ALLOCATION OF LIABILITY TO UNCOMPENSATED LANDOWNERS FOR DAMAGES ARISING IN THE INTERSTATE HIGHWAY SYSTEM

Traditionally, highway construction and maintenance have been regarded as functions of the state rather than the federal government.[1] States are said to have ownership and plenary control over all public ways, including sections of interstate highways, within their borders.[2] Despite the increasing influence exercised in recent years by the federal government, principally through federal-aid programs, courts have retained the view that these functions form an area of state competence:

> Certain of our highways are built and maintained in part out of funds contributed by the Federal government. They form links in an interstate system and are designated as U.S. highways. They are, nonetheless, State highways under the supervision and control of . . . [state agencies].[3]

In 1956 the role of the federal government in highway construction was greatly expanded by the Federal-Aid Highway Act.[4] Its provision for federal contributions up to ninety per cent of the cost of interstate highways[5] requires reevaluation of the traditional view of highway development as a state function. This statute raises the problem whether liability for mone-

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1. Highway Dep't v. Barnwell Bros., 303 U.S. 177, 187 (1938); Atkins v. Kansas, 191 U.S. 207, 222 (1903); Villages of Eden & Hazelton v. Board of Highway Directors, 83 Idaho 554, 564, 367 P.2d 294, 300 (1961); Batcheller v. Highway Comm'n, 251 Iowa 364, 368, 101 N.W.2d 30, 33 (1960); State v. Maas & Waldstein Co., 83 N.J. Super. 211, 218, 199 A.2d 248, 251 (Super. Ct. 1964).

2. Maurer v. Boardman, 336 Pa. 17, 22-23, 7 A.2d 466, 471 (1939), *aff'd sub nom.* Maurer v. Hamilton, 309 U.S. 598 (1940); Hurley v. City of Rapid City, 121 N.W.2d 21, 24 (S.D. 1963).

3. Yost v. Hall, 233 N.C. 463, 468, 64 S.E.2d 554, 558 (1951); *accord,* Mahler v. United States, 306 F.2d 713, 716 (3d Cir.), *cert. denied,* 371 U.S. 923 (1962); State v. George F. Lang Co., 191 A.2d 322 (Del. 1963). Several cases have held that state or local agencies do not delegate the functions of highway location, construction and maintenance—which are the traditional functions of the states—to the federal government when they choose to comply, in order to receive federal aid, with federal regulations concerning highway projects: Sibley v. Volusia County, 147 Fla. 256, 2 So. 2d 578 (1941); Logan v. Matthews, 330 Mo. 1213, 52 S.W.2d 989 (1932); City of Lakewood v. Thormeyer, 171 Ohio St. 135, 168 N.E.2d 289 (1960); Eargle v. Richland County Permanent Roads Comm'n, 123 S.C. 368, 116 S.E. 445 (1923); Bogue v. Clay County, 75 S.D. 140, 60 N.W.2d 218 (1953); Futch v. Greer, 353 S.W.2d 896, 900 (Tex. Civ. App. 1962), *cert. denied,* 372 U.S. 913 (1963); Highway Comm'n v. Humphreys, 58 S.W.2d 144, 146 (Tex. Civ. App. 1933); Singletary v. Heathman, 300 S.W. 242, 246 (Tex. Civ. App. 1927), *aff'd,* 12 S.W.2d 150 (Tex. Comm'n App. 1929).

4. 23 U.S.C. §§ 101-34 (1964).

tary damages should be shifted to the federal government, in a variety of actions including inverse condemnation, when land which has not been formally condemned is damaged as the result of a federal-aid interstate highway project. As yet, no case has shifted monetary liability in the conventional situation in which the state agency works on a highway with federal funds under some degree of federal supervision; state liability in inverse condemnation continues to be derived from the traditional view that highway improvement is a matter of state competence and policy.[6] For example, the Arizona Supreme Court in 1958 refused to modify the conventional view of state liability despite the argument that federal financing and interest in the highway improvement causing the landowner's injury called for a shift to federal liability.[7]

The availability of extensive federal aid is a powerful incentive for the states to submit to federal supervision, and they are undoubtedly relinquishing much of their former control over highway development. Although it operates in this indirect way, federal policy has become the vital, dominant force in highway planning and construction, and this fact challenges the realism of the traditional view of the states' function. This note considers two factors that provide the doctrinal basis for a retention of state liability: (1) the traditional test for allocating liability in joint governmental public improvements, and (2) the traditional respect for state autonomy. These

5. 23 U.S.C. § 120(c) (1964). The provision for 90% federal financing is an innovation of the 1956 Act. The principal predecessor of this act, the Federal Highway Act of 1921, ch. 119, § 11, 42 Stat. 212 (1921), provided that federal funds should not exceed 50% of the cost of improvements, with the exception that certain western states containing extensive unappropriated public lands could receive grants in excess of that percentage.

The primary Congressional purpose in increasing grants-in-aid to the states was to assure that, in the interest of national defense, an adequate interstate system of highways is maintained. United States v. Certain Parcels of Land, 209 F. Supp. 483 (S.D. Ill. 1962), discussed in text accompanying note 30 *infra*; see 23 U.S.C. § 101(b) (1964). The highway-aid program therefore is related to other enactments pertaining to the existence of adequate highways as a factor in national defense. See 23 U.S.C. § 210 (1964) (federal subsidizing of defense access roads); 23 U.S.C. § 311 (1964) (highway improvements strategically important to the national defense).

6. Several state courts, without discussing whether liability could be shifted to the federal government, have tacitly assumed that if anyone is liable to landowners for damages resulting from work on interstate highways it is the state agency that performs construction. *E.g.*, State v. Hollis, 93 Ariz. 200, 379 P.2d 750 (1963); State *ex rel.* Department of Highways v. Keen, 354 P.2d 396 (Okla. 1960); Hurley v. City of Rapid City, 121 N.W.2d 21 (S.D. 1963); Darnall v. State, 108 N.W.2d 201 (S.D. 1961).

7. State v. Leeson, 84 Ariz. 44, 323 P.2d 692 (1958), discussed in text accompanying notes 14 & 25 *infra*; *cf.* Mahler v. United States, 306 F.2d 713 (3d Cir.), *cert. denied*, 371 U.S. 923 (1962) (action for personal injuries resulting from highway construction under pre-1956 federal-aid program).

factors will be viewed against the presence of a national purpose to achieve an adequate interstate highway system, a purpose which may permit the shifting of liability to the federal government. Conceptual problems that would be encountered if a shift were attempted will be briefly treated, and finally, the note will consider the differences in practice that would result from a shift to federal liability.

