Governmental Power and Private Property*

A. Introduction

The source of property in the legal sense is government. The detailed meaning of property is found through piecing together relevant constitutional provisions, court decisions, statutes and administrative decisions and regulations in force at a given time in a given jurisdiction. These formal evidences of the law of property, in turn, have been said to take their shape from tradition, and ideas of social and economic policy. Since social and economic policy changes as time passes, and even tradition may gradually erode, it is to be expected that the content of property will vary with time.

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1 "In a strict legal sense, land is not 'property,' but the subject of property. The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.'" Eaton v. Boston, Concord & Montreal R.R., 51 N.H. 504, 511 (1872). Rights in land recognized by the law are only those activities in relation to land that governmental force or the threat thereof protects from interference by third persons or by government itself. The extent and type of governmental force that will be used in particular circumstances to protect the favored activities detail the content of property rights. The content in relation to interference from government may be different from the content in relation to interference from private persons. See Kratovil & Harrison, Eminent Domain—Policy and Concept, 42 Calif. L. Rev. 596, 599-604 (1954); Philbrick, Changing Conceptions of Property in Law, 86 U. Pa. L. Rev. 691, 723-25, 728-32 (1938).

* Kratovil & Harrison, supra note 1, at 604.

* Id. at 598. See generally Philbrick, supra note 1.
Often when governmental power is exercised through court decisions pricking out the boundaries of private property rights the courts are simply adjusting conflicts caused by disharmonious private uses of property. Decisions in the field of nuisance exemplify such adjustment. The governmental policies implemented by these decisions typically are broad, and stem from judicial ideas of how best to achieve the greatest good from natural resources for the greatest number of people, without departing drastically from the attitudes toward government and property current at the time among the people of the particular state. When governmental power over property is exercised through statutes or ordinances and proceedings pursuant thereto, the legislative bodies and executive personnel may be adjusting private land use conflicts, or they may be developing a physical asset for the use and benefit of the community.

Land use zoning ordinances establishing districts for particular uses, perhaps controlling the size of lots, and of the size and location of buildings on the lots, or even of the mixture of single and multi-family residential uses with commercial uses in a planned neighborhood, exemplify the adjustment function. Proceedings establishing highway rights of way, and preventing premature highway obsolescence exemplify the developmental function. Absent the protection, enterprises which generate traffic—shopping centers and residential subdivisions, for example—would be lured to the highway's flanks by the promise of quick transportation.

The distinction between the adjustment and developmental functions is really superficial, remembering that zoning and allied controls may create and preserve economic or aesthetic values while at the same time the protective aspect of legislative and executive action toward rights of way largely adjusts highway and non-highway uses of land, even though the adjustment may be achieved by obtaining title to property, such as the rights of access between the highway and adjoining land.4

Viewing the result of legislative and executive programs involving private land as developmental, the question arises—who is to pay for the development? The question presently is powerfully affected by the particular combination of governmental powers over property that is used in a particular instance.

The governmental powers exercised by the legislative and executive

4 One commentator has suggested that government plays two roles in its activities affecting land, that of participant and that of mediator in the competition for legal protection of demands to use land. Activities in the participant role benefit some government "enterprise"—which he defines to include highway construction—whereas, according to the commentator, activities in the mediator role do not. The suggestion is then made that only private economic losses caused by government in its enterprise capacity should be considered takings, hence requiring compensation; losses of whatever severity caused by the mediator role of government should not be compensated. Sax, Takings and the Police Power, 74 YALE L. J. 36, 62-63 (1964).
branches, and which directly shape the content of property, are the powers of eminent domain, taxation, and police. Of these powers, only one—eminent domain—purports to effect a transfer of title to the government. It is true that the taxing power may effect a transfer of title from the landowner to the government, but only if tax delinquency occurs. But the police and taxing powers effect a deprivation of land use rights virtually as final as the deprivation caused by condemnation. For example, development rights in the bed of a proposed street are for practical purposes gone when the proposed street is adopted as part of an official map, barring the situation where a fair return cannot be earned on the mapped land unless further development is permitted. Development may also be effectively prevented by imposing a high tax on improvements. Yet in spite of these similarities in the practical effect of the powers of eminent domain, taxation and police on the landowner, only when eminent domain is exercised is the landowner compensated for at least part of his loss.  

