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“Necessity” in Condemnation Cases—Who Speaks for the People?

By Michael V. McIntire*

“Pave Paradise
Put up a parking lot.”
Big Yellow Taxi

In August 1970 a United States district court halted the construction of a freeway bridge and interchanges in the District of Columbia at the behest of property owners and others who proved, inter alia, that the bridge as then designed was, in the words of the Federal Highway Administrator, “extremely hazardous and fraught with danger.”¹ If the identical situation had occurred in California, the California state courts would have refused to grant relief.

In 1969, a United States district court enjoined the construction of a freeway requiring the filling of a portion of the Hudson River on the grounds that Congress had prohibited such activity without specific congressional approval, and that no such approval had been granted.² California state courts, however, refuse to hear evidence of such illegality when offered by a landowner seeking to save his land from an unauthorized taking.

In July 1969 a United States district court in California enjoined the construction of a freeway through a national park and forest to a proposed ski resort on the grounds that the permits for such construction were illegally issued by federal agencies.³ The court of appeals reversed, not on the merits, but because plaintiff, the Sierra Club, did not have a sufficient interest in the action to bring the lawsuit.⁴ By curious coincidence, the persons who have the most direct economic in-

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⁴ Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).
terest—those whose property would be taken to construct this "illegal" project—are precluded by California law from attacking the State Division of Highways in the state court on the same grounds.

In Illinois, in 1961, the Park Board of a Chicago suburb moved to condemn the sites of two new, integrated subdivisions for use as a park after it learned that the developments were to be interracial. The Illinois Supreme Court allowed the developer to introduce evidence that the sole purpose of the condemnation was to prevent the plaintiffs from constructing the integrated subdivisions.\(^5\) In California, however, the developer would not have been able to question the board's motive.

California courts are closed to litigants—at least to land-owning litigants—in cases like the foregoing because of a 1959 decision by the California Supreme Court in *People ex rel. Department of Public Works v. Chevalier*.\(^6\) In that landmark decision, the court declared:

> [W]here the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's "motives or reasons for declaring that it is necessary to take the land are no concern of his."\(^7\)

At this critical time in the nation's history, when a myriad of technical, sociological and economic problems are challenging the very core of the federal system of government, and when all branches of government are required to put shoulder to the wheel to meet these challenges, such a judicial abrogation of responsibility is not only inexcusable, but dangerous.

I. **History of Judicial Avoidance of "Necessity" Questions**

Almost from the beginning of statehood, California courts have demonstrated a disturbing tendency to avoid reviewing decisions made by a condemning authority as to the location of or necessity for a public works project.\(^8\) They have taken this position in spite of an enactment by the legislature in 1872, continued to the present day, which specifically provides:

> Before property can be taken, it must appear: 1. That the use to which it is applied is the use authorized by law; 2. That the taking is necessary to such use . . . . \(^9\)

\(^7\) Id. at 307, 340 P.2d at 603, quoting *County of Los Angeles v. Rindge Co.*, 53 Cal. App. 166, 174, 200 P. 27, 31 (1921), aff'd, 262 U.S. 700 (1922).
\(^8\) See, e.g., cases cited notes 10, 17, 29 infra.
\(^9\) *CAL. CODE CIV. PROC.* § 1241.
As early as 1891, the court began limiting the scope of that statute. In *Pasadena v. Simpson*\(^1\) the court permitted a condemnee to present evidence to prove that a taking by the City of Pasadena for a sewer system was not necessary, but took a narrow view of the word “necessary:"

> When a city or town decides for itself—as it may do—that a sewer is desirable, it is not bound to prove that such sewer is necessary, but only that the taking of the property it seeks to condemn is necessary for the construction of the sewer.\(^11\)

The court then ruled that the location as determined by the condemning authority must be presumed to be correct and could only be overcome by very strong proof.\(^12\)

Several years later, in *Wulzen v. Board of Supervisors*,\(^13\) the same court refused to review a resolution of the San Francisco Board of Supervisors declaring that the taking of petitioner's property was necessary for the extension of Market Street. In its decision the court noted that governing statutes provided petitioner with an opportunity to be heard before the city council, which had power to stop the project if his objections were sustained.\(^14\) Relief was denied. The following year, in *County of Siskiyou v. Gamlich*,\(^15\) the court ruled that a condemnee could not introduce evidence questioning the necessity for a county road or the appropriateness of its proposed location, notwithstanding that the final location of the road as laid out by the board of supervisors did not conform to the location suggested by the “viewers” appointed by the board. The court said:

> It was for the Board of Supervisors to determine whether a new road was necessary or not, and, if necessary, over what route it should be laid out and constructed.\(^16\)

By 1900 a relatively firm rule had been established. Where the legislature had created a tribunal to determine the necessity of a public work after notice to affected parties and the opportunity for a hearing, and if such tribunal stayed within the statute, it acquired the exclusive jurisdiction to determine whether the work and the location were necessary, and no subsequent review by the judiciary was authorized.\(^17\)

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11. *Id.* at 253, 27 P. at 607.
12. *Id.* at 255-56, 27 P. at 608.
14. *Id.* at 19, 35 P. at 354. *See also* Cal. Stat. 1889, ch. LXXVI, §§ 1-5 at 70-71.
16. *Id.* at 98, 42 P. at 469.
The average citizen who has had sufficient contact with adminis-
trative agencies to acquire a healthy skepticism about bureaucratic wis-
dom may marvel at this polyanna-like view of governmental decisions. Yet it must be noted that all the cases above, and many others de-
cided in the same era,\textsuperscript{18} had a number of common features which can explain judicial abstention. They involved projects of only local in-
terest and the condemnor who made the decision as to necessity and location was an agency very close to the people. In addition, the ag-
grieved citizens had ample opportunity to fully air their views, and none of the cases involved a factual situation so grossly unfair and un-
just that it cried for remedy by the judiciary—the City of Pasadena ob-
viously had to have a sewer; the Market Street extension was certainly appropriate, if not in fact “necessary;” and farmers were entitled to some public highway to reach their land.

