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Assessing the Benefits of California's New Valuation Rule for Partial Condemnations

Juliet E. Cox

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Juliet E. Cox†

TABLE OF CONTENTS

Introduction............................................................................................................566
I. Basic Principles of Condemnation and Assessment Law .........................570
   A. Direct Condemnation (Eminent Domain) ..............................................570
   B. Inverse Condemnation (Takings) .........................................................576
   C. Benefit Assessment .............................................................................578
II. Conflicts Between Condemnation and Assessment Law
   After Continental Development ...............................................................581
      A. Unwarranted Distinction Between Direct and Inverse
         Condemnation ..................................................................................581
      B. Inconsistency Between Benefit Offsets and Benefit
         Assessments ......................................................................................584
III. Reconciling These Conflicts with a Different Rule ...............................585
      A. Consistency Between Condemnation and Assessment .................585
         1. Identical Standards for Direct and Inverse
            Condemnation ...............................................................................585
         2. Similarity Between Benefit Offsets and Benefit
            Assessments ..................................................................................593
         3. Condemnation and Assessment Without Wealth
            Redistribution ..................................................................................597
      B. Public Policy Considerations in Support of a “Special”
         Standard ..........................................................................................600
            1. Lower Administrative Costs .....................................................601
            2. Political Accountability ............................................................602
Conclusion.........................................................................................................604

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† J.D. Candidate, School of Law, University of California, Berkeley (Boalt Hall), 2000; M.S., University of California, Berkeley, 1991; B.A., Rice University, 1988. I am grateful to my classmate Mark Mandell for unwittingly suggesting this topic. I am even more grateful to Professor John Dwyer, whose interest in my Comment came as a welcome surprise, and whose insightful questioning and guidance helped me understand and clarify my argument. My greatest gratitude, however, goes to Bruce Mast, whose dedication to the common good is rivaled only by his patience.
Assessing the Benefits of California's New Valuation Rule for Partial Condemnations

Juliet E. Cox

Using a problem in California condemnation law, this Comment examines relationships between private and public property rights and among the legislative and judicial methods for enforcing those rights. When a state or local government agency in California exercises its power of eminent domain, the state and federal constitutions entitle the seller to "just compensation" for her property. If the seller gives up only part of her holdings, she receives payment not only for the portion she sells, but also for the effects of the sale on the remainder portion she keeps. The California Supreme Court held in 1997 that compensation to an owner of remainder property should factor in all the effects of partial condemnation, whether those effects are unique to the remainder or common to the neighborhood.

This Comment analyzes the court's new valuation rule for partial condemnation by comparing it to the common law rules of inverse condemnation and the voter-approved constitutional limitations on benefit assessment. The new rule makes compensation for the negative effects of public works projects more generous to private owners in partial condemnations than in inverse condemnations; it also makes private owners' contributions to the cost of beneficial public works projects more generous to the government in partial condemnations than in benefit assessments. This Comment argues that both results are wrong. It concludes that a rule limiting remainder compensation to the same sorts of special and distinct harms and benefits required for inverse condemnation awards or benefit assessments would have been more equitable, less expensive to administer, and more respectful of local legislative and political choices.

Introduction

California’s state and local governments are major property owners. The state Department of Transportation owns, maintains, and improves thousands of miles of roads and freeways throughout California. The state and its cities, counties, and special service districts own office buildings, parks, schools, airports, cemeteries, reservoirs, and jails.
Governmental agencies rarely acquire the real estate and other property interests they need for public facilities without paying for them. But if a state or local government agency cannot negotiate the purchase of property it needs to accomplish a public goal, it may use the power of condemnation to force the owner to sell. The California Constitution, like the Federal Constitution, guarantees that the property owner will receive "just compensation" for the sale,¹ but the operative meaning of this command is the subject of enduring debate.

In 1997, the California Supreme Court issued an opinion that alters the definition of "just compensation" in California condemnation law. The case, Los Angeles County, Metropolitan Transportation Authority v. Continental Development Corp.,² received little attention in the popular or legal press.³ Attorneys in the condemnation field, however, recognized the significance of the case: One described it as having the potential for "‘billions of dollars in savings to the government . . . or billions of dollars in losses to property owners who don’t receive compensation.’"⁴ This Comment argues that the importance of the decision may instead lie in its potential to cost state and local governments significant sums, and to make more generous the compensation available to people who must sell their property to the public.

Continental Development involved a partial condemnation. The Metropolitan Transportation Authority (MTA) was building an elevated train line, and it needed to buy a small part of Continental's land.⁵ The issue on appeal was whether and how much the MTA had to pay Continental to mitigate damage the condemnation caused to the property Continental retained.⁶

Compensation for such remainder damage covers losses in remainder value because of the sale or the public project, offset by the value of benefits the sale and the project bring to the remainder.⁷ The parties agreed that the jury should consider evidence about the harm the train line might cause to Continental's remaining land.⁸ The parties disagreed, however, as to

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1. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."); CAL. CONST. art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner.").
2. 941 P.2d 809 (Cal. 1997) [hereinafter Continental Development].
6. See id.
7. See CAL. CIV. PROC. CODE §§ 1263.410(b), 1263.420 (West 1982).
8. See Continental Development, 941 P.2d at 813-14 (describing MTA’s grounds for appeal, which did not include an argument that the trial court should have excluded Continental’s damage evidence entirely).
whether the trial court had correctly excluded evidence of certain benefits from the jury's calculation of remainder damage.9

Continental argued that the jury should consider only benefits that had some unusual or special effect on the remainder.10 It asked the California Supreme Court to affirm the exclusion of evidence the MTA had proffered about the transit project's benefits, which Continental said were common to the entire neighborhood.11 The court refused. It held that any factors, whether common to the neighborhood or unique to Continental's remainder, that could affect the remainder value were appropriate subjects for proof as elements of remainder damage.12

Two related processes, inverse condemnations and benefit assessments, present similar questions about paying for the effects of a public activity on private property. In suits for inverse condemnation, an owner sues the government for having taken or harmed her property. To receive any compensation, the owner must show not only that the burden on her property is severe, but that it is different from that on other property in the area.13 Similarly, to impose a benefit assessment on private property, a public agency must demonstrate that the property receives net benefits from the agency approximately equal in value to the amount of the assessment, and that the benefits are unusual rather than common to all.14

All three areas of California law—direct condemnation, inverse condemnation, and assessment law—reflect public policy decisions about the appropriate relationship between private property and public activity. In each, a just outcome for both the property owner and the community requires finding the point at which effects are sufficiently private, and causes sufficiently public, to warrant redistribution.15 Where private owners must give up their property (or suffer damage to it) for public use, the constitution protects them against majority tyranny by allowing them to have a court determine "just compensation."16 Even so, the constitution does nothing to establish the level of compensation courts should award to achieve justice or to clarify when damage to property requires such

9. See id.
10. See id. at 821.
11. See id.
12. See id. at 824.
14. See CAL. CONST. art. XIII D, § 2(i) (defining "special benefit"); id. § 4 (describing the procedures and requirements for assessments of special benefits).
15. Where effects are public and their causes private, regulatory intervention causes this redistribution. The connection between regulatory fees or activities and the concepts of condemnation and assessment is hotly debated but beyond the scope of this Comment. See, e.g., Sinclair Paint Co. v. State Bd. of Equalization, 937 P.2d 1350 (Cal. 1997) (upholding regulatory fee imposed on manufacturers of lead-based paint against challenge as unconstitutional taking or tax).
compensation. Instead, courts must look to interacting elements of state constitutional and property law, to principles of sound public policy, and to popular sentiment to decide how to apply the constitutional command.

The *Continental Development* rule is internally consistent, and it almost surely led to a fairer result upon remand of the case. In the overall context of California law, however, the decision fails to promote just compensation. By allowing a wide-open trial on remainder property value, rather than restricting damages to special, discrete, and substantial categories of harm and benefit, the decision conflicts with California inverse condemnation and assessment law. These conflicts will lead to unnecessarily inconsistent outcomes among property owners who share the good and bad effects of public projects. The new rule will also cost more to administer than would an alternative allowing compensation only for highly focused remainder damage, and it may cause condemnation and assessment practices to deviate further than they already do from the goal of revenue neutrality. Finally, the new rule disregards the clear implication of twenty years of California citizens' initiatives: that voters want to exercise direct political control over most decisions about allocating the costs and benefits of public activity, rather than to delegate those decisions to legislative or judicial bodies.17 Regardless of the California Supreme Court's views on the property tax revolt, the new *Continental Development* rule will cause more harm in this context than would a rule that acknowledged and respected the strong lines the electorate has drawn.

The *Continental Development* opinion purported to address only one aspect of direct condemnation law. However, because of the similarity between condemnation and assessment law, the decision has broader implications for the ordering of public-private property relations in California. Part I of this Comment describes California condemnation and assessment law. It explains the constitutional and statutory rules that govern direct condemnation, inverse condemnation, and benefit assessment, and highlights recent changes in all three areas. Part II examines the relationship between the rule announced in *Continental Development* and the rules of inverse condemnation and benefit assessment and shows how the *Continental Development* decision conflicts with both areas of law. Finally, Part III presents several public policy justifications for a different rule, one that the *Continental Development* court should have used.

17. See Cal. Const. art. XIII A (approved as "Proposition 13" on June 6, 1978); id. art. XIII B (approved as "Proposition 4" on Nov. 6, 1979); id. arts. XIII C, XIII D (approved as "Proposition 218" on Nov. 5, 1996); see also id. art. XIII A, § 4 (requiring voter approval, by two-thirds majority, for "special" taxes); id. art. XIII B, § 4 (giving local electorate initiative power to raise or lower local appropriations limit); id. art. XIII C, § 2(b) (requiring voter approval, by simple majority, for "general" taxes); id. § 2(d) (reiterating two-thirds majority requirement for "special" taxes); id. § 3 (giving local electorate initiative power to reduce or repeal local taxes); id. art. XIII D, § 4 (requiring complex voting process among property owners to impose benefit assessment).
I

BASIC PRINCIPLES OF CONDEMNATION AND ASSESSMENT LAW

Several areas of California law address payments from government agencies to private property owners or from private owners to public agencies. In eminent domain (another name for direct condemnation) proceedings, a government agency forces a private owner to sell her property to the government so that the public can use it. Where governmental action effectively makes public use of private property without following eminent domain procedures, the property owner may bring an inverse condemnation action to demand compensation from the government.

Many California public agencies also possess the power of benefit assessment, with which they may require property owners to pay the public to support governmental activities that benefit those properties more than they benefit the general community. Although controlled by procedural rules different from those for direct or inverse condemnation, a benefit assessment is conceptually similar to a condemnation in reverse. In both direct and inverse condemnation actions, the government pays the property owner an amount of money calculated to reimburse the owner for the fair value of the interests or use the public has taken. In benefit assessment, the private owner reimburses the public for disproportionately private use of public goods or services. This Part will explain the basic substantive law of condemnation and benefit assessment in California as it existed before and after the California Supreme Court's 1997 decision in Continental Development.

