (dictum). In the appendix, table 1, statutory provisions that require a court order authorizing destruction of property, but that do not explicitly or by clear implication provide for notice and hearing, are classified as measures that contemplate only an *ex parte* proceeding.

56. In most instances the possibility of significant residual economic value, despite the existence of contamination, infestation, or other harmful condition, is readily apparent. Contaminated foodstuffs, for example, may be salvaged by reprocessing; infested plants may be saved by fumigation or by application of insecticides: animals unlawful to possess in California may be salable in other states or for zoological exhibition; uninspected meat, regarded as dangerous for human consumption, may be acceptable for consumption by animals or for certain processing or manufacturing purposes.

The statutes cited in the appendix do not include provisions applying to objects of destruction regarded as having no possible commercial value, such as harmful insects, CAL. HEALTH & SAFETY CODE § 2270 (West Supp. 1967), field rodents, CAL. AGRIC. CODE §§ 6021–24 (West Spec. Supp. 1967), and noxious weeds, *id.* §§ 7201–305.

57. Twenty-six California statutes of this type are collected in the appendix, table 1. These statutes are limited to measures that purport to authorize destruction of property presenting a threat to public health or safety, or to the welfare of agriculture. Some of them, however, have a broader purview than this, additionally authorizing destruction as a sanction to induce compliance with regulatory policies not concerned primarily with the physical well-being of persons, animals, or plant life. *See, e.g.*, CAL. AGRIC. CODE § 28121 (West Spec. Supp. 1967) (destruction of egg products authorized both for noncompliance with sanitary and health standards and for improper labeling). In addition, classification of a statute as one authorizing summary abatement does not necessarily imply that more formal abatement procedures are improper; some statutes authorize enforcement officers to decide, in their discretion, whether to employ summary or judicial procedures. *Compare* CAL. HEALTH & SAFETY CODE §§ 26580–89.5 (West 1967) (destruction after full hearing) *and* CAL. AGRIC. CODE § 28121 (West Spec. Supp. 1967) (*ex parte* order) *with* CAL. HEALTH & SAFETY CODE § 26590 (West 1967) (summary destruction).

Some of the code sections listed in table 1 authorize payment of compensation, at least in part, for the property destroyed. Since the purpose of the listing is to illustrate the diversity of situations in which official destruction has been authorized by law, no attempt is here made to distinguish between those in which compensation is provided by statute and those which are noncompensable.

58. *E.g.*, CAL. AGRIC. CODE §§ 10061–71 (West Spec. Supp. 1967) (quarantine of cattle found to be tubercular, followed by destruction within 30 days after appraisal for indemnification purposes).

59. *E.g.*, *id.* §§ 29154–63 (destruction of diseased bees and their hives and appliances, after notice and opportunity for administrative review).

60. *E.g.*, *id.* §§ 6521–24 (imported pest-infested nursery stock authorized to be destroyed on owner's failure, after notice, to treat or return to state of origin).

61. When summary abatement is authorized by statute in order to expedite the elimination of a health menace, the courts ordinarily will decline to entertain an action for injunctive relief, since ac-

obtain judicial review of the underlying factual assumptions upon which the abatement decision rests before the harm is done.[62]

Third. Certain other statutory provisions require a formal abatement proceeding prosecuted to judgment in a court of competent jurisdiction as a prerequisite to actual abatement.[63] If the offending property is easily moved or hidden the statutes often authorize its seizure, quarantine, or constructive detention pending the judicial proceedings.[64] Unlike the abatement procedures authorized by the statutes encompassed by classes one and two, actual destruction of the property is permitted by the provisions in the third class[65] only when the court is convinced in an adversary proceeding that destruction is required by law. The owner is afforded a full opportunity not only to contest the public entity's factual contentions, but also to persuade the court that the alleged nuisance can be effectively abated by some remedy short of destruction.[66]

Fourth. A few statutory measures classify certain harmful conditions as public nuisances, but fail to prescribe an explicit remedy. For example, they may simply provide that the described nuisance "is subject to all the laws which relate to the abatement of such nuisance,"[67] or words of equivalent generality. Nuisance abatement in general is governed by provisions of the California Civil Code that authorize abatement either by a civil

ceptance of jurisdiction would frustrate the policy underlying the legislative determination to dispense with hearing procedures in advance of destruction. *See* Affonso Bros. v. Brock, 29 Cal. App. 2d 26, 34, 84 P.2d 515, 519 (3d Dist. 1938); Durand v. Dyson, 271 Ill. 382, 111 N.E. 143 (1915); Neer v. State Live Stock Sanitary Bd., 40 N.D. 340, 168 N.W. 601 (1918); *cf.* North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908). Absent a showing of urgency, however, the courts seem to be willing to provide full judicial review, in advance of its execution, of the official decision to destroy the alleged "nuisance." *See, e.g.*, Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (2d Dist. 1957).

62. Twenty-three California statutes of this type are collected in the appendix, table 2. The practical availability of judicial review on the owner's initiative, in cases covered by these statutes, is partly a function of the diligence with which enforcement officers may proceed in abatement cases. In a few cases, specific time limits are fixed by statute. *See, e.g.*, CAL. AGRIC. CODE §§ 29156, 29161–63 (West Spec. Supp. 1967) (owner of bees infected with foulbrood disease must be given at least 24 hours' notice to abate hive, subject to extension if administrative appeal is prosecuted). Table 2 also includes many statutes that afford the owner a reasonable period of time to preserve the property from destruction by removing it from the state or otherwise remedying the deficiency; election to pursue this option, in lieu of litigation, is undoubtedly a frequent consequence of notice to abate.

63. *E.g.*, CAL. HEALTH & SAFETY CODE §§ 26361–69 (West 1967) (adulterated drugs, or drugs that are mislabeled and may therefore be dangerous to health, abatable in action instituted by state board of public health).

64. *E.g.*, CAL. AGRIC. CODE §§ 12601–03, 12642–47 (West Spec. Supp. 1967) (agricultural produce containing excessive insecticide-spray residues or other deleterious substances authorized to be seized and tagged with notice of "hold order," pending reconditioning or abatement proceedings).

65. Eleven California statutes that conform to this pattern are listed in the appendix, table 3.

66. Judicial abatement proceedings, even where successfully prosecuted, do not always result in judgments authorizing destruction of the offending property. Alternative, and less injurious, abatement remedies are sometimes expressly authorized by statute. *See, e.g.*, CAL. AGRIC. CODE § 12644 (West Spec. Supp. 1967) (court may direct denaturing, processing, or conditional release of agricultural produce with excessive spray residues, in lieu of destruction, if satisfied that danger to public health will be removed). Recourse to such less drastic remedies is, in any event, probably within the court's sound discretion. *See* Morton v. Superior Court, 124 Cal. App. 2d 577, 269 P.2d 81 (1st Dist. 1954) (complete abatement of nuisance deemed abuse of discretion where lesser restraint will afford effective relief).

67. *E.g.*, CAL. AGRIC. CODE § 5782 (West Spec. Supp. 1967).

action in the courts,[68] or by "removing, or, if necessary, destroying the thing which constitutes the [public nuisance], without committing a breach of the peace, or doing unnecessary injury."[69] Statutory provisions of the fourth type thus appear to authorize both judicial proceedings and summary abatement, with the choice of remedy left to the discretion of the enforcement officer.[70]

Fifth. A few statutes simply authorize official confiscation, seizure, or quarantine of objects violating statutory standards, without more.[71] They contain no meaningful specification of the consequences of the seizure, and fail to set out either substantive or procedural criteria governing the subsequent disposition of the property seized.[72]

The police-power rationale advanced by the courts to support these classes of statutory provisions has been articulated principally in the context of communicable-disease-prevention programs.[73] The same reasoning, however, has been extended to programs for eradicating agricultural pests that impair economic productivity but are not otherwise a menace to public health or safety.[74] On this ground, the Supreme Court unanimously sustained the validity of a Virginia statute authorizing uncompensated destruction of ornamental redcedar trees that were hosts to a rust disease destructive of apple trees.[75] The preponderant public interest in the economic success of the applegrowing industry justified a legislative choice to sacrifice the private, and relatively less important, interests in ornamental cedar trees. This deliberate preferment of one property interest over another did not, in the Court's judgment, violate due process or constitute an invalid taking of private property, since the choice had been "controlled by considerations of social policy which [were] not unreasonable . . . ."[76]

Review of the statutory provisions listed in tables 1–5 of the appendix suggests the existence of substantial problems of public policy that neither the courts nor the legislatures have considered adequately. These problems

68. CAL. CIV. CODE § 3491 (West 1954).

69. *Id.* § 3495.

70. Four California statutes of this type are listed in the appendix, table 4.

71. *E.g.*, CAL. AGRIC. CODE § 12961 (West Spec. Supp. 1967) (adulterated, misbranded, or otherwise detrimental agricultural poisons authorized to be seized and quarantined).

72. Four California statutes of this sort are listed in the appendix, table 5. Included among them is one statute, CAL. AGRIC. CODE §§ 18971–72 (West Spec. Supp. 1967), that authorizes seizure and retention of meat and meat-food products not produced in accordance with statutory regulations "until released by the director or by a court of competent jurisdiction." Since no subsequent judicial proceedings are expressly authorized or required, the seized meat could conceivably be retained under state control indefinitely, absent an action initiated by the owner. Even were such an action initiated, spoilage might well render the question moot. The resulting uncertainty about the ultimate consequences of seizure justifies the statute's inclusion in table 5.

73. 1 P. NICHOLS, EMINENT DOMAIN § 1.42[15] (rev. 3d ed. 1964).

74. Miller v. Schoene, 276 U.S. 272 (1928) (cedar rust disease of apple trees); Skinner v. Coy, 13 Cal. 2d 407, 90 P.2d 296 (1939) (disease of peach trees); Graham v. Kingwell, 218 Cal. 658, 24 P.2d 488 (1933) (American foulbrood disease in honeybees); Irvine v. Citrus Pest Dist. Number Two, 62 Cal. App. 2d 378, 144 P.2d 857 (4th Dist. 1944) (citrus diseases).

75. Miller v. Schoene, 276 U.S. 272 (1928).

76. *Id.* at 280.

relate to (1) the desirability of more flexible compensation policies, (2) the availability of effective remedies for mistakes in statutory enforcement, and (3) the need for uniformity of procedural safeguards.

2. *Compensation policy.*

Compensation policy, as reflected in the statutes, seems haphazard in both scope and impact. Payment of compensation for the property destroyed is mandatory in a few instances,[77] although the amount paid is in some cases limited by law and may be less than full reimbursement,[78] and the duty of payment is subject to significant exceptions.[79] Permissive authorization for reimbursement of private losses is established by some provisions,[80] but frequently it is conditioned upon advance consent to destruction from the property owner.[81] In general, however, provisions for the payment of any compensation are the exception, not the rule; most of the statutes considered authorize no compensation.

The paucity of compensatory provisions cannot be attributed to doubt about the validity of compensation, for its validity has been thoroughly established.[82] The lack may, however, reflect a legislative conviction that diseased plants, animals, and trees have little or no actual value and may be liabilities to their owners.[83] In some situations this explanation seems to have potential merit,[84] but it fails to account for the many situations in which the offending property retains substantial market value despite its diseased, infested, or otherwise deficient condition.[85] An attempt to justify noncompensability on the ground that the owner of diseased or disease-

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77. CAL. AGRIC. CODE §§ 9591–94, 10067–71, 10405–07 (West Spec. Supp. 1967).

78. *See, e.g.*, CAL. AGRIC. CODE §§ 10067, 10405 (West Spec. Supp. 1967).

79. *E.g.*, *id.* §§ 10068, 10406 (compensation not payable for certain cattle affected with brucellosis or tuberculosis).

80. *E.g.*, CAL. HEALTH & SAFETY CODE §§ 3052, 3114(b) (West Supp. 1967) (local governing body authorized to provide compensation for household goods destroyed to prevent spread of contagious disease). *See also* CAL. AGRIC. CODE §§ 5405, 5764, 8554, 10081, 10421 (West Spec. Supp. 1967).

81. *E.g.*, CAL. AGRIC. CODE § 5405 (West Spec. Supp. 1967) (premises infested with agricultural pests); *id.* § 5764 (host plants of fruit flies); *id.* § 8554 (diseased citrus trees); *id.* § 10081 (infected cattle); *id.* § 10421 (infected cattle).

82. *See* Patrick v. Riley, 209 Cal. 350, 287 P. 455 (1930).

83. *See* Affonso Bros. v. Brock, 29 Cal. App. 2d 26, 84 P.2d 515 (3d Dist. 1938); State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959). *See generally* 1 P. NICHOLS, EMINENT DOMAIN § 1.42[15] (rev. 3d ed. 1964).

84. The enforcing officer is occasionally required to give notice to the owner of the prohibited condition of the property, so that the owner may exercise a statutory option to have the property returned to him or to request that it be destroyed. *See, e.g.*, CAL. AGRIC. CODE § 32764 (West Spec. Supp. 1967) (impure, tainted, unclean, adulterated, or unwholesome milk or cream). These measures suggest that under some circumstances efforts to salvage or reclaim the offending property may be uneconomical and immediate destruction fiscally more prudent.

85. *See, e.g.*, Skinner v. Coy, 13 Cal. 2d 407, 90 P.2d 296 (1939) (infected peach trees that were still producing marketable fruit); State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959) (citrus trees under attack by nematodes in soil, but still producing commercial fruit). Due to the irregular pattern of regulations governing the storage and sale of fireworks, their destruction as a nuisance may cause a substantial economic loss of goods legally merchantable in some other state or in another community within the same state. *See* Alpha Enterprises, Inc. v. City of Houston, 411 S.W.2d 417 (Tex. Civ. App. 1967), *cert. denied*, 36 U.S.L.W. 3242 (U.S. Dec. 12, 1967).

inducing property realizes a net economic benefit, at least in the long term, from the destruction of his offending property is similarly unpersuasive,[86] since the compelled sacrifice of one's assets solely for the protection of economic interests of *others* is characteristic of many of the measures in question. The killing of escaped nutrias, for example, to protect against damage to crops of nearby farmers[87] is scarcely an act beneficial to the owner-breeder of these valuable fur-bearing animals.

Probably the best explanation of the legislature's general failure to authorize compensation is the legislative process itself. Nuisance-abatement measures are ordinarily sponsored by parties concerned about threats to public or agricultural health and safety; opposition by persons likely to be harmed by a proposed statute is seldom voiced, and, if heard, is generally discounted as the pleading of self-interest. Because the statutes receive no real organized opposition, the appropriateness of reimbursement for destroyed property is not likely to receive serious legislative attention. Considerations of public economy, reinforced by judicial acceptance of abatement without compensation, suggest avoidance of the reimbursement issue as a politically prudent and less controversial approach for the statute's sponsors and spokesmen.

Here, as elsewhere, however, political realities have bred legal anomalies. Compensation may be authorized in one situation and denied in another, with seeming indifference to their inherent similarities. For instance, compensation is provided for destruction of host plants of oriental fruit flies, but not for like destruction of hosts of other agricultural pests,[88] and for disposition of disease-infected household goods and furnishings but not for destruction of contaminated foodstuffs, dangerously adulterated drugs, or other hazardous materials.[89]

Consideration should be given to the development of more uniform legal standards of compensability. Perhaps uniformity could best be achieved by the enactment of statutory criteria for the mandatory awarding of compensation. Compensation could be related to the degree of the property owner's responsibility for the existence of the menacing condition,[90]

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86. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417–19 (1922) (Brandeis, J., dissenting). Of course, the argument of reciprocal advantage may in some situations provide a makeweight in support of the enforcement of property regulations that impose substantial fiscal burdens. *See, e.g.*, City of Bakersfield v. Miller, 64 Cal. 2d 93, 103, 410 P.2d 393, 399–400, 48 Cal. Rptr. 889, 895–96, *cert. denied*, 384 U.S. 988 (1966) (building-code enforcement).

87. *See* CAL. AGRIC. CODE § 11381 (West Spec. Supp. 1967).

88. *Compare id.* §§ 5933–35 *with id.* §§ 5906, 6323.

89. *Compare* CAL. HEALTH & SAFETY CODE § 3114 (West Supp. 1967) *with id.* §§ 26584, 26364 (West 1967).

90. Some abatement laws already implicitly incorporate elements of culpability in their practical implementation. For example, a milk-inspection law that authorizes destruction of milk from a dairy herd that has not been examined for tuberculosis in effect imposes a penalty upon the distributor for the culpable conduct of offering milk for sale in knowing violation of the applicable health standards. *See* Adams v. City of Milwaukee, 228 U.S. 572 (1913). Previous nonconformity with applicable

the extent to which the owner's losses are or will be offset by reciprocal economic benefits,[91] the availability of remedies other than destruction,[92] and the ability of the owner to absorb the loss.[93] While these criteria are not characteristic of existing legislation generally, they do seem to represent the kinds of practical considerations that in specific circumstances in the past have motivated discrete legislative appropriations for the adjustment of otherwise legally unenforceable claims.[94] There is no reason why they should not be used more generally as the basis for a uniform system of statutory compensation in nuisance-abatement cases. If a mandatory statewide system is deemed politically unacceptable or is regarded as inexpedient because of the disparities of fiscal resources of potentially affected local public entities, an alternative approach could authorize payment of compensation on a local-option basis, subject to the statutory criteria. This approach sacrifices uniformity, but has the advantage of reducing the risk of arbitrary governmental action by introducing a cost variable into the political bargaining that affects local decisions to undertake broad-gauge nuisance-abatement programs.

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standards may also be a basis for withholding compensation. For example, California statutes deny reimbursement to owners of cattle destroyed in disease-control areas if the owners have failed to comply with applicable disease-control regulations or have failed to maintain their premises in a sanitary condition. CAL. AGRIC. CODE §§ 10068(g), 10069, 10406(h), 10407 (West Spec. Supp. 1967).

91. The inducement offered by potential future benefits seems to be part of the rationale of statutory authorizations for voluntary abatement agreements between owners and enforcement agencies. *See, e.g.*, CAL. AGRIC. CODE §§ 5405, 5764, 8554, 10081, 10421 (West Spec. Supp. 1967). The economic value to agricultural producers of pest- and disease-abatement programs is measured in billions of dollars nationwide. *See* U.S. DEP'T OF AGRICULTURE, ANIMAL DISEASES: THE YEARBOOK OF AGRICULTURE, H.R. Doc. No. 344, 84th Cong., 2d Sess. 11–14 (1956); U.S. DEP'T OF AGRICULTURE, PLANT DISEASES: THE YEARBOOK OF AGRICULTURE, H.R. Doc. No. 122, 83d Cong., 1st Sess. 1–9 (1953).

92. The availability of reasonably effective, administratively feasible, and economically acceptable alternative means for abating a public nuisance, short of actual destruction, has often been indicated by the courts to be a rational basis for withholding judicial approval of destruction. *See, e.g.*, Sings v. City of Joliet, 237 Ill. 300, 86 N.E. 663 (1908) (destruction of house to eradicate smallpox infection held unnecessary where disinfection of contents of house shown to be equally effective remedy); Forney v. Mounger, 210 S.W. 240 (Tex. Civ. App. 1919) (destruction held unnecessary to abate unsanitary stable nuisance where offensive use could be eliminated by removal of manure and dirt).

Salvaging of values that would otherwise be lost, in lieu of destruction, might also be an acceptable alternative to payment of compensation, with an attendant net gain in both public and private resources. A number of the statutes cited in the appendix, table 2, incorporate a legislative policy suggestive of this approach, permitting destruction of the offending property only as a last resort after notice to the owner and an opportunity for him to take less damaging abatement action satisfactory to enforcement officers. *See, e.g.*, CAL. AGRIC. CODE §§ 6175, 6304–05, 6462–65, 6521–24, 29095, 32761–64 (West Spec. Supp. 1967); CAL. FISH & GAME CODE §§ 2188, 6303 (West Supp. 1967); CAL. HEALTH & SAFETY CODE § 25861 (West 1967). In some instances the enforcement officers themselves are required to employ techniques of pest eradication that do not entail total destruction, when such techniques are deemed sufficient to protect the public welfare, with the cost chargeable to the owner. *See, e.g.*, CAL. AGRIC. CODE §§ 6464–65, 6523–24 (West Spec. Supp. 1967).

93. Relative ability to absorb the loss is, of course, a judicially approved policy consideration relevant to inverse condemnation liability. *See* Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

94. *See, e.g.*, Dittus v. Cranston, 53 Cal. 2d 284, 347 P.2d 671, 1 Cal. Rptr. 327 (1959) (legislative appropriation to compensate fishermen for nets and other fishing equipment made valueless by recently enacted antinetting legislation); State v. Morison, 148 Colo. 79, 365 P.2d 266 (1961) (special statutory authorization for owner to sue state to determine claim of negligence by agricultural officers in conducting bovine-disease–eradication program on plaintiff's ranch).

3. *Enforcement mistakes.*

A second major problem relating to health-menace statutes concerns the possibility of mistakes in the course of enforcement.[95] Valuable plants or animals may be destroyed on the basis of an erroneous finding by an agricultural inspector that they are infected with some pest or disease, although the statutes only rarely authorize destruction of property not itself a menace of some sort.[96]

Traditionally an officer who mistakenly destroyed healthy property was held to have acted without authority of law[97] and was therefore personally liable in tort to the owner.[98] This rule was unsatisfactory,[99] however, because it exposed a public official charged with the enforcement of health and safety provisions to the risk of liability even when he acted in good faith and with reasonable care. Moreover, the reliability of the officer's determination was partially a consequence of the degree of specificity with which the legislature had defined the offending condition.[100] Nonetheless, courts repeatedly held that the availability of this remedy was essential to the validity of abatement programs since the police power permits the uncompensated destruction only of property that threatens the public welfare, and the Constitution requires compensation for the destruction of innocuous property.[101] The ruling decisional law in this area was developed when the doctrine of governmental immunity generally barred tort actions

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95. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.05 (1958); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 29.10 (1956); W. PROSSER, TORTS § 126, at 1017–19 (3d ed. 1964).

96. *But see* CAL. AGRIC. CODE § 18975 (West Spec. Supp. 1967) (meat not bearing required inspection stamp); CAL. HEALTH & SAFETY CODE § 28298 (West 1967) (foodstuffs stored in unsanitary food processing plant). These statutes authorize destruction without any determination that the condemned commodities are unwholesome or contaminated. Their purpose is to avoid a potential rather than an established danger by creating a sanction to induce compliance with preventive regulations. They are generally sustained on the same police-power rationale that supports destruction of diseased or contaminated property. *See* Adams v. City of Milwaukee, 228 U.S. 572 (1913).

97. Lertora v. Riley, 6 Cal. 2d 171, 57 P.2d 140 (1936); Houston v. State, 98 Wis. 481, 74 N.W. 111 (1898).

98. Lertora v. Riley, 6 Cal. 2d 171, 57 P.2d 140 (1936) (dictum); Pearson v. Zehr, 138 Ill. 48, 29 N.E. 854 (1891); Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891). The rule imposing personal liability for mistake, however, is not unanimous. *See, e.g.*, Spillman v. Beauchamp, 362 S.W.2d 33 (Ky. 1962).

99. The rule of personal liability, and the leading case announcing it, Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891) (Holmes, J.), have been widely criticized. *See* authorities cited note 95 *supra*. *But see* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 227–28 (1963).

100. For example, statutory authority to seize and destroy dressed meat not bearing an inspection stamp, CAL. AGRIC. CODE § 18975 (West Spec. Supp. 1967), affords far narrower opportunities for challenging a particular act of abatement than does authority to destroy either cattle found by physical examination or chemical test to be tubercular, *see id.* § 10063, or foodstuffs determined by inspection to be contaminated, *see* CAL. HEALTH & SAFETY CODE §§ 26580–89.5 (West 1967). By making authority to destroy dependent upon the officer's evaluation of observed data, statutes of the latter sort provide a greater margin for subsequent disagreement by a jury than do the strictly objective standards of the former type. Narrowly drawn criteria, on the other hand, tend to eliminate consideration of special circumstances and extenuating facts that, in the sound exercise of discretion, might mitigate the severity of an abatement program.

101. *See* North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Loftus v. Department of Agriculture, 211 Iowa 566, 232 N.W. 412 (1930), *appeal dismissed*, 283 U.S. 809 (1931).

against the public entities themselves,[102] so that the private action was necessary to satisfy the constitutional requirement.[103]

In recent years, however, as the citadel of governmental tort immunity has fallen in state after state, it has been largely replaced by an expanded version of the official immunity of public officers performing discretionary functions, together with a derivative immunity of the employing public entity whenever its officers are personally immune.[104] Thus, in several jurisdictions,[105] including California,[106] the remedy against the enforcement officer, as postulated in the nuisance-abatement cases, either is no longer available or is very substantially limited. The California Tort Claims Act of 1963, for example, created a series of general and specific immunities from tort liability, inuring to the benefit of both public employees and public entities, that are applicable to nuisance-abatement, official-inspection, and public health and safety programs.[107] Under these provisions a non-negligent enforcement officer who mistakenly destroys innocuous private property in the justifiable belief that it constitutes a statutory nuisance is not liable in tort.[108] The officer's public-entity employer is equally immune.[109]

The present statutory law of public tort liability is thus contrary to the implications of the nuisance-abatement decisions. Although a few cases have imposed inverse condemnation liability to protect against the unauthorized and improvident destruction of private property,[110] the practical availability of the inverse condemnation remedy is conjectural and un-

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102. *See* Lertora v. Riley, 6 Cal. 2d 171, 57 P.2d 140 (1936).

103. It has been suggested that the immunity of the public agency was the chief reason for judicial willingness to impose the liability upon the enforcement officer. *See* Spillman v. Beauchamp, 362 S.W.2d 33 (Ky. 1962); Jaffe, *supra* note 99.

104. *See generally* Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919.

105. *See, e.g.*, ILL. REV. STAT. ch 85, §§ 2-201 to -203 (1965), *discussed in* Baum, *Tort Liability of Local Governments and Their Employees: An Introduction to the Illinois Immunity Act*, 1966 U. ILL. L.F. 981, 994-1011; NEV. REV. STAT. § 41.032 (1965); WIS. STAT. ANN. § 895.43(3) (1966).

106. *See* notes 107-09 *infra* and accompanying text.

107. *See* CAL. GOV'T CODE § 815.6 (West 1966) (no liability for failure to discharge mandatory duty imposed by law if reasonable diligence exercised); *id.* § 818.2 (no liability for failure to enforce any law); *id.* § 818.4 (no liability in connection with issuance, denial, suspension, or revocation of permits, licenses, certificates, approvals, or other authorizations); *id.* § 818.6 (no liability for failure to make an inspection, or for making an inadequate or negligent inspection, for health or safety hazards); *id.* § 820.2 (no liability for discretionary acts or omissions); *id.* § 855.4 (no liability for discretionary decisions to perform or not to perform acts to control spread of disease).

108. Ordinarily, the immunity obtains even if the officer acts negligently, or abuses his discretion, in making the initial decision that the property is to be destroyed. *Id.* §§ 820.2, 855.4. *See* Jones v. Czapkay, 182 Cal. App. 2d 192, 6 Cal. Rptr. 182 (1st Dist. 1960). Once the decision to destroy is reached by competent authority, the public employee charged with the duty of actual abatement is absolved from liability, provided he employs reasonable care in carrying out the decision. CAL. GOV'T CODE § 855.4(b) (West 1966).

109. CAL. GOV'T CODE § 815.2(b) (West 1966).

110. Spillman v. Beauchamp, 362 S.W.2d 33, 36 (Ky. 1962) (dictum): "We are not at all sure that in the kind of situation under discussion the state itself would not be liable in damages. If the killing of the cow falls into the category of a wrongful taking of property for public purposes, a basis for liability might exist . . . ." To the same effect see State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959); Rhyne v. Town of Mount Holly, 251 N.C. 521, 112 S.E.2d 40 (1960).

certain. Yet the absence of an appropriate remedy casts doubt upon the constitutional validity of health and safety programs in which unauthorized destruction of property is possible. The need for legislation correcting this deficiency is apparent.

Adequate legislation might take the form of (a) authorization for payment of compensation upon an administrative determination of liability, subject to judicial review; (b) authorization of an inverse condemnation suit against the responsible public entity; or (c) authorization of a tort action against the responsible public officers and employees.[111] Whatever its form, such legislation should provide an adequate remedy not only for the negligent or malicious exercise of abatement powers, but for nonnegligent good-faith conduct as well.[112]

The "mistake" problem, as a practical matter, can arise only in those cases in which property destruction is not preceded by an adversary hearing and a judicial-abatement decree, since under the doctrine of res judicata a judicial determination that the statutory grounds for destruction exist precludes subsequent litigation of an alleged error in application of the statutory authority.[113] Even in the judicial-abatement cases, however, a problem analogous to mistake can arise. Ordinarily, in these situations the institution of judicial proceedings by an enforcement officer follows closely upon, or is contemporaneous with, the seizure or quarantine of the allegedly offending property.[114] But because the owner's powers of use, disposition, and sale of the property are suspended during the proceedings, spoilage, depreciation, freezing of capital investment in the property, and loss of markets may all impose substantial losses on him. In some circumstances, anticipated collateral costs of this type might be so great that sound business judgment would dictate abandonment of opposition, even where evidentiary support for such opposition is available. Where the matter is litigated, such costs could render inadequate a final judgment freeing the property. There is no assurance that actions predicated upon mistaken assessments of factual data or unduly severe interpretations of the statutory provisions are any less frequent here than in the summary-abatement cases;[115] yet a tort remedy is

111. Imposition of personal liability may be an acceptable solution in view of the present statutory rule that requires payment of the judgment against the employee by the employing entity, without recourse against the employee, provided the employee acted in good faith and in the scope of his employment. *See* CAL. GOV'T CODE §§ 825–25.6 (West 1966); A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY §§ 10.21–.26 (1964). Statutory indemnification precludes undue interference, based on fear of personal liability, with the vigorous execution of the officer's duties in the field, and at the same time satisfies the constitutional requirement of compensation for the wrongful destruction of innocuous property. *See* text accompanying note 101 *supra*; *cf.* Jaffe, *supra* note 99.

112. *See* Silva v. MacAuley, 135 Cal. App. 249, 26 P.2d 887 (3d Dist. 1933); cases cited note 98 *supra*.

113. *Cf.* Bazard v. Louisiana State Livestock Sanitary Bd., 135 So. 2d 652 (La. Ct. App. 1961). Allowance of a preliminary administrative appeal, in an adversary setting, may also be accorded res judicata effect. *Cf.* Neer v. State Live Stock Sanitary Bd., 40 N.D. 340, 168 N.W. 601 (1918).

114. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 26361, 26366 (West 1967).

115. Even if Silva v. MacAuley, 135 Cal. App. 249, 26 P.2d 887 (3d Dist. 1933), had involved judicial-abatement proceedings rather than a summary seizure, the loss to the owner, due to the perish-

equally unavailable, and statutory immunity prevails even if the enforcement officers act maliciously.[116] Nor is there any provision for recovery of collateral damages analogous to the damages recoverable for wrongful attachment.[117] These deficiencies as well should be remedied.

4. *Procedural safeguards.*

Procedural fairness and uniformity is another objective appropriate to statutory schemes of health- and safety-menace abatement. In constitutional theory summary abatement by destruction is justified by emergency conditions requiring immediate action undelayed by judicial proceedings.[118] The concept of "emergency," however, is applied loosely; it includes situations in which practical administrative considerations reasonably support a legislative option for immediate destruction rather than more costly or protracted abatement procedures.[119]

In the absence of a compelling necessity for dispensing with prior judicial proceedings, however, the public interest in efficient enforcement should be balanced against countervailing considerations of fairness and objectivity. In many cases, for instance, summary destruction makes unavailable the best evidence of the condition of the assertedly offending property—the property itself. The owner's tort remedy, predicated upon his ability to prove that the alleged condition was not present, may thus be illusory.[120] A judicial hearing in advance of destruction would afford an

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able nature of his property (fresh crabs), would probably have been just as complete. Moreover, a quarantine pending ultimate judicial exoneration may extend over a very prolonged period of time. *See, e.g.*, People v. 2,624 Thirty-Pound Cans of Frozen Eggs, 224 Cal. App. 2d 134, 36 Cal. Rptr. 427 (2d Dist. 1964).

116. *See* CAL. GOV'T CODE § 821.6 (West 1966).

117. *See* Reachi v. National Auto. & Cas. Ins. Co., 37 Cal. 2d 808, 236 P.2d 151 (1951); CAL. CODE CIV. PRO. § 539 (West Supp. 1967) (liability for damages on attachment undertaking conditioned upon recovery of judgment for defendant). *See also* Russel v. United Pac. Ins. Co., 214 Cal. App. 2d 78, 29 Cal. Rptr. 346 (5th Dist. 1963) (liability on injunction bond where party enjoined ultimately prevails).

Existing legislative policy presently appears to support the general policy of permitting recovery for interim damages; CAL. CODE CIV. PRO. § 1095 (West Supp. 1967) authorizes the successful petitioner, in an action for mandamus against a public officer, to recover the "damages which he has sustained" by the officer's failure to perform his duty. *See* Adams v. Wolff, 84 Cal. App. 2d 435, 190 P.2d 665 (1st Dist. 1948). In some circumstances the remedy of mandamus may provide effective relief to a property owner threatened with an abatement action. For example, mandamus might lie to compel the officer to release property preliminarily confiscated by him without adequate cause, or to grant permission to transport or sell property unjustifiably held in quarantine. *Cf.* Ellis v. City Council, 222 Cal. App. 2d 490, 35 Cal. Rptr. 317 (1st Dist. 1963); A. VAN ALSTYNE, *supra* note 111, § 5.13.

118. *See* North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Affonso Bros. v. Brock, 29 Cal. App. 2d 26, 84 P.2d 515 (3d Dist. 1938). *See also* Thain v. City of Palo Alto, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515 (1st Dist. 1962) (dictum).

119. Adams v. City of Milwaukee, 228 U.S. 572 (1913) (summary destruction of milk from uninspected and untested herds justified, in part, by impracticability of delay in light of capacity of milk for spoilage and rapid bacterial growth); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (summary abatement of meat in cold-storage plant justified, in part, by danger that such meat might enter commercial channels unless continuously guarded by enforcement officers at exorbitant public expense); *cf.* Lawton v. Steele, 152 U.S. 133 (1894).

120. *See, e.g.*, State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959); Oglesby v. Town of Winnfield, 27 So. 2d 137 (La. Ct. App. 1946).

owner greater fairness in the production of evidence on the crucial issue of fact. Such a hearing, in addition, might permit objective consideration of the availability of less damaging techniques of abatement.[121] Authorizing judicial control over choice of abatement techniques, and limiting destruction to cases in which less drastic alternatives are not shown to be available, would be more protective of private property rights and more consistent with accepted notions of procedural fairness.[122] Finally, the res judicata effect of a preliminary determination by a court in an adversary proceeding would provide the public entity with greater assurance against unwarranted fiscal liabilities for wrongful or mistaken destruction (assuming a system of liability is authorized in some form).

A prior-judicial-hearing requirement, of course, might result in some decisions that, in failing to approve abatement by destruction, interfered with important public welfare objectives. This problem could be alleviated by authorizing the court merely to determine whether the alleged offending condition existed. If the court found that the condition had not been established, it might then enter a conditional judgment: The enforcement officials must either (a) abide by the court's decision and refrain from destruction or (b) proceed with destruction subject to the continuing jurisdiction of the court on motion to enter a judgment against the enforcing public entity for the reasonable value of the property (less salvage values realized by the owner). Thus, in borderline cases the public entity could still abate what it regarded as a menace, but payment of compensation would be the price of its inability to satisfy judicial doubts about the underlying facts. Similarly, if the enforcement officers elected to challenge the trial court's adverse determination by appeal or extraordinary writ, the continuation of a quarantine or other equivalent restraint upon disposition of the property pending the outcome of the proceedings could be made contingent upon payment of damages for detention in the event the trial court was affirmed.

The suggestion that preliminary adjudication should be required more widely may be opposed as proposing an unnecessary and time-consuming imposition of additional administrative and judicial burdens. But if the added judicial load improved the reliability of factfinding and increased protection against arbitrary official action, the burden argument would be unpersuasive. The issue is therefore whether these justifications would exist, at least in some cases.

121. *See* cases cited note 92 *supra*.

122. A few statutes presently vest explicit discretion in the court in judicial abatement proceedings to require abatement by the least detrimental method available. *See, e.g.*, CAL. AGRIC. CODE § 7578 (West Spec. Supp. 1967) (abatement order to specify whether contaminated seed screenings or cleanings shall be destroyed, denatured, processed, or released on specified conditions); *id.* § 15113 (adulterated commercial feeds to be seized and sold, or, in court's discretion, released upon compliance with all legal requirements).

In some situations the added burden on the courts would be relatively slight, because *ex parte* adjudication is already required by statute;[123] the short additional delay necessary to provide for notice to the owner and for a hearing under an expedited procedure would, in most of these cases, be unlikely to harm the public welfare.[124] Other statutory provisions already authorize substantial delays before ultimate destruction of the offending property,[125] thereby implicitly incorporating a legislative determination that immediate abatement is not necessary; a preliminary adjudication, perhaps in a proceeding enjoying a high order of calendar preference, might well be consistent with public health and safety objectives in such cases.[126]

A number of statutes provide for temporary seizure of the offending property, require notice to the owner to abate the noxious condition, and authorize destruction only after the owner's failure to remedy the defect within the time allowed.[127] The range of statutory options open to the owner under these statutes, however, might be narrower than the full range of procedures that would fulfill the public welfare objective of the law without totally destroying the value of the property in question.[128] More flexibility of disposition might be secured in cases of this sort by a mandatory hearing in which impartial judicial evaluation of the available alternatives would be required before the property could be destroyed. The time required might be limited by law to a period not substantially longer than that presently prescribed in connection with the notice to abate.

Fears of increased burdens on enforcement officers and the courts could also be minimized by carefully drawn procedural provisions. For example, more general use might be made of the procedures already embodied in those nuisance-abatement provisions under which the offending property is held for a specified period of time and then destroyed, unless the owner, after notice, initiates a prescribed administrative or judicial proceeding in

123. *See* note 55 *supra* and accompanying text.

124. Whether a plenary hearing in lieu of an *ex parte* proceeding would be administratively feasible would depend, in part, upon extralegal considerations, such as the availability of storage space to hold quarantined goods, the practicability of temporary precautionary techniques other than seizure, and the problems of spoilage and deterioration of perishables.

125. *See* appendix, table 2.

126. Procedures carefully adapted to the exigencies of particular types of abatement problems would presumably be necessary. The time element in dealing with highly perishable commodities, such as fresh milk or farm produce, might preclude anything but summary abatement. *See* Adams v. City of Milwaukee, 228 U.S. 572 (1913). Expeditious procedures, where necessary, have respectable legislative precedents. *See, e.g.*, CAL. CODE CIV. PRO. §§ 1159–79a (West 1955) (unlawful-detainer proceedings). *See also* Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) (rapid procedure for suppressing pornographic publications).

127. *See* appendix, table 2.

128. Some of the California statutes provide for a variety of alternative techniques of abatement, usually at the owner's option and expense. *See, e.g.*, CAL. AGRIC. CODE §§ 6462–65, 6521–24 (West Spec. Supp. 1967) (plants and nursery stock infested with pests); *id.* §§ 32761–64 (adulterated or impure milk). Other statutes, however, are less flexible, permitting only the options of destruction or removal from the state. *See, e.g.*, CAL. FISH & GAME CODE § 6303 (West 1958) (infected or diseased fish, amphibia, or aquatic plants).

the interim.[129] The owner's failure to initiate such an action is treated as a waiver,[130] although the burden of proving the need for abatement remains upon the enforcement agency.[131]

A final procedural safeguard responsive to minimizing the property owner's loss involves the recovery of salvage values. Although some of the California statutes require that salvage values be returned to the owner of the property,[132] most of them are silent on the subject. Consideration should be given to requiring that methods of destruction be adopted, perhaps through administrative rulemaking procedures, that are most likely to maximize net salvage values, which can then be used to reimburse the owner at least partially for his losses.

II. Confiscation and Destruction as Sanctions

A. *Enforcement of Regulatory Policies*

A broad range of federal and state statutes authorize seizure, forfeiture, or official destruction of private property as sanctions to enforce regulatory policies.[133] While closely analogous to the statutes discussed above, these enforcement statutes are distinguishable in that they are not aimed at property that is inherently harmful, but rather at property that has a substantial capability for, or is ordinarily intended for, socially harmful uses. To prevent such harmful uses, the property is outlawed under specified circumstances and declared subject to confiscation or destruction. The techniques of seizure, forfeiture, and destruction are thus employed, at least in part, as penal sanctions to enforce legislative policies designed to prevent fraud and deception,[134] improve the economic welfare of the state,[135] standardize the processing, packaging, and distribution of goods,[136] promote conservation of natural resources,[137] and discourage particular kinds of criminal ac-

129. *See* CAL. HEALTH & SAFETY CODE §§ 12350–52 (West 1964) (illegal explosives); *id.* § 12711 (illegal fireworks); *id.* § 19814 (dangerously inflammable fabrics).

130. *Cf.* Neer v. State Live Stock Sanitary Bd., 40 N.D. 340, 168 N.W. 601 (1918).

131. *See* Lawton v. Steele, 152 U.S. 133, 142 (1894) (dictum); *cf.* People v. 2,624 Thirty-Pound Cans of Frozen Eggs, 224 Cal. App. 2d 134, 36 Cal. Rptr. 427 (2d Dist. 1964) (by implication); People v. 237 Thirty-Pound Cans of Whole Hen Eggs, 23 Cal. App. 2d 292, 72 P.2d 929 (2d Dist. 1937) (*semble*).

132. *See, e.g.*, CAL. AGRIC. CODE §§ 10067(a), 10405(a) (West Spec. Supp. 1967) (statutory indemnification for destruction of diseased cattle includes proceeds of sale of salvage from the destroyed animals); *cf. id.* § 7580 (where contaminated seed screenings are abated, pursuant to court order, by sale, net proceeds to be paid into court for owner).

133. Many of the pertinent federal statutes are collected and discussed in Note, *Forfeiture of Property Used in Illegal Acts*, 38 NOTRE DAME LAWYER 727 (1963). The California statutes are collected in appendix, tables 6–9.

134. *See, e.g.*, CAL. BUS. & PROF. CODE § 12605 (West 1964) (confiscation of containers with false bottoms or other deceptive features). *See generally* Barber, *Government and the Consumer*, 64 MICH. L. REV. 1203 (1966).

135. *See, e.g.*, CAL. AGRIC. CODE § 43039 (West Spec. Supp. 1967) (destruction of perishable foods, nuts, and vegetables not conforming to legal standards).

136. *See, e.g., id.* § 29731 (seizure of honey not packed or labeled properly).

137. *See, e.g.*, CAL. FISH & GAME CODE § 12157 (West Supp. 1966) (forfeiture of equipment used for illegal hunting or fishing).

tivity.[138] These statutes incorporate a legislative judgment that a forfeiture of private property expediently supplements the more usual sanctions for violations of legislative policy.

The California statutory provisions allowing such confiscations are as diverse procedurally as are the measures dealing with health and safety hazards. Some statutes authorize summary seizure, destruction, or forfeiture.[139] Other measures require a form of notice to the owner, expressly or impliedly permitting passage of an interval of time in which the owner may institute remedial proceedings before official action is taken.[140] Still another group of statutes require formal judicial proceedings as a prerequisite to forfeiture.[141] Finally, some statutory provisions authorizing regulatory confiscations are incomplete or ambiguous.[142] They either declare the described property to be a nuisance subject to all lawful modes of abatement or authorize official seizure of the property without making provision for any subsequent proceedings or for disposition of the property seized.[143]

The use of uncompensated confiscation, forfeiture, and destruction of private property as means of enforcing regulatory policies has been repeatedly sustained as consistent with constitutional standards.[144] Courts ordinarily accord substantial weight to the legislative judgment that the seizure of property used to further socially harmful purposes is an appro-

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138. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 25353, 25606 (West 1964) (forfeiture of vehicles used to transport illegal alcoholic beverages). Forfeiture of property employed as the "operating tools" of a lawbreaker is extensively employed in federal statutes to serve a slightly different purpose: to "strike at commercialized crime . . . through the pocketbooks of the criminals who engage in it." H.R. REP. No. 1054, 76th Cong., 1st Sess. 2 (1939). *See also* H.R. REP. No. 2751, 81st Cong., 2d Sess. (1950); Note, *Forfeiture of Property Used in Illegal Acts*, 38 NOTRE DAME LAWYER 727 (1963). The outlawing of certain kinds of weapons that are not characteristically used for law-abiding purposes combines the "pocketbook" and preventive functions. *See, e.g.*, CAL. PENAL CODE § 12251 (West Supp. 1967) (machine guns); *id.* § 12307 (bombs, grenades, cannons, bazookas).

139. *See* appendix, table 6.

140. *See* appendix, table 7.

141. *See* appendix, table 8.

142. *See* appendix, table 9.

143. Some of the statutory provisions here classified as instances of regulatory destruction or confiscation, and listed in tables 6–9, are also included in tables 1–5 as statutes authorizing destruction to prevent hazards to health and safety. This duplication arises from the fact that the same statutory provisions sometimes authorize destruction of particular types of property both (a) as a hazard to health or safety and (b) because possible fraud, deception, or other adverse economic consequences are deemed likely although no direct threat to health or safety is perceived. *See, e.g.*, CAL. AGRIC. CODE § 28121 (West Spec. Supp. 1967) (destruction of egg products that are either contaminated *or* improperly labeled or packed); *id.* § 32761 (condemnation of milk and cream that is either impure and unwholesome *or* adulterated but not unwholesome); CAL. HEALTH & SAFETY CODE § 26581 (West 1967) (seizure of either injurious *or* misbranded food).

Some additional duplication and overlapping of citations result from the fact that the legislature has sometimes authorized alternative techniques for abating the same statutory nuisance. *See, e.g.*, CAL. STS. & H'WAYS CODE §§ 754–57 (West Supp. 1967) (authorization to remove nonconforming junkyards located near interstate and federal-aid highways by summary abatement, by state action at the owner's expense after 30 days' notice, or by any other lawful remedies, including judicial-abatement proceedings).

144. Samuels v. McCurdy, 267 U.S. 188 (1925); Santa Cruz Oil Corp. v. Milnor, 55 Cal. App. 2d 56, 130 P.2d 256 (1st Dist. 1942). *See also* Van Oster v. Kansas, 272 U.S. 465 (1926); Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921); Associates Inv. Co. v. United States, 220 F.2d 885 (5th Cir. 1955); United States v. One 1962 Ford Thunderbird, 232 F. Supp. 1019 (N.D. Ill. 1964); United States v. One 1961 Cadillac Hardtop, 207 F. Supp. 693 (E.D. Tenn. 1962).

priate and reasonable sanction to aid law enforcement.[145] The power to enact the underlying regulatory policy is deemed to include the power to make that policy effective by all rational means available, including the destruction of property rights. As Justice Stone phrased it, forfeiture constitutes a "secondary defense against a forbidden use."[146] The conclusion that loss of property is a "reasonable" sanction, moreover, is often buttressed by reference to the long historical acceptance of the practice.[147]

The decisional law, however, does not extend blanket constitutional approval to all regulatory-destruction statutes.[148] And in *Lawton v. Steele*,[149] the leading case upholding a seizure under such a statute, the Supreme Court hedged its conclusion that destruction of articles normally used for legal purposes was not an infringement upon constitutional rights:

> Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. *It is true that this rule does not always follow from the illegal use of a harmless article.* A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose . . . but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them.[150]

The thrust of the quoted passage, and of the opinion at length, appears to be that the constitutional validity of uncompensated confiscation or destruction rests upon a judicial assessment of the reasonableness of the legislative decision to destroy the private property in order to promote law enforcement.[151] In the balancing process the courts necessarily allow the legislature a considerable latitude of choice, and invoke constitutional limitations only in extreme cases.[152]

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145. *See generally* Note, *Forfeiture of Property Used in Illegal Acts*, 38 NOTRE DAME LAWYER 727 (1963).

146. Van Oster v. Kansas, 272 U.S. 465, 467 (1926).

147. *See, e.g.*, Goldsmith v. United States, 254 U.S. 505, 510–11 (1921) (tracing forfeiture procedures to the ancient law of deodand); United States v. One 1940 Packard Coupe, 36 F. Supp. 788, 790 (D. Mass. 1941); *cf.* Moore v. Purse Seine Net, 18 Cal. 2d 835, 118 P.2d 1 (1941), *aff'd*, 318 U.S. 133 (1943). The prevalence of statutory forfeitures in aid of regulatory policy in England during the 18th and 19th centuries is reviewed in People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951).

148. *See* People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932) (statute authorizing forfeiture of vehicles used to transport narcotics held unconstitutional in absence of provision for notice and hearing); Hey Sing Ieck v. Anderson, 57 Cal. 251, 40 Am. R. 115 (1881) (statute authorizing forfeiture of illegal fishing equipment held invalid in absence of provision for notice and hearing).

149. 152 U.S. 133 (1894).

150. *Id.* at 142–43 (emphasis added).

151. *See* Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919); People *ex rel.* Bradford v. Barbiere, 33 Cal. App. 770, 166 P. 812 (3d Dist. 1917). *See also* cases cited note 144 *supra*.

152. *See* People v. One 1933 Plymouth Sedan, 13 Cal. 2d 565, 90 P.2d 799 (1939) (forfeiture of vehicle used with consent of owner, but without knowledge of illegal use, held valid); People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932); Hey Sing Ieck v. Anderson, 57 Cal. 251, 40 Am. R. 115 (1881); *cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

1. *Proper legislative considerations.*

The judicially declared outer contours of constitutionality, however, are by no means sufficient guides for legislative policy; they outline only the minimum levels of governmental actions that will survive judicial review. More rational public policy can be achieved by a more thorough consideration of the interests affected by the implementation of specific statutes, in light of the social and economic values sought to be furthered.

Many statutes are explicitly designed to implement a legislative proscription of some particular harmful conduct that is characterized by the possession or use of property not readily usable for innocent or nonharmful purposes. The offense of possession, consumption, or sale of illegally produced liquor, for example, presupposes the existence of such liquor.[153]

Destruction of such property is justified, in part, by the special aptness of destruction as a means to achieve the statutory objective. Destruction prevents, in a physical sense, the continuation or repetition of the proscribed conduct. Conversely, the impact of destruction upon private property interests is minimized by the relatively low probability that the property could lawfully be used for commercially profitable purposes.[154] Thus, the policy arguments supporting uncompensated confiscation or destruction are at their maximum and those supporting compensability at their minimum.

This rationale, however, depends largely upon the assumption that the underlying legislative objective is a reasonable and appropriate occasion for invocation of the police power. Despite the general abdication by the Supreme Court of responsibility for due process review of business and property regulations,[155] the continuing possibility that an overextended regulation may be judicially classified as a taking[156] cautions against uncritical acceptance of the assumption. For example, it is far from clear—as the California Legislature itself has seemingly conceded—that junkyards may be summarily removed or destroyed without compensation merely

153. *See* CAL. BUS. & PROF. CODE §§ 25350–55 (West 1964). *See also id.* § 12605 (fraudulent containers).

154. Judicial decisions sometimes justify destruction of property used for illegal purposes on the theory that such property is incapable of use for any lawful purpose. *See, e.g.*, Lawton v. Steele, 152 U.S. 133, 140 (1894) (dictum) (summary destruction said to be permissible with respect to "obscene books or pictures, or instruments which can only be used for illegal purposes"); People v. Broad, 216 Cal. 1, 7, 12 P.2d 941, 943–44 (1932) (dictum). This view, obviously, is an overstatement. Obscene books, for example, may lawfully be used for medical research; illegal weapons may be socially useful instruments in the hands of law-enforcement or military personnel. *See* CAL. PENAL CODE §§ 12030, 12302 (West 1956, Supp. 1967).

155. *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. Due process in matters relating to economic and property regulations still has some vitality in the state courts. *See* Hetherington, *State Economic Regulation and Substantive Due Process of Law* (pts. 1–2), 53 NW. U.L. REV. 13, 226 (1958).

156. Uncompensated takings today represent the most likely area for federal due process challenges to state regulations affecting property interests. *Compare* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), *with* Griggs v. Allegheny County, 369 U.S. 84 (1962). *See generally* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

because they are situated within 1,000 feet of an interstate highway and are thus aesthetically offensive, and perhaps a distraction, to motorists.[157] Significantly, in providing for removal of previously erected nonconforming billboards located near interstate highways, for combined aesthetic and safety purposes, the legislature avoided similar doubts about constitutionality[158] by expressly authorizing payment of just compensation to the landowner and billboard owner.[159]

Policy considerations in a different range affect a second group of regulatory-destruction provisions. Statutes in this group authorize the uncompensated destruction or confiscation of private property that can be used for either legal or illegal purposes but that in fact is being used, held, or prepared for an illegal purpose. Fishing boats and nets, hunting rifles, and other types of sporting equipment, for instance, are subject to seizure and destruction when used for the illegal taking of fish and game,[160] yet they are equally capable of being employed for lawful activities. Similarly, adulterated or misbranded foodstuffs are not necessarily unwholesome and, even if unfit for human consumption, may be capable of use for feeding pets or domestic animals, or, at relatively slight expense, of being processed or repackaged to conform to legal standards for sale for human consumption.[161]

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157. *See* CAL. STS. & H'WAYS CODE § 752 (West Supp. 1967) (authorizing payment of compensation for removal or disposal of nonconforming junkyards only "[i]f federal law should be interpreted as requiring the states to pay just compensation" in such cases). The Federal Highway Beautification Act of 1965, § 201, 23 U.S.C. § 136 (Supp. II, 1965–66), requires payment of "just compensation," with the federal government contributing 75% of the cost, where removal or relocation is ordered after July 1, 1970. The state is authorized to accept allotments of federal funds for this purpose. CAL. STS. & H'WAYS CODE § 758 (West Supp. 1967). It is not clear whether payment of compensation by the state is mandatory in the absence of the federal government's 75% contribution.

158. California decisions have generally upheld antibillboard regulations where a police-power objective other than mere aesthetics has been discerned and a reasonable period for amortization of nonconforming signs has been provided. County of Santa Barbara v. Purcell, Inc., 251 Adv. Cal. App. 173, 59 Cal. Rptr. 345 (2d Dist. 1967); Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d 270, 30 Cal. Rptr. 731 (2d Dist. 1963); National Advertising Co. v. County of Monterey, 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (1st Dist. 1962). In the absence of these factors, however, the case law suggests that uncompensated destruction or removal of existing advertising displays originally erected in conformity with the law would be unconstitutional. *See* Varney & Green, Inc. v. Williams, 155 Cal. 318, 100 P. 867 (1909); City of Santa Barbara v. Modern Neon Sign Co., 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (2d Dist. 1961). Cases in other jurisdictions are divided. *Compare* Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964) (valid), *with* State Highway Dep't v. Branch, 222 Ga. 770, 152 S.E.2d 372 (1966) (unconstitutional).

159. *See* CAL. BUS. & PROF. CODE § 5288.3 (West Supp. 1967). This authorization for payment was apparently enacted primarily to qualify California for the 75% federal grant-in-aid program relating to billboard removals along interstate highways, as provided by the Federal Highway Beautification Act of 1965, § 101(g), 23 U.S.C. § 131(g) (Supp. II, 1965–66). That avoidance of constitutional doubts may also have been a factor in its enactment, however, can be inferred from the fact that the state standards appear to be stricter than the federal requirements. The federal act, for example, authorizes a 5-year period for nonconforming signs to be removed, ending on July 1, 1970. *See id.*; H.R. REP. No. 1084, 89th Cong., 1st Sess. 6 (1965). The state amortization period ends on July 1, 1969. *See* CAL. BUS. & PROF. CODE § 5288.3 (West Supp. 1967). *But see* CAL. BUS. & PROF. CODE §§ 5291–92 (West 1962, Supp. 1967) (3-year amortization period for nonconfroming billboards following completion of freeway landscaping projects; no compensation authorized).

160. CAL. FISH & GAME CODE §§ 7891, 8630, 12157 (West 1958).

161. The possibility of reprocessing, relabeling, or otherwise correcting the deficiency is recognized in some instances by the California statutes. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 26588

Destruction of private property in these instances exhibits a merger of directly regulatory and punitive policies. Destruction prevents further use of the property for socially inimical purposes; but, because it also prevents use for socially acceptable purposes, it constitutes a punishment, with both deterrent and retributive aspects.[162] Often a statute's regulatory function seems merely ancillary to its punitive objectives, and the statute constitutes essentially an integrated program of criminal-law enforcement.[163] Other statutes, however, appear to exhibit the characteristics of a civil regulatory program in which destruction is invoked primarily for prophylactic rather than punitive purposes.[164] Provisions of the latter kind, where applied to property that is generally used for socially acceptable purposes, appear to require a policy evaluation significantly different from that relevant to destruction of property ordinarily used only for illegal purposes. The economic interests protected by the just-compensation clauses, as well as the social values embodied in the constitutional policy requiring reasonable proportionality between offense and sanction,[165] for example, are both more conspicuously relevant and more weighty.

The value of the property taken is therefore a factor of great importance. In *Lawton v. Steele*,[166] for instance, destruction of fishing nets was deemed constitutionally permissible largely because the nets were "minor" articles of personal property having only "trifling value"; the same result, the Court suggested, would not necessarily have obtained had the property been of great economic worth.[167] Other decisions have also stressed the degree of

(West 1967) (adulterated or misbranded foodstuffs). In other, seemingly analogous instances, however, this flexibility of disposition is not authorized. *See, e.g.*, CAL. AGRIC. CODE §§ 18973–74 (West Spec. Supp. 1967) (adulterated meat or meat products).

162. *See* Note, *Forfeiture of Property Used in Illegal Acts*, 38 NOTRE DAME LAWYER 727 (1963).

163. "Red light" abatement proceedings pursuant to CAL. PENAL CODE §§ 11225–35 (West 1956) are typical of the use of regulatory confiscation primarily as an adjunct to criminal-law-enforcement policy. *See* Board of Supervisors v. Simpson, 36 Cal. 2d 671, 227 P.2d 14 (1951). Narcotics-forfeiture proceedings are likewise predominantly an aspect of criminal-law enforcement. *See* People v. One 1960 Cadillac Coupe, 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964). In some of the statutes under consideration the interrelationship between seizure and punitive policy is disclosed by an express condition permitting confiscation and destruction of property only after criminal conviction for the conduct in connection with which the property was used or acquired. *See, e.g.*, CAL. AGRIC. CODE § 15113 (West Spec. Supp. 1967) (condemnation of mislabeled commercial feeding stuffs as additional penalty); CAL. FISH & GAME CODE § 12157 (West Supp. 1967) (forfeiture of hunting and fishing equipment as additional penalty on conviction of violating game laws).

164. Most of the provisions for regulatory seizure and destruction found in the California Agricultural Code, *see* appendix, tables 6–8, are clearly regulatory, rather than penal, in purpose. The fact that violations of statutory standards are also punishable as misdemeanors, *see* CAL. AGRIC. CODE §§ 8–9 (West Spec. Supp. 1967), does not vitiate this appraisal; on the contrary, misdemeanor prosecutions are in this context merely auxiliary techniques to aid the civil regulatory policy. *See* MODEL PENAL CODE § 1.05, Comment (Tent. Draft No. 2, 1954); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

165. With respect to the underlying policy of proportionality reflected in the constitutional prohibition against cruel and unusual punishment see Weems v. United States, 217 U.S. 349, 367 (1910); Black v. United States, 269 F.2d 38, 43 (9th Cir. 1959) (dictum), *cert. denied*, 361 U.S. 938 (1960); *cf.* Robinson v. California, 370 U.S. 660, 666–67 (1962); Trop v. Dulles, 356 U.S. 86, 100–02 (1958) (Warren, C.J.); *id.* at 110–13 (Brennan, J., concurring).

166. 152 U.S. 133 (1894).

167. *Id.* at 142–43; *see* text accompanying note 150 *supra*.

financial detriment to the owner as important in the judicial equation.[168] Additional elements warranting judicial evaluation include the nature and magnitude of the threat to the public welfare that would result from reliance on sanctions other than destruction, the practical problems and administrative costs of effective enforcement of alternative measures, and the relative cost and feasibility of shifting from an illegal to a lawful use of the property.[169]

In statutes authorizing regulatory confiscation primarily for punitive purposes, considerations of the effectiveness and efficiency of the sanction are relevant. Confiscation of the trophies of an illegal hunt, for example, may reflect both pragmatic administrative considerations and a sophisticated selection of the most efficacious deterrent to both deliberate and inadvertent violations. The threat of loss of an automobile through narcotics-forfeiture proceedings may represent a more effective deterrent to recidivism among certain marginal operators in the narcotics traffic than does "doing time," and, by making motor vehicles less available through normal marketing channels to narcotics violators,[170] may hamper the kind of free mobility that is conducive to success in the illicit narcotics trade. Pragmatic considerations of this sort, however, are not readily discernible in all such statutes, and, in addition, have only limited utility as sources of constitutional justification; forfeiture of a commercial jet airliner in which narcotics had been found could scarcely be supported by the same rationale that sustains the forfeiture of an automobile in analogous circumstances.[171] The legislative choice of sanctions must be reasonable.

2. *An assessment of the California statutes.*

California's regulatory-confiscation and -destruction statutes incorporate some legislative judgments that are difficult to justify in light of the policy considerations just discussed. For example, summary destruction of certain foodstuffs is authorized, without differentiation, for both unwholesomeness[172] and mislabeling,[173] although statutes imposing analogous quality-control and packaging requirements authorize destruction only as a last resort after the owner of the goods, with notice, has failed to remedy the

168. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); Goldsmith v. United States, 254 U.S. 505, 512 (1921); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 322–23 (1905).

169. *See generally* Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 626–29 (1954). The relevance of less drastic but reasonably available alternatives as an element influencing the scope of judicial review of legislation is discussed in Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964). Legislatures, of course, may attach controlling significance to practical factors, such as administrative efficiency. *See, e.g.*, Dittus v. Cranston, 53 Cal. 2d 284, 347 P.2d 671, 1 Cal. Rptr. 327 (1959); Patrick v. Riley, 209 Cal. 350, 287 P. 455 (1930).

170. *See* note 178 *infra*.

171. *Cf.* Goldsmith v. United States, 254 U.S. 505, 512 (1921); cases cited note 165 *supra*.

172. CAL. HEALTH & SAFETY CODE § 26590 (West 1967).

173. CAL. AGRIC. CODE § 28121 (West Spec. Supp. 1967).

deficiency.[174] Similarly, some statutes expressly require that consideration be given to the feasibility of alternatives to destruction,[175] while others ignore alternatives altogether.[176]

Inconsistencies such as these indicate the need for more careful observance of the need to distinguish those who offend public welfare regulations from violators of the fundamental moral strictures found in the law of crimes. Elimination of such anomalies would be an appropriate objective for legislative reform. Preventive confiscation and destruction of socially useful private property, for example, should be limited to circumstances in which practical considerations of preventive policy or administrative efficiency substantially outweigh the pecuniary detriment to the owner. Moreover, even where enforcement policy supports destruction as the appropriate remedy, equitable considerations may suggest the need for statutory guidelines governing payment of compensation, in whole or in part, to the owner. For example, the policies implicit in existing statutory authority for reimbursement of farmers when diseased cattle are destroyed[177] tend to support similar compensation for regulatory destructions when private detriment is disproportionate to the public advantage, when the owner's culpability is minimized or mitigated by special circumstances, and when compensation will facilitate public cooperation and effective enforcement.[178]

A review of the California statutory scheme also indicates a need for more consistent standards of procedural administration of seizure, forfeiture, and destruction sanctions. The California courts have repeatedly underscored the constitutional need for adequate notice and judicial hear-

174. *Id.* §§ 43031–41.

175. *See, e.g.*, CAL. BUS. & PROF. CODE § 12507 (West 1964) (defective weighing and measuring devices); CAL. HEALTH & SAFETY CODE § 26588 (West 1967) (adulterated or misbranded foodstuffs); *cf.* Wormuth & Mirkin, *supra* note 169.

176. *See, e.g.*, CAL. AGRIC. CODE § 28121 (West Spec. Supp. 1967) (egg products); *id.* §§ 18973–74 (adulterated meat or meat products).

177. *See* CAL. AGRIC. CODE §§ 10067–69, 10405–07 (West Spec. Supp. 1967).

178. *See* text accompanying notes 90–94 *supra*. The relevant policy considerations are already reflected, in part, in California legislation dealing with regulatory destruction or confiscation. For example, legislative concern that total loss of value through destruction would be disproportionate to the public advantage seems implicit in prevailing fertilizer quality controls. Adulterated, mislabeled, or otherwise agriculturally detrimental fertilizers or soil additives may, on court order, be processed or sold on conditions that ensure against harmful use; but the net proceeds of the sale, after costs of disposition, are required to be paid into court for the owner. CAL. AGRIC. CODE §§ 14701–11 (West Spec. Supp. 1967). Again, the pre-1959 statutory authority for forfeiture of vehicles used to transport or conceal narcotics was often applied to destroy the security interest of innocent financing agencies, unless they could satisfy the court that they had made a reasonable investigation of the purchaser's moral responsibility and reputation. *See* Dooley, *Position of Lienholders Under California's Narcotics Law*, 6 HASTINGS L.J. 218 (1955). The unfairness of imputing culpability to innocent lienholders, in light of the practical realities of the automobile-financing business, was recognized by the legislature in 1959. In a significant change of policy the lending agencies were permitted to defeat forfeiture in narcotics cases by proving that they had no "actual knowledge," at the time of acquisition of their security interest, that the vehicle was to be used for illegal transportation or concealment of narcotics. *See* People v. One 1953 Buick 2-Door, 57 Cal. 2d 358, 369 P.2d 16, 19 Cal. Rptr. 488 (1962); ch. 1085, §§ 3, 4, 7, [1959] Cal. Stat. 4816–17, *amending* CAL. HEALTH & SAFETY CODE §§ 11614, 11619, 11622, which were repealed in 1967, ch. 280, § 1, [1967] Cal. Stat. ——.

ing as prerequisites to forfeiture of "innocent" property (that is, property not inherently a threat to health or safety but inimical to the public welfare only in its prospective illegal use).[179] Nevertheless, many of the regulatory enforcement measures being studied make no provision for such safeguards,[180] and those that do provide for judicial proceedings contain substantial and largely inexplicable variations in procedural requirements.[181]

The absence of notice and hearing provisions in many of the statutes cannot be explained merely as a legislative acceptance of the invitation extended by the Supreme Court in pronouncing that "where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, . . . it is within the power of the legislature to order its summary abatement."[182] Some of the statutory provisions dispensing with a hearing encompass situations in which extremely valuable property, as well as that of "trifling value," may be at stake, or in which the expense or difficulty of enforcement is not disproportionately greater than the value of the property to be condemned.[183] And since by definition the statutes in question do not involve threats of imminent peril in which expeditious abatement is essential to the protection of public health or safety, recourse to an emergency rationale is equally unavailing.[184]

The development of uniform and efficient procedural techniques for advance adjudication of the facts allegedly justifying destruction would,

179. *See* People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932); Hey Sing Ieck v. Anderson, 57 Cal. 251, 40 Am. R. 115 (1881).

180. *See* appendix, tables 6–7.

181. Three procedures are commonly employed: (1) proceedings in the civil courts for abatement, adhering to the normal procedures for abatement of public nuisances, *see, e.g.*, CAL. AGRIC. CODE §§ 52981–82 (West Spec. Supp. 1967) (abatement of nonconforming cotton plants in one-variety district); (2) authorization for forfeiture of property as an additional penalty to be imposed by the court upon conviction in a criminal prosecution, *see, e.g.*, CAL. FISH & GAME CODE § 12157 (West Supp. 1967) (equipment used in violating game laws); and (3) preliminary confiscation followed by judicial forfeiture proceedings to affect actual change of title, *see, e.g.*, CAL. BUS. & PROF. CODE §§ 25360–70 (West 1964) (alcoholic beverages); People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932). *See also* CAL. BUS. & PROF. CODE § 4323 (West 1962); *id.* §§ 21880.5, 21931 (West 1964). In a few instances the statutes are deliberately equivocal: Both summary destruction and judicial proceedings to abate are sometimes authorized under identical circumstances, without any legislative guidelines to condition the discretion of the officers. *See, e.g.*, CAL. STS. & H'WAYS CODE §§ 754, 757 (West Supp. 1967) (removal of junkyards authorized by use of any remedies provided by law for abatement of nuisances); text accompanying notes 139–43 *supra.*

182. Lawton v. Steele, 152 U.S. 133, 141 (1894).

183. An automobile "graveyard" located close to an interstate highway may be a valuable and profitable business; a sign advertising the business, and illegally located in the highway right-of-way, may, on the other hand, be of merely nominal value. The present statutory law, however, authorizes summary destruction of both. *See* CAL. STS. & H'WAYS CODE § 670(c) (West Supp. 1967) (forbidden signs); *id.* § 754 (automobile graveyards).

184. *See* People v. Broad, 216 Cal. 1, 7, 12 P.2d 941, 943–44 (1932): "[W]hile it is a proper exercise of legislative power to provide for the destruction of property without notice when the public welfare demands summary action—instances of this kind being the power to destroy diseased meat or decayed fruit, to kill diseased cattle, or to destroy property kept in violation of law which is incapable of lawful use . . . —nevertheless, where the property involved is what is sometimes termed innocent property, threatening no danger to the public welfare, the owner must be afforded a fair opportunity to be heard." *Accord*, Lawton v. Steele, 152 U.S. 133, 140–41 (1894). Even in cases involving health or disease threats, some courts are unwilling to permit summary abatement when the consequences sought to be prevented arise slowly. *See* Corneal v. State Plant Bd., 95 So. 2d 1 (Fla. 1957) (nematode infestation of citrus groves).

of course, minimize the danger of mistaken, improvident, or overzealous exercise of statutory powers by enforcement officers. To be sure, the summary seizure and destruction of Lawton's fish nets,[185] according to the Supreme Court, did not leave him without an effective remedy against Steele if the latter had mistakenly exercised his statutory authority. If, in fact, Lawton's nets had not been used in violation of the act and were thus not liable to seizure and destruction, "he may replevy [them] from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute."[186]

The dilemma in which Lawton would have found himself had the confiscation occurred under present California law has already been examined.[187] It bears repeating, however, that the tort remedy hypothesized by the Court is no longer available under existing California statutory law, that no clear judicial approval of inverse condemnation as an alternate remedy has been discovered, and that the current validity of summary destruction, at least in theory, is therefore dubious.[188] But even ignoring the constitutional argument, the increases in fairness, reliability of factfinding, and protection against unwarranted liability that would ensue from a prior hearing are sufficient in themselves to warrant adoption of such a proceeding.

Departures from a general policy of preconfiscation hearings may be warranted, of course, in special circumstances; but even here techniques that balance the competing interests more equitably can be developed. A useful illustration is found in existing legislation. Fish or game illegally taken may be confiscated for punitive purposes. Considering their perishable nature, however, and the circumstances in which seizure is often likely to occur, storage is generally impractical. Yet uncompensated destruction would be unfair in the event of acquittal.[189] Therefore the Fish and Game Code authorizes sale of the confiscated game by the enforcement officers and disposition of the proceeds to await the outcome of the prosecution.[190]

The reported cases seldom mention—let alone discuss—the balancing

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185. Lawton v. Steele, 152 U.S. 133 (1894).

186. *Id.* at 142.

187. *See* text accompanying notes 107–09 *supra.*

188. *See* note 101 *supra* and accompanying text.

189. Where the statutes do not declare that forfeiture is an additional penalty to be imposed as part of the sentence upon conviction in a criminal prosecution, but separately authorize it as a sanction independent of criminal proceedings, conviction is not a prerequisite nor is acquittal a bar to forfeiture. *See* Annot., 3 A.L.R.2d 738 (1949). The California statutes, however, expressly condition the forfeiture of fish and game alleged to have been illegally taken upon ultimate conviction of the criminal offense. *See* CAL. FISH & GAME CODE §§ 12159–61, 12164 (West 1958).

190. CAL. FISH & GAME CODE § 12160 (West 1958). *See also* CAL. AGRIC. CODE §§ 25564, 25566 (West Spec. Supp. 1967) (poultry); *id.* §§ 43039, 43041 (*semble*) (fruits, nuts, and vegetables). A possible deficiency in these procedures is the absence of adequate assurances that the forced sale will take place under conditions conducive to realization of a fair market price.

process at the heart of legislative and judicial acceptance of regulatory destruction. For the most part the courts have been content to inquire whether a legislative authorization to confiscate or destroy private property is within the range of allowable legislative discretion, and is not so arbitrary that it requires invalidation on constitutional grounds. That a statute meets the minimum standards of due process, however, should scarcely conclude a *legislative* judgment about its reasonableness, and obviously does not foreclose continuing legislative responsibility for the initial judgment and its periodic reappraisal. Yet all too many of the California statutory provisions are devoid of even the slightest suggestion that they represent a consistent or thorough legislative assessment of the competing interests they affect, or that their procedural incidents are adequate to accommodate the demands of both administrative practicality and protection of citizens against arbitrary enforcement. The general pattern is, regrettably, one of indiscriminate authorization of confiscatory and destructive sanctions in distinguishable but undifferentiated factual circumstances.

B. *Building and Safety Code Enforcement*

Destruction of private buildings as a means of enforcing building and safety regulations is another form of deliberate taking of private property that has achieved widespread use in the United States.[191] In most cases of deficiency, enforcement procedures are aimed at correction, seeking to bring the building up to code standards in the interests of health and safety;[192] in some instances of serious dilapidation, however, the owner's failure to conform the structure to applicable requirements may lead to its uncompensated demolition.[193]

191. *See generally* Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965). Demolition is a remedy of last resort that is generally employed only in aggravated cases. *Id.* at 831–33.

192. The term "code standards" refers to both state and local regulations; promulgation and enforcement of building codes have traditionally been delegated to local government entities, but in recent years many states have promulgated statewide minimum standards, directed primarily at mechanical aspects of building construction (elevators, plumbing, electrical installations). *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM 11–32 (1966). California is one of the few states that have adopted a broader form of state regulation. The California State Housing Law authorizes statewide administrative regulations relating to construction, alteration, maintenance, repair, sanitation, occupancy, and use of all forms of housing. CAL. HEALTH & SAFETY CODE § 17921 (West Supp. 1967). The state standards, however, are regarded as minima; city and county ordinances imposing stricter standards are expressly authorized. *Id.* § 17951 (West 1964). Enforcement of both state and local requirements is generally a duty of city or county officials. *Id.* §§ 17960, 17961, 17961.5, 17964–66 (West 1964, Supp. 1967).

193. Abatement proceedings leading to a demolition order may, under local ordinances, be initiated before a local enforcement board in the form of administrative proceedings. *See, e.g.*, Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist. 1959). Under state law, however, demolition must be authorized by court order following a plenary judicial hearing. CAL. HEALTH & SAFETY CODE §§ 17980–89 (West 1964). Statutory insistence upon judicial abatement proceedings probably reflects the impact of cases holding that, absent a court order, the enforcing agency is liable in inverse condemnation if the owner establishes that the structure razed was not, in fact, a nuisance subject to demolition. *See* McMahon v. City of Telluride, 79 Colo. 281, 244 P. 1017 (1926); Albert v. City of Mountain Home, 81 Idaho 74, 337 P.2d 377 (1959).

It seems obvious that strict enforcement of building and safety standards, in a period of growing concern about urban blight and the problems of slums, will involve increasingly complex interrelationships between legal, social, and economic policy considerations.[194] The critical problem, from the viewpoint of constitutional compensation policy, is that enforcement of present requirements with respect to structures antedating their enactment may impose very substantial economic burdens upon the owners. The periodic upgrading of building and safety regulations to reflect the changing technology of the construction industry and increased understanding of the nature of structural, fire, and health hazards results in vast numbers of nonconforming buildings.[195] Their deficiencies, judged by current standards, may present substantial threats to the health and safety of their occupants and neighborhood. Compliance with present requirements, however, may necessitate major structural alterations or reconstruction, often at prohibitive expense.

To the extent that governmental entities seek to compel an owner to make necessary alterations, the question of compensation for the economic burden thus imposed is squarely raised. Elimination of nonconforming buildings has the outward manifestations of a police-power program, since it aims to eliminate sources of community harm rather than to appropriate private property for use.[196] Yet the public does realize substantial benefits in the form of improved safety, aesthetic enhancement, increased property values, and diminished tax burdens for police, fire, and health services—benefits that arguably comprise an identifiable public use for which the property owner's resources have been taken in disproportionate degree, and for which compensation should therefore be paid.[197] Even if compensation is not constitutionally required, however, the question remains whether considerations of equity and distributive justice nonetheless warrant statutory authorization therefor.

In at least one aspect of building-code-enforcement practices, inverse condemnation liability appears to be reasonably well established. Retroactive application of newly promulgated building and safety regulations

194. *See* Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801–04 (1965). *See also* G. LEFCOE, LAND DEVELOPMENT LAW 89–106 (1966).

195. *See, e.g.*, Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (2d Dist. 1957); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937). Disparities among building, fire, and other structural codes also tend to contribute to the prevalence of nonconformities. *See generally* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 192.

196. *See* Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

197. *See* Clement v. State Reclamation Bd., 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950) (Traynor, J.): "The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking." *See also* Albers v. County of Los Angeles, 62 Cal. 2d 250, 262–63, 398 P.2d 129, 136, 42 Cal. Rptr. 89, 96 (1965); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 397, 153 P.2d 950, 956 (1944) (Traynor, J., concurring).

to preexisting nonconforming structures is generally impermissible,[198] although discrete phases of such regulations may be enforced when justified by urgent health and safety objectives.[199] A blanket rule of retroactivity would impair established economic values predicated upon good-faith compliance with building regulations extant at the time of construction, and thus would constitute an unconstitutional taking.[200] Enforcement practices, however, have by no means been confined to strictly prospective violations. Two doctrinal devices have been invoked, often in conjunction, to circumvent the retroactivity barrier.

The most prevalent technique is a vigorous utilization of the doctrinal resources inherent in the concept of nuisance. Decayed and dilapidated buildings that are devoid of structural attributes and mechanical features currently regarded as essential to health and safety can readily be characterized as "injurious to the health, or . . . indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ," and thus an abatable public nuisance.[201] Moreover, under the broad constitutional delegation to cities and counties of power to enact local police and sanitary measures,[202] local entities in California have been quick to devise comprehensive legislative definitions of structural nuisances, invoking the sanction of demolition to induce owners of preexisting structures to repair or remodel them to conform with current building and safety requirements.[203] On the whole, courts have accorded a considerable degree of deference to legislative measures of this sort.[204] In addition, while insisting that abatement of a nonconforming building cannot be predicated upon violations of present regulations unless the violations make the structure a public nuisance,[205]

198. Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist. 1959); Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (2d Dist. 1957); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937); City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871 (1949). The California State Housing Law is expressly not retroactive insofar as authorized regulations relate to erection or construction, but is retroactive with respect to regulations governing use, maintenance, and change of occupancy. CAL. HEALTH & SAFETY CODE §§ 17912, 17913 (West Supp. 1967); *see* City & County of San Francisco v. Meyer, 208 Cal. App. 2d 125, 25 Cal. Rptr. 99 (1st Dist. 1962) (dictum).

199. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946) (automatic fire-extinguishing sprinkler system in nonfireproof lodging house); City of Bakersfield v. Miller, 64 Cal. 2d 93, 410 P.2d 393, 48 Cal. Rptr. 889, *cert. denied*, 384 U.S. 988 (1966) (nonconformities that created fire hazards in hotel); Kaukas v. City of Chicago, 27 Ill. 2d 197, 188 N.E.2d 700 (1963) (fire exits in multiple dwellings).

200. Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (2d Dist. 1957).

201. CAL. CIV. CODE § 3479 (West 1954); *see* Moton v. City of Phoenix, 100 Ariz. 23, 410 P.2d 93 (1966); San Diego County v. Carlstrom, 196 Cal. App. 2d 485, 16 Cal. Rptr. 667 (4th Dist. 1961); cases cited note 207 *infra*.

202. *See* CAL. CONST. art. XI, § 11.

203. *See, e.g.*, Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist. 1959) (Los Angeles); Baird v. Bradley, 109 Cal. App. 2d 365, 240 P.2d 1016 (4th Dist. 1952) (Porterville); People v. Morehouse, 74 Cal. App. 2d 870, 169 P.2d 983 (2d Dist. 1946) (Santa Barbara).

204. *See, e.g.*, City of Bakersfield v. Miller, 64 Cal. 2d 93, 410 P.2d 393, 48 Cal. Rptr. 889 (1966).

205. Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (2d Dist. 1957); City

the courts ordinarily accord like deference to the determination of local enforcement officers that a particular building is sufficiently dilapidated to be regarded as a nuisance.[206] Compulsory demolition of buildings conceded to be of substantial value, without payment of compensation, has repeatedly been approved by California appellate courts under this rationale.[207]

A second and somewhat more sophisticated technique for circumventing the retroactivity barrier is postulated upon the typical property owner's periodic need to undertake voluntary maintenance, alteration, and repair work on his building in order to maximize its economic potential or to remedy damage from fire or other causes. Where such repairs are extensive, they may amount to a substantial reconstruction of the building. In such cases existing laws often require full compliance with present-day building and safety regulations, in order to prevent circumvention of code policies under the guise of remodeling. These laws, then, must distinguish between repairs that do, and those that do not, amount to substantial reconstruction. In California and elsewhere full compliance with present code requirements is usually required if the total cost of repairs exceeds 50 percent of the present cost of replacement of the structure in its nonconforming state.[208]

The 50-percent rule serves a clear purpose when used to test whether voluntary repairs or alterations must conform to present building requirements. It has sometimes been extended, however, to other situations in which its justification is more doubtful. For example, some ordinances ban any voluntary repair of a structure if the estimated repair costs exceed the 50-percent level, unless the entire building (not merely the portion under repair) is brought up to present standards.[209] Others employ the 50-percent

of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871 (1949); *see* 1 P. NICHOLS, EMINENT DOMAIN § 1.42[15], at 142–47 (rev. 3d ed. 1964).

206. *See* Takata v. City of Los Angeles, 184 Cal. App. 2d 154, 7 Cal. Rptr. 516 (2d Dist. 1960) (demolition order held not an abuse of discretion vested in city board of building and safety commissioners); Stoetzner v. City of Los Angeles, 170 Cal. App. 2d 394, 338 P.2d 971 (2d Dist. 1959). To the extent that review of an administrative demolition order is by mandamus proceedings, deference to the initial determination, if supported by evidence, is required by statute. *See* CAL. CODE CIV. PRO. § 1094.5 (West 1955).

207. *See* Yen Eng v. Board of Bldg. & Safety Comm'rs, 184 Cal. App. 2d 514, 7 Cal. Rptr. 564 (2d Dist. 1960); Takata v. City of Los Angeles, 184 Cal. App. 2d 154, 7 Cal. Rptr. 516 (2d Dist. 1960); Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist. 1959); Stoetzner v. City of Los Angeles, 170 Cal. App. 2d 394, 338 P.2d 971 (2d Dist. 1959); Baird v. Bradley, 109 Cal. App. 2d 365, 240 P.2d 1016 (4th Dist. 1952).

208. *See* Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist. 1959); West Realty Co. v. Ennis, 147 Conn. 602, 164 A.2d 409 (1960); Soderfelt v. City of Drayton, 79 N.D. 742, 59 N.W.2d 502 (1953); Hill Military Academy v. City of Portland, 152 Ore. 272, 53 P.2d 55 (1936); West v. City of Borger, 309 S.W.2d 250 (Tex. Civ. App. 1958).

209. The Los Angeles ordinance, as described in Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist. 1959), establishes a three-step standard: (1) Alterations and repairs to nonconforming structures may be made in conformity with original material and construction standards if the aggregate cost of repairs in any year does not exceed 10% of replacement cost; (2) alterations or repairs costing more than 10% of replacement cost must conform to present requirements for materials and type of construction applicable to new buildings of like area, height, and occupancy; (3) if necessary alterations and repairs will cost more than 50% of replacement cost, the entire building must either be conformed to present requirements or be demolished.

test as a criterion for adjudging when a building has become so dilapidated that it constitutes a public nuisance; if the estimated cost of conforming the structure to present standards exceeds the 50-percent figure, the building is regarded as one that cannot feasibly be repaired and thus a nuisance to be abated by demolition.[210]

The application of building and safety regulations to nonconforming structures touches directly upon inverse condemnation considerations. To be sure, slum clearance and the eradication of fire and health hazards are significant public interests to which property rights may sometimes be subordinated.[211] But the property owner's good-faith investment in a building that was constructed in compliance with then-existing standards also deserves legal protection. The problem of balancing these competing interests, in light of the inconclusive decisional law, constitutes a running invitation to litigation in nearly every case. Therefore, legislatures should undertake the development of statutes that will promote uniformity, clarify the rights of both public entities and property owners, and generally strengthen building and safety enforcement programs.

One area in which statutory development is very much needed is the relative priorities of building regulations. Courts have almost uniformly held that certain basic health and safety requirements necessitating structural alterations may be enforced with respect to nonconforming structures if the cost of compliance is reasonable in relation to the public benefit obtained.[212] Public benefit, of course, varies according to the regulation: A minimum-cubic-footage standard for sleeping quarters in hotels or apartments, for example, is surely less important than a rule forbidding maintenance of toilet and cooking equipment in the same room, but more important than a requirement that separate men's and women's restroom facilities be properly identified with signs.[213] The job of assessing the public

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210. This form of 50% rule has often been employed to determine when a wooden building located within a later established fire district within which new wooden structures are forbidden has deteriorated to the point that it may be classified as a public nuisance abatable by demolition. *See* West Realty Co. v. Ennis, 147 Conn. 602, 164 A.2d 409 (1960); Soderfelt v. City of Drayton, 79 N.D. 742, 59 N.W.2d 502 (1953); Russell v. City of Fargo, 28 N.D. 300, 148 N.W. 610 (1914).

The validity under California law of measures employing these techniques is not entirely clear. *Compare* Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (2d Dist. 1957) (dictum) (suggesting possible invalidity), *with* Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (2d Dist. 1959) (50% rule held validly applicable only to buildings constructed after its effective date and to preexisting nonconforming structures that have deteriorated to the status of a nuisance as tested by common-law standards). *But cf.* City of Bakersfield v. Miller, 64 Cal. 2d 93, 410 P.2d 393, 48 Cal. Rptr. 889 (1966) (suggesting, by implication, that result turns on balancing the interests of the owner against those of the municipality).

211. *See* Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); City of Bakersfield v. Miller, 64 Cal. 2d 93, 410 P.2d 393, 48 Cal. Rptr. 889 (1966).

212. *E.g.*, City of Bakersfield v. Miller, 64 Cal. 2d 93, 410 P.2d 393, 48 Cal. Rptr. 889 (1966); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937).

213. The tendency to treat alike code violations of essentially dissimilar gravity is illustrated by decisions such as City & County of San Francisco v. Meyer, 208 Cal. App. 2d 125, 25 Cal. Rptr. 99 (1st Dist. 1962); People v. Morehouse, 74 Cal. App. 2d 870, 169 P.2d 983 (2d Dist. 1946). *Cf.* Richards v. City of Columbia, 227 S.C. 538, 565, 88 S.E.2d 683, 696 (1955) (dissenting opinion).

benefit in each area belongs properly to the legislature, not the courts. A statutory classification scheme that assigned differing levels of public urgency to the various building requirements would substantially facilitate application of the courts' balancing standard.

A second area for legislative action relates to the procedural aspects of building-code enforcement. Under existing practices enforcement officials sometimes seek total demolition of dilapidated nonconforming structures as the exclusive remedy for the deficiencies; where the 50-percent formula is used, demolition may result in substantial financial loss to the property owner despite his willingness and ability to undertake the necessary alterations and repairs. In the absence of overriding public necessity, such owners should be given statutory protection. A legislature might require, for instance, that unless the defects in a building cannot be conformed to present standards at a cost less than the cost of demolition of the nonconforming structure and reconstruction of a new conforming building, demolition will be allowed only after the owner has been given a specified period of time in which to complete the required repairs.[214]

Alternatively, the legislature might eliminate the "all-or-nothing" quality of most existing codes by introducing a more flexible balancing process. The 50-percent formula, for example, fails to give appropriate consideration to the practical economic impact of building-code enforcement, since replacement cost rather than economic viability is the applicable reference for judgment. From a business viewpoint, conforming alterations and repairs costing substantially more than 50 percent of current building value may be quite acceptable if financial arrangements, grounded upon the increased earnings potential of the remodeled building, are available to amortize the cost over a reasonable period. On the other hand, compulsory demolition does not invariably produce economic hardship when necessary repair costs are below the 50-percent standard. For example, to reduce holding costs, land speculators may maintain slum buildings that are economic liabilities judged by reference to site development prospects; the market value of the cleared site, less demolition costs, may actually exceed the improved-site value after remodeling of the existing structure. Compulsory demolition, if made available under a more flexible rule than the prevalent

214. Some courts have indicated that if the building in question can be conformed to the code requirements, a demolition order ordinarily will not be sustained until the owner has been given an opportunity to make the necessary repairs or alterations and thus protect his investment. *See* Birch v. Ward, 200 Ala. 118, 75 So. 566 (1917) (dictum); Bloomfield v. West, 68 Ind. App. 568, 121 N.E. 4 (1918); Comm'r v. Anderson, 344 Mich. 90, 73 N.W.2d 280 (1955); State Fire Marshal v. Fitzpatrick, 149 Minn. 203, 183 N.W. 141 (1921); Abraham v. City of Warren, 67 Ohio App. 492, 37 N.E.2d 390 (1940); West v. City of Borger, 309 S.W.2d 250 (Tex. Civ. App. 1958). This position is especially persuasive in cases where demolition would cause substantial economic loss to the owner and the cost of remedying the deficiencies is relatively slight. *See* Albert v. City of Mountain Home, 81 Idaho 74, 337 P.2d 337 (1959); Comm'r v. Anderson, *supra*; City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871 (1949); Forney v. Mounger, 210 S.W. 240 (Tex. Civ. App. 1919).

50-percent test, might eliminate future speculative profits in such circumstances, but would still confer a net benefit, not a compensable loss, upon the owner.

Finally, since a building altered to conform to applicable code standards may well be deemed less desirable than an entirely new structure from the viewpoint of public policy, consideration might be given to authorizing public subsidization of demolition and reconstruction as an alternative to alteration or repair.[215]

Legislatures should also act to prevent arbitrary or discriminatory building-code enforcement designed to reduce the condemnation costs of private property scheduled for public acquistion.[216] Vigorous selective enforcement of building inspection, for example, can compel property owners to demolish, at no cost to the public, buildings with substantial residual values. Absent private abatement, these values would be reflected in higher condemnation awards, and public costs for demolition and site clearance would be higher. Judicial disapproval of suspected practices of this sort has frequently been voiced.[217] Actual use of nuisance-abatement authority for such a purpose, however, is obviously difficult for an aggrieved property owner to establish. Not only is the burden of overcoming the generally applicable presumption of official regularity a heavy one,[218] but direct evidence of discriminatory intent is almost impossible for the property owner to secure.

A partial solution to the problem would be to shift the burden of proof. Legislation might provide that whenever compulsory demolition of a building in an area already slated for public taking, or in an area so denominated within a specified period of time after the destruction, is required on

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215. Public subsidization in the interest of aesthetics, as well as other public objectives, is already implicit in urban-renewal and community-redevelopment legislation. *See* Berman v. Parker, 348 U.S. 26 (1954); G. Lefcoe, *supra* note 194, at 76–103. Compensation in the form of low-cost long-term loans is supportable as a reasonable means for inducing cooperation, or at least lack of resistance, to the public program. It should encounter no legal obstacle. *See* note 82 *supra* and accompaning text. Moreover, public subsidies may relieve, in part, the tendency of overstrict enforcement of building codes to reduce the availability of low-cost housing by increasing landlords' costs, and thus to exacerbate the social and economic problems of the low-income groups residing in substandard dwellings. *See* D. Mandelker, Managing Our Urban Environment 665–70 (1966); Comment, *Building Codes, Housing Codes, and the Conservation of Chicago's Housing Supply*, 31 U. Chi. L. Rev. 180, 186–87 (1963).

