North Dakota Law Review

Volume 41 | Number 3 Article 2

1964

Urban Redevelopment to Further Aesthetic Considerations: The Changing Constitutional Concepts of Police Power and Eminent Domian

W. Paul Gormley

URBAN REDEVELOPMENT TO FURTHER AESTHETIC CONSIDERATIONS: THE CHANGING CONSTITUTIONAL CONCEPTS OF POLICE POWER AND EMINENT DOMAIN*

W. PAUL GORMLEY†

The pressing need for urban communities to improve their physical environments is receiving increased attention from specialists in many areas, including the members of the legal profession. Architects, sociologists, statesmen, and planners of all types are changing the face of America's modern cities. This desire to improve the aesthetic quality of the United States is recognized by President Johnson as an essential feature of his proposed "Great Society," in which blighted cities and bleak suburbs will be replaced by a *"beautiful America."*[1] Though many diverse political, economic and human problems become involved in federal and state redevelopment plans, basic legal considerations are still of primary importance for the reason that there is an ever-increasing clash between the rights of private property owners as against the use of eminent domain and police power by the sovereign. In fact, these two constitutional provisions—previously held to be separate and distinct, though closely related—are now in the process of "modification," not by means of a constitutional amendment, but through judicial interpretation. The leading case of *Berman v. Parker*[2] presents a new insight into the use and application—or perhaps even a misuse—of the police power and eminent domain as complementary legal norms. Indeed, *Berman v. Parker* is actually growing in importance because it constitutes the basic authority for a new

* This study is based on one prepared for Professor Herman Hillman in the Graduate Seminar on "Legal, Social and Political Aspects of Urbanization," New York University School of Law. While acknowledging the help received from Professor Hillman, the writer assumes full responsibility for all statements.

† Associate Professor of Law, University of Tulsa. A.B., 1949, San Jose State College; M.A., 1951, Southern California; Ph.D., 1952, Denver; LL.B., 1957, LL.M., 1958, George Washington.

1. State of the Union Message by President Johnson, January 4, 1964. In order to achieve the goals of his "Great Society" he advocated the creation of a Department of Housing and Urban Development. "We do not intend to live—in the midst of abundance—isolated from neighbors and nature, confined by blighted cities and bleak suburbs. . . . The first step is to break old patterns—to begin to think, work and plan for the development of entire metropolitan areas. We will take this step with new programs of help for basic community facilities. . . . New and existing programs will open to those cities which work together to develop unified long-range policies for metropolitan areas. We must also make important changes in our housing programs if we are to pursue these same basic goals. A Department of Housing and Urban Development will be needed to spearhead this effort in our cities."

2. 348 U.S. 26 (1954), *affirming* Schneider v. District of Columbia, 117 F. Supp. 705 (D.D.C. 1953).

line of cases not only from the United States Supreme Court,[3] but also the lower federal courts,[4] and even the highest tribunals of the states.[5] This 1954 decision by the Supreme Court remains the fundamental pronouncement of the *merger of the police power and eminent domain* into a single legal entity, not only as to urban redevelopment but also in a large number of federal renewal schemes.[6] Accordingly, it seems desirable to consider the direction in which this judicial legislation is moving.[7] Regardless of the viewpoint taken concerning the desirability, or lack of desirability, of redevelopment and renewal programs, one inescapable conclusion emerges: the concept of police power used to further aesthetic considerations—supported by "just compensation" drawn from eminent domain—will be broadened in the future. While the community interest will be served, some individuals and groups will suffer. For instance, approximately four million people will be displaced from their homes by 1970; one out of every fifty persons living in the United States[8] will be compelled to leave condemned structures. While many practical arguments in favor of urban redevelopment plans can be offered,[9] a basic judicial consideration still must be resolved; how far can federal and state laws (and even municipal ordinances) go without violating the constitutional rights of private land owners?

Obviously, the courts in the United States have adopted a changed attitude as to private property rights in relation to community planning during the last half century.[10] The aesthetic needs of our major cities now predominate, and the implication of such a social-functional approach seems fairly obvious. Citizens and cities alike must evaluate the interest of the community in protecting existing private property rights as against the community interest of rebuilding and rehabilitating marginal and gray areas, in addition

3. *E.g.*, United States v. Twin City Power Co., 350 U.S. 222 (1956); Ivanhow Irrigation District v. McCracken, 357 U.S. 275 (1958).

4. See collected cases, *infra* notes 51 through 58.

5. *E.g.*, Allen v. City Council, 215 Ga. 778, 113 S.E.2d 621 (1960), 70 HARV. L. REV. 799 (1961); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955), 35 NEB. L. REV. 143 (1956). See also Note, 50 CAL. L. REV. 483 (1962).

6. See HAAR, LAND USE PLANNING 409-566 (1959). Craig, on the other hand, says: "In urban renewal projects, the workings of police power regulation and eminent domain can be seen at their closest conjunction. Formerly, urban redevelopment concentrated on demolition and rebuilding from the ground up, but now renewal programs, with their rehabilitation and conservation techniques, involve the use of regulations such as housing codes, building codes, and sanitary codes, applied within the renewal area to properties not taken by eminent domain." *Regulation and Purchase: Two Governmental Ways to Attain Planned Land Use*, in LAW AND LAND: ANGLO-AMERICAN PLANNING PRACTICE 207 (Haar ed. 1964).

7. Craig tends to take a more moderate position than that of the writer. He does not speak of the merger of police power and eminent domain, but concludes: "There is increasing narrowness of the line between police power regulation and eminent domain in the attainment of planned land use. . . . Distinctions between the two powers on the basis of difference in mode of application, as between uniform application and case to case application, become much less useful as the police power is adopted to a multiplicity of shading and classifications in application." *Id.* at 211.

