

CONTROL OF HIGHWAY ACCESS. By Ross D. Netherton. Madison: The University of Wisconsin Press. 1963. Pp. 518. \$10.00.

Dr. Netherton has provided us with a penetrating analysis of a critical concept in the development of our highway system. For access—the control of entry—is as important to the modern highway as the exclusive right-of-way is to the railroad.¹ If our legal system has retained its capacity for institutionalizing the legal norms through which our society maintains social balance, then access control will achieve its place as a technique for allocating the burdens and benefits of highway use. This book takes a long step toward this synthesis.

There are three parts to Netherton's study. Part I, *The Legal Relationship of the Roadside and the Roadway*, details the history and the development of the access concept. Because the notion of access control is so closely tied in with the growth of a modern highway system, this part provides a valuable review of the evolution of the highway concept. Part II, *Access-Control Powers and Their Uses*, reviews available methods of controlling access, from nuisance, through land-use regulation, to outright acquisition. Part III, *Valuation of Access Rights*, contains a provocative analysis of the market value concept in eminent domain, and illustrates the difficulties of applying this concept in the access context. Indeed, Chapter 12 affords the most useful summary of the valuation process in eminent domain that this reviewer has seen.

The opening chapters carefully detail the development of the highway servitude. Of note here is the important historical fact that even the right to compensation for the taking of the highway right-of-way was unrecognized in early American Law. English law provides even more provocative precedent for treating the obligations of highway abutters as a duty to protect free passage rather than as a legally-protected right to unrestricted access. For example, "In Elizabethan times, the landowner was required to scour and maintain ditches along the edges of the roadway, and if it was necessary to drain the roadway he was obliged to permit drainage waters to flow naturally or to be turned artificially into or across the lands adjacent to the highway. There were other duties. Trees and hedges had to be kept trimmed, for example, so that they would not interfere with passage."²

This early bias of the English law in favor of the public servitude was reflected in American judicial opinions in the nineteenth century, which at

1. Contrast the analysis of urban structure in terms of access in a section on General Concepts, which is a critical part of the Philadelphia City Planning Commission's Comprehensive Plan for the City of Philadelphia (1960).

2. P. 13.

first generally denied compensation for consequential injuries to roadside property if these injuries were attributable to highway construction. A shift in climate in favor of the private landowner by the turn of the nineteenth century had produced judicial recognition of landowner rights in the highway right-of-way. But Netherton warns that the rationale of the doctrine of abutters' rights "cannot satisfactorily be based upon any of the familiar principles of property law or contract. The existence or extent of the abutter's right of access does not depend upon whether the highway is built on an easement over privately owned land or upon land owned by the public in fee."³

The remainder of the book builds on this historic framework to examine the policy implications of access restriction for present-day highway programs. Chapter 8, for example, deals with the difficult problems of compensation that arise in the conversion of existing highways to limited-access. Increasing judicial recognition of the non-compensability of traffic diversion, and increasing judicial acceptance of frontage roads providing more limited access points, highlights a return to more ancient concepts of abutters' rights and the striking of a fairer balance between public and property owner. Another chapter outlines the procedures under which access rights can be acquired by public agencies through condemnation proceedings. Techniques for the acquisition of access rights through negotiation and purchase are also explored, and the available range of conveyancing devices surveyed. There is a section on acquisition by the highway agency of scenic and other roadside easements that prevent the development of abutting property for uses detrimental to the highway. A fascinating discussion of the control of land use in the vicinity of interchange areas outlines some of the policy issues that must be solved when dealing with this modern counterpart of the commuter railway station.

The discussion of valuation problems in the acquisition of access rights contains many provocative suggestions. One suggestion is that the replacement-cost method of valuation be applied to the access problem. On the theory that the landowner will be protected if adequate alternative access can be provided, Dr. Netherton suggests that the cost of replacement be taken as the upper limit of responsibility for valuation purposes.⁴ This comment ties in with the further observation that "accessibility rather than direct access [is] the most important effect upon value for residential land use."⁵ Reference is made to a growing accumulation of economic studies sponsored by state highway agencies and the Federal Bureau of Public Roads, which

3. P. 45.

4. P. 351.

5. P. 351.

suggest that accessibility to a system of freeways enhances rather than detracts from marketability, even though direct access is lacking. The evidence cumulates toward the conclusion that the law will do no less than equity if it adjusts, in turn, to these newer realities.

The book is well-served by adequate footnotes, an extensive glossary, an appendix containing the text of the Model Controlled-Access Highway Act, and a series of diagrams illustrating leading cases on the control of highway access. These illustrations provide a useful precedent for textbooks on land-use and condemnation problems, as graphic material which visualizes the background of a case and adds materially to understanding.

Dr. Netherton closes on a contemplative note:

Inevitably, competing demands will be made by the traveling public and the roadside landowner. And just as inevitably, the legal system must be used as a positive force for creating the kind of circumstances that will favor those demands most consistent with the public interest. The law must be prepared to carry out its role as arbitrator between these competing demands.⁶

DANIEL R. MANDELKER
Professor of Law
Washington University

6. P. 381.