The various state constitutions require state and local government to pay “just compensation” for private property taken by eminent domain. E.g., Md. Const. art. III, §40. Sometimes the phrase is “taken or damaged.” See Calif. Const. art. I, §14. The federal government is under a similar obligation. U.S. Const. art. V. The exact size of the state or local governmental obligation to pay laid down by the constitutions is constantly evolving in state case law as judges interpret the meanings of “property,” “taken or damaged” and “just compensation.” A dominant reality with which the judges live while making their interpretations is that condemnation awards ultimately are paid by taxpayers interested in economical government to individuals interested in being shielded from harm caused by governmental activity. An effort to give some recognition to the two interests results in paying less than the entire economic harm an individual experienced; often because the interest invaded was not “property;” or, although the interest invaded was property, it was not “taken or damaged;” or because to pay for the harm claimed would go beyond the requirements of “just compensation,” as when the measurement of the harm is “speculative.”

For example, “property” of an owner whose land joins a highway does not include a right to have the highway grade remain the same. Lewis v. State Road Dep’t. 95 So. 2d 248 (Fla.), cert. denied, 355 U.S. 907 (1957); Horn v. City of Chicago, 403 Ill. 549, 87 N.E.2d 642, cert. denied, 338 U.S. 940 (1949); Anderson v. Stuarts Draft Water Co., 197 Va. 36, 87 S.E.2d 756 (1955). But it does include a right of egress and ingress to and from the highway. Blount County v. McPherson, 268 Ala. 133, 105 So. 2d 117 (1958); State ex rel. Morrison v. Thelberg 86 Ariz. 263, 344 P.2d 1015; modified & aff’d, 87 Ariz. 318, 350 P.2d 988 (1960); People ex rel. Dep’t. of Public Works v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957); Fleming v. State Road Dep’t., 157 Fla. 170, 25 So. 2d 373 (1946); Dougherty County v. Hornsby, 213 Ga. 114, 97 S.E.2d 300 (1956); Mabe v. State ex rel. Rich, 83 Idaho 222, 360 P.2d 799 (1961); Dep’t. of Public Works & Bldgs. v. Wolf, 414 Ill. 386, 111 N.E.2d 322 (1953); Hathaway v. Sioux City, 244 Iowa 508, 57 N.W.2d 228 (1953); Anderlik v. Iowa State Highway Comm’n., 240 Iowa 919, 38 N.W.2d 605 (1949); Riddle v. State Highway Comm’n., 184 Kan. 603, 554 P.2d 301 (1959); Royal Transit, Inc. v. Village of West Milwaukee, 266 Wis. 271, 63 N.W.2d 62 (1954).

Sometimes access rights, although drastically impaired, are not considered “taken” because of the manner in which the impairment occurred. Building a curb within the existing right of way with 30 foot openings for exit and entrance from a truck loading dock affords an example. State Highway Dept. v. Strickland, 213 Ga. 785, 102 S.E.2d 3 (1958). And expenses of removing personalty from a building, or of moving the building off the condemned land have been held not to represent a “taking” of property. People ex. rel. Dept. of Public Works v. Auman, 100 Cal. App. 2d 262, 223 P.2d 260 (1950); First Nat’l. Bank v. Maine Turnpike Authority, 153 Me. 131, 136 A.2d 699 (1957); Williams v. State Highway
B. BASIC CRITICISM AND SUGGESTED CHANGES IN THE LAWS OF COMPENSABILITY

1. Constitutional Requirement that Compensation be Paid

From the point of view of landowners, the above described situation presents a major inconsistency of the law: although the uses to which owners are permitted to put their land have been limited in similar fashion, one owner is compensated and another is not, simply because of the government’s choice of the tool by which to effect the limitation. One way to eliminate the inconsistency might be to abolish property taxes and equalize the impact on landowners of police power regulations and of eminent domain takings. But there seems little practical chance that taxation of property will entirely

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Subjective value to the owner of the property taken is excluded from the determination of the award, market value, where a market exists, being considered the standard of “just compensation.” See Dodge, Acquisition of Land by Eminent Domain, in BEUSCHER, LAND USE CONTROLS—CASES AND MATERIALS 525, 531 (1966); Beuscher & Delogu, Land Use Controls, Wisconsin Development Series, State of Wisconsin, Dept. of Resource Development, V 3-5 (1966). But where only part of a tract is taken, damages to the remainder are paid as part of just compensation, as reduced by the value of any special benefits conferred on the land by the public project. See Dodge, supra at 533, 554-55. Problems in appraising the value of land taken, either entirely or in part, are discussed in Ratcliff, Real Estate Valuation and Highway Condemnation Awards (Univ. of Wisconsin Graduate School of Business, Wisconsin Commerce Reports, Vol. VII, No. 6, 1966).

