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THE VALUATION OF AN EXPERIENCE: A STUDY IN LAND USE REGULATION

BOB MADDEN*

Imagine Congress has just passed legislation, the Lewis and Clark Route Restoration Act, and that the President has signed it into law.¹ The Act requires restoring the entire route used by Lewis and Clark in their journey from St. Louis to the Pacific Ocean.² Under this new legislation, St. Louis will be restored to its 1804 form, the year Lewis and Clark departed on their journey.³ The restoration will include removing all modern pavement along the route. In addition, any objects that did not exist at the time of the expedition, such as electrical wires, will be removed from the route in order to restore it to its appearance in the early 1800s.⁴

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1. Although the Lewis and Clark Route Restoration Act is only hypothetical, similar laws do exist in the United States. See National Trails System Act of 1978, 16 U.S.C. § 1244(a)(6) (2000) (creating the category of National Historic Trails, and designating the Lewis and Clark Trail as one of four new National Historic Trails). See also, Lewis & Clark Heritage Foundation, Inc., *The History of the Lewis & Clark Expedition*, at <http://www.lewisandclark.org/history.htm> (last visited April 15, 2003) [hereinafter *Lewis & Clark Foundation*] (describing the historic Lewis and Clark expedition originating near Wood River, Illinois, and following the route to the mouth of the Columbia River in Oregon).

2. ALF J. MAPP, JR., *THOMAS JEFFERSON PASSIONATE PILGRIM: THE PRESIDENCY, THE FOUNDING OF THE UNIVERSITY, AND THE PRIVATE BATTLE 128-29* (Madison Books 1991). On May 14, 1804, twenty-three men, including Meriwether Lewis and William Clark, left St. Louis, then a frontier settlement and fur trading center, and made their way up the Missouri River. *Id.* Crossing the Continental Divide in what is now Montana, they eventually moved down the Columbia River, and on November 15, 1806, came into view of the Pacific Ocean. *Id.* at 129.

3. *Id.*

4. See JEAN COOKE, *HISTORY'S TIMELINE* (Fay Franklin ed., Barnes and

The legislation bans all vehicles, including trains and airplanes, from the area so as not to pollute the route with sounds not heard in 1804 and 1805.⁵ Tourists experiencing the route will be transported via a perfectly silent electric train system utilizing state of the art technology, allowing the train to blend into the surrounding scenery.

The recent public resurgence of patriotism, resulting in renewed public interest in American history, is the motivation behind this legislation. Based on the renewed public interest, Congress concluded that the experience of the Lewis and Clark adventure has significant public benefits that exceed the benefits derived from the modern infrastructure currently in existence along the route.⁶

This hypothetical represents an exaggerated exercise of governmental power. However, analyzed in its component parts, many of the issues presented by the hypothetical act have been litigated and resolved in United States courts.⁷

Noble Books 1996) (indicating that there were no electrical wires present in the early 1800s). The electric telegraph was patented by inventor Samuel Morse in 1840. *Id.* at 168.

5. Trains, automobiles, and airplanes, like electrical wires, would not have existed in the early 1800s. The first practical and mobile steam engine was built in England in 1813, followed by a passenger line in 1825. *Id.* at 162. Railway operations in North America began within the next ten years. *Id.* Karl Benz marketed a petrol-powered car in 1888, dubbed to have been the motor industry's start. *Id.* at 176. The Wright brothers conducted the first successful powered, manned flight of a heavier-than-air machine at Kittyhawk, North Carolina in 1903. *Id.* at 188. The flight lasted for twelve seconds and covered a distance of 120 feet. *Id.*

6. See 16 U.S.C. § 1241 (2000) (describing the purpose of the national trail system as preservation of outdoor historic resources and scenic historic travel routes).

7. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 319-321 (2002) (describing cases involving: governmental actions found to be condemnations; regulatory takings requiring compensation; and regulations that did not require governmental compensation). In the hypothetical Lewis and Clark legislation, the taking of all the buildings and streets in St. Louis for the purpose of restoring them to their vintage state would require the government to exercise its power of eminent domain. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (holding that legislation allowing the taking of private property and transferring ownership of it to other private parties was constitutional if the transfer served a public purpose). Removal of the modern intrusions along the route would probably fall under the category of zoning regulation. See *Village of Euclid v. Amber Realty*, 272 U.S. 365, 395 (1926) (holding that government can control private land use through the police power). Ridding the route of noise-producing modern contraptions (other than the Expedition Train in which the "experiencers" will be riding) could be accomplished by using public nuisance laws. See, e.g., *United States v. Atlantic-Richfield*, 478 F. Supp. 1215, 1220 (D. Mont. 1979) (holding that federal statute had not eliminated the federal common law regulating nuisance, and that the government could sue for a court order to have the defendants reduce the emissions of fluoride being

The Supreme Court has recognized that, while the Fifth Amendment to the United States Constitution authorizes governmental takings of private property, it also requires the government to provide compensation to the property owners.⁸ The Court has held that the language of the Fifth Amendment distinguishes between physical takings and regulatory takings.⁹ Thus, a "taking" may occur either through eminent domain or by the over-regulation of property. The issue that gives rise to litigation is over what constitutes just compensation. Compensation rarely includes any reimbursement to property owners for the value of their experience associated with the ownership of land—only the market value of the land. In addition, if a court determines a regulation affecting land use is not a taking, a landowner may lose, without compensation, the experiential value of land ownership.

This Comment will demonstrate that the valuation of experiences is important, and that the current laws do not adequately address the issues surrounding valuation of an experience.¹⁰ Two major problems result from this failure. First, private landowners can be forced to bear an unfair burden of the cost of land use decisions. Second, the public loses because resources may be squandered and their value exploited by a few, at the public's expense.

Part I of this Comment will introduce the general concepts involved in governmental takings and other land use regulation. It will also describe the general authority for and the limitations of these actions. Part II will analyze the methods of valuation and the remedies that have been applied in these actions. It will also discuss why these methods are inadequate in the valuation of an experience. Part III will explain why the valuation of an experience is important. Finally, Part IV will propose valuation methods intended to more appropriately and precisely value experiences associated with land use.

I. PRINCIPLES IN PROPERTY AND LAND USE REGULATION

A. *Common Definitions of Property*

One problem in valuation of experiences associated with land use is the variety of definitions associated with property. Most everyone, whether a lawyer, a factory worker, or the kid next door,

emptied into the waterway from their plant).

8. *Tahoe-Sierra Pres. Council*, 535 U.S. at 321.

9. *Id.*

10. See Douglas O. Linder, *New Direction for Preservation Law: Creating an Environment Worth Experiencing*, 20 ENVTL. L. 49, 70 (1990) (discussing why experiences are important and why current legal and political doctrines do not adequately address their recognition and protection).

believes that they understand the definition of property. However, the term has many different meanings.¹¹ A layperson would likely define property as something tangible that is owned by a natural person, a corporation, or a unit of the government.¹² This definition confuses the physical manifestation with the subject matter of property, and fails to acknowledge that property may be an intangible, non-physical thing.¹³

From a legal perspective, property is not a thing,¹⁴ but the range of entitlements to the use or benefit of assets, including the use and enjoyment of land and physical resources.¹⁵ The subject matter of property includes land, chattels, or intangible things.¹⁶ In Anglo-American law, property in land is classified as “real property” while chattels and intangible things are “personal property.”¹⁷ For example, a child may claim that his parents own the house they live in and the yard surrounding it, because ownership to the child is generally equated with possession of the property.¹⁸ He may be unaware that his parents are only renting the house, or that they may have bought the house but have a large mortgage, in which case the lending institution would also have an ownership interest in the property.¹⁹ As evidenced by

11. See WEBSTER'S II NEW COLLEGIATE DICTIONARY 887 (Houghton Mifflin Co. 1995). Property is defined as “1. Ownership. 2.a. A possession. b. Possessions as a whole. 3. Something tangible of intangible to which its owner holds legal title. . . .” *Id.* Property is legally defined as “all a person’s legal rights, of whatever description . . . property includes not all a person’s rights, but only his proprietary as opposed to his personal rights.” BLACK’S LAW DICTIONARY 1232 (7th ed. 1999) Black’s definition lists thirty-two types of named property, including intangible property, intellectual property, personal property and real property. *Id.* at 1233-34.

12. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 1 (West Group, 3d ed. 2000).

