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Repository Citation

William B. Stoebuck, *Condemnation of Riparian Rights, A Species of Taking Without Touching*, 30 La. L. Rev. (1970)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol30/iss3/3>

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CONDEMNATION OF RIPARIAN RIGHTS, A SPECIES OF TAKING WITHOUT TOUCHING

William B. Stoebuck*

I. INTRODUCTION

That access to a body of water is a substantial increment of the value of land, "wealth" in the economic sense, will not be doubted by anyone familiar with the price of waterfront land. The desirable and valuable uses of standing or flowing water vary, of course, according to the location of the adjacent land, as well as the character of the body of water. Commercial navigation may be the valuable attribute at one place; waterpower, at another place; use in manufacturing, at another; floating logs, at another; recreational pursuits, at another, and so forth.

To the extent the legal system recognizes and protects the uses of water, they become rights inhering in the ownership of land: that form of property known as "riparian rights." These may be succinctly categorized as the continuation of the body of water reasonably or substantially in its natural state; a limited use of the water; access to the water; accretion and reliction; seaweed; and, under statutes in most states, a preference right to purchase state-owned underwater land adjacent to the owner's upland.¹ This formulation must be taken as descriptive only and not definitive. Obviously, the categories overlap, and we find the listing of riparian rights varies from case to case and from state to state.² Moreover, local doctrines may radically alter the extent of riparian rights; an example is found in those states that hold that a riparian owner on navigable water has no right to cross adjacent state-owned underwater beds to reach the navigable part.³ These matters are pointed out simply to show that riparian rights, as recognized in a given jurisdiction, are forms of property appurtenant to the ownership of land and to admonish that their extent and nature is a matter far too large to be cov-

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1. 1 H. FARNHAM, *WATERS AND WATER RIGHTS* 278-347 (1904); Wiel, *Running Water*, 22 HARV. L. REV. 190 (1909), is a well known study of the right to use running water.

2. *E.g.*, *Thurston v. City of Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965), which contains a formulation quite different from that above, which is adapted from 1 H. FARNHAM, *WATERS AND WATER RIGHTS* 278-347 (1904).

3. *Port of Seattle v. Oregon & W.R.R.*, 255 U.S. 56 (1921); *Henry Dalton & Sons Co. v. City of Oakland*, 168 Cal. 463, 143 P. 721 (1914); *Bilger v. State*, 63 Wash. 457, 116 P. 19 (1911); *Annot.*, 21 A.L.R. 206, 212-15 (1922).

ered here. It took Mr. Farnham three large volumes to state the law of water rights in 1904, and no American writer has seen fit to repeat the task since then.

Riparian rights attach to "riparian land"; that is, to land having a boundary on a stream, on a pond or lake, or on tidal water. "Littoral" is sometimes used to refer to land on a lake or on tidal water, but "riparian" is sufficient and simpler and therefore preferable. The term "upland" will be adopted here to refer to the dry, or fast, land bounding the body of water. "Shorelands" describes the more or less narrow band where, on salt water, the tide ebbs and flows,⁴ and, on fresh water, fluctuations in water level cover and uncover the upland edge. Other words for the same thing, such as "tidelands" and "foreshore," seem superfluous. Under the body of water, out beyond the shoreland, it is proper to speak of the underwater land as the "bed."

That body of law known as the law of eminent domain, is precisely speaking, not much about eminent domain. Eminent domain in its narrow sense is the power of a government to take from persons under its jurisdiction things and property in things. It is an inherent power of sovereignty enjoyed by the federal government, by the states, and indeed by political societies in general.⁵ Hardly any cases deal with the existence or nature of this inherent power. Rather, the litigated questions are posed by federal or state constitutional limitations on the power, such as in the fifth amendment to the United States Constitution, which says: "nor shall [1] private property [2] be taken [3] for public use, [4] without just compensation." The ultimate question litigated is whether compensation shall be given or how much shall be given. Determination of the question whether to give compensation will turn upon resolution of issues of "taking" or "property." This brings us to the focal point of the present investigation, where the difficult issues usually have to do with whether governmental activity affects riparian "property" and occasionally whether the activity is a "taking."

4. We should acknowledge that there are still some unanswered questions about the precise extent of tidal shorelands. See *Hughes v. State*, 67 Wash.2d 799, 410 P.2d 20 (1966), *rev'd*, 389 U.S. 290 (1967); Corker, *Where Does the Beach Begin, and to What Extent is This a Federal Question*, 42 WASH. L. REV. 33 (1967).

5. *United States v. Carmack*, 329 U.S. 230, 241-42 (1946); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954).

One might suppose that if governmental activity diminished a use that the jurisdiction recognized as a riparian right, there would inevitably be a taking of a property right. This article has been written chiefly because that has not in fact always been the course of the law. The reason it has not been lies in a disparity between the concept "property" as developed in eminent domain cases and the concept "property" as understood in the law generally. Law students accept after their first class of property law that "property" is a legal construct, denoting not things, but legal rights arising with respect to things, a proposition not doubted at least since Blackstone's time.⁶ With this general understanding, why should it matter that government activity affecting riparian rights, for instance, the pollution of a stream or the lowering of water level, probably will not cause the slightest physical invasion or appropriation of land? Indeed, close reasoning would suggest that, if "property" is intangible, its "taking" could not be a physical act, though it might be caused by physical acts that deprived the owner of enjoying his rights.

Early leading American condemnation cases established the principle that there could be no taking of property without physical invasion and even appropriation to governmental use. *Callender v. Marsh*⁷ put the matter succinctly in 1823: "It [a taking of property] has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government." In 1843 the opinion in *Monongahela Navigation Co. v. Coons*,⁸ written by the influential Chief Justice Gibson, applied the same principles to a riparian owner. The defendant, chartered by the state and invested with the power of eminent domain, built a dam, the headwaters of which backed up in front of the plaintiff's upper riparian land, lessening the plaintiff's fall of water. No taking, said Gibson, because there was no physical appropriation of land to public use. Note also that, in both of these cases, the courts blended the elements of "taking" and "property"; i.e., they did not analyze whether the interest affected was property separately from the question of whether it was taken. This is still a common shortcoming of the

6. See, e.g., *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945): "the group of rights inhering in the citizen's relation to the physical thing"; 2 C. BLACKSTONE, COMMENTARIES, *2; Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11 (1927).

7. 18 MASS. (1 PICK.) 418, 430 (1823).

8. 6 W. & S. (Pa.) 101 (1843).

reasoning in many, if not most, decisions. Analysis would be more precise and results more consistent if the courts would first determine if the interest affected is property. Then, if it is, there will be a taking if that interest is destroyed or substantially diminished.

The subsequent history of riparian-right cases is largely a story of increasing recognition that intangible rights are property capable of being taken. Riparian rights belong to a family of intangibles which, if they are taken at all, will be taken without a touching of the owner's land—by non-trespassory acts of the state. Others in the family include street access; lateral support; light, air, and a view; easements across neighboring land; freedom from certain nuisance-type activities; and, under one line of analysis, freedom from aerial overflights. With all these interests, it can be said the law of eminent domain has tended increasingly to recognize them as forms of property.⁹ There probably has been a more complete recognition of riparian rights than of the others. However, the navigation-servitude doctrine, to be discussed presently, has cut deeply into the availability of compensation in the riparian cases.

In broad outline, then, we are working in an area of eminent domain law that involves the taking of intangible interests appurtenant to the holding of land, by non-trespassory acts of the state. Within the language of constitutional limitations on the power of eminent domain, we are concerned mainly with the concept of "property" and secondarily with the concept of a "taking" or possibly, in the twenty-six states whose constitutions use the word,¹⁰ of a "damaging." In historical perspective, we

9. See Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967); Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEXAS L. REV. 733 (1969).

10. "Damaged" or an equivalent word appears in the following state constitutions: ALA. CONST. art. XII § 235 (applies only to damagings by municipal and private corporations and individuals); ALASKA CONST. art. I, § 18; ARIZ. CONST. art. II, § 17; ARK. CONST. art. 2, § 22; CALIF. CONST. art. I, § 14; COLO. CONST. art. II, § 15; GA. CONST. art. I, § III, ¶ I; ILL. CONST. art. II, § 13; KY. CONST., § 242 (applies only to damagings by municipal and private corporations and individuals); LA. CONST. art. I, § 2; MINN. CONST. art. I, § 13; MISS. CONST. art. 3, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. III, § 14; NEB. CONST. art. I, § 21; N. M. CONST. art. II, § 20; N. DAK. CONST. art. I, § 14; OKLA. CONST. art. II, § 24; PENN. CONST. art. XVI, § 8 (applies only to damagings by municipal and private corporations and individuals); S. DAK. CONST. art. VI, § 13; TEX. CONST. art. I, § 17; UTAH CONST. art. I, § 22; VA. CONST. § 58 (applies only to damagings by municipal and private corporations and individuals); WASH. CONST. art. I, § 18; W. VA. CONST. art. III, § 9;

follow the process, still continuing, by which these eminent domain concepts, once understood in quite a physical sense, have come to be increasingly conceived of as ideal or intangible legal constructs. Most of the cases cited bear the label "inverse condemnation action," but this is only fortuitous, for it discloses simply that the owner sought compensation after the state failed to institute condemnation proceedings.

