allow de novo review in a plethora of cases. The minority would let local agencies revoke licenses, for example, checked only by substantial evidence review. The judiciary and the agencies must coexist and coordinate efforts over a whole range of facts and cases. The proper "vested rights" approach, because of its clarity and relation to traditional judicial due process, provides the best hope of self-discipline by courts, which will always have the final word on defining their own area of competence.

Richard M. Travis

II

CIVIL PROCEDURE

Community of Interest Requirement in Class Actions

City of San Jose v. Superior Court. This case involved a class action brought on behalf of owners of land in the vicinity of San Jose Municipal Airport. After the city rejected claims filed on behalf of the plaintiffs and others similarly situated, plaintiffs, as representatives of "all real property owners in the flight pattern of the San Jose Municipal Airport," brought suit in nuisance and inverse condemnation for damages caused by increased noise, vibration, vapor, and dust resulting from the introduction of jet traffic to the airport. The trial court ruled that a class action was appropriate and ordered notification of the other members of the class. The city then sought writs of mandate or prohibition to prevent the maintenance of the suit as a class action. The supreme court granted a writ of mandamus ordering the trial court to vacate its order certifying the class on the ground that the proposed class lacked sufficient community of interest.

2. First Amended Complaint at 4, 6-7. The court held that the claims statutes, Cal. Gov't Code §§ 905, 945.4 (West 1966), do not forbid class actions against public entities. Rather, a claim may be filed on behalf of a class if it is identified sufficiently to be ascertainable. 12 Cal. 3d at 458, 525 P.2d at 708, 115 Cal. Rptr. at 804. The court declined to decide whether the instant claims complied with this test: "Extraordinary relief is not available to remedy defective compliance with claims statutes." Id., citing County of Santa Clara v. Superior Ct., 4 Cal. 3d 545, 547-51, 483 P.2d 774, 775-77, 94 Cal. Rptr. 158, 159-61 (1971).
3. 12 Cal. 3d at 452-53, 525 P.2d at 704-05, 115 Cal. Rptr. at 800-01.
4. Id. at 458, 525 P.2d at 708, 115 Cal. Rptr. at 804.

The court also held that, by failing to allege damages for nuisance other than diminution in market value, plaintiffs did not properly represent the class. Id. at 463, 525 P.2d at 712, 115 Cal. Rptr. at 808. See note 20 infra.
The court relied on the community of interest requirement as articulated in *Weaver v. Pasadena Tournament of Roses Association.* In a series of later cases, however, the court had developed an approach to community of interest inconsistent with that of *Weaver.* Unfortunately, these cases failed to overrule *Weaver*; they clarified neither the content nor the purpose of the community of interest requirement. By continuing to rely on *Weaver* and simultaneously paying deference to the later line of cases, the court in *San Jose* obscured still further the meaning of community of interest. In addition, it undermined the policies favoring class actions which had been articulated in previous decisions.

This Note will first examine the development of the community of interest doctrine; it will then discuss the requirement of manageability as an alternative means of dealing with the concerns which the court expressed in *San Jose*; and finally, it will examine the policies favoring maintenance of a class action in circumstances such as those presented in *San Jose.*

**I. THE COMMUNITY OF INTEREST DOCTRINE**

One of the longstanding requirements for class actions in California has been that the proposed class have a "well-defined community of interest." This requirement has been said to mean that there must be common questions of law and fact or, alternatively, that each plaintiff's right to recover must not depend on facts peculiar to the individual alone. Moreover, in cases where there are issues requiring separate adjudication, it must appear that the issues common to the class are so "numerous and substantial" that maintenance of the class suit will be-

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5. 32 Cal. 2d 833, 198 P.2d 514 (1948), relied on in City of San Jose v. Superior Ct., 12 Cal. 3d 447, 459, 525 P.2d 701, 709, 115 Cal. Rptr. 797, 805.
6. Chance v. Superior Ct., 58 Cal. 2d 275, 373 P.2d 849, 23 Cal. Rptr. 761 (1962) (class action to foreclose 2,139 deeds of trust on portions of a single tract of land); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) (class action on behalf of taxicab customers to recover uniformly imposed overcharges); Vasquez v. Superior Ct., 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971) (class action on behalf of purchasers fraudulently induced to buy food freezers and food plans); Collins v. Rocha, 7 Cal. 3d 232, 497 P.2d 225, 102 Cal. Rptr. 1 (1972) (class action on behalf of forty-four farm workers alleging fraud by farm labor contractor).
fit the court and the litigants. This balancing formulation has allowed the court to reach inconsistent results when interpreting the community of interest standard.

