
2012

Access Management: Balancing Public and Private Rights in the Modern "Commons" of the Roadway

Michael L. Stokes

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Property Law and Real Estate Commons](#), and the [Transportation Law Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Michael L. Stokes, *Access Management: Balancing Public and Private Rights in the Modern "Commons" of the Roadway*, 60 Clev. St. L. Rev. 585 (2012)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol60/iss3/5>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

ACCESS MANAGEMENT: BALANCING PUBLIC AND PRIVATE RIGHTS IN THE MODERN “COMMONS” OF THE ROADWAY

MICHAEL L. STOKES*

I.	INTRODUCTION.....	586
II.	THE UNCLEAR ORIGIN AND SCOPE OF THE “RIGHT OF ACCESS”	591
	A. <i>No Compensation for “Right Use of Property Already Belonging to the Public”: The 1823 Decision in Callender v. Marsh</i>	592
	B. <i>Sharing the Streets with Publicly-Authorized Users: The 1839 Decision in Lexington and Ohio Rail Road Co. v. Applegate</i>	594
	C. <i>Balancing Private Property Rights and the Public Right to Improve the Streets: The Ohio Approach</i>	595
	D. <i>Statutory Changes in the Late 1800s</i>	597
	E. <i>“No Easement of Access . . . As Against any Improvement of the Street for the Purpose of Adapting It to Public Travel”: The U.S. Supreme Court’s 1906 Decision in Sauer v. City of New York</i>	598
	F. <i>State Constitutional Changes and the Law of Access at the Dawn of the Automobile Age</i>	603
III.	THE GROWTH OF AUTOMOBILE USE AND THE BEGINNINGS OF ACCESS REGULATION.....	604
	A. <i>Access may be Regulated but not Denied Altogether: The 1910 Goodfellow Tire Decision</i>	604
	B. <i>Access to an Abutting Street or to Each Abutting Street: The Brownlow and Wood Cases</i>	605
	C. <i>Locating the Boundary Between Individual and Public Interests: The Pennsylvania Access Cases</i>	608
IV.	THE PUBLIC ROADS ADMINISTRATION’S 1947 STUDY OF HIGHWAY ACCESS AND ROADSIDE DEVELOPMENT AND THE UNDERPINNINGS OF ACCESS MANAGEMENT.....	611

* J.D., Ohio State University (1995); M.A., Industrial Relations, Wayne State University (1983); B.A., Economics and Political Science, University of Michigan-Dearborn (1981). Mr. Stokes is an attorney practicing in Toledo, Ohio.

V.	MODERN ACCESS MANAGEMENT PROGRAMS: SOME BRIEF SKETCHES.....	617
	<i>A. Colorado</i>	617
	<i>B. Florida</i>	619
	<i>C. New Jersey</i>	622
	<i>D. An Overview of Typical Access Management Principles</i>	625
VI.	A SUMMARY OF THE CURRENT LAW OF ACCESS	626
	<i>A. Access to Traffic and Accessibility within the Network of Roads</i>	626
	1. Access to Traffic	627
	2. One-Way Traffic Flow and Median Dividers	629
	3. Accessibility within the Road Network.....	629
	4. The Minority Approach: When a Location within the Network Becomes too Remote.....	631
	<i>B. Access to Land: The Point of Contact Between the Public and Private Pavement</i>	634
	1. Corner Parcels and Multiple Road Frontages.....	634
	2. Parcels Fronting on a Single Road: What Access is Enough?.....	635
	<i>C. How Can Reasonable Access Be Measured?</i>	638
VII.	THE IMPLICATIONS OF THE LAW OF ACCESS FOR ACCESS MANAGEMENT PROGRAMS	643
	<i>A. The Application of Specific Access Management Techniques</i>	644
	<i>B. Direct Access to Arterial Roads as an Appropriation of the Commons to Private Use</i>	648
	<i>C. Accessibility: Claiming a Property Interest in the Road Network</i>	651
VIII.	CONCLUSION	653

I. INTRODUCTION

Effortless travel along a smoothly flowing highway is part of the American automotive dream—yet it all too often is only a dream, as anyone facing daily commuter traffic can confirm. According to the 2011 Urban Mobility Report by Texas A&M University, traffic congestion in U.S. cities caused 4.8 billion wasted hours and burned 1.9 billion gallons of fuel, resulting in a “congestion cost” of \$101 billion,¹ to say nothing of the tailpipe emissions of vehicles stuck in traffic. Since

¹ DAVID SCHRANK ET AL., TEX. TRANSP. INST., 2011 URBAN MOBILITY REPORT 1 (2011) [hereinafter URBAN MOBILITY REPORT], available at http://www.tti.tamu.edu/documents/mobility_report_2011_wappx.pdf.

1982, travel delay and the cost of congestion have multiplied by a factor of five.² During the same period, traffic on the nation's roadways has steadily increased. The trend clearly appears in Federal Highway Administration statistics showing that from 1980 to 2007 the yearly number of vehicle-miles traveled on U.S. roads doubled, reaching a remarkable three *trillion* miles.³

Drivers and vehicles competing for space within the limited confines of the nation's roadways create a classic "tragedy of the commons" by using more and more of a freely available public resource—highway capacity—and degrading it through their cumulative overuse.⁴ Policymakers continue to seek viable alternatives to single-occupant vehicle travel, yet people balk at options that limit their freedom to drive where and when they choose.⁵ At least for the foreseeable future, transportation officials will need to cope with heavy and increasing use of the roadway system.

The use of the roadways takes two main forms. The first form of use, and the most apparent one, is for mobility. An interstate highway, built to handle large volumes of fast-moving traffic, is the best example of a road intended for mobility. Vehicles enter and exit at interchanges only, and between those points they flow "freely down an unencumbered corridor 'pipe'" without having to slow or stop for other streams of traffic entering or crossing the highway.⁶ Nearly all travel, though, begins and ends off the roadway system, in a place such as a parking lot or residential driveway. This fact points to a second use of the road: it provides access

² *Id.*

³ FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., ANNUAL VEHICLE-MILES OF TRAVEL, 1980-2009, *available at* <http://www.fhwa.dot.gov/policyinformation/statistics/2009/pdf/vm2.pdf>. Travel declined between 2007 and 2009, likely due to the economic recession, but it is once again increasing. A comparison of data between November 2010 and November 2009 shows a 1.1% rise in vehicle-miles traveled. FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., NOVEMBER 2010 TRAFFIC VOLUME TRENDS, *available at* <http://www.fhwa.dot.gov/ohim/tvtv/10novtvt/index.cfm>.

⁴ Christian Iaione, *The Tragedy of Urban Roads: Saving Cities from Choking, Calling on Citizens to Combat Climate Change*, 37 *FORDHAM URB. L.J.* 889, 890-91 (2010). In his classic article, biologist Garrett Hardin illustrated how, even when a common pasture is already overgrazed, it is individually rational for each herder to add another animal (and another, and another) to his herd since he receives the entire proceeds from selling it but the cost of the overgrazing is shared by everyone. But as Hardin noted, "this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited." Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968). Many publicly-held resources are vulnerable to this problem. Hardin's article gives as examples cattle owners who pressure federal officials to allow more cattle to graze on leased public land "to the point where overgrazing produces erosion and weed-dominance" and tourists who visit national parks that are "open to all, without limit" even though "[t]he values that visitors seek in the parks are steadily eroded" by the overwhelming number of sightseers. *Id.* at 1245.

⁵ Shi-Ling Hsu, *What is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 *ALB. L. REV.* 75, 126 (2005).

⁶ FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., WHAT IS ACCESS MANAGEMENT?, *available at* http://www.ops.fhwa.dot.gov/access_mgmt/what_is_accsmgmt.htm.

to properties that abut it. A residential subdivision street, lined with parked cars and driveways, is a prime example of a road mainly intended to provide access to property.⁷

Unfortunately, the mobility and access functions are often at odds with one another, especially when traffic is heavy. When one vehicle turns from a main arterial road into a side street or driveway, other vehicles on the main road must slow down, change lanes, or stop.⁸ This disruption of smooth traffic flow might result in an accident, particularly if another driver is not paying attention or makes a sudden lane change to avoid the turning auto.⁹ More typically, the disruption caused by the turning auto will persist as vehicle after vehicle brakes in response to the slowdown in front of it. Similarly, when a vehicle attempts to enter a busy main road from a driveway or side street, heavy traffic can make the movement difficult and dangerous.¹⁰

In an effort to balance the competing functions of mobility and access, many state and local governments are adopting access management programs.¹¹ Access management is defined as “the systematic control of the location, spacing, design, and operation of driveways, median openings, interchanges, and street connections to a roadway.”¹² The goal of an access management program “is to ensure roadway safety and efficient operations while providing reasonable access to the adjacent land use.”¹³ When implemented on a given roadway, access management may mean fewer (and more widely separated) driveways and street intersections; the construction of dedicated right-turn lanes to driveways that serve multiple properties; and the use of median barriers with openings located near traffic signals, so that left-turn and U-turn movements can only be made when oncoming traffic is stopped. In the 101 urban areas studied in the 2011 Urban Mobility report, access management techniques such as these reduced delay by 77 million hours.¹⁴

⁷ *Id.*

⁸ *Id.*; see also NAT'L COOP. HIGHWAY RESEARCH PROGRAM, REPORT 121, PROTECTION OF HIGHWAY UTILITY 46-47 (1971).

⁹ A Purdue University study, published several years before the advent of the first statewide access management program, found driveway-related crashes to be a significant percentage (13.95%) of all motor vehicle accidents. WILLIAM W. MCGUIRK, EVALUATION OF FACTORS INFLUENCING DRIVEWAY SAFETY, INTERIM REPORT (1973), available at <http://dx.doi.org/10.5703/1288284313850>.

¹⁰ WHAT IS ACCESS MANAGEMENT?, *supra* note 6; NAT'L COOP. HIGHWAY RESEARCH PROGRAM, *supra* note 8, at 47.

¹¹ According to data from the Transportation Research Board of the National Academies, twenty states have extensive access management programs and all but ten have some form of access management effort. ACCESS MGMT. COMM., TRANSP. RESEARCH BD., STATE WEB PAGES (2009), available at <http://www.accessmanagement.info/AM2005/StateWebpages.htm>. Each of the 101 urban areas given detailed study in the 2011 Urban Mobility Report reported some level of access management, covering about one-third of the street miles in the cities. URBAN MOBILITY REPORT, *supra* note 1, at B-31.

¹² NAT'L COOP. HIGHWAY RESEARCH PROGRAM; REPORT 548, A GUIDEBOOK FOR INCLUDING ACCESS MANAGEMENT IN TRANSPORTATION PLANNING 3 (2005).

¹³ *Id.*

¹⁴ URBAN MOBILITY REPORT, *supra* note 1, at B-31, B-33.

When more governmental control is exerted over where and how a road may be accessed, however, the interests of the public may collide with those of property owners. A few examples will illustrate the kinds of problems that can arise:

Some older commercial properties have their entire road frontage paved, so customer vehicles turn directly from the road into parking spaces. Often, the buildings are located so close to the road that the parking stalls overlap the public right-of-way. Replacing this wide-open access with defined driveways lessens the number of places where vehicles entering or exiting the parking lot can cross the movement of vehicles on the road, limiting these “conflict points” to the discrete areas where the driveways meet the road. Fewer conflict points mean fewer accidents and less “friction” between through traffic and vehicles entering and exiting the road. But if the commercial property was laid out so that the public road functioned like a parking lot aisle, restricting access to one or two defined driveways might mean a loss of parking spaces that the business depends upon.¹⁵

Gas stations provide another example of the difficulties that may arise when modern access controls are imposed on older developed properties. Historically, many gas stations were located at street corners and laid out with two driveways on each side of the property so vehicles could enter and exit the rows of gas pumps without having to turn around on-site. Traffic engineers studying accident patterns have determined, however, that driveways near intersections cause accidents because they require drivers to make too many decisions in too little space (and time).¹⁶ To mitigate this problem, the street authority may reduce the number of driveways allowed and require them to be as far as possible from the intersection.¹⁷ This change in access may lead to litigation if the gas station operator perceives that it will turn customers away.¹⁸

Disputes can also happen when undeveloped properties are affected by access management efforts. One such case arose after the City of Waterloo, Illinois enacted legislation that allowed access to a new bypass at widely-spaced street intersections only, reasoning that the two-lane rural road might someday be improved to a five-lane urban highway.¹⁹ The Illinois Department of Transportation (IDOT) had already granted driveway permits to the owners of a farm parcel abutting the bypass, but when they later sought approval of a commercial subdivision using two of the IDOT-permitted driveways, the city denied it as inconsistent with the ordinance and

¹⁵ Galvis v. Dep’t of Transp., 167 P.3d 584, 586 (Wash. Ct. App. 2007).

¹⁶ FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., INTERSECTION SAFETY ISSUE BRIEFS: ACCESS MANAGEMENT, available at http://www.safety.fhwa.dot.gov/intersection/resources/fhwasal0005/doc/brief_13.cfm.

¹⁷ See, e.g., *In re I/M/O Route 206 at Lot 13B New Amwell*, 731 A.2d 56, 58-59 (N.J. Super. Ct. App. Div. 1999) (closing drive that was too close to intersection). New Jersey requires 100 feet of clearance between a driveway and a signalized intersection. N.J. ADMIN. CODE § 16:47-3.8(k)(3) (2011). If a property’s access points are placed at the corners farthest from the intersection, it “interferes least with intersectional operations.” NAT’L COOP. HIGHWAY RESEARCH PROGRAM, *supra* note 8, at 48. “As a general rule, the farther from an intersection a driveway can be located, the less it will affect arterial traffic.” *Id.* at 53.

¹⁸ *In re I/M/O Route 206*, 731 A.2d at 63.

¹⁹ *State Bank of Waterloo v. City of Waterloo*, 792 N.E.2d 329, 330-31 (Ill. App. Ct. 2003).

the projected future expansion of the highway.²⁰ The farm owners argued that Waterloo could not use driveways that IDOT had already accepted as a reason to reject the plat, but the court held that a municipality could enforce access regulations more stringent than the state's.²¹

Another recent case involved an Ohio city's effort to channel traffic from a planned technology park onto an interior loop road being built by the city on land it was appropriating for that purpose.²² At trial in the appropriation case, the property owners claimed damages of \$4 to \$6 million for loss of access to the abutting state highway, contending that their farm property had no actual access to the loop road and that the remaining access to the state highway was insufficient for future development.²³ The jury found no damages and the appeals court affirmed, holding that the jury could consider whether access to the loop road would be reasonably foreseeable when the farm actually develops.²⁴

When a government agency acts to regulate the consumption of highway capacity by managing access to it—and, more pointedly, when an owner of abutting property wants to have access to a public road in a way that the government agency is not willing to allow, some important legal questions arise. What right of access does the owner of abutting property have? How far can the government agency regulate access to the road? Many courts hold that a taking occurs if a governmental act amounts to a substantial or material interference with access, but how is that measured? And what is “access” anyway?

This Article will begin by examining how the concept of a right of access to an abutting roadway developed and how courts treated early efforts to regulate roadway access for public welfare and safety. Next, we will see how public authorities began to comprehend the differences between mobility and land access and to perceive the conflict between traffic volume, traffic speed, and frequent driveways and intersections. This new knowledge led to the adoption of statewide permit-based programs to manage access to roadways using criteria calibrated to match each road's function in the continuum between access and mobility. We will identify some of the important common features of those programs.

Turning to the modern law of access, this Article will highlight the significant distinctions between access to land, accessibility within the network of roadways, and access to traffic volume and suggest how the reasonableness of access can be evaluated. We will then analyze what implications these distinctions have for access management programs. Finally, we will consider the “access” concept as an assertion of private rights in the commons of the roadway and what that means for the balancing of public and private interests. The Article will conclude by recommending that the adequacy of access should be evaluated in physical terms only, because economic constructs such as the “convenience” of access amount to an unwarranted claim to perpetuate a preferred location within the road network.

²⁰ *Id.* at 330.

²¹ *Id.* at 332-34. Given the posture of the case, the court did not have to decide whether the city's actions amounted to a taking of access rights. *Id.* at 337.

²² *City of Dublin v. Pewamo Ltd.*, 954 N.E.2d 1225, 1229-30 (Ohio Ct. App. 2011).

²³ *Id.* at 1227.

²⁴ *Id.* at 1228, 1231-32.

II. THE UNCLEAR ORIGIN AND SCOPE OF THE “RIGHT OF ACCESS”

The United States is woven together by a network of roads—over four million miles of them, occupying about one percent of the country’s land mass.²⁵ Many of these roads are owned by the public in fee simple. In other instances, usually in rural areas, the right-of-way is a perpetual easement. Seemingly a lesser interest, a highway easement nonetheless gives the public full control of the land between the right-of-way lines, even as against the fee owner.²⁶ This control is so broad that there is little practical difference between a highway easement and public ownership of the land on which the highway is built.²⁷

Whenever we enter this roadway network—whenever we leave a driveway and pull out into the street—an imperceptible and seldom-considered threshold is crossed. The roads we use (and need to use) every day to reach our homes and businesses belong to someone else.

Just what happens upon crossing the threshold between private property and a public road is, in the realm of legal rights, a question that has bedeviled courts for years. Some judicial opinions affirming that a property owner has a right of access to an abutting public road speak rather cautiously of “a property right in the nature of an easement in the street”²⁸ or a “right . . . in the nature of a property right.”²⁹ Other

²⁵ U.S. GEOLOGICAL SURVEY, U.S. DEP’T OF THE INTERIOR, DISTANCE TO NEAREST ROAD IN THE COTERMINOUS UNITED STATES, *available at* <http://www.fort.usgs.gov/products/publications/21426/21426.pdf>. The percentage in urban areas is much greater: Even forty years ago, a report estimated that “[a]bout 28 percent of the developed land of an urban area may be devoted to highway rights-of-way.” NAT’L COOP. HIGHWAY RESEARCH PROGRAM, *supra* note 8, at 35.

²⁶ *See, e.g.*, *United States v. Certain Land in Cook County*, 248 F. Supp. 681, 682-83 (D. Minn. 1965) (stating that owner’s fee simple interest was “burdened by a substantially exclusive easement for highway purposes, and defendant retains no right to the use and enjoyment of this land”); *People v. Henderson*, 85 Cal. App. 2d 653, 657 (Ct. App. 1948) (stating that fee owners had no right to put a shed in the right-of-way, even though it did not interfere with travel: “[D]efendants as owners of the fee would have had no greater right than those who were strangers to the title.”); *Paquet v. Mt. Tabor St. Ry. Co.*, 18 Ore. 233, 235 (1889) (“The establishment of a public highway practically divests the owner of the fee to the land upon which it is laid out of the entire present beneficial interest.”).

²⁷ *See, e.g.*, *Van Leuven v. Akers Motor Lines, Inc.*, 135 S.E.2d 640, 642-43 (N.C. 1964) (stating that public control of a highway easement is “so exclusive in extent that the subservient estate in the land . . . amounts to little more than the right of reverter in the event the easement is abandoned” and “the difference between an easement of this nature and extent and a fee simple estate in the land covered by the right of way is negligible”); 5 JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 16.02(7) (rev. 3d ed., 1997) (“Where land already subject to a highway easement is taken for highway purposes it has been held that only nominal damages may be recovered.”).

²⁸ *Bacich v. Bd. of Control*, 144 P.2d 818, 823 (Cal. 1943); *see also* *Simkins v. Davenport*, 232 N.W.2d 561, 564 (Iowa 1975) (stating that the owner of land abutting a highway has “a property right in the nature of an easement” of access to the highway); *State ex rel. State Highway Dep’t v. 14.69 Acres of Land*, 226 A.2d 828, 831 (Del. 1967) (stating that the right of access is “said to be ‘in the nature of an easement’”).

²⁹ *County of Anoka v. Blaine Bldg. Corp.*, 566 N.W.2d 331, 334 (Minn. 1997).

courts step out further, calling this rather amorphous right “fundamental”³⁰ or “basic.”³¹ Still, its ancestry is “obscure.”³² As the New Mexico Supreme Court put it, “The ‘right of access’ is apparently judge-made, the exact origin of which is difficult to determine.”³³

Yet origins are important. Early decisions on a subject are often the most revealing, because when there is no precedent to lean on, courts must more fully explain their reasoning. Understanding how, and to what degree, a particular interest attained legal recognition is also necessary when considering whether it is “sufficiently bound up with . . . reasonable expectations . . . to constitute ‘property’ for Fifth Amendment purposes.”³⁴ For those reasons, we begin with a look at the law of access at its inception.

A. No Compensation for “Right Use of Property Already Belonging to the Public”: The 1823 Decision in Callender v. Marsh

In the early nineteenth century, when the nation’s surface transportation network was in its infancy and travel moved no faster than a horse could go, there was little need to regulate access between publicly-built roads and adjoining private property.³⁵ Sometimes, though, public improvements to a road would affect an abutting landowner’s access to it. Early roads often followed the natural contours of the land over which they were built. As population and trade increased, local officials might improve a road by building up the grade in a low place or cutting it down on a hill to make the road easier and safer to traverse. Such changes, while beneficial to the public using the road, could be detrimental to the properties next to the cut or filled areas.

That was the problem presented in the widely-followed 1823 Massachusetts opinion in *Callender v. Marsh*.³⁶ The case arose when the surveyor of highways in Boston decided to reduce the grade of a road on a steep hill in front of the plaintiff’s

³⁰ BSW Dev. Grp. v. City of Dayton, 699 N.E.2d 1271, 1275 (Ohio 1998).

³¹ *People ex rel. Dep’t of Public Works v. Ayon*, 352 P.2d 519, 522 (Cal. 1960).

³² *D’Arago v. State Rds. Com.*, 180 A.2d 488, 490 (Md. 1962) (citing *Bacich*, 144 P.2d at 823).

³³ *State ex rel. State Highway Comm’n v. Danfelter*, 384 P.2d 241, 243 (N.M. 1963).

³⁴ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978).

³⁵ The private builders of chartered turnpikes had a right to erect toll-gates and charge people to pass through them, but even so, an abutting landowner had no duty to pay unless his travel took him through a toll-gate. *See, e.g.*, *Buncombe Turnpike Co. v. Mills*, 32 N.C. 30, 34 (1849) (finding that a company had no authority to charge for use of turnpike that began and ended between toll-gates which, by statutory charter, had to be spaced at least ten miles apart); *Lexington & Georgetown Turnpike Co. v. Redd*, 41 Ky. 30, 31-32 (1841) (holding that a company had no claim against abutter who leased a strip of ground to connect his property with the turnpike at a point between town and the first toll-gate, and closed up his access point to the turnpike beyond the toll-gate).

³⁶ *Callender v. Marsh*, 18 Mass. 418, 425 (1823). John Lewis, the author of an early treatise on eminent domain law, described *Callender* as the “leading case” on street grades, attributing to it “an important influence in moulding the law in this country.” JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 94 (1900).

house.³⁷ Cutting down the road exposed the house's foundation and endangered its stability, requiring costly efforts to correct.³⁸

The owner contended that the surveyor's change to the grade of the road was a compensable taking under the state constitution, arguing that a taking occurred not only when an individual's land is occupied for public use, "but likewise where he is injured in respect to an incorporeal right."³⁹ The surveyor replied that, although other individuals had suffered similar consequences from grade changes, no one had ever brought suit before, "and if such an action can be sustained, it will put a check to all improvements in our highways."⁴⁰

The *Callender* court agreed with the surveyor, deciding that a taking occurs only when property is "actually taken" and occupied by the government, and ruling that the constitutional provision requiring compensation for takings did not apply "to the case of one who suffers an indirect or consequential damage or expense, by means of the right use of property already belonging to the public."⁴¹

As the court reasoned, neighboring homeowners have no right to seek payment when a schoolhouse is built on public land, even though the resulting crowd and noise may materially reduce the value of their dwellings.⁴² Moreover, even though the road might have been established on an easement, with the abutting owner retaining title to the soil, "the public acquired the right, not only to pass over the surface in the state it was in when first made a street, but the right also to repair and amend the street, and, for this purpose, to dig down and remove the soil sufficiently to make the passage safe and convenient."⁴³

With regard to compensation, the abutting owner had a right to seek payment from the government when the road was established "not only on account of the value of the land taken" but also "for the diminution of the value of the adjoining lots, calculating upon the future probable reduction or elevation of a street or road."⁴⁴

³⁷ *Callender*, 18 Mass. at 425.

³⁸ *Id.* at 425.