What is most disturbing about the trends indicated by these cases is the apparent predisposition of the court to decline review of “neces-
sity” questions. This attitude is evident from the contradictory ra-
tionales used by the court to support its abstention. In the \textit{Wulzen}\textsuperscript{19} case, for example, when a landowner petitioned for certiorari to review the resolution of the San Francisco Board of Supervisors declaring the necessity for taking petitioner’s land, the court held that the board’s de-
termination was a “legislative” function. It thus avoided review under the oft-cited rule that “certiorari does not lie to review the action of an inferior tribunal or board in the exercise of purely \textit{legislative functions which are not judicial} in character.”\textsuperscript{20} On the other hand, when the attack on the resolution of a county board of supervisors was made by way of defense to the condemnation action, the court took comfort in the principle of collateral estoppel, reasoning that, “[i]n laying out a public road, the Board of Supervisors exercises \textit{judicial} functions, and its order approving the report of the viewers cannot be collaterally at-
tacked on the ground that it was made on insufficient evidence.”\textsuperscript{21} The

\textsuperscript{18} Sutter County v. Tisdale, 136 Cal. 474, 69 P. 141 (1902); Sonoma County v. Crozier, 118 Cal. 680, 50 P. 845 (1896); Riverside County v. Alberhill Coal & Clay Co., 34 Cal. App. 538, 168 P. 152 (1917). The general discretion afforded to public agencies by these cases was, even then, being extended to private corporations supplying public needs without reconsidering the rationale. Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 110 P. 134 (1910); San Francisco & S.J.V. Ry. Co. v. Levison, 134 Cal. 412, 66 P. 473 (1901).
\textsuperscript{19} Wulzen v. Board of Supervisors, 101 Cal. 15, 21, 35 P. 353, 355 (1894).
\textsuperscript{20} \textit{Id.} at 18, 35 P. at 354 (emphasis added).
\textsuperscript{21} County of Siskiyou v. Gamlich, 110 Cal. 94, 98, 42 P. 468, 469 (1895) (emphasis added).
court distinguished *Pasadena v. Stimson*,\(^\text{22}\) wherein such a review was allowed, by observing that the *Stimson* case "was a direct proceeding for condemnation of land, without any intermediate action taken before suit by any board or tribunal acting in a *judicial capacity* . . . ."\(^\text{23}\)

In 1913 the state legislature entered the picture, amending the law to provide that approval by two-thirds of the governing board of counties, cities and towns (later extended to include nearly all special purpose districts)

shall be conclusive evidence: (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which would be most compatible with the greatest public good, and the least private injury . . . .\(^\text{24}\)

Thus the way was cleared for some abuse of the power of eminent domain, as evidenced in *County of Los Angeles v. Rindge Co.*\(^\text{25}\) The litigation discloses that some conflict had occurred between the owners of a very large ranch outlying Los Angeles and the city fathers over the public or private character of a road running through the ranch. When the ranch owners closed the road at the ranch boundary and excluded the public the city decided to expropriate the road. A condemnation resolution was passed without any notice, actual or constructive, to the ranch owners. There was no opportunity for them to be heard. In the condemnation suit which followed, the Rindge Company attempted to resist the taking by proving, *inter alia*, that the road was unnecessary—it would go absolutely nowhere, but would end in a *cul de sac* at the opposite side of the ranch. There was no existing or planned highway with which it could or would connect. People living on the ranch had free access over the private road to town, and no one alleged, much less proved, that they were unhappy with the existing arrangement.

Nevertheless, the California appellate court viewed the question as a legislative issue and affirmed the order of condemnation.\(^\text{26}\)

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\(^{22}\) 91 Cal. 238, 27 P. 604 (1891).

\(^{23}\) 110 Cal. at 100, 42 P. at 470 (emphasis added).


\(^{26}\) 53 Cal. App. 166, 200 P. 27 (1921).
state supreme court apparently found nothing in the case to review. Hearing the case on a writ of error, the United States Supreme Court characterized the determination of the "necessity" issue as "purely political," not the subject of any judicial inquiry, not a "judicial question," and said: "This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers." The considerations which, in earlier cases, had furnished a rationale for judicial abstention in planning and locating public works—i.e., the decision of an impartial administrative tribunal, the opportunity for notice and hearing and at least some apparent justification for the project—were absent in this case.

It was during this decade of the roaring twenties that the California Legislature passed several bills which, coupled with the studied effort of the state courts to avoid any role in the physical planning process, set the stage for many of the serious sociological and environmental problems which now plague California. The legislature created the Division of Highways and conferred on it the power of eminent domain. This legislation provided that any resolution of the California Highway Commission, an appointive board, which declares a highway or improvement to be necessary and in the public interest is conclusive evidence that the use is public, that the property can be taken as needed, and that the location is most compatible with the greatest public good and the least private injury.

The California Supreme Court solidified its no-review policy shortly thereafter, declaring in People v. Olsen that the legislature delegated to the California Highway Commission the exclusive authority to determine the necessity for and location of highways. Nevertheless, the court did hedge its decision, stating that the commission's determination could not be disputed "in the absence of fraud, bad faith, or an abuse of discretion." At this point in the development of the law, the California Legislature and courts were in accord with the vast majority of the other states.