8. *The Truth About Urban Renewal*, Nation's Business, Jan., 1964, p. 31. See ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1919-1962 (1964).

9. For an extremely able appeal in favor of governmental action see McDougal & Mueller, *Public Purpose in Public Housing: An Anochronism Reburied*, 52 YALE L.J. 42 (1942).

10. Note, 72 HARV. L. REV. 504 (1959).

to such normal governmental functions as slum clearance and the protection of the health, welfare, safety, and morals of the population. The need for urban redevelopment and city planning, therefore, becomes involved with legal doctrines promulgated at a period in history when cities barely existed, let alone city planning.

The issue presented in *Berman* is not the traditional problem of slum clearance or the use of police power to protect the health, welfare, safety, or morals of the population but rather the use of such police power—with some elements of eminent domain—for purely aesthetic considerations.[11] The point of contention was that private land, in this instance a department store, was to be seized and condemned by the National Capitol Planning Commission and subsequently turned over to another private individual in keeping with the objectives of the federal agency. It was argued that such a seizure was permitted under the terms of the District of Columbia Redevelopment Act.[12] In spite of the fact that "just compensation" was to be awarded in keeping with the normal use of eminent domain, a challenge to the constitutionality of the Act was made on the ground that "public purpose" as required under the terms of the fifth amendment did not exist because the land in question was merely being made available to another private person, thereby depriving the petitioner of his property. The power of Congress to provide for the general welfare in the District of Columbia clashed with the right of petitioner to own and enjoy the exclusive us of his property in the absence of any statutory violation.[13]

THE PROBLEM

It seems obvious that by the process of substituting "public purpose" for "public use" as the relevant test of constitutionality

11. Note, 23 GEO. WASH. L. REV. 730 (1955). *But see* Murphy v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944), which followed the older view that private property could not be taken for aesthetic considerations. In the past, the law of aesthetics has ridden the two vehicles of police power and eminent domain. *But cf.* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). See also *From Blackstone to Berman v. Parker: The Public Use Requirement In Urban Renewal*, in HAAR, LAND USE PLANNING 410-469 (1959). For an excellent discussion of the changed attitudes of courts relative to aesthetic control of outdoor advertising, see Note, 6 ST. LOUIS L.J. 534 (1961).

12. D.C. CODE §§ 5-701 to 5-719 (1951). Section 2 states that Congress made a "legislative determination [that] owing to technological and sociological changes, obsolete layout, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare; and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose. [These ends cannot be obtained] . . . by the ordinary operations of private enterprise alone without public participation; [that] sound replanning and redevelopment of an obsolescent or obsolescing portion cannot be accomplished unless it be done in the light of comprehensive and coordinated planning of the whole territory of the District of Columbia and its environs . . . the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use." *Id.* at § 701.

13. Furthermore, the Supreme Court stated: "The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. . . . We deal . . . with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purpose of government, purposes neither abstractly nor historically capable of complete definition." Berman v. Parker, *supra* note 2, at 31-32.

the narrow concept of eminent domain is being substantially enlarged to the extent that it now tends to resemble that of police power.[14] Unfortunately, the courts, in upholding the actions of governments in an area such as aesthetics do not spell out the precise limits of the power on which their decisions rest with the desired degree of specificity.[15] The *Berman* case, for example, contains some "interesting language," but it does not indicate the exact status of constitutional law. May it be suggested, therefore, that the Supreme Court, in allowing the District of Columbia to eliminate gray areas in housing, is creating an even more difficult "gray area" in contemporary constitutional law for the reason that one cannot be certain as to the scope of the police power as it becomes related to that of eminent domain under a modified concept of public purpose.[16] Nonetheless, in considering the *Berman* doctrine and its subsequent impact on developing law it is necessary to first consider the two basic concepts involved.

a. Police power.

The traditional notion of police power was clearly restricted to matters of public necessity. Thus, property might be seized or even destroyed for a limited purpose, often of an emergency nature;[17] no liability attached to the state or municipality; and *no compensation* had to be awarded.[18] This lack of compensation for restrictions placed on the free enjoyment of land was its main distinguishing feature. In addition, the great majority of examples from the police power sphere concerned a restriction on the use of property rather than an outright taking.

In considering the extent of the police power it is well to note

14. In Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 158 (1896), the Court said that the fifth amendment provides: "property shall not be taken for a *public use* without just compensation." [Emphasis added.] Likewise, the fourteenth amendment prohibits state action that deprives any person of life, liberty or property without due process of law, which requires that the taking by the state be for a public purpose. Attacks on the validity of both federal and state exercise of eminent domain have attempted to raise for judicial consideration the issues of: 1. the extent to which the property may be taken, and 2. whether the use contemplated is a public use. See Brown v. United States, 263 U.S. 78 (1923); New York Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936), 58 YALE L.J. 599 (1949). Moreover, the particular use to be made of the property has been accorded great deference by the courts, as is shown by the *Berman* case. See also United States *ex rel.* T.V.A. v. Welsh, 327 U.S. 546 (1946) in which the Supreme Court held that the use was purely a legislative question and beyond judicial review.

15. Craig says that "the old distinctions are becoming less workable. . . . Thus public purchase is now used to take a property out of circulation, as well as for the conventional purpose of recirculating it for the public. In recent years, particularly in its application to planned land-use control, eminent domain goals have been broadened from "public use" to a wider concept of "public purpose," thus minimizing the importance of the public's mere title in the taken property and emphasizing the purpose, possibly negative, for which the title has been taken." Craig, *op. cit. supra* note 6, at 182-183.