³⁹ *Id.* at 429. The incorporeal right at issue in *Callender* was not access to the street, but a right to rely on the earth under the street to provide support to the adjacent building. Whether such a right exists was debatable, then and now. See *Transp. Co. v. Chicago*, 99 U.S. 635, 645 (1879) ("[T]his right of lateral support extends only to the soil in its natural condition. It does not protect whatever is placed upon the soil increasing the downward and lateral pressure. If it did, it would put it in the power of a lot-owner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter."); *Panhandle E. Pipe Line Co. v. Tishner*, 699 N.E.2d 731, 739 (Ind. Ct. App. 1998) ("[A] landowner has an absolute right to have his land in its natural state laterally supported by the lands of adjoining landowners. . . . There is, however, no such absolute right to lateral support of buildings. Liability for damage to buildings resulting from the loss of lateral support must be based upon the negligence of the adjoining landowner in carrying on the activity which occasioned the loss of lateral support.").

⁴⁰ *Callender*, 18 Mass. at 430.

⁴¹ *Id.* at 437.

⁴² *Id.* at 439.

⁴³ *Id.* at 438.

⁴⁴ *Id.* at 439.

The buyers of those lots could decide for themselves whether the city's growth might someday warrant changes to the road and price their purchase offers accordingly.⁴⁵ Similarly, owners of property abutting a road had to think about whether the grade might be changed and locate their buildings accordingly.⁴⁶

The *Callender* court realized that its market-based approach might not always account for the effects of future grade changes: "although, theoretically, all this may be considered as determined when the street is originally laid out, yet practically there may be cases where this just provision has been overlooked."⁴⁷ This realization prompted the court to remark that the legislature might enact a statute providing for an adjudication (and compensation) when long-existing streets are raised or lowered to the detriment of abutting houses.⁴⁸ Nonetheless, under the common law, the surveyor of highways was plainly not liable for damages, for his acts occurred on public property and under color of a statute that authorized him to do the work.⁴⁹

*B. Sharing the Streets with Publicly-Authorized Users: The 1839 Decision in
Lexington and Ohio Rail Road Co. v. Applegate*

Another kind of access-related litigation began when local governments decided to let railroads operate in public streets. Railroads provided an important transportation service to the public, yet they were privately owned, and their rails and road-beds physically occupied part of the public space. The presence of railroad structures and trains changed how the street could be used, potentially to the detriment of nearby properties. But did owners of property abutting a street have any legally-protected right in it to assert against the railroad's municipally-authorized use?

Steam railroads were cutting-edge technology in 1838⁵⁰ when the Lexington and Ohio Rail Road Company began carrying passengers and freight along Main Street in Louisville, Kentucky.⁵¹ Shortly after the railroad began operating, however, a group of property owners and tenants obtained an injunction against it, convincing the equity court that the railroad was a nuisance that unlawfully encroached on their private property rights in the street.⁵²

⁴⁵ *Id.* at 438.

⁴⁶ *Id.* at 438-39.

⁴⁷ *Id.* at 440.

⁴⁸ *Id.* at 441. The Massachusetts legislature later passed a law that did provide compensation to owners whose property was damaged by the alteration of a road grade. See *Morse v. Stocker*, 83 Mass. 150, 154-55 (1861).

⁴⁹ *Callender*, 18 Mass. at 441.

⁵⁰ The B&O railway, generally regarded as the nation's first, broke ground in 1828. JAMES A. WARD, *RAILROADS AND THE CHARACTER OF AMERICA 1820-1887* 16 (1986). By 1837 there were 1,498 operating miles of rail line in the United States. *Id.* at 13.

⁵¹ *Lexington & Ohio R.R. Co. v. Applegate*, 38 Ky. 289, 290 (1839). *Lexington* appears to be the first American case dealing with an abutter's right of access to the street. Frank M. Covey, Jr., *Frontage Roads: To Compensate or Not to Compensate*, 56 NW. U. L. REV. 587, 588 n.11 (1961).

⁵² *Lexington*, 38 Ky. at 291.

On review, the Kentucky Court of Appeals agreed that the owners of property abutting Main Street did have a property right in the street: “a private right of the nature of an incorporeal hereditament, legally attached to their contiguous ground . . . without which their property would be comparatively of but little value, and would never have been bought by them.”⁵³

Even if the owners of property along the street suffered some inconvenience or loss, however, the court of appeals decided that they had no right to an injunction or damages if the railroad’s use of the street was consistent with the purposes for which the street was established.⁵⁴ As the court explained, the abutting owners “purchased their property, and must hold it . . . subject to any consequences that may result, whether advantageously or disadvantageously, from any public and authorized use of the streets, in any mode promotive of, and consistent with the purposes of establishing them as common highways in town, and compatible with the reasonable enjoyment of them by all others entitled thereto.”⁵⁵

The *Lexington* court went on to say that if, in a future case, there was satisfactory proof that a railroad’s use of the street “encroaches on any private right, or obstructs the reasonable use and enjoyment of the street, by any person who has an equal right to the use of it,” then the court would “be ready to enjoin all such wrongful appropriation of the highway.”⁵⁶ Since the record before it did not show that the railway had “unreasonably abridged” any public or private right in or use of Main Street,⁵⁷ however, the court of appeals reversed, ordering that the injunction be dissolved.⁵⁸

C. *Balancing Private Property Rights and the Public Right to Improve the Streets: The Ohio Approach*

Early nineteenth century street improvements intended for horse and carriage, such as regrading, were a normal characteristic of municipal growth and progress.⁵⁹ As the *Callender* case illustrated, such public betterments could work to the disadvantage of people who bought lots and built improvements with reference to the street as it was when they came to it. Yet virtually all courts, when confronted with an abutting property owner’s suit for damages, agreed that no common-law claim existed—any remedy would have to be provided by the legislature.

The main exception to this rule was in Ohio. Beginning in 1846, the Ohio Supreme Court recognized an abutter’s common-law claim for damages against a municipal corporation even if the city used proper care when changing the grade of a

⁵³ *Id.* at 294. An “incorporeal hereditament” is an intangible right capable of being inherited. BLACK’S LAW DICTIONARY 726 (6th ed. 1990).

⁵⁴ *Lexington*, 38 Ky. at 301.

⁵⁵ *Id.* at 301-02.

⁵⁶ *Id.* at 310.

⁵⁷ *Id.* at 306.

⁵⁸ *Id.* at 311.

⁵⁹ *Callender v. Marsh*, 18 Mass. 418, 426 (1823).

street.⁶⁰ In its subsequent, more comprehensive opinion in *Crawford v. Village of Delaware*, the Ohio court explicitly stated that it was balancing the private right of access against the public right to improve the street.⁶¹ Interestingly, though, the *Crawford* court did not attach this right to the land next to the street—as suggested by the Kentucky court in the *Lexington* case—but to the buildings erected on that land.⁶²

Significantly, the Ohio court framed the issue in terms of an *established* street grade and a lot owner who put up buildings in a reasonable relation to that grade, which the city later changed for the public convenience “so as to substantially and materially injure the buildings.”⁶³ Under those circumstances, the Ohio court explained, the lot owner’s “use of the street as an incident to his permanent erections [and] the private rights of the owner, inherent in and incident to the erections upon the lot, are invaded.”⁶⁴ The injury to the buildings, in the court’s view, was “as positive and substantial an injury to private property, and as direct an invasion of private right, incident to the lot, as if the erections upon the lot were taken for public use.”⁶⁵

The court carefully confined its holding to structures built “in good faith” and “with a view to the established grade.”⁶⁶ The owner of an unimproved lot had no claim for damages.⁶⁷ And if the street grade was not established, then a lot owner had to use reasonable care to anticipate what the established grade might be, and locate any buildings accordingly.⁶⁸ But once the public had “defined the interests and improvements necessary” for a highway by establishing grades, creating roadside drainage swales, installing culverts, and the like, then the owners of abutting lots had “the right to assume this exercise of authority as a final decision of the wants of the public, and to make their improvements in reference to it.”⁶⁹

⁶⁰ *Crawford v. Village of Delaware*, 7 Ohio St. 459, 464-65 (1857) (citing *McComb v. Town of Akron*, 15 Ohio 474 (1846)). The Ohio court acknowledged that its position was unique and in direct conflict with decisional law in the United States and England. *Id.* at 465.

⁶¹ *Id.* at 469-70.

⁶² *Id.* at 470.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 470-71.

⁶⁶ *Id.* at 470.

⁶⁷ *Id.*

⁶⁸ *Id.* A landowner had no claim for damages if alteration to a road made it less convenient for travel but did not directly impair “access to the road from the improvements on his land.” *Jackson v. Jackson*, 16 Ohio St. 163, 163 (1865).

⁶⁹ *Cincinnati & Spring Grove Ave. St. Ry. Co. v. Inc. Village of Cumminsville*, 14 Ohio St. 523, 547 (1863). The court continued: “If any mistake is made, it is the mistake of the public authorities, and cannot be corrected at the expense of those who have acted and expended their money on the faith of its being final.” *Id.*

D. Statutory Changes in the Late 1800s

The *Callender*, *Lexington*, and *Crawford* decisions, all of which preceded the Civil War, represent some of the earliest judicial efforts to resolve difficulties that arose when new transportation technologies and new public works impinged upon older property uses.

Other efforts to resolve those difficulties were legislative. As the nineteenth century went on, some states enacted statutes requiring payment for damage to the value of abutting properties resulting from a grade change after the municipal corporation had officially established the grade of a street.⁷⁰ The process to establish a permanent grade could be a formal matter, involving public notice, a hearing, and recording of the grade line.⁷¹ Once the “permanent” grade was established, the act of recording vested in the owners of abutting lands a right to be compensated if a future change to the grade caused damage to the value of their properties.⁷²

Absent some enactment to the contrary, however, the common law doctrine precluding compensation for damages consequential to “right use of property already belonging to the public” still held sway. As the U.S. Supreme Court explained in an 1878 decision in *Transportation Co. v. Chicago*:

The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. . . . The remedy, therefore, for a consequential injury resulting from the State’s action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law.⁷³

Because there was no legislative remedy then in effect in Illinois,⁷⁴ the Court concluded that the Northern Transportation Company had no valid claim against the

⁷⁰ See, e.g., *City of Lafayette v. Nagle*, 15 N.E. 1, 2 (Ind. 1888) (“[N]o action will lie unless the grade has once been established by the [municipal] corporate authorities.”).

⁷¹ See *Kelly v. Mayor of Baltimore*, 3 A. 594, 596-97 (Md. 1886) (describing Baltimore’s procedure for establishing or changing the grade of a street).

⁷² See, e.g., *Moore v. City of Atlanta*, 70 Ga. 611, 613 (1883) (describing statutory procedure for recording an established grade).

⁷³ *Transp. Co. v. Chicago*, 99 U.S. 635, 641-42 (1878). Like the Massachusetts court in *Callender*, the Supreme Court reasoned that the city’s power over its streets was the same whether it held them in fee or by easement:

It is immaterial whether the fee of the street was in the State or in the city or in the adjoining lot-holders. If in the latter, the State had an easement to repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage.

Id. at 641.

⁷⁴ The Supreme Court was applying Illinois law as it existed before the 1870 constitutional amendment that required compensation when private property was “damaged” for public use. *Id.* at 642.

City of Chicago for interruption of street and river access to its property during construction of the LaSalle Street tunnel under the Chicago River.

The many jurists who had considered and rejected similar claims, moreover, were not acting blindly, as the Supreme Court emphasized:

The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority.⁷⁵

E. "No Easement of Access . . . As Against any Improvement of the Street for the Purpose of Adapting it to Public Travel": The U.S. Supreme Court's 1906 Decision in Sauer v. City of New York

By the early twentieth century, courts had seen many years of litigation over abutting owners' rights in a public highway. Much of this litigation involved railroads in the streets. As the *Lexington* case illustrates, since at least the 1830s public authorities had been allowing railroads to lay their tracks in existing streets.⁷⁶ These decisions were meant to foster a synergistic development of rail transportation and urban commercial areas.⁷⁷ Yet a railroad in the street might interfere with the street's ability to provide access to already-developed properties.⁷⁸ Accordingly, between about 1850 and 1910 many "great court battles" were fought over claims that a public roadway had been converted into "a right of way for mass transit systems at the expense of its street functions."⁷⁹

⁷⁵ *Id.* Ohio's differing rule was an anomaly noted by the Court: "The decisions in Ohio, so far as we know, are the solitary exceptions." *Id.* at 641. Contemporary writers took the same view of the rule's wide acceptance. 10 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1124-28 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1899) (noting that, except in Ohio, a "change of grade in streets made by a municipality, if made in accordance with statute, is not such an injury to adjoining property as to require compensation to be made to owners unless there is a statute rendering the municipality liable therefor," and this rule applied even when the grade change interfered with access).

⁷⁶ *Lexington & Ohio R.R. Co. v. Applegate*, 38 Ky. 289, 290-91 (1839).

⁷⁷ *Id.* at 307.

⁷⁸ *See, e.g., Kan., Neb. & Dakota Ry. Co. v. McAfee*, 21 P. 1053 (1889) (holding that five-foot railroad embankment, built eighteen feet from the property line in front of a boarding house, left enough room for street traffic, so the owner had no claim against the railroad; owner did have a claim for a switch and "wye" track built seven feet from the fence, as the remaining street area was too narrow to provide reasonable access to the property).

⁷⁹ ROSS D. NETHERTON, CONTROL OF HIGHWAY ACCESS 50 (1963). Netherton observed that the cases dealing with non-highway use "are still good law" but "seldom applied in the courts for the simple reason that nonhighway uses rarely arise in modern practice." *Id.* Instead, "the current demands of vehicular transportation have so taxed the capacity of the available space in the streets that there is no longer any place for facilities which do not

How the battles came out often depended on how much the railroad interfered with normal use of the roadway space. A local street railway, running on rails placed at or near grade and sharing the roadway surface with other vehicles, often was viewed as just another street use.⁸⁰ Its presence in the street might be no more obtrusive than a series of horse-drawn vehicles carrying the same number of passengers.⁸¹ On the other hand, if the railroad ran on an embankment, then the public could no longer use the raised part of the roadway—a practical form of exclusion that some called “a perversion of the street from street uses.”⁸² Because the interference with access did not result from a “legitimate street improvement,” it might be considered a compensable taking of the right or easement of access appurtenant to land abutting the street.⁸³ In *Callender*’s descriptive phrase, the railroad embankment was *not* a “right use of property already belonging to the public.”

The U.S. Supreme Court’s 1906 decision in *Sauer v. City of New York* highlights the critical distinction courts drew between railroad uses and true street improvements.⁸⁴ Relying on law that had developed in railroad cases, Sauer sought damages for loss of access after the city constructed a viaduct in the street in front of his built-up property.⁸⁵ The viaduct did impair access to Sauer’s property, and if it had been put there because of a railroad, Sauer likely would have had a good claim.⁸⁶ Railroads, however, were not allowed to use the viaduct, which was “devoted to ordinary traffic by teams, vehicles and pedestrians.”⁸⁷

contribute directly to expanding the traffic-carrying capacity or efficiency of the street.” *Id.* Notably, too, the railroad cases were “distinguishable from the bulk of . . . eminent domain cases, in that the offending activities were said to be beyond the purposes for which the streets were dedicated, instead of furthering road purposes, as, for example, a change of grade or regulation of driveway openings would do.” WILLIAM B. STOEBCUK, *NONTRESPASSORY TAKINGS IN EMINENT DOMAIN* 24 (1977).

⁸⁰ *Canastota Knife Co. v. Newington Tramway Co.*, 36 A. 1107, 1108-09 (Conn. 1897). New York was the only state that considered an electric street railway to be a new servitude. *Id.* at 1108.

⁸¹ *Lexington*, 38 Ky. at 308-09.

⁸² *Sauer v. City of New York*, 206 U.S. 536, 545 (1907) (internal citation omitted). In an 1889 decision the Mississippi Supreme Court held that because a “railroad requires a permanent structure in the street, the use of which is private and exclusive,” its exclusion of “all ordinary travel” was inconsistent with “the legitimate uses of a public street.” *Theobold v. Louisville, New Orleans & Texas Ry. Co.*, 6 So. 230, 230 (1889). One judge stressed that the railroad at issue in *Theobold* was built to connect distant points and merely passed through the city of Vicksburg, using the street to lay its track. If the railroad lay within the city, and was “constructed and used as an ordinary street railway,” then “possibly a different question would arise.” *Id.* (note following case, LexisNexis).

⁸³ *Sauer*, 206 U.S. at 544-48.

⁸⁴ *Id.* at 545.

⁸⁵ *Id.* at 540.

⁸⁶ *Id.* at 542-43.

⁸⁷ *Id.* at 543.

Because the viaduct was restricted to ordinary street uses, Sauer was out of luck: the state court held that he “had no easement of access . . . as against any improvement of the street for the purpose of adapting it to public travel.”⁸⁸ As the Supreme Court put it, the state court “decided that the property alleged to have been injured”—namely, an easement of access to the street from the Sauer property—“did not exist.”⁸⁹

The Supreme Court also observed that the state court’s rejection of a takings claim, when the interference with access resulted from a street improvement made for ordinary vehicular travel, appeared “to be in full accord with the decisions of all other courts in which the same question has arisen.”⁹⁰ Despite their many disagreements in railroad cases, nearly all the state courts did agree on one point: if public authorities improved a street for purposes of general public travel, then under the common law the owner of abutting land was not entitled to damages for impairment of access.⁹¹ As the *Sauer* court concluded:

“The doctrine of the courts everywhere, both in England and in this country (unless Ohio and Kentucky are excepted), is that so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully, and not negligently performed, does not impose an additional servitude upon the street, and hence is not within the constitutional inhibition against taking private property without compensation, and is not the basis of an action for damages, unless there be an express statute to that effect.”⁹²

According to the Supreme Court in *Sauer*, then, at the beginning of the twentieth century there was no common law property right that an owner of abutting land could assert when a public project, undertaken within the existing public right-of-way to improve the road for ordinary travel, interfered with access between that property and the road. But, as the following part of this Article will describe, the common law was not the only game in town.

F. State Constitutional Changes and the Law of Access at the Dawn of the Automobile Age

We have seen that, in 1878 and again in 1906, the U.S. Supreme Court decided that an impairment of access to abutting property, caused by an improvement made within a street to serve the purposes of general public travel, was not a taking of a property right. As the Court’s *Sauer* decision remarked:

The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to

⁸⁸ *Id.* at 542.

⁸⁹ *Id.*

⁹⁰ *Id.* at 543-44.

⁹¹ *Id.* at 544.

⁹² *Id.* at 545 (quoting *Willis v. Winona City*, 60 N.W. 814, 815 (Minn. 1894)).

damages for the impairment of access to his land and the lessening of the circulation of light and air over it.⁹³

This uniformity of holdings was significant as far as it went, for within the realm of the common law, abutting property owners whose access was impaired by a legitimate street improvement—by a “right use of property already belonging to the public”—had no claim for damages. In effect, whatever right they had to get between their property and the street was subordinate to the public’s right to improve the street for general public travel. Courts recognized that this rule might produce harsh results in some cases, particularly when valuable buildings laid out to conform to the previous street grade ended up far below (or far above) the traveled way, but the common law did not provide a remedy.

The near-unanimity in common law doctrine, however, masked a broad popular movement for change. In the last decades of the nineteenth century, public works projects became increasingly larger, and the adverse effects they sometimes had on already-developed properties could not be ignored. Consequential damages from street grading were “especially widespread in Chicago, which was built on a swamp. Street raising projects in Chicago in the mid-nineteenth century, covering the entire downtown area and many nearby neighborhoods, had buried the first floors of many existing buildings.”⁹⁴ This problem, along with widespread concern over abusive practices by railroads, led Illinois to amend its constitution to state that “private property shall not be taken *or damaged* for public use without just compensation.”⁹⁵

These same concerns “caught the imagination of constitutional conventions in many other states as well. By 1880, a mere ten years after Illinois pioneered the ‘taking or damage’ clause, eleven other states had adopted similar constitutional provisions. By 1912, twenty-five of the forty-eight states had a ‘taking or damage’ provision”⁹⁶

The constitutional changes effectively divided the states into two broad camps. One group required compensation only when private property was “taken” for public use. Although these states may have recognized a property right of access to an abutting street, it was a subordinate one:

But as all streets are established primarily for the public use and the general good, the right of the public is paramount to the right of the individual. And so the private rights of access, light and air are held and enjoyed subject to the paramount right of the public to use and improve the street for the purposes of a highway. And as these private rights are thus subject to the right of the public to use and improve as a highway, it follows that, when such uses or improvements are made, no private right is interfered with and consequently no private property is taken.⁹⁷

⁹³ *Id.* at 544.

⁹⁴ Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 119 (1999).

⁹⁵ *Id.* at 118 (emphasis added).

⁹⁶ *Id.* at 119-20.

⁹⁷ *Barrett v. Union Bridge Co.*, 243 P. 93, 94 (Or. 1926) (internal citation omitted). As the *Barrett* court pointedly observed, the Oregon constitution requires just compensation when private property is taken for public use, but “[t]he word ‘damaged’ is not used.” *Id.* at 93.

The other group, which required compensation when property was “damaged” for public use, replaced the common law rule with one that more closely resembled Ohio’s. Cases applying this new constitutional provision were “nearly uniform in holding [that] . . . where a grade is once established by public authority, and private property is improved with reference thereto, a subsequent alteration or change in that grade to the damage of abutting property renders the municipality liable.”⁹⁸

If the grade of a road had not yet been established, however, the decisions were not so uniform.⁹⁹ Some courts reasoned that the constitutional change entirely abrogated the common law rule; accordingly, they required payment of damages even for the first grade of a road.¹⁰⁰ Others, however, found liability only when an established grade had been altered, reasoning that abutting lot owners should expect a road’s original, natural surface to be improved when public travel required it.¹⁰¹

Courts limited the sweep of this new rule in other important ways, as well. To be constitutionally cognizable, the “damage” had to result from some direct *physical* disturbance of a right—regulation alone would not suffice.¹⁰² And the right had to be one enjoyed “in connection with” the property.¹⁰³ This meant that a damage claim must relate to access between the road and the property: a change to the street network causing a loss of convenient accessibility lacked the requisite connection because everyone using the affected road experienced it, whether they owned property there or not.¹⁰⁴ Finally, benefits resulting from the public project might partly or even totally offset any injury.¹⁰⁵ For example, a street grade change might

⁹⁸ *Salden v. City of Little Falls*, 113 N.W. 884, 884 (Minn. 1907).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 885.

¹⁰¹ *See, e.g., City of Mangum v. Todd*, 141 P. 266, 269 (Okla. 1914); *Gray v. Salt Lake City*, 138 P. 1177, 1182-84 (Utah 1914).

¹⁰² *City of Mangum*, 141 P. at 267 (citing 4 JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 1684-85 (5th ed. 1911)); *see also Rigney v. Chicago*, 102 Ill. 64, 80-81 (1881) (“In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.”).

¹⁰³ *Rigney*, 102 Ill. at 81.

¹⁰⁴ Courts drew an important distinction between “general” and “special” damages in access cases. If a transportation project made travel to and from the property less convenient—for example, by blocking a street some distance away from the property—courts normally found no legally-cognizable damage, even in states that had constitutions requiring compensation when property was damaged for public use. *See, e.g., Rude v. City of St. Louis*, 6 S.W. 257 (Mo. 1887). Under those circumstances, the damages were general: they were suffered by everyone using the street, though perhaps in a greater degree by those who lived or owned property there. *Id.* If the obstruction made it difficult to get between the property and the road, by contrast, the ensuing damage was special—peculiar to that property—and therefore a compensable form of damage. *See, e.g., Gilbert v. Greeley, Salt Lake & Pac. Ry. Co.*, 22 P. 814 (Colo. 1889).

¹⁰⁵ *Schroeder v. Joliet*, 59 N.E. 550, 551 (Ill. 1901) (“The rule has long been settled that if property is actually taken and applied to a public use this provision of the constitution requires

make a residential property become suitable for commercial use, and if so, that benefit would be set off against damage to the existing use.¹⁰⁶

Accordingly, at the beginning of the automobile age, the “default rule” still held that disruption of access to and from property abutting a road, caused by an improvement built for purposes of public travel within the existing right-of-way, was not a taking of a property right. Some states had enacted statutes providing for compensation under those circumstances; many adopted constitutional amendments requiring payment when certain factors (such as alteration of established grade, direct physical disturbance, and special damages not offset by benefits) were present. But *regulation* of access, especially where motor vehicles could conflict with pedestrians or other traffic, presented a new set of circumstances.¹⁰⁷ And so it is to those matters that we will turn next.

