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Whether the police power or the power of eminent domain should be used to implement projects seeking to mold the environment in the public interest, is a question of ultimate importance, not only to those whose private proprietary rights are at stake, but to the public in general. Mr. Netherton analyzes the basic nature of these powers and the principles that control their use suggesting that a new rationale be used to determine the appropriate criteria to guide future policy.

IMPLEMENTATION OF LAND USE POLICY: POLICE POWER VS. EMINENT DOMAIN

*Ross D. Netherton**

MANY of the milestones in the history of the conservation movement in the United States are also significant in the history of American law. As conservation policy has relied substantially on the lawyer's tools and skills for its implementation, the evolution of American law relating to land, water, air and other resources, therefore, has been accelerated by the innovative thinking of conservationists. In turn, conservationists have been the beneficiaries when imaginative and sympathetic thinking has occurred in the arenas of legislation, judicature and public administration. Recently this reciprocal process has been given new vigor by a rising concern for the quality of the environment. This concern has been directed to both urban and rural areas, and has included efforts to improve both the tangible values, which can be measured by statistics on health, economic prosperity and efficient utilization of resources, and the intangible values which collectively comprise the concept of amenity or aesthetic excellence. Today's planners and developers work-

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ing in the field of natural resources therefore enjoy a wider range of opportunity than any of their predecessors have had.

In the law, however, opportunity is seldom a one-sided coin. Wider opportunities to exercise legal power sharpen the need for careful selection of the proper means to accomplish desired results. Thus, in the present atmosphere of enthusiasm for environmental improvement, the choice of legal tools to implement policies and programs has become a matter of major importance for lawmakers, administrators and the public generally.

Where this implementation contemplates the control of land, water or air, the question of methods is generally posed as a choice between regulating the use of the subject matter through the police power or acquiring the subject matter, or property rights therein, through lease, purchase or eminent domain. Other courses of action are, of course, open to public agencies, and include use of the tax power, the broad power of government to bargain and create contractual arrangements, and the planning processes. These latter, however, are at present considerably less familiar to lawmakers than the powers of regulation and condemnation, and their ultimate potential remains to be explored. The discussion that follows will therefore be confined to the police power and eminent domain, and, more specifically, the choice between these powers in programs for preservation or development of scenic values in the environment where some of the major issues in this choice appear in greatest contrast.

THE ESSENTIAL ELEMENTS OF POLICE POWER

In the literature of American law, a great deal has been written regarding the police powers of the states. Much of this writing encourages a belief that the police power is a malleable thing, capable of being extended or molded into different shapes in response to the pressure of circumstances, so that one generation's power to regulate land uses may differ from that of its predecessors and its successors. The same feeling may also be detected in recent writing about the growth of the power of eminent domain. This view of

the law should be handled with care, for while the Anglo American legal system has a mechanism for evolutionary growth, this mechanism depends on a clear understanding of and respect for certain broad principles which comprise the constitutional framework of police power and eminent domain. Within the latitude provided by these broad principles of the law specific applications of the power to regulate or acquire land may vary in response to circumstances. Thus, what at first impression may seem to be erosion of the basic principles, often turns out to be logical modification and adaptation of doctrine within the permissible scope of these principles. When one looks at the uses of police power and eminent domain to implement public policy in the development of natural resources, the basic nature of these powers and the principles that control their lawful use are relatively easy to state.

Under the police power, private use of land is regulated for the advancement of some acknowledged public interest. It is customarily thought that this "advancement" consists of preventing a condition or activity which is injurious to health, safety or morals of the community and, in a somewhat less definable way, the general welfare. So, at least, most treatises on the police power have said.[1] More than half a century ago, however, Ernst Freund described a wider aspect to the police power which now is becoming an accepted working element of its doctrine.

> The state places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds; and it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common-law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control that constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce

1. *E.g.*, C. RHYNE, MUNICIPAL LAW § 26-2 (1957); S. WEAVER CONSTITUTIONAL LAW AND ITS ADMINISTRATION § 329 (1946).

> the danger of the abuse of these rights on the part of those who are unskillful, careless or unscrupulous.[2]

Freund's analysis, written in 1904, contained two points which have assumed particular significance in applications of the police power through the years that have followed. First, he noted that the power to regulate private property extends beyond the point of merely preventing private appropriation of or injury to property which belongs to the public, and includes restriction of uses of private property which adversely affect the public interest in any and all of its forms. And second, necessary regulation may be applied prospectively, in anticipation of danger, and is not confined to correcting already existing injury. The inherent capacity of the police power for adaption to new community needs as they emerge was emphasized by Holmes' famous declaration from the bench that, "the police power extends to all the great public needs . . . . It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[3]

Historically the process of extending the application of the police power can be traced to efforts to complement nuisance law.[4] Whereas nuisance provided a civil remedy for continuing uses of land which interfered with or injured neighboring land, police power restrictions on permissible uses of land uses prevented the advent of such injuries or noxious activities. Restrictions or prohibitions of land uses, and even destruction of structures or property deemed undesirable under the law, were familiar to English and American courts and legislatures long before the twentieth century development of municipal and county zoning codes.[5] By virtue of customary association with community master plans and specialized plans (dealing with such things as transportation, public facilities and services, flood plain conservation, open space preservation), however, zoning and its

2. E. FREUND, THE POLICE POWER (1904).
3. Noble State Bank v. Haskell, 219 U.S. 104 (1911).
4. Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440; Note, *Public Nuisance in New England*, 39 B.U.L. REV. 95 (1959).
5. Beuscher, *Roadside Protection Through Nuisance and Property Law*, 113 HIGHWAY RESEARCH BOARD BULL. 66 (1956); R. WALKER, THE PLANNING FUNCTION IN URBAN GOVERNMENT, 50-89 (1941).