I. The Traditional Test for Allocation of Liability in Joint Improvements: Participation in Construction

The problem of which governmental unit jointly participating in a public improvement should be liable for monetary damages to uncompensated landowners has arisen in various contexts. In the cases considering this problem, the claimed damage usually can be traced to construction, and the courts either expressly or impliedly have focused on this phase of the improvement—rather than planning or preparation[8]—as the cause of

8. Cases in which the owner is unable at the time he files suit to causally relate his damage to construction are unlikely to present an issue of liability allocation between the state and federal governments. In most of these cases the land in question is physically situated close enough to the improvement that the commencement or completion of construction will bring about the damaging circumstances; and the inability of the landowner arises simply because he has failed to wait for construction to begin before filing suit. One reason why such cases are unlikely to raise an issue of allocation of monetary liability is that the owner filing suit before construction often seeks a non-monetary remedy. Note, 1962 Wash. U.L.Q. 210-23 reviews the remedies of injunction and mandamus. The theory of these actions is that the defendant has failed to formally condemn plantiff's land when the circumstances were such that it should have been condemned. The effect of the former remedy is to restrain further progress on the project until the plaintiff is compensated, and the latter compels officials to institute condemnation proceedings. There are, however, actions for money relief available to the owner suing before construction, and with respect to these, there is a possibility that an issue of monetary liability allocation between the state and federal governments could arise. See Note, *supra*, at 230-42 for a review of these actions, chief of which is the action in inverse condemnation in which the owner theoretically recovers what would have been awarded if a condemnation proceeding had been brought.

The importance and frequency of these pre-construction actions is reduced by one fact: most land, to which damage is certain enough to be compensable in a condemnation proceeding, will in fact be formally condemned. See Note, *supra*, at 242. Uncompensated owners whose damage is speculative will have to wait until the commencement of construction enables them to demonstrate their right to monetary damages; at that time they can causally relate their damage to construction. In an often-cited California case the court said:

> The damage sustained by the plaintiffs was caused by the actual grading of the street, and not by the ordinance fixing the grade. . . . Until the physical condition of the street was changed, their lot had received no actual damage for public use. The enactment of the ordinance rendered it possible that the street would at some time be reduced to that grade, but a mere paper change of grade, did not affect the condition of the lot, or impair its use or enjoyment. Any diminution in value that it might sustain from the mere passing of the ordinance was purely speculative, and

damage. As a logical step they then place liability on the governmental unit most visibly or directly engaged in the construction.[9] Active participation

contingent upon the time when grading should be done. . . . Hence, the court did not err in refusing to permit testimony as to the damage caused by the adoption of the ordinance. Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 621-22, 37 Pac. 750, 753 (1894).

See MANDELKER, INVERSE CONDEMNATION: THE CONSTITUTIONAL LIMITS OF PUBLIC RESPONSIBILITY 1-2 (1964).

Once construction is available it is unlikely that courts would refer to some preparatory or planning phase as the cause of plaintiff's damage. But because it is possible to causally relate some kinds of damage to either planning or construction, a knotty problem of allocating liability could be presented if the state performed one of these functions and the federal government the other. For example, an owner's loss of access might be related to the location decision made by one government or it might be related to omission to build an underpass by the other government which performs the construction. However, the courts are likely to disregard the former conceptualization of cause, because the idea of overt governmental activity which physically affects the land is engrained in the theories of recovery to which the courts are accustomed. See United States v. Causby, 328 U.S. 256, 265 (1946). MANDELKER *op. cit. supra,* at 4-10 reviews three conceptual backbones for the variety of actions grouped under the term "inverse condemnation": (1) the property right approach, (2) the tort approach and (3) the eminent domain background. The first category revolves around some physical occurrence such as flooding (bringing into play doctrines drawn from water law) or slides and encroachments (which make relevant the doctrines of property law concerning the obligation of lateral support between private landowners). *Id.* at 4-5. Tort analysis is predicated upon physical occurrences such as have traditionally formed the basis for recovery in trespass, negligence or nuisance. *Id.* at 6-7. The extension of eminent domain concepts has resulted from increased recognition that damage arising from construction may be tantamount to a physical entry and "taking" by the sovereign. *Id.* at 9-10.

There is a possibility that uncompensated landowners could not causally relate their damages to construction, even if it had been commenced at the time of filing suit. In Logan v. Matthews, 330 Mo. 1213, 52 S.W.2d 989 (1932), taxpaying residents of a town sought to enjoin the state highway commission from relocating a highway around their town. If they had proceeded on a theory of damage to their land, such as depletion of value, they could not have related their damage to anything except the choice of location. However, it is unlikely that governmental liability could be predicated upon decisions that have non-physical consequences this remote (see Darnall v. State, 108 N.W.2d 201, 205 (S.D. 1961)) and, in fact, the plaintiffs in *Logan* made no such claim but rather alleged that the commission lacked statutory authority to make the relocation decision.

9. In Cooper v. City of Bogalusa, 195 La. 1097, 198 So. 510 (1940), the state was relieved of liability for damages resulting from a flood control project. The court articulated the step from causation to allocation of liability: "If plaintiff has suffered damage, then the active and only agency causing the damage is the United States government." *Id.* at 1103, 198 So. at 512. In Central N.Y. Broadcasting Corp. v. State, 3 App. Div. 2d 128, 158 N.Y.S.2d 650 (1957), a landowner sued the state for erosion damage to his land resulting from a flood control project on which the federal government had done the actual construction work. The court, employing an analysis sounding in negligence, searched the record for a causal connection between the damage and some negligent act or omission on the part of the state. Finding none, the court released the state from liability. This same sort of causation reasoning is manifested in

in construction appears to be the pivotal factor in allocation of liability in joint flood control projects and maintenance of navigable streams.[10] Two California cases illustrate. *In Cory v. City of Stockton*[11] the state was relieved of liability when its participation was limited to acquisition of all rights-of-way for the project, and the federal government was responsible for actual construction. In *Clement v. State Reclamation Bd.*[12] the state and federal governments were held jointly liable when, in addition to providing the rights-of-way, the state actively joined the federal government in construction.[13]

These cases reveal a judicial predilection to hold liable the government whose agents actually were doing the work that caused damage to land. Because state agencies typically perform the actual construction of federal-aid highways, this tendency is one explanation for the result reached by courts that have continued to uphold state liability. This observation is based

Owens v. Highway Dep't, 239 S.C. 44, 121 S.E.2d 240 (1961), discussed in text accompanying note 15 *infra*; see City of Wichita Falls v. Real Estate Trust, 135 S.W.2d 736 (Tex. Civ. App. 1939).

10. In Vuljan v. Board of Comm'rs, 170 So. 2d 910 (La. Ct. App. 1965), the owner of an oyster bed sued for damages allegedly resulting from the dredging of a channel in the Mississippi River Gulf Outlet. State participation was limited to furnishing all lands, servitudes and rights-of-way incident to the construction and maintenance of the project, and to indemnify and hold harmless the United States against all claims that might result. The Army Corps of Engineers performed the actual work on the project, which fact led the court to call this a "federal project" for which the state could not be liable. *Id.* at 912; *accord,* Haeuser v. Board of Comm'rs, 170 So. 2d 728 (La. Ct. App. 1965); Cooper v. City of Bogalusa, *supra* note 9; Central N.Y. Broadcasting Co. v. State, *supra* note 9; see Tilden v. United States, 10 F. Supp. 377 (W.D. La. 1934); *cf.* General Box Co. v. United States, 351 U.S. 159 (1956). *But see* Danziger v. United States, 93 F. Supp. 70 (E.D. La. 1950); Demoski v. State, 12 Misc. 2d 416, 168 N.Y.S.2d 242 (Ct. Cl. 1957); *cf.* Stewart v. Sullivan County, 196 Tenn. 49, 264 S.W.2d 217 (1953).

