the end of which all judgments rendered, if their total exceeds the maximum permissible amount, would be adjusted on a pro-rata basis.

The advantages of statutory imposition of liability are: 1) The issues would be submitted to public debate prior to enactment by Congress.[43] 2) A passenger-plaintiff would be vested with a legal right more advantageous to him than res ipsa loquitur as applied under the more limited interpretations, since the risk of non-persuasion of the jury would be shifted to the defendant. 3) Airlines, knowing what is demanded of them, would more readily settle claims out of court. 4) Aviation insurance underwriters, protected by the maximum liability provision from huge potential losses which unrestricted application of the doctrine might impose upon them, would not have to seek greater premiums or government reinsurance but might even lower their charges, thus encouraging more air transportation by allowing airlines to reduce fares.[44] 5) If for any reason such a law should not prove workable, it can be repealed or amended far more easily than a well-established common-law precedent.

Although the findings of the CAB investigation in the instant case[45] may not be admitted as evidence for obvious reasons,[46] their tenor supports the court's decision in this case. But as precedent this and similar decisions should be narrowly construed and confined to the particular facts of their cases. While, in the absence of suitable legislation, it may be necessary to invoke res ipsa loquitur in some actions arising out of air disasters, the doctrine should be applied only where all the circumstances, including available statistics on the causes of similar previous crashes, indicate that the likelihood of the defendant's negligence clearly outweighs all other possibilities.

FRANCHISE "VALUE" IN EMINENT DOMAIN PROCEEDINGS

In connection with the wartime expansion of the Brooklyn Navy Yard, the United States condemned some seventy acres of land in the borough of Brooklyn. For the most part, the taking by the government concerned privately owned real estate, and the various condemnation proceedings in respect to such property raised no noteworthy questions. Also involved, however, were municipal facilities owned by the city of New York and certain property rights of two

[43] The occasional advantages of open legislation are pointed out by Miller, A Law is Passed —The Atomic Energy Act of 1946, 15 Univ. Chi. L. Rev. 799 (1948).

[44] Barnes, Economic Role of Air Transportation, 11 Law & Contemp. Prob. 431 (1946).

[45] "The Board finds that the probable cause of this accident was the action of the pilot in descending below the minimum enroute altitude under conditions of weather which prevented adequate visual reference to the ground. A contributing cause was the faulty clearance given by Airway Traffic Control, tacitly approved by the company dispatcher, and accepted by Flight 410." CAB, op. cit. supra note 37, at 8. The summary, however, sounds much more impressive than the facts in the report seem to justify.

[46] Civil Aeronautics Act § 701, 52 Stat. 1012 (1938), 49 U.S.C.A. § 581 (Supp., 1947).

public utility companies which had been engaged in supplying gas and electricity to the former residents of the taken area. The facilities taken from the city consisted of segments of three public streets, one containing a bridge and a crosstown trolley line, and two parcels of land under a canal and boat basin. The taking of the land and the bridge apparently did not require any replacements or adjustments by the city, but the taking of the streets made it necessary to lay new connecting switches and reroute the crosstown trolley over existing tracks with an increased operating distance of slightly more than one-half mile. Both utilities maintained distribution facilities within the taken area. Those of the gas company consisted of underground gas mains with small pipes running from the mains into buildings within the area. The electric company maintained underground conduits, cables, transformers, and service connections to buildings supplied with electricity. In a realistic sense the taking involved only a cutting off of both distribution systems at their points of entry into the taken area. There they were connected to government-owned distribution facilities of the naval base, so that in fact the United States was substituted as consumer of the utilities' services in the area. In light of the petition of taking, in which the government stated its intention to acquire "an estate in fee simple absolute . . . all improvements thereon and all rights, easements and appurtenances thereto, except removable fixtures. . . ,"[1] both companies were given permission to salvage or remove all their individual installations. Although the gas company failed to do so, the electric company removed all its transformers and some of its cables, stipulating that the removal was not a waiver of any claim for compensation for facilities not removed. Thus the taking required no special outlays to fulfill the franchise obligations in the new situation.

Municipal ownership and the granting of franchises are essentially similar methods adopted by communities to provide necessary public services. Thus, as alternatives to the Brooklyn arrangement, facilities for public transportation are often provided by private companies while gas and electricity are furnished through publicly owned plants. Yet this basic similarity was not recognized in the condemnation proceedings. In dealing with the taking of city property, both the federal district court[2] and the circuit court[3] in the instant case held the condemnee entitled only to the actual cost of necessary substitute facilities. But in the case of the utilities both courts felt compelled to proceed on the assumption that the franchises were property which had in some way been taken and for which value must be paid. They differed only as to the proper method of valuation, the lower court issuing an order for a substantial award[4] which was reversed and remanded on the ground that evidence excluded by the district court indicated the absence of any loss to either utility company.[5]

[1] United States v. 25.4 Acres of Land, 65 F. Supp. 333, 334 (N.Y., 1946).