It should be remembered the statements above refer to the scope of the constitutional requirements to pay compensation. Legislatures frequently have enlarged the obligation by statute.

*The basis of choice is hard to state. Tradition may account for some choices. For example, the right of exclusive possession is so vital in the property concept, both to law-trained persons and to others, its elimination is virtually the prototype to Americans of a taking—hence eminent domain is used. Similarly, the creation of districts in which different uses of land are permitted—all pursuant to a rational plan for districting at least a considerable portion of a coherent area such as a city or riverbasin—is well known to city dwellers and, as long as reasonable benefit from the premises may be enjoyed within the permitted uses, compensation is not expected—hence the police power is used. The different expectations in the two instances perhaps stem from popular ideas of property being the land rather than rights to use it in various ways.

When some interest in land less than the fee and other than possession is to be acquired, tradition is less potent in guiding choice and pragmatic factors become important. Can the unit of government contemplating the elimination of private rights afford to pay for them? Will there be an outcry from the people if payment is not made? Will there be sufficient possibilities of use left to most landowners to allow a police regulation to be constitutionally applied to the bulk of the land involved? Decisions on such questions involve judgment and hence may be expected to be decided differently by different planners without any single decision necessarily being arbitrary. Yet the difference in impact to landowners remains drastic. For example, building set-back lines from streets are established partly to improve safety in use of the streets and partly to improve the appearance of buildings
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cease, in view of the severely limited sources of revenue for local government. As to the two other powers of government over land, their impacts on landowners can be equalized either by adjusting the police power impact to conform with that of eminent domain or vice versa. To do the former would require paying the value of all potential land uses wiped out by police regulations. The payment could be accompanied by requiring that the value of the barred uses be paid to the governmental unit that imposed the controls when and if the uses later became lawful, appraised as of the time they returned to legality. Thought also could be given to a requirement that government be paid for rises in land value caused by the government action when such rises were realized by sale or mortgage borrowing. Such a provision would recognize one surface distinction between eminent domain and police power, i.e., the latter power leaves title to affected land undisturbed in form, hence allowing the private owner a chance either to develop the land to the forbidden uses if the ban is lifted, or to enjoy the benefits of rises in land values that later occur, whereas eminent domain transfers title to the government and thus forestalls later private benefits from the land taken. Considering the multitude of police regulations affecting land uses, and that probably the bulk of them are imposed by local government, the expense of such a program of compensation may prove prohibitive, unless the application of police regulations was reduced or taxation increased.  

erected along the street. Scenic easements along highways are established to preserve aesthetic values important to society. Each control leaves the landowner free to use the land controlled in a number of ways. But the set-back lines often are established by police power, the easements by purchase or eminent domain. Who is to say the land use control tool used might not have been the opposite in each instance? And how much comfort does the landowner who is affected by the set-back line and receives no compensation derive from knowing the choice of tool was reasonable, when he contemplates the owner affected by the easement who does receive compensation?

7 The idea that diminution of property value caused by police power regulations should be compensated is not new. See Dunham, From Rural Enclosure to Re-Enclosure of Urban Land, 35 N.Y.U.L. REV. 1238, 1253-54 (1960). Experience under zoning ordinances based on eminent domain makes it doubtful that compensation on such a scale is feasible. The following critique of eminent domain zoning in Minnesota appeared in the 1920's.

It was suggested that zoning proceeded too slowly to be effective when diminutions it caused in property value were compensated. Less than 1 per cent of the area of Minneapolis, 1.22 per cent of St. Paul, and \( \frac{4}{5} \) of 1 per cent of Duluth had been zoned under the 1915 eminent domain zoning act, whereas under the 1913 police power acts, 23%. 27 of 1%, and \( \frac{4}{5} \) of 1% of the respective cities had been zoned. The critic then continued:

The eminent domain act was open to additional objections. The expense of condemnation and assessment proceedings in each case was an appreciable item, and would have made it well-nigh prohibitive to have zoned the entire city at one time by this method. Naturally, there was always a certain amount of guesswork and uncertainty in the damages awarded and the assessments levied. It was said, also, that the act lent itself to a sort of extortion; for the owner of a vacant lot of appropriate size in a good residential district had only to announce his intention to erect a store or apartment house thereon to induce neighboring residents to circulate a petition for a restriction with the result that he received damages at their expense. Whither anyone profited unjustly in this way would be hard to prove. A final objection to the eminent
Reforming eminent domain practice to simulate the practice followed in testing the validity of police power regulations does seem feasible, however. The reform would not affect appraisal technique; it would change the significance of fixing the "value" of property.