11. 90 Cal. App. 634, 266 Pac. 552 (Dist. Ct. App. 1928).

12. 35 Cal. 2d 628, 220 P.2d 897 (1950). The court rejected dictum from Brandenburg v. Los Angeles County Flood Dist., 45 Cal. App. 2d 306, 114 P.2d 14 (Dist. Ct. App. 1941) to the effect that any federal participation relieved the state of liability.

13. An active role in construction appears to have been a prime factor in the allocation of liability in joint municipal-federal projects undertaken during the depression years. Morgan v. City of Logan, 125 W. Va. 445, 24 S.E.2d 760 (1943) (city liable for active operational role of providing trucks and drivers for hauling materials); see City of Houston v. Anderson, 115 S.W.2d 732 (Tex. Civ. App. 1938) (city liable). Municipal liability for blasting damage was denied, however, in Perry County v. Tyree, 282 Ky. 708, 709, 139 S.W.2d 721 (1940), because:

> The proof introduced at the trial failed to show that either the City or the County planned or supervised the work, or engaged or directed any of the workmen. On the contrary, the project was planned and financed by the Works Progress Administration, whose agents and employees were in complete charge of the operation.

See Heimann v. City of Los Angeles, 30 Cal. 2d 747, 756, 185 P.2d 597, 603 (1947). See also Annot., 136 A.L.R. 525 (1942).

partly on inference because the allocation of liability between state and federal governments has been infrequently acknowledged as a problem with regard to highway improvements (this is probably because the traditional view of state function has been entrenched so strongly that it has not often occurred to anyone that liability might be shifted to the federal government). Cases considering the problem have, however, established an operative distinction between an active role by federal employees or agents in construction on the one hand and behind-the-scenes federal involvement in financing, planning and supervision on the other. The Arizona Supreme Court upheld state liability in inverse condemnation, principally on the basis of this distinction, in *State v. Leeson*.[14] The federal government, possessing a special interest in improving access roads to military reservations, effectively supervised the improvement since its approval of state proposals was a condition precedent to the granting of a federal subsidy (which covered almost the entire cost of the project). Nevertheless, state responsibility for construction was held determinative. The opposite result obtained in the South Carolina case of *Owens v. Highway Dep't*,[15] in which the state highway department was relieved of liability in inverse condemna-

14. 84 Ariz. 44, 323 P.2d 692 (1958), discussed in text accompanying note 25 *infra*; *accord*, Public Water Supply Dist. v. United States, 66 F. Supp. 66 (W.D. Mo. 1946); *cf.* Mahler v. United States, 306 F.2d 713 (3d Cir.), *cert. denied*, 371 U.S. 923 (1962) (action for personal injuries resulting from highway construction). In the *Water Supply Dist.* case the federal government was interested in widening a highway owned by the state of Missouri so as to provide better access to a war plant. Accordingly, the federal government acquired the land necessary for the improvement and then entered into an agreement with the state whereby the state was responsible for actual construction which was to be subsidized by federal funds. The private contractor performing the construction damaged the pipelines of the water district, which thereafter was made a party to the condemnation action and filed the claim in question against the United States. The district's theory was that the contractor had a contract with the federal government in the performance of which he did what amounted to a "taking" of plaintiff's property. The court rejected the contention that the United States had been in privity with the contractor, stating that the project was "an undertaking of the Highway Commission of Missouri, and not an undertaking of the United States Government." 66 F. Supp. at 70. The only undertaking of the federal government was to provide funds for the improvement.

> Under the scheme by which the United States Government is shown to have participated in question, it is apparent that the United States Government was only seeking a "means" whereby commerce and defense workers could reach one of its defense plants. The United States Government did not, as a primary obligation, undertake to establish such "means." The road which was . . . [improved] that provided such "means" belonged to the state of Missouri. . . . The highway Commission of said state prepared the plans and specifications for the project in question and undertook the direct work of constructing said road. Under such circumstances it cannot be contended that any damage resulted to plaintiff by reason of any act or thing that was done, by any person in the work of constructing said road who had a contract with, or acted on behalf of the United States. *Id.* at 71.

15. 239 S.C. 44, 121 S.E.2d 240 (1961).

tion for damages resulting from a highway relocation necessitated by extension of runways at a military base. However, in this case the state highway department's participation was limited to surveying the relocation route; the Army Corps of Engineers drafted the specifications for construction and contracted for a private firm to do the work. In addition, the contractor, who was paid by the Department of Defense, was supervised by one Army engineer who was present on the job. The court noted that the action was to recover damages for a "taking" (water damage to plaintiff's land) which had resulted from the manner in which the construction was carried out. It held that the state agency could not be held to have "taken" since it had not engaged in the construction of the highway.

Against this background, the statement in the 1956 Federal-Aid Highway Act that "construction of any highways or portions of highways located on a Federal-aid system shall be undertaken by the respective *state highway departments or under their direct supervision,*"[16] becomes a significant impediment to any shift towards federal liability. Nevertheless, the position that liability attaches solely to the state because it performs construction fails to recognize that federal policy increasingly controls the detail, direction and manner in which construction operations are conducted. Once recognized, this fact makes possible the assertion that the federal government, by controlling state activity, does the "taking" of land which is damaged by interstate highway development. As the effectiveness of state policy as an initiating and directing force wanes in favor of federal influence, state activity becomes an unsatisfactory foundation upon which to support a theory of liability. The following section, however, discusses impediments to the success of this argument.

II. State Autonomy as a Factor in State Liability

A second factor in the traditional result of state liability is the respect Congress and the courts exhibit for state autonomy. To preserve state autonomy Congress has tended to pursue its policies through indirect channels, *i.e.,* to induce state action in directions that achieve national policies. Courts have deferred to this Congressional tendency, which placates those who assert that federal power is growing at an alarming rate; indirect action by Congress appears less threatening than direct preemption.

The concept of state autonomy embodied in the tenth amendment is also influential in judicial characterizations of the federal-state relationship concerning national policies as one of contract between principals, into which the states have entered voluntarily.[17] This position expresses the

16. 23 U.S.C. § 114 (1964). (Emphasis added.)

17. The framework of this concept of federal-state relations was largely established by

currently prevailing view of federal-state relations in the context of interstate highway development;[18] the states are said to enter as contracting principals

the Supreme Court's discussion of Congressional taxing power in two famous cases. In United States v. Butler, 297 U.S. 1 (1936) the Court struck down national legislation concerning agricultural adjustment and thereby placed limits upon the power of Congress to authorize expenditure of public funds to indirectly accomplish some policy pertaining to the general welfare. The Court held that Congress could not utilize the power given it by the Constitution to tax and spend as an "instrument to enforce a regulation of matters of state concern." *Id.* at 70. The Court's view of a burgeoning of federal power is expressed in the words: "The power to confer or withhold unlimited benefits is the power to coerce or destroy." *Id.* at 71.

The coercion argument was next raised in Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937): "The assailants of the [federal] statute say that its dominant end and aim is to drive the state legislature under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government." *Id.* at 587. However, the Court, endeavoring to draw a distinction between duress and inducement (*Id.* at 586), rejected this argument and upheld the Social Security Act:

> Even sovereigns may contract without derogating from their sovereignty. . . . The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. . . . We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. Alabama is seeking and obtaining a credit of millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government . . . do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. *Id.* at 597-98.

