

Eminent Domain—Policy and Concept

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I. THE BACKGROUND

THE Federal Constitution contains no express grant of the power of eminent domain, but that power has nonetheless existed in the federal government from its beginning. Thus the provision of the Fifth Amendment that private property shall not be taken for public use without just compensation is a tacit recognition of a pre-existing power to take private property for public use, rather than a grant of a power.¹ It is an implied power, "necessary and appropriate" for the execution of powers expressly conferred.² The state governments also possess this power, as a matter of "political necessity."³ It is an inherent right of sovereignty.⁴ Doubtless the power is as old as political society.⁵

Public projects cannot, therefore, be blocked by the recalcitrance of persons who happen to own property in the path of the improvement; their property can be taken from them. When this is done, however, a correlative right to compensation arises in their favor. The first constitutions of most of the original states did not contain any provision requiring compensation to be paid when private property was taken.⁶ But the courts took the view that the state is bound to make good the loss to those whose property it takes, as a matter of "natural law."⁷ In later constitutions it was generally provided that compensation had to be paid and the courts came to look to those provisions exclusively as the basis of the right to compensation.⁸ At

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¹ *United States v. Carmack*, 329 U.S. 230, 241-242 (1946).

² *United States v. Gettysburg Electric Ry.*, 160 U.S. 668, 681 (1896).

³ *Kohl v. United States*, 91 U.S. 367, 371 (1875).

⁴ *Inspiration Consolidated Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 144 Pac. 277 (1914).

⁵ *Tuckahoe Canal Co. v. Tuckahoe & J. R. Co.*, 11 Leigh 42, 75 (Va. 1840). For a discussion of instances in Roman law when such power was exercised in aid of highways, municipal buildings, and other improvements, see Matthews, *The Valuation of Property in the Roman Law*, 34 HARV. L. REV. 229, 252-55 (1921).

⁶ Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 70 (1931).

⁷ E.g., *Bonaparte v. Camden & A. R. R.*, 3 Fed. Cas. 821, No. 1617 (C. C. D. N. J. 1830); *Petition of Mt. Washington Road Co.*, 35 N.H. 134 (1857); *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N. Y. 1816).

⁸ *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1944); 1 NICHOLS, *THE LAW OF EMINENT DOMAIN* § 1.3 (3d ed. 1950). Yet the older "natural law" concept left its imprint upon the newer decisions. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928); Grant, *The Natural Law Background of Due Process*, 31 COL. L.

any rate, the existence of some limitation on the state's power to affect private property rights without paying compensation is clearly one of the "jural postulates of civilized society in our time and place,"⁹ a part of the "social ideal of the time."¹⁰ The courts today recognize it to be an end of social policy that losses inflicted by public improvements shall be imposed, as far as practicable, upon the community rather than upon the individual property owners who are adversely affected.¹¹

Nearly all state constitutions now contain a provision which expressly prohibits those states from taking private property without compensation and the Fifth Amendment expressly prohibits the Federal Government from so doing. In addition the Fourteenth Amendment provides, in general language which has been adapted to a like use, that no state shall deprive any person of life, liberty, or property "without due process of law." The same or an equivalent expression appeared early in many of the state constitutions and, by the time of the enactment of the Fourteenth Amendment in 1868, the phrase "without due process of law" had come to mean "without just compensation" in questions of eminent domain.¹² Accordingly, the Fourteenth Amendment now guarantees payment when a state takes property for public use.¹³ It requires the states to observe certain minimum standards of fairness in their treatment of property owners.

These standards of fairness have had to be worked out by the courts. The terse commandments of the federal and state constitutions reject confiscation as a measure of justice, but they contain no definite rules or standards indicating when compensation is to be given and in what amount.¹⁴ The courts have had to define the rights protected and the circumstances under which recovery might be had for a deprivation of those rights. Their task has been one of safeguarding property rights, on the one hand, and seeing to it, on the other, that governmental projects are not impeded or blocked altogether by excessive liberality in the awarding of compensation.¹⁵

Two factors have contributed to the growth of the body of eminent

REV. 56 (1931); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931); Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L. J. 617, 643 (1916).

⁹ POUND, *SOCIAL CONTROL THROUGH LAW* (1942).

¹⁰ *Id.* at 6.

¹¹ *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

¹² *Taylor v. Porter*, 4 Hill 140, 147 (N.Y. 1843); *State v. Glen*, 7 Jones 321, 330-32 (N. C. 1859). See Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 478 (1911).

¹³ *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

¹⁴ *United States v. Cors*, 337 U.S. 325, 332 (1949).

¹⁵ *People v. Ricciardi*, 23 Cal.2d 390, 396, 144 P.2d 799, 802 (1943). "The law of eminent domain," it has been said, "is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner." *U.S. ex rel. T. V. A. v. Powelson*, 319 U.S. 266, 280 (1943).

domain law in bulk and complexity. The first is the expansion of governmental activities characteristic of our times. This expansion has caused increasingly frequent collision between the government and the property owner. For example, when the government seeks to exercise its power of eminent domain in an area previously unexplored, it may be met with the contention that a public purpose is not involved;¹⁶ or when in some new area the government seeks to exercise another of its powers, such as the police power, it may be met with the contention that private property is being taken without compensation.¹⁷ The second factor is the endless process of change to which the institution of private property is subject. From new conditions, new rights and obligations have arisen.¹⁸ Moreover, governmental activity may itself generate new property rights, e.g., the right to enforce zoning ordinances.¹⁹ The courts are moving toward the recognition of a multitude of novel property rights, and yet at the same time are lending support to a "creeping abrogation" of existing rights.²⁰

With such cross currents at work it is inevitable, of course, that the decisions will reveal a pronounced diversity of viewpoint.

The basic problem of striking a balance between public and private interest is beset with grave difficulties even where the situation is reduced to its simplest terms, that is, where land is wholly appropriated to some public use without occasioning injury to adjoining owners.²¹ The difficulties may be much more complex where a body having the power of eminent domain engages in an activity that involves some harm to land not appro-

¹⁶ Compare *Belovsky v. Redevelopment Authority*, 357 Pa. 329, 54 A.2d 277 (1947) with *Adams v. Housing Authority of City of Daytona Beach*, 60 So.2d 663 (Fla. 1952).

¹⁷ *Gorieb v. Fox*, 274 U.S. 603 (1927); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

¹⁸ *Perlmutter v. Green*, 259 N.Y. 327, 333, 182 N.E. 5, 7 (1932). For example, courts in recent times have given recognition to an "easement of ingress and egress." *Bacich v. Board of Control of California*, 23 Cal.2d 343, 350, 144 P.2d 818, 823 (1943), an "easement of reasonable view," *People v. Ricciardi*, 23 Cal.2d 390, 404, 144 P.2d 799, 806 (1946), and a "right to inundation," *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754 (1950). Courts have found an "easement of flight" to have been imposed by planes, *United States v. Causby*, 328 U.S. 256, 261 (1946), and a "servitude" by gunfire, *Portsmouth Co. v. United States*, 260 U.S. 327, 330 (1922), and have found an "easement" to have been established by a building line, *Curtis v. Boston*, 247 Mass. 317, 426, 142 N.E. 95, 97 (1924). This remarkable expansion of property rights is well described in Philbrick, *Changing Conceptions of Property in Law*, 86 U. OF PA. L. REV. 691 (1938).

¹⁹ *Welton v. 40 East Oak St. Bldg. Corp.*, 70 F.2d 377 (7th Cir. 1934), *cert. denied*, 293 U.S. 590 (1934) *sub. nom.* *Chicago Title & Trust Co. v. Welton*; Note, 13 N. C. L. REV. 233 (1934); Notes, 54 A.L.R. 366 (1928), 129 A.L.R. 885 (1940).

²⁰ NOYES, *THE INSTITUTION OF PROPERTY* 302, 432 (1936).

²¹ Here the task is one of determining the compensation to be paid. The traditional formula calls for payment of the fair market value of the land at the time of taking. *United States v. Miller*, 317 U.S. 369 (1943). In actual application this rubric loses its disarming simplicity and a host of infinitely complex valuation problems are revealed. 1 BONBRIGHT, *THE VALUATION OF PROPERTY*, 407 *et seq.* (1937).

priated by it for its use, or where a regulatory law or ordinance results in damage to a landowner, and the question of compensation for such damage arises. The effort to arrive at a solution of these perplexing damage problems has led the courts toward the development of a number of rules or principles of policy. These policy factors, although at times discussed by the courts, are usually left undisclosed²² or concealed behind a veil of concept. It is our purpose to study the decisions, chiefly those involving damage to landowners, with a view to revealing the policy attitudes that are helping to shape the modern law of eminent domain.

II. TAKING OF PROPERTY

One of the earliest controversies to emerge in the law of eminent domain centered around the meaning to be read into the phrase "taking of property." The Supreme Court, and many state courts, originally thought of "property" as land itself or some other tangible object of ownership.²³ This physical approach extended also to the word "taking." Owing largely, no doubt, to the connotation of the word itself,²⁴ "taking" was thought to mean a *taking over*, an appropriation of the property by the taker for the latter's own use.²⁵ Under the physical approach, the philosophy underlying the constitutional provisions is reduced to the notion that when the government appropriates land for its own use it should pay for what it gets.

In the latter half of the nineteenth century, with the enhancement of urban land values in growing cities and towns,²⁶ increasing recognition of the hardships inflicted under the physical approach²⁷ led to a two-pronged attack thereon. First came the adoption in Illinois of its Constitution of 1870, in which the eminent domain clause was broadened to provide com-

²² *Bacich v. Board of Control of California*, 23 Cal.2d 343, 347, 144 P.2d 818, 823 (1943).

²³ *Cormack, Legal Concepts in Cases of Eminent Domain*, 41 YALE L. J. 221, 229 (1931).

²⁴ *ORGE, VALUATION UNDER THE LAW OF EMINENT DOMAIN* 11 (1936).

²⁵ *SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW* 456 (2d ed. 1874). The view that a "taking of property" involves a physical appropriation of land itself apparently first found clear expression in *Callender v. Marsh*, 1 Pick. 418 (Mass. 1823). Before long it commanded a substantial following. *SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW* 456 *et seq.* (2d ed. 1874). There is no compensable taking of property under this view, for example, when a change in the grade of a street inflicts damage upon abutting land. *Smith v. Corp. of Washington*, 20 How. 135 (U.S. 1857); *O'Connor v. Pittsburgh*, 6 Harris 187 (Pa. 1851). Several reasons might be advanced in explanation of this early physical point of view. The word "taking" itself is strongly suggestive of an acquisition by the condemner rather than of an injury to the property owner. Moreover, in any field of law the earliest concepts to develop are likely to deal with concrete objects rather than with abstract rights. Furthermore, as the country moved into a period of canal building, railroad construction, and other public enterprises, the growing sentiment in favor of such undertakings may have enlisted the sympathy of the courts on the side of the condemner. *Cormack, Legal Concepts in Cases of Eminent Domain*, 41 YALE L. J. 221, 226 (1931).

²⁶ *Liddick v. City of Council Bluffs*, 232 Iowa 197, 5 N.W.2d 361 (1942).

²⁷ *SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW* 524 (1st ed. 1857).

pensation for property taken *or damaged*.²⁸ Dissatisfaction with denial of compensation in the cases involving damage to abutters caused by a change of street grade was responsible for this innovation.²⁹ Yet ultimately the repercussions of this step were felt far beyond this narrow area. The concept of eminent domain had been broadened to include compensation not only for land actually appropriated or "taken over" but also for "consequential" injuries to land not appropriated.³⁰ A step had been taken toward recognition of the indemnity principle,³¹ under which the objective is to compensate the owner to the full extent of his loss rather than to the extent of the government's gain. Other states were not long in following the example set by Illinois.³²

Almost simultaneously with the adoption of the first "or damaged" constitution, came an attack from another direction upon the physical approach. In a landmark decision, *Pumpelly v. Green Bay Co.*,³³ the Supreme Court enlarged the content of the phrase "taking of property" through the simple expedient of defining the word "taking" as including a *destruction* of property. In another leading case, *Eaton v. Boston C. & M. R. R.*,³⁴ a step toward adoption of the indemnity principle was taken through redefinition of the word "property" in the eminent domain clause of a state constitution to denote not land itself but the rights, powers, privileges, and immunities that the owner has in his land and that taken in their aggregate comprise his ownership of the land. A simplified version of the rationale that began to appear might run somewhat as follows: "property" in land consists of a cluster of rights that make beneficial enjoyment of the land possible. The right of access is one of these rights. When a municipality closes a street or changes its grade in such a manner as to deprive a landowner of access to his land, he has been deprived of a valuable property right. Since the owner has been deprived of the right, it must have been *taken from him*, for if it had not been taken, the owner would still have it. Therefore such an interference is a "taking" of "property."³⁵

²⁸ A similar step had been taken in England twenty-five years earlier through enactment of legislation providing for compensation where land was "injuriously affected" by the construction of public works. Land Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 18, § 68.

²⁹ *Rigney v. City of Chicago*, 102 Ill. 64 (1882).

³⁰ *Reardon v. City and County of San Francisco*, 66 Cal. 492, 6 Pac. 317 (1885).

³¹ See text, pt. VIII, *infra*.

³² 2 NICHOLS, EMINENT DOMAIN 324 (3d ed. 1950). The words "injured" or "injuriously affected" in some state constitutions have substantially the same meaning as "damaged." *Tidewater R. Co. v. Shartzter*, 107 Va. 562, 59 S.E. 407 (1907).

³³ 13 Wall. 166 (U.S. 1871). There were earlier state court decisions to this effect, e. g., *Glover v. Powell*, 2 Stockt. 211, 229 (N.J. Eq. 1854), but *Pumpelly* is regarded as the leading case.

³⁴ 51 N.H. 504, 511 (1872).

³⁵ In re *Forsstrom*, 44 Ariz. 472, 38 P.2d 878 (1934); *Liddick v. Council Bluffs*, 232 Iowa 197, 5 N.W.2d 361 (1942); *Thompson v. Androscoggin Co.*, 54 N.H. 545, 551 (1874); *White v. Southern Ry.*, 142 S.C. 284, 140 S.E. 560 (1927); *Ill. Cent. R. R. v. Moriarity*, 135 Tenn. 446, 186 S.W. 1053 (1916).

Thus it is evident that some courts were moving toward adoption of the indemnity principle along a course roughly parallel to that followed elsewhere through the medium of constitutional change.

The *Pumpelly* and *Eaton* cases had important consequences. They enabled the concept of "taking of property" to escape from its physical confines and thus it became a much more elastic formula. When a landowner suffers damage from some activity of a body having the power of eminent domain, a court disposed to hold such damage compensable under a "taking of property" constitution need only decide that a property right exists which has been abridged. Compensation may then be awarded for the "taking" of the "property" right.³⁶ It is evident that where a court is willing to take a liberal view of "taking" of "property," an "or damaged" constitutional provision is unnecessary.³⁷ Indeed, courts so disposed can arrive at a more liberal result under a "taking of property" formula than will other courts under "or damaged" constitutions.³⁸ Thus the phrase "taking of property" has been robbed of much of its significance. Today when a court grants or denies compensation on the ground that a "taking of property" is or is not involved, it is stating its conclusion and the reasons for its decision must be sought elsewhere. All that one can be sure of is that courts will be more liberal than they were in the early days of the physical approach.

Suggestions that the phrase "or damaged" has been added to the Federal Constitution by judicial interpretation³⁹ are of highly doubtful validity.⁴⁰ Seven years after the *Pumpelly* decision, another decision made it clear that the physical approach had not been abandoned altogether. In *Transportation Company v. Chicago*,⁴¹ the Supreme Court denied compensation for obstruction of an abutter's access. It limited the applicability of the *Pumpelly* case to situations where there was a "physical invasion of the real estate of the private owner, and a practical ouster of his possession."⁴² Thus the Supreme Court began to delineate and confine the area of federal protection under the due process clause of the Fourteenth Amendment. Since under the *Pumpelly* doctrine a physical invasion that renders

³⁶ Note, 32 CALIF. L. REV. 95 (1944).

³⁷ *Hyde v. Minnesota D. & P. Ry.*, 29 S.D. 220, 136 N.W. 92 (1912).

³⁸ Thus, in Connecticut, Michigan, and New York, under "taking of property" constitutions, the courts have awarded landowners compensation for the introduction by a public body of a prohibited use into an area protected by a general scheme of building restrictions, while compensation for a similar violation has been denied in California, Georgia, and Texas under "or damaged" constitutions. See text, pt. XIV, *infra*.

³⁹ *United States v. Chicago B. & Q. R. R.*, 90 F.2d 161 (7th Cir. 1937), *cert. denied*, 302 U.S. 714 (1937). See Note, 30 ILL. L. REV. 1063 (1936).

⁴⁰ 3 U. OF CHI. L. REV. 668 (1936).

⁴¹ 99 U.S. 635 (1878).

⁴² *Id.* at 642.

the land virtually useless is a taking though no appropriation is involved, earlier state court decisions denying compensation in such circumstances seem in effect to have been overruled. Under the *Transportation Company* doctrine, on the other hand, where there is no physical invasion, as in the cases dealing with changes in street grade, state court decisions refusing to award compensation involve no denial of due process.⁴³

A landowner seeking to invoke the Fourteenth Amendment as a protection against a "taking" of "property" must comply with the vestigial requirement that there be some kind of physical invasion. In addition, when he complains of a state court decision, he must show that the decision is egregiously wrong. It is not enough if the error complained of is only "a dubious mistake in the appraisal of the evidence,"⁴⁴ or the adoption of "too narrow a view upon a doubtful point in the measure of damages."⁴⁵ Rather, "the error must be gross and obvious, coming close to the boundary of arbitrary action."⁴⁶

One striking limitation upon the operation of the due process clause of the Fourteenth Amendment is afforded by the view that in the area of novel property rights, such as the abutter's easements of light, air, and view existing under the doctrine of the New York *Elevated Railroad Cases*,⁴⁷ each state is free to determine for itself whether or not such property rights exist.⁴⁸ But there are certain fundamental rights, an "irreducible minimum," that fall within the area of federal protection.⁴⁹ Thus from the viewpoint of American condemnation law there are forty-nine distinct concepts of "property" falling within the area of protection, the forty-eight state views and that of the federal courts.

The word "property" may be used to describe either of two separate and distinct relationships: that which exists between the owner and other individuals with respect to the object owned⁵⁰ or that which exists between the owner and the government with respect to such object. As the Supreme Court has observed, an economic interest is a "property right" only if it is a legally protected interest, and whether it will be legally protected depends, in part, on whether the conflict is with another private interest or with a

⁴³ Quite a number of courts in jurisdictions that have retained "taking of property" constitutions have continued to follow their old decisions in the change of grade cases. 2 NICHOLS, *THE LAW OF EMINENT DOMAIN* 342, 364 (3d ed. 1950). In a number of these jurisdictions compensation for such damage is provided by statute. Note, 156 A.L.R. 416 (1945).

⁴⁴ *Roberts v. New York City*, 295 U.S. 264, 278 (1935).

⁴⁵ *McGovern v. City of New York*, 229 U.S. 363, 371 (1913).

⁴⁶ *Roberts v. New York City*, 295 U.S. 264, 277 (1935).

⁴⁷ See, e.g., *Story v. New York Elevated R. R.*, 90 N.Y. 122 (1882). See note 329 *infra*.

⁴⁸ *Sauer v. New York*, 206 U.S. 536, 548 (1907).

⁴⁹ NOYES, *THE INSTITUTION OF PROPERTY* 432 (1936).

⁵⁰ RESTATEMENT, PROPERTY § 5, comment e (1936).

public interest.⁵¹ An individual's economic claim that is given legal protection in conflicts with other individuals is a property right *as against them*, but the same economic claim may not be entitled to protection *against the government*, and as against the government it may not be a property right at all.⁵² Thus, as to other riparian owners, the owner of land abutting on a navigable stream may have the right to have the stream come to him in its natural condition, but no such right exists as against the paramount power of the United States to improve navigation.⁵³ Again, an owner of land abutting on a public highway has a right that the view of his property from the highway be not obstructed by his neighbors,⁵⁴ but the state may obstruct the view by erecting any structure that will serve highway purposes.⁵⁵ Such instances might be indefinitely multiplied.