A. Direct Condemnation (Eminent Domain)

The California Constitution requires state and local government agencies to give private property owners "just compensation" whenever their property is "taken or damaged for public use."18 When a public agency19 forces private property owners to sell their property for a public works project, it must follow the procedures set out in the California Eminent Domain Law.20 The Eminent Domain Law represents the California

18. Id. art. I, § 19.
19. Only public agencies that the California legislature has authorized to exercise the power of eminent domain may force other parties to sell them property for public uses. See Cal. Civ. Proc. Code § 1240.020 (West 1982). Agencies that do possess the eminent domain power must exercise it in accordance with the statewide statutory scheme. See id. § 1230.020; see also Wilson v. Beville, 306 P.2d 789, 793 (Cal. 1957) (holding eminent domain power to be a matter of statewide concern). Various state statutes give eminent domain power to cities, see Cal. Gov't Code § 37350.5 (West 1982), counties, see id., and special districts such as county water districts, see Cal. Water Code § 31040 (West 1982), and mosquito abatement districts, see Cal. Health & Safety Code § 2270(d) (West 1982).
legislature's interpretation of the general terms in the constitution. It describes the showing an agency must make of the public nature of its project and the reasons the project requires the agency to buy property, lists property interests for which an owner must receive compensation, and lays out procedures for determining the amount of that compensation.

Because the constitutional command to give just compensation is paramount, the items of property and types of compensation mentioned in the Eminent Domain Law are not exhaustive. Nevertheless, the California courts usually defer to the Eminent Domain Law on questions of whether certain interests merit compensation for public interference and on the procedures for setting that compensation. The weighing of public goods against private burdens involves strong policy considerations as well as constitutional judgments, and California's courts have recognized the important role of the state legislature in striking the appropriate balance.

Despite its comprehensive treatment of condemnation procedure, the Eminent Domain Law leaves many substantive decisions to local authorities and to the courts. Public agencies may exercise the power of eminent domain only for "public use," but the Eminent Domain Law allows those agencies to determine, under deferential judicial supervision, whether particular uses are "public." Similarly, although the Eminent Domain Law requires an agency to show that property it proposes to condemn is necessary for a public use, it gives the agency's decision that particular

can bring an inverse condemnation action to demand just compensation under the constitution. See infra Part I.B.

23. See id. §§ 1263.010-150, 1263.310-330.
24. See id. § 1235.125 (defining "interest" as "any right, title, or estate in property"); id. § 1235.170 (defining "property" as "real and personal property and any interest therein"); id. § 1263.010, Law Revision Comm'n Cmt., 1975 Addition ("[T]his chapter in no way limits compensation that may be required by Article I, Section 19, the 'just compensation' clause of the California Constitution."); see also City of Oakland v. Oakland Raiders, 646 P.2d 835, 840 (Cal. 1982) (holding football franchise to be property that a city might condemn).
25. Compare, e.g., Community Redevelopment Agency of Los Angeles v. Abrams, 543 P.2d 905, 909-10 (Cal. 1975) (holding business goodwill, although property for some purposes of California law, not to be compensable in condemnations in the absence of legislative action establishing a right to such compensation), with City of Vista v. Fielder, 919 P.2d 151, 156-57 (Cal. 1996) (holding that legislation adopted after Abrams, declaring goodwill to be compensable in condemnation proceedings, entitles lessees as well as owners to goodwill compensation).
26. See Abrams, 543 P.2d at 916 ("We have concluded that valid reasons of policy, based primarily upon considerations of institutional competence, counsel in favor of judicial deference to the legislative branch in fashioning standards and procedures responsive to present realities in this area.").
28. See, e.g., Oakland Raiders, 646 P.2d at 841-43 (holding city's determination that operation of a professional football team was a "public use" not to be an abuse of discretion); Housing Auth. v. Dockweiler, 94 P.2d 794, 801 (Cal. 1939) (holding "slum clearance" to be valid public use supporting condemnation power and noting that legislative decisions about public uses deserve "great weight").
property is necessary nearly conclusive weight. Finally, the Eminent Domain Law leaves to the courts the most basic task of all: deciding when and how government interference with a protected interest constitutes condemnation. It requires agencies to pay fair market value for the property they take, but it leaves the agencies and the courts to define both “property” and “taken.”

When a public project requires the government to acquire an entire parcel, the condemning agency must pay the former owner the fair market value of the parcel. If the agency and the owner cannot negotiate the sale, the constitution entitles the owner to have a jury determine the price. The price for the condemnation purchase is the price as it would have been on the open market, regardless of any idiosyncratic or sentimental value the owner places on the property. The market-based measure of value serves to compensate the owner for what she transfers to the government and to enable her to purchase an objectively similar substitute property. All property owners share the risk that the collective good might require use of their property, and their parting with it for an objectively reasonable value (rather than for some higher personal measure) is “part of the burden of common citizenship.”

On the other hand, the fair market value measure also ensures that the public pays enough to satisfy a rational property investor and does not force individual sellers to make disproportionate contributions to the cost of public projects.

Where a public project does not require all of an owner’s holdings, the agency can condemn the necessary part and leave the owner in

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30. See id. §§ 1245.250-255; Anaheim Redev. Agency v. Dusek, 239 Cal. Rptr. 319, 326 (Cal. Ct. App. 1996) (limiting examination of resolution of necessity to search for “gross abuse of discretion” and noting that such review does not require the resolution to include findings of fact).
31. See CAL. CIV. PROC. CODE § 1263.310.
32. See id. § 1235.170 (providing a circular definition of “property” as “real and personal property”); Community Redev. Agency of Los Angeles v. Abrams, 543 P.2d 905, 909-10 (Cal. 1975) (holding business goodwill does not constitute property compensable in eminent domain action).
34. See CAL. CIV. PROC. CODE § 1263.310.
35. See CAL. CONST. art. 1, § 19 (requiring “just compensation, ascertained by a jury unless waived”).
possession of the rest.\textsuperscript{40} Determining the amount of just compensation is more complex for partial condemnation than for condemnation of a complete, discrete property interest because the California Constitution requires that government agencies compensate owners for both taking and damaging private property.\textsuperscript{41} The current Eminent Domain Law implements this requirement by providing that compensation to an owner for a partial condemnation must reflect not only the value of the interests the government takes, but also any "severance" damage the sale causes to the interests the private owner retains.\textsuperscript{42} Moreover, if the public project causes damage or ill effects to the owner’s remainder, the Eminent Domain Law entitles the owner to additional compensation for those ill effects.\textsuperscript{43}

In other words, whether the owner’s remaining land is less valuable per square foot because of its new configuration or because of its new neighbor, the owner will receive compensation for this loss. The California courts construe this remainder damage requirement in market terms: The government must pay "the difference in the fair market value of [the owner’s] property in its ‘before’ condition and the fair market value of the remaining portion thereof."\textsuperscript{44} Although several kinds of damage are typical in the cases (light reduction and view impairment,\textsuperscript{45} invasion of privacy,\textsuperscript{46} noise,\textsuperscript{47} and deprivation of access\textsuperscript{48}), any factor that might reduce the fair market value of the remainder is fair game for proof of remainder damages.\textsuperscript{49}

Before \textit{Continental Development}, California law was murky as to whether certain kinds of remainder damage qualified for compensation. Supreme Court opinions were in direct conflict on the issue, with some opinions requiring a threshold showing that remainder injuries fell into

\begin{itemize}
  \item \textsuperscript{40} See \textsc{Cal. CIV. PROC. Code} § 1240.110 (authorizing condemnation of any interests necessary for a public use); \textit{id.} § 1245.210 (giving nearly conclusive force to an agency’s determination that particular interests are necessary); \textit{id.} § 1263.410 (describing compensation scheme for cases of partial condemnation). Perhaps most commonly, a partial condemnation consists of the government’s buying in fee less than all of a contiguous area of land. Nevertheless, a partial condemnation can also leave the government with an easement over land to which the owner retains the fee, with a fee interest in land over which the former owner retains an easement, or with some other partial set of rights to use or control property.
  \item \textsuperscript{41} See \textsc{Cal. Const. art. I, § 19.}
  \item \textsuperscript{42} See \textsc{Cal. CIV. PROC. Code} §§ 1263.410, 1263.420(a).
  \item \textsuperscript{43} See \textit{id.} § 1263.420(b).
  \item \textsuperscript{44} Pierpont Inn v. State, 449 P.2d 737, 746 (Cal. 1969).
  \item \textsuperscript{45} See, e.g., \textit{id.}
  \item \textsuperscript{46} See, e.g., \textsc{People ex rel. Department of Pub. Works v. TeVelde}, 91 Cal. Rptr. 556, 557 (Cal. Ct. App. 1970).
  \item \textsuperscript{47} See, e.g., \textsc{Pacific Gas & Elec. Co. v. Hafford}, 319 P.2d 1033, 1041-42 (Cal. 1957) (holding that noise from power lines, and its effect on suitability of remainder for pasture, was permissible element of remainder damage).
  \item \textsuperscript{48} See, e.g., \textsc{City of San Diego v. Neumann}, 863 P.2d 725, 727 (Cal. 1993).
  \item \textsuperscript{49} See \textit{Pierpont Inn}, 449 P.2d at 746; \textsc{City of Salinas v. Homer}, 165 Cal. Rptr. 65, 68 (Cal. Ct. App. 1980).
\end{itemize}
certain compensable categories and others declaring that market price was the only test. Indeed, in Continental Development, the majority and the dissent could not agree on what constituted the California rule on the subject or even on which cases were relevant authority.

Some public projects increase the value of properties near them, by providing new methods of access to land, by improving public health and safety, or by removing visual blight. Many—perhaps most—public projects have thoroughly mixed effects on land near them, with some features that tend to diminish nearby property values and others that tend to enhance them. For projects with mixed or debatable effects on a remainder’s post-project fair market value, the Eminent Domain Law requires separate calculation of benefits the project might bestow upon the remainder, with those benefits then explicitly deducted from remainder damages to arrive at a final compensation figure.

Before Continental Development, although a condemnee could generally introduce evidence about any decrease in market value from a project, the condemning entity that wished to show offsetting increases had a restricted menu of potential benefits from which to choose. To qualify as offsetting special benefits, project features had to confer market value increases that were both “reasonably certain to result from construction of the work” and “peculiar to the land in question.” For evidence of offsetting benefits, admissibility under this rule turned not on relevance to the remainder’s fair market value but on the degree to which those benefits were or were not shared by the remainder and other nearby property.

50. See, e.g., People ex rel. Department of Pub. Works v. Symons, 357 P.2d 451, 453 (Cal. 1960) (“It has long been recognized that there is no right to recover for all elements of damage caused by the construction of a public improvement.”).

51. See, e.g., Pierpont Inn, 449 P.2d at 746 (“Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its ‘before’ condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken.”).