The body of the article falls into two chief divisions. First, situations in which takings of riparian rights may occur are discussed according to the kinds of interference involved. Major subdivisions are diminution of access, water pollution, change in water flow or level, and restrictions on use of the surface. The second chief division deals with the navigation-servitude doctrine, subdivided into discussions of the federal and state doctrines.

II. TAKINGS OF RIPARIAN RIGHTS

A. *Diminution of Access*

Subject to important qualifications, a riparian owner has the property right of ingress and egress to and from the body of water touching his upland. On navigable waters, by the traditional view, this includes the right to maintain piers, wharves, and such structures, to reach water of navigable depth.¹¹ However, because most states of the Union retain title to the beds of navigable waters, a few states have developed the contrary rule

and Wyo. CONST. art. I, § 33. The model for these provisions is the amendment to the Illinois constitution, adopted in 1870, intended to liberalize the allowance of compensation for loss of certain kinds of property rights, particularly street access. See *City of Chicago v. Taylor*, 125 U.S. 161 (1888), which reviews the history and purpose of the Illinois amendment.

11. *Town of Orange v. Resnick*, 94 Conn. 573, 109 A. 864 (1920); *Leitch v. Sanitary Dist.*, 369 Ill. 469, 17 N.E.2d 34 (1938); *City of New York v. Wilson & Co.*, 278 N.Y. 86, 15 N.E.2d 408 (1938); *Gumbes v. City of Philadelphia*, 191 Pa. 153, 43 A. 88 (1899); 1 H. FARNHAM, *WATERS AND WATER RIGHTS* 290-302 (1904); Annot., 89 A.L.R. 1156 (1934). A further question, the answer to which seems in doubt, is whether a riparian owner has the right, not only to reach water of navigable depth, but also to navigate the main body of water. *Commonwealth v. Thomas*, 427 S.W.2d 213 (Ky. 1967), and *State ex rel. The Andersons v. Masheter*, 1 Ohio St.2d 11, 203 N.E.2d 325 (1964), both involve the situation in which riparian land lay on a narrow body of water leading to a larger body. In each case the state built a low bridge some distance away that prevented the riparian owner from navigating the larger body, though his vessels could "navigate" the smaller immediate body. *Thomas* held that access to the main body was property, for the taking of which the owner deserved compensation, and *Masheter* held precisely the opposite. Cf. *Colberg, Inc. v. State ex rel. Dep't of Pub. Works*, 62 Cal. Rptr. 401, 432 P.2d 3 (1967), which agrees with *Masheter* in result but on completely different reasoning.

that a riparian owner has no right to trespass on state-owned beds to reach the line of navigability.¹² In practice the harshness of this rule must be largely ameliorated by frequent sale of state-owned beds to riparian owners, but otherwise the right of access to navigable water is destroyed in these few states.

On nonnavigable streams, where the riparian owner owns the bed to the center, or in some states the thread, of the water-course, there is no question of his right of access to the water.¹³ Ownership of the beds of nonnavigable ponds is in the state in about half the states that have decided the issue and in riparian owners, each owner owning a pie-shaped wedge to the center of the pond, in about the other half.¹⁴ If the owner has title to a portion of the bed, of course he has access to that portion at least, and the litigated questions, on which the few cases on the subject are badly split, are whether one owner, or the public, has access to the water above non-owned portions.¹⁵ Where the state owns the beds of nonnavigable ponds, logic indicates that riparian owners should have access rights to the same extent they would have on navigable lakes, which means they would have these rights except possibly in a few jurisdictions.¹⁶ However, direct authority on the precise question appears lacking. As a statistical matter, none of the cases cited in this article have involved alleged takings of access to nonnavigable streams or ponds. Cases dealing with nonnavigable waters are concerned chiefly with water pollution and will be discussed under another head.

Were it not for the navigation-servitude doctrine, we could say that riparian access rights, as described above, were fully recognized and protected as a form of property in the law of eminent domain. That doctrine will be discussed separately and critically later. Suffice it to say at this point that when the fed-

12. *E.g.*, *Henry Dalton & Sons Co. v. City of Oakland*, 168 Cal. 463, 143 P. 721 (1914); *Bilger v. State*, 63 Wash. 457, 116 P. 19 (1911); 1 H. FARNHAM, *WATERS AND WATER RIGHTS* 313-17 (1904). That this rule was a matter of state property law that did not offend the Federal Constitution was held in *Port of Seattle v. Oregon & W.R.R.*, 255 U.S. 56 (1921).

13. 1 R. PATTON & C. PATTON, *LAND TITLES* 345-47 (2d ed. 1957).

14. *Id.* at 348-50.

15. R. Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580, 605-10 (1960). Professor Johnson suggests that the trend seems to be toward the position that all riparian owners may have access to all portions of the water in nonnavigable ponds. 1 R. PATTON & C. PATTON, *LAND TITLES* § 133 (Supp. 1967), agrees.

16. See notes 11-13 *supra* and accompanying text.

eral government or a state¹⁷ destroys riparian access by some exercise of the power to regulate navigation, there is no taking of property, though there would otherwise be.¹⁸ The navigation servitude may be analyzed as a servitude or easement to improve navigation, a sort of governmental proprietary right burdening and diminishing the quantum of an owner's riparian rights.¹⁹ Under this analysis it is precise to say no property interest is taken from the owner, for the government is merely enjoying a proprietary right it already held. What we have done, of course, is to rework the definition of riparian "property."

Governmental activity, not carried out pursuant to the power to regulate navigation, that destroys or substantially diminishes a riparian owner's right of access, recognized as such by the law of a given jurisdiction, causes a compensable taking of property. This may be asserted firmly, with virtually no authority to the contrary.²⁰ Stated in terms of the analysis followed in this paper,

17. Under the commerce clause of the Constitution, Congress has the supreme power to regulate navigation on all navigable waters. However, the states also have similar inherent powers, and the commerce clause is not self-executing. The result is that, until Congress has specifically acted to regulate navigation on a given body of water, the state within which it lies may do so. *United States v. Bellingham Bay Boom Co.*, 176 U.S. 211 (1900); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

18. *Scranton v. Wheeler*, 179 U.S. 141 (1900) (federal power); *Gibson v. United States*, 166 U.S. 269 (1897) (federal power); *Peck v. Alfred Olsen Constr. Co.*, 216 Iowa 519, 245 N.W. 131 (1932) (state power); *Frost v. Washington County R.R.*, 96 Me. 76, 51 A. 806 (1901) (federal power); *Fish v. Chicago G.W. Ry.*, 125 Minn. 380, 147 N.W. 431 (1914) (federal power); *Crance v. State*, 309 N.Y. 680, 128 N.E.2d 324 (1955) (dictum, state power); *Sage v. Mayor of City of New York*, 154 N.Y. 61, 47 N.E. 1096 (1897) (state power); *Milwaukee Western Fuel Co. v. City of Milwaukee*, 152 Wis. 247, 139 N.W. 540 (1913) (federal power); *Delaplaine v. Chicago N.W. Ry.*, 42 Wis. 214, 24 Am. Rep. 386 (1877) (dictum, state power).

19. This is the analysis usually accepted and is brought out perhaps the most clearly in *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913). See also Baldwin, *The Impact of the Commerce Clause on the Riparian Rights Doctrine*, 16 U. FLA. L. REV. 370, 383-84 (1963); Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1, 41 (1968); Comment, *Just Compensation and the Navigation Power*, 331 WASH. L. REV. 271, 273-76 (1956). However, the most comprehensive article on the subject does not use the servitude or easement analysis, preferring to speak of Congress's "power" and of "the rule of no compensation." See Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1, 19-23 (1963). For our purposes the servitude analysis has great utility, because our attention is particularly turned toward riparian rights as a species of property.

20. *Town of Orange v. Resnick*, 94 Conn. 573, 109 A. 864 (1920); *Padgett v. Central & S. Fla. Flood Control Dist.*, 178 So.2d 900 (Fla. App. 1965) (dictum); *Leitch v. Sanitary Dist.*, 369 Ill. 469, 17 N.E.2d 34 (1938); *Commonwealth v. Thomas*, 427 S.W.2d 213 (Ky. 1967); *Crance v. State*, 309 N.Y. 680, 128 N.E.2d 324 (1955); *City of New York v. Wilson & Co.*, 278 N.Y. 86, 15 N.E.2d 408 (1938); *In re Waterfront and Harbor*, 268 App. Div. 131, 49 N.Y.S.2d 474 (1944); *Gumbes v. City of Philadelphia*, 191 Pa. 153, 43 A. 88

the property right of riparian ingress and egress, as delimited in the preceding three paragraphs, is fully recognized and protected in the law of eminent domain.

B. Water Pollution

The fact pattern in water-pollution cases is easy to visualize and almost monotonously uniform. Typically a municipal sewage disposal system discharges its effluent into a stream or pond, allegedly polluting the water to an unreasonable degree. Riparian owners complain that the water is made unfit for domestic, industrial, or recreational use and that noxious odors are given off. Since the existence of these facts tends to be a matter of degree, hotly debated, decisions often are preoccupied with factual issues, to the end that legal principles may not emerge in crystalline forms.