later extensions inevitably came to be regarded as having positive or creative roles. As planners came to regard their mission as one of guiding the physical growth and molding the character of community development along lines consistent with policies arrived at through legislative or administrative processes, they turned to the regulatory power which traditionally had been used to implement the so-called "Euclidean" zoning and other, older forms of regulation. Subtly there has emerged the suggestion that the police power of the states can legitimately be used by state and local government to foster private land use patterns consistent with community goals for enhancement of environmental quality.[6]

Precedents for this development could be found as far back as colonial Boston and Philadelphia, which controlled the location of certain activities that were potentially, if not actually, dangerous to their surroundings.[7] State statutes well into the twentieth century prescribed positive duties for roadside landowners in relation to the public right-of-way.[8] And in both statute law and decisional law numerous steps could be cited to mark the expansion of what Powell has called "social welfare police power" with respect to land usage.[9] The rationale for this view was that a landowner's assurance that other property in his vicinity would not be devoted to the prescribed undesirable uses normally compensated him sufficiently for complying with the restriction of his own freedom to devote his own land to any use he pleased. Where, because of circumstances, this form of compensation seemed inadequate to him, the rationale asked him to bear his loss as a reasonable contribution to the communal welfare.

It is in this area of the police power's positive aspects that the lines of distinction become blurred, and courts have

6. R. BABCOCK, THE ZONING GAME ch. 1 (1967); Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955).
L. SEGOE, LOCAL PLANNING ADMINISTRATION 248-50 (2d ed. 1948), has remarked: "Everytime a new land subdivision with its streets, blocks, lots, and open spaces is planned and developed, a piece of city planning and building has been accomplished . . . . The original layout of an area will determine its character . . . the cost of changing it once the area has been built up is almost prohibitive."
7. *E.g.*, CONN., PUB. STAT. LAWS, Title 86, "Highways", ch. 1 (1808 ed.); 1 Laws of Del., 25 Geo. 2, ch. 131 (1700-1797); Laws, N. Hamp., chs. 13, 14 (1786); 6 Pa. Stat. at Large, ch. 484 (1682-1801) (Act of Mar. 4, 1763): 1 Acts & Resolves of the Province of the Massachusetts Bay, 1692, ch. 13 (Act of Oct. 25, 1692).
8. NEW JERSEY STATS. COMP., Title 19, ch. 1, §§ 26, 28 (1847 ed.).
9. 6 R. POWELL, LAW OF REAL PROPERTY § 867 (1965).

trouble developing consistent patterns to describe those situations in which non-compensable regulation of land use will be permitted and those in which acquisition with compensation will be required. Accordingly, when regulatory measures have been challenged as unconstitutional, courts have tended to limit the scope of their decisions to the issues and circumstances before them, declaring that it is not in the nature of things that any definitive list of the police power's applications can be drawn up.[10] They have, moreover, consciously resisted pleas to substitute judicial judgment for legislative judgment on the merits of regulatory measures where any reasonable basis for the action was demonstrated. Prediction of what the courts will decide as to the validity of proposed applications of the police power to land use is, therefore, more reliably based upon an understanding of the basic nature of the power and the factual setting in which it is applied than upon any tally of the courts' historic handling of regulatory laws.

Police power measures, whether protective or creative in character, must avoid constitutional prohibitions against the taking or damaging of property without due process of law. As applied to regulation of land use, these constitutional provisions raise questions regarding the reasonableness of the relation between the means used and the ends sought. Reasonableness must exist in the way that subjects are classified for regulatory treatment, and in the way a regulatory measure seeks to accomplish its objective. Satisfying these requirements, the police power may be used without constitutional objection.

THE ESSENTIAL ELEMENTS OF EMINENT DOMAIN

Reducing eminent domain to its essential elements, it has been described as the "power of the sovereign to take property for public use without the owner's consent."[11] No private property is exempt from this power for it is an inherent attribute of sovereignty, traceable to necessities which all forms of organized government recognize. Logically the only limitation imposed on eminent domain by its basic

10. Commonwealth v. Alger, Mass. (7 Cush.) 53, 85 (1952).
11. 1 P. NICHOLS, EMINENT DOMAIN § 1.11 at 7 (3d ed. 1950).

nature and definition is that the property taken must be used for a public purpose. The right of the property owner to be compensated for his loss to the public is not *inherent* in the concept of eminent domain but is *imposed upon* the sovereign government by constitutional and statutory enactments.[12] So universal has the requirement of compensation become, however, that for practical purposes any working definition of eminent domain must now include it.

In addition to the element of compensation, American state constitutions have introduced into eminent domain the idea that the obligation to compensate landowners extends to instances where property is "damaged" for public use as well as where it is "taken" through actual appropriation of land to the exclusion of the former owner.[13] Beginning with Illinois in 1870, some 26 states have amended their constitutions to include this broader language.[14] Interpretation, however, has seemed to minimize, if not altogether remove, any real difference in the effect of these two forms of language. Viewing property as a collection of proprietary rights and rights of use, courts have equated denials or reductions of an owner's right of use with an appropriation of property and ouster of its owner. As a result, modern working doctrine in eminent domain now not only provides for condemnation of less-than-fee property rights (i.e., use-rights), but also is rapidly developing a form of action known as "inverse condemnation" for cases where property use is impaired as an incidental aspect of another taking or a public improvement on adjacent land.[15]

Within the scope of these broad principles of eminent domain law, there are numerous recent signs that new appli-

12. Thayer, CASES ON CONSTITUTIONAL LAW 953; S. WEAVER, *supra* note 1, at § 366 (1946); 2 P. NICHOLS, EMINENT DOMAIN § 7.1 (3d ed. 1950).