It is not proposed to push the reform to the outer limits of constitutionality as now understood. Occasionally one finds courts suggesting today that if a police regulation leaves an owner able to earn the real estate taxes on his land, the regulation is lawful in its application to the tract in question. It may be wise to adopt a less rigorous test of taking where highway right of way acquisition is concerned. The fiscal resources of the states and federal gov-

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domain procedure was the cast-iron rigidity of the resulting restriction. The entire public gained a sort of restrictive easement upon the land in question, which it was almost impossible to change since each owner who had paid assessments to obtain the restriction had a right of action to enforce it . . .

Each lot in the district affected was thus subjected to a restriction which could be wiped out only as it had been created . . .

Anderson, Zoning in Minnesota; Eminent Domain vs. Police Power, 16 NAT'L. MUNIC. REV. 624, 628-29 (1927).

The Minnesota act that was the subject of the above criticism provided for the creation of zoning districts upon the petition of 50% of the owners of real estate in the proposed district. Minn. Laws 1915, Ch. 128, §1. The possibility of blackmailing private owners could be eliminated by making public authorities responsible for developing the zoning scheme, as commonly is done under police power ordinances. However, this only shifts the spectre of blackmail to the public authorities, and through them to the taxpayers generally. The payments contemplated by the Minnesota act were to be financed by special assessments against the property benefited by the zoning. Minn. Laws 1915, Ch. 128, § 3 Fifth. Even if the payments were financed by general funds of the zoning governmental unit the rigidity of the restrictions will remain. Although perhaps no specific private individual will have acquired a property right in the restricted land if financing is by general funds, the zoning government will have, and it will be as inhibited in giving it away in the future if the restriction becomes undesirable as it is inhibited in giving away other public property.

Another criticism of compensating losses in property values caused by public controls of land use is that it would make legislative bodies too cautious to enact land use controls sufficiently vigorous to deal effectively with today's pressing problems of land use. BEUSCHER, LAND USE CONTROLS—CASES AND MATERIALS 539 (4th ed. 1966). Professor Beuscher is writing specifically of consequences to be expected if inverse condemnation is allowed as a remedy against a police power control that is unconstitutional in its application to a particular tract of land. Timid public controls perhaps are even more likely if compensation of property losses is the general rule. See BEUSCHER, supra at 545-47.

* Ratcliffe, supra note 5, describes conventional appraisal practice today as attempting to correlate three different measurements of value, each based on different data. The three bases of value are cost less accrued depreciation, income, and market data. After pointing out that courts have directed market value be sought as a basis for a condemnation award, Professor Ratcliff urges that the only form of market value which is susceptible of objective estimation and determined by the market is the most probable selling price of the subject property if exposed to the market for a reasonable time. Estimating the most probable selling price requires predicting future behavior of real people; of the three traditional approaches, only the third—market data—is helpful for this purpose. The Ratcliff analysis is highly recommended reading for lawyers concerned with the condemnation process.

* See the concurring opinion of Justice Currie, in which Justice Dieterich joined, in Nick v. State Highway Comm'n, 13 Wis. 2d 511, 109 N.W. 2d 71 (1961). Justice Currie states: The writer of this opinion believes . . . that highway access rights are but one of a bundle of rights which appertain to a parcel of real estate.
ernment acquiring the right of way are far greater than those of local government, which for the most part imposed the controls in relation to which the tax test of taking emerged. Greater ability to pay suggests there should be greater readiness to pay as well.

a. “Taking” to mean inability to earn a reasonable return

The compensation inconsistency now existing between eminent domain and police power actions can be materially reduced while staying well within constitutional limits. The key lies in redefining “taking” or “taking or damaging” as used in the just compensation clauses of the various constitutions. “Taking” should only occur when the land or interests in land remaining to the owner immediately after the governmental action in question is not of practical utility. Lack of practical utility, in the case of commercial property, would be shown by inability to earn a reasonable return on the value of the entire tract, appraised immediately before, and without regard to, the action taken. Non-commercial property could be treated similarly by imputing a return to it.