27. 262 U.S. 700 (1923).
29. Id. §§ 102-03.
30. People v. Olsen, 109 Cal. App. 523, 531, 293 P. 645, 648 (1930). Interestingly enough, the court characterized the decision of the Highway Commission as a judicial action, and also stated that the Highway Commission is a quasi-judicial body for the purpose of determining necessity. Ordinarily, judicial review of some sort is available over quasi-judicial determinations of administrative agencies.
31. Id. at 531, 293 P. at 648.
II.  Limited Judicial Review—Developments in Other Jurisdictions

The law remained static in California until 1959, the condemnor being permitted to freely plan and take property for public improvements without fear of judicial review except in those cases where the condemnee could sufficiently maintain the onerous burden of proving the elusive concepts of fraud, bad faith or abuse of discretion. Nevertheless, had the development ended at this point there would have been much cause for optimism. Even these limited grounds of review are sufficient to permit a condemnee to resist condemnation in cases where the project is potentially unsafe, illegal, in excess of authority or based upon patently improper motives.33

Indeed, courts in other states are tending to construe these exceptions to the “no-review” rule with greater liberality,34 conforming to the principle that “[t]o hold that these decisions cannot be reviewed, no matter how arbitrary they may be, would be unsound and unjust,”35 and sometimes noting the insulation from the general public of the agency making the decision.36 An agency’s actions in excess of its statutory authority have been held to be an abuse of discretion,37 and failure to hold required public hearings and follow other prescribed procedures in making location and design decisions has sometimes invalidated the decision.38 Judicial innovation has expanded these concepts; the New Jersey Supreme Court held in Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.39 that a condemnor’s refusal to consider alternative locations for its project was arbitrary and an abuse of discretion, giving the condemnee the right to present evidence of alternative locations as a defense to a condemnation proceeding. The Massachusetts high court, skeptical of giving any agency unrestrained power to wreak havoc on the environment, has construed an apparently broad legislative grant of power to that state’s highway depart-

33. See text accompanying notes 1-5 & 25-27 supra.
34. See cases cited notes 35-40 infra.
ment in an extremely narrow fashion.\textsuperscript{40}

State legislatures, too, have responded to the need for providing some rein on the powers of highway departments and other public agencies in their location and construction processes. Recent laws require that an opportunity be provided for increased public participation in or familiarity with the decisions in early stages,\textsuperscript{41} or that local public agencies be given significant voice, sometimes a veto, in the decision making process.\textsuperscript{42} Montana has long permitted full judicial review of the necessity for public works projects in condemnation proceedings.\textsuperscript{43} Recently, the State of Vermont substantially revised its highway location procedures to require a State Highway Board to hold a hearing on the necessity of the highway and the proposed location, after which the board must seek an "order of necessity" from the courts prior to condemnation.\textsuperscript{44} Such order is granted only after full judicial hearing in which the burden of proof is upon the highway board to prove the necessity and location by a preponderance of the evidence. There is no presumption of good faith or reasonable discretion.\textsuperscript{45}

III. The Finishing Touch—People ex rel. Department of Public Works v. Chevalier

None of this legislative or judicial response to the needs of the times has occurred in California. In fact, California appears to be moving in the opposite direction. Consider, for example, California's legislation requiring the Division of Highways to consult closely with local agencies

to assure all interested individuals, officials and civic or other groups an opportunity to become acquainted with the studies being made and to express their views with respect thereto. . . . \textsuperscript{46}

This statute, unfortunately, was not intended to be substantive. This is clearly revealed by the concluding section:

Failure of the department or the commission to comply with the requirements of this article shall not invalidate any action of the commission as to the adoption of a routing for any state highway, nor shall such failure be admissible evidence in any litigation for

\textsuperscript{43} State Highway Comm'n v. Danielsen, 146 Mont. 539, 402 P.2d 443 (1965).
\textsuperscript{45} Id.
\textsuperscript{46} Cal. Sts. & H'ways Code § 210.
the acquisition of rights-of-way or involving the allocating of funds or the construction of the highway.\textsuperscript{47}

The most significant regressive activity, however, has been in the area of judicial review. In 1959, the California Supreme Court removed what little remained of judicial control over the aggressive designs of public agencies intent upon development. In \textit{People ex rel. Department of Public Works v. Chevalier}\textsuperscript{48} the court set the issue to rest in the following language:

> We therefore hold, despite the implications to the contrary in some of the cases, that the conclusive effect accorded by the Legislature to the condemning body’s findings of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion. In other words, the questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement, cannot be made justiciable issues even though fraud, bad faith, or abuse of discretion may be alleged in connection with the condemning body’s determination of such necessity. . . . We are therefore in accord with the view that where the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body’s “motives or reasons for declaring that it is necessary to take the land are no concern of his.”\textsuperscript{49}

The opinion is devoid of any significant rationale or justification for such a major pronouncement of public policy. It does recite the arguments of the Department of Public Works (under which the Division of Highways is organized) that to allow review where fraud, bad faith or abuse of discretion were affirmatively pleaded

would allow public improvements to be unduly impeded by frequent and prolonged litigation by persons whose only real contention is that someone else’s property should be taken, rather than their own.\textsuperscript{50}

This argument, of course, assumes the issue; it is apparent that if the public improvement is illegal, improperly authorized, unsafe or would cause an undue amount of private injury, it should be “impeded.”

The court in \textit{Chevalier} also noted the state’s argument “that property owners do have considerable protection . . . since just compensa-

\textsuperscript{47} \textit{CAL. STS.} & \textit{H’WAYS CODE} § 215. \textit{See id.} § 75.5 for a similar statute regarding location of state highways other than freeways.

\textsuperscript{48} 52 Cal. 2d 299, 340 P.2d 598 (1959).