13. HIGHWAY RESEARCH BOARD, SPECIAL REPORT 50, STATE CONSTITUTIONAL PROVISIONS CONCERNING HIGHWAYS, 19 (1959), states that 26 state constitutions specify "taking or damaging." Variations in language include eight states which require compensation when private property is "applied," five which speak of property being "destroyed," and two which speak of "appropriation" of property.

14. Lenhof, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596 (1942) traces this development. *See also*, Rigney v. City of Chicago, 120 Ill. 64 (1882), as one of the early interpretations of this language.

15. Among recent analyses of the inverse condemnation action, *see* Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, (Washington Univ., St. Louis, 1964, multilith); *see also* Van Alstyne, A Study Relating to Inverse Condemnation, pt. 1., (Univ. of Utah, Salt Lake City, 1966 multilith).

cations are being explored. In states where legislative revision of eminent domain law has been studied, serious consideration has been given to recognizing elements of property damage that heretofore have gone uncompensated. Thus, such items as relocation assistance, loss of business, and costs of litigation are now the new frontiers of compensability, just as in the field of "public" purpose scenic easements for aesthetic objectives are testing the limits of eminent domain doctrine.

"Public purpose" is also being tested in programs for acquisition of land for parks and recreational use, conservation in all its aspects—soil, water, fish and wildlife habitats, retention of open space, preservation of historic landmarks, and renewal of urban neighborhoods. In the field of easements, these programs are also exploring the scope of the public's interests which are of a positive nature and a negative character.[16]

Historically the necessity for the taking has been treated by the courts as a matter of administrative judgment which will not be reversed except for a showing of fraud, bad faith or clear abuse of discretion.[17] However, a growing awareness of the impact which public works have upon the economic value of adjacent lands and the values related to conservation, recreation and scenic development of wilderness areas has begun to appear in recent cases concerning highway route locations.[18]

In all of these three major areas of eminent domain doctrine—compensation, public use, and present necessity—recent developments in both legislation and case law give the

16. POSITIVE EASEMENTS: HUNTING AND FISHING RIGHTS—Albright v. Sussex County Lake & Park Commission, 71 N.J.L. 303, 57 A. 398 1904; Ottawa Hutting Assoc. v. State, 178 Kan. 460, 289 P.2d 754 (1955). *But see qualifications* in Hampton v. Arkansas State and Fish Commission, 218 Ark. 757, 238 S.W.2d 950 (1951). FLOWAGE EASEMENTS—United States v. Cress, 243 U.S. 316 (1917); AVIGATION EASEMENTS—United States v. Causby, 328 U.S. 256 (1946); NEGATIVE EASEMENTS: MISSILE SAFETY EASEMENTS—United States v. 29.28 Acres of Land, 162 F. Supp. 502 (D, N.J., 1958); AIRPORT CLEARANCE EASEMENTS—United States v. 64.88 Acres of Land, 244 F.2d 534 (3d Cir., 1957); RADAR INSTALLATION EASEMENTS—United States v. 72.35 Acres of Land, 150 F. Supp. 271 (ED, N.Y., 1957); SCENIC EASEMENTS —Kamrowski v. State, 31 Wis.2d 256, 142 N.W.2d 793 (1966).

17. 1 P. NICHOLS, EMINENT DOMAIN § 4.11 (3d ed., 1950); Williams, *Land Acquisition for Outdoor Recreation: An Analysis of Selected Legal Problems*, ORRRC REPORT 16, 5-7 (1962).

18. Tippy, *Review of Route Selections for the Federal Aid Highway Systems*, 27 MONT. L. REV. 131 (1966); Road Review League v. Boyd, 67 Civ. 481 Nr. 33456, (D.S.D., N.Y., 1967); Delaware Valley Conservation Association v. Resor, 269 F. Supp. 181 (M.D. Pa., 1967).

appearance of expanding the application of the public power to condemn land and property rights. And as public programs involving regulation and acquisition have expanded, the spheres of police power and eminent domain activity, which lawyers once could view as distinguishable and separate spheres, have increasingly come in contact with each other. This has led to questioning whether one can continue to keep them separated, and, if so, how. On first appearance, it would seem that the effort should be made to keep this distinction alive in order for lawmakers and administrators to be clear in their choice of means for achieving land use policy objectives, and in order for courts to be clear as to what issues properly are involved on judicial review of these actions.

POLICE POWER VS. EMINENT DOMAIN: THE NEED FOR A NEW RATIONALE

Recourse to regulatory methods to *create or improve* the quality of the environment as well as *preserve* existing amenities and features of natural, architectural, or scenic significance has increased the difficulty of keeping the use of police power and eminent domain separated. As new applications of each are suggested and appear to be aimed at accomplishing similar results, there is need for a theory that will take into account these tendencies along with the changing attitudes of the marketplace regarding the nature of property and the changing economics of modern life. In this search for a new rationale or theory of property rights and public powers, a starting point is provided by the texts of nineteenth century legal scholars.

The Second Edition of *Lewis on Eminent Domain,* published in 1900, stated the currently accepted theory of police power and eminent domain, as follows:

> Everyone is bound to use his own property as not to interfere with the reasonable use and enjoyment by others of their property. For a violation of this duty the law provides a civil remedy. Besides this obligation, which every property owner is under to the owners of neighboring property, he is also bound to use and enjoy his own so as not to interfere with the general welfare of the community in which he lives.