13. *Id.*

14. *Id.*

15. JACK L. KNETSCH, PROPERTY RIGHTS AND COMPENSATION, COMPULSORY ACQUISITION AND OTHER LOSSES 1 (Butterworths 1983).

16. STOEBUCK & WHITMAN, *supra* note 12, at 10.

17. *Id.* Intangible things relating to personal property include claims to bank accounts, promissory notes, bonds, corporate stock, life insurance policies and annuities, patents, copyrights, trademarks, and goodwill of a business. *Id.* at 10-11.

18. See *id.* at 5 (stating that one is said to be the owner of a thing when one has “complete property” or the totality of rights, privileges, powers and immunities that are legally possible, in a thing). However, a person is said to be the owner even when their interests in the thing do not add up to the totality of the complete property. *Id.* A person is commonly termed to be the owner of land or an automobile despite the fact that there may be other parties who hold an interest in the land or automobile respectively, through mechanisms such as mortgages, liens, or easements. *Id.*

19. See *id.* (stating that a person who has a property interest such as a leasehold or an easement may properly be said to either “own” or “to have” the particular leasehold or easement).

these often used and cited definitions, one can ascertain that many views of property do not encompass the value of experiences associated with the land and its use. This places these experiences at risk of being undervalued, or overlooked completely.

B. Laws Regulating Property Rights

Property owners' legal rights are defined by legislation, regulations, court rulings, and societies' customs and traditions.²⁰ These rights are not static; rather, they change through the action of legislatures, administrative agencies, courts and other institutions.²¹ In addition, society's values influence and shape these rights even though, in some instances, the owner may not share these values.²² This fact sets the stage for the undervaluing of a property owner's experience.

Current legal doctrines address the basic aspects of property ownership, such as the right of the government to seize private property or regulate the owner's use of that property. For example, the Fifth Amendment authorizes the government to take possession of real property from the private landowner through a process called eminent domain.²³ In other instances, the government may choose to regulate the use of real property by preventing the owner from performing a particular act on his land because it is considered a nuisance.²⁴ Zoning regulations also limit

20. KNETSCH, *supra* note 15, at 1.

21. *Id.*

22. *See id.* at 1-2 (stating that the interests of the owner and of the community may not be entirely congruent).

23. STOEBUCK & WHITMAN, *supra* note 12, at 524. The power of eminent domain is granted to the federal government by the Fifth Amendment's "Takings Clause". It states, "nor shall *private property* be taken for *public use*, without *just compensation*." U.S. CONST. amend V (emphasis added). The government's powers of eminent domain are limited by the terms of the amendment itself, namely "public use" and "just compensation." STOEBUCK & WHITMAN, *supra* note 12, at 524-25. Until *Kohl v. United States*, 91 U.S. 367, 373-74 (1875), the federal government customarily asked that the states condemn any land for federal government use. *Id.* at 525 n.1. In fact, most states have language similar to the Takings Clause of the Fifth Amendment as part of their own constitutions. *Id.* However, the United States Supreme Court made it clear in *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922), that the states eminent domain power is restricted through the Due Process Clause of the 14th Amendment. STOEBUCK & WILLIAM, *supra* note 12, at 525 n.2.

24. *Id.* at 418. Nuisance law deals with the freedom of a party entitled to possession of land to use and enjoy certain rights associated with that possession. *Id.* at 410. Typical nuisances are caused by, but not limited to, noise, dust, smoke, odors, vermin, insects and vibrations. *Id.* at 413-14. Causation of a nuisance is a tort, but it is distinguished from trespass in that a trespass involves a physical invasion of the possessor's land, while a nuisance generally does not involve invasion of the land by a human entity. *Id.* at 414. A nuisance occurs when a party maintains a condition on his land that unreasonably interferes with a plaintiff's use and enjoyment of the

how a property owner uses his or her own property.²⁵

In the case of a taking through eminent domain, the taking must be justified by a public use, and compensation is generally the fair market value of the property taken.²⁶ The Supreme Court has established clear rules governing the power of eminent domain.²⁷ The Court has stated that a taking is generally undisputed when the government condemns or physically appropriates the property.²⁸ A private landowner may disagree with the level of compensation provided through an eminent domain proceeding because, as explained in Part II, the fair market value does not include the subjective value that the owner associates with the experience of owning the land.

To justify a regulatory taking, the government must be exercising its police power to protect the health, safety and welfare of its citizens.²⁹ A regulation is deemed to be a taking, and thus requires compensation "when either (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land."³⁰ While easy to articulate, applying the test often requires a complex analysis.³¹ This determination requires a factual assessment of both the purpose

plaintiff's land. *Id.*

25. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (holding that a New York village ordinance, restricting the use of land to one-family dwellings, was constitutional). Historically, zoning was primarily utilized to control public nuisances. *STOEBUCK & WHITMAN*, *supra* note 12, at 575. In the United States, during the colonial period, municipalities would enact regulations banning to the outskirts of town activities described as "noisome." *Id.* Noisome activities included slaughterhouses, gunpowder mills and other similar activities. *Id.*

26. *STOEBUCK & WHITMAN*, *supra* note 12, at 539.

27. *Tahoe-Sierra Pres. Council*, 535 U.S. at 321-22. See *Kohl*, 91 U.S. at 372 (establishing that the federal government can condemn land on its own accord without forcing the states to do the condemnation for them).

28. *Tahoe-Sierra Pres. Council*, 535 U.S. 322.

29. RICHARD A. EPSTEIN, *TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*, 107-08 (Harv. Univ. Press 1985). The Constitution does not contain the words "police power", but it is understood to be the grant of those powers to the state governments that are not explicitly limited by the United States Constitution. *Id.* at 107. The scope of the police power being limited to public safety, health, moral and welfare issues is attributed to *Lochner v. New York*, 198 U.S. 45, 53 (1905). *Id.* at 108. See EPSTEIN, at 108-09 (quoting *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975), as a modern, more pallid definition of police power allowing rejection of zoning ordinance challenges). The modern formulation allows rejection of challenges when the ordinance "bears any rational relationship to a legitimate state interest." *Id.* Unfortunately for many challengers of the government's police power, this standard is almost always met. *Id.* at 109.

30. *Tahoe-Sierra Pres. Council*, 535 U.S. at 314 (quoting the district court's decision and recognition of the Supreme Court decision in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

31. *Tahoe-Sierra Pres. Council*, 535 U.S. 321-22.

and the economic effects of the action.³²

Although a regulation that is not a taking requires no compensation, the regulation must nonetheless be justified by one of the police powers.³³ Zoning and nuisance laws are examples of justified regulations that may not constitute a taking. Zoning laws are justified as legitimate governmental exercises in the regulation of private land use.³⁴ However, when the purpose of the zoning law is the preservation of an aesthetic preference or a view, the justification is less clear.³⁵ Nuisance law has also been justified as a governmental regulation of land use.³⁶ Zoning and nuisance laws may regulate a private landowner without compensation, in a manner that reduces or destroys the experience associated with his or her ownership of the land.

C. Allocation of Costs and Benefits

When landowners are compensated for eminent domain takings, *in theory*, they have not suffered a loss because they can

32. See *id.* at 323 (quoting *Yee v. Escondido*, 503 U.S. 519, 523 (1992), the opinion gives a list of cases exemplifying when governmental actions are and are not takings). For example, when the government takes possession of an interest in property, it has a duty to compensate the former owner. *Id.* (citing *United States v. Pewee Coal Co.*, 341 U.S. 113, 115 (1951)). This applies regardless of whether the entire parcel is taken, or whether only a portion of the parcel is taken. *Tahoe-Sierra Pres. Council*, 535 U.S. 323. The government continues to have a duty to compensate the owner, even when the taking is temporary. *Id.* (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945)). *Id.* A taking will also occur if the government appropriates part of a rooftop to mount a TV cable. *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). Takings even are experienced when planes use private airspace to approach a government airport. *Id.* (citing *United States v. Causby*, 328 U.S. 256 (1946)). In all these circumstances, and many similar to them, the government must pay for the use. *Id.* at 322-23. In contrast, the case cites examples where governmental action is not a taking. For example, the following government actions were not takings according to the United States Supreme Court: (1) a government regulation that prohibited landlords from evicting tenants because the tenant was unwilling to pay higher rent, *Block v. Hirsh*, 256 U.S. 135 (1921); (2) a ban on certain uses of private property in a residential area as other than family homes, *Village of Euclid*, 272 U.S. at 365; and (3) a regulation concerning historic preservation which prevented the landowners from constructing a multi story addition above the owner's train station. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

33. EPSTEIN, *supra* note 29, at 108.

34. See *Village of Euclid*, 272 U.S. at 396-97 (holding that government can control private land use through the police power).