52. Compare Continental Development, 941 P.2d 809, 821 (Cal. 1997) (remainder damages not limited to unique or even special injuries to remainder property) (distinguishing City of Berkeley v. von Adelung, 29 Cal. Rptr. 802 (Cal. Ct. App. 1963)), with id. at 835 (Kennard, J., dissenting) (remainder damages limited to injuries that “arise out of some direct and unique relationship...between the remainder of the severed property and the project”) (relying on von Adelung).

53. For example, new roads increase not only convenience but also noise and pollution for people living near them; sewage treatment plants look and smell bad, but they permit high population densities and intense economic development while safeguarding environmental and human health.

54. See Cal. Civ. Proc. Code §§ 1230.410, 1230.430 (West 1982). The requirement that benefits appear as a separate element in the calculation prevents a condemning agency from simply impeaching the condemnee’s appraisal with evidence that the appraiser did not consider some positive feature of the project.

55. Beveridge v. Lewis, 70 P. 1083, 1086 (Cal. 1902).

56. Id.

57. Compare City of Hayward v. Unger, 15 Cal. Rptr. 301, 302 (Cal. Ct. App. 1961) (holding increased traffic past retail store to be special benefit offsetting severance damages), with Pierpont Inn
Increased traffic past a commercial site might be a special benefit (if the increase affected primarily the condemnee), or it might not be (if the increase affected many property owners).

In *Continental Development*, the California Supreme Court confronted the disparity between the rules for evidence of remainder damages and those for offsetting benefits. At issue were damages to the owner of a commercial lot located near the new Green Line elevated train in Los Angeles. To build the Green Line, the MTA condemned a narrow strip of land from a lot on which Continental planned to construct (and later did construct) an office complex.

At the trial, an appraiser for Continental testified that rents on offices facing the new tracks would be lower than they would have been without the project, because the train would make noise and block views. The MTA had received two appraisals concluding that whatever the effect of noise or view obstructions, proximity to a nearby Green Line station would raise the average rents in the office building as a whole, yielding an overall increase in the value of the site. The trial court allowed the MTA to introduce expert testimony challenging the Continental appraiser’s opinion that rents would drop. However, it refused to allow MTA either to introduce independent evidence of rent inflation from proximity to the station or to question Continental’s appraiser on cross-examination about any overall positive effect of the transit project on office rents.

The trial court based its ruling on a straightforward application of the California rules for calculating severance damages and benefits. The liberal rules for proof of severance damages entitled Continental to introduce evidence of any project-related factor that would reduce the value of its building. However, the requirement that benefits be “peculiar or unique” to the remainder property led the court to exclude evidence on rent increases from station access because many office buildings would be as near as or nearer than Continental’s to the new station. The result of this decision—to allow appraisers to testify only to the negative or neutral effects of a project that other qualified appraisers had concluded would in

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59. *See id.*
62. *See id.* at 813. The MTA’s expert testified only that transit projects did not decrease rents; given the ruling on benefits, he could not have testified that such projects in fact increased rents. *See id.*
63. *See id.*
64. *See id.* at 820-21.
65. *Id.* at 813 (quoting the trial court’s order excluding evidence of the benefits).
fact cause significant benefits—was that a jury awarded Continental at least $500,000 from the public treasury without hearing a full range of professional opinions on the remainder’s value. The California Supreme Court granted review in order to reconsider the rules that led to this result.\(^6\)

Noting that in its ninety-five-year history the special benefits rule had produced “inconsistency among published decisions on the subject”\(^6\) and no “helpful rule of general application,”\(^7\) the court concluded that the distinction between special and general benefits was both outmoded and unworkable. It held that any and all effects the project would have on the remainder’s fair market value could be subject to proof as elements of severance compensation, and that the trial court should have allowed the MTA to introduce its appraiser’s testimony.\(^7\) The court emphasized that its new rule would treat severance damages and offsetting benefits “evenhandedly,”\(^3\) reflecting their parallel definitions in the Eminent Domain Law.\(^3\) The complex and variable nature of property valuation and public activity made impossible “an absolutely fair distribution of costs and benefits across the entire community,”\(^7\) but the court decided that the new rule would be one of “greatest relative fairness, or least unfairness.”\(^7\)

As Continental Development illustrates, the previous rule was potentially unfair and the California Supreme Court has probably improved matters by revising it. The new rule more accurately reflects the process of real estate appraisal, in which experts take account of all the factors affecting property value. It may give juries a more realistic picture of the value of property before and after partial condemnation than did the rule excluding evidence of general benefits. Nevertheless, given California rules for inverse condemnation and for benefit assessment, the new rule for remainder damage may defy the court’s hopes by being neither workable nor fair.\(^7\)

B. Inverse Condemnation (Takings)

The state constitution allows California property owners to demand just compensation when they believe that the government has taken or damaged their property for public use, even when a state or local

\(^{67}\) See id. at 813.
\(^{68}\) See id. at 812.
\(^{69}\) Id. at 818.
\(^{70}\) Id. at 819.
\(^{71}\) See id. at 824.
\(^{72}\) Id.
\(^{73}\) See CAL. CIV. PROC. CODE §§ 1263.420, 1263.430 (West 1982).
\(^{74}\) See Continental Development, 941 P.2d at 823.
\(^{75}\) Id.
\(^{76}\) See id. at 825 ("[W]e are persuaded the rule we announce today is ultimately the most workable and the most fair to all parties concerned.").
government has not followed the eminent domain procedure. Occasionally, the private owner alleges that the government has simply appropriated her property by beginning construction of a public works project on the site or by behaving as if it were already the owner. In such cases, courts usually treat the inverse condemnation proceeding like a belated proceeding in eminent domain. They apply the principles of timing and proof set out in the Eminent Domain Law, and they award severance damages offset by benefits.

More typically, inverse condemnation suits rely on the constitutional entitlement to compensation for damage to private property. Such suits often seek compensation for injury caused by spillover effects from government activities on public property (such as pollution from a sewage treatment plant or access deprivation due to road alterations) or by allegedly overzealous government regulation. In these "damage" cases, courts seldom defer to the rules set out in the Eminent Domain Law. Instead, they apply a set of common law rules.

California law requires that an owner make two closely related showings as a threshold to recovery for property damage through inverse condemnation. First, the affected interest must qualify under California law as property. Although this requirement is rarely difficult to satisfy, the

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77. See Bacich v. Board of Control, 144 P.2d 818, 822 (Cal. 1943) (holding that the constitution itself, rather than statutory consent to suit, authorized inverse condemnation actions).
78. See, e.g., Pierpont Inn v. State, 449 P.2d 737, 745 (Cal. 1969) (holding that plaintiff had stated a timely cause of action in inverse condemnation when it filed suit as soon as it realized the extent to which the California Department of Transportation had damaged its land by building a freeway on it).
79. See Erro v. City of Santa Barbara, 11 P.2d 890, 892 (Cal. Ct. App. 1932) (holding that perpetual easement of access to private alley constituted property right for which owner must receive compensation when city opened alley to the public).
80. See Patrick Media Group, Inc., v. California Coastal Comm'n, 11 Cal. Rptr. 2d 824, 830-33 (Cal. Ct. App. 1992) (holding that inverse condemnation suit to compensate for loss of property right in billboard should proceed under rules applicable to direct condemnation, even though Coastal Commission lacked formal power of eminent domain).
81. See, e.g., Pierpont Inn, 449 P.2d at 737.
82. See CAL. CONST. art. I, § 19. Many other state constitutions include the "or damaged" language. See, e.g., COLO. CONST. art. II, § 15; MINN. CONST. art. I, § 13; N.M. CONST. art. II, § 20; TEX. CONST. art. I, § 17. In California, as well as in these other states, courts construe the constitutional language requiring compensation for damage to provide more protection for private property interests than does the Fifth Amendment to the Federal Constitution. See, e.g., Varjabedian v. City of Madera, 572 P.2d 43, 52 (Cal. 1977); State v. Strom, 493 N.W.2d 554, 558 (Minn. 1992).
83. See Varjabedian, 572 P.2d at 43.
85. See, e.g., 152 Valparaiso Assocs. v. City of Cotati, 65 Cal. Rptr. 2d 551, 557 (Cal. Ct. App. 1997) (holding that plaintiffs had stated an inverse condemnation claim with allegations that city rent control scheme confiscated their property by unduly restricting profits from apartment rentals).
86. See Breidert, 394 P.2d at 722 (holding that court must decide whether condemnor has taken a property interest, and jury may then decide how much that interest was worth); Bacich v. Board of Control, 144 P.2d 818, 822 (Cal. 1943) ("The major issue presented in this case is whether or not... [plaintiff's] property has been taken or damaged for a public use. The solution of that question....")
Court of Appeal has held that bus routes do not qualify as properties that merit protection under this article of the constitution.\textsuperscript{87} Second, although California courts use loss in market value as the usual measure of inverse condemnation damages, they apply this measure only when injuries to private property interests are "direct, substantial, and peculiar."\textsuperscript{88}

The combined effect of these two requirements is to provide compensation for governmental damage to private property only where owners show significant injuries particular to their properties. Whether they meet this burden may well depend on the ingenuity of their counsel,\textsuperscript{89} but the courts insist on it in part to protect taxpayers' funds, to encourage public improvements, and to discourage suits over small injuries that might cost more to adjudicate than to redress.\textsuperscript{90}

The special injury requirement also diverts widely shared complaints from the judicial to the political arena. In direct condemnations, the California judiciary shows considerable deference to legislative judgment about whether property is needed for public use and about which interests require compensation.\textsuperscript{91} This same reluctance to usurp the role of administrative or legislative bodies applies when the property owner sues first. Courts recognize inverse condemnation only where the circumstances strongly suggest that the local political process has not adequately considered the plaintiff's property interests. Indeed, inverse condemnation claims based on apparent disagreement with the political aims of public programs have met with a particularly chilly reception in California courts.\textsuperscript{92}

\textbf{C. Benefit Assessment}

Just as government activities may concentrate their costs on a few individuals or property owners, so too may public projects provide more

\textsuperscript{87} See Peerless Stages, Inc. v. Santa Cruz Metro. Transit Dist., 136 Cal. Rptr. 567, 570 (Cal. Ct. App. 1977) ("The property right Peerless is asserting is, in essence, a right not to lose business to a competing, tax-supported public transit service. There is, however, no constitutional right of freedom from competition.").

\textsuperscript{88} Varjabedian, 572 P.2d at 52.

\textsuperscript{89} Compare Breidert, 394 P.2d at 719 (holding creation of a cul-de-sac in front of plaintiff's property, because of grade crossing closure, to qualify as compensable damage to plaintiff's right of access), with Rosenthal v. City of Los Angeles, 13 Cal. Rptr. 824 (Cal. Ct. App. 1961) (holding alteration of street in front of plaintiff's property, so as to leave it on a short street closed at both ends, not to qualify as compensable damage to plaintiff's right of access).

\textsuperscript{90} See Varjabedian, 572 P.2d at 50-51.

\textsuperscript{91} See supra notes 25-28 and accompanying text.