What return is reasonable depends in part on the circumstances of the landowner, and those circumstances of which objective evidence is adduced should enter into the decision of specific cases. It is impossible to state in advance of actual litigation all the circumstances relevant to fixing a reasonable return. This writer has suggested elsewhere that they should include the federal income tax bracket to which the landowner belongs and the depreciation allowances he is making—the higher the tax bracket and the higher the depreciation allowance, the lower the return that could be deemed reasonable. Other relevant factors might be the average rate of return earned in the locality by similar real estate developments, and by other

Zoning legislation enacted in the interest of the general welfare may have the effect of extinguishing one or more of the rights embraced in the entire bundle without the necessity of the state or municipality paying compensation to the landowner. In case of zoning enactments the test employed is whether, viewing the property as a whole, there has in reality been a taking without compensation in that confiscation of the property has in effect occurred by depriving the owner of all beneficial use of his property. (Emphasis added). 15 Wis. 2d 511, 518, 109 N.W. 2d 71, 74 (1961).

And in Arvene Bay Const. Co. v. Thatcher, 278 N.Y. 222, 228, 15 N.E. 2d 587, 590 (1938), the New York court said:

The property, then, must for the present remain unimproved and unproductive, a source of expense to the owner, or must be put to some non-conforming use.

The court went on to say that $4,566 of taxes were levied on the land during the nine years it conceded was unsuitable for any conforming use, in addition to assessments of several thousand dollars. The court then declared the ordinance “is in substance a taking of the land prohibited by the Constitution of the United States and by the Constitution of the State.” 278 N.Y. 222, 223, 15 N.E.2d 587, 592 (1938).

E.g., as to zoning, see 8 MCGUILLAN, MUNICIPAL CORPORATIONS §§25.43, 25.45, 25.167 (3d ed. 1957); as to official map see Waite, infra note 11, at 4, 6.

investments, local or otherwise, of comparable risk and possibility of gain. For example, if the real estate in question was fully and properly developed in a stable community, “blue chip” corporate stock might give the proper comparison. If the real estate was farm land being held for future subdividing, it might be compared to “businessman’s risk” stock. The possibility, already mentioned, that mere ability to earn the real estate taxes may sustain police regulations also appears germane, as do comparable expert predictions of the impact of the public improvement on the value of the remnant parcel. In appropriate circumstances a jury might conclude that the chance of capital gain was so probable and of such magnitude as itself to afford all the compensation justice requires.

Whatever the factors relevant to a reasonable rate of return in a given case, it is peculiarly appropriate that the determination of reasonableness be made by the jury. The determination is a step in the process of deciding whether just compensation must be paid—a decision largely grounded in the mores of society. Twelve jurymen may reflect social mores to a greater extent than can a judge or any other individual.

The expected operation of the new definition of taking may be illustrated by a few examples. Imagine the acquisition of a right of way 300 feet wide across the outer 300 feet of a rectangular pasture 1000 acres in area which was part of a western cattle ranch. Assume the belt of land acquired is 40 acres in area and contains no improvements other than fencing. It seems likely in such circumstances the rancher will earn a lower return on his property with a 960 acre pasture than with a 1000 acre one, but the return probably will still be reasonable in relation to the value of the ranch immediately before the acquisition. Therefore no taking in the constitutional sense has occurred and no payment is required. At the other extreme, suppose an owner’s entire tract is acquired. Since the acquisition will leave the owner with no land whatever, and hence he will be able to earn no return at all, and will have no land on which possibly to experience a capital gain, a taking has occurred and compensation must be paid. Perhaps only access

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22 If, as suggested in note 5, supra, the process of determining condemnation awards is one of mediation between the landowner and the taxpayers, whether the result is “fair” is determined by general attitudes in society toward certain critical questions. Examples may include: What is the proper relationship between private property and the public as represented by government? Does it make a difference whether the level of government concerned is local, state, or federal, considering that the three levels have differing responsibilities and fiscal resources? What maximum total portion of private income may properly be exacted in taxes? How rapidly should highways, schools, urban renewal, and other public improvement projects be implemented? Just as the “fairness” of an award, once made, is controlled by mores, so is the “fairness” of the determination that an award should or should not be made in the first place.