35. KNETSCH, *supra* note 15, at 117-18. The trade-off between a view and the activities that block that view are important and fragile because they depend on neighboring property owners. *Id.* However, in most jurisdictions, views are not afforded much protection. *Id.* at 119.

36. BARLOW BURKE ET AL., FUNDAMENTALS OF PROPERTY LAW 184-85 (1999).

replace the land with a suitable equivalent by using the fair market value received for the land taken.³⁷ When a regulation is less than a taking³⁸ the landowner is completely burdened with the cost imposed by the regulation.³⁹ For example, a regulation limiting the height of apartment buildings will prevent a landowner from earning greater rental income by limiting the number of units that can be built on that particular parcel of land.⁴⁰

Other common examples exist in which a regulation allocates the entire cost to the landowner without compensation. Many statutes declare private property to be historic landmarks.⁴¹ Such statutes force the landowner to maintain the site in its current condition. When these statutes are enforced without compensation to the landowners, they bestow a benefit onto the public at a potentially tremendous cost to the landowner.⁴²

Furthermore, even when compensation is required, intangible matters such as aesthetics or views are generally not considered valuable by the law.⁴³ Unless they are associated with other factors such as public health or safety, they are generally not

37. See KNETSCH, *supra* note 15, at 39 (stating that there is a presumption that a compensated party is no worse off after the exchange than before because they can purchase an equivalent replacement).

38. See *supra* Part II.C (discussing regulatory non-takings).

39. See EPSTEIN, *supra* note 29, at 269-72 (discussing *Haas v. City of San Francisco*, 605 F.2d 1117 (9th Cir 1979)). The author notes the Ninth Circuit's holding that an ordinance restricting construction on Russian Hill, which caused a significant economic loss to the landowner, was not a taking. *Id.* at 1118. The author also discusses the Supreme Court's decision in *Agins*, 447 U.S. at 272-73 (1980), holding that the landowner is benefited by the ordinance and is not the only property affected by a regulation that limits the number of homes to five that could be built on his five acre plot. *Id.*

40. *Haas*, 605 F.2d at 1121.

41. STOEBUCK & WHITMAN, *supra* note 12, at 689-90.

42. See *id.* at 693 (discussing *Rebman v. City of Springfield*, 250 N.E.2d 282 (Ill. App. Ct. 1969)). The *Rebman* court rejected a takings claim by property owners in a four-block historic district, declared in the area around the Abraham Lincoln home, and thus preventing the property owners from utilizing the property for commercial purposes. *Rebman*, 250 N.E.2d at 286. Another drastic example of an uncompensated burden placed on a private landowner can be found in *Penn Cent. Transp.*, 438 U.S. at 104. In *Penn Central*, the Court held New York's historic preservation ordinance, restricting the owners of Grand Central Station from building additional offices above the station, was constitutional and not a taking. *Penn Cent. Transp.*, 438 U.S. at 138. The landowners were deprived of the additional income and required to maintain the building in its current state. *Id.*

43. KNETSCH, *supra* note 15, at 119 (stating that loss of a view is generally not compensable). However, there is an exception to this, where compensation may be paid by the buyer of a part of an owner's parcel and the loss of a view in the remaining owner's parcel results in a decrease in property value after that acquisition. *Id.*

viewed as having any fair market value.⁴⁴ Thus, regulations depriving a landowner of aesthetic pleasure associated with property could occur with no compensation.⁴⁵ Although there is a trend toward recognizing aesthetics as a valid exercise of police power in its own right, the acceptance is not yet universal.⁴⁶

Providing a value for the experiences associated with land ownership could impact a large number of people when regulations govern public land use. Governmental condemnation and regulation of public lands both grant and withdraw rights associated with property use for many people. Furthermore, the allocation of the benefits of land regulation is of great interest to the community at large.⁴⁷

There are cases that provide interesting scenarios as to how the courts have reacted to issues concerning the valuation of those things that are amorphous and indeterminable.⁴⁸ For example, courts have wrestled with the issue of how to value the view overlooking a historic battlefield sight, weighed against the value of the rights of adjacent landowners to use their land to construct a tower overlooking the sight. The tower, which was open to the public for a fee, had obvious educational value, but also disrupted the scene's historic nature.⁴⁹ Courts have also weighed the value

44. *Id.*

45. *Id.*

46. *Temple Baptist Church, Inc. v. City of Albuquerque*, 646 P.2d 565 (N.M. 1982). The Supreme Court of New Mexico, in ruling on the constitutionality of a sign ordinance, stated that although some jurisdictions reject aesthetics alone as a justification of an exercise of police power, a better rule of law is for aesthetic considerations alone to justify exercise of a police action. *Id.* at 571. However, the court pointed out that until recently, aesthetics alone was not a sufficient justification for the exercise of police powers, and that other jurisdictions are split on the issue. *Id.* at 570.

47. KNETSCH, *supra* note 15, at 118.

48. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 312 (challenging a temporary moratorium on development surrounding Lake Tahoe in an effort to preserve the water's clarity). *See also Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1172-73 (9th Cir. 2000) (challenging regulations over the use of Hells Canyon Recreational Area in suits initiated by motorized and non-motorized water craft users having competing interest in the use of the area); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 459 (D.C. Cir. 1998) (challenging the FAA's regulation of overflights of the Grand Canyon by private aircraft).

49. *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588, 589-90 (Pa. 1973). Gettysburg National Park in Gettysburg, Pennsylvania has been the subject of litigation with regard to its historic preservation and its scenic views. *Id.* Pennsylvania brought an action to enjoin the construction of a 307-foot tower overlooking the battlefield. *Id.* at 590. The National Park Service had already negotiated an agreement with the defendants, who were the landowners. *Id.* at 589. The defendants agreed to convey certain land to the Park Service in exchange for permission to build an observation tower that would overlook the battlefield from an alternate site. *Id.* at 590. The Commonwealth of Pennsylvania, acting as the plaintiff in the case, objected to

of lake clarity against the value of housing developments that threatened the lake's pristine state.⁵⁰ Courts have also been asked to resolve a dispute involving the value of quietly experiencing the Grand Canyon, weighed against the value of experiencing an airplane ride over this stunning natural feature.⁵¹

this agreement, stating that the proposed tower at the alternate site would be detrimental to the historic, scenic, and aesthetic aspects of the area. *Id.* at 590. The plaintiff produced witnesses who testified that the presence of the tower would be a serious detriment to the historic battlefield. *Id.* at 590. The defendants countered with witnesses who testified that the tower would be aesthetically pleasing, unobtrusive, and of great educational value. *Id.* at 590. The opinion points out that, as owners of the land on which the tower was to be built, the defendants were free to use the property as they wished, as long as they did not interfere with the reasonable enjoyment of their neighbor's property, subject to regulations of the state through its police power. *Id.* at 589. These rights are protected under Article I, §§ 1 & 10 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. *Id.*

The court held that there were no applicable zoning regulations governing the construction of towers, and no Pennsylvania statute authorized the Governor or the Attorney General to initiate this type of lawsuit. *Id.* at 589. The Commonwealth based its position on the Pennsylvania State Constitution, Article 1, § 27, which states that the people of the state have a right to clean air, pure water, and to the preservation of historic and aesthetic values in the environment. *Id.* at 591-92. The Commonwealth alleged that this amendment was self-executing and that no additional legislation was required in order to vest these rights in the people. *Id.* On appeal, the Supreme Court of Pennsylvania held that if the amendment was self-executing, a property owner would not know, other than through expensive litigation, what he could and could not do with his property. *Id.* at 593. The court stated that, under the circumstances, such a self-executing amendment "would pose serious problems of constitutionality, under both the equal protection clause and the due process clause of the Fourteenth Amendment." *Id.* The court held that, in order to make the amendment effective, supplemental legislation defining the protected values needed to be enacted. *Id.* at 594. The legislation also needed to establish fair procedures for regulating the use of private property. *Id.*

50. See *Tahoe-Sierra Pres. Council*, 535 U.S. at 308 (stating that the blue color and clarity of Lake Tahoe is being threatened by the development of land around the lake).