16. See *infra* notes 49-50.

17. *E.g.*, "destruction of diseased animals and plants, burning of buildings to create a back-fire, restrictions on use of natural resources to prevent waste." KAUPER, CONSTITUTIONAL LAW 1110-1112 (2d ed. 1960). For a typical statement of the traditional concept of state police power see RUSSELL, THE POLICE POWER OF THE STATE 85-100 (1900). "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. . . ." *Id.* at 100.

18. *E.g.*, Miller v. Schoene, 276 U.S. 272 (1928).

Justice Holmes' classic pronouncement, "It may be said in a general way 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 on strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[19] By way of contrast, in the *Berman* case the Supreme Court spoke of the public purpose rather than public use; hence, the traditional limitations placed on the use of police power are giving way to eminent domain.[20] Justice Douglas made it clear that the taking was a valid exercise of the police power on the theory that the power of eminent domain was merely *a means selected to accomplish the objective.* With reference to private property, the police power is used in most instances to restrict or regulate the use of such property for the protection of public health, welfare, safety, or morals. On the other hand, when property is taken from the owner to create or provide some particular benefit for the public, the power of eminent domain is exercised so as to enable a public agency to acquire an interest in the property, such as a fee or an easement. The limitations on the exercise of these powers had previously been regarded as being quite different and referring to separate criteria. Each one had a distinctly separate function.

The use of police power by a state must not be unreasonable or arbitrary, and it must have a substantial relation to the objective of the seizure. Yet, the scope of police power—when aided by the use of eminent domain—is very broad; and judicial review is limited to an examination of reasonableness of the means to accomplish the objective.[21] That is to say, under the new approach *the main legal test is whether the taking was in fact "reasonable,"* with the result that the private property owner has only the protection of the reasonableness test.

b. Eminent domain.

The power of eminent domain contains a two-fold limitation; just compensation must be paid, and the property cannot be taken unless it is seized for a public use. In fact, the concept has been stretched to such an extreme position that the requirement of public use no longer exists;[22] and seizure is justified if only the public purpose test has been met. Therefore, neither the necessity nor the extent of the taking are judicial questions.[23]

---

19. Nobel State Bank v. Haskell, 219 U.S. 104, 111 (1911).
20. Craig, *op. cit. supra* note 6, at 181-211. See also 2 NICHOLS, EMINENT DOMAIN §§ 7.3-7.5111, at 670-700, and §§ 7.5156-7.5157 at 760-791 (3rd ed. 1964).
21. ROTTSCHAEFER, CONSTITUTIONAL LAW 82-88 (1939).
22. Harwell v. United States, 316 F.2d 791 (10th Cir. 1963); United States v. 91.69 Acres of Land, 334 F.2d 229 (4th Cir. 1964); and Dillon v. United States, 230 F. Supp. 487 (D. Ore. 1964). See also Grant, *The "Higher Law" Background of the Law of Eminent Domain,* 6 WIS. L. REV 67 (1931); Nichols, *The Meaning of Public Use in the Law of Eminent Domain,* 20 B.U.L. REV.. 615 (1940); Note, 58 YALE L.J. 599 (1949); Note, 23 ALBANY L. REV. 386 (1959). See NICHOLS, *op. cit. supra* note 20.
23. The problem of according the just compensation to be paid upon a taking for

The federal constitution does not expressly confer eminent domain power on the federal government, but this power is implied to the extent necessary to carry on the functions of government, provided just compensation is paid.[24] Does the term "public use" imply a limitation on the eminent domain power? In *United States v. Certain Lands in City of Louisville*,[25] the court affirmed the district court's dismissal of a condemnation proceeding instituted by the United States for the purpose of securing fee-simple title to lands needed for development of a low-cost housing and slum clearance project, for the court held that it was not within the power of the government to condemn the property for these purposes. Conversely, a number of earlier decisions had upheld the right of the government to acquire private land in order to erect public housing projects.[26] In these earlier instances, however, the title remained with the particular public authority, and no resale to other private individuals took place or was even contemplated. Obviously, *Berman* has definitely changed this legal standard.

In considering the expanded employment of eminent domain, in reality the basis of *Berman*, the court cited the prior leading case of *Shoemaker v. United States*.[27] This 1893 verdict upheld the acquisition of land under eminent domain for the creation of Rock Creek Park in the District of Columbia. This case, however, is a rather typical example of seizure for a public use, *i.e.*, park purposes. Naturally, disputes of this type continue with growing frequency.[28] It should be recognized that the typical case does in fact serve as the foundation for the newer approach. For example, *Wilson v. Lambert*[29] allowed the adjoining land owners to be assessed the cost of the land taken for Rock Creek Park in view of the fact that the value of their land was greatly increased; therefore, the compensation paid to the original land owners did not come entirely

---

public use presents great difficulties. The standard applied is that of the owner's loss and not that of the taker's gain, which is the measure of just compensation. United States v. Miller, 317 U.S. 369, 375 (1943). Fair market value is the normal measure of recovery. United States *ex rel.* T.V.A. v. Powelson, 319 U.S. 266, 275 (1943). See in particular ORGEL, VALUATION UNDER EMINENT DOMAIN (2d ed. 1953). Problems of value peculiar to the owner, consequential damages of enhanced value brought about by the project for which the land is condemned, compensation for interests less than a fee, and many other elements complicate the determination of what is just compensation.

24. Kohl v. United States, 91 U.S. 367 (1875).

25. 78 F.2d 684 (6th Cir. 1935). For the older view see Corwin, *Constitutional Aspects of Federal Housing*, 84 U. PA. L. REV. 131 (1935). *Contra*: United States *ex rel.* T.V.A. v. Welch, *supra* note 14.