\textsuperscript{92} See, e.g., Brumer v. Los Angeles County Metro. Transp. Auth., 43 Cal. Rptr. 2d 314 (Cal. Ct. App. 1995) (affirming denial of compensation for alleged injuries from placement of streetcar line adjacent to plaintiffs' business); Moerman v. State, 21 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993) (affirming grant of summary judgment against plaintiff who argued that local population of protected tule elk were a public improvement that had damaged his ranch).
benefits to some properties or individuals than to others. The constitutional command to provide just compensation for public use of private property does not require individuals to reimburse the public for unusual gains they reap from public works. Nevertheless, several California statutes and many home-rule city charters authorize state and local governments to adopt benefit assessments, which charge property owners the approximate cost of services or public works that are unusually valuable to them.3

The rules governing these assessments have expanded and changed since the late 1970s, largely because of California’s property tax revolt. In the last twenty years, the voters of California have added a series of tax-limitation articles to the California Constitution.9 The constitution now limits the amount of revenue local governments can collect and controls how governments can spread assessment charges among the beneficiaries of the funded activities.

These restrictions on local-government funding mechanisms have left cities with smaller and less flexible budgets to meet their residents’ seemingly undiminished appetites for local services. By imposing or increasing fees for city services that were once wholly or partially subsidized by property tax revenues (such as swimming pools and garbage collection), cities maintain services while ensuring that their users pay for them.9 In the 1980s and 1990s, cities increasingly also turned to benefit assessments.

93. A new road is convenient for the traveling public, but especially valuable for people who own real estate adjacent to the road; a program using public funds to provide prenatal care improves the public health in general, but is particularly welcome for poor mothers-to-be.

94. See, e.g., Landscaping and Lighting Act of 1972, CAL. STS. & HIG. CODE §§ 22500-22679 (West 1982); CAL. PUB. UTIL. CODE § 29260 (West 1982) (giving San Francisco Bay Area Rapid Transit District power to form special assessment districts); ALBANY, CAL., CHARTER § 1.06 (1998).

95. See CAL. CONST. art. XIII A (approved as “Proposition 13” on June 6, 1978); id. art. XIII B (approved as “Proposition 4” on Nov. 6, 1979); id. arts. XIII C, XIII D (approved as “Proposition 218” on Nov. 5, 1996).

96. See id. art. XIII A (imposing substantive and procedural restrictions on local property tax amounts).

97. See id. art. XIII D (imposing strict requirements of special impact and proportionality on benefit assessments and local fees).


99. See id. at 16-17. In 1983, the Los Angeles Times surveyed five kinds of California local government units to learn how these agencies had altered their fiscal practices in response to property tax limitation. The overwhelming majority of responding agencies reported instituting new fees for service and raising old fees. See Paul Richter, California and the American Tax Revolt: Proposition 13 Five Years Later 105 (Terry Schwadron ed.) (1984). Some cities cut services instead; in the small city of Antioch, California, after voters rejected a city parcel tax to pay for park maintenance, the city had to lay off park maintenance workers and stopped mowing the grass in several public parks. See Christopher Heredia, Some in Antioch Angry Parks Will Remain Messy, S.F. CHRON., Sept. 25, 1997, at A16.

100. See Coleman, supra note 98, at 17.
Traditionally, California courts allowed local agencies to impose assessments only for improvements that provided special benefits to property owners. As cities increased their use of benefit assessments, several lawsuits against local governments charged that these assessments amounted to poorly concealed property taxes and, as such, violated Article XIII A of the California Constitution. Those local governments that prevailed were able to show that the funded activities were for the specific benefit of certain properties rather than for the benefit of the public at large. Such a showing of distinctive benefits was conspicuously absent in cases in which local governments lost.

Apparently, the architects of California's property tax reform movement were displeased with the courts' permissive stance on benefit assessments. In November 1996, California voters approved Proposition 218, which added Articles XIII C and XIII D to the constitution. These articles changed the procedural rules for adoption of local fees or benefit assessments. They also subtly changed the judicial approach to evaluating assessments and fees that the courts had adopted over the preceding fifteen years.

Proposition 218 added new language to the constitution to make certain that governments cannot impose benefit assessments for public works that do not provide highly focused benefits to private property. State and local governments may assess only for benefits that are "particular and distinct . . . over and above general benefits conferred on real property located in the district or to the public at large." They may not impose benefit assessments for public works that increase the value of most or all

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101. See Dawson v. Town of Los Altos Hills, 547 P.2d 1377, 1381-82 (Cal. 1976) (holding that courts should set aside municipal special assessments only when the assessment amount is not proportional to the special benefits accruing to the assessed properties); Spring Street Co. v. City of Los Angeles, 148 P. 217, 219-20 (Cal. 1915) ("Therefore the compensating benefit to the property owner is the warrant, and the sole warrant, for the Legislature itself to impose the burdens of these special assessments.").


103. See, e.g., Knox, 841 P.2d at 155 ("[T]he residential property owners are uniquely benefited by the proximity of these facilities to their properties."); Evans, 4 Cal. Rptr. 2d at 607 ("[T]he public should not be required to finance an expenditure through taxation which benefits only a small segment of the population.").

104. See, e.g., Blake, 68 Cal. Rptr. 2d at 630 ("[T]he assessed properties received only the most attenuated special benefit.").

105. See CAL. CONST. art. XIII D, §§ 4, 6.

106. See id. § 2(g).

107. Id.
property in a district, and they may not charge property owners fees for services that are “available to the public at large in substantially the same manner as... to property owners.” In sum, the constitution now requires that a local government show clearly that its project provides special benefits to an owner’s property to justify forcing an owner to pay the public treasury.

II

CONFLICTS BETWEEN CONDEMNATION AND ASSESSMENT LAW AFTER CONTINENTAL DEVELOPMENT

The Continental Development decision seemed to provide a fair and neat solution to a nagging problem in condemnation practice. It simplified the proof of damages and benefits to remainder properties in partial condemnations, and it promoted parity between the classes of injuries and benefits that are included in the damage calculation. Indeed, commentators and practitioners had commonly advocated such a change. Nevertheless, because the opinion did not sufficiently consider the interaction of the rule it announced with other rules affecting the relationship between private property owners and public agencies in California, it may well cause more problems than it solves.

This Part describes how the Continental Development decision has created inconsistency in California law by making damages in condemnation cases depend unnecessarily and irrationally on whether the case is one of “direct” or “inverse” condemnation. It also explores the inconsistency between the benefits chargeable against an individual property owner in the Continental Development scheme and the benefits chargeable against a property owner in the benefit assessment process.

A. Unwarranted Distinction Between Direct and Inverse Condemnation

The Eminent Domain Law implements the same constitutional guarantee as an inverse condemnation suit. When a suit in inverse

108. See id.
109. Id. § 6(b)(5).
111. See San Diego Gas & Elec. Co. v. Superior Court, 920 P.2d 669, 697 (Cal. 1996) (“Both eminent domain proceedings and inverse condemnation actions implement the constitutional rule that private property may not be ‘taken,’ (U.S. Const. 5th Amend.) or ‘taken or damaged,’ (Cal. Const. Art. I, § 19) for public use without just compensation.”); City of Oakland v. Oakland Raiders, 646 P.2d 835,
condemnation alleges a straightforward taking of property, courts readily import principles and procedures from the Eminent Domain Law. However, the courts have interpreted the Eminent Domain Law to provide compensation for a far broader range of injuries than would trigger compensation in a suit for inverse condemnation. As a result, an owner who must sell part of her property for a project recovers more generous compensation for damage to her remaining property than does a neighboring owner who suffers no direct condemnation.

Because an inverse condemnee must prove substantial impairment of a legal property interest before advancing to a jury trial on compensation, inverse condemnation offers fewer opportunities for damage recovery than does partial direct condemnation. In both contexts, the usual measure of damage is the decline in the property interest's fair market value caused by the government activity. However, in eminent domain cases, owners who can show that noise, dust, or traffic from a public improvement will reduce the fair market value of their remainders may recover severance damages for the extent of that loss. Neighboring owners who suffer no partial taking but who share the noise, dust, or traffic are unable to recover through inverse condemnation.

Before Continental Development, California courts did sometimes combine the inverse condemnation and the remainder damage formulas. In People ex rel. Department of Public Works v. Symons, the California
Supreme Court held that for damages related to freeway operation rather than to the severance itself, a partial condemnation should not entitle a remainder property owner near a new freeway to greater compensation than other neighbors who had suffered no severance. Following Symons, several appellate courts ruled that certain harms could not qualify for compensation, no matter what their effect on value. However, just nine years later the Supreme Court ruled that remainder damages consisted of any diminution in the remainder’s fair market value and cast Symons as supporting authority.

In Continental Development, the California Supreme Court recognized and approved of the divergence between the standards for recovery in direct and inverse condemnation. Continental had argued that the special benefit rule was fair, because the Eminent Domain Law limited it to recovering compensation only for special damage to its remainder. The court rejected the suggestion that Continental’s property suffered special injury from the nearby train. Nevertheless, it accepted the proposition that Continental’s severance damages could include compensation for rent depression due to view obstruction and noise even though nearby buildings not subject to partial condemnation were ineligible for such compensation.

The Continental Development opinion affirmed that market value is the only measure of severance damages in partial direct condemnations, rejecting any threshold requirement of special or distinct injury. The court eliminated the requirement that offsetting benefits be special primarily to avoid giving Continental a comparative windfall. In other fact

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118. See id. at 454-55.
122. See id. at 824 (“The Green Line obviously will affect views, light and noise levels of other properties in the neighborhood . . . .”).
123. See id. at 822 (“Those of Continental’s neighbors from whom no property is taken therefore do not necessarily share Continental’s right to recover for any and all diminution in the value of their property caused by the Green Line’s noise and visual impact.”).
124. See id. at 821 (“Severance damages are not limited to special and direct damages, but can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property . . . . [T]he landowner seeking severance damages need only prove the value of his or her property has been impaired, not that other members of the public are not similarly affected.”).
125. See id. at 823 (“If . . . Continental is permitted . . . to retain the general enhancement in the value of its property, one could . . . say it thereby pays less than its proper share of the project cost vis-à-vis those property owners from whom no property is taken . . . .”).
situations, however, this general benefit offset may be insufficient to prevent unfairness among neighbors.126

B. Inconsistency Between Benefit Offsets and Benefit Assessments

The offset of project benefits against severance damages arises from the Eminent Domain Law, not from the constitution. The constitution does not require that damage awards to a partial condemnee reflect the condemnee’s share of project benefits, but it permits state statutes to require an offset for benefits unless the offset is so great as to deny just compensation.127 The same principle controls benefit assessments: Those for special benefits are lawful, while assessments that exceed the value of the benefits to the private owner effect an unconstitutional taking.128 However, after Continental Development the two types of reimbursement are subject to inconsistent rules; this disparity undermines the justice of the compensation that the rules govern.