\textsuperscript{50} \textit{id.} at 305, 340 P.2d at 602.
tion must always be paid..." This proposition is highly debatable; in any event, the court's only explicit rationale for its ruling was the statement that:

To hold otherwise [i.e., to allow even limited review of necessity questions] would not only thwart the legislative purpose in making such determinations conclusive but would open the door to endless litigation, and perhaps conflicting determinations on the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement.

The impact of the Chevalier ruling, that the "conclusive" effect of the condemning body's findings of necessity means "conclusive without exception," is quite sweeping, since a "resolution of necessity" by nearly all public condemning authorities is statutorily "conclusive" on the issues of public use and necessity and on the finding that the public benefit outweighs the private harm. The only significant condemning agency whose determination to expropriate land is not statutorily "conclusive"—and is therefore reviewable—is the State Department of Parks and Recreation. Projects which will permanently change the landscape and have severe social and economic trauma associated with them (such as freeways) are therefore unreviewable, while projects having relatively minor environmental impact and which maintain the greatest flexibility for future use are subject to judicial scrutiny.

In Chevalier the concept of due process to the landowner, embodied in his opportunity to be heard before an impartial tribunal, and due process to the public, embodied in governmental responsiveness to all of the issues affecting the public interest, were not even mentioned. As a result, when the question of the desirability of changing the landscape arises, "right" is what the highway commission says it is. All of which leads the average landowner to the cynical comment articulated to the author by a California rancher who has been subject to no less than four separate condemnation actions: "You spend the first part of your life working for the land, and the rest of your life trying to keep it."

51. Id.
54. See, e.g., CAL. CODE CIV. PROC. § 1241; CAL. STS. & H'WAYS CODE § 103. Special districts created by specific legislation usually receive this same power. See, e.g., the powers of the San Mateo County Flood Control District, CAL. WATER CODE APP. § 87-3.
55. CAL. PUB. RES. CODE § 5006.1. A determination by the State Department of Parks and Recreation is prima facie evidence.
IV. Public Projects and Quality of Life

To understand why society can no longer afford to allow the judiciary to withdraw from an affirmative role in decisions affecting resources management, it is necessary to bear in mind the enormously complex impact that results from such decisions. A panel recently established by the National Academy of Sciences to study the assessments of technology has cataloged, by way of example only, a few of the far-reaching problems resulting from decisions made from a limited, technological viewpoint:

[D]rilling rights were leased to oil companies operating in the Santa Barbara channel without sufficient consideration of the possible effects of massive oil leakage near the coast and with inadequate preventive measures to minimize the damages; . . . vast quantities of chemicals have been released into the biosphere with little attention to their potential hazard; . . . the number of internal-combustion automobiles has been allowed to mount steadily with only sporadic efforts to study alternatives that would entail less pollution and crowding. . . . Although . . . pesticides have undoubtedly prevented a great many deaths from starvation and disease, it is now apparent that they have also inflicted unintended but widespread losses of fish and wildlife, and it is increasingly suspected that they are causing injury to man.

. . . One can fly from London to New York in six hours and then encounter difficulties getting from the airport to the city because the roads are often crowded and there is no rail service between the city and the major airports.56

To this catalog we must also add freeways, the necessity, location and design of which have generated widespread concern and bitter controversies, sometimes resulting in physical violence.57 This reaction is understandable, for

[f]reeways have done terrible things to cities in the past decade, and in many instances have almost irrevocably destroyed large sections of the cities which they were meant to serve. On the social level, they not only have often devastated, more completely than any bombing, vast acreages of houses which provided needed low cost housing for families who could not afford higher rents, but they have also wrecked neighborhoods whose old buildings had great character and charm. . . . [The] freeway in the city has been a great destroyer of neighborhood values.58

A specific example of the destruction of neighborhood values is the proposed routing of Interstate 40 through the City of Nashville, which

was alleged to create a permanent barrier between the largely white community to the south and the largely black community of North Nashville. The Sixth Circuit Court of Appeal noted in *Nashville I-40 Steering Committee v. Ellington*:

For example, it is shown that the blocking of other streets will result in a heavy increase in traffic through the campus of Fisk University [a predominantly Negro educational institution] and on the street between this university and Meharry Medical College. A public park used predominantly by Negroes will be destroyed. Many business establishments owned by Negroes will have to be relocated or closed.

Too frequently the engineer's solution to the problem is simple: ease the congestion by building another freeway, and solve the park problem by buying other park land elsewhere. The creation of further congestion by the new freeway and the location of the new park far from the high-density population area where it is most severely needed are apparently not considered significant.

The severe adverse effects of freeway location and construction are not limited to urban areas. Freeways through the rural countryside consume at least 40 acres per mile. Since freeway location is dictated largely by economic considerations, which means ease of construction, this acreage is almost always the same land which is the most fertile and productive for agricultural purposes. Freeway construction requires that mountains be lowered and valleys filled, with severe ecological consequences. Rural communities are often totally destroyed, river beds

59. 387 F.2d 179 (6th Cir. 1967).
60. Id. at 186.
63. As of 1967 all interstate highways were required to have a minimum right-of-way width, exclusive of cuts, fills and ditches, of 150 feet, without frontage roads or interchanges being considered. At this minimum width, highway right-of-way would consume 18 acres per mile. For each foot of cut or fill required, an additional 4 feet of right-of-way is required on each side. States usually establish their own minimum criteria which exceed this minimum. See L. RITTER & R. PAQUETTE, HIGHWAY ENGINEERING 181-86 (3rd ed. 1967). Experienced highway engineers and professors of engineering have reported to the author that because of wide slopes and other state criteria increasing the median width, requiring drainage ditches of certain sizes alongside the roadway, and minimum right-of-way fence set backs, right-of-way for interstate highways averages 40 acres per mile, without interchanges.
64. A review of some basic texts on highway location and design confirms that consideration is given only to economics, traffic counts, soil and geologic conditions and "highway-needs studies." Aesthetics are considered as they relate to traffic safety and highway beautification, after the fact. See, e.g., L. RITTER & R. PAQUETTE,
and stream beds are frequently rechanneled, and drainage and run-off patterns are blithely changed to suit highway needs, all without any serious consideration given to their long-range effects. Furthermore, ease of travel stimulates larger numbers of vehicles, and studies have confirmed that the lead emissions from automobiles driving through the countryside find their way into the agricultural crops growing alongside the roadways, thence into food and thence into the human body.