18. See HIGHWAY RESEARCH BD., SPECIAL REP'T 21, RELOCATION OF PUBLIC UTILITIES DUE TO HIGHWAY IMPROVEMENT 35 (1955):

> As discussed above, the federal-aid highway program is a voluntary one, in which the States participate under their own initiative. Highway projects are initiated, controlled, and executed by the States, the Federal authorities possess merely a veto power in the use of Federal funds on such projects. The States are not forced to undertake any highway improvement program; any highway project they do undertake may be financed exclusively with State funds and would not come within the scope of Federal highway aid. The only sanction invoked for noncompliance with the standards of construction on Federal-aid projects is the withdrawal of Federal-aid from such a project.
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> The position that an offer of Federal-aid in return for compliance with approved standards represents an unconstitutional coercion on the states to adopt such standards and an unconstitutional attempt to regulate activities not within the power of Congress, has been judicially rejected by the Supreme Court in cases involving Federal programs of unemployment insurance, inheritance taxes, and maternity relief. The same principles would seem to be applicable in the case of the highway program. The legislative history of the Federal-aid system and of roads constructed under the National Industrial Recovery Act also support this conclusion. (Footnotes omitted.)

Congress was careful to stipulate that states are under no compulsion to participate in the aid program: "any state *desiring* to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned." 23 U.S.C. § 105(a) (1964); and further:

> The committee emphasizes that the program authorized herein is not one by which the Federal Government will construct highways. . . . [It will] retain the basic structure of existing law without disturbing the present relationship between the Bureau of Public Roads and the States, nor the rights of the States in planning their programs and laying out the location of their highways. S. REP. No. 1965, 84th Cong., 2d Sess. 4 (1956).

In City of Lakewood v. Thormeyer, 171 Ohio St. 135, 168 N.E.2d 289 (1960), the court rejected a contention that state legislative power to designate highways to be im-

and not agents into arrangements by which they act primarily in their own interest but incidentally also promote the national interest.[19] If the states act voluntarily and primarily for their own benefit, it follows that they should correspondingly bear significant financial burdens. If valid, this verbalization of state interest is a strong support for continued state liability to uncompensated landowners. The following section questions whether this idea is realistic.

III. National Purpose

In 1962 the Supreme Court in *Griggs v. County of Allegheny*[20] reiterated the conventional position on federal-state participation in federally assisted programs. The case contains, however, a dissenting opinion by Mr. Justice Black which is the first significant rejection of this position as it relates to liability allocation. The Court found, and the dissent agreed, that by constitutional standards the noise and harassment caused by the landing and taking off of aircraft constituted a "taking" of land located near an airport. Black's position was that the federal government, rather than the local governmental unit held liable by the majority, owed just compensation.

The county had taken the initiative for planning, locating, and construct-

proved or constructed had been abdicated in favor of the federal government when the state participated in the federal-aid program. The court noted the federal government's program is contingent upon a state decision to improve, and that after such a decision the only power of the Secretary of Commerce is to approve or veto. "It still remains with . . . [state officials] to say in the end what highways, if any, can belong to the federal system." *Id.* at 145, 168 N.E.2d at 297.

Two cases, although they were decided before passage of the 1956 Act, express authoritative opinions about the federal-state relationship concerning the exercise of state police power to require relocation of utility facilities in the way of federal-aid highway projects. In Southern Bell Tel. & Tel. Co., 266 S.W.2d 308 (Ky. 1954), Southern Bell contended that the states were acting as agents of federal policy in constructing federal-aid highways, and that since a state cannot exercise its police power in favor of another sovereignty the state could not force a relocation. The court rejected this argument, stating that federal-aid legislation has not only failed to make agents out of the states but also was not intended to displace the conventional state functions of highway development and maintenance. *Id.* at 311. The same argument was rejected (on the Kentucky holding) in Southern Bell Tel. & Tel. Co. v. State *ex rel.* Ervin, 75 So. 2d 796, 800 (Fla. 1954). *But see* Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935), discussed *infra* note 33.

19. See Public Water Supply Dist. v. United States, 66 F. Supp. 66 (W.D. Mo. 1946), discussed *supra* note 14. In State v. George F. Lang Co., 191 A.2d 322 (Del. 1963), the court held that the state could validly exercise its own power of eminent domain to acquire land for a federal-aid highway project, because the state has an interest in adequate highways which exists concurrently with the national interest to maintain an interstate sytem for national defense. *Accord,* State v. Leeson, 84 Ariz. 44, 323 P.2d 692 (1958), discussed in text accompanying note 25 *infra.*

20. 369 U.S. 84 (1962); *accord,* Alfonso v. Hillsborough County, 308 F.2d 724, 726 (5th Cir. 1962).

ing the airport. This work was done subject to the approval of the Civil Aeronautics Administration, and the project was financed in large part by federal funds made available for the purpose of inducing local units to establish airports. The role of the county was analogous to that of the states in the highway-aid program, and the majority holding fortifies the traditional doctrine that the states, voluntarily participating as autonomous entities in that program, should be liable when construction causes a "taking" of private property.

The dissent, however, pierced the veil of ostensible initiative on the part of the county and stated that the county should not be liable because the "taking" had been done by the federal government pursuant to a national purpose: "The planes that take off and land at the Greater Pittsburgh Airport wind their rapid way through space not for the peculiar benefit of the citizens of Allegheny County but as part of a great, reliable transportation system of immense advantage to the whole Nation in time of peace and war."[21] To support his view that the federal government had done the "taking," Mr. Justice Black pointed to three factors. First, Congressional fiat had already declared all airspace for takeoffs and landing, as well as for flight, to be navigable airspace within the public domain. This declaration was a first step in enacting a comprehensive plan for regulating every aspect of air transit. Second, the opinion emphasized the degree of federal control exercised over the airspace: "These airspaces are so much under the control of the Federal Government that every takeoff from and every landing . . . is made under the direct signal and supervisory control of some federal agent."[22] Black concluded by emphasizing the national purpose Congress sought to implement by federal financing: "The construction . . . was financed in large part by funds supplied by the United States as part of its plan to induce localities . . . to assist in setting up a national . . . air-transportation system."[23]

Mr. Justice Black's position is potentially applicable to the question of liability allocation under the federal-aid highway program, especially since the 1956 Act contains the following expression of national purpose:

> It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

21. 369 U.S. at 94 (dissenting opinion); see Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 424 (1935), discussed *infra* note 33. *But see* note 26 *infra* and accompanying text.

22. 369 U.S. at 92-93.

23. *Id.* at 94.

> It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense . . ., is essential to the national interest and is one of the most important objectives of this Act.[24]

At present, no court has considered Mr. Justice Black's argument in connection with a possible shift to federal liability under the 1956 Act. The case most nearly in point, however, rejected an analogous argument which asserted that a state should be relieved of liability for damages resulting from improvement of a military access road. In the 1958 Arizona case of *State v. Leeson*[25] it was contended that the federal interest in such roads—evidenced by almost total federal financing of the project—made federal policy such a dominant force that the state, in carrying out construction, was a mere agent or "middleman." This contention was rejected in an opinion which adopted the conventional view that a state has its own vital interests motivating it to participate voluntarily as a contracting principal; in this case the state interest was said to be that of sharing in the national defense.