Under Continental Development, the proof of damages to the remainder is “competent evidence relevant to any conditions caused by the project that affect the remainder property’s fair market value, insofar as such evidence is neither conjectural nor speculative.”129 The lower limit on severance damages is still zero; if the court finds that the market value of the remainder is more with the project than without it, the court cannot deduct the increase from the compensation the condemnee receives for the property interest she sells outright.130 Nevertheless, by reducing the total amount of damages the condemnee would otherwise receive, benefit offsets represent a shift of assets from the partial condemnee to the condemning agency.

In contrast to the Continental Development rule, the California Constitution allows local governments to impose benefit assessments only for public works or services that provide special and distinct benefits to the assessed properties.131 Under the constitution, then, the benefit the MTA sought to recover in Continental Development—rent inflation because

126. If, for example, the Green Line station had been too far away to confer a measurable benefit on the neighborhood, the offset could not have served to equalize the neighbors’ contributions to the project. See infra Part III.A.1.


129. Continental Development, 941 P.2d at 824.

130. See CAL. CIV. PROC. CODE § 1263.410(b) (West 1982); Continental Development, 941 P.2d at 819.

Continental’s office building would be within walking distance of the new train station—could not support a benefit assessment. By allowing proof of such benefits in remainder situations, the Continental Development rule allows a greater offset than the government agency could impose as a benefit assessment.

The new rule using only overall market value to determine compensation for remainder damage in partial direct condemnations poses more than academic conflicts with the valuation rules for inverse condemnation and for benefit assessment. It may lead to horizontal inequity among otherwise similarly situated property owners, and it may undermine local government’s ability to make reliable and efficient decisions about the value of public projects. The next Part explores these problems and suggests a solution.

III
RECONCILING THESE CONFLICTS WITH A DIFFERENT RULE

The Continental Development decision expanded the category of benefits that a public agency can offset. The California Supreme Court instead should have limited severance damage recovery to the same kinds of special and substantial injuries recoverable in inverse condemnation. This approach would have achieved greater harmony among the rules for direct condemnation, inverse condemnation, and benefit assessment. By restricting judicial damage and benefit awards, the court would have served the purposes of condemnation and assessment law, prevented needless litigation in condemnation disputes, and assured that local government decisions reflect the needs and values of local residents.

A. Consistency Between Condemnation and Assessment

1. Identical Standards for Direct and Inverse Condemnation

The Eminent Domain Law, on which the Continental Development decision rests, does not define “damage” to remainder property except to break it into two components. The statute directs courts to consider injuries to the remainder both from the severance itself and from the

133. No published decisions address the question, but benefits special enough to comply with the Beveridge rule, see supra note 131, would probably also be special enough to support a valid benefit assessment. However, the converse may not be true: Because assessments affect all properties in an assessment district, while benefit offsets affect only the remainder property, a benefit special enough to the district to support valid assessment might not be special enough to the remainder property to satisfy the Beveridge rule. In any event, because the special-general distinction of Beveridge is no longer the law in California, public agencies can clearly deduct from remainder damages some benefits for which they could not impose benefit assessments.
135. See id. § 1263.420(a).
“construction and use of the project for which the property is taken.” The Law Revision Commission Comment to this statutory section makes clear that the legislature intended the courts to develop and refine rules about what types of injuries in each category qualify as “damage” requiring compensation.

Injuries due to severance are confined to properties subject to partial condemnation. In some cases they are serious; a partial condemnation may, for example, leave a private owner in possession of a parcel with no access to public roads, or remove a parking lot without which a retail site violates a parking ordinance. In such cases, the condemnee would not receive the full and fair value of the condemned interests without also receiving compensation for the effect of the loss of those interests on the remainder.

Once the partial condemnee receives compensation for the full effect of the severance, however, she should stand in the same position as her neighbors with regard to the public project and its effects on the area. Although a well-planned public works project should increase property values in the community as a whole, properties very near the project may lose value, whether or not their owners sell to the government. The second component of the statutorily-required remainder damage, loss not due to the severance itself, is conceptually indistinguishable from inverse condemnation. Yet under Continental Development, this component is considerably more generous to direct than to inverse condemnees.

The Continental Development court was not the first in California to address this difference. In People ex rel. Department of Public Works v. Volunteers of America, the Court of Appeal examined several California decisions about whether freeway noise and dust required compensation in either direct or inverse condemnation cases. The court observed that the general rule was that no recovery was possible in inverse condemnation for

136. *Id.* § 1263.420(b). Older versions of the statute, and case law interpreting them, did not make clear whether remainder damages could include compensation for project effects that did not emanate from the severed property itself (for instance, for freeway noise where the new road did not physically touch the partial condemnee’s former holdings). Compare *People ex rel.* Department of Pub. Works v. Symons, 357 P.2d 451, 455 (Cal. 1960) (no), with *People ex rel.* Department of Pub. Works v. Ramos, 460 P.2d 992, 994 (Cal. 1969) (yes). The current statute provides for remainder damages based on project effects whether or not the effects originate on land severed from the remainder in question.

137. *See* Cal. Civ. Proc. Code § 1263.420, Law Revision Comm’n Cmt., 1975 Addition (“Section 1263.420 does not abrogate any court-developed rules relating to the compensability of specific elements of damage, nor does it impair the ability of courts to continue to develop the law in this area.”).

138. *See* e.g., *People ex rel.* Department of Pub. Works v. Chevalier, 340 P.2d 598, 600 (Cal. 1959) (valuing parcel left landlocked by highway project).

139. *See* City of Los Angeles v. Wolfe, 491 P.2d 813, 816-17 (Cal. 1971).

140. *See supra* notes 121-26 and accompanying text.


142. *See id.* at 430-35.
such injuries, even though losses in market value from freeway effects were proper components of remainder damages. The court called this distinction "arbitrary" and "illogical," because "it is... obvious that adjacent property is damaged to the same degree by the detrimental factors of a freeway whether no property is taken... or whether a substantial portion of the property is taken for then [sic] construction of the improvement." Nevertheless, the court allowed the plaintiffs severance damages, on the ground that "[t]wo wrongs do not make a right."

In Continental Development, the dissenters argued in favor of the special benefits rule on the assumption that partial direct condemnees were eligible for no more compensation in remainder damages than they would have been as inverse condemnees. The majority, by contrast, declared that damages for project effects would be more generous in severance than in inverse condemnation cases. It insisted that allowing agencies to deduct for general benefits would remedy any unfairness the damages distinction might cause between adjacent properties, and it did not consider the effect of the rule for projects with no significant benefit to project neighbors.

A few courts in other jurisdictions have considered this question. Some have decided that fairness and justice require, or at least permit, property owners who sell part of their property for a public works project to recover more compensation for project-related injuries than neighbors who did not sell part of their property. Other courts have concluded that fairness and justice require awarding remainder damages only for injuries that would be equally compensable for project neighbors from whom the

143. See id. at 435.
144. Id.
145. Id.
146. See Continental Development, 941 P.2d 809, 835 (Cal. 1997) (Kennard, J., dissenting) ("Because only special and not general damages are compensable, only special and not general benefits should be deductible.").
147. See id. at 822 (majority op.).
148. See id. at 824.
149. See, e.g., La Plata Elec. Ass'n v. Cummins, 728 P.2d 696, 700 (Colo. 1986) (allowing greater compensation to partial condemnees than to noncondemnee neighbors for generalized ill effects of a power line); State v. Strom, 493 N.W.2d 554, 560-62 (Minn. 1992) (allowing remainder damages for noise and inconvenience of highway construction, even though many noncondemnee neighbors shared these harms).

Some states restrict recovery of these remainder damages to injuries that result from activity on the property the particular partial condemnee lost, and disallow compensation for project-related injuries that emanate from property lost by other condemnees. See, e.g., City of Albuquerque v. Westland Dev. Co., 909 P.2d 25, 30 (N.M. Ct. App. 1995). These courts reason that the relationship justifying extensive damages exists only between the remainder and the property condemned from it; as to property condemned from others, the remainder owner is in the same position as any other neighbor. See, e.g., id. at 31-32.
public agency took nothing.\textsuperscript{150} Considered in light of California’s Eminent Domain Law, the reasoning of these decisions suggests that the California Supreme Court erred in deciding that California law should distinguish between direct and inverse condemnees in evaluating damages.

A few commentators make a strictly legal argument for maintaining a distinction between damages recoverable through inverse condemnation and those recoverable through partial direct condemnation. They contend that the threshold rights to compensation in the two procedures rest on different bases: Inverse condemnations vindicate a self-executing constitutional right, while direct condemnations carry out a statute establishing eligibility for remainder damages in severance cases.\textsuperscript{151} These different bases lead, predictably, to variations in the availability of compensation between direct and inverse condemnations. These commentators conclude that such differences should be no more worrisome than differences in the availability of compensation between condemnation and other types of injury.\textsuperscript{152}

This argument misapprehends the basis for remainder damages in severance cases, creating a false distinction and hiding policy judgments in legal terms. The purpose of California’s statutory scheme for direct condemnation is to fulfill the constitutional mandate not to appropriate or damage private property for public use without compensating its owner.\textsuperscript{153} The Eminent Domain Law’s remainder damages requirement\textsuperscript{154} thus is rooted in the same constitutional command as the requirement that inverse condemnees receive compensation for substantial damage short of a taking. The legislature might require that compensation in eminent domain actions, or for certain property interests, be more generous than the constitutionally required minimum,\textsuperscript{155} but it has not done so here.

The text of the Eminent Domain Law does not indicate any legislative determination that more compensation is required to achieve justice in partial direct condemnations than in inverse condemnations. The requirement that compensation cover "damage...to the remainder by...[t]he

\textsuperscript{150} See State v. Schmidt, 867 S.W.2d 769, 777 (Tex. 1993).
\textsuperscript{152} See Adler & Anderson, supra note 151, at 11-16; Singley, supra note 110, at 530-31. For a lesson on the differences in recoveries among causes of action for property damage, see Customer Co. v. City of Sacramento, 895 P.2d 900 (Cal. 1995), in which the court distinguished among damages available for inverse condemnation, for tort claims against private persons, and for tort claims against the local sheriff’s department.
\textsuperscript{154} See CAL. CIV. PROC. CODE § 1263.420(b) (West 1982).
\textsuperscript{155} See Redevelopment Agency v. International House of Pancakes, 12 Cal. Rptr. 2d 358, 361 (Cal. Ct. App. 1992) (noting that federal and state constitutions do not require compensation for loss of goodwill, but that state statute does):
construction and use of the project for which the property is taken" does not establish a basis for compensation unavailable to inverse condemnees. Instead, it describes a kind of injury that could affect many properties adjacent to a public project and ensures that compensation for this injury is included in the severance award. The statute does no more than codify the constitutional mandate to compensate remainder owners for damage the government causes to their properties.

The Law Revision Commission Comment to this statutory section confirms that the legislature intended to leave the California courts free to refine the definition of this damage to achieve fairness and justice. Any legal argument for distinguishing between direct and inverse condemnation is illusory. If courts found that policy arguments favored greater awards for remainder owners than for their nonselling neighbors, however, they could develop damage rules leading to such awards. In fact, however, fairness and sound public policy compel the same treatment for both direct and inverse condemnees.