216. Strict code enforcement has been urged as a device for reducing the costs of urban-renewal and redevelopment projects. *See, e.g.*, Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U.L. Rev. 1238, 1250–52 (1960). The collateral consequences of strict enforcement policies using demolition as the ultimate sanction, however, often offset the advantages claimed for the technique. *See* Note, *Enforcement of Municipal Housing Codes*, 78 Harv. L. Rev. 801, 832–33 (1965).

217. *See* Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 325, 313 P.2d 127, 131 (2d Dist. 1957) (dictum); *cf.* Yen Eng v. Board of Bldg. & Safety Comm'rs, 184 Cal. App. 2d 514, 7 Cal. Rptr. 564 (2d Dist. 1960). These opinions are similar to those invalidating spot zoning used for the same purpose. *See* Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (2d Dist. 1958); Long v. City of Highland Park, 329 Mich. 146, 45 N.W.2d 10 (1950); Yara Eng'r Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945).

218. *See* Yen Eng v. Board of Bldg. & Safety Comm'rs, 184 Cal. App. 2d 514, 7 Cal. Rptr. 564 (2d Dist. 1960); *cf.* Knapp v. City of Newport Beach, 186 Cal. App. 2d 669, 9 Cal. Rptr. 90 (4th Dist. 1960).

the basis that it is a public nuisance, the demolition is presumed to be for the purpose of reducing taking costs. Unless the condemning entity effectively rebutted the presumption, the residual values inherent in the destroyed building (defined, perhaps, as its market value before demolition less the cost of rehabilitating it to a condition permitting its occupancy without hazard to the health or safety of its occupants[219]) would be included in the subsequent condemnation award. Legislatures might always establish a standard of rebuttal; they might provide, for example, that the presumption would be defeated by a showing that the demolition order was the product of a generally conceived, impartially administered, and uniformly applied program of building-code enforcement unrelated to the condemnation proceeding.

Finally, the legislatures should develop uniform statewide standards for determining when the uncompensated demolition of a building as a penalty for noncompliance with the building codes is justified. Some forms of noncompliance would clearly provide an inadequate basis, judged by prevailing constitutional standards, for a demolition order, even if the conditions resulting from the noncompliance constituted a public nuisance.[220] Courts have generally insisted that demolition is a remedy of last resort; its validity is constitutionally questionable if less drastic means of correction are reasonably available.[221] The various forms of the popular 50-percent formula, from this viewpoint, appear to lack the flexibility required by most judicial decisions and by enlightened compensation policy. Adoption of standards that respect these limits would go far to eliminate the inequities prevalent under most current statutory schemes.

CONCLUSION

The quantity of private property exposed under present law in America to deliberate governmental destruction without constitutional right to compensation is surprisingly great. California's law in this regard, while no

219. The cost of rehabilitation to the minimum extent necessary to eliminate health and safety hazards may be substantially less than the cost of conforming the structure in all respects to present code standards. *See* Yen Eng v. Board of Bldg. & Safety Comm'rs, 184 Cal. App. 2d 514, 7 Cal. Rptr. 564 (2d Dist. 1960) (cost of fully conforming 50-year-old building to present standards estimated to be $470,000; cost of repairs to conform it to minimum standards of safe occupancy estimated at $165,000); Comm'r v. Anderson, 344 Mich. 90, 73 N.W.2d 280 (1955); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937). The relevance of rehabilitation costs to the determination of just compensation, where nonconforming structures are taken for public use, has been judicially approved. *See* Research Associates, Inc. v. New Haven Redevelopment Agency, 152 Conn. 137, 204 A.2d 833 (1964) (zero valuation approved where cost of compliance exceeded value of structure); 1 P. NICHOLS, EMINENT DOMAIN § 1.42[15], at 146 (rev. 3d ed. 1964). It is reflected in some statutes. *See* ILL. ANN. STAT. ch. 47, § 9.5 (Smith-Hurd Supp. 1967); N.Y. PUB. HOUSING LAW § 125[4](e) (McKinney 1955).

220. Demolition cannot be sustained as a sanction for nonstructural defects or for minor departures from code standards that are readily repairable at moderate expense. West v. City of Borger, 309 S.W.2d 250 (Tex. Civ. App. 1958); Annot., 14 A.L.R.2d 73, 92–97 (1950); *see* note 214 *supra*.

221. *See, e.g.*, Appeal of Branham, 128 N.E.2d 671 (Ohio Ct. App. 1953); *cf.* Aronoff v. City of St. Louis, 327 S.W.2d 171 (Mo. 1959).

worse than that of other states, is little better, and is beset with statutory inconsistencies and anomalies that resist rational explanation, save as illustrations of the ad hoc and episodic development of the legislative pattern. The demands of fairness and equality in a state's dealings with its citizens support the need for a more comprehensive legislative approach, informed by the fundamental policy considerations that undergird the ethical and constitutional duty to compensate justly when private property is taken or damaged for public use.

APPENDIX

TABLE I

CALIFORNIA STATUTES AUTHORIZING SUMMARY DESTRUCTION OF HEALTH AND SAFETY MENACES

Statute	Subject
AGRIC. CODE § 5763	Plants, objects, and premises infested, infected, or exposed to agricultural pests for which pest-eradication area has been proclaimed.
AGRIC. CODE § 5906	Host plants of citrus white fly.
AGRIC. CODE § 5933	Host plants of oriental fruit fly.
AGRIC. CODE § 5952	Black current plants (host plants of white pine blister rust).
AGRIC. CODE § 5986	Meyer lemon trees (host plants of quick-decline citrus virus).
AGRIC. CODE § 6305	Insects or other pests deemed dangerous to California agriculture being shipped into state without a permit.
AGRIC. CODE § 6323	Host plants of fruit fly Tephritidae being imported without permit.
AGRIC. CODE § 6461	Plants being imported that are found, or for reasonable cause are believed, to be infected or infested with pests detrimental to California agriculture.
AGRIC. CODE §§ 8551(f), 8552	Citrus pests generally (citrus-pest districts mandate).
AGRIC. CODE § 9621	Horses, mules, and other animals affected with dourine.
AGRIC. CODE § 11381	Unconfined nutria (South American beaver) not under control of owner or keeper.
AGRIC. CODE § 18975	Meat or meat products not bearing required inspection stamp or mark.
AGRIC. CODE § 28121	Egg products not conforming to sanitation, health standards, and other requirements; destruction authorized on *ex parte* court order after seizure.

Agric. Code § 29127	Diseased bees, hives, combs, or colonies unlawfully moved within state.
Agric. Code §§ 31102, 31152	Dogs found in act of killing, wounding, or worrying livestock or poultry.
Agric. Code § 31103	Dogs found entering property where livestock or poultry are confined.
Fish & Game Code § 2186	Wild animals shipped into state with disease detrimental to agriculture, native wildlife, or public health.
Fish & Game Code § 2187	Wild animals imported under permit, but later found to be diseased or held in violation of permit conditions.
Fish & Game Code § 2189	Forbidden wild animals possessed in state without a permit.
Fish & Game Code § 2191	Forbidden wild animals found at large.
Fish & Game Code § 2250	Muskrats (in specified areas of state).
Fish & Game Code § 6302	Infested, diseased, or parasite-infested fish, amphibians, or aquatic plants.
Health & Safety Code § 1907	Unrestrained animals found in rabies quarantine areas.
Health & Safety Code §§ 3052, 3114(b)	Bedding, carpets, household goods, furnishings, materials, clothing, or animals determined by health officers to be imminent menace to public health and incapable of being safely disinfected.
Health & Safety Code § 26590	Impure, unwholesome, and unsafe foodstuffs.
Health & Safety Code § 28298	Foodstuffs processed or stored in unsanitary food-processing plants.

Table II

California Statutes Authorizing Destruction of Health and Safety Menaces After Notice but Without Prior Adjudication

Agric. Code § 5403	Premises, plants, conveyances, or things infected or infested with agricultural pests; abatement authorized on owner's default after notice.
Agric. Code § 6175	Capri fig trees (host plants of certain fig pests); abatement authorized on owner's default after notice.
Agric. Code § 6304	Wild rabbit, flying fox, mongoose, or other animals detrimental to agriculture; destruction or shipment out of state authorized at option and expense of owner or bailee (notice implied) within 48 hours.

AGRIC. CODE § 6305	Live insects or other pests being imported without permit, but not immediately dangerous to agriculture; destruction or shipment out of state authorized at option and expense of owner or bailee (notice implied), within time fixed by inspector.
AGRIC. CODE §§ 6462–65	Plants being imported that are found, or for reasonable cause are presumed, to be infected with agricultural pests, but not immediately dangerous to agriculture; destruction, treatment, or shipment out of state authorized at option and expense of owner or bailee after notice.
AGRIC. CODE §§ 6521–24	Nursery stock or plants shipped within state that are found, or for reasonable cause are presumed, to be infected or infested with agricultural pests, but not immediately dangerous to agriculture; destruction, treatment, or shipment out of state authorized at option and expense of owner or bailee after notice.
AGRIC. CODE §§ 9568, 9569(d), 9591–94	Domestic animals affected by or exposed to foot-and-mouth disease, rinderpest, surra, contagious pleuropneumonia, or other infectious animal disease; destruction authorized after quarantine established and after appraisal for indemnification purposes.
AGRIC. CODE § 10063	Cattle infected with tuberculosis; destruction required within 30 days after appraisal for indemnification purposes.
AGRIC. CODE §§ 10401–03	Cattle infected with brucellosis in brucellosis-control area; destruction required within 30 days after identification and appraisal for indemnification purposes.
AGRIC. CODE § 11201	Animals detrimental to agriculture; destruction or shipment out of state authorized at option and expense of owner or bailee (notice implied).
AGRIC. CODE § 29095	Imported bees or used hives not accompanied by required health certificate; destruction or return to shipper authorized at option and expense of person in charge of shipment (notice implied).
AGRIC. CODE § 29153	Unmovable or stationary comb hives for bees; destruction authorized on default of beekeeper after notice to transfer bees to movable frame hive capable of being inspected for disease.
AGRIC. CODE §§ 29155–63	Bees infected with American foulbrood disease; destruction of bees, hives, and appliances

	authorized within 72 hours after owner's default following notice to abate.
AGRIC. CODE § 29218	Neglected or abandoned hives containing comb attractive to bees and exposed to robbing by bees; destruction authorized within 72 hours after owner's default following notice to abate.
AGRIC. CODE §§ 31101, 31105–08	Unlicensed dogs running loose; destruction authorized following seizure and notice to owner.
AGRIC. CODE §§ 32761–64	Impure, adulterated, or tainted milk or cream; destruction or return to producer authorized, at producer's option, after notice.
AGRIC. CODE §§ 32765–67	Impure, adulterated, unwholesome, or stale milk or cream products, or imitation milk products; destruction authorized after notice to owner and administrative hearing.
FISH & GAME CODE § 2188	Specified species of wild animals brought into state without permit; destruction or shipment out of state authorized at owner's option and expense within time set in notice.
FISH & GAME CODE § 6303	Infected, diseased, or infested fish, amphibia, or aquatic plants deemed deleterious, but not immediately dangerous, to aquatic life; destruction or shipment out of state authorized at owner's option and expense within time set in notice.
HEALTH & SAFETY CODE §§ 12350–55	Illegal explosives; seizure followed by destruction or other disposal after 10 days authorized, subject to final outcome of administrative and judicial review.
HEALTH & SAFETY CODE §§ 12711–12	Illegal fireworks; seizure followed by destruction after 30 days authorized, subject to final outcome of administrative and judicial review.
HEALTH & SAFETY CODE § 19814	Dangerously inflammable fabrics; seizure followed by destruction after 30 days authorized, subject to final outcome of administrative and judicial review.
HEALTH & SAFETY CODE § 25861	Radioactive substances, objects, structures, or premises; seizure followed by disposition as radioactive waste material authorized if owner fails to decontaminate within 15 days after notice.

TABLE III

CALIFORNIA STATUTES AUTHORIZING DESTRUCTION OF HEALTH AND SAFETY MENACES BY COURT ORDER AFTER ADVERSARY HEARING

AGRIC. CODE §§ 5551, 5571–605	Neglected or abandoned crops constituting a menace to agriculture as a host for pests or because of pest infestation; abatement action by district attorney authorized.
AGRIC. CODE §§ 5552, 5571–605	Cotton plants left uncultivated or left from previous growing season, and not destroyed by March 1 (or earlier date as proclaimed by director of agriculture), are presumed to harbor pests; abatement action by district attorney authorized.
AGRIC. CODE §§ 7571–81	Seed screenings or cleanings containing seeds of plant pests; abatement action by district attorney authorized upon failure of owner or bailee to process or destroy after notice.
AGRIC. CODE §§ 12641–47	Produce found to carry spray residue in excess of permissible amounts; abatement action by district attorney authorized.
AGRIC. CODE §§ 14701–12	Fertilizers, soil chemicals, and soil additives that are adulterated, mislabeled, injurious, or detrimental to plants when applied as directed; abatement action by district attorney authorized upon failure of owner or bailee to abate after notice.
AGRIC. CODE § 15113	Commercial feed mixed or adulterated with substances injurious to health of livestock or poultry; court may condemn and sell feed in addition to imposing criminal fine for violation.
AGRIC. CODE §§ 52484–85, 52511–14	Agricultural seeds, treated after harvest with substances toxic to humans or animals, that are either not labeled with appropriate warning or contain toxic residues in excess of permitted tolerances; abatement action by district attorney authorized.
HEALTH & SAFETY CODE §§ 26361–69	Adulterated drugs or drugs that, because of misleading or inaccurate labeling, may be dangerous to health; abatement action by state board of public health authorized.
HEALTH & SAFETY CODE §§ 26580–89	Adulterated or dangerously or fraudulently misbranded food; abatement action by state board of public health authorized.

HEALTH & SAFETY CODE § 28298	Foodstuffs processed or stored in unsanitary food-processing plants; abatement action by state board of public health or by local health board authorized.
HEALTH & SAFETY CODE §§ 28782–88	Toxic, corrosive, irritant, inflammable, radioactive, and other types of hazardous substances that are "banned" or so misbranded as to be dangerous; forfeiture proceeding by state department of public health authorized.

TABLE IV

CALIFORNIA STATUTES DECLARING GENERAL LAW OF NUISANCE APPLICABLE TO ABATEMENT OF HEALTH AND SAFETY MENACES

AGRIC. CODE § 5552	Uncultivated cotton plants, or cotton plants left from a previous season and not destroyed by March 1 (or earlier date as proclaimed by director of agriculture), are presumed to harbor pests.
AGRIC. CODE § 5551	Neglected or abandoned crops that are infested with, or constitute a host for, agricultural pests.
AGRIC. CODE § 5762	Plants, objects, and premises infected with, exposed to, or constituting hosts for agricultural pests for which pest eradication area has been proclaimed.
AGRIC. CODE § 5782	Host plants of agricultural pests planted, growing, or being cultivated within proclaimed host-free period or district.

TABLE V

CALIFORNIA STATUTES AUTHORIZING SUMMARY SEIZURE WITHOUT PROVISION FOR SUBSEQUENT PROCEEDINGS OR DISPOSITION

AGRIC. CODE § 12961	Economic poisons (*i.e.*, insecticides, defoliants, growth regulators, fungicides, pest eradicators, etc.) that are adulterated, misbranded, or detrimental to agriculture or public health; seizure and quarantine authorized.
AGRIC. CODE § 14294	Livestock remedies that are not registered or that do not conform to registration requirements; quarantine and removal from sale authorized.

AGRIC. CODE §§ 18971–72	Meat and meat-food products slaughtered in violation of sanitation and inspection laws; seizure and retention authorized until otherwise ordered by court of competent jurisdiction.
BUS. & PROF. CODE § 4313	Prophylactic devices not conforming to legal standards established for disease prevention; seizure by state board of pharmacy authorized.

TABLE VI

CALIFORNIA STATUTES AUTHORIZING SUMMARY CONFISCATION OR DESTRUCTION FOR REGULATORY PURPOSES

AGRIC. CODE § 18973	Meat or meat products containing preservatives, chemicals, or other substances not permitted by meat-inspection regulations (including substances, such as dyes or coloring matter, harmless to health).
AGRIC. CODE § 18974	Meat or meat products for human consumption to which horsemeat has been added.
AGRIC. CODE § 28121	Improperly labeled or packed egg products or foods containing egg products.
BUS. & PROF. CODE § 5312	Temporary advertising displays maintained in violation of statutory regulations.
BUS. & PROF. CODE § 12506	Inaccurate weighing and measuring devices that, in the sealer's "best judgment," are not susceptible of repair.
BUS. & PROF. CODE § 12605	Containers with false bottoms or other deceptive or fraudulent features, used for commercial purposes.
BUS. & PROF. CODE § 25354	Alcoholic beverages produced by unlicensed persons.
PENAL CODE § 12029	Blackjacks, slungshots, billies, sandclubs, sandbags, and metal knuckles.
STS. & H'WAYS CODE §§ 670(c), 721	Advertising devices and other highway obstructions placed or maintained in a state highway without a permit.
STS. & H'WAYS CODE § 754	Junkyards illegally maintained within 1,000 feet of interstate or federal-aid highway.
STS. & H'WAYS CODE § 1460(c)	Advertising signs or devices placed or maintained in a county highway without a permit.

TABLE VII

CALIFORNIA STATUTES AUTHORIZING REGULATORY CONFISCATION OR DESTRUCTION AFTER NOTICE BUT WITHOUT PRIOR ADJUDICATION	
AGRIC. CODE § 25564	Perishable poultry meat not classified, packed, or labeled in accordance with legal requirements; destruction on *ex parte* court order authorized after notice of noncompliance given to owner.
AGRIC. CODE § 29733	Honey and honey containers not packed or labeled in accordance with legal requirements; seizure and destruction on *ex parte* court order authorized.
AGRIC. CODE §§ 32761–64	Adulterated (even if not impure, unclean, or unwholesome) milk or cream; destruction or return to producer authorized at option and expense of producer after notice.
AGRIC. CODE §§ 32765–67	Products of milk or cream, and imitation milk products, that are adulterated (although not unwholesome) or improperly labeled; destruction authorized after notice to owner and administrative hearing.
AGRIC. CODE § 43039	Fruits, nuts, and vegetables, not conforming to legal standards governing grading, quality, condition, packing, and labeling, that are perishable or subject to rapid deterioration; destruction on *ex parte* court order authorized after notice of noncompliance given owner.
BUS. & PROF. CODE § 5312	Advertising displays of a permanent nature maintained or placed in violation of statutory regulations; destruction authorized after 10 days' written notice.
BUS. & PROF. CODE §§ 12025.5, 12211, 12606.1	Commodities offered for sale without net quantity indicated, or containing less weight than indicated; destruction on *ex parte* court order authorized after "off-sale" order given by sealer of weights and measures.
BUS. & PROF. CODE § 12507	Weighing and measuring devices marked "out of order" by sealer and not corrected within 30 days; seizure authorized, followed by destruction if no court order to contrary issued within 4 years on owner's initiative.
BUS. & PROF. CODE § 25355	Unlicensed stills, implements, materials, and supplies, and illegal alcoholic beverages; seizure and destruction authorized, on order of department of alcoholic beverage control, 15 days or more after seizure.

REV. & TAX. CODE §§ 30436–49	Untaxed cigarettes; seizure authorized, followed by forfeiture and public sale after notice, subject to owner's right to redeem on payment of taxes, penalties, and costs within 20 days after seizure.
STS. & H'WAYS CODE §§ 721(a), 722	Highway encroachments; removal authorized after 5 days' written notice.
STS. & H'WAYS CODE § 755	Junkyards illegally maintained within 1,000 feet of interstate or federal-aid highway; removal at owner's expense authorized after 30 days' notice.

TABLE VIII

CALIFORNIA STATUTES AUTHORIZING REGULATORY CONFISCATION, FORFEITURE, OR DESTRUCTION BY COURT ORDER AFTER ADVERSARY HEARING

AGRIC. CODE §§ 14701–12	Fertilizing materials improperly or inaccurately labeled or adulterated (even if not harmful to plants when applied as directed); abatement action by district attorney authorized.
AGRIC. CODE § 15113	Commercial feeding stuffs improperly or inaccurately labeled (even if not harmful to livestock or poultry); condemnation and sale authorized as additional penalty in criminal prosecution.
AGRIC. CODE § 25565	Poultry meat, not perishable or subject to rapid deterioration, not classified, packed, or labeled in accordance with legal requirements; abatement action by director of agriculture authorized.
AGRIC. CODE § 27805	Eggs not packed or labeled in accordance with applicable standards of size, quality, or consumer information; abatement action by district attorney authorized.
AGRIC. CODE §§ 41332, 41581	Canned fruits, vegetables, and olives packed, shipped, or sold in violation of legal standards of quality, condition, fill of container, and labeling; abatement action by state board of health authorized within 90 days after seizure.
AGRIC. CODE § 43040	Fruits, nuts, and vegetables, not conforming to legal standards for grading, quality, condition, packing, and labeling, that are not perishable or subject to rapid deterioration; abatement action by director of agriculture authorized.

AGRIC. CODE §§ 52511–12	Agricultural and vegetable seeds not conforming to legal standards of quality, freedom from weed seeds, and labeling; abatement action by district attorney authorized.
AGRIC. CODE §§ 52981–82	Cotton plants other than "Acala" in a one-variety cotton district; abatement action by district attorney authorized.
AGRIC. CODE §§ 53561–62	Nursery stock not in compliance with legal standards of grade sizes, quality, or labeling; abatement action by district attorney authorized.
AGRIC. CODE § 59289	Agricultural commodities governed by marketing orders or agreements, but not in compliance with requirements relating to quality, condition, size, maturity, pack, labeling, or marking; abatement action authorized on owner's failure to correct condition after notice of noncompliance.
BUS. & PROF. CODE §§ 25360–70	Vehicles, stills, and other property used to produce or transport illegal alcoholic beverages; judicial proceeding for forfeiture to state authorized.
FISH & GAME CODE § 7891	Fishing vessels operating in California waters without permit, and delivering fish outside of state; seizure of boats, nets, and gear authorized, followed by judicial forfeiture suit.
FISH & GAME CODE § 8630	Fishing nets used in violation of statute; judicial forfeiture proceeding authorized.
FISH & GAME CODE § 12157	Equipment (*e.g.*, guns, traps, nets, fishing tackle) used in committing violation of fish and game laws; forfeiture authorized as additional penalty that court, in its discretion, may order on criminal conviction or bail forfeiture in prosecution for violation.
FISH & GAME CODE §§ 12159–61	Birds, mammals, fish, or amphibia taken, possessed, sold, or transported illegally; seizure and sale authorized subject to forfeiture as additional penalty on criminal conviction, or return of proceeds of sale on acquittal.
FISH & GAME CODE § 12164	Birds or mammals taken while trespassing; forfeiture authorized as additional penalty on criminal trespass conviction.
HEALTH & SAFETY CODE §§ 11780–97	Buildings in which narcotics are unlawfully sold, stored, or served; court action to abate by removal and sale of furnishing and by sale (if necessary to pay costs) or padlocking of building for one year authorized.
HEALTH & SAFETY CODE §§ 26580–89	Foods that are adulterated or misbranded so as to be dangerous or fraudulent; abatement

	action seeking destruction or reprocessing order (where feasible) authorized.
PENAL CODE § 245(a)	Deadly weapon or instrument used by owner to commit assault; confiscation and destruction authorized in court's discretion upon criminal conviction.
PENAL CODE §§ 11225–35	Buildings used for purpose of lewdness or prostitution; court action to abate by removal and sale of furnishings and by sale (if necessary to pay costs) or padlocking of building for one year authorized.
PENAL CODE §§ 11305–14	Ships, boats, or aircraft used as a means of conveyance to gambling ships; forfeiture of vehicle together with furnishings and equipment authorized in action by district attorney or private citizen.
PENAL CODE §§ 12028(b), (d)	Firearms used in commission, or attempt at commission, of felony; confiscation and destruction authorized upon conviction.
PENAL CODE § 12251	Machine guns possessed in violation of law; action for confiscation by attorney general or any district attorney or city attorney, and subsequent destruction authorized.
PENAL CODE § 12307	Destructive devices, including bombs, grenades, cannons, and rockets; action for confiscation by attorney general or any district attorney, and subsequent destruction authorized.
STS. & H'WAYS CODE § 723	Highway encroachments; abatement action authorized when owner denies or refuses to remove after notice.

TABLE IX

CALIFORNIA STATUTES AUTHORIZING REGULATORY CONFISCATION WTIHOUT PROVISION FOR SUBSEQUENT PROCEEDINGS OR FOR DISPOSITION OF SEIZED PROPERTY

AGRIC. CODE § 12961	Economic poisons that are improperly labeled or packaged, adulterated, misbranded, or detrimental to either agriculture or public health; seizure by director of agriculture authorized.
AGRIC. CODE § 14294	Livestock remedies offered for sale without registration pursuant to statute, or not conforming to registration; quarantine and removal from sale authorized.

AGRIC. CODE § 18971	Meat and meat-food products produced in violation of slaughterhouse, sanitation, inspection, and labeling requirements; seizure and retention by director of agriculture authorized until release ordered by director or court (no provision indicating grounds for release, time elements, or nature and scope of proceedings leading to court order).
BUS. & PROF. CODE § 4323	Vending machines for sale of prophylactics in violation of statute limiting sale to licensed pharmacists; seizure by state board of pharmacy authorized.
BUS. & PROF. CODE § 21880.5	Brake fluid that is misbranded or does not conform to legal standards; confiscation and impounding by state bureau of weights and measures or local sealer, until court orders final disposition (no provision indicating time elements, scope, or nature of proceedings leading to court order).
BUS. & PROF. CODE § 21931	Automatic transmission fluid that is misbranded or does not conform to legal standards; confiscation and impounding by state bureau of weights and measures or local sealer authorized, until court orders final disposition (no provision indicating time elements, scope, or nature of proceedings leading to court order).
STS. & H'WAYS CODE §§ 754, 757	Junkyards located within 1,000 feet of interstate or federal-aid highway; removal or disposal authorized by invocation of any remedies provided by law.

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CHAPTER 4. UNINTENDED PHYSICAL DAMAGE*

By ARVO VAN ALSTYNE**

Introduction

THE law of inverse condemnation liability of public entities for unintended physical injuries to private property is entangled in a complex web of doctrinal threads.[1] The stark California constitutional mandate that just compensation be paid when private property is taken "or damaged" for public use[2] has induced courts, for want of more precise guidance, to invoke analogies drawn from the law of torts and property as keys to liability.[3] The decisional law, therefore, contains numerous allusions to concepts of "nuisance,"[4] "trespass,"[5] and "negligence,"[6] as well as to notions of strict liability without fault.[7] Unfortunately, judicial opinions seldom seek to reconcile these

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** B.A. 1943, LL.B. 1948, Yale University. Professor of Law, University of Utah. Member of the California Bar.

1 *See generally* Kratovil & Harrison, *Eminent Domain—Policy and Concept,* 42 CALIF. L. REV. 596 (1954); Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility,* 1966 WIS. L. REV. 3.

2 CAL. CONST. art. I, § 14. Approximately one-half the states require just compensation for "damaging" as well as "taking." 2 P. NICHOLS, EMINENT DOMAIN § 6.44 (rev. 3d ed. 1963).

3 Inverse condemnation has been said to be "in the field of tortious action." Douglass v. Los Angeles, 5 Cal. 2d 123, 128, 53 P.2d 353, 355 (1935). *See generally* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power,* 19 STAN. L. REV. 727, 738-42 (1967).

4 *See, e.g.,* Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965). The origin of governmental liability for nuisance, as an aspect of inverse condemnation liability, is discussed in Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus,* 10 U.C.L.A.L. REV. 463, 493-98 (1963).

5 *See, e.g.,* Los Angeles Brick & Clay Prods. Co. v. Los Angeles, 60 Cal. App. 2d 478, 141 P.2d 146 (1943).

6 *See, e.g.,* House v. Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944).

7 *See, e.g.,* Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

divergent approaches. The need for greater uniformity, consistency, and predictability is particularly pressing in the physical damage cases, for they comprise the single most significant class of inverse condemnation claims, whether measured numerically or in terms of the magnitude of potential liabilities. Clarification also would be desirable in order to mark the borderline between the presently overlapping, and hence confusing, rules governing governmental tort and inverse condemnation liabilities.[8]

The purpose of this article, therefore, is to explore and analyze in depth those areas of inverse condemnation law most in need of legislative clarification and correction, and to point out the theoretical guidelines needed to formulate a uniform, consistent, and predictable statutory inverse liability scheme.

I. Preliminary Overview

Before attempting to analyze those typical inverse condemnation claims based on unintended tangible property damage, it is necessary to conduct a preliminary review of the four major strands of doctrinal development most frequently encountered in these cases: (1) inverse liability without fault; (2) fault as a basis of inverse liability; (3) the significance of private law in the adjudication of inverse liability claims; and (4) the doctrine of *damnum absque injuria.*

A. Inverse Liability Without "Fault"

In 1956, a major landslide occurred in the Portuguese Bend area of Los Angeles County, triggered by the pressure exerted by substantial earth fills deposited by the county in the course of extending a county road through the area. Over five million dollars in residential and related improvements were destroyed by the slide. Although it was known to the county that the surface area overlay a prehistoric slide, competent geological studies had concluded that the land had stabilized and that further slides were not reasonably to be expected. In a suit against the county for damages, findings were specifically made to the effect that there was no negligence or other wrongful conduct or omission on the part of the defendant; plaintiff property owners, however, were awarded judgment on the basis of inverse condemnation. This judgment was affirmed on appeal by the California Supreme Court in *Albers v. County of Los Angeles.*[9]

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[8] Liability for property damage has frequently been sustained in California cases upon alternative theories of inverse condemnation and tort as applied to the same facts. *See, e.g.*, Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965).

[9] 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

Albers thus reconfirmed the previously announced, but often forgotten, principle that liability may exist on inverse condemnation grounds in the absence of fault. Reviewing the prior decisions, the court pointed out that the California courts, from the earliest case[10] interpreting the "or damaged" clause added to California's constitutional eminent domain provision in 1879,[11] had repeatedly held public entities liable for foreseeable[12] physical damage caused by a public improvement project undertaken for public use, whether the work was done carefully or negligently.[13] The problem before the court in *Albers* was stated explicitly in these terms:

> The issue is how should this court, as a matter of interpretation and policy, construe article I, section 14, of the Constitution in its application to any case where actual physical damage is proximately caused to real property, neither intentionally nor negligently, but is the proximate result of the construction of a public work deliberately planned and carried out by the public agency, where if the damage had been foreseen it would render the public agency liable.[14]

The conclusion announced was that, in general, "any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under article I, section 14, of our Constitution whether foreseeable or not."[15]

This conclusion was supported, in the Court's view, by relevant policy considerations:

> The following factors are important. First, the damage to this property, if reasonably foreseeable, would have entitled the property owners to compensation. Second, the likelihood of public works not being engaged in because of unseen and unforeseeable possible direct physical damage to real property is remote. Third, the property owners did suffer direct physical damage to their properties as the prox-

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[10] Reardon v. San Francisco, 62 Cal. 492, 6 P. 317 (1885).

[11] *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 771-76 (1967) (historical background of CAL. CONST. art. I, § 14).

[12] The *Albers* opinion appears to treat foreseeability as an element of fault. *Cf.* RESTATEMENT (SECOND) OF TORTS § 302 (1965). Foreseeability is more typically regarded, in the inverse liability decisions, as an element of proximate cause. See text accompanying notes 33-35 *infra.*

[13] *See* Clement v. State Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950); Powers Farms v. Consolidated Irr. Dist., 19 Cal. 2d 123, 119 P.2d 717 (1941); Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895); Reardon v. San Francisco, 62 Cal. 492, 6 P. 317 (1885); Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1921) (opinion of Supreme Court en banc denying hearing). These cases, all cited in *Albers*, do not discuss directly the matter of foreseeability of the damages claimed; the facts in each case, however, are consistent with actual or constructive foresight. For other examples of inverse liability without "fault," see text accompanying notes 225-31 *infra.*

[14] Albers v. Los Angeles County, 62 Cal. 2d 250, 262, 398 P.2d 129, 136, 42 Cal. Rptr. 89, 96 (1965).

[15] *Id.* at 263-64, 398 P.2d at 137, 42 Cal. Rptr. at 97.

imate result of the work as deliberately planned and carried out. Fourth, the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged. Fifth . . . "the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking."[16]

A close reading of the *Albers* opinion indicates that the rule announced is not as favorable to inverse liability as might appear at first glance. It is clearly *not* a blanket acceptance of strict liability without fault.[17] Three important qualifications are indicated. First, *Albers* supports liability *absent* foreseeability of injury (*i.e.*, without fault) only when inverse liability would obtain in a situation involving the same facts *plus* foreseeability (*i.e.*, plus fault). Secondly, the rule is limited to instances of "direct physical damage." Finally, the damage must be "proximately caused" by the public improvement as designed and constructed.

The first of these qualifications assumes that inverse liability ordinarily rests—although not invariably[18]—upon a showing of fault. Unfortunately, the nature of this "fault," and thus the dimensions of inverse liability under situations such as *Albers* where fault is *not* present, is rooted in decisional law that is less than crystal clear. It appears, however, that there are significant types of government projects which, while ultimately producing unforeseeable—or even foreseeable—damage to private property, may nevertheless be undertaken without risk of inverse liability. The *Albers* opinion explicitly withholds liability, for example, when the public entity's conduct is legally privileged, either under ordinary property law principles or as a noncompensable exercise of the police power.[19]

The second qualification limits the *Albers* approach to "direct physical damage," thereby excluding instances of non-physical "consequential" damages.[20] The terms, "direct" and "physical," in this

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16 *Id.* The quotation is from Clement v. Reclamation Bd., 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950).

17 Efforts to secure judicial approval for the idea that inverse condemnation is a form of strict liability have generally failed. *See* Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); Smith v. East Bay Mun. Util. Dist., 122 Cal. App. 2d 613, 265 P.2d 610 (1954); Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 159 P.2d 674 (1945).

18 *Cf.* Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968).

19 Illustrative decisions cited in *Albers* include Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941) (privilege); Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917) (police power); see text accompany notes 46-87 *infra*.

20 The ambiguous term "consequential damages" is often employed to describe generically the kinds of losses for which inverse condemnation lia-

context connote a "definite physical injury to land or an invasion of it cognizable to the senses, depreciating its market value."[21] The cases relied on in *Albers*, for example, involve structural injury to buildings,[22] erosion of the banks of a stream,[23] waterlogging of agricultural land by seepage from a leaking irrigation canal,[24] and flooding and deposit of mud and silt by an overflowing river.[25] The opinion indicates that non-physical losses, such as decreased business profits or diminution of property values due to diversion of traffic or circuity of travel resulting from a public improvement, are not recoverable under this rationale.[26]

The third qualification—requiring that the damage be proximately caused by the public improvement as designed and constructed—involves a troublesome conceptual premise. When the defendant's wrongful act or omission does not directly produce the injury com-

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bility is denied, where no physical injury to, or appropriation of, tangible property is involved. *See* Richards v. Washington Terminal Co., 233 U.S. 546, 554 (1914); 2 P. NICHOLS, EMINENT DOMAIN § 6.4432, at 503 (rev. 3d ed. 1963). One of the purposes for which the "or damaged" clause was added to the constitution was to narrow the categories of injuries previously regarded as "consequential" and thus noncompensable. *E.g.*, Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885) (recognizing that certain kinds of consequential damages were made compensable by the 1879 constitution): Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 37 P. 750 (1894) (*semble*). Thus, although some kinds of non-tangible damagings (*i.e.*, loss of property values) resulting from public projects are now compensable, Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943) (loss of ingress and access), others are still deemed consequential and not within the purview of the just compensation clause. See cases cited note 26 *infra*. *See generally* 2 P. NICHOLS, *supra* § 6.4432[2], at 508-19.

[21] Albers v. Los Angeles County, 62 Cal. 2d 250, 260, 398 P.2d 129, 135, 42 Cal. Rptr. 89, 95 (1965), *quoting* 18 AM. JUR. *Eminent Domain* § 139, at 766 (1939).

[22] Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885).

[23] Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895).

[24] Powers Farms v. Consolidated Irr. Dist., 19 Cal. 2d 123, 119 P.2d 717 (1941) (dictum); Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 P. 814 (1921) (opinion of Supreme Court en banc on denial of hearing).

[25] Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950).

[26] "Such cases as *People v. Symonds*, 54 Cal. 2d 855, involving loss of business and diminution of value by diversion of traffic, circuity of travel, etc., do not involve direct physical damage to real property, but only diminution in its enjoyment." Albers v. Los Angeles County, 62 Cal. 2d 250, 262, 398 P.2d 129, 136, 42 Cal. Rptr. 89, 96 (1965). *Accord*, People *ex rel.* Department of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960); People *ex rel.* Department of Pub. Works v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957). For a more detailed discussion concerning recovery of business profits under inverse liability, see Note, *The Unsoundness of California's Noncompensability Rule as Applied to Business Losses in Condemnation Cases*, 20 Hastings L.J. 675 (1969).

plained of, California tort law generally refers to foreseeability of injury as the test of whether the act or omission is sufficiently "proximate" that liability may attach.[27] Recognizing that "cause-in-fact" may, in strict logic, be traced in an endless chain of cause and effect relationships to exceedingly remote events, the reasonable foreseeability test is regarded as a useful mechanism for confining tort liability within rational limits.[28] But the premise of the *Albers* decision is that neither the harmful consequences of the county's road building project nor the intervening landslide which produced them were foreseeable; the landslide damage was compensable even though wholly unexpected and unforeseeable, and the result of a reasonably formulated and carefully executed plan of construction. Manifestly, the term "proximate cause" must have a special meaning in this context.

Although no decision has been found analyzing in depth the proximate cause concept where inverse liability obtains without fault, the language of several opinions suggests that it requires a convincing showing of a "substantial" cause-and-effect relationship which excludes the probability that other forces alone produced the injury.[29] For example, the decisions sometimes speak of the damage in such cases as being actionable if it is the "necessary or probable result" of the improvement,[30] or if "the immediate, direct, and necessary effect" thereof was to produce the damage.[31] Proof that the injurious consequences followed in the normal course of subsequent events, and were produced predominantly by the improvement, seems to be the focus of the judicial inquiry.[32]

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[27] *See* Akins v. Sonoma County, 67 Cal. 2d 185, 199, 430 P.2d 57, 65, 60 Cal. Rptr. 499, 507 (1967); Mosley v. Arden Farms Co., 26 Cal. 2d 213, 157 P.2d 372 (1945); Gibson v. Garcia, 96 Cal. App. 2d 681, 216 P.2d 119 (1950). It is not necessary that the extent of harm, or the exact manner in which it is incurred, be foreseeable. *E.g.*, Osborn v. Whittier, 103 Cal. App. 2d 609, 230 P.2d 132 (1951).

[28] *See* Premo v. Grigg, 237 Cal. App. 2d 192, 197, 46 Cal. Rptr. 683, 687 (1965); F. HARPER & F. JAMES, THE LAW OF TORTS § 20.5, at 1134-51 (1956); W. PROSSER, THE LAW OF TORTS § 51, at 320-21 (3d ed. 1964). The same results are reached in most but not all cases, by using foreseeability to limit the scope of duty rather than causation. *See* Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961).

[29] The term "substantial" is part of the vocabulary of tort law. *See* RESTATEMENT (SECOND) OF TORTS § 431, comment *a* at 433 (1965).

[30] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 607, 364 P.2d 840, 842, 15 Cal. Rptr. 904, 906 (1961); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 648, 42 Cal. Rptr. 34, 47 (1965).

[31] Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 470, 37 P. 375, 378 (1894). *See also* Conger v. Pierce County, 116 Wash. 27, 198 P. 377 (1921).

[32] Despite the generality of typical judicial language, *see* cases cited notes 30 & 31 *supra*, there appears to be an implication running through the deci-

The opinion in *Albers* rejects foreseeability as an element of the public entity's duty to pay just compensation when its improvement project directly sets in motion the natural forces (*i.e.*, landslide), which results in damage to private property. Foreseeability still may be a significant operative factor in determining liability in other types of cases, however, such as cases in which independently generated forces, not induced by the entity's actions, contribute to the injury. For example, the construction by a public entity of a culvert through a highway embankment is, by hypothesis, the result of foresight that flooding is likely to occur in the absence of suitable drainage. If the culvert proves to be of insufficient capacity during normally foreseeable storms, inverse liability obtains because the flooding, as a foreseeable consequence of the project, was proximately caused by the inherently defective design of the culvert.[33] But if at the same location flooding is produced by insufficiency of the culvert to dispose of the runoff of a storm of unprecedented and extraordinary size beyond the scope of human foresight, the project is regarded as not the proximate cause of damage that would not have resulted under predictable conditions.[34] In other words, where there is an intervening force which cuts off and supersedes the original chain of causation, and the public improvement itself was planned and constructed in a manner reasonably sufficient to cope with foreseeable conditions without causing private damage, then the public entity should not be held responsible for damage that results from the independent, intervening force.[35]

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sions that mere cause-in-fact, under the usual "but for" test, may not be sufficient unless accompanied by a showing that the injurious results were an inescapable or unavoidable consequence. Great Northern Ry. v. State, 102 Wash. 348, 173 P. 40 (1918); RESTATEMENT (SECOND) OF TORTS § 433, comment *d* (1965). Cause-in-fact in the usual sense must, of course, be shown. Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); Janssen v. Los Angeles County, 50 Cal. App. 2d 45, 123 P.2d 122 (1942).

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

[34] Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894); Dick v. Los Angeles, 34 Cal. App. 724, 168 P. 703 (1917) (dictum). To constitute an unforeseeable "act of God" which cuts off the chain of causation, however, the storm must be truly unforeseeable. The mere fact that it may be a heavy storm of unusual intensity or volume, or even set local records for magnitude, is not enough if heavy storms are expectable in the area. Southern Pac. Co. v. Los Angeles, 5 Cal. 2d 545, 55 P.2d 847 (1936).

[35] RESTATEMENT (SECOND) OF TORTS § 432(1) (1965). The fact that the storm was unprecedented and unforeseeable, however, does not absolve the public entity from liability for additional damage which would not have occurred in the absence of the improvement. Jefferis v. Monterey Park, 14 Cal. App. 2d 113, 57 P.2d 1374 (1936); Nahl v. Alta Irr. Dist., 23 Cal. App. 333,

Albers, under this analysis, is clearly distinguishable from the "act of God" cases. In *Albers*, the county road project was planned and constructed with reasonable care in light of all foreseeable future conditions; yet, due to unforeseeable circumstances, the project directly set in motion, and thereby substantially caused, the property damage for which compensation was sought. Liability was thus imposed, since, for the policy reasons summarized in the court's opinion, the just compensation clause supports and requires such an imposition where a direct casual connection between a public project and private property damage is established. In the "act of God" cases, however, the direct causal connection is *broken* by the intervention of an unforeseeable force of nature which, of itself, was *not* set in motion or produced by the entity's improvement undertaking. Absent such direct, or proximate causation, compensation is not required. On the other hand, to the extent that the intervention of independent natural forces is reasonably foreseeable, the entity's failure to incorporate adequate safeguards for private property into the improvement plan remains a proximate, although concurrent, cause of the resulting damage, and thus a basis of inverse liability.

B. Fault as a Basis of Inverse Liability

Most of the pre-*Albers* decisions in California sustaining inverse liability for unintended physical injury to property are predicated expressly on a fault rationale grounded upon foreseeability of damage as a consequence of the construction or operation of the public project as deliberately planned.[36] On the other hand, a substantial number of contemporaneous decisions seemingly affirm the proposition that negligence is not a material consideration if, in fact, a taking or damaging for public use has occurred.[37] This apparent inconsistency of basic doctrine, however, appears to be reconcilable.

The key to an understanding of the cases, it is believed, is the fact that negligence is only a particular kind of fault. What the courts appear to be saying, although somewhat inexactly perhaps, is that it is not necessary to inquire into the exact nature or quality of the fault upon which inverse liability is predicated where the facts demonstrate that some form of actionable fault does exist.[38] When the

137 P. 1080 (1913) (dictum). *See also* Stone v. Los Angeles County Flood Control Dist., 81 Cal. App. 2d 902, 185 P.2d 396 (1947).

[36] There are two leading decisions on this point. Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944).

[37] See cases cited note 13 *supra*.

[38] *See, e.g.*, Clement v. Reclamation Bd., 35 Cal. 2d 628, 641, 220 P.2d 897, 905 (1950), where it is stated that "[t]he construction of the public improvement is a deliberate action of the state or its agency in furtherance of public

probability of resulting damage is reasonably foreseeable, the adoption and non-negligent execution of a risk-prone plan of public improvement rationally can be deemed, with certain exceptions to be discussed, either: (a) negligence in adopting an inherently defective plan, or in failing to modify it or incorporate reasonable safeguards to prevent the anticipated damage;[39] (b) negligent "failure to appreciate the probability that, functioning as deliberately conceived, the public improvement . . . would result in some damage to private property;"[40] (c) "intentional" infliction of the damage by deliberate adoption of the defective plan with knowledge that damage was a probable result;[41] or (d) inclusion in the plan, whether negligently or deliberately, of features that violate a recognized legal duty that the public entity, like private persons similarly situated, owes to neighboring owners as a matter of property law.[42] But, in each instance, it is not materially significant whether the "inherently wrong" plan[43] was the product of inadvertence, negligent conduct, or delib-

purposes. If private property is damaged thereby the state or its agency must compensate the owner therefor, [citations] whether the damage was intentional *or* the result of negligence on the part of the governmental agency." (Emphasis added). In Reardon v. San Francisco, 66 Cal. 492, 505, 6 P. 317, 325 (1885), it was stated in conclusion that the California Constitution requires compensation to the owner "where the damage is directly inflicted, *or* inflicted by want of care and skill." (Emphasis added). Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1921) (opinion of Supreme Court en banc on denial of hearing) held that negligence was not essential to inverse liability, since "the care that may be taken in the construction of the public improvement which causes the damage is wholly immaterial to the right of the plaintiff to recover damage, if the improvement causes it."

39 *See* House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (alternative holding); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (alternative holding); Ward Concrete Co. v. Los Angeles County Flood Control Dist., 149 Cal. App. 2d 840, 309 P.2d 546 (1957); *cf.* W. PROSSER, THE LAW OF TORTS § 51 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 302 (1965).

40 Bauer v. Ventura County, 45 Cal. 2d 276, 286, 289 P.2d 1, 7 (1955) (alternative holding); *see* Kaufman v. Tomich, 208 Cal. 19, 280 P. 130 (1929); Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 33 (1957) (alternative holding).

41 Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961) (dictum); Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950).

42 Pacific Seaside Home for Children v. Newbert Protection Dist., 190 Cal. 544, 213 P. 967 (1923) (diversion of natural stream); Newman v. City of Alhambra, 179 Cal. 42, 175 P. 414 (1918) (obstruction of natural drainage); Steiger v. San Diego, 163 Cal. App. 2d 110, 329 P.2d 94 (1958) (collection and discharge of surface waters).

43 House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 391, 153 P.2d 950, 954 (1944) (Curtis, J.).

eration, for the same result—inverse liability—follows unless there is a sufficient showing of legal justification for infliction of the harm.

Some form of fault is thus a conspicuous characteristic of inverse liability in most California cases. The *Albers* decision does not purport to overthrow this general approach or to reject entirely the frequently expressed position that a public entity defendant "is not absolutely liable"[44] under the just compensation clause irrespective of its involvement in the plaintiff's damage. It merely recognizes an additional occasion for inverse liability by holding that lack of foreseeability does not *preclude* recovery for directly caused physical property damage which would have been recoverable under a fault rationale had that damage been foreseeable.[45]

C. Private Law as a Basis of Inverse Liability

The concept of "fault" supporting inverse liability has been further expanded by the absorbtion of principles of private law into the law of eminent domain. Inverse liability of public entities often has been sustained on the ground that the entity breached a legal duty which it owed to the plaintiff, with such duty being determined by reference to those legal axioms governing private individuals.[46] For example, a private person is under a duty to refrain from obstructing a natural stream so as to divert it upon his neighbor's lands.[47] Correspondingly, a public entity that obstructs or diverts a stream may be liable in inverse condemnation for the resulting damages.[48] Moreover, even when the entity is engaged in privileged conduct, such as the erection of protective works against flood waters, it, like private persons, must act reasonably and non-negligently.[49]

The initial use of private legal concepts as a framework for resolving inverse condemnation claims was a reflection, in part, of the judicial expansion of inverse condemnation as a means for avoiding the discredited doctrine of sovereign tort immunity.[50] The constitu-

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44 Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 607, 364 P.2d 840, 841, 15 Cal. Rptr. 904, 905 (1961).

45 See text accompanying notes 27-35 *supra*.

46 *See, e.g.*, Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (alternative holding).

47 Horton v. Goodenough, 184 Cal. 451, 194 P. 34 (1920).

48 Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950); Elliott v. Los Angeles County, 183 Cal. 472, 191 P. 899 (1920); Smith v. Los Angeles, 66 Cal. App. 2d 562, 153 P.2d 69 (1944).

49 Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (alternative holding).

50 *See generally* Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3.

tional mandate to pay just compensation when private property was "damaged for public use" provided a strong and ready peg upon which to hang a cloak of liability despite a claim of governmental immunity. But the need to establish rational limits to the apparently unqualified constitutional mandate suggested the use of rules of law limiting private tort liability as analogues for denying inverse liability in similar situations. Not unexpectedly, then, the constitutional inverse condemnation clause came to be thought of as merely a waiver of governmental immunity, and an authorization for a self-executing remedy which the injured property owner would not otherwise have had against the state and its agencies.[51] Moreover, as the edifice of governmental immunity began to crumble beneath the weight of exceptions admitted by judicial decisions and occasional legislation, a considerable degree of overlapping of inverse and non-immune tort liabilities became commonplace.[52] Plaintiffs often sued alternatively on inverse and tort theories, with considerable success,[53] thereby confirming the notion that inverse condemnation was merely a remedy to enforce substantive standards found in the law of private torts.

The *Albers* decision, of course, qualified this conception by reaffirming the original position that inverse liability has an independent substantive content which obtains even when private tort liability does not.[54] Moreover, even before *Albers*, the underlying premise of the remedy approach had been largely removed by the judicial abrogation of sovereign immunity.[55] Thereafter, in California, as in a number of other states, the old immunity rule was supplanted by a comprehensive statutory system of governmental tort liability that was in certain respects broader and in other respects narrower than its private counterparts.[56] But while the legislature acted to divorce

[51] *See* Bauer v. Ventura County, 45 Cal. 2d 276, 282-83, 289 P.2d 1, 5 (1955): "Section 14 [of article I], however, is designed not to create new causes of action but only to give the private property owner a remedy he would not otherwise have against the state for the unlawful dispossession, destruction or damage of his property. . . . The effect of section 14 is to waive the immunity of the state where property is taken or damaged for public purposes."

[52] *See, e.g.*, Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) where the liability was affirmed on the alternate grounds of inverse condemnation, nuisance, and statutory liability for dangerous condition of public property.

[53] Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965).

[54] Albers v. Los Angeles County, 62 Cal. 2d 250, 260, 398 P.2d 129, 135, 42 Cal. Rptr. 89, 95 (1965).

[55] Judicial abrogation of sovereign immunity had taken place only four years prior to the *Albers* decision. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[56] California Tort Claims Act of 1963, CAL. GOV'T CODE §§ 810-95.8; A.

governmental tort liability from its inconvenient ties with private tort liability, no similar changes were made with respect to inverse liabilities. As a result, to the extent that the legal principles applied in inverse condemnation litigation remain tied to private tort law analogies, a significant incongruity and source of confusion can be observed between the scope of governmental tort and inverse liabilities. One conspicuous illustration is the different consequences flowing from defects in the plan or design of public improvements, which on private law principles support *inverse* liability,[57] but which, under present statutory provisions, ordinarily provide no basis for governmental *tort* liability.[58]

D. Damnum Absque Injuria

Some mention should also be made here of those situations where, irrespective of gounds for inverse liability under the above mentioned theories and principles, the injury suffered by the property owner is nevertheless held to be *damnum absque injuria.* In California, two lines of decisions recognize that public entities are privileged, in certain situations, to inflict physical damage upon private property for a public purpose without incurring inverse liability. In effect, these cases establish two judicially-created exceptions to the otherwise unqualified language of the constitutional command that just compensation be paid.

(1) *The "Police Power" Cases*

In sustaining the liability of Los Angeles County for landslide damage in the *Albers* case, the Supreme Court explicitly distinguished "cases . . . like *Gray v. Reclamation District No. 1500* . . . where the court held the damage noncompensable because inflicted in the proper exercise of the police power."[59] In *Gray*,[60] plaintiffs' lands were

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VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY (Cal. Cont. Educ. Bar ed. 1964).

[57] *E.g.*, Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955) (negligent improvement of drainage ditch by raising of bank); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (negligently designed culverts).

[58] *See* CAL. GOV'T CODE § 830.6, where public entities are exonerated from tort liability for personal injuries caused by defective plan or design of public improvements if the design or plan could reasonably have been approved by responsible public officials. This immunity has been given a broad interpretation. Becker v. Johnston, 67 Cal. 2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967); Cabell v. California, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967); *see* Note, *Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*, 19 HASTINGS L.J. 584 (1968).

[59] Albers v. Los Angeles County, 62 Cal. 2d 250, 262, 398 P.2d 129, 136, 42 Cal. Rptr. 89, 96 (1965).

[60] Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917).

threatened with temporary inundation from Sacramento River flood waters due to a partially completed system of levees being built by the defendant reclamation district. In the past, these flood waters had spread out harmlessly over lower lands, leaving the plaintiffs' property unharmed. In reversing an injunction against the maintenance of the levees, the court concluded that any damage sustained by the plaintiffs would be the consequence of a proper exercise of the police power for which the district was not liable.[61] As an independent alternative ground of decision, it was determined that construction of the district's levees constituted the exercise of a legal right to protect the district's lands against the "common enemy" of escaping flood waters, and for that reason also was noncompensable.[62] The latter ground alone adequately supported the result on appeal; but the opinion discusses, at some length, the scope of the "police power" rationale.

Briefly summarized, *Gray* reasons that (1) governmental flood control, navigational improvement, and reclamation work is "referable to the police power";[63] (2) damage resulting from a legitimate exercise of the police power is noncompensable, provided the "proper limits" of that power have not been exceeded;[64] and (3) the balance of interests relating to the facts at hand required the conclusion that the damage in question was noncompensable under this test.[65] The factual elements cited as persuasive of this conclusion included the temporary nature of the flooding complained of; the fact that future flooding would be eliminated as soon as the balance of the project was completed; the availability to the plaintiffs of the right of self-protection under the "common enemy" rule; the "vast magnitude and importance" of the flood control project to the state as a whole; and the fact that the plaintiffs, like other landowners within the project area,

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[61] Similar conclusions had been reached on the basis of facts which occurred prior to adoption of the "or damaged" clause in the 1879 constitution. Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887); Green v. Swift, 47 Cal. 536 (1874).

[62] The common enemy doctrine is discussed at text accompanying notes 110-30 *infra*.

[63] Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 638, 163 P. 1024, 1031 (1917).

[64] "[W]hether in any given instance, as in this instance, the proper limits of the police power have been exceeded, with the result that unlawful confiscation or damage is worked, remains still a question for consideration. . . . Always the question in each case is whether the particular act complained of is without the legitimate purview and scope of the police power. If it be then the complainant is entitled to injunctive relief or to compensation. If it be not, then it matters not what may be his loss, it is damnum absque injuria." *Id.*

[65] *Id.* at 645-46, 163 P. at 1034.

would derive substantial long-term benefits from the abatement of flood damage and the improvement of navigation which completion of the project would assure.[66]

Manifestly, *Gray* does *not* stand for the proposition that property damage caused by a public improvement based upon the police power is necessarily *damnum absque injuria.* It suggests, at most, that judicial classification of the project as an exercise of the "police power" adds persuasiveness to the public interest which must be weighed against private detriment in adjudicating compensability. The very term "police power" is inherently undefinable.[67] Its semantic role in the present context is to serve only as a shorthand expression denoting the assertion of governmental power to advance public health, safety, and welfare in a qualitatively substantial sense. The interests represented by these public objectives simply outweighed those asserted by the property owners in *Gray.* Unfortunately, loose language in the opinion,[68] when taken out of context, fails to convey a correct impression of the actual holding, a defect also perpetuated by some later decisions fully reconcilable on their facts.[69]

The implications of the "police power" exception postulated in *Gray* were subjected to thorough reconsideration by the Supreme

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66 *Id.*

67 *See* Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915), where it was stated that "we are dealing with one of the most essential powers of government—one that is the least limitable."; *cf.* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962), where it was stated that "[t]he term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness' this Court has generally refrained from announcing any specific criteria." *See generally* Havran, *Eminent Domain and the Police Power*, 5 NOTRE DAME LAW. 380 (1930); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

68 The court's police power discussion in *Gray* relies heavily upon decisions involving the noncompensability of losses of value resulting from police regulations, rather than cases like *Gray* itself, in which physical damage or destruction was in issue. The principal cases discussed include Hadacheck v. Sebastian, 239 U.S. 394 (1915) (decrease in exploitation value due to land-use regulation); Chicago & Alton Ry. v. Tranbarger, 238 U.S. 67 (1915) (regulation requiring construction of drainage culverts by railroad at its own expense); Chicago B. & Q. Ry. v. Illinois, 200 U.S. 561 (1906) (requirement that railroad deepen, widen, and bridge any natural watercourse crossing its right-of-way). The opinion seems to be oblivious to the distinction, clearly recognized as a significant one in more recent times, between property value diminution unaccompanied by physical invasion and losses caused by tangible injury to or interference with use or enjoyment of property. *Compare* United States v. Causby, 328 U.S. 256 (1946) *with* Goldblatt v. Hempstead, 369 U.S. 590 (1962).

69 *See, e.g.*, O'Hara v. Los Angeles County Flood Control Dist., 19 Cal. 2d 61, 119 P.2d 23 (1941).

Court some twenty-five years later.[70] The factual context was quite different, however. Property owners were seeking inverse recovery for losses of property values (*i.e.*, non-physical damage) allegedly caused by highway improvements. Defendant public entities, relying upon dicta in *Gray* and its progeny, sought refuge in the doctrine that losses caused by an exercise of the police power were *damnum absque injuria*. The argument was rejected on the facts before the court, although the continued vitality of the doctrine, as properly conceived, was reaffirmed. The police power, said the court, "generally . . . operates in the field of regulation, except possibly in some cases of emergency. . . ."[71] The constitutional guarantee of the just compensation clause would be vitiated by a broader view; hence, "the police power doctrine cannot be invoked in the taking or damaging of private property in the construction of a public improvement where no emergency exists."[72] This verbal equivalency of "emergency" and "police power" is not inconsistent with the interest-balancing approach taken in *Gray*. It treats governmental action to cope with emergencies as entitled to judicial preference, although not necessarily controlling significance, in the interest-balancing process.

This judicial restatement of the police power theory was reaffirmed, and directly applied, in the 1944 decision of *House v. Los Angeles County Flood Control District*.[73] Physical damage attributed to levee improvements along the Los Angeles River, which allegedly caused flooding and erosion of the plaintiff's land, was held, on demurrer, to be recoverable in inverse condemnation. The court again cautioned that private property damage may be noncompensable when inflicted by government "under the pressure of public necessity and to avert impending peril."[74] But the plaintiff had alleged that the improvements in question were constructed negligently, pursuant to a plan which was contrary to good engineering practice. From the pleadings, it was apparent that the "defendant district, with time to exercise a deliberate choice of action in the manner of its installation of the river improvements, followed a plan 'inherently wrong' and thereby caused needless damage" to the plaintiff's property.[75] *Need-*

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[70] Rose v. California, 19 Cal. 2d 713, 123 P.2d 505 (1942). *See also* People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).

[71] Rose v. California, 19 Cal. 2d 713, 730, 123 P.2d 505, 515 (1942).

[72] *Id.* at 730-31, 123 P.2d at 516.

[73] 25 Cal. 2d 384, 153 P.2d 950 (1944); *accord*, Smith v. Los Angeles, 66 Cal. App. 2d 562, 153 P.2d 69 (1944).

[74] House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 391, 153 P.2d 950, 953 (1944). *See also* Archer v. Los Angeles, 19 Cal. 2d 19, 24, 119 P.2d 1, 4 (1941).

[75] House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 392, 153 P.2d 950, 954 (1944). O'Hara v. Los Angeles County Flood Control Dist.,

less damage is not damage required by the public necessity that motivates the exercise of the police power. Thus, a cause of action for inverse condemnation was stated since "the principles of nonliability and *damnum absque injuria* are not applicable when, in the exercise of the police power, private, personal and property rights are interfered with, injured or impaired in a manner or by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare."[76]

The *House* approach has been followed consistently in later decisions. Thus, in the absence of a compelling emergency, the police power doctrine will not shield a public entity from inverse liability where physical damage to private property could have been avoided by proper design, planning, construction and maintenance of the improvement.[77] The kind of emergency which will preclude inverse liability is, moreover, narrowly circumscribed. Illustrations given in the *House* opinion itself are limited to "the demolition of all or parts of buildings to prevent the spread of conflagration, or the-destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized."[78] In the generality of situations within the

19 Cal. 2d 61, 119 P.2d 23 (1941), was distinguished upon the ground that the plaintiff there had failed to allege negligence.

[76] House v. Los Angeles Flood Control Dist., 25 Cal. 2d 384, 392, 153 P.2d 950, 954 (1944). This position had the explicit concurrence of four members of the court. Mr. Justice Traynor, with Mr. Justice Edmonds concurring, wrote a separate opinion reaching the same result, but on the ground that the plaintiff's complaint adequately alleged a negligent and unprivileged diversion of water flowing in a natural channel. Agreement with the majority view of the police power, however, was indicated by this statement: "Barring situations of immediate emergency, neither the property law nor the police power of the state entitles a governmental agency to divert water out of its natural channel onto private property." *Id.* at 397-98, 153 P.2d at 957. A second concurring opinion was written by Mr. Justice Carter. He took the position that the majority had not gone far enough in recognizing inverse compensability for property damage resulting from public improvements; but he agreed in principle with what he regarded as a "commendable step" in the right direction. *Id.* at 398, 153 P.2d at 957. On limiting the scope of the police power doctrine the court was essentially unanimous.

[77] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961) (dictum); Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); Ward Concrete Co. v. Los Angeles County Flood Control Dist., 149 Cal. App. 2d 840, 309 P.2d 546 (1957); Veteran's Welfare Bd. v. Oakland, 74 Cal. App. 2d 818, 169 P.2d 1000 (1946). Although some of the cases intimate that the rule is limited to instances of damage resulting from defective design or construction, the *Bauer* case squarely holds that it obtains also with respect to a defectively conceived plan of maintenance and operation as distinguished from routine negligence in carrying out an otherwise proper plan. Bauer v. Ventura County, *supra* at 285, 289 P.2d at 7.

[78] House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 391,

purview of the present article, it seems evident that the police power exception is of negligible significance.

(2) *The "Legal Right" Cases*

Returning to the aforementioned analogies to private law, a second justification for denying compensation for physical damage caused by public improvements is adduced. When a private person would be legally privileged to inflict like damage without tort liability, a public entity also has a "legal right" to do so without obligation to pay just compensation.[79] By hypothesis, such damage does not constitute the violation of any right possessed by the injured party.[80] This rule, which is reaffirmed in *Albers*,[81] has been applied to deny inverse liability in a variety of situations. Examples include cases involving damages caused by public improvements designed to accelerate the flow of a natural watercourse,[82] control the overflow and spread of flood waters,[83] and collect and discharge surface storm waters through natural drainage channels.[84]

The rationale of these "legal right" cases, however, does not imply that the absence of a cause of action against a private person necessarily or invariably precludes a claim for inverse compensation against the state. Broad statements in several decisions, purporting to so declare, were expressly disapproved in the *Albers* case as stating the

153 P.2d 950, 953 (1944). The problem of inverse liability for deliberate destruction of private property in the kinds of situations referred to by the court is discussed in Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968).

79 *See* Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941); San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920); Kambish v. Santa Clara Valley Water Conservation Dist., 185 Cal. App. 2d 107, 8 Cal. Rptr. 215 (1960).

80 *See, e.g.*, Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 608, 364 P.2d 840, 842, 15 Cal. Rptr. 904, 906 (1961): "[I]f a property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14 [of article I]." *Accord*, Bauer v. Ventura County, 45 Cal. 2d 276, 282-83, 289 P.2d 1, 5 (1955).

81 Albers v. Los Angeles County, 62 Cal. 2d 250, 261-62, 398 P.2d 129, 135-36, 42 Cal. Rptr. 89, 95-96 (1965). For a recent application of the "legal right" approach, *see* Joslin v. Marin Muni. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).

82 San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920).

83 Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917) (alternative ground); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887) (alternative ground).

84 Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941).

rule "much more broadly than required by the facts."[85] The court in *Albers*, in fact, expressly "assumed" that a private person in the position of the defendant county would *not* be liable.[86] That assumption, however, was based on findings of fact that denied the existence of any fault whatsoever, a normal prerequisite to private tort liability in all but certain exceptional situations.[87] It was not based on the premise—which is at the root of the "legal right" cases—that the defendant was legally *privileged* to inflict the particular injury. The court's conclusion in *Albers* thus represents an interpretation of the just compensation clause of the constitution as imposing a broader range of public responsibility than the law of private torts.

II. Scope of Inverse Liability in California

The foregoing discussion was intended to be merely a preliminary introduction to the basic doctrinal threads of inverse liability. The interweaving of these different theoretical strands into the finished tapestry that is inverse condemnation law is revealed only by a closer examination of the entire decisional pattern. For convenience, the cases in this section are grouped into four categories having similar factual characteristics. First, the water damage cases, probably the single most prolific source of inverse litigation, are examined. Second are cases dealing with physical disturbance of site stability by landslides, loss of lateral support, and like causes. The third group of cases involves the physical deprivation of advantageous conditions associated with land ownership, such as loss of water supply, annual accretions, or potability of water (*i.e.*, water pollution). Finally, decisions relating to miscellaneous forms of temporary or "one-time" physical injury to property are reviewed.

A. Water Damage

A significant feature of the inverse condemnation decisions dealing with property damage caused by water—whether it be damage due to flooding, soaking, silting, erosion, or hydraulic force—is the tendency of the courts to rely upon the rules of private water law. Although the facts do not always lend themselves to this approach, inverse liability of public agencies is determined in the main by the peculiarities of private law rules governing interference with "sur-

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85 Albers v. Los Angeles County, 62 Cal. 2d 250, 260, 398 P.2d 129, 135, 42 Cal. Rptr. 89, 95 (1965).

86 *Id.* at 262 n.3, 398 P.2d at 136 n.3, 42 Cal. Rptr. at 96 n.3.

87 *See generally* W. PROSSER, THE LAW OF TORTS 506-44 (3d ed. 1964). The court in *Albers* found it unnecessary to consider whether liability without fault could be supported by private law principles as applied to the facts before it.

face waters," "flood waters," and "stream waters."[88] This judicial disposition to blend the complex rules of water law with those governing inverse liability ordinarily is defended on the ground that public entities, in the management and control of their property, should not be subjected to different or more onerous rules of liability than private persons similarly situated.[89] A review of the cases, however, suggests that treating public agencies as if they were private individuals, for the purpose of applying rules of water law, often has proved unsatisfactory and confusing. In a number of situations, therefore, the courts have departed from the strict letter of the private rules where overriding policy reasons have been perceived for according special treatment to public agencies.

(1) *Surface Water*

Water that is "diffused over the surface of the land, or contained in depressions therein, and resulting from rain, snow, or which rises to the surface in springs" is classified as surface water.[90] Private liability for interference with surface water is governed by a wide range of diverse rules throughout the United States, each replete with its own variations.[91] The so-called common law or "common enemy" doctrine accepted by many states, under which each landowner is privileged to fend off surface waters as he sees fit, without regard to the consequences for his neighbors, generally has been rejected by California decisions.[92] Instead, the "civil law rule," which recognizes a servitude of natural drainage as between adjoining lands and postulates liability for interference therewith, has been the traditional California approach. This has been true not only in cases involving private litigants[93] but also in those dealing with public entities in inverse condemnation actions.[94] Under this rule, the duty of both upper

[88] *See generally* David, *Municipal Tort Liability in California (pt. 4)*, 7 S. CAL. L. REV. 295 (1934).

[89] Womar v. Long Beach, 45 Cal. App. 2d 643, 114 P.2d 704 (1941).

[90] Keys v. Romley, 64 Cal. 2d 396, 400, 412 P.2d 529, 531, 50 Cal. Rptr. 273, 275 (1966); *see* H. TIFFANY, REAL PROPERTY, 740 (3d ed. 1939); RESTATEMENT OF TORTS § 846 (1939).

[91] *See* Kinyon & McClure, *Interferences With Surface Waters*, 24 MINN. L. REV. 891 (1940).

[92] *See* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966). *But see* Lampe v. San Francisco, 124 Cal. 546, 57 P. 461 (1899).

[93] LeBrun v. Richards, 210 Cal. 308, 291 P. 825 (1930); Ogburn v. Connor, 46 Cal. 346 (1873).

[94] Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941); Shaw v. Sebastopol, 159 Cal. 623, 115 P. 213 (1911) (dictum); Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894) (dictum); Corcoran v. Benicia, 96 Cal. 1, 30 P. 798 (1892); Andrew Jergens Co. v. Los Angeles, 103 Cal. App. 2d 232, 229 P.2d 475 (1951).

and lower landowners is to leave the flow of surface water undisturbed.

In the recent important decision in *Keys v. Romley*,[95] the Supreme Court, after careful reconsideration of the competing rules and their supporting policies, reaffirmed California's acceptance of the civil law rule. This rule, the court observed, was consistent with the normal expectation that buyers should take land subject to the burdens of natural drainage. It also had the advantage of greater predictability than the common law rule, and correspondingly diminished the opportunity for litigation. On the other hand, a rigid application of the civil law rule might inhibit property development, since improvements frequently would cause a change in the drainage pattern and thus invite potential liability, especially in urban areas. The court concluded, therefore, that the application of the civil law rule must be governed by a test of reasonableness, judged in light of the circumstances of each case. "No party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability."[96]

Under this modified civil law rule, the issue of reasonableness is "a question of fact to be determined in each case upon a consideration of all the relevant circumstances . . . ."[97] Factors to be taken into account include the extent of the damage, the foreseeability of the harm, the actor's purpose or motive, and the relative utility of the actor's conduct as compared with the gravity of the harm caused by the alteration of surface water flow. In this balancing of interests, said the court,

> [i]f the weight is on the side of him who alters the natural watercourse, then he has acted reasonably and without liability; if the harm to the lower landowner is unreasonably severe, then the economic costs incident to the expulsion of surface waters must be borne by the upper owner whose development caused the damage. If the facts should indicate both parties conducted themselves reasonably, then courts are bound by our well-settled civil law rule [and the upper landowner who changed the drainage pattern is liable for the resulting injuries].[98]

Although the *Keys* decision involved only private landowners, presumably it affects public entities as well, since inverse liability actions based on interference with surface waters generally have been resolved in the past by a relatively strict application of the civil law rule. Obstructing the flow of surface waters by a street improvement

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95 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966). *See also* Pagliotti v. Aquistapace, 64 Cal. 2d 873, 412 P.2d 538, 50 Cal. Rptr. 282 (1966).

96 Keys v. Romley, 64 Cal. 2d 396, 409, 412 P.2d 529, 536, 50 Cal. Rptr. 273, 280 (1966).

97 *Id.* at 410, 412 P.2d at 537, 50 Cal. Rptr. at 281.

98 *Id.*

and thereby causing flooding of lands that otherwise would not have been injured has been held actionable on this rationale.[99] A public entity that gathered surface waters together and discharged them upon lower lands with increased volume or velocity by a drainage system which did not conform to the natural drainage pattern was likewise liable.[100] Similarly, public entities have been held not privileged to collect surface waters by the paving of streets and, without providing adequate drains, by conducting them to a low point where they are cast in unusual quantities upon private property that otherwise would not be flooded.[101] But if the gathered waters were discharged into a natural watercourse that was their normal means of drainage, lower owners injured because the channel was inadequate to handle the increased flow were held to have no recourse.[102]

The courts generally applied the civil law rule in a somewhat mechanical manner, apparently without weighing the competing interests identified as relevant to the new rule of reason. It is possible that different results might have been reached had the balancing process been used. For example, the construction of a drainage system by an upper improver that discharges surface waters upon adjoining property in a concentrated stream, where no other feasible alternative is available, may be reasonable and, if relatively slight harm results, noncompensable under the rule in *Keys v. Romley*.[103] Conversely, the gathering of surface waters into a system of impervious storm drains which follow natural drainage routes may result in greatly increased volume, velocity and concentration of water, and

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[99] Conniff v. San Francisco, 67 Cal. 45, 7 P. 41 (1885). *See also* Stanford v. San Francisco, 111 Cal. 198, 43 P. 605 (1896); Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894) (dictum).

[100] Inns v. San Juan Unified School Dist., 222 Cal. App. 2d 174, 34 Cal. Rptr. 903 (1963); Callens v. Orange County, 129 Cal. App. 2d 255, 276 P.2d 886 (1954).

[101] Steiger v. San Diego, 163 Cal. App. 2d 110, 329 P.2d 94 (1958); Andrew Jergens Co. v. Los Angeles, 103 Cal. App. 2d 232, 229 P.2d 475 (1951); Farrell v. Ontario, 39 Cal. App. 351, 178 P. 740 (1919).

[102] Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941). A mere swale that serves as a natural route for escaping surface waters, but which does not have fixed banks and channel bed, is not a watercourse under this rule. *See* Inns v. San Juan Unified School Dist., 222 Cal. App. 2d 174, 34 Cal. Rptr. 903 (1963); Steiger v. San Diego, 163 Cal. App. 2d 110, 329 P.2d 94 (1958).

[103] *See* Pagliotti v. Aquistapace, 64 Cal. 2d 873, 412 P.2d 538, 50 Cal. Rptr. 282 (1966), where the trial court's judgment enjoining the defendant from damming off the discharge of surface waters from the plaintiff's paved parking lot, where no other feasible means of disposal existed, was reversed for reconsideration under the modern "reasonableness" test. The dictum suggested that the same result may be found proper on remand after balancing the interests. Earlier cases on analogous facts have generally imposed liability. See notes 100-01 *supra*.

thus may constitute an unreasonable method for disposing of such water when weighed against the seriousness of the resulting harm to lower landowners whose property is damaged as a result.[104]

The inverse condemnation cases decided prior to *Keys* were not entirely consistent, however; some departed somewhat from the strict letter of the civil law rule. For example, a few decisions advanced the view that interferences with the flow of surface waters would not be a basis of inverse liability where the obstruction was erected in the exercise of the police power.[105] Other like decisions, reflecting judicial concern that the development of an adequate system of public streets and highways not be deterred,[106] tended to relieve public entities from liability when they blocked the ordinary discharge of

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[104] *Compare* Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941) *with* Inns v. San Juan Unified School Dist., 222 Cal. App. 2d 174, 34 Cal. Rptr. 903 (1963). *Inns* held that the district was inversely liable for the discharge of surface waters into a swale through a 28-inch concrete pipe. It was stated to the contrary in *Archer* that "[a] California landowner . . . may discharge [surface waters] *for a reasonable purpose* into the stream into which they naturally drain without incurring liability for damage to lower land caused by the increased flow of the stream". Archer v. Los Angeles, *supra* at 26-27, 119 P.2d at 6 (emphasis added). In other states, inverse liability has been imposed in similar fact situations without regard for fault. *See, e.g.*, Lucas v. Carney, 167 Ohio St. 416, 149 N.E.2d 238 (1958); Snyder v. Platte Valley Pub. Power & Irr. Dist., 144 Neb. 308, 13 N.W.2d 160 (1944).

[105] *See* O'Hara v. Los Angeles County Flood Control Dist., 19 Cal. 2d 61, 63-64, 119 P.2d 23, 24 (1941): "In the present case the plaintiffs would . . . have a cause of action against a private person who obstructed the flow of surface waters from their land [in the manner that has been alleged]. A governmental agency, however, in constructing public improvements such as streets and highways, may validly exercise its 'police power' to obstruct the flow of surface waters not running in a natural channel without making compensation for the resulting damage . . . . The defendant therefore is under no obligation to compensate for the damage caused by the obstruction;" Callens v. Orange County, 129 Cal. App. 2d 255, 276 P.2d 886 (1954) (dictum) (same effect as *O'Hara*). As noted above, text accompanying notes 70-78 *supra*, the police power rationale has been modified substantially by decisions subsequent to *O'Hara*.

[106] *See, e.g.*, Lampe v. San Francisco, 124 Cal. 546, 57 P. 461, 1001 (1899). The question whether street improvements represent a sufficiently urgent public interest to justify inroads upon the constitutional guarantee of just compensation for "damage" to private property appears not to have been considered fully in any of the surface water decisions. *But see* Milhous v. Highway Dep't, 194 S.C. 33, 8 S.E.2d 852 (1940), where it was said that the constitutional property interest prevails without regard for private liability rules. This required a holding of state liability for obstructing surface waters notwithstanding the "common enemy" rule under which private obstruction would be nonactionable. Loss of direct access, however—an intangible detriment often far less damaging than flooding—is regarded as compensable when caused by street improvements. Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).

surface waters and caused flooding of private lands where such action was necessary for the grading and paving of streets.[107] These decisions seem to imply a judicial balancing of interests, similar to the process required by the *Keys* case, but with the results formulated in different terminology.[108] The label, "police power," for example, assimilates value judgments regarding the importance and social merit of the particular government conduct that would be appropriate under the *Keys* test.

It is thus possible to speculate that the *Keys* decision may not fully have impaired the authority of all the earlier surface water decisions; but such conjecture is a flimsy basis for prediction. It is probable, however, that future cases in this area will be resolved by a balancing of interests rather than by the mechanical application of arbitrary rules. The principal uncertainties appear to revolve around the degree of weight that will be assigned by the courts to the public interest objectives behind governmental improvement projects, and the extent to which a review of the reasonableness of the governmental plan or design that exposed the owner's land to the risk of surface water damage will be undertaken by these courts.[109]

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[107] Corcoran v. Benicia, 96 Cal. 1, 30 P. 798 (1892); Dick v. Los Angeles, 34 Cal. App. 724, 168 P. 703 (1917) (dictum). *See also* Womar v. Long Beach, 45 Cal. App. 2d 643, 114 P.2d 704 (1941) (*semble*). Surface waters flowing in a natural or artificial channel, however, cannot be obstructed with impunity where the result is to cast them upon lands which normally would not have received them. Newman v. Alhambra, 179 Cal. 42, 175 P. 414 (1918); Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143 (1900); Conniff v. San Francisco, 67 Cal. 45, 7 P. 41 (1885); Weisshand v. Petaluma, 37 Cal. App. 296, 174 P. 955 (1918).

[108] The opinion in O'Hara v. Los Angeles County Flood Control Dist., 19 Cal. 2d 61, 119 P.2d 23 (1941), for example, intimates that construction of public improvements along a stream "for purposes of flood control is . . . essential to the public health and safety" and for that reason outweighs the private property interest at stake. *Id.* at 63, 119 P.2d at 24. Corcoran v. Benicia, 96 Cal. 1, 30 P. 798 (1892), suggests that the interest of a landowner in property below official street grade is subordinate to the public interest in grading and paving at grade, since any temporary injury due to impounding of surface waters may be alleviated by bringing the adjoining property up to grade. *Id.* at 4, 30 P. at 798. *See* Dick v. Los Angeles, 34 Cal. App. 724, 168 P. 703 (1917) (to the same effect as *Corcoran*). *See also* Stanford v. San Francisco, 111 Cal. 198, 43 P. 605 (1896), where inverse liability was affirmed for injury due to the flooding of property above the street grade as a result of street improvements. *Corcoran* was distinguished as a case where the owner of the property assumed the risk of flooding by building below the grade.

[109] *See* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966); text accompanying note 95 *supra*. The modified civil law rule adopted in *Keys* has been treated as applicable to inverse condemnation actions based on alleged damage from interference with surface waters. Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 868 (1968) (holding, under *Keys*, that burden of pleading and proving that plaintiff lower owner unreasonably failed to take

(2) *Flood Water*

"It is well established," said Justice Traynor, "that the flood waters of a natural watercourse are a common enemy against which the owner of land subject to overflow by those waters may protect his land by the erection of defensive barriers, and that he is not liable for damage caused to lower and adjoining lands by the exclusion of the flood waters from his own property, even though the damage to other lands is increased thereby."[110] Governmental entities acting for landowners in a particular area likewise may provide flood protection against the common enemy without incurring inverse liability for resulting damages.[111] For the purpose of applying this rule, flood waters are deemed the extraordinary overflow of rivers and streams.[112] Although the term normally refers to waters overflowing the natural banks of a river, artificial banks or levees maintained over a substantial period of time are treated as natural banks where a community of property owners, in reliance upon their continued existence, has conformed thereto in its land-use activities and in the construction of improvements.[113]

The "common enemy" rule reflects judicial apprehension that property development would be stifled unless an individualistic view were taken by the law. "Not to permit an upper landowner to protect his land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement and condemn it to sterility and vacancy."[114] The rule, taken literally, contemplates that each landowner has a reciprocal right to protect his own land without regard for the consequences which his acts may visit upon others. However, no landowner may permanently stereo-

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precautions to avoid or reduce injury is upon the defendant state as upper owner).

[110] Clement v. Reclamation Bd., 35 Cal. 2d 628, 635-36, 220 P.2d 897, 901-02 (1950).

[111] *Id. See also* San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887). The common enemy rule, first announced in California in *Lamb*, was originally developed in English cases. *E.g.*, The King v. Commissioners, 8 B. & C. 355, 108 Eng. Rep. 1075 (K.B. 1828) (construction of groins by sewer commissioners to prevent erosion from ocean held privileged as protective measure against the "common enemy").

[112] H. Tiffany, Real Property § 740 (3d ed. 1939).

[113] Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962); Weck v. Los Angeles County Flood Control Dist., 80 Cal. App. 2d 182, 181 P.2d 935 (1947). *See also* Natural Soda Prods. Co. v. Los Angeles, 23 Cal. 2d 193, 143 P.2d 12 (1943); 1 S. Wiel, Water Rights in the Western States § 60, at 59 (3d ed. 1911).

[114] San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 401, 188 P. 554, 558 (1920).

type the condition of the river by erecting flood barriers adequate for the moment, and later seek to prevent others from putting up levees of their own that raise the water level and make the former works insufficient.[115] In addition, an important corollary of the rule recognizes that no liability is incurred merely because flood control improvements do not provide protection to all property owners.[116] Nor does the state, in undertaking to control floods, become an insurer of those lands which are given protection,[117] as there are practical limits to the degree of protection that can be provided.[118] In effect, the law recognizes that some degree of flood protection is better than none.

The "common enemy" rule, however, is not applied as an unlimited rule of privileged self-help. Mindful of the enormous damage-producing potential of defective public flood control projects, the courts have insisted that public agencies must act reasonably in the development of construction and operational plans so as to avoid unnecessary damage to private property.[119] Reasonableness, in this context, is not entirely a matter of negligence, but represents a balancing of public need against the gravity of private harm.[120] In an imminent emergency, for example, a reduction in stream level by the deliberate flooding of unimproved private lands in order to prevent substantial and widespread destruction of the entire community by otherwise uncontrolled flood waters may be regarded as a reasonable, and thus noncompensable, exercise of the police power.[121] But a per-

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[115] Jackson v. United States, 230 U.S. 1 (1913), *cited with approval in* Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917).

[116] Weck v. Los Angeles County Flood Control Dist., 80 Cal. App. 2d 182, 181 P.2d 935 (1947); Janssen v. Los Angeles County, 50 Cal. App. 2d 45, 123 P.2d 122 (1942); *cf.* United States v. Sponenbarger, 308 U.S. 256 (1939).

[117] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961).

[118] Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894) (no liability for damage resulting from inadequacy of culvert to drain waters from extraordinary and unforeseeable flood).

[119] House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944). The rule as to private owners is similar. *See, e.g.*, Weinberg Co. v. Bixby, 185 Cal. 87, 97, 196 P. 25, 30 (1921): "If the defendants merely fend the intruding [flood] waters from their own premises *in a reasonable and prudent manner*, they cannot be held responsible for the action of the stream in depositing more silt and debris either in the channel or on adjacent lands below than would have been done had it been permitted to spread over defendants' lands." (Emphasis added).

[120] Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962); *cf.* United States v. Sponenbarger, 308 U.S. 256 (1939); Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966).

[121] *See* Rose v. State, 19 Cal. 2d 713, 730, 123 P.2d 505, 515 (1942) (dictum); *cf.* Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617, 619-23 (1968) ("denial destruction" to prevent conflagration).

manent system of flood control that deliberately incorporates a known substantial risk of overflow of flood waters upon private property that in the absence of the improvements would not be harmed exceeds "the humane limits of the police power" and constitutes a compensable taking of an easement for flowage.[122] The "common enemy" rule likewise does not permit a public entity to establish a system of improvements designed to divert both actual flood waters and natural stream waters out of their natural channel upon property that otherwise would not have been inundated.[123] It is settled also that flood control improvements which are designed in accordance with a negligently conceived plan and which cause damage to private property while functioning as so conceived are a basis of inverse liability even though their object is to control the "common enemy," flood waters.[124]

The noticeable judicial tendency to reject an unqualified application of the "common enemy" rule may be attributed, in part, to the difficulty of making a sharp factual distinction between flood waters and other waters. For example, when a watercourse which has been improved by flood control measures overflows, it is not always an easy matter to decide whether the flooding resulted from legally privileged efforts to repel the "common enemy" or from an unprivileged diversion of natural stream water.[125] Another illustration of this difficulty is the well-known case of *Archer v. City of Los Angeles*,[126] in which the prevailing opinion explicitly predicates denial of liability for downstrewam flooding upon the privilege of upstream owners to deposit gathered surface waters into natural watercourses. Later decisions, however, have explained *Archer* as a case of non-liability un-

[122] Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 752, 23 Cal. Rptr. 428, 440 (1962).

[123] Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950).

[124] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961) (dictum); Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965); Weck v. Los Angeles County Flood Control Dist., 80 Cal. App. 2d 182, 181 P.2d 935 (1947) (dictum). Although inverse liability can be based upon a negligently conceived plan of maintenance or operation of a public improvement, Bauer v. Ventura County, *supra*, ordinary negligence in the course of routine operations will support only a possible tort recovery. *See* Kambish v. Santa Clara Valley Water Conser. Dist., 185 Cal. App. 2d 107, 8 Cal. Rptr. 215 (1960); Hayashi v. Alameda County Flood Control & Water Conser. Dist., 167 Cal. App. 2d 584, 334 P.2d 1048 (1959); Smith v. East Bay Mun. Util. Dist., 122 Cal. App. 2d 613, 265 P.2d 610 (1954).

[125] *Compare* Clement v. Reclamation Bd., 35 Cal. 2d 628, 648-51, 220 P.2d 897, 909-11 (1950) (Carter, J.) (dissenting opinion) *with* San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920). *See also* House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 397, 153 P.2d 950, 957 (1944) (Traynor, J.) (concurring opinion).

[126] 19 Cal. 2d 19, 119 P.2d 1 (1941).

der the "common enemy" rule governing flood waters.[127] But, apart from difficulties of classification, the trend also appears to represent a judicial conviction that the "common enemy" rule, unmodified by a test of reasonable conduct, would be an unacceptable basis for arbitrary disruption of rationally grounded expectations of private property owners. The courts have recognized that the magnitude of governmental projects often far exceeds the scope of flood protection works reasonably to be anticipated at the hands of neighboring private landowners.[128] A strict and literal assertion of the rule, therefore, if applied to government flood control projects, could well be disastrous to private interests. Accordingly, it has been said, "No court has ever so abused the 'common enemy' doctrine as to constitute it the common enemy of the riparian owner."[129] Finally, the modern approach appears to accept the fact that a rational ordering of duties and liabilities with respect to flood waters is better achieved by the balancing of interests represented in the varying circumstances of individual cases than by a more rigid and inflexible application of narrowly defined property rights.[130]

(3) *Stream Water*

The prevalence of natural watercourses[131] makes it inevitable that public improvements will affect the flow of stream waters in a variety of circumstances, causing flooding and erosion to private property. While early cases intimated that such consequences did not amount to a constitutional "taking,"[132] it is now accepted that injuries

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[127] *Compare* Archer v. Los Angeles, 19 Cal. 2d 19, 28, 119 P.2d 1, 6 (1941) ("evidence . . . shows clearly that the storm drains constructed by defendants either followed the channel of natural streams . . . or discharged into the creek surface waters which would naturally drain into it") *with* Clement v. Reclamation Bd., 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950) ("applicability of common enemy doctrine is set forth in Archer") *and* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 747, 23 Cal. Rptr. 428, 437 (1962) ("[i]n . . . Archer . . . no one was preventing plaintiff . . . from protecting his lands from floods [under the common enemy doctrine]").

[128] *See* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 751-52, 23 Cal. Rptr. 428, 439-40 (1962).

[129] *Id.*

[130] *See* Comment, *California Flood Control Projects and the Common Enemy Doctrine*, 3 STAN. L. REV. 361, 364-66 (1951); *cf.* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966).

[131] "[B]y a watercourse is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow." Horton v. Goodenough, 184 Cal. 451, 453, 194 P. 34, 35 (1920); *see* Inns v. San Juan Unified School Dist., 222 Cal. App. 2d 174, 34 Cal. Rptr. 903 (1963) (swale through which surface water normally drained held not a watercourse).

[132] *See* Green v. Swift, 47 Cal. 536 (1874).

of this kind, where shown to have been caused by public improvements,[133] can amount to a "damaging" for which just compensation must be paid.[134] The decisions appear to distinguish between: (a) governmental improvements that designedly divert stream waters onto private lands; (b) improvements that obstruct the stream and thus result in overflow and flooding of private lands; and (c) improvements that merely change the force of direction of the current with resulting erosion of channel banks.

As a general rule, "when waters are diverted by a public improvement from a natural watercourse onto adjoining lands the [public] agency is liable for the damage to or appropriation of such lands where such diversion was the necessary or probable result even though no negligence could be attributed to the installation of the improvement."[135] In such cases, the private property "is as much taken or damaged for a public use for which compensation must be paid as if it were condemned for the construction of a highway or school."[136] Permanently established artificial watercourses are treated like natural ones under this rule, whereby substantial reliance interests have been generated with the passage of time.[137]

Judicial acceptance of inverse liability without fault in diversion cases appears to reflect the strength of the interests of property owners who have acquired and developed land in justifiable reliance upon the continuance of existing watercourses as means of natural drainage.[138] The risk of damage from disturbance of the established stream

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[133] Causation often presents difficult problems of proof. *See, e.g.*, Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); Stone v. Los Angeles County Flood Control Dist., 81 Cal. App. 2d 902, 185 P.2d 396 (1947).

[134] *See* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (review of most of the important California decisions).

[135] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 607, 364 P.2d 840, 841, 15 Cal. Rptr. 904, 905 (1961) (dictum); Pacific Seaside Home for Children v. Newbert Protection Dist., 190 Cal. 544, 213 P. 967 (1923); Elliott v. Los Angeles County, 183 Cal. 472, 191 P. 899 (1920). *See also* Ghiozzi v. South San Francisco, 72 Cal. App. 2d 472, 164 P.2d 902 (1946) (dictum).

[136] Clement v. Reclamation Bd., 35 Cal. 2d 628, 637, 220 P.2d 897, 903 (1950). Cases in other states are generally in accord. *See, e.g.*, Lage v. Pottawattamie County, 232 Iowa 944, 5 N.W.2d 161 (1942); Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N.W.2d 781 (1960). *See also* Smith v. Los Angeles, 66 Cal. App. 2d 562, 153 P.2d 69 (1944).