III. THE GROWTH OF AUTOMOBILE USE AND THE BEGINNINGS OF ACCESS REGULATION

In 1904, two years before the Supreme Court’s *Sauer* decision, there were 55,290 registered cars and trucks in the United States.¹⁰⁸ By 1910, four years after *Sauer*, the number rose to 468,500.¹⁰⁹ A decade later it was almost twenty times greater: 9,239,161 vehicles were registered in 1920.¹¹⁰ The use of automobiles spread so rapidly that, while only one of every sixty families owned an automobile in 1915, by 1925 one family in eight had a car.¹¹¹

that it shall be paid for in money, regardless of benefits to other land of the same owner of which he is not deprived. Where property is not actually taken by the public for its use but the question is whether it has been damaged for public use, the ordinary rule for the determination of that question is applied, and if the market value of the property is not decreased there is no damage and there can be no recovery.”)

¹⁰⁶ See, e.g., *Chicago v. Taylor*, 125 U.S. 161, 169 (1888) (explaining that even though construction of viaduct meant property was no longer suitable for use as a coal yard, “that would not be material if it can be rented or sold at as good a price for other purposes”); *Moore v. City of Atlanta*, 70 Ga. 611, 614 (1883) (explaining that no recovery would be had if improved accessibility resulting from the street grading project “equaled the inconvenience or discomfort [caused to] the home as a mere residence”); *Brown v. City of Seattle*, 31 P. 313, 314 (Wash. 1892) (“[D]amages are now recoverable by the owners of land abutting upon streets and highways, for any permanent injury inflicted upon such abutting lands, by any material change of grade or obstruction to the abutter’s access, where the damages thus inflicted exceed the benefits derived from the grading or other improvement.”).

¹⁰⁷ One writer has observed that in modern access cases, the “damaged” provision has significance only when access is impaired by a change of grade: “In other areas of access loss, the compensation question does not in general turn on the presence *vel non* of ‘damaged,’ though in some opinions the word seems to predispose to a result more liberal to the landowner than otherwise might have been.” William B. Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733, 758 (1969).

¹⁰⁸ Spencer Miller, Jr., *History of the Modern Highway in the United States*, in *HIGHWAYS IN OUR NATIONAL LIFE* 88, 95 (Jean Labatut & Wheaton J. Lane eds., 1950). Ten years earlier, only four experimental vehicles were in use. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ PHILLIP F. SCHEWE, *THE GRID* 78 (2007).

The thoroughfares that these automobiles shared with horse-drawn vehicles were not unlike today's streets. At the center of the street, municipal authorities would leave open "an unobstructed driveway of ample width for the passage of teams," but the edges of the right-of-way could be used for other public purposes, such as sidewalks, curbs, gutters, fire hydrants, and plots of grass and trees.¹¹² A city or village also might "under reasonable regulations and conditions, permit private driveways to be built from the lands of the abutting owners to the driveway of the street."¹¹³ And when a private driveway was permitted, the municipality could "bend the line of curbing in towards the sidewalk" to "limit the private driveway and prevent teams from passing over the grass or running against the trees."¹¹⁴

Since a municipal corporation had discretion to permit, under reasonable regulations and conditions, the construction of a driveway connecting private property to the traveled part of the street, did it also have discretion to deny it? As the following discussion will show, the results of the earliest decisions answering that question were mixed.

*A. Access may be Regulated but not Denied Altogether:
The 1910 Goodfellow Tire Decision*

In perhaps the first driveway permit case, decided in 1910, the Michigan Supreme Court considered a boulevard statute that stated: "Carriage or drive ways and foot walks connecting with any premises adjoining the boulevard . . . shall be allowed only on a permit issued" by the commissioner of parks and boulevards.¹¹⁵ This statute, according to Detroit's commissioner, allowed him to deny the Goodfellow Tire Company a permit to construct any driveway to Grand Boulevard.¹¹⁶ Without a driveway to the boulevard, however, the only way vehicles or pedestrians could reach Goodfellow Tire's property was through an alley.¹¹⁷

Against the commissioner's claim that the power to permit access included the power to deny it entirely, the Michigan court quoted a legal encyclopedia's statements that an abutter has a right of "'free and unimpeded ingress and egress to and from his property for himself and animals and goods'" and "'an indefeasible right of access to and from their property to the street.'"¹¹⁸ The commissioner, by

¹¹² Dougherty v. Trs. of Horseheads, 53 N.E. 799, 800 (N.Y. 1899).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Goodfellow Tire Co. v. Comm'r of Parks & Boulevards of Detroit, 128 N.W. 410, 412 (Mich. 1910) (internal citation omitted).

¹¹⁶ *Id.*

¹¹⁷ Goodfellow Tire owned the rear half of several lots at the corner of Woodward Avenue and Grand Boulevard. The front half of the lots, facing Woodward Avenue, was owned by someone else and occupied by a block of stores, precluding access to Woodward. *Id.* at 410. If no driveway was allowed to Grand Boulevard, then vehicular access would have been possible only by way of the alley behind the lots. *Id.*

¹¹⁸ *Id.* at 412 (quoting WILLIAM MACK, 28 CYCLOPEDIA OF LAW AND PROCEDURE 856-57, 863 (1908)). The quoted sections deal with the powers of municipal corporations. It is difficult to square the encyclopedia's sweeping declarations with the cases it cited, the very first of which described a presumption *against* compensation when a municipal authority modifies an existing street to further the public's use of it for ordinary highway purposes.

contrast, had not shown the court “a case holding that an abutting owner may be deprived of ingress and egress by means of a driveway to and from his property to the highway in front of it.”¹¹⁹

Notably, too, the statute giving the commissioner authority to permit driveways specified his power to determine how they would be built: from this, the court inferred legislative intent that a permit “shall be allowed upon suitable regulations and conditions.”¹²⁰ Accordingly, the court directed the commissioner to grant Goodfellow Tire a driveway permit, “subject to reasonable regulations and conditions as to number, location, plan of construction, and material used therein.”¹²¹

Interestingly, in *City of Detroit v. Grand Trunk Railroad*, a case decided the same day as *Goodfellow Tire*, the Michigan Supreme Court reaffirmed that consequential injuries, resulting from a separation of grades that was done in accordance with statutory authority, do not constitute a taking of private property.¹²² As *Grand Trunk* reasoned, while a city might be liable for acts taken *without* legislative authority, street improvements or changes made *with* legislative authority did not impose any liability “unless the legislature so declares.”¹²³ As the court put it: “It seems to be unnecessary to say that the legislature has complete control over the highways of the State, that what is done in and upon them by lawful authority cannot be considered a nuisance, and that consequential injuries resulting from what is so done are *damnum absque injuria*.”¹²⁴

Accordingly, *Goodfellow Tire* is best understood as a decision regarding the extent of a municipal commissioner’s discretion under a particular permitting statute. Whether the Michigan legislature could have empowered the commissioner to allow vehicular access through the alley only, and to deny direct access to the boulevard, was not decided.

*B. Access to an Abutting Street or to Each Abutting Street:
The Brownlow and Wood Cases*

The expanding use of automobiles in the United States brought with it an equally growing demand for fuel and the rapid development of gasoline retailing.¹²⁵ Motor fuel retailers quickly saw the advantages of a street-corner location: a site with

WILLIAM MACK, 28 CYCLOPEDIA OF LAW AND PROCEDURE, 863 n.24 (1908) (citing *City of Denver v. Bayer*, 2 P. 6 (Colo. 1883)). In *Bayer*, the Colorado Supreme Court construed the new “taken or damaged” constitutional language as applying to a railroad in the street, but indicated that it should not affect most true street projects: “[W]e think that for injuries caused by a reasonable change or improvement of the street, by the [municipal] council, in a careful manner, the abutting owner should not recover.” *Bayer*, 2 P. at 13.

¹¹⁹ *Goodfellow Tire*, 128 N.W. at 412.

¹²⁰ *Id.* at 412-13.

¹²¹ *Id.* at 413.

¹²² *In re City of Detroit*, 128 N.W. 250, 253 (Mich. 1910). The court decided *Goodfellow Tire* and *City of Detroit* on November 11, 1910.

¹²³ *Id.*

¹²⁴ *Id.* The Latin phrase means “loss, hurt, or harm without injury in the legal sense.” BLACK’S LAW DICTIONARY 393 (6th ed. 1990).

¹²⁵ JOHN A. JAKLE & KEITH A. SCULLE, THE GAS STATION IN AMERICA 49-52, 58 (1994).

driveways to both streets provided many opportunities for cars to enter and exit the filling station.¹²⁶ But easy access to the site would be useless if there were few customers, so locations on heavily-traveled streets were preferred.

Yet this need for traffic brought its own set of problems. In that day, busy streets had busy sidewalks, and autos crossing them posed a hazard to pedestrians.¹²⁷ Municipal governments also saw that vehicles entering and exiting gas stations could interfere with the flow of traffic on the street.¹²⁸ These concerns sometimes led authorities to allow vehicles to cross the sidewalk on the least-used of the two abutting streets only, and to close off any driveways to the busier street.¹²⁹ Predictably, this kind of interference with customer traffic sometimes led to litigation.

The *Brownlow* case, decided in 1921, dealt with a filling station at the corner of Fourteenth and Irving Streets in the District of Columbia.¹³⁰ Fourteenth was a business street that had “a great deal of travel,” and concern for pedestrian safety led the District to close the driveway there, leaving the station with two entrances on the other street, Irving, which was residential in character and had less traffic.¹³¹

The company obtained an injunction, convincing a court that the Irving Street entrances were not sufficient to accommodate the filling station’s customer traffic and, moreover, that “the right to maintain the Fourteenth street entrance is a valuable incorporeal right attached to the lot” that the District could not take away without paying just compensation.¹³²

Citing various authorities, including *Goodfellow Tire*, the appeals court agreed that the District had a right “to make reasonable regulations for the use of driveways across sidewalks.”¹³³ But, the *Brownlow* court continued, “regulation is one thing,

¹²⁶ *Id.* at 210.

¹²⁷ See, e.g., *Oriental Oil Co. v. City of San Antonio*, 208 S.W. 177, 181 (Tex. Civ. App. 1918) (“[T]he conclusion that driving autos across the sidewalks will increase the hazard to pedestrians on those sidewalks is unquestionably true.”).

¹²⁸ *Id.* (“The conclusion that street traffic will be blocked [by vehicles going to and from the gas station] is not clear. The congestion at the intersection is due, primarily, to currents of traffic passing each other at right angles. . . . It does not necessarily follow that to turn out of Travis street delays the current; on the contrary, it may hasten it by removing from it—moving out can be effected as quickly as moving forward.”).

¹²⁹ In the *Oriental Oil* case, the City of San Antonio enacted legislation declaring a gas station in the busy area at the corner of Travis and St. Mary’s streets to be a public nuisance and prohibiting any vehicles from crossing sidewalks in that area. *Id.* at 178. The Texas court recognized a property owner’s “inherent right to drive over the sidewalks for ingress and egress with vehicles for his private use and for the conduct of his business, provided that the use thus made of the sidewalks is reasonable,” and that the ordinance would eliminate that right. *Id.* at 181. But a nuisance is not a reasonable use: “If the conduct of the business is determined to be a menace to pedestrians or a nuisance to street traffic, the city cannot be estopped to abate it.” *Id.*

¹³⁰ *Brownlow v. O’Donoghue Bros., Inc.*, 276 F. 636 (D.C. Cir. 1921).

¹³¹ *Id.* at 636-37.

¹³² *Id.* at 637.

¹³³ *Id.*

and prohibition is another.”¹³⁴ Depriving the filling station of any vehicular access to Fourteenth Street, in the court’s view, exceeded the bounds of permissible regulation.¹³⁵

And the station’s two remaining driveways to Irving Street did not make the regulation any more reasonable: “It needs no argument to show that an entrance to a place of business such as [the company] conducts from a street over which there is much travel is far more valuable than one from a street where the traffic is light.”¹³⁶ With this blended concept of access to the street and access to traffic in mind, the appeals court concluded that the company’s “right to access to and from Fourteenth street is a property right, which, though subject to legitimate regulation, cannot be taken from it without just compensation.”¹³⁷

Soon afterward the Virginia Supreme Court reached the opposite conclusion, holding that the owner of a corner lot might be allowed access to just one abutting street.¹³⁸ The 1927 decision in *Wood v. City of Richmond* involved a gas station built after the lot owner obtained a permit to construct driveways to Leigh Street and to Thirty-Fourth Street.¹³⁹ A few months later, however, the city ordered removal of the Thirty-Fourth Street drive, stating that it violated the city’s zoning ordinance.¹⁴⁰

A chancery court entered an order temporarily restraining the city from removing the drive.¹⁴¹ The city moved to dissolve this injunction, contending that the permit had been issued without due consideration of the large volume of pedestrian and vehicular traffic on Thirty-Fourth Street which, in the opinion of the city’s public works director, made the driveway a safety hazard.¹⁴² The circuit court granted the motion, dissolved the injunction, and dismissed the case.¹⁴³

On appeal to the Virginia Supreme Court the property owner, Wood, asserted a right of access to each street abutting his lot. Wood did not deny that the city had police power to control the traffic on its streets but contended that, as an abutter, he had “the right of access to his lot from Thirty-fourth street, as well as from Leigh street, and that such right is absolute and inherent.”¹⁴⁴ Relying on a legal encyclopedia, Wood argued that, ““An abutting land owner on a public highway has a special right of easement and use in the public road for access purposes, and this is

¹³⁴ *Id.*

¹³⁵ *Id.* at 637-38.

¹³⁶ *Id.* at 637.

¹³⁷ *Id.* at 638.

¹³⁸ *Wood v. City of Richmond*, 138 S.E. 560, 561 (Va. 1927).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

a property right which cannot be damaged or taken from him without just compensation."¹⁴⁵

The Virginia Supreme Court was not convinced that Wood had a right in the street superior to the public:

While conceding the correctness of the proposition that an abutter has an easement in the public road which amounts to a property right, we are of the opinion that the exercise of this right is subordinate to the right of the municipality, derived by legislative authority, to so control the use of the streets as to promote the safety, comfort, health and general welfare of the public.¹⁴⁶

Given the evidence of heavy traffic on Thirty-Fourth Street and the presence of a bus stop there, the Virginia court concluded that the city had authority to close the driveway, and that its decision to do so was a reasonable exercise of the police power.¹⁴⁷

*C. Locating the Boundary Between Individual and Public Interests:
The Pennsylvania Access Cases*

In 1913, the Pennsylvania legislature enacted a statute authorizing cities "to prevent . . . the passage of any vehicles drawn or self-propelled over and across sidewalks."¹⁴⁸ Twenty years later, the City of Reading offered this statute as its authority to enact ordinances prohibiting all private driveways within a nine-block area along Penn Street, one of the city's busiest thoroughfares.¹⁴⁹ These ordinances, which supported an earlier permit revocation, prevented the Farmers-Kissinger Market House from building a driveway across the sidewalk from Penn Street, through its market building, and to its parking garage on Cherry Street.¹⁵⁰ Significantly, the market and the garage already had vehicular access to Cherry Street.¹⁵¹

¹⁴⁵ *Id.* at 562 (quoting WILLIAM MACK, WILLIAM B. HALE & DONALD J. KISER, 29 CORPUS JURIS 547 (1922)). Interestingly, Mack edited the *Cyclopedia of Law and Procedure* quoted by the Michigan Supreme Court in *Goodfellow Tire Co. v. Comm'r of Parks & Boulevards of Detroit*, 128 N.W. 410, 412 (Mich. 1910). Thomas Cooley, perhaps the best-known treatise writer of the period, took a middle position. In Cooley's view, a proper exercise of governmental power that did not directly encroach on the property of an individual, such as a change in the grade of a city street that diminished the value of adjoining lots, was not a taking. THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 781-84 (1903). But if the action deprived the owner of the ordinary use of his property by, for example, preventing any access from the lot to the highway, it was equivalent to a taking and entitled the owner to compensation. *Id.* at 785 n.3, 787-88 n.2.

¹⁴⁶ *Wood*, 138 S.E. at 562.

¹⁴⁷ *Id.* at 563.

¹⁴⁸ *Farmers-Kissinger Mkt. House Co. v. Reading*, 165 A. 398, 400 (Pa. 1933) (internal citation omitted).

¹⁴⁹ *Id.* at 399-400.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 402.

The Pennsylvania Supreme Court had no problem concluding that Reading's ordinances were within the city's statutory authority.¹⁵² Even so, the company contended that the city's exercise of that power was unconstitutional, depriving it of a valuable property right—the right of access—without due process of law.¹⁵³

The court readily agreed that the ordinances deprived the company of “a valuable interest or privilege” by preventing construction of a driveway across the sidewalk on Penn Street.¹⁵⁴ But it rejected any idea that the company's access right was paramount: “Community life requires some curtailment of the individual's freedom in the use of his property.”¹⁵⁵ Quoting the Massachusetts Supreme Court's oft-cited 1851 opinion in *Commonwealth v. Alger*, it declared: “We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious . . . to the rights of the community.”¹⁵⁶

As an abutting owner, the company did have a right of ingress and egress between Penn Street and its property, but the public also had a right to the reasonably unhindered use of Penn Street and the sidewalk in front of the market.¹⁵⁷ With two competing interests in the use of the street at stake, the court rhetorically asked: “Who locates the boundary line between the interests of the individual and the interests of the public?”¹⁵⁸ The legislature, in the first instance, by enacting a general statute; afterward, the judiciary, determining in particular cases whether the statute was a reasonable exercise of the police power or an arbitrary infringement of individual rights.¹⁵⁹

Turning to the facts of the case before it, the court noted that the company already had vehicular access to its market and garage from Cherry Street.¹⁶⁰ If the city were attempting to deny *all* vehicular access to the property “the reasonableness of its act might justly be questioned,” but as it was, the company sought *additional* access that would interfere with motor, street car, and pedestrian traffic on one of the busiest streets in the city.¹⁶¹ Under those circumstances, the court concluded that there was no due process violation: the purpose of the ordinances was valid, their means had a rational relation to the accomplishment of that purpose, and the interference with the company's exercise of its property rights was “not arbitrary but clearly demanded by the public welfare.”¹⁶²

¹⁵² *Id.* at 401.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (quoting *Commonwealth v. Alger*, 61 Mass. 54, 84-85 (1851)).

¹⁵⁷ *Id.* at 401.

¹⁵⁸ *Id.* at 402.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

In its 1938 decision in *Breinig v. Allegheny County*, by contrast, the Pennsylvania court was presented with a case in which all vehicular access was denied.¹⁶³ The county had issued a curb-cut permit for two driveways between the Breinig property and the approach to a bridge over the Allegheny River but then, for reasons unexplained in the opinion, it revoked the permit and closed the driveways.¹⁶⁴ Although the bridge approach handled a fair number of vehicles, the local borough authorities did not believe that the driveways would adversely affect traffic on it.¹⁶⁵ So when the property owners sought injunctive relief the trial court granted it, holding that they “could not be deprived of vehicular access altogether” and ordering the county to “permit the maintenance of the driveways, subject to reasonable regulations.”¹⁶⁶

On review, the Pennsylvania Supreme Court summarized that state’s law on the right of vehicular access in three propositions. First, a municipality cannot “completely shut off an abutting owner’s access to his land” without condemnation. Second, in highly congested areas vehicular access can be reduced to a minimum, and even “be so limited as to exclude the right to maintain driveways immediately fronting the property, where it is possible to locate them elsewhere.” Third, no matter what means of vehicular access is used, “care must be exercised to avoid danger to the traveling public.”¹⁶⁷

As it marked out the location of the boundary line between individual and public interests, the *Breinig* court cautioned that an abutting property owner “cannot make a business of his right of access in derogation of the rights of the traveling public.”¹⁶⁸ Instead, the abutter “is entitled to make only such use of his right of access as is consonant with traffic conditions and police requirements that are reasonable and uniform.”¹⁶⁹

Conversely, the court also warned that: “The absolute prohibition of driveways to an abutting owner’s land which fronts on a single thoroughfare, and which cannot be reached by any other means, is unlawful and will not be sustained.”¹⁷⁰ Because traffic conditions on the bridge approach, according to the local borough authorities, “did not require an absolute prohibition of driveways” to the property, “a complete bar . . . was too extreme a measure.”¹⁷¹ Instead, the *Breinig* court believed that the

¹⁶³ *Breinig v. Allegheny Cnty.*, 2 A.2d 842, 845 (Pa. 1938).

¹⁶⁴ *Id.* The property owners who obtained the driveway permit were a married couple. *Id.* at 842-45. They let their property to a chain grocery store under a lease that expressly provided for the driveways. *Id.* at 845. These facts suggest that the county may not have known the driveways were meant for commercial use until after the permit was issued.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 848.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 847-48.

¹⁷¹ *Id.* at 849.

county should adopt driveway regulations that would “accord some measure of access and yet permit public travel with a minimum of danger.”¹⁷²

As these Pennsylvania decisions illustrate, even in the 1930s courts saw that some balance had to be achieved between an abutter’s “right of access” and the “rights of the traveling public.” Soon afterward, as the next part of this Article will show, an important federal study explored this problem and laid the theoretical groundwork for its solution. The solution itself, however, would still be decades in the future.

IV. THE PUBLIC ROADS ADMINISTRATION’S 1947 STUDY OF HIGHWAY ACCESS AND ROADSIDE DEVELOPMENT AND THE UNDERPINNINGS OF ACCESS MANAGEMENT

By the 1940s the problems posed by unrestricted highway access, and the accompanying “strip” or “ribbon” type of roadside development, had become apparent.¹⁷³ After thirty years of federal support to inter-city highway construction,¹⁷⁴ the nation had developed a system of highways that would “permit traffic literally to fly between cities only to force it to crawl in spasms when it reaches the suburbs.”¹⁷⁵ The U.S. Public Roads Administration’s 1947 study of this situation remarked that: “It is perhaps more startling than revealing to attribute a considerable share of present highway transport inadequacies to a single cause—the accessibility of a road or street to anybody who chooses to use it in a lawful manner.”¹⁷⁶

¹⁷² *Id.* at 848.

¹⁷³ As a 1940 law review article noted:

Various studies have shown that the numerous entrances to the highway, the frequent drawing in and out of the traffic stream, the parking, and the increased pedestrian traffic, all engendered by commercial use of the roadside, jointly conspire to reduce substantially the traffic capacity of the highway and to promote congestion, and to cause a large proportion of the highway accidents.

Robert R. Bowie, *Limiting Highway Access*, 4 MD. L. REV. 219, 220 (1940).

¹⁷⁴ The first federal highway-aid law, enacted in 1916, provided funding to those states that had highway departments. A subsequent 1921 act created a primary road system, eligible for federal funding, which would consist of 7% of the rural highways in each state. FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., PUBLICATION NO. FHWA-SA-93-049, HIGHWAY/UTILITY GUIDE 6 (1993).

¹⁷⁵ DAVID R. LEVIN, PUB. ROADS ADMIN., PUBLIC CONTROL OF HIGHWAY ACCESS AND ROADSIDE DEVELOPMENT 3 (1947).

¹⁷⁶ *Id.* at 4-5. Great Britain responded to this problem with its Restriction of Ribbon Development Act of 1935. *Id.* at 2. The British act not only required access permits for main roads, but also proscribed permits for any building construction (except for farm buildings) within 220 feet of the centerline of the road unless the highway authority consented to it. *Id.* at 90-91. The objective of the act was “to limit the uneconomic, linear expansion of enterprises and residences and thereby facilitate through traffic, increase highway capacity, promote safety, preserve the amenities of the countryside, and generally contribute toward more efficient transportation service.” *Id.* at 11. As one writer put it:

Every time a bypass was built around a village, it seemed, new ‘ribbon’ or what Americans call ‘strip’ development would appear along the bypass, and traffic would

The federal study drew an important distinction between “land service” roads and “through” highways. As the study noted, “Until the era of the motor vehicle, practically all highways and streets were utilized largely for access to farms and homes, factories and business establishments, and recreation facilities.”¹⁷⁷ That access-providing function, the study explained, “is the concept of the ‘land service’ road.”¹⁷⁸ But by the 1940s, “with millions of motor vehicles generating billions of miles of travel on millions of miles of road,” highway authorities had “learned that some highways must be designed and constructed not as ‘land service’ roads but as ‘through’ highways which will facilitate the movement of large numbers of vehicles with a minimum of obstruction and a maximum of speed.”¹⁷⁹

Failure to properly classify roads by their primary functions, and then to apply access controls to roads intended to serve as “through” highways, caused a self-defeating cycle where better roads brought more roadside development, which led to congestion and slowdowns caused by traffic turning on and off the road. Many of the nation’s newer highways were of the latest engineering design, yet the study reported that “compelling evidence indicates that some of these roads will become functionally obsolescent long before they deteriorate physically.”¹⁸⁰ Rapid functional obsolescence occurred “despite attempts at its correction because of the absence of effective control of access.”¹⁸¹

In one example, the federal study described how quickly strip development made California State Route 26 obsolete:

Within about 4 years after the establishment of this fine four-lane “superhighway” between Los Angeles and Pomona, a distance of approximately 30 miles, practically a continuous ribbon had developed so that a 25-mile speed limit had to be imposed for the greater portion of the route.¹⁸²

U.S. 1 in Maryland was another example of the strip development problem:

In 1943, between Baltimore and Washington for a distance of 30.5 miles there were 618 commercial establishments and 665 residences, or one every 125 feet on the average, each with its own entrances and exits multiplying the traffic hazards, reducing highway capacity, and precipitating congestion. . . . This section of US 1 is one of the most dangerous and congested roads in the country.¹⁸³

quickly fill the road [T]he argument . . . that new highways ‘induce’ traffic was already in use at least as early as the 1920s in Britain.

ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* 119-20 (2005).

¹⁷⁷ LEVIN, *supra* note 175, at 5.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 6.

¹⁸³ *Id.*

It should be noted that, at the time of the 1947 federal study, modern limited-access highways were in their earliest formative stages. Parkways, intended largely for recreational purposes and off-limits to commercial traffic, had existed in a handful of states for perhaps twenty years.¹⁸⁴ Because the land along a parkway was acquired as a public park, access points to the road could be limited by the parkway authority.¹⁸⁵ A few expressways or freeways, open to trucks as well as cars, had also recently been built, mostly in large urban areas.¹⁸⁶ The longest of these, Outer Drive in Chicago, had a planned length of twenty-five miles.¹⁸⁷ When those facilities were built, any access rights of abutting owners were also acquired.¹⁸⁸

The study reported that between 1937 and 1947, only twenty-four states had enacted legislation allowing the creation of limited-access highways.¹⁸⁹ Congress, however, had signaled that the planned National System of Interstate Highways would include access restrictions,¹⁹⁰ and the study was meant to provide guidance (and impetus) to the remaining states to enact appropriate enabling legislation.

As it turned out, the highways of the Interstate system were created exclusively as “through” highways and built to a design standard that allows access at road interchanges only.¹⁹¹ Access is so closely controlled that even the construction of a

¹⁸⁴ *Id.* at 14, 16, 41. The Bronx River Parkway, in New York, was the first highway designed for cars. Design work began in 1906, but the parkway was not fully opened for auto traffic until 1924. Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699, 741 (1993).

¹⁸⁵ LEVIN, *supra* note 175, at 16. *See, e.g.*, *Burke v. Metro. Dist. Comm’n*, 159 N.E. 739, 740 (Mass. 1928) (roadways constructed in a park are not public ways; abutters of the park have no access rights to the parkway).

¹⁸⁶ LEVIN, *supra* note 175, at 16, 40.

¹⁸⁷ *Id.* at 40. The Willow Run Expressway system, built to serve the B-24 bomber plant near Ypsilanti, Michigan, joined the Detroit Industrial Expressway, which led to industrial areas on the southern edge of Detroit. The combined mileage of both systems was about 38 miles. *Id.* at 40; *see also U.S. 12/Ford Exit Dr. South Bend*, MICH. DEP’T OF TRANSP. (2012), http://www.michigan.gov/mdot/0,1607,7-151-9620_11154_11188-28776--,00.html. Other expressways built to serve national defense needs included the network around the Pentagon (12.7 miles) and a freeway from Colorado Springs to Fort Carson, Colorado. LEVIN, *supra* note 175, at 40.

¹⁸⁸ LEVIN, *supra* note 175, at 16. These freeways were “the next step in the development of access control techniques, moving from using landscaped park strips to protect the expressway (1914) to using the acquisition of private property access rights by recorded deed to restrict direct access.” PHILIP DEMOSTHENES, *ACCESS MANAGEMENT POLICIES: AN HISTORICAL PERSPECTIVE* 2 (1999), *available at* http://www.accessmanagement.info/pdf/History_of_AM.pdf.

¹⁸⁹ LEVIN, *supra* note 175, at 19-20.

¹⁹⁰ *Id.* at 42.

¹⁹¹ *Dwight D. Eisenhower National System of Interstate and Defense Highways*, FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP. (Mar. 14, 2012), <http://www.fhwa.dot.gov/programadmin/interstate.cfm>. Federal law mandated the acquisition of access rights for all highways on the Interstate system. DEMOSTHENES, *supra* note 188, at 3.

new interchange requires a daunting amount of engineering study and justification.¹⁹² Because the Interstates (and similar freeways and expressways) were designed for mobility only, and not for land access, any access rights of abutting landowners were permanently acquired (and extinguished) when the highway was built. A consideration of those roadways, to which access from abutting properties is not merely regulated but permanently precluded, is outside the scope of this Article. But the Public Roads Administration's 1947 study is significant for other reasons.

First, it reflects an important insight into how the function of roads had changed in the automotive age. In the era of horse-drawn vehicles, there was no evident conflict between access and mobility: the same road could serve both purposes.¹⁹³ But the widespread use of automobiles meant that many more vehicles were using the roadways, and moving at much higher speeds. When those same roadways also provided access to each parcel of abutting land, no matter how small the parcels and how short the intervals between driveways, a conflict developed. Traffic volume, traffic speed, and abundant driveways and intersections did not mix: one of the three had to go. Since traffic volume was not about to lessen, either traffic speed or the number of conflicting access points had to be reduced.

Second, the study revealed that even in the 1940s public planners saw that road building, by itself, could not permanently solve traffic problems. Although wider pavement and more lanes might improve the situation, roadside development—and the conflicting cross-currents of vehicles entering and leaving those properties—would soon reduce the road's traffic-handling capacity.

Third, the study showed that roads could be classified along a continuum, with primary highways (mostly for mobility) at one end and land service roads (mostly for access) at the other.¹⁹⁴ Between these poles, there existed an extensive web of secondary highways and streets allowing traffic to flow between the primary and land service roads. These secondary roadways, the study indicated, would benefit from application of access-control devices such as land-use controls and, in rural areas, restrictions on ribbon development.¹⁹⁵

Interestingly, too, the study observed a connection between public investment in road transportation and the enhancement of private real estate values. Traffic congestion in cities was a critical problem, but transportation betterments were often unaffordable because of high land costs—yet those property values would not have existed but for the network of roads. As the study's reporting author remarked, "It is

¹⁹² Notice of Revised Policy Statement, Access to the Interstate System, 74 Fed. Reg. 43,743 (2009). One item to be considered in an interchange justification study is whether the functioning of local roads and streets can be improved, by means such as access control, to accommodate the traffic demand. *Id.* at 43,744.

¹⁹³ As the Wisconsin Supreme Court described it,

In early times, local roads were constructed for the improvement of property and in many instances the land was dedicated for such purpose and the road was paid for by local real-estate taxes or by special assessments. The concept of access rights in that context was not greatly influenced by the needs of the public generally which might clash with an unrestricted use of the property in relation to the abutting street.

Stefan Auto Body v. State Highway Comm'n, 124 N.W.2d 319, 323-24 (Wis. 1963).

¹⁹⁴ LEVIN, *supra* note 175, at 12.

¹⁹⁵ *Id.*

ironic to think that many sorely needed public improvements have been rendered impossible by the ‘land values’ which the public itself has created.”¹⁹⁶

It would take time, however, for these insights to make their way into general practice. By the late 1940s, many courts had confirmed that state governments could use their police powers to control access to highways “to achieve public safety and protect the functional integrity of the highway.”¹⁹⁷ Nonetheless, “[w]hile there was a strong commitment to use [the states’] access control authority for the national interstate system, the application of access control to the majority of the public roadway system as an engineering and safety element was for the most part ignored.”¹⁹⁸ Driveway permits did include design and construction standards, and a permit application might be denied if the proposed location was one where a driver could not see far enough to safely enter the road, but otherwise “[d]riveways and intersections were simply built wherever someone wanted one. Connections were not a roadway design consideration for engineers.”¹⁹⁹

Ten years later the effects of this policy—or lack of policy—began to draw some professional attention. A 1957 study done for the Highway Research Board

¹⁹⁶ *Id.* at 4 n.3.

¹⁹⁷ DEMOSTHENES, *supra* note 188, at 4. In addition to the cases discussed in Part II, *supra*, by the late 1940s the high courts of several other states had acknowledged the public’s right to regulate access. *See, e.g.*, *Denman v. City of Tacoma*, 268 P. 1043, 1044-45 (Wash. 1928) (because property had reasonable access to one street, city’s continuing regulatory power over the use of its streets allowed it to revoke permit for a drive to another street); *Kaszer v. City of Morgantown*, 152 S.E. 747, 747 (W. Va. 1930) (reversing writ of mandamus that ordered city to remove curbing: “Manifestly the protection of life and limb and the safe, free and convenient use of the public streets by all are matters of public concern and there is both a power and [an] obligation on the part of the public authorities to pass and enforce reasonable police provisions for this purpose.”) (internal citation omitted); *Jones Beach Boulevard Estate, Inc. v. Moses*, 197 N.E. 313, 315 (N.Y. 1935) (“The [access] rights of an abutter are subject to the right of the State to regulate and control the public highways for the benefit of the traveling public.”); *McGowan v. City of Burns*, 137 P.2d 994, 999 (Or. 1943) (“The right of access to and egress from a public street is subject to the public’s superior rights and to public regulation.”); *Alexander Co. v. City of Owatonna*, 24 N.W.2d 244, 248, 251-52 (Minn. 1946) (city council could deny curb cut where evidence at council hearing showed it would be a traffic hazard: “[M]unicipalities possess extensive and drastic police powers with respect to the care, supervision, and control of streets.”). Even decisions that did not uphold particular regulations still agreed that the government could regulate access. *See, e.g.*, *R.G. Lydy, Inc. v. City of Chicago*, 190 N.E. 273, 277 (Ill. 1934) (“The city council may exercise a reasonable supervision over the construction and maintenance of driveway across sidewalks” but the ordinance in question was an unconstitutional delegation of legislative power.); *City of Norman v. Safeway Stores, Inc.*, 145 P.2d 765, 765-67 (Okla. 1944) (trial court did not err in issuing injunction to allow driveway; evidence that driveway was a traffic hazard was conflicting: “No case is cited, and we have found none, holding that an abutting owner may be entirely deprived of his right of ingress and egress to the street under reasonable regulations.”); *Newman v. Mayor of Newport*, 57 A.2d 173, 179-80 (R.I. 1948) (city had the power to regulate driveways for traffic safety, and properly authorized the commissioner of public works to rule on curb cut applications “so that conflicting public and private rights might be fairly adjusted by governmental control and regulation,” but commissioner’s decision was not reasonable because it effectively barred any commercial use of the property).

¹⁹⁸ DEMOSTHENES, *supra* note 188, at 4.

¹⁹⁹ *Id.*

concluded that there was a direct relationship between the number of access points and the number of accidents on highways with similar traffic levels.²⁰⁰ The study's author also concluded that the number of accidents increased as drivers were presented with more situations requiring a decision, such as the presence of a turning vehicle.²⁰¹ This was "one of the earliest conclusions that driver workload, caused in part by the frequency of access-related turning movements, is a strong contributing factor in accident potential on busy highways."²⁰²

Soon afterward, in 1960, the American Association of State Highway Officials published a document providing guidance on how to create appropriate regulations for driveways along major highways.²⁰³ In addition to providing design criteria, the guide recommended use of access controls to lessen interference with traffic flow:

"Most of the interference originates in vehicle movements to and from businesses, residences or other development along the highways. Accordingly, regulations and overall control of driveway connections are necessary to provide efficient and safe operations, and to utilize the full potential of the highway investment. It is proper that some control be exercised over the number, location, and general design features of driveways between the highway and adjacent private property."²⁰⁴

A decade later, in 1971, the National Cooperative Highway Research Program (NCHRP) issued a report on its study of the relationship between transportation and land use in which it concluded:

"The lack of access control along arterial highways has been the largest single factor contributing to the obsolescence of highway facilities. Inadequate access control has resulted in the functional obsolescence of an entire generation of new arterial facilities built only a short while ago."²⁰⁵

The report also noted that access controls were most critically needed in urban areas, "where land development intensity, congestion, and accident potential are greatest."²⁰⁶ Even so, few cities had even tried to control access to their arterial

²⁰⁰ *Id.* at 5 (citing DAVID SCHOPPERT, PREDICTING TRAFFIC ACCIDENTS FROM ROADWAY ELEMENTS OF RURAL TWO-LANE HIGHWAYS WITH GRAVEL SHOULDERS, HIGHWAY RESEARCH BULLETIN NO. 158 (1957)).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* (citing AMERICAN ASS'N OF STATE HIGHWAY OFFICIALS, AN INFORMATIONAL GUIDE FOR PREPARING PRIVATE DRIVEWAY REGULATIONS FOR MAJOR HIGHWAYS (1960) [hereinafter INFORMATIONAL GUIDE]).

²⁰⁴ DEMOSTHENES, *supra* note 188, at 5 (quoting INFORMATIONAL GUIDE, *supra* note 203). The AASHO guide's recommendations were no novel enlargement of governmental power: the 1910 *Goodfellow Tire* decision agreed that a state could delegate to a commissioner authority to issue driveway permits "subject to reasonable regulations and conditions as to number, location, plan of construction, and material used therein." *Goodfellow Tire Co. v. Comm'r of Parks and Boulevards of Detroit*, 128 N.W. 410, 413 (Mich. 1910).

²⁰⁵ DEMOSTHENES, *supra* note 188, at 5 (quoting NCHRP, *supra* note 8, at 46).

²⁰⁶ NAT'L COOP. HIGHWAY RESEARCH PROGRAM, *supra* note 8, at 48.

streets: “These uncontrolled access facilities are subject to the same deteriorating influences that have caused the obsolescence of most of the arterial facilities constructed in the last 50 years.”²⁰⁷

Indeed, the NCHRP report’s conclusion—that proliferating access points damaged the traffic-handling capabilities of highways intended for large volumes of fast-moving vehicles—mirrored the Public Roads Administration’s study from a generation earlier. Nonetheless, it was not until 1979 that Colorado became the first state to legislate a comprehensive program for managing access to all state highways.²⁰⁸ The following section of this Article describes the Colorado program, along with those of Florida and New Jersey, and delineates the important principles that they (and other states’ access management programs) have in common.

V. MODERN ACCESS MANAGEMENT PROGRAMS: SOME BRIEF SKETCHES

A. Colorado

Colorado’s pioneering state-wide access management law took four important steps:

First, to maintain smooth traffic flow on state highways and protect their functional level, the Colorado legislature made each state highway a “controlled-access highway” to which abutting property owners had a right of access only where permitted, under the state highway access code, by the public authority having jurisdiction over it.²⁰⁹

Second, the legislature stated that owners of lands abutting state highways had a right of “reasonable access to the general street system” but no right of direct access to the state highway itself.²¹⁰

Third, it directed the state transportation commission to base the access code’s rules on considerations such as highway traffic volume, the functional classification of the highway, local land use plans and zoning, the type and volume of traffic that would be using the driveway for which a permit is sought, and the availability of vehicular access from local streets rather than a state highway.²¹¹

Fourth, the legislature allowed existing driveways to remain, but specified that their owners might have to relocate or reconstruct them to conform to the access code if “a change in the use of the property . . . results in a change in the type of

²⁰⁷ *Id.*

²⁰⁸ DEMOSTHENES, *supra* note 188, at 6.

²⁰⁹ COLO. REV. STAT. §§ 43-2-147(1)(a), 42-1-102(18) (2010).

²¹⁰ COLO. REV. STAT. § 43-2-147(1)(b)-(c) (2010). The only abutting uses having a right of direct access to state highways are police, fire, ambulance, and other emergency stations. *Id.* To make sure that local land development decisions were consistent with the new law, the legislature also required connections to the state highway system, as laid out in new subdivision plats, to comply with the access code. COLO. REV. STAT. § 43-2-147(1)(b) (2010).

²¹¹ COLO. REV. STAT. § 43-2-147(4) (2010).

driveway operation.”²¹² Whether relocation or reconstruction is necessary would “be determined by reference to the standards set forth in the access code.”²¹³

The central element of the access code’s regulatory framework in Colorado, as in other states, is the categorization of each highway (or segment of a highway) based on its function, current and projected. How a given roadway will be categorized depends on factors such as the speed and volume of traffic and how far it is traveling—regionally, between cities, or within the local area. As those factors increase, the allowable number of intersecting driveways will decrease, and the design requirements for the ones that are allowed will become more demanding. The category decision is made by the Colorado Department of Transportation in consultation with local governments and planning organizations, and if those parties cannot reach a consensus, the matter is decided by the state Transportation Commission in a rule-making hearing.²¹⁴

A road intended for local traffic, for example, might be categorized as a frontage road where “[a]ccess needs . . . take priority over through traffic movements” and each parcel of land is normally granted at least one full-movement, unsignalized driveway.²¹⁵ By contrast, a road intended for high traffic volumes over relatively long distances might be classed as a principal highway, on which “[d]irect access service to abutting land is subordinate to providing service to through traffic movements.”²¹⁶ Direct access to one of these highways is allowed only if there is no reasonable access by the local street system. Any driveway that is allowed may have to serve multiple properties, probably will not have left-turn access unless the location is appropriate for a traffic signal,²¹⁷ and will need to have a right turn deceleration lane if the projected peak volume of traffic using the driveway is greater than 25 vehicles per hour.²¹⁸

Driveway traffic volume is also pivotal. No matter what functional category the highway has, if a driveway is expected to handle 100 vehicles per hour or more,²¹⁹ a

²¹² COLO. REV. STAT. § 43-2-147(6)(a)-(b) (2010). If changes in road or traffic conditions, rather than a change in the use of the property, spurred the need to relocate or reconstruct an existing drive, the work would be done at the Department of Transportation’s expense.

²¹³ COLO. REV. STAT. § 43-2-147(6)(b) (2010).

²¹⁴ 2 COLO. CODE REGS. § 601-2.2 (LexisNexis 2010).

²¹⁵ 2 COLO. CODE REGS. § 601-3.13 (LexisNexis 2010). “Full movement” means that right and left turns can be made into and out of the driveway.

²¹⁶ 2 COLO. CODE REGS. § 601-3.10 (LexisNexis 2010).

²¹⁷ *Id.* In *Magness v. State of Colorado*, the court upheld the highway department’s decision (under an earlier version of the code) to permit a driveway that allowed only right-turn access because the applicant did not prove his application qualified for full-movement access under the criteria set forth in the code. *Magness v. State*, 844 P.2d 1304, 1307-08 (Colo. App. 1992).

²¹⁸ 2 COLO. CODE REGS. § 601-3.10 (LexisNexis 2010). Traffic signals are allowed only if there is good signal progression—that is, if the signals can be “timed” to allow efficient movement of through traffic. *Id.*

²¹⁹ The code refers to a design hourly volume (DHV) of 100 vehicles or more. 2 COLO. CODE REGS. § 601-2.3(5) (LexisNexis 2010). DHV is “an hourly traffic volume determined for use in the geometric design of highways. It is the 30th highest hour vehicular volume experienced in a one year period.” 2 COLO. CODE REGS. 601-1.5 (2010).

permit applicant must conduct a traffic impact study. The study must include analysis of projected traffic volumes for the development site and the study area; reasonable access alternatives (including one with no direct highway access); projected turn lane queue lengths; proximity of other access points; the ability of the roadway system to handle increased traffic; and the ability to synchronize any proposed turn signal with other signals in the area.²²⁰ For existing “grandfathered” driveways, 100 vehicles *per day* is a relevant threshold: a change in use that increases volume above that level, or increases traffic volume to the site by twenty percent or more, may trigger application of the code’s requirements.²²¹

The Colorado access code also specifies many driveway location standards. Notably, the standard for access spacing requires driveways to be separated by a distance equal to or greater than the design sight distance applicable to the highway in question.²²² On a typical arterial highway with a posted speed limit of fifty miles per hour, the design sight distance standard would require at least 475 feet between driveways.²²³

B. Florida

Florida’s “State Highway System Access Management Act” took effect in July, 1988.²²⁴ The Florida legislature prefaced its Act with several findings. First, that it was necessary to regulate access to the state highway system to protect the public safety and welfare, promote the efficient movement of people and goods, and “preserve the functional integrity of the State Highway System.”²²⁵ Second, that an access management program would help coordinate the land use planning decisions of local governments with the investments made in the state highway system, and that “unregulated access to the State Highway System is one of the contributing factors to the congestion and functional deterioration of the system.”²²⁶ Third, that an access management program would benefit the public by increasing the traffic-carrying capacity of the state highway system, reducing accidents and highway

²²⁰ 2 COLO. CODE REGS. § 601-2.3(5) (LexisNexis 2010).

²²¹ 2 COLO. CODE REGS. § 601-2.6(3) (LexisNexis 2010).

²²² 2 COLO. CODE REGS. § 601-4.4 (LexisNexis 2010). This required spacing ensures that a driver in the right lane of the road, coming up on a driveway with a vehicle in it, will have an unobstructed view that is far enough to react to a vehicle entering the road at the *next* driveway. The design sight distance standard is related to stopping sight distance, which is “distance required by a driver of a vehicle, traveling at a given speed, to bring the vehicle to a stop after an object on the roadway becomes visible. It includes the distance traveled during driver perception and reaction times and the vehicle braking distance.” 2 COLO. CODE REGS. 601-1.5(78) (2010). Adequate design sight distance means that the driver has enough space (and time) to see, react to, and stop for another vehicle.

²²³ 2 COLO. CODE REGS. 601-1-4.3(1)-(2) (2010).

²²⁴ *Kunnen v. Dep’t of Transp.*, No. 01-0009, 2001 Fla. Div. Adm. Hear. LEXIS 3051, at *5 (Dec. 14, 2001).

²²⁵ FLA. STAT. § 335.181(1)(a) (2010).

²²⁶ FLA. STAT. § 335.181(1)(b) (2010).

maintenance costs, promoting economic growth, and lengthening the effective life of the state's transportation facilities.²²⁷

Accordingly, the legislature directed the Florida Department of Transportation (FDOT) to develop an access control classification system for all routes on the state highway system, with a coordinated set of access management standards to be used in planning access to state highways and evaluating permit applications.²²⁸ Florida's highways would be classified based on their function, traffic volume, and other factors, with the Department making a final decision after notice, public meetings, and coordination with local government entities.²²⁹ The access management standards, according to the legislature's direction, would set criteria for the spacing, location, design, and construction of connections to the state highway system, for safety factors, for the use of traffic control devices, and similar matters.²³⁰

The act also empowered FDOT to regulate all vehicular access and connections to the state highway system through a new permitting procedure it was ordered to adopt.²³¹ Driveways not covered by earlier permit laws would be allowed to remain in service, but a permit would be required if there was a significant change in use, design, or traffic flow of the connection.²³² Previously permitted driveways also could remain, subject to permit modification or revocation (after notice and a hearing) if a "significant change" occurred.²³³ This meant that whenever additional traffic was projected due to an expansion or redevelopment, the permit holder must ask FDOT to determine if a new permit application would be required.²³⁴

Florida's highway classification system, like Colorado's, depends in part on how much a given roadway is used by through traffic.²³⁵ Florida's system also depends on the amount of development in the area served by the roadway: the most restrictive access categories are for highways in "areas without existing extensive development," while the least restrictive categories relate to places with "moderate to extensive development."²³⁶ On a typical arterial highway with a posted speed limit of fifty miles per hour, connections such as driveways and streets must be spaced at least 440 feet apart, while median openings and traffic signals must be a

²²⁷ See FLA. STAT. § 335.181(1)(c) (2010).

²²⁸ FLA. STAT. § 335.188(1)-(2) (2010).

²²⁹ See FLA. STAT. § 335.188(3) (2010); FLA. ADMIN. CODE ANN. r. 14-97.004 (2010).

²³⁰ See FLA. STAT. § 335.188(3) (2010).

²³¹ See FLA. STAT. §§ 335.182-1825 (2010).

²³² FLA. STAT. § 335.187(1) (2010); FLA. STAT. § 335.182(3)(b) (2010) (defining "Significant change" as "a change in the use of the property, including land, structures or facilities, or an expansion of the size of the structures or facilities causing an increase in the trip generation of the property exceeding 25 percent more trip generation (either peak hour or daily) and exceeding 100 vehicles per day more than the existing use."); FLA. STAT. § 335.182(3)(a) (2010) (defining "Connection" as "driveways, streets, turnouts, or other means of providing for the right of reasonable access to or from the State Highway System.").

²³³ See FLA. STAT. § 335.187(2) (2010).