Not only does the state thus have a different set of rights to respect, but it also has the power in many cases to alter the owner's existing rights in his land. Zoning ordinances afford an illustration of the point. Every restriction upon the use of land imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed and constitutes an abridgment by the state of rights in property without compensation.⁵⁶ But the landowner's neighbors have no such power as individuals to modify his property rights. Clearly, what a governmental agency has the right or the power to do with respect to a person's land is governed by rules quite different from those governing other individuals.⁵⁷ Hence the word "property" in the constitutional provisions must be read with the *owner-versus-government* relationship in mind. To arrive at the meaning of "property" in eminent domain law, it is necessary to determine what interferences with private property are permitted the government and hence are to be excepted from the definition of "property" for the particular purpose.⁵⁸ This means

⁵¹ *United States v. Willow River Power Co.*, 324 U.S. 499, 502-503, 510 (1945).

⁵² *Ibid.*; 2 NICHOLS, *THE LAW OF EMINENT DOMAIN* 288-289 (3d ed. 1950). To be accurate, at least one further relationship should be mentioned—that which exists between the landowner and a private corporation having the power of eminent domain. This may differ in some respects from the owner-versus-government relationship. Lenhoff, *Development of the Concept of Eminent Domain*, 42 COL. L. REV. 596, 610-611 (1942).

⁵³ *Franklin v. United States*, 101 F.2d 459 (6th Cir. 1939), *aff'd*, 308 U.S. 516 (1939).

⁵⁴ Note, 90 A.L.R. 793 (1934).

⁵⁵ *Perlnutter v. Green*, 259 N.Y. 327, 182 N.E. 5 (1932).

⁵⁶ *Parker v. Commonwealth*, 178 Mass. 199, 59 N.E. 634 (1901).

⁵⁷ "We cannot start the process of decision by calling such a claim as we have here a 'property right'; whether it is a property right is really the question to be answered." *United States v. Willow River Power Co.*, 324 U.S. 499, 502-503 (1945).

⁵⁸ 2 NICHOLS, *THE LAW OF EMINENT DOMAIN* 288 (3d ed. 1950). It has been argued, however, that the property rights of an individual against the public should be considered the same as his rights against other individuals, for the purpose of awarding compensation in eminent domain proceedings. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L. J. 221, 240 (1931). This equating Nichols deprecates as a "fallacy." 2 NICHOLS, *op. cit. supra*, at 288.

that both tradition and public policy must be considered, for tradition and shifting social and economic policy determine the content of property rights at a given time,⁵⁹ and neither tradition nor policy considerations are the same in the *owner-versus-government* and *individual-versus-individual* situations.

If policy factors are to play their proper part in eminent domain decisions, it should be understood that "property" describes a constantly changing institution, not a closed category of immutable rights. The term property, it is clear, must have a degree of flexibility, allowing the courts to weigh interests, to evaluate ends, and to shape the law with purpose in view as well as precedent.⁶⁰ The interests of individuals must be weighed against the purposes and the needs of society. The formulas employed in this process must have breadth of view and flexibility of adaptation.⁶¹ Compensation may then be awarded that is "just" both to the property owner and to the public.⁶²

III. PROCEDURE IN DAMAGE CASES

One might have thought that determination of damages under the liberalized constitutions and court decisions would follow the procedural pattern set in the old traditional "taking" cases. This, however, proved not to be the case. Where an improvement does not contemplate the appropriation of any part of the land that is damaged, it is unnecessary in most jurisdictions to assess the damages in advance of the improvement.⁶³ This is for the reason, it is said, that it usually cannot be determined in advance of the improvement what damage will result therefrom.⁶⁴ Also, it is likely that failure to provide machinery for assessing damages to land not "taken" has at times been due to legislative oversight. Procedure simply failed to keep pace with changes in the substantive law.⁶⁵ Moreover courts are often confronted with a *fait accompli*. An improvement has been completed and compensable damage to land not appropriated has resulted. To require resort to condemnation procedure at this point seems cumbersome and unnecessary. Likewise, to enjoin operation of the improvement until condemnation had been completed might result in serious inconvenience to the public and might prevent many useful improvements.⁶⁶ Hence, most courts

⁵⁹ RESTATEMENT, PROPERTY § 5, comment e (1936).

⁶⁰ Note, 36 W. VA. L.Q. 363, 365 (1930).

⁶¹ New York, O. & W. R. R. v. Livingston, 238 N.Y. 300, 306, 144 N.E. 589, 591 (1924).

⁶² Searl v. Lake County School Dist., 133 U.S. 553, 562 (1890).

⁶³ Horn v. The City of Chicago, 403 Ill. 549, 87 N.E.2d 642 (1949); Stetson v. Chicago & Evanston R. R., 75 Ill. 74 (1874); Clemens v. Conn. Mut. Life Ins. Co., 184 Mo. 46, 82 S.W. 1 (1904).

⁶⁴ Stetson v. Chicago & Evanston R. R., *supra* note 63.

⁶⁵ E.g., In re Forsstrom, 44 Ariz. 472, 38 P.2d 878 (1934).

⁶⁶ Bronson v. Albion Tel. Co., 67 Neb. 111, 93 N.W. 201 (1903); Lenhoff, *Development of the Concept of Eminent Domain*, 42 Col. L. Rev. 596 (1942); Note, 133 A.L.R. 11 (1941).

take the practical course of determining the damages directly in a suit by the injured landowner, thus providing a sort of "inverse condemnation" procedure.⁶⁷

The rules of law governing the availability of this kind of suit may be summarized as follows: first, if the act complained of is that of a private corporation or of a public body that does not enjoy immunity from suit, permanent damages may be recovered by action at law or may be imposed in equity as a condition of withholding an injunction.⁶⁸ This is well illustrated by the cases in jurisdictions that have adopted an "or damaged" constitution. Adoption of this provision took away the immunity public service corporations enjoyed theretofore under legislative sanction and placed them on the same footing with individuals and other private corporations.⁶⁹ Second, if a sovereign is involved, an action may lie against the sovereign on the theory that the constitutional provision is self-executing and that such actions constitute an exception to the rule that the sovereign cannot be sued without its consent.⁷⁰ This is in harmony with the current trend toward limiting the immunity of the sovereign from damage suits.⁷¹ However, the waiver of immunity evolved in eminent domain damage cases does not apply to *tort* actions against the sovereign.⁷² Third, if the sovereign is involved but the constitutional guaranty of compensation is not regarded

⁶⁷ *Harrisonville v. Dickey Clay Co.*, 289 U.S. 334 (1933), 40 W.Va. L.Q. 59 (1933); *Campbell v. Arkansas State Highway Commission*, 183 Ark. 780, 38 S.W.2d 753 (1931); *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942); *Commissioner v. Adler*, 69 Colo. 290, 194 Pac. 621 (1920).

⁶⁸ *Harrisonville v. Dickey Clay Co.*, *supra* note 67; *State ex rel. Whitten v. Spokane*, 92 Wash. 667, 159 Pac. 805 (1916); Note, 133 A.L.R. 11, 93, 104, 115, 166 (1941).

⁶⁹ *Tidewater R. Co. v. Shartzer*, 107 Va. 562, 59 S.E. 407 (1907).

⁷⁰ *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942); *Commissioner v. Adler*, 69 Colo. 290, 194 Pac. 621 (1920); Note, 2 A.L.R. 2d 677, 684 (1948); *accord*, *Ettor v. Tacoma*, 228 U.S. 148 (1913). A comparable doctrine was evolved in nuisance law. An exception to the doctrine of municipal immunity for torts occurring in the performance of governmental functions was recognized in nuisance cases. *Smith, Municipal Tort Liability*, 48 MICH. L. REV. 41, 45 (1949). In explanation of this inroad upon the sovereign's immunity from tort liability, courts originally advanced the view that a municipality, as the owner of land, owes the same duties to owners of neighboring lands, with respect to the use of its own, as are owed by a private owner of land, regardless of whether the municipality is engaged in performing a governmental or private function. *District of Columbia v. Totten*, 5 F.2d 374 (D.C. Cir. 1925), *cert. denied*, 269 U.S. 562 (1925); *Wershba v. City of Lynn*, 324 Mass. 327, 86 N.E.2d 511 (1949); Note, 75 A.L.R. 1196, 1198 (1931). After the newer constitutional doctrines had appeared, the decisions were often made to rest on the ground that a nuisance maintained by a municipality constitutes a taking or damaging of property. *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E.2d 245 (1942).

⁷¹ *Dalehite v. U. S.*, 346 U.S. 15 (1953); *Thomas v. Broadlands Comm. Consol. Sch. Dist.* 201, 348 Ill. App. 567, 109 N.E.2d 636 (1952). A like trend is perceivable in England. *Crown Proceedings Act of 1947*, 10 & 11 Geo. 6, c. 44.

⁷² *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950). It is often difficult to distinguish between a tortious act and a taking of property in the constitutional sense. *Harris v. U. S.*, 205 F.2d 765 (10th Cir. 1953).

as waiving the sovereign's immunity from suit,⁷³ an action may lie under some statutory provision permitting the sovereign to be sued, such as the Tucker Act.⁷⁴ Fourth, where the eminent domain provision of the constitution in question is not regarded as involving a waiver of the sovereign's immunity from suit, the landowner may find himself wholly without remedy simply because no machinery has been provided for enforcing his rights.⁷⁵ Fifth, in some jurisdictions the immunity barrier has been surmounted indirectly. The landowner is permitted to institute mandamus against the proper official to compel filing of a proceeding to ascertain damages.⁷⁶ The action instituted in obedience to the writ of mandamus is a true condemnation suit, except that its objective is the assessment of damages. Sixth, where the public body in question wishes to ascertain *in advance of the improvement* what damages the improvement will entail, it may institute a true condemnation suit for the purpose of having such damages assessed, though such suit is usually couched in terms of "taking easements of access" or other property rights, as in the limited access highway cases. Some statutes expressly authorize such a proceeding.⁷⁷ Seventh, in a few jurisdictions the view has been taken that damages compensable under an "or damaged" constitution must be ascertained under the same procedure that governs cases where the whole of the property is appropriated, and any damaging that is not preceded by formal condemnation will be enjoined.⁷⁸ This is particularly true where the constitution specifically requires that payment of compensation be made in advance of the improvement.⁷⁹ Eighth, as we have noted, in awarding compensation for damage to land not appropriated, a court will at times rest its decision on the ground that "property" has been "taken." Occasionally such a court will conclude that since property has been taken, compensation must be determined in a formal condemnation suit.⁸⁰

⁷³ Langford v. United States, 101 U.S. 341 (1879).

⁷⁴ 28 U.S.C. § 1346 (1952); United States v. Dickinson, 331 U.S. 745 (1947). In appraising the consequences of such a statute, one must keep in mind the rule that the state is not liable for the torts of its officers, agents, or servants, and the passage of a statute simply authorizing suits against the state does not waive this immunity. Notes, 13 A.L.R. 1276 (1921), 169 A.L.R. 105 (1947). There is a distinction between immunity from liability and immunity from suit. However, it has been said that a statute waiving immunity from suit should be construed as a statute creating government liability. Heuser, *Dalehite v. United States: A New Approach to the Federal Tort Claims Act?*, 7 VAND. L. REV. 175, 179 (1954).

⁷⁵ Hawks v. Walsh, 177 Okla. 564, 61 P.2d 1109 (1936); Note, 2 A.L.R.2d 677, 696 (1948).

⁷⁶ People v. Kingery, 369 Ill. 289, 16 N.E.2d 761 (1938). *Contra*: People of Colo. v. District Court, 207 F.2d 50 (10th Cir. 1953).

⁷⁷ Holloway v. Purcell, 35 Cal.2d 220, 217 P.2d 665 (1950), *cert. denied*, 340 U.S. 883 (1950); Dept. of Public Works v. Lanter, 413 Ill. 581, 110 N.E.2d 179 (1953), Hinckley v. Seattle, 74 Wash. 101, 132 Pac. 855 (1913).

⁷⁸ McGavock v. Omaha, 40 Neb. 64, 58 N.W. 543 (1894).

⁷⁹ Searle v. City of Lead, 10 S.D. 312, 73 N.W. 101 (1897).

⁸⁰ Johnstone v. Detroit, G. H. & M. R. Co., 245 Mich. 65, 222 N.W. 325 (1928).

"Inverse condemnation" actions brought to recover damages already inflicted are in the nature of condemnation suits, and the measure of damages and rules of evidence are substantially the same as though a direct proceeding by condemnation had been brought.⁸¹ Allowance of full damages in such an action has the effect of exercise of the power of eminent domain,⁸² and satisfaction of the judgment confers an easement or privilege to continue the invasion in question.⁸³

A further illustration of the pragmatic attitude of the courts toward the procedure of determining damage questions is afforded by the rule that where part of a tract of land is condemned in a traditional "taking" procedure, and the owner whose land is being appropriated is before the court, all his ascertainable damages, past, present, and future, to the portion of the tract not appropriated may be determined in the condemnation suit.⁸⁴ These are "severance damages," so called.⁸⁵ However, compensation will not be allowed for speculative or conjectural damage. If the anticipated damages do in fact develop, compensation can be awarded in a subsequent action.⁸⁶

Since damages other than severance damages are usually recovered after they have been suffered, it is obvious that many projects are embarked upon without any accurate notion of the ultimate cost that will be involved. This uncertainty is minimized under the rule of some cases that damages wholly unforeseen are not recoverable⁸⁷ but not eliminated completely. The relative rarity of proceedings to assess damages in advance of the improvement suggests that condemners are not too unhappy in the situation, that they prefer the uncertainties of subsequent damage suits to the certainty of costs, contests, and litigation where all persons who might possibly be affected adversely by the improvement are invited in advance to present their claims.

Inverse condemnation seems to have ease of administration in its favor. Anticipated damage may never occur. Even if damage is certain to occur, it may nevertheless be difficult to compute its amount in advance. To bring into a condemnation suit all those who might in some manner suffer damage from the improvement would needlessly complicate condemnations. The

⁸¹ *Aldis v. Union Elev. R. R. Co.*, 203 Ill. 567, 68 N.E. 95 (1903); *Rigney v. Chicago*, 102 Ill. 64 (1882); Note, 20 A.L.R. 516 (1922).

⁸² *Chicago & E. I. R. R. v. Loeb*, 118 Ill. 203, 8 N.E. 460 (1886).

⁸³ *City of Ardmore v. Orr*, 35 Okla. 305, 129 Pac. 867 (1913).

⁸⁴ *St. Louis & B. Ry. Co. v. Van Hoorebeke*, 191 Ill. 633, 61 N.E. 326 (1901); Note, 128 A.L.R. 1195 (1940).

⁸⁵ *United States v. Miller*, 317 U.S. 369, 376 (1943).

⁸⁶ *Mullen v. Lake Drummond Canal & Water Co.*, 130 N.C. 496, 41 S.E. 1027 (1902); *Jones v. Oman*, 28 Tenn. App. 1, 184 S.W.2d 568 (1944).

⁸⁷ See *infra* pt. VIII.

prevailing attitude is a practical one and leans toward eliminating needless complications.

IV. THE POLICE POWER

The police power of the states is the source of a body of law which is "diversified and multifarious."⁸⁸ Statutes and ordinances sustained by this power need not provide for compensation, because the Fourteenth Amendment has been held not to interfere with the exercise by the states of their powers of police.⁸⁹ Accordingly, the police power has been viewed as a qualification of the Fourteenth Amendment, permitting property values to be diminished or even destroyed in certain circumstances without compensation.⁹⁰ But this qualification must have its limits, beyond which there must be an exercise of eminent domain and payment of compensation, or the protection of the Fourteenth Amendment is gone.⁹¹

It has been suggested that property rights may lawfully be impaired under the police power where their free exercise is detrimental to public interests, and must be taken under the power of eminent domain where they are useful to the public.⁹² But this view seems untenable if it rests on a distinction between an impairment and an appropriation;⁹³ for it is settled that the impairment of the property owner's rights may constitute a taking under eminent domain,⁹⁴ since there need not be a taking over but only a taking away.⁹⁵ It seems also to be untenable if it means that a distinction is to be made between averting detriment to the public and promoting the public advantage, for that would be a distinction without a difference. Again, it has been suggested that the test is whether the purpose is to confer an *added* benefit to the public or to prevent harm to some *established* public interest.⁹⁶ But we should not have to search for a public interest prior in time

⁸⁸ *City of New York v. Miln*, 11 Pet. 102, 139 (U.S. 1837). See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Reinman v. Little Rock*, 237 U.S. 171 (1915).

⁸⁹ *Mugler v. Kansas*, 123 U.S. 623 (1887).

⁹⁰ *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911).

⁹¹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922). There are, to be sure, instances of statutes and ordinances which are aimed at a purpose within the police power but which provide nonetheless for payment of compensation, as where a building line is established under the eminent domain power. Normally such instances arouse little controversy, because the landowners are paid for their loss. Controversy centers around those cases where loss is suffered without receipt of compensation.

⁹² FREUND, *THE POLICE POWER* § 511 (1904).

⁹³ *State ex rel. Interstate Air-Parts, Inc. v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 223 Minn. 175, 194, 25 N.W.2d 718, 730 (1947).

⁹⁴ See *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

⁹⁵ *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950).

⁹⁶ *Havran, Eminent Domain and the Police Power*, 5 NOTRE DAME LAW. 380, 384 (1930); Note, 27 HARV. L. REV. 664, 665 (1914).

to be protected in order to justify a police power regulation.⁹⁷ New methods are needed to deal with new problems. This is the very essence of the police power.⁹⁸ And it would be an inadequate police power indeed that would fail to make provision for tomorrow's problems.⁹⁹ No distinction between the two powers based on their purposes can be pressed far. The police power may serve not only the public health, morals, or safety, but also "public convenience or the general prosperity or welfare."¹⁰⁰ Thus, to quote Mr. Justice Holmes, "It may be said in a general way that the police power extends to all the great public needs."¹⁰¹ Similarly, the power of eminent domain may be exercised in aid of any other power of the sovereign "where public need requires."¹⁰² Property may not be taken for private uses alone,¹⁰³ but the "public use" limitation on eminent domain is today generally held to require only a purpose beneficial to the public and not a right of use by the public.¹⁰⁴ This reveals no difference in kind, no test for determining precisely where the line is to be drawn between the two powers and when compensation must be paid.

It has come to be recognized that only a difference in degree exists between non-compensable damage to a property owner under the police power and a deprivation of property rights under the power of eminent domain.¹⁰⁵ And in appraising the damage to the property owner to determine whether or not the line between the police power and the power of eminent domain has been crossed, the extent of the diminution of the owner's rights must be weighed against the importance of that diminution to the public.¹⁰⁶ Thus a building may be demolished without compensation under the police power to stop a conflagration, but not to establish a new building line. In this process of weighing burdens and benefits, considerable discretion is allowed the legislative body which must decide on the wisdom of a particular measure.¹⁰⁷ But when the problem of the validity of the legislation is presented to the courts, they must do their own weighing of these burdens and benefits, in order to determine whether the legislative body has acted within

⁹⁷ Note, 35 COL. L. REV. 938 (1935).

⁹⁸ E.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁹⁹ *James S. Holden Co. v. Connor*, 257 Mich. 580, 584, 241 N.W. 915, 916 (1932).

¹⁰⁰ *Sligh v. Kirkwood*, 237 U.S. 52, 59 (1915).

¹⁰¹ *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911).

¹⁰² *United States ex rel. T. V. A. v. Welch*, 327 U.S. 546, 554 (1946).

¹⁰³ *Missouri Pacific Ry. v. Nebraska*, 164 U.S. 403 (1896).

¹⁰⁴ Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949). But cf. *Adams v. Housing Authority of City of Daytona Beach*, 60 So.2d 663 (Fla. 1952).

¹⁰⁵ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922); *Interstate Consolidated Street Ry. v. Massachusetts*, 207 U.S. 79, 86-87 (1907). See Note, 35 COL. L. REV. 938 (1935).

¹⁰⁶ *Pennsylvania Coal Co. v. Mahon*, *supra* note 105 at 412; *Mansfield & Swett, Inc. v. Town of West Orange*, 120 N.J.L. 145, 153, 198 Atl. 225, 230 (Sup. Ct. 1938).