[137] Clement v. Reclamation Bd., 35 Cal. 2d 628, 638, 220 P.2d 897, 903 (1950), in which it was held that the state may not "without liability tear out a man-made flood protection that has existed for sixty-two years to the lands of plaintiff upon which substantial sums have been expended in reliance upon the continuance of the protection."

[138] *See* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 751-52, 23 Cal. Rptr. 428, 439-40 (1962).

pattern is regarded as one that cannot be shifted with impunity to the property owner, even under a claim of exercise of the police power,[139] merely to promote the community welfare. The detrimental impact of the contrary rule in discouraging private property owners from making improvements apparently is regarded as too onerous to permit a withholding of just compensation. Analysis and weighing of the respective interests in the light of the particular facts before the court, however, is not characteristic of these decisions; the rule of liability for diverting stream waters is generally applied in a strictly formal fashion.[140]

Obstructing a natural or artificial[141] watercourse by the construction of a public improvement, on the other hand, ordinarily has been regarded as a basis of inverse liability only when some form of fault is established.[142] For example, the construction of a dam designed to store water which will foreseeably flood certain lands not directly condemned by the constructing agency constitutes a deliberate taking of those lands thereby inundated,[143] as well as of downstream water

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139 This assumes, of course, that no state of emergency existed. As the court stated in Smith v. Los Angeles, 66 Cal. App. 2d 562, 578, 153 P.2d 69, 78 (1944): "[S]imply because the district constructed the dikes in question for the purpose of flood control does not make it immune from liability for damage inflicted thereby upon the plaintiff. There was here no emergency requiring split-second action." If there had been such an emergency, the result would probably have been different. See text accompanying notes 72-78 *supra*.

140 *See, e.g.*, Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400 (1897); Guerkink v. Petaluma, 112 Cal. 306, 44 P. 570 (1896). In litigation growing out of the great Feather River flood of December 1955, the state was adjudged liable upon the basis of ambiguous findings of fact that a levee on the west side of the Feather River, in the planning and design of which the state had "participated," had "caused waters of the Feather River to be diverted onto Plaintiffs' property east of the Feather River and thus caused harm to Plaintiffs' property." Pedrozo v. State, No. 41265, Findings of Fact and Conclusions of Law ¶ 4 (Butte County Super. Ct., Cal., Jan. 30, 1967).

141 Artificial and natural watercourses are treated alike in the obstruction cases, apparently without regard for the length of existence of the artificial channel. *See, e.g.*, Newman v. Alhambra, 179 Cal. 42, 175 P. 414 (1918); Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143 (1900); *cf.* Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955). *See also* notes 113 & 137 *supra*.

142 *See, e.g.*, Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 603 (1961) (dictum recognized liability without fault for diversion of stream waters, but intimated that in other cases, including obstructions of watercourses, fault required); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (complaint held sufficient to state cause of action on ground of diversion, without fault, and alternatively, cause for negligent obstruction of stream waters).

143 United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Dickinson, 331 U.S. 745 (1947); Jacobs v. United States, 290 U.S. 13 (1933); Cotton Land Co. v. United States, 75 F. Supp. 232 (Ct. Cl. 1948); Brazos River Auth. v. Graham, 163 Tex. 167, 354 S.W.2d 99 (1961).

rights that are destroyed,[144] and is, therefore, a basis for inverse liability. The "fault" involved in this type of situation arises from the fact that the agency knew, or should have known, that these lands and interests would be taken, and yet had failed to provide compensation for these foreseeable "takings" through direct condemnation proceedings before the construction. Likewise, the construction, maintenance, or operation of drainage improvements according to a negligently conceived plan, which exposes private property to a substantial risk of damage by interfering with the flow of water therein, is actionable.[145] Again, the building of a street embankment across a known watercourse without providing culverts or other means of drainage, so that foreseeable back-up flooding occurs, requires payment of compensation.[146] Even if culverts are provided, inverse liability obtains if their design characteristics, contrary to sound engineering standards, are insufficient to allow the drainage of reasonably predictable volumes of water flowing in the stream from time to time.[147] Mere routine negligence in maintenance, however, such as the negligent failure to clear debris from an improved flood control channel, where the accumulation of such debris is not part of a deliberately conceived program for controlling the flow of storm waters, is not a basis of inverse liability, although it may support liability on a tort theory.[148]

The necessity for the pleading and proof of fault in the obstruction cases, while no fault is required for liability in the diversion cases, has caused a certain amount of confusion in the California case law. It is obvious that many kinds of stream obstructions may cause a

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[144] Dugan v. Rank, 372 U.S. 609 (1963); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950). *But see* Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).

[145] Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955), in which a negligent plan for the maintenance of a drainage ditch which contemplated deposit and non-removal of stumps, debris, and intersecting pipe which obstructed the flow of water, was held actionable on the inverse theory. *See* Baum v. Scotts Bluff County, 169 Neb. 816, 101 N.W.2d 455 (1960) (to the same effect as *Bauer*).

[146] Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143 (1900); Richardson v. Eureka, 96 Cal. 443, 31 P. 458 (1892); Jefferis v. Monterey Park, 14 Cal. App. 2d 113, 57 P.2d 1374 (1936); White v. Santa Monica, 114 Cal. App. 330, 299 P. 819 (1931). Cases in other states are generally in agreement. *See, e.g.*, Renninger v. State, 70 Idaho 170, 213 P.2d 911 (1950).

[147] Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965); Weisshand v. Petaluma, 37 Cal. App. 296, 174 P. 955 (1918).

[148] *Compare* Hayashi v. Alameda County Flood Control & Water Conser. Dist., 167 Cal. App. 2d 584, 334 P.2d 1048 (1959) (tort, but not inverse liability, for routine negligence in failing to clear debris) *with* Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955) (inverse liability obtained for defective plan which includes retention of debris).

diversion of stream waters, and, conversely, diversion normally requires an obstruction of some kind. Whether fault must be shown by the injured property owner thus depends, to some extent, upon how the facts are classified. A deliberate program intended to alter the course of a stream for a public purpose is ordinarily treated under the "diversion" rubric, while unintended flooding is usually attributed to a negligently planned project that creates an "obstruction."[149] The distinction, however, is not a sharply defined one, and plaintiffs have sometimes sought recovery alternatively on both theories while pleading the same facts.[150]

Regardless of the factual approach employed, inverse liability for interference with stream waters depends upon a showing of proximate causation. In the principal litigation against the State arising out of the virtual destruction of the town of Klamath in the great flood of December, 1964, for example, the trial court denied liability on the alternative grounds that any obstruction to the flow of water allegedly created by either an old bridge, or a partially completed new bridge, located near the townsite "did not constitute a substantial factor" in causing plaintiffs' damages,[151] and that in any event the damage was caused by the intervention of a superseding force consisting of an extraordinary and unprecedented storm.[152]

A third group of cases dealing with stream waters concerns the downstream consequences of natural channel improvement. For example, the narrowing and deepening of a natural watercourse and the construction of a concrete stream bed may increase greatly the total volume, velocity and concentration of water running in the channel by preventing absorption of stream waters and eliminating natural impediments to stream flow. This, in turn, would create a substantial risk of downstream damage due to overflow or intensified erosion of the stream banks. For policy reasons, centered upon the fear of discouraging upstream land development, this kind of channel improvement (at least insofar as downstream damage results from an increased volume of water) is not regarded as an actionable basis for inverse liability[153] unless it is constructed according to an in-

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149 *See* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (both theories held available under facts).

150 *Id. See also* Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965); Pedrozo v. State, No. 41265 (Butte County Super. Ct., Cal., Jan. 30, 1967) (ambiguous findings).

151 Crivelli v. State, No. 9142, Findings of Fact and Conclusions of Law ¶ 2 (Del Norte County Super. Ct., Cal., Aug. 4, 1966).

152 *Id.* ¶ 5. Public improvement design standards are not required to provide adequate capacity or strength for storms of unforeseeable magnitude. Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894); see notes 33-35 *supra.*

153 *See* Archer v. Los Angeles, 19 Cal. 2d 19, 27, 119 P.2d 1, 6 (1941); San

herently defective or negligently conceived plan.[154] Here again, however, classification of the facts plays a significant role. If the improvements are regarded as causing an alteration in the direction of force of the normal current within the channel, they may readily be thought of as having "diverted" the stream. This approach supports a holding of inverse liability without fault for resulting downstream erosion of the banks.[155] By describing the channel improvements as measures to fight off the common enemy of flood waters, however, attention is focused upon the issue of fault and the alleged defective nature of the improvement plan.[156] The result is to make liability *vel non* turn ostensibly upon the unarticulated premises that control the classification process, rather than upon a conscientious appraisal of the relativity of public advantage and private harm in the particular factual situation.

(4) *Other Escaping Water Cases*

The prevailing ambivalent approach, under which some water damage situations are exposed to a "liability without fault" rationale, while others require a showing of intentional or negligent fault, is observable also in cases that do not fit neatly into the foregoing categories. Damage resulting from the overflow of sewers, for example, is recoverable in inverse condemnation if the plaintiff establishes that the sewers were deliberately or negligently designed so as

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Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920). Although dictum in *San Gabriel Valley Country Club* suggests that nonliability attends an increase in both volume and velocity of downstream flow, the actual holding in both this case and in *Archer* is limited to damage resulting from increased volume only. This result may thus be consistent with the "common enemy" rule, under which individual efforts to stave off flood waters may increase downstream volume without incurring liability. The potential erosive effect of increased velocity, however, creates a hazard of greater destructive impact and possibly permanent devastation. Neither decision, it is submitted, should necessarily be taken as authoritative in the latter type of case.

[154] House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944).

[155] *See, e.g.*, Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895) (diversion of current by bridge abutment resulting in downstream erosion); *cf.* Green v. Swift, 47 Cal. 536 (1874) (not a "taking" under pre-1879 constitution). Cases in other states generally sustain inverse liability without fault in such cases. *See, e.g.*, Dickinson v. Minden, 130 So. 2d 160 (La. 1961); Tomasek v. State, 196 Ore. 120, 248 P.2d 703 (1952); Morrison v. Clackamas County, 141 Ore. 564, 18 P.2d 814 (1933); Conger v. Pierce County, 116 Wash. 27, 198 P. 377 (1921).

[156] Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962).

to be inadequate to accommodate the volume of sewage and storm waters reasonably foreseeable in their service area.[157] The element of fault as the basis of liability, however, is underscored by a corollary rule: inadequacy due to an unprecedented volume of water that could not reasonably be anticipated in the planning process constitutes no basis for inverse liability.[158]

On the other hand, there are also many decisions that flatly approve inverse liability for property damage caused by the seepage of water from irrigation canals, "with or without negligence."[159] The leading case to this effect involves a ruling of the District Court of Appeal that inverse liability for water seepage may be predicated upon a showing of negligent construction or maintenance by an irrigation district. On denying the district's petition for hearing, the Supreme Court, in a unanimous opinion, expressly disapproved the court's intimations as to the necessity of negligence.[160] Where the damage is "caused directly" by seepage from the district's canal, inverse liability obtains without any showing of fault: "In such cases the care that may be taken in the construction of the public improvement which causes the damage is wholly immaterial to the right of the plaintiff to recover damage, if the improvement causes it."[161] The sudden escape of water from a public entity's irrigation canal, however, has been held actionable only upon allegations and proof of defective design or operational plan.[162]

Under the cases, then, inverse liability for water that escapes from irrigation channels or other conduits is based sometimes on fault and obtains sometimes without fault; the choice of rule appears to be a function of classification of the facts, rather than the application of a consistent theoretical rationale. Liability without fault in these situa-

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[157] Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 33 (1957) (alternative ground). *See also* Mulloy v. Sharp Park Sanitary Dist., 164 Cal. App. 2d 438, 330 P.2d 441 (1958) *(semble)*.

[158] *See* Southern Pac. Co. v. Los Angeles, 5 Cal. 2d 545, 55 P.2d 847 (1936) (break in aquaduct—rule recognized but held inapplicable on facts). *See also* notes 33-35 *supra*.

[159] Powers Farms v. Consolidated Irr. Dist., 19 Cal. 2d 123, 126, 119 P.2d 717, 720 (1941) (dictum); Lourence v. West Side Irr. Dist., 233 Cal. App. 2d 532, 43 Cal. Rptr. 889 (1965); Hume v. Fresno Irr. Dist., 21 Cal. App. 2d 348, 69 P.2d 483 (1937); Ketcham v. Modesto Irr. Dist., 135 Cal. App. 180, 26 P.2d 876 (1933).

[160] Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1921) (opinion of Supreme Court on denial of hearing).

[161] *Id.* This statement is quoted approvingly in the recent case of Albers v. Los Angeles County, 62 Cal. 2d 250, 258, 398 P.2d 129, 133, 42 Cal. Rptr. 89, 93 (1965).

[162] Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 159 P.2d 674 (1945). *See also* Southern Pac. Co. v. Los Angeles, 5 Cal. 2d 545, 55 P.2d 847 (1936) (break in aquaduct caused by storm which was foreseeable).

tions appears in theory to be an application of the doctrine announced in the famous English case of *Rylands v. Fletcher*,[163] under which a landowner is strictly liable without fault for damage done to the property of others by the escape of substances with a mischief-producing capacity, such as water, collected and impounded upon his land for some "non-natural" purpose.[164] The theory, however, has little support in California decisional law, for the California courts appear to have rejected the *Rylands* doctrine as applied to escaping waters.[165] The use of water for irrigation purposes in a semi-arid state such as California, it is said, is not only a "natural" use of land but is useful and beneficial to a degree that should not be deterred by threat of strict liability.[166] Yet, as noted above, the same courts have displayed no reluctance in approving inverse liability for irrigation water seepage without regard for negligence,[167] and also, upon similar facts, regularly have imposed tort liability without fault on a nuisance theory.[168]

This seeming inconsistency of approach may possibly be reconcilable. An irrigation ditch built and maintained in a careful manner may, nonetheless, necessarily be located where natural conditions (*e.g.*, porous subsoil) make percolation or seepage a predictable risk

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163 L.R. 3 H.L. 330 (1868); *see* Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. PA. L. REV. 298, 373, 423 (1911).

164 Water seepage problems have been regarded as within the *Rylands* doctrine in certain jurisdictions. *See, e.g.*, Union Pac. R.R. v. Vale Irr. Dist., 253 F. Supp. 251 (D. Ore. 1966).

165 Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., 123 F. Supp. 720 (N.D. Cal. 1954) (collapse of cofferdams); Clark v. DiPrima, 241 Cal. App. 2d 823, 51 Cal. Rptr. 49 (1966) (water escaping from break in irrigation ditch); Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 159 P.2d 674 (1945) (sudden escape of water from irrigation ditch). The *Rylands* doctrine has been denied application to a case of water escaping from a private reservoir. Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 P. 766 (1920). *But see* Rozewski v. Simpson, 9 Cal. 2d 515, 71 P.2d 72 (1937), suggesting that the application of *Rylands* to some kinds of escaping water cases may be an open question. Liability without fault has been accepted in California decisions dealing with certain types of ultrahazardous activities. *See, e.g.*, Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948); Comment, *Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine*, 37 CALIF. L. REV. 269 (1949).

166 *See* Clark v. DiPrima, 241 Cal. App. 2d 823, 51 Cal. Rptr. 49 (1966).

167 See cases cited note 159 *supra*.

168 *See, e.g.*, Fredericks v. Fredericks, 108 Cal. App. 2d 242, 238 P.2d 643 (1951); Nelson v. Robinson, 47 Cal. App. 2d 520, 118 P.2d 350 (1941); Kall v. Carruthers, 59 Cal. App. 555, 211 P. 43 (1922); *cf.* Nola v. Orlando, 119 Cal. App. 518, 6 P.2d 984 (1932). Nuisance liability is a long-recognized exception to the doctrine of governmental tort immunity in California. *E.g.*, Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 333 (1957). It evolved principally from decisions grounded on inverse condemnation. Van Alstyne,

of the improvement.[169] Proof of fault may then be regarded as immaterial from either an inverse liability or a nuisance law viewpoint, because the existence of damage caused by the irrigation improvement supports an inference, as a matter of law, that the defendant either deliberately exposed the plaintiff to the risk of foreseeable harm or negligently adopted a defective plan of improvement that incorporated that risk.[170] Moreover, statutory policy supports the view that seepage damage should be treated as a cost of the water project.[171] On the other hand, when the escaping water is not attributable to some inherent risk of the project as planned, but results from an unexpected deficiency in its practical operation, a specific factual showing of fault may be necessary because the basis for the legal inference is no longer present.[172]

B. Interference With Land Stability

As in water damage cases, the judicial process has had little success in bringing order and consistency to the law of inverse condemnation for damage caused by a disturbance of soil stability. Here, too, the California cases exhibit a schizophrenic tendency to vacillate between

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A Study Relating to Sovereign Immunity, 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 225-30 (1963). Because of its inherent ambiguity, it has been relied upon frequently as a convenient basis for imposing liability without regard for fault. Comment, *Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine*, 37 CALIF. L. REV. 269, 270 n.7 (1949).

169 *See* U.S. DEP'T AGRIC., WATER: THE YEARBOOK OF AGRICULTURE 311 (1955).

170 *See* Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 587, 159 P.2d 674, 676 (1945), where it is said that "[a]n examination of the foregoing cases [including *Powers*, *Hume*, and *Ketcham*] . . . show[s] that in the majority of them the landowner sought recovery for damages caused by seepage from canals constructed through porous soil that did not confine and hold water . . . . Although the canal was constructed carefully and according to specifications this has been referred to as improper designing or improper planning which would make the irrigation district liable for damage. In some cases it is pointed out that this seepage of water may be prevented easily by puddling the canal with clay, by the use of oil on the banks and bottom, or by other simple means." *See also* Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 P. 814 (1921).

171 *See* CAL. WATER CODE § 12627.3: "It is declared to be the policy of the State that the costs of solution of seepage and erosion problems which arise or will arise by reason of construction and operation of water projects should be borne by the project."

172 Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 159 P.2d 674 (1945). *But see* Boitano v. Snohomish County, 11 Wash. 2d 664, 120 P.2d 490 (1941), where the unexpected opening of an underground spring in the course of gravel operations created a resultant necessity for drainage in which the county was held inversely liable without fault when excess waters were directed over the plaintiff's property.

a theory of liability based on fault and one that admits liability without fault.

In *Reardon v. San Francisco*[173] (the earliest California decision interpreting the "or damaged" clause of the 1879 constitution), the city, in the course of a street grading and sewer installation project, deposited large quantities of earth and rock upon the street surface to raise its grade, causing the unstable subsurface to shift and thereby damage the foundations of the plaintiffs' abutting buildings. Although the damage was both foreseeable and foreseen (the city had been warned that it was occurring), the city took no steps to protect the plaintiffs' property. The Supreme Court affirmed a judgment for the plaintiffs, but did not predicate its decision upon fault. On the contrary, it held that when a landowner is damaged as a consequence of public work, "whether it is done carefully and with skill or not, he is still entitled to compensation for such damage" under the command of the just compensation clause of the constitution.[174] The opinion is a square holding on this point,[175] as the court had concluded preliminarily that the plaintiffs could not recover on common law tort principles since no breach of a duty owed them was shown. Moreover, they could not recover inverse damages for a "taking," since no physical invasion of their land had occurred. Thus, the plaintiffs' judgment was sustained solely upon the ground that their property had been constitutionally "damaged."

The approach taken in *Reardon*, making fault immaterial to inverse liability for physical damage directly caused by public improvement projects, was widely accepted in states which, like California, had expanded the just compensation clause of the state constitution to include "damaging" as well as "taking."[176] On almost identical

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[173] 66 Cal. 492, 6 P. 317 (1885).

[174] *Id.* at 505, 6 P. at 325.

[175] A recent student work has classified *Reardon* as "dictum". Note, 13 U.C.L.A.L. REV. 871, 872 (1966). This analysis ignores the reasoning of the court's unanimous opinion, as summarized in the text. Text accompanying notes 158-61 *supra*. Moreover, subsequent decisions of the Supreme Court have explicitly treated *Reardon* as a holding on the point here being discussed. *See, e.g.*, Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1921) (opinion of Supreme Court on denial of hearing).

[176] *See, e.g.*, Atlanta v. Kenny, 83 Ga. App. 823, 64 S.E.2d 912 (1951) (house collapsed into trench for fire communications); Brewitz v. St. Paul, 256 Minn. 525, 99 N.W.2d 456 (1959) (gullying and erosion due to loss of support after street grade lowered); Great N. Ry. v. State, 102 Wash. 348, 173 P. 40 (1918) (slides and earth deposits resulting from uphill blasting and road work). A contrary view is often taken in states limiting inverse compensation to "takings." Hoene v. Milwaukee, 17 Wis. 2d 209, 116 N.W.2d 112 (1962) (damage to foundation of building due to inadequately constructed highway unable to sustain heavy traffic); Wisconsin Power & Light Co. v. Columbia County, 3 Wis. 2d 1, 87 N.W.2d 279 (1958) (displacement of soil as result of

facts, for example, the Supreme Court of Washington has reached the same result as in *Reardon*.[177] This approach also has been followed in subsequent California decisions,[178] but in an uneven pattern. The collapse of a building due to the construction of a tunnel beneath it, for example, has been regarded as a basis of inverse liability without fault.[179] Moreover, affirmance of landslide liability in the recent *Albers* decision makes it clear that the *Reardon* doctrine of inverse liability without fault is part of the current constitutional law of California.[180] Yet, numerous other California decisions exist that seem to affirm fault as an essential prerequisite, at least in some circumstances, to inverse liability.[181]

Even in cases closely analogous to *Reardon*, dealing with damage resulting from shifting soil, fault has been emphasized as a criterion of inverse liability. For example, damage to a house caused by excavation in the street for the installation of a sewer, which removed lateral support for the plaintiff's land, was held recoverable because the city's construction plans were "intrinsically dangerous and inherently wrong" according to expert engineering testimony adduced by plaintiff.[182] In sustaining inverse liability under similar circum-

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deposit of heavy fill material caused twisting and destruction of transmission tower); *cf.* Edison Co. v. Campanella & Cardi Constr. Co., 272 F.2d 430 (1st Cir. 1959), where it was said by way of dictum that damage to transmission towers due to displacement of soil by a highway embankment was not a "taking" but possibly subject to statutory liability. *See generally* 2 P. NICHOLS, EMINENT DOMAIN § 6.4432[2], at 508-19 (rev. 3d ed. 1963).

[177] Hinckley v. Seattle, 74 Wash. 101, 132 P. 855 (1913). *See also* Department of H'ways v. Widner, 388 S.W.2d 583 (Ky. 1965) (destruction of home in landslide caused by removal of lateral support during downhill road project held compensable without proof of negligence); Newport v. Rosing, 319 S.W. 2d 852 (Ky. 1958) (similar facts and holding as in *Widner*).

[178] *See, e.g.*, Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895); Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 P. 814 (1921). *See also* Powers Farms v. Consolidated Irr. Dist., 19 Cal. 2d 123, 119 P.2d 717 (1941) (dictum).

[179] Porter v. Los Angeles, 182 Cal. 515, 189 P. 105 (1920). Although this opinion is concerned primarily with an issue of the statute of limitations, its substantive aspects have been regarded in subsequent decisions as authoritative with respect to issues of liability. *See* Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App. 2d 850, 855, 10 Cal. Rptr. 811, 813 (1961). *See also* Marin Mun. Water Dist. v. Northwestern Pac. R.R., 253 Cal. App. 2d 82, 92, 61 Cal. Rptr. 520, 526 (1967).

[180] Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965); *see* text accompanying notes 9-35 *supra*.

[181] *See, e.g.*, Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944).

[182] Kaufman v. Tomich, 208 Cal. 19, 280 P. 130 (1929). The court here observes that it is unnecessary to determine whether liability was based on

stances, however, an attempted police power justification for destruction of lateral support was rejected on the ground that "there is no reason to invoke the doctrine of police power to protect public agencies in those cases where damage to private parties can be averted by *proper* construction and *proper* precautions in the first instance."[183] These cases may possibly be explained as a product of unnecessary judicial preoccupation with private law analogies in the development of inverse condemnation law.[184] The opinions themselves, however, contain no intimation of a judicial willingness to recognize inverse liability on any basis other than fault; only by a subtle and sophisti-

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tort or inverse condemnation principles, for the same result would obtain in either event.

[183] Veteran's Welfare Bd. v. Oakland, 74 Cal. App. 2d 818, 831, 169 P.2d 1000, 1009 (1946) (emphasis added). *See also* Wofford Heights Ass'n v. Kern County, 219 Cal. App. 2d 34, 32 Cal. Rptr. 870 (1963).

[184] The common law rule of absolute liability for deprivation of lateral support, RESTATEMENT OF TORTS § 817 (1939), has been modified in California. CAL. CIV. CODE § 832. Under this statutory rule, except in the case of very deep excavations, the adjoining owner is liable only if loss of lateral support results from negligence or from failure to notify one's neighbor so that he may take protective measures. *See* Wharam v. Investment Underwriters, 58 Cal. App. 2d 346, 136 P.2d 363 (1943); Conlin v. Coyne, 19 Cal. App. 2d 78, 64 P.2d 1123 (1937). Section 832, however, applies only to lateral support situations; it does not impair the former rule of strict liability for loss of subjacent support. Marin Mun. Water Dist. v. Northwestern Pac. R.R., 253 Cal. App. 2d 82, 61 Cal. Rptr. 520 (1967); RESTATEMENT OF TORTS § 820 (1939); *cf.* Porter v. Los Angeles, 182 Cal. 515, 189 P. 105 (1920). Accordingly, Kaufman v. Tomich, 208 Cal. 19, 280 P. 130 (1929), and Veteran's Welfare Bd. v. Oakland, 74 Cal. App. 2d 818, 169 P.2d 1000 (1946), may arguably be regarded as consistent with the fault rationale required in lateral support cases by section 832, while Porter v. Los Angeles, *supra*, and Reardon v. San Francisco, 66 Cal. 492, 6 P. 318 (1885), may be understood as instances of strict liability for loss of subjacent support. This explanation, however, is inconsistent with explicit language in *Reardon* that "there could be no . . . recovery at common law." *Id.* at 505, 6 P. at 325. It has no formal support or recognition in *Kaufman, Veteran's Welfare Board*, or *Porter*.

It is not entirely clear whether section 832 governs excavation work by public agencies. It has been said to be inapplicable to street excavation work by a municipal contractor which impairs lateral support of abutting land. Cassell v. McGuire & Hester, 187 Cal. App. 2d 579, 593, 10 Cal. Rptr. 33, 42 (1960) (dictum); *cf.* Gazzera v. San Francisco, 70 Cal. App. 2d 833, 161 P.2d 806 (1945) (city held not liable for loss of lateral support in absence of showing that street excavation work caused plaintiff's damage; section 832 neither cited nor discussed). On the other hand, previous uncertainty whether general statutory provisions governing tort liability were applicable to governmental entities has now been resolved, since sovereign immunity has been abrogated in California, in favor of applicability. *E.g.*, Flournoy v. State, 57 Cal. 2d 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962) (wrongful death act held applicable to state). Under the latter view, it seems that section 832 would be regarded today as apropos in a lateral support case maintained against a public entity either on an inverse or tort theory.

cated analysis can they be reconciled with the rationale of the *Reardon* and *Albers* decisions.

C. Loss of Advantageous Conditions

The value of real property is often directly dependent upon advantageous conditions physically associated with it, such as an adequate supply of potable water. Government activities, however, may impair or terminate the existence of such physical attributes and thereby substantially diminish the sum total of the value-enhancing features that comprise the owner's property interest. In a California case, for example, the construction of a tunnel as part of a municipal water supply project diverted an underground stream which fed natural springs used by a farmer for irrigation purposes. Loss of this valuable water supply source was held to be a compensable damaging of property, although there was no evidence that the city had acted negligently or unreasonably.[185] Similarly, upstream improvements, such as a dam, that divert stream water to governmental purposes in derogation of established water rights of downstream riparian owners also may constitute a basis of constitutional liability.[186] Loss of water supply, however, is recognized as a basis of inverse liability only so far as the injured party is recognized to possess a property right therein.[187]

The crucial significance of private property law concepts in the

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[185] De Freitas v. Suisun, 170 Cal. 263, 149 P. 553 (1915). A landowner's interest in spring water located on his premises is recognized, ordinarily, as being equally protectible with his ownership of the surface. State v. Hansen, 189 Cal. App. 2d 604, 11 Cal. Rptr. 335 (1961). The interest of a surface owner in percolating underground waters, however, has traditionally been subject to a rule of correlative reasonable use. Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766 (1903); *cf.* Passadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949), *cert. denied*, 339 U.S. 937 (1950). *See generally* Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677, 76 P.2d 681 (1938), where the city was held liable for the diminution of artesian well pressure resulting from extensive pumping and exportation of water from an underground basin.

[186] Dugan v. Rank, 372 U.S. 609 (1963); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

[187] Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967); De Freitas v. Suisun, 170 Cal. 263, 149 P. 553 (1915); Volkmann v. Crosby, 120 N.W.2d 18 (N.D. 1963) (city held inversely liable for impairment of private artesian well supply by drilling of municipal well); Canada v. Shawnee, 179 Okla. 53, 64 P.2d 694 (1936) (similar to facts in *Volkmann*); Griswold v. Weathersfield School Dist., 117 Vt. 224, 88 A.2d 829 (1952) (school district held inversely liable for diversion of underground stream, with consequent drying up of plainitff's spring, due to blasting in course of district improvement project). Judicial enforcement of property rights in water, however, may be unavailable where conflicting prescriptive rights have matured. *See* Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949).

disposition of cases of this kind is underscored by the recent state Supreme Court case of *Joslin v. Marin Municipal Water District.*[188] This decision denied compensation to downstream riparian owners for damage caused by loss of accretions of commercial sand and gravel deposits upon their land, which formerly had been carried in suspension by the waters of Nicasio Creek. The defendant district, in order to develop a municipal water supply, had constructed a dam across the creek which obstructed the normal flow of waters and thus terminated the periodic replenishment of sand and gravel used by the plaintiffs in their business. The value of the plaintiffs' land allegedly was diminished in the amount of $250,000. Inverse liability was denied under the prevailing California doctrine of reasonable beneficial use which governs the relative property interests of riparian owners (such as the plaintiffs) and upstream appropriators (such as the defendant district).[189] The plaintiffs' use of the stream waters for acquisition of commercial sand and gravel—commodities in plentiful supply for which no significant interest in development and conservation by stream water usage could be identified—was held to be clearly unreasonable and therefore subordinate, as a matter of law, when contrasted with the district's interest in the beneficial use of those waters for domestic and industrial purposes. In effect, no compensable property right of the plaintiffs had been taken or damaged.[190]

In *Joslin*, the court distinguished two important cases relied upon by the plaintiffs. The first, a decision of the United States Supreme Court, declared that loss of natural irrigation through seasonal overflow of riparian lands, caused by the construction of an upstream dam, constituted a compensable "taking" of the landowners' riparian property interest.[191] Reliance on seasonal flooding of a stream for agricultural irrigation purposes was regarded there as a reasonable beneficial use of river water by a riparian owner, and thus a compensable

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188 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).

189 *See* CAL. CONST. art. XIV, § 3 (1928), which modified the strict doctrine of superiority of riparian to appropriative rights as applied in cases like Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 252 P. 607 (1926). By the 1928 amendment, the rule of reasonable beneficial use became firmly established as the legal framework for adjudication of competing claims to water in California. Peabody v. Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935); Chow v. Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933); CAL. WATER CODE §§ 100-01.

190 *See* Peabody v. Vallejo, 2 Cal. 2d 351, 369, 40 P.2d 486, 492 (1935). *But see* Miramar Co. v. Santa Barbara, 23 Cal. 2d 170, 143 P.2d 1 (1943); Note, *Eminent Domain: Damage Without Taking, Damnum Absque Injuria*, 32 CALIF. L. REV. 91 (1944) (court evenly divided as to existence, as against the state, of property right in littoral owner to uninterrupted sandy accretions from natural ocean currents).

191 United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950); *see* Annot., 20 A.L.R.2d 656 (1951).

interest. Use by the plaintiffs in *Joslin* for sand and gravel accretions, however, was deemed not reasonable under the circumstances.[192]

The second case, a California decision, held that loss of accretions of sand and gravel as the result of the construction of a concrete flood control channel in the bed of a natural watercourse, thereby preventing overflow of the waters and deposit of their contents upon the plaintiffs' land, constituted the taking of a property right the value of which was required to be included in severance damages in the flood control district's eminent domain suit to condemn the channel easement.[193] This decision, however, did not involve a clash between a riparian owner and an upper appropriator in light of the "reasonable and beneficial use" test, but was concerned only with the question of the extent to which the land not taken for flood control purposes, on which plaintiff's long-established gravel business was situated, had sustained severance damages by reason of the flood control channel project. The Supreme Court in *Joslin* expressly disapproved any language in the earlier case which intimated that the use of stream flow for replenishment of sand and gravel accretions was a reasonable one or could be regarded as giving rise to a property right as against an appropriator who was putting the water itself to reasonable and beneficial use.[194]

According to the *Joslin* opinion, the critical determination whether a particular use of water is reasonable and beneficial "is a question of fact to be determined according to the circumstances in each particular case."[195] Ample latitude for the weighing of policy

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[192] *Cf.* CAL. WATER CODE § 106: "It is hereby declared to be the established policy of the State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." The *Joslin* opinion, it should be noted, does not constitute a clear approval of the *Gerlach* decision; it may be read, instead, as merely explaining and distinguishing *Gerlach* as based on a determination, which the *Joslin* court was not required to reexamine, that the riparian use there in question was in fact "reasonable" under the circumstances. In any event, *Joslin* strongly intimates that "reasonableness" is a relative concept, to be determined by comparing the relative social utility of the competing water uses before the court. For example, it would not be inconsistent with *Joslin* for a court, under some circumstances, to conclude that agricultural irrigation purposes (a secondary priority of use under section 106) may be unreasonable when in conflict with water supply for domestic consumption. Moreover, the hierarchy of priorities as between other forms of water usage not mentioned in section 106 remains uncertain and subject to case-by-case elaboration, absent additional legislative clarification.

[193] Los Angeles County Flood Control Dist. v. Abbot, 24 Cal. App. 2d 728, 76 P.2d 188 (1938).

[194] Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 145, 429 P.2d 889, 896, 60 Cal. Rptr. 377, 386 (1967).

[195] *Id.* at 139, 429 P.2d at 894, 60 Cal. Rptr. at 382. Accordingly, a use

factors judicially regarded as relevant to the compensability issue is thus allowed. For example, in *City of Los Angeles v. Aitken*,[196] the court's opinion, after emphasizing the importance of natural recreational facilities both to the state's economic well-being and to the health and welfare of its citizens, concluded that the use of navigable lake waters for recreation and as an adjunct to the scenic and recreational use of littoral lands (whose value for that purpose directly depended upon the continued existence of the lake) was a reasonable beneficial use entitled to judicial protection. A secondary factor supporting this conclusion was the virtual unusability of the lake waters in question for domestic or irrigation purposes, due to excessive impregnation with minerals and alkali. Finally, the *Aitken* opinion stresses the fact that substantial investments had been made along the lake shore in reasonable and good-faith reliance upon the continuance of the natural lake level. Accordingly, the diversion of the waters of tributary streams feeding the lake, even though for the concededly reasonable and beneficial purpose of augmenting a municipal water supply, was held to constitute the damaging of property rights of littoral owners for which just compensation was required to be paid.

Although a careful perusal of *Aitken* suggests that the frustration of substantial investment-backed expectations, reasonably grounded in experience, was the pivotal factual element of the decision, *Joslin* seemingly rejects the view that the magnitude of private loss is of legal significance. The destruction of a valuable, long-standing, and socially useful business enterprise grounded upon reasonable expectation that periodic replenishments of sand and gravel would continue to be supplied by natural river flow, was countenanced as not a compensable damaging because of the general preference shown by California law for domestic water use. Unlike *Aitken*, the *Joslin* result seems to reflect a judicial disposition to permit decision in cases of this kind to turn upon abstract classifications of water use priorities, thereby making unnecessary the more difficult task of assessing the weight of the competing interests revealed by the adjudicative facts. Absent a comprehensive legislative scheme of relative priorities, however, this approach scarcely improves predictability. In any event, it appears to disregard significant factual and policy considerations which, in other contexts (*e.g.*, *Albers*,) have been regarded as determinative of the public duty to pay just compensation for economic losses caused by governmental activities.

It could be argued that the inherent uncertainty of the reason-

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recognized as beneficial under some circumstances may, under other circumstances, be subordinated to more important uses. *See* Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935); CAL. WATER CODE § 106.

[196] 10 Cal. App. 2d 460, 52 P.2d 585 (1935).

able beneficial use criterion of compensable water rights has been reduced at least partially by statutory provisions. The result in the *Aitken* case, for example, apparently has been codified in somewhat expanded form. Section 1245 of the California Water Code makes every municipality that appropriates water from any watershed or its tributaries fully liable to persons within the watershed area for "injury, damage, destruction or decrease in value of [their] property, business, trade, profession or occupation" caused by the appropriation. The *Joslin* opinion, however, considered the quoted language as indicating only a legislative intent to provide statutory compensation in those limited situations in which a constitutionally secured right to just compensation already existed. In holding that the plaintiffs' business and occupational losses were not compensable under section 1245, the court reasoned that "since there was and is no [constitutionally cognizable] property right in the instant unreasonable use, there has been no taking or damaging of property. Since by constitutional fiat no property right exists, none is created by statutory provisions intended to provide compensation for the deprivation of protectible property interests."[197] This view, which treats the statute as a useless and redundant exercise of legislative power, wholly ignores clear language in section 1245 suggesting that the legislature was not attempting to formulate a rule of compensation enmeshed in technical notions of what is a constitutionally protectible property interest, but was seeking to protect against economic loss (*i.e.*, "decrease in value") caused by water appropriation to any previously established "business, trade, profession or occupation" in the watershed. The *Joslin* sand and gravel enterprise may not have been "property" in the constitutional sense, but it is difficult to understand why it was not a "business" or "occupation" in the statutory sense. Moreover, the court in *Joslin* ignored the possibility that section 1245 is simply another proviso in the extensive array of statutory mandates requiring compensation to be be paid for governmentally caused economic losses despite the absence of a constitutional compulsion to do so.[198]

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[197] Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 146, 429 P.2d 889, 898, 60 Cal. Rptr. 377, 386 (1967).

[198] *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617, 630-32 (1968), collecting and discussing numerous statutes. The most directly analogous statutory pattern of required compensation for economic losses caused by public improvements, absent constitutional compulsion to compensate, relates to the reimbursement of costs incurred by private utility companies in relocating underground facilities and structures in order to make room for, or accommodate, public projects (*e.g.*, sewers, water mains, drainage facilities, street improvements). *See* Van Alstyne, *Government Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 501-02 (1963). The constitutional validity of statutory indemnification in such situations is, of course, well-

It should be noted that other legislation relating to water resources, from a practical viewpoint, may have an impact upon inverse liability claims for interferences with water uses, although the nature and extent of the impact cannot be evaluated on an abstract basis. Claims of appropriative rights to surplus stream water, for example, are now subject to an application-permit procedure made applicable to all appropriators, including municipalities,[199] and designed to allocate such claims on "terms and conditions . . . [which] will best develop, conserve, and utilize in the public interest the water sought to be appropriated."[200] The relativity of water uses also has been given partial definition by statutory declarations that "domestic use is the highest use and irrigation is the next highest use of water,"[201] together with statutory preferences for appropriations by municipalities for domestic consumption purposes.[202] Finally, provision is made for administrative adjudication of competing claims to water by the State Water Rights Board,[203] as well as for court referral of water rights controversies to this agency.

Although the statutory framework appears to provide an orderly basis for the determination of water rights, it leaves the determination of compensability for governmental "takings" or "damagings" of interests in water in a state of uncertainty. The only explicit legislative effort to deal with the problem has been nullified by the exceedingly narrow interpretation of Water Code section 1245 announced by *Joslin*. The "reasonableness" test (which *Joslin* indicates applies to all competing water claims and not merely to disputes between appropriators and riparian users) is derived ultimately from the language of article XIV, section 3 of the California Constitution,[204] but this fact

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settled. Dittus v. Cranston, 53 Cal. 2d 284, 347 P.2d 671, 1 Cal. Rptr. 327 (1959). *See also* Southern Cal. Gas Co. v. Los Angeles, 50 Cal. 2d 713, 329 P.2d 289 (1958).

199 CAL. WATER CODE § 1252.5. *See generally id.* §§ 1200-1801.

200 *Id.* § 1253. *See also id.* §§ 10000-507, where the "State Water Plan" and "California Water Plan" provisions, under which the state has assumed a primary interest in the orderly and coordinated conservation, development, and utilization of all water resources in the state, has been codified.

201 *Id.* §§ 106, 1254.

202 *Id.* §§ 106.5, 1460-64. *But see id.* §§ 10505, 11460-63 ("county of origin" and "watershed of origin" preferences); Note, *State Water Development: Legal Aspects of California's Feather River Project*, 12 STAN. L. REV. 439, 450-55 (1960).

203 CAL. WATER CODE §§ 2000-76 (references); *id.* §§ 2500-2866 (administrative adjudication subject to court review).

204 CAL. CONST. art. XIV, § 3 (1928), provides in part: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the con-

should not and does not preclude legislative clarification of the criteria to be used by the courts in applying this test to specific circumstances.[205] Indeed, the *Joslin* decision itself relies heavily upon legislative provisions which declare the predominant importance of domestic water use in the socio-economic environment of California, as well as the absence of such legislative standards respecting sand and gravel accretions, as support for its conclusion that the latter interest was not a reasonable and beneficial use as contrasted with the former. More explicit and comprehensive legislative clarification, including possible amendment of Water Code section 1245 in order to make its basic intent indisputably clear, would seem to be a desirable legislative objective.

The recognition of certain aspects of water rights as compensable "property" interests has been accompanied in recent years by a growing body of law likewise giving effect to the landowner's compensable interest in the purity of both water and air. Pollution, ordinarly comprised of domestic and industrial wastes, and sometimes of silt, often is attributable to governmental functions, such as the collection of waste matter in sanitary sewer systems for concentrated discharge (ordinarily after some form of treatment) at a relatively few outlets, or (in the case of silting) public construction projects conducted without adequate erosion controls.[206] Sewage disposal, in addition, sometimes produces pollution of the atmosphere by noxious odors which drastically impair the usability and value of property subjected thereto.[207]

Governmental liability for environmental pollution often has been sustained on a tort theory of nuisance.[208] California case law

servation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be *reasonably required for the beneficial use to be served*, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. . . ." (Emphasis added).

[205] *See id.*: "This section shall be self-executing, and the Legislature may also enact laws in furtherance of the policy in this section contained." *Cf.* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967).

[206] *See generally* Schwob, *Pollution—A Growing Problem of a Growing Nation*, in U.S. DEP'T OF AGRIC., WATER—THE YEARBOOK OF AGRICULTURE 636 (1955); Edelman, *Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution*, 33 GEO. WASH. L. REV. 1067 (1965).

[207] *E.g.*, Sewerage Dist. v. Black, 141 Ark. 550, 217 S.W. 813 (1920); Ivester v. Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1939).

[208] *See Annot.*, 40 A.L.R.2d 1177 (1955) (sewage disposal plants); Annot., 38 A.L.R.2d 1265 (1954) (pollution of underground waters).

has provided support for this approach in the past.[209] However, it is no longer entirely clear whether governmental nuisance liability will be recognized in California in light of the legislative decision in 1963 placing all governmental tort liability upon a statutory basis while omitting to provide explicitly for liability on a nuisance theory.[210] Inverse condemnation appears to offer an acceptable alternate remedy that would survive legislative disapproval.[211] Before abrogation of sovereign immunity from tort liability, the California cases recognized nuisance liability as an exception to the general rule of tort immunity; but the exception was largely an evolutionary development rooted in inverse condemnation liability for property damage.[212] To the extent that nuisance and inverse liability overlap one another, the inverse remedy still would be available in pollution cases.[213]

Elsewhere, public entities have been held liable on inverse condemnation grounds in such diverse situations as sewage contamination of oyster beds,[214] pollution of private water resources,[215] ocean salt water intrusion upon agricultural lands riparian to a river because of upstream diversion of fresh water,[216] silting of a private lake

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209 *See* Hassell v. San Francisco, 11 Cal. 2d 168, 78 P.2d 1021 (1938) (injunction against maintenance of comfort station in public park on showing that nuisance would result); Adams v. Modesto, 131 Cal. 501, 63 P. 1083 (1901) (open sewer ditch nuisance); Ingram v. Gridley, 100 Cal. App. 2d 815, 224 P.2d 798 (1950) (sewage pollution of stream).

210 The legislative history of the Tort Claims Act of 1963 indicates a deliberate legislative decision to preclude governmental tort liability for damages on a common law nuisance theory. *See* SENATE COMM. ON THE JUDICIARY, REPORT ON S. 42, CAL. S. JOUR. 1887 (daily ed. Apr. 24, 1963), *quoted in* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 497-98 (Cal. Cont. Educ. Bar 1964). However, nuisance liability is not purely a matter of common law doctrine in California; it is codified. CAL. CIV. CODE §§ 3479, 3491, 3501. Arguably, therefore, nuisance liability may still obtain under the last-cited provisions. Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 740 n.56 (1967).

211 *See* Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAW. 1, 11 (1967).

212 Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 225-30 (1963).

213 *See* County Sanitation Dist. No. 2 v. Averill, 8 Cal. App. 2d 556, 47 P.2d 786 (1935) (dictum); *cf.* Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 33 (1957).

214 Gibson v. Tampa, 135 Fla. 637, 185 So. 319 (1938).

215 Game & Fish Comm'n v. Farmers Irr. Co., 149 Colo. 318, 426 P.2d 562 (1967) (pollution by waters discharged from fish hatchery); Cunningham v. Tieton, 60 Wash. 2d 434, 374 P.2d 375 (1962) (percolation from sewage lagoon to underground wells); Snavely v. Goldendale, 10 Wash. 2d 453, 117 P.2d 221 (1941) (sewage discharge into stream).

216 Early v. South Carolina Pub. Serv. Auth., 228 S.C. 392, 90 S.E.2d 472 (1955); Rice Hope Plantation v. South Carolina Pub. Serv. Auth., 216 S.C. 500, 59 S.E.2d 132 (1950).

from erosion of an unstabilized highway embankment,[217] and persistent pollution of the atmosphere by noxious and offensive odors from a sewage disposal plant.[218] Negligence or alternative findings of fault are not regarded as essential to liability in these cases; regardless of the care with which the public improvement is operated, if it in fact creates a condition that substantially damages property values, the public entity must absorb the resulting cost.[219] In addition, by grounding these decisions upon the constitutional mandate to pay just compensation, the courts have blocked municipal contentions that liability should not attach to the performance of essential "governmental" functions, such as sewage disposal,[220] or that liability should not be recognized for governmental activities expressly authorized by statute.[221]

The persistence of a nuisance rationale at the heart of the inverse condemnation decisions dealing with environmental pollution damage introduces into the law of inverse liability the same vagaries, uncertainties, and obscurities of decisional processes that plague ordinary tort litigation pursued on a nuisance theory.[222] In addition, it may blur significant distinctions between the interests represented by public agencies and those which pertain to private persons. For example, a comparison of public and private defendants may disclose substantial differences of size, legal responsibility, territorial impact, fiscal resources, and available practical alternatives. All these differences should be considered in a rational balancing process. On the other hand, the nuisance analogue does usefully direct attention to the remedial resources inherent in the powers of equity to abate the source

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217 Department of H'ways v. Cochrane, 397 S.W.2d 155 (Ky. App. 1965); Kendall v. Department of H'ways, 168 So. 2d 840 (La. App. 1964), *writ refused*, 247 La. 341, 170 So. 2d 864 (1965).

218 Clinard v. Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939); Gray v. High Point, 203 N.C. 756, 166 S.E. 911 (1932).

219 *See, e.g.*, Clinard v. Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939); Parsons v. Sioux Falls, 65 S.D. 145, 272 N.W. 288 (1937); *cf.* Pheonix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938).

220 *See* Brewster v. Forney, 223 S.W. 175 (Comm'n App. Tex. 1920); Southworth v. Seattle, 145 Wash. 138, 259 P. 26 (1927).

221 *See* Parsons v. Sioux Falls, 65 S.D. 145, 272 N.W. 288 (1937); Aliverti v. Walla Walla, 162 Wash. 487, 298 P. 698 (1931); *cf.* Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 33 (1957).

222 "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for analysis of a problem . . . ." W. PROSSER, THE LAW OF TORTS 592 (3d ed. 1964).

of harm rather than merely award just compensation and thereby confirm the permanence of the injury.[223]

D. Miscellaneous Physical Damage Claims

The factual setting of inverse liability claims is not complete without at least brief attention to a variety of other circumstances in which physical injuries to property have been conceptualized as constitutional "damagings."

(1) *Concussion and Vibration*

Property damage caused by shock waves from blasting and other activities has resulted in varying judicial views.[224] In jurisdictions that recognize inverse liability only for a "taking," structural damage as the result of vibrations from heavy equipment (*e.g.*, a pile driver)[225] or from shock waves caused by blasting,[226] ordinarily is held to be noncompensable. Consistent with the widely recognized rule that injuries caused by blasting in a populated area are an occasion for absolute tort liability,[227] however, California regards such injuries as an

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[223] *See, e.g.*, Jones v. Sewer Improvement Dist., 119 Ark. 166, 177 S.W. 888 (1915); Lakeland v. State, 143 Fla. 761, 197 So. 470 (1940); Briggson v. Viroqua, 264 Wis. 47, 58 N.W.2d 546 (1953). The limited availability of remedies other than damages, where inverse takings or damagings have occurred, is surveyed in Note, *Eminent Domain—Rights and Remedies of an Uncompensated Landowner*, 1962 WASH. U.L.Q. 210. *See also* Horrell, *Rights and Remedies of Property Owners Not Proceeded Against*, 1966 U. ILL. L.F. 113.

[224] In private tort law, a division of authority exists as to whether such damage is actionable without fault. Annot., 20 A.L.R.2d 1372 (1951); *see* notes 227 and 232 and accompanying text *infra* for the California position.

[225] State *ex rel.* Fejes v. Akron, 5 Ohio St. 2d 47, 213 N.E.2d 353 (1966). This result is also reached in some "damaging" states by narrow construction. *See, e.g.*, Klein v. Department of H'ways, 175 So. 2d 454 (La. App. 1965), *writ refused*, 248 La. 369, 178 So. 2d 658 (1965) (collapse of roof due to vibration from pile drivers held noncompensable since not an intentional or purposeful infliction of damage); Beck v. Boh Bros. Constr. Co., 72 So. 2d 765 (La. App. 1954) (similar).

[226] Bartholomae Corp. v. United States, 253 F.2d 716 (9th Cir. 1963) (atomic test detonations); Sullivan v. Commonwealth, 355 Mass. 619, 142 N.E.2d 347 (1957) (non-negligent blasting during aquaduct tunnel project); Crisafi v. Cleveland, 169 Ohio St. 137, 158 N.E.2d 379 (1959) (single blast during park improvement project). Some of the holdings of noncompensability for blast and vibration damage appear to be based on the view that the resulting injuries were *de minimis*. *See, e.g.*, Moeller v. Multnomah County, 218 Ore. 413, 345 P.2d 813 (1959); *cf.* Louden v. Cincinnati, 90 Ohio St. 144, 106 N.E. 970 (1914) (severe and prolonged blast and vibration damage may amount to a "taking").

[227] Colton v. Onderdonk, 69 Cal. 155, 10 P. 395 (1886); Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967); Balding v. D.B. Stutsman, Inc., 246 Cal. App. 2d 559, 54 Cal. Rptr. 717 (1966).

inversely compensable "damaging" of property regardless of the care or the negligence of the public entity in causing them.[228] Moreover, the California decisions have rejected efforts to limit strict liability to damages from blast-projected missiles,[229] ruling that the plaintiff's right to recovery does not turn on whether the damage was caused by atmospheric concussion, vibration of the soil, or throwing of debris, but upon the extrahazardous nature of the defendant's activities.[230] The same conclusions have been reached with respect to subterranean damage caused by the vibration of a large rocket motor undergoing testing.[231]

The rationale of strict inverse liability for concussion and vibration damage caused by blasting or similar activities has recognized limits; thus, California requires a showing of negligence as a basis of liability where the blasting occurred in a remote or unpopulated area.[232] Activities of this type undertaken in a residential area are deemed to create a risk of substantial harm which cannot be eliminated entirely even by the use of utmost care. Thus, the policies of negligence deterrence and loss distribution support a rule imposing strict liability upon the enterprise which exposes property owners to that risk and which is ordinarily in a position best able to absorb the loss.[233] In remote and unsettled areas, however, the risk is minimized

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[228] Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App. 2d 850, 10 Cal. Rptr. 811 (1961) (vibration damage from pile driver). Cases in other "damaging" states are in substantial agreement. *See, e.g.*, Richmond County v. Williams, 109 Ga. App. 670, 137 S.E.2d 343 (1964) (physical damage from pile driver vibration held compensable, while annoyance from dust, fumes and noise held noncompensable); Muskogee v. Hancock, 58 Okla. 1, 158 P. 622 (1916) (concussion damage from blasting during sewer construction); Knoxville v. Peebles, 19 Tenn. App. 340, 87 S.W. 2d 1022 (1935) (vibration and concussion damage from blasting).

[229] Inverse liability for damage caused by rocks and debris thrown upon private property by construction blasting is generally recognized. *See, e.g.*, Jefferson County v. Bischoff, 238 Ky. 176, 37 S.W.2d 24 (1931); Adams v. Sengel, 177 Ky. 535, 197 S.W. 974 (1917).

[230] *See* McGrath v. Basich Bros. Constr. Co., 7 Cal. App. 2d 573, 46 P.2d 981 (1935); McKenna v. Pacific Elec. Ry., 104 Cal. App. 538, 286 P. 445 (1930); *accord*, Whiteman Hotel Corp. v. Elliott & Watrous Eng'r Co., 137 Conn. 562, 79 A.2d 591 (1951).

[231] Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967) (loss of underground water supply due to subterranean vibration and earth shifting caused by test of rocket engine of unusual power and size). Where inverse liability is limited to a "taking", however, contrary results have been reached. *See, e.g.*, Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964) (jet engine test).

[232] *See* Alonso v. Hills, 95 Cal. App. 2d 778, 214 P.2d 50 (1950); *cf.* Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 P. 82 (1907) (personal injuries from blasting in unpopulated area); Wilson v. Rancho Sespe, 207 Cal. App. 2d 10, 24 Cal. Rptr. 296 (1962) (fire caused by blasting in remote area).

[233] The strict liability rule, however, has been strongly criticized as in-

by environmental conditions. The social utility of property development overrides the relatively slight risk of damage and justifies the withholding of liability unless fault is established.[234] This dual rationale incorporates a rough balancing technique of limited scope that could well achieve equitable results, as well as predictability, in allocating losses from blasting and like conduct by private individuals.[235] The cases, however, indicate a judicial disposition to apply the same rules that govern private activities to the solution of inverse liability claims against public entities, without taking into account the significant differences between private and public undertakings that may alter the balance of interests.[236]

(2) *Escaping Fire and Chemicals*

Claims against public entities for negligently permitting fire to escape from the control of public employees and damage nearby property are deemed to be grounded upon tort theory in California.[237] Until recently, such claims ordinarily have withered on the vine of sovereign immunity.[238] However, while the courts generally have refused to regard escaping fire as a basis for inverse liability when only mere negligence is involved,[239] it is clear that in a proper case the inverse remedy would be fully applicable. For example, it has been held that a public rubbish disposal dump operated pursuant to a plan that deliberately keeps fire burning to consume trash deposited

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consistent with a rational balancing of the competing interests in the light of modern technology. *See, e.g.*, Reynolds v. W. H. Hinman Co., 145 Me. 343, 75 A.2d 802 (1950); Smith, *Liability for Damage to Land by Blasting* (pts. 1-2), 33 HARV. L. REV. 542, 667 (1920).

[234] *See* Berg v. Reaction Motors Div., 37 N.J. 396, 181 A.2d 487 (1962), *cited in* Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 785-86, 56 Cal. Rptr. 128, 137-38 (1967); RESTATEMENT OF TORTS § 520 (1938).

[235] *See* Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 786, 56 Cal. Rptr. 128, 138 (1967).

[236] *Cf.* Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App. 2d 850, 10 Cal. Rptr. 811 (1961). *But see* Pumphrey v. J. A. Jones Constr. Co., 250 Iowa 559, 94 N.W.2d 737 (1959), where no liability was incurred for concussion damage caused by non-negligent blasting by a government waterway project contractor under government supervision and in accordance with government-approved plans.

[237] *See* Miller v. Palo Alto, 208 Cal. 74, 280 P. 108 (1929); Hanson v. Los Angeles, 63 Cal. App. 2d 426, 147 P.2d 109 (1944).

[238] *See* Miller v. Palo Alto, 208 Cal. 74, 280 P. 108 (1929); Hanson v. Los Angeles, 63 Cal. App. 2d 426, 147 P.2d 109 (1944).

[239] *See* Miller v. Palo Alto, 208 Cal. 74, 280 P. 108 (1929), in which the inverse condemnation theory was held inapplicable where the complaint alleged a single act of negligence that permitted escape of fire from the city dump. *See also* McNeil v. Montague, 124 Cal. App. 2d 326, 268 P.2d 497 (1954); Western Assurance Co. v. Sacramento & San Joaquin Drainage Dist., 72 Cal. App. 68, 237 P. 59 (1925).

therein can expose the public entity to statutory tort liability for intentionally maintaining a dangerous condition of public property.[240] The deliberate adoption of such a plan, however, also clearly supports inverse condemnation liability where damage results.[241] Fault, in the form of an inherently defective plan involving the use of fire for a public purpose, is the conceptual basis of this application of the just compensation clause. The water seepage cases, which typically impose inverse liability without fault, are regarded as distinguishable.[242] Water seeping from an irrigation ditch creates a relatively permanent condition reducing the utility of the affected land as a direct consequence of the functioning ("public use") of the ditch; fire escaping from control of public employees, however, does not produce such "direct" consequences unless the plan of use itself includes the risk of its escape as an inherent feature of the project functioning as conceived.[243]

Judicial disposition of inverse liability claims resulting from the drifting of chemical sprays employed for such public objectives as weed or insect control follows the same approach as the escaping fire cases. Mere routine negligence will not support inverse liability,[244] but a deliberately adopted plan of use that includes the prospect of property damage as a necessary consequence of the application of chemicals is recognized as actionable.[245] It should be mentioned, how-

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[240] Osborn v. Whittier, 103 Cal. App. 2d 609, 230 P.2d 132 (1951). *See also* Pittam v. Riverside, 128 Cal. App. 57, 16 P.2d 768 (1933) (dictum).

[241] *See* Bauer v. Ventura County, 45 Cal. 2d 276, 284-85, 289 P.2d 1, 7 (1955), expressly distinguishing *Miller, McNeil* and *Western Assurance Co.* as instances of escaping as a result of a single act of negligence in routine operations, and sustaining the sufficiency of a complaint for inverse condemnation (for flood damage) based on an inherently defective plan of construction and maintenance of a governmental project. See text accompanying notes 38-43 *supra.* This distinction was also noted in Western Assurance Co. v. Sacramento & San Joaquin Drainage Dist., 72 Cal. App. 68, 77, 237 P. 59, 63 (1925), where the court observed that inverse liability would obtain if the work that caused the fire had been done "in accordance with specific directions of . . . plans and specifications" approved by the district and the damage had resulted "necessarily and directly" therefrom.

[242] *See* McNeil v. Montague, 124 Cal. App. 2d 236, 268 P.2d 497 (1954).

[243] See note 241 *supra.*

[244] Neff v. Imperial Irr. Dist., 142 Cal. App. 2d 755, 299 P.2d 359 (1956); St. Francis Drainage Dist. v. Austin, 227 Ark. 167, 296 S.W.2d 668 (1956); Dallas County Flood Control Dist. v. Benson, 157 Tex. 617, 306 S.W.2d 350 (1957).

[245] *See* St. Francis Drainage Dist. v. Austin, 227 Ark. 167, 296 S.W.2d 668 (1956) (dictum); Dallas County Flood Control Dist. v. Benson, 157 Tex. 617, 306 S.W.2d 350 (1957) (dictum); *cf.* Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); Cope v. Live Stock Sanitary Bd., 176 So. 657 (La. App. 1937) (death of mule by ingestion of arsenic solution during anti-tick dipping operation).

ever, that the trend of the private law cases involving damage from chemical sprays appears to be toward imposition of strict liability.[246] The tendency of the courts to employ private law analogies in inverse liability cases suggests that the latter decisions may follow suit.

The escaping fire and chemical drift cases further illustrate the overlap of tort and inverse remedies against public entities in California. Under current statutory law, however, the overlap is of little importance because an injured property owner today appears to have fully adequate remedial weapons in tort litigation with respect to both escaping fire[247] and chemical drift.[248] There may be some procedural advantages, however, in pursuing the inverse remedy in certain situa-

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246 *See* Note, *Crop Dusting: Two Theories of Liability?*, 19 HASTINGS L.J. 476 (1968). Technical data cited in this note suggest that substantial drift from chemical applications is an inherent risk of dusting and spraying operations notwithstanding use of reasonable care.

247 The former doctrine of sovereign immunity has been supplanted by a statutory rule making public entities liable, except where otherwise provided by statute, for the tortious acts and omissions of their employees. CAL. GOV'T CODE § 815.2. Although there is a specific statutory immunity for "any injury caused in fighting fires," CAL. GOV'T CODE § 850.4, this immunity would not preclude governmental tort liability for negligently permitting a fire started or attended by public employees to escape. There are four theories that are available to supplant immunity. First, negligently permitting the fire to escape is probably not within the purview of the immunity for "fighting fires." A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 7.29 (Cal. Cont. Educ. Bar ed. 1964). Secondly, there is an express statutory liabil-liability for negligently or willfully permitting a fire to escape. CAL. HEALTH & SAFETY CODE § 13007. This section, although framed in general terms, applies to public entities and their employees. Flournoy v. State, 57 Cal. 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962). This section supersedes (that is, "otherwise provides") the immunity provisions of the Government Code. CAL. GOV'T CODE § 815 (introductory exception); A. VAN ALSTYNE, *supra* §§ 5.11, 5.28. Thirdly, negligently or deliberately permitting a fire under the control of a public employee to escape appears to constitute a failure to exercise reasonable diligence to discharge a mandatory duty imposed by statute. CAL. HEALTH & SAFETY CODE § 13000; CAL. PUB. RESOURCES CODE § 4422. This is a basis of governmental liability under CAL. GOV'T CODE § 815.6. Fourthly, escaping fire would, in some cases, be actionable as a dangerous condition of public property. Osborn v. Whittier, 103 Cal. App. 2d 609, 230 P.2d 132 (1951); CAL. GOV'T CODE § 835.

248 Although governmental use of dangerous chemicals for pest control purposes is expressly authorized by statute, CAL. AGRIC. CODE §§ 14002, 14063, 14093, such authorization does not relieve the user from liability for property damage caused thereby. *Id.* §§ 14003, 14034. Moreover, use of pesticides in such a manner as to cause "any substantial drift" is a misdemeanor, the commission of which appears to be an actionable tort. *Id.* §§ 9, 12972; Note, *Crop Dusting: Two Theories of Liability?*, 19 HASTINGS L.J. 476, 486-87 (1968). However, the applicability of the Agricultural Code provisions to governmental entities, and their interrelationship to the Tort Claims Act of 1963, are in need of clarification. *See* note 330 *infra*.

tions.[249]

(3) *Privileged Entry Upon Private Property*

In the course of performing their duties, public officers often have need, and commonly are authorized by statute, to enter private property to make inspections and surveys, abate public nuisances, and perform other governmental functions.[250] These official entries and other related activities on private property, if restricted to reasonable performance of public duties, are privileged and do not constitute a basis of personal tort liability of the public officer.[251] If, however, the privilege is abused by the commission of a tortious act in the course of the entry, the common law regards the officer as personally liable *ab initio* for both the original trespass and all resulting injuries.[252] The Tort Claims Act of 1963 rejects the *ab initio* approach, but does recognize liability of both the public entity and its employee for tortious injuries inflicted by the latter during an otherwise privileged entry.[253]

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[249] Actions to impose statutory tort liability for a dangerous condition of public property, note 247 *supra*, are subject to certain defenses not available in inverse condemnation. *See, e.g.*, CAL. GOV'T CODE §§ 835.2, 835.4 (lack of notice and reasonableness of entity's actions after notice). *See also id.* § 830.6 (immunity for injury resulting from defective plan or design where not wholly unreasonable at time of adoption); Note, *Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*, 19 HASTINGS L.J. 584 (1968).

[250] *See, e.g.*, CAL. CODE CIV. PROC. § 1242 (surveys of land required for public use); CAL. HEALTH & SAFETY CODE § 2270(f) (investigations and nuisance abatement work by mosquito abatement district); CAL. WATER CODE § 2229 (surveys for irrigation district purposes). For a comprehensive list of citations, see Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 CAL. L. REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 110-19 (1963). Entries into private buildings, unless consent is given by the owner, must be supported by a valid search warrant. See v. Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967). Under the cited decisions, however, the warrant may authorize an "area inspection," and need not be particularized to individual structures.

[251] Giacona v. United States, 257 F.2d 450 (5th Cir. 1958); Onick v. Long, 154 Cal. App. 2d 381, 316 P.2d 427 (1957); Commonwealth v. Carr, 312 Ky. 393, 227 S.W.2d 904 (1950); Johnson v. Steele County, 240 Minn. 154, 60 N.W.2d 32 (1953); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.20, at 56-57 (1956); RESTATEMENT OF TORTS § 211 (1934).

[252] RESTATEMENT OF TORTS § 214 (1934), has apparently been approved as the California rule. Onick v. Long, 154 Cal. App. 2d 381, 316 P.2d 427 (1957); Reichhold v. Sommarstrom Inv. Co., 83 Cal. App. 2d 173, 256 P. 592 (1927). *See also* Heinze v. Murphy, 180 Md. 423, 24 A.2d 917 (1942); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.21, at 58-59 (1956).

[253] The California Tort Claims Act of 1963 declares public entities and public employees immune from tort liability for authorized official entries upon private property, but this immunity does not extend to injuries caused

Freedom from trespass liability, however, does not absolve the public entity from inverse condemnation liability. For example, although a public entity may be privileged to enter and remove obstructions from drainage channels running through private property as a means of promoting flood protection, damage sustained by adjoining private property as a result of the work performed (*e.g.*, piling of rock and debris on channel banks) is compensable.[254] Similarly, a public entity acts fully within its rights in undertaking to install storm drains within an easement traversing private land, until its operations substantially obstruct normal use of the land in ways not shown to be essential to the performance of the work.[255]

The fact that the entry is pursuant to statutory authority does not alter the result. Statutory authorizations for official entries upon private lands generally are held to be valid on their face[256] since the courts feel constrained to assume that the contemplated interference with private property rights ordinarily will be slight in extent, temporary in duration, and *de minimis* in amount. As the leading California case of *Jacobsen v. Superior Court*[257] declares, the privilege of entry for official purposes is available only for "such innocuous entry and superficial examination . . . as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property."[258] Minor and trivial injuries, in effect, are noncompensable; the public purpose to be served by the entry requires subordination of private property rights to this limited

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by the employee's "own negligent or wrongful act or omission." CAL. GOV'T CODE § 821.8; *see* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 5.62 (Cal. Cont. Educ. Bar ed. 1964).

254 Frustuck v. Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1963); Bernard v. State, 127 So. 2d 774 (La. 1961). *See also* Podesta v. Lindeen Irr. Dist., 141 Cal. App. 2d 38, 296 P.2d 401 (1956), where the burdening of a servitude for drainage by widening and deepening a normally dry watercourse traversing a private ranch, thereby preventing its use for agricultural purposes, was held compensable.

255 There are many examples of actionable interferences. Heimann v. Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947) (substantial temporary interference with access to adjoining property by storage of construction materials and erection of sheds upon and in front of plaintiff's land); O'Dea v. San Mateo County, 139 Cal. App. 2d 659, 294 P.2d 171 (1956) (obstruction of surface for over ten months by storing drainage pipes on easement while awaiting underground installation).

256 Irvine v. Citrus Pest Dist. No. 2, 62 Cal. App. 2d 378, 144 P.2d 857 (1944); Contra Costa County v. Cowell Portland Cement Co., 126 Cal. App. 267, 14 P.2d 606 (1932) (by implication); *see* Annot., 29 A.L.R. 1409 (1924).

257 192 Cal. 319, 219 P. 986 (1923).

258 *Id.* at 329, 219 P. at 991. *See also* Dancy v. Alabama Power Co., 198 Ala. 504, 73 So. 901 (1916); 2 P. NICHOLS, EMINENT DOMAIN § 6.11, at 379-83 (rev. 3d ed. 1963).

extent, at least.[259]

The threatened entry that the owner was seeking to prevent in *Jacobsen* contemplated the occupation of parts of the owner's ranch for two months by municipal water district employees, and the use of power machinery to make test borings and excavations to determine the suitability of the premises for use as a possible water reservoir. Recognizing that the resulting damages could not be a basis of tort liability, absent negligence, wantonness, or malice, the supreme court nevertheless concluded that they would constitute a compensable damaging of the owner's right to possession and enjoyment of his property. The district's argument of necessity was rejected. The fact that extensive soil testing, to depths up to 150 feet, was deemed essential to an intelligent evaluation of the suitability of the site for reservoir purposes—a determination that necessarily must precede any decision to institute condemnation proceedings—was held insufficient to justify an uncompensated interference of this magnitude with private property.

The specific holding in the *Jacobsen* case has been obviated by a special statutory procedure, enacted in 1959, as section 1242.5 of the Code of Civil Procedure. Public entities with power to condemn land for reservoir purposes are authorized to petition the superior court for an order permitting an exploratory survey of private lands to determine their suitability for reservoir use, when the owner's consent cannot be obtained by agreement. The order, however, must be conditioned upon the deposit with the court of cash security, in an amount fixed by the court, sufficient to compensate the owner for damage resulting from the entry, survey, and exploration, plus costs and attorneys fees incurred by the owner.

While section 1242.5 is limited to reservoir site investigations, other types of privileged official entries may also cause substantial private detriment.[260] But, as discussed below, this provision constitutes a useful starting point for generalized legislative treatment of the problem of damage from privileged official entries upon private property.

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[259] *See* Heimann v. Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947) (no inverse recovery for personal discomfort or annoyance or for insubstantial interferences with property); *cf.* People *ex rel.* Department of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 9 Cal. Rptr. 151 (1960) (*semble*).

[260] *See* Onorato Bros. v. Massachusetts Turnpike Auth., 336 Mass. 54, 142 N.E.2d 389 (1957) (highway route survey); Wood v. Mississippi Power Co., 245 Miss. 103, 146 So. 2d 546 (1962) (utility line route survey); Vreeland v. Forest Park Reser. Comm'n, 82 N.J. Eq. 349, 87 A. 435 (Ct. of Err. and App. 1913) (fire prevention); Litchfield v. Bond, 186 N.Y. 66, 78 N.E. 719 (1906) (county boundary survey); Rhyne v. Mount Holly, 251 N.C. 521, 112 S.E.2d 40 (1960) (weed abatement work); cases cited in notes 254-45 *supra*.

(4) *Physical Occupation or Destruction by Mistake*

It is well settled that, absent an overriding emergency, the intentional seizure or destruction of private property by a governmental entity acting in furtherance of its statutory powers subjects it to inverse condemnation liability.[261] De facto appropriations of this type, however, often represent an erroneous exercise of governmental power based upon a negligent, or otherwise mistaken, assumption that the government owns the property taken. In such cases, the view that the entity's actions are merely tortious (and thus nonactionable as against the immune sovereign) generally has been rejected where the dispossession is a permanent one to which a public use has attached.[262] For example, inverse liability obtains where the entity constructs public improvements upon private land which its project officers negligently assume has been acquired for that purpose.[263] The same result has been reached where the mistake was purely one of law, in that the officers acted in the mistaken belief that under pending condemnation proceedings an immediate entry was authorized.[264] Destruction of buildings and other improvements on a private ranch by naval personnel engaged in aerial gunnery and bombing practice, in the erroneous belief that the ranch was included within a naval gunnery range, has also been held a compensable taking.[265]

Although the cited cases appear to be analogous to private trespass actions,[266] significant differences may be noted. Although the

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261 *See* Dugan v. Rank, 372 U.S. 609 (1963); 2 P. NICHOLS, EMINENT DOMAIN § 6.21, at 393 (rev. ed. 1963); Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968) (emergency exception). *See also* Wofford Heights Ass'n v. Kern County, 219 Cal. App. 2d 34, 32 Cal. Rptr. 870 (1963) (unintentional but foreseeable damage held compensable).

262 *See, e.g.*, Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965); Department of H'ways v. Gisborne, 391 S.W.2d 714 (Ky. 1965).

263 Napa v. Navoni, 56 Cal. App. 2d 289, 132 P.2d 566 (1942) (water pipeline laid in plaintiff's land under mistaken belief that easement had been acquired); Department of H'ways v. Gisborne, 391 S.W.2d 714 (Ky. 1965) (contractor in good faith reliance proceeded with improvement work on land which highway engineer mistakenly staked out); *cf.* Road Dep't v. Cuyahoga Wrecking Co., 171 So. 2d 50 (Fla. App. 1965) (highway contractor removed building from land not yet condemned, apparently by mistake).

264 Bridges v. Alaska Housing Auth., 375 P.2d 696 (Alas. 1962) (owner awarded value of building, attorneys fees, and damages for mental anguish when private structure destroyed). *See also* R.J. Widen Co. v. United States, 357 F.2d 988 (Ct. Cl. 1966) (United States Corps of Engineers mistakenly commenced flood control work under joint federal-state project three months before state, pursuant to agreement, "took" the property by condemnation).

265 Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965).

266 *Compare* Napa v. Navoni, 56 Cal. App. 2d 289, 139 P.2d 566 (1942)

public trespass may be capable of being discontinued, the injured party does not have the option, ordinarily open to private litigants, to seek recovery for past damages together with specific removal of the offending structure or condition.[267] Where a public use has intervened, the courts ordinarily refuse to enjoin continuance of the invasion, and relegate the plaintiff instead to recovery of compensation for whatever property damage inflicted, both past and future.[268] In addition, the plaintiffs in factually similar private tort litigation may recover not only for property damage but also for personal discomfort and annoyance caused by the trespassory invasion,[269] while these elements of damage generally are excluded from the purview of inverse condemnation.[270] The overlap of the tort and inverse remedies under present California law is thus somewhat less than complete duplication.[271]

III. Conclusions and Recommendations: A "Risk Analysis" Approach to Inverse Liability

The foregoing review of California inverse condemnation law, as applied to claims based on unintentional damaging of private prop-

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(inverse condemnation) *with* Slater v. Shell Oil Co., 58 Cal. App. 2d 864, 137 P.2d 713 (1943) (trespass).

267 *Cf.* Spaulding v. Cameron, 38 Cal. 2d 265, 239 P.2d 625 (1952). *See generally* Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507 (1955); Slater v. Shell Oil Co., 58 Cal. App. 2d 864, 137 P.2d 713 (1943); RESTATEMENT (SECOND) OF TORTS § 161, comment *b* (1965). The option is ordinarily denied, however, when the offending structure is maintained as a necessary part of a public utility operation. Thompson v. Illinois Central R.R., 191 Iowa 35, 179 N.W. 191 (1920); McCormick, *Damages for Anticipated Injury to Land*, 37 HARV. L. REV. 574, 584-85 (1924).

268 Frustuck v. Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1963); *cf.* Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964) (denial of injunction to prevent excessive jet aircraft noise by commercial planes landing and taking off at public airport held proper in view of public interest in continuation of air transportation).

269 Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507 (1955).

270 *See* People *ex rel.* Dep't of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 9 Cal. Rptr. 151 (1960); Heimann v. Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947); Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App. 2d 306, 114 P.2d 14 (1941). *Contra*, Bridges v. Alaska Housing Auth., 375 P.2d 696 (Alas. 1962).

271 Although common law governmental immunity is no longer a defense to trespass as a remedy against California public entities for mistaken occupation or destruction of private property, relief in tort may not always be available in light of the special defenses included in the California Tort Claims Act of 1963. *See, e.g.*, CAL. GOV'T CODE §§ 820.2 (discretionary conduct), 820.4 (non-negligent enforcement of law), 821.8 (trespass within express or implied authority).

erty, discloses three major areas of difficulty discussed below to which legislative reform efforts should be directed.

A. Clarification of the Basis of Inverse Liability

One of the most striking features of California decisional law is the dual approach to inverse liability. In some types of cases (*e.g.*, landslide, water seepage, stream diversion, concussion), present rules appear to impose inverse liability without regard for fault; in others (*e.g.*, drainage obstruction, flood control, pollution) an element of fault is required to be pleaded and proved by the claimant. The confusion produced by this judicial ambivalence has been compounded, in part, by an understandable tendency of counsel to pursue the "safe" course of action. Faced by appellate dicta to the effect that an inverse liability claimant cannot recover against a public entity without the pleading and proving of a claim actionable against a private person under analogous circumstances,[272] plaintiffs' lawyers often have proceeded, it seems, on the erroneous assumption, readily accepted by defense counsel and thus by the court, that a showing of fault was indispensable to success. Appellate opinions in such cases, after trial, briefing, argument, and decision predicated upon that assumption, do little to dispel the theoretical cleavage.[273] Only occasionally have reported opinions explicitly noted, ordinarily without attempting to reconcile, the interchangeability of the "fault" and "no fault" approaches to inverse liability.[274] Even the recent *Albers* decision, which at least set the record straight by revitalizing the position that inverse liability may be imposed without fault, did not undertake a thorough canvass of the law, but rather left many doctrinal ends dangling. Uniform statutory standards for invocation of inverse condemnation responsibility thus would be a significant improvement in California law, both as an aid to predictability and counseling of claimants and as a guide to intelligent planning of public improvement projects.

It already has been suggested above that the concept of fault as a basis of inverse liability includes a broad range of liability-producing acts and omissions that, in individual cases, are not required to be

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[272] *See, e.g.*, Archer v. Los Angeles, 19 Cal. 2d 19, 24, 119 P.2d 1, 4 (1941). Statements to this effect in *Archer* and other cases were characterized as dicta in Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

[273] *See, e.g.*, Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); Ward Concrete Co. v. Los Angeles County Flood Control Dist., 149 Cal. App. 2d 840, 309 P.2d 546 (1957).

[274] *See, e.g.*, Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962).

identified with precision, provided the operative facts are located within the extremes.[275] If private property is damaged by the construction of a public improvement, the cases relate that "the state or its agency must compensate the owner therefore . . . whether the damage was intentional or the result of negligence on the part of the governmental agency."[276] In this typical pre-*Albers* statement, the *kind* of fault becomes immaterial, but fault is assumed to be essential. Yet the case[277] cited in principal support of the quoted statement is also the chief authority relied upon in *Albers* to sustain liability without fault. Reconciliation of the seeming inconsistency, it is believed, is possible in a manner consistent with acceptable policy considerations.

Each of the variant kinds of fault that are recognized as a potential basis for inverse liability includes the fundamental notion that the public entity, by adopting and implementing a plan of improvement or operation, either negligently or deliberately exposed private property to a risk of substantial but unnecessary loss. Negligence in this context often appears to be an after-the-fact explanation, couched in familiar tort terminology, of what originally amounted to the deliberate taking of a calculated risk.[278] Foreseeable damage is not necessarily inevitable damage. Plan or design characteristics that incorporate the probability of property damage under predictable circumstances may later be judicially described as "negligently" drawn; yet, in the original planning process, the plan or design with its known

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[275] See text accompanying notes 38-43 *supra.*

[276] Clement v. Reclamation Bd., 35 Cal. 2d 628, 641, 220 P.2d 897, 905 (1950). *See also* Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961).

[277] Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885).

[278] *See* Smith v. Los Angeles, 66 Cal. App. 2d 562, 578, 153 P.2d 69, 78 (1944): "During this [six year] period the district had ample time and opportunity to make adequate provision for the care of the diverted waters and for the protection of plaintiffs' property. It was simply *a choice of means deliberately made* by the governing board of the district in selecting one method of controlling possible future floods as against another." (Emphasis added). *See also* Lubin v. Iowa City, 257 Iowa 383, 391, 131 N.W.2d 765, 770 (1965), where the court said in affirming an order granting plaintiff a new trial in an action for damages to a flooded basement caused by a break in an 80 year old water main installed six feet beneath the surface without a reasonable inspection capability that "[a] city . . . so operating knows that eventually a break will occur, water will escape and in all probability flow onto the premises of another with resulting damages. . . . *The risk from such a method of operation should be borne by the water supplier* who is in a position to spread the cost among the consumers who are in fact the true beneficiaries of this practice and of the resulting savings in inspection and maintenance costs." (Emphasis added). *Cf.* Broeder, *Torts and Just Compensation: Some Personal Reflections,* 17 HASTINGS L.J. 217, 224 (1965).

inherent risks may have been approved by responsible public officers as being adequate and acceptable for non-legal reasons. For example, the damage, although foreseeable, may have been estimated at a low order of probability, frequency, and magnitude, while the added cost of incorporating minimal safeguards may have been unacceptably high in proportion to available manpower, time and budget.[279] Again, additional or supplementary work necessary to avoid or reduce the risk, although contemplated as part of long-term project plans, may have been deferred due to more urgent priorities in the commitment of public resources. The governmental decision (whether made by design engineers, departmental administrators, budget officers, or elected policy-makers) to proceed with the project under these conditions thus may have represented a rational (and hence by definition non-negligent) balancing of risk against practicability of risk avoidance.[280]

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279 The legislative approach to governmental tort liability for dangerous conditions of public property includes directly analogous considerations. There are several examples. First, tort liability cannot be based upon defects in the plan or design of a public improvement where reasonable grounds for official approval thereof existed at the time the plan or design was accepted. Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967); CAL. GOV'T CODE § 830.6; Note, *Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*, 19 HASTINGS L.J. 584 (1968). Secondly, a condition of public property which causes injury is not regarded as "dangerous" if the court determines, as a matter of law, that the risk of harm thereby created was minor, trivial, or insignificant in light of the surrounding circumstances. CAL. GOV'T CODE § 830.2; *see* Barrett v. Claremont, 41 Cal. 2d 70, 256 P.2d 977 (1953). Thirdly, even if the condition is a dangerous one, liability is not imposed if the public agency establishes that either "(a) . . . the act or omission that created the condition was reasonable . . . [as] determined by weighing the probability and gravity of potential injury . . . against the practicability and cost of taking alternative action . . . ." or "(b) . . . the action it took to protect against the risk . . . or its failure to take such action was reasonable . . . [as] determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury . . . against the practicability and cost of protecting against the risk of such injury." CAL. GOV'T CODE § 835.4; *see* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY §§ 6.29, 6.30 (Cal. Cont. Educ. Bar ed. 1964).

280 *See* RESTATEMENT (SECOND) OF TORTS § 302, comment *a* (1965). Evidence that planners or designers failed to employ sound engineering practices, *e.g.*, Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (expert testimony), may thus be explainable on grounds other than negligence. The deficient culverts in *Granone*, for example, may have represented an intermediate or temporary stage of the channel improvement project; the county may have elected to bridge the stream by a less expensive technique (earth fill pierced by culverts) within current budget appropriations, rather than the more expensive expedient of a wide-span steel and concrete bridge. On the other hand, the decision to culvert rather than bridge may, in fact, have been due to negligence or incompetence of the responsible

When the government, acting in furtherance of public objectives, has thus taken a calculated risk that private property might be damaged, and such damage has eventuated, a decision as to inverse liability should be preceded by a discriminating appraisal of the relevant facts. The usual doctrinal approach surely is consistent with this view: "The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking."[281] But whether the loss constitutes more than a "proper" share depends upon a careful balancing of the public and private interests involved, so far as those interests are identified, accepted as relevant, and exposed to factual scrutiny.

Assuming foreseeability of damage, the critical factors in the initial stage of the balancing process relate to the practicability of preventive measures, including possible changes in design or location. If prevention is technically and fiscally possible, the infliction of avoidable damage is not "necessary" to the accomplishment of the public purpose.[282] The governmental decision to proceed with the project without incorporating the essential precautionary modifications in the plan thus represents more than a mere determination that effective damage prevention is not expedient. It is also a deliberate policy decision to shift the risk of future loss to private property owners rather than to absorb such risk as a part of the cost of the improvement paid for by the community at large. In effect, that decision treats private damage costs, anticipated or anticipatable, but uncertain in timing or amount or both, as a deferred risk of the project. If and when they materialize, however, the present analysis suggests that those costs should be recognized as planned costs in-

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officers. The latter conclusion, if true, would merely move the risk analysis back an additional step. Employment of engineers, designers, and managers to develop and execute public improvement projects of substantial size and complexity entails a calculated risk of human error resulting in defective plans. An alternate analysis might emphasize the view that standards of personnel recruitment, methods of qualification investigation, and levels of compensation may not have been pitched at a level reasonably calculated to exclude the risk of employing untrained, incompetent, and careless designers and planners.

281 Clement v. Reclamation Bd., 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950).

282 *See* House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 392, 153 P.2d 950, 954 (1944): "In view of the organic rights to acquire, possess and protect property and to due process and equal protection of the laws, the principles of nonliability and *damnum absque injuria* are not applicable when in the exercise of the police power, private, personal and property rights are interfered with, injured or impaired in a manner or by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare."

flicted in the interest of fulfilling the public purpose of the project, and thus subject to a duty to pay just compensation.[283]

On the other hand, if the foreseeable type of damage is deemed technically impossible or grossly impracticable to prevent within the limits of the fiscal capability of the public entity, the decision to proceed with the project despite the known danger represents an official determination that public necessity overrides the risk of private loss. The shifting of the risk of loss to private resources is not sought to be supported on grounds of mere prudence or expedience but on the view that the public welfare requires the project to move ahead despite impossibility of more complete loss prevention. In this situation, an additional variable affects compensation policy. The magnitude of the public necessity for the project at the particular location, with the particular design or plan conceived for it, must be assessed in comparison to available alternatives for accomplishing the same underlying governmental objective with lower risk, but presumably higher costs (*i.e.*, higher construction and/or maintenance expense, or diminished operational effectiveness).[284] Unavoidable damage of slight or moderate degree, especially where widely shared or offset by reciprocal benefits, does not always demand compensation under this approach. Such damage may be reasonably consistent with the normal expectations of property owners and with community assumptions regarding equitable allocation of public improvement costs. But relevant reliance interests ordinarily do embrace an understanding that the stability of existing property arrangements will not be disturbed arbitrarily, or in substantial degree, by governmental improvements, and that project plans ordinarily will seek to follow those courses of action that will minimize unavoidable damage so far as possible.[285]

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[283] *See* Smith v. Los Angeles, 66 Cal. App. 2d 562, 578, 153 P.2d 69, 78 (1944).

[284] *Cf.* Bacich v. Board of Control, 23 Cal. 2d 343, 359, 144 P.2d 818, 828 (1943) (Edmonds, J.) (concurring opinion): "The factors to be considered in deciding an inverse condemnation claim are, on the one hand, the magnitude of the damage to the owner of the land, and, on the other, the desirability and necessity for the particular type of improvement and the danger that the granting of compensation will tend to retard or prevent it. . . . In addition, before compensation may be denied, the court must find that the particular improvement be *not unreasonably more drastic or injurious than necessary* to achieve the public objective." (Emphasis added).

[285] *See* Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950) (reliance on flood protection afforded by existing levees); Podesta v. Linden Irr. Dist., 141 Cal. App. 2d 38, 296 P.2d 401 (1956) (reliance upon continuance of drainage channel in natural condition); Los Angeles County Flood Control Dist. v. Abbot, 24 Cal. App. 2d 728, 76 P.2d 188 (1938) (reliance on accretions of sand); Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P.2d 585 (1935) (reliance on continued water level of recreational lake).

The importance of the project to the public health, safety and welfare, in relation to the degree of unavoidable risk and magnitude of probable harm to private property, thus constitutes the criterion for estimating the reasonableness of the decision to proceed. A change in the location of a highway, for example, may add only slightly to length and total construction costs, yet may reduce substantially the frequency or the extent of property damage reasonably to be anticipated from interference by the highway with storm water runoff. Alternately, the change might make it possible to include more adequate drainage features in the project plans without exceeding budgetary limits. On the other hand, the erection of a massive water storage tank at a particular location may entail a relatively low risk of landslide under foreseeable conditions, yet be justified by emergency considerations (*e.g.*, impending failure of other facilities), the need for adequate hydrostatic pressure pecularily available by storage at that location, or the costs that pumping equipment, together with longer distribution lines and access roads, would entail if a less suitable location were selected. The calculated risk implicit in such governmental decisions appears capable of rational judicial review, particularly if aided by statutory standards relevant to compensation policy. The factual elements deserving consideration, for example, do not appear unlike those specified in present statutory rules governing the liability in tort of public entities for dangerous conditions of public property.[286]

Although the preceding discussion has centered chiefly upon the concept of fault as a basis of inverse liability, it seems evident that the risk analysis here advanced also could be applied fruitfully in cases, like *Albers*, in which inverse liability obtains notwithstanding unforeseeability of injury and absence of fault. *Albers* may simply embody an implicit hypothesis that practically every governmental decision to construct a public improvement involves, however remotely, at least some unforeseeable risks that physical damage to property may result. In the presumably rare instance where substantial damage does in fact eventuate "directly" from the project,[287] and is

[286] See note 279 *supra*. It is clear, however, that the conditional "plan or design" immunity, CAL. GOV'T CODE § 830.6, withholds tort liability in precisely the same situations in which well settled rules of inverse condemnation law impose liability. *Compare* Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967) (tort liability withheld) *with* Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (inverse liability affirmed).

[287] Even though the risk may be deemed remote or even unforeseeable, the damage that eventuates is actionable if it results "directly" from the improvement. *See* Albers v. Los Angeles County, 62 Cal. 2d 250, 298 P.2d 129, 42 Cal. Rptr. 89 (1965); text accompanying notes 27-35 *supra*. *See also* House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 397, 153 P.2d 950, 957 (1944) (Traynor, J.) (concurring opinion): "It is of no avail to defendant that the invasion of plaintiff's property in the manner in which it hap-

capable of more equitable absorption by the beneficiaries of the project (ordinarily either taxpayers or consumers of service paid for by fees or charges) than by the injured owner,[288] absence of fault may

pened was not forseeable. . . . The public purpose was not the mere construction of the improvement but the protection that it would afford against floods. The dangers inherent in the improvement would cause injury only when storms put the flood control system to a test. The injury sustained by plaintiff was therefore not too remote."

[288] The conclusion in *Albers* that the County of Los Angeles was a better loss distributor than the plaintiff property owners (the losses in question were presumably not of a kind ordinarily covered by insurance) is unexceptional. But many public entities have very limited fiscal resources. *See* Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 465 n.7 (1963), where "the tremendous disparities in size, population and fiscal capacity" of local public entities are pointed out. It is evidenced by the fact that some counties, cities, and special districts "function on *annual* fiscal budgets of less than $50,000, while other cities, counties and districts have budgets averaging more than that sum *per day*." *See generally* [1965-1966] CAL. CONTROLLER ANN. REP., FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS OF CALIFORNIA; J. VIEG, CALIFORNIA LOCAL FINANCE (1960). The total liability of the defendant in *Albers* exceeded $5,000,000. Reliance upon loss distribution capacity as a significant criterion of inverse liability would thus, upon occasion, result in inequitable and discriminatory treatment of equally deserving property owners, depending upon the differing fiscal capacities of the defendant public entities.

