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## Eminent Domain: A Need for Policy Re-Consideration - Preface

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## EMINENT DOMAIN: A NEED FOR POLICY RE-CONSIDERATION

### PREFACE

This collection of case notes is the product of a general feeling on the part of the authors that the existing policy considerations applied in cases involving the use of the power of eminent domain are antiquated. Each of these articles should be read with three basic factors in mind.

First, land is important today for the multiple uses which it can support; as a result, the value of ownership is not ownership itself, but the value resulting from the bids which multiple users will submit for the right to put the land to a particular use. Second, as the population and urbanization of our society increase, the competing number of uses necessarily increases. Third, since our economic system of choice is based on a "price tag" for each use, it is necessary to insure that the cost of a use is properly and fully reflected if the choice as between competing uses is to be exercised in the most economic manner.

Thus, each article deals with an instance in which the existing legal theories result in an improper reflection of the real cost of the use which is taken. As a result, the cost of the use for which the land is taken is reduced and the cost of the program it implements appears to be less. From the viewpoint of the condemnee, the proportionate cost is greater than the money which he receives in return. If the costs involved are categorized as social and individual costs, this means that part of the social cost is borne by the individual. In short, an individual should suffer no other loss than an exchange of his property for money, but when he receives less than the real value of the property, he is actually assuming that part of the social cost of the program which is not reflected in the condemnation award.

In this day of increasing activity in areas of broad social programs such as urban renewal, federal power projects, etc., it seems unwise to continue to allow choices based on inaccurate cost data. It must be recognized that eminent domain as

a legal concept is really a servant of economic choice by the governing body and as such a servant it should be concerned with supplying the decision makers with the most accurate data upon which to make their choices.

Mr. Neville discusses the need for an increased flexibility in the concept of taking so as to allow for a reflection of reality in certain close cases. He demonstrates that some courts have recognized and continue to recognize the need to alter present standards in particular factual situations. There is no indictment of these standards in the general run of cases, but the recommendation of a case by case approach in instances like those illustrated by his case seems to be a more sensible solution than allowing a rote application of inadequate law based on dated policy considerations.

Mr. Keene looks closely at a narrow area of the law of eminent domain and discovers that the original purpose of the concept as suggested in *Gibbons v. Ogden*, that is a guaranty of control in the federal government so as to implement free interstate commerce, has been replaced by a purpose through use which appears to serve no other end than insuring that the government can accomplish a social end at less than full cost. Again, there is no dispute with the necessity for such power in the federal government, but there is a very real question of the need to continue to tolerate the broad use of this power for no valid policy reason. It is interesting to bear in mind the general rules relating to highway and airport cases when reading this note.

Finally, Mr. Schuster provides a theoretical scheme which would expedite focus on the proper economic considerations which should affect judicial decisions on contract interest questions. His thesis is that a proper, considered classification scheme would provide the courts with the means to arrive at the proper valuation.

Taken as a unit, these articles suggest that the existing legal structure serves its purpose in most cases, but is far too rigid in certain other types of cases. Overall, the interest is to encourage an awareness of the need to loosen up these rigid principles so that the law may meet its obligation to provide the proper data for decision-making.

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