The policy argument in favor of the distinction assumes that an owner who will sell part of his property for a project is in a different bargaining position from one whose property the project does not require. Proponents argue that in a completely open market, a bargaining seller would consider the effect of the project on the value of his remainder in setting a sale price. Because the neighboring owners would be in different positions with respect to private purchasers—partial sellers could choose their neighbors or their sales terms, while nonselling neighbors could only watch—they should also be in different positions with respect to a public project. Under this view, the fact that the Green Line required a strip of Continental's land entitled Continental to charge a price for that strip that included its soundproofing costs, even if the landlords (or the tenants) next door would soundproof at their own expense. This argument rather gravely misstates the interests and bargaining positions that would exist if the purchaser were a private party rather than the government. Moreover, it asks California courts to ignore the law.

156. CAL. CIV. PROC. CODE § 1263.420(b).
157. See People v. Ricciardi, 144 P.2d 799, 803 (Cal. 1943) (using inverse condemnation rules to supply meaning for statutory section on remainder damage).
158. Generally, a property owner gets only one shot—the eminent domain suit—to prove all damages that will or might result from the condemnation. See Ellena v. State, 138 Cal. Rptr. 110, 115 (Cal. Ct. App. 1977) (dismissing later action for inverse condemnation as precluded by earlier judgment in eminent domain).
159. See CAL. CIV. PROC. CODE § 1263.420(b), Law Revision Comm'n Cmt., 1975 Addition.
The Eminent Domain Law's valuation rules require courts and juries to ignore the buyer's unusual features in a condemnation—the power to force a sale and the openly stated need for particular property. Instead, the law demands that they assume a buyer "ready, willing, and able to buy but under no particular necessity for so doing." A private purchaser planning a project that might be unpopular with its neighbors would be under no compulsion to buy from sellers who would charge a high premium to compensate for features they disliked. On the contrary, such a purchaser would look for property it could buy without leaving a remainder (and dealing with remainder owners) or, if no such site were available, for neighbors who would not mind the project. The policy argument treats remainder damages in excess of those that would be available to inverse condemnees as reflecting the true price of the property taken, but a rational buyer in an open market would not pay an above-market price.

Furthermore, the fair market value to which the statute refers assumes only that both parties know the full range of uses to which the property in question might be put. A private purchaser planning a project that would bother its neighbors would not necessarily disclose to those neighbors what it intended to do with its property. The Eminent Domain Law assumes a bargaining table at which everyone knows that property can be put to a particular use but no one knows whether it will be, and where fair market value reflects the discounted probability that an obnoxious use will in fact materialize. The statutory mandate is to award the seller compensation assuming only that everyone knows that the project could occur, not that everyone knows that the project will occur; the difference between "could" and "will" may well represent quite a lot of money.

In the case of a large public works project such as the Green Line, everyone knows how the government will use the property it acquires. Furthermore, the size of the project and its transportation purpose made the MTA much less flexible in shopping for a location than a typical private buyer would have been. Even if the MTA had begun purchase negotiations before its precise intentions were clear, the fact of the MTA's identity would have alerted potential sellers of its probable plans. Because public agencies cannot bargain as shrewdly as private parties, they possess the

162. For a brief exploration of the rationale for this difficult requirement, see supra notes 36-39 and accompanying text.
163. CAL. CIV. PROC. CODE § 1263.320(a).
164. See La Plata Elec., 728 P.2d at 701 ("The landowner rationally will fix his selling price [for the severed interests] at an amount that will compensate the landowner not only for the portion sold, but also for any diminution in value of the remainder of his land that results from the use of the property sold ... ").
165. Such a purchaser would neither buy more expensive property than is needed nor pay more for property than other potential purchasers would pay.
166. See CAL. CIV. PROC. CODE § 1263.320(a).
167. See id. § 1263.330(a).
condemnation power to ensure that projects the local legislature has decided are in the overall public interest can go forward without holdouts.¹⁶⁸

The policy argument for distinguishing between direct and inverse condemnation damages also conflicts with other principles of the Eminent Domain Law and with judicial decisions interpreting it. The Eminent Domain Law specifically prohibits consideration of the proposed public works project in valuing the property taken;¹⁶⁹ allowing higher compensation for a remainder than for a nonselling neighbor ignores this prohibition. In particular, it overlooks decisions holding that unusual value to the condemnor is not a legally accurate measure of fair market value in condemnation.¹⁷⁰ By assuming a transaction in which the MTA could not build the Green Line without buying from Continental,¹⁷¹ advocates for higher damages in severance than in inverse condemnation would import precisely this consideration—the condemnor's need—into the fair market value calculation.

To exercise its eminent domain power, the MTA had to make three findings: that the Green Line project served the public interest; that Continental's property was necessary for the Green Line; and that the project planning and location maximized public benefits and minimized private injuries.¹⁷² Continental's neighbors were stuck with the MTA's conclusion that running the Green Line past their buildings would, overall, be good for the area. If they believed its burdens on them outweighed its benefits to them, their only recourse was to attempt to stop the entire project.¹⁷³ As a partial condemnee, however, Continental could argue again the relationship between the Green Line's benefits and burdens at its condemnation trial. Without derailing the entire project, Continental could make a

¹⁶⁹ See CAL. CIV. PROC. CODE § 1263.330(a).
¹⁷⁰ See Merced Irrig. Dist. v. Woolstenhulme, 483 P.2d 1, 8-9 (Cal. 1971) (reaffirming that the value of land as part of a condemnor's project is not the correct measure of pre-project value); County of San Diego v. Rancho Vista del Mar, 20 Cal. Rptr. 2d 675, 687 (Cal. Ct. App. 1993) (holding that landowner whose property was condemned for a jail could not receive compensation based on its value in use as a jail).
¹⁷¹ Cf. State v. Schmidt, 867 S.W.2d 769, 775 (Tex. 1993) (paraphrasing owner's argument as assuming "a buyer constrained to buy or abandon his plans for the use of his other property").
¹⁷² See CAL. CIV. PROC. CODE § 1240.030. A condemning agency must adopt a resolution of necessity, establishing these findings, by a two-thirds vote after giving potential condemnees notice and the opportunity for a hearing. See id. §§ 1245.220, 1245.235(a), 1245.240.
¹⁷³ The Continental Development decision made clear that these neighbors were unlikely to meet the threshold requirements for inverse condemnation recovery. See Continental Development, 941 P.2d 809, 822 (Cal. 1997).
collateral attack on the MTA’s determination that the Green Line’s location would cause the least private injury possible.\textsuperscript{174}

The eminent domain authority is a potent tool, and the legislature has adopted safeguards against its unwise use.\textsuperscript{175} Even with these safeguards, state and local public agencies undoubtedly use it, on occasion, in ways that do not provide the best value to the public. Nevertheless, decisions about the overall scope, operation, and location of public projects are the province of local legislatures or administrative agencies. Sound public policy and the Eminent Domain Law require that property owners take their disagreements about the proper mix of community injuries and benefits to those bodies in the first instance, with judicial review limited to cases of special and focused private effects.

Courts in other states have addressed the relationship between remainder damages and inverse condemnation, and their decisions could have guided the \textit{Continental Development} court. A few have responded to perceived differences between severance and inverse condemnation damages by eliminating the distinction. For example, in 1993 the Texas Supreme Court announced that the rules governing the types of compensable injuries for severance damages should be the same as those for inverse condemnation.\textsuperscript{176} Although Texas, like California, relies on a market value test to determine severance damages,\textsuperscript{177} the state court identified several factors traditionally held noncompensable in cases of inverse condemnation and labeled them exceptions to the general market value rule.\textsuperscript{178} In North Dakota as well, to recover for injuries to a remainder from a public works project, the owner must prove that those injuries are “different in kind from [those] sustained in common by the public.”\textsuperscript{179} Even in Colorado, where the current rule allows remainder owners greater compensation than inverse condemnees,\textsuperscript{180} the state Supreme Court has recognized


\textsuperscript{176} \textit{See Schmidt}, 867 S.W.2d at 777.

\textsuperscript{177} \textit{See id.} at 772-73 (describing the fair market value rule and calling it “as settled as any in our jurisprudence can be”).

\textsuperscript{178} \textit{See id.} at 777.

\textsuperscript{179} United Power Ass’n v. Heley, 277 N.W.2d 262, 268 (N.D. 1979).

\textsuperscript{180} \textit{See La Plata Elec. Ass’n v. Cummins}, 728 P.2d 696, 700 (Colo. 1986).
that this distinction can cause “serious problems of fairness to landowners similarly situated.”

Rather than requiring the courts to allow remainder owners more damages than their neighbors, fairness supports using the same rule to determine remainder damages as to determine damages for inverse condemnation. California’s courts could resolve the inconsistency between damages for partial direct condemnation and those for inverse condemnation by decreeing that the market-value-only test should apply henceforth in inverse condemnation as well. While this solution would eliminate inconsistency between neighboring landowners where damages were significant and benefits slight, it would bury local governments in a landslide of inverse condemnation suits. Liberalizing the availability of damages for inverse condemnation would also lead to significant disparity between assessment law and condemnation law.

A better solution would be to restrict damages for remainder owners in the same manner as for inverse condemnees.

2. Similarity Between Benefit Offsets and Benefit Assessments

The only reference in the Continental Development opinion to the connection between benefit offsets and benefit assessments came in a footnote at the very end of the opinion. An amicus had argued that rather than taking any benefit offsets, a condemning agency should have to recoup any expenditures that provided particular benefits to property owners near a project through benefit assessments. Without questioning whether the MTA could have used an assessment to fund the Green Line station, the court simply noted that it did not intend to alter the existing rule on the subject. That rule bars an agency from offsetting severance damages by the value of project benefits if the agency has adopted a benefit assessment to fund the project. Although neither party had raised the issue earlier in the litigation, the footnote suggests that the inconsistency between assessment law and the new scheme for benefit offsets could cause problems both for property owners and for courts.

181. State Dep’t of Highways v. Davis, 626 P.2d 661, 665 (Colo. 1981). The La Plata Electric majority tried valiantly to explain why its decision did not overrule Davis. See La Plata Elec., 728 P.2d at 701-02. Nevertheless, the dissenters seem to have had the clearer understanding, seeing “no way in which today’s holding can be reconciled with Davis.” Id. at 703 (Rovira, J., dissenting).

182. See infra Part III.B.1.

183. See infra Part III.A.3.


185. See id.

186. It probably could not have imposed an assessment for the station. See supra notes 131-33 and accompanying text.


The rule against benefit offsets where a condemnee will pay a benefit assessment on the remainder poses at least two serious conflicts with the Continental Development scheme for proving severance damages. First, the Continental Development method of proof will probably be available only where the condemning agency has not imposed a benefit assessment. Where an assessment exists, courts will have to apply the same seemingly arbitrary restrictions on testimony and cross-examination that they applied before. Second, an agency choosing not to impose a benefit assessment may pay less to condemnees than it would if it imposed the assessment, because Continental Development allows the agency to offset more for benefits than the constitution would have allowed it to assess. In other words, individual landowners not subject to benefit assessments may end up paying more for public improvements than they would have paid through condemnation plus assessment.