The National Academy of Sciences panel has recognized the urgent demand for expanding the frame of reference within which these critical decisions are made. It further noted that there is sufficient knowledge and ability available to evaluate the long-range effect of such projects:

The experience [with pesticides] suggests that carefully designed experiments in the early days might have influenced the technology of pesticides before the nation was so committed to certain forms of pest control as to make any significant alteration of the technology extremely difficult. Knowledge has advanced to the point where, in spite of many uncertainties, it is possible to predict at least some of the ecological effects of building another Aswán dam or opening a sea-level canal through the Isthmus of Panama, or the effects of paving and housing on the reflectivity of the earth's surface, or the effects of high-altitude aircraft exhaust on the radiation balance of the earth. The panel saw an obligation to undertake the necessary research and monitoring at the earliest possible stages of development.

Congress has expressed a similar philosophy through the National Environmental Policy Act of 1969. Among other things, that act directs all federal agencies to use an interdisciplinary approach in the planning of projects to ensure that "presently unquantified environmental amenities and values are given appropriate consideration in decision making. . . ." Prior to any approval of legislation or other major federal action affecting the environment, the concerned agency must prepare a detailed report relative to the project's environmental impact, its unavoidable adverse effects, alternatives, and any irreversible

Highway Engineering (3rd ed. 1967). One author recognizes the need to consider intangibles more fully than has been done in the past. R. Winfrey, Economic Analysis for Highways 552-83 (1969).

65. Id.
69. Id. § 4332(C).
and irretrievable commitments of resources which would be involved.\textsuperscript{70} President Nixon's Executive Order\textsuperscript{71} further expands the role of federal agencies in environmental protection, and specific legislation at both the state and federal level is designed to insure that certain specified amenities, such as historical places and buildings and parks and recreational facilities, are given some measure of protection from the highwayman's bulldozer.\textsuperscript{72}

Still, the ultimate decision as to whether to construct a public improvement, and where and how to construct it, is made by a special purpose government agency, often with the support of some legislation which the agency has sponsored and advocated. There is justifiable skepticism as to the ability of such agencies to broaden their horizons sufficiently to protect the public interest, notwithstanding legislative mandates or rules and regulations requiring them to do so:

Within the set of governmental and market processes the initial assessment of the costs and benefits of alternative technologies is normally undertaken by those who seek to exploit them. As a result the frame of reference is often quite limited. Although such groups as professional societies and conservation organizations may add inputs to the evaluation, the assessment is usually based on the contending interests of those who already recognize their stake in the technology and are prepared to enter the public arena to defend their position. In all but a few cases, usually when Congress takes a special interest, no other assessment occurs. The central question asked is what will the technology do for the economic and institutional interests of those who want to exploit it or to the interests of those with a stake in competing technologies. If the technology leads to social problems, they are usually recognized only when they have reached serious proportions and generated acute public concern.\textsuperscript{73}

In theory, administrative decisions are kept within reasonable bounds by the courts' exercising a limited power of review.\textsuperscript{74} Logically, as the courts become increasingly aware of the seriousness and irreversibility of decisions affecting the environment, the scrutiny should

\textsuperscript{70} Id.


\textsuperscript{73} Brooks & Bowers, \textit{supra} note 56 at 16-18.

\textsuperscript{74} "Absent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual." Cappadora v. Celebrezze, 356 F.2d 1, 6 (2d Cir. 1966).
become closer. Recent cases, ¹⁶ both state and federal, seem to point in this direction—except in California.

V. Can Public Agencies Protect the Public Interest?

The California Supreme Court has attempted to rationalize its total refusal to see or to hear any criticism of condemnation decisions by utilizing an archaic, court-created presumption of regularity. The court presumes, conclusively, without exception, and as a matter of law, that the Division of Highways, charged with promoting and developing highway transportation systems, has carefully and sympathetically considered alternative means of transport and all relevant ecological, sociological and economic information in determining whether and where to lay-out and to build the next freeway. It is as reasonable to presume that the fox will properly guard the henhouse.

The fallacy of this presumption is evident from a review of the highway decision-making process. First, decisions affecting the number, location and design of freeways are made by engineers of the Division of Highways, who are ill-equipped through education or experience to evaluate ecological or sociological problems. ⁷⁶ Second, where hearings are required to increase the "frame of reference" for the decision-makers, they give every appearance of being a pro-forma performance. They are usually chaired by a highway official, whose natural predisposition and bias is so obvious that it has been judicially recognized—although not in California. Notices of the hearing are often carelessly given or inconspicuously posted; microphones are unavailable to other than proponents of the project; and equipment malfunctions sometimes prevent an accurate transcript of the "hearing." ⁷⁸

In addition, the "mission orientation" of a single-purpose public agency tends to obscure whatever objective analysis exists. Very rarely

⁷⁵ See cases cited notes 1, 2, 5, & 35-40 supra.


does the agency entertain the thought that the criticisms of its decision may have merit. Quite the contrary is often true. Where a decision of such an agency is questioned, the considerable resources of the agency are marshalled to defend and implement that program as conceived, regardless of the cost. 79