> It is the enforcement of this last duty which pertains to the police power of the State as far as the exercise of that power affects private property. Whatever restraints the legislature imposes on the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby, he is without remedy . . . . But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, then the act becomes one of eminent domain.[19]

In Lewis' day the chief examples of permissible regulatory control of land use consisted of fire regulations, building height restrictions, specifications for wood structures in certain locations, prohibition of slaughter houses and rendering plants in built-up areas, and general prohibitions against businesses deemed injurious to public health, safety or morals. An extensive body of case law was also developing in the regulation of rates charged by mills and wharves, the uses of pipes for carrying gas under pressure, the cutting of timber and practices of extractive industries, and the duties which utilities owed to public convenience. Lewis concluded from these cases that

> Use of property may be regulated as the public welfare demands. A public nuisance may be abated and private property interfered with or destroyed for that purpose. The conduct of any business detrimental to the public interests may be prohibited. Property made or kept in violation of the law may be destroyed . . . . Beyond this, private property cannot be interfered with under the police power, but resort must be had to the power of eminent domain and compensation made.[20]

Fifty years of growth and change in the United States have left their mark on the law, and rendered obsolete this relatively safe and simple dichotomy. Preoccupation with rights of possession and undisturbed enjoyment of land use as the test of taking has given way to preoccupation with rights of use and economic stability as the influential elements of the test of taking. As a consequence, the usual rationale for distinguishing where the permissible scope of the police

19. J. LEWIS, EMINENT DOMAIN § 6 (2d ed., New York, 1900).
20. *Id.*, § 156f.

power ends and that of eminent domain begins is stated in terms of comparing hardships and benefits. Thus, Jahr has suggested that

> While the courts have sustained the police power of the state on the theory that what is best for the public must prevail over private interests, nevertheless, they endeavor to maintain some vague balance between the public welfare and private rights of a property owner. They say, for example, that while a state may with impunity limit the use of a property owner's property, the owner must not be deprived of *all* beneficial uses of his property. If enforcement of the regulation would cause unnecessary damage or hardship, the aggrieved property owner must have a forum to obtain a variance of the restriction on his property; that the hardship imposed upon the owner in the use of his property must not be unreasonable. But if the validity of the restriction is fairly debatable, the judgment of the legislative branch of the government will be allowed to prevail in favor of the restriction.[21]

During the past two decades, under the impetus of an accelerated national highway building program, cases involving control of access to express-type highways have provided a broad spectrum of situations for testing this approach to the question of when impairment of a landowner's ability to use his land constitutes a compensable taking (or damaging) of property. The touchstone of the access control cases has been the test of whether a landowner retained "reasonable" means of access under the design of the highway structure or improvement which the state or municipality proposed to establish. The language of the New Hampshire

21. A. JAHR, LAW OF EMINENT DOMAIN § 3 at 7 (New York, 1953). Holmes, who had good reason to consider this same problem in the context of his own times, commented in Bent v. Emery, 173 Mass. 495, 53 N.E. 910 (1899), that:

> We assume that one of the uses of the convenient phrase, police power, is to justify those small diminutions of property rights, which, although within the letter of constitutional protection, are necessarily incident to the free play of the machinery of government. It may be that the extent to which such diminutions are lawful without compensation is larger than when the harm is inflicted only as incident to some general requirement of public welfare. But whether the last mentioned element enters into the problem or not, the question is one of degree, and sooner or later we reach a point at which the Constitution applies, and forbids physical appropriation and legal restrictions alike unless they are paid for.

Supreme Court in *Tilton v. Sharpe*,[22] illustrates this balancing process where the owner of a gasoline filling station applied for a driveway curb cut onto a limited-access highway:

> The defendant contends that he is entitled to an entrance . . . because it has been found on the amended record that he cannot profitably carry on the business which he proposes to transact. The answer to this contention is that the test of reasonableness of the proposed use is to be found, not by inquiring whether such use is essential to the profitable transaction of any particular business on his lot, but in answer to the inquiry whether such use would be fraught with such unusual hazard that the danger to the traveling public would be out of proportion to the detriment to the owner by being deprived of it. The convenience or necessity of the owner constituted but one side of the question . . . . Inability to carry on the defendant's proposed business profitably notwithstanding access may be had at other points . . . does not prove that reasonable use of his lot may not be had by such access.[23]

On its face the rationale of the access control cases appears simple enough and essentially fair: "reasonable" restriction of land use must be accepted by the landowner without compensation, but restrictions which reach the point of being unreasonable constitute compensable takings of property. And, such a rationale fitted well with the familiar constitutional doctrine protecting landowners from being deprived of property without due process of law. Yet in practice it has not introduced much certainty into the pattern of precedents on this subject, for, as Justice Norvell of the Texas Supreme Court has observed: "Law in action . . . in most instances is a compromise between the ideals of fairness, justice and equity and the factors of practicability and expediency".[24] Therefore, while the recent cases on access control appear to have used the test of reasonableness to determine whether police power or eminent domain is the appropriate means to accomplish desired goals of land use control,

22. 84 N.H. 43, 146 A. 159 (1929); 84 N.H. 393, 151 A. 452 (1930); 85 N.H. 138, 155 A. 44 (1931).

23. 85 N.H. at 139-140, 155 A. at 45, 46 (1931).

24. Norvell, *Recent Trends Affecting Compensable and Noncompensable Damages*, Proceedings of Fifth Annual Institute on Eminent Domain 1, 23 (S.W. Legal Center, Dallas, May 2-3, 1963).

the decisions turn on the facts of each case with little agreement on either the composition of the factors which are relevant or the weight to be given to each.

In the current concern over raising the quality of community environment it has been natural to transfer and use as much of this body of highway law doctrine as possible. For some aspects of the problem, such as the regulation of roadside junkyards and billboards, this has been an easy step since the presence of the highway in all of these situations furnished certain common factors for all.[25] For other aspects, this transfer has not been as easy because the desired objectives have not readily been related to the efficiency, safety, and economy of the highway facility. In the process of balancing the relevant competing interests involved, the courts have therefore been presented the problem of weighing the interests of private land use against the public interest in such activities as recreation, conservation, preservation of cultural and historical heritage, scenic values for promotion of tourism, and an intangible but growing sense of amenity.

