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The problems presented by the enormous increase in air pollution since the start of the Industrial Revolution are only beginning to plague mankind. Many of the traditional remedies afforded by Anglo-American law are poorly adapted to deal with this condition. The purpose of this article is to examine the possible applications of one recognized form of action—the suit in inverse condemnation—to the problem of air pollution.

I
THE AIR POLLUTION PROBLEM

It is clear to anyone who has lived or traveled in any large metropolitan area that air pollution is for millions of people, part of their way of life. According to the Department of Health, Education and Welfare, sixty percent of all Americans are presently enduring excessive pollution in the ambient air.[1] The most obvious consequence of such a situation is the atrocious degree of filth to which most city dwellers have become accustomed.[2] Were this the only consequence of air pollution, it would be reason enough for concern. Unfortunately, the consequences are far more severe.

Reliable medical authorities concur unanimously in the opinion that air pollution is a major contributing factor to lung cancer, heart disease, ventricular failure, asthma, pulmonary fibrosis, emphysema, bronchitis, flu, tonsillitis, sore throats, headaches, tiredness, allergies and the common cold.[3] Consequently, it is not simply desirable that the contemporary bar examine ways to cope with this evil; it is imperative.

Where the cause of air pollution can be isolated and proximately related to a particular etiological or economic harm, a remedy in tort on a theory of nuisance[4] or ultrahazardous liability[5] is recognized.

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1. 25 Cong. Q. Weekly Rep. 723 (May 5, 1967).

2. Eighty tons of dust per month per square mile are estimated to fall in New York City. N.Y. Times, June 27, 1965, at 12E, col. 1.

3. *Hearings on S. 780 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 90th Cong., 1st Sess., Pt. 3, at 119 (1967); U.S. Public Health Service, New Medical Materia, July 1961, at 11, and Feb. 1963, at 30; Mitchell, Medical Tribune, Jan. 11, 1963, at 3, and Jan. 28, 1963, at 33; *Pulmonary Emphysema*, 1960 Med. Trial Tech. Q. 221; Greenburg, 182 J.A.M.A. 161 (1962); Noehran, 182 J.A.M.A. 889 (1962); Reid, 49 Proc. Royal Soc'y Med. 767 (1956).

4. *E.g.*, Combs v. Crawford, 258 Ky. 405, 80 S.W.2d 46 (1935) (city dump).

5. *E.g.*, Luthringer v. Moore, 31 Cal.2d 489, 190 P.2d 1 (1948) (fumigation).

Similarly, where negligence can be shown, a recovery on that theory is a possibility.[6] These cases, however, represent a small group of situations where the offender may be isolated, the alternative causes can be eliminated, and the damage can be proved and apportioned.[7] The great difficulty involved in setting a standard of due care, and proving a cause of action for failure to observe it, is apparent when one considers that there may be several million polluters in an urban area.[8]

Even if it is assumed that a private remedy could be utilized to provide damages for air pollution, such a solution would be of little benefit to the owner of property in an area where the ambient air becomes too polluted for people to endure. When such a situation presents itself, property is rendered worthless for any purpose and damages do not sufficiently compensate the owner. It is in such cases that the inverse condemnation suit becomes a meaningful possibility. Such a suit would be particularly appropriate in areas where a major polluter is a sovereign that has retained its traditional immunity from suits in tort. It would also be appropriate in a great number of localities where up to ninety percent of air pollution is caused by automobiles.[9] There is good reason to believe that in certain parts of the country no measures can be taken to avoid the consequence of a large amount of land becoming unsuitable for use by human beings.[10] In light of such factors the argument that air pollution can result in a taking of private property does not appear untenable.

II
THE INVERSE CONDEMNATION SUIT

Inherent in our law is the power of eminent domain—"the power of the sovereign to take property for public use without the owner's consent upon making just compensation."[11] The right to exercise this attribute of sovereignty is closely aligned with a correlative duty on the part of the sovereign to make just compensation in all cases where private property is taken for public use without the owner's consent.[12] In the United States this duty is imposed on the sovereign

6. *E.g.*, Smith v. Weber, 70 S.D. 232, 16 N.W.2d 537 (1944).