This "damn the torpedoes" attitude was recently demonstrated in San Luis Obispo County Flood Control and Water Conservation District v. DeVauls, 80 a rare California case in which the condemnee was permitted to challenge the necessity of the taking. A county flood control district sought to take a 600 acre ranch for a water supply and recreation reservoir. The law then in force provided that the district's "resolution of necessity" was only prima facie evidence of the necessity of the taking and that the project was consistent with the greatest public good and least private injury. The condemnee introduced expert testimony showing, inter alia, that the proposed dam would very likely stop the recharge of a ground-water aquifier relied upon for the intensive irrigation of the fertile valley downstream, in violation of the downstream owners' water rights, and would probably increase the already serious problem of salt-water intrusion. As a result of a special setting which advanced the case on the trial calendar, the condemnee's witnesses were forced to testify after only 2 months of investigation. Yet this was the only investigation ever made into those problems. The district's witnesses admitted that they had not studied them, while at the same time denying that they existed.

The trial judge, entirely missing the point, ruled that the condemnee had failed to prove by a preponderance of the evidence that the proposed dam definitely would have the adverse effects projected by his witnesses, and allowed construction to commence. The flood control district apparently did not, either before or after the trial or during construction, attempt to study the impact of the project upon the surface or the ground water supplies in the fertile valley downstream, or of the salt-water intrusion problem. The objection here made is not that the dam was constructed, but that the district apparently proceeded without ever considering these factors, even after it knew of competent evidence indicating the possibility of serious adverse consequences.


Reported cases from other jurisdictions also illustrate the extent to which institutional loyalty supersedes objective analysis of previous decisions. Where objective court review is sought, the agency frequently attempts to attack the standing of the objectors to raise the question or argues that the agency's action is immune from judicial review. If this procedural approach fails, the agency then vigorously argues for a very narrow, restrictive interpretation of the statute or regulation alleged to have been violated. The spirit of the law is disregarded.

For example, in *South Hill Neighborhood Association v. Romney,* a citizen's group sued to prevent an urban renewal project from destroying seven historical buildings listed in the National Register of Historic Places, on the grounds that the Department of Housing and Urban Development had failed to consider their historic value and had failed to submit the question of preservation of the buildings to the Advisory Council on Historic Preservation, as required by statute. The federal and local agencies urged upon the court a construction of the statute which would limit its operation to only those buildings which had been on the Historical Register prior to the time federal funds were committed for the project. The court agreed with this argument and allowed demolition of the buildings, notwithstanding the expressed policy of Congress to seriously consider and preserve the nation's historical heritage, and despite the listing of the buildings on the National Register more than 3 months before a regional federal engineer orally approved the local agency's demolition plan.

Similarly, the Farmers Home Administration recently sought to avoid complying with the Environmental Policy Act's requirement to review and to report upon the environmental impact of a program it was funding on the grounds that the paper work was largely completed prior to the effective date of the act, totally ignoring petitioner's objections of serious ecological damage which would result from the project. Happily, this argument was unsuccessful.

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One of the most recent and cogent illustrations of the length to which public agencies will go in attempting to justify ill-considered decisions is *Citizens Committee for the Hudson Valley v. Volpe.* In that case citizens objected to construction of the Hudson River Expressway in New York on the grounds that the construction would require filling significant amounts of the Hudson river, an illegal act unless Congress had expressly authorized it. The citizen's committee relied upon a federal statute which expressly provides:

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any . . . navigable river . . . of the United States until the consent of Congress to the building of such structures shall have been obtained. . . .

Congressional authorization for the project had never been obtained. Nevertheless, the project was commenced and litigation challenging the right to do so was vigorously defended. The arguments of the highway men are best set forth in the words of the court:

The defendants, while accusing the plaintiffs of arguing semantics, postulate that what is called a dike (by the various engineers who prepared the plans for the State Department of Transportation and the Corps of Engineers) is not really a dike since a real dike has a different purpose from their dikes. . . .

The defendants urged that Congress, in using the term "dike" in 1899, meant a structure that would be within the definition set forth in Chambers Technical Dictionary, p. 273 . . . which was originally published in 1940. . . .

> We hold. . . . that Congress when it said "any dike" over or in any navigable river meant exactly that.

Unbending loyalty often leads otherwise honest and competent employees to resort to devices more drastic than mere semantics in attempting to justify their own or their employer's decision. In a recent case involving the disputed location of the Three Sisters Bridge in Washington, D.C., highway officials and their attorneys, after unsuccessfully opposing judicial inquiry into the decision-making process, "manufactured" evidence in the form of subsequent inter-office memos in an attempt to prove that they had complied with the mandate of certain statutes and regulations.

Another factor inhibiting objective decision-making by the highway departments is the heavy pressure imposed by the federal aid programs designed for the construction of the interstate highway system. The federal statute requires that federal funds be paid out by the end of the

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88. 302 F. Supp. at 1088.
second year after the state and the Federal Governments have signed the highway project agreement, the threat of losing federal money creates strong pressure to bend state policies and laws in the way that will most quickly build the highway. As a result of the congressional declaration that "the prompt and early completion of the national system of defense and interstate highways is essential to the national interest," highway engineers frequently propose routing an interstate along the cheapest and straightest of alternative routes.

The foregoing illustrations should serve to confirm or reinforce what the average man-in-the-street already knows—that it is unrealistic to expect a public agency created to promote, build and maintain a highway system throughout the state to entertain any point of view which conflicts with this mission, and that the enactment of a statute directing consideration of other viewpoints is not going to change things. A single-purpose, mission-oriented public agency cannot, by definition, protect the public interest, which by definition requires competent consideration of a variety of factors.