a. The plaintiff-oriented test

In Weaver, the court held that there was no community of interest among the members of the proposed class in a suit brought under former California Civil Code section 53 for wrongful exclusion from a place of public accommodation. Plaintiffs alleged that defendant had advertised 7500 Rose Bowl tickets for sale but allowed only 1500 to be purchased. The court emphasized that, in order to recover, each plaintiff would have to prove that he attempted to purchase tickets, that he was denied the opportunity to do so, and that the denial was wrongful. It attached no importance to the fact that the basic issue of law underlying the cause of action—whether the defendant’s actions constituted wrongful exclusion within the meaning of the statute—could be jointly litigated.

b. The defendant-oriented test

In later cases, the court took an entirely different approach to the community of interest requirement. Rather than emphasizing the issues requiring individual proof by each plaintiff, the court focused on the conduct of the defendant to determine whether liability as to all plaintiffs depended on common issues of law or fact. For example, in Daar v. Yellow Cab Co., the court held that sufficient community of interest existed where plaintiffs alleged that defendant had uniformly overcharged the class by setting its taxi meters to register rates higher than those approved by law. It reasoned: “[T]he fact that each in-

11. 32 Cal. 2d at 838, 198 P.2d at 517. This analysis assumes the resolution of an issue which the court later admits is crucial and unresolved—whether these elements establish plaintiffs’ right to recover under the statute.
12. Although the court noted the existence of this issue, it stated, “[T]he determination of such question in the present case would still leave to be litigated the right of any other person to recover [in light of his own circumstances].” Id. at 838-39, 198 P.2d at 517.
dividual ultimately must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper."

Similarly, in Vasquez v. Superior Court, the court held that a class action could be maintained for damages for fraudulent sales of freezers and frozen food plans. The court assumed the truth of plaintiffs' allegation that the defendant's salesmen had used a standard sales pitch and reasoned that, while ordinarily each plaintiff would have to prove reliance, in this case an inference of reliance could be drawn as to the class if the representations were found to have been materially false.

c. San Jose—return to the plaintiff-oriented test

In San Jose the court revived the Weaver interpretation of the community of interest requirement. It reasoned that plaintiffs could not recover in inverse condemnation or nuisance without proving damage as an element of liability. Relying on the "fundamental maxim that each parcel of land is unique," and looking to the diverse uses of the land surrounding the airport, it found that plaintiffs could not prove this crucial element of liability as a class. For this reason the majority was of the opinion that "the class judgment . . . would not determine issues of sufficient number or substantiality to warrant class treatment."

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15. *Id.* at 713, 433 P.2d at 745, 63 Cal. Rptr. at 737. The court also stated that, since the total amount overcharged could be determined from defendant's books, it would be unnecessary for each member of the class to appear and assert an individual claim. *Id.* at 716, 433 P.2d at 747, 63 Cal. Rptr. at 739. In addition, the amount of recovery for each plaintiff would be so small as to make any other form of redress infeasible. *Id.* at 715, 433 P.2d at 746, 63 Cal. Rptr. at 738.

16. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

17. *Id.* at 814, 484 P.2d at 972-73, 94 Cal. Rptr. at 804-05. Plaintiffs alleged elements of damages requiring individual proof, such as injury to their credit ratings. In addition, each plaintiff's recovery would be reduced by the value of the food consumed. Nevertheless, the court stated:

Dear makes it clear that although ultimately each class member will be required in some manner to establish his individual damages this circumstance does not preclude the maintenance of the suit as a class action. *Id.* at 815, 484 P.2d at 973, 94 Cal. Rptr. at 805.

18. 12 Cal. 3d at 461-62, 525 P.2d at 711, 115 Cal. Rptr. at 807.

19. *Id.* at 461, 525 P.2d at 710-11, 115 Cal. Rptr. at 806-07.

20. *Id.* at 463, 525 P.2d at 712, 115 Cal. Rptr. at 808.