If it has not been easy to keep the spheres of police power and eminent domain clearly separated in the access control cases, it seems certain that this task will become even more difficult when it involves the multiplicity of considerations comprising the public's interests in environmental quality. In some degree this is because there is a lack of easily measurable standards for these goals, but it is also because the total effort to improve the quality of a community's environment must be aimed at serving a number of public interests, and varying combinations of these interests inevitably will be involved in specific measures. For example, a lake located adjacent to a highway may have potential for scenic views, conservation of fish or wildlife, and recreation. What regulatory measures can be applied to the land in question to implement a plan for protecting or enhancing these values? When does regulation of land use in this setting become confiscatory, and thus pass into the realm where eminent domain

25. *E.g.*, W. STANHAGEN, HIGHWAY TTANSPORTATION CRITERIA IN ZONING LAW, BUREAU OF PUBLIC ROADS (1960); and W. STANHAGEN & J. MULLINS, JR., POLICE POWER AND PLANNING CONTROLS FOR ARTERIAL HIGHWAYS, BUREAU OF PUBLIC ROADS (1960).

is the appropriate method of proceeding? What public agencies should be made responsible for promoting the public's interests in this location? And does this choice of agencies affect the selection of means that will be used?

In the process of balancing the interests involved in protecting or improving the scenic quality of the environment courts will find precedents for almost all of the factors or elements which have been noted above. For example, the long history of legislation and litigation regarding regulation of roadside billboards has been the subject of extensive writing in legal journals.[26] Preservation of open space has more recently begun to develop its own body of interpretive literature.[27] Commencing with the establishment by Congress of the Outdoor Recreation Resources Review Commission in 1958,[28] an extensive series of reports has been published as the result of study of criteria for preservation of historical landmarks, and for development and use of recreational areas of all types in the United States.[29] During this same period, substantial contributions were made to an understanding of the interests involved in scenic and conservation interests as

26. HIGHWAY RESEARCH BOARD, SPECIAL REPORT 41, OUTDOOR ADVERTISING ALONG HIGHWAYS, (1958); R. NETHERTON & M. MARKHAM, ROADSIDE DEVELOPMENT AND BEAUTIFICATION: LEGAL AUTHORITY AND METHODS, PT. 2, 32-61 (1966). Price, *Billboard Regulations Along the Interstate Highway System*, 8 KAN. L. REV. 81 (1959); Note, *Outdoor advertising control along the Interstate Highway System*, 46 CALIF. L. REV. 796 (1958); Johnson, *The Structure and Content of State Roadside Advertising Control Laws*, HIGHWAY RESEARCH BOARD BULL. 337 (1962); Biven & Cooper, *Recommendations Regarding Control of Outdoor Advertising Along the Interstate Highways*, 14 MERCER L. REV. 308 (1963).

27. *E.g.*, Urban Renewal Administration, Open Space For Urban America, (1965) prepared by Ann Louise Strong; Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961); Open Space Communities in the Market Place, URBAN LAND INSTITUTE TECH. BULL. 57 (1966); Whyte, *Securing Open Space for Urban America*, URBAN LAND INSTITUTE TECH. BULL. 36 (1959).

28. 72 Stat. 238, 16 U.S.C. § 17k (1958).

29. Especially pertinent to the legal framework for recreational sites is the Outdoor Recreation Resources Review Commission, Land Acquisition for Outdoor Recreation: Analysis of Selected Legal Problems, ORRRC Study Report (1962) prepared by Norman Williams, Jr. The legal framework for programs of historical site preservation is described in J. MORRISON, HISTORIC PRESERVATION LAW, (1965).

a result of certain state programs[30] and the Highway Beautification Act of 1965.[31]

This growing body of data and analysis on the major elements which determine environmental quality is of direct benefit to legislators, administrators and courts in identifying the interests involved in programs to enhance that quality. The balancing of private hardship against public benefits, however, requires standards of comparative value, which, if they are not expressed in terms that can be quantified and measured, should at least be described so that legislative and administrative policy making bodies can establish priorities of importance on some rational basis which the courts will uphold as satisfying the constitutional requirements of due process of law. Some efforts have been made to create mathematical models which will express the extent to which desired effects in the direction of such characteristics as physical quality, harmony with nature, visual attractiveness, and variety will result from the investment of a dollar spent by the public (or a dollar lost by private landowners).[32] Similarly, efforts have been given to apply a cost-benefit technique to the analysis of scenic enhancement proposals.[33] The difficulty with these experiments is, however, that while they offer some promise of aiding the administrator of public funds who wishes to choose more wisely between alternative engineering or land acquisition plans for enhancing environmental quality, they are not likely to fully answer the needs of courts in deciding whether a prospective private hardship outweighs a prospective public benefit by so much as to constitute a taking of property without due process of law.

30. *E.g., Proceedings of Conservation Easements and Open Space Conference,* Wisconsin Department of Resources Development (1961); Jordahl. *Conservation and Scenic Easements: An Experience Resume,* 39 LAND ECONOMICS 343 (1963); *Workshop Manual for Conference on Scenic Easements in Action,* University of Wisconsin (December 16-17, 1966); *The Scenic Route: A Guide For the Designation of an Official Scenic Highway,* California Department of Public Works, (1966); *Report on Recommendations for Land Acquisition, Scenic Easements, and Control of Access for the Great River Road in Wisconsin,* U.S. Department of Commerce (1963); *A Proposed Program for Scenic Roads and Parkways,* U.S. Department of Commerce (1966) prepared for the President's Council on Recreation and Natural Beauty (1966).