It is evident that the presumption utilized in California to avoid judicial review of the necessity or location of a proposed public work is the kind of "fading presumption" to which Judge (now Chief Justice) Berger referred when he wrote:

The theory that the [Federal Communications Commission] can always effectively represent the listener interests without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it.

In view of the ever-broadening powers of condemnation and the very serious environmental consequences resulting therefrom, the continued refusal of California courts to critically review the decision-making process is judicial naiveté in the extreme.

VI. Is Judicial Review Practical?

There are other reasons, besides the "presumption of regularity,"

92. Id.
which are urged to support the condemnor's argument that a court should abstain from inquiry into the necessity or location of the proposed public work. These arguments proceed along more pragmatic lines.

The first of these is that if the court permits any condemnee to question a project, such as a highway, which involves taking the land of a number of landowners, the project will be plagued by continuous delays while each landowner separately litigates the necessity of the taking or the desirability of the location. Such an argument distorts reality by ignoring the extensive costs of litigation. Furthermore, even if every landowner were resolved to oppose the condemnation in court, the condemnor's attorney, who completely controls the action from the standpoint of determining when the complaints are filed and against whom, could move to bifurcate the trial into the "necessity" question and the compensation issues and consolidate the trial of all cases raising the necessity question. Where landowners contest the necessity of the taking without any evidence a motion for summary judgment in favor of the condemnor on the necessity issue could expediently dispose of that defense. In short, by a comparatively easy modification of condemnation practices, a desirable project can be completed economically and with minimum delay, while still permitting landowners to seek judicial review of the necessity for the taking of their lands.

It is apparent, of course, that a project which is of questionable value and necessity ought not proceed until those issues are finally resolved. The typical condemnor's argument—that judicial review should be avoided because it only delays the project—can therefore be put aside as so much make-weight.

Another pragmatic argument against judicial review in condemnation suits is that the condemnor may find himself in a perplexing situation if one court finds the original location of the project unnecessary and in a subsequent action another court determines an alternative route is unnecessary, and so forth. This argument caught the fancy of the California Supreme Court in 1891 in *Pasadena v. Stimson*, where the court said:

> And we think that when an attempt is made to show that the location made is unnecessarily injurious the proof ought to be clear and convincing, for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so ad infinitum. . . . [I]mprovement could

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95. 91 Cal. 238, 27 P. 604 (1891).
never be secured, because, whatever location was proposed, it could be defeated by showing another just as good.\footnote{96} The self-defeating aspects of that argument apparently never occurred to the court, sitting in a state which was still frontier in many respects. For if the prospective condemnor could never find a location which could be determined to be compatible with the greatest public good and the least private injury, he obviously ought not construct the project.

Another argument nearly always heard on this question is that judicial review is inappropriate at the stage when condemnation proceedings are initiated because, by that time: (1) the financial arrangements have been made; (2) the contracts to construct the project have been let;\footnote{97} or (3) the project has already been commenced on land previously taken. This argument is an equitable one, equivalent to laches, except that the equities seem to favor the condemnee. Since the condemnor has full control over the commencement of a condemnation action, and as the condemnee has no standing to bring an action challenging the determination of necessity,\footnote{98} it is grossly inequitable to prohibit a condemnee from questioning the taking because the suit against him was not filed until the project reached advanced stages.

Here again, a revision of the condemnor’s land acquisition procedures can alleviate any problem which arises during condemnation. Acquisition of land for highway projects which are constructed in segments can be acquired in equivalent segments. Condemnation complaints could be issued against the holdout landowners, and since an attack on the necessity of the project is only by affirmative defense, the condemnor would quickly know to what extent the project would be challenged for that segment. If the project were contested, and there were no triable issue of fact, the matter could be resolved by summary judgment. If there were no contest, the project could proceed as scheduled.

It is conceded that there will necessarily be some delay to some desirable projects if a condemnee is permitted to test the necessity of the project as a defense to the taking of his land. Considering, however, the limited amount of land resources available, the permanence of the public work and the serious nature of its ramifications, a well-planned and well-thought-out project which is truly in the public interest will not be significantly harmed by a delay of even 12 to 24 months. If a project is based on so precarious a footing that it will topple if its mo-

\footnote{96} Id. 255-56, 27 P. at 608.  
\footnote{98} See notes 6 & 8 & accompanying text \textit{supra}.  
mentum is reduced or lost, such an argument should present a prima facie case against the necessity of the project.

Finally, it might be argued that courts are incompetent to pass judgment on questions involving location of public work projects because of the necessarily complex nature of such decisions. This argument, however, is as devoid of rational support as the others. California courts are not now, nor have they ever been, incapable of determining complex sociological and technical issues. The court has been in the forefront of major changes in criminal justice, civil rights, defacto segregation, and minority-group voting, to name only a few social issues. On the technical side, the court could rarely be presented with cases involving more complex technology than those in which it is required to apportion the state's scarce water resources among a multitude of competing uses. Yet in 1938, the California Supreme Court ordered a trial court to work out a physical solution to resolve competing water-users' demands, considering water available from surface stream flow, springs, underground flow and underground reservoirs. As far back as 1903, responding to an argument that the court had insufficient capability to deal with complex problems of underground waters, and therefore must avoid any judicial activity in this field, the court said:

99. This argument—that courts should not involve themselves in second-guessing the experts—is not often articulated so bluntly, but the thread of it appears in some cases. E.g., District of Columbia Fed'n of Civic Ass'ns, Inc. v. Volpe, 316 F. Supp. 754, 770-71 (D.D.C. 1970): "The court is merely reviewing the actions of the Secretary to determine whether they have a basis in fact, and that they do not amount to an abuse of discretion. The wisdom of the statutory scheme of committing such decisions to administrative officials experienced in the area of their jurisdiction, rather than to the courts, is evident in the present situation." Similarly, in Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 223, 257 N.E.2d 870, 871, 309 N.Y.S.2d 312, 314 (1970), a citizen's action against an air polluter, the court said: "[I]t seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution."