51. *Grand Canyon Air*, 154 F.3d at 459. In August 1987, Congress passed the Overflights Act, which required the FAA to create one or more locations where visitors to the Grand Canyon would be free from the distraction of aircraft noise. *Id.* at 459-60. The stated purpose of the Act was to allow visitors to the Grand Canyon to enjoy a quiet "experience," free from the buzzing noise of planes and other aircraft. *Id.* Groups such as the Grand Canyon Air Tour Coalition, whose members provide tour flights over the Grand Canyon, challenged the establishment of no flight zones by the FAA. *Id.* at 464. The Air Coalition argued that the statute did not intend to authorize the elimination of noise, but was intended to increase the enjoyment of people on the ground. *Id.* at 465. The court held that the Air Coalition misread the intent of the Federal Register notice accompanying the final rule, and that the intent of the statute was indeed to restore quiet to enhance the visitors' experience. *Id.* at 465. Thus, this holding begs the question of

Courts have also dealt with the use of public waterways by incompatible types of watercraft,⁵² and with the construction of a bridge providing access to a busy national park.⁵³ These cases

whether the prohibition of the right of flight is a good tradeoff, if only a handful of the public seek solitude from noise, while multitudes of people want to experience the thrill of flying over the Grand Canyon.

52. *Hells Canyon Alliance*, 227 F.3d at 1172-73. In *Hells Canyon Alliance*, Judge McKeown stated that "balancing the competing and often conflicting interests of motorized water craft users, including jetboaters, and non-motorized water craft users, such as rafters and kayakers, is no easy task." *Id.* at 1173. The litigation surrounded the Forest Service's plans to implement regulation of the Hells Canyon area in compliance with the Hells Canyon Act. *Id.* The opinion notes that use of the area by both motorized and non-motorized craft has soared between the 1970s and the 1990s. *Id.* The Forest Service developed the Recreation Management Plan as a response to charges that it had failed to regulate motorized watercraft in the Hells Canyon National Recreation Area. *Id.* In 1993, the agency released a draft environmental impact statement, along with six alternatives for restricting or complete elimination of motorized watercraft from the wild parts of the river. *Id.* A seventh alternative, designated Alternative G, was ultimately selected, which included motorized use level restrictions and three-day time windows during which use of motorized watercraft was banned. *Id.* at 1173-74. The plaintiffs opposed the implementation of the window and sued the Forest Service, objecting to the implementation of the Recreational Management Plan on several grounds. *Id.* at 1175. The court upheld the district court's grant of summary judgment, thus upholding the Forest Service's implementation of the Recreational Management Plan, and the subsequent restrictions on motorized watercraft use. *Id.* at 1173. In doing so, the court rejected the plaintiffs' claim that the Forest Service's analysis of the window proposal was inadequate. *Id.* at 1184.

53. *Coalition for Canyon Pres., Inc., v. Hazen*, 788 F. Supp. 1522 (1990). *Coalition for Canyon Pres.* represents a useful example of the government's struggle to balance various and conflicting public interests with regards to the use of public lands. In 1988, the Red Bench Forest Fire destroyed a bridge that crossed the North Fork of the Flathead River. *Id.* at 1523. The bridge was a major access point to Glacier National Park. *Id.* The National Park Service undertook an environmental assessment and found that reconstructing the bridge in another location would have no significant impacts. *Id.* At 1520. Because the bridge crossed a navigable stream, it was necessary for the Federal Highway Administration (FHWA) to apply to the Corps of Engineers for a 404 permit under the Clean Water Act. *Id.* at 1524. Based on the environmental impact study, the Corps issued the 404 permit, and the Park Service issued a contract to Frontier West, a private contractor, to begin construction of a new bridge. *Id.* The plaintiffs moved for a temporary restraining order and a preliminary injunction to stop construction of the bridge. *Id.* Their case was based on seven violations, all related to the issuance of the 404 permit. *Id.* at 1523. The plaintiffs' arguments were based along two lines of reasoning. *Id.* First, plaintiffs argued that the location of the new bridge, 350 feet upstream from the original site, would have a significant impact on the wild and scenic river. *Id.* Second, plaintiffs argued that the proposed two-lane bridge should be a one-lane bridge consistent with the historic and natural qualities of the area. *Id.* The FHWA pointed out that the bridge being used at the original bridge sight was a temporary structure, and that halting construction of the new bridge would extend the use of the temporary bridge exposing the public to a risk of bridge failure. *Id.* at 1524.

demonstrate that courts can analyze and put a value on competing interests involving more than the transfer of property, and that cannot be evaluated on a purely monetary basis. In these cases, the courts used factors other than fair market value to resolve the disputes. The factors applied in these scenarios can be helpful in understanding the problems associated with the valuation of an experience.

II. EVALUATING CURRENT LEGAL DOCTRINES IN LAND USE AS A GUIDE TO VALUING AN EXPERIENCE

The legal doctrines currently applied in land use regulation present varying degrees of help in the valuation of experiences. The doctrines associated with takings, regulatory non-takings, nuisance law, and land use regulations are discussed below with regards to their usefulness and shortfalls in the valuation of experiences.

A. Valuation of Land in Condemnation Actions

Condemnation takes the right of possession from the current property owner and transfers it to another party, typically the government.⁵⁴ In exchange, the government is required to compensate the landowner.⁵⁵ Compensation is generally in the form of payment to the owner for the fair market value of the land.⁵⁶ If the government only takes a partial interest in the land, for example by condemnation for a roadway across a portion of an

The park department also testified as to having considered other concerns. *Id.* Many issues were considered, including the (1) safety of the park employees' children due to increased traffic on the original bridge leading into the Park Service's residential and maintenance facilities, (2) minimizing the effect of the bridge on the river by limiting the number of piers in the water and thus minimizing obstructions to persons floating the river in the summer, and (3) the need for the design of the new bridge to be sufficiently rustic so as to blend with the area's natural and historic surroundings. *Id.* at 1526. The Park Service coordinated with the United States Fish and Wildlife Service concerning the impact the bridge might have on threatened and endangered species in the river. *Id.* The Park Service also called upon the Montana State Historic preservation Officer to ascertain the impact that the bridge might have on prehistoric sites in the area and its effect on any remaining sites listed on the National Register for Historic Places and Sites. *Id.* The court ultimately held that the defendants, "adequately . . . considered the project in light of the entire public interest," and that, "it would be a travesty on the public interest to enjoin this project." *Id.* at 1530.

54. See *Tahoe-Sierra Pres. Council*, 535 U.S. at 322 n.17 (stating that condemnation or physical appropriation of property by the government is typically an undisputed taking).

55. See *id.* at 322 (citing *Pewee Coal* as holding that there is a categorical duty to compensate the former owner of property when the government takes a property interest).

56. *STOEBUCK & WHITMAN*, *supra* note 12, at 539.

owner's land, the payment is based on the diminution in value of the land that results from the burden.⁵⁷

Payment to the landowner is termed "eminent domain compensation"⁵⁸ and is determined by the fair market value of land based on what a willing person would pay the owner, as a willing seller, for that parcel of land.⁵⁹ However, this pricing method can lead to some improprieties.⁶⁰ For example, if the landowner has plans to utilize the land in the future to generate income, say from an apartment complex, that future income is not accounted for in the fair market value.⁶¹ No anticipated or unanticipated future value, unless already a factor in influencing the fair market value, is compensated.⁶²

Thus, if the land has special value to the landowner not reflected in the market value, the landowner will not be compensated for this loss in a condemnation.⁶³ Although the law considers land unique, the theory behind compensation assumes that by paying the landowner the fair market value for the condemned land, the landowner can purchase an equally suitable replacement. This legal doctrine fails to take into account a landowner's personal experience associated with a particular property.

For example, if the land had been in the owner's family since the American Revolution, but had no other significant historical or locational value to others, the emotional and sentimental loss to the owner would not be compensated by the fair market value under the current methods used by courts.⁶⁴ Land that represents a special place for a particular group of people, such as holy ground for an American Indian tribe, would not be considered in the calculation of the fair market value awarded in a condemnation action of that land.⁶⁵

57. *Id.*

58. *Id.* In addition, the owner may be eligible for compensation based on "severance damages" in cases where an easement taking causes a diminished value to the untouched land. *Id.* § 9.5, at 539 n.1.