31. 79 Stat. 1028, 23 U.S.C. § 131 (1965).

32. *E.g.,* Peterson, *Complete Value Analysis: Highway Beautification and Environmental Quality,* 182 HIGHWAY RESEARCH RECORD 9-17 (1967).

33. Davidson, *An Exploratory Study to Identify and Measure Benefits Derived From Scenic Enhancement of Federal Aid Highways,* 182 HIGHWAY RESEARCH RECORD 18-21 (1967).

This question is still one in which judgment regarding the relative priority of public and private interests is the ultimately decisive factor.

These approaches, essentially mathematical in character, have suggested that in determining whether police power or eminent domain is proper under varying circumstances the courts might use the test of whether the purpose of a proposed restriction on land use is to prevent one landowner from inflicting on his neighbors or on the public a burden of "external costs" of his particular land use, or whether, on the other hand, the purpose is to make the landowner provide some public benefit. Under this rationale, the former case would be an appropriate subject for police power regulation, and the latter would be a compensable taking.[34] Dunham explains this rationale as follows:

> Until recently the zoning plan in relation to activities of a private developer has dealt primarily with external costs. It has sought to reduce these costs by the orderly location of land use activities, and it has sought to allocate the cost to its producer by requiring, for example, off street parking and loading facilities. Should not the city planner also consider the location and character of private development in terms of any external benefit arising from private development in the same way that it may locate a public work to obtain an external benefit?
>
> . . . . .
>
> Strictly speaking a benefit can be induced via a restriction only where the external benefit results from non-use of private land. A restriction limiting the height of buildings in the approach to an airport, or compelling the land to be kept open for desirable open space, obtains the desired benefits by preventing building.[35]
>
> . . . . .
>
> Common law and statute have . . . [said] it was proper to make an activity assume burdens which that activity might cause. This nuisance makes an

34. Mishkin, *A Critical Look at Zoning Law*, 10 MUNIC. L. SERVICE LETTER 1 (A.B.A. Section on Municipal Law, January 1960); Dunham, *A Legal and Economic Basis For City Planning*, 58 COLUM. L. REV. 650 (1958).
35. Dunham, *supra* note 34, at 660.

> owner install purification equipment as a cost of doing business.[36]
>
> But to compel an owner to undertake a particular activity or use to benefit the public, even if in the form of a restriction, is to compel a person to assume the cost of a benefit conferred on others. Where the owner is prevented from building in the path of a runway of an airport, the owner is compelled to give a benefit which is the same as donating land for an additional runway. The evil of doing this by restriction is that there is no equal sharing of cost by the beneficiaries. The accident of ownership of land in a particular location determines who bears the cost.[37]

Applied to the case where, say, the government gives a direct order that private land shall henceforth be opened to the public for park use, the result of this rationale is both clear and beyond question on any moral or legal grounds. But this is the easy case. Much more difficulty will be caused by instances where a landowner is directed to forego some use of his land, or perhaps merely continue his land in its present uses, in the interest of preserving a natural scenic vista, a refuge for fish or wildlife, an historic site or landmark, or undeveloped open space. Are such measures for the purpose of preventing a landowner-developer from imposing a burden of "external costs" (composed of economic, social and aesthetic factors) upon the rest of the community? Or, are they for the purpose of compelling him to confer an additional benefit on the community at large? In terms of the capabilities of planners, economists and statisticians, there is a real question whether these questions can be fully answered. Cost-benefit technique has been developed furthest in the direction of identifying benefits to users;[38] it is less well developed as a device for analyzing detriments. Because of this imbalance in the state of the art, it has been suggested in the following comment that its application is not likely to give courts a basis for full judgment:

> I do not think the verbalizing of a rule that you don't pay when the forbidden land use would work a

36. *Id.* at 663.
37. *Id.* at 665.
38. *E.g.*, AMERICAN ASSOCIATION OF STATE HIGHWAY OFFICIALS, ROAD USER BENEFIT ANALYSIS FOR HIGHWAY IMPROVEMENTS, (1960); FEDERAL INTER-AGENCY RIVER BASIN COMMITTEE, SUBCOMM. ON BENEFITS AND COSTS, PROPOSED PRACTICES FOR ECONOMIC ANALYSIS OF RIVER BASIN PROJECTS, (1950).

> neighborhood harm, and you do pay when it is forbidden merely for 'public benefit' moves us very far forward. We perhaps need a Green Book[39] comparable to that for cost-benefit river basin analysis which suggests in detail the *kind of harms* (that is, direct and indirect, obvious and subtle costs) particular types of land uses may foist upon others .... We need to try this analysis in great detail in typical real life situations. We may then find that a control that at first sight seems only to confer a public benefit at the expense of the complaining landowner is on second look justified because of costs, relatively hidden, which the landowner's proposed use would impose. In short, cost-benefit analysis properly refined may give us some factual insights that are crucial in answering what is basically a question of judgment-on-the-facts .... But such analysis should be used as a device to uncover factual insights, not as a litmus test of constitutionality or unconstitutionality.[40]

The search for a new rationale to aid the courts in determining when uses of the police power and eminent domain are appropriate would thus seem to have come fully circle, back to the point where judicial judgment is relied upon to balance the competing interests involved and say, case by case, which predominates without necessary regard for whether positive or restrictive measures are intended. If this result seems inescapable, it may be because of the way that lawmakers and administrators tend to approach the question. There is an almost irresistable urge in this matter to think of the question in terms of police power versus eminent domain—as if the choice of means for working for environmental improvement had to be either one or the other. The process of choosing means for implementing policy goals for environmental improvement thus tends to start with the premise that public agencies should first see how far they can go in requiring landowners to submit to regulatory controls of land use, and resort to eminent domain techniques only where the courts compel them to compensate landowners for a "taking" of property. Such a tendency is suggested by Jaffe's comments on the administrative process:

39. The reference to the "Green Book" is a familiar one to engineers, and is a reference to the Senate document noted *supra* note 36.