7. *See* Rheingold, *Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere*, 33 Bkln. L. Rev. 17 (1966).

8. *Id.* at 27, 28.

9. *See* Drinkler, 264 N. Eng. J. Med. 754 (1961).

10. *See* Note, *The Expanding Scope of Air Pollution Abatement*, 70 W. Va. L. Rev. 195 (1968).

11. 3 Nichols, Eminent Domain, § 8.1 (3d rev. ed. 1963).

12. *Id.* at 5.

by the federal constitution.[13] This duty, together with the long-established rule that the just compensation requirement is binding on the states,[14] establishes the basis for an inverse condemnation action for all nonconsentual takings for public use.

At the outset two frequent misunderstandings should be eliminated. The suit in inverse condemnation is not related to any form of tort action and is not an exercise of the police power.[15] The confusion with tort law concepts stems from numerous efforts to circumvent sovereign immunity from suits in tort by bringing an inverse action.[16] It follows that the principles of trespass, nuisance and sovereign immunity and the concepts of fault and foreseeability have no place in a discussion of inverse condemnation.[17] This confusion has caused a number of courts to hold that a suit in inverse condemnation cannot succeed unless, as against a similarly situated private party, there could be a recovery in tort.[18]

The confusion with valid exercises of the police power is attributable to the frequent difficulty in distinguishing a regulation from a taking.[19] The resolution of that problem does not lie within the scope of this discussion. It is sufficient to note here that a proper exercise of the police power does not result in a taking in the constitutional sense merely because it imposes restraints on the free use of land.[20]

From what has been said it may be concluded that an inverse condemnation action is appropriate in those situations where all the elements of an exercise of the power of eminent domain are present, with the exception of the constitutionally required just compensation.[21] The word "inverse" is therefore suitable since it is the private party, rather than the sovereign, who seeks the aid of the courts.

III
THREE HYPOTHETICAL SITUATIONS

The following situations will serve to illustrate the types of problems that may arise:

13. U.S. Const. amend. V.

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

15. *See* Van Alystyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 Santa Clara Law. 1, 10 (1967).

16. *Id.* at 11.

17. *Cf.* Reardon v. City and County of San Francisco, 66 Cal. 492, 6 P. 317 (1885).

18. *E.g.*, Youngblood v. Los Angeles County Flood Control District, 55 Cal.2d 603, 364 P.2d 840 (1961).

19. *See* Sax, *Takings and the Police Power*, 74 Yale L. J. 36 (1964). *See also* Van Alstyne, *supra* note 15, at 13.

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

21. *See* Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. Rev. 3, 4.

(I) The corporate owner in fee of a tract of land constructs a factory on it. The operation of the factory entails a process, a by-product of which is carbon monoxide gas. The gas is released into the atmosphere through smokestacks. When the factory begins operating, the entire process is lawful in the area in which the land is located. Subsequently, the state passes a statute proscribing the releasing of noxious gas into the atmosphere. No practical means exist for converting the factory into a lawful operation. The corporation brings an inverse action against the state.

(II) The owner in fee of a tract of land zoned for residential use constructs a house on it. The state establishes a garbage dump nearby which causes noxious fumes to be released into the atmosphere. The fumes greatly diminish the homeowner's enjoyment of his property and substantially reduce its value. The homeowner brings an inverse action against the state.

(III) The owner in fee of a tract of land zoned for residential use constructs a house on it. Nearby, in an area zoned for commercial use, factories are constructed which release noxious fumes into the atmosphere. The fumes greatly diminish the homeowner's enjoyment of his property and substantially reduce its value.

(A) The pollution may be traced to factories which are being operated in violation of state clean air statutes.

(B) The pollution represents the cumulative effect of a large number of factories, no one of which is being operated in violation of state statutes. The homeowner brings an inverse action against the state.