59. EPSTEIN, *supra* note 29, at 182-83.

60. *Id.* at 183.

61. *Id.* Epstein points out that the best use of the property lies either in the owner's hands or in the hands of another individual. *Id.* In the first instance, the owner will not be willing to sell at the current market price because by selling at that price, the owner will be deprived of the surplus value possession of the property provides him. *Id.*

62. KNETSCH, *supra* note 15, at 40.

63. *Id.* Prevailing practices of compensation do not fully account for the economic losses suffered when owners are forced to lose the value associated with their present parcel and that are not regained by purchase of another parcel. *Id.*

64. *Id.*

65. See Linder, *supra* note 10, at 57 (stating that beauty is ascribed to a place by the meaning an observer attaches to it). See also Lyng v. Northwest

Because compensation based on fair market value fails to anticipate future value and fails to compensate landowners for personal value associated with the land, fair market value is an unreliable method of determining the value of an experience in land use. In addition, the requirement that the land be for public use lends little help in determining the value of an experience. While the government can only condemn land for public use, the definition of "public use" has been liberally construed.⁶⁶ The Supreme Court in *Hawaii Housing Authority v. Midkiff* determined that the definition of "public use" does not require that the public actually have access to the condemned land.⁶⁷ The requirement is that the use be for public benefit.⁶⁸ However, the value of the benefit conferred to the public does not have to outweigh the benefit taken from the owner.⁶⁹ Because no balancing of this kind is required, there is no impetus for any parties (or for the courts) to value the experience lost by the owner or gained by the public.⁷⁰ Because a landowner can simply be stripped of land if the government deems it necessary for almost any perceived public benefit, without considering the landowner's perceived value, public use provides little help in determining the

Indian Cemetery Protective Ass'n, 485 U.S. 439, 441-42 (1988) (refusing to block the construction of a roadway on National Forest lands that would devastate the use of the land by Indian tribes for religious practices).

66. EPSTEIN, *supra* note 29, at 161 (stating that the question of public use is an empty one). Epstein quotes the Supreme Court's decision in *Parker* stating "the concept of the public welfare is broad and inclusive," and concludes that the power of eminent domain can be used to achieve any end within Congress's authority. *Id.* Epstein also notes that the Court advanced the point in *Midkiff* by stating "the public use requirement is thus coterminous with the scope of the sovereign's police powers [and] where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.*

67. *Midkiff*, 467 U.S. at 244.

68. *Id.* at 241.

69. *Id.*

70. See EPSTEIN, *supra* note 29, at 183 (stating that market valuation does not compensate for real values that are subjective.) Market value is the price a willing buyer will receive from a willing seller. *Id.* Market price contains a systematic bias that underestimates the use value of land, which is normally higher than the market value. *Id.* This higher use value may reside with either the current landowner, or with the governmental entity condemning the property. *Id.* In cases where the higher use value resides with the current landowner, the land may be more valuable to the landowner because the property is customized to fit the owner's particular needs, or gives the landowner a locational advantage. *Id.* In a condemnation, the use value to the government condemning the land may be well above what the use value to the market represents, so the government is able to compensate the landowner at a level below the use value to that receiving governmental body. *Id.* In either case the landowner loses, because the owner will receive an amount less than the use value of the land. *Id.*

valuation of experiences.

B. *Valuation of Regulatory Takings*

A regulatory taking occurs when a regulation affecting the use of private land is deemed to “go too far” and thus requires the government to compensate the owner for the loss.⁷¹ The problems with the current methods for valuing condemned lands under eminent domain are also present in regulatory takings. The compensation ascribed to the value of the taking is the difference in the value of the land before and after the regulatory taking.⁷² In most instances, a regulation is deemed a taking if it deprives the owner of *all* economic use of the property.⁷³

Depriving the owner of only some of the use of his land can have one of two general affects upon the landowner. In one instance, the owner can be deprived of his future plans to utilize the property.⁷⁴ In such a case, the owner is not compensated for his loss of potential future income.⁷⁵ By contrast, in other instances, the same regulation would literally have no affect on a landowner. For example, assume an Indian tribe who owns an area of land. They hold it sacred and are told that they cannot build apartments on that land. If they had no intentions of building on the land, they may experience no loss, economic or otherwise.

These examples illustrate that the economic valuation methods currently used to determine compensation for a regulatory taking provide little insight into the value of the owner’s experience.

C. *Valuation of Regulatory Non-Takings*

The general definition of a regulatory non-taking is that the

71. STOEUBUCK & WHITMAN, *supra* note 12, at 528-29. The famous “too far” test was the result of the opinion of Justice Holmes in *Penn. Coal*, 260 U.S. at 393. *Id.* In *Penn. Coal*, the coal company challenged the Pennsylvania Kohler Act that prevented mining of coal near homes. *Id.* at 529. The Act prohibited the coal company from making any use of the land where they had already purchased mining rights, but because of the location of the defendant’s house, actual mining would cause the coal company to violate the Act. *Id.* The Court stated “[t]he general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Id.* The opinion gives government regulation a threshold, above which the regulation is considered a taking. *Id.*

72. BURKE, *supra* note 36, at 861.

73. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

74. *See Penn Cent. Transp.*, 438 U.S. at 137-38 (holding that a city ordinance preventing the owners of Grand Central Station from renovating was not a taking because it did not deprive the owners of their investment backed expectations for the property, and therefore did not require compensation).

75. *Id.*

government, through its police power, has regulated the use of land for the health, welfare and safety of the public.⁷⁶ These actions do not require compensation to the landowner.⁷⁷ The theory is that the landowner, as a member of the public, is receiving the benefit of the regulation, just as the rest of the public.⁷⁸ Although the owner is personally bearing the cost of the regulation, that cost is offset by the benefit received.⁷⁹

However, if a regulation does go too far, it will be deemed a taking, and will be thrown back into the category of regulation that must be compensated.⁸⁰ Even when the regulation does not constitute a taking, the regulation must be justified by conferring a public benefit.⁸¹ Although the courts have determined which factors are to be used in deciding what constitutes a public benefit, these decisions do not require an evaluation of the public benefit relative to the value of freedom from regulation.⁸² Nor is there any

76. EPSTEIN, *supra* note 29, at 94. In *Penn. Coal*, 260 U.S. at 413, the Court held that the "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* However, the ability to regulate is limited by due process. *Id.* If it is determined by the court that the diminution in value caused by a regulation is not overwhelming, it is not compensable. *Id.* at 102. The harm is said to be *damnum absque iniuria*, meaning loss for which there is no legal remedy. *Id.* For examples of governmental regulations that prevented the owner from the getting the most beneficial use of their land without any compensation see *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (preventing an owner from removing sand and gravel below a waterline); and *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1958) (prohibiting the owner of a gold mine from operating the mine). *Id.* at 103.

77. A TASK FORCE REPORT SPONSORED BY THE ROCKEFELLER BROTHERS FUND, *THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH*, 150-52 (William K. Reilly, ed. 1973). New York city's Grand Central Terminal was slated for major renovation as part of a \$180 million redevelopment project. *Id.* at 150. The plan included construction of a fifty-five story skyscraper in the space above the terminal. *Id.* The New York City Landmarks Preservation Commission sought to prevent the construction based on the premise of preserving the building. *Id.* Penn Central brought action in court, claiming that they were being deprived of millions of dollars in potential income, while being forced to maintain the building at a deficit. *Id.* at 151. The Supreme Court ruled that the city's regulation of the use of the building was not a taking because it did not deprive the defendant of their investment backed expectations. *Penn Cent. Transp.*, 438 U.S. at 136. See *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 614 (holding that the designation of a property as historic, without the owner's consent, is not a taking and thus does not require compensation).

78. *Penn Cent. Transp.*, 438 U.S. at 134-35.

79. *Id.*

80. See *Lucas*, 505 U.S. at 1019 (1992) (stating that it is a taking when an owner is deprived of all economic use of a property).

81. See EPSTEIN, *supra* note 29, at 108-112 (explaining state police power is utilized for the public good).

82. See *id.* at 161-62 (discussing cases such as *Berman* and *Midkiff*, which have led legal scholars to conclude that the public use requirement is a non-

requirement to evaluate the value of the public benefit relative to the potential public benefit that might occur by not regulating the private landowner.⁸³

The only real limitation to regulation based on the governmental police power may be political, rather than one based on legal limitation.⁸⁴ Thus, a regulatory non-taking need not balance any public benefit against the values associated with freedom from regulation by the landowner or the public. Therefore, these cases provide little help in valuation of experiences associated with land use.