100. People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964), was the first case to require proof that the defendant have objective knowledge of the victim's minority in a statutory rape case.


102. Id.

103. Castro v. California, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970), struck down a California constitutional provision making the ability to read English a prerequisite of voting.

The objection that this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but if the rule is the only just one, as we think has been shown, the difficulty in its application in extreme cases is not a sufficient reason for rejecting it and leaving property without any protection from the law. 105

These are hardly words from a court incompetent to handle complex issues.

VII. Conclusion

Americans are only now beginning to realize the many facets of "public interest" and to appreciate that the decision to spend public monies to build public works requiring permanent changes of our diminishing natural resources must be made only after long, thoughtful and objective analysis considering a wide variety of viewpoints. The recent enactments by the Federal Government requiring public hearings in highway location cases, the Environmental Policy Act and the Presidential Executive Order issued thereunder are salutary first steps in reversing the existing trend. But they are only first steps. Yet to be developed is an ultimate means of balancing conflicting viewpoints and arriving at a sound determination of what public works are within the public interest.

One possibility is the creation of a "super-agency" in the state with the power to license public agencies to condemn private property for a given public work after extensive public hearings and inquiries, with all parties having the right of cross examination. Ultimate appeal from such an agency to a court would have to be provided, the extent of which would depend upon the composition of the agency, its methods and the possibility of abuse of power.

On the other hand, the National Academy of Sciences report recommends the creation of an agency which would be responsible for independently evaluating and assessing proposed technological changes within the realm of each branch of the Federal Government. To maintain their credibility among diverse interests, such an agency would not have any policy-making authority, regulatory powers or responsibility for promoting any particular technology. Nor would it be given authority to screen new technological undertakings, since such a power might discourage innovation. In the views of the panel, the agency "should be empowered to study and recommend but not to act; it must

be able to evaluate but not to sponsor or prevent." It would be designed to influence, and thus would be situated close to the seat of the executive and legislative power. Existing institutions would operate much as they now do, but would be under varying degrees of influence from these technological assessment groups. Presumably, the court would still maintain its traditional review, where necessary.

The mechanism by which a landowner challenges the necessity or location of the proposed public work as a defense to a condemnation action is not the most desirable one for ensuring complete and full consideration of the public interest in highway location decisions. Nor is court review guaranteed to prevent all or most of the abuses of the condemnation power which are now condoned. But in the absence of any single agency capable of determining all of these questions, judicial review is an absolutely necessary intermediate step.

The general trend throughout the country is certainly in the direction of increasingly critical judicial review. The courts, responding to the clamor for more responsive and objective decisions, are taking increased notice of the insulation and bias of the sponsoring agencies, usually highway departments. While it is still the general rule throughout most of the country that decisions locating highways or other public works projects will not be reviewed by courts except in cases of fraud, bad faith or abuse of discretion, there is a distinct and growing trend to liberalize those concepts and thus provide greater judicial scrutiny of those decisions.

There is absolutely no question that there must be substantial improvement in the process for planning public works. Suggestions for such changes vary, but all agree that the process must include adequate representation of the variety of viewpoints which go into the definition of "public interest." But until such an ultimate process is developed, we must live with what we have; and we cannot permit environmental degradation by single-purpose agencies to continue until the perfect solution is found.

Notwithstanding its imperfections, the mechanism of judicial review of administrative decisions is sufficiently flexible to protect the public interest in a quality environment without major changes in judicial

107. Id.
process. By liberally interpreting the concepts of "arbitrariness" or "abuse of discretion," the court can expand the scope of its review. Further, the courts can make their determinations on a more flexible and realistic basis by adopting as the standard of review the yardstick suggested by the panel of the National Academy of Sciences:

[A] basic principle of decision-making should be to maintain the greatest practicable latitude for future action. Other things being equal, the technological projects that should be favored are the ones that leave maximum room for maneuver. The reversibility of an action should thus be counted as a major benefit, its irreversibility as a major cost.\(^\text{109}\)

In highway location problems, the court is presently the first and only forum in which objectors to the location or necessity of the project can obtain a fair and impartial hearing, together with the all-important right to cross-examine highway officials. Since the court is the first forum which can adequately protect the public interest, its responsibility is analogous to that of the Federal Power Commission in licensing projects involving water resources: it must "affirmatively protect the public interest"; it cannot adopt the role of the umpire "blandly calling balls and strikes for adversaries appearing before it. ..."\(^\text{110}\) Courts have the power to call upon independent referees. They can, on their own motion, appoint one or more qualified experts to testify as friends of the court on matters affecting the public interest, regardless of whether the parties raise the questions.

Courts must be permitted a significant amount of discretion in the handling of such cases. And while some complaints about judicial abuse of discretion can be expected, there is no doubt that the approval of a controversial highway project after a full and extensive hearing, in the exercise of judicial discretion, is vastly more credible than the approval of such a project by a highway engineer under the present circumstances. The judicial mechanism, if handled by judges bent on a realistic protection of the broad public interest, can do much to prevent the sacrifice of our vital national resources on the altar of short term expedience. But to reach this goal in California requires the immediate overruling, judicially or legislatively, of the unrealistic and deadly case of People ex rel. Department of Public Works v. Chevalier.

\(^{109}\) Brooks & Bowers 15.

\(^{110}\) Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 620 (2d Cir. 1965).