The court also held that plaintiffs had breached their fiduciary duty to represent the class by failing to allege personal nuisance damages such as physical damage to property, annoyance and inconvenience. The rule against splitting causes of action would preclude the unnamed plaintiffs from subsequently seeking redress for these damages. *Id.* at 464, 525 P.2d at 712-13, 115 Cal. Rptr. at 808-09. However, the majority in San Jose itself noted that the plaintiffs could amend the complaint to allege these personal damages. *Id.* at 464 n.14, 525 P.2d at 713 n.14, 115 Cal. Rptr. at 809 n.14. Liability for these damages could not be jointly determined in the class action, but since each plaintiff must appear individually to establish the diminution of value of his property
The common issues to which the court attached so little importance were in fact issues of law and fact basic to the case. The legal issues common to all plaintiffs included the fundamental and as yet unsettled question of an airport’s liability for damage to adjoining property, the validity of the defense of sovereign immunity, and the adequacy of plaintiffs’ attempt to comply with the claims statute. Liability also depended on common factual issues: facts relating to the expansion of airport operations, scheduling of flights, and pattern and intensity of noise caused by jets would require extensive and costly proof based on expert testimony. Therefore, substantial savings of court time and litigant expense would have resulted from maintenance of a class action, even assuming that individual trials on the damage issue were necessary.

Moreover, the court’s assumption that proof of the specific amount of monetary damage to each parcel of land would be necessary to establish liability for inverse condemnation is questionable. An action in inverse condemnation, unlike one sounding in nuisance, does not require proof of damages which depend on facts peculiar to the individual plaintiff. There is no liability without a showing of substantial diminution in the value of the property. The measure of recovery is the extent of the diminution. Plaintiffs here attempted to avoid the need for individual showings as to diminution by proposing to divide the class into subclasses and to prove a substantial diminution as to each subclass.

anyway, see text accompanying note 32, infra, he could prove his personal nuisance damages, if any, at the same time. Alternatively, as the dissenting opinion suggests, the failure to allege personal nuisance damages was not inadequate representation at all. Membership in the class would be easily ascertainable from county land ownership records. Each member would be notified of the action and given the chance to opt out if he wished to assert personal damages. Id. at 465, 525 P.2d at 714-15, 115 Cal. Rptr. at 810-11 (Tobriner, J., dissenting), citing Chance v. Superior Ct., 58 Cal. 2d 275, 290, 373 P.2d 849, 858, 23 Cal. Rptr. 761, 770 (1962). Amending the complaint would preserve the benefits of joint litigation of the inverse condemnation issue for all class members. Allowing the action to proceed without amendment, as Justice Tobriner suggests, would force each class member to weigh the benefits of joint litigation of the inverse condemnation issue against the loss of his personal claim for damages. Either solution seems better than not allowing the action to proceed as a class action at all.


23. City of San Jose v. Superior Ct., 12 Cal. 3d at 465-66, 525 P.2d at 714, 115 Cal. Rptr. at 810 (Tobriner, J., dissenting).

Such an approach seems to be supported by prior cases in which class plaintiffs proved substantial diminution of market value for the class by evidence concerning market values of representative parcels or of the entire area. Assuming that the land uses around San Jose Airport, rather than being randomly scattered, fall into definable geographical areas similarly affected by noise, fumes, and dirt, there seems to be no reason why appraisers could not establish substantial loss of market value as to subclasses of plaintiffs in order to establish liability. The plaintiffs could subsequently be required to prove the extent of the diminution of their individual parcels in order to recover.

II. MANAGEABILITY

As Justice Tobriner pointed out in dissent, by expressing its concern about plaintiffs' need to prove diverse issues in terms of the community of interest requirement, the majority failed to give deference to the trial court's exercise of discretion. Generally, it is the trial court's role to determine whether the issues peculiar to individual members of the class are so numerous as to make the action unmanageable. In the face of a trial court decision upholding the class, lack of community of interest should be relied upon by an appellate court only where either plaintiffs' or defendant's due process right to a fair hearing is imperiled by maintenance of the class action—a danger not present in San Jose.

25. Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968) (inverse condemnation first determined as to 25-block area of Detroit without regard to specific amounts of damage; owners of property then allowed to intervene to prove individual damages); Nestle v. City of Santa Monica, 6 Cal. 3d 920, 924 n.1, 496 P.2d 480, 482 n.1, 101 Cal. Rptr. 568, 570 n.1 (1972) (inverse condemnation claim resolved by determining whether there had been diminution in the market value of ten representative parcels); Biechele v. Norfolk and Western Railway Co., 309 F. Supp. 354 (N.D. Ohio 1969) (liability for nuisance in large area established by evidence of the general effects of defendant's conduct; plaintiffs to prove specific kinds and amounts of individual damage later before a special master).

26. See Biechele v. Norfolk and Western Railway Co., 309 F. Supp. 354, 358-59 (N.D. Ohio 1969), in which the court stated that if damages could not be stipulated, a special master would be appointed to conduct individual hearings. This procedure was also approved by the Sixth Circuit in Foster v. City of Detroit, 405 F.2d 138, 146-47 (6th Cir. 1968).

It should be noted that in order for any individual to recover once liability to the class is established, it will always be necessary to prove class membership. Such proof must rest on facts peculiar to the individual. While the San Jose court reasoned that the necessity for such proof destroyed the community of interest of the class, other courts have treated diverse issues of damages as unsubstantial when compared with issues held in common. See Collins v. Rocha, 7 Cal. 3d 232, 237, 497 P.2d 225, 228, 102 Cal. Rptr. 1, 4 (1972); Vasquez v. Superior Ct., 4 Cal. 3d 800, 815, 484 P.2d 964, 973-74, 94 Cal. Rptr. 796, 805-06 (1971); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 714, 433 P.2d 732, 746, 63 Cal. Rptr. 724, 738 (1967).

27. San Jose v. Superior Court, 12 Cal. 3d at 465, 525 P.2d at 713, 115 Cal. Rptr. at 809 (Tobriner, J., dissenting),
Lack of community of interest is harmful to plaintiffs only in those cases where the members of the class have conflicting interests in the outcome of the litigation. This is a failure of community of interest in its most literal application. The classic example of such a situation was presented in *Hansberry v. Lee*, an action to determine the validity of a restrictive covenant brought by a few named plaintiffs seeking to represent all other signatories of the covenant. Having obtained a judgment that the covenant was valid, plaintiffs sought to have it enforced against the successors in interest of a member of the purported class. The United States Supreme Court held that the unnamed class members could not be bound by the earlier judgment. It reasoned:

Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Because of the conflict of interest among the members of the class, it would have been a denial of due process to hold that the judgment was res judicata as to the unnamed plaintiffs. However, there was no allegation in *San Jose* that any such conflict existed. Community of interest in this sense was not at issue.

The court in *San Jose* was concerned with the impact of the asserted lack of community as it affected the defendants. Essentially, the majority argued that because each plaintiff's land is unique in terms of physical characteristics and use, defendant would be deprived of the opportunity to assert a crucial defense—that there was no damage—if plaintiffs were permitted to proceed as a class in order to prove diminution. This, the majority implied, would constitute a denial of due process.

This argument would have been a proper one for the court to make had it had facts before it indicating that plaintiffs could not feasibly have demonstrated loss in land value either as a class or as sub-

28. *Id.* at 32 (1940).
29. *Id.* at 44.
30. *Id.* at 45.
31. Although the court did hold that named plaintiffs, by failing to ask for damages based on nuisance, did not adequately represent the class, this criticism was clearly not founded on an assertion that the class lacked community of interest. As the court noted, had there been adequate community of interest, the named plaintiffs could have cured this defect by amending the complaint. See note 20 supra.
32. Because liability here is predicated on the impact of certain activities on a particular piece of land, the factors determinative of the close issue of liability are the specific characteristics of that parcel. The grouping and treating of a number of different parcels together, however, necessarily diminishes the ability to evaluate the merits of each parcel. The superficial adjudications which class treatment here would entail could deprive either the defendant or the members of the class—or both—of a fair trial.

12 Cal. 3d at 462, 525 P.2d at 711, 115 Cal. Rptr. at 807.
classes. This might have been the case if land uses around the airport were so varied and so interspersed that no meaningful subclassifications would be possible. In such a situation, as the majority asserted, parcels being similarly used would be subject to different quantums of noise, vapor, and vibration, depending on their distance from the jets' flight paths and the direction in which they traveled; moreover, parcels in the same geographic area, if subject to different uses, would be damaged in differing degrees. However, the court had no facts before it to indicate that such was the case. By holding, on the basis of mere supposition, that the class lacked community of interest, the court foreclosed plaintiffs from obtaining the substantial benefits of class litigation, thereby creating the possibility that some plaintiffs would have no effective remedy.