Notice, however, a departure in this case from the usual situation in which a contract analysis is utilized. Rather than acting primarily to immediately serve its own interests and only incidentally to further the national purpose, the state here acted primarily in furtherance of the national purpose of maintaining an adequate national defense, which would not benefit the state until accomplished on a national scale and then only as an incident to the protection of all the states. The contract analogy is less applicable in this case because what the state was doing is incompatible with a view that a unique set of interests relating only to the state's governmental competence, existing within a certain geographical area, motivated the state to participate. This observation about the *Leeson* case does not, however, necessarily preclude application of the state interest analysis to a high-

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24. 23 U.S.C. § 101(b) (1964), quoted in City of Carrollton v. Walker, 215 Ga. 505, 511, 111 S.E.2d 79, 83 (1959). In City of Lakewood v. Thormeyer, 171 Ohio St. 135, 168 N.E.2d 289 (1960), discussed *supra* note 18, the court said:

> The lessons of World War II, the changing international picture since then, and the unexpected population increase in this state and nation, together with the attendant increase in motor-vehicle registration, have presented transportation problems undreamed of 25 years ago. The national concern is evidenced by the multibillion-dollar aid program authorized by the Federal Aid Highway Act. Most certainly, national defense was a prime consideration in this program. . . . Naturally the route and design of a relocated facility on an f. a. p. highway or the designation of an f. a. p. highway is of concern and subject to the approval of both the Director of Highways and the federal authority. *Id.* at 147, 168 N.E.2d at 298.

25. 84 Ariz. 44, 323 P.2d 692 (1958), discussed in text accompanying note 14 *supra*; see Public Water Supply Dist. v. United States, 66 F. Supp. 66 (W.D. Mo. 1946), discussed *supra* note 14.

way improvement under the 1956 Act. A state can envision that the existence of an improved interstate highway system within its borders will produce benefits such as the alleviation of traffic congestion and a boost to its economy. These are matters of state concern, and they form a set of interests which exists concurrently with the national interest.

Mr. Justice Black's position nevertheless raises the question whether there is a primacy of national purpose in the interstate highway program which so overshadows the state interest that it makes the idea of contracting principals unrealistic. This observation raises the further question of what sense "primacy" is used here. It cannot mean that the set of state interests are not sufficiently important to the state that it would not, in the absence of a federal-aid program, undertake the financing of a highway program in which it would have to accept liability to uncompensated landowners. Thus, the benefits of federal-aid for highway development do not necessarily accrue to the states as a mere incident to the attainment of a national purpose.[26] In fact, it is possible to assert that the benefits accruing to a state are, relatively speaking, as important to the population of the state as are those that accrue to the nation. Thus, the *Leeson* statement of state interest effectively counters any attempt such as that made by Black to quantitatively or qualitatively compare the importance of the national and state interests in highway development and thereby show that a state is not acting primarily in its own behalf.

The idea of primacy of national interests, however, can be conceived in another way which more effectively undermines the conventional view of

26. The *Leeson* argument is an effective counter to Mr. Justice Black's opinion in Griggs v. County of Allegheny, 369 U.S. 84, 94 (1962), quoted in text accompanying note 21 *supra,* that liability should be shifted because the primary purpose behind the operation of airports is national in scope. The argument points out what Black arguably overlooked: that the locality may have an interest which exists concurrently with the federal interest and which, although not as wide in scope, may be intensive enough in the geographical area within which it exists to support local liability. The *Leeson* argument gains support from authoritative expressions on issues other than federal-state liability allocation. See State v. George F. Lang Co., 191 A.2d 322 (Del. 1963), discussed *supra* note 19. HIGHWAY RESEARCH BD., SPECIAL REP'T 21, RELOCATION OF PUBLIC UTILITIES DUE TO HIGHWAY IMPROVEMENT 33 (1955), rejects as untenable the position that the highway-aid program is designed solely for national rather than local benefit and that therefore the states cannot exercise their police power to require utilities to relocate their facilities when they obstruct a federal-aid project. The rejection is based upon what is called the obvious truth that localities almost inevitably benefit when nearby highways are improved because of the alleviation of such problems as traffic congestion and because of the boost better transportation facilities gives to commerce and the standard of living. From this perspective, it becomes almost irrelevant for purposes of liability allocation that the Congressional design was national in scope, because both the nation and the locality derive benefits which may be relatively as important to one as to the other.

principals contracting to further their own interests. This argument is that the development of interstate highways is essentially the function of the federal government. Rejection of the position that highway development is a state function is accomplished by asserting that the national purpose has become the dominant motivating and directing force behind highway development, and that Congress is determined to fulfill, one way or the other, this national purpose. The federal government is willing to defer as much as possible to the idea of state autonomy by maintaining a scheme of ostensible state initiative which appears to revolve around a set of state interests and policies. But realistically viewed, the federal-aid highway program contains machinery which enables the federal government to accomplish its goals with or without state cooperation. Under this view it is acknowledged that the states are induced to participate by appeals to their interests; but the federal-state relationship is not viewed from the perspective of the states' purpose in entering that relationship. Rather, the starting point of this approach is the contemplation of Congress that the states should be allowed, at the grace of the federal government, the privilege of assisting only as long as they function satisfactorily.

It is unrealistic to call this a contract relationship between principals when one party has so much leverage over the other, both in regard to the terms of the arrangement and the power to accomplish its purpose with or without the participation of the other. This view is supported by cases in which courts have dealt with aspects of federal-state relations which—unlike the question of liability allocation—directly and immediately threaten the fulfillment of the national purpose of the 1956 Act. The issue in these cases arises when a state is unable to condemn land for a section of the Interstate System because of state law or cannot do so with sufficient promptness, and it requests the federal government to condemn under section 107 of the act.[27] In *United States v. Certain Parcels of Land in Knox County*[28] a federal district court upheld section 107 against a contention that the federal government could not constitutionally do for the state what the state lacked the power to do for itself. The court stated that the provision was not intended to aid the states in carrying out state projects but authorized the federal government to exercise *its own power* of eminent domain to accomplish the national purpose of acquiring lands for the Interstate System.[29] It follows from the court's reasoning—although the issue pre-

27. 23 U.S.C. § 107 (1964).

28. 175 F. Supp. 418 (E.D. Tenn. 1959).

29. We must conclude that state policy with reference to cemeteries, whatever it may be, is not controlling. The Federal-Aid Highway Act of 1956 makes it clear that these lands are being taken for highways to be used in the national defense. The authority of the Federal Government to condemn for that pur-

sented did not require the court to go this far—that the Interstate sections are actually constructed pursuant to a national purpose. From this perspective, it is arguably unrealistic to assert that construction—the traditional touchstone for liability—remains essentially a state function.