40. Beuscher, J., comments on Mishkin's paper, *supra* note 34, at 8.

> We have, perhaps, succumbed too easily to the siren song of regulation, or rather, let us say, of comprehensive regulation. We may have been too easily moved by notions of rationalized completeness. If some regulation was good, more was even better. It is the way of the regulator to be mightily irritated by the peripheral which lies just beyond his grasp because what goes on there appears to him to be precisely the cause of trouble in his own bailiwick. And, of course, it may be. But it does not follow that the trouble is great enough to be worth the cost of trying to suppress it. We should, in short, look for the *strategic control,* for that control which is the least we can get along with and the most effective for our urgent need.[41]

A RATIONALE FOR COMBINATION OF POLICE POWER AND EMINENT DOMAIN

When the spheres of police power and eminent domain are viewed conjunctively rather than disjunctively, the problem of selecting the means to pursue a specified goal of environmental improvement becomes somewhat easier. Since one does not proceed from the premise that a public agency must first exhaust the potential of the police power before resorting to compensable taking under eminent domain, the necessity of defining this limit is not presented. The choice is based on the test of appropriateness to the objective laid down by the legislature or its delegated authority. Substitution of "appropriateness" for "necessity" does not, however, mean that unlimited administrative discretion may replace strict and uniform rules. The choice of means for accomplishing public objectives must still have a rational basis, and if the choice becomes easier in this context, it is because the approach which seeks to use combinations of police power and eminent domain offers more possibilities to work out accommodations of the competing interests which are involved.

An example of the conjunctive use of police power and eminent domain in improving environmental quality is pre-

41. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation,* 67 HARV. L. REV. 1105, 1134-35 (1954).

sented in the Highway Beautification Act of 1965.[42] This act provided the basis for state action to prohibit billboards and junkyards in certain roadside areas, and to remove billboards and screen or relocate junkyards in other such areas. It specified that in instances of removal or relocation the states must pay just compensation to the junkyard owner, and to the sign owner for taking his "right, title, leasehold, and interest in such sign" and to the landowner for taking his "right to erect and maintain such sign".[43] This represented a policy decision to combine the use of regulation and compensation, and to provide for compensation in the instances specified not because the Federal or state constitutions necessarily required it, but because it appeared desirable to relieve anticipated financial hardship. The decision was in marked contrast to the policy declared by Congress in the roadside advertising control law of 1958 which gave the states a choice of whether to implement the national standards by using their police power or eminent domain.[44]

Given this choice under the 1958 Federal-aid Highway Act, most states which enacted implementing legislation chose to use their police power; about one-third authorized their highway agency to use both methods, and only two out of twenty-five restricted their efforts to eminent domain.[45] The reason, quite clearly, was that the need to use available highway funds for construction was considered greater than the prospective hardship or inequity resulting from sign removals. As this program was revised in 1965 to require control of more extensive roadside mileage, the concern of Congress for the billboard companies' and landowners' possible financial loss found its way into the new law—together, it should be noted, with proposals that the costs of highway beautification be paid without impairing current levels of expenditures for road construction.

Policy decisions of much the same sort, dealing with a wide range of subjects in the land acquisition phases of highway, urban renewal, and other public works programs are

42. 23 U.S.C. § 131 (1965).
43. 23 U.S.C. §§ 131(g), 136(j) (1965).
44. 72 Stat. 904, 23 U.S.C. § 101 (1958).
45. A comparative analysis of these state laws is contained in R. NETHERTON & M. MARKHAM, ROADSIDE DEVELOPMENT AND BEAUTIFICATION: LEGAL AUTHORITY AND METHODS, PT. 2., 47-55, 142-146 (1966).

constantly being made at the administrative level where delegated authority allows a choice of techniques under standards prescribed by the legislature. In these circumstances certain basic considerations regarding the potential of the land involved will generally determine the selection of measures that are appropriate, and the "mix" of regulation and compensable taking which is desirable.

A typical setting for such decisions is presented when the highway department examines a segment of road which has been designated for scenic protection and preservation. Assume for the sake of discussion that the segment is 20 miles long; at some points crossing productive farm land with occasional stands of timber; at others, crossing wetlands and second growth scrub timber with little or no commercial value; and, at still other points, traversing broken terrain with lakes and streams having a certain recreational value. Assuming there is freedom to use either police power or eminent domain techniques in any combination which seems best, what sort of plan should be devised to protect, preserve, and develop scenic beauty along this highway?

One set of factors bearing on such a plan might be described as the "future use potential" of the land traversed by the highway. Assessment of these factors involves an evaluation in both quantitative and qualitative terms, and consideration of future use from the viewpoint of both the public, represented by the highway agency, and the landowner.

Viewed in these terms, the section of roadside in the area of wetlands and second-growth scrub timber might be adequately protected by the police power through roadside zoning that restricted its future use to conservation and flood plain preservation. The foreseeable potential of this area for anything other than its present development is likely to be very low.

On the other hand, roadside lands which are actively being farmed present a different future use potential. Their location may offer possibilities for eventual intensive development, and, even if this does not suggest a change from farm use, it is likely the owner may at some time want to build a new farm building, cut a stand of timber, or drain

a pond. If such future use would spoil a scenic view, acquisition of a scenic easement is likely to be the best plan, particularly if such an easement gives the state a right to supervise or perform certain tasks, such as the selective cutting of trees, and other maintenance functions affecting the view from the road.