The Continental Development opinion contemplates a wide-open process of proof for remainder damages. Before the decision, appraisers could testify freely about a public project's negative impact on remainder property, but courts had to restrict any direct or cross-examination testimony about a project's positive features to those that provided special benefits. The Continental Development approach anticipates that appraisers for both parties will present their full opinions of the value of the remainder before and after the severance and project, and that each side will be able to examine the other's appraiser about any element of the value determination.

However, where the remainder lies within an assessment district for the project, the Continental Development procedure may not apply. Instead, strict application of the rule against benefit offsets would allow the condemnee to argue that project features reduced remainder value, but would prohibit the condemnor from attempting to show that equally reputable appraisers found the same features not negative, but positive. The presence or absence of a benefit assessment would thus completely control the availability of the liberalized and sensible procedure authorized in Continental Development.

In its passing treatment of assessments in Continental Development, the Supreme Court acknowledged that it had not received briefing on the issue. But it also gave no indication that the rule against benefit offsets on assessed remainders would be any different after Continental Development from what it had been before. If the rule excluded all benefit testimony, it would bar evidence not only of any special benefits

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189. See supra notes 55-57 and accompanying text.
190. See Continental Development, 941 P.2d at 824.
191. See id. at 825 n.6.
192. See id.
captured by the assessment but also of general benefits that the assessment did not and could not legally capture. Yet the central rationale for the Continental Development decision was that the remainder owner's opportunity to recover damages for general injuries justified giving the agency an opportunity to offset those damages for general benefits.193

Where an agency has adopted a benefit assessment, the Continental Development scheme may increase the property owner's remainder damages by permitting testimony about all potential injuries but excluding testimony about general benefits that the agency can neither offset nor recover through assessment. On the other hand, if an agency could offset all benefits against severance damages and still charge the property a benefit assessment, the owner would effectively pay twice for the private benefits he gained. The Continental Development rule creates this conflict between benefit assessments and benefit offsets, but provides no guidance toward its resolution.

In fact, the constitutional limitation on benefits a public agency can recover through assessment may create a perverse incentive for the agency to make as many partial condemnations as possible to reduce a project's overall cost to the public. If a city government were to fund a project through special assessment, it might prefer to maximize partial condemnation for the project of properties that are not part of the assessment district.194 By doing so, it could minimize the amount it paid in remainder damages: Damages to unassessed remainders would be subject to offset for any project benefits the city could prove, while damages to assessed remainders would lose no benefit offsets. On the other hand, if a city could subject most or all property receiving special benefits from a project to partial condemnation for that project, it might be able to use the Continental Development rule to minimize the cost to the general public of the project. Instead of taking the complicated and difficult steps to form an assessment district,195 the city could use the more expansive benefit offsets against remainder damages to maximize the remainder properties' contributions to the project.196

193. See id. at 820-21, 824.

194. If the remainder properties received special benefits from the project but paid no assessments, the entire assessment might be unconstitutional. See Cal. Const. art. XIII D, § 4(a); see also 81 Op. Cal. Att'y Gen. 104 (1998) (advising that the Vallejo Sanitation and Flood Control District violates Article XIII D by failing to charge some property owners a storm drain fee, so that other owners pay more than their proportional share of the costs of flood control). If the remainder properties did not receive the special benefit, though, but (for example) supplied rights-of-way so that the special benefit could reach the assessment district, they might nevertheless rise in value because of their proximity to the assessment district.


196. A city could not raise money by this method: The maximum offset for remainder benefits is the amount of remainder damages, and the city would still have to pay for the property it condemned outright. See Cal. Civ. Proc. Code §§ 1263.310, 1263.410(b) (West 1982). Nevertheless, for projects
An alternate solution exists that would allow remainder damage offsets for general benefits without forcing remainder owners to pay twice for special benefits their assessed remainders receive from public works. The solution would be rather complex to administer; indeed, the California Supreme Court has rejected it once for that very reason. Nevertheless, the tension between the general benefits rule in eminent domain and the special benefits rule in benefit assessment may justify reconsidering the need for complicated procedures in order to achieve fairness.

In City of Baldwin Park v. Stoskus, the city condemned a strip of land from one side of the defendant's property to build a new street. The city had formed an assessment district to pay for the new street (and the storm drain under it), and the defendant had been among the minority of property owners in the assessment district who had protested. At trial on the remainder damages, the defendant did not offer a before-and-after appraisal of her remainder property, but the city's appraiser testified that the severance did not alter the value of the remainder. The appraiser also explained that his estimate of the remainder's value after the construction of the new street and storm drain did not include special benefits the project would bestow upon the remainder, because those were the subject of the assessment.

The defendant argued that because her property in fact received no special benefit from the project, her remainder damages should include the amount of the assessment. She proposed that the court calculate remainder damages as follows: severance damage and damage because of the project, plus the amount of the assessment, less any special benefits that in fact accrued to the remainder because of the project. The California Supreme Court refused to adopt the defendant's proposal, calling it "unnecessary and unwise."

Under the law at the time, the court's decision was correct. Given the rule allowing offsets only for special benefits, any benefits the city could have deducted from the defendant's remainder damages would necessarily

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198. See id. at 1334.
199. See id. at 1334, 1334 n.1.
200. See id. at 1334.
201. The new street and storm drain enabled the defendant to subdivide the land into five individual lots. See id.
202. See id. at 1335 n.2.
203. See id. at 1335, 1337.
204. See id. at 1337. Her position was apparently that the amount of the severance damage and damage from the project was $0, as was the value of the special benefits accruing to her property, so that her remainder damage would equal the amount of her assessment.
205. Id. at 1338.
206. See Beveridge v. Lewis, 70 P. 1083, 1086 (Cal. 1902).
have been included among the benefits for which she paid a special assessment. Moreover, the rule against deducting benefits when an assessment was in force\textsuperscript{207} created an irrebuttable presumption that the two were equal, but the defendant’s formula asked the court to ignore this presumption. Allowing the defendant to raise the issue of the assessment amount at the condemnation trial would have “permit[ted] a collateral attack on the amount of the assessment,” despite a statutory scheme providing limited time and strict procedures for challenging the legislative act of assessment.\textsuperscript{208} The court declined to make eminent domain proceedings a forum in which condemnees who had lost the political battle over an assessment could fight it again, preferring to leave complex determinations about the long-term effects of public improvements to the local legislative process.\textsuperscript{209}

Under the \textit{Continental Development} decision, however, a city can offset remainder damages with benefits for which it could not impose a special assessment. Eliminating all benefit offsets where a project receives assessment financing from the remainder causes a return to the rule compensating owners for general injuries but offsetting only with special benefits. The formula the defendant proposed in \textit{Stoskus}, on the other hand, is an effective way of eliminating double deduction for special benefits while ensuring full offset for general benefits. By calculating remainder damages to include any and all project-related injuries, plus the benefit assessment, less any and all project-related benefit, the courts could comply with \textit{Continental Development} and also achieve just compensation.

Neither solution is attractive. If the \textit{Continental Development} rule is more fair than the rule it replaced, the existence of a benefit assessment should not justify abandoning the rule entirely. The \textit{Stoskus} scheme, however, would make condemnation trials extremely complex and could turn them into opportunities for revisiting political disputes that are long gone from the local legislative agenda. As with the disparity between remainder damages and inverse condemnation damages, the conflict between benefit offsets and benefit assessments creates unfairness and inconsistency. Any attempt to alter these rules, however, raises serious public policy concerns.

\textbf{3. Condemnation and Assessment Without Wealth Redistribution}

Whether funded by general tax revenues or by benefit assessment, a public works project is an investment of the community’s wealth for future benefit. A transit line permits economic growth and freedom of movement, and public hydrants ensure that buildings will survive a fire. Projects or government activities whose benefits are strongly collective receive funding from general tax revenues, whereas those that concentrate their


\textsuperscript{208} \textit{Stoskus}, 503 P.2d at 1337.

\textsuperscript{209} See \textit{id.}
benefits on certain people or properties often receive funding from those beneficiaries in proportion to their share of benefits. The overriding goal of condemnation law is to make sure that individuals do not bear more than their share of the costs of public works, while simultaneously ensuring that beneficial projects can go forward at the lowest possible cost. Similarly, a fair benefit assessment ensures that individual property owners pay for no more than their share of special governmental benefits.

Other government actions may well have a redistributive purpose, but condemnation and assessment do not. Although Continental Development eliminated the disparity between benefit offsets and remainder damages, it retained the inconsistency between direct and inverse condemnation. A recent case involving rescission of a special benefit, Leonard v. People ex rel. Department of Transportation, illustrates the potential for unfair wealth redistribution under the new rule.

The Leonard family had owned a lot that the California Department of Transportation (Caltrans) condemned in 1959 for a freeway project. Under the pre-Continental Development scheme, the Leonards received $182,000 for the portion of their property Caltrans took in fee and $142,000 for injury to their remaining property from the severance and the freeway construction and operation. Because an off-ramp from the freeway would empty onto the street directly adjacent to their property, the jury subtracted $20,000 from their $142,000 damage award to offset the special benefits the project would provide their remainder. The property was in a commercial area of Culver City, and the site now includes a hotel, a conference center, and an office building. The benefit deduction for the off-ramp represented a jury’s finding that the increased income the Leonards could have expected from using the site was $20,000.

In 1986, Caltrans reconfigured the freeway interchange near the Leonards’ property, moving the off-ramp about one-half mile away. The Leonards sued for inverse condemnation, saying that they had not yet received the full value they expected for their $20,000 offset and seeking

212. See CAL. CONST. art. XIII D, § 2(i).
214. See id. at 329.
215. See id.
216. See id.
217. See id.
218. See Leonard, 73 Cal. Rptr. 2d at 329.
compensation for the change in freeway access to their property. The California Court of Appeal held that the Leonards had failed to state an inverse condemnation claim and refused to consider compensation. The court’s holding rested on the premise that a benefit offset for a project feature at the time of condemnation did not make the later loss of that feature a subject for inverse condemnation recovery.

The benefit offset to the Leonards’ severance damages occurred under the old California rule limiting offsets to special benefits. Even under that rule, however, Caltrans avoided paying the Leonards in 1959 because of project benefits that were not special enough for their later discontinuance to require any reexamination of Caltrans’s condemnation liability. The result in Leonard may turn out to be unusual; indeed, Caltrans might well have prevailed on the facts of the Leonards’ case. Nevertheless, under the liberalized rule of benefit offsets announced in Continental Development, more partial condemnees may find themselves without recourse when their severance damages are offset by benefits that a public project then fails to produce. Rather than contributing their approximate share to the cost of public works, they will contribute to benefits that go to others.