In *United States v. Certain Parcels of Land in Peoria County*[30] another federal district court rejected an analogous contention of federal inability to condemn because of the state's disability to proceed under state laws. The argument was that because the agency designated by the state legislature to guide the participation of the state in the federal-aid program could not under Illinois law condemn land which had already been devoted to a public use (in this case, a cemetery), the agency had no authority to circumvent its disability by requesting federal condemnation. The foundation for the court's holding was its recognition of Congressional intent that the national purpose should be implemented, only to a limited extent, by state right-of-way acquisitions. When state implementation becomes impracticable, the act "holds in reserve the federal power of eminent domain" to carry out the federal policy.[31] The court interpreted Congressional intent to be that "accomplishment of the construction of the nation-wide system should not be thwarted by the inability of the several states to obtain the necessary rights-of-way."[32] After making these policy observations, the court held that:

> [T]he authority of the . . . [state agency] to make the request which invoked the federal power must be inherent in the Illinois statute. *The interstate system is essentially a federal project.* Had Illinois chosen to not participate in the project, the power of the United States to route FAI 74 over the proposed right-of-way through Illinois and over the land in suit cannot be questioned. Illinois did choose to participate. . . . Illinois, having elected to participate . . . and having designated the . . . agency authorized to act in her name, may not invoke the laws of the State to deny to her designated agent the authority to do every act necessary to the furtherance of the federal program.[33]

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pose is unquestioned. Since a national interest is involved, it is immaterial whether the Federal Government utilizes its own power of condemnation or that of the State. *Id.* at 423.

30. 209 F. Supp. 483 (S.D. Ill. 1962), *aff'd sub nom.* United States v. Pleasure Driveway & Park Dist., 314 F.2d 825 (7th Cir. 1963).

31. *Id.* at 489.

32. *Ibid.*

33. *Id.* at 490. (Emphasis added.) Eden Memorial Park Ass'n v. Department of Pub. Works, 59 Cal. 2d 412, 380 P.2d 390, 29 Cal. Rptr. 790 (1963), held that the State Highway Engineer had been properly authorized by the state legislature to make a request for federal acquisition under section 107. The court stated:

> In seeking a reasonable balance between local and national needs with respect to the Interstate System section 107 does not put generally applicable local policies governing condemnation ahead of the needs of the Interstate System. . . . It does,

The language of these federal cases challenges the realism of retaining the conventional position that the state and federal governments participate as contracting principals in all joint highway projects. In effect, the courts indicated that the availability as well as the employment of the federal power to condemn evidences the essentially federal character of the project, which, in an appropriate case, could form the basis of an assertion by an uncompensated landowner that the federal government has done the "taking." However, these cases involved projects in which the state inability to condemn immediately blocked development of the Interstate System; courts not faced with such an impending threat have not displayed comparable impatience with the conventional position of state autonomy. Since the issue of liability allocation poses no immediate threat, it is questionable whether courts would bring national purpose so strongly to bear upon that issue.

IV. Conceptual Problems Involved in a Shift to Federal Liability

Basically, the theory developed in this note is that liability should be imposed upon that government whose interest makes it the preeminent force

however, protect local interests by requiring that the state request any action by the Secretary [of Commerce] pursuant to its terms. *Id.* at 418, 380 P.2d at 394, 29 Cal. Rptr. at 794.

The argument that construction of the Interstate System is essentially a federal undertaking gains limited support from Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935), *reversing* Nashville, C. & St. L. Ry. v. Baker, 167 Tenn. 470, 71 S.W.2d 678 (1934). In this case the state court had upheld the constitutionality of a statute providing for contribution by railroads when the presence of their facilities necessitated construction of an underpass to enable a highway improvement to go through. The Supreme Court reversed and remanded because the state court, under the impression that a statute valid when enacted could not be invalidated by a change in the circumstances in which it is administered, refused to consider several arguments raised by the railroad to the effect that the statute had been invalidated because its administration under the then current conditions amounted to an unreasonable and arbitrary exercise of the state's police power. The Supreme Court opinion offers no direct holding on these arguments, but it lends tacit assent to them because it states that the court should have at least considered and possibly could have adopted the arguments. One of these arguments had been adopted by the trial court (which had been reversed by the state supreme court); it stated that the building of the underpass to which the railroad was expected to contribute was "part of a state-wide and nation-wide plan to foster commerce . . . and that the decision to build this underpass, its location and construction, was not in any proper sense an exercise of the police power, but rather . . . [was] pursuant to a general plan of internal improvement fostered by the Congress of the United States in conjunction with the several States to make a nation-wide sytem of super-highways. . . ." *Id.* at 416. The Supreme Court added that the state court might have found that the building of adequate facilities for such purposes as carrying the mails and national defense was included in this national purpose, and that the national purpose had, since the passage of the statute, made the federal government rather than the state the primary builder of roads, which change of conditions could have been found to invalidate the statute. *Id.* at 416-19.

behind a highway project; the courts should put aside the rhetoric of state autonomy and ostensible state responsibility for construction and inquire whether federal policy, operating behind the scenes to achieve a national purpose, is such a force. However, because there is probably insufficient federal influence to justify a shift to federal liability in every federal-aid project, there is a need for criteria to define the proper spheres of liability. This need makes it necessary to formulate more precisely the theory of federal liability.

A. *The Federal Government Causing Damage to Land*

Liability has been allocated traditionally on the theory that the government performing construction causes damage to land and should therefore be liable. A shift to federal liability would not necessarily depart from this analysis if the courts were able to visualize that the federal government is, in effect, responsible for construction. Professor Mandelker has stated that the setting of federal standards, which states must follow if they are to receive aid, suggests a principal-agent relationship between the state and federal governments under which the latter might be held vicariously liable for actions of the state agency performing construction.[34]

The matter might also be viewed by analogy to another private law doctrine, that of the borrowed servant. Under this view it would be emphasized that interstate highway development is essentially a federal undertaking in which the federal government borrows the state highway department and its employees to carry out construction. Under this view the state is no longer an autonomous entity participating—even as agent—in a highway project, and the federal government is solely responsible for acts of construction. State-paid employees would be working directly for the federal government with the state existing as a mere conduit[35] for the payment of these employees.

These theories drawn by analogy from private law doctrines suffer from two principal defects. First, they strike at a point where traditional views are most entrenched; they openly conflict with the idea of state autonomy. To expressly call the states agents of the federal government, or conduits for effecting the national will, would be objectionable to those desiring to maintain the status quo in federal-state relations. Second, the courts would probably become involved in the technical issues suggested by the private law doctrines, which issues have little to do with policy questions concern-

34. MANDELKER, INVERSE CONDEMNATION: THE CONSTITUTIONAL LIMITS OF PUBLIC RESPONSIBILITY 45 (1964). The agency analysis is, of course, against the weight of present case authority. See cases cited note 18 *supra*.

35. *Cf.* Northern Pac. Ry. v. Morton County, 131 N.W.2d 557, 565 (N.D. 1964).

ing allocation of the financial burdens of highway development. Damage typically results from particular operations connected with a project. Federal standards and supervision are more influential with respect to some of these operations than to others, and courts might be tempted to consider arguments to the effect that the federal government should be absolved from liability when the decisions of state officials were the predominant initiative behind a particular operation causing damage, despite the overwhelming federal influence behind the project in general. Courts would be forced into a case-by-case unravelling of federal-state relations with regard to these particulars. Thus, if the state were called the agent of the federal government, courts might get entangled in a factual issue of whether the state had been "authorized" to perform the activity that led to the damage. A similar issue might arise under the borrowed servant analysis if a court considered whether the federal government, as borrower, had attained enough dominion and control over the servant highway department with respect to a particular operation, and the state, as lender, had relinquished enough control, to justify a conclusion that the federal government should be solely liable.[36] There is also danger that a court employing these analogies would hold the state and federal governments concurrently liable, which would lead, in turn, to complex case-by-case considerations of proportioning the contributions of each.