D. Nuisance Law in Valuing Experiences in Land Use

Nuisance law is of some value in helping to preserve experiences,⁸⁵ and it may provide some instructional help in the valuation of experiences, depending on the type of nuisance considered. As a preservation tool, for example, nuisance law can be used to enjoin a neighboring landowner from producing pollution, which can help preserve the experience of clean rivers, lakes and oceans.⁸⁶ However, nuisance law is based on tort principles, not property principles.⁸⁷ Nonetheless, factors used to determine whether a particular activity is or is not a nuisance may be helpful in valuing the subjective experiences because they involve the valuation of the tradeoffs between the right of a landowner to use and enjoy his land against the rights of adjoining landowners and the public.⁸⁸

issue with regards to limiting the government's police powers).

83. *See id.* at 161 (noting that a regulatory non-taking is still limited by the public use requirement).

84. *See* HERMAN L. BOSCHKEN, *LAND USE CONFLICTS, ORGANIZATIONAL DESIGN AND RESOURCE MANAGEMENT, POLITICAL SPHERES AND THE COMPETITION FOR LAND* 3-20 (Univ. of Ill. Press 1982) (describing how problems in urban growth and governance affect land use regulations).

85. *Compare* *Illinois v. Milwaukee*, 406 U.S. 91, 104 (1992) (holding that federal nuisance law could be used to abate the pollution of interstate waterways), *with* *United States v. County Bd.*, 487 F. Supp 137, 141-143 (E.D. Va. 1979) (holding that although the Attorney General has standing to protect the rights and properties of the United States, the injunction sought against the construction of a high-rise in Arlington to prevent visual intrusion on the area would constitute an over-extension of the police power).

86. *Illinois v. Milwaukee*, 406 U.S. at 99.

87. RESTATEMENT (SECOND) OF TORTS § 821 (1979). A public nuisance is defined as "an unreasonable interference with a right common to the general public." *Id.* § 821(B) A private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Id.* § 821(D).

88. STOEBUCK & WHITMAN, *supra* note 12, at 415. Factors in determining whether a particular activity constitutes a nuisance include: (1) whether the activity is customarily suited to the area; (2) whether observable effects are caused by the activity that would be disagreeable to most; (3) whether the activity could be carried out by a less disturbing method; (4) the value of the activity to the person performing the activity; (5) the importance of the activity

E. Land Use Control and Valuation of Experiences

Land use control may provide the most fertile ground for developing a plausible scheme for pricing experiences. Land use control involves land allocation based on market forces and political and administrative governmental actions.⁸⁹ Land use control supports the idea that, in the development of land, livability is an element that can override economic considerations.⁹⁰ Public policy requires agencies tasked with land use control to ask questions such as "(1) what are the public needs and who is affected (2) how are the benefits and costs to be distributed and (3) how should values be accommodated and resources allocated."⁹¹ These questions give structure to the strategy pursued by the agency in controlling the use of land.⁹² Land use control thus provides valuable insight into the valuation of an experience because it has been used as a basis to override economic and traditional property rights, and apply alternative valuation mechanisms such as evaluation of industrial, developmental, pastoral, recreational, and human interests in natural resources.⁹³

A particularly useful doctrine that may be included under the category of land use is the Public Trust Doctrine.⁹⁴ This doctrine states that the government has the duty to utilize public land to the benefit of the public.⁹⁵ Although it has received weak support in the courts, it has often been invoked in litigation as justification for aesthetic preservation.⁹⁶

III. THE IMPORTANCE OF VALUING AN EXPERIENCE IN LAND

The valuation of subjective experiences associated with land

to society; and (6) whether the activity was begun before the offended parties arrived. *Id.*

89. BOSCHKEN, *supra* note 84, at 3.

90. *Id.*

91. *Id.* at 209.

92. *Id.*

93. *Id.* at 3.

94. *Light v. United States*, 220 U.S. 523, 537 (1954) (holding that "all public lands of the nation are held in trust for the people of the whole country").

95. *Id.*

96. See *Nat'l Gettysburg Battlefield Tower*, 311 A.2d at 590 (explaining that the state did not have authority to prohibit the erection of an observation tower near the Gettysburg battlefield under the Public Trust Doctrine). The opponents of the construction plan argued unsuccessfully that the Public Trust Doctrine, as incorporated in the state's constitution, gave the state the authority to regulate or bar the construction because the public would benefit from the preservation of the battlefield in its current state. *Id.* But see *Sierra Club v. Dept. of the Interior*, 376 F. Supp. 90, 93 (N.D. Cal. 1974) (holding that the Public Trust Doctrine is applicable in determining whether the Secretary of the Interior breached his duty to protect Redwood National Park from lumber company activities).

and land use, such as scenic beauty and historical significance, are entangled in an unclear patchwork of legal history. Surely, the government has the power to condemn property,⁹⁷ and can regulate private landowner's use of their property through regulatory controls such as zoning⁹⁸ and nuisance law.⁹⁹ Why then is it necessary to determine the value of an experience?

One answer is that experiences associated with land use can be viewed as limited resources that require protection, and the means of protecting these experiences are limited.¹⁰⁰ The government has limited funds to purchase land and compensate landowners for regulatory takings.¹⁰¹ Therefore, the government must determine how much to allocate for these purposes, and where and what lands to purchase and regulate.¹⁰² Some features, such as the Grand Canyon, are unique, while other resources, such as scenic rivers, may exist in various forms throughout the country. Obviously, the government cannot transport the Grand Canyon around the country for everyone to share, but it does have an obligation to distribute parks of some type to all areas of the country equitably.¹⁰³ Some method is required to determine where to apply the limited governmental funds in a manner that will provide an equitable distribution of the available experiences.¹⁰⁴

Regulatory non-takings cost the government nothing directly, however, they do impose costs on public and private landowners.¹⁰⁵

97. See *STOEBUCK & WHITMAN*, *supra* note 12, at 525 n.1 (referencing *Kohl*, which "established that the Federal Government, in its own right, has the power to condemn land. . .").

98. See *Vill. of Belle Terre*, 416 U.S. at 9 (holding a New York village ordinance restricting the use of land to single-family dwellings constitutional).

99. See *Illinois v. Milwaukee*, 406 U.S. at 104 (holding that federal nuisance law could be used to abate the pollution of interstate waterways).

100. See *LINDER*, *supra* note 10, at 81 (arguing that public resources should be used to enrich human lives, and this includes preservation of environments that are worth experiencing).

101. See *id.* at 50 (discussing hard choices made due to limited resources).

102. *Id.* at 50-51. Decisions concerning the allocation of public resources must be made "by design and not by accident." *Id.* at 51. As economic calculations increasingly determine the focus of decision makers, it becomes more important to direct attention to the preservation of intangibles. *Id.* Because of the difficulty in putting a value on these intangibles, there is a tendency to think of them as unimportant. *Id.*

103. *Id.* at 81. More attention needs to be focused on geographically dispersed areas and smaller places that can enrich people who experience them, but who may not be able to visit major attractions in remote locations. *Id.*

104. *Id.* at 50. "The granting of such unbridled discretion invites arbitrariness." *Id.* at 51. In order to prevent this, "priorities among criteria must be established." *Id.* at 50. It is important to gain an understanding of why these resources are important for the future because they are being lost or diminished by development. *Id.* at 51.

105. See *Penn Cent. Transp.*, 438 U.S. at 124 (stating that whether a restriction is invalid for failure to compensate a landowner for a resulting loss

The cost to the landowners may not always be monetary. For example, regulations to preserve historic areas impose costs on landowners and the public, while conferring a benefit to the public.¹⁰⁶ Regulations dictating the use of land already in public possession involve benefit trade-offs. For example, a regulation preventing the use of motorized jet skis on waters that have been designated as scenic rivers takes away the jet skier's experience of operating his or her equipment on that body of water.¹⁰⁷ Regulations prohibiting overflights of the Grand Canyon take away a person's chance to experience the Grand Canyon from above.¹⁰⁸

In the case of a bridge spanning a river providing access to a national park, the conflicting interests of public access, public safety, use of the river, historic preservation, environmental harm and aesthetics all weigh into the decisions of whether to build the bridge, and where and how it should be constructed.¹⁰⁹ Without a method to value experiences, these conflicts may not be resolved in a manner that best serves the public good.¹¹⁰ Lack of valuation could result in an ad hoc policy application.¹¹¹ Experiences that are not recognized may be lost completely.¹¹² Failure to recognize

is determined on a case by case basis). The Court stated that it has been unable to develop a formula for determining "justice and fairness" when economic injuries are "disproportionately concentrated on a few persons." *Id.*

106. See David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64, 68 (1985) (arguing that historic preservation laws have displaced minorities and the poor from urban neighborhoods).