¹⁰⁷ *Reinman v. Little Rock*, 237 U.S. 171 (1915).

its constitutional powers. If a court decides, then, that a police power regulation imposes a much more serious burden on a landowner than the public benefit seems to warrant, it will designate the regulation as "unreasonable" and hold it to be not a legitimate exercise of the police power.¹⁰⁸ It cannot be helped that the items thus to be weighed, individual loss and public gain, neither allow accurate measurement nor have a common unit of measure for their surmised weights.¹⁰⁹ In this process of establishing a line between police power measures and compensable takings, the courts are influenced by "... conflicting and seldom expressed considerations On the one hand, there is the belief that an emphasis upon the obligation to pay for injuries caused by public measures would mean that such measures would not and could not be carried out. On the other hand, there is the belief that an emphasis upon freedom to carry out public measures without liability for compensation would emasculate the Fifth Amendment and encourage a resort to regulation as a means of taking without payment."¹¹⁰ Even the line so drawn will shift as the courts recognize changes in community needs and attitudes.¹¹¹ "In a changing world, it is impossible that it should be otherwise."¹¹²

The Fourteenth Amendment is not applied to police power measures, it has been said, because government could hardly go on if values incident to property could not be diminished to some extent without compensation.¹¹³ The police power decisions are thought to show just how far such diminution of property rights may validly be carried.¹¹⁴ This problem may also be approached from another direction. Property values are enjoyed under an implied limitation imposed by the police power.¹¹⁵ This implied limitation reduces the aggregate of property rights which the landowner can assert *against the government*, and only those remaining constitute the "legally protected interests" which are his property as *against the government*.¹¹⁶ Accordingly, the assertion by the government of any of its powers within the area of this implied limitation is not a taking of property without

¹⁰⁸ *Reschke v. Village of Winnetka*, 363 Ill. 478, 2 N.E.2d 718 (1936).

¹⁰⁹ Ribble, *The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation*, 16 VA. L. REV. 689, 692 (1930). A systematic classification of the conflicting interests that press for recognition is never encountered in the decisions. See, however, POUND, *OUTLINES ON JURISPRUDENCE* 96 (1943) and Stone, *A Critique of Pound's Theory of Justice*, 20 IOWA L. REV. 531 (1935).

¹¹⁰ Marcus, *The Taking and Destruction of Property under a Defense and War Program*, 27 CORNELL L.Q. 476, 515 (1942).

¹¹¹ *Mansfield & Swett, Inc. v. Town of West Orange*, 120 N.J.L. 145, 156, 198 Atl. 225, 232 (Sup. Ct. 1938).

¹¹² *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

¹¹³ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922).

¹¹⁴ *Tyson & Brother v. Banton*, 273 U.S. 418, 446 (1927).

¹¹⁵ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922).

¹¹⁶ See *United States v. Willow River Power Co.*, 324 U.S. 499, 503 (1945).

compensation in derogation of the Fourteenth Amendment because property *as against the government* is not thereby affected.

V. SPECIAL DAMAGE

As condemnation allowances became liberalized, it became necessary for the courts to evolve formulas determining the boundaries of compensability. One analogy at hand was that afforded by the nuisance cases. From its inception, the doctrine of tort liability for a public nuisance had been confined to cases where the plaintiff could show that he had suffered special damage over and above the ordinary damage caused to the public at large by the nuisance.¹¹⁷ The reason given for this rule is that it relieves the defendant of the multiplicity of actions which might follow if everyone were free to sue for the common harm.¹¹⁸ As the area of compensability in condemnation cases expanded to include damaging of property, the doctrine of special damage began to make an appearance.¹¹⁹ Indeed, in an authoritative decision expounding the meaning of the "or damaged" clause, it was said that the damage referred to in the Constitution is "special damage . . . in excess of that sustained by the public generally."¹²⁰ It is not difficult to account for the appearance of this doctrine in the law of eminent domain. As a policy proposition, it had long been evident in litigation involving private nuisances that not all injuries suffered by a landowner in the use and enjoyment of his land could or should be compensable.¹²¹ The new doctrines liberalizing recovery in eminent domain cases did not call for any deviation from this principle.¹²² Thus the doctrine of special damage became firmly embedded in condemnation law.¹²³ It was realized that there will occur, in the course of even the most careful construction and operation of public improvements, a great many annoyances and disturbances, which, although they may affect the use and enjoyment of land and therefore its value, must be considered as *damnum absque injuria*. They are the price paid for the public advantages and accommodations supplied by public or quasi-public enterprises.¹²⁴ Landowners are compensated for such injuries by sharing in the general benefits of the project.¹²⁵ But where a landowner suffers spe-

¹¹⁷ Y. B. 27, Hen. VIII, f. 27, pl. 10 (1535); Williams' Case, 5 Co. Rep. 726 (1595); Stetson v. Faxon, 19 Pick. 147 (Mass. 1837); PROSSER, TORTS 569 (1941).

¹¹⁸ PROSSER, *op. cit. supra* n. 117, at 570.

¹¹⁹ Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

¹²⁰ Rigney v. Chicago, 102 Ill. 64, 81 (1882).

¹²¹ RESTATEMENT, TORTS § 822, comment j (1934).

¹²² Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941); Hyde v. Minnesota, D. & P. Ry., 29 S.D. 220, 136 N.W. 92 (1912). See Note, 128 A.L.R. 1195, 1198 (1940).

¹²³ Stuhl v. Great Northern Ry., 136 Minn. 158, 161 N.W. 501 (1917).

¹²⁴ Lenhoff, *Development of the Concept of Eminent Domain*, 42 COL. L. REV. 596, 637 (1942).

¹²⁵ City of Winchester v. Ring, 312 Ill. 544, 144 N.E. 333 (1924).

cial damage, some extreme and unusual interference, there is a compensable "taking" of his property for public use.¹²⁶ The damage must be different in kind from that suffered by the rest of the public.¹²⁷ As in the nuisance cases, the reason given for denying recovery in the absence of special damage is that to hold otherwise would be to encourage many trivial suits and that this would discourage public improvements.¹²⁸

Cases involving obstruction or vacation of a public street provide an illustration of the difference between general and special damage. Courts that have considered the right of a property owner to damages for closing of that portion of a street on which a tract of land abuts, thereby destroying all access to the land, hold that damage is recoverable, even under "taking of property" constitutions, but, by the great weight of authority, no compensation may be obtained because of an obstruction to or the vacation of a street in another block, even though the value of the complainant's property is substantially reduced thereby, regardless of whether the particular state constitution requires compensation solely for property "taken" or property "taken or damaged."¹²⁹

It is clear that when compensation is awarded on the ground that special damage has been suffered, some property right has been abridged, for the constitutional mandate extends only to injuries to property rights.¹³⁰ Interestingly, the courts in awarding such damages often fail to mention the particular property right involved. Thus in *Richards v. Washington Terminal Company*,¹³¹ the court does not speak of an "easement to be free from concentrated emissions of smoke." In other words, under our constitutional system, some property rights have names and others do not. Courts often give an economic claim a property-sounding name, such as "easement," in order to lend plausibility to the case for compensation.¹³²

VI. REASONABLE EXPECTATIONS—PROTECTION OF RELIANCE INTERESTS

There is a pronounced tendency in the law to give protection to reasonable expectations, to protect those who have relied where withholding of

¹²⁶ *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). Property owners whose lands adjoined a railroad were denied recovery for damages resulting from the noise, vibrations, smoke, and the like, incident to the operations of the trains. These were "consequential" damages. But the owner of land near the portal of the railroad's tunnel was entitled to compensation for the diminution in the value of his property occasioned by concentration of smoke from the tunnel. This was special damage.

¹²⁷ *Reichelderfer v. Quinn*, 287 U.S. 315 (1932).

¹²⁸ *Davis v. County Commrs.*, 153 Mass. 218, 26 N.E. 848 (1891); *Cram v. Lacomia*, 71 N.H. 41, 51 Atl. 635 (1901).

¹²⁹ See text pt. XV, *The Right of Access and Street Vacations*, *infra*.

¹³⁰ *Hyde v. Minnesota, D. & P. R. Co.*, 29 S.D. 220, 136 N.W. 92 (1912).

¹³¹ 233 U.S. 546 (1914).

¹³² *E.g.*, *Story v. N. Y. Elev. R. R.*, 90 N.Y. 122, 145 (1882).

protection would cause injustice.¹³³ Protection of expectations is not confined to cases where a change of position has occurred. For example, in contract law, without insisting on reliance by the promisee, courts may seek to give the promisee the value of the expectancy which the promise created.¹³⁴ This protection of reasonable expectations, moreover, is no novelty. In the law of torts it goes back at least as far as 1621.¹³⁵ These tendencies are clearly discernible in modern condemnation law. For example, so strong was the feeling among property owners that they ought to be protected when they made investments in reliance upon an existing street grade that adoption of "or damaged" constitutions was the result.¹³⁶ In other jurisdictions, courts themselves arrived at the same result by liberalizing their views of "taking" of "property."¹³⁷ Even in jurisdictions that refused protection against most changes of grade, it was almost universally recognized that total destruction of access is compensable.¹³⁸ Here the frustration of reliance interests is so complete as to compel general recognition. Of the profusion of novel property rights, easements of light, air, view, and the like, many, if not most, were invented by the courts in an effort to extend protection to the reasonable expectations of property owners.¹³⁹

The cases involving novel property rights strikingly illustrate the attitude of the Supreme Court toward reliance interests. At an early time it became evident that there was no federal requirement that all states recognize the various novel property rights that were springing up throughout the country.¹⁴⁰ Suppose, however, that one buys or improves land in reliance upon a state court decision recognizing some novel property right. Is he

¹³³ In contract law, for example, there is the view that a plaintiff should be protected to the extent that he has changed his position in reliance upon the defendant's promise. Fuller and Perdue, *Reliance Interest in Contract Damages*, 46 YALE L. J. 52 (1936). In promissory estoppel "the thread that runs through all the cases is reliance." Boyer, *Promissory Estoppel: Principle from Precedents*, part II, 50 MICH. L. REV. 873 (1952). And see Seavey, *Reliance upon Gratuitous Promises or other Conduct*, 64 HARV. L. REV. 913, 925 (1951). Statutory protection of purchasers against imposition and consequent defeat of their reasonable expectations is commonplace. *Serve Yourself Gasoline Stations Ass'n. v. Brock*, 39 Cal.2d 813, 249 P.2d 545 (1952); *In re Sidebotham*, 12 Cal.2d 434, 85 P.2d 453 (1938), *cert. denied*, 307 U.S. 634 (1939). Protection of reliance interests is also encountered in tort law. Seavey, *id.* at 925; James, *Scope of Duty in Negligence Cases*, 47 NORTHWESTERN U. L. REV. 778, 802, 807 (1953).

¹³⁴ Fuller and Perdue, *id.* at 54. It has been said that protection is based on the psychological fact that whether or not the promisee has actually changed his position because of the promise, he has formed an attitude of expectancy such that a breach of promise causes him to feel that he has been deprived of something that was his. *Id.* at 57. In other words failure to keep what one has, or thinks he has, is loss. *Foehrenbach v. German-American Title & Trust Co.*, 217 Pa. 331, 66 Atl. 561 (1907).

¹³⁵ *Garret v. Taylor*, Cro. Jac. 567 (1621); RESTATEMENT, TORTS § 766, comment b (1934).

¹³⁶ See text, pt. II, *supra*; also pt. XV, *Change of grade, infra*.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ See text, pt. XV, *Abutters' rights, infra*.

¹⁴⁰ *Sauer v. New York*, 206 U.S. 536, 548 (1907).

entitled to federal protection against a change of attitude on the part of the local court? This question was originally answered in the affirmative in *Muhlker v. N.Y. & Harlem R. Co.*¹⁴¹ Clearly the attitude here is that if people buy or build in reliance on a court decision, they should be protected in this reliance interest. Presently, however, it became evident that in other situations the Constitution affords no protection against a change in judicial attitude. Hence the *Muhlker* case was later overruled.¹⁴² Here the feeling is that judges sometimes change their minds, and society cannot afford to deny them freedom to do so. This qualification, however, the court saw fit to add, that the state court may, of course, choose to make the new rule prospective only, so that rights acquired in reliance on the earlier decisions will be protected.¹⁴³

Where compensation has been denied, often the motivating factor has been the feeling that no defeat of reasonable expectations was involved. For example, addition of the "or damaged" clause to a state constitution has not resulted in an award where governmental activity conducted entirely on public property, such as construction of a pest-house, jail or police station, has depressed the value of adjoining property,¹⁴⁴ for in general it may be said that the reasonable expectations of property owners do not include protection against governmental activities if equally offensive activities might be conducted by private persons on their land without liability to their neighbors.¹⁴⁵

Property is an institution of many facets. From one viewpoint it may be said that the essence of private property is my right to exclude others from interference with my enjoyment of that which the law recognizes as mine.¹⁴⁶ This exclusion of others is accomplished by means of a system of governmental protections.¹⁴⁷ "Just so far as the aid of the public force is given a man, he has a legal right."¹⁴⁸ In this country, as in the law of many other countries in the present century, there is a movement which has as its watchword the satisfaction of human expectations involved in life in civilized society, and it seems to put, as the end of law, satisfaction of as much of the whole scheme of human expectations as possible.¹⁴⁹ Like other human

¹⁴¹ 197 U.S. 544 (1905).

¹⁴² *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 452 (1924).

¹⁴³ *Gt. Northern Ry. v. Sunburst Co.*, 287 U.S. 358 (1932).

¹⁴⁴ *City of Winchester v. Ring*, 312 Ill. 544, 144 N.E. 333 (1924); Note, 36 A.L.R. 527 (1925). *Contra*: *City of Paducah v. Allen*, 111 Ky. 361, 63 S.W. 981 (1901).

¹⁴⁵ *Jackson v. United States*, 230 U.S. 1, 21 (1913); *Hyde v. Minnesota, D. & P. Ry.*, 29 S.D. 220, 136 N.W. 92 (1912).

¹⁴⁶ Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

¹⁴⁷ NOYES, *THE INSTITUTION OF PROPERTY* 430, 437 (1936).

¹⁴⁸ HOLMES, *THE COMMON LAW* 214 (1881).

¹⁴⁹ POUND, *THE PROPERTY OWNER AND THE PUBLIC*, unpublished address before the University of Chicago Law School Conference on the Use and Disposition of Private Property, February 27, 1953.

institutions, property has as one of its important contemporary functions that of satisfying these human expectations,¹⁵⁰ and the decisions will tend, at least, to turn the system of governmental protections toward that end. However, in a community where each person's wants, needs, and expectations are necessarily limited by the overlapping wants, needs, and expectations of others, the protection which each will receive is necessarily limited to what is reasonable at any given time and place.

VII. THE INDEMNITY PRINCIPLE

Owner's loss and taker's gain

The decisions clearly illustrate two irreconcilable theories of compensation in true condemnation proceedings. One is the principle of indemnity, the "owner's loss" theory, under which the owner is entitled to be put in as good a pecuniary position as he would have been if his property had not been taken.¹⁵¹ The other is the "taker's gain" viewpoint, that the government should pay only for what it gets. It stems from the fear that to allow compensation for such items as disturbance of a business on the land condemned would impose an inordinate drain on the public purse because of the discrepancy between the value of the thing obtained and the losses suffered.¹⁵² Thus it has been observed that to make the owner whole for losses consequent on the taking of fee simple title of land occupied by a going business would require compensation for future loss of profits, expense of moving removable fixtures and personal property, and loss of goodwill that inheres in the location; yet compensation must be denied for such "consequential" damage because, it is said, "that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and . . . damage to those rights of ownership does not include losses to his business."¹⁵³ This may be paraphrased: when the government takes only the land, having no use for the business operated thereon, it should pay only for what it gets, namely, the market value of the land. Illustrative of this latter view is *Mitchell v. United States*.¹⁵⁴ Here the land condemned was especially adapted to growing a particular quality of corn. Compensation was denied the landowner for the destruction of his corn canning business although the business could not be re-established elsewhere. The court reasoned that it was the land, not the business, that was taken. The court evidently uses the word "taking" in its old sense of "appropriating" or "taking over." In its newer meaning, "taking" also

¹⁵⁰ *Ibid.*

¹⁵¹ *United States ex rel T. V. A. v. Powelson*, 319 U.S. 266, 281 (1943).

¹⁵² *Marcus, The Taking and Destruction of Property under a Defense and War Program*, 27 *CORNELL L.Q.* 476, 520 (1942).

¹⁵³ *United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945).

¹⁵⁴ 267 U.S. 341, 345 (1925).

comprehends damage or destruction, and without question the *Mitchell* case involved destruction of a business. With respect to the reason given for the denial of compensation for damage actually suffered, the decision is hard to defend.

Just as one cannot start the process of decision by calling a claim a "property right," since that is really the question to be answered,¹⁵⁵ one cannot dismiss a claim with the observation that property has not been "taken," for that, also, is the question to be answered.

Until recently, the "taker's gain" view seemed predominant. Lip service was paid to the principle of indemnity, but statement of the principle was invariably followed by a catalogue of emasculating exceptions.¹⁵⁶ Lately there has been a pronounced shift toward genuine recognition of the principle of indemnity. This has occurred in several areas.

Removal costs.

Traditionally, expenses incurred by either a fee owner or a lessee in moving personal property or a business from the premises condemned are deemed non-compensable.¹⁵⁷ Other "disturbance damages" deemed non-compensable are increase in rental in new location, bonuses paid to secure substitute space, cost of new installations, loss of business profits, and costs incident to changes in stationery, telephone service, advertising and signs.¹⁵⁸

Various reasons have been assigned for the rule denying compensation to a tenant for removal costs and other disturbance damages incidental to a condemnation of leased premises. It has been explained that such losses would be incurred in any event on expiration of the term,¹⁵⁹ that personal property and removable fixtures are not "taken," and that any verdict would necessarily rest on conjecture since the cost of removal would vary according to where the tenant moves.¹⁶⁰ In *United States v. General Motors Corporation*¹⁶¹ the federal government condemned, for a short term, a ware-

¹⁵⁵ *U. S. v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

¹⁵⁶ *E.g.*, *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 281 (1943).

¹⁵⁷ *Joslin Co. v. Providence*, 262 U.S. 668, 676 (1923) (fee owner); *Potomac Electric Power Co. v. United States*, 85 F.2d 243 (D.C. Cir. 1936) (fee owner); *Gershon Bros. v. United States*, 284 Fed. 849 (5th Cir. 1922) (lessee). See Note, 13 GEO. WASH. L. REV. 242 (1945); Note, 39 ILL. L. REV. 420 (1945); Comment, 34 IOWA L. REV. 690 (1949); Note, 22 N. C. L. REV. 325 (1944); Note, 19 So. CALIF. L. REV. 64 (1945); Note, 23 TEX. L. REV. 402 (1945). See Notes, 34 A.L.R. 1523 (1925), 156 A.L.R. 397 (1945). *Contra*: *West Side El. Ry. v. Siegel*, 161 Ill. 638, 44 N.E. 276 (1896) (lessee); *Chicago, M. & St. P. Ry. v. Hock*, 118 Ill. 587, 9 N.E. 205 (1886) (fee owner).

¹⁵⁸ Marcus, *The Taking and Destruction of Property under a Defense and War Program*, 27 CORNELL L.Q. 476, 520 (1942); Dolan, "Just Compensation" and the *General Motors Case*, 31 VA. L. REV. 539 (1945).

¹⁵⁹ McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 461, 480 (1933).

¹⁶⁰ Note, 39 ILL. L. REV. 420 (1945).