The agency analogies could be avoided by asserting that the setting of federal standards and specifications is the ultimate cause of the damage, because they divert the activity of the state agency performing construction into that which is the immediate cause.[37] But this approach suffers from the

36. For discussions of issues that might arise concerning federal borrowing of state or local employees, see McFarland v. Dixie Mach. & Equip. Co., 348 Mo. 341, 153 S.W.2d 67 (1941); Annot., 136 A.L.R. 525 (1942).

37. Professor Mandelker suggests that the federal government might be held liable "directly on the basis of its own requirements and standards." MANDELKER, *op. cit. supra* note 34, at 45. The existence of federal supervision in regard to the particulars involved in highway construction was relied upon heavily in United States v. Certain Parcels of Land in Peoria County, 209 F. Supp. 483 (S.D. Ill. 1962), discussed in text accompanying note 30 *supra*. Among the areas of federal control listed by the court were:

> All programs of construction proposed by a State must be submitted to the Secretary for prior approval, and the Secretary must give preference to programs which expedite completion of the interstate system and priority to projects recommended by the Secretary of Defense as important to the national defense. All plans, specifications and estimates of construction projects must be submitted for the approval of the Secretary, and these must meet with standards established by the Act. All construction by a State is subject to inspection and approval by the Secretary. *Id.* at 489. (Footnotes omitted.)

Many of the standards established by the 1956 Act are quite detailed. For example, the state, in order to receive aid for construction in the Interstate System, must adopt geometric and construction standards such as to enable the proposed project to adequately accommodate traffic for at least a period of twenty years (section 109(a)); construction

same two principal defects as the agency theories. First, it resembles too closely a holding that the states are coerced by the federal government in the manner in which they perform construction operations. Second, the courts would again become entangled in deciding whether the state was acting under its own initiative or was attempting to satisfy some federal standard when it engaged in a particular operation in a particular way.

B. *Allocation of Liability Based on a Pre-Set Formula: Avoidance of Case-by-Case Determinations*

This sampling of problems indicates that a shift to federal liability would be accomplished best by wiping the slate clean of all formulae drawn by analogy from private law. There is no need for tedious conceptualizations in such terms as agency to enable courts to visualize—in a way that satisfies the mind trained in a common law tradition still dominated in large measure by the idea of the physical event as an operative fact—a chain of physical causation between the federal government acting through its agents and damage to land. Even though the particular operation causing damage occurs on a construction site miles from the nearest federal agent, the federal government can be linked to that operation without postulating either its physical presence or some other tangible evidence of its influence. The link suggested here is the non-tangible one of the national purpose, which transforms some highway development, regardless of who performs construction, into an essentially federal undertaking by virtue of the federal policy which is the predominant motivating and directing influence behind the project, although an influence which cannot physically be seen on the job.

A shift to federal liability could be accomplished by gauging the intensity of the national interest in different kinds of highway improvements according to predetermined rules. Rules might be formulated on the basis of the classification of all federal-aid highways into a "secondary system," a

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must ensure "all weather service and permit maintenance at a reasonable cost (section 109 (c)); the Secretary must approve state installation of traffic signals and various marking signs only when it will "promote the safe and efficient utilization of the highways" (section 109(d)); the Secretary's approval of safety devices at railroad crossings or drawbridges is a condition precedent to the granting of federal aid (section 109(e)); states shall not allow commercial establishments to be located on the Interstate System, nor allow additional points of access, without the prior approval of the Secretary (section 111). This latter provision could, for example, form the basis of an assertion that federal restrictions on access, rather than state construction of an Interstate section, were the cause of a plaintiff's loss of access. Likewise, federal specifications concerning matters like grade could be called the cause of flood damage resulting from construction of a fill to meet the grade requirements.

"primary system," and an "Interstate System."[38] The national purpose does not necessarily relate to each of these classifications in the same way,[39] and the courts could find that possibly the first two classifications do not involve a sufficient national purpose to overshadow local interests. The conclusion would be reached that federal aid is an incident to programs in which the state is the vital party in interest; liability accordingly would remain in the state with liability shifting to the federal government in the remaining program.

These rules for gauging the intensity of federal involvement in different kinds of joint projects reflect policy determinations for the allocation of the monetary burden of landowners' actions. Administration of the rules, once they were established, would not necessarily require a renewed discussion of the reason for federal liability in every case;[40] it is the avoidance of such discussion as much as possible that would decrease the appearance of a threat to the status quo in federal-state relations. The rules would be established most successfully in the first instance by Congress; it is doubtful that anyone would challenge legislation, not couched in terms of federal preemption, that would have the effect of relieving the states of a significant financial burden. The courts, on the other hand, even if they were willing to impose federal liability, might be less likely to take the alternative of establishing blanket rules revolving around the intangible factor of national interest; they might choose instead to allocate liability on the basis of the more conventional but less workable private law analogies discussed above. Technical considerations, rather than the policy questions concerning financial burdens, would largely exhaust the efforts of the courts if they chose this alternative.

V. Policy Considerations

Mr. Justice Black argues that retention of state or local liability tends to thwart the national purpose envisioned by Congress in making federal funds available for public improvements. This results because the financial

38. 23 U.S.C. § 103 (1964).

39. See Eden Memorial Park Ass'n v. Department of Pub. Works, 59 Cal. 2d 412, 417-18, 380 P.2d 390, 393, 29 Cal. Rptr. 790, 793 (1963).

40. It would be impossible, however, to allocate liability on a totally mechanical basis. For example, suppose that land is located near the intersection of two highway improvements, one a section of the Interstate System and the other classified as part of the "primary" system of federal-aid highways. Suppose further that the land is damaged as the result of construction of an approach from the "primary" highway to an overpass to serve the intersection. The damage therefore resulted from construction on the "primary" and not the Interstate section. A court faced with such a situation should have rules flexible enough to allow an assertion that the whole area of the intersection was affected by a national interest in uninterrupted traffic on the Interstate section, which interest would support federal liability.

burden of landowners' recoveries detracts from the set of self-interests a state or locality can serve, and therefore dulls the inducement to participate in a federal-aid program.[41] Another consideration is that landowners' recoveries—at least those based on inverse condemnation sounding in eminent domain, as opposed to tort—are susceptible of being called part of the total cost of a project.[42]

A makeshift answer to these considerations presently exists in the policy of the Bureau of Public Roads to reimburse states in part for landowners' recoveries.[43] Basically, the Bureau reimburses in the same ratio it has agreed to pay toward the total cost of a highway project. However, this device for shifting the financial burden to the federal government presents complex administrative difficulties which would be avoided if the federal government were amenable to suit in the first instance. First, the landowners are compensated through a two-step process, in which the problems—among others—of accounting involve a waste of the efforts of administrative personnel. Second, problems arise because comity dictates that the Bureau follow the general policy of accepting the state court's characterization of the nature of recoveries against the states. "The problem is that lines between tort and inverse have been difficult to draw, and while some overlap might provide a needed flexibility in state substantive law, it presents serious reimbursement problems to the Bureau of Public Roads."[44] Much time must be spent by federal personnel in reviewing the state characterization of recovery to determine whether it is compensable as a project cost.