To the extent a riparian owner is entitled to have the water flow by or lap his upland,²¹ he is entitled to receive it in reasonably pure condition.²² The word "reasonable" suggests a qualification on the right to pure water, ambiguous enough to cause considerable uncertainty. It implies that other riparian owners on the same body of water have a conflicting immunity to pollute the water to a "reasonable" extent with waste material and by using it as it passes their uplands. This is said to give cities and towns an immunity to deposit "natural" drainage into the

(1899) (state constitution allowed compensation for "property taken, injured or destroyed"); *Burrows v. Superior Court*, 48 Wash. 277, 93 P. 423 (1908); *Delaplaine v. Chicago & N.W. Ry.*, 42 Wis. 214, 24 Am. Rep. 386 (1877). Massachusetts does not compensate for blockings of access by the commonwealth, because its constitution allows compensation only for property "appropriated to public use." See dictum in *United States Gypsum Co. v. Mystic River Bridge Auth.*, 329 Mass. 130, 108 N.E.2d 677 (1952), where the bridge authority, having blocked the plaintiff's access, was required to give compensation by a special statute. *But see Wood v. South River Drainage Dist.*, 422 S.W.2d 33 (Mo. 1967), where the defendant's act of draining away a bay on the Mississippi River was justified as an exercise of the police power. This seems to be an isolated decision, unsound, and dangerous to riparian rights in Missouri.

21. The weasel phrase "to the extent" is used in acknowledgment of the fact that a riparian owner does not have the absolute right to have all the water flow by or touch his upland. For one thing, his common law right seems always to have been subject to a conflicting right of other riparian owners to consume sufficient water for domestic use. 1 H. FARNHAM, *WATERS AND WATER RIGHTS* 285-90 (1904). Another and, where it exists, larger qualification is the other owners' power to appropriate water in the seventeen Western States that have appropriation systems or combinations of appropriation and common-law systems. For a general introduction to such systems and citation of more detailed studies, see Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580, 586-90 (1960).

22. 1 H. FARNHAM, *supra* note 21, at 285-89.

water.²³ Adequate definition of "natural" and "unnatural" (artificial?) drainage would seem crucial to our present discussion, which involves cases where cities and towns have allegedly unreasonably polluted streams. So would consideration of the problem of how an entire city, stretching back perhaps miles from the water, can enjoy the immunities of "riparian" land.²⁴ Courts, however, have not much resolved their cases by precise analysis of these and like problems, preferring to speak in the broader rhetoric of "reasonable," "unreasonable," and language of that sort.

So, the riparian property right to reasonably pure water is a concept with flexible limits. Within those limits it ought in theory to be protected as "property" in eminent domain law. It is, in the sense that eminent domain compensation is awarded in many cases where governmental entities have polluted water-courses, and there seems to be no body of authority saying this ought not be done. The complicating factor is that a number of decisions go on an alternative theory, that the pollution may amount to a nuisance, so that the courts rendering them have no occasion to decide whether a taking has occurred. Some states have decisions applying both theories.²⁵ Even some individual cases will attempt both theories together, blending them in some fashion.²⁶ Therefore, it is practically necessary to discuss the nuisance cases here as well as the eminent domain ones, though the nuisance theory is not strictly within our subject.

(1) *Eminent Domain Cases*

A court that applied eminent domain theory in unalloyed

23. *Id.* at 288-89.

24. For what is apparently one of the few discussions of this problem, in another context, see *Montrose Canal Co. v. Loutsenhizer*, 23 Colo. 233, 48 P. 532 (1896).

25. Compare *Sewerage Dist. No. 1 v. Black*, 141 Ark. 550, 217 S.W. 813 (1920) (nuisance) with *McLaughlin v. City of Hope*, 107 Ark. 442, 155 S.W. 910 (1913) (eminent domain). Compare *Southern New England Ice Co. v. Town of West Hartford*, 114 Conn. 496, 159 A. 470 (1932) (nuisance case with some eminent domain language) with *Platt v. City of Waterbury*, 72 Conn. 531, 45 A. 154 (1900) (eminent domain). Compare *Riggs v. City of Springfield*, 344 Mo. 420, 126 S.W.2d 1144 (1939) (eminent domain case expressly rejecting nuisance theory) with *Windle v. City of Springfield*, 320 Mo. 459, 8 S.W.2d 61 (1928) (nuisance).

26. Reflect on this curious quotation from *Snavely v. City of Goldendale*, 10 Wash.2d 453, 455, 117 P.2d 221, 222 (1941): "While polluting a stream is generally held to be tortious . . . , it may assume the character of a *taking* or *damaging* of property . . . when a municipal corporation does it on such a scale as to create a public nuisance." (Italics by court.)

manner would determine simply if a riparian owner's property right to pure water had been unreasonably impaired and if the impairment was caused by activity of a governmental entity. If so, a taking would have occurred. While the pollution-eminent domain decisions often do not spell this theory out so clearly, their results are probably consistent with it.²⁷ Where compensation is denied it is generally not because the court repudiates the existence of the eminent domain theory, but because the interference was not thought in fact substantially to have diminished the property right. The water has not been rendered unreasonably impure. Or—and perhaps this is but the same thing in different words—the municipality is thought only to have been exercising its own riparian right to pollute the water to a reasonable extent.²⁸

One complication arises because twenty-six state constitutions allow compensation for property either taken or "damaged."²⁹ Opinions in these jurisdictions are apt to announce that pollution is "a taking or at least a damaging of the owner's property," or some similar statement.³⁰ Even though courts in the twenty-six states might rely exclusively on the "damaging" language, they apparently wish to keep open the option of later

27. *McLaughlin v. City of Hope*, 107 Ark. 442, 155 S.W. 910 (1913) (taking or damaging); *Platt v. City of Waterbury*, 72 Conn. 531, 45 A. 154 (1900); *Riggs v. City of Springfield*, 344 Mo. 420, 126 S.W. 2d 1144 (1939); *City of Cape Girardeau v. Hunze*, 314 Mo. 438, 284 S.W. 471 (1926) (no taking on the facts); *King v. City of Rolla*, 234 Mo. App. 16, 130 S.W.2d 697 (1939); *Newkirk v. City of Tipton*, 234 Mo. App. 920, 136 S.W.2d 147 (1939) (no taking, on facts); *Donnell v. City of Greensboro*, 164 N.C. 330, 80 S.E. 377 (1913) (some nuisance language too); *Kinnischtzke v. City of Glen Ullin*, 57 N.W.2d 588 (N.D. 1953) (property "damaged"); *Sheriff v. City of Easley*, 178 S.C. 504, 163 S.E. 311 (1936); *Parsons v. City of Sioux Falls*, 65 S.D. 145, 272 N.W. 288 (1937) (taking, "or at least a damaging"); *Snavely v. City of Goldendale*, 10 Wash. 2d 453, 117 P.2d 221 (1941) (taking or damaging).

28. *City of Cape Girardeau v. Hunze*, 314 Mo. 438, 284 S.W. 471 (1926), a well known case, is strongly suggestive of this. The court emphasizes that upper owners, including the city and its residents, were entitled to discharge natural domestic drainage into the stream. An analogous group of cases, even more suggestive of the same reasoning, are the oyster-bed cases. Typically, the plaintiff is an oyster farmer whose undersea beds have been polluted by the outfall from a city sewer. Where compensation is denied the rationale seems to be that the city, as a saltwater riparian owner, had "the ancient right . . . to drain the harmful refuse of the land into the sea, which is the sewer provided therefor by nature . . ." *Darling v. City of Newport News*, 123 Va. 14, 18, 96 S.E. 307, 309 (1918), *aff'd*, 249 U.S. 540 (1919). *Accord*, *Lovejoy v. City of Norwalk*, 112 Conn. 199, 152 A. 210 (1930).

29. See note 10 *supra*.

30. The quoted language is from *Parsons v. City of Sioux Falls*, 65 S.D. 145, 151, 272 N.W. 288, 291 (1937). Other similar phraseology is contained in *McLaughlin v. City of Hope*, 107 Ark. 442, 155 S.W. 910 (1913); and *Snavely v. City of Goldendale*, 10 Wash.2d 453, 117 P.2d 221 (1941). No doubt there are other such cases.

holding that pollution could amount to a taking.³¹ There seems to be no authority for the proposition that absence of "damaging" language will bar compensation. On the basis of such authority as there is, and certainly in theory, the presence of this language should not be necessary to recovery, though it probably is easier for a court to hold there has been a damaging than a taking when harm flows from non-trespassory acts. "Damaging" language was first used in an 1870 amendment to the Illinois constitution. Courts of that state, and of others, had been holding that certain kinds of non-trespassory governmental activities, chiefly changes in street grade that blocked access, were not takings. The new language was intended to change that result.³² In Illinois and the other states that followed its lead, compensation became possible in the change-of-grade cases and has been more or less facilitated in other classes of non-trespassory cases.³³

The status of the eminent domain theory in pollution cases is further complicated by the use of nuisance language in a number of decisions that are ultimately to be classified as resting on the eminent domain doctrine. We speak not of cases that go on nuisance theory, to be discussed separately below, but only of decisions where nuisance language is somehow blended in, perhaps as part of the court's rationale. This passage from the Washington case of *Snavely v. City of Goldendale* epitomizes the doctrinal confusion: "While polluting a stream is generally held to be tortious . . . , it may assume the character of a *taking* or *damaging* of property in contemplation of the constitutional guaranty when a municipal corporation does it on such a scale as to create a public nuisance." (Italics by the court.)³⁴ There was a clear holding that the plaintiff's action lay in eminent domain, for the result could not have been supported on nuisance theory. Courts that commingle the two kinds of language prob-

31. *But see* *Kinnischtzke v. City of Glen Ullin*, 57 N.W.2d 588 (N.D. 1953), which seems to say stream pollution was a damaging only. In most contexts it may not matter whether there is a taking or a damaging, but this can be crucial if, for instance, the period of limitations is different for one than for the other. *See Ackerman v. Port of Seattle*, 55 Wash.2d 400, 348 P.2d 664 (1960).