¹⁶¹ 323 U.S. 373 (1945). See Note, 39 ILL. L. REV. 420 (1945); Note, 22 N. C. L. REV. 325 (1944); Note, 19 So. CALIF. L. REV. 64 (1945); Note, 23 TEX. L. REV. 402 (1945).

house which had been leased to General Motors. On appeal, the Supreme Court held that General Motors' reasonable costs stemming from the removal could be proved, not as independent items of damage, but as an aid in the determination of what would be the usual price that would be asked and paid for a temporary occupancy.¹⁶² With respect to this decision, several observations are pertinent: first, the Court's decision rests chiefly on a recognition of the obvious injustice to a tenant of compelling him to move and later reoccupy the premises, thus placing on his shoulders a double removal cost.¹⁶³ This is clear from the Court's dictum that removal costs remain non-compensable where the fee is taken¹⁶⁴ and from subsequent decisions denying recovery for a tenant's removal costs where the entire term was condemned.¹⁶⁵ Second, that the Court's uneasiness over the difficulty of estimating such damages accurately has not been dispelled is evident from its statement that removal costs are not to be allowed as independent items of damage but merely as an aid in the determination of market price for the temporary occupancy, a questionable formula,¹⁶⁶ manifestly difficult of application.¹⁶⁷ The Court seems aware, for example, of the possible disparity in removal costs that might be borne by two tenants occupying different floors in the same building and seems to be groping toward a formula that will reduce such disparity to a minimum. Such formula, moreover, since it speaks in terms of market value, serves to cloak the Court's reluctant recognition of "consequential" damages in awarding indemnity. Third, however, the decision constitutes a departure from precedent and marks a step toward the view that, although they may be difficult of judicial ascertainment, consequential damages must be allowed where full indemnity for actual loss is otherwise impossible. Further progress in this direction seems inevitable, for the claims of a dispossessed fee owner for disturbance damage seem fully as meritorious as those of a tenant, at least in instances of temporary taking, where costs of moving and return-

¹⁶² A similar formula was evolved in *West Side El. Ry. v. Siegel*, 161 Ill. 638, 44 N.E. 276 (1896), which involved compensation for the entire balance of the tenant's term. See also, Note, 34 A.L.R. 1524 (1925). McCormick seems to have anticipated this development: "An examination of the cases dealing with the liability of the condemner for the incidental, but often serious, loss imposed upon the occupant of premises by his being forced to move out discloses an interesting progression in judicial thought toward expanding the concept of 'market value' so as to embrace these losses." McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 461, 480-481 (1933).

¹⁶³ *United States v. Petty Motor Co.*, 327 U.S. 372 (1946).

¹⁶⁴ *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

¹⁶⁵ *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. Westinghouse Co.*, 339 U.S. 261 (1950).

¹⁶⁶ It is doubtful that the market value of a term of years is markedly influenced by removal costs. Rentals commanded by similar accommodations would probably be the decisive factor. Dolan, *"Just Compensation" and the General Motors Case*, 31 VA. L. REV. 539 (1945).

¹⁶⁷ Dolan, *Consequential Damages in Federal Condemnation*, 35 VA. L. REV. 1059 (1949).

ing are involved.¹⁶⁸ Fourth, there seems to be an unspoken fear that through the novel device of temporary taking the government might seek to shift, to individual property owners, burdens that ought to be shouldered by the public generally. Fifth, there is also the unspoken sense of the injustice of keeping an owner's capital tied to his investment while depriving him of the beneficial use of his property.¹⁶⁹

Going concern value.

Under the traditional view, destruction of going-concern value consequent upon the taking of a fee simple title is deemed non-compensable.¹⁷⁰ This view seems to rest upon the assumption that with the funds paid by the condemner for the land taken, the condemnee can re-establish his business elsewhere without loss of going-concern value.¹⁷¹ It is not that going-concern value is not "property," for in other situations such value is readily recognized as "property" by the courts.¹⁷² Rather, it seems that although going-concern value is "property" susceptible of judicial valuation, it is not "taken," that is, appropriated by the condemner.¹⁷³ It would seem that the chief stress is upon the notion that the government should pay only for what it gets, since it has heretofore been customary to deny compensation for loss of good will even in condemnation of retail stores and other businesses where good will is to a substantial degree attached to the old location.¹⁷⁴ Here the justification for refusing to indemnify the condemnee for the loss suffered seems to rest in part upon the general principle denying recovery for damages too difficult to admit of judicial valuation.¹⁷⁵

A recent case involving a temporary taking situation seems to have opened a breach in this venerable doctrine. In *Kimball Laundry Co. v.*

¹⁶⁸ See *United States v. General Motors*, 323 U.S. 373, 385 (1945) (dissenting opinion); Dolan, "Just Compensation" and the *General Motors Case*, 31 VA. L. REV. 539 (1945).

¹⁶⁹ Note, 63 HARV. L. REV. 352 (1949).

¹⁷⁰ *Mitchell v. United States*, 267 U.S. 341 (1925).

¹⁷¹ See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 13 (1949); Comment, 53 COL. L. REV. 660, 674 (1953).

¹⁷² McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 461, 477 (1933).

¹⁷³ Note, 35 VA. L. REV. 792 (1949). Where the going concern value is "taken" in the sense that the government appropriates a going business such as a public utility with the intention of carrying on the business, the taker is acquiring going concern value and therefore must pay for it. *Omaha v. Omaha Water Co.*, 218 U.S. 180 (1910). Also, by its very nature a public utility is a monopoly, and whatever going concern value attaches to the enterprise is necessarily lost to its proprietors when the business is condemned. See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 13 (1949). Thus, whether one approaches the problem from the "owner's loss" or "taker's gain" viewpoint, there is a compensable taking in the utility cases.

¹⁷⁴ McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 461, 477 (1933).

¹⁷⁵ *Kimball Laundry Co. v. United States*, 338 U.S. 1, 12 (1948). See McCormick, *supra* note 174; Comment, 53 COL. L. REV. 660, 674 (1953).

United States,¹⁷⁶ the government condemned the plant of a laundry for a temporary term, extendable from year to year, under the Second War Powers Act of 1942. During the army's three and one-half years' possession the laundry was forced to suspend its business, since it had no other plant or equipment with which it might begin business in another location. The laundry claimed and was awarded compensation for loss due to destruction of its trade routes. Here the owner was put out of business for a period of time without receiving the full market value of the land that would be awarded in condemnation of a fee simple title, with which it would be possible to engage in business elsewhere. In the meantime all the going-concern value attaching to the laundry business was destroyed. The importance of this case lies in its statement that if going-concern value is shown to be present and to have been "taken," the loss is compensable.¹⁷⁷ It is significant, also, that since the government was not operating a laundry for the public at large, it received no benefit from the trade routes. Hence the phrase "taken," as used by court, means destruction. It is not used in its old and narrow sense of "taking over," that is, appropriating. If the logic of this decision is carried over to cases involving taking of fee titles,¹⁷⁸ compensation will be payable for incidental destruction of going-concern value in such cases.

The *Kimball* case seems to bear out the prediction that, as the commercial world moves toward a standardized practice in computing the value of good will, we may expect a growing tendency of legislatures and courts to give compensation for injury to the good will of a business by a forced change of location.¹⁷⁹ Moreover, as emphasis shifts from taker's gain to owner's loss point of view, courts will doubtless feel less inclined to erect arbitrary barriers against recovery for such items as removal costs and going-concern value. More than likely the trend will be toward a more elastic formula under which compensation will be allowed where the existence of substantial damage can be shown with reasonable certainty.¹⁸⁰

Amount of the award

Adoption of the indemnity principle may involve rejection of traditional views toward separate valuation of the interests the totality of which comprises fee simple title. The generally accepted approach involves determination of the value of the condemned land as a whole, followed by

¹⁷⁶ 338 U.S. 1 (1949). See Notes, 63 HARV. L. REV. 352 (1949), 37 CALIF. L. REV. 680 (1949), 35 VA. L. REV. 792 (1949).

¹⁷⁷ *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11 (1949).

¹⁷⁸ The court seems not prepared as yet to take this step. *Id.* at 12.

¹⁷⁹ McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 461, 478 (1933).

¹⁸⁰ See Note, 63 HARV. L. REV. 352 (1949).

apportionment of this gross sum among the several owners of interests therein according to their respective interests.¹⁸¹ This is an orthodox "taker's gain" viewpoint, for the award is made to equal the value of the land, regardless of the consequences to the holders of various interests therein. Courts that have held that the sum of the separate values of the divided interests may not exceed the value of the unincumbered whole have, at that point, abandoned the rule that the measure is what the owner has lost and have applied the rule that the measure is what the taker gained.¹⁸² It is perfectly plain that the value of the separate interests in the tract of land condemned may aggregate more than the value of the land viewed physically and without regard to the clusters of rights and arrangements that have been constructed around the tract in question. Where this is the case, indemnity would seem to require separate valuation of the interests.¹⁸³ Conversely, where the creation of separate interests results in a depreciation in the value of the property, as where an existing easement curtails the beneficial use that can be made of the land by the fee owner, compensation should be reduced accordingly.¹⁸⁴

VIII. LIABILITY FOR UNFORESEEABLE DAMAGE

For damage to be compensable, some cases suggest that it must be shown that the damage was the direct or necessary result of the project and that it was within the contemplation of, or was reasonably to be anticipated by, the government.¹⁸⁵ Occasionally compensation is denied because of the absence of "proximate cause," and stress is placed upon temporal or spacial remoteness, or the presence of an intervening force.¹⁸⁶ At times, similar factors are stressed as tests of "consequential" or "direct" injury.¹⁸⁷ In this area, the decisions are hopelessly conflicting.¹⁸⁸

When one looks to other fields of law for analogies, the policy factors involved come into somewhat sharper focus. We are all moved by sympathy for one who has suffered loss and our disposition is to award compensation. But in litigation between private individuals, the plaintiff must show

¹⁸¹ Notes, 69 A.L.R. 1263 (1930), 166 A.L.R. 1211 (1947).

¹⁸² *State v. Platte Valley Pub. Power & Irrig. Dist.*, 147 Neb. 289, 23 N.W.2d 300 (1946).

¹⁸³ *United States v. Certain Parcels of Land*, 43 Fed. Supp. 687 (D.C. Md. 1942); *Baltimore City v. Latrobe*, 101 Md. 621, 61 Atl. 203 (1905).

¹⁸⁴ *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910).

¹⁸⁵ *Sanguinetti v. United States*, 264 U.S. 146 (1924).

¹⁸⁶ *Christman v. United States*, 74 F.2d 112 (7th Cir. 1934). See Comment, *Federal Eminent Domain Power in the Development of Water Projects*, 50 YALE L.J. 668, 674 (1941).

¹⁸⁷ *Bedford v. United States*, 192 U.S. 217 (1904). But see *Franklin v. United States*, 101 F.2d 459, 464 (6th Cir. 1939), *aff'd*, 308 U.S. 516 (1939) (dissenting opinion).

¹⁸⁸ *Fitts and Marquis, Liability of the Federal Government and its Agents for Injuries to Real Property Resulting from River Improvements*, 16 TENN. L. REV. 801 (1941); Note, 61 HARV. L. REV. 882 (1948).

not merely that he ought to be compensated, but that he ought to be compensated by the defendant.¹⁸⁹ For example, according to one view, tort liability should not attach in the absence of legal fault except with respect to those who engage in ultrahazardous activity. An essential ingredient of legal fault in cases of unintentional injuries is foreseeability of harm.¹⁹⁰ Where a public body engages in an activity that is not ultrahazardous, and an appreciable risk of harmful consequences cannot reasonably be foreseen, but damage nevertheless results, it would seem that the public body is not guilty of legal fault, as fault is defined between private litigants.

The question remains whether liability should nevertheless be imposed. Some writers perceive a trend away from the earlier concept of strict or absolute liability, except with respect to ultrahazardous activity.¹⁹¹ The view represented by this trend rests on the assumption that to impose liability where no fault is involved will tend to stifle initiative.¹⁹² The contrary view, known as the *entrepreneur theory*, would impose liability for damage flowing from the operation of a business enterprise even in the absence of legal fault.¹⁹³ This view regards liability for harm connected with an enterprise as a normal business expense and is the result of a preference for security, even if this means some stifling of progress.¹⁹⁴ Loss, under this view, is allocated to the superior risk bearer, the party better equipped to pass it on to the public.¹⁹⁵ There is also the feeling that those who enjoy the fruits of an enterprise must also accept its risks.¹⁹⁶

Ultimately, this conflict must be resolved, in eminent domain law as well as in tort law. At present the question is an open one. Among the conflicting decisions in eminent domain law are many where, despite the con-

¹⁸⁹ Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBLEMS, 137, 151 (1951).

¹⁹⁰ Mahoney v. Beatman, 110 Conn. 184, 147 Atl. 762 (1929). GREEN, RATIONALE OF PROXIMATE CAUSE 65 (1927); James, *Scope of Duty in Negligence Cases*, 47 NORTHWESTERN U. L. REV. 778, 785, 798 (1953). Or, as the Restatement puts it, the actor, as a reasonable man, should recognize at the time of his action or inaction, that his course of conduct involves an appreciable risk of harmful consequences. RESTATEMENT, TORTS § 282, comment f; § 283; § 289, comment c (1934). Foreseeability of loss is also significant in determining liability for breach of contract. *Developments in the Law—Damages 1935–1947*, 61 HARV. L. REV. 113, 117 (1947).

¹⁹¹ PROSSER, TORTS 554 (1941); Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 987 (1952). This appears to be the current trend in England. Griffith, "Fault" Triumphant, 28 N.Y.U.L.Q. REV. 1069 (1953).

¹⁹² Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBLEMS 137, 152 (1951).

¹⁹³ Williams, *id.* at 152; Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NORTHWESTERN U. L. REV. 855, 858 (1953); Green, *The Individual's Protection under Negligence Law: Risk Sharing*, 47 NORTHWESTERN U. L. REV. 751, 774 (1953); James, *Scope of Duty in Negligence Cases*, 47 NORTHWESTERN U. L. REV. 778, 804 (1953); Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

¹⁹⁴ Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBLEMS 137, 152 (1951); Foster and Keeton, *Liability without Fault in Oklahoma*, 3 OKLA. L. REV. 1, 10 (1950).

¹⁹⁵ Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

¹⁹⁶ Smith, *Municipal Tort Liabilities*, 48 MICH. L. REV. 41, 48 (1949).

cepts employed, the Court's refusal to hold the government liable rested essentially on the fact that the injury was not predictable on the basis of available engineering data.¹⁹⁷ Where the injury was not foreseeable, complete destruction of valuable property has occasionally been held not compensable, for "any other conclusion would deter from useful enterprises on account of a dread of incurring unforeseen and immeasurable liability."¹⁹⁸ The doctrine of the immunity of the sovereign from liability is in current disfavor,¹⁹⁹ as witness the Federal Tort Claims Act.²⁰⁰ Even under the Tort Claims Act, however, there is a noticeable tendency to avoid imposing "an inordinate amount of liability to an indeterminate number of people."²⁰¹

In tort law, there are many cases where an unintentional non-trespassory invasion of another's interest in the use and enjoyment of his land will not result in liability because the actor was not guilty of negligence; nevertheless, if the actor persists in the conduct after he has learned that an invasion is resulting from it, further invasions are deemed intentional.²⁰² The result is liability if the invasion is unreasonable under the doctrine of nuisance. While the weighing process necessary in determining questions of reasonableness often occurs in condemnation situations,²⁰³ the cases refuse to be fitted into any consistent pattern.²⁰⁴ Thus the federal cases, dealing with conduct persisted in after damage has become evident, reveal a disposition to refuse compensation where such damage was unpredictable.²⁰⁵ This would seem to indicate a feeling that the undertaking of public projects is of such paramount importance that a special rule of non-liability must be invoked based on inability to foresee the harm such a project might entail. Liability does not ensue upon failure to discontinue the project when unanticipated damage results. This notion, however, is inconsistent with the current trend toward allowance of full indemnity.²⁰⁶ Especially if the *entrepreneur theory* makes headway, one would expect an attitude of greater liberality toward the property owner.

¹⁹⁷ Fitts and Marquis, *Liability of the Federal Government and its Agents for Injuries to Real Property Resulting from River Improvements*, 16 TENN. L. REV. 801 (1941). But cf. *United States v. Kansas City Ins. Co.*, 339 U.S. 799 (1949).

¹⁹⁸ *John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921). Similar language occurs in *Bedford v. United States*, 192 U.S. 217, 224 (1904).

¹⁹⁹ Comment, 47 NORTHWESTERN U.L. REV. 914, 924 (1953).

²⁰⁰ 28 U.S.C. § 1346 (1952).

²⁰¹ Note, 66 HARV. L. REV. 488, 494 (1953). See also *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950), cert. denied, 341 U.S. 939 (1951).

²⁰² PROSSER, TORTS 554 (1941); RESTATEMENT, TORTS § 825, comment b (1934).

²⁰³ See text, pt. XIII, *infra*.

²⁰⁴ Note, 61 HARV. L. REV. 882 (1948).

²⁰⁵ Fitts and Marquis, *Liability of the Federal Government and its Agents for Injuries to Real Property Resulting from River Improvements*, 16 TENN. L. REV. 801 (1941).

²⁰⁶ See text, pt. VII, *supra*.

IX. DIFFICULTY OF EVALUATION

There is a general principle of the law of damages that damages to be recoverable must be certain.²⁰⁷ It is subject to the qualification that if the fact of damage is proved with certainty, recovery will be allowed as long as there is a basis for a reasonable inference as to the extent of damage.²⁰⁸ This doctrine often appears in condemnation cases. It has been held that for an injury to be compensable under the eminent domain clause it must be susceptible of proof and capable of being approximately measured.²⁰⁹ As in cases regarding liability for unforeseeable damage, the courts seem motivated by a desire to avoid discouraging needed public projects by the award of substantial and unpredictable damages.

However, in cases where special damage is present, difficulty in evaluating the damage has not been regarded as a barrier to recovery.²¹⁰ Moreover, in harmony with the trend in other areas toward relaxing the certainty requirement,²¹¹ the more recent decisions reveal a wholesome disposition to approach the problem of compensation with the idea of making the property owner whole.²¹² It would seem to follow that further relaxation of the certainty requirement is inevitable.

X. PUBLIC CONTROL OF PUBLIC AREAS

Since the welfare of the community depends to a great degree upon the wisdom with which public authorities administer the public areas under their jurisdiction, it is evident that strong considerations of policy dictate that the authorities be allowed freedom of action commensurate with the responsibilities involved. For example, where compensation is denied an abutter for the introduction into a street of additional street uses, such as electric street railways and subways, it is evident that the feeling is that such changes in the use of a city street are well within the area of proper public control. Protection of the reasonable expectations of the abutter does not include protection against exercise of a large measure of public control over the street, for all persons must take cognizance of this impor-

²⁰⁷ *McCORMICK*, DAMAGES 97 (1935).

²⁰⁸ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

²⁰⁹ *City of Winchester v. Ring*, 312 Ill. 544, 144 N.E. 333 (1924). Thus, compensation has been denied on the ground that the interest in question was one incapable of valuation, for example, inchoate dower, *United States v. Certain Parcels of Land*, 46 F.Supp. 441 (D.Md. 1942), 7 Mh.L.Rev. 263 (1943); a right of entry for breach of a condition subsequent, *Note*, 144 A.L.R. 769 (1943); an executory devise, *Fifer v. Allen*, 228 Ill. 507, 81 N.E. 1105 (1907); a possibility of reverter, *People of Puerto Rico v. United States*, 132 F.2d 220 (1st Cir. 1942); a voidable lease, *Couness v. Indiana I. & I. R.R.*, 193 Ill. 464, 62 N.E. 221 (1901); and a tenancy at will, *Tate v. State Highway Comm.*, 226 Mo. App. 1216, 49 S.W.2d 282 (1932).

²¹⁰ *Richards v. Washington Terminal Co.*, 233 U.S. 546, 557-558 (1914).

²¹¹ *Developments in the Law—Damages 1935-1947*, 61 HARV.L.REV. 113, 121 (1947).

²¹² See text, pt. VII, *supra*.

tant public right. The same is true of land on navigable streams. Those who acquire land on navigable streams expect to enjoy the benefits flowing from such location, but they must also expect that the situation will not remain static. Thus, in the case of land abutting on navigable waters, diminution of land value by a program of public development will in many cases not constitute a compensable interference with the landowner's reasonable expectations.²¹³ In these cases the courts say that from the beginning the public right is there, and the landowner should recognize that the benefits he enjoys are held subject to the possibility of future diminution or loss by the exercise of this right.²¹⁴

So strong is the public policy involved that statements will be found to the effect that the public power of control over public places is absolute.²¹⁵ Of course, that is a very great overstatement. In the process of balancing the competing claims of the public and of private property owners, courts are often compelled to place limitations upon the public right of control.²¹⁶

Where necessary for effective control of the public area, public control can be extended into the abutting privately owned land, as the billboard cases show.²¹⁷ And as the need for community planning grows more evident,²¹⁸ decisions sustaining extension of control into future public areas appear with increasing frequency.²¹⁹

XI. DISALLOWANCE OF WINDFALLS

In the law of damages courts endeavor to guard against overcompensation of the plaintiff. He must not be allowed to profit from his misfortune.²²⁰ In keeping with this attitude, courts in eminent domain cases have evinced a disposition to deny compensation that would amount to a windfall to the property owner arising from the fortuitous circumstance of government action or condemnation. It has been held that no compensation is allowable for any increment of value (scarcity profit) arising because the govern-

²¹³ *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *United States v. Chicago, M. St. P. & P. R.R.*, 312 U.S. 592 (1941); *United States v. Chandler-Dunbar Water Co.*, 229 U.S. 53 (1913).