Moreover, federal officials are naturally reluctant to reimburse states for recoveries had under state law doctrine which they consider to be unusual

41. Griggs v. County of Allegheny, 369 U.S. 84, 94 (1962) (dissenting opinion), discussed in text accompanying note 20 *supra*.

42. MANDELKER, *op. cit. supra* note 34, at 45. The present distinction drawn by state courts between tort and theories such as inverse condemnation sounding in eminent domain is quite fuzzy, due to the fact that "the trend is toward a coalescence of these two doctrines." *Id.* at 44. But the distinction is helpful, at least between extreme cases on either side of the distinction, to indicate whether a recovery should be considered part of the project cost. Recoveries based on negligent maintenance after completion of construction and, possibly, those based on single negligent acts of construction which cause no continuing circumstance which is damaging to land should be excluded; and the fact that these cases are typically analyzed in terms of tort serves as one guideline for exclusion. See *id.* at 13, 44-45.

43. Reimbursement has been authorized for consequential and severance damages "of a type generally compensable in eminent domain . . . determined by [the Bureau of] Public Roads to be generally reimbursable on federal-aid highway projects." U.S. Department of Commerce, Bureau of Public Roads, Policy and Procedure Memorandum 21-4.1, Right-of-Way Procedures § 3b (Dec. 30, 1960).

44. MANDELKER, *op. cit. supra* note 34, at 45.

or unsound.[45] The same is true of recoveries, in local courts suspected to be unduly liberal toward the claims of landowners within that locality, which have been affirmed by state appellate courts in their normal deference toward trial court findings. Inevitably, however, the flow of federal reimbursing funds into the states is uneven, because total landowner recoveries vary according to the manner in which each state handles inverse condemnation actions.

If the states were relieved of liability and landowners forced to proceed directly against the federal government, they would presumably do so under the Tucker Act[46] which would bring them either into the federal district courts or the Court of Claims.[47] These federal tribunals would employ, more or less uniformly throughout the United States, the federal law

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45. The Bureau has developed independent criteria for reimbursement of recoveries for loss of access. U.S. Department of Commerce, *supra* note 43, at § 6k (amend. 3, Oct. 17, 1963). The development of such independent criteria is an exception to the general policy of following state courts' characterization of the recovery. These exceptions often are the source of friction between the Bureau and the states, as indicated by a protest memorandum prepared by the Assistant Attorney General of Georgia in regard to some amendments to the Bureau's reimbursement format:

> The above amendments of PPM 21-4.1 are believed to be objectionable for the following reasons:
>
> A. The first of the proposed amendments . . . is believed to represent an attempt by the Bureau to find some means by which it may refuse to participate in a jury verdict rendered in a condemnation suit even though such verdict may be valid and fair in all respects and rendered in full accord with prevailing State law. The manner by which the Bureau seeks to do this is by enumerating certain elements of damage or value which it says are 'not eligible for Federal participation', not under any particular Federal law but under its own policy pronouncements. . . . This appears to be an indirect attempt to make uniform the laws of the 50 States regarding eminent domain compensation so far as the Bureau is concerned. In these respects it appears that the Bureau has exceeded its authority as an administrative agency and has, in effect, resorted to legislating rather than rule-making. FEDERAL LAWS, REGULATIONS AND POLICY MEMORANDA PERTAINING TO FEDERAL PARTICIPATION IN RIGHT-OF-WAY ACQUISITION AND PROPERTY DAMAGE COSTS INCURRED BY STATES ON FEDERAL-AID ROAD PROJECTS at 14, memorandum by Richard L. Chambers, Assistant Attorney General and Special Attorney to Georgia State Highway Department, presented at the Annual Convention of American Association of State Highway Officials, Atlanta, Ga., Dec. 10, 1964.

46. 28 U.S.C. § 1346(a) (1964). The act provides that claims founded upon the United States Constitution or upon express or implied-in-fact contracts may be brought against the United States in the federal district courts or in the Court of Claims. Note, 1962 WASH. U.L.Q. 210, 242 states that uncompensated landowners typically bring their actions against the federal government under this act, although the federal courts do not uniformly indicate which of the two allowable bases for suit under that act are utilized in these actions.

47. The act does not expressly provide for a suit against the United States to be brought in state court, and suits "are allowed only in the designated forum and only to the extent that the United States has consented to be sued." United States v. Carey Terminal Corp., 209 F. Supp. 385, 386 (E.D.N.Y. 1962); see Fleming, *The Federal Government as an Adversary*, 9 PRAC. LAW., DEC. 1963, p. 21, at 22-23.

of inverse condemnation.[48] In short, the flow of federal funds to meet this financial burden would be considerably evened.

What about policy considerations from the viewpoint of the landowner? In many states the uncompensated landowner is restricted to remedies such as mandamus or conditional injunction which only indirectly fetch him a monetary premium.[49] Or the owner may be required to put his claim through time-consuming and expensive administrative channels as a condition to maintaining a suit against the state.[50] Plaintiffs whose compensation for the most part comes from the federal government would be able to hurdle these occasional state procedural difficulties and proceed directly against the primary source of highway funds. It is therefore probable that if inverse condemnation actions were adjudicated within the uniform procedural framework of the federal system and according to one body of substantive law, liabilities on the Interstate System would be more uniformly handled under a common body of substantive and procedural law which is less burdensome to plaintiffs and which would dispose of litigation more efficiently.

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48. State law is normally disregarded in cases under the Tucker Act. Fleming, *supra* note 47, at 23. Admittedly, the federal law of inverse condemnation is somewhat illiberal toward landowners' recoveries and would probably have to undergo considerable conceptual adjustments to enable it to accommodate the vast number of highway cases that would be channeled into federal courts. See MANDELKER, *op. cit. supra* note 34, at 19-20. "Federal law has arisen primarily out of riverbank improvements, and so it reflects factual patterns not typical of the highway cases." *Id.* at 19. However, the opportunity for development of a body of uniform law in federal tribunals is a promising alternative to the present, rather chaotic, state of the law as it has emerged in the several state courts.

49. The development in inverse condemnation procedures has been left to the vagaries of judicial development in 50 jurisdictions. The result is a complex body of doctrine difficult to survey except in the most incremental fashion. . . . A first glance at the constitutional basis of inverse law is an invitation to mistaken expectations. Constitutional provisions in all states either explicitly guarantee or have been construed to guarantee that compensation will be paid for property taken for public uses. However, only twenty of fifty states take the simplest and most direct route and permit the aggrieved landowner to file a common law action for inverse damages. The rest employ a variety of more or less complicated procedures: a special statutory procedure, a writ of mandamus to compel the institution of condemnation proceedings, or a qualified injunction to restrain the public agency pending the institution of proceedings to pay compensation. *Id.* at 32. (Footnotes omitted.)

50. Professor Mandelker's survey of procedures in 50 states revealed that California has a system which is most rigid in this regard. *Id.* at 39.