²³⁴ See FLA. ADMIN. CODE ANN. r. 14-97.005(2) (2010).

²³⁵ See FLA. ADMIN. CODE ANN. r. 14-97.003(2)(b) (2010).

²³⁶ *Id.*

half-mile apart.²³⁷ For the least restricted roadways, “where there is little intent or opportunity to provide high speed travel,” connections may be as close together as 125 feet, and signals may be a quarter-mile apart.²³⁸

As in Colorado, the complexity of the permit application process depends on the number of daily vehicle trips expected at the site. If that number exceeds 601, the application must include estimated trip generation data, a site plan, information about the abutting roads and nearby connections, location and design information for each connection to be permitted, and a detailed traffic study.²³⁹

In addition to its findings, the Florida legislature made a policy declaration: that a property owner “has a right to reasonable access to the abutting state highway but does not have the right of unregulated access to such highway.”²⁴⁰ “Reasonable access” was left undefined, but the legislature signaled that it does not have to be direct access,²⁴¹ especially if a service road is built.²⁴² The Florida Administrative Code later defined “reasonable access” as “the minimum number of connections, *direct or indirect*, necessary to provide safe and efficient ingress and egress to the State Highway System based on [the access management act], the Access Management Classification, projected connection and roadway traffic volumes, and the type and intensity of the land use.”²⁴³

²³⁷ FLA. ADMIN. CODE ANN. r. 14-97.003(1) (2010) (using an Access Class 5 roadway as an example).

²³⁸ *Id.*; FLA. ADMIN. CODE ANN. r. 14-97.003(2)(b)(6) (2010) (referring to an Access Class 7 roadway).

²³⁹ FLA. ADMIN. CODE ANN. r. 14-96.005(4) (2010); *see also* FLA. ADMIN. CODE ANN. r. 14-96.002(35) (2010) (Here a “trip” is defined as a one way vehicle movement, so each time a customer visits an establishment in a car, there are two trips: one in and one out. A business that is open twelve hours and serves twenty-five customers per hour would generate 600 trips (300 in and 300 out)).

²⁴⁰ FLA. STAT. § 335.181(2)(a) (2010).

²⁴¹ *See* FLA. STAT. § 335.181(6) (2010) (“The denial of reasonable direct access to an abutting state highway [in the administrative permitting process] is not compensable under the provisions of this act unless the denial would be otherwise compensable absent the provisions of this act.”).

²⁴² *See* FLA. STAT. § 335.181(7) (2010) (encouraging construction of service roads that provide reasonable access to state highways: “[N]othing in this act requires that a property owner whose land abuts a service road be given direct access across the service road to the state highway.”).

²⁴³ FLA. ADMIN. CODE ANN. r. 14-97.002(25) (2010) (emphasis added); *see also* *Racetrac Petroleum, Inc. v. Dep’t of Transp.*, No. 94-6741RP, 1995 Fla. Div. Adm. Hear. LEXIS 4874, at *18-19 (Apr. 27, 1995) (stating that gas station and restaurant owners challenged the rule’s equivalent treatment of direct and indirect access and argued that FDOT lacked authority “to consider either alternate or joint access as reasonable access”); *id.* at *19-20 (explaining the hearing officer’s disagreement, and holding that indirect access could be reasonable: “No firm and fast formula for determining the reasonableness of access has been devised. Direct access is easy to determine. It is a connection which joins the highway directly. However, there are other means of providing access. These may include access gained by connection to a side street which directly connects with the highway, or the use of a joint easement or a service road and are called indirect access. In determining whether indirect access can constitute reasonable access, many factors . . . must be considered.”).

One form of access connection is the shared or joint-use driveway. Florida's legislature has encouraged property owners to "implement the use of joint access where legally available"²⁴⁴ and the state's courts have upheld FDOT's power to require a joint-use driveway as a condition of permit approval.²⁴⁵ The legislature has also encouraged the use of service roads to provide reasonable access to state highways.²⁴⁶ So long as a service road provides access suitable to the property's type of development, Florida courts have found it to be a legally sufficient substitute for direct access to an abutting state highway.²⁴⁷

C. New Jersey

New Jersey's 1989 State Highway Access Management Act, like its Florida counterpart, begins with several important legislative findings and declarations. First, the purpose of the state highway system is to serve as a network of principal arterial routes, and it is an irreplaceable public asset that was built at great public expense. Second, land development and unrestricted access to state highways can impair this purpose and damage the public investment in the highway system. Third, every owner of property abutting a public road has "a right of reasonable access to the general system of streets and highways" but not to a particular means of access; and while government regulation may not eliminate all access to the general street system without providing just compensation, access to a state highway is subordinate to the public's right and interest in a safe and efficient highway. Fourth, access management regulations are needed to protect the functional integrity of the state highway system and the public investment in the system.²⁴⁸

Like Colorado's and Florida's programs, New Jersey's access management code is based on a classification of highways by function, with attention to "the

²⁴⁴ FLA. STAT. § 335.181(2)(b) (2010).

²⁴⁵ See *Paradyne Corp. v. State*, 528 So. 2d 921, 926 (Fla. Dist. Ct. App. 1988) (holding that FDOT could require Paradyne's drive connection to an arterial road to provide access to a neighboring property as well); see also *id.* at 926-27 (stating that FDOT could not make Paradyne build a joint-use driveway on its own private property, but it could make the shared driveway a condition precedent to an access permit, since the evidence showed that separate driveways would be unsafe and impractical; and adding that if Paradyne would not accept that condition, then FDOT could deny access to the arterial road, and Paradyne (and the neighboring property) would be relegated to use of the "alternate available accesses to their properties").

²⁴⁶ FLA. STAT. § 335.181(7) (2010).

²⁴⁷ Where Florida courts draw the line on this issue is somewhat unclear. It seems safe to say that if a commercial property loses its only direct access to an abutting main road, and the substitute access is through residential streets, a substantial loss of access (and a taking of a property right) occurs. See *Palm Beach Cnty. v. Tessler*, 538 So. 2d 846, 847-50 (Fla. 1989). But service road access can adequately replace direct highway access if the new travel path to and from the property seems reasonable to the court. See *Dep't of Transp. v. Fisher*, 958 So. 2d 586, 590-93 (Fla. Dist. Ct. App. 2007) (explaining that the service road did not cause a "substantial loss of access"); accord *Kunnen v. Dep't of Transp.*, No. 01-0009, 2001 Fla. Div. Adm. Hear. LEXIS 3051, at *21-23, 33-34 (Dec. 14, 2001) (explaining that the service road did not cause a substantial loss of access where the new travel path involved two service roads).

²⁴⁸ See generally N.J. STAT. ANN. § 27:7-90 (West 2010).

appropriate and desirable balance between facilitating safe and convenient movement of through traffic and providing direct access to abutting property.”²⁴⁹ For each classification, the code contains standards for geometric design and minimum and desirable spacing criteria for driveways and intersections.²⁵⁰ New subdivisions of land abutting state highways must comply with the access code;²⁵¹ existing permitted driveways are allowed to remain in place, but if an expansion or change in use will result in a significant increase in traffic (an additional ten percent of daily traffic or one hundred movements during the peak hour, whichever is greater), a new permit and compliance with the access code are required.²⁵²

Access management rules are most readily applied to new development. As an older and more densely populated state, however, New Jersey faced a greater problem in “retrofitting” its regulations to existing development. The legislature addressed this problem in three novel ways.

First, it declared that areas with “extensive commercial activity oriented toward and dependent upon a State highway should not be classified by reason of that level of activity as urban environments for access management purposes.”²⁵³ Instead, if an area of highway-oriented business was “characterized by excessive driveway openings, excessive traffic congestion, excessive accident rates, or undesirably low average rates of speed” then New Jersey Department of Transportation (NJDOT) should manage the highway within that area “to mitigate these nuisances.”²⁵⁴

Second, the legislature authorized the commissioner of transportation to issue nonconforming-lot access permits that would include limits on the maximum vehicular use of any driveway built or operated under the permit.²⁵⁵ The act also called for the adoption of “alternative design standards for each highway classification which, combined with limits on vehicular use, can be applied to lots which were in existence prior to the adoption of the access code” and cannot meet the code’s standards.²⁵⁶

Third, it empowered the commissioner to revoke an access permit (after notice and a hearing) if “alternative access” is available and the revocation would be

²⁴⁹ N.J. STAT. ANN. § 27:7-91(b) (West 2010); *see generally* N.J. STAT. ANN. §§ 27:7-91(a)-(i) (West 2010) (stating that the access code and classifications were developed after public hearings, with the input of members of the legislature, and under the guidance of an advisory committee appointed by the governor that included members recommended by the legislature, a traffic engineer, two developers, and representatives of business and industry).

²⁵⁰ *See* N.J. STAT. ANN. § 27:7-91(c) (West 2010).

²⁵¹ *See generally* N.J. STAT. ANN. § 27:7-96 (West 2010).

²⁵² N.J. STAT. ANN. §§ 27:7-92(d), 7-95 (West 2010).

²⁵³ N.J. STAT. ANN. § 27:7-90(i) (West 2010).

²⁵⁴ *Id.*

²⁵⁵ *See* N.J. STAT. ANN. § 27:7-93 (West 2010) (ensuring that, if a driveway cannot be located to meet the access code’s requirements because the lot it is too narrow or located too close to an intersection, the parcel will not be landlocked); Jerome G. Rose, *Regulating the Use of Land Abutting State Highways: New Jersey’s State Highway Access Management Act*, 18 REAL EST. L.J. 288, 292 (1990) (discussing N.J. STAT. ANN. § 27:7-93 (West 1990)).

²⁵⁶ N.J. STAT. ANN. § 27:7-91(c) (West 2010).

consistent with the purposes of the access management act.²⁵⁷ For properties zoned or used for residential or agricultural purposes, a connection to any improved public street or highway that provides reasonable access to the general system of streets and highways is deemed “alternative access.”²⁵⁸ If the property is zoned or used for industrial purposes, a connection to an access road is sufficient, but it must be “of sufficient design to support necessary truck and employee access as required by the industry.”²⁵⁹ Properties zoned or used for commercial purposes may connect to “any parallel or perpendicular street, highway, easement, service road or common driveway” provided the roadway’s design is sufficient to support commercial traffic and will give motorists “a convenient, direct, and well-marked means of both reaching the business or use and returning to the highway.”²⁶⁰

The alternative access must be open for use before the commissioner can revoke a permit.²⁶¹ In addition, the state must pay for engineering costs; construction work associated with the change such as installing new access drives and removing old ones, improving on-site circulation to accommodate the new drive locations, and replacing signs; and obtaining any needed land or property rights.²⁶² Finally, the act authorized the commissioner, and county and municipal governments, to “build new roads or acquire access easements to provide alternative access to existing developed lots which have no other means of access except to a State highway.”²⁶³

New Jersey’s courts have sustained these provisions of the act, but have reached somewhat different results about how to decide whether “alternative access” is acceptable under the statutory standards. If no land is taken from the abutting owner, the decision is made and reviewed administratively, and any judicial review is made with deference to the administrative findings and decisions.²⁶⁴ In that setting the appeals court actually used heightened deference, reasoning that application of the access management code required highly technical knowledge within the area of expertise that the legislature had specifically assigned to NJDOT.²⁶⁵ When land is taken from the abutter, however, exhaustion of administrative remedies has not been

²⁵⁷ N.J. STAT. ANN. § 27:7-94(a) (West 2010); *see also In re I/M/O Route 206 at Lot 13B New Amwell*, 731 A.2d 56, 61 (N.J. 1999) (Closing one driveway onto a state highway, when another point of direct access to the highway remains open, is considered to be a “modification” of access and not the revocation of an access permit.).

²⁵⁸ *See* N.J. STAT. ANN. § 27:7-94(c)(3) (West 2010).

²⁵⁹ N.J. STAT. ANN. § 27:7-94(c)(2) (West 2010).

²⁶⁰ N.J. STAT. ANN. § 27:7-94(c)(1) (West 2010) (including wholesale, retail, service, and office uses in the commercial category, along with residential developments “in excess of four residential units per acre with a total acreage of 25 or more acres”).

²⁶¹ *See* N.J. STAT. ANN. § 27:7-94(d) (West 2010).

²⁶² *Id.*

²⁶³ N.J. STAT. ANN. § 27:7-97 (West 2010).

²⁶⁴ *See In the Matter of the Revocation of the Access of Block No. 1901, Lot No. 1, Borough of Paramus, Bergen Cnty. Parkway 17 Assoc.*, 735 A.2d 594, 597, 601 (N.J. 1999) [hereinafter *Parkway 17*].

²⁶⁵ *Id.* at 601-02.

required: the jury in the eminent domain case, as fact-finder, may decide whether the alternative access is reasonable.²⁶⁶

D. An Overview of Typical Access Management Principles

State and local governments continue to adopt access management programs. Some are based on new enabling legislation like Virginia's 2007 access management act;²⁶⁷ others, like Indiana's 2009 Access Management Guide, are administrative rules or policies issued under the state transportation department's existing authority to regulate and control state highways.²⁶⁸ Certain key principles, however, are held in common.

The first is classification of roadways by their intended function. The categorization is made using measurable criteria such as traffic volume, speed limits, and the relative amounts of through and local traffic; along with reference to the built environment as shown by type and density of nearby development, number of lanes in the road, and the presence or absence of median dividers. This classification function is somewhat like the establishment of zoning districts for the regulation of land use, but with one major difference: in access management, the regulations apply to the use of a public asset rather than private property.

The second key principle is tailoring access management regulations to fit the roadway classifications. If a given roadway is largely meant for low-speed local travel, interruption of traffic flow at driveways and intersections and traffic signals is expected and consistent with the road's intended purpose. Conversely, if the roadway's main function is to carry large volumes of traffic over longer distances, such interruptions interfere with the purpose of the road and should be minimized. Safety concerns will also dictate wider driveway and street intersection spacing on high-speed, high-volume roads, particularly in urban settings where a driver's attention is subject to more distracting influences.²⁶⁹

²⁶⁶ *Compare* *Magliochetti v. State*, 647 A.2d 1386, 1393-95 (N.J. 1995) (deciding not to send the issue to an administrative law judge since the factual record about the access point's location and functionality was undisputed and court involvement (in the eminent domain action) would be needed anyway), *with Parkway 17*, 735 A.2d at 601-02 (N.J. 1999) (differing on one key point: *Magliochetti* held that a jury could decide whether the alternative access was reasonable while *Parkway 17* treated the matter as one that required specialized agency expertise).

²⁶⁷ *See generally* VA. CODE § 33.1-198.1 (2010).

²⁶⁸ *See generally* AECOM TRANSP., IND. DEP'T OF TRANSP., ACCESS MANAGEMENT GUIDE (Aug. 2006, revised Sept. 2009), *available at* http://in.gov/indot/files/guide_total.pdf; *see also* IND. CODE §9-21-19-2 (2012) (providing the legal authority for access permitting: "The Indiana department of transportation shall adopt rules and requirements for private entrances, driveways, and approaches necessary to provide for drainage of the highway, preservation of the highway, and the safety and convenience of traffic on the highway.").

²⁶⁹ *See* TRANSP. RESEARCH INST. AT OR. ST. UNIV. & OR. DEP'T OF TRANSP., STOPPING SIGHT DISTANCE AND DECISION SIGHT DISTANCE (Feb. 1997), *available at* <http://www.oregon.gov/ODOT/HWY/ACCESSMGT/docs/StopDist.pdf?ga=t> (explaining that traffic engineers have determined that, in addition to the time (and space) that it takes to stop a vehicle once the brakes are applied, it also takes time (and space) for the driver to discern an object or event in the road, understand its implications, decide how to react, and then initiate the action (such as applying the brakes)); *see also id.* at 24 (describing that the perception-reaction process takes longer on high-speed, high-volume roadways, such as

Third, how the regulations are applied through the permitting process depends not only on the classification of the roadway but also on the amount of traffic expected to use the driveway. A high-volume driveway might require a right-turn lane or even a stop light, introducing another variable because its proposed location must meet traffic signal progression requirements. On the other hand, a permit for a low-volume driveway might allow movements (such as left turns in and out) that would not be acceptable for a higher-volume use.

Fourth, existing driveways that do not meet the new regulations normally are allowed to remain in service, but their use cannot be significantly expanded. So, for example, the driveways serving a small 1960s-era sit-down restaurant might be “grandfathered,” but if the owner plans to tear it down and replace it with a fast-food restaurant—or to assemble the parcel with others to create a site for a big-box retailer—the prospective change in driveway traffic volume would trigger application of all the access management code’s permitting requirements. Such provisions are analogous to “legal non-conforming use” status under a zoning code, blunting the impact of the access regulations on improvements that were lawful when built but not allowing the non-conformity to be expanded.

Having considered how (and why) governments exercise their police powers to regulate access to roadways, we will next consider what rights property owners have to gain access to public roads. As the next part of this Article will show, “access” encompasses a number of concepts, and not all of them are entitled to the same degree of legal protection. And having a clear understanding of the kind of “access” at issue is critical when courts are called on to determine whether a property right has been taken.

VI. A SUMMARY OF THE CURRENT LAW OF ACCESS

A. *Access to Traffic and Accessibility within the Network of Roads*

Changes to the network of public roadways can have a great impact on the use and value of private property. When a new interchange is built on a major highway, for example, land situated at the interchange will gain development potential for a highway-oriented use such as a fast-food restaurant or gas station or motel. Larger sites, further from the interchange but benefiting by its proximity, may become more attractive for industrial or commercial development. The land now has access to something: to traffic volume, to a road that offers rapid long-distance mobility, that it did not have before. Variations in these elements can have a significant influence on property use and property value. Yet none of them have anything to do with access to land—with the ability to go back and forth between land and an abutting public road—which is the interest upon which the law of access is based.

These multiple meanings can lead to confusion when access is at issue in a lawsuit. When the Florida Department of Transportation closed the entrance and exit ramps at McCoy’s Creek Boulevard and Interstate 95 in Jacksonville, for example, the nearby area’s connectivity to the road network changed radically, as did its access to traffic on the Interstate. An affected landowner, L.I. Gefen, sued in inverse condemnation, presenting expert testimony that the ramp closure

arterial streets and highways in urban areas, due to the complex conditions and driver expectations of an uninterrupted traffic flow); *id.* at 23, 25 (concluding that while the design standard for *stopping* sight distance on a road with a design speed of fifty miles per hour is 461 feet, the *decision* sight distance for the same road in an urban area would be 975 feet).

substantially impacted access to and from her property and destroyed it as a business site.²⁷⁰ The trial and appeals courts agreed that a taking had occurred: in their view the evidence showed that “the closing of the ramp effectively denied suitable access” to the commercial property, which could “only be reached by an ‘indirect, winding route through several blocks of residential neighborhood.’”²⁷¹

But the Florida Supreme Court disagreed with the lower courts, pointing out that access from the Gefen property to the roads that actually abutted it was undiminished.²⁷² What had changed was the way those roads connected to I-95. Yet as the Florida court explained, the owner had no “compensable vested right to that access.”²⁷³ Nor did she have a right to high-volume vehicle traffic: “Access, as a property interest, does not include a right to traffic flow even though commercial property might very well suffer adverse economic effects as a result of reduced traffic.”²⁷⁴

As the Florida court’s *Gefen* opinion illustrates, the law of access distinguishes between vehicle movements to and from an abutting road and movements within the road network. And these differ yet again from access to traffic volume. These differences—between access to land, accessibility within the overall system of roads, and access to traffic—have led to some generally accepted (but not often well-explained) rules of law, as the following discussion will show.

1. Access to Traffic

Traffic volume is the best-defined of all the “access” issues. There is nearly universal agreement that no one has a property right in the volume of traffic using a road.²⁷⁵

²⁷⁰ Dep’t of Transp. v. Gefen, 620 So. 2d 1087, 1087 (Fla. Dist. Ct. App. 1993).

²⁷¹ *Id.* at 1088.

²⁷² Dep’t of Transp. v. Gefen, 636 So. 2d 1345, 1346 (Fla. 1994).

²⁷³ *Id.*

²⁷⁴ *Id.*; see also Leonard v. People ex rel. Dep’t of Transp., 62 Cal. App. 4th 1296, 1299 (Ct. App. 1998) (“Such compensation must rest upon the property owner’s showing of a substantial impairment of his right of access to the general system of public streets.”).

²⁷⁵ See, e.g., Grove & Burke, Inc. v. City of Fort Dodge, 469 N.W.2d 703, 705 (Iowa 1991) (“We have long held that landowners have no vested right to the continuance of existing traffic past their establishments.”) (quoting Iowa State Highway Comm’n v. Smith, 82 N.W.2d 775, 762 (1957)) (internal quotation marks omitted); Gibson v. Comm’r of Highways, 178 N.W.2d 727, 730 (Minn. 1970) (“A property owner has no vested interest in the continued flow of the main stream of through traffic.”); Barnes v. N.C. State Highway Comm’n., 126 S.E.2d 732, 738 (N.C. 1962) (“An individual proprietor has no right to insist that the entire volume of traffic that would naturally flow over a highway of which he owns the fee pass undiverted and unobstructed. In fact, while under some circumstances and conditions he has a right of access to and from his own premises, he has no constitutional right to have anyone pass by his premises at all.”); State ex rel. Merritt v. Linzell, 126 N.E.2d 53, 56-57 (Ohio 1955) (“It is now an established doctrine in most jurisdictions that such an owner has no right to the continuation or maintenance of the flow of traffic past his property. The diminution in the value of land occasioned by a public improvement that diverts the main flow of traffic from in front of one’s premises is noncompensable.”); 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 6.02(8)(d) (rev. 3d ed., 1997) (“The temporary or permanent diversion of

When the State of New York rerouted part of a highway leading to a popular recreational area in the Catskills, for example, it diverted traffic away from a restaurant and motel that previously enjoyed a “strategic” location.²⁷⁶ But the landowners had no right to any compensation for losing access to the tourist traffic that formerly passed in front of their business:

A property owner so situated has no right to be located directly on a State highway nor does he have a right to have traffic pass in front of his property. True, the presence of those factors may increase the value of the property, but any such increase is purely fortuitous in the sense that it does not result from any expenditure of effort or funds on the part of the property owner.²⁷⁷

Instead, the advantage enjoyed by the motel was essentially an opportunistic one, like that of a diner next to an office building or a bar across the street from a stadium. No one has a property right in the office workers on their lunch break or the fans after a football game; likewise, no one has a property right in the tourist traffic on a road:

It is as if the State . . . shut down the recreational center which attracted so many persons to the area . . . Surely no one would argue that the State would be liable to the claimants for consequential damages resulting from such closing. While the recreation center is in operation the claimants benefit because their property happens to be located in the same general area. If the recreation center were closed, they would have no legal right to complain.²⁷⁸

Given the clear consensus against compensating property owners when loss of traffic volume results in loss of property value, affected landowners commonly frame such claims as a generic “access” problem. But any confusion can be sorted out by considering what would happen if the road did not change but the traffic disappeared: the extent to which a property’s utility and value decrease under that scenario is the extent to which those factors depend on traffic volume, not access.²⁷⁹

traffic as a result of highway construction does not effect a compensable taking so long as reasonable access is provided to an impacted property.”).

²⁷⁶ Bopp v. State, 227 N.E.2d 37, 38 (N.Y. 1967).

²⁷⁷ *Id.* at 39.

²⁷⁸ *Id.* at 39-40.

²⁷⁹ See *La Briola v. State*, 328 N.E.2d 781, 785 (N.Y. 1975); see also *Kan. City v. Berkshire Lumber Co.*, 393 S.W.2d 470, 474 (Mo. 1965) (rejecting business’s claim for damages due to loss of “view” from the highway: “Any claim on this basis is inextricably related to a property right in the traffic upon Truman Road. Cases of this state have consistently refused to accord to property owners any right in the continuation of traffic upon an established highway.”). It appears that two states, Alabama and Oklahoma, while not recognizing claims based solely on diversion of traffic, will allow evidence of lost traffic volume when assessing damages in partial-takings cases. These decisions rest on the fact that traffic influences value; they err by allowing compensation to be awarded for the loss of traffic volume even though access to traffic is not a property right. Compare *State v. Moore*, 382 So.2d 543, 545 (Ala. 1980), and *State ex rel. Dep’t of Highways v. Bowles*, 472 P.2d 896, 899-901 (Okla. 1970), with *Stipe v. United States*, 337 F.2d 818, 821 (10th Cir. 1964) (“The

2. One-Way Traffic Flow and Median Dividers

Like traffic volume, the direction or pattern of traffic flow on an abutting road does not give rise to a property right.²⁸⁰ Courts in general accept the principle that regulation of vehicle movement on a public road does not affect any right of an abutting landowner.