This difficulty, of course, could be minimized by development of adequate means for funding of inverse liabilities by even the smallest of public entities. Even if it is assumed that commercial insurance against such risks is obtainable at reasonable premiums, it is not entirely clear that adequate statutory authority exists for public entities to insure against all inverse liabilities. *See* CAL. GOV'T CODE §§ 989-991.2, 11007.4 (authorizing insurance against "any injury"). *But see id.* § 810.8 (defining "injury" to mean losses that would be actionable if inflicted by a private person). Since inverse liability may obtain where private tort liability does not, Albers v. Los Angeles County, 62 Cal. 2d 250, 298 P.2d 129, 42 Cal. Rptr. 89 (1965), comprehensive tort liability insurance may still be regarded as inapplicable to some inverse claims. Existing statutory authority to fund judgment liabilities with bond issues, CAL. GOV'T CODE §§ 975-78.8, is, however, clearly broad enough to include inverse liability judgments. A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 9.16 (Cal. Cont. Educ. Bar ed. 1964). And although authority for payment of judgments by installments, CAL. GOV'T CODE § 970.6, is, in terms, limited to "tort" judgments, A. VAN ALSTYNE, *supra*, § 9.15, inverse liabilities may possibly be a form of "tort" for this purpose. *See generally* Douglass v. Los Angeles, 5 Cal. 2d 123, 128, 53 P.2d 353, 355 (1935).

In principle, the existing devices for funding tort liabilities appear to provide ample flexibility for administering inverse liabilities of the great majority of public entities. The statutes should, however, be clarified to avoid any doubt as to their applicability to inverse situations. In addition, the "catastrophe" liability problem should be given appropriate legislative attention. *See* Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 308-11 (1963) (similar proposal geared to local "fiscal effort"); Borchard, *State and*

be treated as simply an insufficient justification for shifting the unforeseeable loss from the project that caused it to be the equally innocent owners. Absence of foreseeability, like the other factual elements in the balancing process, is, in effect, merely a mitigating but not necessarily exonerating circumstance.

The risk analysis here advanced, it is submitted, reconciles most of the seemingly inconsistent judicial pronouncements as to the need for fault as a basis of inverse liability. Consistent with the intent of the framers of the just compensation clause to protect property interests against even the best intentioned exercises of public power,[289] it avoids as well a fruitless search for the somewhat artificial moral elements inherent in the tort concepts of negligence and intentional wrongs. It assumes that in the generality of cases, the governmental entity with its superior resources is in a better position to evaluate the nature and extent of the risks of public improvements than are potentially affected property owners, and ordinarily is the more capable locus of responsibility for striking the best bargain between efficiency and cost (including inverse liability costs) in the planning of such improvements.[290] Reduction in total social costs of public improvements may also be promoted by this approach, since political pressure generated by concern for inverse liability costs imposed upon taxpayers may be expected to produce both a reduction in the number of risk-prone projects undertaken and an increase in the use of injury-preventing plans and techniques.[291]

It may be objected, of course, that the risk analysis approach assumes the competence of judges and juries to sit in review upon basic governmental policy decisions involving a high degree of discretion and judgment—a competence explicitly denied by prevailing legislation dealing with governmental liability in tort.[292] However meri-

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Municipal Liability in Tort—Proposed Statutory Reform, 20 A.B.A.J. 747, 751-52 (1934) (proposal for state "backup" insurance to supplement insurance efforts of small local entities). The development of an equitable plan of state-funded "backup" insurance presupposes the availability of appropriate and fair tests of local fiscal effort to fund such protection more directly. Such tests appear to be available. *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, MEASURES OF STATE AND LOCAL FISCAL CAPACITY AND EFFORT (1962).

[289] *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 771-76 (1967), for a review of the constitutional convention proceedings which led to adoption of the "or damaged" clause in section 14 of article I of the California Constitution.

[290] *Cf.* Calabresi, *The Decision for Accidents; an Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965).

[291] *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 11.4 (1956); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500-17 (1961).

[292] *See* CAL. GOV'T CODE §§ 820.2, 830.6; A. VAN ALSTYNE, CALIFORNIA

torious the objection may be in considering statutory tort policy,[293] it fails in the face of settled constitutional policy regarding eminent domain. The cases are legion that approve inverse condemnation liabilities grounded precisely upon determinations of judges or juries that the consequences of carefully considered discretionary decisions of public officials, including decisions relating to the plan or design of public improvements, amounted to a "taking" or a "damaging" of private property for public use.[294] To deny adjudicability in such cases would effectively remove from the purview of the just compensation clause those very situations in which compensation was clearly intended to be available for the protection of property owners.[295] In any event, the risk analysis approach does not interfere directly with official power or discretion to plan or undertake public projects; it merely determines when resulting private losses must be absorbed as part of the cost of such projects.

Certainty and predictability also would be improved significantly by the enactment of general legislative standards for the determination of inverse liability. The "risk theory" of inverse liability, here suggested, provides a possible approach to uniform guidelines that would eliminate arbitrary distinctions based on fault, absence of fault, and varieties of fault. Moreover, since it seems likely that the practical impact of the *Albers* decision will be more frequent imposition of inverse liability without fault,[296] it is noteworthy that the American

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GOVERNMENT TORT LIABILITY §§ 5.51-.57 (Cal. Cont. Educ. Bar ed. 1964). *See also* California Law Revision Commission, *Recommendation Relating ot Sovereign Immunity*, in 4 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 807, 810 (1963).

293 *See* Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Ne Casek v. Los Angeles, 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965). *But see* Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 473-91 (1963).

294 There are two leading California decisions. Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944).

Cases in other states are discussed in Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3. Imposition of inverse liability upon public entities for defectively designed public structures is consistent with the trend in private tort law toward imposition of liability upon architects and engineers for defective plans. *See* Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CALIF. L. REV. 1361 (1967).

295 *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967).

296 See text accompanying notes 9-35 *supra*. Despite the implications of the *Albers* decision, however, subsequent inverse litigation has continued to revolve principally around the concept of fault. *See, e.g.*, Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968) (flooding caused by highway improvement and related flood control works).

Law Institute has under consideration a proposal to restate the law of strict tort liability for abnormally dangerous activities by reference to factors not unlike those suggested as appropriate to the "risk theory." Determination whether an activity is "abnormally dangerous," for example, would be determined as a matter of law (*i.e.*, not as a jury question) by considering such factors as the degree of risk, gravity of potential harm, availability of methods for avoiding the risk, extent of common participation in the activity, appropriateness to the locality, and social and economic importance to the community of the activity.[297] Limitations upon strict liability in tort have been recommended also where the damage was caused by the intervention of an unforeseeable force of nature (*i.e.*, "act of God"),[298] where the plaintiff assumed the risk,[299] and where the injury was due to the abnormally sensitive nature of the plaintiff's activities.[300]

A somewhat similar approach is suggested as well by the prevailing interpretation of those Massachusetts statutes authorizing compensation for "injury . . . caused to . . . real estate" by state highway work.[301] Proceeding from the premise that statutory authority for construction of highways contemplates the use of reasonable care, the Massachusetts courts have concluded that statutory compensation is available only when the claimed damage was a "necessary" or "inevitable" result of the work when performed in a reasonably proper manner.[302] To recover, the claimant must show that the damage was

297 RESTATEMENT (SECOND) OF TORTS § 520, at 56 (Tent. Draft No. 10, 1964): "In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others; (b) whether the gravity of the harm which may result from it is likely to be great; (c) whether the risk cannot be eliminated by the exercise of reasonable care; (d) whether the activity is not a matter of common usage; (e) whether the activity is inappropriate to the place where it is carried on; and (f) the value of the activity of the community." *See also id.* § 521, stating that there should be no strict liability for abnormally dangerous activities required or authorized by law; liability should be governed by the standard of reasonable care appropriate to such activity.

298 *Id.* § 522(a), at 82 (minority proposal by Reporter, W. Prosser, and three Advisors).

299 *Id.* § 523, at 86. *See also id.* § 524, at 91 (contributory negligence).

300 *Id.* § 524A, at 93.

301 MASS. GEN. LAWS ANN. ch. 81, § 7 (1964). *See, e.g.*, United States Gypsum Co. v. Mystic River Bridge Auth., 329 Mass. 130, 106 N.E.2d 677 (1952). Although Massachusetts is a "taking" state, it has enacted an extensive pattern of legislation providing for payment of compensation for damage inflicted by governmental programs. For citations of Massachusetts cases, *see generally* 2 P. NICHOLLS, EMINENT DOMAIN § 6.42-.43, at 464-86 (rev. 3d ed. 1963).

302 The development of the Massachusetts doctrine is reviewed fully in Boston Edison Co. v. Campanella & Cardi Constr. Co., 272 F.2d 430 (1st Cir.

either (a) unavoidable by exercise of due care, or (b) economically impracticable to avoid in fact even if technically avoidable.[303] This dual approach thus imposes inverse (statutory) liability where the plan, design, or method of construction of the public improvement incorporates a deliberately accepted risk of private property injury, but relegates to tort litigation any injuries caused by mere negligence in carrying out the public entity's program.[304]

B. De-emphasis of Private Law Analogies

The existing judicial gloss on the just compensation clause is, to a considerable degree, a reflection of legal concepts derived from the private law of property and torts. The analogues, however, are unevenly drawn, sometimes disregarded, and occasionally confused. There is no compelling reason why rules of law designed to adjust jural relationships between private persons necessarily should control the rights and duties prevailing between government and its citizenry.[305] Indeed, the definition of the constitutional term "property"

1959). This case is factually similar to Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885).

[303] Boston Edison Co. v. Campanella & Cardi Constr. Co., 272 F.2d 430 (1st Cir. 1959); Murray Realty, Inc. v. Berke Moore Co., 342 Mass. 689, 175 N.E.2d 366 (1961). *See also* Webster Thomas Co. v. Commonwealth, 336 Mass. 130, 143 N.E.2d 216 (1957). Economic considerations are deemed relevant to a determination of the practicability of damage avoidance. "In determining whether the damage was inevitable, the test is not whether the method was absolutely necessary, but whether in choosing another method so as to avoid damage 'the expense would be so disproportionate to the end to be reached as to make [the other method] from a business and common sense point of view impracticable.'" Murray Realty, Inc. v. Berke Moore Co., *supra* at 692, 175 N.E.2d at 368. In this case, the use of explosives for demolition work had been disapproved by the state as too risky, and the "pin and feather" method (drilling a series of holes and driving wedges to break paving) as too expensive and time-consuming. Adoption of the steel-ball-and-crane technique was found to be a reasonable decision and, absent negligence in the actual use of this technique, was thus a basis for statutory liability for "necessary" damage that resulted. In Boston Edison Co. v. Campanella & Cardi Constr. Co., *supra*, the twisting of the plaintiff's foundation as a result of dumping heavy fill on unstable soil on an adjoining public improvement site was held to be foreseeable, but the evidence failed to support a finding that avoidance techniques were practicable.

[304] *See, e.g.*, Murray Realty, Inc. v. Berke Moore Co., 342 Mass. 689, 175 N.E.2d 366 (1961) (negligent use of steel ball for demolition work); Holbrook v. Massachusetts Turnpike Auth., 338 Mass. 218, 154 N.E.2d 605 (1958) (flood damage due to negligently constructed embankment that interfered with drainage).

[305] *Cf.* Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965). *But see* Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968); Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 868 (1968). *See also* Milhous v. Highway Dep't, 194 S.C. 33, 8 S.E.2d 852 (1940), where the state

—a term that merely connotes the aggregate of legal interests to which courts will accord protection[306]—often is different, when damage has resulted from governmental conduct, from its definition when comparable private action caused the injury. For example, the "police power" may immunize government from liability where private persons would be held responsible;[307] conversely, public entities may be required to pay compensation for harms which private persons may inflict with impunity.[308] Yet, in other situations (notably the water damage cases) private law principles are invoked without hesitation as suitable resolving formulae for inverse liability claims.[309]

The present uneasy marriage between private law and inverse condemnation has none of the indicia of a comprehensively planned or carefully developed program of legal cohabitation. Its current status may perhaps best be understood as the product of an episodic judicial process that often regards factual similarity as more important than doctrinal consistency. In this process, the doctrinal treatment invoked in flooding cases tends to beget like handling of other flooding cases, in seepage cases of other seepage cases, and in pollution cases of other pollution cases; cross-breeding between these genealogical lines is relatively rare. The interchangeability of private and public precedents has, of course, some superficially deceptive virtues, including consistency and predictability. These apparent advantages, however, are obtained at the risk that significant differences between the interests represented by governmental functions and like private functions may be overlooked and the application of legal rules consequently distorted.

The water damage cases provide a useful illustration of the point. The "common enemy" rule, which California decisions invoke to absolve riparian owners from liability for damage caused by reasonable flood protection improvements, may arguably possess merit as applied to individual proprietors. In the interest of promoting useful land development through individual initiative, the law should not discourage private efforts to take protective action against the emergency of menacing flood waters even though other owners who act

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was held liable for flooding due to the obstruction of surface waters even though, under private water law rules, a private person would not be liable; inverse liability for the "taking" of private property was held to be unfettered by rules of common law.

306 *See* 2 P. NICHOLS, EMINENT DOMAIN § 5.1, at 4-8 (rev. 3d ed. 1963).

307 See text accompanying notes 59-78 *supra*. *See also* Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968).

308 See text accompanying notes 9-35 *supra*.

309 *See, e.g.*, Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968) (stream water diversion); Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 868 (1968) (surface water diversion).

less diligently or are unable to command the resources to protect themselves may sustain losses as a result.[310] Indeed, during the early development of the State, prior to the proliferation of governmental agencies explicitly charged with flood control duties, the owner's privilege to construct protective works was perhaps indispensable to the safeguarding of valuable agricultural lands from destruction.[311] Moreover, potential damage resulting from the undertakings of individuals in this regard is not likely to be extensive or severe.

The rationale of the "common enemy" rule, however, is of dubious validity when considered in the context of governmentally administered flood control projects developed for the collective protection of entire regions. The aggregation of resources involved in most flood control district developments, as well as the comprehensive nature of such schemes, imports a quantum jump in damage potential. For example, a major project may well entail massive outlays of public funds over an extended period of years for the construction of an area-wide network of interrelated check dams, catch basins, stream bed improvements, drainage channels, levees, and storm sewers, all programmed for completion in a logical order dictated primarily by engineering considerations. The realities of public finance may, at the same time, require the cost to be distributed over a substantial

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310 See note 114-18 *supra*.

311 *See* San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920). The first comprehensive legislative approach to regional flood control involved the creation of the Sacramento & San Joaquin Drainage District as a state agency to implement, in cooperation with the federal government, the flood control plans formulated by the California Debris Commission. Cal. Stats. 1913, ch. 170, at 252; *see* Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917). Local flood control organizations, until recent years, consisted principally of relatively small drainage, levee, or flood control districts created pursuant to general enabling statutes. *E.g.*, CAL. WATER CODE APP. §§ 6-1 to -29 (1968) (corresponds to Protection District Act of 1895, Cal. Stats. 1895, ch. 201, §§ 1-29); CAL. WATER CODE APP. §§ 9-1 to -25 (1968) (corresponds to Levee District Act of 1905, Cal. Stats. 1905, ch. 310, §§ 1-16). A few flood control districts of more sweeping geographical scope had been established by special legislation before 1939. CAL. WATER CODE APP. §§ 28-1 to -23 (1968) (Los Angeles County); CAL. WATER CODE APP. §§ 36-1 to -23 (1968) (Orange County); CAL. WATER CODE APP. §§ 37-1 to -31 (1968) (American River Basin). However, the modern trend to establishment of such districts in a majority of the counties of California by carefully tailored special laws began in 1939 with the creation of the San Bernardino County Flood Control Act. CAL. WATER CODE APP. §§ 43-1 to -28 (1968) (corresponds to Cal. Stats. 1939, ch. 73, §§ 1-28). In the 30 years since then, some 35 major flood control districts have been created by special act. *See* CAL. WATER CODE APP. §§ 46-106 (1968). The validity of such specially created districts, despite the constitutional prohibition against local and special legislation, has been affirmed repeatedly. *See* American River Flood Control Dist. v. Sweet, 214 Cal. 778, 7 P.2d 1030 (1932).

time span, either in the form of accumulations of proceeds from periodic tax levies for capital outlay purposes or through one or more bond issues.

Piecemeal construction, often an inescapable feature of such major flood control projects, creates the possibility of interim damage to some lands left exposed to flood waters while others are within the protection of newly erected works.[312] Indeed, the partially completed works, by preventing escape of waters that previously were uncontrolled, actually may increase the volume and velocity of flooding with its attendant damage to the unprotected lands, often to such a degree that private action to repel the onslaught is completely impracticable.[313] The prevailing private law doctrine embodied in the "common enemy" rule, however, imposes no duty upon the public entity to provide complete protection against flood waters; like private riparians, the entity is its own judge of how extensively it will proceed with its improvements. Increased or even ruinous damage incurred by the temporarily unprotected owners, due to the inability of the improvements to provide adequate protection to all, therefore, is not a basis of inverse liability.[314] The constitutional promise of just compensation for property damage for public use thus yields to the overriding supremacy of an anomalous rule of private law.

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[312] *See, e.g.*, Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917).

[313] *See* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962); Comment, *California Flood Control Projects and the Common Enemy Doctrine*, 3 STAN. L. REV. 361 (1951). A collateral problem, to which little or no attention has been given in the case law, is the question of notice. The physical activity of one farmer in putting up protective levees might well give adequate notice to his immediate neighbors of the need for similar self-help to repel the "common enemy"; but it seems unrealistic to expect that lower landowners will necessarily realize that upstream flood control improvements being installed by a large public district, possibly many miles distant, will augment the volume, velocity, and intensity of downstream flow to a degree that warrants additional protective barriers. To the extent that the "common enemy" rule assumes that the resulting downstream flood damage is the result of the injured owner's failure to take self-protective measures, despite absence of notice of the need to do so, it tends to function as a rule of strict liability operating in reverse. *Cf.* Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941); San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920). The analogous problem of allocating responsibility for protection against loss of lateral support due to normal excavations for improvement purposes has been resolved by statutory provision for the giving of "reasonable notice" by the improver as a condition of non-liability. CAL. CIV. CODE § 832; *see* note 184 *supra*.

[314] Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917). *See also* United States v. Sponenbarger, 308 U.S. 256 (1939); Kambish v. Santa Clara Valley Water Conser. Dist., 185 Cal. App. 2d 107, 8 Cal. Rptr. 215 (1960); Weck v. Los Angeles County Flood Control Dist., 80 Cal. App. 2d 182, 181 P.2d 935 (1947).

Assimilation of private concepts into inverse condemnation law also may produce governmental liability in circumstances of dubious justification. This result, in part, can be explained by the blurred definitional lines which distinguish the various categories of factual circumstances (*e.g.*, "surface water," "stream water," flood water) to which disparate legal treatment is accorded under private law rules.[315] But it is also a consequence of the failure of the private law rules to accord appropriate weight to the special interests that attend the activities of governmental agencies. For example, it is arguable that strict liability for damage resulting from the diversion of water flowing in a natural watercourse may be reasonably sensible as applied to adjoining riparian owners; a contrary view would expose settled reliance interests to the threat of repeated and diverse private interferences that could discourage natural resource development. Stream diversions, however, may be integral features of coordinated flood control, water conservation, land reclamation, or agricultural irrigation projects undertaken on a large scale by public entities organized for that very purpose.[316] Where this is so, the community may suffer more by general fiscal deterrents resulting from indiscriminately imposed strict liabilities than by specifically limited liabilites determined by the reasonableness of the risk assumptions underlying each diversion.

Liability in water damage cases, it is submitted, should not be reached by mechanical application of private law formulas. Instead, it should be based upon a conscientious appraisal of the overall public purposes being served, the degree to which the loss is offset by reciprocal benefits, the availability to the public entity of feasible preventive measures or of adequate alternatives with lower risk potential, the severity of damage in relation to risk-bearing capabilities, the extent to which damage of the kind sustained is generally regarded as a normal risk of land ownership, the degree to which like damage is distributed at large over the beneficiaries of the project or is peculiar to the claimant, and other factors which in particular cases may be relevant to a rational comparison of interests.[317]

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[315] See text accompanying notes 125-30, 149-50, 155-56 *supra*.

[316] *See, e.g.*, Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950); Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400 (1897).

[317] Although most of the California decisions have tended to exemplify a somewhat mechanical application of doctrinal precepts, *e.g.*, Callens v. Orange County, 129 Cal. App. 2d 255, 276 P.2d 886 (1954), some notable exceptions can be found. *E.g.*, Dunbar v. Humboldt Bay Mun. Water Dist., 254 Cal. App. 2d 480, 62 Cal. Rptr. 358 (1967) (damage issues); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (liability issues); Smith v. Los Angeles, 66 Cal. App. 2d 562, 153 P.2d 69 (1944) (liability issues). Instructive examples of explicit balancing of interests are also found in United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) (feasability of equitable cost

Recent California Supreme Court decisions indicate that a balancing approach along these lines henceforth will be taken in cases involving loss of stream water supply and claims of damage resulting from interference with surface water.[318] But it is far from certain whether, absent legislative standards, the balancing process in such cases would take into account all the peculiar factors appropriate to governmental, but irrelevant to private, nonliability. Similarly, it is arguable that prevailing private law rules governing liability for damage due to concussion and explosion may be unrealistically severe as applied in an inverse condemnation context.[319]

Conversely, growing national concern over problems of environmental pollution[320] necessarily is focused on the continuing expansion of governmental functions capable of contributing to pollution problems (*e.g.*, sewage collection and treatment, garbage and rubbish collection).[321] Accordingly, a statutory rule of strict inverse liability arguably may be regarded as a desirable incentive to the development of intragovernmental anti-pollution programs supported by widespread cost distribution. This certainly would be preferable to an unfounded adherence to somewhat ambiguous legal concepts developed in comparable private litigation.[322]

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distribution deemed relevant to compensability for loss of riparian rights due to seasonal overflowing of agricultural lands); United States v. Willow River Power Co., 324 U.S. 499 (1945) (appraisal of competing private and public interests deemed relevant to compensability for loss of head due to increase in water level).

[318] *See* Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967) (stream water); Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966) (surface water); Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 868 (1968).

[319] See text accompanying notes 297-300 *supra*.

[320] *See, e.g.*, Water Quality Act, 33 U.S.C. § 466 (Supp. I, 1965); Water Pollution Control Act, 33 U.S.C. § 466a (Supp. II, 1966); Clean Air Act, 42 U.S.C. § 1857 (1964); 1 FED. WATER POLLUTION CONTROL ADM'N, THE COST OF CLEAN WATER: SUMMARY REPORT *passim* (1968); U.S. DEPT. OF AGRIC., A PLACE TO LIVE: THE YEARBOOK OF AGRICULTURE 83-132 (1963).

[321] It has been estimated authoritatively that "municipal waste treatment plant and interceptor sewer construction costs to attain federal water quality standards in the five-year period, FY 1969-73, will require the expenditure of $8.0 billion," excluding land costs. 1 FED. WATER POLLUTION CONTROL ADM'N, THE COST OF CLEAN WATER: SUMMARY REPORT 10 (1968). *See also* Bryan, *Water Supply and Pollution Control Aspects of Urbanization*, 30 LAW & CONTEMP. PROB. 176, 188-92 (1965).

[322] See text accompanying notes 206-23 *supra*. *But see* N.J. Rev. Stat. § 40:63-129 (1967): "The owner of any land adjacent to any plant, works or station for the treatment, disposal or rendering of sewage . . . who shall sustain any direct injury by reason of the *negligence or lack of reasonable care* of the contracting municipalities . . . in the establishment and maintenance of any such plant, works, or station, may maintain an action at law . . . for

The law of inverse condemnation liability for loss of soil stability and deprivation of lateral support, as already noted, is also in need of clarification by legislation.[323] Here again, because of the vast volume of construction work undertaken by governmental agencies with potential damage-producing characteristics, a rational approach—already adopted, for example, in several states, including Connecticut,[324] Massachusetts,[325] Pennsylvania,[326] and Wisconsin[327]—might well substitute a statutory rule of strict inverse liability in place of rules developed for private controversies and predicated upon fault.[328] In connection with damage claims arising from drifting chemical sprays used in governmental pest abatement work, where current statutory provisions appear to impose a large measure of strict liability,[329] legislation again would be helpful to clarify applicability of the relevant provisions to public entities.[330]

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the recovery of all damages sustained by him by reason of such injury." (Emphasis added). Since the concept of "nuisance" appears to be the principal doctrinal basis for tort liability (and possibly for inverse liability) in pollution cases, there is a need for legislative clarification of the extent of governmental tort liability for nuisance under the Tort Claims Act of 1963. Note 210 and accompanying text *supra.*

[323] See text accompanying notes 173-84 *supra.*

[324] CONN. GEN. STAT. REV. § 13a-82 (1966).

[325] MASS. GEN. LAWS ch. 81, § 7 (1964).

[326] PA. STAT. tit. 26, § 1-612 (Supp. 1966).

[327] WIS. STAT. § 80.47 (1957).

[328] To some extent, of course, a form of strict inverse liability is already required in some cases by the decision in Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965). The full implications of this decision, however, remain to be worked out. *Cf.* Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968) (dictum) (opinion quotes extensively from pre-*Albers* opinions).

[329] *See* note 248 *supra.*

[330] For example, the legislature in CAL. AGRIC. CODE §§ 14063, 14093, has explicitly authorized governmental agencies to use certain dangerous chemicals in pest control operations, while the use of 2,4-D and other injurious herbicides in accordance with administrative regulations is authorized (apparently, but not explicitly, applicable to public entities) by a different section. *Id.* § 14033. Use of these chemicals may, of course, result in damage to private property. *See* Comment, *Crop Dusting: Two Theories of Liability?*, 19 HASTINGS L.J. 476 (1968). Legislative recognition of this risk is implicit in provisions declaring that authorized and lawful use of pesticides will not relieve "any person" from liability for damage to others caused by such use. CAL. AGRIC. CODE §§ 14003, 14034. Furthermore, in the interest of preventing improper and harmful methods from being employed, the legislature has delegated extensive authority to the director of agriculture to promulgate regulations, including a permit procedure, to govern the actual use of injurious agricultural chemicals. *Id.* §§ 14005-11, 14033. All users are under a mandatory duty to prevent substantial drift of economic poisons employed in the course of pest control operations and to conform to applicable regulations. *Id.* §§ 12972, 14011, 14032, 14063.

Legislative development of uniform inverse liability guidelines which avoid reliance upon established private legal rules would improve predictability and rationality of decision-making. Statutory criteria also would tend to clarify the factors of risk exposure to be considered by responsible public officials, and might well produce systematic improvements in preventive procedures associated with the planning and engineering of public improvements.

A collateral advantage might be the identification of situations, elucidated in the process of formulating appropriate criteria of *public* liability, in which reciprocal *private* liabilities may also appear worthy of legislative treatment. For example, a review of water damage problems in Wisconsin led in 1963 to an abrogation of formerly inflexible rules and the substitution of a new statutory duty, imposed correlatively upon both public entities and private persons, requiring the

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It seems probable that the courts would hold governmental agencies subject to the cited statutory provisions. Flournoy v. State, 57 Cal. 2d 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962) (general statutory language held applicable to public entities absent legislative intent to contrary). However, this conclusion is open to some doubt. Express reference to public agencies in certain code sections, CAL. AGRIC. CODE §§ 14063, 14093, suggests the intended nonapplicability of others in which no such reference is included. On the other hand, the code expressly makes the sections dealing with "Injurious Materials," *id.* §§ 14001-98, inapplicable to public entities while engaged in research projects. *Id.* § 14002. This impliedly indicates that it does apply in nonresearch situations. Legislation clarifying applicability would, it is submitted, be helpful.

Assuming applicability of the code provisions, the scope of governmental tort liability resulting from violations is not entirely clear. In some instances, such violations, for example, the use of a method of chemical pest control which caused substantial drift in violation of section 12972 would presumably constitute a basis for entity liability for breach of a mandatory duty. CAL. GOV'T CODE § 815.6. In some instances, however, it may be questionable whether such property damage resulted from actionable negligence in applying the chemicals or from the immune discretionary determination to apply them under circumstances in which drift, and resultant damage, was inevitable. CAL. GOV'T CODE §§ 820.2, 855.4; A. VAN ALSTYNE, CALIFORNIA GOVERNMENTAL TORT LIABILITY 639 & n.4 (Cal. Cont. Educ. Bar ed. 1964). If no negligence is found or the discretionary tort immunity obtains, the question remains whether liability could be predicated upon inverse condemnation or nuisance theories. *See* Bright v. East Side Mosquito Abatement Dist., 168 Cal. App. 2d 7, 335 P.2d 527 (1959) (nuisance theory). On the need for legislative treatment of the scope of nuisance liability of public entities, in conjunction with inverse condemnation, *see* notes 168, 208-223 and accompanying text *supra*. Finally, it is not clear whether the special "report of loss" procedures, which may affect the injured party's ability to establish the extent of his damages from chemical drift, CAL. AGRIC. CODE §§ 11761-65, are applicable to governmental operations or are limited to private commercial pest control activities. Clarification of these doubtful areas by legislation would also be helpful.

use of "sound engineering practices" in the construction of improvements so that "unreasonable" impediments to flow of surface water and stream water would be eliminated.[331] California statutes, however, have taken precisely the opposite stance: private landowners are denied the full benefit of private law rules according upper owners a privilege to discharge surface waters upon lower lying lands, as well as the "common enemy" privilege to repel flood waters, where damage to or flooding of state or county highways results.[332] As standards are developed for the inverse liability of governmental entities injuring private property, consideration also should be given to the possible justification if any, for retention of inconsistent stand-

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[331] WIS. STAT. § 88.87 (Supp. 1967). In this measure, the Wisconsin legislature explicitly recognizes that some diversions and changes in both volume and direction of flow of surface and stream waters are the inevitable consequences of the improvement of property by public and private proprietors. Accordingly, in the interest of eliminating discouragements to the physical development of land, and to promote responsible drainage engineering to reduce unnecessary water damage, a statutory test of "reasonableness" was substituted for the less flexible and more mechanical criteria recognized under prior law. See Note, *Highways—Flood Damage—Proposed Modification of Common Enemy Doctrine*, 1963 WIS. L. REV. 649. Other states have taken varying approaches. In North Dakota highway construction is required to be "so designed as to permit the waters . . . to drain into coulees, rivers, and lakes according to the surface and terrain . . . in accordance with scientific highway construction and engineering so as to avoid the waters flowing into and accumulating in the ditches to overflow adjacent and adjoining lands." N.D. CENT. CODE § 24-03-06 (1960). Also when a highway has been constructed over a watercourse into which surface waters from farmlands flow and discharge, the state conservation commission, on petition, "shall determine as nearly as practicable the maximum quantity of water, in terms of second feet, which such watercourse or draw may be required to carry," after which the responsible authority is required to install a culvert or bridge of sufficient capacity to permit "such maximum quantity of water to flow freely and unimpeded through the culvert or under such bridge." *Id.* § 24-03-08 (1960). In Ohio, an administrative procedure exists for adjusting claims for private damage resulting from the overflow or leakage of a public reservoir, canal or dam, or the insufficiency of a public culvert. An appointed board of commissioners is required to award "such damages as they may deem just" upon a finding that the injury resulted from "defective construction of any part of the public work which might have been avoided by the use of ordinary skill or care, or resulted from the want of proper care on the part of the officers or agents of the state in maintaining or repairing" the improvement. OHIO REV. CODE ANN. §§ 123.39-.42 (Page 1953).

[332] CAL. STREETS & H'WAYS CODE §§ 725, 1487, 1488; People *ex rel.* Dep't of Pub. Works v. Lindskog, 195 Cal. App. 2d 582, 16 Cal. Rptr. 58 (1961); *cf.* Colusa County v. Strain, 215 Cal. App. 2d 472, 30 Cal. Rptr. 415 (1963) (sustaining validity of county ordinance requiring permit for land leveling or excavation work that changes drainage pattern, even though such work may be privileged under common law rules governing water damage). *But see* People v. Stowell, 139 Cal. App. 2d 728, 294 P.2d 474 (1956).

ards such as these governing the liability of private persons for damage to public property.

Complete displacement of existing private rules may not be essential to an effective legislative program; indeed, in certain respects those rules may be worthy of retention.[333] Improvement also could take the form of statutory presumptions tied to existing liability criteria. This is essentially the approach now taken in private litigation involving interferences with surface water drainage. Where both parties are shown to have acted reasonably in disposing of and protecting against surface waters, liability ordinarily falls upon the upper owner who altered the drainage pattern unless he can establish that the social and economic utility of his conduct outweighs the detriment sustained as a result.[334] A comparable legislative approach, for example, might provide that property damage newly caused by a public improvement is presumptively compensable in inverse condemnation if private tort liability would follow on like facts, but is subject to a defense by the public entity grounded upon the existence of overriding justification. Conversely, property damage which public improvements (*e.g.*, flood control works) were intended, but failed, to prevent could be declared presumptively non-recoverable if that same result would obtain under private law. The result would be contrary, however, if the claimant could bring forth persuasive evidence that the inadequacy of the improvement was attributable to the unreasonable taking of a calculated risk by the entity that such damage would not result.

Constitutional protections for property rights, it should be noted,

333 For example, present statutory provisions relating to liability for escaping fire, note 247 *supra*, and for damage to drifting of injurious chemicals used in past abatement work, note 248 *supra*, may be reasonably appropriate for retention as part of the tort-inverse liability framework. Modification of the existing statutes in the interest of clarification may, however, be necessary. See the suggestions relating to the chemical drift problem in note 330 *supra*.

334 Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 868 (1968). Care should be taken, of course, to appraise the validity of the suggested approach in varying kinds of situations. For example, the problem of flooding of adjoining property as the result of inadequate drainage of public streets is marked, in the California cases, by excessive confusion and uncertainty. See text accompanying notes 106-08 *supra*. Consideration should be given to the question whether, in this type of case, damages should be administered under a rule of strict liability. *See, e.g.*, S.C. CODE ANN. § 59-224 (1962), by which municipalities are under a mandatory duty to provide "sufficient drainage" for surface water collected in streets, after demand by property owners, and are liable for failure or refusal to do so. Hall v. Greenville, 227 S.C. 375, 88 S.E.2d (1955). On the other hand, in this type of case, consideration should be given to the question whether there is need for a rule of reasonableness geared to standard engineering expertise. See note 331 *supra*.

do not preclude the fashioning of reasonable inverse liability rules which differ from the rules of liability applied between private property owners. Over half a century ago, the California Supreme Court declared the existence of legislative power to alter the rules of private property law to the extent necessary to carry out the beneficent public purpose of government.[335] Moreover, the United States Supreme Court has indicated that the basic content of the "property" rights protected by the just compensation clause is governed by state law,[336] and that "no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit."[337] Significant changes in settled rules of law, of course, have repeatedly been given effect by the courts in actions against public entities, both in inverse condemnation[338] and in tort actions.[339]

C. Statutory Dissolution of Inconsistencies Caused by the Overlap of Tort and Inverse Condemnation Law

It is widely recognized that inverse condemnation liabilities developed, in part, as limited exceptions to the governmental immunity doctrine.[340] The abrogation of that doctrine in California, and its replacement by a statutory regime of governmental tort liability and immunity has produced inconsistencies between tort and inverse liabilities of governmental entities which are a source of confusion, and occasional injustice.[341]

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335 Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 653, 163 P. 1024, 1037 (1917).

336 *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 758-59 (1967).

337 Chicago & Alton R.R. v. Tranbarger, 238 U.S. 68, 76 (1915), where a statute which imposed a duty on railroads to construct culverts for drainage of surface water across a right-of-way, contrary to state common law rules of property law, was held not a compensable "taking" of a property right.

338 *See, e.g.*, Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967), discussing the historical changes in California law relating to riparian water rights.

339 There are many cases sustaining the retroactive application of statutory provisions destroying previously accrued tort causes of action against governmental agencies. *E.g.*, Los Angeles County v. Superior Court, 62 Cal. 2d 839, 402 P.2d 868, 44 Cal. Rptr. 796 (1965); Flournoy v. State, 230 Cal. App. 2d 520, 41 Cal. Rptr. 190 (1964).

340 Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 758-59 (1967).

341 *See, e.g.*, Burbank v. Superior Court, 231 Cal. App. 2d 675, 42 Cal. Rptr. 23 (1965) (mandamus granted to compel trial court to sustain demurrer to complaint for interference with surface water drainage so that plaintiff would be required to set out tort and inverse theories of liability in separate counts). *See also* text accompanying notes 46-58 *supra*.

The precise status of nuisance as a source of inverse liability, notwithstanding its omission from the purview of statutory tort liabilities recognized by the California Tort Claims Act, is a prime example of law in need of legislative clarification.[342] In addition, the frequent interchangeability of tort and inverse condemnation theories, where property damage has resulted from a dangerous condition of public property, may result in inverse liability notwithstanding a clearly applicable statutory tort immunity.[343] Lack of conceptual symmetry also is seen in the fact that damages for personal injuries or death often are wholly unrecoverable (due to a tort immunity) even though full recovery for property losses is assured by inverse condemnation law upon precisely the same facts.[344]

The overlap of trespass and inverse condemnation is reflected presently in section 1242.5 of the California Code of Civil Procedure, under which public entities with power to condemn land for reservoirs, on petition and deposit of security for damages, may obtain a court order authorizing reservoir site investigations upon private land. Ordinarily, official entries upon private land are a privileged exercise

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[342] *See* notes 168, 208-23 and accompanying text *supra*.

[343] *See, e.g.*, Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (defective plan of culvert design held actionable for inverse condemnation purposes; court does not, however, discuss possible application of immunity provision of CAL. GOV'T CODE § 830.6). *Cf.* Burbank v. Superior Court, 231 Cal. App. 2d 675, 42 Cal. Rptr. 23 (1965) (newly created defenses to "dangerous property condition" liability, as provided in CAL. GOV'T CODE § 835.4, held retroactively applicable; such defenses, however, impliedly deemed not a limitation upon inverse condemnation). The need for legislative reconsideration of the present tort immunity for public improvements which are dangerous because of their plan or design, CAL. GOV'T CODE § 830.6, is underscored by the Supreme Court's position that the reasonableness of the plan must be judged solely as of its origin, without regard for latent dangers inherent therein which became apparent in the course of use and experience. Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476, (1967); Note, *Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*, 19 HASTINGS L.J. 584 (1968). Inverse liability thus serves as a "loophole" to the tort immunity conferred for initial bad planning; but neither tort nor inverse remedies are available for governmental failure to correct known dangers that later develop. Any incentive for accident prevention or for upgrading public facilities for safety purposes is not conspicuous here.

[344] Although inverse condemnation liability is not limited to real property but extends also to personalty, *see* Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968), it has never been deemed applicable to personal injuries or death claims. Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App. 2d 306, 114 P.2d 14 (1941); note 270 *supra*. However, if the factual basis for inverse liability also constitutes a nuisance, damages for personal injuries are recoverable. *See* Murphy v. Tacoma, 60 Wash. 2d 603, 374 P.2d 976 (1962); *cf.* Bright v. East Side Mosquito Abatement Dist., 168 Cal. App. 2d 7, 335 P.2d 527 (1959).

of governmental authority.[345] Section 1242.5 was designed to meet the special problem of substantial property damage likely to occur from the kinds of technical operations, including soil tests, trenching, and drilling operations, often necessitated by reservoir investigations.[346] It appears, however, that section 1242.5 is both too broad and too narrow. By requiring a preliminary court proceeding in all cases, without regard for the degree of improbability that substantial damage will result from the entity's proposed investigatory methods, it imposes a requirement that often is unduly burdensome, time-consuming, and constitutionally unnecessary.[347] At the same time, since other kinds of privileged entries also may result in substantial property damage,[348] section 1242.5 is more restricted in scope than its policy rationale warrants.

What is required are general statutory criteria based upon section 1242.5, but limited to those cases in which its safeguards are required most urgently. It would be desirable, for instance, to make the procedure mandatory only when the owner's consent is not obtainable through negotiations,[349] and the planned survey (regardless of purpose) includes the digging of excavations, drilling of test holes or borings, extensive cutting of trees, clearing of land areas, moving of large quantities of earth, use of explosives, or employment of vehicles or mechanized equipment. Bypassing the formal statutory procedure by voluntary agreement with the owner could be promoted by a statutory requirement that, in any event, the entity at its sole expense must repair and restore the property, so far as possible, after the survey is concluded.[350] In addition, the entity could be required to com-

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345 CAL. CODE CIV. PROC. § 1242; CAL. GOV'T CODE § 821.8; A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 5.62 (Cal. Cont. Educ. Bar ed. 1964).

346 *See* Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986 (1923); text accompanying note 257 *supra*.

347 *See* 2 P. NICHOLS, EMINENT DOMAIN § 6.11 (rev. 3d ed. 1963); Annot., 29 A.L.R. 1409 (1924). Disproportionate costs of administering a system for settlement of nominal inverse condemnation claims is a rational basis for withholding compensation for trivial injuries. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967); *cf.* Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818, 839 (1943) (Traynor, J.) (dissenting opinion).

348 See note 260 *supra*.

349 The petition and deposit procedure need be employed only "in the event . . . [the public] agency is unable by negotiations to obtain the consent of the owner." CAL. CODE CIV. PROC. § 1242.5.

350 Precedent for imposition of a duty to restore the previous condition of the premises is found in numerous statutes providing, in connection with authorization for the construction of public improvements in or across streets, rivers, railroad lines, and the like, that the public entity "shall restore" the intersection, street, or other location to its former state. *See, e.g.*, CAL.

pensate the owner for his damages if for any reason the entity is unable fully to restore the premises to their previous condition.[351] Other minor defects in section 1242.5, while not discussed in this article, should also be abrogated.[352]

HEALTH & SAFETY CODE § 6518 (sanitary districts); CAL. PUB. UTIL. CODE § 16466 (public utility districts); CAL. WATER CODE § 71695 (municipal water districts). Statutory provisions to this effect are collected in Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 91-96 (1963).

[351] Statutes of other states, which authorize official entries upon private property for survey and investigational purposes, typically require the entity to reimburse the owner for "any actual damage" resulting therefrom. Kansas allows entry by the turnpike authority to make authorized "surveys, soundings, drillings and examinations." The authority is required to make reimbursement for "any actual damages." KANS. STAT. ANN. § 68-2005 (1964). Massachusetts permits entry by the highway department for authorized "surveys, soundings, drillings or examination." The department is required to restore lands to previous condition, and to reimburse owner for "any injury or actual damage . . . ." MASS. GEN. LAWS ANN. ch. 81, § 7F (1964). Ohio authorizes the condemning public agencies, prior to instituting eminent domain proceedings, to enter to make "surveys, soundings, drillings, appraisals, and examinations" after notice to the property owner. The agency is required to "make restitution or reimbursement for any actual damage resulting" to the premises or improvements and personal property located thereon. OHIO REV. CODE ANN. § 163.03 (Supp. 1966). Oklahoma also allows entry by the department of highways to make "surveys, soundings and drillings, and examinations" with the department required to make reimbursement for "any actual damages resulting" to the premises. OKLA. STAT. tit. 69, § 46.1-.2 (Supp. 1966). In Pennsylvania the condemning agencies are authorized to enter property, prior to filing a declaration of taking, to make "studies, surveys, tests, soundings and appraisals." Agencies are required to pay "any actual damages sustained" by the owner. PA. STAT. ANN. tit. 26, § 1-409 (Supp. 1966).

The courts have generally construed statutes of this type as limited to reimbursement for substantial physical damages only. *See e.g.*, Onorato Bros. v. Massachusetts Turnpike Auth., 336 Mass. 54, 142 N.E.2d 389 (1957), where recovery was denied for "trivial" damage caused by the setting of surveyors' stakes, and for temporary loss of marketability due to apprehension by prospective buyers that the property being surveyed would be condemned in the near future; *cf.* Wood v. Mississippi Power Co., 245 Miss. 103, 146 So. 2d 546 (1962). Since the owner may fear that some injuries will occur despite the entity's assurances to the contrary, authority for the entity to pay the owner a reasonable amount within stated limits as compensation for prospective apprehension and annoyance (in addition to assurance of payment of actual damages) could also usefully assist in promoting owner cooperation through negotiation.

[352] Defects deserving consideration include:

(1) It is not entirely clear under section 1242.5 whether the court proceedings preliminary to the order for the survey are *ex parte* or on notice to the owner. *See* Los Angeles v. Schweitzer, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (1962) (on appeal from order for reservoir survey made under section 1242.5 in which report fails to indicate whether owner received notice and hearing; interlocutory order held nonappealable). Since no elements of

D. Expansion of Statutory Remedies

Procedural disparities also deserve legislative treatment. The remedy in inverse condemnation generally contemplates the recovery of monetary damages,[353] although in special circumstances the courts

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emergency justify summary entries for survey and testing purposes, it is doubtful that *ex parte* proceedings would meet the requirement of procedural due process. *Cf.* People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932) (notice and hearing required before narcotics forfeiture of vehicle effective); Thain v. Palo Alto, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515 (1962) (notice and hearing required, absent emergency, before weed abatement action taken on private property). Assurance of a fully informed decision with respect to the amount of security to be required would be promoted by a noticed hearing with opportunity for presentation of evidence by the owner. If in the course of the survey, the deposit becomes inadequate because of unforeseen injuries inflicted, the court should also be authorized to require deposit of additional security and the statute should indicate the procedures open to the owner to obtain such an order.

(2) Section 1242.5 is silent on the scope of the court's authority to inquire into the techniques of exploration and survey that are contemplated, and as to the extent of its power to impose limitations and restrictions upon their use in the interest of reducing the prospective damages or of requiring utilization of the least detrimental techniques where alternatives are technologically feasible. *See* Los Angeles v. Schweitzer, *supra* (appeal from trial court order imposing specific limitations upon investigatory methods, under section 1242.5, dismissed without consideration of merits).

(3) Section 1242.5 fails to provide for remedies available to the owner when a public entity fails to invoke the statutory procedure, whether inadvertently or by design.

(4) Although section 1242.5 expressly authorizes the landowner to recover, out of the deposited security, compensation for the damages caused by the survey, plus court costs and a reasonable attorney fee "incurred in the proceedings before the court," it is not clear what "proceeding" is referred to—the initial proceeding leading to the order permitting the survey, or the subsequent proceeding to obtain compensation for the damages incurred, or both.

[353] Legislative clarification of the rules of damages applicable in inverse condemnation proceedings would be appropriate, since present statutory provisions governing eminent domain awards are geared solely to affirmative condemnation proceedings. *See* CAL. CODE CIV. PROC. §§ 1248-55b. Consideration should be given to the following aspects of inverse damages rules:

(a) Should a "before-and-after" test, as a measure of loss of value, be established by statute as the basic rule of damages, in accordance with the decisional law? *See* Rose v. State, 19 Cal. 2d 713, 737, 123 P.2d 505, 519 (1942). It is clear that loss of value is not the only constitutionally permissible measure of just compensation. United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961); Citizens Util. Co. v. Superior Court, 59 Cal. 2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963). If this standard is adopted, however, it should be recognized that exceptions may be needed to deal equitably with situations in which damage to improvements may not be reflected in diminished land value. *See, e.g.*, Kane v. Chicago, 392 Ill. 172, 64 N.E.2d 506 (1946) (no inverse damage recognized where, after destruction of building, land was more

sometimes have developed a "physical solution" where successive fu-

valuable than before); Evans v. Wheeler, 209 Tenn. 40, 348 S.W.2d 500 (1951) (detriment to operation of riding academy, caused by diversion of river, held noncompensable since no loss was established when property values were judged by "before-and-after" method in light of fact that highest and best use was for residential subdivision); Note, *Compensation For a Partial Taking of Property: Balancing Factors in Eminent Domain*, 72 YALE L.J. 392 (1962). Furthermore, the method of computing loss of value should exclude increased values attributable to general inflationary trends, especially where the damage was inflicted over an extended period of time. *See* Steiger v. San Diego, 163 Cal. App. 2d 110, 329 P.2d 94 (1958).

(b) Should "special" benefits be set off against inverse damages, in accordance with the case law? *See* Dunbar v. Humboldt Bay. Mun. Water Dist., 254 Cal. App. 2d 480, 62 Cal. Rptr. 358 (1967). In affirmative eminent domain proceedings, special benefits may only be set off against severance damages, not against the value of what is taken. CAL. CODE CIV. PROC. § 1248; *see* Gleaves, *Special Benefits: Phantom of the Opera*, 40 CALIF. ST. B.J. 245 (1965); Comment, *The Offset of Benefits Against Losses in Eminent Domain Cases in Texas: A Critical Appraisal*, 44 TEX. L. REV. 1564 (1966). Inverse litigation, however, ordinarily does not involve issues of severance damages; hence, to allow a complete offset against inverse damages might, in some cases, reduce the plaintiff's recovery to zero. *Cf.* United States *ex rel.* TVA v. Land in Hamilton County, 259 F. Supp. 377 (E.D. Tenn. 1966), even though, had the identical facts been the subject of an affirmative condemnation suit, no offset would have been permissible. *But see* CAL. CODE CIV. PROC. §§ 534, 1248. Section 1248 provides for an offset of specifically defined benefits against damages for appropriation of water. This section is incorporated by reference in section 534 which provides for an inverse damage award as alternative relief in a suit to enjoin appropriation of water

(c) To what extent should expenses incurred by the plaintiff in an effort to mitigate inverse damages be recoverable? Such mitigation expenses are presently recoverable under the decisional law, when incurred in good faith and in reasonable amount, even though the mitigation efforts were unsuccessful. Albers v. Los Angeles County, 62 Cal. 2d 250, 269-72, 398 P.2d 129, 140-42, 42 Cal. Rptr. 89, 100-02 (1965). Such mitigation expenses are recoverable in addition to loss of market value. *Id.* *See also* Game & Fish Comm'n v. Farmers Irr. Co., — Colo. —, 426 P.2d 562 (1967); Kane v. Chicago, 392 Ill. 172, 64 N.E.2d 506 (1945).

(d) When "cost-to-cure" is less than loss of market value, should this measure of damages be authorized or required in lieu of loss-of-value? *See* Dunbar v. Humboldt Bay Mun. Water Dist., 254 Cal. App. 2d 480, 62 Cal. Rptr. 358 (1967) (cost of remedial measures held relevant to damage issues); Steiger v. San Diego, 163 Cal. App. 2d 110, 329 P.2d 94 (1958) (cost of constructing adequate drainage to alleviate erosion held relevant to loss of value); Bernard v. State, 127 So. 2d 774 (La. 1961) (cost of construction of new bridge to restore access destroyed by enlargement of drainage canal); Brewitz v. St. Paul, 256 Minn. 525, 99 N.W.2d 456 (1959) (cost of retaining wall to control erosion caused by lowering of street grade). Should the cost of available remedial measures limit inverse damages where the owner, by unreasonably failing to take such measures in mitigation of damages, increased the physical injuries and loss of value sustained? *See* United States v. Dickinson, 331 U.S. 745, 751 (1947) (fair to measure erosion damage by

ture damaging to an uncertain or speculative degree is anticipated.[354] Ordinarily, however, injunctive or other equitable relief is not available in an inverse condemnation action where a public use of the property has attached.[355] Accordingly, equitable powers to mold de-

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cost of reasonable protective measures which plaintiffs could have undertaken). *See generally* Note, *Compensation for a Partial Taking of Property: Balancing Factors in Eminent Domain*, 72 YALE L.J. 392 (1962).

(e) Should removal and relocation costs be authorized in inverse condemnation proceedings? *Cf.* Albers v. Los Angeles County, 62 Cal. 2d 250, 267-68, 398 P.2d 129, 139, 42 Cal. Rptr. 89, 98 (1965) (removal and relocation costs held not allowable in addition to loss of value). *See generally* HOUSE COMM'N ON PUB. WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 194-237 (Comm. Print 1964) (collection of statutory provisions for relocation and removal costs); U.S. ADVISORY COMM'N OF INTERGOVERNMENTAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESS DISPLACED BY GOVERNMENTS (1965).

(f) Should attorney fees and expert witness fees be recoverable in inverse condemnation proceedings? Ordinarily, such losses are not presently recoverable in inverse suits. *See* Frustuck v. Fairfax, 230 Cal. App. 2d 412, 41 Cal. Rptr. 56 (1964), in which the abandonment of the project causing inverse damages was held not a basis for a statutory award of attorneys fees and expert witness fees under CAL. CODE CIV. PROC. § 1255a. *But see id.* § 532 (attorneys fees authorized in water appropriation suit where defendant posts bond on obtaining modification of injunction).

[354] *See* Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949) (allocation of water rights in underground basin); Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677, 76 P.2d 681 (1938) (replacement of public school water supply depleted by municipal exportation). Unconditional mandatory orders for physical correction of a cause of recurrent damaging have sometimes been approved. *See, e.g.*, Union Pac. R.R. v. Irrigation Dist., 253 F. Supp. 251 (D. Ore. 1966) (mandatory correction of seepage from irrigation canal); Weisshand v. Petaluma, 37 Cal. App. 296, 174 P. 955 (1918) (mandatory installation of culvert); Colella v. King County, — Wash. 2d —, 433 P.2d 154 (1967) (mandatory injunction to county to provide drainage for plaintiff's lands). It is submitted, however, that the public entity preferably should be given a choice, in the form of a conditional judgment, whether to undertake physical correction of the difficulty or to pay just compensation and thereby acquire the right to continuation of the injurious condition in the future. *See, e.g.*, Gibson v. Tampa, 135 Fla. 637, 185 So. 319 (1938) (city could not be compelled to erect expensive sewage treatment plant in lieu of just compensation for pollution damage); Buxel v. King County, 60 Wash. 2d 404, 374 P.2d 250 (1962) (city given alternative between construction of drainage facilities or payment of damages); *cf.* Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 339-41 (1933) (Brandeis, J.) (injunction against sewage nuisance conditioned upon city's failure to pay damages). The latter view would reduce the danger of judicial interference with the discretionary determinations of elected public officials in matters relating to fiscal and budget policy, scope of improvement projects, and arrangement of priorities in allocation of public resources.

[355] Peabody v. Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935); Frustuck v. Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1963). However, there are cases to the contrary. Note 354 *supra*. Injunctive relief has been recognized

crees to fit the practical situations presented in inverse litigation seldom have been exploited in California inverse condemnation litigation, perhaps on the assumption that "just compensation" contemplates pecuniary relief only.[356] If, by statute, inverse condemnation actions were treated as tort actions, greater flexibility of remedial resources could become available to adjust the relations between the parties in an equitable fashion.[357] Moreover, alternative ways to redress the property owner's grievance could be provided, perhaps subject to the public entity's option. In water damage cases, for example, a Wisconsin statute permits the entity to choose whether to pay damages, correct the deficiency, or condemn the rights necessary to allow a continuation of the damage.[358] Qualified judgments, under which a reduction in the amount of the inverse damage award is conditioned upon correction of the cause of the damage, also might be authorized.[359]

It appears reasonably probable that much of the artificiality of inverse condemnation law, derived largely from its use as a device to evade sovereign immunity, can be eliminated by the codification of statutory standards. Moreover, in cases where unintended physical property damage is the basis of the claim, it is now both possible (due to the demise of sovereign immunity) and desirable (in the interest of greater certainty and predictability,) to develop a single legislative

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as generally appropriate to prevent a threatened taking or damaging of private property if a public use has not yet materialized. Beals v. Los Angeles, 23 Cal. 2d 381, 144 P.2d 839 (1944); *cf.* Hassell v. San Francisco, 11 Cal. 2d 168, 78 P.2d 1021 (1938) (nuisance).

[356] For a good review of the flexible inverse remedies which could be made available, see Note, *Eminent Domain—Rights and Remedies of an Uncompensated Landowner*, 1962 WASH. U.L.Q. 210. *See also* Horrell, *Rights and Remedies of Property Owners Not Proceeded Against*, 1966 U. ILL. L. FORUM 113; Oberst & Lewis, *Claims Against the State of Kentucky—Reverse Eminent Domain*, 42 KY. L.J. 163 (1953); Note, *Compensation for a Partial Taking of Property: Balancing Factors in Eminent Domain*, 72 YALE L.J. 392 (1962).

[357] *See, e.g.*, Enos v. Harmon, 157 Cal. App. 2d 746, 321 P.2d 810 (1958) (mandatory injunction, plus damages, awarded in private tort suit to compel removal of obstruction to flow of irrigation water). *See also* CAL. CODE CIV. PROC. § 1251 (authorization for condemning agency to elect to build fences, in lieu of paying damages, when property is taken for highway purposes).

[358] WIS. STAT. § 88.87, -.89 (Supp. 1967).

[359] See note 354 *supra*. In appropriate cases, the court could be authorized to award just compensation for damages accrued in the past, plus a mandatory order to undertake corrective measures to prevent damage in the future, unless the defendant public entity formally asserts its desire to acquire title to a permanent easement or servitude and pay compensation therefor. *See* Game & Fish Comm'n v. Farmers Irr. Co., — Colo. —, 426 P.2d 562 (1967) (stream pollution); Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N.W.2d 781 (1960) (stream diversion and erosion).

remedy with adequate scope and flexibility to supplant the uncertain and inconsistent inverse condemnation action developed by the courts. The prospect is a worthy challenge for modern law reform.

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CHAPTER 5. INTANGIBLE DETRIMENT

Arvo Van Alstyne*

I. Introduction

Governmental activities impinge upon private property interests in diverse ways. The law of inverse condemnation provides remedial procedures for identifying, and imposing financial responsibility upon government for, those impinging consequences that amount to a "taking" or "damaging" of private property. Two previous studies have examined the constitutional compensability of deliberately inflicted and unintentional physical damage to *tangible* private assets.[1] A third aspect of the general topic remains for treatment here: to what extent can greater consistency, rationality and social justice be achieved through legislative modification of prevailing legal rules governing constitutional compensability for *intangible detriment*[2] imposed upon private property by governmental improvements? Situations of this sort are commonplace in modern society, although they may not always be recognized as such in the terms here employed. Lack of recognition is due, in part, to the fact that the relevant litigation ordinarily appears dressed in the subtle disguise of a controversy as to whether the limits of governmental "police power" have been exceeded, in the misleading

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* B.A. 1943, LL.B. 1948, Yale University. Professor of Law, University of Utah; Member, California Bar. This article is based on a research study prepared by the author for the California Law Revision Commission. The opinions, conclusions and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect those of the California Law Revision Commission or its individual members.

1 *See* Van Alstyne, *Inverse Condemnation: Unintended Physical Damage,* 20 Hastings L.J. 431 (1969); Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction,* 20 Stan. L. Rev. 617 (1968).

The California Constitution, art. I, § 14, like the constitutions of about half the states, requires payment of just compensation when private property is "taken" or "damaged" for public use. 2 P. Nichols, The Law of Eminent Domain § 6.44 (rev. 3d ed. 1962) [hereinafter cited as P. Nichols].

2 The term "intangible detriment" is used to denote a range of recurring situations in which governmental action, not deliberately undertaken for the purpose, causes a substantial diminution in the value of neighboring private property and thereby, in practical effect, exacts a compelled private contribution to the total costs of the governmental objective.

cloak of an issue as to whether the seeker after compensation ever possessed a legally cognizable "property" right, or as a feigned dispute as to whether the governmental defendant was acting—in reference to plaintiff's property—in the exercise of its "eminent domain" or its "regulatory" power. Yet, in each instance, the basic clash of interests involves the same fundamental problem: the extent to which governmentally compelled indirect contributions to the general public welfare must be justly compensated.[3]

An extensive literature has developed in relation to the problem of compelled indirect contributions—or various phases of it—much of which is devoted to a critical examination of the prevailing doctrinal positions exhibited in the relevant decisions.[4] The general verdict of the commentators is that the existing legal rules and distinctions —which are predominantly the product of judicial decisions interpreting and applying broad constitutional precepts—are confusing, inconsistent, and unsatisfactory.[5] This article seeks to isolate and define acceptable criteria—capable of statutory formulation—by which public officials, lawyers, judges, property owners and others may be better able to identify the line between compensability and noncompensability for intangible detriment imposed by governmental improvements. Since the range of potential fact situations is nearly endless, two topics which appear to include most of the significant recurring forms of relevant litigation have been selected to illustrate the general problems being analyzed: (1) losses caused by highway and street improvements, and (2) losses resulting from aircraft operations.

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3 This way of looking at what are usually described, in more traditional terminology, as "police power" measures, is believed to be a useful contribution to analysis of the problems with which this article is concerned. Its principal development appears to be in the work of Professor Allison Dunham. *See* Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U.L. REV. 1238 (1960). A modification of the same concept forms the basis of Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

4 *See, e.g.*, Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REV. 63; Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 U. DETROIT J. URBAN L. 1 (1968); Netherton, *Implementation of Land Use Policy: Police Power v. Eminent Domain*, 3 U. WYO. LAND & WATER L. REV. 33 (1968); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437 (1962); Comment, *Distinguishing Eminent Domain From Police Power and Tort*, 38 WASH. L. REV. 607 (1963). *See also*, Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation*, 80 HARV. L. REV. 1165 (1967). For a review and analysis of the principal lines of doctrinal analysis, see Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAW. 1 (1967).

5 *See, e.g.*, Van Alstyne, *supra* note 4.

II. Losses Caused by Highway and Street Improvements

An abutting California landowner is deemed to possess a property interest ordinarily described as an easement of access (or of ingress and egress) to and from the street or highway immediately appurtenant to his property, and, once in the street, to and from the general community street system.[6] This interest, long protected against damage or taking for public use without payment of just compensation,[7] appears to have had its origins in the desire of courts to safeguard the reasonable expectation of property owners that the primary purpose of the street—to service the abutting land—would be discharged.[8] Its persistence as a basis for relief in inverse condemnation is undoubtedly due, at least in part, to the historical fact that the "or damaged" clauses introduced into state constitutional provisions assuring payment of "just compensation" were intentionally designed by their nineteenth century framers to afford protection for such interests as access right.[9]

Development of the freeway and the limited access highway—"streets" that are instrumentalities of transportation service rather than land service—has produced a conflict of interests. A substantial volume of litigation involving clashes between landowners seeking to vindicate their rights in the abutting street or highway, and government agencies seeking to meet ever-increasing demands for more and better highways, has resulted.[10] Reconcilliation of these com-

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[6] People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943); Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942).

[7] *See* Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 37 P. 750 (1894). Abutters' access rights are recognized as compensable property interests by Cal. Sts. & H'ways Code § 1003 (West 1969).

[8] *See* Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 423-24, 62 Cal. Rptr. 401, 411, 432 P.2d 3, 13 (1967): "The right of access to a land highway derives from the 'land service road' concept, whereby roads are conceived of as arteries constructed through condemnation of private land for the purpose of serving other land abutting on them, rather than for the purpose of serving public traffic passing over them." *Cf.* Sauer v. City of New York, 206 U.S. 536 (1907). *See generally*, R. Netherton, Control of Highway Access—Its Prospects and Problems 35-59 (1963).

[9] *See* City of Chicago v. Taylor, 125 U.S. 161 (1888); McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139 (1931); Rigney v. City of Chicago, 102 Ill. 64 (1882). *See also* 2 P. Nichols, *supra* note 1 § 6.44, at 486; Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 Stan. L. Rev. 727, 771-75 (1967); Lenhoff, *Development of the Concept of Eminent Domain*, 42 Colum. L. Rev. 596, 610 (1942).

[10] The most thorough account is R. Netherton, *supra*, note 8. Other useful treatments of various aspects of the problem include Covey, *Control of Highway Access*, 38 Neb. L. Rev. 407 (1959); Covey, *Highway Protection Through Control of Access and Roadside Development*, 1959 Wis. L. Rev. 567; Cromwell, *Loss of*

peting interests has proven to be extraordinarily difficult. Despite a good deal of confusion in the case law, however, the principal lines of legal development can be discerned with confidence.

A. *The Cul-de-sac Cases*

The leading California decision vindicating the abutter's right of access is *Bacich v. Board of Control.*[11] Plaintiff sued in inverse condemnation to recover damages alleged to have been sustained when, during the construction of approaches to a major bridge, a street intersecting that on which plaintiff's property abutted was lowered fifty feet, leaving plaintiff on a cul-de-sac or dead-end street. Previously, the plaintiff had been able to enter the general street system by going from his residence in either direction to the first intersecting street. After the improvement he was limited to traveling in but one direction. This deprivation, according to the majority of the court, amounted to a compensable impairment of a property right:

> The extent of the easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted . . . . It would seem clear that the reasonable modes of egress and ingress would embrace access to the next intersecting street in both directions.[12]

Although the *Bacich* opinion contains language suggesting that all cul-de-sac situations are not necessarily alike and that a non-compensable damaging could result in some instances,[13] it was generally considered to have established a rule of compensability where access to the *next intersecting street* was cut off,[14] and a corollary of non-compensation where the interference with through travel occurred beyond the first intersection.[15] This "cul-de-sac" rule, how-

Access to Highways: Different Approaches to the Problem of Compensation, 48 VA. L. REV. 538 (1962); Mayberry & Aloi, *Compensation for Loss of Access in Eminent Domain in New York: A Re-evaluation of the No-Compensation Rule With a Proposal for Change*, 16 BUFFALO L. REV. 603 (1967); Stubbs, *Access Rights of an Abutting Landowner*, in SOUTHWEST LEGAL FOUNDATION PROCEEDINGS OF THE FIFTH ANNUAL INSTITUTE ON EMINENT DOMAIN 59 (1963); Note, *California and the Right of Access: The Dilemma Over Compensation*, 38 S. CAL. L. REV. 689 (1965); Note, *Control of Access By Frontage Roads—Police Power or Eminent Domain?*, 11 KANS. L. REV. 388 (1963).

11 23 Cal. 2d 343, 144 P.2d 818 (1943). *See also* Beals v. City of Los Angeles, 23 Cal. 2d 381, 144 P.2d 839 (1943).

12 23 Cal. 2d at 352, 144 P.2d at 824.

13 *Id.* at 355, 144 P.2d at 826.

14 *See, e.g.*, Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264, 299 P.2d 347 (1956); People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (1951); Constantine v. City of Sunnyvale, 91 Cal. App. 2d 278, 204 P.2d 922 (1949).

15 People *ex rel.* Dep't of Pub. Works v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957); Beckham v. City of Stockton, 64 Cal. App. 2d 487, 149 P.2d 296 (1944).

ever, operated mechanically to support an award of compensation even though actual loss was highly doubtful, and required denial of relief in cases where the closing of a street beyond the first intersection imposed a serious hardship upon owners whose access to the general street system was thereby made substantially more difficult and time-consuming.[16] Like most rules of thumb, it improved predictability at the expense of substantial justice.

The cul-de-sac problem again came to the attention of the California Supreme Court in *People ex rel. Department of Public Works v. Symons*.[17] This was an action to condemn a small portion of the defendant's land to form a cul-de-sac and turn-around, made necessary by the construction of a freeway on condemned land immediately adjoining defendant's property. So far as impairment of access was concerned, the factual circumstances were within the "next intersecting street" rule of *Bacich*. Defendant's right to compensation was partially obscured, however, by the fact that recovery was sought as part of claimed severance damages also including loss of light, air, view, and privacy. Treating all the claimed losses together, the court relied upon a familiar rule limiting recovery of severance damages to injurious consequences resulting from improvement work on the property taken from the claimant.[18] Since all of the defendant's alleged injuries were attributable to the freeway built on adjoining land—taken from a third person and not from defendant—they were not recoverable.[19]

Manifestly, the *Symons* case can be distinguished from *Bacich* in its procedural setting; it involved a claim of severance damages, while *Bacich* was a suit in inverse condemnation. But that is obviously a distinction without a difference. Inverse condemnation has traditionally been regarded as merely a remedial device to implement the self-enforcing language of the just compensation clause. It permits judicial enforcement of a claim to constitutionally-required damages at the initiative of the property owner when a public

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[16] *Cf.* People *ex rel.* Dep't of Pub. Works v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966); Note, *California and the Right of Access: The Dilemma Over Compensation*, 38 S. CAL. L. REV. 689, 695 (1965).

[17] 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960).

[18] 4 P. NICHOLS, *supra* note 1, § 14.21[1], at 514. Prior California decisions expressing the rule include People v. Emerson, 13 Cal. App. 2d 673, 57 P.2d 955 (1936); County Sanitation Dist. No. 2 v. Averill, 8 Cal. App. 2d 556, 47 P.2d 786 (1935). The leading case is Campbell v. United States, 266 U.S. 368 (1924).

[19] People *ex rel.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960). This result seems inconsistent with the literal language of CAL. CODE CIV. PRO. § 1248(2) (West 1955) which authorizes inclusion in severance damages of an amount to offset losses to the remainder caused by "the construction of the improvement in the manner proposed by the" condemnor, without reference to the location of that improvement.

entity has failed to commence eminent domain proceedings for that purpose.[20] The basic assumption underlying inverse condemnation has been that the property owner's substantive rights are identical to those recognized in eminent domain proceedings.[21] By seemingly declaring that interference with access rights by an improvement on property other than that taken from the claimant was noncompensable,[22] *Symons* appeared to have severely qualified *Bacich*, sub silentio.

The uncertainty as to the status of *Bacich* was broken after four years when the court decided *Breidert v. Southern Pacific Company*.[23] Rejecting the view that substantive compensability was different in eminent domain proceedings than in inverse condemnation actions, the court reaffirmed the cul-de-sac rule as fully applicable in the latter form of action, even when none of the property owner's land had been taken. The troublesome difference between *Bacich* and *Symons*, the court explained, was merely one of degree; in *Symons* the owner had failed to allege facts showing that his right of access had been impaired to a substantial extent.[24] The mere fact, standing alone, that the improvement which caused the cul-de-sac was not upon land taken from the complaining owner had not been controlling.[25] Thus, the general rule emerging from *Breidert*

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20 Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942); Van Alstyne, *supra* note 9, at 730-31.

21 *See, e.g.*, Breidert v. Southern Pac. Co., 61 Cal. 2d 659, 663 n.1, 394 P.2d 719, 721 n.1, 39 Cal. Rptr. 903, 905 n. 1 (1964): "The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action."

22 This was the prevalent interpretation placed upon the *Symons* decision. *See, e.g.*, Rosenthal v. City of Los Angeles, 193 Cal. App. 2d 29, 13 Cal. Rptr. 824 (1961). *Cf.* People *ex rel.* Dep't of Pub. Works v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966).

23 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964).

24 *Id.* at 666, 394 P.2d at 724, 39 Cal. Rptr. at 908: "Thus we denied recovery [in *Symons*] because defendants' bare showing that their property was placed in a cul-de-sac did not of itself satisfy the requirement of substantial impairment of access. . . . Although destruction of access to the next intersecting street in one direction constitutes a significant factor in determining whether the landowner is entitled to recovery, it alone cannot justify recovery in the absence of facts which disclose a substantial impairment of access."

25 Discarded authority sometimes dies hard. As late as April 1969, nearly five years after *Breidert* was decided, a California appellate court affirmed a denial of severance damages for loss of access on the explicit ground that the freeway improvement creating the offending cul-de-sac was not on the parcel of land taken from the property owner. People *ex rel.* Dep't of Pub. Works v. Ramos, 272 A.C.A. 112, 77 Cal. Rptr. 130 (1969). The court relied principally upon People *ex rel.* Dep't of Pub. Works v. Elsmore, 229 Cal. App. 2d 809, 40 Cal. Rptr. 613 (1964), where severance damages due to freeway construction had been denied on the same ground, and upon *Symons*. *Elsmore*, however, was clearly distinguishable; it did not involve loss of access but solely proximity damage resulting from the nearby freeway, losses to which the rationale of *Symons* continued to apply unimpaired by anything said

was that creation of a cul-de-sac is not actionable per se, but may become actionable on a further showing that the abutting owner's access to the general street system has been interfered with in a substantial way.

Whether or not the *creation* of a cul-de-sac effects a substantial interference with an abutting owner's easement of access is regarded as a question for the court to determine, while the *extent* of the owner's pecuniary loss is a question of fact for the jury.[26] Little guidance can be found, however, as to what factual criteria enter into a judicial determination that the adverse consequences have been "substantial." In *Breidert,* the court intimated that it was impossible to adduce any usable abstract definition, since the question necessarily must be resolved in light of the facts of the particular case.[27] In the companion case of *Valenta v. County of Los Angeles,*[28] however, the court pointed out that the complaint should have alleged such pertinent facts as the use being made of plaintiff's property, the added distance of travel caused by the cul-de-sac, the unavailability of alternate routes to get to the general road and highway system, and the extent to which the use of the property was impaired by reduced access to the general road system. Other cases, following this lead, have likewise concluded that additional circuity of travel—with attendant inconvenience and expense—is relevant to the inquiry, since it is a factor which could influence an informed buyer's judgment as to market value of the property for its highest and best use.[29]

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in *Breidert.* The opinion in *Elsmore,* however, omitted any mention of *Breidert* (decided one month previously), and, as written, seemingly endorsed the view that the *Symons* rule was applicable, without qualification, to all kinds of severance damages. *Ramos* simply followed *Elsmore,* failing to note that its authority as precedent for claimed loss of access, like that of *Symons,* had been vitiated by *Breidert.* Judicial misconception of this order, nearly five years after the rule of law had been "clarified" by *Breidert,* illustrates the subtle confusions—characteristic of this branch of inverse condemnation law—that could be resolved by appropriate legislation.

26 Highland Realty Co. v. City of San Rafael, 46 Cal. 2d 669, 298 P.2d 15 (1956); People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); Riverside County Flood Control & Water Conservation Dist. v. Halman, 262 Cal. App. 2d 510, 69 Cal. Rptr. 1 (1968); People *ex rel.* Dep't of Pub. Works v. Guimarra Vineyard Corp. 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (1966). Intimations in People *ex rel.* Dep't of Pub. Works v. Becker, 262 Cal. App. 2d 634, 69 Cal. Rptr. 110 (1968), that the substantial impairment issue is a "mixed" issue of law and fact, for jury determination, are contrary to the weight of authority.

27 Breidert v. Southern Pac. Co., 61 Cal. 2d at 664, 394 P.2d at 725, Cal. Rptr. at 906. *Accord,* People *ex rel.* Dep't of Pub. Works v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957).

28 61 Cal. 2d 669, 394 P.2d 725, 39 Cal. Rptr. 909 (1964).

29 People *ex rel.* Dep't of Pub. Works v. Guimarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (1966) (additional distance of travel of several miles in either direction from commercial ranch to main highway leading to markets). *Cf.*

By favoring a pragmatic assessment of relevant circumstances to determine when substantial interference with access has resulted, *Breidert* and *Valenta* departed significantly from the more mechanical approach of *Bacich*. The spatial limitation embodied in the "next-intersecting-street" definition of access rights, as approved in the latter case, apparently has been supplanted by a more sophisticated view in which the underlying interest of the property owner—reasonable convenience of access consistent with effective use of the property—is identified as the object of constitutional protection. This approach, moreover, implies that under some circumstances the termination of a street beyond the first intersection could constitute a compensable impairment of access if shown to interfere substantially with convenient use of the general street system.[30] It implies, in short, that the prevailing rule of thumb should be applied as a rule of reason.

B. *The Frontage Road Cases*

The *Breidert* case made it clear that a cul-de-sac created by a public improvement which does not curtail the abutting owner's right to enter the street from his property, but curtails his ability to reach a desired destination after he has entered the street, is merely a special instance of impaired access. Modern freeway construction programs often involve a more direct impairment, actually cutting off the abutting owner's right to enter the new limited access highway where it passes in front of his land. Three general situations of this sort may be identified:

1. The state may construct a new freeway on a right-of-way not previously employed for street or highway purposes and, in so doing, leave abutting owners along the path of the new freeway with infrequent and inconvenient access to it.[31] Since the transportation-

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People *ex rel.* Dep't of Pub. Works v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966) (added travel of one-third mile from commercial property held not substantial impairment under circumstances of case).

30 The "next intersecting-street" rule assumes that reasonable access to the general system of streets may be obtained by use of the next crossing thoroughfare, so that interferences with through traffic beyond that point are generally both de minimis and widely shared by other property owners in the vicinity. This assumption, of course, may prove to be factually erroneous. For example, the next intersecting street may itself be a cul-de-sac in both directions. *Cf.* People *ex rel.* Dep't of Pub. Works v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966).

31 CAL. STS. & H'WAYS CODE § 23.5 (West 1969) defines "freeway" to mean "a highway in respect to which the owners of abutting lands have no right or easement of access to or from their abutting lands or in respect to which such owners have only limited or restricted right or easement of access." For a general review of access-control legislation in the United States, see R. NETHERTON, *supra* note 8, at 82-119.

service concept that motivates the freeway program necessarily contemplates limited access, no private right arises from the construction of a freeway abutting property which did not, prior to such construction, enjoy any such right. Inasmuch as no previously existing property right is taken or damaged, lack of direct access to the new freeway is not a basis for inverse condemnation recovery.[32]

2. The freeway construction program may leave an existing street or highway in use as a frontage or service road, while the new freeway is constructed parallel to it on the opposite side of the street from the claimant's land. In this situation, the new freeway is intended to, and in effect does, supplant the former highway as the principal transportation corridor past the property. Although the abutting owner still has exactly the same access to the old highway which he formerly possessed, the only feasible means for getting to a point on the freeway opposite his land, or from that point to his land, may entail an additional journey, with attendent delay and expense, through the closest interchange in either direction.

Here, as in the cul-de-sac cases, the California courts have recognized a right in the owner to just compensation if the impairment of egress and ingress between the freeway and the abutting property is substantial in light of the uses to which the property reasonably may be put.[33] For example, if the new highway is built, in part, upon the old one, leaving only a portion of the latter as a frontage road, the owner may find it difficult or impossible to realize the maximum value of his property for commercial purposes because the narrow service road cannot accommodate large modern truck transportation equipment essential to that use.[34] On the other hand, if the diminished width of the abutting street does not adversely affect optimum use of the adjoining land,[35] or the additional journey made necessary by the improvement is not shown to be a substantial detriment to its full profitable use,[36] no compensation is warranted.

Diminished accessability of property located on a frontage road generally reduces the volume of traffic flowing directly past the prop-

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[32] Schnider v. State, 38 Cal. 2d 439, 241 P.2d 1, 43 A.L.R.2d 1068 (1952); People v. Thomas, 108 Cal. App. 2d 832, 239 P.2d 914 (1952). *See* Covey, *Control of Highway Access*, *supra* note 10, at 427-28.

[33] People *ex rel.* Dep't of Pub. Works v. Logan, 198 Cal. App. 2d 581, 17 Cal. Rptr. 674 (1961). *See also* People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943).

[34] *See* Goycoolea v. City of Los Angeles, 207 Cal. App. 2d 729, 24 Cal. Rptr. 719 (1962). *See also* Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942).

[35] *See* People *ex rel.* Dep't of Pub. Works v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957).

[36] *Cf.* People *ex rel.* Dep't of Pub. Works v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966); Beckham v. City of Stockton, 64 Cal. App. 2d 487, 149 P.2d 296 (1944).

erty; vehicles that previously would have travelled the frontage road, when it was the principal highway passing the property, are diverted to the new freeway. For certain kinds of land uses—especially commercial uses dependent upon patronage of passing motorists—the reduced volume of traffic may mean economic disaster. Yet, paradoxically, while diminished accessability may provide a basis for awarding just compensation, losses of market value as well as business profits attributed to the diversion of traffic are regarded as noncompensable.[37] This result is ordinarily explained on the formal ground that property owners have no right to the maintenance of any particular volume of traffic flow past their lands. From the viewpoint of public policy, however, it appears to represent a judicial conviction that governmental power to control, re-route and divert traffic as the public interest dictates must be kept flexible and undeterred by fear of possible inverse liabilities of unpredictable magnitude.[38] Implicit, also, may be the belief that the adverse economic consequences of new highway developments are risks impliedly recognized and assumed by the entrepreneur when he selects a commercial location for development.[39]

The distinction which emerges from the cases—recognizing inverse compensability of diminished access but not of losses resulting from reduced traffic flow caused in part by diminished access—is subtle and difficult to administer. In the typical frontage road situation, diminished accessability and diminished traffic flow appear to be merely semantically different descriptions of two related manifestations of the same basic facts. The anomaly may best be understood by isolating the underlying interests embodied in the opposing

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[37] *See* Holloway v. Purcell, 35 Cal. 2d 220, 217 P.2d 665 (1950) (dictum), *cert. denied*, 340 U.S. 883 (1950); People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943) (dictum); Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264, 299 P.2d 347 (1956).

On the basic issue—loss of market value—evidence of decreased business profits ordinarily is inadmissible in any event, due to the speculative nature of such evidence and the practical difficulty of discerning a reliable cause-and-effect relationship between diminished profit and traffic diversion. See 4 P. Nichols, *supra* note 1, § 12.3121[1], at 116-18. Moreover, even if it is assumed that a loss of business profits reflects (albeit imperfectly) the commercial consequences of traffic diversion, that loss may not mean that a loss of market value has been sustained, but merely that the existing business use is not the most suitable one for the site. Diminished market value, on the other hand, may be the result of a shift—caused by traffic diversion—in potential highest and best use that is unrelated to actual present use. *Cf.* People *ex rel.* Dep't of Pub. Works v. Becker, 262 Cal. App. 2d 634, 69 Cal. Rptr. 110 (1968). Noncompensability of diminished business profits, although sometimes explained on the grounds set out in the text, may thus be supported also by collateral reasons.

[38] *See* Holloway v. Purcell, 35 Cal. 2d 220, 217 P.2d 665 (1950).

[39] *See* People *ex rel.* Dep't of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 9 Cal. Rptr. 151 (1960).

sides of the distinction. The concept of diminished accessability clearly derives from the land-service policy characteristic of the pre-freeway road system; the frontage (or "service") road continues to afford access to property abutting it in the interest of its maximum utilization and enjoyment. Decreased traffic flow along the frontage road, on the other hand, is the planned and intended consequence of the transportation-service policy that dominates development of the freeway system. Tension between these two competing policies has produced the uneasy judicial compromise represented in the distinction here discussed. The distinction, however, tends to obscure the fact that the freeway also has a land-service policy component and the frontage road a transportation-service policy component.[40] Viewed in the light of such an interest analysis, it becomes evident that a balance should be struck by a discriminating attempt to identify the predominating policy implications of the facts in each case. The decisions recognizing the distinction may, on their individual circumstances, be reconciled by this approach. On the whole, however, the opinions fail to recognize or articulate the full dimensions of the competing interests involved.

3. The last type of frontage road situation arises when part of the abutting owner's property is taken for a frontage road right-of-way in conjunction with a freeway project, leaving the claimant's property abutting on the new frontage road. In practical terms, the claimant is in precisely the same situation as in the second type of case, except that in this instance the total extent of his physical domain has been reduced by the partial taking. In such instances, the law grants the claimant compensation consisting of the value of the land actually taken, plus a sum (severance damages) representing any loss of value to the remainder—so far as attributable to the partial taking—which is not offset by special benefits created by the taking.[41] Here again, the courts have announced that diminished property values caused by mere traffic diversion or circuity of travel are not includable in severance

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[40] Rapid and uninterrupted vehicular transportation by freeway is not an end in itself. It merely expands the geographical area (*i.e.*, the aggregate of individual land locations) served by the highway pattern. Conversely, the frontage road ordinarily provides transportation service to distant places that can be conveniently reached by the freeway to which it is a connecting link as well as to locations along the way.

[41] *See* CAL. CODE CIV. PRO. § 1248(2) (West 1955); Pierpont Inn, Inc. v. State, 70 Cal. 2d 293, 449 P.2d 737, 74 Cal. Rptr. 521 (1969). *See also* Sacramento & San Joaquin Drainage Dist. v. W. P. Roduner Cattle & Farming Co., 268 Cal. App. 2d 215, 73 Cal. Rptr. 733 (1968). As to the rule permitting setoff of special benefits against severance damages only, see Note, *Benefits and Just Compensation in California*, 20 HASTINGS L.J. 764 (1969). *See also* Annot., 13 A.L.R.3d 1149 (1967).

damages,[42] but that a *substantial* interference with the abutting owner's rights of ingress and egress is compensable.[43]

C. *Other Diminished Access Cases*

The case law recognizes a number of other impaired access situations as warranting inverse liability. For example, a street improvement project that entails a change of grade may impair the value of abutting property by making access thereto less convenient or even impossible.[44] Since the degree of impairment will ordinarily vary with the magnitude of the change of grade, the operative legal rule appears consistent with the "substantial interference" test employed in the cul-de-sac and frontage road cases. Similarly, the closing of a street, which—like a cul-de-sac—may deprive an abutting owner of convenient access to the general street system of the community, is also subject to a "substantial interference" analysis.[45]

There are two major lines of decisions, however, which involve diminished access rights but in which compensation is almost uniformly denied. The first is predicated upon the concept that the abutting owner's right of access does not include a right to get to the street, and return, at every point along the frontage of his property. It is recognized that the state, in the exercise of its police power, may limit the points at which access is allowed, provided that reasonable access rights, consistent with the use of the property, are retained by the owner.[46] On a corner lot, for example,

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42 *See* People *ex rel.* Dep't of Pub. Works v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957); People *ex rel.* Dep't of Pub. Works v. Becker, 262 Cal. App. 2d 634, 69 Cal. Rptr. 110 (1968); People *ex rel.* Dep't of Pub. Works v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966).

43 *See* People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943). *See also* People *ex rel.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960) (dictum).

The same distinction—compensability for substantial deprivation of access but noncompensability for traffic diversion or circuity of travel—arises here as in the second class of cases. *See* text accompanying notes 37-40 *supra.* Judicial manipulation of the key term, "substantial," has apparently served to minimize obvious inconsistencies between results achieved under the two approaches.

44 *See* Sala v. City of Pasadena, 162 Cal. 714, 124 P. 539 (1912); Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 37 P. 750 (1894); Anderson v. Fay Improvement Co., 134 Cal. App. 2d 738, 286 P.2d 513 (1955). The compensability of property losses due to changes of grade is recognized by statute. CAL. STS. & H'WAYS CODE §§ 858, 869, 6121 (West 1969).

45 *See* Simpson v. City of Los Angeles, 4 Cal. 2d 60, 47 P.2d 474 (1935) (no substantial impairment); Norcross v. Adams, 263 Cal. App. 2d 362, 69 Cal. Rptr. 429 (1968) (dictum); Constantine v. City of Sunnyvale, 91 Cal. App. 2d 278, 204 P.2d 922 (1949) (no damage since small extension street provided as substitute for vacated street). *See also* Beals v. City of Los Angeles, 23 Cal. 2d 381, 144 P.2d 839 (1944).

46 *See* Smith v. County of San Diego, 252 Cal. App. 2d 438, 60 Cal. Rptr. 602 (1967); People *ex rel.* Dept. of Public Works v. Di Tomaso, 248 Cal. App. 2d 741, 57 Cal. Rptr. 293 (1967). *Accord,* Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755, 73 A.L.R. 2d 680 (1957).

this principle may authorize the denial of all curb cuts on one of the fronting streets, thereby limiting entrance driveways to the other, if justified by considerations of traffic control and accident prevention.[47]

The second line of cases is also dependent upon the ascendency of the police power to deal with the practical exigencies of local traffic problems. Compensation is here denied for losses caused by circuity of travel and inconvenience due to "traffic regulations," a term which includes median barriers, turning restrictions, one-way-streets, traffic signals, and curbside parking prohibitions.[48] A peculiar feature of this group of decisions is that the courts appear to regard it as an independent legal category; there is an automatic judicial response of "no compensation," without regard for or attempt to assess the practical consequences of the particular regulation upon adversely affected private interests. Even extreme circuity of travel —more than enough to satisfy the substantial interference test if the pertinent governmental action were a cul-de-sac—is routinely denied relief when caused by a "traffic regulation."[49] For example, the construction of a median barrier on an abutting highway may have substantially the same practical impact upon an abutting owner as the creation of a cul-de-sac which closes the highway to his left. In either case, upon leaving his property the owner is forced to travel in one direction only—to the right—in order to reach the general street system that will take him to his destination. The fact is that the rationale of these decisions is circular and spurious. The real reason why substantial private property losses should here go uncompensated is hidden beneath the facile label "police power."[50]

D. *Proximity Damages*

The normal functioning of highway improvements for their planned purpose often imposes burdens upon nearby property—

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[47] City of San Antonio v. Pigeonhole Parking of Texas, Inc., 158 Tex. 318, 311 S.W.2d 218 (1958). *See* Note, *Control of Access by Frontage Roads—Police Power or Eminent Domain?*, 11 KANS. L. REV. 388 (1963).

[48] People *ex rel.* Dep't of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 9 Cal. Rptr. 151 (1960); People *ex rel.* Dep't of Pub. Works v. Presley, 239 Cal. App. 2d 309, 48 Cal. Rptr. 672 (1966); City of Berkeley v. Von Adelung, 214 Cal. App. 2d 791, 29 Cal. Rptr. 802 (1963); People *ex rel.* Dep't of Pub. Works v. Logan, 198 Cal. App. 2d 581, 17 Cal. Rptr. 674 (1961); People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (1951); Holman v. State, 97 Cal. App. 2d 237, 217 P.2d 448 (1950). *Accord*, City of Phoenix v. Wade, 5 Ariz. App. 505, 428 P.2d 450 (1967); Snyder v. State of Idaho, — Idaho —, 438 P.2d 920 (1968); State v. Williams, 64 Wash. 2d 842, 394 P.2d 693 (1964).

[49] *See, e.g.*, People *ex rel.* Dep't of Pub. Works v. Logan, 198 Cal. App. 2d 581, 17 Cal. Rptr. 674 (1961).

[50] Note, *California and the Right of Access: The Dilemma over Compensation*, 38 S. CAL. L. REV. 689, 696 (1965).

vehicular noise, fumes, dust, glare, and loss of light or view—the incidence and intensity of which are dependent upon proximity to the highway. Adverse consequences of this kind tend to generate claims for inverse compensation grounded upon diminution of property values, especially with respect to lands closely adjoining and, thus, continuously exposed to the discomfort and annoyance associated with intense highway use. The advantages of ready access to a freeway or expressway tend to offset such proximity effects for lands somewhat removed from the freeway periphery; those effects are dissipated to a negligible level by distance alone.

Distance, however, performs no significant function in the accepted rules which purport to distinguish compensable from noncompensable proximity damages. The cases uniformly deny compensation for decreased property value attributable to noise, fumes, dust, discomfort and annoyance produced by nearby freeway or highway usage where the highway improvement is not located upon land previously taken from the claimant for that purpose.[51] Conflicting views exist as to whether damage based on loss of light, air, and view—caused, for example, by a viaduct or highway embankment—is compensable, absent a partial taking.[52] It is clear, however, that if the project responsible for the claimed proximity damage is constructed upon land taken from the claimant, his recovery of severance damages to the remainder of the parcel may include losses caused by increased noise, dust, and fumes[53] as well as interference

[51] People *ex rel.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960); People *ex rel.* Dep't of Pub. Works v. Elsmore, 229 Cal. App. 2d 809, 40 Cal. Rptr. 613 (1964); Sacramento & San Joaquin Drainage Dist. *ex rel.* State Reclamation Bd. v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963); City of Berkeley v. Von Adelung, 214 Cal. App. 2d 791, 29 Cal. Rptr. 802 (1963). *See also* Lombardy v. Peter Kiewit Sons' Co., 266 Cal. App. 2d 652, 72 Cal. Rptr. 240 (1968) (private deed restrictions limiting the purposes for which land may be used do not constitute a compensable interest supporting recovery for loss of amenity due to freeway project in violation thereof).

[52] *Compare* People *ex rel.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960) (impairment of light and view held nonrecoverable, as part of alleged severance damages, where improvement causing impairment was constructed on land other than that taken from condemnee) *and* People *ex rel.* Dep't of Pub. Works v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966) (accord, alternative ground) *with* Goycoolea v. City of Los Angeles, 207 Cal. App. 2d 729, 24 Cal. Rptr. 719 (1962) (inverse condemnation judgment, including recovery for loss of light, air and view, affirmed). *See also* People *ex rel.* Dep't of Pub. Works v. Presley, 239 Cal. App. 2d 309, 48 Cal. Rptr. 672 (1966) (abutter's right of light, air and view, as well as right of access, described as property rights protected by just compensation clause of constitution).