32. For the history of that development, *see Chicago v. Taylor*, 125 U.S. 161 (1888).

33. *See Stoebuck, The Property Right of Access Versus the Power of Eminent Domain*, 47 TEXAS L. REV. 733 (1969).

34. 10 Wash.2d 453, 455, 117 P.2d 221, 222 (1941). For similar language, *see also* *Donnell v. City of Greensboro*, 164 N.C. 330, 80 S.E. 377 (1913); *Kinnischtzke v. City of Glen Ullin*, 57 N.W.2d 588 (N.D. 1953); *Parsons v. City of Sioux Falls*, 65 S.D. 145, 272 N.W. 288 (1937).

ably mean to equate nuisances with takings only on the factual level, that is, to say only that nuisance-type facts may give rise to an eminent domain action, but not to equate the legal doctrines. At least this is all they should say, and they should be much clearer on it than they sometimes have been, so as not to create doctrinal confusion.

(2) Nuisance Cases

As lawyers are wont to pigeonhole legal doctrines, the law of nuisance lies on the thin edge that separates the law of tort from that of real property. A property right, the owner's freedom from unreasonable interference with use of land, is invaded by some non-trespassory activity of the tortfeasor.³⁵ This of course provides one riparian owner an action against another who pollutes their stream, lake, or pond to an unreasonable degree. Suppose the defendant happens to be a governmental entity. Will the nuisance action lie? A sizeable group of cases holds it will.³⁶

Our first concern is to determine whether nuisance and eminent domain theory ought to be alternatively available for the same harm. This is a question on which the courts have spoken little. *Oklahoma City v. West*,³⁷ a skimpily written opinion, suggests that only the nuisance theory should be available if the pollution is temporary in the sense of being abatable. That may tend to be so, though, on logic and a slight amount of authority we may ask why a temporary interference, if serious and not too transitory, might not cause a taking.³⁸ At any rate, the prob-

35. RESTATEMENT OF TORTS, Scope Note to ch. 40 and §§ 822, 825 (1939); 1 F. HARPER & F. JAMES, TORTS 67-71 (1956); W. PROSSER, TORTS 598-602 (3d ed. 1964).

36. *Sewerage Dist. No. 1 v. Black*, 141 Ark. 550, 217 S.W. 813 (1920); *Southern New England Ice Co. v. Town of West Hartford*, 114 Conn. 496, 159 A. 470 (1932); *City of Kewanee v. Otley*, 204 Ill. 402, 68 N.E. 388 (1903); *Dohany v. City of Birmingham*, 301 Mich. 30, 2 N.W.2d 907 (1942); *Windle v. City of Springfield*, 320 Mo. 459, 8 S.W.2d 61 (1923); *Oklahoma City v. West*, 155 Okla. 63, 7 P.2d 888 (1931); Annot., 40 A.L.R.2d 1177 (1955). *Contra*, *Riggs v. City of Springfield*, 344 Mo. 420, 126 S.W.2d 1144 (1939), which expressly rejects nuisance in favor of the eminent domain theory and in so doing casts doubt on, but does not overrule, *Windle, supra*.

37. 155 Okla. 63, 7 P.2d 888 (1931).

38. *See Anhoco Corp. v. Dade County*, 144 So.2d 793 (Fla. 1962), and *Lobdell v. State*, 89 Idaho 559, 407 P.2d 135 (1965), which held loss of street access for two and five years, respectively, were takings. It is true that other cases have said that temporary loss of access could not be takings. Annot., 45 A.L.R. 534, 543 (1926). However, if the government can condemn a leasehold, *United States v. General Motors Corp.*, 323 U.S. 373 (1945), why not

lem is minor compared with a more fundamental, if more speculative, one the courts have not raised. We speak of "unreasonable" pollution as being a taking and of "unreasonable" interference with use and enjoyment, caused by pollution, as a nuisance. The terminology is similar, but is the interest interfered with necessarily the same? Is the riparian right to clean water synonymous with the owner's right to be free from unreasonable interference with enjoyment? In very many cases these rights do overlap, probably in the vast majority of the pollution cases one can imagine. But it seems possible that there may be differences. Suppose the government introduces some harmless but odoriferous substance into water, which does not make the water less usable, though the smell might amount to a nuisance. On the other hand, because the action of nuisance has long been available to protect riparian rights among private owners, we probably have to say that, if the action is available against a given state, it is available whenever pollution unreasonably diminishes the right to pure water. So, our speculations suggest that every taking of the right to pure water can be a nuisance, but the converse, while usually true, is not so of necessity. In other words, nuisance theory appears to cover a slightly wider spectrum of fact patterns than does eminent domain.

Whether nuisance has greater utility than eminent domain theory is doubtful. A defense often raised in nuisance actions, though seldom successfully, is akin to sovereign immunity. It is to the effect that nothing (e.g., the operation of a sewage disposal plant) done pursuant to legislative authority can be a nuisance. The usual judicial answer, ever so sophistic and just a bit circular to boot, is that the legislature mentioned only the operation of a disposal plant, not the maintenance of a nuisance.³⁹ Still, the defense occasionally is allowed, so that the efficacy of the nuisance theory is lessened in some states.⁴⁰

Theoretically a nuisance action has an advantage over eminent domain, in that the equitable remedy of injunction is avail-

other interests temporarily? And if the government might directly condemn, say, a privilege to pollute water temporarily, why could not the same thing be done by inverse condemnation?

39. *E.g.*, *Sewerage Dist. No. 1 v. Black*, 141 Ark. 550, 217 S.W. 813 (1920); Annot., 40 A.L.R.2d 1177, 1179-82 (1955).

40. *Northern Transp. Co. v. City of Chicago*, 99 U.S. 635 (1878); *Bennett v. Long Island R.R.*, 181 N.Y. 431, 74 N.E. 418 (1905); Spater, *Noise and the Law*, 63 MICH. L. REV. 1373, 1382 (1965). Some states have enshrined the defense in statutory form. See Spater, *supra* at 1384 n.50.

able in the former. Though sewage disposal activities have been enjoined in a few cases,⁴¹ this is rare, probably because the utility of the governmental activity is thought to outweigh the harm to the private owner.⁴² Also, one suspects that injunctions seldom issue except against some particular phase of the sewage disposal system that can be changed without replacing the entire system. Damages are the usual redress, and where the interference is permanent, as it almost always is, damages are measured by the diminution in land market value caused by the nuisance.⁴³ In most fact patterns, then, the remedy will be the same under the nuisance theory as in an eminent domain action.

There are some situations in which the owner will be remediless if he cannot maintain a particular one of the two forms of action. One such situation exists when his action is barred by the statute of limitation applicable to one form but not by a different statute for the other form. Because of the varying language of the statutes, as well as individual judicial interpretations, it is difficult to make a general statement as to the statute applicable to eminent domain actions. They are often governed by the catch-all statute or by the statute for adverse possession.⁴⁴ The statute applicable to nuisance actions is generally the one for injuries to land.⁴⁵ Similar to the statute-of-limitations problem is the common requirement that, as a condition to maintaining a nuisance, or other tort, action against certain governmental entities, the plaintiff must have timely presented a notice of his

41. *Sewerage Dist. No. 1 v. Black*, 141 Ark. 550, 217 S.W. 813 (1920); *City of Kewanee v. Otley*, 204 Ill. 402, 68 N.E. 388 (1903); *Dohany v. City of Birmingham*, 301 Mich. 30, 2 N.W.2d 907 (1942).

42. Annot., 40 A.L.R.2d 1177, 1179-82 (1955).

43. *Southern New England Ice Co. v. Town of West Hartford*, 114 Conn. 496, 159 A. 470 (1932); Annot., 49 A.L.R.2d 253, 260-66 (1956); *But cf. Oklahoma City v. West*, 155 Okla. 63, 7 P.2d 888 (1931), where the court identified a temporary nuisance and seemed to intimate that a taking instead of a nuisance might have occurred if the interference had been permanent.

44. Annot., 30 A.L.R. 1190 (1924), and Annot., 139 A.L.R. 1288 (1942), suggest that the catch-all statute is most apt to be applied in cases of non-trespassory takings. But the most elaborate opinion on the subject, *Riggs v. City of Springfield*, 344 Mo. 420, 126 S.W.2d 1144 (1939), concludes persuasively that the adverse possession statute applies. Observe that the result is apt to be different yet when there is a physical taking of land. The catch-all statute is generally not applied, though the adverse possession statute is frequently, and the statute for injury to land is occasionally. *See* Annot., 123 A.L.R. 676 (1939).