23 In Eaton v. Boston, Concord & Montreal R.R., 51 N.H. 504 (1872), the New Hampshire court recognized the essential similarity of denying to the owner certain use rights in an entire tract and of denying his title to the small portion of the tract. The Eaton case suggests compensation should be denied in both instances, assuming a fair return can still be earned.
rights are acquired. Whether a reasonable return still may be earned in such an instance will depend on the availability of other access and its utility. When the acquisition severs a tract into two parcels compensability will depend on whether a reasonable return may be earned on the parcels relative to the value of the entire tract immediately prior to the acquisition. Suppose non-commercial property such as an owner-occupied residence is acquired. Compensability would hinge on the estimated return imputable to the property immediately after the governmental action occurred. If such imputed return was reasonable in relation to the “before” value of the property, no compensation would be needed. If the property be a public park and it is determined the remnant parcel is not susceptible to other use, compensability might depend on whether it is still usable as a park by a sufficient number of people to make its per-visitor-cost comparable to that of other comparable parks.

A convenient means of adopting and administering the new standards might be to enact legislation defining “taking” and the method of determining a “reasonable return” for constitutional purposes. The statute then should provide explicitly for paying compensation when the government acquires either an entire tract or all the rights a particular claimant has in a tract, since under the suggested test a taking always would occur in these situations. For all other situations the statute should create a rebuttable presumption that no taking has occurred, and provide a period of time within which claimants might bring suit to try to overcome the presumption.

2. The measure of just compensation

The present system of paying the market value of property interests acquired by eminent domain creates another inequity favoring landowners whose property rights are condemned over those whose property rights are diminished by application of police power controls. The latter owners may be forced to accept a reasonable return on their land, presumably this would be a lower return than could have been earned had the police regulations not been imposed. The Constitution has not been thought to require the owner to be made whole as to his return, by government paying him the difference between the return possible to be earned on the property rights remaining after imposition of the regulation and the return that would have been earned on the totality of property rights available for use prior to the regulation.14 Yet when an interest in land is acquired through eminent domain,

14 Police power regulations often increase the return from land, of course, as when zoning restrictions are changed by amendment, exception, or other device to permit uses higher in economic value than those formerly permitted. See Dewar, Zoning Reforms Asked in Wake of Indictments, Washington Post, Oct. 8, 1966, p. D1. There is no constitutional requirement that private benefits from public action be paid the government. Since the government regulations effect this rise in return, however, the landowner's situation is
the theory of the law imposes no similar risk that the owner accept less compensation for the property taken than he could have obtained had the public acquisition not occurred. Instead, the attempt is made to pay the owner just what he would have received had he sold the property in the normal manner.

Today it is hard to justify the different compensation philosophies applied to landowners in eminent domain and in police power matters. When real property was thought to be land in the physical sense, if such a time ever really existed, and a taking only occurred if government acquired the right of possession, the distinction between "taking" and "regulation" probably seemed plausible. The distinction suggested a reason for not compensating when only regulation had occurred—no property had been taken. Today this distinction is seen to be illusory. At first blush it seems still true that legal title to property taken under eminent domain is transferred to the government, whereas title to property regulated under the police power is not. But remembering property to be a bundle of rights, it is clear this distinction, too, is illusory. The substantive content of title is largely rights of use, and in both situations a transfer has occurred—under eminent domain all rights of analogous to that of an owner, part of whose land has been condemned for a project that ultimately benefits the remaining part. Special benefits are set off against damages in computing a condemnation award (Dodge, supra note 5, at 534-35) yet the beneficiary of police power regulations is presently allowed to remain undisturbed in his gains, and thus in this situation appears to have an advantage over the condemnee. A tax on the increased return created by the police regulation might help correct the inequity. It may be mentioned that Montgomery County, Maryland, is reported studying a tax on zoning profits, although apparently the purpose is revenue rather than equity. Washington Post, Dec. 20, 1966, p. Cl, col. 3; C6, col. 1-2.

15 Even Blackstone, who considered part of real property to consist of corporeal hereditaments,—"substantial and permanent object"—also considered another part to be "incorporeal" hereditaments which could not be handled. 2 BLACKSTONE, COMMENTARIES 16-17 (1771).