[53] Pierpont Inn, Inc. v. State, 70 Cal. 2d 293, 449 P.2d 737, 74 Cal. Rptr. 521 (1969); People *ex rel* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 859-60, 357 P.2d 451, 454, 9 Cal. Rptr. 363, 366 (1960) (dictum). *Contra*, People *ex rel.* Dep't of Pub. Works v. Presley, 239 Cal. App. 2d 309, 48 Cal. Rptr. 672 (1966).

with air, light, and view,[54] unfavorable consequences of the project which would be taken into account by an informed potential purchaser.

The cutting edge of the prevailing rules of proximity damages is not the logic of distance but the accident of location of the injury-producing activity upon land taken from the claimant. If no part of the claimant's land has been taken for the project, though it be immediately adjoining, he must suffer resulting proximity losses without recourse; but if a partial taking occurs, however slight, those losses are compensable as severance damages. Concededly of rough utility, this rule of thumb—like the "next-intersecting-street" rule applied in cul-de-sac cases—manifestly yields indefensible results in a significant number of specific cases.

E. *The Need for Legislative Clarification*

The preceding survey of decisional law demonstrates the unsatisfactory nature of the existing rules defining the obligation of governmental agencies to pay just compensation for private losses to abutting property caused by highway improvements. The cul-de-sac rule adduced in the *Bacich* case—with its "next intersecting street" limitation—was somewhat arbitrary and overly rigid. To the extent that courts failed to assess the actual degree of interference, relative to needs of the property owner, it led to possible overcompensation in some cases and undercompensation in others. Moreover, the assumption that the next intersecting street would provide an adequate connecting link to the general street system, and thus a sufficient basis for withholding of compensation to one who had access to it, was at best questionable. A street dead-ended just beyond the next intersection might, in fact, have provided the only efficient and direct route to the principal thoroughfares in the community or to the local business and commercial district. All alternate routes might well be substantially longer, more difficult, or physically inadequate.[55] Indeed, access to the next intersecting street could be meaningless if the intersecting street itself is blocked off against through traffic.[56]

[54] Pierpont Inn, Inc., 70 Cal. 2d 293, 449 P.2d 737, 74 Cal. Rptr. 521 (1969) (impaired scenic view from remainder parcel); People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943) (impairment of right that travellers on highway have reasonable view of premises); Sacramento & San Joaquin Drainage Dist. *ex rel.* State Reclamation Bd. v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963) (impaired view of connected farm lands due to construction of intervening levee).

[55] *See, e.g.*, Beckham v. City of Stockton, 64 Cal. App. 487, 149 P.2d 296 (1944).

[56] *Cf.* People *ex rel.* Dep't of Pub. Works v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966).

Introduction in *Breidert* of the more refined test of "substantial interference," while useful to mitigate the most unsatisfactory aspects of the cul-de-sac rule, scarcely improved predictability. The courts have never undertaken the task of identifying relevant factual criteria for deciding what degree of interference is "substantial;" they have been content to observe that its meaning must be determined in light of the facts of each individual case. While this approach may provide latitude for the gradual development of some judicial wisdom and expertise, it has the defect of suggesting that nearly every controversy relating to impairment of access may be worth litigating. The additional burden of litigation, or of prolonged bargaining and negotiation to avoid litigation, must be regarded as a social cost which deserves legislative consideration. Moreover, the substantial interference approach has, so far, failed to produce a satisfactory reconciliation of the competing rules which deny compensability for mere circuity or inconvenience of travel to and from the claimant's property but, at the same time, allow compensation for interference with access if substantially the same factors are shown to the court.[57]

The frontage road and proximity damage cases exhibit many of these same difficulties. In addition, these decisions expose dramatically the basic inconsistencies and irrationalities which permeate the legal rules governing severance damages as compared to damages awardable as inverse compensation. Thus, whether an owner whose land is left upon a frontage road by a freeway construction project may recover for resulting diminution of property value, depends principally upon whether any part of his land was taken and used in the freeway project. One whose land was so taken in part may recover for reduced value of the remainder caused by such factors, apparent to an informed prospective buyer, as the noise and dust from the adjoining freeway.[58] An adjoining land owner exposed to precisely the same, or even greater, detriment from freeway traffic recovers nothing, merely because none of his land was taken for use in the freeway project.[59] Likewise, a third owner,

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[57] *See* cases cited in notes 42 and 43 *supra; cf.* cases cited in note 29 *supra.* An attempt was made, twenty-six years ago, to predicate the distinction (which, at root, seems based on differences of degree of "police power" significance attached by courts to the purpose of the governmental action) on whether there was a "compelling emergency" or "public necessity" for the public entity's decision. *See* Bacich v. Board of Control, 23 Cal. 2d 343, 351, 144 P.2d 818, 824 (1943). *Cf. id* at 359, 144 P.2d at 828 (Edmonds, J., concurring opinion). Although more recent decisions often speak of the "police power" concept as lending support to a conclusion of noncompensability, the notion of emergency or necessity is seldom, if ever, mentioned.

[58] *See* note 53 *supra.*

[59] *See* note 51 *supra.*

whose land was taken in part, but was not used for actual freeway construction,[60] is without remedy for the same economic loss.[61] Even in those cases in which the resulting losses are regarded as compensable, it is difficult to discern the underlying logic of some of the prevailing rules of damages. In determining severance damages, for example, loss of amenity from *increased* traffic on the abutting freeway may be taken into account,[62] but loss of value due to *diminished* traffic passing on the abutting highway is regarded as irrelevant.[63]

Finally, the "police power" rubric employed to justify denial of compensation in cases where alleged property value depreciation has been caused by "traffic regulations,"[64] describes only the result; it does not advance supporting reasons. By concentrating on classification of the problem, rather than an objective effort to isolate and evaluate the competing governmental and private interests, the "police power" approach lends itself to mechanical application with potentially irrational results. Moreover, since the principal injurious effects of traffic regulations ordinarily are a consequence of the reduced capacity of the street or highway to service the abutting land, it appears that the differences between regulation and freeway cases are essentially matters of degree. As a device for ordering traffic flow, improving traffic safety, and reducing traffic accidents, the freeway undeniably constitutes an expanded, albeit indirect, exercise of the police power.[65] This fact emerges most strikingly in the decisions denying compensability for loss of business profits occasioned by diversion of traffic from an existing highway to a new freeway.[66] It is also clear that limitations on access to modern high-speed highways result from considerations of safety *and* traffic ex-

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[60] It may have been used for collateral purposes, such as a turn-around area in a cul-de-sac created by the freeway, or for an unimproved emergency stopping area along the outer margin of the paved roadway.

[61] *See* People *ex rel.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960); People *ex rel.* Dep't of Pub. Works v. Elsmore, 229 Cal. App. 2d 809, 40 Cal. Rptr. 613 (1964).

[62] Pierpont Inn, Inc. v. State, 70 Cal. 2d 293, 449 P.2d 737, 74 Cal. Rptr. 521 (1969).

[63] People *ex rel.* Dep't of Pub. Works v. Becker, 262 Cal. App. 2d 634, 69 Cal. Rptr. 110 (1968). Conversely, increased profitability due to an increase in traffic volume passing a commercial location may be considered as a special benefit which, by offset against severance damages, reduces the abutting owner's recovery. City of Hayward v. Unger, 194 Cal. App. 2d 516, 15 Cal. Rptr. 301 (1961).

[64] *See* note 48 *supra.*

[65] *See* R. NETHERTON, *supra* note 8, at 78-81, indicating that control of highway access promotes multiple objectives (*e.g.*, expediting traffic flow, protecting highway investment, controlling roadside improvements, balanced transportation facilities, promoting safety, and achieving community amenity) that are consistent with advancement of the public welfare.

[66] *See* Holloway v. Purcell, 35 Cal. 2d 220, 217 P.2d 665, *cert denied*, 340 U.S. 883 (1950).

pedition.[67] Once it is recognized that inverse compensation claims growing out of freeway projects—and those stemming from traffic regulations—are merely factual variants on a common legal spectrum, the task of formulating acceptable statutory criteria for drawing of lines between compensability and noncompensability may be approached unembarassed by conceptual irrelevancies.

F. *Developing Statutory Standards: Preliminary Concepts*

The moral imperative behind the constitutional mandate for payment of just compensation—the ideal of equitable loss distribution—can be only partially achieved in an imperfect world. Many claims that in theory might be compensable are so small and so widely distributed throughout the community that efforts at further redistribution would cost more in administrative and litigation expense than would be gained in distributive justice.[68] These considerations suggest that, so far as feasible, any proposed statutory standard contain a relatively simple test, with high predictability, by which cases of potential compensability can be distinguished from those beyond the pale.[69]

The courts have, in fact, worked out a series of practical tests of this sort, although their substance is subject to criticism. The "next intersecting street" limitation upon the cul-de-sac rule, for example, has been said to incorporate an implicit judicial declaration "that the next intersecting street is the dividing line between injuries peculiar to oneself and those which one suffers in common with the general public."[70] Similarly, the judicially developed rule which denies severance damages for loss of amenity due to construction or use of an improvement on land other than that taken from the claimant,[71] observes a line between compensability and noncompen-

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[67] Covey, *Highway Protection Through Control of Access Roadside Development*, 1969 WIS. L. REV. 567, 567-69.

[68] Moreover, the imperfections of the fact-finding process with respect to property values—the principal issue in the controversy once compensability is admitted—suggest the social utility of rules of law which will reduce the incentives to engage in the battle of expert witnesses that is so typical of condemnation litigation.

[69] As to the general policy criteria deemed relevant to the development of a legislative program for modernizing inverse condemnation law, see Van Alstyne, *supra* note 4, at 30-36. The constitutional purview of such legislation is considered in Van Alstyne, *supra* note 9.

[70] Rosenthal v. City of Los Angeles, 193 Cal. App. 2d 29, 32, 13 Cal. Rptr. 824, 826-27 (1961). This position is consistent with the general rule that recognizes only the compensability of damage which is peculiar to the abutting owner and not shared widely by the public. *See* City of Berkeley v. Von Adelung, 214 Cal. App. 2d 791, 793, 29 Cal. Rptr. 802, 803 (1963).

[71] *See* note 18 *supra*. That the rule represents an effort to distinguish damages peculiar to the claimant from those suffered in common with adjoining landowners is widely acknowledged in the case law. *See* 4 P. NICHOLS, *supra* note 1, § 14.21[1], at 517-18, and cases cited therein.

sability that probably differentiates with rough equity between those losses which are broadly distributed throughout the community and those which are special and peculiar to the claimant. At the very least, when the injurious activity takes place on land on which there has been a partial taking, there is a greater likelihood that it will be closer to and more intense in its impact upon the occupant of the remainder parcel than is the case with respect to other owners from whom no land was taken. Even the "traffic regulation" cases may be said to imply a judicial belief that the burdens of such regulations generally will be distributed with approximate fairness over the population at large—at least in the long run—or are likely to be so predominantly claims of a de minimis order as not to warrant the social costs of isolating and administering relief in the rare instances where this is not the case. The objective of the judicially developed rules appears sound; their chief defect lies in the fact that they represent an uneven approach to important issues that deserve disposition under principled rules characterized by greater equality, insight and precision.

Statutory precedents from other jurisdictions provide little or no assistance in the development of acceptable criteria. As in California,[72] legislation in several states recognizes that existing rights of access cannot be destroyed by construction of a limited access highway without payment of just compensation or voluntary relinquishment by the owner.[73] These statutes, however, typically employ general language which, in practical effect, delegates to the courts the task of defining the extent of the statutorily protected rights. Only in somewhat rare instances have legislatures attempted to supply significant descriptive detail. Wisconsin, for example, requires severance damages—where there has been a partial taking for highway purposes—to include elements reflecting not only "deprivation or restriction of existing right of access," but also "loss of air rights" and "proximity damage to improvements remaining on condemnee's land."[74] Pennsylvania makes explicit provision for compensation to include damages "specially affecting the remaining property due to its proximity to the improvement for which

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[72] CAL. STS. & H'WAYS CODE § 100.3 (West 1969) provides that a declaration by the state highway commission creating a freeway "shall not affect private property rights of access, and any such rights taken or damaged within the meaning of Article 1, Section 14, of the State Constitution for such freeway shall be acquired in a manner provided by law. No state highway shall be converted into a freeway except with the consent of the owners of abutting lands or the purchase or condemnation of their right of access thereto."

[73] *See, e.g.*, ILL. ANN. STAT. ch. 121, §§ 8-102, 8-103 (Smith-Hurd 1960); MASS. ANNO. LAWS, ch. 81, § 7C (1964); PA. STAT. ANN. tit. 26, § 1-612 (Supp. 1969); WASH. REV. CODE ANNO. § 47.52.080 (1961).

[74] WIS. STAT. ANN., § 32.09(6) (1964). *See also id.* at § 80.47 (1957).

the property was taken."[75] A particularly interesting Oregon statute, addressed to the cul-de-sac problem, authorizes suit to recover damages by the owner of land abutting on the cul-de-sac only if his property lies within 300 feet of the point of closing and between that point and the next intersecting street.[76] However, no jurisdiction is known to have enacted a comprehensive set of statutory criteria defining the extent of compensable property interests of landowners abutting public highways.

A useful approach to the development of acceptable statutory standards, and one which would least disrupt existing institutional arrangements and practices, might seek to employ the present court-made rules—modified to the extent warranted by sound policy considerations—as the core of a legislative program.[77] Such an incremental approach could relieve the rules of their all-or-nothing characteristics, in the interest of more equitable treatment of peripheral and exceptional cases, by recasting existing case-developed standards as presumptions rather than as inflexible substantive norms.[78] Accordingly, a preliminary assessment of the competing interests involved in inverse claims arising from typical highway improvement projects suggests that consideration should be given to enactment of legislation along the following lines:

1. The creation of new access rights, by the construction of new streets and highways should be limited by a legislative declaration to the effect that all such projects—not merely freeways—shall create no new rights of access in abutters except to the extent expressly provided by an appropriate agency of the governmental entity undertaking the project.[79] No constitutional impediment to

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[75] PA. STAT. ANN., tit. 26, § 1-606 (Supp. 1969).

[76] ORE. REV. STAT. § 373.060 (1963). *Cf.* WASH. REV. CODE § 47.52.041 (1962), providing that no claim shall lie "by reason of the closing of such [intersecting] streets, roads or highways as long as access still exists or is provided to such property abutting upon the closed streets, roads or highways. Circuity of travel shall not be a compensable item of damage."

[77] Avoidance of disruption of existing legal relationships, so far as possible, is an appropriate criterion of legislative reform. *See* Van Alstyne, *supra* note 9, at 35-36.

[78] California already provides a useful illustration of the suggested technique. Section 30631 of the Public Utilities Code, authorizing the Southern California Rapid Transit District to use existing public streets for rapid transit purposes (including elevated railways and monorails), provides that "it shall be presumed" that such use "constitutes no greater burden on adjoining properties" than preexisting uses. Compare the lengthy New York litigation regarding claimed deprivations flowing from the construction of the elevated railway system near the turn of the century, as recounted in Sauer v. City of New York, 206 U.S. 536, 546-56 (1907).

[79] Oregon statutes may provide useful models. *See* ORE. REV. STAT. § 374.405 (1967): "No rights in or to any state highway, including what is known as right of access, shall accrue to any real property abutting upon any portion of any state highway constructed, relocated or reconstructed after May 12, 1951, upon right of

such a change in the law is known to exist.[80] Such a measure would limit the scope of the access problem to pre-existing rights, or to those intentionally conferred in the future. Additionally, it would permit long-range plans for future freeway development to be coordinated more adequately with temporary street and highway construction programs, as well as with local land-use planning and zoning considerations. Ultimate financial savings would also, in reasonable likelihood, be substantial.

2. When the law recognizes the right of an abutting owner to ingress and egress, as between his property and the street or highway on which it abuts, the right should be defined as including only that minimum degree of accessability which is reasonable under all the circumstances. This rule is consistent with the view, already taken by the courts, that a right to access does not exist at all points along the frontal perimeter, as long as reasonable access is provided.[81] It assumes that in our modern complex society, which places high rewards upon mobility, private rights that might impede transportation advances should be defined at the minimal level consistent with the interests they serve. Moreover, it reconciles a theoretical discrepancy in the case law. Attention is directed not to the misleading question of whether the right of access has been "substantially interfered with," but to the somewhat different issue of whether, as a result of governmental action, the claimant has been left with means of access to his property which are reasonably adequate in light of all the circumstances. The definition should also make it clear that the right, as so defined, prevails over any form of governmental action—whether denominated a "police power" measure or otherwise—which is found to have taken or damaged it.[82]

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way, no part of the width of which was acquired prior to May 12, 1951, for public use as a highway, by reason of the real property abutting upon the state highway." A companion provision authorizes the state highway commission, in acquiring any right of way for state highway purposes, to "prescribe and define the location, width, nature and extent of any right of access that may be permitted by the commission to pertain to real property described in ORS 374.405." *Id.* at § 374.410. *See also id.* at §§ 374.420, 347.425 (similar provisions relating to county throughways).

[80] *See* authorities cited in Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 758-59, 776-78 (1967).

[81] *See* notes 46 & 47 *supra*, and accompanying text.

[82] This proposal seeks to eliminate a source of confusion found in decisions intimating, perhaps inadvertently, that any interference with access rights, if imposed under a legitimate claim of "police power", is noncompensable. *See* notes 46-50 *supra*, and accompanying text. The sounder view, it is submitted, recognizes that an exercise of "police power" adds weighty elements to the balancing process—elements that favor the validity of the measure and noncompensability of resulting private injury—but does not wholly preclude compensability for substantial deprivations of access not

3. If access rights are redefined as suggested, it would be helpful to enact concurrently a set of criteria incorporating factual elements which the court is directed to consider in determining whether the claimant's pre-existing right of access has been diminished below the level of reasonable need as a result of the improvement or other governmental action, and that he has therefore sustained a compensable damaging. The stated considerations should leave a measure of latitude for judicial discretion in their application, so as to avoid undue rigidity and inflexibility in adjudicating unusual or unique claims. It seems appropriate that consideration be given to adoption of such factors as the following:

a. *The extent to which the property retains direct access capabilities reasonably adequate for its highest and best use in light of (i) the nature and requirements of that use; (ii) the number, physical dimensions, and usefulness of access facilities; and (iii) any other circumstances relevant to effective utilization of the property,*

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justified by considerations of public safety or welfare. *See, e.g.*, Bacich v. Board of Control, 23 Cal. 2d 343, 363, 144 P.2d 818, 830 (1943) (Edmonds, J., concurring) (circuity of travel and related inconvenience, due to traffic regulations, said to be "an element of damage for which the property owner may not complain *in the absence of arbitrary action*") (emphasis added); People v. Sayig, 101 Cal. App. 2d 890, 905, 226 P.2d 702, 712 (1951) (distinction between situations supporting compensation and those in which compensability is denied said to be "simply one of degree"); Beckham v. City of Stockton, 64 Cal. App. 2d 487, 502, 149 P.2d 296, 303 (1944) (dictum) (traffic regulations "may interfere *to some extent* with right of access without furnishing a basis for recovery" of inverse compensation) (emphasis added). *See also* Smith v. County of San Diego, 252 Cal. App. 2d 438, 60 Cal. Rptr. 602 (1967); People *ex rel.* Dep't of Pub. Works v. Di Tomaso, 248 Cal. App. 2d 741, 57 Cal. Rptr. 293 (1967); Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957); Hilleredge v. City of Scottsbluff, 164 Neb. 560, 83 N.W.2d 76 (1957); Tubular Service Corp. v. Comm'r of State Highway Dep't, 77 N.J. Super. 556, 187 A.2d 201 (App. Div. 1963); Breining v. Allegheny County, 332 Pa. 494, 2 A.2d 842 (1938); Annot., 73 A.L.R.2d 654 (1960).

Cases denying relief on seemingly absolute "police power" grounds often appear, on their facts, to be instances in which access was not wholly denied but was only made less convenient for purposes not shown to be outweighed by the private detriment asserted. *See, e.g.*, People *ex rel.* Dep't of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960) (divider strip); Holman v. State, 97 Cal. App. 2d 237, 217 P.2d 448 (1950) (median barrier). *See also* Phoenix v. Wade, 5 Ariz. App. 505, 428 P.2d 450 (1967) (no-left-turn regulation, no-parking regulation, traffic signals, inconvenient driveway location); Dep't of Pub. Works & Bldgs. v. Mabee, 22 Ill. 2d 202, 174 N.E.2d 801 (1961) (one-way traffic controlled by median barrier); State v. Gannons, Inc., 275 Minn. 14, 145 N.W.2d 321 (1966) (median divider); City of San Antonio v. Pigeonhole Parking of Texas, Inc., 158 Tex. 318, 311 S.W.2d 218 (1958) (denial of curb cut for access to corner parking facility); State v. Williams, 64 Wash. 2d 842, 394 P.2d 693 (1964) (ban on curbside parking of trucks for unloading and loading purposes).

When deprivation of access rights has been found to be excessive, and not overborne by necessity for achieving "police power" objectives, inverse compensation has been awarded. *See, e.g.*, Weaver v. Village of Bancroft, 439 P.2d 697 (Idaho 1968); Elder v. City of Newport, 73 R.I. 482, 57 A.2d 653 (1948); Hurley v. State, 143 N.W.2d 722 (So. Dak. 1966); Annot., 73 A.L.R.2d 689 (1960).

including reasonably available alternatives. The premise underlying this proposal is that direct access rights influence value primarily, if not exclusively, in relationship to use or potential use of property. Commercial and industrial premises are largely dependent upon direct accessability to customers and freight; on the other hand, property in residential use may actually be harmed by too much accessability.[83] The relationship between highest and best use and direct accessibility is thus a critical element in balancing of the interests presented.[84]

b. *The degree to which the property enjoys general accessability to the surrounding community, which is reasonably adequate in relation to its highest and best use, in light of (i) increased travel time and distance to normal destinations; (ii) greater hazards of traveling alternate routes; (iii) the practical unavailability of reasonable alternate routes; and (iv) the likelihood that visits to the property by members of the public (including commercial patronage) may decline due to difficulties in travelling between the general street system and the property.* These factors are intended to direct attention to the effect on property value of the relationship between use and general community accessability (as distinct from direct ingress and egress between street and property). For certain kinds of property uses, including many residential properties, moderate circuity of travel probably has little or at best slight impact on property values.[85] The same degree of circuity, on the other hand, may for certain commercial undertakings mean the difference be-

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[83] *See* Moore, *Nature and Compensability of Access*, in SOUTHWESTERN LEGAL FOUNDATION PROCEEDINGS OF THE THIRD ANNUAL INSTITUTE ON EMINENT DOMAIN 1 (1961). Optimal access for one kind of use may be inadequate for another. For example, a narrow cul-de-sac may be an ideal location for a quiet residential lot, and could be adequate for the modest traffic generated by certain business or professional offices. The same street, however, could be wholly insufficient for a commercial operation dependent upon large truck-trailer transport.

[84] Goycoolea v. City of Los Angeles, 207 Cal. App. 2d 729, 24 Cal. Rptr. 719 (1962). *See also* Bacich v. Board of Control, 23 Cal. 2d 343, 363, 144 P.2d 818, 830 (1943) (Edmonds, J., concurring); State v. Tolliver, 246 Ind. 319, 205 N.E.2d 672 (1965); Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959); State, *ex rel.* Barman v. Lukens, 5 Ohio Misc. 1, 213 N.E.2d 367 (Com. Pl. 1964); Mayberry & Aloi, *supra* note 10, at 603. Highest and best use—rather than actual use—is the suggested reference point—since, as a result of the regulatory measure or improvement in question, "[a] particular business might be entirely destroyed and yet not diminish the actual value of the property for its highest and best use." People v. Ricciardi, 23 Cal. 2d 390, 396, 144 P.2d 799, 802 (1943). *Cf.* 4 P. NICHOLS, *supra* note 1, § 14.243, at 578.

[85] Hill, *Glendale Report*, in 43 CALIFORNIA HIGHWAYS AND PUBLIC WORKS 42 (1964), (proposed freeway route shown to promote increase in property values of adjacent residential areas through acceleration in change from single family to multiple residence units); Kelly, *Residences and Freeways*, in 36 *id.* at 23 (1957), (land economic study indicating only nominal depression in market value of residential properties located near freeway); *see* Moore, *supra* note 83.

tween success and failure, and affect materially the value of the property on which the business is being conducted.[86] This approach seeks to avoid the conceptual disparity in the present case law between judicial reluctance to award compensation for mere circuity of travel and judicial willingness to grant relief for substantial interference with access.[87] It is believed to be consistent with the general position advanced in *Breidert*[88] and *Valenta*,[89] but eliminates the rigidity of the "next intersecting street" rule presently applied in cul-de-sac situations.[90] Under it, community inaccessability—like unreasonably impaired direct access capability—would be judged on the basis of all of the relevant circumstances, rather than by application of an arbitrary rule of thumb.

c. *The extent to which the claimed impairment of access may be regarded as reasonable and thus noncompensable because (i) the challenged governmental action has a primary purpose and effect of safeguarding public health, safety and welfare by means which would be substantially impaired or deterred by the cost of making just compensation, if required, and for which equally salutary alternatives, with less capacity for interfering with private access rights, are unavailable at equal or lower cost; (ii) the adverse impact of the governmental action upon access rights is so widely shared, speculative in nature or amount, or relatively slight that the cost of distributing such losses in the form of constitutional compensation would impose an unreasonable burden upon governmental finances, or upon the judicial system, or both; or (iii) the claimant's*

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86 People *ex rel.* Dep't of Pub. Works v. Giumarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (1966). *See also* Pierpont Inn, Inc. v. State, 70 Cal. 2d 293, 449 P.2d 737, 74 Cal. Rptr. 521 (1969), (loss of access to beach frontage); Dunbar v. Humboldt Bay Municipal Water Dist., 254 Cal. App. 2d 480, 62 Cal. Rptr. 358 (1967) (loss of access to recreational land).

87 *See* note 57 *supra*, and accompanying text. *Cf.* Priestly v. State, 23 N.Y.2d 152, 242 N.E.2d 827, 295 N.Y.S.2d 659 (1968), approving adequacy of community accessibility of property in light of its highest and best use as relevant to compensability. After reaffirming the rule, established by previous New York cases, that mere circuity of access is noncompensable, the court held that compensation is required if the degree of interference with access goes beyond what is merely circuitous, and the remaining access is "unsuitable" for the highest and best use of the land. Noting the ambiguity in the crucial terms, "circuitous," and "unsuitable," the court offered the following definition: "'Circuitous' . . . indicates that which is roundabout and indirect but which nevertheless leads to the same destination. 'Suitable' . . . describes that which is adequate to the requirements of or answers the needs of a particular object. The concepts are not mutually exclusive and, therefore, a finding that a means of access is indeed circuitous does not eliminate the possibility that that same means of access might also be unsuitable in that it is inadequate to the access needs inherent in the highest and best use of the property involved." 23 N.Y.2d at 156, 242 N.E.2d at 829-30, 295 N.Y.S.2d at 663.

88 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964).

89 61 Cal. 2d 669, 394 P.2d 725, 39 Cal. Rptr. 909 (1964).

90 *See* notes 11-16 *supra*, and accompanying text.

abutting land enjoys compensating special benefits derived from the public improvement or from the practical operation of the regulatory measure. This three-fold factor is intended to provide specific criteria which appraisers, lawyers, and courts may use to evaluate the nebulous element of "reasonableness" in the "reasonably adequate" standards embodied in the previous two suggestions. Since relevance of "all the circumstances" is here assumed, the notion of "reasonable adequacy" should not be predicated solely upon an estimate of *physical* accessability. Rather, it should undertake to weigh—as against the claimed private detriment—the importance of the underlying governmental objects and the feasibility of possible alternate means for achieving them[91] as well as the extent to which the claimed private losses are rationally ascertainable,[92] dis-

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91 *Cf.* the proposal of Mr. Justice Edmonds in Bacich v. Board of Control, 23 Cal. 2d 343, 359, 144 P.2d 818, 828 (1943) (concurring opinion): "The factors to be considered are, on the one hand, the magnitude of the damage to the owner of the land, and, on the other, the desirability and necessity for the particular type of improvement and the danger that the granting of compensation will tend to retard or prevent it. . . . In addition, before compensation may be denied, the court must find that the particular improvement be not unreasonably more drastic or injurious than necessary to achieve the public objective." *See also* Mr. Justice Traynor's dissent in the same case, 23 Cal. 2d at 379, 144 P.2d at 839: "Of recent years the growth of traffic has necessitated the construction of highways with fewer intersecting streets to expedite the flow of traffic and reduce the rate of motor vehicle accidents. . . . The cost of making such improvements may be prohibitive now that new rights are created for owners of property abutting on streets that would be at right angles to the improvements, for these rights must be condemned or ways constructed over or under the improvements. The construction of improvements is bound to be discouraged by the multitude of claims that would arise, the costs of negotiation with claimants or of litigation, and the amounts that claimants might recover."

92 Practical difficulties in valuing access rights are reviewed in R. NETHERTON, *supra* note 8, at 327-40. One reason sometimes advanced in support of judicial exclusion of certain elements of loss (*e.g.*, noise, fumes, dust, annoyance) from the calculation of inverse damages in highway cases, although the same elements are generally admissible for their bearing upon severance damages (*see* notes 51-54 *supra*, and accompanying text), is the relative ease with which the claimed loss, in partial taking cases, can be reflected in the difference between "before" and "after" values of the remainder parcel when viewed from the perspective of a willing buyer. *Cf.* Pierpont Inn, Inc. v. State, 70 Cal. 2d 293, 449 P.2d 737, 74 Cal. Rptr. 521 (1969). In inverse cases, such differences may be far more uncertain and speculative, inasmuch as they are potentially attributable to a variety of indeterminative and noncompensable factors. *See* Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264, 299 P.2d 347 (1956); 4 P. NICHOLS, *supra* note 1, § 14.1[1], at 490-91. This explanation supports the view that the probative weight of the claimant's proof of loss should be discounted to the extent that uncertain "proximity damage" factors are included therein. It does not, however, provide an adequate explanation for the prevailing rule denying compensation altogether for such elements in inverse litigation where there has been no taking, while allowing it as part of severance damages when there has been a partial taking. Adequate protection for the public fisc would be secured, it is submitted, by adherence in inverse condemnation litigation to rules—already familiar in severance damage situations—that require exclusion of valuation evidence clearly based upon noncompensable factors, see Sacramento & San Joaquin

cernably unique,[93] quantitatively significant,[94] administratively manageable,[95] and not compensated by offsetting benefits.[96]

Drainage Dist. *ex rel.* State Reclamation Bd. v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963), but authorize consideration of other circumstances attributable to the governmental action which informed buyers would consider as bearing on the market value. Pierpont Inn, Inc. v. State, 70 Cal. 2d 293, 449 P.2d 737, 74 Cal. Rptr. 521 (1969). *See generally* 4 P. NICHOLS, *supra* note 1, § 14.241, at 564-73.

[93] The general rule is that injury sustained by a property owner in common with other local landowners—and not peculiar to his land—is noncompensable. *See* People *ex rel.* Dep't of Pub. Works v. Symons, 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960); 4 P. NICHOLS, *supra* note 1, § 14.24, at 561. Although this rule is usually articulated as a substantive standard of compensability, it manifestly requires, in practical application, a judgment based on variations of degree. The text proposes a more flexible treatment in which the rule becomes but one factor to be evaluated, without necessarily being given controlling importance. *See* Michelman, *supra* note 4, at 1217-18.

[94] It is assumed, by the present proposal, that administrative efficiency in the settlement of inverse claims would be impaired to a socially unacceptable degree unless the de minimis limitation on recoverable losses is incorporated into legislative standards. *See* Michelman, *supra* note 4, at 1178-80.

[95] *Id.* The development of statutory guidelines to decision-making can directly improve administrative manageability. *Cf. id.* at 1245-53. Consideration should also be given, however, to authorization for statutory compensation in selected instances, at prescribed dollar amounts, in the interest of reducing both administrative expense and "demoralization costs." *See id.* at 1253-56. *Cf.* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENTS (1965); Note, *An Act to Provide Compensation for Loss of Goodwill Resulting From Eminent Domain Proceedings*, 3 HARV. J. LEGIS. 445 (1966).

[96] California law requires "special" benefits—but not "general" benefits—to be deducted from severance damages in eminent domain proceedings. CAL. CODE CIV. PRO. § 1248 (West 1955); Pierpont Inn, Inc. v. State, 70 Cal. 2d 293, 449 P.2d 737, 74 Cal. Rptr. 521 (1969); Sacramento & San Joaquin Drainage Dist. v. W. P. Roduner Cattle & Farming Co., 268 Cal. App. 2d 215, 73 Cal. Rptr. 733 (1968). The proposal in the text assumes continued retention of this rule, and its applicability to inverse claims. *See* 3 P. NICHOLS, supra note 1, § 8.6210, at 105-08. It is recognized that absent a partial taking, as in *Pierpont Inn*, the California inverse decisions seldom discuss the benefit problem, since special benefits are ordinarily assimilated into evidence relating to the extent of claimed diminution of value without the need for separate identification. *See, e.g.*, Rose v. State, 19 Cal. 2d 713, 737, 123 P.2d 505, 519 (1942) (measure of inverse damages said to be "diminution in value of the property"); Enfield, *The Limitations of Access in Partial Takings*, 27 APPRAISAL J. 31, 38-39 (1959) (creation of cul-de-sacs often found to create no compensable damage due to offsetting benefits).

Consistency suggests the appropriateness, in inverse cases where differences in result might be significant, of seeking to isolate special from general benefits so that the latter may be excluded from the computation of compensation. It should be noted, however, that the special benefit rule, in most applications, is beset with serious ambiguities and definitional uncertainties. *See* City of Hayward v. Unger, 194 Cal. App. 2d 516, 15 Cal. Rptr. 301 (1961); Gleaves, *Special Benefits in Eminent Domain: Phantom of the Opera*, 40 CAL. S.B.J. 245 (1965). These conceptual difficulties would be eliminated by replacing the present rule with one based on the federal "before-and-after" test for compensable loss. 33 U.S.C. § 595 (1964). *See* Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 CALIF. L. REV. 833 (1963); Note, *Benefits and Just Compensation in California*, 20 HASTINGS L.J. 764 (1969); Annot., 13 A.L.R.3d 1149 (1967). No constitutional barrier to such a change appears to exist. Bauman v. Ross, 167 U.S. 548 (1897). *Cf.* Beveridge v. Lewis, 137 Cal. 619, 70 P. 1083 (1902) (by implication). *See also* Norwood v. Baker, 172 U.S. 269 (1898) (dictum). Adoption of the federal rule for

4. Assuming that determination of the issues identified by the foregoing proposals would remain, as under present law, a function of the court rather than of the jury,[97] judicial weighing of pertinent evidence and related arguments of counsel could be controlled —in the interest of avoiding inverse compensation costs except where clearly established—by enactment of carefully devised statutory presumptions such as the following:[98]

a. It could be rebuttably presumed that "proximity" damage (*i.e.*, damage resulting from the fact that the property is located in proximity to the highway or other improvement and is thereby exposed to loss of light, view and air, or to noise, dust, fumes, and other deleterious influences) is not sustained in constitutionally significant degree by any property located more than — feet from the highway or improvement causing it.

b. It could be rebuttably presumed that property damage is not sustained in constitutionally significant degree as the result of inconvenience, hardship, difficulty, or circuity of travel caused by reasonable traffic regulations of designated types, *e.g.*, weight and boulevard restrictions, no-left-turn and one-way-street regulations, median strips, roadway markings, lane divider barriers, vehicular stopping, unloading or parking controls, speed limitations, or traffic control signs and signals.

The first of these suggested presumptions accepts the premise that the right to recover for proximity damages should depend neither on the fortuitous circumstance of a partial taking nor on the equally arbitrary fact that the harm-producing improvement is located on property taken from the claimant.[99] To supplant these aspects of existing law, a distance test is suggested as the fairest way to approximate the distinguishing line between special damages to particular property (which should be treated as compensable) and

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California would avoid double compensation of the landowner (as now occurs when special benefits exceed severance damages) and—as applied in inverse condemnation—would tend to reduce both the number and amount of claims. This would offset to some extent the added cost of compensating the broader class of property-owners protected by the proposals here advanced. *See* Note, *Benefits and Just Compensation in California*, 20 HASTINGS L.J. 764, 767-69 (1969).

97 Whether there has been a compensable "taking" or "damaging" is an issue for the court; absent waiver, the amount of loss sustained is a jury question. *See* Breidert v. Southern Pacific Co., 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964); Highland Realty Co. v. City of San Rafael, 46 Cal. 2d 669, 298 P.2d 15 (1956); Riverside County Flood Control & Water Conservation Dist. v. Halman, 262 Cal. App. 2d 510, 69 Cal. Rptr. 1 (1968).

98 This proposal contemplates presumptions that are (a) rebuttable, and (b) affect the burden of proof. *See* CAL. EVID. CODE § 601(b) (West 1966). It is designed to implement a collateral public policy of avoidance of unnecessary fiscal burdens that might deter or delay essential public improvement projects. *See id.* § 605.

99 *See* notes 51-54 *supra*, and accompanying text.

damages shared generally by the community at large (which should not be compensable). The distance to be selected has been left to legislative discretion, since opinions will necessarily vary as to an appropriate figure; testimony from competent land economists should assist in adducing a reasonable distance.[100] Since the proposed distance test is formulated as a rule of evidence,[101] it lacks the all-or-nothing characteristic that mars the prevailing decisional law. It also permits recovery by a deserving claimant who can make a convincing case on special circumstances by demonstrating peculiar interference with use and enjoyment of his property that is sufficient to overcome the presumption.[102]

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[100] The distance prescribed may, of course, be geared to varying circumstances (*e.g.*, urban or rural environment, uphill or downhill grade, residential or commercial use of land).

[101] Courts have not infrequently restricted the scope of compensation for loss of amenity by taking into account the distance between the affected property and the source of the claimed loss, *see, e.g.*, Collins v. State Highway Comm'n, 233 Miss. 474, 102 So. 2d 678 (1958), as well as by imposing a rigorous burden of proof upon the claimant. *See* United States v. Certain Parcels of Land, 252 F. Supp. 319 (W.D. Mich. 1966); Dep't of Highways v. Cleveland, 407 S.W.2d 417 (Ky. App. 1966).

[102] By affording claimants an opportunity to establish special circumstances justifying inverse compensability for proximity damages, the suggested presumption brings the rules governing inverse liability more closely into conformity with accepted principles governing liability based on nuisance. Governmental tort liability for nuisance has long been recognized in California as an exception to the doctrine of sovereign immunity. *See* Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 CALIF. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 225-30 (1963). Under the nuisance rationale, public entities have often been held liable for proximity damages analogous to those here under consideration. *See, e.g.*, Hassell v. City & County of San Francisco, 11 Cal. 2d 168, 78 P.2d 1021 (1938) (noxious odors from outdoor comfort station); Peterson v. City of Santa Rosa, 119 Cal. 387, 51 P. 557 (1897) (noxious odors from untreated sewage); Fendley v. City of Anaheim, 110 Cal. App. 731, 294 P. 769 (1930) (noise and vibrations from nearby municipal power plant). *See also* Jacobs v. City of Seattle, 93 Wash. 171, 160 P. 299 (1916) (smoke and noxious odors from municipal garbage incinerator). *Cf.* Sheridan Drive-In Theatre, Inc. v. State, 384 P.2d 597 (Wyo. 1963) (nuisance standards applied in denying inverse compensation for diminished value of drive-in theatre site due to lights from vehicles using nearby freeway). Tort recoveries for like interferences with comfortable enjoyment of property have also been typical of private nuisance litigation. *See, e.g.*, Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507 (1955) (dust and fumes); Gelfand v. O'Haver, 33 Cal. 2d 218, 200 P.2d 790 (1948) (noise); Johnson v. V. D. Reduction Co., 175 Cal. 63, 164 P. 1119 (1917) (noxious odors); Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966). No California decision has been found that undertakes to explain the anomaly of recognizing nuisance liability for property damages while denying that identical injuries are within the purview of inverse condemnation. *But see* Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (nuisance may amount to "taking" within meaning of fifth amendment). This anomaly, ironically, ignores the fact that governmental liability in nuisance appears to have originated as a specialized application of inverse condemnation law. *See* Van Alstyne, *supra*, at 226-28. The need for reconciliation of the two lines of authority is emphasized by existing uncertainty as to whether, in light of the California Tort Claims Act of 1963, CAL. GOV'T CODE § 810-95-8 (West 1966), nuisance liability in tort may presently be asserted against governmental entities. A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY, § 5.10, at 126 (1964).

The second suggested presumption postulates a general priority of police power "traffic regulations" over incidental inconveniences caused by such regulations in the use of abutting property. Consistent with prevailing legal tradition,[103] property owners may be fairly assumed to include within the framework of their expectations regarding the streets and roads on which their property abuts an appreciation of the likelihood of reasonable traffic controls, and a general understanding that adverse economic consequences of such controls are widely shared by all abutters, in varying degrees, with a roughly compensating advantage of enhanced personal and community safety of street use.[104] To deny relief in such cases by an absolute rule of noncompensability, however, is to lose sight of the fact that a traffic regulation which appears reasonable in the abstract may, when viewed in a specific factual context, seem unnecessarily harsh or arbitrary in its practical impact. Demonstrably capricious or abritrary traffic regulations are presumably rare. However, the channels of litigation (and settlement negotiations) should be left open to an owner who claims an adverse impact upon his property due to special circumstances which would make application of an otherwise reasonable regulation constitutionally compensable as to him. To provide added guidance in determining whether the presumption against compensability has been rebutted, the statute could provide further, if desired, that "this presumption shall be deemed overcome only if the claimant satisfies the court, by clear and convincing evidence, that the value of the subject property for its highest and best use has been depreciated, as a consequence of the traffic regulation or regulations of which complaint is made, to a degree substantially in excess of that sustained by other properties subject to the same regulation or regulations within a radius of — feet therefrom."

5. Diversion of traffic by new highway construction poses a particularly troublesome problem. Decisional law amply documents the fact that, in certain kinds of cases, the construction of a new freeway may bring economic disaster to commercial businesses formerly dependent upon traffic which has been diverted to the freeway.[105] On the other hand, the entrepreneurial reliance interest is probably slight in this context; changes in traffic flow patterns due to highway improvements are an obvious business risk to the road-

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[103] *See* notes 46-48 *supra*, and accompanying text.

[104] The protection of reliance interests—based on reasonable expectations—as a major policy goal of the law of eminent domain, is discussed in Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 612-15 (1954).

[105] *See, e.g.*, Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959) (loss ranging between $5,000 and $25,000); Pennysavers Oil Co. v. State, 334 S.W.2d 546 (Tex. Civ. App. 1960) (economic ruin for gasoline service station).

side enterpriser.[106] In addition, exposing the state to inverse liability for all adverse economic consequences of its modern highway program might well mean fiscal paralysis for a part of the public business already hard-pressed to keep abreast of transportation needs.[107]

A possible legislative approach, of course, is simply to codify the present decisional rule that damages due to traffic diversions are not compensable under any circumstances.[108] The difficulty with this solution is that it would exclude significant social losses attributable to the freeway (or other project) from the accounting of total costs which, in an economic sense, should be attributed to the project in the interest of fair and responsible allocation of community

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[106] State v. Peterson, 134 Mont. 52, 328 P.2d 617 (1958); *See* State Highway Comm'n v. Humphreys, 58 S.W.2d 144 (Tex. Civ. App. 1933); R. NETHERTON, *supra* note 18, at 56-57; Gibbes, *Control of Highway Access*, 12 So. CAR. L. Q. 377, 397-98 (1960). As the California Supreme Court has suggested, it would be unreasonable for the roadside businessman to assume that he had any legal right to a changeless highway in a changeless world. Holloway v. Purcell, 35 Cal. 2d 220, 230-31, 217 P.2d 665, 671-72 (1950), *cert. denied*, 340 U.S. 883 (1950).

[107] *See* Bacich v. Board of Control, 23 Cal. 2d 343, 356, 144 P.2d 818, 826 (1943) (Edmonds, J., concurring); Note, *California and the Right of Access: The Dilemma Over Compensation*, 38 S. CAL. L. REV. 689, 690-91 (1965).

The difficulty of identifying a reliable causal relationship between traffic diversion and loss of business profitability appears also to be recognized as a supporting reason for the usual rule of noncompensability. *See* 4 P. NICHOLS, *supra* note 1, § 14.1[1], at 476-91. Claims by individual property owners, which rely on diminished profitability of existing business operations, may not reflect accurately the impact of freeway construction upon adjacent land values. Competent studies suggest that long-term enhancement of value is the more usual by-product of such projects. CALIF. DEP'T OF PUBLIC WORKS, DIVISION OF HIGHWAYS, CALIFORNIA LAND ECONOMIC STUDIES (1962) (collected reprints of various land economic studies between 1949 and 1962); Hess, *The Influence of Modern Transportation on Values—Freeways*, ASSESSORS J. 26 (Dec. 1965); Kelly & Reilly, *Industry and Frontage Roads*, in 33 CALIF. H'WAYS AND PUB. WORKS 19 (July-Aug. 1954). A national survey of such land economic studies concluded that "owners of property adjacent to improved highways generally benefit greatly in terms of land value gains," particularly when a change of land use is brought about; nevertheless, "[i]n many cases . . . it is difficult to know just who benefits from highway changes and to determine the extent of these benefits." U.S. DEP'T OF COMMERCE, BUREAU OF PUBLIC ROADS, HIGHWAYS AND ECONOMIC AND SOCIAL CHANGES 47 (1964).

[108] Holloway v. Purcell, 35 Cal. 2d 220, 217 P.2d 665 (1950), *cert. denied*, 340 U.S. 883 (1950). The task of drafting a statute along these lines would encounter formidable definitional problems, since there is no clearly discernible line between diversion of traffic and diminution of access. *Cf.* People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943) (distinguishing between noncompensable traffic diversion and compensable change in highway location in relation to claimant's land); People *ex rel.* Dep't of Pub. Works v. Giumarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (1966) (loss of direct access to through highway held compensable; evidence related, in part, to economic consequences of traffic diversion); People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (1951) (divided highway case; court recognizes close analogy to restricted access cases, but applies "police power" rationale to support denial of compensation for resulting traffic diversion).

resources.[109] In addition, it would perpetuate a logical gap in the system of legal responsibility, since, under existing interpretations of the just compensation clause, depreciated property values significantly grounded in certain forms of traffic pattern modifications (*e.g.*, circuity of travel and diminished community access due to cul-de-sacs) are presently compensable.[110]

An intermediate position is available. Conceding on policy grounds that diminished property values due to traffic diversions should ordinarily remain noncompensable, it is still probable that *some* highway projects may result in substantial economic distress for a relatively few property owners who thereby bear a disproportionately large share of the burdens of the project.[111] The owner's plight, however, may not be simply one of depreciated property value. Where marketability is primarily dependent upon estimated profitability, it may also involve the lack of an active market for the land, thereby preventing a relocation of the affected business to a more suitable site.[112] The state could, in the interest of fairness, provide a market by declaring itself obligated to purchase the land at its current appraised-market-value on demand of the owner if made within a fixed period of time (*e.g.*, six months after notice

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109 *See generally* Michelman, *supra* note 93, at 1165; Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain*, 3 UNIV. WYO. LAND & WATER L. REV. 33 (1968). *Cf.* Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965).

110 *See* notes 11-30 *supra*, and accompanying text.

111 Inverse condemnation policy has consistently emphasized the goal of avoidance of unfair distribution of the burdens of public improvements. *See* Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965), and note 109 *supra*.

112 The federal-aid highway program includes relocation assistance for persons and businesses displaced by highway projects. *See* Federal-Aid Highway Act of 1968, 82 Stat. 830, 23 U.S.C. §§ 501-11 (Supp. 1968). This relocation program, which authorizes compensation beyond constitutional requirements, appears to be based primarily upon a legislative concern for the economic and social disruptions likely to accompany major public improvement programs. *See* S. REP. No. 1340, 90th Cong., 2d Sess. (1968); STAFF OF HOUSE COMM. ON PUBLIC WORKS, SELECT SUBCOMMITTEE ON REAL PROPERTY ACQUISITION, 88TH CONG., 2D SESS. (1964), STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS (Comm. Print No. 31); 3 *U.S. Code Cong. & Admin. News* 3482, 3487-89 (1968). California's matching relocation program, CAL. STS. & H'WYS CODE §§ 156, 156.5, 157, 159 (West 1969), has long emphasized the need to minimize social and economic costs of highway acquisitions through careful planning and timing of projects. *See* Hess, *Relocation of People and Homes from Freeway Rights-of-Way: Community Effects*, 28 RESIDENTIAL APPRAISER 3 (April 1962). A practical consequence is the probable reduction in over-all costs of right-of-way acquisition due to enhanced goodwill and reduced litigation. Waite, *Property and Just Compensation*, 1969 URBAN L. ANN. 43, 96. The existing programs, however, do not appear to extend their benefits to nearby properties in the absence of a taking.

from the state, or after completion of the freeway project). By hypothesis, the state would realize full value in the forced purchase of the property and, in the long run, would presumably be made substantially whole upon resale to private interests or by utilization for public purposes.[113]

6. State and local officials responsible for highway and street improvements could be empowered, by clear statutory language, to minimize and compensate for private property losses by optional means other than payment of damages. For example, if the claimant in an inverse condemnation action satisfies the court that a compensable damaging has occurred, the defendant public entity could be authorized to propose a plan, subject to court approval, by which the injury-producing features of the improvement would be corrected, or their harmful impact reduced, in lieu of payment of compensation, in whole or in part.[114] For example, the construction of a bridge over or an underpass beneath a highway could remove nearly all of the owner's basis for inverse damages, and yet be substantially less costly to the state than payment of adequate compensation.[115] Moreover, physical restoration of the premises to maximum usefulness may, in some cases, assure more adequate compensation of the owner than an award of damages calculated according to diminution of market value; inherent deficiences in the processes of land appraisal suggest that such awards do not necessarily correspond to the owner's actual loss.[116] The use of "physical solutions" in appropriate inverse litigation, often implemented in the form of alternative or conditional judgments, has received widespread judicial approba-

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113 *Cf.* MASS. ANN. LAWS, ch. 80, § 3 (1964), authorizing owner of land abutting a public improvement, and assessed for its cost, to surrender it to the public entity, in lieu of payment of the assessment, and recoup its value. The public entity is authorized to sell the property, after surrender, in whole or in part. *See also* Mandelker, *Notes From the English: Compensation in Town and Country Planning*, 49 CALIF. L. REV. 699 (1961).

114 *See generally* Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431, 512-16 (1969), for a similar suggestion in related context.

115 *See, e.g.*, State v. Wheeler, 148 Mont. 246, 419 P.2d 492 (1966) (underpass beneath highway ordered constructed in lieu of payment of full severance damages for bisecting of unitary ranch by highway).

116 The possible inadequacy of severance damages based on valuation comparisons has been relied upon to support the relevancy of evidence as to the cost of remedial measures. *See* Dunbar v. Humboldt Bay Mun. Water Dist., 254 Cal. App. 2d 480, 62 Cal. Rptr. 358 (1967) (cost of bridging stream to connect recreational land, access to which had been destroyed by augmentation of stream flow); Bernard v. State, 127 So. 2d 774 (La. App. 1961) (cost of constructing new bridge to restore access destroyed by enlargement of drainage canal). *See generally*, 4 P. NICHOLS, *supra* note 1, § 14.22, at 520-28. Physical restoration by the public entity also provides greater assurance that community resources will be employed for their optimum use, since it deprives the owner of the option of pocketing a monetary award based on cost-to-cure, without devoting it to actual restoration or remedial work.

tion.[117] A statutory requirement that consideration be given to nonpecuniary alternatives, coupled with a grant of ample supporting authority (*e.g.*, statutory power to condemn additional land[118] needed to implement an alternative physical solution), would regularize the practice and thereby assist in reducing the net cost of vindicating private property rights.[119]

III. Noise Damage From the Operation of Aircraft

The rising noise level of contemporary society, long recognized as an actionable feature of the law of nuisance,[120] in recent years has provided the setting for extensive litigation growing out of military and commercial aircraft operations.[121] Jet aircraft, in particular, have tended to impose noise, vibration and fumes upon occupants of land located in the vicinity of major airports to a degree, and with sufficient intensity, to become a problem of national proportions.[122]

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[117] *See, e.g.*, Mississippi State H'way Comm'n v. Spencer, 233 Miss. 155, 101 So. 2d 499 (1958) (state given option to build bridge or pay compensation); Buxel v. King County, 60 Wash. 2d 404, 374 P.2d 250 (1962) (city given alternative between construction of drainage facilities or payment of compensation); *cf.* Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 339-41 (1933) (Brandeis, J.) (injunction against sewage nuisance conditioned on failure of city to pay damages).

[118] Condemnation of additional land, outside the confines of the injured owner's boundaries and not needed for the basic public improvement work, may be necessary in order to provide an adequate physical solution. This might be the case, for example, where a substitute access road or a new bridge would substantially mitigate the owner's loss. *See* notes 115-117 *supra*, and accompanying text. Comprehensive power of excess condemnation, where limited to the purpose of implementing a physical solution which would reduce the economic costs of the public project by mitigating severance or consequential damages, appears to be fully within legislative authority to bestow. People *ex rel.* Dep't of Pub. Works v. Superior Court, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968) (holding CAL. STS. & H'WAYS CODE § 104.1 (West 1969) valid as for a public purpose). *See generally* Capron, *Excess Condemnation in California—A Further Expansion of the Right to Take*, 20 HASTINGS L.J. 571 (1969).

[119] *See generally* Note, *Restoration Costs as an Alternative Measure of Severance Damages in Eminent Domain Proceedings*, 20 HASTINGS L.J. 571, 800 (1969); Note, *Compensation for a Partial Taking of Property: Balancing Factors in Eminent Domain*, 72 YALE L.J. 392 (1962).

[120] Lloyd, *Noise as a Nuisance*, 82 U. PA. L. REV. 567 (1934). *See also* Spater, *Noise and the Law*, 63 MICH. L. REV. 1373 (1965).

[121] *See e.g.*, Fleming, *Aircraft Noise: A Taking of Private Property Without Just Compensation*, 18 SO. CAR. L. REV. 593 (1966); Hill, *Liability for Aircraft Noise —The Aftermath of Causby and Griggs*, 19 U. MIAMI L. REV. 1 (1964); Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967). Both technical and legal aspects are reviewed in U.S. OFFICE OF SCIENCE & TECHNOLOGY, ALLEVIATION OF JET AIRCRAFT NOISE NEAR AIRPORTS: A REPORT OF THE JET AIRCRAFT NOISE PANEL (1966) [hereinafter cited as NOISE PANEL REPORT].

[122] The national dimensions of the jet aircraft noise problem have recently been recognized in legislation authorizing promulgation of federal noise abatement regulations by the Federal Aviation Administration, enforceable through certification proceedings. Federal Aviation Act of July 21, 1968, Pub. L. No. 90-411, § 611, 82

Technical studies indicate that while moderate reductions in jet engine noise may be possible—principally through modifications in engine and airframe design—a major "break-through" that would permit a substantial reduction in generated noise characteristics of present and future jet aircraft, at economically acceptable costs, is unlikely.[123] Moreover, developmental work on supersonic commercial aircraft suggests that sonic boom damage will probably constitute an unavoidable consequence of use of the SST and its military counterparts.[124]

The widespread public importance of the air transport industry, coupled with the pre-empting effect of comprehensive federal regulations[125] governing flight patterns, use of the airways, and landing and takeoff procedures, preclude any realistic possibility of either injunctive relief for adversely affected property owners[126] or local regulatory measures designed to prevent excessive aircraft noise.[127] The possibility of a tort remedy, while theoretically available on proof of fault,[128] does not offer the injured owner a realistic solution.

Stat. 395, 49 U.S.C. § 1431 (Supp. 1968). *See also* S. REP. No. 1353, 90th Cong., 2d Sess. 1-2 (1968), pointing out that since the American air carrier fleet is now over 75% jet-powered, with nearly a thousand additional jet aircraft in the general aviation fleet (mainly in the executive flying sector), aircraft noise "is a burgeoning national problem, which can only become worse if action is not taken." *See also* HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE, SPECIAL SUBCOMMITTEE ON REGULATORY AGENCIES, INVESTIGATION AND STUDY OF AIRCRAFT NOISE PROBLEMS, H.R. REP. No. 36, 88th Cong., 1st Sess. (1963).

[123] NOISE PANEL REPORT, *supra* note 122, at 5-6. *See also* S. REP. No. 1353, 90th Cong., 2d Sess. 2-3 (1968).

[124] *See* Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. REV. 1 (1968); Note, *Sonic Booms—Breaking the Tort Barrier?*, 2 GA. L. REV. 83 (1967).

[125] 14 C.F.R. §§ 91.61-.129 (rules of flight), §§ 93.1-.129 (special regulations governing flight patterns near high density traffic airports), §§ 151.1-.123 (airport design and related conditions of federal-aid airport program eligibility) (1969). *Cf.* CAL. PUB. UTIL. CODE § 21240 (West 1965): "This State recognizes the authority of the Federal Government to regulate the operation of aircraft and to control the use of the airways, and nothing in this act shall be construed to give the division [of aeronautics] the power to so regulate and control safety factors in the operation of aircraft or to control use of the airways." Continuing efforts of the federal government to devise safe aircraft flight procedures conducive to effective noise abatement are discussed in detail in NOISE PANEL REPORT, *supra* note 122, at 48-58, 86-106.

[126] *See* Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964). *See also* Town of East Haven v. Eastern Airlines, Inc., 282 F. Supp. 507 (D. Conn. 1968); Bourland v. City of San Antonio, 347 S.W.2d 660 (Tex. Civ. App. 1961). *See generally* Tondel, *Noise Litigation at Public Airports*, in NOISE PANEL REPORT, *supra* note 122, at 117, 122-23.

[127] American Airlines, Inc. v. City of Audubon Park, 407 F.2d 1306 (6 Cir. 1969); American Airlines Inc. v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); Allegheny Airlines, Inc., v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956).

[128] RESTATEMENT (SECOND) OF TORTS § 159 (1965) (trespass). *See, e.g.*, Weisberg v. United States, 193 F. Supp. 815 (D. Md. 1961) (liability for low helicopter flights under Federal Tort Claims Act); City of Newark v. Eastern Airlines, Inc., 159 F. Supp. 750 (D. N.J. 1958) (trespass liability recognized) (dictum).

As a practical matter, aircraft noise damage is seldom—except perhaps in the case of sonic booms—the product of an isolated occurrence; its most prevalent feature consists of the cumulative physical and psychological impact of recurring jet aircraft flights at relatively low altitudes during takeoff and landing operations over an extended period of time. It may fairly be assumed that very few, if any, of these repeated invasions of the claimant's tranquillity are the product of negligence or other wrongful acts or omissions. Traditional concepts of nuisance liability seem applicable in theory to this pattern of persistent and repetitive injuries.[129] However, the interest-balancing technique that characterizes nuisance litigation is unattractive to noise-damage claimants in most jurisdictions, inasmuch as the public importance of commercial aviation constitutes a formidable barrier to such recovery.[130] Inverse condemnation thus emerges as the principal remedial approach to this kind of intangible detriment.

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129 *See, e.g.*, Chronister v. City of Atlanta, 99 Ga. App. 447, 108 S.E.2d 731 (1959); Tondel, *supra* note 126, at 125; Annot., 90 L. Ed. 1218, 1222-28 (1947).

130 *See, e.g.*, Louisville & Jefferson County Air Bd. v. Porter, 397 S.W.2d 146 (Ky. App. 1965). *Cf.* Dyer v. City of Atlanta, 219 Ga. 538, 134 S.E.2d 585 (1964); Thompson v. City of Atlanta, 219 Ga. 190, 132 S.E.2d 188 (1963) (nuisance actions dismissed on pleadings); Thornburg v. Port of Portland, 244 Ore. 69, 415 P.2d 750 (1966) (instructions to jury in inverse condemnation suit, framed on nuisance theory, held erroneous). *See* Comment, *Inverse Condemnation in Washington—Is the Lid Off Pandora's Box?* 39 WASH. L. REV. 920, 934 (1965). It is settled that airport operations are not, per se, a nuisance. Yorkavitz v. Board of Township Trustees of Columbia Twp., 166 Ohio St. 349, 142 N.E.2d 655 (1957). *See also* Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

Since the enactment of the California Tort Claims Act of 1963, CAL. GOVT. CODE §§ 810-895.8 (West 1966), it is not clear whether damages are recoverable against public entities on a nuisance theory. *See* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 5.10, at 126 (1964). Moreover, airport and aircraft operations are expressly sanctioned by California statutes, *see* CAL. PUB. UTIL. CODE §§ 21401-03 (West 1965), thereby suggesting applicability of the doctrine that nothing "done or maintained under the express authority of a statute can be deemed a nuisance." CAL. CIV. CODE § 3482 (West 1954). However, general authority conferred by legislation to engage in a particular activity has usually been regarded as insufficient to "legalize" what would otherwise be an actionable nuisance. Hassell v. City & County of San Francisco, 11 Cal. 2d 168, 78 P.2d 1021 (1938); Bright v. East Side Mosquito Abatement Dist., 168 Cal. App. 2d 7, 335 P.2d 527 (1959). *But see* Nestle v. City of Santa Monica, 3 Av. L. REP. (10 Av. Cas.) ¶ 18,238 (L.A. Super. Ct. 1969) (theory of "legalized nuisance" applied to deny liability for aircraft noise) (alternative ground). Inverse condemnation has long been recognized in California as the theoretical basis for nuisance liability of public entities, notwithstanding the prevailing doctrine (prior to 1961) of sovereign immunity. *See* Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 CALIF. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 1, 225-30 (1963). A similar relationship has been observed in other jurisdictions. Stoebuck, *supra* note 121. Accordingly, for present purposes, distinctions between nuisance and inverse theories appear to be negligible so far as the scope of liability under the latter approach is concerned. Since inverse liability has a constitutional origin, statutory limitatons upon nuisance liability cannot serve to mitigate the duty of a public entity to pay just compensation for a taking or damaging of private property. Richards v. Washington Terminal Co., 233 U.S. 546 (1914); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942).

Indeed, most of the significant decisions have been litigated in the context of inverse liability theory.[131]

A. *Compensation Under Federal Law: The Overflight Rule*

United States v. Causby,[132] clearly the leading case, has been a source of confusion. The Supreme Court's opinion, which affirmed the constitutional duty of the government to pay just compensation under the fifth amendment for aircraft noise damage, contains a mixture of conceptualisms. After forthrightly rejecting the applicability of the common law doctrine that ownership of land extends vertically to an unlimited height, the Court emphasized repeatedly the fact that the military aircraft in question flew directly *over* the plaintiff's land and had thereby "taken" an easement for flight purposes in contravention of the owner's right to full enjoyment and use of the immediately superadjacent airspace.[133] This aspect of the opinion suggests a trespass theory, predicated upon recognition of a property interest belonging to the landowner in "at least as much of the space above the ground as he can occupy or use in connection with the land."[134] Concurrently, however, the opinion identified the source of injury as the destruction of the usefulness of the land for commercial raising of chickens, the disruption of the owner's dominion and control of the surface, and the "direct and immediate interference with the enjoyment and use of the land."[135] This appears to be the language of nuisance—although it is intertwined (as is often true of nuisance decisions) with property terminology. Since it was the noise, glare and vibrations from the aircraft that actually produced the interference referred to—rather than a pre-emption by the planes of airspace actually intended to be occupied by buildings or structures designed to promote surface use—*Causby* can be read as implying approval of a nuisance approach to inverse liability in the absence of actual overflights.[136]

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[131] *See* Tondel, *supra* note 126, at 117, 125: "25 of the 27 cases in the last decade in which damages have been recovered were decided on the theory of constitutional taking—5 involving civil airports, and 20 military airports."

[132] 328 U.S. 256 (1946).

[133] The "taking" aspect of the decision is underscored by the disposition remanding *Causby* to the Court of Claims for a finding containing "an accurate description of the property taken," which was deemed essential "since that interest vests in the United States." *Id.* at 267.

[134] *Id.* at 264. The trespass analysis of *Causby* was incorporated into RESTATEMENT (SECOND) OF TORTS § 159 (1965).

[135] 328 U.S. at 266. The majority opinion further expressed agreement with the findings of the Court of Claims that "the frequent, low-level flights were the direct and immediate cause" of the plaintiff's damage, as indicated by "a diminution in value of the property." *Id.* at 267.

[136] *See, e.g.*, Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965); Note, *Airplane Noise: Problem in Tort Law and*

Griggs v. Allegheny County[137] reaffirmed *Causby*. The Supreme Court ruled that just compensation must be paid for property losses sustained as a result of extreme noise caused by regular, commercial jet aircraft flights at low altitudes (between 30 and 300 feet) above plaintiff's home which made it wholly uninhabitable. Although a technical invasion of plaintiff's superadjacent airspace was established, the compensable loss, as in *Causby*, was attributed not to the trespass but to the accompanying noise and vibration. Had the aircraft in question flown slightly to one side—so as to avoid passing directly over plaintiff's land—but at the same altitudes, substantially the same degree of interference with habitability of the premises would apparently have occurred. Thus, since the exact issue was not presented, *Griggs* offered no intimations as to the compensability of damage sustained in the absence of actual overflights. It did, however, supply another highly important dimension to the problem: the airport operator—the defendant county, which had planned and built the airport with federal approval and financial assistance—was the responsible entity that had "taken" the aviational easement in the constitutional sense. Noting that appropriate approach and glide paths are indispensable to airport operation, the court concluded that the county was responsible for acquisition of the necessary easements as well as the necessary land on which the runways were built. To develop the airport, the county had to acquire some private property. "Our conclusion," said the court, "is that by constitutional standards it did not acquire enough."[138]

The question left open in both *Causby* and *Griggs*, whether direct overflights of a trespassory nature are prerequisite to inverse liability, has produced diverse views in state and federal courts alike. The leading decision denying compensation in the absence of over-

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Federalism, 74 HARV. L. REV. 1581 (1961); Note, *Wrongs and Rights in Superterraneous Airspace: Causby and the Courts*, 9 WM. & MARY L. REV. 460, 462-67 (1967).

137 369 U.S. 84 (1962).

138 *Id.* at 90. *Accord*, Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664 (1960). Striking verification of the principle underlying the concept that insufficient land had been taken is supplied by the recent decision in Johnson v. City of Greenville, — Tenn. —, 435 S.W.2d 476 (1968), where it appeared that the public airport authorities had acquired one-half mile long flight easements beyond the north end of the runway, but none off the south end of the same runway, where plaintiffs resided. Plaintiffs' complaint for noise damage was held to state a cause of action.

Griggs, it should be noted, also held that compensability of damage caused by aircraft noise was not affected by the fact that the flights in question took place within approach glide paths and takeoff gradients prescribed by the appropriate federal regulatory authorities and defined by statute (enacted subsequent to *Causby*) as embraced within the "navigable airspace" comprising the public domain. *See* 72 Stat. 739 (1958), 49 U.S.C. § 1301(24) (1963).

flights is *Batten v. United States*.[139] Although the trial court found that plaintiffs had suffered a substantial interference with use and enjoyment of their residential property[140] as the result of noise, vibration and smoke caused by military jet operations from a nearby Air Force Base, compensation was denied. Reading *Causby* as authorizing constitutional compensation only for direct invasions of the surface owner's vertical airspace, the majority opinion concluded that the plaintiffs' injuries were merely incidental—amounting to "no more than a consequence of the operations of the Base"[141] —and did not amount to a "taking" of private property within the meaning of the fifth amendment. The record did not suggest that any homes had been rendered uninhabitable or that any plaintiff had been forced to move because of the jet aircraft annoyance. On the contrary, it showed "nothing more than an interference with use and enjoyment."[142] Thus, the holding was a guarded one; the court suggested that a showing of "total deprivation of use" of plaintiffs' properties might have brought a different result.[143]

B. *Compensation Under State Law: The Substantial Interference Test*

The position taken in *Batten* has attracted a substantial following. Noncompensability in the absence of direct overflights is firmly established as the prevailing rule in the federal courts.[144] It also has respectable, although limited, support in the state courts.[145] Its persistence may be due to some extent to mere conceptual attractiveness. In inverse condemnation suits against the federal government, for example, the plaintiff's claim must be grounded upon a "taking" of private property within the meaning of the fifth amendment. Overflights can easily be conceived—in traditional property law terminology—as the "taking" of an easement for flight purposes.[146] Laterally imposed damage from aircraft operations,

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[139] 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

[140] Plaintiffs' homes had diminished in value, according to the evidence in amounts ranging from $4700 to $8800, or, expressed in percentages of their value before the alleged damaging, from 55.3% to 40.8%. *Id.* at 583 n.3.

[141] *Id.* at 585.

[142] *Id.* at 585.

[143] *Id.* at 584-85, *distinguishing* United States v. General Motors Corp., 323 U.S. 373 (1945).

[144] *See e.g.*, Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964); Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1963). The cases are collected in Note, *Overflights Not Allowed in Inverse Condemnation for Aircraft Noise*, 18 So. CAR. L. REV. 320 (1966).

[145] Ferguson v. City of Keene, 108 N.H. 409, 238 A.2d 1 (1968). *See also* Bowling Green-Warren County Airport Bd. v. Long, 364 S.W.2d 167 (Ky. 1962) (by implication).

[146] *See* Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

absent a physical appropriation of the owner's airspace, is more easily regarded as a form of "consequential" or "incidental" damage for which just compensation is not constitutionally required.[147]

The constitutions of many states, however, expand the requirement of just compensation to include instances in which private property is "damaged" as well as "taken."[148] It is generally conceded that this more liberal form of constitutional language was intended to authorize recovery of many kinds of consequential damages that do not constitute a "taking."[149] The absence of overflights poses no conceptual barrier to inverse liability under a clause of this kind.[150] Indeed, the majority opinion in *Batten* explicitly noted this broader scope of compensability under state law, observing that "the federal obligation has not been so enlarged either by statute or by constitutional amendment."[151] Thus, the Supreme Court of Washington, in holding that laterally imposed noise from aircraft operations constituted a compensable "damaging" under the state constitution, observed:

> The specific purpose of the addition of language [*i.e.*, the "damaging" clause] beyond that of the United States Constitution is to avoid the distinctions attached to the word "taking" appropriate to a bygone era. It is unnecessary to become embroiled in the technical differences between a taking and damaging in order to accord the broader conceptual scope intended by the additional language.[152]

Even in states which do not provide the textual support of a "damaging" clause, the courts have, in recent years, tended to reject the overflight rule in favor of a more flexible approach to aircraft noise damage in which the degree of interference with use and enjoyment of the ground—whether resulting from overflights or from laterally imposed noise—is the main focus of judicial attention.[153]

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[147] *See* 4 P. NICHOLS, *supra* note 1, § 14.1[1], at 476-83.

[148] Approximately half the states have a state constitutional requirement like that of California, *see* CAL. CONST. art. 1, § 14, requiring payment of just compensation for property which is either "taken or damaged" for public use. 2 P. NICHOLS, *supra* note 1, § 6.1[3], at 376-77.

[149] See 4 P. NICHOLAS *supra* note 1, § 14.1[1], at 483-93. For the historical evidence that California's "damage" clause, CAL. CONST. art. 1, § 14, was intended to broaden the scope of compensable interferences with private property beyond the limited areas traditionally deemed within bare "taking" language, see Van Alstyne, *supra* note 9, at 771-76.

[150] *See* Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965). *See also* City of Atlanta v. Donald, 111 Ga. App. 339, 141 S.E.2d 560 (1965), *rev'd for insufficiency of complaint*, 221 Ga. 135, 143 S.E.2d 737 (1965).

[151] 306 F.2d at 584.

[152] Martin v. Port of Seattle, 64 Wash. 2d 309, 317-18, 391 P.2d 540, 546 (1964).

[153] *See* City of Jacksonville v. Schumann, 199 So. 2d 727 (Fla. App. 1967), *cert. denied*, 390 U.S. 981 (1968); Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962). *See also* Town of East Haven v. Eastern Airlines, Inc., 292 F. Supp.

The dissenting opinion of Chief Judge Murrah in *Batten* has been influential in this regard. Pointing out that non-trespassory interferences with use and enjoyment of land have often been deemed "takings" in other factual settings,[154] Judge Murrah urged that the result should turn upon a careful balancing of the competing interests at stake rather than upon a circular distinction between "direct" and "consequential" damage.[155] On this analysis, he concluded that plaintiffs were entitled to just compensation for their losses, since "the interference shown here was sufficiently substantial, direct and peculiar to impose a servitude on the plaintiffs' homes, quite as effectively as the over-flights in Causby and Griggs . . . ."[156]

C. *Objections to the Overflight Rule: The California Position*

From the viewpoint of sound policy, the overflight requirement exhibits major deficiencies. The policy arguments most frequently urged in support of the rule generally express variations of a single theme: that departure from a strict overflight rule might impose intolerable fiscal burdens upon governmental airport operations.[157] Since the federal government has shown no disposition to provide financial assistance to the states to meet the cost of acquiring the property interests necessary to avoid noise damage liability,[158] these burdens—apart from losses connected with military air bases—would fall principally upon the local entities that manage and control the major civilian airports.[159] The magnitude of these potential

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507 (D. Conn. 1968) (by implication); Board of Education v. Palmer, 88 N.J. Super. 378, 212 A.2d 564 (1965), *rev'd on other grounds*, 46 N.J. 522, 218 A.2d 153 (1966) (dictum).

[154] 306 F.2d at 586, *citing, inter alia*, Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (smoke and fumes exhausted from tunnel by fans and directed upon plaintiff's property held a compensable taking).

[155] 306 F.2d at 587: "The constitutional test in each is first, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone."

[156] *Id.*

[157] *See generally* Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313 (1958); Spater, *Noise and the Law*, 63 MICH. L. REV. 1373 (1965). For the view that this ground is unpersuasive on its merits, see Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207, 233-36 (1967). *Cf.* Tondel, *supra* note 122, at 117, 124 (actual experience indicates that aircraft damage "exposure appears far less than frequently thought").

[158] *See* Dygert, *An Economic Approach to Airport Noise*, 30 J. AIR L. & COM. 207, 208-13 (1964), reviewing the history of federal airport development programs and concluding that Congressional interest has been primarily centered about safety and adequacy for transportation needs, leaving other aspects of airport development (including noise considerations) to the local sponsor. Recently there have been signs of increased federal interest in noise abatement. *See* note 123 *supra.*

[159] *Cf.* Griggs v. Allegheny County, 369 U.S. 84 (1962).

liabilities is difficult to estimate, but there are sound policy reasons for believing that they are manageable and should be accepted in expanded form, including both proximity and lateral flight—as well as overflight—damages:

1. Restricting recovery to damage caused by overflights makes no sense from a scientific standpoint, and postulates an arbitrary line between compensability and non-compensability that defies logical justification. Technical studies demonstrate that the "noise-affected" area in the vicinity of airports is not confined to the land directly below aircraft approach and departure paths, but extends for a considerable distance to each side.[160] Variations in physical conditions (*e.g.*, uneven surface topography, distribution of trees and vegetation, prevailing wind patterns) also exert a significant influence upon sound dispersion and impact.[161] Moreover, even relatively minor but consistent deviations from prescribed flight patterns may, under the overflight rule, arbitrarily enlarge or contract the group of property owners who may assert recoverable claims, despite substantially equivalent detrimental effects upon all.[162]

2. Prevailing economic theory indicates that the "substantial interference" test for compensability would implement optimum utilization of community resources more effectively than the overflight rule.[163] The airport operator, having primary responsibility

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[160] *See* Dygert, *supra* note 158, at 208; Galloway, *Measurement and Description of Aircraft Noise Exposure Around an Airport*, in NOISE PANEL REPORT, *supra* note 122, at 28, 34. *Cf.* Baxter, *supra* note 124, at 37-38.

[161] *Hearings Before Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th and 87th Cong., 297 (1963) [hereinafter cited as *Hearings*]. The attentuation of sound by intervening objects makes possible the use of sound barriers, deflectors, and suppressors for ground engine testing, *id.* at 528, while weather conditions tend to influence the development of preferential runway usage and special operational procedures designed to reduce noise problems. *See id.*, at 62-64, 387-92, 408-09.

[162] Technical studies indicate that unacceptable noise levels (over 100 PNdB *i.e.*, "perceived noise decibels") from the takeoff of large commercial jet aircraft (*e.g.*, a Boeing 707) ordinarily extend over an area approximately one-half mile laterally from the runway in the direction of travel. *See Hearings*, *supra* note 161, at 302-303; note 160, *supra*. Actual overflights ordinarily will cover only a small part of this affected area. Moreover, factual uncertainty as to the precise flight paths of aircraft relative to land boundaries, and as to frequency of incidental overflights affecting peripheral properties not routinely exposed to them, may tend to encourage unnecessary litigation of claims that could be settled amicably under a broader rule. *Cf.* Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963) (occasional overflights, but damage principally attributed to lateral impact of noise); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1963) (plaintiffs classified in three groups identified by subjection to persistent overflights, occasional overflights, and no overflights).

[163] *See generally* Dygert, *supra* note 158, at 207 (1964). *See also* Baxter, *supra* note 124; Dygert, *A Public Enterprise Approach to Jet Aircraft Noise Around Airports*, in NOISE PANEL REPORT, *supra* note 122, at 107; Haar, *Airport Noise and the Urban Dweller: A Proposed Solution*, 1968 APPRAISAL J. 551.

for airport planning and development, is strategically situated to deal with "externalized" costs of airport operation consisting of noise burdens imposed on surrounding land users. These costs usually can be minimized and distributed by the airport management in the manner least harmful to the general social welfare, either by improving airport operational characteristics,[164] eliminating external perception of airport-generated noise,[165] or compensating for the external losses and distributing the costs of so doing in equitable fashion among those airport users who are benefitted. Because it has not previously been so used, the effectiveness of the airport enterprise as a risk distributor may not be entirely clear, but its ability to employ user-fees for this purpose places it in a far more effective position than the class of surrounding property owners.[166] Even if part of the added burden of internalizing lateral—as well as overflight—noise costs through payments of compensation were assumed by the governmental airport operator and charged against

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164 *See* Dygert, *supra* note 158, at 216-17. The extent to which noise abatement can be achieved by operational procedures, including use of preferential runways, installation of special landing aids, encouragement of use of special flight procedures, and development of flight patterns designed with noise abatement objectives in mind, are reviewed in NOISE PANEL REPORT, *supra* note 122, at 79-106. To a substantial degree, noise abatement practices of this kind can be implemented effectively only by joint and cooperative efforts between the public entity airport operator, the Federal Aviation Administration, and the aircraft operators, working within the limitations of applicable federal flight regulations. *See* CAL. PUB. UTIL. CODE §§ 21240, 21243 (West 1965) and 21403 (West Supp. 1969) (state power to regulate aircraft operations recognized as subject to federal authority). *Cf.* Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964) (dictum) (suggesting state regulatory power not completely preempted by federal government). Experience at major airports, however, has indicated that local governmental initiatives may produce worthwhile results in airport noise abatement. *See Hearings, supra* note 161, at 50-67, 525-28 (Kennedy International Airport, New York City); Goldstein, *A Problem in Federalism, Property: I—Rights in Air Space and Technology*, in *id.* at 132, 135-37; Odell, *Jet Noise at John F. Kennedy International Airport*, in NOISE PANEL REPORT, *supra* note 122, at 162.

165 *Cf.* von Gierke, *The Air Force Program on Aircraft Noise Control*, in NOISE PANEL REPORT, at 48 (describing broadly conceived program for community noise abatement at military airports, employing a variety of technical, land use planning, aircraft operational, and regulatory techniques). One way to reduce noise perception, of course, is for the governmental airport operator to acquire the necessary aviational easements for this purpose. *See* Griggs v. Allegheny County, 369 U.S. 84 (1962). Local public entities in California have express statutory authority to acquire airspace or air easements, by condemnation, for noise abatement purposes. CAL. CODE CIV. PRO. § 1239.3 (West Supp. 1969). This use of eminent domain powers is for a constitutionally appropriate public purpose. Oklahoma City v. Shadid, 439 P.2d 190 (Okla. 1966), *cert. denied*, 386 U.S. 1034 (1967). The employment of zoning powers to ensure low-density land use in the vicinity of airports has received judicial approval in California. Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967); Smith v. County of Santa Barbara, 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 (1966).

166 *See* Dygert, *supra* note 158, at 216-19.

general tax revenues, the result—from an economic viewpoint—would be preferable to non-compensation.[167]

3. Anticipation of unacceptable fiscal burdens imposed by noise damage losses could be mitigated by use of techniques that are more refined and discriminating than the overflight rule. Land in the vicinity of large commercial airports—where jet aircraft produce the bulk of serious noise problems—often appears to be in significant demand for industrial and commercial uses compatible with high noise levels.[168] Substantial diminution of inverse condemnation claims thus appears to be possible through careful innovation of land use control devices.[169] In addition, development of statutory standards for evaluating noise damage claims—if designed to supply specificity to the judicially developed rule limiting inverse compensation in analogous situations to "substantial" interference with property rights[170]—could reduce the fiscal magnitude of claims. Other controls

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[167] As a charge upon local taxpayers—who generally benefit directly or indirectly from airport operations—compensation costs would tend to generate political pressures for reduction of noise or for readjustment of fees charged for airport services to bring them into line with actual operational (including noise) costs. *Cf. id.* at 219. Moreover, as an effective and broadly-based risk-spreading device, taxation offers equitable advantages over ad hoc imposition of noise costs upon the narrow class of vicinal property owners.

[168] *See Hearings, supra* note 162 at 178-79, 683; Walther, *Effect of Jet Airports on the Value of Vicinal Real Estate*, in SOUTHWESTERN LEGAL FOUNDATION, PROCEEDINGS OF THE FOURTH ANNUAL INSTITUTE ON EMINENT DOMAIN 149 (1962). Plaintiffs have sometimes experienced difficulty in proving actual loss of market value caused by noise because of this offsetting advantage of proximity. *See* Nestle v. City of Santa Monica, 3 AV. L. REP. (10 Av. Cas.) ¶ 18,238 (L.A. Super. Ct. 1969); City of Los Angeles v. Mattson, 3 AV. L. REP. (10 Av. Cas.) ¶ 17,632 (L.A. Super. Ct. 1967). On retrial of Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962) (complaint for aircraft noise damage held sufficient), the jury awarded judgment to defendant. Thornburg v. Port of Portland, 244 Or. 69, 415 P.2d 750 (1966) (second judgment reversed for error in instructions). *But see* City of Houston v. McFadden, 420 S.W.2d 811 (Tex. Civ. App. 1967) (judgment for plaintiff affirmed on conflicting valuation evidence).

[169] *See, e.g.*, Seago, *The Airport Noise Problem and Airport Zoning*, 28 MD. L. REV. 120 (1968); Strunck, *An Analysis of the Advantages and Difficulties of Zoning Regulations for Chicago O'Hare International Airport*, in NOISE PANEL REPORT, *supra* note 122, at 151; Comment, *Airport Approach Zoning: Ad Coelum Rejuvenated*, 12 U.C.L.A. L. REV. 1451 (1965). Zoning of nearby land for low-density uses compatible with airport operations has been employed, with judicial approval, in California. Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967); Smith v. County of Santa Barbara, 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 (1966).

[170] *See* notes 176-77 *infra*, and accompanying text. The "substantial" deprivation of access test, judicially invoked in cul-de-sac cases arising from highway construction, provides a useful analogy. *See* Valenta v. County of Los Angeles, 61 Cal. 2d 669, 394 P.2d 725, 39 Cal. Rptr. 909 (1964); Breidert v. Southern Pacific Co., 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964). See the suggested statutory measures, applicable to this problem, discussed in the text accompanying notes 80-96 *supra*.

are also feasible, including the use of procedural techniques for limiting the volume of claims asserted[171] as well as alternative methods for conferring the just compensation required by the Constitution.[172]

It is reasonably probable that the California courts would accept the more liberal "substantial interference" test, holding aircraft noise damage compensable whether or not accompanied by overflights. Denial of injunctive relief against aircraft noise caused by flights "immediately above *or in close proximity to*" residential property near the San Diego municipal airport, for example, was affirmed in *Loma Portal Civic Club v. American Airlines, Inc.*,[173] but with a strong suggestion that a remedy in damages was open to the plaintiffs.[174] In analogous situations, vibration damage, without physical invasion, has been regarded as a basis for inverse liability,[175] while noise and fumes, attributable to governmental operations, have been deemed actionable public nuisances.[176] In addition, the explicit premise of California decisions sustaining local zoning to exclude residential development in the vicinity of airports has been the assumption that nearby residential land use is particularly susceptible to compensable damage from noise created by normal aircraft operations.[177]

Adoption of the overflight rule in order to diminish the number of potential claims for just compensation would be inconsistent with the trend of recent decisions dealing with inverse liability.[178] California courts, especially, have sought to avoid a jurisprudence of

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171 California law presently requires the presentation of a claim, within one year after a real property injury claim has accrued, as a condition precedent to the maintenance of an inverse condemnation action. CAL. GOVT. CODE §§ 911.2, 945.4 (West 1966). The action must be filed within six months after the claim is rejected by the public entity, or within one year after the claim accrued, whichever date is the later. *Id.* at § 945.6. The public entity also may demand the posting of an undertaking for costs by the plaintiff. *Id.* at § 947.

172 Just compensation may be conferred in the form of benefits other than payment of money. *See* Bauman v. Ross, 167 U.S. 548 (1897).

173 61 Cal. 2d 582, 586, 394 P.2d 548, 555, 39 Cal. Rptr. 708, 711 (1964) (emphasis added).

174 *Id.* The question of whether overflights are essential to inverse recovery for aircraft damage was raised in two recent actions in the Los Angeles Superior Court, but was not decided since judgments for the defendants were entered on other grounds. Nestle v. City of Santa Monica, 3 Av. L. REP. (10 Av. Cas.) ¶ 18,238 (L.A. Super. Ct. 1969) (no evidence showing unreasonable interference with plaintiffs' enjoyment of land, or substantial damage thereto); City of Los Angeles v. Mattson, 3 Av. L. REP. (10 Av. Cas.) ¶ 17,632 (L.A. Super. Ct. 1967) (no damage proved).

175 *See* cases collected in Van Alstyne, *supra* note 114, at 478-80.

176 *See* note 102 *supra*. *But see* notes 51-54 *supra*, and accompanying text.

177 *See* Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967); Smith v. County of Santa Barbara, 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 (1966).

178 *See* Van Alstyne, *supra* note 114, *passim*.

classifications grounded in outmoded historical definitions of property rights, and to implement equitable loss distribution—through inverse condemnation—by a pragmatic assessment of conflicting social interests.[179] Prominent in the accepted approach has been judicial concern that individual property owners not be compelled, in the absence of overriding justification, to bear a disproportionate share of the burdens of public improvement programs.[180] Recognition of the compensability of aircraft noise damage inflicted laterally—as well as by overflight—would thus be within the mainstream of California inverse condemnation law.

D. *Developing Statutory Standards*

It seems clear that, absent a clear conflict with federal flight regulations,[181] California and the other states retain authority to define and adjust the competing property interests reflected in aircraft noise claims by establishing statutory guidelines for inverse compensation.[182] The principal objective of such legislation, it may be assumed, would be to provide assistance in distinguishing cases warranting compensation from the larger mass of potential claims based on aircraft noise. It should be recognized, however, that many variables complicate the intellectual task of isolating and measuring the impact of aircraft noise upon the value of real estate located near airports.[183] Moreover, the public importance of a sound and thriving commercial aviation industry providing services at economically attractive price levels suggests that unwarranted imposition of damages in inverse condemnation should be minimized.

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179 *Compare* Colberg, Inc. v. State *ex rel.* State Dep't of Pub. Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967) *with* Breidert v. Southern Pacific Co., 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964) *and* Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

180 *See* Albers v. County of Los Angeles, 62 Cal. 2d 250, 263-64, 398 P.2d 129, 137, 42 Cal. Rptr. 89, 97 (1965); Clement v. Reclamation Bd., 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950) (public policy said to favor compensation if "the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking").

181 *Cf.* American Airlines Inc. v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

182 *Compare* Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964) *with* Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965). *See also* Hughes v. Washington, 389 U.S. 290, 295 (1967) (state said to be "free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners.") (Stewart, J., concurring opinion).

183 *Cf.* City of Los Angeles v. Mattson, 3 Av. L. Rep. (10 Av. Cas.) ¶ 17,632 (L.A. Super. Ct. 1967). *See generally* Walther, *supra* note 169, pointing out that the economic advantages of business and residential location near airports, especially for aviation-related occupations, often offsets any value diminution attributable to annoyance considerations based on noise or vibration. Variations in human response to noise are also a complicating factor. *See* Kryter, *Evaluation of Psychological Reactions of People to Aircraft Noise*, in Noise Panel Report, *supra* note 122, at 13.

The best that can be hoped for, perhaps, is a set of rules which would provide some assurance that truly deserving noise damage claims—those of sufficient magnitude and intensity—which are accompanied by demonstrably adverse collateral consequences will be compensated, while claims that are tenuous, de minimis, or unfounded will be rejected. The actual content of a legislative enactment of this sort could include provisions such as the following:

1. A statute should provide, in general terms, that injuries sustained by real or personal property as the result of noise, vibration, dust, fumes or other consequences of takeoff and landing operations of aircraft constitute the basis for a cause of action for damages against the public entity which owns, operates, or controls the airport being used by the aircraft.[184]

2. The general rule of liability could be given clarifying scope by enactment of a basic standard of proof which must be met by the claimant. For example, it might be provided that: *Plaintiff must establish, by clear and convincing evidence, that the aircraft operations of which complaint is made were of such frequency and caused noise, dust, vibration, fumes and other forms of annoyance with such intensity that (a) they interfered materially with use of plaintiff's property (b) in such a physically disagreeable manner as to deprive plaintiff of the full use and enjoyment of said property and (c) thereby caused a significant diminution of the market value of the property for its highest and best use.* This proposed standard emphasizes the qualitative impact of the aircraft operations in question, without reference to the artificial distinctions attendant upon the "overflight" doctrine.[185] It also rejects the view that mere diminution in value alone constitutes an adequate measure of noise damage.[186] In so doing, it is believed to be consistent with the reasoning of the better judicial opinions.[187]

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[184] Consideration should also be given to enactment of a statutory definition of "takeoff and landing operations" to make it clear that noise, dust and fumes produced during engine run-up prior to takeoff is included. *Cf.* Schubert v. United States, 246 F. Supp. 170 (S.D. Tex. 1965) (severe damage from jet engine testing on ground held noncompensable since not a "taking").

[185] This position is believed to be consistent with California law. *See* text accompanying notes 174-181 *supra*. Moreover, the legislature, by authorizing condemnation of noise easements designed to reduce interference with enjoyment of "property located adjacent to or in the vicinity of an airport," CAL. CODE CIV. PRO. § 1239.3 (West Supp. 1969), has seemingly rejected the overflight approach.

[186] The view, which seems to have been advanced uniquely by the Washington Supreme Court in Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), has been cogently criticized in Note, *Inverse Condemnation in Washington—Is the Lid Off Pandora's Box?*, 39 WASH. L. REV. 920, 933-39 (1965). For a more fundamental attack upon the "diminution of value" rationale for inverse compensability, *see generally* Sax, *supra* note 3, at 50-60 (1964).

[187] *See, e.g.*, Johnson v. City of Greenville, — Tenn. —, 435 S.W.2d 476 (1968) (aircraft noise held compensable if shown to interfere unreasonably with

3. Assistance in making the somewhat delicate and interrelated determinations of fact subsumed by the foregoing standard of proof could be provided by a series of rebuttable presumptions designed to allocate the burden of proof as fairly as possible. A statute, for example, could declare that: *A diminution of property value claimed to have been caused by aircraft operations shall be presumed not to have been caused thereby unless the plaintiff establishes that during the six month period immediately preceding the commencement of the action, or such other period of time as may be fixed by the court in light of the circumstances of the case, (a) the number of actual separate incidents of actionable aircraft operations averaged more than twenty per day;*[188] *(b) the peak noise pressure level during such incidents averaged more than 90 perceived noise decibels on each of 75% of said days, and during not less than one-third of all such incidents exceeded 100 perceived noise decibels for a period of ten seconds or more;*[189] *and (c) the mean distance between the flight paths flown by the offending aircraft, at their nearest point to plaintiff's property, and the location of maximum*

property use, in sufficiently substantial degree to deprive owner of practical enjoyment of land, with resulting substantial loss of market value). *Cf.* Breidert v. Southern Pacific Co., 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964) (creation of cul-de-sac held compensable only if "substantial" interference with access results); Thornburg v. Port of Portland, 233 Or. 178, 184, 376 P.2d 100, 103 (1962): "It is equally clear that a reasonable volume of noise . . . must be endured as the price of living in a modern industrial society."