In each of the three situations the selection of a fee interest is arbitrary. Should the aggrieved party enjoy an interest inferior to a fee simple, the substantive issues involved would be unchanged. The multifaceted problems of just compensation as related to the interest allegedly taken are not within the scope of this discussion. It is sufficient to note here that any interest in property that is taken without just compensation may provide a basis for a suit in inverse condemnation.[22]

The word "state" as used in the three hypothetical cases should be understood to contemplate federal or state governments as well as subdivisions of the latter. The fifth amendment mandate that just compensation be made for the taking of private property for public use is binding on the states through the due process clause.[23]

22. On the taking of less than a fee interest *see generally* Waldman, *Eminent Domain–Options–Rights of Optionee to Compensation in a Condemnation Proceeding When Option is Exercised After the Taking,* 14 Wayne L. Rev. 660 (1968); Comment, *Protection of Mortgagee's Investment when the Security is Condemned in New York,* 36 Ford. L. Rev. 586 (1968).

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

Furthermore, numerous state constitutions impose a similar obligation.[24] A subdivision of a state must likewise respond, in an inverse action, for an unconstitutional taking.[25] It follows therefore that the problem is not substantially altered by changing the sovereign against whom the action is brought.

It should also be noted that in the second and third cases proposed above the absence of a feasible private remedy for damages is presumed.[26] Such an assumption is not unrealistic. In the second case a remedy for damages would be frustrated by the inability of tort law to deal with noxious vapors and by the uncertainties involved in determining when there is sovereign immunity from tort liability. In the third case also, a remedy for damages would be frustrated by the inadequacies of tort law and, additionally, by the procedural problems presented by a large number of defendants. In any event a remedy for damages is obviously unsatisfactory unless coupled with an injunction to prohibit further air pollution.

Situation I

Of the three situations, the first is most amenable to solution under existing law. In a landmark case the Supreme Court held that the previously lawful operation of a brewery could be terminated without violating the constitutional mandate that a taking for public use be compensated.[27] That decision has served as a starting point for the distinction, recognized by all courts, between a valid exercise of the police power, which restricts the use of land, and a taking which appropriates land to public use.[28] Only in the latter case is compensation warranted.

In the area of water pollution, it is clearly established that pollution is not a property right.[29] It follows that any restriction a state may place on pollution of waterways does not result in a taking deserving of compensation. Furthermore, where the general operation of a business becomes obnoxious to the community, the use may be curtailed without there being a taking in the constitutional sense.[30]

Although no cases clearly fit the proposed situation, resort to the analogous water cases would seem to command a similar result. Clearly a state may act to protect the health of its citizens by enforc-

24. *E.g.*, Cal. Const. art. I, § 14; N.Y. Const. art. I, § 7.
25. *See, e.g.*, Page v. Metropolitan St. Louis Sewer District, 377 S.W.2d 348 (Mo. 1964).
26. *See* Van Alstyne, *supra* note 15, at 10; Mandelker, *supra* note 21, at 14.
27. Mugler v. Kansas, 123 U.S. 623 (1887).
28. *See* Sax, *supra* note 19.
29. United States v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592 (1941).
30. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

ing clean air legislation. It has been argued persuasively by one writer that the federal government could sustain national air pollution standards under the interstate commerce power.[31] The fact that air and water pollution is rarely wholly intrastate could, under the modern concept of the interstate commerce power, authorize the federal government to act in this area. The recent federal legislation concerning air pollution reiterated the conviction expressed in the first federal air pollution measure, that clean air is primarily a responsibility of the states.[32] As a result of this legislation, it is to be anticipated that the first cases to reach the courts will be those in which the alleged taking is by a state.

The cases which follow the principle established in *United States v. Causby*[33] and *Griggs v. Allegheny County*[34] that ownership of land includes the use of a certain amount of air space above it, may be clearly distinguished from our situation. Such cases are characterized by affirmative action on the part of the government, which effectively results in the use of private land for a public purpose. However, in the case where one's use of his own land is limited by prohibiting pollution, the government is in no way using such person's land.[35] As noted in *Griggs*, it is the fact that something is acquired by the public that brings the requirement of just compensation into play.

The recognized distinction between a regulation and a taking has persuaded at least one writer to conclude that no clean air measure would provide a basis for an inverse action.[36] Such claims have been wholly unsuccessful where the loss of the right to pollute water was concerned.[37] There seems to be substantial agreement that since air pollutants travel from the land on which they originate, governmental regulation of them does not result in an appropriation for public use.[38]

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31. Edelman, *Federal Air and Water Pollution Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution*, 33 Geo. Wash. L. Rev. 1067 (1965).