The use of median dividers to separate opposing streams of traffic illustrates this principle most starkly: if vehicles cannot turn left into and out of a property, visitors may find it less convenient to reach, and this could have an impact on both use and value. Nonetheless, courts make no distinction between median barriers, “no left turn” signs and pavement markings, and one-way streets.²⁸¹ Each of these methods of controlling the directional flow of traffic is seen as a permissible exercise of the police power, not a compensable interference with a property right.²⁸²

3. Accessibility within the Road Network

Drivers who must pass by a business due to a median barrier, turn around at a crossover point, and then come back to reach their intended destination experience what courts call “circuitry of travel” or “circuitry of access.”²⁸³ Other alterations in the road network, such as street closure or rerouting, the creation of overpasses, and the use of service roads to replace direct highway access, can also result in a more roundabout way of travel. Most courts hold that a road network change making a property harder to reach is “mere circuitry of travel,” not a compensable interference with the access right.²⁸⁴

record as a whole discloses beyond any doubt that the decrease in the value of the business resulted not from the taking of part of Stipe's land, but from the relocation of Highway 69, which diverted traffic over the highway away from the business operation. Whatever his loss, it is due to the destruction or frustration of his business, and not the taking of the property. Such losses are not compensable.”).

²⁸⁰ See *State v. Dunn*, 888 N.E.2d 858, 868 (Ind. Ct. App. 2008) (“Indiana is in the firm majority of jurisdictions that have addressed whether the construction of medians in roadways constitutes a compensable taking and have concluded that it does not.”); *Dale Props., L.L.C. v. State*, 638 N.W.2d 763, 764 (Minn. 2002) (“[A] property owner who retains direct access to traffic in one direction, although losing it in the other direction due to the closure of a median crossover, retains reasonable access as a matter of law.”).

²⁸¹ See *State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206, 215 (Ind. 2009) (“Neither the construction of the median alone, nor the hypothetical conversion of Green River Road to a one-way street, would have constituted a compensable taking by the State.”).

²⁸² See *Hales v. City of Kansas City*, 804 P.2d 347, 350 (Kan. 1991) (“We conclude that limiting the landowners' ingress and egress to lanes for southbound travel when they formerly had direct access to both the northbound and southbound lanes of traffic, whether by a median strip, one-way street, or no left turn, is a valid exercise of police power and is not compensable.”).

²⁸³ A roundabout course to get to a particular destination is “circuitous.” The use of “circuitry” to describe what happens when property is harder to get to within the network of roads is awkward, as the word is uncommon and easily confused with “circuitry.” Nonetheless, this unfortunate usage is too long-established to be changed.

²⁸⁴ See, e.g., *State ex rel. Preschool Dev., Ltd. v. City of Springboro*, 792 N.E.2d 721, 725 (Ohio 2003) (“Mere circuitry of travel, necessarily and newly created, to and from real property does not of itself result in legal impairment of the right of ingress and egress to and

This circuitry rule is but another statement of a principle that has been part of the law of access since its early days. Courts in the late nineteenth century did not make the public pay for every change to the streets that impaired access: instead, they required compensation only for those access-related damages that were special to the property involved.²⁸⁵ Only if a street obstruction made it difficult to get between a property and its abutting road were there (at least potentially) damages peculiar to that property, which the law regarded as a compensable event.²⁸⁶

Conversely, a network-level change, such as the obstruction of a street some distance away, did not cause special damages. *Everyone* who used the street, even people who did not own property on it, suffered the same inconvenience. That fact made any resulting damage general. Even though the owners of property along the blocked street may experience the inconvenience to a greater degree, the *kind* of damage sustained—namely, less convenient travel within part of the road network—was not due to property ownership, but rather to membership in the affected community. Accordingly, courts did not consider loss of accessibility within the network to be a legal taking (or damaging) of property.²⁸⁷

Courts continue to find this distinction controlling. As the Colorado Supreme Court explained:

The general rule is that an abutting landowner is entitled to compensation for limitation or loss of access only if the limitation or loss substantially interferes with his means of ingress and egress to and from his property. In determining whether there has been substantial interference . . . we have declared that inconvenience caused by the required use of a more circuitous route to gain access to property does not constitute substantial impairment of access. The rationale for denying compensation for limitation or loss of access manifested by circuitry of route is that the inconvenience suffered by the landowner is identical in kind to that suffered by the community at large, and the landowner's inconvenience is only greater in degree.²⁸⁸

from such property.”) (internal citation omitted); *Dep’t of Transp. v. Taylor*, 440 S.E.2d 652, 654 (Ga. 1994) (explaining that a change to the road network causing inconvenience shared by the public in general, such as a change “resulting in longer drive to reach a particular destination,” is not a compensable taking of a property right); *State v. Wood Oil Distrib.*, 751 S.W.2d 863, 865 (Tex. 1988) (“It is well settled that damages to a condemnee’s business which result merely from traffic being required to travel a more circuitous route to reach a condemnee’s property are not compensable.”); 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 13.23(1) (rev. 3d ed., 1997) (“A change which results in inconvenience or a circuitry of access is generally held to be non-compensable.”).

²⁸⁵ See, e.g., *Rude v. City of St. Louis*, 6 S.W. 257, 257-59 (Mo. 1887).

²⁸⁶ See, e.g., *Gilbert v. Greeley, Salt Lake & Pac. Ry. Co.*, 22 P. 814, 815-17 (Colo. 1889).

²⁸⁷ *Id.* at 816-17; *Rude*, 6 S.W. at 258-59.

²⁸⁸ *State Dep’t of Highways v. Davis*, 626 P.2d 661, 664-65 (Colo. 1981). Judicial opinions often use “ingress and egress” to describe the movement between property and an abutting street. See also *Miller v. Preisser*, No. 103,938, 2012 Kan. LEXIS 460, at *38 (Kan. Aug. 31, 2012) (drawing a distinction “between *direct* access to *abutting* roadways, which creates a right of access that is compensable in an eminent domain action, and *indirect* access to a

One legal scholar has criticized the circuitry-of-access rule as merely rhetorical.²⁸⁹ But doing so misses the rule's real insight: that it differentiates between network-level inconveniences and those that relate to access between a property and the road it touches. If a property owner has a right of access to and from an abutting road, but no right to demand that the linkages of the road network must stay the same, then the circuitry rule still performs a valuable function.

4. The Minority Approach: When a Location within the Network Becomes too Remote

Courts frequently decide access claims by evaluating whether the property has "reasonable access" after the government action at issue. Because "access" can have multiple meanings, however, a reasonableness analysis can blur the distinctions between access to land, access to traffic, and accessibility within the network of roads.

Boehm v. Backes, for example, arose after the State of North Dakota closed the intersection between a highway and the local street on which a towing and auto repair business was located, creating a cul-de-sac.²⁹⁰ The business's access to and from the local street was unaffected, but the street no longer connected to the highway; instead, the highway could only be reached "in the opposite direction via a circuitous route through a residential neighborhood."²⁹¹ The trial court, applying the usual circuitry principle, dismissed the Boehms' inverse condemnation suit.²⁹² But the North Dakota Supreme Court did not limit the focus of its "reasonableness" analysis to the property's access to the abutting street. Rather, it looked at the length of the travel path to the main highway, concluding that there was a "substantial interference with direct access to the nearby thoroughfare" which "resulted in a compensable taking as a matter of law."²⁹³

Similarly, in *Palm Beach County v. Tessler*, the Florida Supreme Court considered the effects of a retaining wall, built within the public right-of-way, which blocked a beauty salon's driveway to the main road, forcing customers to take a winding route through a residential neighborhood to reach the salon's other driveway.²⁹⁴ Each party contended for a bright-line rule:

Where there has been no taking of the land itself, when is a property owner entitled to be compensated for loss of access to the property caused by governmental intervention? The county argues that unless the property owner has been deprived of all access, the law of eminent domain does

nearby roadway, which relates to a regulation of traffic flow that is not compensable in an eminent domain action.") (emphasis in original).

²⁸⁹ Stoebuck, *supra* note 107, at 744-45, 752.

²⁹⁰ *Boehm v. Backes*, 493 N.W.2d 671, 672 (N.D. 1992).

²⁹¹ *Id.*

²⁹² *Id.* ("The trial court also ruled . . . that the damage they 'have suffered to their access is a damage shared by the general public,' and that their circuitous access was 'not unreasonable.'").

²⁹³ *Id.* at 674 (emphasis added).

²⁹⁴ *Palm Beach Cnty. v. Tessler*, 538 So. 2d 846, 847-49 (Fla. 1989).

not recognize that a taking has occurred. Respondents contend that a taking has occurred when any portion of the access has been eliminated and that the suitability of the remaining access may be taken into account in the assessment of compensation.²⁹⁵

The court, however, rejected “both positions as being extreme.”²⁹⁶ Instead, striving for a balance, the court looked at whether the remaining access was suitable for the property as it was used by the business that occupied it:

[T]he fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner's right of access was substantially diminished. The loss of the most convenient access is not compensable where other suitable access continues to exist.²⁹⁷

The *Tessler* court emphasized that loss of access to traffic could not be considered in deciding whether access is suitable.²⁹⁸ But network-level access apparently could be: the Tesslers showed a substantial loss of access to their beauty salon, sufficient to prove a taking, by evidence that “the retaining wall will require their customers to take a tedious and circuitous route to reach their business premises which is patently unsuitable and sharply reduces the quality of access to their property.”²⁹⁹

The blurring of distinctions between the various types of “access” is perhaps best highlighted by the Kansas Supreme Court’s 1977 *Teachers Insurance* opinion.³⁰⁰ That case involved Kellogg Street, designated as U. S. Highway 54 and State Highway 96, which was a major four-lane road through the City of Wichita.³⁰¹ Public authorities decided to make it into a highway with fully controlled

²⁹⁵ *Id.* at 847.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 849. As the *Tessler* court noted, in Florida the ultimate question was a legal one: “[T]he judge . . . decides as a matter of law whether the landowner has incurred a substantial loss of access by reason of the governmental activity.” *Id.* at 850.

²⁹⁸ *Id.* at 849 (“A taking has not occurred when governmental action causes the flow of traffic on an abutting road to be diminished.”).

²⁹⁹ *Id.* at 850. The actual use of land and its potential “highest and best use” are often interwoven with access to traffic and convenience of access within the overall road network. See discussion *infra* Part V.C. In *Gefen*, the expressway-ramp closure case discussed above, the owners of a commercial property presented evidence that loss of convenient access to Interstate 95 damaged the use and value of their property. *Dep’t of Transp. v. Gefen*, 636 So. 2d 1345, 1346 (Fla. 1994). But the *Gefen* court distinguished *Tessler* as involving not just network-level access, but also loss of access from land to an abutting road. *Id.* (“However, the facts of this case are significantly different from those in *Tessler*. Gefen's access to all roads abutting her property is undiminished.”) Accordingly, the reach of the *Tessler* decision is uncertain.

³⁰⁰ See generally *Teachers Ins. & Annuity Ass’n. of Am. v. City of Wichita*, 559 P.2d 347 (Kan. 1977).

³⁰¹ *Id.* at 351.

(interchange-only) access and shift it to a new alignment slightly north of its old location.³⁰² The old roadway, renamed Kellogg Drive, was narrowed to a two-lane street.³⁰³

Three commercial properties on Kellogg Drive were most affected by this change. Their driveways still connected to the old roadway pavement in the same places, but that pavement was now part of a five-block-long street, not a major thoroughfare.³⁰⁴ U.S. 54 and State Highway 96, still visible across Kellogg Drive, were now reachable only by a mile-long trek through several other streets.³⁰⁵

The businesses sued Wichita, contending that the highway project constituted “a taking of their rights of access to a through street, Highway 54, Highway 96, and through traffic . . . [and] that the circuitry of travel under the new plan is unreasonable.”³⁰⁶ The city, conversely, argued that no taking had occurred because access to the portion of old Kellogg that abutted the properties was unchanged and, in any event, the businesses had no right to the traffic flow that formerly passed in front of their properties.³⁰⁷

The Kansas Supreme Court sided with the owners, for even though access between the business properties and the street was unaltered, the street itself had changed: it was no longer a highway, and it did not have a nearby connection to U.S. 54.³⁰⁸ Seeking to distinguish its prior decisions in traffic-flow cases, the court declared that the highway had not truly been rerouted: it was just on the other side of Kellogg Drive, but out of reach. That fact, in the court’s view, was tantamount to a denial of access.³⁰⁹

Tellingly, the court then blended the concepts of access to land, accessibility within the road network, and access to traffic, concluding that:

On the facts in the instant case we are dealing with two service stations and a candy shop. These business properties are dependent upon access to the new highway facility fronting these properties. In *McCall Service Stations, Inc. v. City of Overland Park*, 215 Kan. 390, 524 P. 2d 1165, the court stated: “. . . The value of a service station is dependent almost entirely upon the access the traveling public has to the service station.”³¹⁰

A subsequent decision by the Kansas Supreme Court distinguished the *McCall* opinion, on which *Teachers Insurance* relied, as involving closure of a business

³⁰² *Id.*

³⁰³ *Id.* at 350-52.

³⁰⁴ *Id.* at 351.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 352.

³⁰⁷ *Id.* at 353, 356.

³⁰⁸ *Id.* at 355-56.

³⁰⁹ *Id.* at 356 (“[W]hile the state is under no duty or obligation to send traffic past the plaintiffs’ properties, as long as the traffic does pass the plaintiffs’ properties they are entitled to avail themselves of it in common with other abutting property owners.”).

³¹⁰ *Id.* at 356-57.

entrance, denying that there had been any compensation for loss of traffic flow.³¹¹ And it characterized *Teachers Insurance* as a rather extreme situation in which the public authority had stipulated that travel to and from the property was not practical.³¹² Because the Kansas court has now squarely ruled that a network-level change to the street system leading to a retail center was *not* a loss of access,³¹³ the continuing vitality of those earlier decisions is questionable. Nonetheless, they serve to illustrate the confusion that can occur when a court is trying to determine whether a property has reasonable access without first carefully defining what “access” is.

B. Access to Land: The Point of Contact Between the Public and Private Pavement

Thorny issues can also arise when a governmental action affects the ability to get back and forth between land and an abutting road. That movement—the initial step into the overall road network—is “access” in its elemental form: the interest that courts have recognized since the nineteenth century. As we have seen, too, it was the loss of this kind of access that courts have used to justify and distinguish decisions that seemingly allowed compensation for loss of traffic flow or changes to network-level access.³¹⁴

There appears to be universal agreement that government preclusion of vehicular access to any roadway is a taking that requires compensation. But when a property has *some* vehicular access to a road, the analysis can be complicated.

1. Corner Parcels and Multiple Road Frontages

As foreshadowed by the *Brownlow* and *Wood* gas station decisions in the 1920s, when a corner parcel is involved, public authorities may want to allow access to just one of the intersecting roads to minimize interference with traffic.³¹⁵ If the legally-recognized interest is access to *an* abutting road, as in *Wood*, the decision would be upheld as a permissible exercise of the police power—and one that does not rise to the level of a taking.³¹⁶ On the other hand, if a property owner has a legal right to access *each* abutting road, as in *Brownlow*, then refusal of a driveway permit to either, even if demonstrably in the public interest, would nonetheless be a taking requiring just compensation.³¹⁷

³¹¹ *City of Wichita v. McDonald’s Corp.*, 971 P.2d 1189, 1199 (Kan. 1999).

³¹² *Id.*

³¹³ *Id.* at 1198 (“Wal-Mart has misused the term ‘access’ in crafting its arguments. . . . The City did not permanently close any of the entrances or exits to the property. Wal-Mart still has four entrances located as they were before the project. In addition, Wal-Mart also has the same access to the same streets it previously had.”); *id.* at 1198-99 (distinguishing statutory factors that must be considered when awarding damages in an eminent domain case: “We will not rewrite the [statutory] language ‘access to the property remaining’ to mean ‘access to the highway remaining.’”).

³¹⁴ *Id.* at 1199 (distinguishing *McCall*); *Dep’t of Transp. v. Gefen*, 636 So. 2d 1345, 1346 (Fla. 1994) (distinguishing *Tessler*).

³¹⁵ See generally *Brownlow v. O’Donoghue Bros., Inc.*, 276 F. 636 (D.C. Cir. 1921); *Wood v. City of Richmond*, 138 S.E. 560 (Va. 1927).

³¹⁶ *Wood*, 138 S.E. at 563.

³¹⁷ *Brownlow*, 276 F. at 638.

Not surprisingly, judicial opinions still go both ways on this issue. Some courts hold that an abutter has a right to access each abutting road.³¹⁸ Other states allow public authorities to eliminate direct access to one street so long as there is another means of vehicular access to the property.³¹⁹ So, for example, a decision denying a permit for a driveway from a fast-food restaurant to a high-volume state highway, and requiring access from an abutting township road instead, can be sustained if it is made pursuant to a reasonable and uniform policy.³²⁰ Similarly, an office complex's access to one street may be closed, provided that reasonable access is available from another street.³²¹

2. Parcels Fronting on a Single Road: What Access is Enough?

For parcels that have frontage on a single public road, the broad consensus now, as in the 1910 decision in *Goodfellow Tire*, is that access may be regulated.³²² In the New Jersey Supreme Court's words, "It seems to be . . . the general rule is that the property owner is not entitled to access to his land at every point between it and the highway, but only to free and convenient access to his property and the improvements on it."³²³ This rule invites the use of a "reasonableness" analysis to

³¹⁸ See, e.g., *Hilton Head Auto., L.L.C. v. S.C. Dep't of Transp.*, 714 S.E.2d 308, 310 (S.C. 2011) ("As an abutting property owner, HHA had 'an easement for access' to Highway 278, 'regardless of whether [it had] access to and from an additional public road.'"); *Harper Invs., Inc. v. Dep't of Transp.*, 554 S.E.2d 619, 622 (Ga. Ct. App. 2001) ("Although Harper may have alternative access to its property on an abutting street . . . [this factor goes] to the amount of damages, if any, due Harper for the 'deprivation of one means of access to [its] property.'").

³¹⁹ See, e.g., *State v. Dawmar Partners, Ltd.*, 267 S.W.3d 875, 880 (Tex. 2008) ("In light of the considerable amount of remaining access to and from the property, we could not conclude that there is a material and substantial impairment of access . . . without imposing a requirement that there be some degree of direct access to the highway. . . . We decline to impose such a requirement because it would be inconsistent with our well-developed case law regarding circuitry of travel."); *Commonwealth v. Comer*, 824 S.W.2d 881, 883-84 (Ky. Ct. App. 1991) (noting that property at intersection still had access to one street, therefore no taking occurred because the remaining access was reasonable); *Hardee's Food Sys., Inc. v. Dep't of Transp. of Pa.*, 434 A.2d 1209, 1211 (Pa. 1981) ("[M]unicipalities may, under the police power, severely limit, or even eliminate, the right of direct access onto a public street—at least where other available access exists.").

³²⁰ *Hardee's*, 434 A.2d at 1212.

³²¹ *City of San Antonio v. TPLP Office Park Props.*, 218 S.W.3d 60, 61, 66 (Tex. 2007).

³²² *Goodfellow Tire Co. v. Comm'r of Parks & Boulevards of Detroit*, 128 N.W. 410, 412 (Mich. 1910).

³²³ *State by Comm'r of Transp. v. Weiswasser*, 693 A.2d 864, 873 (N.J. 1997) (citation omitted); see also *Shaklee v. Bd. of Cnty. Comm'rs*, 491 P.2d 1366, 1368 (Colo. 1971) ("[A]n owner is not entitled, as against the public, to access to his land at every point on the property line adjacent to the highway."); *State ex rel. Dep't of Highways v. Linnecke*, 468 P.2d 8, 9-10 (Nev. 1970) ("[A]n owner is not entitled to access to his land at all points in the boundary to it and the highway, although entire access to his property cannot be cut off. If he has free and convenient access to his property and his means of egress and ingress are not substantially interfered with, he has no cause for complaint."); *State v. Ensley*, 164 N.E.2d 342, 351 (Ind. 1960) ("The owners of abutting real estate are not entitled to 'egress and ingress to their premises for the full length of the abutment of said real estate upon such highway.' Nor is an

determine whether a governmental action that affects access, such as the closure of a driveway, is significant enough to rise to the level of a taking. And reasonableness is the measure many courts use.

The Texas Supreme Court's decision in *State v. Bristol Hotel Asset Co.* provides a good illustration.³²⁴ The Bristol Hotel had three entrance driveways before the state began a highway project; afterward, the main driveway was so steep as to be unusable, but one of the other driveways could be converted into the primary entrance.³²⁵ These facts led the hotel's appraiser to find over \$500,000 in damages, primarily due to the loss of the former main driveway: in his view it would cause "some interruption in 'traffic patterns'" and result in "new 'site circulation characteristics' of the hotel [that] would be atypical."³²⁶ The Texas court agreed that access to the property not be as easy, but denied that there was a taking. Rather, it found that the property "remained reasonably accessible because it retained two other driveways fronting the hotel and modified to provide adequate access for patrons, as well as two service driveways in the rear."³²⁷ Because the hotel still had reasonable access, the court concluded that the appraiser's damages testimony was improper.

What if a public authority decides, for safety or operational reasons, to relocate a parcel's driveway? Does access have to be direct from the frontage of the property to the highway? Or may public authorities enlarge the road network by creating a service road and use it to provide access to multiple parcels through a single connection to the highway? The majority and dissenting opinions in the Ohio Supreme Court's 2003 *Preschool Development* decision outline the contending positions.³²⁸

State Route 73 is the main commercial corridor through Springboro, Ohio. In 1999, a company called Preschool Development, Ltd. (PDL) began to convert a parcel on that road from a residence to a daycare center. The city engineer, however, determined that "although left turns in and out of PDL's existing curb cut had been

abutting property owner entitled to damages merely for 'a partial limitation and obstruction' of the right of access. Such right must be substantially or materially interfered with or taken away.") (internal citation omitted); *State Highway Dep't v. Strickland*, 102 S.E.2d 3, 5 (Ga. 1958) ("[Abutting owners] are not entitled however, as against the public, to access to their land at all points in the boundary between it and the highway if the entire access has not been cut off, and if they are afforded a convenient access to their property and the improvements thereon, and their means of ingress and egress are not substantially interfered with by the public authorities in charge of the highway."); *Iowa State Highway Comm'n v. Smith*, 82 N.W.2d 755, 759 (Iowa 1957) ("It seems fairly well settled that, while access may not be entirely cut off, an owner is not entitled, as against the public, to access to his land at all points between it and the highway. If he has free and convenient access to his property and the improvements on it and his means of ingress and egress are not substantially interfered with by the public he has no cause for complaint.").

³²⁴ *State v. Bristol Hotel Asset Co.*, 293 S.W.3d 170 (Tex. 2009).

³²⁵ *Id.* at 171. The third driveway required some regrading to restore its utility. *Id.*

³²⁶ *Id.* at 174.

³²⁷ *Id.*

³²⁸ See generally *State ex rel. Preschool Dev., Ltd. v. City of Springboro*, 792 N.E.2d 721 (Ohio 2003).

acceptable for the low traffic volumes associated with a single-family residence, these left turns would be hazardous for business-generated traffic volumes.”³²⁹ Springboro subsequently obtained a permanent easement through an adjacent shopping plaza, then under construction, to provide a route for the daycare center traffic to go through the plaza’s parking lot to a single common access point on State Route 73.³³⁰ Finally, as part of a repaving project, the state closed off PDL’s individual curb cut.

The company sued Springboro to compel it to bring an eminent domain action, contending that the city’s elimination of the curb cut “denied its right of access to the abutting public highway, S.R. 73, and constituted a compensable taking.”³³¹ In Ohio the right of access to an abutting public road is considered to be “a fundamental attribute of ownership” and access to property “from the street or highway on which it abuts cannot be lawfully destroyed or unreasonably affected.”³³² Accordingly, a “governmental action that substantially or unreasonably interferes” with a property owner’s “right to access public streets or highways on which the land abuts” will constitute “a taking of private property.”³³³

A majority of the Ohio Supreme Court rejected the idea “that a substantial or unreasonable interference with access to abutting roads *necessarily* occurs when that access no longer is direct from the frontage of the parcel itself.”³³⁴ Instead, it applied the circuitry-of-access rule:

It is true that PDL no longer has access to and from S.R. 73 directly from its property. It does, however, have access to and from S.R. 73 via a route that runs parallel to S.R. 73 from its property to the center line of the curb cut of an adjacent shopping center The fact that drivers must negotiate one additional turn and travel 207 feet along a secondary access route rather than on S.R. 73 to reach the PDL parking lot does not warrant a finding of a compensable taking.³³⁵

The dissenting justices, by contrast, believed that the right of access meant direct access to the abutting roadway.³³⁶ Like the *Brownlow* and *Teachers Insurance* opinions, the dissent in *Preschool Development* equated an element of property value with the existence of a property right:

³²⁹ *Id.* at 723.