[188] Frequency of disturbance from flights is a recognized element in identification of a constitutional taking or damaging. *See* Griggs v. Allegheny County, 369 U.S. 84, 87 (1962) (regular and almost continuous daily flights). *Accord,* State *ex rel.* Royal v. City of Columbus, 3 Ohio St. 2d 154, 209 N.E.2d 405 (1965), *cert. denied,* 383 U.S. 925 (1966). *Cf.* City of Los Angeles v. Mattson, 3 Av. L. REP. (10 Av. Cas.) ¶ 17,632 (L.A. Super. Ct. 1967) (inverse compensation denied—partially on ground that "flights over the subject properties, or in close proximity thereto, did not occur frequently or regularly." The suggested figure of 20 incidents per day is arbitrarily selected for illustrative purposes. In Nestle v. City of Santa Monica, 3 Av. L. REP. (10 Av. Cas.) ¶ 18,238 (L.A. Super. Ct. 1969), jet takeoffs and landings at Santa Monica Municipal Airport, averaging from none to five per day, were held not sufficiently regular or frequent to meet the constitutional test for compensability.

[189] The Jet Aircraft Noise Panel concluded that in areas peripheral to airports "with perceived noise levels below 90 PNdB [a widely accepted unit for measuring noise quantitatively, but weighted to reflect subjective reactions of listeners] there are almost no complaints; in those with values between 90 and 105 PNdB, there are some but not many complaints; and in those above 105 PNdB the volume of complaints increases rapidly with increasing PNdB level." NOISE PANEL REPORT, *supra* note 122, at 5. *See also* Kryter, *Evaluation of Psychological Reactions of People to Aircraft Noise,* in *id.* at 13, 22: "[A] noise fairly often repeated during each day having a peak level of 100 PNdB . . . would probably be an unacceptable noise environment for a residential community." The duration of the sound is also a relevant factor in measurement of unacceptable noise. *See id.* at 18 (indicating that over the range from 2 to 12 seconds, increasing the duration of a constant sound will increase its perceived noise level at a rate such that doubling the duration raises the noise level by about 4.5 PNdB). The figures used in the text are merely illustrative of the way in which PNdB and duration factors could be interrelated in a statutory standard.

noise perception on plaintiff's property, averaged less than 2,000 feet during not less than one-third of all such incidents.[190] The purpose of the suggested presumption is to add an element of quantitative specificity to the process of proof. The figures used admittedly are to a degree arbitrary; but they do appear to have some support in actual experience. Specific evidentiary critiera such as these—formulated as rebuttable presumptions rather than as absolute substantive norms—should assist materially in limiting inverse condemnation awards to demonstrably deserving cases. At the same time, it should be clear that compensation would not automatically obtain merely because all of the evidentiary criteria were established by the plaintiff. It would still be possible for the court to determine that the general standard had not been satisfied.

4. The legislature could also prescribe a variety of rules setting substantive limits to the interests that are deemed compensable in aircraft noise cases. For example, a statute might contain safeguards against attempts to circumvent the general standard of liability[191] by declaring: *In the absence of evidence which meets the requirements of [the act], compensation shall not be awarded to a claimant merely because of (a) violation by aircraft operators of applicable rules or regulations promulgated for the purpose of noise reduction or abatement and imposing specific requirements or restrictions upon aircraft operational or maneuvering procedures; (b) alleged loss of property value based upon personal annoyance, loss of pleasure, or unjustified fear and apprehension of physical injury from objects falling from or of crash landings of said aircraft; or (c) alleged loss of value based upon reduction or elimination of speculative future development or use of the claimant's land.* Underlying this suggestion is a variety of policies. Noise abatement rules, for example, should not result in lower safety standards; their violation, when regarded as necessary for safe operation, should not be discouraged even in the slightest degree by concern for possible sharp increases in noise or the possibility of inverse liability.[192] In addition, losses attributable largely to personal suscepti-

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190 A recent survey of aircraft noise litigation disclosed that in almost every case in which compensation has been awarded, the flight pattern in question carried the aircraft within about 200 feet of the claimant's land. Tondel, *Noise Litigation at Public Airports*, in NOISE PANEL REPORT, *supra* note 122, at 127. On the other hand, the normal contours of the 100 PNdB noise level belt surrounding an airport during the takeoff of a large commercial jet plane usually extend outwards as much as 4000 feet laterally from the runway. *See* Galloway, *Measurement and Description to Aircraft Noise Exposure Around an Airport*, in *id.* at 34. Again the figure used in the text is merely suggestive and not intended to represent a firm recommendation.

191 *See* notes 183-186 *supra*, and accompanying text.

192 Federally prescribed rules for noise abatement purposes are authorized by the Aircraft Noise Abatement Act, 82 Stat. 395 (1968), 49 U.S.C. § 611 (Supp. 1968). The impact of safety considerations upon the content of such rules is discussed by

bility to annoyance or fears which are not widely shared in the community or wellfounded in experience should not be regarded as the kind of "property" damage for which just compensation must be paid.[193] Similarly, loss of prospective developmental values which are not so imminent as to be reflected in current values as determined by market forces—as distinguished from the optimistic speculations of the owner—should be deemed irrelevant to the owner's damage presently realized.[194]

5. In anticipation of special factual situations requiring a more flexible approach than might be afforded by strict application of the suggested statutory criteria,[195] a statutory provision could be enacted to declare that: *Notwithstanding the plaintiff's failure or inability to adduce evidence which meets the requirements of [the act], compensation is recoverable if the plaintiff establishes to the satisfaction of the court that market value of his property, determined in relation to its highest and best use, was adversely affected by the aircraft operations in question to a degree substantially in excess of the average loss of value sustained by like properties exposed to the same aircraft operations and situated within a radius of 500 feet from the plaintiff's property.*[196] This suggestion assumes that one of the basic purposes of inverse condemnation policy is to prevent

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Bakke, *Air Traffic Control and Flight Procedures*, in NOISE PANEL REPORT, *supra* note 122, at 86; Frankum, *Jet Aircraft Noise Abatement Flight Procedures*, *id.* at 99; and Ruby, *Operational Procedures*, *id.* at 102.

193 Idiosyncratic elements, such as unwarranted fears, have generally been deemed too speculative and uncertain, and too unlikely to influence a reasonably informed purchaser's appraisal of value, to be includible as an element of inverse damages. *See, e.g.*, Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); Moore v. United States, 185 F. Supp. 399 (N.D. Tex. 1960); Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958). It has been held, however, that fear is an admissible element bearing on damages if (a) grounded in danger supported by authentic observation, experience, or scientific investigation, (b) which circumscribes activity or limits freedom of use of the property exposed to that danger, and (c) results in reduction of market value of the land. Johnson v. Airport Authority of Omaha, 173 Neb. 801, 115 N.W.2d 426 (1962). Under this test, jet aircraft noise would ordinarily not qualify as a source of fear, for experience indicates that such fears are not well grounded in fact. *See* Tondel, *supra* note 126, at 117 n.3.

194 *See, e.g.*, United States v. Buhler, 305 F.2d 319, 329-31 (5th Cir. 1962) (speculative value for residential subdivision purposes, absent showing of present adaptability or need, held not a compensable element in suit to condemn navigational easement). *See also* Jensen v. United States, 305 F.2d 444 (Ct. Cl. 1962).

195 *See* notes 183-186 *supra*, and accompanying text.

196 The 500 foot radius figure is admittedly arbitrary, and has little or no empirical support. Its function, as explained in the text, *infra*, is to provide a basis of comparison between apparently like properties by which the uniqueness of a particular claimant's damage may be assessed. *Cf.* City of Los Angeles v. Mattson, 3 Av. L. REP. (10 Av. Cas. Ct.) ¶ 17,632 (L.A. Super. Ct. 1967) (evidence that certain properties depreciated in value as a result of aircraft noise held unpersuasive when same witness testified that other properties, not involved in suit and located "just a few feet away" from subject properties, had not diminished in value although noise exposure was substantially identical).

one citizen from bearing an undue proportion of the burdens of governmental activities.[197] Accordingly, if a claimant's property is for some reason uniquely situated and is peculiarly exposed to substantial noise damage from which like properties in the vicinity are free (due, for example, to unusual topographical or acoustical circumstances), the law should authorize ultimate disposition of the claim on its merits, free from the limiting effect of the statutory presumptions.

6. Since the impact of aircraft noise is, to some extent, largely a subjective matter for both land owners and informed buyers—and, as such, will normally be discounted in the private bargaining for land exposed to such noise—the cause of action for inverse condemnation should be declared by statute to be personal to the land owner and non-assignable.[198] One who buys land already subject to a servitude for aircraft noise, in effect, would purchase subject to that burden—defined by the extent of the noise impact on the date of purchase. This rule of law would not preclude inverse liability of the airport operator for a subsequent enlargement of the servitude—either by introduction of new and noisier aircraft or by extension or realignment of airport runways closer to the subject property[199]—but it might diminish the former owner's incentive to prosecute his noise claims.[200] It would also, presumably, promote marketability of land in the vicinity of airports by removing as an impediment to agreement on price the need to bargain over speculative values attributable to the seller's potential cause of action for inverse liability.

7. The scope of fiscal responsibility for, and the practical administration of, aircraft damage claims could be substantially improved by legislation clarifying certain procedural and remedial

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[197] *See* Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

[198] *Cf.* the Federal Assignment of Claims Act, 31 U.S.C. § 203 (1964), which has been construed to forbid assignment of just compensation and tort claims against the Government. United States v. Dow, 357 U.S. 17 (1958); United States v. Shannon, 342 U.S. 288 (1952); Potts v. United States, 126 F. Supp. 170 (Ct. Cl. 1954). *See also* Herring v. United States, 162 F. Supp. 769 (Ct. Cl. 1958) (aircraft noise claims) (by implication).

[199] A. J. Hodges Industries, Inc. v. United States, 355 F.2d 592 (Ct. Cl. 1966); Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964); Bacon v. United States, 295 F.2d 936 (Ct. Cl. 1961). *See also* Houston v. McFadden, 420 S.W.2d 811 (Tex. Civ. App. 1967). One who buys property already subject to a servitude for aircraft noise would, under this view, have no right of recovery since any diminution in value of the property would have been reflected in the purchase price. *See* Highland Park v. United States, 161 F. Supp. 597 (Ct. Cl. 1958) (dictum); Louisville & Jefferson County Air Board v. Porter, 397 S.W.2d 146 (Ky. 1965) (by implication).

[200] *But cf.* Griggs v. Allegheny County, 369 U.S. 84 (1962) (former owner continued to litigate claim after sale of property).

incidents of such litigation. Included in measures that would be of significant value in this connection would be the following:

a. The time when the present one year period for presentation of the plaintiff's claim for damages begins to run should be defined with precision. The prevailing rule of law—that the claimant in a case involving repeated infliction of damage to property by a series of discrete events may file a claim at any time which is effective as to all damage accrued during the one year period immediately preceding the filing[201]—is unsatisfactory, since it leaves the matter of liability in potential suspense for an indefinite period of time.[202] The uncertainty could, in theory, be avoided by an eminent domain action initiated by the public entity against all property owners who conceivably may have an enforceable noise damage claim. This alternative, however, is unsatisfactory; it would impose the burden of defense on many property owners who, if left alone, might forego the hazards of inverse litigation and waive their claims. An intermediate statutory solution could, perhaps, be devised under which a formal notice from the public entity would mark the inception of the period within which all noise damage claims are required to be presented or be thereafter barred.[203]

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[201] The California Tort Claims Act of 1963—which applies procedurally to inverse condemnation claims—requires, as a condition precedent to suit, that a written claim be presented within one year after the cause of action accrued. CALIF. GOVT. CODE §§ 911.2, 945.4 (West 1966). *Cf.* Cramer v. County of Los Angeles, 96 Cal. App. 2d 255, 215 P.2d 497 (1950). California law is not entirely certain as to when an inverse condemnation claim accrues within the meaning of this requirement, since the conduct of the public agency that caused the claimed damage may not always consist of a single discrete act. *See, e.g.*, Pierpont Inn, Inc. v. State, 70 A.C. 2d 293, 449 P.2d 737, 74 Cal. Rptr. 521 (1969). In cases involving claims that inverse damage incurred incrementally, by successive events attributable to a common course of governmental action, it has generally been held that the plaintiff may recover for all such damage incurred during the claim presentation period (*i.e.*, one year) immediately preceding actual presentation of his claim. Bellman v. County of Contra Costa, 54 Cal. 2d 363, 353 P.2d 300, 5 Cal. Rptr. 692 (1960). *See also* Natural Soda Products Co. v. City of Los Angeles, 23 Cal. 2d 193, 143 P.2d 12 (1943); Trippe v. Port of New York Authority, 14 N.Y.2d 119, 249 N.Y.S.2d 409, 198 N.E.2d 585 (1964). *Cf.* United States v. Dickinson, 331 U.S. 745, 747-49 (1947).

[202] *Cf.* Hillsborough County Aviation Authority v. Benitez, 200 So. 2d 194, 199 (Fla. App. 1967): "There is no single test for discovering in all cases when an aviational easement is first taken by overflights. Some annoyance must be borne without compensation. The point when that stage is passed depends on a particularized judgment evaluating such factors as the frequency and level of the flights, the type of planes, the accompanying effects such as noise or falling objects, the uses of the property, the effect on values, the reasonable reactions of the humans below, and the impact upon animals and vegetable life." *Accord*, Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1963); Jensen v. United States, 305 F.2d 444 (Ct. Cl. 1962).

[203] The public entity, for example, could be authorized to serve a written notice upon all potentially affected property owners in the vicinity of the airport, advising that any claim for aircraft noise damage would be barred unless a formal claim is presented within a specified period of time. Those parties who presented a timely claim would then be free to institute an action, if their claim were rejected

b. Greater flexibility in devising an appropriate form of relief for the property owner, other than a mere award of monetary compensation, could be provided by statute. For example, the defendant public entity might be authorized to propose to the court a "physical solution" of the noise problem—such as a program of soundproofing of the claimant's home or other building at the entity's expense—in lieu of immediate payment of damages.[204] Another alternative might be authorization for the court to award the public entity a short-term lease of the right to inflict future noise damage upon the plaintiff's property, reserving jurisdiction to determine the amount of compensation justly due the owner at the end of the period.[205] Still a third approach might be to authorize the court, before assessing compensation for a constitutional "damaging," to give the public entity a reasonable period of time in which to consider and enact, if it elected to do so, a change of zoning of the subject land, deferring the question of loss of value until after the rezoning had been stabilized.[206] A change of zoning classification—under this

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by the entity; failure to file a claim within the noticed period, however, would be a complete defense for the entity. The statutory scheme should, however, include provisions permitting property owners barred by non-filing to initiate later claims, limited to additional inverse damages incurred subsequent to the original notice proceeding, if a substantial increase in the noise impact pattern of the airport thereafter takes place. The changing technology of the aircraft and power plant industries suggests the likelihood of such changes. *See* Rummel, *Aircraft Noise Operational and Economic Considerations*, in NOISE PANEL REPORT, *supra* note 122, at 82. *Cf.* Baxter, *supra* note 124.

[204] The City of Los Angeles Department of Airports has reportedly experimented with home soundproofing, at city expense, as part of a noise abatement program at Los Angeles International Airport. A similar British experiment contemplates payment, by the government, of one-half the cost of soundproofing of three rooms in residential housing near a London airport. *See* Fleming, *Aircraft Noise: A Taking of Private Property Without Just Compensation*, 18 S.C. L. REV. 593, 594 (1966).

[205] *See* Harr, *Airport Noise and the Urban Dweller*, 1968 APPRAISAL J. 551.

[206] Although zoning for more restrictive use, when motivated by a desire to minimize the cost of acquisition of particular property the taking of which is contemplated, is constitutionally vulnerable, *see* Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (1958), a liberalization of zoning restrictions with attendent increase in property value appears to pose no insurmountable problems, provided adequate statutory authority exists and is complied with. The probability of rezoning for less restricted uses has long been regarded as an appropriate basis for assigning value to land in eminent domain proceedings, where the probability is sufficiently likely to affect present market value. *See e.g.*, People v. Donovan, 57 Cal. 2d 346, 369 P.2d 1, 19 Cal. Rptr. 473 (1962); 4 P. NICHOLS, *supra* note 1, § 12.322 [1], at 238-50. The most valuable uses of land near airports frequently are nonresidential, and more compatible with jet aircraft operations. *See* Randall, *Possibilities of Achieving A Quiet Society*, in NOISE PANEL REPORT, *supra* note 122, 143, 147; Walther, *supra* note 169. Moreover, non-cumulative (sometimes called "exclusive") zoning, which would exclude uses incompatible with airport operations, such as residential uses, while authorizing less restrictive activities, appears to create no substantial constitutional difficulties. *See* Plum v. City of Healdsburg, 237 Cal. App. 2d 308, 46 Cal. Rptr. 827 (1965); 1 R. ANDERSON, AMERICAN LAW OF ZONING § 8.15, at 595-600 (1968).

last proposal—might well confer benefits, measurable as an increment to market value, that would completely offset any detriment caused by the aircraft noise.[207] Finally, consideration should be given to enactment of statutory authority for public entities engaged in airport operations to acquire nearby real property—by condemnation if necessary—for purpose of subsequent sale or long-term lease for private development on terms, devised by the public entity, compatible with airport use.[208]

IV. Conclusion

The suggestions here advanced are premised upon the belief (supported by the authorities discussed) that present legal arrangements for adjusting private claims arising from highway improvements and airport operations of governmental entities are in need of substantial revision. Currently accepted doctrinal and procedural techniques for allocating the real costs of environmental changes resulting from the freeway and jet transport aircraft—truly revolutionary advances in the technology of transportation—have proven inadequate. Under the present legal regime, loss of amenities of property ownership—whether in the form of reduced accessability or increased discomfort and annoyance from externally imposed noise—frequently and routinely appear to be translated into uncompensated financial losses in the form of diminished property values.

The fundamental question that should be faced, and which deserves a rationally developed legislative response, is not *whether* these costs will be paid; it is *who* will pay them, in accordance with

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207 Monetary compensation is not the only means by which the constitutional mandate may be satisfied. *See, e.g.*, Bauman v. Ross, 167 U.S. 548 (1897), holding benefits from improvement project to be a form of compensation, hence a valid offset against the owner's loss. The concept of "reciprocity of advantage" has long been relied on to support the noncompensability of police regulations which might otherwise be deemed a taking or damaging of private property. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

208 *See* notes 114-16 *supra*, and accompanying text, suggesting a similar approach in connection with highway development. Authority to acquire land for resale or lease purposes, analogous to techniques employed in urban renewal and community redevelopment programs, would be a helpful alternative in the event that zoning for more compatible land use proves to be politically impracticable. *Cf.* Strunck, *An Analysis of the Advantages and Difficulties of Zoning Regulations for Chicago O'Hare International Airport*, in Noise Panel Report *supra* note 122, at 151. It would also be consistent with the views of experienced airport managers that, in the longer view, the aircraft noise problem will be solved only by changes in vicinal land use patterns toward greater compatibility. *See, e.g.*, Fox, *Consideration of the Problems Arising from the Effects of Jet Engine Sounds and Recommended Solutions*, in *id.* at 157, 159 (view of general manager, Los Angeles Department of Airports, that "[e]very means of economically converting land [exposed to frequent jet aircraft noise] to 'compatible' uses should be adopted").

what substantive and procedural criteria, and through *which* institutional arrangements. This article has undertaken to suggest possible legislative solutions to the most pressing and unsatisfactory aspects of the existing legal rules and has sought to devise techniques that would assure payment of the social costs in a fair and consistent manner, would avoid anachronistic and unrealistic technical distinctions, and would observe a defensible balance between the public interest in transportation improvements and the private interest in distributive justice.

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CHAPTER 6. TAKING OR DAMAGING BY POLICE POWER

ARVO VAN ALSTYNE*

Governmental police power—which for present purposes may be defined as the power to regulate human activity in order to promote public health, safety, welfare and morals[1]—generally can be exercised only at a price. Curtailment of individual freedom of action is a familiar cost of such regulation, as witnessed by recurring litigation challenging such measures as violative of constitutional prohibitions. If a regulatory policy impinges upon the use of private property, resulting in a diminution of property value, a potential basis exists for an assertion of unconstitutionality, or for a claim of constitutionally required compensation, under the just compensation clauses.[2]

Mere diminution of value, however, is clearly not sufficient, standing alone, to support a conclusion that the regulatory measure has either taken or damaged the private property in question. As Justice Holmes once observed, "government hardly could go on if to some extent values

* B.A. 1943, LL.B. 1948, Yale University. Professor of Law, University of Utah. This article is based on a research study prepared by the author for the California Law Revision Commission. The opinions, conclusions, and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect those of the California Law Revision Commission or its individual members.

1. No generally acceptable, exact definition of "police power" has been devised, *see* Berman v. Parker, 348 U.S. 26, 32 (1954), and the manifest need for continued evolutionary development, with broad flexibility of application, cautions against efforts to introduce specificity. *See, e.g.,* Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925). *Cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962): "'Police power' connotes the time-tested conceptual limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria."

2. *See generally* Sax, *Takings and the Police Power,* 74 YALE L.J. 36 (1964). The fifth amendment to the United States Constitution merely forbids private property to be "taken for public use, without just compensation;" however, about half of the state constitutions, including that of California, require compensation when private property is either "taken" or "damaged." 2 P. NICHOLS, EMINENT DOMAIN § 6.44 (rev. 3d ed. 1962). *See* CAL. CONST. art. I, § 14. Just compensation clauses of the latter type provide protection for property interests which, in certain respects, exceeds that which is available under the fifth amendment, *see* Chicago, B.&Q.R.R. v. Chicago, 166 U.S. 226 (1897), as a limitation upon state action. *See* Reardon v. City and County of San Francisco, 66 Cal. 492, 6 P. 317 (1885).

incident to property could not be diminished without paying for every such change in the general law."[3] On the other hand, since "every regulation necessarily speaks as a prohibition,"[4] police power measures relating to the use of property typically tend to impair or destroy, to some extent, interests included within the general concept of "property."[5] Exercises of state or local regulatory power thus may, in a variety of situations, pose a perplexing question whether the impact of the regulatory action is "so onerous as to constitute a taking [or damaging] which constitutionally requires compensation."[6]

Judicial efforts to chart a usable test for determining when police power measures impose constitutionally compensable losses have, on the whole, been notably unsuccessful.[7] With some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric.[8] Even the modicum of predictability which might otherwise inhere in the pattern of judicial precedents is impaired by the frequently reiterated judicial declaration that each case must be decided on its own facts.[9] In part, this state of affairs may be

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3. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *See also*, Tyson & Bros. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J.) ("[P]roperty rights may be taken for public purposes without pay if you do not take too much . . . [since] some play must be allowed to the joints if the machine is to work.").

4. Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962).

5. Modern sophisticated notions as to the nature of the interests described as "property," *see* Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938), have long outmoded the early view that a physical invasion was essential to compensability. *See* Sax, *supra* note 2, at 46-48; Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAW. 1, 13-16 (1967) (hereinafter cited as Van Alstyne, *Legislative Prospectus*). *See also* Reich, *The New Property*, 73 YALE L.J. 733 (1964). The few remnants of the earlier view that still persist, *see, e.g.*, Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), appear to be largely anachronistic reflections of the terminological restriction of the fifth amendment and some state compensation clauses to "takings." The enlargement of state constitutional language to embrace "damagings," as well as "takings," was largely due to adverse reaction to the restricted protection secured by the strict interpretation of the narrower wording. *See* City of Chicago v. Taylor, 125 U.S. 161 (1888); Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 771-76 (1967) (hereinafter cited as Van Alstyne, *Statutory Modification*).

6. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). The theoretical approaches usually articulated in discussions of inverse condemnation policy are reviewed in Van Alstyne, *Legislative Prospectus*, *supra* note 5, at 13-25. *See also* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

7. *See* Van Alstyne, *Legislative Prospectus*, *supra* note 5, at 13-25.

8. *See, e.g.*, Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

9. United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958). *See also*,

attributed to the amorphous nature of the legal dilemma posed by the need to balance the interest in social control against the interest in distributive justice.[10] But, in part at least, it also reflects the absence of a generally accepted theoretical rationale for circumscribing the boundaries of the police power, as well as the persistent reluctance of legislatures to provide statutory guidelines or criteria for the resolution of the issues thus posed.[11]

It is the purpose of the present study to identify, with a view toward their statutory codification and improvement, the practical criteria and policy elements which characterize exercise of governmental regulatory power for which compensation for resulting economic losses is constitutionally required.[12] Hence the study is directed primarily toward analysis of the three broad categories of recurring situations in which claims of unconstitutional taking or damaging of private property, as a result of regulatory measures, have been repeatedly asserted: (1) cases in which economic loss has been caused by newly imposed regulations, or by changes in an existing pattern of regulatory conditions primarily affecting personal property or activity; (2) cases in which economic loss has been caused by regulations of the use of privately owned real property; and (3) cases in which economic loss has been caused by the compelled use of private property to serve governmental ends, or by compelled contributions, exactions, or expenditures in relation to property.

I. REGULATIONS OF PERSONAL PROPERTY OR ACTIVITY

The just compensation clauses have imposed only a minimal effect upon efforts of legislative bodies to regulate various forms of human activity disassociated from regulations of property use. In part, this meager impact reflects the fact that most police power regulations of this type impose no perceptible economic loss upon the persons being regulated. Obvious illustrations include traffic controls, curfew requirements, anti-

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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. Caltex, Inc., 344 U.S. 149, 156 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses."). To the same effect, see Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), *appeal dismissed*, 371 U.S. 36 (1962).

10. *See* Michelman, *supra* note 6.

11. The range of permissible statutory provisions is discussed in Van Alstyne, *Statutory Modification*, *supra* note 5.

12. *Id.* An implicit assumption is that the language of the constitutional eminent domain clauses provides reasonable latitude for legislative prescription of standards to guide judicial application of those clauses to discrete fact situations.

litter ordinances, and the like. It is also attributable, without doubt, to widespread judicial realization that economic loss incurred by persons being regulated cannot always be recognized as a barrier to such regulation;[13] to hold otherwise would make orderly government impracticable. Therefore, what Justice Holmes once referred to as "the petty larceny of the police power"[14] has become generally accepted as a cost of the effective legislative adjustment of competing interests of specific individuals and groups which is necessary to promote the general welfare of an entire community.

Despite general judicial reluctance to invalidate regulations of conduct on the ground that ensuing economic loss constitutes a taking or damaging of private property, appellate opinions have persisted in giving lip service, at least, to the thought that such a result is legally possible. For example, in its most recent pronouncement on the subject, the Supreme Court reminded us in a related context that a regulation may "so diminish the value of property as to constitute a taking."[15] The reminder, significantly, was mere dictum; the court held, in the cited case, that there had been no constitutionally recognizable taking. The catalog of similar cases, in which economic loss allegedly resulting from regulatory measures was held not to be constitutionally required, cuts a broad sweep across an extended array of human conduct. Familiar examples include losses caused by regulations prohibiting the manufacture or sale of alcoholic beverages[16] and oleomargarine,[17] controlling maximum prices[18] or minimum wages,[19] restricting the fees which attorneys may charge for their services,[20] regulating prostitution,[21] ban-

13. *See, e.g.*, Bowles v. Willingham, 321 U.S. 503, 518 (1944).

14. 1 HOLMES-LASKI LETTERS 457 (Howe ed. 1953).

15. United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (dictum). *See also* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (by implication). Actual decisions in which regulations of personal property or activity, unrelated to land use controls, have been held to amount to a taking of private property are relatively few in number. Illustrative cases include Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937) (natural gas prorate order) (Brandeis, J.); Bydlen v. United States, 175 F. Supp. 891 (Ct. Cl. 1959) (limitation on aircraft flight). *Cf.* Bedford v. Salt Lake City, 22 Utah 2d 12, 447 P.2d 193 (1968) (requirement that attorneys perform legal services for indigents without compensation).

16. Mugler v. Kansas, 123 U.S. 623 (1887); *Ex parte* Young, 154 Cal. 317, 97 P. 822 (1908).

17. Powell v. Pennsylvania, 127 U.S. 678 (1888).

18. Nebbia v. New York, 291 U.S. 502 (1934); Munn v. Illinois, 94 U.S. 113 (1876).

19. United States v. Darby, 312 U.S. 100 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

20. Calhoun v. Massie, 253 U.S. 170 (1920).

21. L'Hote v. City of New Orleans, 177 U.S. 587 (1900).

ning collection of garbage by private collectors[22] and burning of rubbish in outdoor incinerators,[23] and forbidding racial discrimination in the operation of motels and restaurants.[24]

While many decisions sustaining the validity of legislation imposing regulatory losses are devoid of detailed analysis, often relying solely upon sterile citation of precedents or treating the claim of property loss as an undifferentiated aspect of a general due process objection,[25] two principal theories may be seen running through the cases.

Under the first theory, the institution of private property ownership is generally viewed as being necessarily subject to the implied condition that the state, through exercise of its police power, may impose appropriate regulations to ensure that such property will not be used in a way that unreasonably causes injury to others.[26] This postulate, which assumes a system of reciprocal duties and benefits as between individual owners of property, implicitly regards the constitutional mandate for just compensation as satisfied in non-monetary form. Conceding that the owner has sustained loss as a result of the regulation, it concludes that "he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."[27] Although this approach, often described in the felicitous phrase coined by Justice Brandeis as "average reciprocity of advantage,"[28] is not free from substantial theoretical objections,[29] its pragmatic appeal is large. As a guideline for judicial review of just compensation claims, however, it has been subordinated to another theory.

Recognizing that many forms of regulations "necessarily impose financial burdens . . . for which no compensation is paid," since they constitute "part of the costs of our civilization,"[30] most courts have left to legislative judgment the question whether the private losses imposed

22. Gardner v. Michigan, 199 U.S. 325 (1905).

23. Lees v. Bay Area Pollution Control Dist., 238 Cal. App. 2d 850, 48 Cal. Rptr. 295 (1965).

24. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

25. *See, e.g.*, Day-Brite Lighting Co., Inc. v. Missouri, 342 U.S. 421 (1952). *But cf. id.* at 426-27 (Jackson, J., dissenting).

26. *See, e.g.*, Gardner v. Michigan, 199 U.S. 325 (1905); Mugler v. Kansas, 123 U.S. 623 (1887).

27. L'Hote v. City of New Orleans, 177 U.S. 587, 599 (1900), citing 1 DILLON, MUNICIPAL CORPORATIONS § 141 (4th ed. 1890).

28. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922) (dissenting opinion).

29. *See* Michelman, *supra* note 6, at 1195-96; Van Alstyne, *Legislative Prospectus*, *supra* note 5, at 17-19.

30. Day-Brite Lighting Co., Inc. v. Missouri, 342 U.S. 421, 424 (1952).

by regulatory measures are reasonably proportionate to the benefits secured thereby. If the legislative judgment in this connection is fairly debatable or not unreasonable,[31] the courts profess themselves as either unwilling or incapable of intervening. This "fairly debatable" approach considerably restricts the potential range of judicial calculus seemingly demanded by the reciprocal advantage test; but it is not necessarily synonymous with judicial abdication of responsibility for the rationality of the legislative judgment.[32] The courts frequently acknowledge in dictum, and occasionally exemplify by actual holdings, that a more rigorous judicial review is available in those "extreme cases" where the legislative decision is unsupportable.[33] For present purposes, then, the critical inquiry relates to the criteria that distinguish the kind of case that is regarded as "extreme."

On its face, the liquor prohibition statute challenged in *Mugler v. Kansas*[34] seems rather extreme, particularly the provisions authorizing courts to order destruction of preexisting stocks of alcoholic beverages being held for sale. Mr. Justice Harlan, writing for the majority, conceded that "there are, of necessity, limits beyond which legislation cannot rightfully go";[35] but, on the facts presented, he concluded that there had been no unconstitutional taking of private property without just compensation:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner and the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public

31. *Id.* at 425. *See also* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); Miller v. Schoene, 276 U.S. 272 (1928). To the same effect, see City of Bakersfield v. Miller, 64 Cal. 2d 93, 48 Cal. Rptr. 889, 410 P.2d 393 (1966), *cert. denied*, 384 U.S. 988 (1966); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), *appeal dismissed*, 371 U.S. 36 (1962).

32. State courts have sometimes demonstrated greater willingness to invalidate state legislation on due process grounds than have federal courts. *See* Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

33. Day-Brite Lighting Co., Inc. v. Missouri, 342 U.S. 421, 424 (1952) (dictum). *See also*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (dictum); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963).

34. 123 U.S. 623 (1887).

35. *Id.* at 661.

> interest . . . . The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.[36]

The *Mugler* opinion, as the quoted passage suggests, appears to be predicated upon two conceptual theories.[37] First, regulation of the use of property must be distinguished from an appropriation or occupation of such property; only the latter form of governmental action can constitute a "taking" of the private property. Second, a prohibition on manufacture and sale of alcoholic beverages is not an interference with "property" within the meaning of the just compensation clause, but amounts only to the abatement of a harmful and noxious use; "all property," Mr. Justice Harlan pointed out, "is held under the implied obligation that the owner's use of it shall not be injurious to the community."[38] Compensation thus need not be paid when such a nuisance is abated, although due process would require just compensation if "unoffending property is taken away from an innocent owner."[39]

The first of these conceptual positions has, of course, long since been relegated to the rank of an academic curiosity; modern courts, recognizing that property consists of more than a mere right of physical occupancy, concede that just compensation may be constitutionally required where regulatory measures short of appropriation substantially diminish property values.[40] The second approach, which assumes that the legislature has the basic responsibility for balancing the conflicting interests of community welfare and private property and that its conclusions are entitled to great if not conclusive deference, is, however, a familiar feature of the contemporary legal scene.[41] It would be naive, perhaps, to place undue weight upon the judicial rhetoric of presumed legislative reasonableness in resolving debatable issues; but it seems clear that in balancing the public need against the private cost, the

36. *Id.* at 669.

37. *See* Sax, *supra* note 2, at 38-40.

38. Mugler v. Kansas, 123 U.S. 623, 665 (1887).

39. *Id.* at 669.

40. *See* the authorities collected and discussed in Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A.L. REV. 491 (1969). *See also* Sax, *supra* note 2, at 46-48.

41. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963). The Supreme Court decisions are discussed in detail in McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. *But see* Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13, 226 (1958).

judgmental considerations recognized by Mr. Justice Harlan continue to furnish several significant operative factors in the process of judicial review.[42]

A. JUDICIAL DECISIONAL CRITERIA

Analysis of the cases evaluating police power regulations reveals that there are three significant factors with which courts are often concerned. One is the weight to be accorded to the legislative judgment as to public need. For example, Mr. Justice Harlan proclaimed in *Mugler* that courts would not accept the constitutional validity of a regulatory measure if they were satisfied that "its real object is not to protect the community or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law."[43] Modern courts, with more sophisticated awareness of the complexities of social realities in the highly interdependent economic and political system of today, have largely renounced the search for legislative motive suggested by Justice Harlan.[44] Yet, in somewhat altered verbal guise, it tends to reappear regularly as a claim of judicial responsibility for assessing the reasonableness of the effect of (rather than the motive underlying) the regulatory measure.[45] Focusing upon the effect of the regulation facilitates judicial review consistent with judicial deference to the legislative prerogative; without questioning the general validity of a regulation on its face, the courts remain free to determine that its effect in a particular application, as shown by the adjudicative facts of record, exceeds constitutional limitations.[46] It must be recognized, however, that judicial

42. *Compare* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) *with* Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962). *But see* Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335 (1963) (one acre restriction held invalid). As to the pragmatic theme underlying typical judicial rhetoric in cases of this type, see Feiler, *Zoning: A Guide to Judicial Review*, 47 J. URBAN LAW 319, 321-22 (1969).

43. Mugler v. Kansas, 123 U.S. 623, 679 (1887).

44. *See, e.g.*, Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 462, 327 P.2d 10, 16 (1958) ("[T]he motives which influence a legislative body in passing an ordinance which is within its power to pass may not be inquired into . . . .").

A remnant of judicial concern for the legitimacy of legislative objectives is still occasionally seen in cases declaring that restrictive zoning is impermissible when its apparent purpose is to reduce the ultimate cost of condemning the regulated property, the governmental acquisition of which is already contemplated. *See, e.g.*, Kissinger v. City of Los Angeles, *supra*; Robertson v. City of Salem, 191 F. Supp. 604 (D. Ore. 1961).

45. *See, e.g.*, McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954); Scrutton v. County of Sacramento, 79 Cal. Rptr. 872, 275 Cal. App. 2d 412 (1969).

46. The role of "adjudicative" and "legislative" facts in constitutional litigation is

deference operates to give the legislature a broad measure of freedom to exercise the police power without judicial interference save in those instances where the courts deem its actions to be glaringly improper.

A significant aspect of police regulations which are challenged as unconstitutional takings or damagings of private property is the extent to which the effect of a measure upon the complaining party is consistent with rational and even-handed policy effectuation.[47] For example, legislative prohibition of all sales of alcoholic beverages can readily be sustained as constitutional[48] although, paradoxically, a law reducing the number of liquor licenses permitted in a community may be declared invalid.[49] The former measure embodies a legislative judgment that prohibition is essential to the community welfare; the latter reflects quite a different judgment: some sales of alcoholic beverages can be permitted consistent with the public welfare, but a limitation on the number of sales outlets will promote peace and good order. The effect of both regulations, as applied, may be the destruction of the economic value of the existing business, including good will and stocks of alcoholic beverages, of a particular retailer; however, the concession in the second case impairs the persuasivenesss of the legislative judgment as to the necessity for such private loss. Moreover, to permit some retailers to enjoy the advantages of a license while terminating permission for others to continue, imposes the principal social costs of promoting the community welfare upon the latter while bestowing substantial economic benefits (elimination of competition) upon the favored licensees. In the latter situation, then, it is not surprising to find a court declaring that the denial of a license is "indicative of a plan or scheme designed to eliminate [the applicant's] business under color of municipal authority attempted to be exercised not only retroactively, but in an unreasonable, arbitrary and discriminatory manner."[50]

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discussed in Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75. *See also* Kadish, *Methodology and Criteria in Due Process Adjudication*, 66 YALE L.J. 319 (1957).

47. Although a full discussion is beyond the scope of the present article, it should be noted that regulatory measures having a highly selective impact may well raise substantial questions of equal protection. *Compare* Railway Express Agency v. New York, 336 U.S. 106 (1949) (regulation of advertising on vehicles held valid) *with* Morey v. Doud, 354 U.S. 457 (1957) (regulation of money order sales held invalid). Analogous issues may also arise under state constitutional prohibitions upon special legislation. *See, e.g.*, Broadbent v. Gibson, 105 Utah 53, 140 P.2d 939 (1943) (Sunday closing law).

48. *See Ex parte* Young, 154 Cal. 317, 97 Pac. 822 (1908).

49. *See* Winther v. Village of Weippe, 430 P.2d 689 (Idaho 1967).

50. *Id.* at 695.

Similarly, a comprehensive prohibition against outdoor advertising displays may be more easily defended against the contention that it amounts to a taking of private property than one which merely forbids signs of a specific type. The legislative judgment supporting elimination of commercial advertising signs, on the theory that they amount to a general source of community annoyance and contribute to a depreciation of property values, is more readily perceived as a reasonably debatable (and thus acceptable) policy judgment[51] than is a determination to ban only certain types of displays.[52]

On the whole, while the courts exhibit great reluctance to deny effectiveness to the legislative judgments incorporated in police power measures, a latent strain of judicial skepticism seems to run through the decisions, at least those of state courts, when the onerous effect of such a regulation suggests a lack of sensitivity to the legitimate claims of the challenging party. The validity of a police power measure thus, to some extent, rests upon the ability of the practiced judicial eye to perceive, via its regulatory impact, impermissible reflections of local parochialism, chauvinistic attitudes, excessive regulatory zeal, or interest-group favoritism attired in the formal trappings of community welfare legislation.[53]

A second factor often considered in the judicial calculus is the severity of the economic impact of the regulatory measure upon those adversely affected by it, as compared to the beneficial community values promoted by the regulatory program. In a related situation, the Supreme Court has pointedly announced that "a comparison of values before and after is relevant [although] it is by no means conclusive."[54]

A third element which may affect judicial review of police regulations is the fairness and consistency of the legislative choice, as between the eminent domain and police powers, as means for achieving selected

51. *See, e.g.*, Desert Outdoor Advertising v. County of San Bernardino, 255 Cal. App. 2d 765, 63 Cal. Rptr. 543 (1967); Burk v. Municipal Court, 229 Cal. App. 2d 696, 40 Cal. Rptr. 425 (1964).

52. *See, e.g.*, City of Santa Barbara v. Modern Neon Sign Co., 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (1961) (striking down an ordinance outlawing all moving signs as opposed to fixed ones which gave illusion of movement through use of flashing lights as creating an arbitrary and unreasonable classification); Eskind v. City of Vero Beach, 159 So. 2d 209 (Fla. 1963) (ban on signs advertising rates for lodging accommodations held unconstitutional).

53. *See, e.g.*, Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937). *Cf.* Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964).

54. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). For further discussion of the significance of fiscal losses, see the text accompanying notes 170-98, *infra*.

goals.[55] The choice of means, however, is not always strictly limited to these alternatives; a determination to proceed by police regulation may be invalid, as a taking or damaging of private property, if less onerous but equally effective methods for achieving the same public objectives are available, short of an exercise of the eminent domain power. For example, in *Willis v. Wilkins*,[56] the New Hampshire court concluded that a regulation prohibiting bathing and swimming in a lake, devised as a health measure to prevent pollution of the municipal water supply, constituted an unreasonable impairment of the right to beneficial use of the lake by riparian owners.[57] In balancing the public health objective of the regulation against its restrictive effect upon private riparian rights, the court noted that prohibition of bathing and swimming was not the only anti-pollution method available, but that other scientifically acceptable means (e.g., filtration and treatment techniques) were shown to be available at moderate cost for safeguarding the public health. In effect, where the additional public cost of a less drastic approach was slight in comparison to the private loss that would otherwise be imposed, the availability of other means to achieve the public welfare objectives of the regulation, with less economic detriment to private property interests, was a relevant basis for discounting the legislative judgment to exercise the police power.

B. The Criteria In Context

A striking illustration of these three decisional factors operating conjointly is the case of Bydlen v. United States,[58] an inverse condemnation action brought by the owners of resort property located in the roadless upper reaches of the Superior National Forest. The only feasible access to plaintiffs' resort was by aircraft, and they had developed a substantial vacation business based on that mode of transportation. In order to preserve the wilderness characteristics of this portion of the national forest, and in particular to discourage continued use of private recreational resorts located within it and serviced by air, a governmental order had been issued banning flight over the territory at an altitude

55. The overlapping of the police and eminent domain powers, and their concomitant interchangeability as instruments of governmental policy, has often been noted in the legal literature. *See, e.g.*, Van Alstyne, *Legislative Prospectus, supra* note 5, at 14-15; Waite, *Governmental Power and Private Property*, 16 CATH. U.L. REV. 283, 284-85 (1967); Michelman, *supra* note 6, at 1185-87.

56. 92 N.H. 400, 32 A.2d 321 (1943).

57. To the same effect, see *In re* Clinton Water Dist., 36 Wash. 2d 284, 218 P.2d 309 (1950); Pounds v. Darling, 75 Fla. 125, 77 So. 666 (1918).

58. 175 F. Supp. 891 (Ct. Cl. 1959).

below 4,000 feet. The practical effect of the order was to prevent the plaintiffs from bringing guests and supplies in by air, making it necessary to use surface methods of travel which were more time consuming, costly, and dangerous. Although the air ban did not totally terminate use of the resorts, it substantially limited and curtailed their accessibility, and sharply cut into plaintiffs' business. After unsuccessful efforts to enjoin the aircraft prohibition, plaintiffs obtained a judgment for the "taking" of the right to access to their properties by air, the damages being measured by the resulting diminution in value of those properties.

In reaching this result, the court in *Bydlen* emphasized the fact that, by applicable statute, the government had been forbidden to condemn the plaintiffs' properties without their consent, and that plaintiffs had refused voluntarily to sell their holdings to the forest service in pursuance of its wilderness preservation policy. The flight prohibition embodied in the executive order thus had been devised to accomplish indirectly what the government was powerless to do in more normal fashion—compel the evacuation of the plaintiffs' property. Its effect was to reduce the value of the two properties in the amounts of $25,000 and $30,000 respectively. To that extent, the court concluded, the government had "taken" property interests of the plaintiff.[59] This degree of private loss, moreover, could not be justified in the name of the police power, since the air ban was not shown to be required to meet any "compelling emergency," but was calculated largely to preserve for public recreational use "the esthetic values of the wilderness"; those values, the court stated, represented a "luxury rather than such a necessity as would justify the taking of private property without compensation."[60]

The opinion in *Bydlen* demonstrates not only judicial concern for the magnitude of economic loss sustained by the claimant, but also judicial unwillingness to approve a deliberately adopted (i.e., overzealous) governmental decision to use the police power to achieve, indirectly and without payment of just compensation, results clearly contrary to declared legislative policy. Moreover, since most of the private property interests in the roadless area of the national forest had

59. *See* Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-called Inverse or Reverse Condensation*, 1968 URBAN LAW ANN. 1, 6-8.

60. 175 F. Supp. at 900. For further discussion of the role of legislative objectives in relation to the validity of police power measures, see the text accompanying notes 65-124, *infra*.

already been acquired by negotiated purchase or in condemnation proceedings, the uncompensated impact of the air ban upon plaintiffs' properties appeared to be both arbitrary and discriminatory. Thus, plaintiffs' inverse condemnation award substantially extended to them the treatment, with respect to acquisition of property rights in the national park, which was seemingly intended when Congress had elected to employ the condemnation power, rather than the police power, in furtherance of national wilderness area policy.

II. LAND USE CONTROLS

The limiting effect of the just compensation clauses upon police power regulations is most frequently asserted in relation to governmentally imposed restrictions upon the use of land. Unlike police regulations of activities not directly associated with real property (discussed above), in land use control situations the economic detriment resulting from use restrictions is often directly perceivable, readily describable, and conveniently provable. The frequency with which such issues have been litigated has provided substantial areas of fairly solid legal terrain in which predictability is reasonably assured; there are, however, significant borderline situations in which the doctrinal guidelines and their application are blurred.[61]

In part, the existing uncertainties can be traced to the propensity of courts to avoid the difficult analytical task of articulating a substantive decision between the competing claims of private right and community order by relying upon procedural rules. Most prominently invoked in this connection are the rule placing a heavy burden upon the challenger to prove that a restriction is arbitrary and confiscatory and the presumption (often conjoined with a reference to the burden of proof) that legislative determinations upon debatable questions are predicated upon rational grounds.[62] Judicial opinions rejecting constitutional attacks on the stated ground that a challenger had failed to discharge his burden of proof, and thus had not refuted the presumption of validity, seldom provide reliable guides to the relevant substantive standards against which the challenger's case was ostensibly measured.[63]

61. *See generally* Sax, *supra* note 2.

62. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Zahn v. Board of Public Works, 195 Cal. 497, 234 Pac. 388 (1925), *aff'd*, 274 U.S. 325 (1927); Vickers v. Township Committee of Gloucester Township, 37 N.J. 232, 181 A.2d 129 (1962), *appeal dismissed*, 371 U.S. 233 (1963); Brae Burn, Inc. v. City of Bloomfield Hills, 350 Mich. 425, 86 N.W.2d 166 (1957).

63. *Compare* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) *with* Consolidated

On the other hand, decisions invalidating land use controls are often equally devoid of helpful explanatory data, particularly where, as is all too often the case, the opinions are phrased largely in general conclusory descriptions of the regulations in question as arbitrary, unreasonable, or confiscatory.[64]

Despite the unsatisfactory and equivocal quality of many of the pertinent cases, however, it appears possible tentatively to identify the main strands of policy that influence judicial decisions on the issue whether a land use restriction constitutes a compensable "taking" or "damaging" of private property.

A. Acceptability Of Regulatory Objectives

An important consideration is the acceptability of the objective asserted to support exercise of the police power. Mr. Justice Holmes once pointed out, in a pertinent context, that the police power may be employed "in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[65] More recently, a like thought has been expansively affirmed in a much-quoted dictum by Mr. Justice Douglas:

> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . . . The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[66]

1. *Traditional v. Avant Garde Goals*

The statements just quoted are representative of the mainstream of legal development; the courts have generally expressed reluctance to

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Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), *appeal dismissed,* 371 U.S. 36 (1962). *See generally* Feiler, *Zoning: A Guide to Judicial Review,* 47 J. Urban Law 319, 321-22 (1969).

64. *See, e.g.,* State Highway Dep't v. Branch, 222 Ga. 770, 152 S.E.2d 372 (1966) (anti-billboard statute held invalid).

65. Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911).

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

limit the purview of objectives reachable by police power measures.[67] Yet, at the same time, novel and nontraditional policy goals, perceived as lacking in broad community acceptability, have sometimes failed to obtain judicial approval.[68] Objectives with a strong historic pattern of social approval are thus more likely to survive constitutional attack than those which are regarded as *avant garde*.

Viewed from this perspective, some of the land use control decisions which at first blush seem troubling take on a more acceptable posture. For example, the historically recognized common law of nuisance,[69] with its strong bias against annoying activities that unreasonably impair the enjoyment of nearby property, provided a ready analogue for judicial approval of early legislative efforts to outlaw similar functions, even though very substantial private economic hardship resulted. Thus, prohibitions upon the emission of dense smoke from industrial furnaces,[70] the maintenance of a fertilizer works,[71] the manufacture of bricks,[72] the operation of livery stables,[73] and the storage of gasoline,[74] have been upheld where the prohibited activity could reasonably be regarded as incompatible with surrounding community uses and possessed of a high potential for offensive interference or obstruction of ordinary use of property in the vicinity. A modern application of the same general principle is found in cases sustaining the validity of prohibitions against the use of incinerators for the burning

67. *See* Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949), *cert. denied*, 337 U.S. 939 (1949); Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1931); Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381 (1925); Mansfield & Swett, Inc. v. Town of West Orange, 120 N.J.L. 145, 198 A. 225 (1938). The police power has been said to be the least limitable of all governmental powers. Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (upholding city ordinance outlawing operation of pre-existing brickyard within recently expanded city limits as a proper exercise of police power).

68. *See, e.g.*, Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909) (aesthetic interest rejected as permissible basis for ban on advertising billboards); City of West Palm Beach v. State, 158 Fla. 863, 30 So. 2d 491 (1947) (architectural design controls held invalid).

69. The law of nuisance has ancient roots. *See* 4 BLACKSTONE, COMMENTARIES 168 (16th ed. 1825) (offensive smelling business enterprises); Cogswell v. New York, New Haven & Hartford R.R., 103 N.Y. 10, 13-14 (1886). Dean Prosser has described the law of nuisance as an "impenetrable jungle." W. PROSSER, LAW OF TORTS 592 (3d ed. 1964).

70. Northwestern Laundry v. City of Des Moines, 239 U.S. 486 (1916).

71. Northwestern Fertilizer Co. v. Hyde Park, 97 U.S. 659 (1878).

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

73. Reinman v. City of Little Rock, 237 U.S. 171 (1915).

74. Pearce Oil Corp. v. City of Hope, 248 U.S. 498 (1919). *But see* Dobbins v. City of Los Angeles, 195 U.S. 223 (1904) (ordinance forbidding gas works in industrial area held unenforceable as to previously existing nonconforming use).

of rubbish,[75] as well as other types of controls aimed at reduction of air pollution.[76]

Restrictions against nuisance-type activities, it should be noted, ordinarily are relatively narrow in scope, and leave the owner free to use his property for a very broad range of lawful uses, some of which, at least presumptively, may be just as profitable as the banned use.[77] In any event, the law of nuisance has long recognized that the economic costs imposed by the noxious use upon the community, when sufficiently onerous to be classified as "unreasonable," would justify the decision to abate the nuisance even though the ensuing private loss to the owner might be substantial.[78] In a like manner, the exercise of the police power to prohibit harmful uses usually represents a choice between mutually inconsistent public and private interests; and, as Mr. Justice Stone noted in *Miller v. Schoene*,[79] "preferment of [the public] interest over the private interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."

The limited degree to which such prohibitions deprive the owner of freedom of use also tends to weight the scales in favor of constitutionality. In a civilized society, all property is subject to a variety of restrictions and limitations in the interests of community welfare; indeed, the most valuable use of property may well consist of illegal activities or of operations which are excessively offensive or annoying to the general community or which obstruct the reasonable use of neighboring property. The distinction between noxious and innocent uses of property, which has evolved over centuries of development of the common law of nuisance, strongly supports the view that a prop-

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75. *See* Lees v. Bay Area Air Pollution Control Dist., 238 Cal. App. 2d 850, 48 Cal. Rptr. 295 (1965); Barber's Super Markets, Inc. v. City of Grants, 80 N.M. 553, 458 P.2d 785 (1969); Board of Health v. New York Central R.R., 10 N.J. 294, 90 A.2d 729 (1952).

76. *Cf.* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.")

77. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (by implication).

78. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ban on brickyard operation, with resulting reduction in land value from $800,000 to $60,000), as explained in Jones v. City of Los Angeles, 211 Cal. 304, 316-17, 295 P. 14, 20-21 (1931).

79. 276 U.S. 272, 279-80 (1928). *See also* Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 492 (1916): "Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance."

erty owner seeking to profit from noxious activities can be prevented from doing so by legislation (just as readily as by the traditional abatement powers of courts) without impairing the constitutional just compensation principle. In effect, the body of expectations incorporated in the accepted notion of property ownership are deemed to exclude any notion that the owner has a legally protected right to create a public nuisance. Thus, legislative prohibition does not deprive him of any recognizable property interest for which compensation is required.

Early judicial willingness to invoke traditional nuisance theory, as the basis for sustaining the validity of restrictions against harmful uses of land, exerted a major influence upon the development of modern planning and zoning legislation.[80] By recognizing the need to establish enforceable priorities between incompatible uses in the interest of the general welfare of all property owners, these decisions suggested a rationale for comprehensive zoning: the police power should legitimately be concerned not only with the noxiousness of particular uses but also with the compatibility of location of non-noxious uses. After initially encountering mixed judicial reactions,[81] comprehensive zoning was sustained upon this basis as consistent with constitutional requirements in the leading case of *Village of Euclid v. Amber Realty Co.*[82] Since *Euclid*, the view that orthodox zoning, which groups compatible uses into districts having decreasing scales of restrictiveness, is reasonably calculated to safeguard public health, safety, and welfare objectives, and thus is a valid exercise of the police power, has been accepted throughout the United States.[83] Constitutional challenges to zoning measures are, as a rule, no longer levelled at the propriety of the basic legislative objectives; rather, they seek to establish that specific regulatory provisions, or their application to specific parcels of land, are so arbitrary and unreasonable as to amount to an unconstitutional taking or damaging.[84]

General acceptance of the traditional objectives of Euclidean zoning, however, has not signalled any complete judicial abdication of responsibility for reviewing the legitimacy of police power goals.

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80. *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 2.03-.06 (1968).

81. *Id.* at § 2.08.

82. 272 U.S. 365 (1926).

83. 1 R. ANDERSON, AMERICAN LAW OF ZONING at § 2.10.

84. *Id.* at § 2.12. *See* Nectow v. City of Cambridge, 277 U.S. 183 (1928); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), *appeal dismissed*, 371 U.S. 36 (1962).

Conceding that that power, especially as applied to land use controls, must necessarily be very broad and sufficiently flexible to meet the ever-changing needs of a dynamic society, the state courts have continued to examine legislative innovations to determine whether they appear calculated to promote objectives that are readily perceived as relating to public health, safety, welfare, or morals. For example, a regulatory measure creating a maximum height limit for commercial buildings can be readily identified as a valid police power measure having a rational relationship to community amenity (i.e., adequate light and air) and community safety (e.g., fire protection capability, earthquake protection, etc.).[85] Conversely, a regulation requiring all structures to be not less than a minimum height may be constitutionally suspect, when judged by reference to traditional police power objectives, since such a regulation appears to be counter-productive.[86]

Perhaps the most conspicuous example of judicial insistence that zoning objectives comport with police power theory is found in the prevalence of the view that zoning cannot, consistently with constitutional standards, be used to promote solely aesthetic objectives.[87] Although several courts have accepted the view that the promotion of aesthetic objectives constitutes an adequate justification for zoning restrictions,[88] the weight of authority, including the California decisions,[89] recognizes aesthetics only as an allowable secondary purpose for regulations primarily seeking to advance other, more traditional, police power objectives.[90] As a practical matter, however, the distinc-

85. Welch v. Swasey, 214 U.S. 91 (1909); City of St. Paul v. Chicago, St. P., M.&O. Ry. Co., 413 F.2d 762 (8th Cir. 1969). *But see* Piper v. Ekern, 180 Wis. 586, 194 N.W. 159 (1923) (height limit held unreasonable as applied).

86. *See* 122 Main St. Corp. v. City of Brockton, 323 Mass. 646, 84 N.E.2d 13, 8 A.L.R. 2d 955 (1949). In this regard, I am, of course, not dealing with those minimal regulations which are designed to insure adequate space for human habitation.

87. For recent treatments of the subject, see Steinback, *Aesthetic Zoning: Property Values and the Judicial Decision Process*, 35 Mo. L. Rev. 176 (1970) (collecting the authorities); Mosotti and Selfon, *Aesthetic Zoning and Police Power*, 46 J. Urban Law 773 (1969). *See also* 1 R. Anderson, American Law of Zoning §§ 7.21-.24 (1968).

88. *See, e.g.*, Ohio v. Buckley, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S. 22 (1967); State v. Diamond Motors, 429 P.2d 825 (Hawaii 1967); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965). *Cf.* Berman v. Parker, 348 U.S. 26 (1954).

89. Desert Outdoor Advertising v. County of San Bernardino, 255 Cal. App. 2d 469, 63 Cal. Rptr. 543 (1967); County of Santa Barbara v. Purcell, Inc., 251 Cal. App. 2d 169, 59 Cal. Rptr. 345 (1967). *But see* People v. Dickenson, 171 Cal. App. 2d Supp. 872, 343 P.2d 809 (1959), *cert. denied*, 361 U.S. 894 (1960).

90. United Advertising Corp. v. Borough of Metuchen, 35 N.J. 193, 172 A.2d 429 (1961), *on remand* 76 N.J. Super. 301, 184 A.2d 441 (1962), *aff'd* 42 N.J. 1, 198 A.2d 447 (1964).

tion between these two views appears to have more conceptual than substantive content; when they desire to do so, courts that are unwilling to ascribe validity to land use regulations solely on aesthetic grounds seemingly experience no difficulty in identifying traditional police power objectives that can provide theoretical support for regulations with incidental aesthetic objectives.[91] Obvious examples include cases sustaining prohibitions against outdoor advertising[92] and junkyards[93] where promotion of highway safety and preservation of land values have been cited as legitimate police power purposes for sustaining what, to many observers, appear to be predominantly aesthetic regulations. Decisions approving architectural zoning[94] and land-use regulations calculated to preserve the character and appearance of historic districts[95] can be explained on similar grounds.

2. *Public v. Private Benefit*

Another significant determinant of the decisional law relating to the permissibility of land-use regulatory objectives is the principle that the police power may only be used to promote general community, rather than purely private, objectives. For example, a zoning restriction limiting industrial or commercial land uses to areas already fully developed for that purpose, and excluding such uses entirely from the rest of the community, may be viewed as conferring upon existing business interests a practical monopoly by excluding future business competition; accordingly, the restriction may be an invalid exercise of police power, since its predominant practical effect is to enhance the private economic position of existing businesses rather than the public welfare.[96] The pur-

91. 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 7.22-.24 (1968).

92. *E.g.*, Desert Outdoor Advertising v. County of San Bernardino, 255 Cal. App. 2d 469, 63 Cal. Rptr. 543 (1967); United Advertising Corp. v. Borough of Metuchen, 35 N.J. 193, 172 A.2d 429 (1961), *on remand* 76 N.J. Super. 301, 184 A.2d 441 (1962), *aff'd* 42 N.J. 1, 198 A.2d 447 (1964).

93. *E.g.*, City of Shreveport v. Brock, 230 La. 651, 89 So. 2d 156 (1965); Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960).

94. *See, e.g.*, Reid v. Architectural Board of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955), *cert. denied*, 350 U.S. 841 (1955).

95. *See, e.g.*, Rabman v. City of Springfield, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964).

96. *In re* White, 195 Cal. 516, 234 P. 396 (1925). The courts have often noted that land-use restrictions calculated to confer monopolistic advantages or protect existing businesses from commercial competition are constitutionally suspect. *See, e.g.*, Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P.2d 542 (1946); Suburban Ready-Mix Corp. v. Village of Wheeling, 25 Ill. 2d 548, 185 N.E.2d 665 (1962); Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962). The same result is more often reached upon the

posive enhancement of private rather than community values has often been held an improper basis for zoning in situations where severe private detriment has not been offset by widely shared public benefits but has instead inured chiefly to the advantage of a narrowly defined but specifically identifiable class of private beneficiaries.[97]

In a recent Washington case,[98] for example, part of the bed and shoreline of a lake had been zoned for commercial purposes; this was inconsistent with the riparian rights of owners of shoreline properties. Since its restrictions on riparian rights operated primarily for the economic advantage of a developer seeking to construct an apartment house extending out over the lake, the ordinance was held invalid. A recent Michigan case[99] reached an analogous result. The decision held unconstitutional, as applied, the law used to zone plaintiff's lot, which was in an area almost completely developed for commercial and governmental purposes, so as to permit its use solely for institutional, residential, or, as an adjunct to other uses, off-street parking purposes. Since the property, as zoned, had no commercial value for any purpose other than off-street parking, the court concluded that profitable use was possible only if the plaintiff either purchased other nearby property and used his lot for parking in conjunction therewith, or sold the lot to the owner of such other property for adjunctive parking use. Under either of these alternatives, however, the plaintiff's lot would have a value far below that of neighboring lands, and there was no showing in the record of any public need for additional off-street parking in the area. The court concluded that the zoning pattern, as applied to plaintiff's land, principally benefited nearby private owners, by providing them with a potential parking area as an adjunct to their own operations, without any compensating general public benefit.

Cases invalidating land use regulations because their dominant effect is to enhance private advantage are relatively scarce; such decisions necessarily assume judicial capability for distinguishing between regulations primarily serving private rather than public interests, in direct opposition to the presumptively valid legislative judgment on

ground that the control of competition is not a legislatively authorized purpose for zoning. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 7.28, at 547 (1968).

97. In addition to the authorities cited in note 96, examples of invalid bestowal of private economic advantage include such cases as Wyatt v. City of Pensacola, 196 So. 2d 777 (Fla. App. 1967) (dry cleaning establishment); Caudill v. Milford, 10 Ohio Misc. 1, 225 N.E.2d 302 (C.P. 1967) (gasoline service station); Spohrer v. Oyster Bay, 29 Misc. 2d 366, 219 N.Y.S.2d 376 (1961) (motel).

98. Bach v. Sarich, 74 Wash. 2d 575, 445 P.2d 648 (1968).

99. Brandau v. City of Grosse Pointe Park, 5 Mich. App. 297, 146 N.W.2d 695 (1966).

the matter. The difficulty in drawing any such line is increased by the tendency of every land-use regulation to have incidental beneficial consequences for some private interests.[100] Many such cases probably can be explained best in terms of a shifting of the burden of persuasion.[101] When the objecting property owner has made a prima facie showing that the primary effect of the regulation, as applied, is to enhance private rather than public advantage, the burden of showing a justification in terms of community benefit (i.e., that the private advantage is merely incidental to promotion of a proper police power objective) shifts to the public agency. Hence, a holding of invalidity, in this context, may mean that the public agency has merely failed to satisfy the court that acceptable public objectives were adequately served by the regulation, a failure which, *inter alia,* may reflect a judicial disposition to employ more rigorous standards of review of local legislation than of state statutes.[102]

In other instances, such a holding may reflect a judicial determination of an entirely different order, namely, the scope of community interests which the police power may constitutionally seek to advance. For example, although minimum floor area and density requirements have generally been upheld,[103] principally on the ground that such provisions have a rational relationship to health and safety, such holdings assume a rather expansive definition of the concept of public welfare, since the maintenance of private property values through the preservation of the aesthetic character and appearance of the community is obviously a significant motivating factor and effect of such requirements.[104] Such regulations, however, are often vulnerable to a con-

100. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 7.28, at 549 (1968).

101. *Cf.* Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937) (gas prorate order held unconstitutional taking of private property; opinion recognizes burden of proof of unreasonableness rests on party challenging measure, but concludes that the burden was satisfied and not overcome by justifications advanced in favor of the order). Other decisions consistent with the same explanation, although not containing any explicit discussion of the burden of persuasion, include Chicago, St. Paul, M. & R. Co. v. Holmberg, 282 U.S. 162 (1930) (regulatory order to railroad to construct cattle underpass held invalid since primarily for private use) (Stone, J.); Missouri Pacific Ry. Co. v. Nebraska, 217 U.S. 196 (1910) (statutory mandate to railroad to construct siding for benefit of private grain elevator, when demanded by latter, held invalid) (Holmes, J.).

102. As to the propriety of a policy of judicial activism in reviewing local regulatory ordinances, see S. SATO AND A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 221-22, 266-67 (1970); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts,* 48 MINN. L. REV. 643 (1964); Note, *City Government in the State Courts,* 78 HARV. L. REV. 1596 (1965).

103. 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 1.20, 7.19 (1968).

104. Modern decisions usually reject earlier judicial doubts whether the police

tention that the police power is being exercised for the implicit purpose of discouraging intrusion into the community of members of social, economic, and ethnic groups deemed incompatible with the generally homogeneous cultural milieu in the community.[105] "Snob zoning" of this sort is not necessarily insulated from judicial invalidation by reason of the fact that the essentially private interests being promoted are widely shared throughout the entire community. Other values implicit in the democratic ethic, the practical implications of which tend to be exposed by consideration of the consequences of local parochialism upon expanding metropolitan land use patterns, may induce courts to define the purview of the police power by reference to a broader community prospective than that reflected in exclusionary zoning regulations.[106]

The line of demarcation between permissible "public" and impermissible "private" objectives of land use regulations is blurred and wavering, tending to strain judicial competence to its limits.[107] As a

power embraces setback and lot-area regulations, *see, e.g.*, White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215 (1926), and tend to accept the preservation of community amenity and protection of property values as proper police power objectives. *See, e.g.*, County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967); Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952); Bilbar Construction Co. v. Easttown Township Board of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958).

105. As to the validity of economic segregation through zoning regulations, see Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Aloi, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1969 U. TOLEDO L. REV. 65 (1969). *See also* Johnston, *Developments in Land Use Control*, 45 NOTRE DAME LAW. 399, 408-13 (1970); Lloyd, *Public Control of Land Use*, 12 LOCAL GOVT. LAW SERVICE LETTER 1, 2-3 (Dec., 1962). Explicit racial exclusion by zoning has, of course, long been unconstitutional. Buchanan v. Warley, 245 U.S. 60 (1917).

106. *See, e.g.*, G. & D. Holland Construction Co. v. City of Marysville, 12 Cal. App. 3d 989, 91 Cal. Rptr. 227 (1970); National Land and Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965); County Bd. of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959). *See also* Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 65, 89 A.2d 693 (1952) (Oliphant, J., dissenting).

107. A major source of difficulty in judicial efforts to impart meaning to this distinction is the pervasiveness of intermingled public and private consequences of all land use regulations. For example, local zoning authorities may readily succumb to the pressures of essentially "private" interests widely shared in the community by adopting exclusionary policies detrimental to the broader public welfare. *See, e.g.*, Note, *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J. 720 (1961). Traditional reluctance to approve of aesthetics as a rationale for land use controls seems to be rooted largely in the belief that the components of aesthetic criteria are essentially idiosyncratic and subjective, and thus may too easily be manipulated to serve arbitrary and capricious private goals. *See, e.g.*, Reid v. Architectural Board of Review, 119 Ohio App. 67, 76, 192 N.E.2d 74, 81 (1963) (dissenting opinion); Steinbach, *Aesthetic Zoning: Property Values and the Judicial Decision Process*, 35 Mo. L. REV.

recognized component of potential just compensation claims, moreover, it scarcely provides a reliable basis for prediction. Although it may prove difficult to devise acceptable statutory criteria to narrow the range of existing uncertainty, legislative efforts to this end would seem to be a desirable aim for law reform efforts.

3. *Governmental Enrichment*

A third group of decisions illustrating the disposition of courts to question the constitutional propriety of land use regulatory objectives involves, paradoxically, the principle that governmental asset enhancement—like private interest enhancement—is deemed an impermissible objective of the police power.[108] For example, a regulation which restricts the use of private property solely to governmental functions, such as use for public schools,[109] public parks,[110] or public housing,[111] as a prelude to later eminent domain proceedings, is uniformly regarded as an unconstitutional infringement of private property rights. Even in the absence of a limitation to public activities, highly restrictive use regulations, imposed for the purpose of preventing private developments that would increase the cost of planned future acquisition of the subject property for governmental purposes, are equally invalid.[112]

The vice in regulations of this sort has two components. First,

176, 184-86 (1970); Comment, *Aesthetic Considerations and the Police Power*, 35 B.U.L. REV. 615 (1955). Widespread criticism of zoning administration, especially in connection with the disposition of applications for variances and special use permits, has centered upon the tendency of zoning boards to disregard statutory standards and employ essentially private criteria of decision. *See, e.g.*, Dukeminier and Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962); R. BABCOCK, THE ZONING GAME (1966).

108. For a thorough examination of this principle in the context of inverse condemnation see Sax, *supra* note 2.

109. City of Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785 (1961).

110. Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951).

111. Chase v. City of Glen Cove, 41 Misc. 2d 889, 246 N.Y.S.2d 975 (1964).

112. Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969) (restrictive regulations in contemplation of airport expansion); Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (1958) (*semble*). *See also* Robertson v. City of Salem, 191 F. Supp. 604 (D. Ore. 1961) (zoning freeze to reduce state capitol expansion program costs); State *ex rel.* Willey v. Griggs, 89 Ariz. 70, 358 P.2d 174 (1960) (prohibition on improvements to reduce highway acquisition costs); Long v. City of Highland Park, 329 Mich. 146, 45 N.W.2d 10 (1950) (residential zoning in commercial area to reduce costs of condemnation for municipal construction); Sanderson v. Willmar, 282 Minn. 1, 162 N.W.2d 494 (1968) (restriction of commercial property to off-street parking in contemplation of future condemnation for public parking).

the loss of private value caused by such use restrictions is generally severe and unmatched by reciprocal community advantages; it is clear that "the promise of condemnation at an indefinite future time is not just compensation;"[113] and the mere possibility that lower future condemnation costs will produce significant tax savings to the mass of local property owners is both inadequate and speculative as a *quid pro quo.* More fundamentally, while long-range promotion of the general welfare may be contemplated through conservation of the subject property for public purposes, the immediate restriction is perceived as based upon narrowly focused fiscal and budgetary considerations which are inconsistent with the constitutional premise that the costs of community benefits derived from police power measures should be distributed impartially over the community. When the government steps out of its role as a neutral arbiter engaged principally in "defining standards to reconcile differences among the private interests in the community," and instead acts in an enterprise capacity seeking the "enhancement of its resource position," the use of regulatory power is more readily seen by the judicial eye to constitute a compensable "taking" than a non-compensable "regulation."[114]

The police power, however, is sufficiently flexible that governmental resource enhancement may, in practical effect, be achieved by regulation in certain situations in which future condemnation is not contemplated at all. This is, of course, not unexpected; it has often been observed that the police and eminent domain powers are to a considerable degree alternative means by which governmental agencies may seek to achieve public objectives.[115] Accordingly, land use regulations may be constitutionally suspect if so narrowly conceived, with respect to permissible uses, as to render the subject property virtually valueless for normal private purposes while permitting a few uses that appear to be calculated to promote broad community benefits of a kind which could also be readily achieved through an exercise of the power of eminent domain. For example, flood plain developmental restrictions, enacted to facilitate a community flood control and storm drainage program, have sometimes been held invalid in the absence of carefully drafted provisions designed to permit maximum private utilization of the subject property for purposes not inconsistent with

113. Chase v. City of Glen Cove, 41 Misc. 2d 889, 892, 246 N.Y.S.2d 975, 979 (1964).

114. Sax, *supra* note 2, at 63.

115. *See, e.g.*, Van Alstyne, *Legislative Prospectus, supra* note 5, at 13-15; Waite, *Governmental Power and Private Property*, 16 CATH. U.L. REV. 283, 284-85 (1967).

flood control objectives.[116] Similarly, an ordinance which restricted use of a parcel of unimproved land in a highly developed business district to off-street parking has been held unconstitutional, since it prevented more profitable development of the land and required the disfavored property owner to devote it to an essentially public objective—relief of vehicular congestion.[117] Under a similar analysis, the decisional law casts doubt upon the constitutional validity of attempts to enhance community amenities through "open space" or "greenbelt" restrictions imposed as an exercise of the police power, rather than by public acquisition of developmental rights.[118]

The most familiar application of the present approach arises in connection with airport zoning. In light of the settled general rule that a surface owner enjoys a property right to the reasonable use of the airspace immediately superadjacent to his land,[119] height limit restrictions upon private property development beneath flight paths for landing and takeoff of aircraft at public airports have generally been held to constitute an unconstitutional taking of private property.[120] Such flight paths, cleared of obstructions that could endanger

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116. Dooley v. Town of Fairfield, 151 Conn. 304, 197 A.2d 770 (1964); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963). *See also* Hager v. Louisville & Jefferson County, 261 S.W.2d 619 (Ky. 1953).

There appears to be a consensus of informed opinion that flood plain zoning restrictions reasonably supported by hydrological data relating to risk of inundation and permitting, so far as feasible, private uses compatible with such risks, are constitutionally valid. *See* Hines, Howe & Montgomery, *Suggestions for a Model Flood Plain Zoning Ordinance*, 5 LAND & WATER L. REV. 321 (1970); Hogan, *State Flood-Plain Zoning*, 12 DEPAUL L. REV. 246 (1963); Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098 (1959); Comment, *Zoning the Flood Plains of Ohio*, 1969 U. TOLEDO L. REV. 655.

117. Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954). Reasonable and non-discriminatory requirements that off-street parking be provided in connection with other uses are a clearly distinguishable type of regulation, and have generally been sustained. 2 R. ANDERSON, AMERICAN LAW OF ZONING § 8.40 (1968).

118. *See* Greenhills Home Owners Corp. v. Village of Greenhills, 202 N.E.2d 192 (Ohio App. 1964) (greenbelt zoning held unconstitutional taking), *rev'd on other grounds*, 5 Ohio St. 2d 207, 215 N.E.2d 403 (1966), *cert. denied*, 385 U.S. 836 (1966). For a full analysis and discussion of the possibilities of open space control through the police power see Bowden, *Article XXVII—Opening the Door to Open Space Control*, 1 PAC. L.J. 461 (1970); Heyman, *Open Space and the Police Power*, in OPEN SPACE AND THE LAW 7 (Herring ed., Institute of Governmental Studies, Univ. Calif. 1965). *See generally* Strong, Open Space for Urban America (U.S. Dept. of Housing and Urban Development, 1965).

119. *See* United States v. Causby, 328 U.S. 256 (1946), *followed in* Griggs v. Allegheny County, 369 U.S. 84 (1962).

120. The leading California decisions are Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); and Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963). Cases in accord elsewhere include: Roark v. City of

flight safety, are presumptively intended to be put to actual use as part of the physical resources of the airport enterprise; thus, unlike most zoning restrictions, airport height limitations appear to constitute, in effect, an attempt by the municipal operator to acquire an easement for flight in the guise of regulation.[121]

The suggested distinction between a compensable governmental enhancement of its resources, and a noncompensable exercise of governmental arbitral or regulatory power—a distinction which appears, on the whole, to explain rather well the results in the group of cases here under discussion—is not altogether precise, and can readily be manipulated to reach divergent results.[122] For example, a general zoning ordinance, for reasons arguably rooted in traditional planning considerations (*i.e.*, policies related largely to the arbitral function of government to resolve conflicting private interest claims), may restrict private property development in the vicinity of an airport to uses which are largely compatible with the airport. Such restrictions, however, may also tend to improve the utility of the airport enterprise as well as reduce the risk of damage claims based on airport operations, *e.g.*, claims predicated upon overflight noise. The ordinance thus appears to be both arbitral and resource enhancing. California courts faced with this sort of dilemma have generally found such area zoning patterns, where consistent with a general plan of community land-use controls, to be valid, thereby at least implicitly recognizing the arbitral implications to predominate over the enterprise features.[123] Despite the imprecision of the suggested approach, however, it deserves to be considered as a potentially useful key to compensability in certain kinds of cases,[124] when applied together with other appropriate statutory guidelines.

Caldwell, 87 Idaho 557, 394 P.2d 641 (1964); Indiana Toll Road Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963), *cert. dismissed*, 379 U.S. 487 (1965); Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945); Jackson Municipal Airport Authority v. Evans, 191 So. 2d 126 (Miss. 1966).

121. *See* Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963). *Cf.* Sax, *supra* note 2, at 67-69 (1964).

122. *See* Van Alstyne, *Legislative Prospectus*, *supra* note 5, at 21-24.

123. Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967); Smith v. County of Santa Barbara, 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 (1966). *See also* McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953) (zoning of beach frontage solely for beach recreational purposes), as explained by Heyman, *supra* note 118, at 13-16.

124. Professor Sax concedes that the "enterprise-arbitral" functional analysis does not accommodate or reconcile all of the significant lines of cases. Indeed, the well-settled rule that allows the cost of eliminating railway grade crossings to be charged to the

B. Rational Relationship To Regulatory Objectives

Marginal areas of constitutionally questionable land use control objectives, which we have just surveyed, represent relatively insignificant (albeit doctrinally fascinating) features of the general legal landscape. The validity of comprehensive zoning in pursuit of traditional objectives—the promotion of community welfare through control of physical development patterns and regulation of the interrelationships between activities that use land[125]—has long been settled everywhere in the United States.[126] Legal attacks upon legislative objectives, save in the exceptional situations reviewed above, are seldom undertaken in contemporary litigation. On the other hand, the claim that land use controls have taken or damaged private property interests in an unconstitutional sense is frequently advanced today as the basis for an attack upon the validity of a particular restriction as applied to a particular parcel of land.[127] In a particularized challenge of this sort, the factual components of the individual cases are obviously of crucial significance, and tend to defy meaningful generalization; the decisions, as one might expect, often repeat the familiar judicial disclaimers that the legal result necessarily "varies with circumstances and conditions," and that an exact line between valid measures and unconstitutional overreaching "is not capable of precise delimitation."[128]

Resolution of the constitutional issues posed by litigation challenging the validity of land use restrictions as applied to specific parcels ordinarily starts from the premise that the task of reconciling competing private interests with the general welfare objectives inherent in planned community development is primarily a matter of legislative discretion. Accordingly, the standard judicial approach states that legislative decisions inherent in zoning policy will not be interfered with

railroad, *see, e.g.*, Atchison, T. & S. F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953), is quite inconsistent with it, while still other fact situations do not "readily submit" to this analysis. Sax, *supra* note 2, at 70.

125. *See* ALI Model Land Development Code xv-xvi (Tent. Draft No. 1, 1968).

126. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); 1 R. Anderson, American Law of Zoning § 2.10 (1968).

127. *See, e.g.*, National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 83 Cal. Rptr. 577, 464 P.2d 33 (1970); Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969).

128. Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926), at 387. *See also* Nectow v. City of Cambridge, 277 U.S. 183 (1928) (zoning ordinance held invalid as applied).

Because of the unique character of land, as well as the ever-changing relationships between demands for land use and existing use restrictions, decisions dealing with the validity of zoning restrictions as applied to specific parcels of land have only limited precedential significance. *See* 1 R. Anderson, American Law of Zoning § 2.12 (1968).

by the courts unless the particular regulation, as applied, appears to have no rational relationship to legitimate land use control objectives,[129] and that judicial doubts will be resolved in favor of the regulation if its reasonableness is fairly debatable.[130]

This rational nexus test postulates a strong presumption of the validity of zoning regulations, and imposes upon the party attacking a restriction the burden of showing that the regulation, as applied to his property, constitutes an arbitrary and unreasonable exercise of the police power.[131] It thus assumes the existence of identifiable factual criteria capable of judicial assessment in considering whether a particular land use regulation has been rationally applied; and it further assumes that the process of organizing a community land use plan and defining use zones is not so highly discretionary as to insulate it from effective judicial review.[132] Finally, the rational basis test accepts judicial responsibility for evaluating the reasonableness of a regulation, as applied, in light of all of the surrounding circumstances, including the nature and use of the subject property and of surrounding properties, trends in the land development pattern in the community, suitability of the affected property for uses permitted by the regulation, impact of the regulation upon the value of the property, practicability of less drastic restrictions, and the extent to which enforcement of the regulatory scheme tends to promote legitimate planning objectives.[133]

The frequency with which one or more of the indicated decisional factors explicitly appears as part of the rationale in judicial opinions

129. *See, e.g.*, Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963); E. B. Elliott Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970).

130. *See, e.g.*, Zahn v. Board of Public Works, 274 U.S. 325 (1927), *aff'g* 195 Cal. 497, 234 P. 388 (1925); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962).

131. *See* Feiler, *Zoning: A Guide to Judicial Review*, 47 J. URBAN LAW 319, 321-22 (1969).

132. *See, e.g.*, Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P.2d 542 (1946); Ryan v. Andriano, 91 Cal. App. 136, 266 P. 831 (1928); 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.01 (1968).

133. The courts have generally been reluctant to catalog all relevant decisional criteria, and any attempt to do so would probably be incomplete in any event. Cases sustaining the statement in the text as to the range of factors that may be taken into account, however, include: Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38, 43, *cert. denied*, 337 U.S. 939 (1949) ("the character of the property of the objecting parties, the nature of the surrounding territory, the use to which each has been put, recent trends of development, etc."); Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961); City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941); La Salle Natl. Bank v. County of Cook, 60 Ill. App. 2d 39, 208 N.E.2d 430 (1965).

varies greatly; it depends, of necessity, upon the nature of the record before the court, the argumentative strategies adopted by counsel, and the deviant policy preferences of the judges deciding the matter. Certain patterns of analysis, however, can be discerned.

1. *Suitable Zoning Regulations*

In considering a constitutional challenge to a zoning restriction as applied, a primary approach—seen more frequently in reported opinions than any other—leads the courts to consider the degree to which the legally permitted uses of the subject property are reasonably compatible, when viewed in terms of acceptable zoning objectives, with those authorized for surrounding and nearby land. A negative conclusion typically may be invoked to support a decision that a land use regulation creating an island of residential use surrounded by less restrictively zoned properties constitutes an invalid exercise of legislative power.[134]

Why this result necessarily follows from the legal premise, however, is seldom explained. Often, on the apparent assumption that the connective reasoning is self-evident, the result is merely announced in conclusionary form. Sometimes it is accompanied by references to evidence showing that the less restrictively zoned adjoining land was physically similar to the subject property, that the latter land would be more valuable without the existing use restrictions, and that elimination of those restrictions would not adversely affect surrounding lands.[135] Each of the reinforcing factors mentioned, however, has been said to be insufficient, standing alone, to invalidate a zoning regulation.[136] Accordingly, the controlling question relates to the weight to be ascribed to the several factual elements and their interrelationship in the total judicial equation. On these matters, however, typical judicial opinions are generally uninformative. All that clearly emerges is the court's view that the restriction under consideration, in the light of all the surrounding circumstances, is invalid because it is an "unrea-

134. Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963) (one-acre residential zoning of land surrounded by improved parcels of less than one-acre); Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938) (residential "island" surrounded by commercial and other non-residential uses). *See also* Janesick v. City of Detroit, 337 Mich. 549, 60 N.W.2d 452 (1953) (residential zoning of parcel partially surrounded by light manifacturing uses); Schwartz v. Lee, 50 Misc. 2d 533, 270 N.Y.S.2d 855 (1966) (residential zoning of parcel surrounded by industrial and commercial uses).

135. *See, e.g.*, Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963).

136. Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P.2d 542 (1946); Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938).

sonable, oppressive and unwarranted" interference with property rights that "bears no reasonable relation to the public welfare."[137]

The "zoning island" problem is a particularized manifestation of a more general genre of cases in which a determination of unconstitutionality of zoning restrictions turns upon the "unsuitability" of the property for any lawfully permitted use.[138] In effect, a challenge upon this ground is a frontal assault upon the wisdom of the legislative judgment; the property owner undertakes to demonstrate by reference to relevant factual data, weighed in light of zoning objectives, that there is no valid reason for imposing the challenged restriction upon his property.[139] Any relevant circumstances tending to impugn the propriety of the legislative decision with regard to the particular parcel in question may be adduced to support the attack; this includes evidence of environmental factors (traffic, noise, fumes, smoke, dust, weather), topographical elements (marshy soil, hilly terrain, exposure to flooding or erosion, lack of accessibility, etc.), proximity relationships (nearby nonconforming uses, local developmental trends, actual uses of surrounding property, visual barriers, etc.), and a host of other elements that may conceivably persuade a court that enforcement of declared zoning policy with respect to the particular parcel would make little or no sense.[140]

"Unsuitability," in this context, is a form of judicial shorthand for expressing a conclusion drawn from a complex array of unique

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137. Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 339, 382 P.2d 375, 379.

138. *See, e.g.*, Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 338, 175 P.2d 542, 548 (1946), classifying, as a recognized situation in which zoning restrictions are invalid as applied, cases where "The land [is] entirely unsuited to or unusable for the only purpose permitted by the ordinance." *See also* Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 93 P.2d 93 (1939).

The verbal formulations of the text by different courts vary somewhat, although the same general substantive content appears to be rather uniformly accepted. *See, e.g.*, City of Phoenix v. Burke, 9 Ariz. App. 395, 396, 452 P.2d 722, 723 (1969) (owner must be "precluded from using . . . property for any purpose for which it is reasonably adapted"); Chicago Title & Trust Co. v. Village of Wilmette, 27 Ill. 2d 116, 124, 188 N.E.2d 33, 37 (1962) ("little suitability or value for the purpose for which it is zoned"); Abbott v. Appleton Nursing Home, Inc., 355 Mass. 217, 221, 243 N.E.2d 912, 917 (1969) (restriction "operates to deprive [owner] of all reasonably advantageous use of its property"); Summers v. City of Glen Cove, 17 N.Y.2d 307, 308, 217 N.E.2d 663, 207 N.Y.S.2d 611, 612 (1966) ("property cannot be utilized economically for the purpose permitted by the ordinance").

139. *See* Feiler, *Zoning: A Guide to Judicial Review*, 47 J. URBAN LAW 319, 336 (1969).

140. Illustrative cases are conveniently collected in R. ANDERSON, AMERICAN LAW OF ZONING §§ 2.24-.26 (1968).

facts; it means, in substance, that in the court's judgment, the private detriment resulting from the challenged restriction substantially outweighs the potential community benefit to be realized by its enforcement. Yet, in both theory and practice, the primary responsibility for weighing the competing private and public interests is on the legislative body enacting the restriction. Judicial intervention on the ground of "unsuitability" appears to run counter to both the frequently voiced presumption favoring the validity of the legislative judgment and its corollary burden upon the challenger to demonstrate unconstitutionality beyond the point of reasonable debate.[141] As an astute commentator has observed, however, intimations by courts that the burden of attack is a formidable one often represent the rhetoric of opinion-writing more than the realities of judicial review:

> There is reason to believe that the courts which require clear and convincing evidence are willing to be convinced; that they are sometimes prepared to resolve sharp conflicts while disclaiming jurisdiction to enter the area of fair debate; and that a litigant who makes a strong case can, not infrequently, satisfy a court beyond a reasonable doubt that a zoning ordinance is unconstitutional as it applies to certain land.[142]

The willingness of courts to engage in this sort of ad hoc rezoning seems to be based upon recognition of the need for parcel-by-parcel adjustments in order to moderate the rigors of zoning restrictions where external considerations peculiar to individual lots undercut the legislative rationale.[143] In considering policies affecting general zoning patterns, legislative attention may not be adequately focused upon exceptional norms. While all zoning tends to be detrimental to someone, constitutional prohibitions against the taking or damaging of private property supply a convenient conceptual framework for judicial nullification of "unsuitable" land use restrictions that impose particularized detriment disproportionate to the resulting community advantage.

To identify and classify all of the factual elements that have been mentioned in court opinions as being relevant to a conclusion of "unsuitability" would be an almost impossible task—especially because of

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141. *See* cases cited in notes 129-30, *supra.*

142. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.19, at 80 (1968).

143. *See, e.g.*, Reid v. City of Southfield, 8 Mich. App. 553, 155 N.W.2d 252 (1967) (chain reaction of invalid residential zoning along heavily trafficked street). *See generally* Feiler, *Zoning: A Guide to Judicial Review*, 47 J. URBAN LAW 319, 337-38 (1969).

the tendency of the courts to use a multi-factor judicial calculus in which the weight of the individual elements is seldom indicated or discussed. A sampling of representative cases, however, suggests that "unsuitability" in this context generally involves an adverse judicial appraisal of three principal variables, none of which is alone likely to be conclusive.

First, the courts generally undertake to assess the extent to which enforcement of the challenged restriction upon the subject land, in light of alternatives reasonably available, is essential to fulfillment of its regulatory purpose. In *Nectow v. City of Cambridge*[144]—which followed shortly upon the heels of *Euclid*[145]—the Supreme Court ruled that a residential zoning ordinance was invalid as applied, emphasizing the point that the use restriction in question was "not indispensable to the general plan."[146] A broadly phrased conclusion of this kind obviously masks a variety of subsidiary legal and factual determinations, including, for example, identification of the objectives of the general plan, the importance of the subject restriction to accomplishment of those objectives, the probable trend of development, the degree of incongruity between adjacent and nearby uses, and the reasonableness of legislative judgments in light of their impact upon widely shared community assumptions as to feasible use patterns.[147] The thrust of the inquiry is whether the enforcement of the challenged restriction upon the subject property can reasonably be deemed to promote the zoning objectives of that restriction in any significant degree, and whether its avoidance in favor of a prohibited use—almost invariably one proposed by the owner—can reasonably be discerned as substantially detrimental to surrounding properties in light of their actual and prospective uses.

Although marked by imprecision, the test of indispensability provides a focal point for the marshalling and presentation of relevant evidence. For example, the effect of alternative uses of the subject property upon surrounding lands may be examined. If the use which the complaining owner desires to make of his property is shown to be compatible with and non-detrimental to adjoining and nearby properties, the utility of the restriction to the general plan may well be ques-

144. 277 U.S. 183 (1928) (unanimous opinion).

145. 272 U.S. 365 (1926); *see* text accompanying notes 82-86, *supra*.

146. 277 U.S. at 188.