²¹⁴ *Scranton v. Wheeler*, 179 U.S. 141 (1900); *Home for Aged Women v. Commonwealth*, 202 Mass. 422, 89 N.E. 124 (1909). See Note, 64 HARV. L. REV. 114, 139 (1950).

²¹⁵ *State v. Parsons St. Ry. & Elec. Co.*, 81 Kan. 430, 432, 105 Pac. 704, 705 (1909).

²¹⁶ See text, pt. XIII, *infra*.

²¹⁷ See text, pt. XV, *Building line ordinances, infra*.

²¹⁸ *Mansfield & Swett v. Town of West Orange*, 120 N.J.L. 145, 198 Atl. 225 (1938). And see ELY, *LAND ECONOMICS* 464 (1940).

²¹⁹ *Ayres v. City Council of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1 (1949); *Seligman v. Belknap*, 288 Ky. 133, 155 S.W.2d 735 (1941); *Matter of Brous v. Smith*, 304 N.Y. 164, 106 N.E.2d 503 (1952); *Prudential Co-op. Realty Co. v. Youngstown*, 118 Ohio St. 204, 160 N.E. 695 (1928). See also Repts, *The Zoning of Undeveloped Areas*, 3 SYRACUSE L. REV. 292 (1952); Note, 65 HARV. L. REV. 1226 (1952).

²²⁰ *Developments in the Law—Damages 1935-1947*, 61 HARV. L. REV. 113, 117 (1947).

ment's special wartime need for a particular commodity has created a demand which has outrun the supply.²²¹ Where a public project from the beginning has contemplated the taking of certain tracts, but only some of them have been taken in the first instance, the weight of authority denies compensation for any increment in value to the remaining tracts arising from the existence of the project and the government's need for such remaining tracts.²²² Even in situations not calling for a policy denial of bonus compensation because of the government's special need for the land condemned, windfall awards are almost universally denied, as for example, in the cases denying compensation for rights of entry or possibilities of reverter where application of the land to a forbidden use would not have taken place but for the condemnation.²²³ Likewise, where only a portion of a single tract is condemned, if the taking has benefited the remainder of the tract, the benefit, according to many decisions, may be set off against the value of the land taken.²²⁴

Where land is subject to a right of user, as where it has been condemned or dedicated as a street or where it is subject to some private servitude, use of the land for a purpose differing from that for which it was originally condemned, dedicated, or granted may result in a claim for compensation. However, the original servitude may have rendered the land virtually useless for other private purposes, so that damages will not be recoverable by the fee owner in consequence of the new use.²²⁵

XII. ESTATES AND INTERESTS NOT ESTATES

Recent condemnation decisions evince a wholesome disposition to avoid the semantic traps of technical concepts like "estates." From a policy viewpoint, the basic issues of compensability boil down to these: has damage been inflicted? If it has, ought compensation be paid? Under this approach, whether or not the interest in question rises to the dignity of an estate is immaterial.²²⁶ Often enough, to be sure, a claim for compensation has been

²²¹ *United States v. Cors*, 337 U.S. 325 (1949).

²²² *United States v. Miller*, 317 U.S. 369 (1943). See Note, 27 MINN. L. REV. 534 (1943); Note, 147 A.L.R. 66 (1943).

²²³ *United States v. 1119.15 Acres of Land*, 44 F. Supp. 449 (E.D. Ill. 1942); *State v. Federal Square Corp.*, 89 N.H. 538, 3 A.2d 109 (1938). See 7 DUKE B.A.J. 137 (1939). In some jurisdictions where a land developer incorporates restrictive provisions in his deeds to lot purchasers and such provisions, though couched in the form of conditions, reveal the existence of a general plan, any lot owner is permitted to enforce such restrictive provisions by means of an injunction suit. *Hopkins v. Smith*, 162 Mass. 444, 38 N.E. 1122 (1894); *Genske v. Jensen*, 188 Wis. 17, 205 N.W. 548 (1925). In such situations the governing principles would be those discussed in pt. XIV, *infra*.

²²⁴ *E.g.*, *United States v. Miller*, 317 U.S. 369, 376 (1943).

²²⁵ *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1909).

²²⁶ *Beard's Erie Basin v. People*, 142 F.2d 487 (2d Cir. 1944); *Brooklyn Eastern Dist. Terminal v. New York*, 139 F.2d 1007 (2d Cir. 1944).

casually dismissed with the observation that the interest in question did not rise to the dignity of an estate.²²⁷ But the cases that have avoided this kind of reasoning provide a much sounder approach. Applicable constitutional provisions express a basic principle of fairness; they are not concerned with technicalities.²²⁸ Courts impatient with the "unwitty diversities of the law of property"²²⁹ will find little occasion to "gripe about in the mysterious world of 'estates' and 'interests not estates.'"²³⁰

XIII. BALANCING OF CONFLICTING INTERESTS

The process of balancing conflicting interests is commonplace in many areas of the law;²³¹ in the law of eminent domain it is of primary importance. Indeed, it is not an overstatement to say that perhaps the principal concern of the courts in the law of eminent domain is to draw the line equitably between compensable and non-compensable governmental interferences with property owners, and the process of arriving at a decision that is fair both to the public and to private interests involves a careful weighing and balancing of these interests.²³² Cases that grapple with the problem of whether a particular interference with property rights falls within the legitimate scope of the police power provide a conspicuous illustration of this process.²³³

It is evident that non-compensability for minor injuries caused by public projects is a product of this balancing process. Illustrative are the cases denying compensation for damages resulting from temporary conditions incident to a public improvement, even under "or damaged" constitutions,²³⁴ and the cases holding that an entry for the purpose of a preliminary survey is not a compensable taking.²³⁵ Holdings that compensable damage must be substantial are commonplace,²³⁶ as in the cases applying the doctrine *de minimis non curat lex*.²³⁷ Moreover, if government activities in-

²²⁷ *E.g.*, *Cornell-Andrews Smelting Co. v. Boston & P. R. Corp.*, 209 Mass. 298, 95 N.E. 887 (1911).

²²⁸ *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

²²⁹ *Helvering v. Hallock*, 309 U.S. 106, 118 (1940).

²³⁰ *United States v. 53¼ Acres of Land*, 139 F.2d 244, 247 (2d Cir. 1943).

²³¹ For example, in determining liability for an alleged nuisance, among the factors to be considered are the social value which the law attaches to the respective activities of the plaintiff and defendant and the gravity of the harm inflicted. *RESTATEMENT, TORTS* §§ 826, 827, 828 (1934).

²³² *Lenhoff, Development of the Concept of Eminent Domain*, 42 *COL. L. REV.* 596 (1942).

²³³ See text, pt. IV, *supra*.

²³⁴ *Chicago Flour Co. v. Chicago*, 243 Ill. 268, 90 N.E. 674 (1910). See Notes, 98 *A.L.R.* 956 (1935), 68 *A.L.R.* 340 (1930), 45 *A.L.R.* 534, 543 (1926).

²³⁵ *State v. Simons*, 145 Ala. 95, 40 So. 662 (1906). See Note, 29 *A.L.R.* 1409 (1924).

²³⁶ *E.g.*, *United States v. Cress*, 243 U.S. 316, 328 (1917).

²³⁷ *E.g.*, *Fenlon v. Western Light and Power Co.*, 74 Colo. 521, 223 Pac. 48 (1924). See Note, 44 *A.L.R.* 168, 188 (1926).

flict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a windfall or special bounty; hence such slight damage is not compensable.²³⁸

In the balancing process, the social utility of the various interests involved is accorded due weight. Economic factors may so strongly favor particular private enterprises that substantial damage to other property owners resulting from the operation of such enterprises may be regarded as non-compensable.²³⁹ Thus the real reason for the holding that a railroad is not liable to abutting landowners for smoke, noise, vibration and other damages incident to non-negligent operation was the fear of hindering railway development.²⁴⁰ For similar reasons, in more recent times, the conflict between landowners and operators of aircraft is being resolved in favor of the latter,²⁴¹ except in cases of special damage.²⁴² In other words, a private interest that substantially promotes a public interest may be preferred over another private interest.²⁴³ As the policy considerations favoring an enterprise grow stronger, a landowner's claim for compensation for damage caused by the enterprise appears to grow correspondingly weaker.

On the other hand, uses that have a low social utility receive only limited protection, as is illustrated by the cases holding that a court cannot consider the value of land for a purpose prohibited by a zoning ordinance unless there is a reasonable probability of removal of such restriction.²⁴⁴ Most cases hold that value for a present illegal use is not protected by the Constitution.²⁴⁵ Such interests are not deemed worthy of protection.²⁴⁶ It would be stultifying indeed were the state to protect economic interests that owe whatever value they possess to a defiance of state laws. Harmful uses, though not in themselves illegal, are also given only limited protection.²⁴⁷

In the process of balancing, policy considerations must often be weighed, one against the other. For example, the policy of allowing public

²³⁸ *United States v. Sponenbarger*, 308 U.S. 256 (1939).

²³⁹ *E.g.*, *Bean v. Central Maine Power Co.*, 133 Me. 9, 173 Atl. 498 (1934).

²⁴⁰ See, *e.g.*, *Richards v. Washington Terminal Co.*, 233 U.S. 546, 555 (1914).

²⁴¹ *Antonik v. Chamberlain*, 81 Ohio App. 465, 78 N.E.2d 752 (1947). See Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 LAW & CONTEMP. PROB. 539 (1946).

²⁴² *United States v. Causby*, 328 U.S. 256 (1946).

²⁴³ *Miller v. Schoene*, 276 U.S. 272, 279-280 (1928); *Sligh v. Kirkwood*, 237 U.S. 52 (1915).

²⁴⁴ *Long Beach City H.S. Dist. v. Stewart*, 30 Cal.2d 763, 185 P.2d 585 (1947). See Notes, 61 HARV. L. REV. 707 (1948), 46 MICH. L. REV. 988 (1948).

²⁴⁵ Note, 14 U. OF CHI. L. REV. 232 (1947).

²⁴⁶ *Marcus, The Taking and Destruction of Property under a Defense and War Program*, 27 CORNELL L.Q. 476, 527 (1942).

²⁴⁷ *E.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). See Notes, 99 U. OF PA. L. REV. 1019, 1020 (1951), 102 U. OF PA. L. REV. 91, 94 (1953).

control over public areas often conflicts with the policy of protecting the reasonable expectations of property owners, and the policy of allowing full indemnity for damage may conflict with the policy of requiring certainty of proof of damage. The process of weighing one policy against another is also illustrated by the zoning cases. Historically, the first crucial issue in zoning law was whether the owner of vacant land well adapted for high-value industrial and commercial uses could be made to bear the loss when such uses, obviously not noxious in themselves, were forbidden in neighborhoods zoned for private residences. The validity of such zoning was sustained and the resulting sharp drop in value of the vacant land was held non-compensable.²⁴⁸ The expectations of the landowner in purchasing the property must yield to the public interest in the enforcement of a comprehensive zoning plan.²⁴⁹ The welfare of large numbers of urban residents, therefore, outweighs the private loss, the defeat of the expectations of property owners. But if a zoning ordinance unduly curtails the use of a particular tract of land without the counterbalance of promoting the public welfare appreciably, as to that particular tract of land it is invalid.²⁵⁰

Traditionally, the zoning ordinance, whatever the impairment in the value of vacant land, allows the preservation of the value of existing improvements and enterprises under the exception in favor of non-conforming uses.²⁵¹ Thus the conflict between the interests of the public and of property owners is resolved by a compromise that preserves some property values and sacrifices others. There is some incongruity in a device that destroys hundreds of thousands of dollars of vacant land value, while preserving from destruction the value, for example, of a non-conforming neighborhood delicatessen. Nevertheless, the job needs to be done; the line must be drawn somewhere and the fact that some persons on one side or the other of the line are dissatisfied with the legislative judgment does not militate against its validity.²⁵²

In some jurisdictions the non-conforming use exception is extended to protect one who at the time of the adoption of the ordinance has expended substantial sums under a valid building permit.²⁵³ Clearly this is an instance of the protection of a reliance interest.

It was originally the view that non-conforming uses would disappear in time.²⁵⁴ This hope has proved to be unfounded. Non-conforming uses

²⁴⁸ *Village of Euclid v. Ambler*, 272 U.S. 365 (1926).

²⁴⁹ *County of San Diego v. McClurken*, 37 Cal.2d 683, 234 P.2d 972 (1951).

²⁵⁰ *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

²⁵¹ *County of San Diego v. McClurken*, 37 Cal.2d 683, 234 P.2d 972 (1951).

²⁵² *De Bartolo v. Village of Oak Park*, 396 Ill. 404, 71 N.E.2d 693 (1947).

²⁵³ *County of San Diego v. McClurken*, 37 Cal.2d 683, 234 P.2d 972 (1951). See Note, 102 U. OF PA. L. REV. 91 (1953).

²⁵⁴ Note, 60 HARV. L. REV. 800, 807 (1947).

tend to become protected monopolies. Instead of withering, they thrive and flourish. Moreover they provide a basis for requests for permits authorizing establishment of additional non-conforming uses on neighboring land.²⁵⁵ As the magnitude of the problem has become evident, the disposition has grown to sanction more stringent measures for dealing with the problem, as by requiring liquidation of non-conforming uses within a fixed period.²⁵⁶ In the balancing process, it is evident that as a problem grows in difficulty, the courts sanction more drastic measures to cope with it.

We have previously suggested that property may be thought of as a system of protections,²⁵⁷ and that the area of protection will vary, depending on whether the claim for protection is asserted against other individuals or against the public.²⁵⁸ At first blush the notion of protection *by* the government *against* the government seems anomalous, but when viewed in the light of the balancing process the concept becomes clearer. When confronted with a claim for compensation under the eminent domain clause, the courts, in deference to the legislative and executive branches of the government, indulge in the presumption that a legislative or executive decision to proceed without payment of compensation has resulted from a fair weighing of public and private interests.²⁵⁹ But since the legislative and executive branches, as they grapple with pressing problems, may focus on the public need rather than the private harm, the courts have assumed the function, where properly invoked, of re-weighing the conflicting public and private interests to determine whether the legislative or executive action goes beyond that which is fair and reasonable.

XIV. BUILDING RESTRICTIONS

The foregoing discussion is by no means exhaustive of the policy considerations and concepts involved in eminent domain damage situations. Yet it furnishes some working tools with which an attack can be made on the problems that arise. Some notion of the help these tools will provide can be gained by applying them to two illustrative situations, namely, the building restriction cases and the cases involving abutters' rights.

Effective land use control through private building restrictions is a development of relatively recent origin, arising with the availability of the

²⁵⁵ Notes, 28 TEX. L. REV. 125 (1949), 9 U. OF CHI. L. REV. 477 (1942), 35 VA. L. REV. 348 (1949).

²⁵⁶ *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir. 1950); *City of Lansing v. Gage*, 274 P.2d 34 (Cal. App. 1954). See Note, 99 U. OF PA. L. REV. 1019 (1951). *County of San Diego v. McClurken*, 37 Cal.2d 683, 234 P.2d 972 (1951). See Comment, 48 MICH. L. REV. 103, 107 (1949); Notes, 28 TEX. L. REV. 125 (1949), 35 VA. L. REV. 348 (1949).

²⁵⁷ See text at note 51 *supra*.

²⁵⁸ See text at note 52 *supra*.

²⁵⁹ *Alexander Co. v. Owatonna*, 222 Minn. 312, 24 N.W.2d 244 (1946).

injunction to enforce the general scheme or plan.²⁶⁰ Through an evolutionary process, building restrictions adopted in furtherance of a general plan have been elevated in most jurisdictions to the dignity of equitable interests or property rights in each lot for the benefit of each other lot covered by the same restrictions.²⁶¹ When a body having the power of eminent domain introduces a prohibited use into a restricted area, the question arises whether a compensable invasion of property rights has resulted. The decisions are sharply conflicting.²⁶² It has been held in some states that application of land by a public body to a purpose violative of private building restrictions involves a compensable "taking" of the "property" of landowners whose equitable rights have been thus invaded. In other words, each lot owner in a restricted district has a property right in every other lot, and the use of a lot for a forbidden purpose is, therefore, a "taking" of "property."²⁶³ Because of its unqualified acceptance there, this view is hereinafter referred to as the Michigan view.

The criticism instantly suggests itself that the existence of property rights as between a landowner and some other private person is by no means determinative of the existence of such property rights as against the state or some other condemner. As has previously been observed, a determination that "property" has been "taken" is merely descriptive of the end result, the conclusion reached, rather than of the reasons that impelled the conclusion. The very question to be decided in a case of this character is whether, after all relevant factors are weighed, it can be said that a property right does exist as between the condemner and the person claiming compensation.²⁶⁴ The Michigan view represents an enormous oversimplification of a complex problem. Countless governmental activities, *e.g.*, the adoption of a zoning ordinance, necessarily involve the destruction of land values,²⁶⁵ and yet the power of government to carry on such activities without compensating the injured landowners is beyond argument.

Other courts deny compensation where the condemnation is for a purpose violative of building restrictions. Occasionally such decisions are made to rest upon the ground that restrictive covenants create contractual rights,

²⁶⁰ *Tulk v. Moxhay*, 2 Phillips 774 (1848).

²⁶¹ *Johnstone v. Detroit, G.H. & M.R. Co.*, 245 Mich. 65, 222 N.W. 325 (1928). Aigler, *Measure of Compensation for Extinguishment of Easement by Condemnation*, [1945] WIS. L. REV. 5; Notes, 38 HARV. L. REV. 115 (1924), 31 HARV. L. REV. 876 (1918), 24 MINN. L. REV. 425 (1940).

²⁶² Notes, 17 A.L.R. 554 (1922), 67 A.L.R. 385 (1930), 122 A.L.R. 1464 (1939).

²⁶³ *Town of Stamford v. Vuono*, 108 Conn. 359, 143 Atl. 245 (1928); *Johnstone v. Detroit, G.H. & M.R. Co.*, 245 Mich. 65, 222 N.W. 325 (1928); *Peters v. Buckner*, 288 Mo. 618, 232 S.W. 1024 (1921); *Flynn v. N.Y. W. & B. Ry.*, 218 N.Y. 140, 112 N.E. 913 (1916); *Stokely v. Owens*, 189 Va. 248, 52 S.E.2d 164 (1949).

²⁶⁴ See text at note 52 *supra*.

²⁶⁵ *E.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

not property rights, and are therefore not within the ambit of constitutional protection.²⁶⁶ Occasionally compensation is denied on the theory that building restrictions create negative rights, not affirmative rights.²⁶⁷ This conceptual approach is also unrealistic. Like the majority view, it arrives directly at a desired result with but scanty consideration of the factors that should be weighed before any conclusion is reached.

Occasionally in denying compensation courts have expressed the view that restrictions insofar as they seek to prevent a condemner from devoting the condemned land to a public use are against public policy.²⁶⁸ This view is subject to the obvious criticism that private restrictions do not in any wise restrain the taking of land for a legitimate purpose. The question is simply whether adjoining property owners should be compensated.