107. See *Hells Canyon Alliance*, at 1173-74 (proposing Alternative G as part of a Recreational Management Plan that would ban the use of motorized watercraft in certain areas of Hells Canyon on particular days during the summer).

108. See *Grand Canyon Air*, 154 F.3d at 459 (litigating objections from the Grand Canyon Air Tour Coalition and others concerning the FAA's final rule covering overflights of Grand Canyon National Park).

109. *Coalition for Canyon Pres.*, 788 F. Supp at 1523-27 (evaluating whether the Federal Highway Administration, the Army Corps of Engineers, and a private contractor constructing a bridge, violated the Clean Water Act, the National Environmental and Policy Act, and the Wild and Scenic Rivers Act).

110. See BOSCHKEN, *supra* note 84, at 3-5 (discussing how renewed interest in land ethics can overrule the utilitarian value, or economic rule). Urban expansion and the changes in metropolitan processes have caused an increase in land prices along with greater competition among land users. *Id.* at 3. Competing interests of industrial, developmental, pastoral, recreational, and natural resources have created a renewed emphasis for land use planning. *Id.* The central theme of land use control is to make sure that the administrative process works to provide public policies that suitably allocate resources to competing interests). *Id.* at 19.

111. Linder, *supra* note 10, at 50-51. (stating that variations caused by a lack of principled decision making will generate arbitrariness).

112. A TASK FORCE REPORT, *supra* note 77, at 103. North Carolinians observed that the English countryside seems more spacious than that of rural

the value of an experience may not result in loss, but may result in high recovery costs once the value has been recognized.¹¹³ Without method of valuation, the rich and influential may obtain a disproportionate amount of experiences, leaving the poor or less influential public without access to these experiences.¹¹⁴ Public

North Carolina, while England and Wales are approximately the same size as North Carolina, but have nine times North Carolina's population. *Id.* The author attributes this to Britain's active protection of open space, not viewing such space as mere voids in urbanization yet to be developed. *Id.* See Lisa Healy, *Trophy Homes and Other Alpine Predators: The Protection of Mountain Views Through Ridge Line Zoning*, 25 B.C. ENVTL. AFF. L. REV. 913, 935 (1998) (noting that North Carolina passed the Mountain Ridge Protection Act (Ridge Act) in 1993). North Carolina was the nation's first state to pass comprehensive legislation regulating mountain ridge construction. *Id.* The act was in response to out-of-state developers commencing construction of a condominium complex on the peak of Little Sugar Mountain. *Id.* The act was passed by the North Carolina General Assembly imposing height limitations of construction within one hundred feet of a mountain's crest line. *Id.* The act gives local government flexibility in enforcing the act, and provides the opportunity for a county or city to exempt itself through a binding referendum, and to opt back into regulation under the act, again by referendum. *Id.* at 936.

113. Consider the cost of restoring St. Louis to its 1804 dress, mentioned in this Comment's opening hypothetical. For example, the government would most likely have to condemn, through its powers of eminent domain, the entire area within the city limits of St. Louis. This is necessary because more likely than not, none of the buildings currently in the city existed in 1804, and thus will have to be demolished and replaced with replicas of the buildings that existed in 1804. A court is likely to rule that this act in effect leaves the landowner, even if he or she were allowed to retain ownership of the land, without any economically viable means of utilizing the land. In other words, if a particular parcel of land that now has an apartment complex on it was simply woodland in 1804, the owner would be forced to demolish the apartment building and then plant native species of trees on the lot. The action would most likely be considered a taking, and would require compensation to the landowners at the fair market value of the land. It is unlikely that any government, especially not a local or state government, could afford the cost of purchasing a city the size of St. Louis. In addition to these direct expenses, the removal of the buildings, other structures such as airports, train tracks, paved roadways, telephone and other communication devices such as cell phone towers, would result in almost a complete loss of the employment within the area, and a resultant loss to the city's tax base.

114. See FEIN, *supra* note 106, at 68 (discussing the adverse consequences of zoning and governmental responses). Following World War II, a migration from urban areas to the suburbs resulted in municipalities amending their zoning laws in an effort to preserve a certain quality of life. *Id.* Amendments included requirements for larger lot sizes, restrictions on the number of building permits to be issued, and bans on mobile homes, apartments and row houses. *Id.* This type of zoning is called exclusionary zoning. *Id.* Exclusionary zoning leads to minorities and the poor being trapped in deteriorating urban neighborhoods, generally denying them access to employment, housing and educational opportunities equal to the suburban residents. *Id.* Judiciary scrutiny of these ordinances has increased, but most states have upheld exclusionary zoning. *Id.* at 68-69. In *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, *appeal dismissed*,

pressure for economic growth in a particular geographic area could result in the public being deprived of experiences in that geographic area.¹¹⁵

The potential for loss of experiences and the potential for abuse in allocating these experiences to the public in an equitable fashion are strong reasons for developing a system of valuing experiences. Thus, the existing benefit analysis philosophies used to determine policy must be re-examined and utilized in a different form to more effectively and fairly value an experience.

IV. POTENTIAL SOLUTIONS FOR VALUATION OF EXPERIENCES

A. Declaration of Policy and Purpose

As a starting point, a policy to be used in guiding legislation or acts of Congress relating to land use should be enunciated. Such a policy statement would serve at least two important functions. First, a policy statement would give clear direction to parties attempting to implement any legislation enacted in pursuance of experience valuation. This is extremely helpful when federal, state, or local governments are making implementation decisions of how best to draft the legislation. Second, a policy statement will bring about a general awareness concerning the problems associated with valuating experiences. As pointed out previously, one of the problems with experiences associated with land use is that, because they represent subjective material, they are not easily recognized and may be viewed as too difficult to

423 U.S. 808 (1975), the New Jersey Supreme Court held as unconstitutional a municipal zoning ordinance restricting residential construction to lots of one acre minimum and limited to single family homes. FEIN, *supra* note 106, at 70-71. The court held that Mount Laurel must provide fair share housing. *Id.* at 71. Other types of zoning, such as historic preservation, have the positive benefits of enhanced general public welfare, educational opportunities, cultural opportunities, and encourages tourism and reinvestment. *Id.* at 70. Historic preservation can also displace and exclude minorities and the poor from these neighborhoods. *Id.* These consequences can outweigh the contributions of the preservation ordinances. *Id.* Contrast *Vill. of Belle Terre*, 416 U.S. at 9 (holding a city ordinance restricting land use to one family dwellings constitutional). The court held that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs." *Id.* The police power can be used to create zones where family and youth values, and quiet seclusion and clean air provide a sanctuary for people. *See id.* (quoting *Berman* in holding that it was within the power of the legislature to determine that a community should be beautiful, healthy, spacious and clean).

115. Richard Brooks & Peter Lavigne, *Aesthetic Theory and Landscape Protection: The Many Meanings of Beauty and Their Implication for the Design, Control and Protection of Vermont's Landscape*, 4 UCLA J. ENVTL. & POL'Y 129, 135 (1985).

regulate.¹¹⁶

A policy statement should include a general definition of what subject matter an experience associated with land use might entail. The policy should include a statement that experiences, as defined by statutes or other regulations, are a valuable and limited resource to both private landowners and to the public. The policy statement should include language to the effect that, as valuable resources, experiences should be preserved and protected by means deemed appropriate to serve the interests of both the public and private landowners.

A policy statement should also include language making clear the government's obligation to determine what the current and future needs of the public are, and its obligation to determine a course of action for creation, preservation and allocation of the resources that can satisfy those needs. The allocation of these experience resources must be made in a manner that serves the best interest of the public, and does not favor or discriminate against specific geographic, demographic or other particular groups or classes of individuals.