147. *See* Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P.2d 542 (1946); Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961); La Salle National Bank v. County of Cook, 60 Ill. App. 2d 39, 208 N.E.2d 430 (1965).

tionable.[148] If it is inferable that a proposed departure from the restriction would be detrimental to surrounding properties, however, its essentiality to the welfare objectives of the zoning plan is adequately established.[149]

A second, and closely related, variable underlying the "unsuitability" test relates to feasibility of developing the subject property for any use permitted within the scope of the applicable restrictions.[150] If existing uses of surrounding or nearby land are so highly incompatible with permitted uses of the subject property that development for the latter purposes is unlikely to occur, the restriction may be deemed arbitrary and confiscatory.[151] In terms of constitutional theory, a legislative measure which "so restricts the use of property that it cannot be used for any reasonable purpose goes . . . beyond regulation, and must be recognized as a taking of the property."[152]

The issue of feasibility of development necessarily requires an assessment of probabilities, and thus is to some extent a matter of judgment and opinion. It is generally accepted that mere speculation with respect to possible difficulty of development of the land for permitted uses will not suffice.[153] On the other hand, although the courts

148. *See, e.g.*, Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963) (one acre zoning in midst of smaller lots); City of Phoenix v. Burke, 9 Ariz. App. 395, 452 P.2d 722 (1969). *Cf.* Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961). This approach, of course, is seldom, if ever, used as more than a make-weight in judicial reasoning, since some degree of boundary-line incompatibility is inherent in all zoning schemes. *See* Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938); Orinda Homeowners Committee v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970).

149. *See, e.g.*, Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963) (proposed multiple residence use of land zoned for single family residences).

150. *See, e.g.*, Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938) (residentially zoned parcel surrounded by commercial and institutional uses need not feasible to develop for residential purposes); *accord*, Nectow v. City of Cambridge, 277 U.S. 183 (1928); Chicago Title & Trust Co. v. Village of Wilmette, 27 Ill. 2d 116, 188 N.E.2d 33 (1963); Brandau v. City of Grosse Pointe Park, 5 Mich. App. 297, 146 N.W.2d 695 (1966); Mary Chess, Inc. v. City of Glen Cove, 18 N.Y.2d 205, 273 N.Y.S.2d 46, 219 N.E.2d 406 (1966).

151. The same result is sometimes reached by an alternate rationale: A land-use restriction calculated to preclude development in order to enhance aesthetic or other community objectives may be assumed to be "suitable" for that purpose, but may be invalid because of the impermissibility of the objective. *See, e.g.*, Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963). *See* text accompanying notes 116-21, *supra*.

152. Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 592, 117 A.L.R. 110 (1938).

153. De Paul v. Prince George's County, 237 Md. 221, 205 A.2d 805 (1965).

often state the test in seemingly inflexible terms (*e.g.*, that the plaintiff must show that his land is "entirely unsuited to or unusable for the only purpose permitted by the ordinance"[154]), the factual criteria underlying the crucial terms ("unsuited" and "unusable") appear to be essentially pragmatic. "Unusable" in this context seldom appears to connote physical impossibility; rather, it refers to a substantial unlikelihood, in light of the physical surroundings of the subject property and their economic and financial implications, that a reasonable man would undertake to develop the land for any of the purposes for which it is zoned.[155] Evidence that some other use would be more profitable or more suitable in relation to surrounding uses is not sufficient, standing alone, to invalidate a restriction under this view.[156] The attack may succeed only if it is shown that the restriction denies to the landowner any reasonable possibility of at least some advantageous or profitable use of his land.[157]

A third variable often explicitly said to be relevant, but not conclusive, on the issue of "unsuitability" of a land-use restriction is the degree of property value depreciation which will be incurred by the owner if the subject land can only be used for the purposes permitted by the restriction.[158] The logical role of economic loss, in this context, seems to be that of reinforcing and confirming conclusions reached by the other lines of analysis; the values attributed by market forces to the land under varying conditions of use are perceived as fairly reliable measures of the relative "suitability" of the property for those purposes. Loss of value thus constitutes a means of quantification of other elements of the same basic issue.

The conceptual significance of loss of value, in the present context, should not be overestimated. The degree of private detriment

154. Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 337, 175 P.2d 542, 548 (1946).

155. *See, e.g.*, Summers v. City of Glen Cove, 17 N.Y.2d 307, 207 N.Y.S.2d 611, 217 N.E.2d 663 (1966) ("property cannot be utilized economically for the purposes permitted by the ordinance"); *accord*, Schiffer v. Village of Wilmette, 105 Ill. App. 2d 80, 245 N.E.2d 143 (1969); Brandau v. City of Grosse Pointe Park, 5 Mich. App. 297, 146 N.W.2d 695 (1966); Horn Construction Co. v. Town of Hempstead, 41 Misc. 2d 438, 245 N.Y.S.2d 614 (Spl. T. 1963).

156. Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P.2d 542 (1946); Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938); Baum v. City & County of Denver, 147 Colo. 104, 363 P.2d 688 (1961).

157. Tauber v. Montgomery County Council, 244 Md. 332, 223 A.2d 615 (1966); Abbott v. Appleton Nursing Home, Inc., 355 Mass. 217, 243 N.E.2d 912 (1969).

158. *See, e.g.*, Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938); City of Phoenix v. Burke, 9 Ariz. App. 395, 452 P.2d 222 (1969); La Salle National Bank v. County of Cook, 60 Ill. App. 2d 39, 208 N.E.2d 430 (1965).

resulting from police power regulations has often been urged as a general test of the validity of such restrictions, entirely apart from their alleged unsuitability.[159] Judicial opinions identifying loss of value as a component of the latter approach thus, to a degree difficult to estimate, may tend to blur important practical distinctions between these two uses of market value evidence.

Despite the latent ambiguities just noted, the relevance of market valuation data to a rational application of the "unsuitability" approach seems apparent. The courts quite properly insist that such data is not conclusive.[160] To argue that a substantial loss of value necessarily connotes the invalidity of land use restrictions proves too much, and, if accepted, would destroy the effectiveness of existing and accepted institutions of land use control.[161] But a restriction that produces a substantial loss of the value of a particular parcel of land to which it is applied, without equally perceptible community benefits, may well be regarded as an unsuitable—and hence unconstitutional—interference with property rights.[162] From a procedural perspective, moreover, the reported decisions seem consistent with a judicial disposition to weight the property owner's burden of persuasion on the issue of unsuitability of the restriction in inverse proportion to the degree of private detriment sustained.[163]

Although hyperbole in reported opinions sometimes intimates that an owner seeking to convince a court of the unsuitability of a zoning restriction must show that his land has "little value" or "no value" for permitted uses,[164] more accurate terminology would emphasize the

159. *See* text accompanying notes 170-90, *infra.*

160. *See* cases cited note 158, *supra. See also* Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961) (value depreciation need relevant, but not a "controlling or decisive factor"; evidence showed value for zoned uses was $28,000, while value without zoning restrictions would be between $100,000 and $125,000). *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.21, at 88 (1968).

161. *See* Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388, 394 (1925) ("Every exercise of the police power is apt to affect adversely the property interest of somebody"), *affirmed,* 274 U.S. 325 (1927); Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961).

162. *E.g.*, Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963); Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938); La Salle National Bank v. County of Cook, 60 Ill. App. 2d 39, 208 N.E.2d 430 (1965).

163. *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 2.21-2.23, at 88-105 (1968).

164. *E.g.*, Reynolds v. Barrett, 12 Cal. 2d 244, 250, 83 P.2d 29, 33 (1938) ("valueless"); Chicago Title & Trust Co. v. Village of Wilmette, 27 Ill. 2d 116, 124, 188 N.E.2d 33, 37 (1963) ("of little value"); Brandau v. City of Grosse Pointe Park, 5 Mich. App. 297, 146 N.W.2d 695 (1966) ("no value").

hardheaded economic realities that influence land development decisions. For example, evidence of a market consensus that a zoning change to permit less restrictive uses of the subject property is likely to receive early official approval, has been generally recognized in eminent domain litigation as an acceptable component of market value opinions.[165] Conversely, it seems reasonable to conclude that property value diminution caused by a particular restriction, in the absence of any reasonably anticipated zoning change, is an index of the degree to which the restriction is regarded by market forces as "unsuitable" in light of conditions generally regarded as relevant to developmental patterns.[166]

The variables underlying the "suitability" approach are interrelated, and to a considerable degree represent merely different ways of assessing the same set of facts. For example, expert testimony relating to feasibility of development of the subject property will often focus upon the relative compatibility of surrounding uses; but compatibility considerations are also a familiar component of expert opinions on valuation.[167]

Evidence relevant to the indicated variables, however, is not necessarily limited to opinion testimony by qualified land developers or other experts. Proof of diligent but unsuccessful efforts by the owner, over an extended period of time, to promote development of the property for permitted uses, for example, seems logically probative of unsuitability of the existing restrictions.[168] In a recent well-reasoned Arizona opinion,[169] all three variables were alluded to in support of a decision invalidating a single-family zoning restriction so far as it precluded development of the subject land for multiple-residence use. The minimal relevancy of the restriction to the underlying regulatory objectives was deemed established by evidence that the proposed (but forbidden) use of the subject property for multiple residential development would be fully consistent with the prevailing use pattern of

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165. *See* University of California v. Morris, 266 Cal. App. 2d 616, 72 Cal. Rptr. 406 (1968); People v. Investors Diversified Services, Inc., 262 Cal. App. 2d 367, 68 Cal. Rptr. 663 (1968); State v. Covich, 260 Cal. App. 2d 663, 67 Cal. Rptr. 280 (1968).

166. *Cf.* Zipser, *Zoning Classification and Eminent Domain*, 1 URBAN LAW. 89 (1969).

167. CAL. EVID. CODE § 821 (West 1965).

168. *E.g.*, Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 117 A.L.R. 1110 (1938); Horn Construction Co. v. Town of Hempstead, 41 Misc. 2d 438, 245 N.Y.S.2d 614 (Spl. T. 1963). *See also* La Salle National Bank v. County of Cook, 60 Ill. App. 2d 39, 208 N.E.2d 430 (1965) (dictum); Brandau v. City of Grosse Pointe Park, 5 Mich. App. 297, 146 N.W.2d 695 (1966) (by implication).

169. City of Phoenix v. Burke, 9 Ariz. App. 395, 452 P.2d 722 (1969).

nearby land, would not adversely affect existing but scattered single-family residential uses in the area, and had stimulated no opposition from other landowners in the area. Lack of feasibility for single-family development was shown by evidence that nearby uses—including heavy traffic on an abutting street, a nearby irrigation ditch, the proximity of a city water filtration plant, and the prevalence of multi-family and commercial uses—were incompatible with that type of development, and by evidence that no mortgage financing could be found to support such use, although such financing was readily available for apartment construction. Confirmatory market data established that the subject property had a reasonable value of $95,000 if it were zoned for multiple residential purposes, but only $35,000 if the existing restriction to single-family use was valid and enforced. Typically, although the court discussed each of the variables identified above, none was singled out as a controlling feature of the case; the cumulative impact of all, however, was deemed to support the conclusion that the restriction in question was unconstitutional.

2. *Extent of Private Loss*

a. *Loss of market value*: Evidence of substantial loss of market value as a result of a regulatory restriction is not relevant solely as proof bearing on the "unsuitability" approach; it is frequently employed in a more dominant role suggesting judicial recognition as an independent decisional factor.[170] It is often difficult to discern whether a showing of substantial economic depreciation is regarded by a particular court as a substantive criterion of decision or as an element which tends to shift the burden of justification to the public agency.[171] The prevalence with which judicial opinions examine comparative valuation data in determining the validity of land use regulations, however, makes it clear that financial impact may exert a significant influence upon the court's views as to "whether the public interest advanced by the [regulation] is worth the price."[172]

Justice Holmes was an articulate spokesman on the Supreme

170. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 2.21-.23, at 88-105 (1968).

171. Although the ultimate burden of proof (i.e., the risk of nonpersuasion) appears everywhere to remain upon the party attacking the regulation, court decisions often suggest that a strong showing of substantial loss of values will shift to the public agency the burden of going forward with evidence demonstrating an offsetting public interest. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963); Averne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

172. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.22, at 93 (1968).

Court for the view that the principal focus of the constitutional question should be upon the magnitude of the economic loss imposed upon the property owner.[173] Many state courts, including those of California, routinely acknowledge the relevancy of the economic loss sustained by the complaining property owner, but such loss, standing alone, is seldom deemed to be a controlling consideration.[174] Absent other supporting factors, even very substantial economic detriment resulting from an exercise of regulatory authority has been held insufficient to invalidate the regulation.[175]

As the California Supreme Court has pointed out,[176] every land use regulation has a tendency to impose economic loss upon someone, since such regulations ordinarily represent a governmental decision mediating between competing claims with respect to the use of the property. For example, the mere fact that a particular parcel of land would be more valuable if it were less restrictively zoned cannot control the constitutional issue, for the more profitable use, if allowed, could deprive surrounding properties of the protection of use restrictions essential to the preservation of their value.[177] The basic concept which permeates the reasoning that sustains Euclidean zoning is that a balancing of the competing interests, with their respective trade-offs between

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173. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Sax, *supra* note 2, at 41. Holmes, however, recognized that even a very substantial private property loss could be justified by overriding public interest. *See, e.g.*, Erie R.R. v. Public Utilities Comm'rs, 254 U.S. 394, 410 (1921).

174. *See* Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 368, *appeal dismissed*, 371 U.S. 36 (1962). Decisions from other states are collected and discussed in 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.23, at 101 (1968). *See also* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962): "Although a comparison of values before and after is relevant [to the taking issue], it is by no means conclusive. . . ."

175. *See, e.g.*, Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 368, *appeal dismissed*, 371 U.S. 36 (1962) (zoning restriction found by trial court to have substantially destroyed all economic value of the subject land); Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm., 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970) (*semble*); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (75% loss in value of zoned land); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (more than 85% loss in value).

176. Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388, 394 (1925), *affirmed*, 274 U.S. 325 (1927).

177. Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963). Conversely, the mere fact that restrictive zoning of surrounding lands may confer benefits upon the property-owner's land does not generate interests constitutionally protected against a diminution of value through a zoning change adequately supported by police power objectives. Orinda Homeowners Committee v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970).

loss of value and community advantage, is primarily the responsibility of the authorized legislative branch. Judicial review is still available, however, in those marginal cases in which the economic loss sustained is shown to be grossly disproportionate to the public advantage resulting from enforcement of the regulation with respect to the claimant's property.[178]

The judicial calculus involved in the balancing process is described in a variety of unilluminating ways. Most often found, perhaps, is the declaration that a land use regulation will normally be sustained unless the resulting private detriment amounts substantially to "confiscation."[179] This formulation, however, may simply mean that in the factual context of the particular case, the court estimated the public advantage resulting from enforcement of the regulation to be sufficiently important that it was unwilling judicially to set aside the legislative judgment favoring that result at the expense of a relatively moderate or widely shared private detriment.

Viewed in this way, the "confiscation" theory emerges as a conventional balancing concept, with the variables of private loss and public benefit being weighed on the judicial scales.[180] As the Illinois Supreme Court has suggested, a holding of invalidity is most likely when both variables tend to favor that result: "If the gain to the public is small, from rezoning real estate, and the hardship to the owner is great, no valid reason exists for the exercise of such police power."[181] On the other hand, if the scales are not tipped in favor of invalidity in the manner just described, even a very substantial private loss may still be regarded by the courts as insufficient to justify invalidating an otherwise reasonable legislative judgment.[182]

The process is well illustrated in cases considering the validity of regulations forbidding the extraction of natural resources from the earth. The California courts have long recognized that prohibitions

178. Hamer v. Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963) (one-acre lot restriction); Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938) (residential zoning of parcel in commercial area); Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969) (airport height limit zoning).

179. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.22, at 93 (1968).

180. *E.g.*, Radco, Inc. v. Zoning Comm'n, 27 Conn. Supp. 362, 238 A.2d 799 (Com. Pl. 1967); Langguth v. Village of Mount Prospect, 5 Ill. 2d 49, 124 N.E.2d 879 (1955).

181. Langguth v. Village of Mount Prospect, 5 Ill. 2d at 52, 124 N.E.2d at 880. *See also* Herman v. Hillside, 15 Ill. 2d 396, 155 N.E.2d 47 (1958). *Cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

182. *See* cases cited in note 172, *supra*. *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 2.22-.23, at 93-105 (1968).

of this type are likely to have an especially onerous impact, and thus are especially difficult to justify as valid exercises of the police power.[183] "Such a business," said Chief Justice Gibson in an important case, "must operate, if at all, where the resources are found. Considerations which justify an exercise of the police power that necessarily results in putting a business out of existence are different from those which justify regulations that do not prevent the operation of the business but merely restrict its location."[184] In light of these considerations, the outright prohibition of extractive enterprises has often encountered judicial disfavor; less drastic limitations, emphasizing effective control of the methods by which the resources are exploited, must ordinarily be adopted in lieu of outright prohibition.[185] Yet, where no effective alternative means for protecting the public welfare is shown to be available, outright prohibition of the extraction of natural resources constitutes a valid exercise of police power.[186]

A striking example is found in *Consolidated Rock Products, Inc. v. City of Los Angeles*,[187] where a zoning ordinance forbidding rock and gravel operations on a 340 acre tract was shown to have largely destroyed the economic value of the land in question. Despite this severe economic loss, the court sustained it as valid, finding a rational factual basis for the use restriction. The proposed quarrying and processing operations, even though conducted with all possible safeguards, would, according to the court's summary of the evidence, "still create appreciable quantities of dust, which would be carried by the prevailing winds to the residences and sanitariums of nearby communities which had a national reputation as havens for sufferers from respiratory ailments, thereby precipitating a damaging effect upon persons residing there for health reasons, and depreciating the values of properties in those communities."[188]

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183. *See, e.g.*, Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38, *cert. denied*, 337 U.S. 939 (1949); People v. Hawley, 207 Cal. 395, 279 P. 136 (1929); Morton v. Superior Court, 124 Cal. App. 2d 577, 269 P.2d 81 (1954).

184. Lockard v. City of Los Angeles, 33 Cal. 2d 453, at 467, 202 P.2d 38 at 46. *See generally* Annot., 10 A.L.R.3d 1226 (1966).

185. *E.g.*, Morton v. Superior Court, 124 Cal. App. 2d 577, 269 P.2d 81 (1954). *See also* Certain-Teed Products Corp. v. Paris Township, 351 Mich. 434, 88 N.W.2d 705 (1958).

186. Goldblatt v. Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); New York Trap Rock Corp. v. Clarkstown, 3 N.Y.2d 844, 166 N.Y.S.2d 82, 144 N.E.2d 725, *rehearing denied*, 3 N.Y.2d 938, 168 N.Y.S.2d 6, 146 N.E.2d 188 (1957), *appeal dismissed*, 356 U.S. 582 (1958).

187. 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962).

188. 57 Cal. 2d at 520, 20 Cal. Rptr. at 641, 370 P.2d at 345.

Consolidated Rock is therefore grounded upon judicial deference to a legislative judgment preferring one of two mutually inconsistent interests despite substantial economic loss thereby occasioned to the other.[189] Moreover, the favored interest—as embodied in the nearby residential and health care utilization of adjoining properties—was, at the time of the decision, a lawfully established one representing substantial investment-backed expectations that such uses would continue unimpaired by artificially produced environmental changes. On the other hand, the economic losses asserted by plaintiff were largely speculative and represented, for the most part, merely a present market evaluation of potential future profits if sand and gravel operations were permitted on the property. Although there had been some minor operations of this sort in the past, such use of the property had been forbidden and in fact had not been engaged in for more than twenty-five years. The claimed loss, in short, represented principally economic disappointment at inability to maximize profits from a change in the future of the property. Moreover, plaintiff, as the lessee (not the owner) of the subject property, had entered into its lease with notice of the existing zoning restrictions, and presumably had ample opportunity to protect itself in the event the requested zoning change could not be obtained.[190]

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189. Many decisions which appear seemingly indifferent to substantial economic loss resulting from police power regulations may be explained on similar grounds. *See, e.g.*, Miller v. Schoene, 276 U.S. 272, 279 (1928) (J. Stone) (sustaining requirement that cedar trees in vicinity of apple orchards be destroyed to eliminate infectious disease harbored by cedars but destructive to apple trees):

> On the evidence . . . the state was under the necessity of making a choice between the preservation of one class of property and that of the other, whenever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its border to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public . . . . And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

190. Although knowledge of an existing zoning restriction does not necessarily preclude a purchaser or lessee from attacking the validity of the regulation (*see* Vernon Park Realty v. City of Mt. Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954); Carter v. Bluefield, 132 W. Va. 881, 54 S.E.2d 747 (1949)), courts have frequently observed that one who takes with notice of zoning restrictions is in a less favorable position to contend that, as to him, the restriction is arbitrary and unreasonable than is one who purchased prior to imposition of the restriction. *See* Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963); Acker v. Baldwin, 18 Cal. 2d 341, 115 P.2d 455 (1941); Eckhardt v. Des Plaines, 13 Ill. 2d 562, 150 N.E.2d 621 (1958); Annot., 17 A.L.R.3d 743 (1968). The rationale for this view emphasizes the fact that the price paid for the land presumably reflected a dis-

b. *Loss of use*: The impact of loss of value is perhaps most sharply accentuated in cases, unlike *Consolidated Rock*, in which a newly enacted zoning restriction or prohibition is sought to be applied to an existing nonconforming use or structure embodying substantial financial investment.[191] In the formative years of zoning law, nonconforming uses were not regarded as a serious handicap to the effective operation of comprehensive zoning, since it was expected that such uses would be few in number and probably would be eliminated by natural attrition over a reasonable period of time.[192] This view has given way to a general consensus "that the fundamental problem facing zoning is the inability to eliminate the nonconforming use."[193] Accordingly, zoning authorities have employed a variety of methods designed to neutralize the effect of nonconforming uses and finally eliminate them. Efforts to invoke the police power to this end have included (1) abatement of nonconforming uses amounting to public nuisances;[194] (2) imposition of strict limitations on the right of the owner to repair, extend, or rebuild a nonconforming structure;[195] (3) prohibitions upon resumption of nonconforming uses after their destruction due to natural causes or

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count based on the effect of the known zoning restrictions upon market value. American National Bank & T. Co. v. City of Chicago, 30 Ill. 2d 251, 195 N.E.2d 627 (1964).

191. The literature of nonconforming uses is extensive. *See, e.g.*, Anderson, *The Nonconforming Use—A Product of Euclidean Zoning*, 10 SYRACUSE L. REV. 214 (1959); Graham, *Legislative Techniques for the Amortization of the Nonconforming Use: A Suggested Formula*, 12 WAYNE L. REV. 435 (1966); Katarincic, *Elimination of Nonconforming Uses, Buildings, and Structures By Amortization—Concept Versus Law*, 2 DUQ. U.L. REV. 1 (1963); Moore, *The Termination of Nonconforming Uses*, 6 WM. & MARY L. REV. 1 (1965); Young, *The Regulation and Removal of Nonconforming Uses*, 12 W. RES. L. REV. 681 (1961); Comment, *Elimination of Nonconforming Uses: Alternatives and Adjuncts to Amortization*, 14 U.C.L.A.L. REV. 354 (1966); Note, *Nonconforming Uses in Iowa: The Amortization Answer*, 55 IOWA L. REV. 998 (1970); 31 MO. L. REV. 280 (1966).

192. *See* City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 454, 274 P.2d 34, 40 (1954); Grant v. Mayor & City Council, 212 Md. 301, 307, 129 A.2d 363, 365 (1957); 57 NW. U.L. REV. 323 (1962).

193. National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 83 Cal. Rptr. 577, 581, 464 P.2d 33, 37 (1970) (Sullivan, J., dissenting).

194. Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121, 272 P.2d 4 (1954) (cement batching plant); City of Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959) (equipment repair lot). *Cf.* City of Bakersfield v. Miller, 64 Cal. 2d 93, 48 Cal. Rptr. 889, 410 P.2d 393, *cert. denied*, 384 U.S. 988 (1966); Van Alstyne, *Statutory Modification*, *supra* note 5, at 649-56 (1968) (nonconforming structures under building and safety codes).

195. San Diego County v. McClurken, 37 Cal. 2d 683, 234 P.2d 972 (1951); City of Los Altos v. Silvey, 206 Cal. App. 2d 606, 24 Cal. Rptr. 200 (1962); Paramount Rock Co. v. County of San Diego, 180 Cal. App. 2d 217, 4 Cal. Rptr. 317 (1960). For an extended analysis and collection of cases, see 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 6.31-6.57, at 377-433 (1968).

their abandonment by non-user for a specified period of time;[196] (4) provisions terminating the continuance of a nonconforming use following sale of the property to a purchaser with notice of the zoning restrictions;[197] and (5) the holding out of incentives calculated to induce the owner voluntarily to terminate the nonconforming use at an early point of time.[198]

This arsenal of approaches to the problem was necessitated by the prevalent judicial view that "discontinuance forthwith of the nonconforming use which is not a nuisance and which existed when the ordinance was adopted is a deprivation of property without due process of law."[199] The rationale for this rule seems to be rooted in considerations of fairness. While it is freely recognized that most restrictions upon property use tend to have a retroactive and often detrimental effect upon property not previously so restricted, when such detriment consists merely of frustration of plans for future property use, it is generally deemed outweighed by the community welfare advantages result-

196. Regulations forbidding restoration of nonconforming uses after destruction by natural causes (e.g., fire, flood, other calamity) have met a mixed judicial reception. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 6.56-6.57, at 429-33. *See also* O'Mara v. City of Newark, 238 Cal. App. 2d 836, 48 Cal. Rptr. 208 (1965) (ordinance construed strictly to avoid constitutional doubts); State ex rel. Home Ins. Co. v. Burt, 23 Wis. 2d 231, 127 N.W. 2d 270 (1964) (ordinance prohibiting reconstruction of nonconforming building destroyed by fire to degree exceeding 50% of assessed value held invalid as applied to building worth $24,000, assessed at $10,000, and damaged to extent of less than $6,500). Termination of nonconforming uses by intentional abandonment or discontinuance of actual use for a period of time, usually specified by statute or ordinance, has been more successful from a legal standpoint. *See, e.g.*, Hopkins v. MacCulloch, 35 Cal. App. 2d 442, 95 P.2d 950 (1939); Stieff v. Collins, 237 Md. 601, 207 A.2d 489 (1965); Yorkville v. Fonk, 3 Wis. 2d 371, 88 N.W.2d 319, *appeal dismissed*, 358 U.S. 58 (1958). *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 6.58-6.61, at 434-443 (1968). As a practical means for eliminating nonconforming uses, however, abandonment has been a failure. *See* Note, *Nonconforming Uses in Iowa: The Amortization Answer*, 55 IOWA L. REV. 998, 1006-1007 (1970).

197. Legislative attempts to impose a forfeiture of the right to continue a nonconforming use upon change of ownership have generally failed, since the right is deemed to attach to the land and not to the particular owner. *See, e.g.*, O'Connor v. Moscow, 69 Idaho 37, 202 P.2d 401 (1931); Watts v. City of Helena, 151 Mont. 138, 439 P.2d 767 (1968).

198. *See, e.g.*, Edmonds v. County of Los Angeles, 40 Cal. 2d 642, 255 P.2d 772 (1953) (zoning exception granted for enlargement of nonconforming use on condition that owner would agree to earlier termination than maximum period provided by amortization schedule). *See also* Igna v. City of Baldwin Park, 9 Cal. App. 3d 909, 88 Cal. Rptr. 581 (1970) (improvement of lots being employed for nonconforming use held conditional upon securing of valid conditional use permit).

199. National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 882, 83 Cal. Rptr. 577, 581, 464 P.2d 33, 37, fn. 4 (1970), quoting from City of Los Altos v. Silvey, 206 Cal. App. 2d 606, 609, 24 Cal. Rptr. 200, 2020 (1962). To the same effect, see Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1931); People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952).

ing from the regulation. But, a restriction that purports to require immediate termination of a pre-existing use or destruction of a pre-existing building, both of which were lawful at their inception, drastically frustrates the previously conceived, reasonable expectations of the property owners and peculiarly imposes upon them fiscal losses of relatively large magnitude, not generally shared by the community at large. These consequences have generally been viewed by the courts as unduly harsh; unjustified by the necessities of public health, safety, or welfare; and, therefore, so unreasonable as to amount to a taking or damaging of private property.[200]

In order to strike a balance between the interests thus affected which will avoid constitutional doubts, the policy of amortization of nonconforming uses has been widely adopted as a significant feature of zoning ordinances.[201] Although contrary views obtain in some states,[202] most courts, including those of California, sustain the validity of compelled terminations of non-conforming uses as a rational exercise of police power, provided an amortization period is allowed having a duration reasonably consistent with the estimated remaining economic life

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200. *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 6.06, at 317-23 (1968). Immediate termination of preexisting uses of a noxious character, amounting to nuisances, has, however, been sustained when adjudged adequately supported by accepted health and welfare considerations. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (immediate termination of brickyard operation), as explained in Jones v. City of Los Angeles, 211 Cal. 304, 315, 295 P. 14, 20 (1931) (noting that while *Hadacheck* "is an extreme illustration of the hardship which may result from an exercise of the police power, it can be justified on the ground of nuisance regulations.").

201. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 6.64, at 445-46 (1968); articles cited in note 191, *supra*. Amortization in substance, contemplates the specification of a period of time, ordinarily calculated with reference to the useful economic life of the nonconformity, after which the nonconforming use is required to be discontinued. The term, "amortization," reflects the premise that the nonconforming user ordinarily will be able to amortize his investment during the period prescribed. "It is reasoned that this opportunity to continue for a limited time cushions the economic shock of the restriction, dulls the edge of popular disapproval, and improves the prospects of judicial approval." 1 R. ANDERSON, *supra*, at 447.

202. Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965). A number of courts have also disapproved particular amortization ordinances, or the application of particular amortization ordinances to specific facts, upon the ground that an unreasonably short period was allowed for amortization. *See, e.g.*, County of Santa Barbara v. Modern Neon Sign Co., 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (1961) (one year period for amortization of newly installed moving advertising signs); City of La Mesa v. Tweed & Gambrell Mill, 146 Cal. App. 2d 762, 304 P.2d 803 (1958) (five year period for amortization of building with twenty year economic life); Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956) (two year period for billboards); City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953) (nineteen months for junkyard). Decisions of this kind, however, do not necessarily reject the validity of the amortization principle.

of the resources invested in the barred use.[203] As recently stated by the California Supreme Court, the validity of an amortization provision depends upon whether the amortization period prescribed "is reasonable and commensurate with the investment involved and so may validly apply to the particular property and use at issue."[204]

The usual presumption of validity attends an amortization clause, thereby placing on the property owner the burden of demonstrating its unreasonableness as applied to his property.[205] This burden, inherently a difficult one to discharge, is made more onerous by the absence of clearly formulated standards to which evidence can be directed; it is frequently reiterated that "each case must be decided on its own facts."[206] In general, however, the issue of reasonableness, so far as revealed by existing appellate decisions, revolves about an appraisal by the court of such factors as (1) the extent of private investment in the non-conforming use; (2) the degree to which that investment would be jeopardized by a termination of the non-conformity; (3) the age, condition, and physical characteristics of the non-conforming property and the practical possibility that it may be relocated at a legally permissible site without unreasonable expense; and (4) the range of alternative but legally permissible uses to which the property could be put if the existing non-conforming use were terminated.[207]

To a considerable degree, of course, the level of judicial sophistication employed in the evaluation of these and similar factors will be influenced by the extent to which relevant and persuasive factual data are made a part of the record in the case. The unlimited variety of possible fact situations, as well as a measure of uncertainty as to the relevancy of various factors relating to the property in question, tend to account in part for what, on a conceptual level, appears to be a somewhat disorderly and inconsistent body of decisions dealing with non-conforming uses.[208]

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203. Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121, 272 P.2d 4 (1954); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954); Grant v. Mayor and Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957); Harbison v. Buffalo, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42 (1958); Annot., 22 A.L.R.3d 1134 (1968).

204. National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 879, 83 Cal. Rptr. 577, 579, 464 P.2d 33, 35 (1970).

205. *Id.*

206. *Id.*

207. *See* City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 304 P.2d 803 (1956); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954). *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 6.66-6.68, at 451-63 (1968).

208. *See* authorities cited in note 188, *supra*.

Thus, when the record suggests that the economic investment in a building can be profitably exploited for lawful purposes after the termination of the non-conforming use,[209] a much shorter amortization period is likely to be sustained as reasonable for a non-conforming use located in a conforming building. On the other hand, if the non-conforming use is located in a non-conforming building specially designed for the purpose and not readily adaptable for other operations, the courts tend to be reluctant to sustain an amortization period substantially shorter than the estimated economic life of the structure.[210]

The interplay of the relevant variables in this determination is highlighted by a series of California decisions involving advertising displays. For example, a five year amortization period appears to be generally accepted as constitutionally valid with respect to outdoor advertising billboards, at least in the absence of evidence that that period is unreasonably short in light of the initial cost, age, physical condition, and remaining useful life of the particular structures.[211] On the other hand, a one-year period for amortizing movable advertising signs, recently installed and having at least a ten-year economic life, has been held too abbreviated to meet constitutional standards.[212] That the period of time is not in itself a controlling consideration, however, is demonstrated by a recent case, *National Advertising Co. v. County of Monterey.* That decision[213] sustained a one-year amortization period as applied to non-conforming billboards which, the evidence established, had been fully amortized for tax purposes under rules of the federal Internal Revenue Service. With respect to certain other nonconforming signs owned by the same plaintiff in the same zoning district, however, the court ruled that since the original investment had not yet been fully amortized for federal income tax purposes, "removal should await expiration of a rea-

209. City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

210. City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 304 P.2d 803 (1956).

211. County of Santa Barbara v. Purcell, Inc., 251 Cal. App. 2d 169, 59 Cal. Rptr. 345 (1967); National Advertising Co. v. County of Monterey, 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (1962); E. B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1140 (5th Cir. 1970); Grant v. City and Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957). *See also,* Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968) (three year amortization period for billboards held valid).

212. County of Santa Barbara v. Modern Neon Sign Co., 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (1961).

213. National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 83 Cal. Rptr. 577, 464 P.2d 33 (1970).

sonable amortization period in order to permit plaintiff to recover their original cost."[214]

The court in *National Advertising* treated as inconclusive a trial court finding to the effect that the fully amortized signs, due to careful maintenance and repair, had "many years of useful life remaining." Reading the record to indicate that the extended utility of the signs was a consequence of careful and systematic maintenance, the court observed that "repairs cannot be relied upon to defeat zoning legislation which looks to the future and the eventual liquidation of nonconforming uses."[215] Apparently recognizing that this position was undercut by the fact, noted in a dissenting opinion,[216] that the repairs had occurred prior to enactment of the prohibition, when the signs were fully conforming uses, the court added that the property owner had failed to demonstrate that the remaining economic values could not be successfully exploited by moving the signs to permissible locations, a task which the evidence showed could be performed at a relatively modest cost averaging approximately $139 per sign.[217] The court's opinion further noted that the plaintiff had failed to produce any evidence with respect to present actual value of any of the fully amortized signs or the additional time required to amortize any such present value.[218]

It is not clear from the *National Advertising* opinion whether the court was laying down a basic rule of amortization which would permit immediate removal, by police power means, of nonconforming structures which have been fully amortized for federal income tax purposes.[219] Despite its ambiguities, *National Advertising* does tend to

214. *Id.* at 886, 83 Cal. Rptr. at 580, 464 P.2d at 36.
215. *Id.*
216. *Id.* at 881, 83 Cal. Rptr. at 580, 464 P.2d at 36.
217. *Id.* at 880, n.1, 83 Cal. Rptr. at 580, 464 P.2d at 36.
218. *Id.*
219. *National Advertising Co.* can be read as sustaining the ordinance in question principally because it provided a one year removal period even for fully tax-depreciated signs, after they had first become nonconforming uses by change in the zoning classification applicable to their location; that period, moreover, had been effectively extended for more than one year additional time by provisional injunctive relief granted by the trial court during the pendency of the action. In the absence of evidence that the total period was insufficient to recoup any residual investment value in the fully amortized signs, the court may have concluded that plaintiff's burden of showing the unreasonableness of the ordinance as applied to them had not been met. *See id.* at 880, 83 Cal. Rptr. at 580, 464 P.2d at 36. It is thus not clear whether the court would have sustained the ordinance had it required the immediate removal of the signs which, prior to the effective date of the zoning change, had been fully tax-depreciated.

support two important propositions relating to the problem of constitutionally required compensation for private property losses occasioned by the enforcement of land use regulations. First, the burden of showing sufficient resulting detriment to off-set public benefits subsumed by the land use regulation, including evidence negating the possibility of investment recoupment through means other than continuation of the non-conforming use, is squarely upon the complaining property owner.[220] Second, since full recovery ("amortization") of the owner's original investment in the non-conforming structure appears to be a major consideration in determining the reasonableness of a statutory amortization policy, uniform (*i.e.*, inflexible) amortization periods, especially where of relatively short duration, declared by statute tend to be inherently invalid and thus constitute an invitation to litigation.[221] Suggestive of the need for ad hoc determination of the length of amortization periods is the fact that in *National Advertising*, the court studiously refrained from requiring that the city permit continuation of advertising signs not yet fully amortized for the balance of the period within which, under federal tax regulations, full amortization would be completed. Instead, the court merely indicated that compelled removal must await expiration of "a reasonable amortization."[222]

III. COMPULSORY EXPENDITURES AND CONTRIBUTIONS

Legislative bodies do not limit their police power activities to the enactment of prohibitory measures. Regulations requiring property owners to engage in specified conduct at their own expense, or to make prescribed contributions or expenditures for specified public purposes, are also frequently employed either alone or in conjunction with negative prohibitions.[223] Since the economic consequence of such demands is

220. This is in conformity with the usual rule placing the burden upon the party challenging the validity of land use regulations. *See, e.g.*, Beverly Oil Co. v. City of Los Angeles, 40 Cal. 2d 552, 254 P.2d 865 (1953); Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P.2d 542 (1946).

221. *See, e.g.*, 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 6.66-6.68, at 451-63 (1968).

222. National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 886, 83 Cal. Rptr. 577, 580, 464 P.2d 33, 36 (1970).

223. While the distinction, taken in the text, between affirmative obligations and negative prohibitions seems conceptually simple, its application is sometimes blurred by the ease with which certain kinds of restrictions can be described, both in legal and economic terms, as in either category. For example, the prohibition upon maintenance of ornamental cedar trees in Miller v. Schoene, 276 U.S. 272 (1928) can also be described as the imposition of an affirmative duty to sacrifice (contribute) those trees for the general benefit of nearby apple growers. Similarly, the prohibition upon removal of unmined coal in

generally immediate, direct, and quantitatively certain, a potential conflict with constitutional just compensation requirements is obviously presented.

A. PROMOTING "PUBLIC" SAFETY

A conventional police power rationale is typically employed to sustain measures compelling property owners to remove conditions which are potentially costly to the public. Common examples of such regulations include legislation compelling owners of property to eradicate, at their own expense, noxious weeds, brush, and debris deemed to be health or fire hazards;[224] to reseed or restock denuded lands for conservation and flood control purposes following commercial lumbering operations;[225] to install automatic fire extinguishing sprinkler facilities in hotels and lodging houses;[226] and to fill in dangerous excavations or holes.[227]

Required private expenditures in cases of this kind seldom encounter serious judicial doubts; the analogy to traditional nuisance abatement doctrine is obvious.[228] Moreover, cost-benefit analysis supports internalizing possible social costs flowing from noxious and either actually or potentially hazardous conditions on private property.[229]

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) can be described as the mandatory contribution of a valuable interest in subadjacent support for the benefit of occupiers of the surface. While the distinction thus appears to be more of degree than of kind, it is believed useful for present purposes in that the affirmative obligation category ordinarily embraces regulations imposing a conspicuous drain upon existing tangible resources, while the negative prohibition category is exemplified chiefly by limitations that impair values by frustrating intangible expectations. The economic impact of the former class of regulation, which may provoke a claim of unconstitutional "taking" or "damaging," is thus likely to be substantially more visible and immediate than that of regulations of the latter type.

224. Tain v. City of Palo Alto, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515 (1962). Upon the owner's failure to comply with an abatement order, the work is ordinarily performed by city personnel with the cost charged to the owner and secured by a lien on the property. *See* CAL. GOVT. C. §§ 39501-02 West (1955). *See also* Perley v. North Carolina, 249 U.S. 510 (1919); People v. Rhoades, 12 Cal. App. 3d 720, 90 Cal. Rptr. 794 (1970); Ohio v. Buckley, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968).

225. State v. Dexter, 32 Wash. 2d 551, 202 P.2d 906.

226. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946).

227. People v. Greene, 264 Cal. App. 2d 774, 70 Cal. Rptr. 818 (1968).

228. *See, e.g.*, Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 492 (1916) (sustaining validity of smoke abatement ordinance): "Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance." *See also* Mugler v. Kansas, 123 U.S. 623 (1887).

229. Van Alstyne, *Legislative Prospectus*, *supra* note 5, at 19-21 (1967). *See generally* Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958).

Theoretical as well as logical difficulties are encountered, however, when this nuisance analogy is pressed too far. For example, statutes requiring railroads at their own expense to construct grade separation facilities—often at very substantial cost—can scarcely be justified, as some courts have asserted,[230] on this basis.[231] While grade crossings may expose both vehicular and rail traffic to serious hazards, it is difficult to discern logical grounds for attributing this harmful consequence to the railroad any more than to the ever-increasing highway traffic.[232] Moreover, mandatory grade separations appear to constitute legal overkill: automatic signal devices and barrier gates, at far lower cost, can readily deal with the safety hazard problem.[233] Grade separations, viewed realistically, are desirable principally because they confer public benefits by expediting highway traffic flow for the convenience of motorists and truckers.[234] But promotion of convenience for highway users—an objective only tenuously related to the safety objectives ordinarily relied upon to justify imposing the cost burden on the railroad—has been held insufficient to support a grade separation requirement.[235]

Indeed, the nuisance rationale simply breaks down when it is applied to compelled expenditures which, in effect, require the property owner to assume the burden of conferring public benefits rather than merely the cost of reducing or eliminating community harms caused by his activities.[236] Where the advantage obtained from a mandatory expenditure is enjoyed primarily, if not exclusively, by persons other than the one required to make it—as appeared to be the case with certain

230. *E.g.*, Atchison, Topeka & Santa Fe R. Co. v. Public Utilities Comm'n, 346 U.S. 346 (1953); Erie R. Co. v. Board of Public Utility Comm'rs, 254 U.S. 394 (1921).

231. *See* Sax, *supra* note 2, at 48-49; Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 73-81.

232. *See* Proceeding No. 33440, Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles, 322 I.C.C. 1, 82 (1964): "In the past it was the railroad's responsibility for protection of the public at grade crossings. This responsibility has now shifted. Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal."

233. *See, e.g.*, Seaboard Air Line R. Co. v. City of West Palm Beach, 373 F.2d 328 (5th Cir. 1967); Southern Railway Co. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969).

234. Proceeding No. 33440, Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles, 322 I.C.C. at 87 (finding number 13): "That highway users are the principal recipients of the benefits flowing from rail-highway grade separations and from special protection at rail-highway grade crossings. For this reason the cost of installing and maintaining such separations and protective devices is a public responsibility and should be financed with public funds the same as highway traffic devices."

235. Nashville, C. & St. L. R. Co. v. Walters, 294 U.S. 405 (1935). *See* Comment, *Cost Allocation and Substantive Due Process*, 27 U. CHI. L. REV. 160 (1959).

236. Dunham, *supra* note 231, at 80.

early Minnesota statutes requiring railroads to construct cattle scales for the convenience of their customers—the basic unfairness of the imposition seems obvious.[237]

In most instances, the benefits and burdens are intermixed; for example, a railroad grade separation may eliminate public hazards which are also a hazard to railroad operations, but it may, as well, confer private benefits upon both the railroad and highway users. In such instances, the nuisance rationale indicates the need for an apportionment of costs,[238] for, in the words of Justice Brandeis, the "imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."[239]

B. Utility Relocation

A second form of compelled expenditure which, when challenged on constitutional grounds, ordinarily seeks support in police power principles is related to utility relocations.[240] In a typical instance, the construction or improvement of public facilities (*e.g.*, highways, storm drains, water pipelines, sewers, etc.) necessitates the relocation, reconstruction, or alteration of privately owned structures (for convenience, described herein as "utility structures")[241] which were earlier constructed at the same location (often underground or beneath a street surface) either in the exercise of private proprietary rights[242] or pursuant to statutory[243] or contractual franchise.[244] The constitutional issues

237. Great Northern Railway Co. v. Cahill, 253 U.S. 71 (1920); Great Northern Railway Co. v. Minnesota *ex rel.* Railroad & Warehouse Comm'n, 238 U.S. 340 (1915). *See also* Delaware, L. & W.R. Co. v. Town of Morristown, 276 U.S. 182 (1928) (mandatory dedication of taxicab stand on railroad company property held an unconstitutional taking).

238. Atchison, Topeka & Santa Fe R. Co. v. Public Utilities Comm'n, 346 U.S. 346 (1953).

239. Nashville, C. & St. L.R. Co. v. Walters, 294 U.S. 405, 429 (1935).

240. *See generally* Van Alstyne, *A Study Relating to Sovereign Immunity* in 5 Calif. Law Revision Commission Reports, Recommendations, and Studies 1, 79-96 (1963).

241. *E.g.*, Passaic Water Co. v. Board of Public Utility Comm'rs, 254 U.S. 394 (1921) (relocation of water mains ordered to accommodate change of street grade). Some of the cases cited in the present connection involve relocations of publicly owned utility structures, and thus involve no issues of constitutional compensability. Allocation problems in such cases, however, are usually resolved by judicial techniques similar to those used in dealing with *private* relocations and constitutional contentions relating to them. Accordingly, they are cited herein interchangeably with cases of private relocations.

242. *E.g.*, Pacific Gas & Elec. Co. v. County of San Mateo, 233 Cal. App. 2d 268, 43 Cal. Rptr. 450 (1965).

243. *E.g.*, State of California v. Marin Municipal Water Dist., 17 Cal. 2d 699, 111 P.2d 650 (1941).

244. *E.g.*, Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co., 51 Cal. 2d 331, 333 P.2d 1 (1958).

posed by persistent governmental efforts to impose the cost of such relocation or alteration upon the owners of the utility structures are distinguishable from those arising in connection with grade crossing separations in that the safety component of the latter case is seldom, if ever, present.[245] It is thus difficult conceptually to contend that utility relocation requirements represent the use of police power to reduce externalities; the nuisance rationale simply does not fit the facts. Judicial recognition of this difference is reflected in the fact that relocation litigation is characterized by judicial efforts to define the relationship between the new governmental improvement project and the earlier incompatible structure in terms of temporal,[246] functional,[247] or conceptual[248] pri-

245. *See* Panhandle Eastern Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613, 622 (1935) (relocation of pipeline in private easement, necessitated by intersecting highway project, held constitutionally compensable; grade separation cases held distinguishable).

246. As between conflicting but equally permissible uses of a public street, the courts often favor the earlier user over the later developer. *See, e.g.*, Northeast Sacramento County Sanitation Dist. v. Northridge Park County Water Dist., 247 Cal. App. 2d 317, 55 Cal. Rptr. 494 (1966) (cost of relocating previously installed water mains held chargeable to sanitary district constructing sewers that necessitate relocation); County of Contra Costa v. Central Contra Costa Sanitary Dist., 255 Cal. App. 2d 701, 37 Cal. Rptr. 767 (1964) (realignment of county road held to justify charging cost of relocating sewer mains, located therein subsequent to original road improvement, to sanitary district). *See also* State *ex rel.* Herman v. Electrical Dist. No. 2, 474 P.2d 833 (Ariz., 1970).

247. Judicial allocation of relocation costs of utility structures located in public streets under franchise has sometimes turned doctrinally upon the court's classification of the competing uses as "governmental" or "police power" functions, as opposed to "proprietary" functions. The franchise holder is said to be under an implied contractual duty to move its facilities to make way for a proper "governmental" or "police power" purpose. *See, e.g.*, Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co., 51 Cal. 2d 331, 333 P.2d 1 (1958) (power lines relocated to permit installation of storm drains under "police power"); Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal. 2d 713, 329 P.2d 289 (1958) (gas lines relocated to make way for municipal sewers as a "governmental" function). *See also* National City v. California Water & Tel. Co., 204 Cal. App. 2d 540, 22 Cal. Rptr. 560 (1962); East Bay Municipal Utilities Dist. v. County of Contra Costa, 200 Cal. App. 2d 477, 19 Cal. Rptr. 506 (1962).

248. For example, a traditionally "governmental" purpose ordinarily will not excuse payment of just compensation for the cost of relocating private structures located upon a private easement. *See* Panhandle Eastern Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613, 622 (1935); Southern California Gas Co. v. Los Angeles County Flood Control Dist., 169 Cal. App. 2d 840, 338 P.2d 29 (1959); County of Los Angeles v. Wright, 107 Cal. App. 2d 235, 236 P.2d 892 (1951). But the more tenuous interest of the holder of a franchise "privilege" to locate utility structures in a public street is deemed subordinate to such "governmental" functions, thus permitting the governmental entity to require uncompensated relocation of its facilities. *See, e.g.*, East Bay Municipal Utilities Dist. v. County of Contra Costa, 200 Cal. App. 2d 477, 19 Cal. Rptr. 506 (1962).

The same result is often conceptualized by construing the franchise "privilege" as subject to an express or implied contractual condition that the utility structures will be relocated on demand by the franchise grantor. *See, e.g.*, State of California v. Marin Municipal Water Dist., 17 Cal. 2d 699, 111 P.2d 651 (1941) (express condition); National City

orities. Just compensation is generally required if the existing utility structure is attributed to an interest having a higher priority than the new project; uncompensated compliance with the demand to relocate is required if the priorities are reversed.[249] Thus, in the absence of statute, judicial ranking of the competing governmental and private interests assumes a controlling role in the formal allocation of relocation costs; however, the actual criteria of decision are often elusive, being obscured by conclusionary and circular reasoning in the reported court opinions.[250]

In many states, most notably California, the legislature has undertaken to anticipate many utility relocation issues by enacting statutory standards for allocation of relocation costs in selected instances.[251] Some of the statutes, expressly placing the burden on the private utility, purport to exonerate governmental bodies from relocation costs;[252] others incorporate constitutional standards as the applicable criteria[253] or, by omission, leave the question to the processes of adjudication.[254] The trend of legislative policy, however, as exemplified by many California

v. California Water & Tel. Co., 204 Cal. App. 2d 540, 22 Cal. Rptr. 560 (1962) (implied condition); 6 U.C.L.A.L. Rev. 336 (1959). This approach, of course, does not preclude constitutional compensability issues from arising, since it is clear that the enjoyment of a "privilege" cannot be qualified by imposition of unconstitutional conditions. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935).

249. *See* cases cited in notes 246-48, *supra*.

250. Tentative judicial efforts to grapple with underlying policy issues may be seen in County of Contra Costa v. Central Contra Costa Sanitary Dist., 182 Cal. App. 2d 176, 5 Cal. Rptr. 783 (1960) and Northeast Sacramento County Sanitation Dist. v. Northridge Park County Water Dist., 247 Cal. App. 2d 317, 55 Cal. Rptr. 494 (1966).

251. The California statutes are discussed in Van Alstyne, *supra* note 240, at 79-97. *See also, e.g.*, Conn. Gen. Stats. § 8-133a (Supp. 1969) ("equitable share" of relocation costs in connection with urban renewal projects required to be paid by redevelopment agency, calculated on formula basis); Kan. Stats. Anno. § 68-415 (1964) (utility relocations in connection with state highway improvements required to be assumed by utility); Okla. Stats. Ann. tit. 69, § 1403 (1969) (accord).

252. *E.g.*, CAL. STS. & HWYS. C. § 680 (West 1939), (utility required to assume cost of relocating utility structures in state highways, where necessary to promote safety or permit highway improvement), held valid in State v. Marin Municipal Water Dist., 17 Cal. 2d 699, 111 P.2d 651 (1941). To the extent that such statutes attempt to exonerate the public agency from compensating for relocating structures located in privately owned rights of way or easements, they may constitute an unconstitutional taking. *See* Panhandle Eastern Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613 (1935); Southern California Gas Co. v. Los Angeles County Flood Control Dist., 169 Cal. App. 2d 840, 338 P.2d 29 (1959).

253. *E.g.*, Los Angeles County Flood Control Act, CAL. WATER C. APP. § 28-16 (West 1968), applied in Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co., 51 Cal. 2d 331, 333 P.2d 1 (1958).

254. *E.g.*, CAL. H. & S. C. §§ 4700-858 (West 1939) (county sanitation districts); CAL. WATER C. §§ 55000-991 (West 1953) (county waterworks districts).

statutes, strongly favors payment of such costs by the agency which engages in activities requiring relocation of pre-existing utility structures.[255] This legislative approach often requires compensation to be provided as a matter of sound policy in many cases in which constitutional standards do not impose that obligation.[256] Such statutes appear to reflect a determination that imposing relocation costs upon the agency which disrupts the status quo deters overzealous or heedless project planning by creating an economic incentive to avoid unnecessary utility relocations; promotes stability of legitimate expectations by utility owners who were earlier in time; reduces waste in the allocation of scarce resources; and generally produces a more equitable spreading of the costs of new public improvements by distributing them over the beneficiaries of the new project rather than adding to the costs previously assumed by beneficiaries of the earlier installation.[257]

The statutory solutions which have been devised, however, incorporate a bewildering array of apparently idiosyncratic, ambiguous, and incomplete provisions demonstrating the absence of a consistently applied legislative policy which results from ad hoc and episodic enactment of legislation. For example, some California measures require

255. *E.g.*, CAL. GOVT. C. § 61610 (West 1955) (community services districts); CAL. STS. & HWYS. C. §§ 700-11 (West 1947) (utility relocations on freeway projects); CAL. PUB. UTIL. C. § 21634 (West 1953) (state division of aeronautics); CAL. PUB. UTIL. C. § 25703 (West 1955) (transit districts); CAL. PUB. UTIL. C. § 30631 (West 1964) (Southern California Rapid Transit District); CAL. PUB. UTIL. C. § 96002 (West 1965) (Santa Barbara Metropolitan Transit District); CAL. STS. & HWYS. C. § 32950.5 (West 1968) (parking authorities); CAL. WATER C. §§ 56041(d), 56060 (West 1955) (county drainage districts); CAL. WATER C. §§ 71693, 71694 (West 1963) (municipal water districts); CAL. WATER C. § 82301 (West 1965) (sanitation authorities). Additional California statutes are collected in Van Alstyne, *supra* note 240, at 80-88.

As illustrative of similar legislation in other states, see Conn. Gen. Stats. § 13a-126 (Supp. 1969) (relocations caused by highway improvements); Kan. Stats. Ann. § 68-2005 (1964) (turnpike improvements). The Federal Aid Highway Act of 1956, § 111, 23 U.S.C. § 123 (1966), authorizes federal financial participation in federal aid and Interstate System highway projects to include utility relocation costs which are not in violation of state law. Accordingly, several states expressly condition state payment of utility relocation costs upon eligibility for federal reimbursement. *See, e.g.*, Neb. Rev. Stats. § 39-1304.02 (reissue vol. 1968); Okla. Stats. Ann., tit. 69, § 1205 (Supp. 1970); Texas Rev. Civ. Stats., § 6674 w-4 (1969).

256. Statutory authorization for payment of relocation costs which are not constitutionally required but which promote public purposes is regarded as a valid exercise of legislative discretion. *See, e.g.*, Southern Cal. Gas Co. v. County of Los Angeles, 50 Cal. 2d 713, 719, 329 P.2d 289, 292 (1958) (dictum); State Highway Dept. v. Delaware Power & Light Co., 39 Del. Ch. 467, 167 A.2d 27 (1961); Opinion of the Justices, 152 Me. 449, 132 A.2d 440 (1957).

257. *See, e.g.*, County of Contra Costa v. Central Costa Sanitary Dist., 182 Cal. App. 2d 176, 5 Cal. Rptr. 783 (1960).

that the government assume the costs of "removing, reconstructing, or relocating"[258] or "relocating or altering or otherwise changing" utility structures;[259] others restrict liability to the costs of "removal and relocation,"[260] or instances in which utility structure must be "replaced."[261] In some, the public agency is merely directed to restore the property crossed or intersected to its former state of usefulness.[262] Similarly, although many provisions requiring cost reimbursement are completely silent as to the elements of expense which may properly be included in the computation,[263] some expressly require that relocation costs reflect appropriate deductions for depreciation of superseded structures, credit for betterments and salvage, and inclusion of the costs necessarily incurred in rearranging or rehabilitating other facilities related to those relocated[264] and a few expressly give agencies the power to negotiate and allocate the relocation costs by contractual arrangements.[265]

Other similar disparities of detail, inexplicable except as a product

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258. *E.g.*, CAL. PUB. UTIL. C. § 40162 (West 1965) (Orange County Transit District); CAL. PUB. UTIL. C. § 98212 (West 1967) (Santa Cruz Metropolitan Transit District); CAL. WATER C. §§ 71693, 71694 (West 1963) (municipal water districts). *See also* CAL. PUB. UTIL. C. § 30631 (West 1964) (Southern California Rapid Transit District) ("relocation, replacement, or alteration").

259. *E.g.*, Lassen—Modoc County Flood Control and Water Conservation District Act, § 3(g), CAL. WATER CODE APP. § 92-3(g) (West 1968); Siskiyou County Flood Control and Water Conservation District Act, § 3(g), CAL. WATER CODE APP. § 89-3(g) (West 1968).

260. *E.g.*, CAL. PUB. UTIL. C. § 21634 (West 1953) (state division of aeronautics); CAL. STS. & HWYS C. § 31006 (West 1967) (Folsom Lake Bridge Authority); El Dorado County Water Agency Act, § 3(g), CAL. WATER CODE APP. § 96-8 (West 1968). *See also* CAL. STS. & HWYS. C. § 32950.5 (West 1951) (parking authorities) ("removal, relocation, or alteration"); CAL. WATER C. §§ 56041(d), 56060 (West 1955) (county drainage districts) ("alteration or relocation").

261. *E.g.*, Bighorn Mountains Water Agency Act, § 15(9), CAL. WATER C. APP. § 112-15(9) (West Supp. 1971); Tuolumne County Water Agency Act, § 8, CAL. WATER C. APP. § 113-8 (West Supp. 1971). In statutes adhering to this pattern, reimbursable costs of replacement are required to be accompanied by "costs incurred to rearrange or rehabilitate the facilities" not required to be replaced.

262. *E.g.*, CAL. PUB. UTIL. C. § 16466 (West 1953) (public utility districts); CAL. WATER C. § 43154 (West 1951) (water storage districts); CAL. WATER C. § 55377 (West 1953) (county waterworks districts).

263. *E.g.*, CAL. GOVT. C. § 61610 (West 1955) (community services districts); CAL. PUB. UTIL. C. § 25703 (West 1955) (transit districts).

264. *E.g.*, CAL. PUB. UTIL. C. § 10013.1 (West 1951) (Santa Clara County Transit district); CAL. PUB. UTIL. C. § 28953 (West 1957) (San Francisco Bay Area Rapid Transit District); West Bay Rapid Transit Authority Act, § 6.6, CAL. PUB. UTIL. C. APP. 3, § 6.6 (West Supp. 1971); Tuolumne County Water Agency Act, § 8, CAL. WATER C. APP. § 113-8 (West Supp. 1971). The most carefully defined and detailed set of computation criteria in California statutory law is in CAL. STS. & HWYS. C. § 705 (West 1947) (cost of utility relocations on freeway projects).

265. *See, e.g.*, CAL. STS. & HWYS. C. §§ 706 (West 1947), 707.5 (West 1951) (freeways).

of the legislature's failure to examine the problem of utility relocations as a whole, permeate the relevant statutes.[266] The nonuniform and haphazard pattern of legislative treatment of the problem of utility relocations creates obvious opportunities for arbitrary and discriminatory results. Under present California statutory law, for example, a public utility company operating in several different communities may receive full compensation for relocation or alteration of its subsurface lines to accommodate some types of governmental improvements, but not others; be reimbursed by one governmental agency, but not another; be compensated by different agencies for substantially identical relocation work in amounts which reflect varying methods of computation. Similar aberrational results obtain when publicly owned utility structures are relocated to make way for public improvements by other public agencies.[267] Such disparate results may generate significant inequities in cost distribution and cost sharing among consumers, taxpayers, and rate payers.[268] The fact that these inequities, for the most part, function at a low level of public visibility does not diminish the desirability of legislative development of a more rationally consistent and uniform approach to the problem.[269]

C. Land Development Controls

A third category of situations in which contributions of private property or funds are routinely required by governmental action is rooted

266. For further discussion of the California statutes, see Van Alstyne, *supra* note 240, at 80-96. Similar differences of detail appear in the utility relocation statutes of other states. *Compare* Conn. Gen. Stats. § 8-133a (Supp. 1969) *with* Texas Rev. Civ. Stats. § 6674w-4 (1969).

267. *Cf.* County of Contra Costa v. Central Costa Sanitary Dist., 225 Cal. App. 2d 701, 37 Cal. Rptr. 767 (1964); East Bay Municipal Utilities Dist. v. County of Contra Costa, 200 Cal. App. 2d 477, 19 Cal. Rptr. 506 (1962).

268. These three groups, by whom it is assumed the relocation costs ordinarily will be borne (excluding, on *de minimis* grounds, others, such as stockholders, who may assume a portion of the burden in some instances), are seldom of identical composition and may vary substantially in membership. Consumers, for example, may reside over a much larger utility service area (subject to a common rate structure) than the area benefited by the governmental project which made the relocation necessary. Many consumers of utility services may not be taxpayers of the governmental unit, or may be exempt from its tax levies (e.g., churches, eleemosynary institutions, governmental entities). When the utility services are provided by public agencies, moreover, the total costs of service (including non-reimbursed relocation expense) may not be fully spread over utility consumers, in the form of service rates and charges, but may be defrayed in part by taxation. It follows that the allocation of relocation costs as between the immediate parties to the project may significantly alter the identity of the persons who ultimately bear the cost burden.

269. *See* Van Alstyne, *supra* note 240, at 89.

in the practical dynamics of land development operations. Subdivision controls, originally a response to conveyancing needs as well as to demands for consumer protection against fraudulent, premature, and badly planned land promotion schemes, have become a major tool for guiding and coordinating community development and ensuring orderly compliance with minimum standards of design and improvement.[270] The principal point of control is a requirement that a land developer obtain official approval of his subdivision plans before engaging in sales operations; approval is contingent upon compliance with officially promulgated standards relating to such matters as street alignments, grades and widths, lot sizes and layout, utility service facilities, local traffic laws, and drainage provisions.[271] Reasonable conditions of this sort have generally been perceived as conducive to orthodox police power objectives relating to public health, safety, and welfare. Thus, they have generally been regarded as constitutionally permissible restraints upon freedom of property ownership and development.[272]

Since successful land development is both legally and practically impossible unless the necessary approval is obtained,[273] the requirement of subdivision plan approval obviously constitutes a tactically powerful control device. Authority to withhold approval, coupled with the inherently judgmental nature of many typical subdivision stan-

270. *See generally* 3 R. ANDERSON, AMERICAN LAW OF ZONING §§ 19.01-.05, at 375-95 (1968). The relevant California legislation is the Subdivision Map Act, CAL. BUS. & PROF. C. §§ 11500-640. (West 1943).

271. *See* Taylor, *Current Problems in California Subdivision Control*, 13 HASTINGS L. J. 344 (1962); Reps, *Control of Land Subdivision by Municipal Planning Boards*, 40 CORNELL L. Q. 258 (1955). CAL. BUS. & PROF. C. § 11525 (West 1943) vests control of "the design and improvement of subdivisions" in the governing bodies of cities and counties, and requires every city and county to adopt an ordinance dealing with the matter. "Design" is defined to refer to "street alignment, grades and width," and also includes "land to be dedicated for park or recreational purposes." CAL. BUS. & PROF. C. § 11510 (West 1943). "Improvement" is defined to embrace street work and utilities to be installed "as necessary for the general use of the lot owners in the subdivision" as well as "local neighborhood traffic and drainage needs as a condition precedent to the approval and acceptance of the final map thereof." CAL. BUS. & PROF. C. § 11511 (West 1943). Home rule cites may expand the purview of their subdivision controls beyond the express authorizations of the Subdivision Map Act. *See* Ayres v. City of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 553, 6 Cal. Rptr. 900 (1960).

272. Ayres v. City of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); Mansfield & Swett v. West Orange, 120 N.J.L. 145, 198 A.2d 225 (1938); Annot., 11 A.L.R. 2d 524 (1949).

273. 3 R. ANDERSON, AMERICAN LAW OF ZONING § 19.04, at 391 (1968): "The problems inherent in the development of land not included in a recorded plat are so great that landowners must seek approval of their plats and qualify them for recordation."

dards, has introduced an element of bargaining into the control process, as public agencies seek to impose conditions of approval which are appropriate to public needs but not incompatible with the basic economic and fiscal realities of the particular development. Conditions routinely imposed include the installation of specified utility facilities (*e.g.*, sanitary sewers, water mains); paving of streets; the construction of sidewalks, curbs, gutters, and local drainage facilities; and dedication to the local governmental entity of the streets, utility facilities, and related easements.[274] More recently, in recognition of the fact that the influx of new residents stimulated by a subdivision development tends to increase the demands made upon existing public recreational, educational, and other service facilities, efforts have been made to require subdividers to dedicate or reserve lands for public use for such purposes or, in lieu of setting aside land, to make equivalent cash contributions to public funds, as conditions of subdivision plan approvals.[275] In many instances, where it seems likely that the cost of complying with compulsory installation and dedication conditions can readily be passed on to the purchasers of lots or homes in the subdivision, the developer may yield to such demands.[276] When the conditions become so costly or onerous as to make the proposed development unprofitable, however, litigation may well ensue in which the compelled contributions are challenged as unconstitutional takings.[277]

Similar constitutional issues, it should be noted, are not exclusively associated with subdivision controls.[278] Effective control points, at which the power to withhold official permission to alter existing land

274. *See* Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L. Q. 871 (1967).

275. In addition to *Ayres*, the recent California decisions dealing with subdivision exactions include Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970); Santa Clara County Contractors & Home Builders Ass'n v. City of Santa Clara, 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965); and City of Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960). Important treatments of the constitutional aspects of the problem are found in Johnston, *supra* note 274; Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964). *See also* Comment, *Subdivision Regulation: Requiring Dedication of Park Land or Payment of Fees as a Condition Precedent to Play Approval*, 1961 WIS. L. REV. 310; Note, *Forced Dedications in California*, 20 HASTINGS L.J. 735 (1969); Note, *Subdivision Exactions: Where is the Limit?*, 42 NOTRE DAME LAW. 400 (1967).

276. *See* 3 R. ANDERSON, AMERICAN LAW OF ZONING § 19.24, at 440-44 (1968).

277. *See, e.g.*, Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970); Pioneer Trust & Savings Bank v. Village of Mt. Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

278. 3 R. ANDERSON, AMERICAN LAW OF ZONING §§ 14.65-.66, at 46-53 (1968) (exactions imposed as conditions of zoning variances).

uses can be employed to exact contributions of land or funds, also exist in connection with the administration of zoning and building code regulations. Thus, the granting of a zoning variance or use permit,[279] or the issuance of a building permit,[280] may be declared conditional upon the applicant's dedication of land to the public agency. As in the case of subdivision exactions, forced dedications in these instances may involve trade-offs which are mutually acceptable. When it is considered that the obligation of maintenance and taxation on that property is also terminated,[281] obtaining the required official permission may yield advantages that outweigh loss of the property which is to be dedicated. On the other hand, the public agency may significantly enhance its assets without direct cost, while presumably obtaining compliance with its land use control policies.

The use of forced dedications as an instrument of land use control appears to involve practical policy risks, emanating largely from the institutional dynamics governing relationships between land developers and land use control officials, which may significantly influence application of constitutional principles.[282] One obvious danger is that in periods of public fiscal shortage, public agencies may yield to the temptation to maximize the exactions demanded of land developers as a means of financing governmental services; collateral policies (*e.g.*, the stimulation of adequate supplies of low and moderate cost housing) may be compromised as a result. Another risk is that the acquisitive potential represented by forced dedications may, at least in a practical sense, improperly displace the planning and developmental standards

279. *See* Bringle v. Board of Supervisors, 54 Cal. 2d 86, 4 Cal. Rptr. 493, 351 P.2d 765 (1960) (dedication for widening of street as condition precedent to zoning variance); Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969) (street dedication as condition precedent to zoning change); Alperin v. Middletown, 91 N.J. Super. 190, 219 A.2d 628 (1966) (dedication for street widening as condition precedent to zoning variance).

280. *See* Sommers v. City of Los Angeles, 254 Cal. App. 2d 605, 62 Cal. Rptr. 523 (1967) (dedication for street widening as condition precedent to building permit); Southern Pacific Co. v. City of Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966), *appeal dismissed*, 385 U.S. 647 (1967).

281. *See* Ayres v. City of Los Angeles, 34 Cal. 2d 31, 41, 207 P.2d 1, 7 (1949); 3 R. ANDERSON, AMERICAN LAW OF ZONING § 19.25, at 444-45 (1968). Dedication does not relieve the subdivision of the duty of maintenance, since acceptance of the dedicatory offer may be conditioned upon continued private maintenance. *See, e.g.*, Galeb v. Cupertino Sanitary Dist., 227 Cal. App. 2d 294, 38 Cal. Rptr. 580 (1964).

282. *Cf.* 3 R. ANDERSON, AMERICAN LAW OF ZONING § 19.24, at 440-44 (1968). *See also* Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 1143, 90 Cal. Rptr. 663, 673 (1970): "But we cannot subscribe to the premise that the police power expands, and property rights guaranteed by the Constitutions contract, in proportion to the general fiscal exigencies which make expropriation attractive."

which should underlie such actions as the primary criterion underlying official decision-making on subdivision plans, zoning changes, and building permits. A third is that judicial surveillance of dedication requirements may be ineffective and sporadic. The result would be diminution of constitutional protection against overextension of the police power, since the cost and delays inherent in litigation tend to discourage resistance to improper demands and induce compliance by the developer. The unlikelihood of legal challenge may, in turn, reinforce existing incentives for local officials to exploit their superior bargaining position by expanding the practice of imposing dedication conditions to its maximum feasible extent.[283]

A typical judicial response to these perceived risks is to construe enabling legislation narrowly, and to deny approval to compelled contribution conditions which do not have a firm basis in clear statutory grants of power.[284] The attractiveness of dedication requirements in times of governmental budget shortages has tended, however, to produce a legislative counteraction in the form of proliferating statutory authorizations to local governmental agencies to utilize the device in a variety of situations.[285] The constitutional dimensions of exactions imposed under such statutory provisions appear, from recent indications, to be a likely subject for judicial investigation for some years to come.[286]

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283. One indication of the practical pressures felt by local officials to utilize conditional exactions to relieve a budgetary pinch is the frequency with which local efforts to impose such exactions have been held invalid as *ultra vires*. *See, e.g.*, Santa Clara County Contractors & Home Builders Ass'n v. City of Santa Clara, 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965) (cash deposit to general recreational capital outlay fund of city); Newport Bldg. Corp. v. City of Santa Ana, 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962). Wine v. City of Los Angeles, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960); Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957); Rosen v. Downers Grove, 19 Ill. 2d 488, 167 N.E.2d 230 (1967); Coronado Development Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962); Ridgemont Development Co. v. City of East Detroit, 358 Mich. 387, 100 N.W.2d 301 (1960); West Park Ave., Inc. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1 (1966); Haugen v Gleason, 226 Or. 99, 359 P.2d 108 (1961); City of Corpus Christi v. Unitarian Church, 436 S.W.2d 923 (Tex. Civ. App. 1968).

284. *See* Johnston, note 274 *supra*, at 875-76.

285. The California Subdivision Map Act, CAL. BUS. & PROF. C. §§ 11500-641 (West 1943), authorizes dedications or cash contributions, for streets and alleys § 11535 (West 1943), planned drainage facilities and sanitary sewers § 11443.5 (West 1965), parks and recreational facilities § 11546 (West 1965), construction of bridges § 11547 (West 1970), and easements for public access to shorelines, lakes, and reservoirs §§ 11610.5, 11610.7 (West 1970). In addition, a form of conditional dedication of land for public school purposes is authorized in connection with large subdivisions. CAL. BUS. & PROF. C. § 11525.2. (West 1943).

286. *See* Johnston, *supra* note 274, at 922: "Virtually every subdivision control dispute

Courts considering constitutional challenges to dedicatory conditions have generally sought to strike a balance between the regulatory purposes sought to be achieved and the constitutional protections embodied in the just compensation clauses.[287] Cases occasionally approving such exactions on the fictive theory that the developer, being under no compulsion to improve and sell his land, acts "voluntarily"[288] when he conse: to dedications in order to obtain the "privilege"[289] of official project approval are both unrealistic and opposed in principle to the "unconstitutional conditions" doctrine.[290] A California court recently articulated a more acceptable judicial approach: "Not all conditions are valid. . . . An arbitrarily conceived exaction will be nullified as a disguised attempt to take private property for public use without resort to eminent domain or as a mask for discriminatory taxation."[291] Such exactions must therefore survive review under traditional tests of the "reasonableness" (and hence the validity) of police power measures.[292] As in other challenges to police power measures,

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presents issues concerning the constitutionality and interpretation of the enabling act, the validity of the implementing ordinance, and the question whether a given regulation constitutes so severe a burden as to be unreasonable as applied to a particular subdivider. These issues are closely interrelated. Each involves judgments about the proper scope of the police power and the ambit of freedom from official regulation that is implicit in the concept of private property." The accuracy of the prediction implicit in the first sentence here quoted is confirmed by Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970).

287. *See, e.g.*, Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 1144, 90 Cal. Rptr. 663, 674 (1970): "Because the plat of a subdivision is required to be approved and therefore affords a point of control with reference to those immediate and direct costs which the physical development of the subdivision makes necessary for public health, safety and welfare, it does not follow that communities may use this point of control to solve all of the community problems they foresee, based on the increased population."

288. The inadequacies of the theory of "voluntariness" are incisively exposed by Johnston, *supra* note 274, at 876-81. "Any rationalization that by presenting a subdivision map for approval, the subdivider voluntarily offers to make any 'donations' required by the authorities is a fiction which cannot be permitted to subvert the Constitution." Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 1139, 90 Cal. Rptr. 663, 670 n. 8 (1970).

289. Johnston, *supra* note 274, at 881-85.

290. The grant of a lawful public "privilege" may not be conditional upon unreasonable deprivation or waiver of constitutional protection. Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969). *See also* Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 504-505, 55 Cal. Rptr. 401, 413-14, 421 P.2d 409, 421-22 (1966), and authorities there collected.

291. Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 421, 79 Cal. Rptr. 872, 879 (1969).

292. Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970).

burdens of pleading and proof as to the unreasonableness of the particular exaction are upon the complaining landowner.[293]

Judicial attempts to formulate decisional criteria by which to assess constitutionally based claims of unreasonableness have ordinarily focused upon the relationship between the nature and magnitude of the exaction and the community advantages discernibly promoted by it.[294] The applicable general rule is that "conditions imposed on the grant of land use applications are valid if reasonably conceived to fulfill public needs emanating from the landowner's proposed use."[295] In this formula, the concept of public needs includes the need to protect the surrounding community from harmful consequences caused by the project, as well as the need to provide additional service facilities to meet the increased demands resulting from the project.[296] Although the distinction between these two aspects of public need may be analytically useful, it seems clear that they overlap and blend into one another to a significant degree, for the principal external harms emanating from a particular land development will often be perceived as an overloading of existing public service facilities by the new residents. In either aspect, however, an exaction is valid only if it does not exceed what is reasonably appropriate to satisfy the public need caused by the project.[297] This test, at least in theory, is calculated to limit the risk of overextended use of the police power: where a dedication requirement

293. *Id. See also* Bringle v. Board of Supervisors, 54 Cal. 2d 86, 4 Cal. Rptr. 493, 351 P.2d 765 (1960).

294. *See, e.g.*, Mid-Way Cabinet Fisture Fmg. Co. v. County of San Joaquin, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967); Sommers v. City of Los Angeles, 254 Cal. App. 2d 605, 62 Cal. Rptr. 523 (1967).

295. Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 421, 79 Cal. Rptr. 872, 879 (1969); *accord*, Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970). Substantial variations exist in the case law as to the strength of the showing required to establish that the exaction is necessitated by the development. *Compare* Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 379-80, 176 N.E.2d 799, 801-02 (1961) (costs imposed on developer must be "specifically and uniquely attributable" to the development) *with* Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 35, 394 P.2d 182, 188 (1964) (legislative determination that development created the need satisfied by the exaction deemed almost conclusive). *See generally* Johnston, *supra* note 274, at 907-21.

296. Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).

297. Bringle v. Board of Supervisors, 54 Cal. 2d 86, 4 Cal. Rptr. 493, 351 P.2d 765 (1960); Ayres v. City of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1, 11 A.L.R.2d 503 (1949). *See also* Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966); Jordan v. City of Menominee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

is found to be "only an attractive device for the public benefit, without the existence of a reasonable nexus, based upon some physical condition created upon or to be created upon the owner's property," the exaction ordinarily will be rejected.[298]

On-site dedications and physical improvements in a subdivision, such as streets, utility lines, and local drainage facilities, are easily compellable under this approach when they are discerned as essential to use and enjoyment of lot owners, and thus of substantial benefit to them.[299] Similarly, contributions to the cost of off-site improvements, such as adequate drainage or sewage outlets to serve subdivision needs, are readily seen as valid exactions in the absence of a showing that they are disproportionate to such needs.[300]

Constitutional doubts arise, however, when on-site dedications or

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298. Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 1141, 90 Cal. Rptr. 663, 672 (1970).

299. *See* Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956) (curbs, gutters, and storm sewers); Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964) (parks and playgrounds); Brazer v. Borough of Mountainside, 102 N.J. Super. 497, 246 A.2d 170 (1968) (street right of way); Johnson v. Benbrook Water & Sewer Authority, 410 S.W.2d 644 (Tex. Civ. App. 1966), *cert. denied*, 393 U.S. 836 (1968); Jordan v. City of Menominee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966) (school, park, and recreation lands). Exactions required as conditions precedent to zoning changes and building permits are generally sustainable on the same basis. *See, e.g.*, Bringle v. Board of Supervisors, 54 Cal. 2d 86, 4 Cal. Rptr. 493, 351 P.2d 765 (1960) (street widening easement required to accommodate additional traffic burdens caused by use for which zoning variance requested); Southern Pacific Co. v. City of Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966), *appeal dismissed*, 385 U.S. 647 (1967) (*semble*).

300. City of Buena Park v. Boyer, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960) (off-site drainage channel); Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960) (outfall sewer line expansion, replacement, and maintenance); Rounds v. Board of Water & Sewer Commr's, 347 Mass. 40, 196 N.E.2d 209 (1964) (water mains). Where economic considerations indicate the desirability of building off-site facilities with excess capacity to meet future demands caused adjoining or nearby property developments, rebate contracts are often employed by which the original developer is repaid for his additional investment out of "hook-in" fees charged to subsequent users. *See, e.g.*, CAL. BUS. & PROF. C. §§ 11543 (West 1947), 11543.6; (West 1965) Lawrence v. City of Concord, 156 Cal. App. 2d 531, 320 P.2d 215 (1958). A significant problem suggested by this technique relates to the need for adequate standards and procedures for allocating costs attributable to the present development as distinguished from costs properly chargeable to future users or others benefited by the improvement. *See, e.g.*, Longridge Builders, Inc. v. Planning Board of Princeton Township, 52 N.J. 348, 245 A.2d 336 (1968), *discussed in* Johnston, *Developments in Land Use Control*, 45 NOTRE DAME LAW. 399, 414-15 (1970); Lake Intervale Homes, Inc. v. Township of Parsippany-Troy Hills, 28 N.J. 423, 147 A.2d 28 (1958). In addition, since the developer is, in effect, forced to make an interest-free and highly speculative loan by such arrangements, the possibility of constitutional challenge remains open.

monetary exactions are shown to be excessive when gauged by on-site needs; they must find their justification, if any, in the amelioration of external harms or burdens allegedly caused by the project.[301]

New subdivision or building projects are usually, if not invariably, a reflection of general community economic and population growth. Consequently, the external burdens immediately and directly imposed by the physical development of the project may blend into and become difficult to isolate from those which are consequences of general community growth.[302] The latter costs must be borne by the taxpayers generally. As Judge David has cogently observed, neither governmental fiscal exigencies (*i.e.*, general community burdens) nor general public benefits can provide constitutional support for uncompensated exactions of private property or funds: "On that basis, any appropriation of land for public use without compensation could be justified."[303] Exactions calculated to satisfy external needs directly caused by the project itself, however, are constitutionally permissible.[304]

In the leading case of *Ayres v. City of Los Angeles*,[305] for example, a forced opening, widening, and dedication of land for street purposes was upheld where a reasonable basis in fact was shown for the legislative determination that the exactions were necessary to accommodate present and future internal traffic flow generated by the subdivision, and to mitigate peripheral traffic congestion caused by concentration of subdivision traffic at ingress and egress points.[306] Similarly, *Associ-*

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301. Most of the litigation relating to this issue has involved alleged efforts to (a) mitigage external traffic congestion aggravated by the development, [*compare* Mid-Way Cabinet Fixture Mfg. Co. v. County of San Joaquin, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967) (dedicatory condition held invalid) *with* Sommers v. City of Los Angeles, 254 Cal. App. 2d 605, 62 Cal. Rptr. 523 (1967) (dedicatory condition held valid).]; or (b) relieve overburdened educational or recreational facilities allegedly overburdened by service demands from the residents of the new development. *See, e.g.*, Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970); Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966). *See generally* Johnston, *supra* note 274, at 903-21.

302. *See* Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960). Some courts have attempted to evade the allocation problem by indulging in a practically conclusive presumption favoring the legislative determination. *See, e.g.*, Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964).

303. Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 1144, 90 Cal. Rptr. 663, 674 (1970).

304. *Id.*

305. 34 Cal. 2d 31, 207 P.2d 1, 11 A.L.R.2d 503 (1949).

306. Loosely worded language in the *Ayres* opinion has been a source of much confusion in the law relating to subdivision dedications. *See* Taylor, *Current Problems*

ated Home Builders v. City of Walnut Creek,[307] declared a municipal exaction for park and recreational purposes of cash or, in lieu thereof, land at the rate of 1.3 acres per thousand residents, to be prima facie valid, since it was based upon a not unreasonable legislative determination that that quantum of land was ordinarily required for neighborhood facilities directly benefiting subdivision residents. In other decisions sustaining exactions, conclusions that the challenged exactions were not shown to be disproportionate to needs directly caused by the projects in question have been emphasized.[308] Absence of a reasonable nexus of this kind has been relied on to invalidate other exactions.[309]

It is generally recognized that determination of the issues posed by the nexus test are controlled primarily by the underlying factual circumstances, viewed with deference to the legislative judgments under attack.[310] The inherent ambiguities of the test, however, expose

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in California Subdivision Control, 13 HASTINGS L.J. 344, 352 (1962); Johnston, *supra* note 274, at 889-894. A restrictive interpretation of *Ayres* advanced by the California Attorney General, 29 Cal. Op. Att'y Gen. 49 (1957), has apparently been endorsed by the Court of Appeal for the First District. Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970). The description of *Ayres* in the text adheres to the explanation advanced by Judge David in the latter case, 11 Cal. App. 3d at 1145, 90 Cal. Rptr. at 670-671.

307. 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970).

308. *E.g.*, Bringle v. Board of Supervisors, 54 Cal. 2d 86, 4 Cal. Rptr. 493, 351 P.2d 765 (1960) (street widening dedication to reduce traffic congestion imputed to improvement); Sommers v. City of Los Angeles, 254 Cal. App. 2d 605, 62 Cal. Rptr. 523 (1967) (similar); Southern Pacific Co. v. City of Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966), *appeal dismissed*, 385 U.S. 647 (1967) (similar).

309. Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969) (triable issue as to reasonable nexus held to exist, precluding summary judgment as to validity of street dedication requirement); Mid-Way Cabinet Fixture Mfg. Co. v. County of San Joaquin, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967) (trial court determination that reasonable nexus existed reversed as lacking in factual support). *See also* Wine v. City of Los Angeles, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960) (dictum); Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957) (alternative ground).

310. *See* cases cited in notes 307-08, *supra*.

It has often been noted that compelled exactions may, in many instances, confer correlative benefits upon the affected property owners, and thus, for purposes of constitutional analysis, may be regarded as a form of financing technique designed to distribute the cost of public improvements over the class of persons principally advantaged. *See* Johnston, *supra* note 274, at 890-903 (1967); Note, *Forced Dedications in California*, 20 HASTINGS L.J. 735, 740-43 (1969). The plausibility of the analogue has stimulated elaborate proposals for development of sophisticated techniques by which land use exactions may be fairly employed to shift the burdens of municipal services to the newcommers who make them necessary. *See* Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964). *See also* Reps and Smith, *Control of Urban Land Subdivision*, 14

property owners to the danger that it may be readily manipulated to achieve constitutionally impermissible goals. Even the relatively sophisticated supplementary criteria provided by the expansive California enabling legislation relating to subdivision exactions are susceptible to criticism upon this score[311] and, at least in some appli-

SYR. L. REV. 405 (1963). The assumption underlying these proposals—that the existence of correlative benefits to the property owner may provide constitutional justification for compelled exactions—was apparently rejected in Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 422, 79 Cal. Rptr. 872, 880 (1969):

> Standing alone, the landowner's economic benefit supplies inadequate underpinning for the exaction. The police power forms the exaction's constitutional foundation. That power is aimed at public need, not private profit. The landowner should be free to reject the paternalism which forces him into an exaction conceived for his personal benefit. The decisions seem to utilize the "private benefit" notion as judicial gloss after the prime essential, a public burden emanating from the improvement, has been discerned . . . . The fulfillment of public needs emanating from the proposed land use is the *sine qua non* of the exaction's reasonableness.

This position, it is submitted, fails to distinguish between two important but separable concepts implicit in the constitutional requirements of just compensation for takings or damagings of private property. Absence of public needs requiring fulfillment by a forced exaction, it is submitted, might support a holding that it was invalid upon the ground that it was not for a legitimate "public use" or "public purpose." *See* text accompanying notes 65-105, *supra*. *Cf.* People *ex rel.* Department of Public Works v. Superior Court, 68 Cal. 2d 206, 65 Cal. Rptr. 342, 436 P.2d 342 (1968) ("public use" requirement in eminent domain); Note, *Excess Condemnation in California—A Further Expansion of the Right to Take*, 20 HASTINGS L.J. 571 (1968). But this would be quite different from a rule that benefit to the property owner is irrelevant to the constitutionality of such exactions. There is ample authority for the proposition that an owner's constitutional right to "just compensation" is limited to actual losses sustained. *See, e.g.*, Kane v. City of Chicago, 392 Ill. 172, 64 N.E.2d 506 (1946); Evans v. Wheeler, 209 Tenn. 40, 348 S.W.2d 500 (1951). Indeed, the realization of benefits by the property owner constitute a form of compensation which, in federal eminent domain proceedings, supports denial of monetary awards when the value of the property remaining after a partial "taking" exceeds the original value of the intact parcel. Bauman v. Ross, 167 U.S. 548 (1897); Aaronson v. United States, 79 F.2d 139 (D.C. Cir. 1935); Note, *Benefits and Just Compensation in California*, 20 HASTINGS L.J. 764 (1969). This view of the role of correlative benefits was properly recognized in Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 1145, 90 Cal. Rptr. 663, 674 (1970): "Such benefit or lack of it . . . bears on the issue of [the property owner's] constitutional right to damages . . . ."

311. *See, e.g.*, CAL. BUS. & PROF. C. § 11546 (West 1965) which authorizes city and county governing bodies, by ordinance, to require land dedications (or payments of fees in lieu of land) for "park or recreational purposes" if certain criteria are satisfied. The criteria, however, are devoid of specific limitations, being addressed largely to local legislative discretion. For example, the dedication ordinance must include "definite standards for determining the proportion of a subdivision to be dedicated and the amount of any fee to be paid in lieu thereof." This delegation to the local board to spell out standards is scarcely limited in any meaningful way by the further requirement that the "amount and location of land to be dedicated or the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision." In Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663, 674-78 (1970), the court found it possible to

cations, appear to authorize exactions that exceed constitutional limitations.[312] The absence of statutory standards governing dedications required in connection with zoning modifications and building permits poses an even more obvious risk of official overreaching with respect to private property interests.[313] It is submitted that statutory prescription of carefully conceived specific criteria applicable to the entire range of compelled contributions should be ranked among the important objectives of contemporary law reform. In this effort, the carefully considered views of the court in *Associated Home Builders*,[314] which appear to take an intermediate position between unduly specific nexus requirements and excessive deference to legislative judgments, are deserving of respectful attention.[315]

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sustain these standards as against a charge of indefiniteness only by incorporating into them the constitutionally required element of a direct nexus between the required dedication and the needs created by the subdivision. While the latter standard may improve the inherent vagueness of the statutory "reasonable relationship" test to some extent, the fact that the property owner has the burden of proof on the issue, and must overcome a presumption favoring the legislative determination of the local governing body, implies the existence of considerable flexibility of action by the latter agency. *See id.* at 1144, 90 Cal. Rptr. at 679-80. The tendency of local governing bodies to try to stretch the concept of reasonableness as far as possible, so that compelled exactions will make as large as possible contributions to local fiscal burdens, is documented not only by the Walnut Creek ordinance considered in *Associated Home Builders* but in many other decisions. *See, e.g.*, Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969); Wine v. City of Los Angeles, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960); Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957). *Cf.* Newport Bldg. Corp. v. City of Santa Ana, 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962) (subdivision tax).

312. In *Associated Home Builders* subsection (g) of CAL. BUS. & PROF. C. § 11546 West 1965 was held invalid for indefiniteness. That subsection authorized local ordinances to require only payment of fees, in lieu of land dedications, "in subdivisions containing fifty (50) parcels or less." Absence of a statutory definition of the term, "parcels," which would adequately correlate the policy expressed in subdivision (g) with the constitutional nexus requirement, was regarded as a fatal flaw. 11 Cal. App. 3d at 1154, 90 Cal. Rptr. at 680. The court also construed the statutory term, "recreational facilities," as used in § 11546, to be limited to land acquisitions, thereby excluding structural improvements such as athletic equipment, bleachers, or lawn sprinklers. *Id.* at 1145, 90 Cal. Rptr. at 678. It is not clear from the opinion, however, whether this interpretation was regarded as essential to avoid constitutional doubts, or was deemed purely a matter of statutory construction of the terms employed in the statute.

312. In *Associated Home Builders* subsection (g) *of* CAL. BUS. & PROF. C. § 11546 with zoning changes or building permits does not impair local power to impose such exactions, since it is attributed to the local police power conferred, in the absence of conflicting state law or local charter provisions, by CAL. CONST. art. XI, § 7 (formerly CAL. CONST. art. XI, § 11). *See* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 417, 79 Cal. Rptr. 872, 876-877 (1969).

314. 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970).

315. *See also* Johnston, *supra* note 274, at 914-17, 921-24.

IV. POSSIBLE DIRECTIONS FOR LEGISLATIVE ACTION

The police power is obviously an indispensable prerogative of orderly government which must be allowed a degree of flexibility commensurate with the complexity of the issues with which it must cope. As the California Supreme Court pointedly remarked, nearly a half century ago, this power must be regarded as "elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race."[316] On the other hand, as the preceding pages demonstrate, regulatory actions ascribed to the police power tend with increasing frequency to collide with property interests safeguarded by constitutional prohibitions against uncompensated takings or damagings. With some limited exceptions, these conflicts between governmental (i.e., community) and private interests have been left for resolution by courts seeking to apply vague generalities of constitutional language supplemented by little, if any, legislative guidance. It seems beyond serious dispute, however, that legislatures have a responsibility, as well as the undeniable power, to provide both substantive criteria and procedural mechanisms designed to clarify issues, minimize dispute, and expedite resolution of such controversies.[317]

Statutory prescription of substantive standards by which the validity of police power regulations may be adjudicated, for example, could serve a useful purpose in minimizing litigation. Even if such statutes merely listed decisional factors to which evidence and argument could be addressed in the course of both legislative consideration of regulation and litigation attacking police measures,[318] it seems probable that a substantial share of the analytical ambiguity characteristic of present case law might be dissipated.[319]

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316. Miller v. Board of Public Works, 195 Cal. 477, 484-85, 234 P. 381, 383 (1925).