32. The first federal air pollution statute was the Air Pollution Control Act of 1955, 42 U.S.C. § 1857. There have been two major amendments. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392, *amending* 42 U.S.C. § 1857; Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, *amending* 42 U.S.C. § 1857.

33. 328 U.S. 256 (1946).

34. 369 U.S. 84 (1962).

35. *See* Sax, *supra* note 19.

36. Bermingham, *The Federal Government and Air and Water Pollution*, 23 Bus. Law. 467, 490 (1968).

37. *E.g.*, City of Eufaula, Alabama v. United States, 313 F.2d 745 (5th Cir. 1963); City of Demopolis, Alabama v. United States, 334 F.2d 657 (Ct. Cl. 1964); United States v. 531.13 Acres of Land, 366 F.2d 915 (4th Cir. 1966).

38. *See* Bermingham, *supra* note 36, at 492.

Assuming, *arguendo,* that the law must be that no loss of the right to pollute air should result in a compensable taking, the question remains whether such a result can be defended by resort to existing law. As noted earlier, if the particular use to which property is put is obnoxious enough to the public welfare, it will generally be held that such use may be terminated altogether without there being a taking. Where the welfare of a community is sufficiently enhanced, the use of certain land may be so restricted as to prohibit industry altogether.[39]

In the last analysis, when a court decides what is a taking, in the constitutional sense, it is deciding when the loss of a few persons resulting from government action should be shared by the public in general.[40] If a taking is found and just compensation necessitated, the taxpayers within the sovereign's jurisdiction will foot the bill. The issue then becomes whether such a result is more acceptable than allowing the polluter to bear the loss alone. The latter alternative seems to be more desirable. First, it would, for the most part, be those very taxpayers who have a stake in the industrial wealth of the community who would be paying the price of the acquisition. Such a process obviously leads nowhere. Second, by spreading the cost throughout the community, persons guilty of air pollution will not be greatly encouraged to explore technological means for correcting the problem and those persons who, through care and expense, have "cleaned up" their operations will be rewarded by having to compensate the less ambitious members of the community.

Situation II

The second situation is representative of problems which a large number of landowners have already encountered. Unfortunately for most of them, a recovery where a sovereign interferes with a private person's use of his land by polluting the air is very difficult. There are of course a few cases where the injury has been so peculiar to the particular landowner that a taking has been found.[41] But in the great bulk of cases, the long-established rule that air pollution does not result in a taking requiring compensation has been applied.[42]

The early common law recognized ownership in land to extend *a coelo usque ad centrum* (from the heavens to the center of the

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

40. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1168 (1967).

41. *E.g.,* Richards v. Washington Terminal Co., 233 U.S. 546 (1914). The owner of land directly in the exhaust stream of a municipal corporation's tunnel was permitted recovery.

42. *E.g.,* Sadlier v. City of New York, 185 N.Y. 408, 78 N.E. 272 (1906).

earth).[43] With the advent of the age of flight, realistic limitations had to be placed on this doctrine. Notwithstanding these limitations, it is still recognized that the owner of land is entitled to enjoy freedom from certain invasions of the superadjacent air space. The *ad coelum* doctrine is now restricted primarily to cases where the invasion is the physical presence of airplanes flying within very close proximity to the ground.[44]

The courts have given a variety of reasons for not permitting recovery for air pollution which is within the same superadjacent air space recognized in the airplane cases as the ambit of a property owner's domain. A rule was early developed by the federal courts that a taking meant an actual physical occupation or invasion of private land.[45] Fortunately, this rule is losing a good deal of its impact as progressive courts come to recognize that there are an infinite number of ways in which property can effectively be taken, although the owner's title and possession is in no way challenged.[46] Furthermore, a considerable number of state constitutions have been amended to include the word "damaged" as well as the word "taken" in their respective just compensation clauses.[47] Such a revision is suggestive of a broader understanding of what is entailed in meaningful ownership of property. It is probable that the trend towards liberalizing the meaning of a taking will continue.