³³⁰ *Id.*

³³¹ *Id.* at 724. Under Ohio law, inverse condemnation claims are brought as mandamus actions. If the affected property owner proves to the court that a taking has occurred, the court will issue a writ of mandamus directing the responsible government agency to file a lawsuit to appropriate the property that it took. *See generally* State *ex rel.* Wasserman v. City of Fremont, 960 N.E.2d 449 (Ohio 2012).

³³² *Preschool Development*, 792 N.E.2d at 724 (internal citations omitted).

³³³ *Id.* at 725 (internal citation omitted).

³³⁴ *Id.* (emphasis added).

³³⁵ *Id.* at 724-25.

³³⁶ *Id.* at 727 (Pfeifer, J., dissenting).

The PDL property will most likely not house a daycare center in perpetuity. When the owners sell the property, would its value be diminished without its own curb cut? When faced with properties in a similar location, which would a buyer choose, the property with or without its own access to the roadway? The age-old adage is that the three most important considerations in determining the value of a piece of property are location, location, and location. From the standpoint of real estate values (excepting residential), direct access to a busy street or highway is among the most important aspects of location.³³⁷

The dissent's assertion about the value of direct access to a busy street is somewhat overstated. Some land uses, such as retail, do seek locations that offer a high volume of local traffic, visibility, and convenient accessibility within the road network. But direct access to the main road is not required, as the proliferation of mall out-lot development shows. Other land uses, such as many office developments, chiefly need access to the local road network and may not benefit from traffic volume. Still others, such as industrial uses, often look for access to a highway that provides rapid long-distance mobility; traffic volume is a detriment if it interferes with trucks heading to and from the site. Yet the dissenting opinion does underscore the problem that courts face when legal rules, such as the bar against compensation for diminished traffic volume, conflict with what the real estate market does. Since market-based evidence of use and value does not distinguish between amenities that happen to be available to properties in a given area and ownable rights that are specific to individual tracts of land, how should a court evaluate whether access is reasonable?

C. How can Reasonable Access be Measured?

Access, as we have seen, has a physical dimension and another aspect that is essentially economic. Any measurement of or decision about the reasonableness of access must consider how the access is used. That factor depends, in turn, on the use of the property: a commercial building with a loading dock for semis has different access requirements than a beauty salon. Yet even that can be hard to pin down, because how buildings and tracts of land are used changes over time.

The Texas Supreme Court's recent *Dawmar Partners* decision is an excellent example of how these issues can be analyzed and decided.³³⁸ Dawmar owned an eighty-acre farm tract at highway FM 1695 and Ritchie Road on the outskirts of Hewitt, Texas. The property had direct access to the highway and its frontage roads until the state condemned thirteen acres to widen and elevate FM 1695. At the condemnation trial, Dawmar gave expert evidence that, before the taking, the "highest and best use of the property was to hold it for subsequent commercial development."³³⁹ The property remaining afterward still had access to two public

³³⁷ *Id.* Cf. *Reichelderfer v. Quinn*, 287 U.S. 315, 318-19 (1932) (rejecting takings-clause challenge against use of a public park to build a fire station; although the park may have enhanced the value of neighboring property "the existence of value alone does not generate interests protected by the Constitution against diminution by the government").

³³⁸ *State v. Dawmar Partners, Ltd.*, 267 S.W.3d 875 (Tex. 2008).

³³⁹ *Id.* at 877.

roads.³⁴⁰ Even so, Dawmar gave evidence that “loss of direct access to FM 1695 made the remainder suitable only for residential development.”³⁴¹ The jury evidently found this evidence to be persuasive, awarding over \$400,000 in damages, and the court of appeals affirmed.

On review, the Texas high court first asked whether diminished value resulting from a change in the property’s highest and best use was independently compensable: in other words, whether the government should have to pay whenever its actions decrease the economic value of property. The court’s answer was negative: “diminished value is compensable only when it derives from a constitutionally cognizable injury.”³⁴²

Under Texas law in access cases, that threshold is crossed “only when access is materially and substantially impaired.”³⁴³ So the next question was whether an impairment of access that changed a property’s highest and best use was *necessarily* material and substantial. The court rejected this proposition as well, because it was too close to the diminished-value-as-taking concept: “it would be a rare case in which a reduction of access would not have some impact on the value of property, and the ‘material and substantial’ limitation would be effectively eliminated in the vast majority of cases.”³⁴⁴ On the facts before it the court could hardly have reached another conclusion, because the Dawmar property still had physical access to 3,992 feet of road frontage.³⁴⁵

This brought the Texas court to the final, critical question: whether the reasonableness of access must be evaluated in light of the property’s highest and best use. That standard, the court decided, was too speculative. Instead, its decisions analyzed reasonableness of access “in light of the actual or intended uses of [the] remainder property as reflected by existing uses and improvements and applicable zoning.”³⁴⁶ Hypothetical development plans might be pertinent to appraised value, but not to the threshold legal question: evidence that it would be more difficult to install driveways to unimproved land, or that hypothetical development plans would have to be modified, or that development would be less extensive and more expensive, was “immaterial” to the legal issue of whether a taking had occurred.³⁴⁷ The Dawmar property was zoned for residential use and there was “no evidence of a pending request for a zoning change, existing commercial development plans, or a contract for commercial use.”³⁴⁸ Those facts, the court concluded, made “any future commercial development . . . purely speculative.”³⁴⁹

³⁴⁰ *Id.*

³⁴¹ *Id.* at 877.

³⁴² *Id.* at 878.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 880.

³⁴⁶ *Id.* at 879.

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 880.

³⁴⁹ *Id.* The Dawmar court’s rejection of highest and best use as the reference point for determining reasonable access is significant for transportation planning. Highway designers

Having rejected economic evidence as too conjectural, the *Dawmar* court then turned to the physical dimension. The property still had “2,165 feet of access to Old Ritchie Road” and would gain “1,827 feet of access to New Ritchie Road,” which was to be built as a two-lane road with a center turn lane, curbs, and gutters.³⁵⁰ And there was no evidence of existing driveways, drainage systems, or any other physical features that would make access to these roads “impossible or impracticable.”³⁵¹

Because of this “considerable amount of remaining access to and from the property,” the court noted, it “could not conclude that there is a material and substantial impairment of access . . . without imposing a requirement that there be some degree of direct access to the highway.”³⁵² Lack of access to an arterial road, however, did not equate to a legal impairment of access, and the *Dawmar* court declined to make it one, “because it would be inconsistent with our well-developed case law regarding circuity of travel.”³⁵³

Dawmar involved vacant land, but access to improved properties can be evaluated in a similar way. For example, when two commercial parcels in Lexington, Kentucky lost direct access to a main thoroughfare but retained access to a secondary road named Scott Street, the courts were called on to decide whether the owners had been deprived of reasonable access.³⁵⁴ The appeals court told the lower court to disregard the fact that vehicles on the main road would have to travel an extra nine-tenths of a mile to get to the businesses.³⁵⁵ But it should consider physical

can see existing uses and improvements and plan for access to them. Existing zoning, approved site plans, and comparable acts of local land-use agencies are matters of public record and knowable by the highway authorities. The concept of “highest and best use,” by contrast, is rather fluid. Appraisers screen a property’s potential uses to determine which of them are legally permissible, physically possible, and financially feasible. Of these, the one that is maximally productive (that results in the highest value) is the highest and best use. These tests are applied, in order, to “develop adequate support for [a] highest and best use opinion.” APPRAISAL INST., THE APPRAISAL OF REAL ESTATE 278-79 (13th ed. 2008) (emphasis added). Professional appraisers routinely have differing opinions about highest and best use. Notably, too, the property’s existing zoning is not determinative: an appraiser may conclude that market participants would pay more for a parcel than its current zoning would justify and hold it in anticipation of a zoning change. *Id.* at 282; see, e.g., *Masheter v. Kebe*, 359 N.E.2d 74, 77 (Ohio 1976) (“[A]s a practical matter, the existing zoning regulation does not and may not control the market value of the property involved. If, in the opinion of an expert appraisal witness, an informed, willing purchaser would be presently agreeable to pay more than an amount justified under existing zoning, such evidence is admissible [at trial in an eminent domain action] because it reflects upon the fair market value of the property.”). Since highest and best use is a matter of opinion, not fact, it is not a reliable touchstone for highway planning and design.

³⁵⁰ *Dawmar*, 267 S.W.3d at 880.

³⁵¹ *Id.*

³⁵² *Id.* (emphasis added).

³⁵³ *Id.*

³⁵⁴ *Commonwealth v. Comer*, 824 S.W.2d 881, 882 (Ky. Ct. App. 1991).

³⁵⁵ *Id.* at 883 (“It is well-settled law in Kentucky that reasonable restriction of access, rerouting of public highways, and circuity of travel caused thereby are not legally compensable.”).

access to the business properties: evidence “that Scott Street does not meet modern vehicular requirements, or that it was impassable at certain times, or that it provided insufficient driveway space for commercial vehicles, or that [Scott Street] *in some way other than circuitry* was not reasonable access.”³⁵⁶

Beginning the reasonableness-of-access inquiry with physical factors, and evaluating those factors in light of existing uses, improvements, and zoning, helps to clarify what is really at issue in an access case.

At the most basic level of inquiry, is vehicular movement into and out from the property still possible after the access change? Is there a driveway, or can one reasonably be built, to connect the property to a public road? Does that road link up to the overall road network? If so, then the property has access in the fundamental sense.³⁵⁷

The next level of inquiry considers how an access change affects improvements on the property. If there is pavement within the property (such as a parking lot) that is meant for vehicular use, is there a travel path between that pavement and a public road, or can one reasonably be built? Can the kinds of vehicles that normally would be expected to use the property enter and exit the site and move about on the pavement within it, or would it be practicable to modify the on-site pavement to allow those movements?³⁵⁸ Looking out into the road network, are the physical characteristics of a public road to which a driveway connects, and those of a travel path to the general system of roads, adequate for the kinds of vehicles that normally would be expected to use the improved property? If so, then the *improvements* have access in the expanded sense first recognized in the early Ohio decisions.³⁵⁹

³⁵⁶ *Id.* at 882 (emphasis added).

³⁵⁷ *Cf.* Lexington & Ohio R.R. Co. v. Applegate, 38 Ky. 289, 294 (1839) (stating that a private right in the street is legally attached to the contiguous lots or contiguous ground).

³⁵⁸ Courts differ on how to treat the relationship between on-site improvements and access. In one recent Minnesota appellate case, for example, the court decided that closure of an access point leading to a gravel pit was not a taking because gravel trucks could reach and enter the property at a different location. The alternate entrance was close to the owners’ house and apparently not constructed for use by heavy trucks. Even so, the court framed the issue as “whether there is a reasonably convenient and suitable point of access connecting the *perimeter* of landowners’ property to a public roadway,” reasoning that “[t]he convenience and suitability of ingress and egress pertains to the path between the abutting road and the parcel’s perimeter, not to a preferred point on the interior of the property.” *Oliver v. State*, 760 N.W.2d 912, 917 (Minn. Ct. App. 2009) (emphasis added). An Ohio appellate court, by contrast, found a taking to occur when some newly-installed curbing, which narrowed the driveways into a gas station, required the gasoline tankers that made deliveries to back into or out of the property. *State ex rel. Thielen v. Proctor*, 904 N.E.2d 619, ¶ 18 (Ohio Ct. App. 2008). In that court’s view, the curb so “limited the tanker trucks’ ability to access and leave the property” that it “substantially or unreasonably interfered with [the owner’s] right of access,” resulting in a taking under Ohio law. *Id.* at ¶¶ 18-21. Each of these examples deals with the convenience of movement *within the property* after an access change. In Minnesota, the fact that gravel trucks could still reach and enter the property was dispositive: there was no taking even though travel within the property to the gravel pit had become more difficult. In Ohio, by contrast, gasoline tankers could still reach and enter the property and make deliveries, but the court found a taking because the tankers’ exiting movement was cumbersome.

³⁵⁹ *Cf.* Crawford v. Village of Delaware, 7 Ohio St. 459, 470 (1857) (holding that an abutter who erected buildings in reasonable reliance on the established grade of a street had a

At this point, any inquiry related strictly to access should end. The land itself has access to an abutting public road. And if the law extends to improvements on the land, as it does in a number of states, then they too have access to an abutting public road.³⁶⁰

The few judicial decisions that took their analysis beyond this level got into a different subject: the *convenience* of access to a given property as it is situated within the overall road network. The towing business in *Boehm* and the beauty shop in *Tessler* still had access that was physically adequate to serve both land and improvements.³⁶¹ What changed was the distance traveled to reach an arterial street or highway. Most courts do not consider the convenience of access to an arterial thoroughfare, standing alone, to be a constitutionally-protected property interest.

Finally, there is access to traffic volume. A great weight of judicial authority rejects any assertion of an abutter's right to traffic on the road. Yet real estate experts know that a high volume of local traffic is good for most commercial development, while heavy through traffic benefits retail developments that serve regional areas.³⁶² When property value is damaged by a loss of traffic, savvy claimants often will frame the issue as one of "access" or "loss of frontage." But if analysis shows that the same damage would result if physical access was unaltered but the traffic disappeared, then the true problem is not access, but lack of traffic.

With these principles in mind, we will next consider how the law should resolve the disputes that will arise when an owner of abutting property wants to gain access to a public road in a way that clashes with access management regulations. The following part of this Article will address how specific methods of access management fit within the framework of the law of access. Then, more broadly, the Article will view access from the perspective of the road and explain why some asserted "access rights" merit scant legal protection because they amount to private claims, adverse to the public interest, in the commons of the roadway.

property right of access to the buildings that would constrain the public from materially changing the street grade without paying compensation).

³⁶⁰ See, e.g., *State by Comm'r of Transp. v. Weiswasser*, 693 A.2d 864, 873 (N.J. 1997) (a property owner is entitled "to free and convenient access to his property and the improvements on it"); *Iowa State Highway. Comm'n v. Smith*, 82 N.W.2d 755, 760-61 (Iowa 1957) (holding that two access points were reasonable for filling station and cafe; adjacent residential parcel owned by the Smiths needed to have its own access point so the residential tenants would not have to share the filling station driveways). A problem lurks here, though: some sites are laid out so that vehicles cannot exit from the same driveway that they entered. By designing the site this way, the developer externalized onto the public roadway a vehicle movement (turning around) and a traffic conflict point that, by current standards, should have been kept on-site. Does this mean that the owner should have a right to two driveways while a neighbor, whose site can function with a single driveway, has a right to only one? Why should the first owner's decision about how to lay out his buildings and driveways enlarge the scope of his right, as against the public, in the roadway? This externalization of vehicle conflicts (and development costs) is discussed in more depth *infra* Part VI.B.

³⁶¹ See *supra* Part V.A.4. (discussing the *Boehm*, *Tessler*, and *Teachers Insurance* cases). The gas stations in *Teachers Insurance* may not have had physically adequate access: the opinion does not disclose whether the new travel path within the street system would accommodate tank trucks for gasoline deliveries.

³⁶² THE APPRAISAL OF REAL ESTATE, *supra* note 349, at 222.

VII. THE IMPLICATIONS OF THE LAW OF ACCESS FOR ACCESS MANAGEMENT PROGRAMS

In past years, the commons of the roadway was freely available for access to land. On collector-type roads, with low speeds and low traffic volumes, frequent driveways were not a problem. But arterial roads, which carried greater volumes of traffic going longer distances at higher speeds, were a different story. Highway planners came to see that entering and exiting vehicles impeded the ability of an arterial road to handle through traffic.³⁶³

Even so, the traffic volume and easy mobility offered by an arterial road made property along it attractive for commercial development. Many areas along arterial roads were developed in an era when driveways “were simply built wherever someone wanted one.”³⁶⁴ Individually, each new development—and each new demand on the roadway for access to it—was economically rational for the abutting landowner, and the added burden to the roadway caused by one or two more driveways did not seem large.³⁶⁵ Yet every new conflict point consumed a bit more of the arterial road’s traffic-handling capacity. Ultimately, the unbridled use of arterial roads for land access resulted in their degradation: a classic tragedy of the commons.

Access management is a reassertion of public control over the commons of the roadway. This message comes through clearly in the legislative findings of states adopting comprehensive access management legislation. In New Jersey, for example, the legislature declared that the state highway system’s purpose was to serve as a network of principal arterial routes; that the state had a public trust responsibility to manage these highways to preserve their functional integrity; and

³⁶³ See *supra* Part III.

³⁶⁴ DEMOSTHENES, *supra* note 188, at 4. In some strip-type development, small residential lots fronting on a main road were at first converted directly to commercial use. Later on, the demand for off-street parking led to redevelopment, with individual lots being consolidated into larger commercial parcels. THE GAS STATION IN AMERICA, *supra* note 125, at 209-17 (describing the growth of a commercial strip). In the initial stage, each small parcel had its own driveway, as each needed access. As parcels were consolidated, parking lots typically were built in front of the commercial structures. This process, however, did not necessarily result in a significant change in the number of driveway connections to the road: decisions about how many driveways each parcel would have, and where they were located, were typically made for the benefit of the redeveloped site, not the roadway.

³⁶⁵ A property developer adding one driveway connection to an arterial road, like a herder adding one sheep to a common pasture, may not perceive that his action has any adverse impact on the public resource, but individually little actions with a big aggregate impact are the very hallmark of a tragedy of the commons. The small scope of discrete acts is also no barrier to regulation that is necessary (and justifiable) because of their aggregate or cumulative effect. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (reaffirming that Commerce Clause regulatory power extends to activities, such as individual marijuana use, which Congress had a rational basis to conclude would “taken in the aggregate, substantially affect interstate commerce”); *Env’tl. Def. Ctr., Inc. v. U.S. Env’tl. Prot. Agency*, 344 F.3d 832, 869-72 (9th Cir. 2003) (upholding regulation of stormwater runoff from small construction sites; even if cumulative effect of small discharges was not quantified, EPA may write preventative regulations to protect water quality).

that land development activities and unrestricted access to state highways can impair their purpose and damage the public investment in them.³⁶⁶

Similarly, the state of Washington predicated its decision to adopt an access management program on a finding that “uncontrolled access to the state highway system is a significant contributing factor to the congestion and functional deterioration of the system.”³⁶⁷ As part of the enabling act, its legislature declared that, “The access rights of an owner of property abutting the state highway system are subordinate to the public’s right and interest in a safe and efficient highway system.”³⁶⁸ Other legislatures have made equivalent statements about the need to use access management to protect the functioning of their states’ arterial highways.

In a sense, the term “access management” is somewhat of a misnomer. From the perspective of the roadway, what is happening is traffic flow management: specifically, the management of where and how streams of traffic enter, exit, and move within the flow of traffic on the road. One means of accomplishing this is by regulating the location and design of intersecting driveways and streets. Another means is by governing the volume of traffic that can enter and exit the main flow—for example, by allowing high-volume streams to enter at signalized intersections only. Viewed from the perspective of the adjoining land, however, many of these methods to manage traffic flow on the roadway have the effect of regulating access to property.

In any event, as public authorities implement access management programs they will confront property owners whose expectations were formed in a day when access to roads was largely unregulated. For developing (or redeveloping) tracts of land there will be fewer obstacles to overcome, since new buildings and other site features can be planned with access management policies in mind. In already-developed areas, however, some sites—perhaps many sites—will have driveway connections to arterial roads that do not conform to the new access policies. In that setting the public interest in preserving the commons, by managing arterial roads to preserve their traffic-carrying purpose, will collide with private investment decisions predicated on using that commons for a conflicting land-access purpose.

As the next section will show, many access management techniques can be implemented without impacting any legally-recognized access right. Others, however, may pose legal issues in some jurisdictions. The following sections will suggest ways in which the private right of access may have been overstated and give reasons why the public’s right to manage its transportation system deserves greater weight.

A. The Application of Specific Access Management Techniques

Perhaps the easiest access management technique to apply is the use of median dividers to eliminate a major source of traffic conflicts (and accidents) by preventing left turns. The use of median dividers is squarely supported by well-established law. They do not infringe on any recognized property right. The use of other methods, such as driveway design, to restrict vehicle movements to right turns in and out has not been considered by the courts. Since right-turn-only driveways accomplish the

³⁶⁶ N.J. STAT. § 27:7-90 (West 2010).

³⁶⁷ WASH. REV. CODE 47.50.010 (West 2010).

³⁶⁸ *Id.*

same purpose and have the same effect on abutting property as median dividers, however, the same legal principles should apply to them.

The construction of dedicated turn lanes within the road right-of-way, to separate exiting vehicles from through traffic and provide merging space for ones that are entering, raises no constitutional or property-rights issues. Whether an abutting property owner can be required to pay for that construction, however, or to transfer to the public the additional right-of-way needed for a turn lane, raises questions outside the scope of this Article. Suffice it to say that if the government requires a property owner to transfer land or pay money as a condition of permit approval, there must be a rational connection between the permitted activity and how the land or money is used; there must also be a rough proportionality between the size of the land transfer or payment and the impact of the permitted activity on the public resources.³⁶⁹ Since access management codes typically require permit applications for large-volume driveways to include a professional traffic impact study, these concerns should be addressed as part of the permit process.

From a design standpoint, the use of service roads to provide access to multiple parcels through a single connection to an arterial highway is an elegant solution to the access/mobility dilemma. In those states that adhere to the “circuitry” rule, the substitution of access to a publicly-maintained service road for direct access to the main thoroughfare should be viewed as a permissible change to the road network, not a compensable interference with property rights. Even in states that have moved away from a bright-line rule against compensating for increased circuitry of travel, courts have sustained the use of a service road if the travel path to the main highway—considered together with any other roadway access—is reasonably suitable to the property’s use.

When a parcel with frontage on two roads is allowed to connect to the less traveled one only, the legal analysis in most jurisdictions should be like that for a service road. Courts in a few states, however, do consider the access right to apply to each abutting road;³⁷⁰ in those jurisdictions a taking will likely be found unless right-in and right-out access to the busier road is also allowed.

³⁶⁹ See, e.g., David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 356-65 (2007) (describing “rational nexus” and “rough proportionality” requirements for land development conditions).

³⁷⁰ There can be a definitional question about what the abutting road is. During the heyday of the freeway-building era, “outer roadways” were sometimes built within an existing highway right of way and used to provide land access, while the inner lanes became a limited-access highway that connected to the outer roadways at interchanges only. In effect, the outer and inner roadways were a single public facility with “through” and “local” lanes. Access to the local part (the outer roadway) was viewed as access to the abutting road, and the separation between the local and through lanes was analogous to a median divider. See, e.g., *State ex rel. State Highway Comm’n v. Brockfeld*, 388 S.W.2d 862, 864-65 (Mo. 1965) (preclusion of access to through lanes “without compensation to an abutter who is furnished unrestricted right of access to a lane of the highway upon which his property abuts and which connects to the restricted lanes at designated points” was not a taking; abutters had access to the “outer road” along the entire front of their property; “any compensation resulting from this situation would have to be for circuitry of travel rather than for loss of access to the highway”). As the *Brockfeld* court perceptively noted, “[t]he real basis for complaint of an abutting owner, which makes a difference to him if he operates a commercial enterprise, is diversion of traffic,” but the abutter “has no right to a continuation of the flow of traffic directly in front of his property.” *Id.* at 865.

A somewhat different question is presented when an access management code will allow direct highway access for a low-volume driveway, such as might serve a residential property or a small office, but requires side-road or other indirect access for a high-volume driveway. In that case direct access to the highway is regulated—based on the traffic volume of the proposed driveway—but not denied. If the access management rule is being applied on a prospective basis, so long as some land uses qualify for direct access to each highway, even those jurisdictions that recognize a legal right of access to every abutting road should be less inclined to find a taking.