26. Craig, *op. cit. supra* note 6, at 193-197. For an excellent discussion, see Johnstone, The *Federal Urban Renewal Program*, 25 U. CHI. L. REV. 301 (1958).

27. 147 U.S. 282 (1893).

28. United States v. Certain Parcels of Land, 175 F. Supp. 418 (E.D. Tenn. 1959); citing the leading case of United States v. Carmack, 329 U.S. 230, 236 (1946). See especially *id.*, at 422-423 for the District Court's application of the *Berman* case. Note the application of the *Berman* doctrine in United States v. 23.9129 Acres of Land, 192 F. Supp. 101 (N.D. Cal. 1961). The court stated: "[I]t appears that the road is to be built and operated by a private owner under agreement with the Government. There is nothing legally wrong with this procedure. It is not necessary that the road be built and operated by public agencies. The only requirement is that it be built for a public purpose (Berman v. Parker, *supra*). Insofar as this issue is concerned, it is clear that the taking is for a public purpose." *Id.* at 103.

29. 168 U.S. 611 (1898).

from the federal government. In *United States v. Gettysburg Electric Railway Co.*[30] it was held that the federal government could acquire the Gettysburg battlefield areas for patriotic and military reasons on the theory that such national monuments created aesthetic values constituting a great benefit to the entire nation. The writer believes that the *Gettysburg* case is in fact the basis upon which the *Berman* decision rests, though the Court does not so indicate. A later decision has very ably shown the relationship of such early cases[31] with the *Berman* concept. Subsequently, it has been held that a state could take land from private persons and then give it to the federal government in order to establish a national park; hence, aesthetic considerations were given an even broader scope.[32]

The conclusion to be drawn from the above cases is that the Supreme Court has become more liberal concerning the right of a government to use the power of eminent domain on the ground that just compensation is provided the owners. Indeed, these prior holdings dealing with aesthetic considerations have not been reversed but stand as a bulwark for the *Berman* rule, but we must not lose sight of the fact that *Berman* does not contain a single reference to a prior judicial pronouncement in regard to aesthetics. Nevertheless, the decision clearly recognizes such aesthetic considerations as a basis for condemnation. The issue that remains is whether the area of aesthetic improvements—formerly a sub-division of police power—remains within the scope of police power exclusively or also under eminent domain.

THE RATIONALE OF THE MERGER

The older cases indicated above kept these two concepts separated. The modern trend has been to give considerable leeway to the use of police power so as to bring it closer to eminent domain, provided that just compensation is given in those instances where property is taken rather than suffering a mere restriction.[33] It seems obvious, therefore, that the government can accomplish much more if it uses police power rather than relying exclusively upon eminent domain. Indeed, many early redevelopment aims could not be realized under the more restricted eminent domain; consequently, in order to bring this broader authority into play, early statutes resorted to subterfuge and would include aesthetic objectives within the broader ground of health, welfare, safety, or morals. In effect, then, *Berman* represents a major step in the movement to include aesthetics within the scope of police power. In evaluating

30. 160 U.S. 668 (1896).
31. See United States v. Certain Parcels of Land, *supra* note 28, at 422-423, for an application of these early cases, United States v. 39.970 Acres of Land, 360 U.S. 328 (1959); United States v. Carmack, *supra* note 28; United States v. Gettysburg Electric R. Co., 160 U.S. 668 (1896).
32. Yarborough v. North Carolina Park Commission, 196 N.C. 284, 145 S.E. 563 (1928).
33. Note, *Aesthetics as a Justification for the Exercise of the Police Power or Eminent Domain*, 23 GEO. WASH. L. REV. 730 (1955).

the traditional use of police power it must be recognized that the basis of the decisions was the legitimate protection of the public. To illustrate, the early case of *Welch v. Swasey*[34] sanctioned the regulation of the height of buildings in Boston. It was held that such regulation was a reasonable effort to promote the public safety by preventing the uncontrollable spread of fire among the tops of tall buildings; hence, it was a valid exercise of the police power. As the court stated:[35]

> The inhabitants of a city or town cannot be compelled to give up rights in property, or to pay taxes, for purely aesthetic objects; but *if the primary and substantive purpose of the legislation is such as justified the act, considerations of taste and beauty may enter in, as auxiliary.* [Emphasis added.]

This language has led one writer to conclude that the above decision formulated the rule that even though the primary purpose of the act is aesthetic, it may be upheld if here is a secondary purpose of promoting public health or safety.[36] In other words, a valid police regulation will not be invalidated by the inclusion of an aesthetic principal. This relatively simple rule represents the intermediate view, which was later to be expanded into aesthetic considerations, minus the legal fiction of health and safety. Nonetheless, the courts would often hesitate to enforce regulations that obviously did not have the promotion of police power as their primary consideration. For instance, in *Piper v. Ekern*[37] the court refused to go to the extreme of upholding a Wisconsin statute limiting the erection of buildings to ninety feet tall around the State Capitol building. The real aim, namely to beautify the area, was clearly recognized and rejected as an invalid legislative determination.

The next major advancement of the trend to include the aesthetic field within the police power involved the long line of billboard disputes wherein the courts finally held that they constituted a menace to the public health, welfare, safety and morals, in a number of very strained decisions. For example, such reasoning was used as the billboards could: hide immoral acts, constitute a fire hazard, or fall down on pedestrians if struck by a strong wind. Thus, the leading case in the expansion of the police power for aesthetic considerations was *St. Louis Gunning Advertisement Co. v. City of*

34. 193 Mass. 364, 79 N.E. 745 (1907), *aff'd*, 214 U.S. 91 (1909).