[2] United States v. 25.4 Acres of Land, 71 F. Supp. 255 (N.Y., 1947).

[3] United States v. City of New York, 168 F. 2d 387 (C.C.A. 2d, 1948).

[4] United States v. 25.4 Acres of Land, 71 F. Supp. 248 (N.Y., 1947).

[5] United States v. Brooklyn Union Gas Co., 168 F. 2d 391, 398 (C.C.A. 2d, 1948).

In limiting the city's award to the cost of the switches and denying any compensation for the cost of operating the longer trolley line,[6] the circuit court relied on evidence showing that the increased costs had been more than compensated for by an increase in net revenue per mile since the date of the rerouting. Judge Clark's opinion described the city as being "in the business not of making profits, but of supplying public needs," and went on to emphasize the well established rule that in such cases the measure of compensation is the actual cost of providing the necessary substitutes. Therefore, since "there has been no convincing evidence of any annual recurring loss, the award was properly denied."[7] The "annual recurring loss" which the court found absent in the present case—an increase in costs resulting from the taking not compensated for by a corresponding increase in revenue—might arise in either of two fact situations: one where the total revenue after the taking was less than the total costs, the other where the total revenue exceeded even the increased total costs. A logical application of the rule that public condemnees are to receive the cost of substitute facilities would seem to call for an award in both cases, in spite of the fact that in the latter situation the city is not actually out of pocket.

In the companion proceeding against the public utilities the district court held that the distribution facilities which the companies had maintained within the taken area, as well as the franchise rights to operate them, were elements which constituted compensable property at the date of the taking. The court refused to consider the evidence showing that the United States had subsequently consumed more of the condemnees' gas and electricity for use on the naval base than had been sold to private consumers located therein prior to the taking. On appeal Judge Clark, again speaking for the circuit court, held that the evidence of the subsequent profits should have been considered, "not as a standard of value in itself, but for its bearing upon the prospective value at the time of the taking." The opinion of the lower court was reversed and the action was remanded for further proceedings in accord with the proposition that "the award is not to exceed the amount of the loss; and if there has been none as to the franchise, then there should be no award for its asserted impairment."[8]

It was the contention of the United States that, since the two defendant utilities performed public services similar to those performed by the city in the companion case, the award in both cases should be only the actual cost of providing the necessary substitute facilities elsewhere in light of the change made by the taking. But although Judge Clark conceded that there was much logic

[6] Only nominal awards of one dollar each were made for the parcels of land represented by the streets and the land under water, the taking of which necessitated no substitute facilities. Since the taken bridge had been built in 1936 with federal funds, the city was allowed only the sum of $5,303, which represented the salvage realized by the United States. Also allowed was the cost of replacing a high tension electric power line for the operation of subway and feeder lines less the salvage value to the city of the old line.

[7] United States v. City of New York, 168 F. 2d 387, 391 (C.C.A. 2d, 1948).

[8] United States v. Brooklyn Union Gas Co., 168 F. 2d 391, 398 (C.C.A. 2d, 1948).

in the government's contention, he insisted that while the utilities performed a public service they were also in business for the profit of their stockholders. "Moreover, the law seems to be too well settled for change now that the taking of a public franchise is the taking of property for which compensation must be paid."[9] But well-settled though this rule is, the similarity between the situations of the city and the utility companies in the instant cases casts considerable doubt on the general validity of the distinction.

The term "franchise" has seldom received adequate definition in condemnation cases. Realistically, a public utility franchise is a grant by a community according certain privileges for use in furnishing essential public service. Reduced to its simplest form, a franchise merely permits the grantee to use and occupy certain public places in order to provide the designated services. It usually includes various terms and conditions with which the utility agrees to comply. Underlying the granting of a franchise is the notion that the use of these facilities is authorized by the public because essential to the public welfare and convenience. Once a utility company has undertaken to provide such service it is not free to abandon its undertaking without the consent of the public authority.[10]

Historically, most franchises prescribed specific rates at which utilities' services were to be furnished. The franchise was then the community's only instrument of regulation[11] and was at the same time a true grant of monopoly. The monopoly position thus accorded to utilities, coupled with the typical inelastic demand for their services, of course accounted for the franchise rate provisions.

For various reasons, however, the franchise proved an increasingly inadequate instrument for handling the problem of rates, and the result was an adoption of state regulation "based on the general sovereign right to regulate in the public interest rather than upon the contractual instrument of the franchise."[12] This function came to be performed largely by state commissions, and the significance of franchise rate provisions disappeared. Today the franchise is practically reduced to a grant of the right to occupy public facilities in order to distribute services which the state commission has authorized by a certificate of public convenience and necessity.