In sharp contrast to the conceptual approach of the foregoing decisions is a view denying compensation on the grounds of public policy. A subdivision protected by a general plan will often embrace a large area. It is said that to bring each lot owner into a condemnation suit involving some isolated parcel in the subdivision involves a record search of the entire tract, naming of all lot owners as defendants and service of process upon them, the trial of such issues as each landowner sees fit to raise, and the payment of compensation to the injured landowners. Such a rule, it is said, would make it wholly impossible to estimate in advance the probable cost of the condemnation and in any event would result in a wholly disproportionate cost for the improvement. For these reasons, it is contended, rights created by building restrictions should be treated as non-compensable.²⁶⁹ That the fear is well-founded is evident from the adjudicated cases in jurisdictions where compensation is allowed despite the expense to the condemner. Thus in *Johnstone v. Detroit, G. H. & M. R. Co.*,²⁷⁰ awards were sought in respect to 295 parcels. As to 166 no compensation was allowed, but as to the remaining 129 lots the commissioners awarded the total of \$269,506.50.²⁷¹

²⁶⁶ *Anderson v. Lynch*, 188 Ga. 154, 3 S.E.2d 85 (1939). See Note, 24 MINN. L. REV. 425 (1940). *Moses v. Hazen*, 69 F.2d 842 (D.C. Cir. 1934); *Friesen v. City of Glendale*, 209 Cal. 524, 288 Pac. 1080 (1930). See Comments, 19 CALIF. L. REV. 58 (1930), 14 WASH. L. REV. 137 (1939). This argument does not dispose of the impairment of contracts clause of the Constitution. See Comment, 38 MICH. L. REV. 357 (1940).

²⁶⁷ *Anderson v. Lynch*, 188 Ga. 154, 3 S.E.2d 85 (1939); *City of Houston v. Wynne*, 279 S.W. 916 (Tex. Civ. App. 1925), *aff'd*, 115 Tex. 255, 281 S.W. 544 (1926).

²⁶⁸ *Anderson v. Lynch*, 188 Ga. 154, 3 S.E.2d 85 (1939); *City of Houston v. Wynne*, 279 S.W. 916 (Tex. Civ. App. 1925), *aff'd*, 115 Tex. 255, 281 S.W. 544 (1926); *Doan v. Railway Co.*, 92 Ohio St. 461, 112 N.E. 505 (1915).

²⁶⁹ *Anderson v. Lynch*, 188 Ga. 154, 3 S.E.2d 85 (1939). See Notes, 24 MINN. L. REV. 425 (1940), 1 WASH. & LEE L. REV. 121 (1939). *Moses v. Hazen*, 69 F.2d 842 (D.C. Cir. 1934); *Friesen v. City of Glendale*, 209 Cal. 524, 288 Pac. 1080 (1930); *City of Houston v. Wynne*, 279 S.W. 916 (Tex. Civ. App. 1925), *aff'd*, 115 Tex. 255, 281 S.W. 544 (1926).

²⁷⁰ 245 Mich. 65, 222 N.W. 325 (1928).

²⁷¹ *In re Dillman*, 256 Mich. 654, 239 N.W. 883 (1932). See *U.S. v. 11.06 Acres of Land*, 89 F. Supp. 852 (E.D. Mo. 1950) (owners of 86 lots entitled to compensation); *Town of Stam-*

The use of building restrictions to protect high class residential areas is commonplace today. Expensive dwellings are erected in reliance upon such protection. A virtual collapse of property values may ensue upon a construction of a needed improvement, such as a railroad running in front of such dwellings, as in the *Johnstone* case. And yet the rule allowing compensation may impose a heavy burden on a condemner even where a relatively innocuous improvement, such as a school, is involved. It is evident that all ramifications of the problem are worthy of exploration.

It is clear, first of all, that the property rights created by a general plan are novel property rights, of much the same vintage as abutters' easements of light and air. Being novel property rights they do not fall within the area of federal protection.

As has already been observed, the view that any interference with property rights created by building restrictions is a compensable "taking" of "property" seems wholly untenable. On what basis, then should the issue of compensability be decided? Since building restrictions are not illegal, and indeed are encouraged in some jurisdictions,²⁷² it would seem that those who acquire land in an area protected by a general plan may reasonably expect that they will enjoy the benefits of the protection they have purchased. Most people will agree that one who has built a costly single-family dwelling in an area restricted to such structures has suffered a defeat of his reasonable expectations if a railroad is constructed almost in his front yard. But to hold that all lot owners in the subdivision must be compensated because there has been a violation of a restriction is wholly unrealistic. Lot owners at some distance from the railroad may even be benefited by the improvement in transportation thus afforded. Clearly, however, compensation should be limited to those who suffer special damage.²⁷³ Property rights that, as between private landowners, are coextensive with the boundaries of the subdivision are nevertheless limited by the special damage rule when such rights are asserted against the government, as the street closing cases clearly show.²⁷⁴ Moreover, the practicalities of condemnation procedure dictate that claims for such incidental damage to land not appropriated either in whole or in part by the condemner should be adjudicated not in condemnation suits but in damage suits brought after the fact of damage has become evident. To hold otherwise requires the public body that plans to erect a school or to lay out a park in a corner of a subdivision restricted to single-family dwellings to make a record search of the entire subdivision and implead all the property owners, and even their mortgag-

ford v. Vuono, 108 Conn. 359, 143 Atl. 245 (1928) (\$10,000 awarded to owner of luxury house for construction of high school on adjoining lot).

²⁷² Note, 48 MICH. L. REV. 1201 (1950).

²⁷³ See text, pt. V *supra*.

²⁷⁴ See text, pt. XV, *Right of access and street vacations, infra*.

ees, so that their claims for damage to their property rights may be adjudicated, no matter how remote the possibility of actual damage. This is precisely the unrealistic attitude that poses a threat to needed public improvements. It is noteworthy that in the *Johnstone* case the court granted an injunction against construction of the improvement pending the completion of condemnation proceedings. Thereafter, the same litigation made two additional trips to the state supreme court.²⁷⁵ If provision of fire protection, for example, is to be deferred until protracted condemnation proceedings can be litigated in this fashion, prospective purchasers may eventually decide that such restrictions represent something less than a benefit.

Other problems that beset the condemner under the Michigan view are formidable indeed. First, it must be determined whether or not a general plan exists.²⁷⁶ Where the restrictions are created by plat, it is usually obvious that a general plan is created.²⁷⁷ However, a general plan may also be created by provisions in deeds, and since the condemner is charged with the same constructive notice that affects all purchasers of land, the condemner is bound to search not only the title to the land condemned, but conveyances of other property made by the grantors whose names appear in such chain, for the weight of authority is to the effect that if a deed or a contract for the conveyance of one parcel of land, with a covenant affecting another parcel of land owned by the same grantor, is duly recorded, the record is constructive notice to a subsequent purchaser of the latter parcel.²⁷⁸ In many jurisdictions the rule is applicable even though the recorder's indexes fail to indicate that the deed in question contains restrictions that affect adjoining land.²⁷⁹ Thus a difficult record search is carried far beyond the boundaries of the land devoted to a violating use.

In defense of the Michigan rule it has been argued that as the distance of a claimant's lot from the invaded tract increases, the amount of compensation rapidly diminishes, soon to the vanishing point, the implication being that remote owners are not necessary parties to the condemnation.²⁸⁰ The answer seems unsatisfactory, for it requires the condemner to determine at its peril, and in advance of condemnation, the areas that are likely to emerge undamaged. Moreover, where the applicable statute requires that all interested persons be made parties to the condemnation, proponents of

²⁷⁵ *In re Dillman*, 256 Mich. 654, 239 N.W. 883 (1932) and *In re Dillman*, 263 Mich. 542, 248 N.E. 894 (1933).

²⁷⁶ *Taylor v. State Highway Comm'r*, 283 Mich. 215, 278 N.W. 49 (1938).

²⁷⁷ Note, 10 U. OF CH. L. REV. 200 (1936).

²⁷⁸ *Finley v. Glenn*, 303 Pa. 131, 154 Atl. 299 (1931). See Note, 16 A.L.R. 1013 (1922). *Contra: Buffalo Academy of the Sacred Heart v. Boehm Bros., Inc.*, 267 N.Y. 242, 196 N.E. 42 (1935).

²⁷⁹ Note, 23 CALIF. L. REV. 107 (1934).

²⁸⁰ Aigler, *Measure of Compensation for Extinguishment of Easement by Condemnation*, [1945] WIS. L. REV. 33.

the Michigan view are placed in the embarrassing position of suggesting that the condemner disregard the statutory mandate, for under their view all persons protected by the plan have a property right, and there is nothing in the statute that warrants disregard of any property rights. Again, courts following the Michigan view will be called upon to adjudicate in condemnation suits difficult questions of enforceability of building restriction, where the defense is raised that the restriction has become unenforceable by reason of abandonment or change of neighborhood.²⁸¹ One would conjecture that most jurisdictions will be content to decide such questions in the typical damage suit brought after the construction of the improvement has demonstrated the fact of actual damage.

The question remains whether recovery ought to be denied altogether, as has been done in a number of cases.²⁸² It would seem that compensation should be awarded whenever special damage can be shown. Questions of the likelihood of damage and the certainty of the amount thereof seem no more formidable than in cases involving closing of streets and changes of street grade. True, if the issues are raised in a damage suit, the court must decide questions of abandonment and change of neighborhood, and other issues may arise, for example, as to the construction of restrictions.²⁸³ Still, problems of equal difficulty arise daily in other litigation and such difficulties are not regarded as sufficient reason for denying protection to legitimate interests. On balance, the claim for compensation where special damage can be shown seems a valid one.

Another problem of pressing importance in this field concerns the effect of zoning ordinances upon existing restriction plans. Up to the present time, this acute problem appears to have been dismissed with the observation that zoning ordinances cannot constitutionally relieve land of lawful restrictions.²⁸⁴ On closer examination it becomes evident that virtually all of the decisions are explainable on the ground that the particular ordinance was unnecessary, unreasonable, or not in the public interest. There is practically no direct authority holding that a municipality does not have the power to affect private covenants by enactment of a reasonable zoning regulation.²⁸⁵

²⁸¹ *United States v. 11.06 Acres of Land*, 89 F. Supp. 852 (E.D. Mo. 1950); *Town of Stamford v. Vuono*, 108 Conn. 359, 143 Atl. 245 (1928).

²⁸² See text at note 269 *supra*. Cf. *Higbee v. Chicago v. B. & Q. R.R.*, 235 Wis. 91, 292 N.W. 320 (1940).

²⁸³ E.g., *In re Nordwood Estates Subdivision*, 291 Mich. 563, 289 N.W. 255 (1939). See Note, 14 A.L.R.2d 1376 (1950).

²⁸⁴ *Burgess v. Magarian*, 214 Iowa 694, 243 N.W. 356 (1932); *Dolan v. Brown*, 338 Ill. 412, 170 N.E. 425 (1930); *Vorenberg v. Bunnell*, 257 Mass. 399, 153 N.E. 884 (1926); *Szilvasy v. Saviers*, 70 Ohio App. 34, 44 N.E.2d 732 (1942); *Taylor v. Hackensack*, 137 N.J.L. 139, 58 A.2d 788 (1948), *aff'd*, 62 A.2d 686 (1948). See Van Hecke, *Zoning Ordinances and Restrictions in Deeds*, 37 YALE L.J. 407 (1928).

²⁸⁵ Comment, 48 MICH. L. REV. 103 (1949).

Zoning ordinances constitute an exertion of the police power. In innumerable instances a valid exercise of the police power has resulted in an abridgment or destruction of property rights. Indeed, in the leading case sustaining the validity of zoning ordinances, it was recognized that enforcement of such ordinances might result in great monetary loss to property owners.²⁸⁶ To say that a zoning ordinance conflicts with established building restrictions merely states the problem, not the solution. If, in the interest of public health and safety, an unencumbered fee simple title can be controlled by a zoning ordinance, it is difficult to perceive why the presence of building restrictions should alter the result.

During the boom days before the stock market crash of 1929, many subdivision plats restricted some or all of the residence lots to apartment house purposes. Generally the purpose was to create a population density that would increase the value of the commercial areas of the subdivision. It is common knowledge today that few, if any, builders are interested in apartment buildings, while great demand exists for sites for single-family dwellings. Consequently, many such areas have recently been zoned for single-family dwellings. It is also evident that these subdivisions, laid out, by and large, with no regard for proper city planning and calling for population densities wholly incompatible with present-day standards, present an obstacle to proper community development. No valid reason exists why the police power should not be available to remedy the situation.

The situation is wholly unlike that where a prohibited use, such as a fire or police station, intrudes into a restricted residential area, where no large-scale replanning of the area is involved. In balancing the claims of plaintiff and defendant, as must always be done where the police power is involved, it is evident that the public interest in the preservation of health, morals and safety in large urban areas is so overwhelming that where the ordinance involved is reasonable, private rights must give way before it. No property owner can reasonably expect that his land will be immune from city planning measures that, in the public interest, override private restrictions.

Many other instances of obsolete restriction plans exist; for example, areas restricted to commercial use where the future holds no possibility of commercial development and areas restricted to two-flat buildings or three-flat buildings where there is no present or future market for structures of that kind. Yet, because areas so restricted have remained stagnant, there has been no such change in the character of the neighborhood as would warrant abrogation of the restrictions under equitable doctrines.²⁸⁷ The zoning has changed in some cases because the restrictions are no longer

²⁸⁶ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

²⁸⁷ *Ockenga v. Alken*, 314 Ill. App. 389, 41 N.E.2d 548 (1942).

suitable to the neighborhood,²⁸⁸ but landowners are deterred from constructing buildings that violate the restrictions for fear of "shakedown" injunction suits instituted at the crucial moment when construction has begun. These areas have, in fact, become blighted vacant areas which arrest the sound growth of communities and prevent the construction of critically needed housing.²⁸⁹ Many such lots have been abandoned by their owners and have become tax delinquent, resulting in loss of tax revenue to the community. So acute has the problem become that some communities have resorted to condemnation so that the land could be made available for redevelopment.²⁹⁰ This is a drastic and expensive remedy. Surely the police power extends to situations such as this where the needs of the community are so imperative and obvious.

It has been held that, in determining the validity of zoning ordinances, courts need not take account of inconsistent private restrictions.²⁹¹ To hold that a city is bound by such restrictions would bind and circumscribe a modern city in its orderly planning by private restrictions made many years previous when conditions were entirely different.²⁹² To fit a zoning plan into the diverse and conflicting schemes created by private restrictions would result in a crazy quilt arrangement that no court would sustain. Which of the two conflicting schemes, then, is to govern the community's orderly development? If the police power gives the community the means to govern its destiny, the answer to the question must be obvious.

XV. RIGHTS OF ABUTTERS

Building line ordinances

Many difficult cases in the border area of eminent domain law have concerned limitations on the use of land adjoining streets. The regulatory powers of cities do not stop at the street line, as the billboard cases show.²⁹³ But the validity of ordinances prohibiting landowners from erecting buildings up to the edge of the street without making any provision for compensating those landowners was more slowly recognized.

The early view was that an attempt by ordinance to prohibit abutting

²⁸⁸ *Goodwin Bros. v. Combs Lumber Co.*, 275 Ky. 114, 120 S.W.2d 1024 (1938).

²⁸⁹ ILL. REV. STAT. c. 67½, § 64 (1953).

²⁹⁰ *People ex rel. Gutknecht v. City of Chicago*, 414 Ill. 600, 111 N.E.2d 626 (1953). See 32 CHI-KENT REV. 1, 91 (1953); Comment, 48 NORTHWESTERN U.L. REV. 470, 483 (1953).

²⁹¹ *Oklahoma City v. Harris*, 191 Okla. 125, 126 P.2d 988 (1941).

²⁹² *Ibid.*

²⁹³ In exercise of the police power, cities may limit the right of owners of land adjoining streets to maintain billboards on their land. *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269 (1919); *General Outdoor Advertising Co. v. Dep't of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935). See Gardner, *The Massachusetts Billboard Decision*, 49 HARV. L. REV. 869 (1936); Proffitt, *Public Esthetics and the Billboard*, 16 CORNELL L.Q. 151 (1931); see Notes, 72 A.L.R. 465 (1931), 156 A.L.R. 581 (1945).

owners from placing any building within a specified distance of the street line "deprives the owner of the lawful use of his property, and amounts to a taking thereof within the meaning of the constitution, and, consequently, can only be carried out by making provision for the compensation of the owner."²⁹⁴ Under this view, ordinances imposing setback lines were held invalid, if they did not provide for compensation, as a deprivation of property without due process of law.²⁹⁵ It was sometimes said, in states having an "or damaged" constitution, that such an ordinance effected a "taking or damaging."²⁹⁶

Another view soon made its appearance, however, as interest in city planning became more widespread; this was the view that building lines might be established by ordinance, without any procedure for assessing damages, as a legitimate exercise of the police power.²⁹⁷ In 1926 the Supreme Court, in the landmark case of *Village of Euclid v. Ambler Realty Co.*,²⁹⁸ upheld a comprehensive zoning ordinance in its general features as a valid exercise of the police power. The following year, in *Gorieb v. Fox*,²⁹⁹ the Court upheld a building line ordinance on the basis of its reasoning in the *Euclid* case, declaring itself unable to find that the ordinance in question had no substantial relation to the public health, safety, morals, or general welfare.³⁰⁰ The *Gorieb* case decided only that the building line ordinance under review did not violate any rights protected by the Federal Constitution; of course, state courts remained free to pass on the validity of such ordinances under their local constitutions.³⁰¹ However, following the leadership of the Supreme Court, the state courts generally came to hold that such ordinances were within the police power and valid under state constitutional provisions.³⁰²

²⁹⁴ 1 LEWIS, EMINENT DOMAIN § 227 (3d ed. 1909).

²⁹⁵ *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828 (1913); *City of St. Louis v. Hill*, 116 Mo. 527, 22 S.W. 861 (1893); *Eaton v. Village of South Orange*, 3 N.J. Misc. 956, 130 Atl. 362 (Sup. Ct. 1925), *aff'd mem.*, 103 N.J.L. 182, 134 Atl. 917 (1926); *People ex rel. Dilzer v. Calder*, 89 App. Div. 503, 85 N.Y. Supp. 1015 (2d Dept. 1903); *White's Appeal*, 287 Pa. 259, 134 Atl. 409 (1926); *Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S.E. 105 (1915).

²⁹⁶ *Fruth v. Board of Affairs*, note 295 *supra*.

²⁹⁷ *Town of Windsor v. Whitney*, 95 Conn. 357, 111 Atl. 354 (1920); *Wulfsohn v. Burden*, 241 N.Y. 288, 150 N.E. 120 (1925); *Harris v. State ex rel. Ball*, 23 Ohio App. 33, 155 N.E. 166 (1926).

²⁹⁸ 272 U.S. 365 (1926).

²⁹⁹ 274 U.S. 603 (1927), *affirming* 145 Va. 554, 134 S.E. 914 (1926).

³⁰⁰ Meanwhile, state courts were drawing the same inference from the *Euclid* decision. *Thille v. Board of Public Works*, 82 Cal.App. 187, 255 Pac. 294 (1927); *State ex rel. McKusick v. Houghton*, 171 Minn. 231, 213 N.W. 907 (1927).

³⁰¹ See *Longshore v. City of Montgomery*, 22 Ala. App. 620, 622, 119 So. 599, 600 (1928).

³⁰² *Papaioanu v. Comm'rs of Rehoboth*, 25 Del. Ch. 327, 20 A.2d 447 (Ch. 1941); *Boardman v. Davis*, 231 Iowa 1227, 3 N.W.2d 608 (1942); *Moore v. City of Pratt*, 148 Kan. 53, 79 P.2d 871 (1938); *Sampere v. City of New Orleans*, 166 La. 776, 117 So. 827 (1928); *James S. Holden Co. v. Connor*, 257 Mich. 580, 241 N.W. 915 (1932); *Sundeen v. Rogers*, 83 N.H. 253, 141 Atl. 142 (1928); *Kerr's Appeal*, 294 Pa. 246, 144 Atl. 81 (1928); *Bouchard v. Zetley*, 196 Wis. 635, 220 N.W. 209 (1928).

General acceptance of the view that building lines might be established under the police power rather than the power of eminent domain was a consequence of the courts' taking a broader view of society's needs. Courts came to recognize that the growth of cities had given rise to new, difficult problems, and that the appropriateness of the measures to be taken to meet those problems was best left to the judgment of the local governing bodies.³⁰³ Accordingly they were ready to find that ordinances establishing building lines without compensation tended to promote the public welfare in ways that fell within the recognized scope of the police power.³⁰⁴ The decisions bringing setback ordinances within the police power were necessary if building lines were to be established by municipal action. For where there is legislation requiring the payment of compensation to abutters for the establishment of a municipal building line over their lands, little or no action of any kind is taken. Reasons for this are the complexities of condemnation procedures, the uncertainty as to what the cost may be, and the tendency of juries to overestimate damages.³⁰⁵

In expanding the scope of the police power to embrace building line ordinances, the process the courts went through was one of reweighing private loss against public gain as it had come to be understood. The courts might have said that there was not a "taking" because there was not a physical invasion of the land, but they did not revert to such a test in their later decisions. Instead, they dwelt on the various justifications they perceived for holding setback ordinances to be a reasonable and legitimate exercise of the police power. These cases might therefore be said to have taken such ordinances outside the reach of the Fourteenth Amendment by putting them within a class of regulations to which that Amendment does not extend.