16 See Beuscher & Delogu, Land Use Controls, Wisconsin Development Series, State of Wisconsin, Dept. of Resource Development (1966), ch. V. at p. 3 of chapter V the authors state, "It is clear that some takings (eminent domain proceedings) require just compensation, while others (regulatory limitations) do not." In describing the approach used by judges in distinguishing the two types of taking, the authors say at pp. v-3, 4: The goal has been to strike a balance between the needed public programs and regulations on one hand and private interests on the other. . . . It is difficult to predict whether a court will be struck by the importance and community need for a given governmental action and uphold uncompensated regulation or in spite of public benefits will call the action a taking of private property which must be compensated. [Finally, after saying that in an earlier day property was thought to be land itself and therefore physical occupancy was necessary to a taking, they say:] But today property is conceptualized as an intangible cable of interests. One or more of these interests (strands in the cable) may be interfered with (taken, in a sense) without either physical occupation of the land or such a complete diminution in the value of the full cable of property interests as to require the payment of compensation. Clearly, land use regulations and other governmental programs which deprive landowners of some alternative use privileges and accordingly of dollar values fall into this definitional framework.
use comprising the interest in land condemned have been transferred, under police regulations some of the rights of use have been, at least in the sense that the private owner no longer can exercise them until they are released by the pertinent governmental body for renewed private use. Here again, an identical approach to compensation of landowners affected by police power restrictions or eminent domain proceedings is indicated, with only the amount of compensation differing under the two powers because the degree of interference with possible private uses of land is different.

One more possible reason for the present different approaches to compensation used under the two governmental powers may be mentioned. Police power regulations always leave the affected landowner with title to some use rights, among which is included the right of possession, whereas eminent domain proceedings often take all the private rights in the property interest condemned. Hence under police power regulations, the owner retains property that may participate in general rises in property values created by the regulation and thus be compensated for his loss. But the owner whose property interest is condemned retains nothing that may similarly share in economic values created by the public project; therefore he must be compensated by a money payment from the government. This distinction also breaks down. First, land values do not always rise as a result of police power regulations, either in general or in regard to particular lots. Second, whenever a partial taking occurs under eminent domain the private owner does retain property that may share in values created by the project, yet compensation is made when a partial taking occurs.

If differences in compensation philosophy in eminent domain and police power matters are unjustified, they should be eliminated in order more nearly to fulfill the basic mandate of due process, that persons in similar circumstances be treated similarly. The elimination can be achieved by forcing landowners whose property rights have been condemned to accept compensation comparable to the reasonable return which owners of land subject to a validly applied police regulation must accept. To do this, the owner in eminent domain proceedings, in which the entire property is taken, should be paid the capitalized value of a fair return on the value of the property, determined as of the time of taking. Where a partial taking occurs, the fair return should be based on the difference between the before and after values of the owner's property.

The meaning of "fair return" for determining the amount of compensation can be defined by statute. The definition suggests itself from the certainty that a condemnation award will actually be paid, once the necessity of payment has been established, compared to the uncertainty that a real estate investment will produce profits. In effect, the determination that compensation must be paid converts the risky investment in real estate to an invest-
ment completely free of risk, such as United States government bonds. Therefore "fair return" for determining the compensation to be paid should be the return that could be earned by a sum equal to the value of the property invested in government bonds on the date of the governmental action. A difficulty arises in determining the percentage rate at which to capitalize the return thus determined. The rate on government bonds tends to be low compared to the rate expected on real estate developments because of the lack of risk. Hence if the bond rate is used for capitalization, the award will be larger than if the real estate rate is used. Using the real estate rate is inconsistent with having converted the investment to one similar to government bonds. Yet using the real estate rate will result in an award of the type needed to eliminate the differences in eminent domain and police power philosophy and hence might be called "the fair rate of capitalization." The award may be expected to be substantial, yet less than the amount obtainable if the property had been sold in the normal manner. Thus the owner whose land is subjected to eminent domain would shoulder part of the real estate costs caused by the eminent domain proceedings, just as the owner now does whose land is depreciated in value by police power regulations.