45. *O'Hair v. California Prune & Apricot Growers' Ass'n*, 130 Cal. App. 673, 20 P. 2d 375 (1933) (alternate holding); *Kentucky West Virginia Gas Co. v. Lafferty*, 174 F.2d 848 (6th Cir. 1949); *McCluskey v. Wile*, 70 Misc. 135, 128 N.Y.S. 190 (1910), *rev'd on other grounds*, 144 App. Div. 470, 129 N.Y.S. 455 (1911).

claim—the so-called non-claim statute. One who has neglected to do this will be barred from his action in nuisance but not from an inverse condemnation action.⁴⁶

C. *Changes in Flow or Level*

While no man owns water flowing in a stream or lying in a pond, every riparian owner has a property right to use the water that washes his shores.⁴⁷ Yet, the very statement of this principle contains within itself a paradox, for how can all riparian owners take and use all of the same finite quantity of water? Solving this riddle produces a reciprocal principle that each owner, for the sake of the others, though he may use and temporarily detain the water, has the duty not substantially to diminish its quantity or level.⁴⁸ Such at least is the common law scheme. In seventeen Western states having in varying degrees the so-called appropriation system, these rights and duties are more or less reordered; we shall discuss the implications of this later. The point for us is that, whichever system is in force in a given jurisdiction, a riparian owner has a right of property, with certain qualifications, to have the flow or level of water remain substantially in its natural state and to use it. In theory, then, an action of the state or its designee that diminishes this right should be regarded as a taking of property.

Obviously this riparian right overlaps in some degree other rights, notably the rights of access and to pure water. The lowering of water level may, for example, deny the riparian owner both the flow of water for his mill and access. Or water pollution may, depending upon how one thinks of it, diminish the right to pure water or make the water unusable for some domestic or industrial process. In practice, the offended owner would likely complain of both kinds of harm, and the court typically would discuss them both in a kind of judicial amalgam. For purposes of analysis we shall separate the right to the flow or level of water, realizing this may be a synthetic separation in real-life terms. It will be convenient to consider first changes of level within the banks of the stream, lake, or pond; then flooding; and

46. *Snavely v. City of Goldendale*, 10 Wash.2d 453, 117 P.2d 221 (1941).

47. The classic discussion is in Wiel, *Running Water*, 22 HARV. L. REV. 180 (1909).

48. 6-A AMERICAN LAW OF PROPERTY 161-64 (A. J. Casner ed. 1954); 1 H. FARNHAM, *WATERS AND WATER RIGHTS* 289-90 (1904).

finally to discuss effects of the Western appropriation systems that are significant here.

(1) *Changes of Level Within the Banks*

Early American opinions were divided on whether changes in water level could cause a taking of property. The 1816 New York case of *Gardner v. Trustees of Village of Newburgh*⁴⁹ is the oldest American case cited in this article. The village, authorized by statute to divert a stream and to pay compensation, lowered the stream's level substantially as it flowed through the plaintiff's land. Interestingly, the New York constitution at that date contained no requirement of compensation. Nevertheless, Chancellor Kent held there was a compensable taking of property, relying not only on the statute but as well upon Magna Charta, English precedents, Blackstone, the Federal Constitution, several state constitutions, and the civil law writers Grotius, Puffendorf, and Bynkerschoeck. Yet, when the same question arose in 1843 in Pennsylvania, Chief Justice Gibson, writing the famous opinion in *Monongahela Navigation Co. v. Coons*,⁵⁰ denied compensation. The act complained of was the raising of water level by a state-licensed dam, which lessened the fall, and so the waterpower, at the plaintiff's riparian land. Gibson's influential rationale was that no taking had occurred, because there had been no physical appropriation of land to the licensee's use.⁵¹

In spite of the shaky start in the nineteenth century, the modern cases leave no doubt that a substantial change in water flow or level is a taking. Where compensation is denied, it is not in derogation of this principle but on the factual ground that no substantial or unreasonable change has occurred.⁵² A compensable taking clearly occurs when a governmental agency or its licensee entirely diverts the waters of a stream, lake, or pond, so

49. 2 Johns. Ch. 161, 7 Am. Dec. 526 (1816).

50. 6 W. & S. 101 (Pa. 1843).

51. *Cf.* Ten Eyck v. Delaware & Raritan Canal Co., 3 Harr.(N.J.) 200, 37 Am. Dec. 233 (1841), in which compensation was denied on the ground that a state-chartered canal company was not acting for the state. Today it would probably not even be debated that such a licensee of the state was exercising the state's eminent domain power.

52. *E.g.*, Dunlap v. Carolina Power & Light Co., 212 N.C. 814, 195 S.E. 43 (1938). The court appeared to follow the rule that there was no taking as long as an increase in level was confined to the natural stream bed. Some qualifying language leaves the question whether the court meant to announce this as a flat rule. If so, the opinion goes further against the owner's rights than is normally to be expected.

that the riparian owner is left without water frontage.⁵³ Extending the same principle a bit, the owner suffers a taking when the lowering of water, though not total, is enough to deprive him of his rightful use of it. So, he may be compensated because his mill will not turn or because he loses water he is entitled to divert for some domestic or industrial purpose.⁵⁴ Conversely, the taking may consist in the raising of water, which might diminish the riparian owner's power head or drown out his intake gates.⁵⁵

We may conclude that a substantial raising or lowering of water level by a governmental entity amounts to a taking, as it ought to in eminent domain theory. One cautionary statement that should be added is that this is an area where the navigation-servitude doctrine, the subject of the latter half of this article, especially tends to intrude to deny compensation that otherwise

53. *Durkee v. Board of County Comm'rs*, 142 Kan. 690, 51 P.2d 984 (1935) (diversion of creek); *Petraborg v. Zontelli*, 217 Minn. 536, 15 N.W.2d 174 (1944) (drainage of navigable lake); *Evans v. Wheeler*, 209 Tenn. 40, 348 S.W.2d 500 (1961) (diversion of creek); *Lewis v. San Antonio River Auth.*, 343 S.W.2d 475 (Tex. Civ. App. 1960) (diversion of irrigation ditch from which plaintiff had right to have water). The *Petraborg* case has facts that prove the old adage that truth is stranger than fiction. Rabbit Lake was a small but navigable lake, dumbbell-shaped, with its eastern and western nodules separated by a narrow neck. The defendant, a state licensee, proposed to build a dam at the neck and drain the eastern nodule, leaving the water intact in the western part. One plaintiff, Ryan, owned riparian land on the eastern section, and Petraborg was a riparian owner on the western part. Both plaintiffs were allowed compensation for loss of riparian rights. As to Ryan, the decision is clearly a correct holding on lowering of the water level, and the only remarkable fact, not significant to the present discussion, is that he owned as tenant in common with the defendant. As to *Petraborg*, the decision does not precisely fall within our present subject, for his loss was not water level but use of the surface of a remote part of a navigable, albeit small, lake. Does a riparian owner on navigable water have a right, qua riparian owner, to use all parts of the surface? What about an owner on the ocean? Or is this the so-called public right of navigation, for which compensation need not be paid? *Petraborg v. Zontelli* is a remarkable case in many ways.

54. *Indian Ref. Co. v. Ambraw River Drainage Dist.*, 1 F. Supp. 937 (E.D. Ill. 1932) (refinery); *Spaulding v. Inhabitants of Plainville*, 218 Mass. 321, 105 N.E. 1006 (1914) (millpond); *Nantahala Power & Light Co. v. Moss*, 220 N.C. 200, 17 S.E.2d 10 (1941) (stream for powerhouse); *Cook v. Town of Mebane*, 191 N.C. 1, 131 S.E. 407 (1926) (use not stated); *Logan v. Chas. K. Spaulding Logging Co.*, 100 Ore. 731, 190 Pac. 349 (1920) (mill wheel stopped at times).

55. *Emmons v. Utilities Power Co.*, 83 N.H. 181, 141 A. 65 (1928) (loss of power head); *Logan v. Chas. K. Spaulding Logging Co.*, 100 Ore. 731, 190 P. 349 (1920) (mill wheel drowned); *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 P. 937 (1906) (flooding and log jams prevented plaintiff from taking water). See also *State ex rel. Burrows v. Superior Court*, 48 Wash. 277, 93 P. 423 (1908), which arose out of the earlier *Burrows* case. Note that the *Logan* case is cited in this footnote for a raising of water and in the preceding footnote for a lowering. The defendant alternated in holding back water then releasing it in artificial freshets.

would be due. Beyond that, any unfair failure to award compensation is more apt to be due to inadequacies in the concept of the right to the water level than to misapplication of eminent domain principles.

(2) *Flooding*

Like the pollution-nuisance cases discussed earlier, the flooding cases are probably not properly within our subject but are mentioned briefly for the sake of completeness. The casting of flood waters upon another's land involves a physical trespass and, assuming the flooding is permanent, a deprivation of use. So, such invasions probably should be analyzed as trespassory takings. Viewed another way, however, there is a destruction of riparian rights through raising of the water level and obliteration of the original riparian edge. As a practical matter, compensation awarded will be for the full market value of the land inundated, which, comprehending the value of riparian rights, usually makes unnecessary separate discussion of the latter.

Thanks to the rationale employed in *Monongahela Navigation Co. v. Coons*,⁵⁶ that there was no taking without appropriation to government use, it was early doubtful that flooding could be a taking. In 1871 the Supreme Court settled the matter in its landmark decision in *Pumpelly v. Green Bay Co.*,⁵⁷ holding that flooding was a compensable taking. The historical implications, not only for the flooding cases, but for our entire subject, are manifest: destruction, at least physical destruction, could be a taking. Had the courts persisted in the notion stated in *Coons*, compensation could never have been granted in any of the classes of riparian-rights cases we are examining.