35. *Supra* note 33, at 736. The general rule of this case is that a valid regulation for health and safety would not be invalidated by the inclusion of an aesthetic factor; therefore, a major break had been made in the old concept of police power. *Accord*: Cochran v. Preston, 108 Md. 220, 70 Atl. 113 (1908); in this case the spread of a potential fire was not the primary consideration. Rather, the case turned on the fact that a fire hose could not reach great heights.

36. *Supra* note 33, at 737, paraphrasing Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124, 130 (1926).

37. 180 Wis. 586, 194 N.W. 159 (1923).

St. Louis.[38] This decision—which held that the primary justification for restriction upon signboards must be found in its relationship to the protection of health, safety, and morals, but that aesthetic considerations could be permitted as a valid purpose, if secondary in nature—is still the law at the present time. But the trend of the great majority of current decisions is to go much further than merely permitting aesthetic values to be included. American tribunals are presently upholding all sorts of restrictions placed on the use of private property based solely on aesthetic grounds.[39] Nonetheless, it should be recognized in passing that a few state courts continue to strike down local ordinances and state statutes when they believe that the regulations constitute an unreasonable interference with the use of the owner's property rights. For instance, it has recently been held that requirements calling for the erection of high fences merely to hide junk yards,[40] or restrictions on billboard advertising[41] are unconstitutional. But the few decisions upholding the right of owners to use and enjoy their property at the expense of community attempts at beautification clearly reflect the older and now minority view. On the other hand, there is some indication that courts are still willing to strike down grossly unreasonable interferences with the use of private property—at least in a few instances. But such cases may be considered the exceptions which prove the broad general rule announced in *Berman v. Parker* that aesthetic considerations are sufficient to justify the use of not only police power but also eminent domain. Subsequently, a Wisconsin case, utilizing the *Berman* rule, stated that aesthetic considerations could supply the primary justification for the exercise of state police power.[42] Further, it can be expected, in the opinion

38. 235 Mo. 99, 137 S.W. 929 (1911). See also Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); the regulation which prevented the use of billboards of over twenty feet was a subterfuge. For later cases, see Preferred Tires Inc. v. Village of Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (1940); Walnut and Quince Streets Corp. v. Mills, 303 Pa. 25, 154 Atl. 29 (1931), wherein the court held that the City of Philadelphia could empower the Fine Arts Commission to approve or disapprove proposed structures on city streets; consequently, a theater marquee was disapproved on aesthetic grounds as being too garish and overly illuminated.

39. Moore, *Regulation of Outdoor Advertising for Aesthetic Purposes,* 8 ST. LOUIS L.J. 191 (1963); Note, 6 ST. LOUIS L.J. 534 (1961). For a discussion of the earlier law see Gardner, *The Massachusetts Billboard Decision,* 49 HARV. L. REV. 869 (1936), and Goldton & Scheuer, *Zoning of Planned Residential Developments,* 73 HARV. L. REV. 241 (1959).

40. State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959), in which the Supreme Court of North Carolina invalidated a statute requiring the screening or fencing of any junk yard, trash, or garbage dump located within one hundred and fifty feet of any highway. Though recognizing that the purpose of the act was to keep land fronting on highways clean and attractive, the court ruled that the statute was unconstitutional on the grounds that it was an improper exercise of police power. The action was predicated solely on aesthetic considerations without a sufficient relationship to public health, safety, morals, or welfare. *Cf.* Town of Vestal v. Bennett, 199 Misc. 41, 104 N.Y.S.2d 830 (1951). Since the ordinance applied to all areas, aesthetic considerations did not control. See Note, 1960 DUKE L.J. 299. While the trend of current cases seems to be clearly in favor of the use of police power to regulate private property for aesthetic considerations, a recent California case, People v. Dickerson, 343 P.2d 809 (Calif. 1959), struck down a municipal ordinance requiring that automobile wrecking businesses be surrounded by fences. Such a municipal ordinance was declared to constitute an invalid exercise of police power, since its aim was merely to eliminate unsightly views. Such an aesthetic consideration constituted an unreasonable interference with the right to carry on a legitimate business. See Note, 13 OKLA. L. REV. 222 (1960) for an excellent analysis of this limited area in relation to the *Berman* case, at 223-224.

41. *Supra* note 39, and Note, 6 ST. LOUIS L.J. 534 (1961).

42. Savel and Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955).

of the writer, that similar decisions will rely on the *Berman* rule, as more extensive redevelopment and renewal plans are tested before federal and state tribunals. In *Donnelly v. District of Columbia Redevelopment Land Agency*,[43] the court rejected appellant's argument that her properties, located within the redevelopment area, should not be condemned because they were ". . .commercial in character, containing modern and attractive business buildings, and are quite distinct from the nearby blighted areas."[44] It was held that such properties had to be taken in order to carry out the total plan, namely the development of a waterfront area and the simultaneous elimination of blighted regions. In striking down the constitutional objection by utilizing the *Berman* rule the court indicated: "No doubt there are limits to what can be done in the name of 'redevelopment,' but those limits—as set by the *Berman* case—have not been exceeded here."[45] Though the court followed the trend of such renewal actions, no additional light was shed upon the problem under investigation, except insofar as this decision does uphold an aesthetic consideration (the beautification of an entire area) pursuant to a traditional eminent domain action. The court never mentions the aesthetic objective; however, the implications are rather obvious, in spite of the lack of specificity in the language chosen, because an entire section of the nation's capital was beautified.