The court could have avoided this result, while adequately protecting the defendant, by viewing the problem as one of manageability. In other cases, the court has been willing to “rely upon the ability of trial courts to adopt innovative procedures which will be fair to the litigants and expedient in serving the judicial process.” The trial court here had not yet determined whether it was feasible, as plaintiffs alleged, to determine diminution in market value as to subclasses, nor had it decided on a fair method of subdividing the parcels represented by the class. Had the trial court found after certifying the class that subclassification was not possible, it could have decertified it, or restricted the evidence to issues subject to joint proof. By relying on the community of interest rationale, the court in San Jose effectively usurped the function of the trial court, thereby preventing it from shaping the litigation so as to effect justice for all the parties.

III. POLICY CONSIDERATIONS

There were many factors present in San Jose which, if the reasoning of past cases had been followed, would indicate that a different result should have been reached. The issue of liability for airport noise is one which affects large numbers of people. The legislature has

33. Id.
34. The three named plaintiffs sought damages in excess of $500,000. Id. at 453 n.2, 525 P.2d at 705 n.2, 115 Cal. Rptr. at 801 n.2. However, it is entirely possible that some of the class members, who numbered in excess of 700, would have lesser damages, so that bringing an individual suit would not be economically feasible. This is particularly true in light of the technical nature of the factual issues; expensive expert testimony could well be required. See text accompanying note 33 supra.
36. Id. at 821, 484 P.2d at 977-78, 94 Cal. Rptr. at 809-10; see San Jose v. Superior Ct., 12 Cal. 3d at 468 n.2, 525 P.2d at 716 n.2, 115 Cal. Rptr. at 812 n.2 (Tobriner, J., dissenting).
shown its concern about the impact of jet traffic on airport neighbors by authorizing condemnation and acquisition of buffer zones around airports.\(^{37}\) This authorization, however, has rarely been invoked.\(^{38}\) Since airport operators decline to use their eminent domain authority to mitigate the effects of modern jet travel on their neighbors, the courts face an increasing burden of inverse condemnation litigation. For example, there are twenty-five suits pending against the city of Los Angeles which have arisen out of the operation of Los Angeles Airport.\(^{39}\) Moreover, the burden on plaintiffs in these suits is increased by the defendants' attempts to relitigate issues which have already been decided.\(^{40}\) The large number of suits and the numerous issues raised indicate that the possibility of settling unresolved questions expeditiously and consistently is exceedingly remote in the absence of class litigation.

As a result, the burdens of airport development, intended by the legislature to be generally distributed, will fall on those who own land around airports which serve the entire public. Remedies will be given only to those hardy enough and financially secure enough to risk litigation, or to those willing to litigate as a matter of principle even when attorneys' fee and costs may outweigh the potential recovery. Even this number of cases will impose a staggering workload on the courts, and the danger of inconsistent results is substantial.\(^{41}\)

The court's willingness in prior cases to allow the trial court great leeway in shaping class litigation has clearly been motivated by an ex-

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37. Cal. Code Civ. Pro. § 1239.3 (West 1967). The federal government also includes money in airport grants to be used for acquisition of buffer zones.


40. See, e.g., letter from Los Angeles City Attorney to Judge Wenke, November 13, 1973, appended to Supplemental Brief of Real Parties in Interest.

For example, defendants in these suits have raised the defenses of federal preemption, held invalid by the United States Supreme Court in Griggs v. Allegheny County, 369 U.S. 84, 89 (1962); sovereign immunity, held invalid by the California Supreme Court in Nestle v. City of Santa Monica, 6 Cal. 3d 920, 935-36, 496 P.2d 480, 490, 101 Cal. Rptr. 568, 578 (1972) and absence of negligence, even though this is not a defense to a suit in nuisance or inverse condemnation. See Biechele v. Norfolk and Western Railway Co., 309 F. Supp. 354, 358 (N.D. Ohio 1969).

41. While collateral estoppel and res judicata arguably might be asserted once an airport has lost one case, courts have generally frowned on the use of these devices as a "sword." See generally Comment, Mass Accident Class Actions, 60 Calif. L. Rev. 1615, 1628-30 (1972).