At first even the Supreme Court showed a disposition to limit *Pumpelly*, saying it was the "extremest extent" to which compensation could be awarded for non-appropriative takings.⁵⁸ But the Court never shook its holding and has always followed *Pumpelly* on similar facts.⁵⁹ Among the state courts also, it is long and well settled that inundation constitutes a taking of

56. 6 W. & S. 101 (Pa. 1843). See note 50 *supra* and the accompanying text for a statement of the case.

57. 80 U.S. (13 Wall.) 166 (1871).

58. *Northern Transp. Co. v. City of Chicago*, 99 U.S. 635, 642 (1878).

59. *United States v. Dickinson*, 331 U.S. 745 (1947); *United States v. Cress*, 243 U.S. 316 (1917); *United States v. Lynah*, 188 U.S. 445 (1903).

property.⁶⁰ We can, in fact, adduce even more potent, if indirect, evidence that flooding is compensable: if the courts are willing to give compensation for such harms as loss of access and pollution, how much more willing must they be to give it also for the more serious, more physical act of flooding.

(3) *Effects of Appropriation Systems*

In the seventeen states west of the ninety-eighth meridian, the rights of riparian owners on streams have been more or less affected by statutory schemes of prior appropriation. In the common law, or riparian, system, the riparian owner, and he alone, has only a limited right to the water itself, as we know. The essence of the appropriation system is that persons, not necessarily riparian owners, may have the right to divert and consume running water, to the detriment of others. Their right to do this depends upon the priority in time when their diversion began, subject perhaps to being taken by a subsequent user for a preferred purpose. It can, and frequently does, happen that one or several priority appropriators will exhaust all the water in a stream, at least during the dry season. The appropriation system is, by no coincidence, peculiarly suited to conditions in the arid Western States, where there is strong impetus to squeeze the juice out of every drop of water.

There is not one appropriation system but seventeen; so, generalizations are difficult, and details are beyond the bounds of the present undertaking. However, the seventeen systems can with utility be divided into two groups. Those very arid states forming the inner core of the seventeen, what we might think of roughly as the Mountain States, have pure appropriation systems. No common law riparian rights exist at all. These states are Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming, eight in all, and their system is often called the Colorado doctrine. In the remaining nine states on the eastern and Pacific Coast fringes, Kansas, Nebraska, North Dakota, Okla-

60. *Tyler v. Tehama County*, 109 Cal. 618, 42 P. 240 (1895) (more erosion than flooding); *Taylor v. Mayor & Council of City of Baltimore*, 130 Md. 133, 99 A. 900 (1917) (dictum); *Weaver v. Mississippi & Rum River Boom Co.*, 28 Minn. 534, 11 N.W. 114 (1881); *Hodges v. Drew*, 172 Miss. 668, 159 So. 298 (1935) (overflowing sewage); *Thurston v. City of St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463 (1873); *Glenhill v. State*, 123 Neb. 726, 243 N.W. 909 (1932); *Faust v. Richland County*, 117 S.C. 251, 109 S.E. 151 (1921); *McDaniel v. Greenville-Carolina Power Co.*, 95 S.C. 268, 78 S.E. 980 (1913); 2 P. NICHOLS, EMINENT DOMAIN 238-45, 397 (rev. 3d ed. 1963); Annot., 6 A.L.R. 1326 (1920).

homa, South Dakota, and Texas and California, Oregon and Washington, both riparian and appropriative rights exist in various combinations: this is loosely termed the California doctrine. It takes no great imagination to see that the marriage of two inconsistent systems of water law on the same stream is bound to produce quarrels.⁶¹

The appropriation system, used alone or together with the riparian system, will work a reordering of riparian rights, compared with such rights under a pure riparian scheme. If the waters of a stream are liable to being legally appropriated and diminished, this must mean that riparian owners' rights otherwise to have the water present and to have access to and use of it are thereby reduced. Riparians and others may gain appropriative rights they would not have under a pure riparian doctrine. Even though this may necessitate a fundamental redefinition of water and riparian rights, yet, once these rights are defined there should be no change in the principles of eminent domain. Substantial diminution of the redefined rights by the state or its designee should still amount to a taking of property. This does indeed seem to be borne out by decisions in the situations in which the appropriative doctrine produces peculiar eminent domain problems.

Appropriation statutes often make appropriative rights of prior appropriators subject to being diminished by subsequent claimants who wish to divert water for a preferred purpose. For instance, *A*, a prior appropriator, may have the right to divert so many second-feet of water for irrigation. But *B* may be allowed to come along later and divert some of the same water for the preferred purpose of domestic use. In this case, the statute, having in effect conferred the state's eminent domain power on *B*, will require him to compensate *A* for the value of the lost water.⁶² Clearly, the prior appropriator has been deprived of a

61. The background on western water law is elementary. Two good, basic sources explaining it are W. HUTCHINS, *SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST* 27-109 (1942), and Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 *TEXAS L. REV.* 24 (1954). Development of California's mixed system is traced in Justice Jackson's opinion for the Court in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

62. See W. HUTCHINS, *supra* note 61, at 337-45, where the various statutes are outlined.

vested property right and must be compensated, as the courts have recognized.⁶³

Much more serious problems, both practical and theoretical, arise when we try to resolve the conflicts between those claiming riparian rights versus those claiming appropriative rights on the same stream. This occurs, of course, in those states following some version of the California doctrine, and perhaps a capsule review of the tortured California history on the point will be instructive. Before 1884 California citizens claimed under both riparian and statutory appropriation systems, but the state's supreme court had not had to resolve their inconsistent claims. That year and again in 1886 the conflict was squarely presented in the famous case of *Lux v. Haggin*.⁶⁴ In two long, detailed opinions the court came out squarely in favor of the common law riparian system, so that riparian owners had the right to full flow of their streams. A slight modification of the common law doctrine was announced, in that "reasonable" use of water for irrigation was said to be a right, but appropriators were denied the power to appropriate water, with or without compensation.⁶⁵ In 1926 in the leading case of *Herminghaus v. Southern Calif. Edison Co.*⁶⁶ and again in 1927 in *Fall River Valley Irrigation Dist. v. Mount Shasta Power Corp.*⁶⁷ the court underwrote riparian rights even more firmly. The purport of these decisions was that a would-be appropriator could not, without paying compensation, divert the waters of a stream from riparian owners even if the latter were making no actual use of the water diverted.

63. *People ex rel. Park Reservoir Co. v. Hinderlider*, 98 Colo. 505, 57 P.2d 894 (1936) (dictum); *Basinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917); *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 P. 741 (1911); *Loup River Pub. Power Dist. v. North Loup River Pub. Power & Irr. Dist.*, 142 Neb. 141, 5 N.W.2d 240 (1942); *State Bd. of Water Eng. v. Slaughter*, 382 S.W.2d 111 (Tex. Civ. App. 1964); W. HUTCHINS, *supra* note 61, at 353-55. But in California, Oregon, and Texas a prior appropriator's right to compensation is limited or denied, and his appropriation permit so states on its face. The theory is that his right was always subject to the condition subsequent that it might be affected by preferential claims. See W. HUTCHINS, *supra*, at 355-56.

64. 69 Cal. 255, 4 P. 919 (1884).

65. See *Lux v. Haggin*, 10 P. 674 (Cal. 1886). The court said it would be unconstitutional to try to allow an appropriator to take vested riparian rights without compensation. The California appropriation statute said something about appropriation of riparian rights, but the court construed the statute to mean that, once a riparian owner had obtained land from the state without the state's having previously granted appropriation rights, the riparian water rights were no longer subject to appropriation.

66. 200 Cal. 81, 252 P. 607 (1926).

67. 202 Cal. 56, 259 P. 444 (1927).

This was not popular in a state where public sentiment favored maximum use of water resources, and the 1926 and 1927 decisions were nullified by an amendment to the California constitution in 1928. The gist of the amendment was that a riparian owner was entitled to only so much of the water as he could beneficially use, and the surplus was available for appropriation. So, today, though the riparian doctrine remains in theory the basis of California's law of flowing water, this doctrine is fundamentally modified. The other eight semi-arid states following the California system have, generally by judicial decision, similarly replaced the common law natural-flow doctrine with the beneficial-use doctrine.⁶⁸

Even under this doctrine a riparian owner has the right to have the presence and use of some quantity of water. So strong is the policy favoring maximum exploitation of water that, in most states in which the riparian and appropriative systems co-exist, appropriators have the statutory power to condemn the rights of riparian owners to some extent.⁶⁹ It is clear that the riparian rights are vested property, so that, even if the state may delegate its power of eminent domain to an appropriator, an attempt to authorize him to take without compensation is void.⁷⁰ Of course if the riparian right is reduced to beneficial use, no compensation is due until the appropriator cuts so deeply into the water supply as to take water the owner could use.⁷¹ The principle of compensation is recognized in the statutes, referred to above, under which appropriators may condemn riparian rights. Since, however, the owner claiming riparian water rights may not have had the right to divert water, at least not to the extent the appropriator wishes to do so (probably for irrigation or municipal water supply), one may question how much good it does the appropriator to condemn riparian rights. The riparian owner, for one thing, would not have the privilege of using

68. Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEXAS L. REV. 24, 38 (1954).