Another obstacle which stands between a plaintiff and his recovery in an inverse action for a taking by air pollution caused by the sovereign is the requirement of foreseeability.[48] This requirement is obviously a result of the confusion with tort principles mentioned earlier. It is encouraging to note that one important jurisdiction has recently abandoned foreseeability as a requisite element for recovery in an inverse action.[49] The fact that an inverse action is based on a constitutional mandate would logically obviate the requirement. Furthermore, it is apparent that to one whose property interest is diminished, it matters little whether the ultimate result was reasonably anticipated when the sovereign undertook the activity.

In addition to the difficulties already discussed, is the further hindrance presented by a rule established in the Supreme Court that

43. 2 Nichols, Eminent Domain, § 5.781 (3d rev. ed. 1963).

44. *Cf.* City of Atlanta v. Donald, 111 Ga. App. 339, 141 S.E.2d 560 (1965).

45. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

46. *E.g.*, Dugan v. Rank, 372 U.S. 609 (1963) (dam resulted in taking of water rights).

47. The first to do so was Illinois in 1870. Ill. Const. art. II, § 13. Twenty-five states have followed the lead.

48. *See* Case Notes, *Inverse Condemnation, Foreseeability Abandoned in California,* 13 U.C.L.A. L. Rev. 871 (1966), and cases collected therein.

49. Albers v. County of Los Angeles, 62 Cal.2d 250, 398 P.2d 129 (1965) (road slide).

"acts done in the proper exercise of governmental powers, and not directly encroaching upon private property . . . are universally held not to be a taking within the meaning of the constitutional provision."[50] Avoidance of this rule would seem to require a demonstration that air pollution is a direct encroachment on private property. Such a showing is most difficult because in the first instance polluted air is usually released far from the property of the prospective plaintiff and only reaches his property by the intervening force of winds. It follows that the eventual encroachment upon private property is not direct.

The Supreme Court of Ohio has had occasion to hear a case very much in point and has come to the sorry conclusion that odors from a sewage disposal plant which wafted over plaintiff's land did not result in a taking deserving of compensation.[51] The court reasoned that the plaintiff simply shared in the burden of a beneficial exercise of governmental power in return for the privilege of sharing in the use of the sewage system.[52] It is not difficult to imagine, however, why the Ohio plaintiff could not concur in the court's utilitarian judgment. This would seem to be a case where property is made so unbearable that for all practical purposes the use of it is taken.

It may be strongly argued that the taking should not have to be as direct as in cases such as *Richards v. Washington Terminal Company*,[53] for compensation to be awarded. The case of *City of Jacksonville v. Schumann*[54] represents a high-water mark in finding a taking resulting from an airborne disturbance not occasioned by a direct invasion of private property. That case held that there could be a recovery in an inverse action for noise, dust and vibrations caused by the close proximity of the defendant city's airport. The court recognized that in so far as the property owner was concerned, the disturbance in the air was just as much a taking as was the actual use of the air in *Causby*.[55] In both cases the use of the superadjacent air space resulted in precluding any possible enjoyment of the property. From the owner's point of view, the degree of injury to his interest is not at all dependent on obscure legal distinctions.

In a recent Florida decision the doctrine expressed in *Schumann* was greatly limited.[56] In that case recovery for noise, dust and vibrations due to construction of an access road adjoining plaintiff's

50. Transportation Company v. Chicago, 99 U.S. 635, 642 (1878).
51. McKee v. City of Akron, 176 Ohio St. 282, 199 N.E.2d 592 (1964).
52. *Id.* at 286, 199 N.E.2d 595.
53. 233 U.S. 546 (1914).
54. 167 So.2d 95 (Fla. 1964).
55. United States v. Causby, 328 U.S. 256 (1946).
56. Northcutt v. State Road Department, 209 So.2d 710 (Fla. 1968).

property was not permitted. The court, apparently fearful of opening the door to all sorts of litigation, distinguished *Schumann* on the tenuous basis that the area involved was labeled "Recommended For Non-Residential Development" by the Federal Aviation Agency.[57] The abrupt turnabout in this case is suggestive of the delicate situation in which courts find themselves when they try to balance the rights of individual litigants to enjoy their land against the necessity for local governments to complete airports, sewers, roads and other community projects. It is clear that if such public works are to be constructed, compensation cannot be awarded to anyone, however remotely affected.