The concept of a franchise as a contract is the basis of the surviving eminent domain doctrine that a franchise is a sort of vested right to a certain market for which value must be paid when it is affected by a condemnation. Insofar as the franchise has been a regulatory device, there has never been any justifica-

[9] Ibid., at 394.

[10] Broad River Power Co. v. South Carolina, 281 U.S. 537 (1930), supplemental opinion rendered 282 U.S. 187 (1930).

[11] Bauer, The Public Utility Franchise, Its Functions and Terms under State Regulation 1 (1946).

[12] Ibid., at 2.

tion for this doctrine. Only the grant of monopoly in the early franchises made it reasonable. With this monopoly element nullified by state regulation,[13] the theory that the taking of a public franchise is the taking of property for which compensation must be paid becomes clearly illogical, finding support only in the opinion that it is "too well settled for change now."[14] The court's adherence to that theory in the *Brooklyn Union Gas Company* case is the more surprising in view of an available ground for denying compensation which would have been equally consistent with eminent domain doctrine.

The Constitution requires just compensation only for property actually *taken*. Thus, the courts distinguish between the "taking" of property, which necessitates an award, and the "damaging" of property, which does not.[15] Generally, a mere reduction in the value of property to its owner is not sufficient to constitute a taking. The property itself must be appropriated to the condemning government. On the other hand, a damaging is held to imply not only that the person responsible for the damage has received no benefit from the act but also that the owner retains the use of his property in its now impaired condition. Since the petition of taking specifically exempted the removable fixtures, the court might have held in the instant case that the utilities suffered nothing but a profitable change of customers. It would have been most difficult to maintain that the franchises accorded a property right to deal with specific customers. And as far as the "legal interest"[16] of the utility companies was concerned, nothing was taken but the obligation to provide their services to the *former* customers, an obligation of which customers may or may not take advantage as they prefer. This rationale would have avoided the issue of franchise value, at the same time furnishing a more satisfactory basis for the denial of compensation than the theory employed by the court.

Once the court had accepted the premise that a franchise is compensable property, it was faced with the problem of finding the "value" of "taken property" which was in fact earning the utilities more than it had before the taking. The franchise was valued by the court not as a disembodied property right inherently valuable in itself but rather as a commercial entity to be appraised by judgment of the "capacity of the franchise to produce earnings." Application

[13] Such monopoly advantages as public utilities now enjoy stem not from their franchises but from the operation of the doctrine of public convenience and necessity in the granting of certificates by state commissions and from partial ineffectiveness of rate regulation by these commissions.

[14] United States v. Brooklyn Union Gas Co., 168 F. 2d 391, 394 (C.C.A. 2d, 1948).

[15] "There is a marked distinction between the instances where the State appropriates . . . business . . . intending to continue its operation as a public service enterprise . . . and those instances where the State desires the property and not the business." Banner Milling Co. v. State, 240 N.Y. 533, 539, 148 N.E. 668, 670 (1925); see Mitchell v. United States, 267 U.S. 341 (1925); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).

[16] "This is not an award for business losses . . . but is a means of finding present worth in a legal interest. . . ." United States v. Brooklyn Union Gas Co., 168 F. 2d 391, 395 (C.C.A. 2d, 1948).

of this standard was to be made by an "exercise of business judgment to determine whether there has been an impairment of productiveness, and if so, by how much."[17] Given the assumption that property had been taken, this was a sound method of valuation. Because no "market price" is available by which to evaluate the franchise as a disembodied right, the "worth [of the franchise] as a producer of earnings" is admissible as evidence of value. As a partial limitation on this type of valuation, the court implied that business judgment is to be applied rather conservatively on the ground that it involves too many uncertain premises.[18]

But the real flaw in valuing a franchise upon its capacity to produce earnings lies in the fact that a taking which causes a "reduction of earning capacity" within the area taken compels an award for the value of the franchise. Suppose an area in which a substantial amount of electricity had been supplied to rural homes were taken by the government for use as an artillery range. Under the circuit court's reasoning such a loss of earning power could not logically be excluded as evidence of the value of the taken franchise, even though the present-day function of a utility franchise makes the granting of such an award clearly objectionable. Under the facts of the present case, the court's approach produced a sound result—denial of compensation. Where a loss is established, however, equally sound results can be achieved only by eliminating the premise that a franchise is valuable property. Direct attack on this premise in the present case would have prevented future difficulty in distinguishing the *Brooklyn Union Gas Company* reasoning to prevent awards to franchise holders who had suffered business losses because of a taking.

[17] The court was thus rejecting the stand taken by the Supreme Court in Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 690 (1897), that such a contract right "is a mere incident to the tangible property.... Its impairment... is a mere consequence of the appropriation of the tangible property."

[18] The court suggested gross receipts, the actual volume of sales past and present, while forecasts of future net earnings based on variables unrelated to the taking were rejected.