69. See *id.* at 55-58.

70. *Clark v. Cambridge & A. Irrig. & Improv. Co.*, 45 Neb. 798, 64 N.W. 239 (1895); *In re Willow Creek*, 74 Ore. 592, 144 P. 505 (1914) (dictum); *St. Germain Irr. Co. v. Hawthorn Ditch Co.*, 32 S.D. 260, 143 N.W. 124 (1913); *Greenman v. City of Fort Worth*, 308 S.W. 2d 553 (Tex. Civ. App. 1957); *Barrett v. Metcalfe*, 12 Tex. Civ. App. 247, 33 S.W. 758 (1896); *Annot.*, 56 A.L.R. 277, 278-83 (1928). See also *State ex rel. Wausau Street Ry. v. Bancroft*, 148 Wis. 124, 134 N.W. 330 (1912).

71. *Joslin v. Marin Munic. Water Dist.*, 60 Cal. Rptr. 377, 429 P.2d 889 (1967); *In re Willow Creek*, 74 Ore. 592, 144 P. 505 (1914); *Sigurd City v. State*, 105 Utah 278, 142 P.2d 154 (1943).

water on land beyond that that borders the stream, which is probably the very object the appropriator has in view. Also, compensating a number of riparian owners can become expensive. These may be the reasons that condemnation has not been much used except in a couple of states.⁷²

D. Restrictions on Use of the Surface

The riparian owner who fronts navigable water has no private right to use the surface except to the extent he may be entitled to use it by wharfing out and the like to reach water of navigable depth. Once he is out there, he has the right to navigate, fish, and swim, to be sure, but these activities he enjoys as a member of the public and not in the right of a riparian owner. On nonnavigable waters, however, riparian rights do include such surface uses. Owners on nonnavigable ponds have, in some jurisdictions, these rights over the entire surface. In other states, each owner on a pond has exclusive use of the surface over the pie-shaped portion of the bed that he owns, formed by extending the front corners of his parcel to the center of the pond. A "nose count" made several years ago showed ten states favoring the latter view and three the former, with a trend toward the minority position.⁷³ On nonnavigable streams, where riparian owners own the beds, they have rights of surface use, qualified in some states, but not in others, by public rights of use for some purposes.⁷⁴

Municipalities that take their domestic water supplies from streams or ponds have an interest in receiving it in as pure condition as possible. Hence, they may enact ordinances prohibiting or restricting certain acts tending to pollution, including boating, fishing, swimming, and bathing. The same result may be achieved via a state law prohibiting the activities within stated distances from the sources of any municipal water supply. Either way, the riparian owner may contend that the legislative act, working an extinguishment of some of his riparian rights, constitutes a taking of property.

There are two schools of thought on the issue. One school

72. See Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEXAS L. REV. 24, 56 (1954).

73. Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580, 605-10 (1960).

74. *Id.* at 610-15.

traces back to *People v. Hulbert*,⁷⁵ a 1902 decision holding that an ordinance forbidding swimming was invalid as a taking without compensation. The reasoning of *Hulbert* and cases like it⁷⁶ is straightforward: use of the surface is a riparian property right, it has been destroyed by an act of the state, and this amounts to a taking. Assuming the restraint on use is a substantial one, this rationale seems to be cut from the familiar eminent domain pattern. This does not mean, of course, that the riparian owner cannot at some point be regulated from polluting municipal water. We have seen that each riparian owner has the privilege to introduce pollutants to only a reasonable extent. Some clean-water regulations seem to have been upheld and imposed on the theory that a riparian owner who violated them was acting unreasonably.⁷⁷

An opposing view brings in a new element, a doctrine that has created a seemingly insolvable dilemma in various eminent domain contexts. Cases in the lineage of *State v. Morse*⁷⁸ take the position that the regulations are exercises of the police power that do not (cannot?) amount to takings. In many respects the police-power doctrine operates like the navigation-servitude doctrine in denying compensation. Both require for their operation the exercise of a designated power of government. However, the courts have tended to analyze the navigation servitude as just that, a servitude burdening riparian rights in favor of the government. Under this analysis one should say that compensation is denied because no "property" of the owner is involved. When we examine police-power decisions, by contrast, we find the courts speaking as though the nature of the state's act kept it from being a "taking," regardless of the kind of property interest

75. 131 Mich. 156, 91 N.W. 211 (1902).

76. *E.g.*, *Pounds v. Darling*, 75 Fla. 125, 77 So. 666 (1918); *Petition of Clinton Water Dist.*, 36 Wash.2d 284, 218 P.2d 309 (1950); *Bino v. City of Hurley*, 273 Wis. 10, 76 N.W.2d 571 (1956). For discussion of additional cases, see Annot., 56 A.L.R.2d 790 (1957); and Annot., 72 A.L.R. 673 (1931).

77. See *Newton v. City of Groesbeck*, 299 S.W. 518 (Tex. Civ. App. 1927), in which a city was allowed to enjoin a commercial bathhouse, the court remarking that this use would introduce more pollution than swimming by only the owner. See also *Bountiful City v. DeLuca*, 77 Utah 107, 292 P. 194 (1930), where the court upheld only so much of an injunction as restrained riparian owners from "unreasonably" polluting a stream. *Cf. Willis v. Wilkins*, 92 N.H. 400, 32 A.2d 321 (1943), in which reasonableness of clean-water regulations was said to depend upon balancing the public necessity for regulation against the riparian owner's rights.

78. 84 Vt. 387, 80 A. 189 (1911). Other examples are *State v. Heller*, 123 Conn. 492, 196 A. 337 (1937); and *State v. Finney*, 65 Idaho 630, 150 P.2d 130 (1944).

affected. If these distinctions are more than just rhetoric, we should expect consequences to result from them, and to some extent they may. As we shall see, the navigation servitude does not affect uplands, so that flooding produced by a federal dam should be compensated for, while loss of the riparian right of, say, access to the water will go uncompensated. With the police-power doctrine it is difficult to say whether it will excuse physical destruction, for the regulatory acts by which police power is exercised are not apt to produce that kind of harm.

It is understandable, this yearning the courts have to devise a police-power doctrine or something like it. The public benefit of regulations on the use of land usually far exceeds the harm to individual owners. A classic case is the zoning regulation or health or building code. Surely, the owner's range of possible uses is narrowed and his property in his land by that degree diminished. But, as Justice Holmes reminded us,⁷⁹ government could hardly go on if it had to compensate for every minimal harm. In essence, then, the police-power doctrine seems an attempt to prevent government from having to pay countless small, perhaps doubtful, nuisance claims. Still, it worries us that the doctrine, though it may tend to destroy mostly small claims, does not necessarily do that only. Suppose the state blocks access to the water by a dike or wall; the owner will be compensated, assuming the act was not to improve navigation. But suppose the state enacts a regulatory statute prohibiting the owner from going onto the water. Who would care to explain to the owner that his inverse condemnation action will be barred? Would his neighbor feel better than he if the neighbor also was uncompensated after the state destroyed most of the value of his fishing resort by prohibiting fishing? How happy would they both be to know their other neighbor was paid because the state chose physically to appropriate a few feet of his land? The point is, of course, that the police-power doctrine does not do what it was apparently intended to do.

There are other objections. The doctrine employs a labeling of governmental activities that is both artificial and inutile. To pigeonhole government activity as being under the police power, the power to build dams, the power to raise armies, and so forth, may be convenient for certain discussions, but it should not for

79. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

that reason produce legal consequences. Moreover, to say the government is immune from compensation if it blocks access by a statute labeled "police power" but not if by a dike labeled "power to build public works" is to make the police power more sacred than the other powers. They all presumably are necessary, all worthy of being exercised. Who is to say the police power has primacy? Not the fifth amendment. It and the eminent domain clauses in the state constitutions include all powers of government alike under their interdiction. If we may, by judicial fiat, remove the police power from the operation of the fifth amendment, why not also the power to build dams, roads, postoffices—all powers? Exit fifth amendment. The point this time is, of course, that we make a false distinction when we predicate a taking *vel non* upon the kind of governmental power being exercised.

If it was our aim to limit compensation to those impacts that cause harm of certain magnitude, we should devise rules that zero in on that aspect. Why not say that "substantial" or "unreasonable" loss of riparian rights is compensable if caused by any form of state action? "Substantial" is a function of various factors and inherently is not susceptible of precise definition. Certainly an economic loss would have to be involved. However, not every economic loss is compensable, for the law does not recognize all elements of economic wealth as property. Therefore, some right of property would have to be diminished or destroyed. As imprecise as the concept of substantial loss might be, it at least works in the direction we wish to go, which the police-power doctrine does not.