To illustrate application of the new measure of compensation, imagine that the right of way condemned includes an apartment building. Imagine also that all the owner's property interests were included in the condemnation, hence compensation must be paid. The amount to be paid would be derived by first applying against the appraised value of the property the effective interest rate on United States government bonds current when the state acquired the property. Assuming the appraised value of the property was $100,000 and that the effective interest rate on government bonds was six per cent, the fair annual return would be $6,000. The rate of return experienced locally on comparable apartment buildings would be determined from testimony. Assume it was eight per cent. The award to be paid the landowner would be $6,000 capitalized at eight per cent, or $75,000. In the event of a partial taking, the same process would be followed except that the sum on which the equivalent bond return would be figured would be the difference between the appraised before and after values. Non-commercial properties in private use, such as owner-occupied residences, may be handled by using an imputed return. It is hard to say how to handle those in public use, such as a city park. Perhaps it is unnecessary to change the present mode of determining the award to be made for such properties since they are now so infrequently subject to police regulations—there is in effect no police practice affecting such properties to which it is worthwhile to conform eminent domain practice.\(^\text{17}\)

\(^{17}\)It should be pointed out that adoption of the new standard of compensation here described does not appear to the writer to lessen the pertinence of suggestions the writer has made elsewhere for reducing land acquisition costs to the government. See Mandelker
3. **Who is entitled to just compensation**

Assuming the basic changes outlined are made to render the impact of eminent domain and the police power on landowners more uniform, a question arises as to which owners of land affected by government programs should be allowed a chance to receive compensation. Presently, if an existing highway is relocated, owners of land abutting the old right of way are denied compensation if the new right of way does not cross their land.\(^1\)

The same is true if an existing highway and the property along it remain physically undisturbed, yet, through completion of a segment of the interstate system, the highway is relegated to use only by local traffic.\(^2\)

Often courts deny compensation for loss of access when the loss was caused by structures placed within the right of way of an existing road.\(^3\) Yet in all these situations, the land affected may decline in value as much or more than does land affected in ways that presently call for compensation. All owners of land whose value declines by virtue of government action, either of the illustrated types or otherwise, should have compensation available to them, within the framework of the new definitions of taking and compensation previously sketched. To protect the government against paying for harm it did not cause, the burden of proving causation by the government should be placed on the compensation claimant.

4. **Direct federal payment for certain damages**

Increasing the circumstances in which landowners have standing in court to

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\(^1\) Jahoda v. State Road Dept., 106 So. 2d 870 (Fla. 1958).


\(^3\) E.g., People ex rel. Dep't. of Public Works v. Ayon, 54 Cal. 2d 217, 5 Cal. Rptr. 151, 352 P.2d 519 (1960).
claim compensation in connection with governmental land acquisition will create a considerable contingent liability for the acquiring unit of government. The liability might well be high enough to exceed the limits of state and local bonding power, with disastrous results to the investment rating given any bonds proposed to be sold to finance the project. The further result would be to destroy the market for the bonds and reduce highway construction by state or local government to a cash basis. To avoid the financing problem just mentioned, the statute allowing claims to be made for damage caused by diversion of traffic, or by structures placed within an existing right of way, should limit them to claims arising from land acquisition programs funded in part by the federal government. Federal legislation also would be necessary to provide for direct payment of such damages by the Bureau of Public Roads or other appropriate agency. The federal statute should also provide that these payments would be in addition to highway aid funds already available, in order to avoid crimping the highway construction program.

5. Constitutional problems and social mores
Adoption of any of the suggestions outlined above poses constitutional problems that can only be resolved by judicial decision. There are reasons to expect the suggested changes would be held constitutional. They would achieve a more nearly equal treatment of landowners whose property declines in value when government acts to create, protect, or improve public highways or other land-based assets. At the same time, redefining taking and compensation protects the public purse. The anticipated result is that more landowners will be given a chance to prove their right to compensation than presently are, but not all will succeed, and the compensation a landowner receives who does succeed will often be less than, theoretically, he could have obtained by sale of his property in the open market.

Whether the end result would afford acceptable treatment of both landowners and of taxpayers is hard to determine. Conceivably, the concept of government obtaining land at a price lower than a private person would pay would not be accepted by those landowners who would receive compensation under the existing law. On the other hand, the large numbers of landowners now receiving nothing for their losses, but who under the new system would have a chance to receive something, presumably would be pleased by the changed law. At the very least, the suggested changes have the virtue of more nearly exposing the true costs of public improvements than the existing law of compensability does, thereby affording the electorate an improved basis on which to determine whether the compensation is just.
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