317. *See* Van Alstyne, *Statutory Modification, supra* note 5; Van Alstyne, *Legislative Prospectus, supra* note 5.

318. By way of example, see the criteria of decision which have been enacted governing the determinations of Local Agency Formation Commissions, CAL. GOV'T CODE § 54796 (West 1966). *Compare* this *with* the proposed model legislation set out in Note, *An Act to Establish Standards and Procedures for Municipal Boundary Adjustment*, 2 HARV. J. LEGIS. 239, 250-51 (1965). A preliminary indication of possible statutory guidelines that might be employed in connection with subdivision controls may be found in ALI MODEL LAND DEVELOPMENT CODE § 3-104, at 58-61 (Tentative Draft No. 1, 1968).

319. For example, a statutory requirement that the court, in inverse condemnation litigation attacking a police power measure, must make specific findings upon such

As to a variety of specific subjects of police power regulation, however, the need exists for objective specifications of legislative intent with respect to whether governmental goals should be achieved through payment of compensation to affected property owners, or by the more rigorous (but, from a broad social point of view, not necessarily less expensive) techniques of uncompensated legislative compulsion.[320] The United States Congress, for example, has moved in favor of compensating property owners for elimination of advertising billboards along the Interstate Highway System.[321] Similarly, the California Legislature has enacted measures requiring, in selected cases at least, reimbursement of utility owners for relocations necessitated by specified public improvements.[322] Present statutes relating to subdivision control exactions also contain provision indicating legislative concern for the more basic policy considerations relevant to compensability of private losses resulting from governmental programs.[323] Measures of this kind, although far from prevalent, suggest a growing legislative awareness that the constitutional availability of the police power to exact uncompensated compliance from property owners is not an adequate basis for declining to provide for compensation by statute.

Clarification of existing law relating to police power programs

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issues as the economic loss sustained by the plaintiff as a direct result of the regulation, and the cost and relative effectiveness of alternative means for accomplishing the same regulatory goal, a sounder basis for adjudication and review might be available. *See* text accompanying notes 54-60, *supra.*

320. While it is clear that eminent domain and police power techniques are often interchangeable instruments of public policy, it is less often recognized that the social costs are roughly equal regardless of which approach is employed; the basic policy question really relates to selection of the most equitable means for distributing those costs. *See generally* Michelman, *supra* note 6. *Cf.* Albers v. County of Los Angeles, 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965); Holtz v. Superior Court, 3 Cal. 3d 296, 90 Cal. Rptr. 345, 475 P.2d 441 (1970).

321. 23 U.S.C. § 131(g), providing that just compensation "shall be paid" for removal of outdoor advertising signs described therein. This requirement has been construed as mandatory even in those instances in which such removal could be achieved without governmental cost by exercise of the police power. 42 Op. Att'y. Gen. 246 (1966) (Acting Att'y Gen. Ramsey Clark). *But see* Markham Advertising Co. v. Washington, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed,* 393 U.S. 1112 (1969). For the California statutory response, see Cal. Bus. & Prof. C. §§ 5411-18 (West 1970) (compliance with federal standards, including compensation, required). As to like provisions respecting screening or removal of junkyards near freeways, see 23 U.S.C. § 136, as implemented by Cal. Sts. & Hwys. C. §§ 745-59.3 (West 1966).

322. *See* text accompanying notes 240-69, *supra.*

323. *See, e.g.,* Cal. Bus. & Prof. C. § 11525.2 (West 1965) (dedications by subdividers for school purposes, subject to reimbursement for cost of land and improvements, taxes, and maintenance and loan costs).

should be a major goal of statutory reform. Existing legislation relating to utility relocations can only be described as disgraceful, irrational, and inequitable.[324] Contemporary emphasis upon improvement of environmental quality suggests that greater attention be directed to efforts at implementing planning and zoning policy through development of effective but constitutionally permissible criteria for amortization of non-conforming uses.[325] Widespread predictions of an impending housing construction boom counsel the need for more careful drafting of statutory authorizations relating to subdivision control exactions, seeking to eliminate existing indefiniteness of statutory language, possible overbreadth of delegated discretion to local governing bodies, and absence of carefully defined state-wide standards governing the crucial issue of how to determine when and to what extent dedications or cash payments are justified.[326]

Improved flexibility in the use of the police power, with greater equity to property owners, would also be a worthy objective for statutory change. Much of the existing law of inverse condemnation, so far as it relates to claims of excessive use of the police power, exhibits an unfortunate tendency to treat the relevant issues on an all-or-nothing basis: either the regulation is valid, or it constitutes a compensable taking.[327] Yet it is clear that a complete range of intermediate positions exists between these extremes. Land use controls which might be invalid under other circumstances may well become constitutionally acceptable if accompanied by full or partial compensation.[328] Incentive

324. *See* text accompanying notes 240-69, *supra.*

325. Suggestive approaches to better techniques for elimination of non-conforming uses are discussed in detail in the articles cited at note 191, *supra.*

326. *See* text accompanying notes 270-315, *supra.* Early revision of the present patchwork of statutory provisions relating to subdivision control exactions is especially urgent in light of Associated Home Builders v. City of Walnut Creek, 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970). Particularly useful suggestions for legislative treatment in these matters is provided in Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions,* 73 YALE L.J. 1119 (1964). *See also* Harvith, *Subdivision Dedication Requirements: Some Observations and an Alternative: A Special Tax on Gain From Realty,* 33 ALBANY L. REV. 474 (1969). Statewide uniform subdivision dedication standards may produce important collateral advantages in the form of more equitable distribution of housing costs as well as reduction of competition among communities to attract or exclude developers. *See* Harvith at 480.

327. *See, e.g.,* Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969) (airport height limitations treated as unconstitutional taking of fee interest in land).

328. Respectable precedents exist for zoning with compensation. *See, e.g.,* City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969); Deimeke v. State Highway Comm'n, 444 S.W.2d 480 (Mo. 1969); 1 R. ANDERSON, AMERICAN LAW OF ZONING 40 (1968).

zoning techniques, in which a developer's compliance with desired planning objectives is purchased by relaxation of restrictive requirements regarded as less essential, offer opportunities for more imaginative and creative developmental controls than are available through strict enforcement of more traditional regulations.[329] In a variety of situations, particularly where changes in community land use patterns are in transitional flux, statutory authorization for and appropriate guidelines relating to temporary controls could serve a useful purpose. For example, wider use of the techniques embodied in landmark and historical preservation laws, under which changes in existing uses of property are required to be deferred for a temporary period pending official determination of their consistency with long-term planning objectives, deserves consideration.[330]

The tendency of judicial decisions relating to the constitutionality of police power measures to cluster around the extremes of validity and invalidity appears, in part at least, to be a reflection of traditional notions regarding remedial proprieties. If a challenged regulation is found to excessively interfere with private property rights, the traditional judicial response (influenced, no doubt, by the form of relief sought by the complaining property owner) is either to preclude its enforcement or award just compensation.[331] Little evidence appears in the case law to suggest that attention is given to intermediate forms of relief, such as partial compensation coupled with qualified injunctive relief, or relief framed in the alternative so as to afford the governmental agency an opportunity to decide whether to persist in its regulatory program (and pay just compensation as the price for doing so) or to rescind its action in whole or in part (subject to attendant equitable adjustment in its duty to make compensation). A preliminary step in this direction would take the form of express authorization for courts to provide for alternative and conditional relief, without regard

329. *See, e.g.*, Note, *Bonus or Incentive Zoning—Legal Implications*, 21 SYR. L. REV. 895 (1970).

330. *See* Note, *Landmark Preservation Laws: Compensation for Temporary Taking*, 35 U. CHI. L. REV. 362 (1968). *Cf.* Metro Realty v. County of El Dorado, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963) (validity of temporary zoning "freeze"). *See also* ALI MODEL LAND DEVELOPMENT CODE §§ 2-208, 2-209, 3-301, 3-302 (Tentative Draft No. 2, 1970).

331. *Compare* Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963) (mandamus to require issuance of building permit without regard to invalid zoning restriction) *with* Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969) (award of just compensation for unconstitutional taking). *See also* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969) (declaratory judgment).

for the relief sought by the plaintiff.[332] In addition, since a judicial determination as to the validity of a particular police power measure may have unforeseen ramifications for an entire regulatory scheme, courts should have clear authority to defer the effectiveness of a judgment, pending possible legislative modifications, and to retain jurisdiction to modify the relief sought in the event that the regulation is changed or repealed so that it no longer effectuates a "taking" or "damaging."[333] Other appropriate subjects for legislative consideration at the remedial level include statutory clarification of the burden of proof[334] and the appropriate measure of damages where compensation is required to be paid.[335] Finally, attention should be given to improving the standards and procedures by which challenges to police regulations may be expedited,[336] including provisions authorizing arbitration of compensation issues where appropriate.[337]

Manifestly, a great deal of unremitting effort is required to bring the police power under effective statutory controls. The increasing need for pervasive regulatory programs in our ever more complex and

332. *See* Buxel v. King County, 60 Wash. 2d 404, 374 P.2d 250 (1962) (city given alternative between construction of corrective facilities which would prevent damage by draining waters, or payment of damages). *Cf.* Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 339-41 (1933) (Brandeis, J.) (injunction against sewage nuisance conditioned upon city's failure to pay damages). *See generally* Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431, 512-15 (1969); Comment, *An Evaluation of the Rights and Remedies of a New York Landowner for Losses Due to Government Action*, 33 ALBANY L. REV. 537, 550 (1969).

333. *See* Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain By Courts: So-Called Inverse or Reverse Condemnation*, 1968 URBAN LAW ANN. 1, 12-14.

334. As to possible techniques for improving predictability in inverse condemnation situations, see the suggestions offered in Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A.L. REV. 491, 517-19, 536-40 (1969), relating to statutory modifications of burden of proof and prescription of presumptions.

335. *See, e.g.*, the proposal advanced in Comment, *An Evaluation of the Rights and Remedies of a New York Landowner for Losses Due to Government Action*, 33 ALBANY L. REV. 537, 556 (1969) to include in inverse compensation "business losses, lost future earnings, and good will" and, where real estate is involved, to take into account "percentage loss of value and total monetary loss as to that portion of the realty affected by the" governmental action or regulation. As to the desirability of statutory provision for settlement of small inverse compensation claims according to arbitrary statutory standards, see Michelman, *supra* note 360, at 1253-56.

336. For relevant suggestions, see Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431, 512-15 (1969).

337. Authorization for arbitration of compensation controversies in eminent domain matters was supplied by Cal. Stat. 1970, ch. 417, enacting CAL. CODE CIV. PROC. §§ 1273.01-.06 (West, 1970), upon recommendation of the California Law Revision Commission. As to the Commission's recommendations, see 2 THE URBAN LAW. 532 (1970).

interdependent society, together with the seemingly endless spiralling of litigation and congested court dockets, provides impressive support for undertaking the effort necessary to make this aspect of the law more predictable, rationally ordered, and equitable. Although the police power may well be the least limitable of all governmental powers, it seems clear that the legislature has the capability for defining some limits and providing remedial techniques which will strike a better balance than is now the case between the competing interests in social order and private justice.

CHAPTER 7. RECENT DEVELOPMENTS IN CALIFORNIA INVERSE CONDEMNATION LAW

Nathaniel Sterling *

This chapter reports developments in the law since the previous chapters were published.[1] The implications of the important recent case, *Holtz v. Superior Court*,[2] are discussed, and significant statutory and judicial developments in each of the inverse condemnation areas covered by the previous chapters are noted.[3]

To facilitate use of the material presented, this chapter is keyed to the previous chapters by substantially identical headings. Omission of a particular subchapter heading indicates the absence of important developments.

THE SCOPE OF LEGISLATIVE POWER

The Problem in Perspective

Inverse condemnation is the name generally ascribed to the remedy that a property owner is permitted to prosecute in order to obtain the just compensation that the Constitution[4] assures him when his property, without prior payment therefor, has been taken or damaged for public use.[5] Although it has been said that the basic principles governing inverse condemnation are the same as those in an eminent domain action[6]—with the obvious difference that it is the condemnee rather than the condemnor who institutes the proceedings—this generalization is not always accurate. For example, even though a public entity may not be authorized to acquire by eminent domain particular property for a particular purpose, that public entity may nonetheless be liable inversely for damage that it causes to the same property while seeking to promote the public interest by its exercise of governmental power.[7]

* B.A. 1967, University of California at Berkeley; J.D. 1970, University of California at Davis. Member of the legal staff of the California Law Revision Commission. Member of the California Bar.

This chapter was prepared by the author to provide the California Law Revision Commission with background information to assist it in its study of inverse condemnation. Any conclusions, opinions, or recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the views of the California Law Revision Commission or its individual members.

[1] Chapters 1 and 2 were published in 1967, Chapter 3 in 1968, Chapters 4 and 5 in 1969, and Chapter 6 in 1971.

[2] 3 Cal.3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970).

[3] For a description of the Law Revision Commission's activity in the field of inverse condemnation, see 10 CAL. L. REVISION COMM'N REPORTS 1001, 1013-1014 (1970).

[4] Section 14 of Article I of the California Constitution states, "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 . . . ." For a discussion of the history and interpretation of this provision, see the text, *supra* at 56–72.

[5] Sheffet v. County of Los Angeles, 3 Cal. App.3d 720, 732, 84 Cal. Rptr. 11, 18 (1970), quoting from the text *supra* at 18.

[6] See the discussion, *supra* at 18–19.

[7] Sutfin v. State, 261 Cal. App.2d 50, 55, 67 Cal. Rptr. 665, 668 (1968) (the fact that defendant was not authorized by statute to condemn personal property was held not to immunize the defendant for damage done to plaintiff's personal property), citing the text *supra* at 69.

The Current Legal Context of Inverse Condemnation

Relationship to tort liability law. Inverse condemnation law, even though intertwined to a great extent with the law regulating governmental tort liability,[8] has its own limited areas of operation based upon distinct philosophical principles.[9] Inverse condemnation is limited to claims for injury to real or personal property and is not an available remedy for personal injuries or wrongful death.[10] Any doubt that personal property damage is compensable has recently been resolved. In *Sutfin v. State*,[11] the plaintiff alleged damage to personal property (automobiles) resulting from the discharge of water onto them caused by defendant's highway and flood control projects. The court held that:[12]

> [I]n proper cases recovery may be had through inverse condemnation for the taking or damaging of private property for public use, whether said property be real or personal.

In *Lombardy v. Peter Kiewit Sons' Co.*,[13]—a case in which plaintiff alleged, among other claims, personal injury resulting from the construction of a freeway nearby—the court reiterated the principle that inverse condemnation is a remedy for property damage only:[14]

> The mental, physical and emotional distress allegedly suffered by plaintiffs by reason of the fumes, noise, dust, shocks and vibrations incident to the construction and operation of the freeway does not constitute the deprivation of or damage to the property or property rights of plaintiffs for which they are entitled to be compensated.

Despite the limitation of inverse condemnation to property damage, the remedy is potentially farther reaching within that area than analogous tort liability theories.[15] The California Supreme Court has recently strongly reaffirmed the concept previously announced in *Albers v. County of Los Angeles* [16] that the Constitution may compel compensation for damage caused by a public entity even absent any plausible basis for tort liability.[17] The court stated in *Holtz v. Superior Court* [18] that a public entity whose improvement as designed and constructed has proximately caused any physical injury to real property must compensate the owner without regard to the existence or nonexistence of

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[8] See Sheffet v. County of Los Angeles, 3 Cal. App.3d 720, 733, 84 Cal Rptr. 11, 19 (1970), citing the text *supra* at 19, 26.

[9] See the discussion, *supra* at 26–30.

[10] *Supra* at 27; see also *supra* at 241 n.344.

[11] 261 Cal. App.2d 50, 67 Cal. Rptr. 665 (1968).

[12] *Id.* at 53, 67 Cal. Rptr. at 666. Footnote 2 of the opinion quotes the text *supra* at 27 n.50. See also Concrete Service Co. v. State, 274 Cal. App.2d 142, 78 Cal. Rptr. 923 (1969) (manufacturing equipment deemed realty for condemnation purposes); City of Los Angeles v. Sabatasso, 3 Cal. App.3d 973, 83 Cal. Rptr. 898 (1970).

[13] 266 Cal. App.2d 599, 72 Cal. Rptr. 240 (1968), *appeal dismissed*, 394 U.S. 813 (1969). This case is noted, *supra* at 262 n.51.

[14] *Id.* at 603, 72 Cal. Rptr. at 242.

[15] See the text, *supra* at 30.

[16] 62 Cal.2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

[17] *Albers* itself merely reconfirmed the principle that liability in inverse condemnation may exist absent fault; this had been announced in a string of cases commencing with *Reardon v. City & County of San Francisco*, 66 Cal. 492, 6 P. 317 (1885). See the discussion, *supra* at 164–170.

[18] 3 Cal.3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970).

possible tort liability. To the same effect is the court of appeal decision in *Reinking v. County of Orange.*[19]

The policies underlying this broad theory of inverse condemnation liability have been clearly identified in the recent court decisions. The Constitution requires compensation for any private property damage resulting from construction or maintenance of a public project designed to serve the interests of the community as a whole.[20] The rationale is one of socializing the burden of public improvements by distributing their costs throughout the community so that no individual will have to contribute more than his proper share to the undertaking.[21] The Supreme Court in *Holtz* stated that this cost-spreading analysis in effect recognizes that, "under article I, section 14, physical damages proximately resulting from a public improvement must be considered as direct a 'cost' as the property actually condemned or the materials actually utilized in its construction."[22]

In essence, inverse condemnation law, unlike tort liability, is designed to protect property values from undue impairment that would result from a forced contribution of a disproportionate share of the burdens of community progress.[23]

Inverse condemnation and private condemnors. If a private person is authorized to exercise the power of eminent domain, that person may be liable in inverse condemnation for damages he has caused.[24] However, as the Superior Court pointed out in *Greater Westchester Homeowners' Ass'n v. City of Los Angeles,*[25] there are stringent limitations on the right of a private person to condemn property. In that case, after plaintiffs had sued the city as airport owner in tort and inverse for damages resulting from jet aircraft operation, the city sought indemnity from a number of commercial airlines. The airlines argued that they had no indemnity obligation on the inverse condemnation claims because they themselves had no right to exercise the power of eminent domain. The court examined the general right of private persons to condemn, looked to statutory declarations that airports are deemed public uses,[26] and concluded that there was "neither authority nor reason to justify a holding that the Airlines may exercise any right of eminent domain or acquire by eminent domain proceedings any air easements for the public use of airports." The court found, however, that, under the facts alleged, the city might be entitled to indemnity from the aircraft operators and the manufacturers of the aircraft.

Although the *Greater Westchester* case can be viewed simply as restricting the power of private persons to condemn flight easements, it has further implications for the theoretical bases of inverse condemnation law. The statement that lack of power to condemn means no inverse

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[19] 9 Cal. App.3d 1024, 88 Cal. Rptr. 695 (1970).
[20] See Sheffet v. County of Los Angeles, 3 Cal. App.3d 720, 734, 84 Cal. Rptr. 11, 20 (1970), citing the text *supra* at 69.
[21] Holtz v. Superior Court, 3 Cal.3d 296, 303, 475 P.2d 441, 445, 90 Cal. Rptr. 345, 349 (1970).
[22] *Id.* at 310, 475 P.2d at 450, 90 Cal. Rptr. at 354.
[23] See the discussion, *supra* at 100–101.
[24] See the discussion, *supra* at 32–34.
[25] Los Angeles Superior Court No. 931,989 (Memorandum Opinion of Judge Bernard S. Jefferson, April 17, 1970).
[26] See, *e.g.*, CODE CIV. PROC. §§ 1238(20), 1239.2 (West 1955), and §§ 1239.3, 1239.4 (West Supp. 1971).

liability is contrary to the general trend of authority to allow inverse recovery even absent statutory authority to condemn.[27] Regardless of legislative authority to exercise the right of eminent domain, an entity or a person who takes or damages property for a public use should be constitutionally required to pay just compensation for it.[28]

Inverse condemnation procedure. Before an inverse condemnation action may be commenced, the plaintiff must present a claim to the public entity within the applicable statutory limitations period.[29] This claims filing requirement has been held constitutional.[30] However, it may be difficult to determine precisely when a cause of action has accrued for purpose of claims statute.[31] The text in Chapter 1 queries: [32]

> 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?

The California Supreme Court answered this question in *Pierpont Inn, Inc. v. State.*[33] The defendant in that case entered plaintiff's land in February 1960 and commenced highway construction in March 1960 without having exercised its eminent domain power. At the time, there was a two-year limitations period for filing claims against the state. Plaintiff filed a damage claim in August 1962, more than two years after construction was commenced but prior to completion of the freeway project. The freeway opened for traffic in October 1962; the state rejected plaintiff's damage claim in November 1962; and the plaintiff brought suit for inverse condemnation in February 1963. The court—after noting that, "there is a paucity of authority dealing with the problem of determining the exact date upon which a claim or cause of action for inverse condemnation arises" [34]—held that the plaintiff was entitled to wait until the end of the sequence of events giving rise to the injury claimed before the limitation statute began to run. While recognizing the desirability of promptness in filing claims, the court nonetheless pointed out that an owner of property is not required to resort either to piecemeal or premature litigation in order to ascertain the just compensation for what has been taken. In essence, *Pierpont* held that the cause of action accrues, for limitations purposes, on the date on which maximum damage was incurred or has stabilized.[35] This

[27] See the discussion in the text, *supra* at note 7.

[28] See, *e.g.*, Sutfin v. State, 261 Cal. App.2d 50, 67 Cal. Rptr. 665 (1968), holding that a public entity may be liable inversely even absent direct statutory condemnation authority, stating that "liability in inverse condemnation is based on the state Constitution and not on statute." *Id.* at 55, 67 Cal. Rptr. at 668. However, as the opinion in the *Greater Westchester* case points out, various policy reasons may be advanced why the private persons—aircraft operators and jet engine manufacturers—should be immune from inverse condemnation liability as distinguished from the duty to indemnify the airport operator.

[29] See, *e.g.*, GOVT. CODE §§ 905, 905.2(c)(3), 911.2, 945.4 (West 1966).

[30] Dorow v. Santa Clara County Flood Control Dist., 4 Cal. App.3d 389, 84 Cal. Rptr. 518 (1970).

[31] See the discussion, *supra* at 34–35.

[32] *Supra* at 34.

[33] 70 Cal.2d 282, 449 P.2d 737, 74 Cal. Rptr. 521 (1969). This case is discussed *supra* at 262–263 in the text accompanying nn.53–54.

[34] *Id.* at 287, 449 P.2d at 740–741, 74 Cal. Rptr. at 524–525.

[35] This holding was followed in Aaron v. City of Los Angeles (Los Angeles Superior Court, No. 837,799) (Memorandum Opinion of Judge Bernard S. Jefferson, Feb. 5, 1970, reprinted in Los Angeles Daily Journal Report, Nov. 6, 1970) where aircraft noise damage was held to accrue when substantial damage became stabilized.

holding does not, however, imply that a claim could not be filed *earlier* than the date of maximum and stabilized damage.[36]

Recent court of appeal decisions have held that, even though a property owner has received compensation for damages to his property, he may also subsequently recover additional compensation for further injuries, provided that the further injuries were not foreseeable at the time of initial recovery. In *Cox v. State*,[37] the state had acquired an easement across plaintiff's property for a flood control project. Subsequently, the project caused flooding of plaintiff's remaining property, and he brought an action in inverse condemnation. The state argued that the prior proceeding had already compensated future damages and that the defendant had thereby waived further rights to recover for property damage. The court held, *inter alia*, that the doctrines of estoppel by deed and estoppel by judgment preclude an owner from recovering in an inverse condemnation action for later damage only if the later damage could reasonably be expected to result from the necessary and ordinary use of the public project on the land granted or condemned.[38] Similar results were reached in *Reinking v. County of Orange*,[39] *Sacramento & San Joaquin Drainage Dist. v. Goehring*,[40]

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[36] The court expressly refrained from deciding the earliest possible date that a claim for damages could have been filed. Apparently, a claim cannot be filed in anticipation of future damage unless it is by way of severance in an eminent domain proceeding. See Olson v. County of Shasta, 5 Cal. App.3d 336, 341, 85 Cal. Rptr. 77, 80 (1970):

> An action in inverse condemnation, however, is generally available only where the taking results in property damage or destruction or other depreciation in market value or unlawfully dispossesses the owner. . . . The very definition of a "taking" requires an "act" . . . and the risk of future flooding is not an act. [Citations omitted.]

Cf. Riverside County Flood etc. Dist. v. Halman, 262 Cal. App.2d 510, 69 Cal. Rptr. 1 (1968) (defendant was allowed interest accruing at the time of judgment rather than at the time of the earlier "taking" of a flowage easement because actual flooding had not occurred up to the date of judgment).

[37] 3 Cal. App.3d 301, 82 Cal. Rptr. 896 (1970).

[38] *Id.* at 309, 82 Cal. Rptr. at 901. The court further pointed out that a condemnation award does not ever bar future recovery for further damages caused by condemnor's activity on the land of others, "at least where the remainder suffers *actual physical injury*, whether foreseeable or not, which neither a private citizen nor government in the exercise of its police power would have a right to inflict." [Emphasis in original; citations omitted.] 3 Cal. App.3d at 309, 82 Cal. Rptr. at 901. The scope of the physical injury, legal right, and police power limitations is discussed in the text accompanying notes 69–104 *infra*.

[39] 9 Cal. App.3d 1024, 88 Cal. Rptr. 695 (1970). In *Reinking*, the defendant county had leased plaintiff's land for sanitary fill. Eight years after the termination of the lease, while the land was in use as a trailer court, it began to subside and smoke from still-smoldering rubbish was emitted through cracks. When plaintiff sued the county for damages in inverse condemnation, the county argued that all damages, including any possible future damages, had been contemplated in the lease price. The court held that the lease could compensate future damage which was reasonably foreseeable, but the Constitution demanded compensation for further unforeseen damage:

> By entering into a lease permitting the county to use the property for a sanitary fill, plaintiffs consented to such damage to the property as could be reasonably anticipated from the natural and ordinary operation of the sanitary fill, but they are not precluded or estopped to claim damage which neither they, the county, nor any other reasonable person, would have anticipated. [Citing cases, including *Cox v. State*, discussed immediately above.]. [*Id* at 1030, 88 Cal. Rptr. at 699.]

[40] 13 Cal. App.3d 58, 91 Cal. Rptr. 375 (1970). In *Goehring*, the drainage district had condemned a temporary easement across defendant's property. The previous year, the defendant had graded and oiled the road and it was in good shape. The district used the road for three years pursuant to its easement, leaving it deteriorated and full of holes; neither the district nor the contractor attempted to repair the road. Defendant sought as damages the full amount needed to re-

and *Aaron v. City of Los Angeles.*[41]

Other procedural problems—including availability of injunctive relief, proper parties to an inverse proceeding, removal and relocation expenses, and the duty to mitigate damages—are discussed in the text accompanying notes 142–156 *infra.*

The California Constitution and Statutory Controls Over Inverse Condemnation

The California Constitution's requirement of just compensation for taking or damaging private property for a public use is not unqualifiedly applicable to all property injuries and may be regulated to a limited extent by statute.[42] Courts have clearly held that well-recognized property values may be substantially impaired by certain kinds of governmental activity without the payment of compensation of any kind.[43]

Recently the California appellate courts have begun to give further indications of the limits of legislative modification of the seemingly absolute constitutional language. In *Holtz v. Superior Court,*[44] the California Supreme Court indicated that, any legislative policy to the contrary notwithstanding,[45] the Constitution requires compensation where a public entity proximately causes *physical injuries* to real property by an improvement as deliberately constructed and planned.[46] The court implied that in other appropriate types of situations legislation might validly curtail open-ended "absolute liability" but made no

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pair the road, to which the court held him entitled despite the existing easement. Any damage to the roadway by the district in pursuit of its public purpose was fully compensable under constitutional principles.

[41] Los Angeles Superior Court No. 837,799 (Memorandum Opinion of Judge Bernard S. Jefferson, Feb. 5, 1970, reprinted in Los Angeles Daily Journal Report, Nov. 6, 1970). Where damages were awarded to property owners for aircraft noise, the court determined that the city should be granted an air easement. This grant, however, does not preclude future damage recoveries if the noise burden of jet aircraft is increased substantially beyond current levels, causing further diminution in property values. Los Angeles Daily Journal Report at 29.

[42] See, *e.g.*, the statutes discussed in the text, *supra* at 30–32.

[43] People v. Curtis, 255 Cal. App.2d 378, 383, 63 Cal. Rptr. 138, 141 (1967), citing the text *supra* at 66–67.

[44] 3 Cal.3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970).

[45] The statute involved was Section 832 of the Civil Code, which sets out the general mutual rights and duties of coterminous owners with respect to lateral and subjacent support. Although the court held that this statute governing private parties could not affect the inverse condemnation liability of public entities, the court's opinion was muddied by the fact that the statute was evidently not *intended* to apply to public entities.

> We note, additionally, that there is absolutely no indication from the language of section 832 of any legislative intention to single out public excavation operations for specialized treatment under the constitutional "just compensation" clause. [3 Cal.3d at 310 n.16, 475 P.2d at 450 n.16, 90 Cal. Rptr. at 354 n.16; citing the text *supra* at 64–72.]

[46] 3 Cal.3d at 304, 475 P.2d at 445, 90 Cal. Rptr. at 349. The court stated:

> Defendants' primary contention, as we understand it, is that since under section 832 a private excavating coterminous owner would not be liable, absent negligence, for the damage incurred by plaintiffs in this case, defendants, though public agencies, should likewise not be liable unless negligent. In thus equating the liability of public and private entities, defendants ignore, however, the distinct constitutional source of a public entity's responsibility to compensate for damages resulting from the construction of a public improvement and overlook the unique purpose of the inverse condemnation duty. . . . In such cases the purposes of the constitutional clause, rather than the limits established by a rule of statutory or common law allocating rights and responsibilities between private parties, must fix the extent of a public entity's responsibility. [*Id.* at 302, 475 P.2d at 444, 90 Cal. Rptr. at 348.]

effort to indicate what those situations and their limits might be.[47] To the same effect was the court of appeal decision in *Sutfin v. State*.[48]

On the other hand, in at least one recent case, *Bank of America v. County of Los Angeles*,[49] the court deemed itself bound by legislative enactment in the field. There, plaintiff alleged that the county's act of announcing its intent to condemn plaintiff's land had lowered its value when the plaintiff attempted to sell the land at a probate sale. Plaintiff sold the land at a reduced price and, when the county abandoned its condemnation plans, sued in inverse to recover the difference in value between actual sale price and the price it would otherwise have received. The court stated, *inter alia*: [50]

> When a condemnation proceeding is abandoned, the rights of the condemnee are fixed by statute. (Code Civ. Proc., § 1255a). Financial impairment of the right to sell is not included as an element of damage.

By deferring to legislative judgment rather than adhering strictly to the dictates of the Constitution, the court in *Bank of America* simply refused to recognize announcement of condemnation proceedings as a compensable impairment of a property right. The *Bank of America* court stated: [51]

> We have been cited to no case and find none which holds that the principle of inverse condemnation applies to interference with the right to sell.

This holding was consistent with the view that, although courts will be liberal in applying existing constitutional doctrine, they will be conservative in recognizing new constitutionally protected rights.[52] The general reluctance of courts to assume responsibility for creating compensable property interests appears frequently in the guise of classifying interests in such a way that they are not "property" "taken

[47] The court reviewed prior decisions in which it recognized competing policy considerations—fears that, if compensation is allowed too liberally, it will seriously affect beneficial public improvements because of their greatly increased costs—and stated simply that the present holding was limited to physical damage only. *Id.* at 304, 475 P.2d at 445, 90 Cal. Rptr. at 349. The apparent consequence of this line of reasoning, and of the nature of the policy questions considered, is that legislative limitations on intangible injuries will be more liberally permitted. Balancing the concept that even the most affluent society cannot feasibly assume the costs of *all* private losses which flow from governmental activities against the notion that an individual should not be forced to contribute a disproportionate share of the burdens of community progress (see the text, *supra* at 100–101), the conclusion will continue to be that only the most substantial, direct, and numerically limited type of injuries will be fully compensated.

[48] 261 Cal. App.2d 50, 67 Cal. Rptr. 665 (1968). Defendant argued that it could not be liable in inverse for damage to personal property because legislation authorized it only to condemn realty. The court imposed liability for injury to personal property nonetheless, pointing out that liability in inverse condemnation is based on the state Constitution and not on statute.

[49] 270 Cal. App.2d 165, 75 Cal. Rptr. 444 (1969).

[50] *Id.* at 177, 75 Cal. Rptr. at 451.

[51] *Id.*

[52] See the text, *supra* at 64–66.

or damaged" for a "public use."[53] Recent examples of this classification process are *Mancino v. Santa Clara County Flood etc. Dist.*,[54] *Joslin v. Marin Mun. Water Dist.*,[55] and *Lombardy v. Peter Kiewit Sons' Co.*[56] The apparent lesson to be drawn from these cases is that expansion of the recoverable interests of private individuals substantially beyond the present constitutional limits of inverse condemnation must be accomplished through the Legislature rather than in the courts.[57]

DELIBERATELY INFLICTED INJURY OR DESTRUCTION

Many California statutes presently authorize destruction of animals, plants, or agricultural products that threaten public health and safety or productivity.[58] In many instances, the property owner is given the option of eliminating the threat himself or, if he fails, of having the public entity abate the nuisance [59] with the property owner obligated to

[53] See the discussion, *supra* at 64–70. However, after initial narrow readings, the "public use" requirement is now broadly construed so that, if construction or maintenance of a public project is designed to serve the interests of the community as a whole, any property damage caused by the project or by its operations as deliberately conceived is for a public use and is constitutionally compensable. See the text, *supra* at 68–70. Thus, in the recent case of *Sutfin v. State*, 261 Cal. App.2d 50, 67 Cal. Rptr. 665 (1968), when the public entity attempted to raise the frivolous argument that incidental damage to property caused by its improvements was not damage for a "public use," the court merely quoted portions of *Clement v. State Reclamation Board* (35 Cal.2d 628, 220 P.2d 897 (1950)):

> "If, however, the construction of a flood control project diverts natural stream waters onto the land of a private owner and causes damage thereto, that property is as much taken or damaged for a public use for which compensation must be paid as if it were condemned for the construction of a highway or a school. . . ." [261 Cal. App.2d at 54, 67 Cal. Rptr. at 667.]

[54] 272 Cal. App.2d 678, 77 Cal. Rptr. 679 (1969). Defendant built a storm drain and control box system under and on a public street fronting plaintiff's property (which extended to the center of the street). Plaintiff sued in inverse condemnation for damages to her property. The court balanced the owner's right to the underlying property against the public interest in grading and improvements and held that the construction projects did not constitute a compensable injury to plaintiff's property:

> So long as [the storm drain] is constructed on and under the street, for a beneficial public use, with the permission of the City, and does not otherwise interfere with the free use of the street or plaintiff's home . . . the plaintiff may not recover for any actual property damage. *Id.* at 682, 77 Cal. Rptr. at 681.

[55] 67 Cal.2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967). The court here balanced the interest of a private person in a continued stream-carried supply of rocks and gravel against the public interest in damming the stream for municipal water supply purposes. The court found that, as between the two interests, that of the private person was "unreasonable" and concluded, "that since there was and is no property right in an unreasonable use, there has been no taking or damaging of property by the deprivation of such use and, accordingly, the deprivation is not compensable." *Id.* at 145, 429 P.2d at 898, 60 Cal. Rptr. at 386. For a detailed discussion of this case, see the text, *supra* at 201–207.

[56] 266 Cal. App.2d 599, 72 Cal. Rptr. 240 (1968), *appeal dismissed*, 394 U.S. 813 (1969):

> It is the law in California that building and use restrictions of a residential tract do not constitute an interest in land vested in the lot owners which is damaged by the construction of a state freeway through the tract. [*Id.* at 605, 72 Cal. Rptr. at 244.]

[57] See the discussion, *supra* at 64–70.

[58] See the text, *supra* at 120–124.

[59] Twenty-three California statutes of this type are collected in Table II, *supra* at 152–154.

reimburse abatement costs.[60] The public entity may secure its abatement costs by a lien imposed upon the property evidenced by a recorded certificate that affects the title to or possession of the affected property.[61]

Destruction of private buildings as a means of enforcing building and safety regulations is another form of deliberate taking of private property but one that involves complex interrelationships between legal, social, and economic policy considerations.[62] One of these considerations—the effect of a public policy of vigorous housing code enforcement upon persons displaced by demolition—is examined in depth in a recent empirical study in the city of Sacramento, California.[63] In addition to the problems involved in compensation for demolished dwellings, the study found that residents were adversely affected by an emphasis on demolition rather than rehabilitation of substandard dwellings and that little relocation advice or assistance was offered to displaced persons.[64] The study recognized the constitutionality of housing code enforcement under the due process clause [65] and offered an equal protection argument for persons displaced by demolition.[66] It made no attempt, however, to recommend relocation assistance or more humane demolition standards on the basis of inverse condemnation theory. It should be noted that it is established federal policy to provide relocation assistance and payments to persons displaced by programs of the Department of Housing and Urban Development.[67]

Some recent legislative developments affecting deliberately inflicted injury or destruction are listed in the footnote.[68]

[60] See generally, *e.g.*, GOVT. CODE §§ 39560–39588 (West 1968) (weed abatement), §§ 50230–50257 (West Supp. 1971) (abandoned excavations); WATER CODE §§ 13000–13908 (West Supp. 1971) (sewage control).

[61] GOVT. CODE § 27297 (West Supp. 1971).

[62] See the text, *supra* at 143–150.

[63] Report of the Low Income Housing Project—Housing Code Enforcement in the City of Sacramento: Proposals for Change (Martin Luther King, Jr. Program, School of Law, University of California at Davis, June 30, 1969).

[64] *Id.* at V-1 through V-94.

[65] *Id.* at III-15, citing the text *supra* at 143–150.

[66] *Id.* at V-12a through V-44.

[67] See, *e.g.*, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646 (Jan. 2, 1971). Section 217 provides that any person who moves as a result of a rehabilitation, demolition, or concentrated code enforcement program under Title I of the Housing Act of 1949, or a comprehensive city demonstration project under Title I of the Demonstration Cities and Metropolitan Development Act of 1966, shall be eligible for a full range of relocation benefits specified in various sections of the act. See HOUSE COMM. ON PUBLIC WORKS, UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970, H.R. REP. NO. 1656, 91st Cong., 2d Sess. (1970).

[68] The following changes and additions are noted in the tables set out *supra* at 151–162.

TABLE I—CALIFORNIA STATUTES AUTHORIZING SUMMARY DESTRUCTION OF HEALTH AND SAFETY MENACES

AGRIC. CODE § 18975 (West 1968)	Repealed Cal. Stats. 1970, Ch. 1385, § 1

TABLE II—CALIFORNIA STATUTES AUTHORIZING DESTRUCTION OF HEALTH AND SAFETY MENACES AFTER NOTICE BUT WITHOUT PRIOR ADJUDICATION

AGRIC. CODE § 31108 (West 1968)	See *Kane v. County of San Diego*, 2 Cal. App.3d 550, 83 Cal. Rptr. 19 (1968) (72 hours required prior to destruction)
HEALTH & SAFETY CODE § 25861 (West 1967)	Replaced by § 25862. See Cal. Stats. 1969, Ch. 666, § 3

UNINTENDED PHYSICAL DAMAGE

Preliminary Overview

The landmark case of *Albers v. County of Los Angeles* [69] reconfirmed the previously announced, but often forgotten, principle that liability may exist on inverse condemnation grounds in the absence of fault.[70] The *Albers* case, however, imposed absolute liability with three limitations: (1) the damage to be compensated must be physical damage; (2) the damage must be proximately caused by the public improvement as designed and constructed; and (3) the public entity will not be held liable under *Albers* if its conduct is legally privileged, either under ordinary property law principles or as a noncompensable exercise of the police power.[71] Recent appellate court decisions have reaffirmed, elaborated upon, and refined the *Albers* doctrine of inverse liability without fault.

TABLE IV—CALIFORNIA STATUTES DECLARING GENERAL LAW OF NUISANCE APPLICABLE TO ABATEMENT OF HEALTH AND SAFETY MENACES

LABOR CODE § 2645 (West Supp. 1971)	Labor camp dwellings which do not meet minimum standards

TABLE V—CALIFORNIA STATUTES AUTHORIZING SUMMARY SEIZURE WITHOUT PROVISION FOR SUBSEQUENT PROCEEDINGS OR DISPOSITION

AGRIC. CODE §§ 18971–18972 (West 1968)	Repealed Cal. Stats. 1970, Ch. 1385, § 1

TABLE VI—CALIFORNIA STATUTES AUTHORIZING SUMMARY CONFISCATION OR DESTRUCTION FOR REGULATORY PURPOSES

AGRIC. CODE § 18973 (West 1968)	Repealed Cal. Stats. 1970, Ch. 1385, § 1
AGRIC. CODE § 18974 (West 1968)	Repealed Cal. Stats. 1970, Ch. 1385, § 1
BUS. & PROF. CODE § 5312 (West 1962)	Replaced by § 5463. See Cal. Stats. 1970, Ch. 991, § 2
BUS. & PROF. CODE § 12605 (West 1964)	Replaced by § 12606. See Cal. Stats. 1969, Ch. 1309, § 3

TABLE VII—CALIFORNIA STATUTES AUTHORIZING REGULATORY CONFISCATION OR DESTRUCTION AFTER NOTICE BUT WITHOUT PRIOR ADJUDICATION

BUS. & PROF. CODE § 5312 (West 1962)	Replaced by § 5463. See Cal. Stats. 1970, Ch. 991, § 2
BUS. & PROF. CODE § 12025.5 (West 1964)	Amended Cal. Stats. 1969, Ch. 1309, § 1, to delete "destruction"
BUS. & PROF. CODE § 12606.1 (West 1964)	Replaced by § 12607. See Cal. Stats. 1969, Ch. 1309, § 3

TABLE VIII—CALIFORNIA STATUTES AUTHORIZING REGULATORY CONFISCATION, FORFEITURE, OR DESTRUCTION BY COURT ORDER AFTER ADVERSARY HEARING

PENAL CODE §§ 11225–11235 (West 1970)	Amended Cal. Stats. 1969, Ch. 262, § 1, to add purposes of "illegal gambling"

TABLE IX—CALIFORNIA STATUTES AUTHORIZING REGULATORY CONFISCATION WITHOUT PROVISION FOR SUBSEQUENT PROCEEDINGS OR FOR DISPOSITION OF SEIZED PROPERTY

AGRIC. CODE § 18971 (West 1968)	Repealed Cal. Stats. 1970, Ch. 1385, § 1

[69] 62 Cal.2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).
[70] See the discussion in the text accompanying notes 15–23 *supra*.
[71] See the discussion, *supra* at 164–170. See also Cox v. State, 3 Cal. App.3d 301, 82 Cal. Rptr. 896 (1970).

The basic principle that a public entity may be liable for damages that it has caused, even if unforeseeable, was reiterated by the Supreme Court in *Holtz v. Superior Court:*[72]

> [W]e conclude that defendant public entities may be liable on an inverse condemnation theory for the alleged physical damage to plaintiffs' property proximately caused by the excavation as deliberately planned and designed without a showing of negligence.

This principle has also been expressly followed by the court of appeal on several occasions in varying contexts. Recent cases that do not require a showing of fault include *Reinking v. County of Orange,*[73] *Sheffet v. County of Los Angeles,*[74] *Cox v. State,*[75] and *Sacramento & San Joaquin Drainage Dist. v. Goehring.*[76]

The three limitations imposed by *Albers* on liability for unforeseeable injuries have also been the subject of judicial comment. The physical damage limitation was expressly adopted by the Supreme Court in *Holtz.* The court stated that the reason for the limitation to physical damage was fear that overly liberal compensation policies might deplete the treasury to the detriment of public progress and improvements:[77]

> Thus we limited our holding of inverse condemnation liability, absent fault, to "physical injuries of real property" that were "proximately caused" by the improvement as deliberately constructed and planned. We have no occasion in the instant case to analyze the operation of article I, section 14, beyond the limits suggested by the facts of *Albers*; here plaintiffs clearly allege that they have suffered "actual physical injuries of real property" . . . .

The type of physical damage involved in *Holtz* was the settling and cracking of plaintiffs' building and other improvements due to withdrawal of lateral support from the underlying land. Other types of damage which have been held to meet the physical damage requirement of *Albers* include subsidence and damage of buildings, streets, walks, trailer foundations, and utility improvements,[78] road deterioration and chuckholes,[79] damage to land by flood waters,[80] and damage to land by surface water and mud drainage.[81]

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[72] 3 Cal.3d 296, 302, 475 P.2d 441, 444, 90 Cal. Rptr. 345, 348 (1970).

[73] 9 Cal. App.3d 1024, 88 Cal. Rptr. 695 (1970) (*Albers* held to apply to unforeseeable damage resulting from subsidence of earth at site of former sanitary fill).

[74] 3 Cal. App.3d 720, 84 Cal. Rptr. 11 (1970) (*Albers* held to apply to surface water damage caused by improvements). See also Olson v. County of Shasta, 5 Cal. App.3d 336, 85 Cal. Rptr. 77 (1970) (*semble*).

[75] 3 Cal. App.3d 301, 82 Cal. Rptr. 896 (1970) (*Albers* applicable if water damage is caused by flood project on land of others) (dictum).

[76] 13 Cal. App.3d 58, 91 Cal. Rptr. 375 (1970) (*Albers* applied to road damage by entity in pursuit of its public purpose).

[77] 3 Cal.3d at 304, 475 P.2d at 445, 90 Cal. Rptr. at 349. For a discussion of the possible limits of absolute liability in inverse, see the text accompanying notes 44–48 *supra.*

[78] Reinking v. County of Orange, 9 Cal. App.3d 1024, 88 Cal. Rptr. 695 (1970).

[79] Sacramento & San Joaquin Drainage Dist. v. Goehring, 13 Cal. App.3d 58, 91 Cal. Rptr. 375 (1970).

[80] Cox v. State, 3 Cal. App.3d 301, 82 Cal. Rptr. 896 (1970).

[81] Sheffet v. County of Los Angeles, 3 Cal. App.3d 720, 84 Cal. Rptr. 11 (1970).

The second limitation on absolute liability is that the damage must be "proximately caused" by the improvement as deliberately constructed and planned. This limitation means that the public improvement must be a cause in fact of the damage that has occurred:[82]

> In their complaint plaintiffs allege (1) injury to property caused by (2) diversion of stream waters which was in turn caused by (3) the levees of the Sacramento River Flood Control Project and the Oroville Dam (public improvements). From this it would appear that plaintiffs have set forth a prima facie cause of action in inverse condemnation.

Beyond the question of actual physical causation, however, the requirement that the damage be "proximately" caused by the public improvement as designed and constructed involves a troublesome conceptual premise.[83] The proximate cause doctrine of tort law is often defined in terms of foreseeability whereas the *Albers* decision. imposing liability absent foreseeability, could not have intended such a construction.[84] In *Holtz,* the Supreme Court recognized this defect in terminology and that a more accurate description of the causal relation required for liability is one of "substantial" causation.[85] However, the court deferred providing a more precise causation test until a case is presented that might better reveal the competing considerations. Substantial causation has, however, already been used as a determinative test by the court of appeal in *Olson v. County of Shasta.*[86] In that case, plaintiffs sought recovery in inverse condemnation for damage caused by road and drainage improvements constructed by defendant that contributed to damage during a storm. The court determined that the connection between defendant's acts and the damage must be a substantial cause and effect relationship sufficient to exclude the probability that other forces alone produced the injury.[87]

The third major limitation on absolute liability in inverse condemnation is that the conduct of the public entity not be legally privileged under the doctrine of *damnum absque injuria.*[88] The court in *Albers* specified two aspects of government conduct that will be legally privileged so that compensation for damages will not be required. These aspects are situations in which the state has the common law right to inflict the kind of damage involved [89] and in which the damage is noncompensable because it results from the proper exercise of the police power.[90] The rationale of these exceptions is that the particular im-

[82] Shaeffer v. State, 3 Cal. App.3d 348, 352, 83 Cal. Rptr. 347, 350 (1970), citing the text *supra* at 189–194.

[83] Olson v. County of Shasta, 5 Cal. App.3d 336, 340, 85 Cal. Rptr. 77, 79 (1970), citing the text *supra* at 167.

[84] *Supra* at 167–170.

[85] 3 Cal.3d at 304 n.9, 475 P.2d at 446 n.9, 90 Cal. Rptr. at 350 n.9, citing the text *supra* at 167–170.

[86] 5 Cal. App.3d 336, 85 Cal. Rptr. 77 (1970).

[87] *Id.* at 340, 85 Cal. Rptr. at 79. The court indicated that there was no evidence to establish that the defendant's improvements as designed and constructed were so substantial a causal contributor to the storm damage as to exclude the probability that other forces alone could have produced the injury. *Id.* at 343, 85 Cal. Rptr. at 82.

[88] See the discussion, *supra* at 174–180.

[89] See, *e.g.*, Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941) (upper riparian owner's right to inflict damage on lower riparian owner).

[90] See, *e.g.*, Gray v. Reclamation Dist., 174 Cal. 622, 638–640, 163 P. 1024, 1031–1032 (1917) (flood control, navigational improvement, and reclamation work).

portance or urgency of the governmental conduct is so overriding that considerations of public policy negate the rule of absolute liability of the acting public entity.[91]

The police power exception has traditionally been the more narrow of the two governmental privileges. In the absence of a compelling emergency, the police power doctrine will not shield a public entity from inverse liability.[92] Examples of the kind of emergency envisioned by the exception are demolition of buildings to prevent the spread of conflagrations and destruction of diseased animals and plants where life or health is jeopardized.[93] Recent court decisions have continued this narrow interpretation of the police power privilege to escape "nonfault" inverse liability. In *Holtz*, for example, the Supreme Court explained that the police power exception as applied to a direct taking or damaging of property comes into effect only under emergency conditions where there is a pressure of public necessity to avert impending peril. The court recognized that a broad interpretation of the doctrine of noncompensable loss would, in effect, completely undercut the constitutional requirement of just compensation and cited this as the reason that courts generally have narrowly circumscribed the types of emergency that will exempt a public entity from liability.[94] Thus, in *Holtz,* where the public entity had engaged in extensive street excavation in connection with its construction of an underground rapid transit system, the court could find "no indication that the 'police power' exception could possibly be applicable . . . ."[95] Likewise, courts have held the police power exception inapplicable to damage created by county-accepted subdivision improvements and streets[96] and to damage caused by a county sanitary fill project.[97]

The limits of the "legal right" exception to absolute liability for physical damage proximately or substantially caused by public entities have traditionally been more nebulous than the limits of the police power exception. Although it has been stated that a public entity will not be liable if a private person would not be liable in the same circumstances, this statement is overly broad and directly contrary to the holding of *Albers*. Rather, the implication of *Albers* is that the public entity will not be obligated to compensate for its damage if it was in fact privileged to inflict that damage.[98] In *Holtz,* the Supreme Court clarified this implication of *Albers*. After stating that the fulfillment of the broad "cost spreading" purpose of the constitutional requirement of just compensation requires a limited rather than expansive application of the legal right exception, the court indicated that, if public responsibility were to be equated with private liability, the legal right exception would in effect swallow up the general *Albers* rule of broad

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[91] Holtz v. Superior Court, 3 Cal.3d 296, 304–305, 475 P.2d 441, 446, 90 Cal. Rptr. 345, 350 (1970).

[92] See the discussion, *supra* at 174–179.

[93] House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 391, 153 P.2d 950, 953 (1944). Inverse liability for deliberate destruction of private property is examined in detail in Chapter 3 *supra*.

[94] 3 Cal.3d at 305, 475 P.2d at 446, 90 Cal. Rptr. at 350, citing Chapter 3 *supra*.

[95] *Id.* at 305, 475 P.2d at 447, 90 Cal. Rptr. at 351.

[96] Sheffet v. County of Los Angeles, 3 Cal. App.3d 720, 84 Cal. Rptr. 11 (1970). "Thus, the first exception noted by *Albers* is inapplicable to the instant case." *Id.* at 732, 84 Cal. Rptr. at 19.

[97] Reinking v. County of Orange, 9 Cal. App.3d 1024, 88 Cal. Rptr. 695 (1970) (*semble*).

[98] See the discussion, *supra* at 179–180.

liability.[99] The court also pointed out that the common law doctrine of the "right to inflict damage" had evolved from the "complex and unique" area of water law and that the legal right exception has been employed in only a few restricted situations, generally for the purpose of permitting a landowner to take reasonable action to protect his own property from external hazards such as floodwaters:[100]

> In some ways the language of the "right to inflict damage" projects a misleading concept, because the essential common characteristic of this category of cases is not that they all involve the infliction of injury on others, but rather that they all involve injury resulting from the landowner's efforts to protect his own property from damage. In recognition of the generally perceived reasonableness of such action and, as a policy matter, to encourage protective measures to preserve land resources, certain types of protective measures were cloaked in a legal "privilege."

The court did not attempt to formulate a rule describing which types of governmental activities are to be deemed privileged for purposes of immunity from inverse condemnation liability. It did, however, indicate that the excavation of land to construct an improvement, which occurred in the *Holtz* case, is not privileged and that there are no policy considerations that might make it privileged.[101] The court further indicated that many activities, which in the past have been "mechanically assumed" to be privileged on the grounds that there would be no liability if conducted by a private person, may not necessarily be deemed privileged for inverse condemnation liability purposes.[102] In addition, some privileges that are still valid liability shields for public entities are only conditional privileges. For example, in order for a public entity to take advantage of its privilege to construct barriers to protect against floodwaters without being liable for damage caused, it must act reasonably and nonnegligently.[103] Likewise, when the state acts pursuant to its authority to regulate navigable waters, compensation may be required for actual physical invasions of or encroachment upon fast lands even though it is privileged not to compensate for

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[99] 3 Cal.3d at 306, 475 P.2d at 447, 90 Cal. Rptr. at 351.

[100] *Id.* at 306–307, 475 P.2d at 447–448, 90 Cal. Rptr. at 351–352 (footnotes omitted). One recent case construing the legal right exception to be limited to the facts of *Archer* and similar water cases is *Sheffet v. County of Los Angeles*, 3 Cal. App.3d 720, 84 Cal. Rptr. 11 (1970). The *Sheffet* court rejected an argument that the county was legally privileged to discharge surface waters into plaintiff's drainage ditch, causing the ditch to overflow, on the basis that, although the *Archer* exception allows an upper owner to discharge surface waters into a natural watercourse and increase its volume without liability for damage suffered by the lower owner, a drainage ditch is not a natural watercourse. *Id.* at 740–741, 84 Cal. Rptr. at 25.

[101] 3 Cal.3d at 308, 310, 475 P.2d at 448–449, 450, 90 Cal. Rptr. at 352–353, 354.

[102] *Id.* at 307–308 n.13, 475 P.2d at 448 n.13, 90 Cal. Rptr. at 352 n.13 (citing the text *supra* at 231–240):

> Although certain socially beneficial conduct may appropriately be designated "privileged" for private individuals in order that they will not be deterred from undertaking the activity, the public entity may continue to engage in this same "privileged" activity even if it must bear the loss of resulting damages. In such a case, there may well be no reason to depart from the general constitutional guarantee of just compensation.

For a discussion of the relationship between enjoining a public entity's activities as opposed to simply granting inverse condemnation damages where the entity's activities are deemed to be unconstitutional takings of property without due process of law, see the text accompanying notes 153–156 *infra*.

[103] 3 Cal.3d at 307 n.12, 475 P.2d at 448 n.12, 90 Cal. Rptr. at 352 n.12.

abridgement or diminution of any access rights of riparian properties.[104]

Scope of Inverse Liability in California

Water damage. Although courts in the past have tended to rely upon the rules of private water law in determining the inverse condemnation liability of public entities for water damage,[105] recent decisions appear to move towards application of the *Albers*[106] rule of liability without fault. This trend can be seen most clearly in the surface water cases. In the past, California has applied a modified civil law rule to such cases: Although landowners take land subject to the burdens of natural drainage, no party—whether an upper or lower landowner—may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability.[107] This rule governing the relations between private landowners has also been applied to governmental improvement projects.[108] In *Sheffet v. County of Los Angeles*,[109] however, the court of appeal intimated that the *Albers* rule might better be applied to public entities. In *Sheffet*, plaintiff had sued the county and a construction company for damages caused by surface waters and mud draining onto his land from streets and land owned by the defendants. The court first discussed the modified civil law rule and determined that, if the plaintiff had acted "reasonably,"[110] he would be able to recover for the damage.[111] The court went on to point out, however, that as to damage caused by the county traditional inverse condemnation rules would require that any actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed, whether or not foreseeable, entitles the injured landowner to recovery in inverse condemnation.[112] The court did not hold that strict liability was the basis of recovery, however, for it had already determined that the county

[104] *Id.* The case of *Colberg, Inc. v. State*, 67 Cal.2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), which held the state privileged to impair access rights for the public good without compensation pursuant to its navigational servitude, was narrowly construed in *Shaeffer v. State*, 3 Cal. App.3d 348, 83 Cal. Rptr. 347 (1970). There, the state asserted that it was privileged to flood lands lying between its levees as part of its navigational servitude without paying just compensation. The court rejected the argument, implying that the privilege was limited to nonphysical damage and interference involved in the public right in navigation. *Id.* at 353, 83 Cal. Rptr. at 350–351.

[105] See the discussion, *supra* at 180–197.

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

[107] See, *e.g.*, Keys v. Romley, 64 Cal.2d 396, 405–406, 412 P.2d 529, 534, 50 Cal. Rptr. 273, 278 (1966).

[108] See, *e.g.*, Burrows v. State, 260 Cal. App.2d 29, 66 Cal. Rptr. 868 (1968); Western Salt Co. v. City of Newport Beach, 271 Cal. App.2d 397, 76 Cal. Rptr. 322 (1969).

[109] 3 Cal. App.3d 720, 84 Cal. Rptr. 11 (1970).

[110] Under the civil law rule as modified, if the plaintiff is reasonable, he may recover regardless of whether the defendant is reasonable or unreasonable. On the other hand, if the plaintiff is unreasonable, he may not recover even if the defendant is also unreasonable. *Id.* at 730, 84 Cal. Rptr. at 17:

> Reasonable conduct may or may not require affirmative action by the lower owner, depending upon all the circumstances. The social utility of the upper owner's conduct must be weighed against the burden that such conduct would impose on the lower owner. More often than not, the lower owner's unreasonable conduct will consist not of his failure to take affirmative steps to protect his property, but of affirmative conduct increasing the danger to his property.

[111] *Id.* at 727–731, 84 Cal. Rptr. at 14–18.

[112] *Id.* at 731–735, 84 Cal. Rptr. at 18–21, quoting the text *supra* at 225–227.

would be liable under modified civil law rules.[113] In another surface water damage case, *Olson v. County of Shasta*,[114] the court appeared to assume without discussion that the *Albers* rule would be the appropriate theory of recovery in inverse condemnation.[115]

Likewise, the trend in case law to apply a rule of strict liability against public entities for physical injury to property is applicable in the stream water cases. As a general rule, public entities have been held liable without fault for diverting stream waters by design onto private lands.[116] This rule has been continued in recent court of appeal decisions.[117] On the other hand, if a public entity makes an improvement with the unintended consequence that stream waters are diverted onto private land, there must be some indication of fault before the entity will be liable in inverse condemnation.[118] In *Sutfin v. State*,[119] plaintiffs alleged that certain of their personal property was injured by the discharge of water from a creek, proximately caused by the plan, design, construction, maintenance, or operation by the state of highway and associated flood control projects. The court noted that the pleading failed to specify whether the physical damage was deliberately calculated (release of water under emergency conditions), caused by faulty planning, design, or construction, a product of negligence (employee or otherwise), or the result of other circumstances not pleaded. Although the court did not note which, if any, of these pleadings would be proper under the circumstances of the case, the implication is that, if the discharge were in fact unintentional, then some measure of fault would be required.[120] Nonetheless, the court also cited with approval *Clement v. Reclamation Board*,[121] which held a public entity liable without fault for damages caused by discharging water from a stream.[122] Finally, despite the traditional rule denying liability for

[113] *Id.* at 733, 84 Cal. Rptr. at 19.

[114] 5 Cal. App.3d 336, 85 Cal. Rptr. 77 (1970).

[115] *Id.* at 340, 85 Cal. Rptr. at 79:

> Article 1, section 14, of the California Constitution . . . guarantees that a landowner whose land is not formally appropriated for a public use, but is damaged by a public improvement has a cause of action against the public entity to recover for the damage suffered.

[116] See the discussion, *supra* at 189–191.

[117] See, *e.g.*, Cox v. State, 3 Cal. App.3d 301, 82 Cal. Rptr. 896 (1970) (where flood control project diverts stream onto private land, the public entity will be liable in inverse condemnation under the *Albers* rule for actual physical injury, whether foreseeable or not, which neither a private citizen nor government in the exercise of its police power would have a right to inflict (dictum)); Shaeffer v. State, 3 Cal. App.3d 348, 83 Cal. Rptr. 347 (1970):

> "Nothing in the law of waters is better settled than the rule that any diversion of water from, or change in the course of flow in, a natural watercourse, attended by damage to private lands makes the actor liable under the maxim: *Sic utere tuo, ut alienum non laedas* [So use your own property as not to injure that of another], and, as applied to public agencies, under the constitutional right to just compensation for a public taking or damaging. . . ." [Footnote omitted.] [*Id.* at 351, 83 Cal. Rptr. at 349, quoting from Beckley v. Reclamation Board, 205 Cal. App.2d 734, 743, 23 Cal. Rptr. 428, 434 (1962).]

[118] See the discussion, *supra* at 191–193.

[119] 261 Cal. App.2d 50, 67 Cal. Rptr. 665 (1968).

[120] *Id.* at 57, 67 Cal. Rptr. at 669.

[121] 35 Cal.2d 628, 220 P.2d 897 (1950).

[122] 261 Cal. App.2d at 55, 67 Cal. Rptr. at 668, quoting from 35 Cal.2d at 642, 220 P.2d at 905–906:

> "If the water is diverted out of its natural channel and discharged into a different channel or upon neighboring land, the diverter is liable to the owner whose land is injured by such discharge. . . ."

downstream damage due to channel improvements,[123] the court of appeal in *Stoney Creek Orchards v. State* [124] held that substantial state participation in a dam project that altered the flow of a river causing substantial downstream bank erosion gave rise to inverse liability.[125]

Interference with land stability. Recent California decisions have come squarely to the conclusion that public entities will be liable without fault in inverse condemnation for damage caused by a disturbance of soil stability. The Supreme Court in *Holtz v. Superior Court* [126] held that a public entity which, by excavation of land adjacent to that of a private property owner, had withdrawn lateral soil support of the private owner's land, causing buildings and other improvements to settle and crack, may be liable without a showing of negligence on an inverse condemnation theory for the physical damage to the private property proximately caused by the excavation as deliberately planned and designed.[127] The Supreme Court expressly rejected distinctions among types of excavation activity that might give rise to theories of liability based upon fault [128] and placed the general principle of liability for physical damage absent fault on the constitutional ground that such damage must be viewed as a direct cost of public improvement for which just compensation is required.[129] Similarly, in *Reinking v. County of Orange*,[130] the court of appeal held that land subsidence causing extensive damage to private improvements on the site of a former county sanitary fill was compensable in inverse condemnation

[123] See the discussion, *supra* at 193–194.
[124] 12 Cal. App.3d 903, 91 Cal. Rptr. 139 (1970).
[125] *Id.* at 906–907, 91 Cal. Rptr. at 141:

> By alleging substantial state participation in such activity and that plaintiffs' lands have been damaged by that activity, the complaint states a cause of action for inverse condemnation.

[126] 3 Cal.3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970).
[127] *Id.* at 302, 475 P.2d at 444, 90 Cal. Rptr. at 348.
[128] *Id.* at 310, 475 P.2d at 450, 90 Cal. Rptr. at 354:

> We can perceive of no policy considerations that would justify differentiating, for purposes of our constitutional "just compensation" clause, damages inflicted in tunnel excavations from those caused by sewer construction.

For a discussion of earlier cases which had reached fault theories on varying sets of land stability facts, see the text, *supra* at 197–201.

[129] *Id.* at 310, 475 P.2d at 450, 90 Cal. Rptr. at 354:

> Our decision in the instant case, and the *Albers* decision more generally, in effect recognize that, under article I, section 14, physical damages proximately resulting from a public improvement must be considered as direct a "cost" as the property actually condemned or the materials actually utilized in its construction.

The court pointed out that the constitutional requirement of just compensation was independent of statutory policies which might have been intended to regulate governmental liability in the excavation and land stability area. Thus *Holtz* answers the query posed *supra* at 200 n.184—namely, whether Civil Code Section 832 governs excavation work by public agencies—in the negative.

> Article I, section 14, of the California Constitution, provides that: "Private property shall not be taken or damaged for public use without just compensation. . . ." and it is this provision, rather than section 832, in which plaintiffs' inverse condemnation claim is fundamentally rooted. (See *Rose v. State* (1942) 19 Cal.2d 713, 724 [123 P.2d 505].) In such cases the purposes of the constitutional clause, rather than the limits established by a rule of statutory or common law allocating rights and responsibilities between private parties, must fix the extent of a public entity's responsibility. [*Id.* at 302, 475 P.2d at 444, 90 Cal. Rptr. at 348.]

The court further noted that, in any case, it is not likely that Section 832 was even intended by the Legislature to apply to public excavation operations. *Id.* at 310 n.16, 475 P.2d at 450 n.16, 90 Cal. Rptr. at 354 n.16, citing the text *supra* at 64–72.

[130] 9 Cal. App.3d 1024, 88 Cal. Rptr. 695 (1970).

absent any fault on the part of the county or foreseeability of the ensuing damage.[131]

Miscellaneous physical damage claims. Several types of physical injuries to property have recently given rise to inverse condemnation claims. In *Sacramento & San Joaquin Drainage Dist. v. Goehring,*[132] the court of appeal held that physical damage to a private roadway temporarily taken for access purposes by the public entity in pursuit of its public improvements was fully compensable in inverse condemnation.[133] In *Mancino v. Santa Clara County Flood etc. Dist.,*[134] however, the court of appeal deemed the placement of storm drain facilities under and protruding above the surface of a city street, between the curb and sidewalk line, did not constitute a compensable damaging either to the adjoining owner's right of access and use of the surface or to his underlying fee interest in the street.[135]

The tendency of courts to employ private law analogies in inverse liability cases has been accentuated by legislation governing liability of public entities for damage caused by its pesticide operations. Government Code Section 862 now provides that the liability of a public entity engaged in pest control operations is the same as that of a private person engaged in the same activity.[136] Since the trend of the private law cases involving damage from chemical sprays appears to be toward the imposition of strict liability,[137] it is likely that public entities will now be liable for damages to both persons and property without regard to fault. Should the private law not apply a rule of strict liability for property damage from chemical sprays, it is possible that the Constitution will compel just compensation without a showing of fault regardless of Section 862.[138]

Recent legislation also regulates the liability of public entities for physical damages to property incurred during a privileged entry on the property for inspections, surveys, and the like that are undertaken to determine whether the property is suitable for acquisition for public use. Government Code Section 816 codifies the rule that a public entity is liable for actual damage to property or for substantial interference with the possession or use of property where the damage arises from an entry, even if privileged, to make studies, tests, surveys, and to conduct similar activities.[139] Under this rule there is no liability for the entry itself or for trivial damages or slight interferences with pos-

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[131] *Id.* at 1029–1030, 88 Cal. Rptr. at 698–699.
[132] 13 Cal. App.3d 58, 91 Cal. Rptr. 375 (1970).
[133] *Id.* at 68, 91 Cal. Rptr. at 381, citing Holtz v. Superior Court, 3 Cal.3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970).
[134] 272 Cal. App.2d 678, 77 Cal. Rptr. 679 (1969).
[135] *Id.* at 682, 77 Cal. Rptr. at 681. The property owner cannot recover for damage to the property as long as the storm drain "is constructed on and under the street, for a beneficial public use, with the permission of the City, and does not otherwise interfere with the free use of the street or plaintiff's home . . . ." *Id.*
[136] Cal. Stats. 1970, Ch. 1099, § 17. See *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act,* 9 Cal. L. Revision Comm'n Reports 801, 835 (1969).
[137] See the discussion, *supra* at 213–214.
[138] See Holtz v. Superior Court, 3 Cal.3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970), holding that a statute cannot immunize a public entity from liability for physical damages caused by the entity; see also the discussion in the text accompanying notes 42–57 *supra.*
[139] Cal. Stats. 1970, Ch. 1099, § 3. See the discussion, *supra* at 215–217.

session.[140] Related statutory provisions generalize the procedures—formerly applicable only to reservoir site investigations—by which a public entity can obtain a written consent or a court order, with appropriate safeguards, to authorize entry for surveys that will cause subtantial damage to property.[141] Likewise, local public entities have been authorized by statute to agree to repair or pay for any damage incident to a right of entry or similar privilege obtained by the entity.[142]

A "Risk Analysis" Approach to Inverse Liability

Clarification of the basis of inverse liability. The inverse condemnation cases in the unintended physical damage area can be viewed as expressing a policy that balances the importance of a project to the public health, safety, and welfare against the risk and magnitude of probable damage to private property and that imposes liability depending on the reasonableness of the public activity in the balance.[143] The absolute liability cases, for instance, can be read to mean that nearly every governmental decision to undertake a public improvement involves at least some unforeseeable risk that physical damage to property may result. If the resulting physical damage is a direct consequence of the project, as in *Albers*,[144] and can more equitably be absorbed by the beneficiaries of the public improvement than by the injured property owner, the fact that the damage was unforeseeable may not be a sufficient justification to shift the loss from the project that caused it to the equally innocent property owner.[145]

The Supreme Court in *Holtz v. Superior Court* [146] expressly adopted this "risk analysis" approach to inverse condemnation liability for physical injuries in holding a public entity liable for physical injury to real property proximately caused by a deliberately planned public improvement.[147] The decision recognized that a public entity planning a project is able to determine the risks and costs involved in the project, to balance the risks against the practicality and expense of their avoidance, and deliberately to shift the future losses to private property rather than treat them as a part of the cost of the improvement paid for by the community at large: [148]

> Our decision in the instant case, and the *Albers* decision more generally, in effect recognize that, under article I, section 14, physcal damages proximately resulting from a public improvement

[140] See *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801, 811–815 (1969).

[141] CODE CIV. PROC. §§ 1242, 1242.5 (West Supp. 1971); see the text, *supra* at 217, pointing out that, although Section 1242.5 was limited to reservoir site investigations, it constitutes a useful starting point for generalized legislative treatment of the problem of damage from privileged official entries upon private property.

[142] GOVT. CODE § 53069 (West Supp. 1971). See generally the discussion, *supra* at 242–243. See also WATER CODE § 260 (West 1971).

[143] See the discussion, *supra* at 220–230.

[144] 62 Cal.2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965). A major landslide caused by the pressure exerted by substantial earth fills deposited by the county in the course of extending a county road destroyed over five million dollars in residential and related improvements.

[145] Sheffet v. County of Los Angeles, 3 Cal. App.3d 720, 733, 84 Cal. Rptr. 11, 19 (1970), citing the text *supra* at 225–227.

[146] 3 Cal.3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970).

[147] *Id.* at 311, 475 P.2d at 451, 90 Cal. Rptr. at 355.

[148] For a discussion of these concepts, see the text, *supra* at 221–224.

> must be considered as direct a "cost" as the property actually condemned or the materials actually utilized in its construction. Indeed, in most instances a public entity may be able to forestall unintended physical damage by initially employing more protective measures in the actual construction of the project; in the instant case, for example, defendants could probably have prevented the damage to plaintiffs' property by expending additional funds in shoring up its excavation. This comment does not imply, however, that defendants would necessarily be negligent in not expending such funds; the likelihood of the damage may have been so remote and the expense of the additional protection so great that it was reasonable (hence, non-negligent) for defendants to forego supplemental measures initially. Nevertheless, since the undertaking of the excavation at this lower cost created some risk, however slight, of damage to plaintiffs' property, it is proper to require the public entity to bear the loss when damage does occur.[149]

The court concluded its discussion of the risk analysis basis of inverse liability by pointing out that the governmental entity with its superior resources is normally in a better position to evaluate the nature and extent of the risks of the improvement than are potentially affected property owners. Further, the governmental entity is the more rational locus of responsibility, capable of striking the best bargain between efficiency and cost (including inverse liability costs) in planning its improvements.[150] For these reasons, liability without regard to fault is appropriate.

The risk analysis rationale for absolute liability in inverse condemnation can only be satisfied if the fiscal capacity of the defendant public entity is adequate to cover the physical damage it causes. One means of assuring adequate fiscal capacity is through commercial insurance. Although the authority of a public entity to insure against liability based on a theory of inverse condemnation is not clearly established by statute,[151] legislation has been recently introduced to express such authority.[152]

Expansion of statutory remedies. Several procedural disparities in inverse condemnation law have received judicial consideration. Normally an inverse condemnation action contemplates money damages, and injunctive or other equitable relief is not available in the presence of a public use.[153] In *Sheffet v. County of Los Angeles*,[154] the court of appeal modified this rule to allow an injunction where property damage was

[149] 3 Cal.3d at 310–311, 475 P.2d at 450–451, 90 Cal. Rptr. at 354–355 (footnote omitted).

[150] *Id.* at 311, 475 P.2d at 451, 90 Cal. Rptr. at 355, quoting from the text *supra* at 227.

[151] See the discussion, *supra* at 226 n.288.

[152] Assembly Bill 333 (1971 Reg. Sess.), introduced to effectuate *Recommendation Relating to Inverse Condemnation—Insurance Coverage* (October 1970), 10 Cal. L. Revision Comm'n Reports 1051 (1971).

[153] See the discussion, *supra* at 244–247.

[154] 3 Cal. App.3d 720, 84 Cal. Rptr. 11 (1970).

being caused by surface waters flowing over a negligently designed or constructed road crown.[155]

> The over-crown run-off, however, is but the result of negligent design of the crown height or road pitch, and has no relationship to the reasonableness of the public improvement sought to be created. As to such unnecessary, unintentional, and negligently created consequences of the public improvement, we see neither logic nor reason which prohibits the issuance of an injunction to prohibit the maintenance thereof.[156]

Questions concerning the proper parties to an inverse condemnation action have also arisen. *Greater Westchester Homeowners Ass'n, Inc. v. City of Los Angeles,*[157] held that, for a valid class action to recover compensation for damaging homeowners' property as a result of airport proximity, plaintiff must be a member of the affected class.[158] On the other hand, for a public entity to be a proper party for suit in inverse condemnation, it need only have "substantially participated" in the damage. Thus, in *Stoney Creek Orchards v. State,*[159] where the alleged damage was land erosion caused by the operation of federal hydroelectric projects, significant state involvement in the planning and development of portions of the projects was held sufficient for imposition of inverse liability.[160] Likewise in *Sheffet v. County of Los Angeles, supra,* the county's approval of defective plans for street improvements and later acceptance of a dedication of the streets as improved by a private developer was sufficient to impose on the county inverse liability for ensuing damages.[161]

It is uncertain to what extent expenses incurred by a plaintiff in an effort to mitigate damages in inverse condemnation should be recoverable.[162] Recent decisions have reaffirmed the principle that, while plaintiff has no duty to mitigate damages when he cannot do so reasonably,[163] any protective measures he takes are compensable [164] as long as the expenses incurred are reasonable and are made in good faith.[165]

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[155] *Id.* at 739, 84 Cal. Rptr. at 23:

> In the instant case, the injunction is proper as it relates to the over-crown run-off, and a mandatory injunction could issue ordering the County to cease engaging in such acts of negligence in the maintenance of the inadequate drainage system.

[156] *Id.* at 738, 84 Cal. Rptr. at 23.

[157] 13 Cal. App.3d 523, 91 Cal. Rptr. 720 (1970).

[158] *Id.* at 526, 91 Cal. Rptr. at 722.

[159] 12 Cal. App.3d 903, 91 Cal. Rptr. 139 (1970).

[160] *Id.* at 906–907, 91 Cal. Rptr. at 141:

> By alleging substantial state participation in such activity and that plaintiffs' lands have been damaged by that activity, the complaint states a cause of action for inverse condemnation.

[161] Sheffet v. County of Los Angeles, 3 Cal. App.3d 720, 735, 84 Cal. Rptr. 11, 20–21 (1970).

[162] See the discussion, *supra* at 245 n.353(c).

[163] Sheffet v. County of Los Angeles, 3 Cal. App.3d 720, 741, 84 Cal. Rptr. 11, 25–26 (1970).

[164] *Id.* at 741, 84 Cal. Rptr. at 26:

> Certainly, whatever plaintiff must erect on his property, he is entitled to both the cost of such erection and the damage caused by the burden requiring such protective structures.

[165] City of Los Angeles v. Kossman, 274 Cal. App.2d 116, 78 Cal. Rptr. 849 (1969).

INTANGIBLE DETRIMENT

Losses Caused by Highway and Street Improvements

If a public improvement results in the substantial impairment of the right of access from private property to the general community highway system, the property owner may recover damages, whether or not any of his property is physically taken for the public improvement, and he can bring an inverse condemnation action if no eminent domain proceeding is instituted.[166] For example, in the recent case of *United California Bank v. State*,[167] the plaintiff was allowed damages in inverse condemnation for substantial impairment of access, loss of visibility, and loss of advantageous business conditions caused by street grading, separation, closing, and rerouting even though the state took none of his property.[168]

Although the courts have often pointed out that the basic principles of inverse condemnation and eminent domain actions are the same,[169] recovery for substantial impairment of access by way of severance damages in an eminent domain proceeding appears to have been restricted, or at least obscured, by the rule of *People v. Symons*,[170] limiting recovery of severance damages to injurious consequences resulting from improvement work on the property taken from the claimant.[171] In *Breidert v. Southern Pacific Co.*,[172] the Supreme Court rejected the view that substantive compensability is different in eminent domain proceedings than in inverse condemnation actions and stated the uniform test of compensability as "substantial impairment of the right of access," distinguishing *Symons* on the ground that the property owner had failed to show such substantial impairment.[173] The confusion caused by *Symons*, however, has not yet subsided.

[166] See the discussion, *supra* at 251–263. Recent cases have reaffirmed, however, that not all losses of access rights are compensable. See Sacramento & San Joaquin Drainage Dist. v. Goehring, 13 Cal. App.3d 58, 91 Cal. Rptr. 375 (1970) (property owner denied recovery for his loss of access to move equipment over a creek onto the property of a neighboring landowner because his access was not a legally enforceable "right"). See also Colberg, Inc. v. State, 67 Cal.2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967) (recovery for loss of access to main water channel caused by highway construction denied because property owner's rights were subject to the state's "navigational servitude").

[167] 1 Cal. App.3d 1, 81 Cal. Rptr. 405 (1969).

[168] *Id.* at 8, 81 Cal. Rptr. at 411:

> The combination of appellant's several works of improvement thus effectually interfered with respondent's rights of access and exposure. No mere rerouting of traffic is involved; rather, a substantial change in the streets themselves as they relate to respondent's property. We hold actionable interference was established.

[169] See, *e.g.*, Breidert v. Southern Pac. Co., 61 Cal.2d 659, 663 n.1, 394 P.2d 719, 721 n.1, 39 Cal. Rptr. 903, 905 n.1 (1964). See the text accompanying notes 6–7 *supra*.

[170] 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960).

[171] *Id.* at 860, 357 P.2d at 454, 9 Cal. Rptr. at 366 (dictum):

> It is established that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as change of neighborhood, noise, dust, change of view, ***diminished access*** and other factors similar to the damages claimed in the instant case, there can be no recovery where there has been no actual taking or severance of the claimant's property [emphasis added].

[172] 61 Cal.2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964).

[173] *Id.* at 666–667, 394 P.2d at 723–724, 39 Cal. Rptr. at 907–908. See the text *supra* at 254 accompanying nn.23–25.

Despite *Breidert's* clarification of the law governing recovery for substantial impairment of access, the courts of appeal have followed and extended *Symons* in subsequent decisions that limit the right to recover severance damages for impaired access to cases where the land taken was used for the portion of the improvement actually causing the impairment.[174] In *People v. Ramos,*[175] the Supreme Court disapproved this restrictive application of *Symons* [176] and held that severance damages are recoverable if any part of the land taken is used for the general purposes of the improvement that causes the loss.[177]

The *Ramos* holding does not appear wholly adequate, however, for by its failure to reassert the more general rule that any property owner may recover for substantial impairment of access, it may perpetuate the rule of *Symons* which appears to be inequitable in its denial of just compensation for damage to property by substantial impairment of access. *People v. Romano,* 17 Cal. App.3d 479 (May 13, 1971) (not final when this book was printed), recognizes this disparity and indicates that the condemnee can recover for substantial impairment of access in an eminent domain case by affirmatively alleging facts stating a cause of action for inverse condemnation.

Noise Damage From the Operation of Aircraft

There is yet in California no appellate court decision whether noise from jet aircraft presents a proper case for inverse condemnation against a public entity, even assuming that such noise has caused a diminution in property values.[178] Although the general principles and pertinent precedents from other jurisdictions have been collected above,[179]

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[174] See, *e.g.*, People v. Elsmore, 229 Cal. App.2d 809, 40 Cal. Rptr. 613 (1964), holding that severance damages caused by freeway construction could not be allowed to a remainder parcel where the part taken was not used for the freeway proper, but merely for auxiliary areas. See also the text, *supra* at 254 nn.22, 25.

[175] 1 Cal.3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969).

[176] *Id.* at 264 n.2, 460 P.2d at 994 n.2, 81 Cal. Rptr. at 794 n.2:

> Any implications found in *People* ex rel. *Dept. of Public Works* v. *Elsmore* (1964) 229 Cal.App.2d 809 [40 Cal. Rptr. 613], contrary to the views we express today must be deemed disapproved.

[177] In *Ramos*, the property owner sought severance damages for partial loss of access caused by a freeway project that placed the property on a cul-de-sac. The state contended that severance damages could not be allowed unless the property taken was actually utilized for the offending freeway and that, since the property was taken only for a freeway shoulder rather than the freeway pavement, severance damages for loss of access should not be allowed. The superior court held that no severance damages could be recovered for the loss of access in such a situation. The Supreme Court reversed and held that severance damages were available because the property was taken as a part of the freeway right of way generally.

The *Ramos* holding allows consideration of the project as a whole in awarding severance damages for impairment of access and apparently for other types of impairment of value as well. This broad interpretation of use of property for a public improvement does not, however, extend to property taken for *related* projects, for the court cited with approval *People v. Wasserman,* 240 Cal. App.2d 716, 50 Cal. Rptr. 95 (1966), denying severance damages for property taken for intersection enlargement in connection with a freeway project impairing access.

[178] See Aaron v. City of Los Angeles (Los Angeles Superior Court No. 837,799) (Memorandum Opinion of Judge Bernard S. Jefferson, Feb. 5, 1970, reprinted in Los Angeles Daily Journal Report, Nov. 6, 1970).

[179] See the text, *supra* at 281–301, and City of Oakland v. Nutter, 13 Cal. App.3d 752, 761 n.7, 92 Cal. Rptr. 347, 351–352 n.7 (1970), citing the text *supra* at 281–301.

> The trial courts must chart the theories of recovery or nonrecovery, and, ultimately, the California Supreme Court will be asked to determine this aspect of the law of inverse condemnation upon appeals from judgments of the trial courts.[180]

Recent cases have commenced the task of shaping the California law in this area.[181]

In *City of Oakland v. Nutter*,[182] the court of appeal considered the question whether property owners who have air easements above their homes condemned for airport purposes can recover by way of severance damages for excessive noise, vibration, discomfort, inconvenience, and other interferences with the use of the underlying property. After noting provisions of the Code of Civil Procedure that permit appropriate governmental bodies to take the initiative in securing rights that otherwise might be the subject of inverse condemnation actions for noise, vibration, discomfort, and the like,[183] the court concluded that such items were proper considerations in determining severance damages to the property from which the easements were taken.[184] This holding was limited to proximity damages that cause actual market value decreases[185] to property actually condemned[186] and directly under the flight paths of airplanes.[187] The court did not decide whether damages would be allowed absent a taking and severance or absent actual overflights.

Two superior court decisions, however—*Aaron v. City of Los Angeles*[188] and *Greater Westchester Homeowners' Ass'n v. City of Los Angeles*[189]—have gone well beyond the limited holding of *Nutter*. In *Aaron*, plaintiffs were homeowners in the vicinity of the Los Angeles International Airport who sought damages in inverse condemnation for decline in their property values due to noise, smoke, vibrations, and aircraft fumes from jet airplanes. Although not entirely clear from the opinion in the case, it appears that not all the plaintiffs were directly

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[180] Aaron v. City of Los Angeles (Los Angeles Superior Court No. 837,799) (Memorandum Opinion of Judge Bernard S. Jefferson, Feb. 5, 1970, reprinted in Los Angeles Daily Journal Report at 14, Nov. 6, 1970).

[181] Although the California Law Revision Commission indicated in its December 1969 Annual Report (9 CAL. L. REVISION COMM'N REPORTS 81, 93 (1969)) that the subject of liability in inverse condemnation for aircraft noise damage is under active study, the Commission states in its December 1970 Annual Report (10 CAL. L. REVISION COMM'N REPORTS 1001, 1013 (1971)) that it has decided not to recommend legislation on this subject at this time, pending judicial clarification of the law in the area.

[182] 13 Cal. App.3d 752, 92 Cal. Rptr. 347 (1970).

[183] 13 Cal. App.3d at 766, 92 Cal. Rptr. at 355–356, citing the text *supra* at 286–293.

[184] *Id.* at 772, 92 Cal. Rptr. at 360.

[185] The evidence indicated that there was no "mere annoyance" to the property owners but actual substantial decreases in property values by about 25% in the area near the jet runway. *Id.* at 769, 92 Cal. Rptr. at 357.

[186] The holding is thus consonant with *People v. Symons*, 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 863 (1960), requiring an actual taking of property before proximity damages will be allowed.

[187] This is the overflight rule of the federal courts. See the discussion, *supra* at 284–286. The court indicated, however, that legislative policy seems to allow compensation even where the property involved is not subject to direct overflights. 13 Cal. App.3d at 766, 92 Cal. Rptr. at 355–356, citing the text *supra* at 286–293.

[188] Los Angeles Superior Court No. 837,799 (Memorandum Opinion of Judge Bernard S. Jefferson, Feb. 5, 1970, reprinted in Los Angeles Daily Journal Report, Nov. 6, 1970).

[189] Los Angeles Superior Court No. 931,989 (Memorandum Opinion of Judge Bernard S. Jefferson, April 17, 1970).

under the flight paths of approaching and departing airplanes. The court stated that those properties which were "substantially damaged" by noise from flyover and flyby aircraft were compensable in inverse condemnation. Thus, the court abandoned the notion that a "trespass" or flyover is required for a cause of action, relying instead on the more reasonable "substantial damage" test. The court distinguished the highway noise cases, which require an actual taking of property before proximity damages will be allowed,[190] on the grounds that those cases are being given a restrictive interpretation generally and that, unlike highway noise which is merely annoying, jet aircraft noise is actually "damaging":[191]

> Furthermore, there is a significant difference between the noise emanating from jet aircraft and that coming from automobiles and trucks on a street or freeway. This difference is so pronounced that the legal consequences of jet noise should not be the same as the legal consequences of street and freeway noise of cars and trucks as enunciated by cases such as *Albers, Lombardy* and *Symons.* Scientific studies demonstrate that jet aircraft noise creates a severe disturbance to the comfort, enjoyment and use of residential property by the owners affected. The sounds emanating from cars and trucks on streets and freeways are simply minor contrasted with the irritating and offensive sounds emanating from jet aircraft.

This rationale was reiterated and strengthened in *Greater Westchester,* which held that damages for jet aircraft noises, vibrations, and fumes recoverable against the city were indemnifiable by the airlines that used the airport and aircraft manufacturers that manufactured the jet engines.

TAKING OR DAMAGING BY POLICE POWER

In *Associated Home Builders etc., Inc. v. City of Walnut Creek,*[192] the California Supreme Court held that a statute requiring a subdivider to dedicate land, or pay a fee, for park or recreational purposes[193] does not deprive the subdivider of his property without just compensation. The court noted that other jurisdictions have upheld comparable dedication statutes under the state's police power on the ground that the subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by the fact of subdivision, and in return for this benefit the city may require

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[190] See, *e.g.*, People v. Symons, 54 Cal.2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960); Lombardy v. Peter Kiewit Sons' Co., 266 Cal. App.2d 599, 72 Cal. Rptr. 240 (1968), *appeal dismissed*, 394 U.S. 813 (1969). See the discussion, *supra* at 261–263; see also the text accompanying notes 169–177 *supra.*

[191] Aaron v. City of Los Angeles (Los Angeles Superior Court No. 837,799) (Memorandum Opinion of Judge Bernard S. Jefferson, Feb. 5, 1970, reprinted in Los Angeles Daily Journal Report at 17, Nov. 6, 1970).

[192] 4 Cal.3d 633, 483 P.2d—, 94 Cal. Rptr. — (1971). The Supreme Court opinion vacates the court of appeal decision in the same case. *Associated Home Builders v. City of Walnut Creek,* 11 Cal. App.3d 1129, 90 Cal. Rptr. 663 (1970), discussed *supra* at 360–369 *passim.*

[193] Section 11546 of the Business and Professions Code authorizes the governing body of a city or county to require that a subdivider must, as a condition to the approval of a subdivision map, dedicate land or pay fees in lieu thereof for park or recreational purposes.

him to dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities.[194]

The California court went beyond this reasoning, however, and held that a dedication requirement is constitutional even though the need for additional park and recreational facilities, is not attributable to population increase stimulated by the new subdivision alone. The court stated that the dedication can be justified on the basis of a "general public need" for recreational facilities caused by present and future subdivisions:[195]

> We see no persuasive reason in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required.

This decision marks a shift in the traditional judicial reluctance to broadly interpret dedication requirements.[196] The court recognized the strongly-expressed California public policy to provide park and recreation land to accommodate the rapid population increases and to preserve open space lands for the economic and social well-being of the state and its citizens. The court indicated that statutes which further this underlying policy will be upheld whenever possible to effectuate those purposes.[197]

Consistent with this liberal construction of dedication requirements, the court noted, without deciding, that dedications may be required even though they will not necessarily primarily benefit the particular subdivision [198] and that contributions for increased costs of governmental services caused by the entry of new residents may be permissible.[199]

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[194] This is the "average reciprocity of advantage" theory, described *supra* at 307.

[195] 4 Cal.3d at 639–640.

[196] See discussion *supra* at 362.

[197] This is true even though land dedication requirements may ultimately discourage the building of low-cost housing. See discussion *supra* at 361.

> The desirability of encouraging subdividers to build low-cost housing cannot be denied and unreasonable exactions could defeat this object, but these considerations must be balanced against the phenomenon of the appallingly rapid disappearance of open areas in and around our cities. [4 Cal.3d at 648.]

[198] The court pointed out that the statute under consideration was limited by its terms to dedications that serve the subdivision. The court went on to state parenthetically in a footnote, however:

> It is difficult to see why, in the light of the need for recreational facilities described above and and the increasing mobility of our population, a subdivider's fee in lieu of dedication may not be used to purchase or develop land some distance from the subdivision but which would also be available for use by subdivision residents. [4 Cal.3d at 640 n. 6.]

[199] The case before the court involved the unique problem of utilization of raw land, a limited resource difficult to conserve in a period of increased population pressure. Thus, the particular dedication is distinguishable from more general or diffuse needs created for such areawide services as fire and police protection. The court noted, however:

> We do not imply that only those exactions from a subdivider are valid which present the special considerations set forth with regard to section 11546 but hold only that the exactions required by the section are justified by special factors not applicable to such matters as the increased cost of governmental services. [4 Cal.3d at 642 n. 8.]

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