Platting of future streets

One of the advantages which cities have found to derive from building line ordinances is that they serve to reduce the cost of later widening of the streets, by making it unnecessary to condemn expensive, new buildings

³⁰³ *Thille v. Board of Public Works*, 82 Cal. App. 187, 255 Pac. 294 (1927); *Papaioanu v. Comm'rs of Rehoboth*, 25 Del. Ch. 327, 20 A.2d 447 (Ch. 1941).

³⁰⁴ They found that setbacks tended to promote safety by diminishing the danger of fires spreading, *Wulfsohn v. Burden*, 241 N.Y. 288, 150 N.E. 120 (1925), by allowing greater opportunity for access by fire departments, *ibid.*, and by bettering the view at intersections, *James S. Holden Co. v. Connor*, 257 Mich. 580, 241 N.W. 915 (1932); to improve health and comfort by allowing freer admission of light and air, *Kerr's Appeal*, 294 Pa. 246, 144 Atl. 81 (1928); and to improve morals and enhance the public welfare by bettering living conditions and increasing the prosperity of the neighborhood, *Town of Windsor v. Whitney*, 95 Conn. 357, 111 Atl. 354 (1920).

³⁰⁵ *Black, Building Lines and Reservations for Future Streets*, in 7 HARVARD CITY PLANNING STUDIES 110-111 (1935).

which might otherwise be erected close to the streets to be widened. Building line ordinances have often been enacted with later street widenings primarily in mind.³⁰⁶ The courts have had much difficulty in deciding whether the police power should be held to authorize cities to keep buildings out of areas marked out for future streets or street widenings.

The governing statute may provide that the filing by the city of a plat showing a plan for future streets operates to bar any right to compensation for buildings thereafter erected on the land marked out for streets. The courts in a number of states have held that such a provision in effect prevents the owners of the land from putting it to any long-term use and have therefore declared this kind of statute void.³⁰⁷ In Pennsylvania, however, such a provision against compensation is valid.³⁰⁸ The early Pennsylvania cases upheld the platting statutes because the plats themselves caused no immediate physical invasion,³⁰⁹ but subsequent cases gave some attention to ways in which the platting of streets might serve the public advantage and might also be a net benefit to the landowners.³¹⁰ These later cases are consistent with the view the Pennsylvania court later came to take regarding the validity of setback ordinances under a more broadly conceived police power.³¹¹

Under the provisions of more recent statutes, the filing of a plat of future streets may have the effect, not of barring compensation for buildings which might later be placed in the areas designated to become streets,

³⁰⁶ *Id.* at 22. Some notion of the problem involved can be gained from the experience of the City of Chicago in the widening of Congress Street into a superhighway. Cost of the improvement for the city portion alone will be in excess of \$92,000,000.

³⁰⁷ *Moale v. Mayor & City Council of Baltimore*, 5 Md. 314 (1854); *Edward v. Bruorton*, 184 Mass. 529, 69 N.E. 328 (1904); *Forster v. Scott*, 136 N.Y. 577, 32 N.E. 976 (1893); *cf. Kittinger v. Rossman*, 12 Del. Ch. 276, 112 Atl. 388 (Ch. 1921); *The State, Jones, Prosecutor, v. Carragan*, 36 N.J.L. 52 (Sup. Ct. 1872). These decisions were handed down before the evils of unplanned development had been generally recognized. It is not entirely clear that they are valid today.

³⁰⁸ *Harrison's Estate*, 250 Pa. 129, 95 Atl. 406 (1915); *In re Forbes Street*, 70 Pa. 125 (1871). The filing of a plat showing where new streets are to be established or old streets widened is not held to be a taking even though permits cannot thereafter be obtained to build in the areas designated to become a street. *Scattergood v. Lower Merion Township Comm'rs*, 311 Pa. 490, 167 Atl. 40 (1933). However, on the rebuilding of existing structures so as to recede to the proposed street lines, an assessment of damages has been allowed. *Brower v. City of Philadelphia*, 142 Pa. 350, 21 Atl. 828 (1891); *In re Chestnut Street*, 118 Pa. 593, 12 Atl. 585 (1888); *City of Philadelphia v. Linnard*, 97 Pa. 242 (1881). Special circumstances, furthermore, have been held to justify an award of damages immediately on the filing of the plat. *Caplan's Appeal*, 293 Pa. 483, 143 Atl. 134 (1928) (too little area left to recede).

³⁰⁹ There is not "a present or an actual appropriation." *Brower v. City of Philadelphia*, 142 Pa. 350, 356, 21 Atl. 828 (1891).

³¹⁰ *In re Philadelphia Parkway*, 250 Pa. 257, 261, 95 Atl. 429, 430 (1915). Nevertheless, the court still has misgivings about its platting cases. *See Miller v. City of Beaver Falls*, 368 Pa. 189, 195-198, 82 A.2d 34, 37-38 (1951).

³¹¹ *Kerr's Appeal*, 294 Pa. 246, 144 Atl. 81 (1928).

but prohibiting construction of buildings in such areas. A statute of this kind has been upheld in Connecticut.³¹² The governing statute may provide that permits to build in the bed of any street shown on the plat may not be obtained unless it is established that the land is not yielding a fair rate of return and the proposed structure will increase as little as possible the cost of opening the street. In New York, where a statute of the older type containing a provision against compensation had been held void³¹³ but where the establishment of building lines under the police power had later been upheld,³¹⁴ a statute of the new variety has been enacted and has since withstood attack.³¹⁵ Yet in New Jersey it has recently been held not constitutionally possible, by ordinance changing the official street map, to keep a person from building within the new street lines.³¹⁶ Thus problems in the platting of proposed streets remain. The proper solution of such problems should be based not on conceptual factors but on a full consideration of the advantages to a city in being able to plan for its growth without the need to make large immediate outlays or to face the risk that expensive buildings will rise in the path of its streets, weighed against the harshness of denying landowners present compensation for the loss in usefulness of the strip of their land which the city plans ultimately to appropriate for a street.

The hostility many courts have shown toward plats of future streets has not extended, however, to measures whereby the location and width of proposed streets are controlled by means of requiring approval of subdivision plats before they can be recorded. It has been held that legislation can permit a planning commission to require a subdivider, as a condition of approving his plat for recordation, to dedicate some of his land for a street,³¹⁷ or to dedicate a strip of his land to widen an existing street,³¹⁸ or to plat all streets a certain minimum width.³¹⁹ A city's control over the growth of its system of streets is permitted in this manner, because the burden on the subdivider is not so serious that a taking or damaging of his property need be found.

³¹² *Town of Windsor v. Whitney*, 95 Conn. 357, 111 Atl. 354 (1920).

³¹³ *Forster v. Scott*, 136 N.Y. 577, 32 N.E. 976 (1893).

³¹⁴ *Wulfsohn v. Burden*, 241 N.Y. 288, 150 N.E. 120 (1925).

³¹⁵ *S. S. Kresge Co. v. City of New York*, 194 Misc. 645, 87 N.Y.S.2d 313 (Sup. Ct. 1949); *Vangellow v. City of Rochester*, 190 Misc. 128, 71 N.Y.S.2d 672 (Sup. Ct. 1947); *Headley v. City of Rochester*, 272 N.Y. 197, 5 N.E.2d 198 (1936).

³¹⁶ *Grosso v. Board of Adjustment of Milburn Township*, 137 N.J.L. 630, 61 A.2d 167 (Sup. Ct. 1948). Cf. *Arkansas State Highway Comm. v. Anderson*, 184 Ark. 763, 43 S.W.2d 356 (1931).

³¹⁷ *Ayres v. City Council of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1 (1949).

³¹⁸ *Ridgefield Land Co. v. City of Detroit*, 241 Mich. 468, 217 N.W. 58 (1928).

³¹⁹ *Newton v. American Security Co.*, 201 Ark. 943, 148 S.W.2d 311 (1941). He can be required, further, to grade the streets and install water and sewer facilities and sidewalks. *Allen v. Stockwell*, 210 Mich. 488, 178 N.W. 27 (1920). See also *Notes*, 65 HARV. L. REV. 1226 (1952), 11 A.L.R.2d 524 (1950).

A law may also be passed providing for the filing of a plat showing a city's plan for future streets, and this law may have the effect of prohibiting subdividers and other persons from laying out any streets in the area described that do not conform to the street plan shown. If the filing of the plat has this effect but does not otherwise restrict the use of improvement of the land, it does not itself constitute a "taking."³²⁰ Here, also, the element of public benefit and public control is substantial, and the interference with the property owner is minimal.

Scope of the public's easement in streets

As to an established and existing street, the question whether title to the underlying soil is in the city, the abutters, the subdivider, or someone else may assume considerable importance. The location of title may become a critical issue in the event that an owner of abutting property decides that he wishes to remove minerals from beneath the street³²¹ or to use the space under the street.³²² It may become important, too, whenever the city decides that it will permit a new use to be made of a street, in which case, if the city has only an easement, it may be argued that such new use is not within the scope of the public's easement but imposes an additional servitude for which the landowner is entitled to compensation as for a new taking of his property.

Where the establishment of a street leaves title in the owner and creates only an easement across the land in favor of the public, the scope of that easement is limited by the body of law which has been built up in the various states itemizing and describing "proper street uses."³²³ The formulations which the courts have evolved to delineate proper street uses may

³²⁰ *Bauman v. Ross*, 167 U.S. 548 (1897).

³²¹ *City of Leadville v. Coronado Mining Co.*, 29 Colo. 17, 67 Pac. 289 (1901).

³²² *Tacoma Safety Deposit Co. v. Chicago*, 247 Ill. 192, 92 N.E. 153 (1910).

³²³ The courts say that the public has a privilege of passage, together with all those other privileges that are "necessarily implied as incidental to its exercise," *Commonwealth v. Morrison*, 197 Mass. 199, 203, 83 N.E. 415, 416 (1908); or "necessary, appropriate and usual for the proper enjoyment of such street," *Matter of City of Yonkers*, 117 N.Y. 564, 573, 23 N.E. 661, 663 (1890); or "annexed as incidents by usage or custom," *State v. Laverack*, 34 N.J.L. 201, 206 (Sup. Ct. 1870); or "reasonable and proper," *New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397, 399, 65 N.E. 835 (1903); or "consistent with its character as a public highway, and not actually detrimental to the abutting real estate," *Mordhurst v. Ft. Wayne & Southwestern Traction Co.*, 163 Ind. 268, 280, 71 N.E. 642, 646 (1904). The easement includes, they say, not only the methods of use known to the landowner at the time of dedication or taking, but "every reasonable means of transportation for persons and commodities, and of transmission of intelligence, which the advance of civilization may render suitable for a highway." *Commonwealth v. Morrison*, 197 Mass. 199, 203, 83 N.E. 415, 416 (1908). Illustrative of the problems involved is the large body of cases in which the courts have struggled with the issue of whether construction of a street railway requires additional compensation; or whether it does so if it is an interurban road, *Note*, 13 A.L.R. 809 (1921); or carries baggage or freight, *Notes*, 2 A.L.R. 1404 (1919), 46 A.L.R. 1472 (1927); or runs beneath the street, *Note*, 11 A.L.R.2d 189 (1950); or is a private railway, *Note*, 61 A.L.R. 1046 (1929).

themselves give little aid when a new situation is presented. They do serve, however, to point out that the cases involve a weighing of conflicting interests, an estimate of reasonable expectations, a determination of the point beyond which losses in abutting property values must in fairness be borne by the public, a blend of conceptualism and policy, questions of degree. But when a decision has been reached that a particular use of the street is not within the public's easement, the owner of the fee has been given compensation.³²⁴

In nearly all cases where the city has only an easement for street purposes, title to the street is vested in the abutting owners. Courts that award compensation on the ground that a particular use of the street is not a proper street use are evidently motivated by a desire to protect the expectations of the abutting owners that they will continue to enjoy the advantages that street frontage affords. Their ownership of the fee is merely a convenient peg on which to hang a right of compensation when those expectations are frustrated.³²⁵ Courts which are slower to award compensation are impressed, rather, with the importance of allowing the public authorities a relatively free hand in their control of public areas such as streets and in the adaptation of those areas to meet changing community needs.

Abutters' rights

Where ownership of the soil within the street is vested in the city, county, or state, manifestly an abutting landowner cannot complain that any use made of the street imposes an additional servitude, for the land falling in the street is not his. But he may be entitled, nonetheless, to receive compensation for harm caused him by a use of the street that is not a proper street use. The fact that his property is located along the street is sufficient in itself to give him certain rights,³²⁶ known as "abutters' rights," or "abutters' easements." They commonly include a right of access, or ingress and egress, and a right to light and air; and they may include a right to lateral support, a right to grow and maintain shade trees, and a right of view to and from the street. It was recognized as early as 1838 that persons owning property located on a street have a special interest in the street which may permit them to recover compensation in the event that the street is used for a purpose inconsistent with the purposes for which it was originally dedicated.³²⁷ The earliest application of this theory that abutters had a special property interest in the street involved interference with access;

³²⁴ Hildebrand v. Southern Bell Tel. & Tel. Co., 219 N.C. 402, 14 S.E.2d 252 (1941).

³²⁵ If the owner is not an abutter, he may be allowed to recover only nominal damages. Coatsworth v. Lehigh Valley Ry., 73 Misc. 645, 131 N.Y.Supp. 300 (Sup. Ct. 1911).

³²⁶ See Notes, 48 HARV. L. REV. 339 (1934), 15 HARV. L. REV. 305, 306 (1901), 77 U. OF PA. L. REV. 793 (1929).

³²⁷ Lexington & O. R.R. v. Applegate, 8 Dana 289, 294-95 (Ky. 1839).

recovery was allowed for impairment of an abutter's access to his land although he had no title to the highway.³²⁸ But it was with the famous New York *Elevated Railroad Cases*, beginning in 1882 with *Story v. New York Elevated Railroad Co.*,³²⁹ that the right of access was coupled with the right to light and air from the open space above the highway, and the doctrine of abutters' rights began to receive widespread recognition. It was the doctrine of the *Elevated Railroad Cases* that regardless of the fact that he does not own the fee in the street, an abutter has, from the mere fact of his adjacency to the street, certain easements, or quasi-easements,³³⁰ of access, light, and air, which are property rights and which may be "taken" when the street is devoted to purposes that involve a substantial interference with these rights.³³¹

The importance of these cases lies in the fact that prior thereto, protection of the abutter depended to a great extent on his ownership of the fee title to the land in the street. This was a tenuous basis of protection, for title to the street often depended on technicalities of platting or condemnation. The abutters' rights doctrine, on the other hand, reflected a fresh approach to the problem, based in essence on protection of the reasonable expectations of abutting owners. Evidently the judges who evolved this doctrine felt, as landowners generally must feel, that one who buys land abutting on a street may reasonably expect that the street will continue to be devoted to street purposes and that these reasonable expectations ought to be protected. It was necessary, however, that these expectations be fitted into the category of property rights, for it is only property rights that the eminent domain provisions protect. Common law easements are property rights, and provide a reasonably close analogy. Hence the courts have denominated these expectations easements³³² and so, by means of this easement concept, have brought them within the area of protection.³³³ That protection of reliance interests is indeed the basis of the abutters' rights doctrine is evident from the reasoning of some of the decisions.³³⁴

In the main, the abutters' rights doctrine is employed to protect abut-

³²⁸ *Parker v. Boston & Main R.R.*, 3 Cush. 107 (Mass. 1849).

³²⁹ 90 N.Y. 122 (1882). For a brief history of these cases see *Roberts v. New York City*, 295 U.S. 264, 279 (1935).

³³⁰ *American Bank Note Co. v. New York Elevated R.R.*, 129 N.Y. 252, 271-72, 29 N.E. 302, 306-07 (1891).

³³¹ See, e.g., *Kane v. New York Elevated R.R.*, 125 N.Y. 164, 180, 26 N.E. 278, 280 (1891).

³³² *Williams v. Los Angeles Ry.*, 150 Cal. 592, 594, 89 Pac. 330, 331 (1907); *Story v. New York Elevated R.R.*, 90 N.Y. 122, 145 (1882).

³³³ The abutters' rights doctrine crystallized into property rights "the practical commercial advantages of the expectation that a street would remain open." Mr. Justice Holmes, dissenting in *Muhler v. New York & H. R. R.*, 197 U.S. 544, 573 (1905).

³³⁴ *Barnett v. Johnson*, 15 N.J.Eq. 481, 488 (1863); *Kane v. N.Y. El. R. R.*, 125 N.Y. 164, 185, 26 N.E. 278, 282 (1891).

ters against destruction of important advantages, such as the right of access, by diversion of the street to a use that is not a proper street use, for example, the erection of an elevated railway by or for a private corporation for its own exclusive use.³³⁵ Such erections deprive the abutter of the expected advantages deriving from street frontage, such as light, air, and access, but without any corresponding benefit to the public in its use of the street. Theoretically, also, an abutter is not obliged to foresee that such a diversion will occur. Hence, his reliance interests are damaged by the diversion. Where an improvement, such as a bridge or a change of grade, damages the abutter, but does not divert the street from proper street use, it is held, under most "taking of property" constitutions, that payment of compensation to the abutter is not required.³³⁶ In other words, the policy of allowing public control over the public street is allowed to prevail despite the damage to the abutter. What makes street frontage valuable is the fact that people travel over the street, and the abutter cannot complain of improvements that facilitate such travel. He must anticipate that such improvements will be made, and that changes in the mode of travel will occur. Where, however, an improvement results in virtually complete destruction of all means of access, it is held that compensation must be given even though the improvement is a proper street use.³³⁷ This total destruction of a reliance interest must be regarded as a taking of property.

"Or damaged" constitutional provisions were designed to afford abutters greater protection than had been enjoyed under "taking of property" provisions. Under "or damaged" constitutions, therefore, an abutter must be compensated for substantial damage resulting from an improvement even though the improvement is a proper street use and even though total destruction of an abutters' right is not present.³³⁸ Here the policy of allowing the public to exercise control over a public street is sacrificed in order to give better protection to the expectations of property owners. In some jurisdictions the same result has been reached by giving a liberal interpretation to "taking of property" constitutions.³³⁹

The protection given the reliance interests of an abutter under the abutters' rights doctrine is more comprehensive and effective than the protection that would be provided an abutter solely on the basis of his owner-

³³⁵ *Sauer v. City of New York*, 206 U.S. 536 (1907).

³³⁶ *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. 457 (1891). See Note, 45 A.L.R. 534 (1926).

³³⁷ *Sanderson v. Baltimore City*, 135 Md. 509, 109 Atl. 425 (1920). See Bowie, *Limiting Highway Access*, 4 Md. L. Rev. 219, 242-243 (1940).

³³⁸ *Rigney v. Chicago*, 102 Ill. 64 (1882); 2 NICHOLS, *THE LAW OF EMINENT DOMAIN* 382 (3d ed. 1950).