EMINENT DOMAIN JOINED TO POLICE POWER

As indicated above, the traditionally separate legal doctrines of police power and eminent domain are being merged. Specifically, the United States Supreme Court feels that both powers are involved; therefore, the problem arises, by way of analysis, as to what criteria must be applied to test the validity of the District of Columbia Act.[46] It must be recognized that the Court has held that the objective of the Act is within the police power; hence, slum clearance is a valid objective notwithstanding the associated purpose of making the community beautiful, spacious, and well balanced.[47] Under the rationale of *Berman* the fifth amendment will not prevent the taking of property on an area basis to eliminate and prevent substandard

43. 269 F.2d 546 (D.C. Cir. 1959).
44. *Id.* at 547.
45. *Ibid.*
46. See *supra* note 12. The Act empowers the District of Columbia Redevelopment Land Agency to acquire and assemble real property in order to "further the redevelopment of blighted territory in the District of Columbia by the prevention, reduction, or elimination of blighted factors or causes of blight." D.C. CODE ANN. § 5-704 (1960). The Agency has the power, in accordance with the plan of the District of Columbia Planning Commission, to transfer to the District all property to be devoted to public uses and to sell the remainder to private individuals or corporations to redevelop in accordance with the plan of the Commission. See also Mandelker, *Public Purpose in Urban Redevelopment*, 28 TUL. L. REV. 96 (1953) for a discussion of state limitations on the use of the eminent domain power. Generally, the state constitutions are interpreted less liberally than is the federal constitution.
47. *Accord*: *In re* Edward J. Jeffries Homes Housing Projects, 306 Mich. 638, 11 N.W.2d 272 (1943); Stockus v. Boston Housing Authority, 304 Mass. 507, 24 N.E.2d 333 (1939); New York City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936).

housing and blighted areas if such taking is carried out *pursuant to a redevelopment plan.* The fact that the property is later resold to private individuals will not invalidate the original seizure.[48] Such condemnation is constitutional, *provided that just compensation is given.* The Court in evaluating the District of Columbia Redevelopment Act takes the position that[49]

> property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. . . . If owner after owner were premitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly . . . . [C]ommunity redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.

The fundamental reason for the holding is that just compensation has been given to the owners of seized property. Without such compensation the taking for purely aesthetic purposes (or even if only the primary purpose) would clearly be unconstitutional—at least as our constitutional law exists at the present time. In other words, *the shifting of the compensation requirement from the fifth amendment to the fourteenth has permitted a new use of police power.* But here lies the danger. Since there is no constitutional guarantee requiring that property seized under police power need be compensated, at what point can a state or the federal government seize land and not give compensation? Moreover, could such seizure be employed for punitive purposes, similar to present condemnation actions against illegally used property? Many instances exist in which restrictions have been placed on the use of property, and no compensation has been given. Numerous zoning restrictions need only be cited by way of illustration.[50] Specifically, the future thrust of such coercion will take place in the area of urban renewal, since property owners will (and are presently) being forced to conform to various master plans designed to create attractive communities. The result is that less freedom of action is left to the private landowner.

THE FUTURE OF THE NEW STANDARD

The last few years have witnessed an increase in the number of decisions citing the *Berman* case generally on simple police power questions, such as *Symonds v. Bucklin,*[51] *United States v.* 239,129

48. District of Columbia Redevelopment Land Agency v. 40 Parcels of Land, 171 F. Supp. 138 (D. D.C. 1959), upholding the right of urban renewal on an area rather than a structure-by-structure basis. Likewise, the aid of private enterprise was upheld.

49. 348 U.S. 26, 35 (1954).

50. Note, *Techniques for Preserving Open Spaces,* 75 HARV. L. REV. 1622, 1638-1641 (1962).

51. 197 F. Supp. 682 (D. Md. 1961). The *Berman* case is cited on the proposition that "zoning regulations, according to a comprehensive plan and in the general public welfare,

Acres of Land,[52] and *United States v. Mischke.*[53] Such important verdicts as *Harrison-Halsted Community Group v. Housing and Home Finance Agency,*[54] upheld the right of Illinois to seize private land and then sell it to the University of Illinois for redevelopment as a campus. Moreover, the balance of the land was to be turned over to private enterprise for redevelopment as a residential area. "There can be no doubt that these are proper public purposes and uses."[55] The court went on to state:[56]

> When such areas have been reclaimed and the redevelopment achieved, the public purpose has been fully accomplished . . . . The achievement of the redevelopment of slum and blight areas, as defined in the [Illinois] act, in our opinion, constitutes a public use and a public purpose regardless of the use which may be made of the property after the redevelopment has been achieved.

At present, the federal courts are relying very heavily on the *Berman* doctrine. Moreover, this case is frequently cited in support of police power or eminent domain decisions, tending to be very traditional.[57] A number of typical eminent domain cases in which property has been seized for obviously proper governmental functions continually cite the broader *Berman* rule.[58] Significantly, the Supreme Court has not been called upon to elaborate upon the extent to which police power incorporating elements from eminent domain may be used as a single entity. So the future limits of this new power have not been adequately set forth. Still, there seems to be relatively little question concerning the power of a state or the federal government to seize land under the police power doctrine.

RESTRICTIONS ON POLICE POWER

As indicated earlier in the study a few courts have resisted the trend to permit almost unlimited public condemnation.[59] In spite

---

may place restrictions on the use of property, even though the restrictions result in serious financial loss to the owner . . . [since] highway plans are within the police power." *Id.* at 685. *But* "zoning cannot be used as a substitute for eminent domain proceedings to defeat the payment of just compensation by depressing values and so reducing the amount of damages to be paid when private property is taken for public use." *Ibid.*

52. 192 F. Supp. 101 (N.D. Cal. 1961) (action to condemn easement to land for the construction of a government highway over which to haul government owned timber). The decision cites *Berman* on the proposition that "where the power to take resides in the Government, it is not for this Court to determine the quantum of estate which may be taken." *Id.* at 102.