Resolving this redistribution problem by liberalizing the availability of inverse condemnation damages, however, could just shift the redistribution problem to other contexts. Some public projects that cause localized property damage do so not for diffuse public benefit, but for benefits that accrue primarily to a few individuals or properties. For example, the central California city of Lindsay for years operated a municipal landfill that accepted waste brine from an olive processing business. The brine leached out of the landfill and caused serious damage to several nearby farms, whose owners eventually received large inverse condemnation judgments against the city. Although the olive processing business was undoubtedly important to the city’s economy, its investors received the main benefit from the low-cost waste disposal scheme.

220. See id. at 329–30.
221. See id. at 331.
222. See id.
223. Caltrans might have been able to show, for instance, that the ramp did not affect the benefits for which the Leonards paid an offset, or that over the 25 years the ramp stood in its initial position, the Leonards had reaped well over $20,000 in benefits because of its location.
225. See F & L Farm Co. v. City of Lindsay, 77 Cal. Rptr. 2d 360, 361 (Cal. Ct. App. 1998).
226. See id.
If a city cannot raise funds to pay its inverse condemnation liability for such a project by assessing the properties (or charging the individuals) receiving the project’s benefits, the city must pay for the property damage out of general tax revenues. Under these circumstances, condemnation judgments against the city redistribute wealth from the city’s general tax base to the private property owners who received benefits from the harmful project but escaped paying their full share of its cost. In fact, some special districts have no sources of funding beyond assessment. If legal or political barriers keep such an agency from collecting funds to cover the judgments against it, it may go bankrupt.227

Indeed, the city of Lindsay had no realistic way to pay its inverse condemnation judgment: With interest, the award was 250% of the city’s annual general fund revenues, and the business that had caused the damage no longer existed.228 The California Court of Appeal solved the problem by ordering the city to disregard the tax limitations in the California Constitution and raise the money.229 The only alternative, even worse from a public policy perspective, would have been for the city to cut other services for which its residents pay general-purpose property and sales taxes.230

In cases with serious and focused damage to private property but widespread benefit to the public, raising money through general taxes is certainly just. But in cases of mild to moderate damage with only a few discrete beneficiaries, the harm to the public from raising taxes or diverting funds away from community-wide public services may well outweigh the corrective justice of the awards. As with the Leonards’ inverse condemnation suit, the story of the Lindsay landfill illustrates the potential for significant wealth redistribution where the standards for valuing benefits differ from those for valuing costs.

B. Public Policy Considerations in Support of a “Special” Standard

Liberalizing the availability of damages for inverse condemnation would eliminate unfair inconsistencies between remainder owners and other project neighbors. Similarly, allowing cities to impose benefit assessments to cover the costs of providing property owners with both

227. For an example of a special district facing bankruptcy because its constituents refuse to pay for any activities not tied to particular properties, see Diana Marcum, High Desert Water District in Fee Fight, L.A. TIMES, Nov. 12, 1998, at A3.

228. The judgment was $5 million, but the city’s annual general fund revenues are only about $2 million. The waste brine came from Lindsay Olive Growers, which went out of business in 1992. See Payoff Would Break Lindsay, City Says, FRESNO BEE, June 13, 1997, at B2.

229. See F & L Farm, 77 Cal. Rptr. 2d at 364-66.

230. See Court Rules Lindsay Must Pay Debt; City Has Leeway to Impose New Tax to Raise $5 Million for Payoff, FRESNO BEE, Aug. 6, 1998, South Valley Edition, at B1; Payoff Would Break Lindsay, supra note 228.
CONDEMNATION AND ASSESSMENT

general and special benefits would simplify application of the rule against benefit offsets on assessed remainders. As an alternative, California law could restrict damages and benefits in both the condemnation and assessment contexts to those that are special and distinct to the property at issue. Public policy considerations as well as consistency and parity favor this latter option.

Restricting all four kinds of damage and benefit compensation\textsuperscript{231} to specific, discrete categories would minimize litigation and maximize predictability both for government officials and for private property owners. It would also maintain an appropriate distribution of government functions. Local political and legislative processes would determine the general balance of benefits and burdens in the community, and courts would have authority to override these decisions only in situations of significant injustice.

1. Lower Administrative Costs

Using a general market value standard to evaluate damages and benefits for both condemnation and assessment cases might seem fairer than a requirement that damages or benefits be special and substantial. However, the costs of administering the “general” standard would probably be much higher than those for the “special” standard, and might well keep the “general” rule from yielding the fairness it promises in theory. A rule requiring that harms and benefits be special would achieve lower transaction costs and more equitable results.

The Continental Development court suggested that its new rule would reduce “transaction costs . . . due to [its] greater clarity and certainty,”\textsuperscript{232} but the costs of administration may be higher than the court anticipates. The Continental Development decision will encourage partial condemnees to introduce evidence about any and all kinds of problems a project might cause for their remainders. Because the eminent domain law imposes no limit on damages,\textsuperscript{233} while benefit offsets are capped at the amount of damages,\textsuperscript{234} expanding the availability of damages may have more overall effect on both damage awards and litigation costs than the majority acknowledged.

Moreover, a court attempting to reconcile the eminent domain rules with those for inverse condemnation and benefit assessment would have to consider the administrative costs for the latter two systems as well. A rule

\textsuperscript{231} These four types are: remainder damages, inverse condemnation, benefit offsets, and benefit assessments.

\textsuperscript{232} Continental Development, 941 P.2d at 823.

\textsuperscript{233} If remainder damages equal the fair market value of the remainder, the condemnor has the option simply to buy the whole property and leave no remainder. See CAL. CIV. PROC. CODE § 1240.410 (West 1982).

\textsuperscript{234} See id. § 1263.410(b).
that allowed litigation over general injuries and benefits would be much more expensive to administer than one restricting judicial intervention to situations of special and discrete effects on property.235 It could encourage people to file more inverse condemnation suits, because they would not have to meet the threshold requirement of showing substantial and peculiar damage to their property. It could also make such suits much more complex and expensive, as more subjects for damages would be open to argument.

Similarly, a rule allowing benefit assessments for public improvements that create widely shared benefits to property would provide little guidance for municipalities trying to decide when to use the procedures for taxation and when to use those for assessment.236 Limiting benefit assessments to situations in which they fund special services to property may compromise the ability of local governments to spread costs among responsible property owners. On the other hand, the rule may eventually reduce haggling over the proper scope and magnitude of such assessments as case law development makes clear what types of projects are fit subjects for assessment.

2. Political Accountability

Inverse condemnation litigation seems an inefficient substitute for political activity as a response to general community problems. Moreover, California voters have amended the constitution to require that assessments pay only for special benefits to assessed properties. The only way to harmonize condemnation law with assessment law while respecting the electorate’s choice is to require a threshold showing of special injury or benefit to support compensation or payment in both.

In cases of serious and focused damage to property, inverse condemnation suits prevent public agencies from pushing community costs onto groups unable to protect themselves in the legislative process. Where many properties experience the same effects from a public project, litigation duplicates the recourse these properties’ owners have in the local political arena. This duplication wastes money and may weaken local political accountability.

For example, the decisions of a local school board may decrease the price of residential property in the district. A rule recognizing property value reduction as the only criterion for inverse condemnation would permit citizens to bypass school board meetings or elections in favor of

235. See City of Baldwin Park v. Stokus, 503 P.2d 1333, 1338 (Cal. 1972) (holding that expanding eminent domain proceedings to allow condemnees to second-guess assessment amounts would “unduly complicate” them).

236. Regardless of its policy justification or lack thereof, such a rule is in fact impossible under the California Constitution. See CAL. CONST. ART. XIII D; see also infra Part III.B.2.
lawsuits against the wayward district. The district would lose the benefits of public participation, and the courts would be able to substitute their judgment for that of the school board about the best ways to use school funds for public purposes. Restricting the availability of damages preserves political accountability by requiring policy choices about community-wide costs and benefits to be made primarily in the legislative process. It encourages public participation in local decisions and respects local policy choices where those choices suggest shared sacrifice for widespread benefit rather than majoritarian rent-seeking.

Restricting damages to special and discrete harms also respects the choices California voters have made about when and how local governments can charge property owners for services. The Continental Development court acknowledged that distributing the costs and benefits of government activity across the populace with perfect equality was impossible. But it failed to recognize that one important way to discover the rule of "greatest relative fairness, or least unfairness," is to ask the public what it would be willing to accept. Several times in the last twenty years, California's voters have addressed whether local governments should be able to collect from individual property owners for projects that provide general community benefits, and the voters have repeatedly said "no."

Instead, California's voters have opted squarely for a benefit assessment scheme that insists that assessments be closely tied to the cost of providing specific property-related benefits. They have expressed their mistrust of legislative and judicial decisions that shift responsibility for paying for projects that create widespread benefits to individual property owners, preferring to rely on elections to establish the appropriate level of cost-sharing. Local government leaders as well as state court judges frequently express disagreement with the goals of the property tax reform movement, but realistic politicians also know that tax and assessment limitation is wildly, perhaps unaccountably, popular with voters.

The extremely strict procedural and substantive requirements for property-related taxes and benefit assessments may or may not be good
public policy, but they are fixed in the California Constitution. California courts do not have the option of achieving consistency between benefit assessments and benefit offsets by allowing assessments based on widespread enhancement of property value. Similarly, even if the California Supreme Court decided to create consistency between direct and inverse condemnation by removing the threshold requirements for inverse condemnation recovery, it could not then achieve parity between condemnation and assessment practice.

The only way for the courts to promote consistency, parity, and administrative efficiency in condemnation and assessment law is to defer to the voter-approved requirements for benefit assessment. The California Supreme Court should require compensation, either from government to private owners or from private owners to government, only in cases in which the party seeking the payment can show special and discrete effects on private property from government activity. The Continental Development case could have provided such a rule, but the court failed to take this opportunity to do so.

**Conclusion**

The rule announced in the Continental Development decision has strong intuitive appeal. It could simplify some condemnation trials and lead appraisers for condemors and condemnees to give juries more complete and accurate information about property valuation. It may also result in smaller condemnation awards in cases where a public agency convinces a jury that a project's benefits outweigh its harms to the condemnee.

Nevertheless, the decision does not mark a major advance in the clarity or justice of California condemnation law. Under Continental Development, the rules of California partial condemnation law cause inequity between similarly situated property owners by allowing remainder owners to receive compensation for injuries that do not entitle their non-selling neighbors to recover by inverse condemnation. They also conflict profoundly with the California Constitution's limitation on local government's ability to impose benefit assessments, and thus with the voters' determination of the proper relationship between individual property owners and the public.

The Continental Development view of compensation in partial takings—far more generous than the constitution requires—will promote litigation and threaten local political autonomy. It risks turning every partial condemnation trial into a full-scale reevaluation of the condemning agency's decision that its project, as planned and sited, is in the best interest of the public. Had the Continental Development majority opted instead

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244. See id. art. XIII D, § 2(i).
to bring the standards for awarding remainder damages into line with those for awarding judgment in inverse condemnation, it would have achieved a far simpler and more equitable result.