B. Gather Information Concerning Experiences

Because the government has many agencies that collect and analyze a myriad of data, this power should be harnessed to collect and review information concerning experiences. The purpose of such an exercise would be to determine what experiences currently exist, where they exist, and how they are being supplied to the public, whether through governmental programs such as the National Park Service or through state, local, or private means. The results of such a survey can be used to determine where experience gaps exist. For example, a determination may be made that a particular geographic area lacks open spaces or parks within a reasonable distance of a large residential population.

116. See LINDER, *supra* note 10, at 81 (contending that even the recent shift in governmental policies geared toward economic efficiency in land use to maximizing ecological integrity does little to enrich human experiences). Linder contends that there are at least four divergent notions of criteria that should be applied to public decisions related to preservation. *Id.* at 50. These include: preserving areas with the greatest visual beauty; preserving areas that preserve cultural stability; preserving areas that protect and stabilize ecosystems; and preserving areas that offer the potential for experiences promoting moral or intellectual growth. *Id.*

Simply giving policy makers a list of factors to consider when developing priorities among these criteria will result in arbitrary decisions, depending on which particular approach the policy maker's favor. *Id.* at 50-51. In order for appropriate preservation decisions to be made, it must come about by design and not accident. *Id.* at 51. Because society increasingly favors hard-edged decisions based on economics, it has become easier for people to believe that intangible resources, such as experiences that enrich human lives, are unimportant or unreal. *Id.*

Applicable information can accurately be gathered by finding answers to the following questions:

- What constitutes an experience?
- What experiences are valuable to the public?
- Are these experiences in existence now; if so, where are they, in what quantities, how distributed, and are they in danger of being lost or destroyed? and
- What experiences need to be created in the future, including ones that the public may not currently be aware of the need for or the existence of?

The federal government need not attempt to accomplish this task on its own. It can share and delegate tasks to the states, which in turn can delegate all or part of their assignments to local and regional committees. This not only eases the burden on federal resources, but has the additional benefit of adding local knowledge and flavor to the collected information. The addition of state and local entities will ensure that local interests and needs are included in the accounting. Special interest groups, such as historical preservation societies, organizations promoting art and music, wildlife preservation, and other land use concerns would provide invaluable input, and should be solicited at all levels.

The goal is to assess the overall current status and projected future needs of the public with regard to land use experiences. This should involve as many diverse opinions and viewpoints as possible.¹¹⁷

The government then needs to develop a system for valuing these experiences. The system should not be based on economic factors alone, but can be based on a quantifiable value system, such as a score value.¹¹⁸

The score value can be determined by assigning a weighted value to each factor in a set of factors relevant to an experience. A simple numerical value, say on a scale of one to ten, could be

117. See Brooks & Lavigne, *supra* note 115, at 172 n.203 (stating that decision making boards should solicit inputs from a cross section of sources, including naturalists, social historians, political representatives and scientists).

118. See *id.* at 146-47 (discussing the use of a scale score to determine the relative value of views). A scale was developed by using a panel of expert observers to evaluate twenty landscape views from various parts of the world. *Id.* The panel developed a numerical range of scores, from zero to thirty-two, based on the view's overall beauty. *Id.* at 147. An alternative method, which purportedly overcomes some of the deficiencies of the scale system, was developed in order to evaluate the features of a landscape that most contribute to its quality. *Id.* The alternative system assigns weights to the attributes of a landscape according to the attribute's perceived importance, and then combines these weights to develop a map of the results. *Id.*

assigned to represent the relative strength or weakness of that particular factor with regards to an experience. For example, with regards to uniqueness, consider the Grand Canyon compared to a patch of green grass. The Grand Canyon might be assigned a value of ten, while the patch of green grass might be assigned a value of one. Guidelines could be developed for each factor to aid in the determination of the value of an experience.

Some suggested factors for consideration might include: uniqueness of the experience,¹¹⁹ ease in creating the experience,¹²⁰ available alternatives to the experience (both public and private),¹²¹ quality and proximity of these alternative experiences, and who may be burdened by a condemnation or regulation regarding the experience, weighed against who is benefited.

Once a score value has been determined for a particular experience, that value can then be used to make rational decisions concerning regulations. For example, in *Grand Canyon Air*, trying to determine the value of quiet solitude while visiting the Canyon, a high score for the uniqueness factor adds weight to the side of the argument against allowing airplane overflights, based on the inability to duplicate the experience through alternative means.¹²²

This system still requires making decisions based on matters of a subjective nature, but the decisions can be made and justified on a basis of equitable allocation of the experience resources. There is no question that this process still involves hard choices.¹²³

119. For example, the Grand Canyon would be considered relatively unique as compared to an open area of green grass.

120. Again using the Grand Canyon versus a patch of green grass example, it would be literally impossible to recreate the Grand Canyon, say in Maryland, but it might be relatively simple to create an area of green grass, even in the parched desert, through the use of irrigation.

121. The contention is that the private sector can provide amusement parks, art museums and other entities that may be considered equivalent substitutes for land uses that would have to be paid for by government funding. When the private sector supplies these experiences, it preserves government funds for other, less fungible land use projects. It could also reduce the need for governmental condemnation and regulation, thus reducing the burden on private land owners. Also, technology can be used as a substitute for an experience. For example, a big screen movie experience of flying over the Grand Canyon might provide an acceptable substitute for an actual overflight of the Grand Canyon. This factor, available alternatives, would require evaluation of both distribution of the alternatives, such as driving or walking distance from a given population, and a determination of what constitutes an alternative. Questions like "Is a public aquarium an alternative to a outdoor public park?" would still have to be addressed.

122. *Grand Canyon Air*, 154 F.3d at 460 (stating that the FAA promulgated these regulations because of safety concerns and "because it believed that there is also a public interest in promoting a quiet environment in the canyon and minimizing the intrusion of aircraft noise on this environment. . .").

123. See Linder, *supra* note 10, at 50 (illustrating the difficulty in this decision making process).

That may be one reason the current law fails to adequately address these issues.

Although the suggestions presented here require more informational input and difficult decisions on subjective issues, the process can and is currently being done by many government agencies.¹²⁴ Even the courts have begun to favor using more subjective tests in an effort to achieve equitable solutions to land use control.¹²⁵

Valuations based on matters of a subjective nature are difficult to make, but these hard choices are going to be made with or without government direction and intervention. Private land owners are going to erect billboards, build apartment complexes, cut trees, and destroy wildlife habitats. Without some controls, individuals or groups will be allowed to exploit land for personal fortune at the expense of destroying, perhaps permanently, the land use experiences of other individuals or groups.

CONCLUSION

As the United States becomes more sophisticated and developed, preservation of subjective issues, such as experiences associated with land use, becomes more important.¹²⁶ These experiences are valuable and limited resource that require legal recognition, and a requisite level of legal protection. The subjective nature of land use experiences has precluded the legal system from dealing with the issue on an in-depth basis, in many instances allowing simple economic and market factors to determine the relative values of various experiences.¹²⁷

This Comment has suggested how to combine aspects from different areas of the law in order to develop a system for valuation of land use experiences. In order to be effective, changes

124. See *Coalition for Canyon Pres.*, 788 F. Supp at 1523 (forcing the National Park Service to balance many competing interests regarding the construction of a bridge); *Grand Canyon Air*, 154 F.3d at 459 (forcing the FAA to promulgate regulations concerning overflights of the Grand Canyon, taking into account the interests of the public, local commercial air plane tour companies, and a resident Indian tribe).

125. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (holding that for an ordinance requiring an exaction from a private landowner, there must be a rough proportionality determination made to ensure that there is a reasonable relationship between the exaction and the impact of the proposed development for which the landowner seeks a permit). For example, in exactions, the government requires a nexus between the exaction required and the public benefit. *Id.* at 386.

126. See BROOKS & LAVIGNE, *supra* note 115, at 129-30 (stating that presently, the system does not protect our nation's environmental beauty, and that a coherent, rational system needs to be put into place in order to direct the changes caused by economic and ecological forces that impact the present and future beauty of the landscape).

127. See *id.* (illustrating the growing importance of land preservation).

and additions to regulation of land use must be made based on a cross-sectional gathering of information and intelligent use of that information to develop regulations based on a well thought out policy statement. These decisions can then be made in an equitable manner designed to best utilize a valuable and limited resource: the experience associated with land use.