53. 285 F.2d 628 (8th Cir. 1961) (condemnation of land for the building of a government dam). The *Berman* rule is cited on the proposition that once a public purpose has been decided the court does not have jurisdiction to determine the amount and character of the land to be taken. *Id.* at 632.

54. 310 F.2d 99 (7th Cir. 1962).

55. *Id.* at 105.

56. *Id.* at 106, quoting from Zurn v. City of Chicago, 389 Ill. 114, 129, 59 N.E.2d 18, 25 (1954).

57. United States v. 929.70 Acres of Land, 205 F. Supp. 456 (D.S.D. 1962). See *supra* note 28.

58. United States v. 23.912 Acres of Land, 192 F. Supp. 101 (N.D. Cal. 1961). The court stated: "It is the law that the power to condemn in such a case as this one is coextensive with the power to purchase. . . . Where the power to take resides in the Government, it is not for this Court to determine the quantum of estate which may be taken. . . ." *Id.* at 102.

59. See notes 40-41 *supra* and notes 77-78 *infra.*

of the fact that little serious question can be raised concerning the right of a sovereign to seize land and subsequently turn it over to private enterprise, a few courts have tended to invalidate abuses of police power, particularly in those situations where unreasonable restrictions were placed on the use and enjoyment of land.[60]

It remained for the Federal District Court of Oregon, in *Robertson v. City of Salem*,[61] further to explain the rationale of *Berman*. In this rather involved dispute, concerning both the City of Salem and the State of Oregon, a clear abuse of the police power was present. The plaintiff instituted an action for declaratory judgment against the City of Salem to test the validity of a zoning ordinance that had been passed for the (improper) purpose of depressing the value of the land. It was intended that either the City or the State of Oregon would acquire the land for governmental use at a lower price at some future date. Fortunately, the Federal District Court held that the zoning ordinance was a clear abuse of police power, since it was, in effect, a taking of land without due process of law or the payment of just compensation. Consequently, the ordinance was unconstitutional and void. In construing the *Berman* rule, the Court stated that "if Oregon desires Robertson's land for future public use, it should exercise its power of eminent domain and give Robertson just compensation. . . ."[62] This case cuts down a small portion of *Berman* for the reason that the use of police power (a restriction without just compensation) cannot be employed in those situations where a city or state is really looking to a subsequent seizure under the power of eminent domain. Therefore, the court clearly makes the point that if the City of Salem or the State of Oregon desires to seize the land for future use they

> should exercise . . . power of eminent domain, as dictated by the Constitution of the State of Oregon. Berman merely holds that the District of Columbia Redevelopment Act . . . wherein its administrative agency was given the power of eminent domain in the course of the redevelopment of a large area of the District of Columbia so as to eliminate and prevent slum and substandard conditions, was constitutional and that the administrative agency had the right to acquire private property for such purpose by eminent domain, which includes the present payment of just compensation.[63]

The District Court goes on to point out that *the requirements of the fifth amendment have been met when just compensation has been paid*; and, in this dispute, compensation was all that was being asked by the plaintiff. Despite the liberal approach taken by

60. *Ibid.*
61. 191 F. Supp. 604 (D. Ore. 1961).
62. *Id.* at 611.
63. *Ibid.*

the great majority of American courts, a seizure—even though compensation is awarded—will be struck down in those few instances where statutory authority is exceeded.[64] Similarly, if zoning regulations pursuant to police power, are ". . .used as a substitute for eminent domain proceedings to defeat the payment of just compensation. . ."[65] such ordinance will be invalidated.[66]

Generally, the courts insist on adequate compensation, regardless of whether eminent domain or police power is used, and the key to the entire urban redevelopment programs is "just compensation," as set forth in the fifth amendment.

JUST COMPENSATION

If any point of certainty is to arise from the present study it is that the award of compensation makes the taking legal. That is to say, our courts will no longer examine the motive behind such seizure, the basis of the administrative determination, the standard adopted by the lower court, the means chosen by the legislature, the extent of the public use, the desirability of the public purpose, the relationship to traditional police powers, and numerous other criteria. Indeed, a number of decisions have clearly set forth the rule that any "reasonable" taking will be upheld provided only that "just compensation" is given. To illustrate, in the 1963 case of *United States v. Agee*[67] the court—relying on *Berman*—enunciated the basic rule as follows:[68] "Where the taking is for a public purpose, the rights of the property owner are satisfied when he receives just compensation which the fifth amendment requires as the price of taking."

Unhappily, this merged concept of police power and eminent domain has left relatively little protection to the small, and often the poorer, landowners. Indeed, low income families—particularly those belonging to minority groups[69]—are being displaced in order to further community aims. Although it is not the purpose of this article to discuss the social aspects of urban renewal, it must be recognized that considerable merit exists in these efforts to make America beautiful. The desirability of furthering aesthetic goals by means of police power, supported by the threat of eminent domain,

64. Malatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).
65. Symonds v. Bucklin, 197 F. Supp. 682, 685 (D. Md. 1961).
66. In the Symonds case, the court ruled: "A zoning ordinance which permanently restricts the use of property so that it cannot be used for any reasonable purpose goes beyond permissible regulation and must be regarded as a taking without just compensation." *Ibid.*
67. 322 F.2d 139 (6th Cir. 1963). It needs to be stressed, however, that the amount of compensation ultimately awarded does not in fact relieve the affected parties from actual loss. See Berger, *Current Problems Affecting Costs of Condemnation*, 26 LAW & CONTEMP. PROB. 85 (1961).
68. *Id.* at 143.
69. "About two thirds of the people that have been forced to move are Negroes, Puerto Ricans or other nonwhite groups." Nation's Business, *supra* note 9, at 84. On the other hand, the necessity of reconsidering basic constitutional law because of the urbanization of America can be seen in Baker v. Carr, 369 U.S. 186 (1962).

is not being intentionally downgraded.[70] But regardless of the benefit derived from urban renewal and the even broader redevelopment schemes by the community, the constitutional guarantees of small landowners must be safeguarded, and such protection can only result from a clarification of the present limits of police power. Admittedly, this basic question remains unanswered, largely because the Supreme Court has so far chosen to remain silent.