³³⁹ *Liddick v. Council Bluffs*, 232 Iowa 197, 5 N.W.2d 361 (1942); *White v. Southern Ry.*, 142 S.C. 284, 140 S.E. 560 (1927); *Coyne v. Memphis*, 118 Tenn. 651, 102 S.W. 355 (1907).

ship of the soil in the street, for abutters' rights extend the full width of the street, not just to the center line,³⁴⁰ and may extend laterally to the next intersection or beyond, as in the case of the right of access. Thus the ownership of the fee in the street has been consigned to a position of constantly diminishing importance.³⁴¹ The abutters' rights doctrine rests on the desire to protect the reasonable expectations of those who acquire street frontage, and, obviously, abutters' expectations with respect to the street are the same regardless of the ownership of the fee in the street.³⁴²

Abutters' rights fall within the category of novel property rights; hence, they do not lie within the area of federal protection.³⁴³ And since the abutters' rights doctrine is entirely a product of judicial ingenuity, it is obvious that the area of protection will vary with the jurisdiction. In some jurisdictions only a limited category of particular abutters' rights is recognized. In other jurisdictions, the desire to equate the position of all abutters regardless of ownership of title to the street has led the courts to go a step further. These courts do not make the right of an abutter to receive compensation depend on whether his right of access, or right to light and air, or right of view, has been impaired by an improper street use; he has not only those specific rights, they say, but a generic right, whatever it may be called, that the street shall not be devoted to other than proper street uses.³⁴⁴ Accordingly, under this view, title to the street is immaterial in any case involving harm caused by a use of the street;³⁴⁵ the only question is whether the particular use is a proper street use. The same result is reached in another way in some of the states which recognize only certain specific abutters' rights but which have an "or damaged" constitution: compensation is required for all "damage" to adjacent land caused by an improper street use, regardless of whether specific abutters' rights have been taken.³⁴⁶ Indeed, the view has been expressed that the entire doctrine of abutters' rights is unnecessary in jurisdictions that have an "or damaged" constitution.³⁴⁷

These abutters' rights must not be confused with the rights a landowner may have or claim against his neighbors on each side. For example, in most

³⁴⁰ *Gustafson v. Hamm*, 56 Minn. 334, 57 N.W. 1054 (1894); *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155 (1909).

³⁴¹ *South Bound Ry. v. Burton*, 67 S.C. 515, 46 S.E. 340 (1903).

³⁴² LEWIS, *EMINENT DOMAIN* § 121 (3d ed. 1909).

³⁴³ No denial of due process is involved if a particular jurisdiction does not choose to recognize the doctrine of abutters' rights. *Sauer v. City of New York*, 206 U.S. 536 (1907).

³⁴⁴ See *Donahue v. Keystone Gas Co.*, 181 N.Y. 313, 320, 73 N.E. 1108, 1110 (1905).

³⁴⁵ See *Town of Hazlehurst v. Mayes*, 84 Miss. 7, 11, 36 So. 33, 34 (1904); *Bronson v. Albion Telephone Co.*, 67 Neb. 111, 115, 93 N.W. 201, 202 (1903); *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166, 174, 64 N.E. 141, 143 (1902). *But cf.* *Ward v. Triple State Natural Gas & Oil Co.*, 115 Ky. 723, 74 S.W. 709 (1903).

³⁴⁶ 2 NICHOLS, *THE LAW OF EMINENT DOMAIN* § 6.444 (3d ed. 1950).

³⁴⁷ 3 *id.* at 254.

jurisdictions in this country, easements to receive light and air from adjoining property can be acquired only by express grant or covenant and cannot be obtained against one's neighbors by prescription.³⁴⁸ Yet the same jurisdictions in many cases recognize that a landowner may have a right to receive light and air from the highway, even in the absence of any grant, or covenant, or lapse of time. For the latter rights rest on a different basis; they are not in any way consensual, but exist as "natural incidents to the creation of highway,"³⁴⁹ by virtue of which an abutter is protected in his expectation that if he builds up to the street line, he will not thereafter be deprived of light and air from the direction of the street, except to the extent that proper, hence largely foreseeable, street uses and improvements may have such effect.

Rights analogous to abutters' rights have not, however, been held to derive from location next to other areas devoted to public use, such as parks. Diversion to other uses of park property owned absolutely by the government is not ordinarily found to be a taking or damaging of property rights of neighboring landowners.³⁵⁰ Private easements in a park may, of course, exist by reason of other circumstances, *e.g.*, the fact that conveyances were made which referred to a plat showing such a park.³⁵¹ But apart from any easements which the landowners may themselves have created, private rights in a park do not usually derive from proximity *per se*. Perhaps the distinction may be ascribed to the different weight given to the claims of the landowners in the two situations. Economic interests growing out of street frontage are doubtless a good deal more significant financially than the claims of those who have chosen to locate in the vicinity of parks. Unlimited public control of park areas can be permitted without inflicting too much pecuniary damage on the adjoining owners.

Changes in the grade of a street

The early view on damage resulting from change of street grade is represented by *Callender v. Marsh*,³⁵² where the court, in denying compensation for substantial harm caused to abutting land by a lowering of the street, observed that the public initially acquired, with the street, the right to change its grade from time to time thereafter, and persons buying lots abutting on the street were bound to calculate the chance that such changes might occur. This argument is in substance an expression of the notion that cities, having obtained the land for use as a street, must be allowed to exer-

³⁴⁸ Note, 56 A.L.R. 1138 (1928).

³⁴⁹ Note, 15 HARV. L. REV. 305, 306 (1901).

³⁵⁰ *Reichelderfer v. Quinn*, 287 U.S. 315 (1932). See Note, 83 A.L.R. 1435 (1933). *But cf.* *Nichols v. City of Rock Island*, 3 Ill.2d 531 (1954).

³⁵¹ Note, 7 A.L.R.2d 650 (1949).

³⁵² 1 Pick. 418 (Mass. 1823).

cise a considerable degree of control over it, making such changes as changing public needs may require;³⁵³ and that no individual, therefore, has a right to rely on a continuance of the *status quo*.³⁵⁴

However, denial of compensation in the street grade cases led to the adoption of the first "or damaged" constitutional provisions.³⁵⁵ Clearly, landowners felt that where land was purchased or improvements were constructed in reliance upon an existing street grade, compensation ought to be awarded when a change of grade subjected them to pecuniary harm. Today it is generally held, in states having "or damaged" constitutions, that harm caused by a change in the grade of a street is compensable as "damage."³⁵⁶ The same result has been obtained by statute in some other states.³⁵⁷

In states that retained their "taking of property" constitutional provisions, most courts continued to adhere to the early rule that a city is not liable for changing the grade of a street.³⁵⁸ However, some courts in "taking of property" jurisdictions found it possible to hold that harm caused by street grade changes required compensation.³⁵⁹ All that was needed was a more liberal interpretation of what constitutes a taking of property. Like landowners, the judges who adopted a more liberal attitude felt that those who had purchased land or made improvements in reliance upon an existing street grade could reasonably have expected that the grade would not be changed. Protection of these reasonable expectations was achieved by denominating them property rights, and finding them to have been "taken" by any substantial change of the grade.³⁶⁰

In some of the states that would otherwise award compensation for harm caused by street grade changes, recovery may yet be denied for damage caused by the *initial* establishment of a street grade.³⁶¹ Compensation is sometimes refused in this situation because it is felt that the abutters must have expected that at some time after the dedication or condemnation of the street it would be graded.³⁶² Likewise, if improvements are erected

³⁵³ *Wabash R.R. v. Defiance*, 167 U.S. 88 (1897); *Talbot v. New York & H. R.R.*, 151 N.Y. 155, 45 N.E. 382 (1896).

³⁵⁴ *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. 457 (1891); *Smith v. B. & O. R.R.*, 168 Md. 89, 93, 176 Atl. 642, 643-644 (1934) (abutters "must be held to have contemplated" that changes of grade might occur).

³⁵⁵ See *Rigney v. City of Chicago*, 102 Ill. 64, 75 (1882).

³⁵⁶ 13 McQUILLIN, MUNICIPAL CORPORATIONS § 37.222 (3d ed. 1950).

³⁵⁷ Note, 156 A.L.R. 416 (1945).

³⁵⁸ 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 6.4441 (3d ed. 1950).

³⁵⁹ *Liddick v. Council Bluffs*, 232 Iowa 197, 5 N.W.2d 361 (1942); *White v. Southern Ry.*, 142 S.C. 284, 140 S.E. 560 (1927); *Coyne v. Memphis*, 118 Tenn. 651, 102 S.W. 355 (1907).

³⁶⁰ *White v. Southern Ry.*, 142 S.C. 284, 140 S.E. 560 (1927).

³⁶¹ *Leiper v. City & County of Denver*, 36 Colo. 110, 85 Pac. 849 (1906). *Contra*: *Eachus v. Los Angeles Consol. Electric Ry.*, 103 Cal. 614, 37 Pac. 750 (1894).

³⁶² See *Dahlgren v. Chicago, M. & P. S. Ry.*, 85 Wash. 395, 411, 148 Pac. 567, 572-73 (1915).

after passage of an ordinance establishing a new street grade, no damages can be recovered for injury to such improvements by bringing the street to the grade so established.³⁶³ It is the unforeseeable change of grade that gives the right to compensation. Clearly these courts are motivated by a wish to protect reliance, but only if the reliance is a reasonable reliance.

The right of access and street vacations

On passage of an ordinance vacating a street or a portion thereof, questions arise regarding the requirement of compensation to abutters for impairment of those access rights existing under the doctrine of the New York *Elevated Railroad Cases*.³⁶⁴ In many states the effect of a street vacation is simply to relinquish the *public rights* in the street and to relieve the municipality of the obligation of keeping it in repair; an abutter's *private right* to use the street continues notwithstanding the vacation.³⁶⁵ Since the abutter's right of access remains, he is not entitled to compensation. But in those jurisdictions where the vacation ordinance has the additional effect of terminating the abutter's right to continue using the street as such, compensation must be paid to those abutters whose lands abut on the vacated portion of the street, for, as to such abutters, such an ordinance does not promote street uses, but has the effect, rather, of cutting off all travel and communication along the street. As to such abutters, moreover, the ordinance is not within the legitimate scope of the police power because the harm it causes them substantially outweighs the gain to the public. Compensation is awarded them because they have suffered special damage.³⁶⁶

Whether a particular landowner has suffered special damage, as distinguished from the inconvenience he may share with the rest of the community, depends on the location of his land with respect to the vacated portion of the street and its accessibility by other streets and from other directions. If adequate means of access remain, the resulting inconvenience is neither a "taking" or "damaging" of property.³⁶⁷ But if the closing leaves the land fronting on a cul-de-sac, *i.e.*, a street with only one outlet, most courts find special damage to have been sustained.³⁶⁸ Thus, under the doctrine of abutters' rights, an owner of land adjoining a street may have a property right in the street, *viz.*, a right of access, yet it will not be protected against abridgement unless the harm thereby caused to him is considered sufficiently serious to be recognized under the special damage doctrine.

³⁶³ *Collins v. Iowa Falls*, 146 Iowa 305, 125 N.W. 226 (1910); *In re Opening East 187th St.*, 78 App. Div. 355, 79 N.Y. Supp. 1031 (1st Dep't 1903).

³⁶⁴ See text at note 329 *supra*.

³⁶⁵ Note, 150 A.L.R. 644 (1944).

³⁶⁶ Notes, 16 Col. L. Rev. 139 (1916); 49 A.L.R. 330 (1927), 93 A.L.R. 639 (1934).

³⁶⁷ *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886 (1912).

³⁶⁸ Notes, 8 MINN. L. REV. 342 (1924), 10 N. C. L. REV. 215 (1932), 39 YALE L.J. 128 (1929).

Similar to the judicially created abutters' right of access is the private easement of a landowner who has taken title to his property by a conveyance referring to a plat showing streets. Depending on the jurisdiction, such a landowner may have an easement of access in all the streets shown on the plat, or in all of those streets which might be materially beneficial, or in the street on which his land abuts as far as the first cross street in either direction.³⁶⁹ Unlike the abutters' right of access, which was evolved by the courts to protect the reliance interests of abutters, this easement is rested usually on a theory of implied grant or of estoppel.³⁷⁰ It gives each lot owner the right, as against the original subdivider and other lot owners, to have the streets shown on the plat remain open for travel and free of obstructions.³⁷¹ The passage of a vacation ordinance in many states does not affect easements of this kind; so no question of compensation arises.³⁷² In such states it is sometimes said that after the vacation the parties stand upon their contractual rights;³⁷³ their private agreements remain effective so as to allow suits among themselves if the street thereafter is physically obstructed. However, in other states a street vacation terminates all private rights to have the street remain open and to be used for passage.³⁷⁴ Here the problem of how far to extend the right to compensation is again presented.

Where the effect of a street vacation is to destroy or abridge the access easements of persons who hold title acquired through conveyances referring to a subdivision plat on which streets are delineated, and where such easements are held to extend to all the streets in the subdivision, the property rights of a great number of persons may be affected. In this situation the "special damage" limitation is a practical necessity. Accordingly, compensation is denied for terminating private easements of this kind in the portion of street vacated unless a showing is made of special damage,³⁷⁵ just as in the cases involving the judicially created abutters' right of access. Moreover, without special injury the landowners are held to have no right to sue to enjoin the vacation or to have the vacation proceedings set aside.³⁷⁶

³⁶⁹ Editorial Note, 19 U. OF CIN. L. REV. 267 (1950). See Note, 7 A.L.R.2d 607 (1949).

³⁷⁰ Editorial Note, 19 U. OF CIN. L. REV. 267, 271 (1950).

³⁷¹ *Severo v. Pacheco*, 75 Cal. App.2d 30, 170 P.2d 40 (1946); *Stevenson v. Lewis*, 244 Ill. 147, 91 N.E. 56 (1910).

³⁷² Compare *O'Donnell v. Porter Co.*, 238 Pa. 495, 86 Atl. 281 (1913), with *Tesson v. Porter Co.*, 238 Pa. 504, 86 Atl. 278 (1913). See Note, 150 A.L.R. 652 (1944).

³⁷³ See *Chambersburg Shoe Mfg. Co. v. Cumberland Valley R.R.*, 240 Pa. 519, 524, 87 Atl. 968, 970 (1913).

³⁷⁴ *Chichester v. Kroman*, 221 Ala. 203, 128 So. 166 (1930); *Hill v. Kimball*, 269 Ill. 398, 110 N.E. 18 (1915).

³⁷⁵ *Dantzer v. Indianapolis Union Ry.*, 141 Ind. 604, 39 N.E. 223 (1895).

³⁷⁶ *Lockwood v. City of Portland*, 288 Fed. 480 (9th Cir. 1923); *Hill v. Kimball*, 269 Ill. 398, 110 N.E. 18 (1915).

Property rights as between private individuals are thus recognized to exist in the portion of the street being vacated, but they are extinguished by the municipality's action; and yet, when the municipality thus extinguishes these "property rights," no compensation is necessary except to persons showing special damage. This furnishes another illustration of the fact that property rights which are conceded to exist as between one individual and another may not be recognized as property rights between an individual and the state and may therefore not lie within the scope of the constitutional provision guaranteeing compensation for a taking, or for a taking or damaging, of "property."

Limited-access highways

The arguments in favor of the limited-access highway³⁷⁷ have become familiar by now. By eliminating many traffic jams, it can add millions of additional productive man-hours to our economy each year. It can reduce motor accidents between 50% and 75%. And it can carry up to three times the amount of traffic over existing traffic lanes.³⁷⁸ Curtailment of the abutters access to the central traffic lane or "thruway" is the price that must be paid for this improvement. That this can be accomplished under the power of eminent domain is, of course, beyond controversy.³⁷⁹ Whether it can be done under the police power, without payment of compensation, is another matter altogether. Regulation of traffic under the police power is commonplace, as in regulations prohibiting left turns, prescribing one-way traffic, prohibiting access or cross-overs between separated traffic lanes, and prohibiting or regulating parking.³⁸⁰ Under this power to regulate, an abutter's access to a road or street may be curtailed without payment of compensation.³⁸¹ Thus in *Jones Beach Boulevard Estate, Inc. v. Moses*,³⁸² an ordinance provided that no U-turns should be made on a parkway, except around a plaza, and that no left turns should be made except where specifically allowed by an officer or a traffic direction signal. This prevented an abutter from entering the parkway and required him to travel a distance of five miles before a left-hand turn would be made, so he could proceed in

³⁷⁷ Other terms used to designate such roads are freeway, limited freeway, expressway, superhighway, controlled-access highway, and parkway.

³⁷⁸ Bowie, *Limiting Highway Access*, 4 MD. L. REV. 219 (1940); Cunnyingham, *The Limited-Access Highway from a Lawyer's Viewpoint*, 13 MO. L. REV. 19, 22-23 (1948); Clarke, *The Limited-Access Highway*, 27 WASH. L. REV. 111 (1952).

³⁷⁹ *Holloway v. Purcell*, 35 Cal.2d 220, 217 P.2d 665 (1950), cert. denied, 340 U.S. 883 (1950).

³⁸⁰ Cunnyingham, *The Limited-Access Highway from the Lawyer's Viewpoint*, 13 MO. L. REV. 19, 28 (1948).

³⁸¹ *Alexander Co. v. City of Owatonna*, 222 Minn. 312, 24 N.W.2d 244 (1946). See Notes, 60 HARV. L. REV. 464 (1947), 31 MINN. L. REV. 292 (1947). *Contra*: *Anzalone v. Metropolitan District Comm.*, 257 Mass. 32, 153 N.E. 325 (1926).

³⁸² 268 N.Y. 362, 197 N.E. 313 (1935).

the opposite direction. Such damage was held non-compensable. In *People v. Ricciardi*,³⁸³ on the other hand, it was held that an owner of land abutting on a road that has been converted into a limited-access highway is entitled as a matter of law to direct access to the thruway. It was conceded by the court in the *Ricciardi* case that diversion of the traffic to another road would have been a valid police regulation and the resulting loss would have been *damnum absque injuria*. This, indeed, the cases make abundantly clear.³⁸⁴ Even under "or damaged" constitutions, no person has a vested right in the maintenance of a public highway in any particular place.³⁸⁵ But where an abutter is cut off from direct access to the highway, the majority of the court in the *Ricciardi* case held that he is entitled to compensation. The fact that service roads are provided, which would afford a more circuitous means of access to the highway, merely mitigates the damage. The dissenting opinion proceeds on the ground that the abutter "has no vested right in any particular avenue of the highway carrying any particular flow of traffic, but only a right to have his land front upon a part of the highway system sufficient to afford reasonable access to his property."³⁸⁶

Let us first take the case of the "taking of property" jurisdictions that do not award compensation to abutters for damage occasioned to access by an improvement that is a proper street use except in instances of virtual destruction of the right of access.³⁸⁷ Here it seems clear that conversion of an existing road into a limited-access highway would not give rise to a right of compensation as long as access to the highway system is preserved by means of service roads, for in these jurisdictions compensation is allowed only "for severe interferences which are tantamount to deprivations of use or enjoyment of property."³⁸⁸

If "or damaged" constitutional provisions afford the protection for which they were originally designed, it would seem that, in jurisdictions having such constitutions, damage to abutters occasioned by conversion of an existing road into a limited-access highway would be compensable.³⁸⁹ This is precisely the type of frustration of the expectations of an abutter that originally gave rise to the adoption of "or damaged" constitutions.

³⁸³ 23 Cal.2d 390, 144 P.2d 799 (1943). See Note, 32 CALIF. L. REV. 95 (1944); Comment, 18 So. CALIF. L. REV. 42 (1944).

³⁸⁴ Board of County Commissioners v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945). See Note, 118 A.L.R. 921 (1939).

³⁸⁵ *Ibid.*

³⁸⁶ 23 Cal.2d 390, 421, 144 P.2d 799, 815 (1943).

³⁸⁷ Baltimore v. Himmelfarb, 172 Md. 628, 192 Atl. 595 (1937); Bowie, *Limiting Highway Access*, 4 Md. L. REV. 219, 242-243 (1940).

³⁸⁸ *Ibid.* See also articles cited note 378 *supra*.

³⁸⁹ Dept. of Public Works v. Wolf, 414 Ill. 386, 111 N.E.2d 322 (1953). See Bowie, *Limiting Highway Access*, 4 Md. L. REV. 219, 245 (1940).

The fact that diversion of traffic over other roads does not give rise to a right to compensation is no answer. The change of grade cases show that if an abutter's access to that portion of the road or street on which his land abuts is materially abridged, he must be compensated in jurisdictions having "or damaged" constitutions. Lines must be drawn somewhere, and in "or damaged" jurisdictions the line between compensable and non-compensable injuries to an abutter has been drawn so as to protect him in his access to that portion of the road or street on which his land abuts. A like result is to be anticipated in those jurisdictions that extend "or damaged" protection under "taking of property" constitutions.³⁹⁰ Indeed, in the *Ricciardi* case such a result was reached under "taking of property" reasoning, although resort to such a device was unnecessary, for in that jurisdiction an "or damaged" constitutional provision was in force.³⁹¹

³⁹⁰ See text at notes 359-360 *supra*.

³⁹¹ Note, 32 CALIF. L. REV. 95 (1944).