The purpose here is not to establish guidelines for when there has been a taking worthy of compensation. If the discussion of this situation has served to illustrate that the traditional requirements of a physical taking, a foreseeable harm and a direct encroachment do not provide a suitable criteria, it has served its purpose. Too often the law lags behind contemporary problems and by so doing permits injustice to be worked in individual cases.

The long line of cases that recognize that a substantial diminution of value effects a taking are particularly well adapted to this situation.[58] A not unduly broad reading of such cases would command the result reached in the *Schumann* case. The fear of encouraging litigation should never prevent a court from reaching a result which gives meaningful interpretation to constitutional guarantees. Admittedly, undue reliance on the diminution of value test alone would not always yield a reasonable result; the resolution of this problem entails the consideration of a large number of factors.[59] The point made here is simply that judicial recognition of losses due to air pollution is necessary if courts are to fairly distribute the burden of this growing problem.

Situation III

A successful inverse action grounded upon the failure of a sovereign to promulgate or enforce regulations dealing with air pollution has not yet been maintained. The problems presented in bringing such an action include not only the difficulties discussed in Situation II, but the additional obstacle of fastening responsibility on a political body for failure to take affirmative action against a third party.

57. *Id.* at 711.

58. The leading case on diminution of value as a taking is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

59. *See* Michelman, *supra* note 40, at 1190.

In the field of tort law, courts have rarely permitted a recovery for the failure of a municipality to act in the public interest. Traditionally, in the absence of a contract to enforce or promulgate rules or a statutory declaration of liability, there could be no recovery for mere nonfeasance on the part of a state or municipality.[60] The difficulty in recovering has not been due to the existence of sovereign immunity but rather to the well-established rule that the exercise of executive functions is purely discretionary.[61] Only in those cases where a nuisance was caused by affirmative action on the part of a municipality has recovery been allowed.[62] Apparently it has been of no importance that the activity complained of was permitted to exist in flagrant violation of a city ordinance for a long period of time.[63] The federal courts have found little difficulty denying recovery, regardless of whether the claim was controlled by state or federal law.[64]

It is of course true that success in an inverse action is not dependent on overcoming unfavorable tort precedents. It does seem, however, that if the sovereign cannot be held answerable for damages for an immediate injury to property caused by a third person, it will be an ambitious feat indeed to demonstrate that by failing to abate air pollution the sovereign has been guilty of an uncompensated taking. Although one writer has suggested negligence as a possible theory for recovery for failure on the part of the sovereign to curtail air pollution,[65] it does not appear that any commentator has considered recovery in an inverse action under such circumstances as a serious possibility.

Of course it is possible for there to be a private remedy for damages or injunction in cases where the polluters can be isolated. There will be situations, however, where no violation of duty, statutory or otherwise, can be shown, or the number of possible defendants is so great that a remedy of this sort becomes procedurally awkward. It will therefore be fruitful to consider if there is a constitutional basis for an inverse action against a sovereign for failure to act to abate air pollution.

Assuming, *arguendo*, that air pollution can result in a taking, the

60. 38 Am. Jur. *Municipal Corporations* § 603 (1941).

61. *E.g.*, Everly v. Adams, 95 Kan. 305, 147 P. 1134 (1915).

62. *Cf.* Milstrey v. City of Hackensack, 6 N.J. 400, 79 A.2d 37 (1951).

63. Galleher v. City of Wichita, 179 Kan. 513, 296 P.2d 1062 (1956).

64. Murray v. City of Milford, 380 F.2d 468 (2d Cir. 1967) (state law); National Manufacturing Co. v. United States, 210 F.2d 263 (8th Cir. 1954), *cert. denied*, 347 U.S. 967 (1955) (Federal Tort Claims Act).