CONCLUSION

The lack of precision in the language of *Berman v. Parker* has created a "gray area" in United States constitutional law for the reason that the precise role to be played by the expanding "federal" and state police power—as "influenced" by eminent domain—has not been clearly indicated. Similarly, the degree of protection to be afforded private property owners in the future has not been established to the degree required in a democratic society, even though the traditional standard of police power has been radically changed. Such conclusion is—sadly—very obvious, but the writer is especially disturbed by the fact that in *Berman* the power of eminent domain was employed in a very "sneaky fashion" because the Court admitted that the action by the District of Columbia represented a taking of private property not for the purpose of slum clearance but merely to develop a more attractive community. The implication of this holding is that it will now be possible to coerce property owners in a variety of situations because of the inherent threat that their property will be seized if they do not conform to administrative determinations.[71] In fact, the most pressing disputes will arise from urban renewal programs, requiring owners to modify existing structures, which are admittedly safe, merely to conform with various master plans. In the event that "cooperation" is not forthcoming, the "unattractive" structures will be likely condemned and subsequently resold to other private individuals who are willing to conform. And this type of coercion is now possible under the *Berman* concept, as constitutional law affords greater deference to community goals, particularly in those situations where restrictions are placed on the use and enjoyment of property.

The extension of eminent domain into that area formerly reserved to police power has provided governmental agencies with a powerful sanction. But the real solution to the numerous problems created by these constitutional changes might better be resolved

---

70. See Rhyne, *The Workable Program—A Challenge for Community Improvement*, 25 LAW & CONTEMP. PROB. 685 (1960). *But see* Nutting, *Standards in Zoning and Planning Legislation*, 50 A.B.A.J. 1097 (1964).

71. In passing, it might be well to note the expanding use of state police power to preserve existing structures and areas for aesthetic and historical purposes. Indeed, police power is becoming a double edged sword, giving the community the right to preserve existing buildings, as well as the right to destroy them pursuant to a larger plan. See Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COL. L. REV. 708 (1963).

by improving present administrative law criteria. Perhaps the individual can obtain the needed protection before administrative and arbitration boards rather than courts of law.

Certainly the writer is not questioning the desirability of creating attractive areas in the nation's capital (or in any other section of the United States); rather issue is being taken as to: (1) the lack of specificity and detailed legal reasoning in *Berman v. Parker,* (2) the lack of consideration given by the Court to the need of the community to protect private property, and (3) the confusion caused by the "merging" of the police power with eminent domain, resulting in a lack of clarity as to the scope of these formerly "separate and distinct" powers. The conclusion seems inescapable that the individual citizen, the poorer private property holder, and the small land owner lacking "political influence" *have considerably less protection under the fifth and fourteenth amendments as a result of the Berman decision.* The Supreme Court might have indicated the sources upon which this "judicial legislation" rests. Is the *Berman* case an example of a sociological decision? We can only speculate as to the answer; the Court does not squarely meet the fundamental issues. Thus, the exact rationale of the case has yet to be determined.

In spite of the above criticism, it is recognized that our developing society is in need of extensive urban planning, redevelopment, and improvement because of such basic changes as the population explosion, the urbanization of the United States, and the increasing emphasis on industrialization, to name just a few. The corresponding necessity for city planning and local projects is, likewise, conceded. Admittedly, the extensive economic, social, and political ramifications were too extensive and involved for the Court to consider them in a single opinion.

We must make a basic value judgment as to the type of society in which we desire to live. It seems impracticable—if not absolutely impossible—to have: (1) the maximum amount of individual freedom, with a corresponding right to ownership and use of private property, and (2)—at the same time—the maximum degree of governmental planning, regulation, and redevelopment. Thus, two basic interests clash, and the final issue becomes: which one is the more important interest that must be protected by the community and also by our courts. The Supreme Court has given only a partial answer by recognizing that changing social conditions are now in conflict with the constitution—as originally conceived and drafted. Such social modifications will influence the developing law in this country for the reason that sociology, politics and the other social sciences are evolving much more rapidly than constitutional law.

The question as to whether government will rely to a greater degree on the use of the police power in order to avoid the more restricted scope of eminent domain cannot be fully answered; however, the *Robertson* case[72] brings out the basic rule that where an actual taking results, compensation will have to be paid, regardless of the alleged legal basis of the action. Such a practice will assure "just" compensation; but the power of government to seize property for aesthetic reasons will thereby become almost unlimited. A public use, in the traditional sense, no longer need be proven. Consequently, at least one conclusion is inescapable; the award of compensation renders the taking legal. As such, the only protection left to the individual is that the seizure be reasonable and that he receive remuneration.

The writer believes that when the fundamental determination is made concerning the type of society in which we all desire to live, the conclusion to be reached is that an expansion of the right to receive just compensation (and simultaneously to live in a more aesthetically pleasing community) is an inadequate substitute for traditional constitutional rights.

72. *Supra* note 61.