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Arvo Arvo Van Alstyne

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MODERNIZING INVERSE CONDEMNATION: A LEGISLATIVE PROSPECTUS*

Arvo Van Alstyne**

The constitution of California¹ and the due process clause of the fourteenth amendment² 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

* This Article was prepared by the author for the California Law Revision Commission and is published here with the Commission's consent. The Article was prepared to provide the Commission with background information to assist it in its study of inverse condemnation. However, the opinions, conclusions, and recommendations contained in this Article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

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 articles⁵ 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

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-

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-

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 liabilities 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 action²⁰ deliberately conceived and undertaken for that purpose with respect to that prop-

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 conflagration²² 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-

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 noise²⁹ or noxious odors³⁰ 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

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 relief³⁷ may

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

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 immunity⁴⁴ but which, probably because of greater predictability, was often assimilated within the purview of

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

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

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 numerous⁵⁴ 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

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

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 aviation 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

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-

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. Zucker- man 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

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-

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

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 lot⁹⁰ or a wildlife sanctuary⁹¹ 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-

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.

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

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-

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. CRV. 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

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

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 non-compensability whose counterpoint is usually described as “eminent

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,

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-

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.¹⁸³ 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.¹⁸⁴

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.¹⁸⁵ 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.¹⁸⁶ In others, expectations regarding stability of existing conditions may be qualified by realization that in

¹⁸³ 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).

¹⁸⁴ See Van Alstyne, *supra* note 118, at 771-76.

¹⁸⁵ 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."

¹⁸⁶ 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

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

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 aviation 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

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 aircraft¹⁴⁹ 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

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

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. STRS. & 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.

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.