65. *See* Rheingold, *supra* note 7, at 28, 29.

question remains: a taking by whom? If in our situation it is found to be private parties that cause the damage, a possible argument is that the private parties must be looked to for any redress. If such is the case, no recovery in inverse condemnation is feasible. Even if it is argued that the sovereign, by countenancing the activities of the private parties, is in fact responsible for them, still no basis for a claim in inverse condemnation arises. The sovereign may not use the power of eminent domain to take private property for a private use, even if just compensation is made.[66] As indicated earlier, an inverse condemnation action is appropriate where all the elements of an exercise of eminent domain, except just compensation, are present. It follows, therefore, that in this case such an action is not appropriate because the element of a public use is absent. The argument that the sovereign must answer for the taking occasioned by private action must therefore fail.

The other possibility is to proceed by contending that it is in fact the sovereign itself that does the taking. If this can be established, a recovery in an inverse action may be had. The contention that the sovereign itself does the taking requires placing an affirmative duty on it to abate air pollution. The argument falters here, in the face of the already noted principle that an exercise of executive functions is discretionary. If the prospective defendant were a state, it might be argued that the federal clean air statutes place an affirmative duty on the states to abate air pollution.[67] Concededly, the logic is cumbersome, but it seems foreseeable that a time will come when courts will be willing to place greater affirmative duties on governmental bodies.

A more direct, though equally speculative argument may be made as follows: The activities which are permitted in a given community will be those which, on balance, the lawmaking body decides ought to exist. The power of eminent domain may be exercised for any object which is within the broad responsibilities of government.[68] When a proceeding in eminent domain is brought, the judicial process is used to determine if in fact the object for which private property is condemned is proper. If the inverse action is a correlative action to the proceeding in eminent domain, should it not be available to bring judicial scrutiny to bear on all questions of whether the effectuation of a particular purpose results in the taking of private property for a public use?

66. Missouri Pac. R.R. v. Nebraska, 164 U.S. 403 (1896) (held a taking for private use violated due process).

67. *See* note 32, *supra.*

68. *Cf.* Berman v. Parker, 348 U.S. 26 (1954).

The argument as outlined is to a certain extent dependent on whether there could be a delegation of the power of eminent domain to all those who pollute the air. If there could not, then the argument for a suit in inverse condemnation where a state permits others to pollute the air becomes untenable. It has been established that the power of eminent domain may be delegated to certain bodies which are created by the authority of a state or the federal government.[69] The power has even been held to be delegable to a private individual, where such delegation was ultimately for a public purpose.[70] It would seem that the next logical step is to say that a state, by chartering a corporation or licensing a business which in its operation appropriates private property, has in fact given that operation the power of eminent domain. If this reasoning will pass muster, then it follows that if the polluter in such instance fails to make just compensation, an inverse action against it or the state will lie.

The theories suggested here are of course speculative. No court has gone so far as to find liability in a situation such as the one presented. It may be that a landowner will before long venture such a suit for want of a remedy for air pollution.

IV
CONCLUSION

It should be clear from this discussion that the law of inverse condemnation needs much development if it is to deal effectively with the problem of air pollution. The direction in which courts and legislatures must point themselves is clear. In the first situation discussed, the law has already provided a solution. The loss of the right to pollute does not provide a basis for an inverse action. In the second situation the law is not nearly adequate. The sovereign may take property by polluting the air and nearly always avoid making just compensation. In the third situation the law is wholly impotent. Responsibility for persistent failure on the part of governmental bodies to act to abate air pollution will not result in an obligation to compensate in any court.

It is apparent that the judicial process is ill-equipped to deal with so great an evil without the help of other branches of government. Changes of the necessary magnitude require a high degree of planning in order to insure lasting solutions. The urgent need for technology

69. Malott v. Collinsville, C. & E. St. L. Elec. R. Co., 108 F. 313 (7th Cir. 1901) (railroad); Arkansas State H'way Comm'n v. Southeastern Bell Tel. Co., 206 Ark. 1099, 178 S.W.2d 1002 (1944) (utility).

70. United States v. 243.22 Acres of Land, 43 F.Supp. 561 (E.D.N.Y. 1942).

to create automobiles and factories and garbage disposals which do not generate pollution cannot be overemphasized. What is suggested here is that the courts have been slow to recognize an analogy between air pollution and the more traditional invasions of property. In this respect they have failed to provide other sectors of government with needed impetus for change.