Yet another access management tool is the use, by neighboring property owners, of a single shared driveway connection to an arterial road. Like many other methods, the shared-driveway concept is most readily applied to a new development or redevelopment, where neighbors often enter into reciprocal easements for access, parking, the operation of common areas, and similar matters.³⁷¹ Required sharing of a driveway as a condition of site plan approval for the enlargement of an existing use has been allowed, provided that reasonable limits on “neighboring” traffic volume were applied.³⁷² It has also been upheld as a permit condition where each neighbor that would be sharing the proposed driveway had alternative, if less desirable, access to another road.³⁷³ When there is no alternative access, however, a court may well find the denial of *any* permitted connection to be a taking: if the neighbors do not agree to a shared driveway, then some other form of access, such as a right-in and right-out driveway, would have to be allowed to each of them.³⁷⁴

It is not uncommon for access management tools, such as the installation of medians and the reconfiguration of driveway connections, to be implemented along with a general street or highway improvement project. If the government uses its eminent domain power to acquire land for the project, there is a risk that the effects of police-power actions affecting access, which would not be compensable standing on their own, may become intermingled with the effects of the taking when just compensation is being determined. Most judicial decisions that have squarely faced this problem require the two matters to be kept separate: a change in access to property that is not in itself a taking cannot be considered when determining compensation for another act that is a taking.³⁷⁵

³⁷¹ See, e.g., Gary A. Glick & Scott L. Grossfeld, *Applying Reciprocal Easement Agreements to Retail Projects*, 31 L.A. LAWYER 18, Nov. 2008, at 18 (discussing use of reciprocal easement agreements in retail development).

³⁷² See *Holmes v. Planning Bd.*, 433 N.Y.S.2d 587 (App. Div. 1980).

³⁷³ See *Paradyne Corp. v. State*, 528 So. 2d 921, 926-27 (Fla. Dist. Ct. App. 1988).

³⁷⁴ Where design considerations allow one, neighboring property owners might agree to a joint *full-movement* driveway in lieu of individual right-in and right-out connections.

³⁷⁵ See, e.g., *State v. Marlton Plaza Assocs., L.P.*, 44 A.3d 626, 642-43 (N.J. Super. Ct. App. Div. 2012) (claim for impaired internal traffic flow in shopping center improper in eminent domain case; it should have been raised in previous administrative driveway closure proceeding, and the driveway closure itself did not amount to a taking); *State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206, 215 (Ind. 2009) (partial taking did not “[open] the door” to damages claim for impaired shopping center traffic flow that resulted from the construction of a median divider); *County of Anoka v. Blaine Bldg. Corp.*, 566 N.W.2d 331, 334-35 (Minn. 1997) (Even if a prospective buyer would consider access to traffic, the court was “not persuaded that the policy of evidentiary inclusiveness in market value determinations should overcome the longstanding rule that loss of traffic access from the construction of a median is

Perhaps the most difficult problem is presented by densely-developed areas where parcels have access to an arterial road only and there is little room for physical changes within the road right-of-way. In such places the only option may be to “grandfather” existing connections that were lawful when built, and to defer required compliance with the access management code until a driveway’s traffic volume increases (due, for example, to a change in or expansion of the property’s use). New zoning rules have been applied in this fashion for many years and in that context the method has solid legal support.³⁷⁶

This method, by tolerating the continued use of already-built improvements but preventing enlargement of the nonconformity, allows new access regulations to be phased in as land uses change and the useful life of existing buildings comes to an end. At that point, any reliance interest would be small, as structures built with reference to the old access regulations have little current value. Furthermore, even if the original permit is treated like an implicit agreement to let the owner to perpetuate the driveway, the new use—with its increased traffic volume and correspondingly greater impact on the roadway—alters the agreement’s terms in a way that should allow the public authorities to revisit it.³⁷⁷

not a compensable taking,” and letting the owners “introduce traffic access into the determination of market value would allow them to do indirectly what they cannot do directly: be compensated for the loss of traffic access from one side of the roadway when they retain access to the other side.”); 4A JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 14A.01(6)(a) (rev. 3d ed., 1997) (“[T]he state may . . . concurrent with a compensable taking in a condemnation proceeding, validly exercise the police power for traffic control and public safety for which there may be no compensation, even if it affects the method of ingress and egress to the affected property.”). Courts that take the opposite tack give primacy to compensation without asking the logically prior question as to whether there is anything to be compensated for. *E.g.*, *State v. Moore*, 382 So.2d 543, 545 (Ala. 1980) (allowing evidence of loss in traffic flow to business resulting from a partial condemnation and construction of a median divider, “not as a separate item of damage, but as a circumstance ‘to enter into the question of the effect of the [taking] upon the entire tract’”).

³⁷⁶ *See, e.g., In re P.M.S. Assets, Ltd. v. Zoning Bd. of Appeals*, 774 N.E.2d 204, 205 (N.Y. 2002) (holding that the zoning board properly found that new owner’s lighting and design business impermissibly exceeded the scope of the previous nonconforming moving and storage use: “While nonconforming uses of property are tolerated, the overriding policy of zoning is aimed at their eventual elimination.”); Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1235-38 (2009) (discussing amortization of prior nonconforming uses).

³⁷⁷ By their terms, driveway permits are often explicitly revocable, and courts normally do not view them as contracts. *See, e.g., City of Winston-Salem v. Robertson*, 344 S.E.2d 838, 839 (N.C. Ct. App. 1987) (holding that driveway permit was a regulatory action undertaken for safety purposes, not an agreement for the owner to retain access at a particular point). Nonetheless, an owner affected by a permit revocation may argue estoppel as a reason to prevent a driveway closure. *See, e.g., City of San Antonio v. TPLP Office Park Props.*, 218 S.W.3d 60, 67 (Tex. 2007) (“TPLP argues that justice requires application of the doctrine of estoppel in this case because the City approved the driveway by approving the plat depicting it in 1975, and TPLP likely would have relied on the plat to confirm access to the property when it decided to purchase the property and spend over \$1 million on improvements.”). Like reliance, however, estoppel and other fairness-based arguments lose their force when the property owner wants to change the status quo by significantly altering the use of the property and the driveway.

B. Direct Access to Arterial Roads as an Appropriation of the Commons to Private Use

Zoning law has been explained as a way of making sure that purely private land-use decisions do not end up producing “a right thing in the wrong place,” like a factory in the midst of a residential neighborhood.³⁷⁸ Access management is somewhat like that: one of its aims is to concentrate the land access function onto collector-type roads and thereby prevent it from causing conflicts with traffic mobility on arterial-type roads. Yet unlike zoning, which regulates the use of private property, access management regulates the use of *public* property by specifying where and how vehicular connections to the roads can be made. Accordingly, courts normally have not applied the law of regulatory takings to roadway access issues.³⁷⁹

³⁷⁸ See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (The propriety of a zoning regulation, “like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”) (internal citations omitted).

³⁷⁹ *Garrett v. City of Topeka* seems to be the only case in which a state’s high court used regulatory-takings analysis to decide an access-related claim. *Garrett v. City of Topeka*, 916 P.2d 21 (Kan. 1996). In *Garrett* an owner of property that was suitable for commercial development sued in inverse condemnation after the city enacted legislation prohibiting commercial driveways to certain arterial streets and then failed to complete an interior “ring road” that was meant to provide alternate access. *Id.* at 26-29. In its majority opinion, the Kansas Supreme Court decided that the facts stated a claim for an economic regulatory taking. *Id.* at 31-35. It then employed a balancing test—the details of which it did not articulate—and concluded that a regulatory taking had occurred because the economic burden on the property owner outweighed the public benefit from the city’s actions. *Id.* at 35-36. The *Garrett* dissent argued that regulatory takings law did not apply because the city’s actions did not regulate how the owner could use her land; rather, the case involved restriction of access to an abutting street, an area of law that had its own well-developed body of cases. *Id.* at 38-39 (McFarland, J., dissenting). In subsequent decisions the Kansas court limited *Garrett* to its facts, emphasizing the importance of Topeka’s failure to complete the commercial “ring road” despite assessing the owner for the project. See *Eberth v. Carlson*, 971 P.2d 1182, 1189 (Kan. 1999) (“We limit the application of *Garrett* to its specific facts.”); *City of Wichita v. McDonald’s Corp.*, 971 P.2d 1189, 1200 (Kan. 1999) (noting that the “‘economic impact’ analysis espoused by *Garrett* was new to condemnation cases in Kansas”). A recent New Jersey appellate decision considered access law within the *Penn Central* regulatory-takings framework. The appeals court reasoned that, because a property owner “does not have an absolute right to access the highway from any particular point on his or her property,” the owner’s “interests in any particular access point are not sufficiently bound up with their reasonable expectations of ownership to constitute ‘property’ for Fifth Amendment purposes.” From this, it followed that “modification or revocation of an access point, so long as free and reasonable access remains, does not constitute a [regulatory] taking.” *State v. Marlton Plaza Assocs., L.P.*, 44 A.3d 626, 636-37 (N.J. Super. Ct. App. Div. 2012) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978)). The appeals court might also have concluded that, since there is no right to access at a particular point, the owner could have no “distinct investment-backed expectation” with regard to the particular driveway location. *Cf. Penn Cent. Transp. Co.*, 438 U.S. at 124, 127 (discussing “distinct investment-backed expectations” in the regulatory-takings analysis). In any event, the *Garrett* dissent’s point remains valid: the *Penn Central* analysis should not apply because governmental control

Instead, an independent body of law has developed in this area, with courts typically seeking to determine whether the access allowed by the government is reasonable.³⁸⁰

Disputes about access nearly always arise in a setting where a property owner is seeking relief due to some governmental action, so it is not surprising that most case law focuses on the private property abutting the road and the property owner's rights. But the question should be viewed from the other perspective, as well. In the context of access management, what are the public's rights? Does a right of access to *a way* that is open to public travel necessarily encompass access to a multi-million-dollar transportation facility? To what extent can the public resist private claims to the roadway that conflict with the public interest?

Suppose a vacant parcel of land at the corner of an arterial road and a collector road is being developed with a fast food restaurant. The restaurant will handle a large amount of vehicle traffic, generating 240 trips per hour at the evening peak.³⁸¹ The site could be laid out so that vehicles reach it from the collector road, or it could be laid out with access from the arterial road. Either layout provides a travel path that is physically adequate for the types of customer and delivery vehicles that normally go to a fast food restaurant. In most jurisdictions, either site layout would have "access" as a matter of law. So if an access management code mandated the use of the collector road access option, public authorities could require the site to be developed that way and not face a takings claim.

Suppose, however, that the jurisdiction is one where a property owner has an access right to *each* abutting road. There, even though collector road access would be entirely adequate for the parcel's intended use, prohibiting a driveway to the arterial road would abridge a property right. In that setting the access right encompasses more than just physically suitable access: it also entails a right to draw traffic directly from, and to discharge traffic directly onto, an abutting arterial road.

Viewed from within the proposed restaurant site, that version of the access right means convenient customer access. But viewed from the arterial road, it means traffic conflicts—*four conflicts a minute* during evening rush hour, detracting from the road's finite capacity to handle through traffic. In addition to physically suitable access, then, the abutter in that jurisdiction has a right to consume highway capacity by creating traffic conflicts on an arterial road. If direct access to an arterial (or compensation for the loss of it) can be insisted upon, even when another adequate means of access is available, then the law has allowed abutting businesses to stake a claim to the roadway commons that is adverse to the general public.

of a public road (and access to it) differs fundamentally from regulation directed at private property, even though access decisions may incidentally affect how private property practically can be used. *Cf.* Clifton v. Village of Blanchester, 964 N.E.2d 414, ¶ 24 (Ohio 2012) (“[W]hen a government’s . . . regulation of property causes incidental damage to an adjacent but unregulated property, the damage is not attributable to the government actor for the purpose of supporting a takings claim.”).

³⁸⁰ What “access” is, and how “reasonable access” is evaluated, are two important matters in this determination that have received little systematic inquiry. This Article is meant to contribute to a better understanding of those subjects.

³⁸¹ The hypothetical trip rate is drawn from Table 1 of the San Diego Land Development Code's Trip Generation Manual. SAN DIEGO MUNICIPAL CODE, LAND DEVELOPMENT CODE: TRIP GENERATION 3-6 (rev. May 2003), *available at* <http://www.sandiego.gov/planning/pdf/tripmanual.pdf>.

Let us suppose, instead, that the law of the jurisdiction requires reasonable access only, and that the restaurant was built thirty years ago with driveways to both roads. Suppose, also, that the local government is planning a road project in which the driveway to the arterial road will be closed off and the driveway to the collector road widened to handle the additional traffic. This new arrangement will be physically adequate for customer and delivery vehicles, and the site improvements (the building, the drive-through window, the parking lot) will still function for their intended purpose. Most courts should view it as “reasonable” or “suitable” access. Some, however, might think the governmental act of closing the driveway to the arterial road must be a taking of some sort. Yet why should the result be any different than the vacant-land hypothetical?

The answer might be that the court is protecting a reliance interest: it believes that developed property oriented to arterial-road access should be left undisturbed. This still means, however, that the abutting owner is allowed a right to use the roadway commons in a manner that is adverse to the public. Although the court may be rejecting new claims for direct driveway connections to the arterial when other access is available, it is honoring claims that were staked in the past—even though the traffic conflicts they create are avoidable. If so, then a past arrogation to private use of the common resource of roadway capacity is given precedence over present efforts to conserve that resource.

As the 1947 Public Roads Administration study showed, strip-type commercial development has had a significantly negative effect on the traffic-handling capacity of arterial roads since the early days of the automotive era.³⁸² Yet back then, and still for decades afterward, real estate developers grabbed up roadway capacity that was freely available. Instead of creating internal streets to provide access to individual lots, developers were allowed to use public roads for that function, splitting off lots along the frontage. Small commercial parcels might have multiple driveways; each parking lot aisle or even every parking space might have its own connection to the public road. Under the permissive circumstances of that era, developers did not have to bear the cost of providing a paved surface for access to the lots they split off, nor were they required to create lots that were large enough to keep on-site all the movements of vehicles using the site. Rather, they were allowed to externalize those vehicle movements—and the conflicts with through traffic that they engendered—to the public roadway.³⁸³

Going back to our hypothetical, we have assumed our fast-food restaurant has (or will have) ingress and egress via a collector road that is physically suitable for its vendors and patrons. If the restaurant also a right of direct access to the arterial road, it might be framed as follows: *in addition* to having access that is physically adequate for the property’s use, the abutter has a right to create four vehicle conflicts

³⁸² See *supra* Part III.

³⁸³ The Montana Supreme Court recently dealt with this externalization problem in an inverse condemnation case that arose when a highway widening project caused an abutting owner, Faith Malipeli, to lose the ability to turn vehicles around in a previously-unused part of the public right-of-way. *Malipeli v. State*, 2012 MT 181, ¶¶ 1-8, 366 Mont. 69, ¶¶ 1-8 (2012). The court decided as a matter of law that Malipeli had “no property interest in the use of the public right-of-way to turn her vehicles around,” *id.* at ¶ 25, because “it is up to the landowner to provide enough room on his or her property to maneuver vehicles” into position for a safe movement onto the highway. *Id.* at ¶¶ 23, 25-27.

per minute on the arterial roadway. Viewed in that way, a preeminent “right” of direct access appears to be an unwarranted intrusion into the arterial road, and perhaps an unsafe one as well if the vehicle conflicts result in accidents.³⁸⁴

C. Accessibility: Claiming a Property Interest in the Road Network

As we have seen, for well over a century courts have drawn a distinction between access to land—the right to ingress and egress—and accessibility within the road network. Early cases drew the line between special damages arising from the loss of access to land, which were compensable, and general damages resulting from a loss of accessibility within the road network, which were not. Today most courts still reject network-level access-loss claims under the “circuitry of travel” rubric.

Some might contend that this distinction is an artificial way to impose a limit on liability when damages truly do exist. Courts have long recognized, however, that the existence of damage does not necessarily mean there also has been an injury to a legally-protected interest.³⁸⁵ As Justice Oliver Wendell Holmes acutely observed, “Government 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.”³⁸⁶

The importance of drawing a clear line against compensating for loss in property value due to network-level access changes becomes particularly compelling when public planning needs are considered. Public choices about which roadway improvement projects to undertake, and about how they should be designed and

³⁸⁴ One interesting Indiana decision held that an abutter could be liable for having too many direct connections to the highway. The *Holiday Rambler* case involved a traffic accident on State Route 19 outside Utilimaster’s manufacturing plant. *Holiday Rambler Corp. v. Gessinger*, 541 N.E.2d 559 (Ind. Ct. App. 1989). Utilimaster had four driveways within its 800 feet of frontage on the highway through which its employees would leave when their shift ended. *Id.* at 561. The accident occurred when one exiting employee stopped his truck part-way into the road to avoid hitting vehicles exiting from the next driveway; a driver on SR 19, Martha Martin, hit the truck and then spun into the plaintiff’s motorcycle. *Id.* Utilimaster argued that it had no duty to control Martin’s conduct and therefore no liability. *Id.* But the court held that the company did have a duty to exercise reasonable care to prevent a defective or dangerous condition on its property from causing injury to persons traveling on SR 19; whether allowing hundreds of employees to exit at the same time through four closely-spaced driveways breached that duty was a question of fact for the jury. *Id.* at 562. The plaintiff contended that the State of Indiana was also liable for failing to close some of Utilimaster’s access points to the highway and requiring it to use an internal service drive. *Id.* at 564. The court held, however, that driveway permitting was a discretionary function for which Indiana could not be liable under that state’s tort claims act. *Id.* The dissent in *Holiday Rambler* felt that Utilimaster’s conduct was simply that of operating a business, and the “exodus of employees” at the end of their shift was a normal incident to that business operation. *Id.* at 565 (Hoffman, J., dissenting). But the majority believed the company had a duty to control the flow of employee vehicles leaving its property to avoid creating a hazard on the highway. *Id.* at 562. This result suggests that the driveway location and spacing requirements of an access management code may come to define a duty of care, or at least be evidence of a standard of care, for abutting owners.

³⁸⁵ See, e.g., *Mich. Dep’t of Transp. v. Tomkins*, 749 N.W.2d 716, 729-30 (Mich. 2008) (Historically, those detrimental effects of a public works project that were experienced by the public generally were not compensable; such incidental losses are considered to be “*damnum absque injuria*—loss without injury.”).

³⁸⁶ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

built, are heavily influenced by cost. But cost cannot be estimated if a decision about whether access rights have been taken depends on a later, fact-specific judicial finding about the “reasonableness” of the access to each parcel whose position within the roadway network is affected by the road project.

In any event, such criticism of the circuitry rule misses the essential point. A claim of right to an advantageous location within the road network is weak at best, because the network is not individual property: it is community property, built and enlarged and maintained and used by the public.³⁸⁷ A change in how the parts of this road network connect together might enhance the value of some properties; but the public can make no claim to the increment of private property value added by the change. So if a change in the connectivity of the network diminishes the value of other properties, the public should not be subject to a claim for the increment of value that is lost, either.³⁸⁸

If we accept the fundamental idea that the road network is a public creation, then when a court allows an owner of property with a commercially advantageous location within the road network to insist that the public keep the network’s linkages the same (relative to her property) or pay damages, it allows that owner to stake out a personal claim of right in the public space. Obviously the improvements on the property cost money to build, as they would have anywhere else. But an advantageous location within the road network is not the fruit of any individual property owner’s labor or investment: it is the product of public investment and the overall community’s development.³⁸⁹ The existence of those locations, and their

³⁸⁷ Cf. *Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932) (Courts are averse to equating property value with a property right, particularly “where the question is not of private rights alone, but the value was both created and diminished as an incident of the operations of the government” and “if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated, the powers of government would be exhausted by their exercise.”).

³⁸⁸ There is a potential connection between market value and the ad valorem property tax, which rises or falls in proportion to changes in assessed value. But that tax is not directly on the value of the property: assessed value is essentially a measuring stick used to gauge what is being taxed, such as the privilege of membership in a particular community. See, e.g., *Fidelity & Columbia Trust Co. v. City of Louisville*, 245 U.S. 54, 59 (1917) (noting “the distinction between a tax measured by certain property and a tax on that property”); *Ohio Grocers Assoc. v. Levin*, 916 N.E.2d 446, ¶¶ 17-21 (Ohio 2009) (distinguishing between “a tax upon a certain factor” and “a tax upon a privilege *measured by* that factor”) (emphasis in original). If there is a connection between market value added (or subtracted) by a property’s change in position within the road network and its assessed value, the ad valorem property tax would increase or decrease as a result. But payment of an annual property tax is different than sharing the sale price (the “value”) of a property. If the public has no right to collect each dollar of a network-related increase in value when a property is sold, it should have no duty to pay each dollar of network-related loss in value, either.

³⁸⁹ The role of the public in creating private property value was highlighted in a different context in the *Penn Central* case, where New York’s high court noted that “absent . . . heavy public governmental investment in . . . connecting transportation, it is indisputable that the terminal property would be worth but a fraction of its current economic value.” *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1276 (N.Y. 1977). Any analysis of whether government regulation excessively interfered with *Penn Central*’s ability to earn a reasonable return from *its* investment in the property, in the court’s view, must factor out the *public* investment that made Grand Central Terminal “a major transportation nexus [and] had

commercial exploitability, is every bit as fortuitous as the volume of traffic on the road.³⁹⁰

The transportation grid and the pattern of land uses overlaid upon it evolved over time—and continue to evolve—as the product of the land development decisions of whole neighborhoods of property owners, of road-building decisions made by the public, periods of regional economic growth and decline, and even the cumulative choices of a multitude of individual travelers seeking a most-preferred route to their destinations. The road network developed at the community level, and the benefits and detriments of any changes to it, although they are felt differently by different individuals, also occur at the community level. Accordingly, relative accessibility within the road network should not be considered a subject of individual property rights.³⁹¹

VIII. CONCLUSION

The law of access is a judicial effort to balance the interests of owners who developed their properties with reference to an existing roadway—and have reasons to want things to stay the same—against the public’s interest in making changes to improve the roadway or the overall road network.

It emerged during an era in which the common law *rejected* the idea that an abutter had any legal right to complain about a use of the street for proper street purposes.

In reaction, about half the states amended their constitutions to require compensation whenever private property was “taken or damaged” for public use. These amendments did not purport to enlarge the concept of “property.” Rather, they widened the class of compensable events to include situations in which private

contributed substantially to the site’s value.” John J. Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402, 410 (1977).

³⁹⁰ See *Bopp v. State*, 227 N.E.2d 37, 39 (N.Y. 1967) (traffic volume “may increase the value of the property, but any such increase is purely fortuitous in the sense that it does not result from any expenditure of effort or funds on the part of the property owner”); see also *N.Y. State Thruway Auth. v. Ashley Motor Court, Inc.*, 176 N.E.2d 566, 569 (N.Y. 1961) (statute restricting billboards directed at drivers on the Thruway held to be constitutional; even if the legislation abrogated a property right, “[w]hat was taken by the regulation . . . was the value which the Thruway itself had added to the land and of this the defendant cannot be heard to complain”).

³⁹¹ By way of analogy, government regulations that apply at the community level are not “takings” of private property rights because the resulting benefits and burdens are widespread. As the U.S. Supreme Court put it:

Even where, the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby “[secures] an average reciprocity of advantage.” It is for this reason that zoning does not constitute a “taking.” While zoning at times reduces individual property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 147 (1978) (internal citation omitted).

property was damaged for public use even though none of it was physically occupied (“taken”) by the government.

These changes to state constitutions opened the door to claims that property abutting a roadway was “damaged” if street improvements interfered with access to it. Yet courts held that property abutting a public road was damaged, in the constitutional sense, only when movement between it and the roadway was obstructed. Once the movement onto the roadway was completed, an abutting property owner had no greater right to easy or direct or convenient travel than any other member of the public.³⁹²

What courts mean by “access,” however, is often not well defined. Because certain attributes created by the community as a whole—such as the “arterialness” of arterial roads, traffic volume, and easy accessibility within the road network—add value to private real estate, they can become conflated with “access” and mistakenly seen as aspects of a private property right. Commercial interests have exerted steady pressure to enlarge the scope of the access right to include these attributes. If that happens, then the public’s assertion of greater control over the roadway commons to preserve the traffic-handling capacity of important thoroughfares may be viewed as a taking of access rights. Consequently, the public would have to pay for the right to preserve the roadway network it created from traffic interference caused by opportunistic development that the network attracted.

The goal of this Article is to create a clearer frame of reference for access-related decisions. Different jurisdictions may well come to different conclusions about the scope of the access right and, consequently, about where to draw the line between regulation of access to the publicly-built road network and a taking of private property.³⁹³ No matter where they fall in the balance, however, those decisions should be a product of thoughtful and well-informed deliberation and cognizant of the public’s right to conserve its roadways.

³⁹² One notable critic of this concept focused on an unusual instance where an abutter had access to a public road that did not connect to the network. Stoebeck, *supra* note 107, at 735. Such oddities are a weak basis on which to build a network-level access right, however. One might more precisely say that a public road that does not serve a transportation function—by connecting to the overall road network or to a transportation node such as a ferry or an airport—is not a road at all, because it is not a public “way.”

³⁹³ *Cf. Sauer v. City of New York*, 206 U.S. 536, 548 (1907) (“The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States . . . and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy.”).