The segment traversing broken terrain may present still another combination of factors. Striking scenic views may be seen from particular vantage points along the road. Here acquisition of roadside land in fee simple may serve both to preserve the foreground view and provide space to construct parking facilities for motorists stopping to enjoy the view. Possible further multiple-use potential might be served by acquisition of sufficient land to allow later expansion of the scenic overlook into a safety rest area, or to provide land for recreational facilities.

These multiple-use potentials which apply to the foreground view may not apply to the area of greater depth which comprises the background and distant view. There, the establishment of districts in which land use is regulated to the minimum extent necessary to preserve the basic integrity of the view may suffice for protecting this public interest without seriously jeopardizing the foreseeable future private use of this land. Quite possibly, also, conservation as well as scenic interests can be served by such regulatory measures.

Somewhat aside from the factors which are grouped under the heading of "future use potential", but still important to the administrator when he decides whether to use police power or eminent domain, are the problems of enforcement. One aspect of this matter was suggested earlier in the reference to the fact that eminent domain normally gives the public agency a right to enter upon property to maintain or develop it; police power regulations, on the other hand, do not, except possibly for a right of inspection.

Just as important, perhaps, is the matter of *who* will enforce aesthetic standards. As among the various public agencies—federal, state, local, or special purpose bodies—which might conceivably be involved, there are wide variations in legal and technical competence. The question thus

becomes a two-fold one: who *can,* and who *should* most reasonably be assigned the task of overseeing the implementation of aesthetic programs.

The enforcement factor may increase in importance when the use of the police power and eminent domain in combination with each other is considered. It is possible to foresee instances where land is first subjected to uncompensated regulation of its use during a period of planning or preliminary development, and subsequently subjected to eminent domain acquisition when it becomes possible to see more clearly just what property interests are needed to protect or develop the public's aesthetic objectives. Such an approach might have much to recommend it in the gray areas between those situations where it is obvious that police power should be used and those where it is not so obvious. During the period of experimental regulation the landowner's interest can be protected by recourse to an action in inverse condemnation where he can sustain the burden of proving damages. In this respect reference may be made to the coastal marsh acts in Rhode Island and Massachusetts, and also to sections of the British Town and Country Planning Acts[46] permitting landowners to file compensation claims for loss of development rights due to planning restrictions on land use.

It is also possible to foresee programs for amenity and aesthetic development which will utilize the combined efforts of several agencies of government, each exercising various of its powers in a coordinated and planned pattern. An example of such a possibility was noted earlier in connection with use of eminent domain to provide land for construction of scenic overlook and rest areas (by fee acquisition) and preservation of the foreground views (by scenic easements), and use of police power restrictions to protect the distant background views. The eminent domain phases of this program might logically be exercised by the highway department since all of the land affected would lie adjacent to or near the highway right-of-way. The police power phases, however,

46. *E.g.,* Town and Country Planning Oct. 1947, 10 & 11 Geo. 6, c. 51. Administration of this concept is explained in D. MANDELKER, GREEN BELTS AND URBAN GROWTH 36-39 (1962) and a revealing description of the application of regulatory controls to outdoor advertising is provided in MINISTRY OF HOUSING AND LOCAL GOVERNMENT, WELSH OFFICE, PLANNING CONTROL OF SIGNS AND POSTERS, (1966) (London HMSO).

might involve land located a quarter mile, half mile or up to several miles from the highway, and so be more logically assigned to an agency responsible for conservation, wildlife protection, or forestry. The potential for coordinated programs in which aesthetic objectives are protected and developed along with other resources of a region or neighborhood is illustrated in Wisconsin's ten-year, $50 million program of resource development,[47] and recommends itself not only as pioneering coordination in planning and the sharing of power, but as an example of mobilizing the financial resources of several public agencies for the combined benefit of all.

SUMMARY

In any discussion of modern doctrine and techniques relating to the use of police power and eminent domain for aesthetic purposes, there very quickly emerges an interplay between two approaches to the question of when to pay and when not to pay. One point of view seeks a definition of the ultimate limits of the state's constitutional power to regulate land uses on the premise that the state will seek to employ this power up to the very brink of constitutionality. The other viewpoint seeks to rest the selection of police power and eminent domain methods on policy decisions which aim at achieving what seems fair and sensible for both the public and private interests of an affluent society.

Each approach has attractive aspects. The former holds out the prospect of certainty and uniformity; the latter suggests equity, balance and the opportunity to innovate when circumstances call for it. For successful application to the problems that arise in efforts to control land use for improvement of environmental quality, however, both of these approaches require sophisticated and penetrating analysis of community environmental values and the effects which various land uses have on them. Whether the fact-finding processes of the legislative, administrative or judicial branches of government are sufficiently sharp to provide this analysis at the present time is questionable. As a result, rationales which are offered for determining when the law should require use of eminent domain instead of the police power all

47. WIS. STAT. §§ 15.60, 109.05 (1965).

ultimately rely on judgment regarding assigning priorities and values to the interests which compete for control of the land development processes. A rationale which recognizes the necessity of judgment therefore seems to be more realistic than one which strives for mathematical certainty.

It seems clear that current interpretation of constitutional guarantees of property rights allows the states to go further in the regulation of land use for protecting and developing community aesthetic values than has occurred to date. Choices between regulation and compensatory taking have, in fact, been made on the basis of policy rather than legal necessity. In these circumstances, the evolution of legal doctrine will proceed on its soundest basis if legislators and administrators clearly indicate with care and candor when their selection of techniques is based on law and policy. Or, to put it more simply, when a particular action is taken because it accords with a wise public desire rather than because constitutional law requires it. Beyond this benefit is another, equally clear from recent experience. That is, the interests of the public in improvement of the quality of community environment will be best served by selectively combining use of eminent domain along with land use regulation for the development of environmental quality and amenity along with other community resources.