III. NAVIGATION SERVITUDES

We face a curious paradox. In the preceding portions of this article we have basically explored the extent to which riparian rights have been accorded recognition as "property" for purposes of eminent domain compensation. Considering the halting start the courts had made in this direction a hundred or so years ago, the recognition has been reasonably complete. At least it has been more complete than in some other situations in which non-trespassory takings may occur.⁸⁰

80. See Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 *DICK. L. REV.* 207 (1967).

No discussion of the taking of riparian rights is complete without consideration of the navigation-servitude doctrines in both the federal and state branches. The subject is hardly virgin territory, for it, mostly the federal branch, has been the sole topic of quite a bit of writing, much of it recent.⁸¹ Viewed, however, not alone but in the context of takings of riparian rights, the servitude doctrines go far to nullify the otherwise relatively complete protection of riparian rights. Stated in its broadest form, the navigation servitude stands as a bar to compensation when riparian rights are destroyed by governmental activities done under aegis of a power to regulate or improve navigation. This includes a great many activities that have increased markedly in the near past; dams built on navigable streams by, or by license of, the federal government are perhaps the leading example. At the same time, the doctrine itself has been broadened to include fact patterns additional to those originally associated with it. Indeed—and this will be demonstrated in the discussion of the federal branch of the rule—the federal navigation servitude seems to have the theoretical potential of being extended to all streams, even to the tiniest creek.⁸² So, the paradox is that, while riparian rights have been pretty well recognized as forms of property for compensation purposes, the navigation servitudes are interposed as a bar to compensation in a great many cases. As the courts have gradually broadened the opportunities for compensation in one way, apace with this development there has been a trend toward reducing the possibilities in another way. One who was cynical about the whole thing might wonder how much the courts really wanted to afford increased protection to riparian rights in the first place.

81. Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1 (1968); Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963); Comment, 24 U. CHI. L. REV. 370 (1957); *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 131 (1956); Comment, 55 MICH. L. REV. 272 (1956); Comment, 31 WASH. L. REV. 271 (1956); Note, 65 YALE L. J. 96 (1955); Annot., 89 A.L.R. 1156 (1934); Annot., 21 A.L.R. 206 (1922); Annot., 18 A.L.R. 403 (1922). Professor Bartke's footnotes, particularly notes 8, 20, and 71, are a source of additional writings on the subject.

82. The federal power to build dams in aid of navigation extends to non-navigable streams in the watershed of a navigable stream, at least if necessary to control of the navigable one. *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960). But, contrary to at least the spirit of *Grand River*, *United States v. Cress*, 243 U.S. 316 (1917), held that the federal navigation servitude did not extend up into the nonnavigable tributary of a navigable stream upon which navigation improvements were built.

A. *Federal Navigation Servitude*

No one doubts that the federal government has the power to regulate interstate commerce; the commerce clause of the Constitution says so.⁸³ Since *Gibbons v. Ogden*⁸⁴ no one has doubted either that this power implied the further power to regulate navigation flowing in interstate commerce and to improve the conditions of navigation. Extensions of this power have allowed it to be used for an ever-increasing number of purposes or events, both of a positive and negative kind. On the positive side the Government may establish lighthouses and other navigation aids, may build dikes, dredge harbors, change the courses of rivers, build dams, and so forth. On the negative side, the Government may, among other things, enforce rules of the road and prohibit obstructions to navigation, such as unwanted wharves and dams. In these and countless other ways, the federal navigation power has been extended in great widening circles. These matters are well known.

Not only have the objects of federal navigation control been extended, but also its geographical extent. The core concept is that the power to control navigation extends to "navigable waters." What are these? The answer the Supreme Court gave in 1825 in *The Thomas Jefferson*⁸⁵ was that navigable waters were those in which the tide rose and fell. It is commonly supposed that this result was the product of literal application of English cases, though the fact seems to be that it was a misreading of English law.⁸⁶ That is academic now, for in 1851 *The Thomas Jefferson* was overruled in the epochal *The Genesee Chief*,⁸⁷ which extended federal navigation control to all waters commercially navigable in fact, whether above or below the tide line. By a further recent development, the power to regulate and improve navigation has been further extended to nonnavigable

83. U.S. CONST. art. I, § 8, cl. 3.

84. 22 U.S. (9 Wheat.) 1 (1824).

85. 23 U.S. (10 Wheat.) 428 (1825).

86. It is true that the crown owned the beds of navigable streams up to the tide line, and riparian owners owned the beds above that point. But, both above and below, streams were impressed with a public right of navigation as far as they were navigable in fact. While the shorter English streams were not usually navigable as far inland as longer American ones, some English streams were navigable and navigated by the public above the tide line. 1 H. FARNHAM, *WATERS AND WATER RIGHTS* 104-117 (1904); SIR MATTHEW HALE, *DE JURE MARIS* chs. 1, 2 (early 17th century), as reprinted in S. MOORE, *HISTORY OF THE FORESHORE* 370-74 (1888). The crown had control over public navigation above and below the salt line.

87. *The Propellor Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

streams in the watersheds of navigable ones.⁸⁸ Can there be many streams beyond the reach of Congress?

The table is now set to serve up the navigation-servitude doctrine. In essence it is that loss of riparian rights upon a navigable stream is not compensable if the loss was caused by an act of the federal government, which act was done under the power to regulate and improve navigation. This formulation, while subject to qualification in some particulars, is at least accurate enough to be a focal point for discussing the development and ramifications of the federal doctrine.

Just as a man's ancestors go back to Adam, any legal doctrine might be traced until it disappeared into the mists of an Anglo-Saxon moor, the council fire of some Germanic tribe, the smoke that enveloped Mount Sinai. So the navigation servitude has its antecedents, which include *The Genesee Chief* and *The Thomas Jefferson*. However, the first case to give it clear voice was *Gibson v. United States* in 1897.⁸⁹ The plaintiff owned a farm on an island in the Ohio River, accessible only by a boat landing on the farm. As a navigation improvement, the Corps of Engineers built a dike that impeded the plaintiff's riparian access and devalued the farm. Denying compensation, the Court's opinion contained some talk about "consequential" damages but relied mainly upon the navigation servitude, thus stated: "[A]lthough the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution."⁹⁰ *South Carolina v. Georgia*⁹¹ was cited as authority, but it is not, as it held only that a federal licensee, Georgia, might not be enjoined from changing the channel of the Savannah River. It is true the Supreme Court had recognized the existence of a navigation servitude several years before in *Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co.*,⁹² but the servitude apparently ran to the State of Wisconsin and arose out of the state's own power to regulate navigation.

Because the Court in *Gibson* partially relied on "consequen-

88. *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960).

89. 166 U.S. 269 (1897).

90. *Id.* at 272.

91. 93 U.S. 4 (1876).

92. 142 U.S. 254 (1891).

tial damage" language, it likely was not as obvious to contemporaries as it is to us that the federal navigation servitude was spawned. Also, the basis for the servitude, the commerce clause, was not spelled out, though we can see it was implicit in the authorities the Court cited. However, the decision did settle some fundamental matters. The interest affected, access to a navigable river, was such a classic example of a riparian right that there was never a doubt that the servitude burdened that class of property. We should note, too, that the Court said the doctrine applied even if the riparian owner owned the bed, a point on which later cases agree.⁹³ As original cases go, *Gibson v. United States* is clearer than most.

The federal navigation servitude was subjected to a full-dress review in the 1900 case of *Scranton v. Wheeler*.⁹⁴ The facts in *Scranton* were similar to those in *Gibson*, though more extreme. A government-built pier in the navigable Ste. Marie's River completely blocked a riparian owner's access to the thread of the stream. No compensation, held a majority of the Court, because the owner's riparian rights were impressed with a servitude in the Government to improve and regulate navigation. Justice Shiras wrote a dissenting opinion, raising objections to the doctrine that have never been satisfactorily answered.⁹⁵ *Scranton* confirmed the vitality of the federal servitude and suggested it was regarded as proprietary in nature, as was spelled out more fully in *United States v. Chandler-Dunbar Water Power Co.* in 1913.⁹⁶ *Chandler-Dunbar* reasoned that the riparian owner's riparian rights, indeed, his very title to the bed of navigable waters, was a "qualified" one. The qualification was said to be a "servitude" held by the federal government, whereby the Government had the right to make navigation regulations or improvements. If the Government had this servitude or easement, then no compensation would be due for the Government's enjoyment or exercise of its own pre-existing property right, just as the owner of a roadway easement would not be a trespasser for crossing the burdened tenement. The Government would be exercising its own property right, not invading any right of the owner. *Chandler-Dunbar* also makes plain that the power to

93. *E.g.*, *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *Scranton v. Wheeler*, 179 U.S. 141 (1900).

94. 179 U.S. 141 (1900).

95. Justice Shiras's objections will be discussed later in the section criticizing the navigation servitude.

96. 229 U.S. 53 (1913).

control and improve navigation was derived from the commerce clause. Subsequent cases have added little to our knowledge of the conceptual nature of the servitude or its origin.

Later navigation-servitude cases, as well as commentators, have generally accepted the proprietary nature of the servitude.⁹⁷ A different analysis would be possible; we might think of the government as having, in Hohfeldian terms, an immunity from compensation for the destruction, diminution, or taking of property rights caused by exercises of the navigation power.⁹⁸ However, if this were so, we would expect to see the government escape compensation for all kinds of harm arising out of the exercise of navigation power, flooding of uplands, for instance. As we shall see, the escape is made good only when the "impact" is within the bounds of the navigable stream, so that only riparian property rights are affected. In other words, the defense seems to follow only riparian rights, indicating that they are impressed with something, call it a servitude or what you will. Moreover, a servitude theory is particularly well suited to our present discussion, which has tended to emphasize the development of the concept of riparian property in the law of eminent domain. Within this framework, it seems accurate to say that in eminent domain law, as compared with the general system of property law, riparian rights are diminished by a servitude or easement held by the government to control and improve navigation.

After *Gibson*, *Scranton*, and *Chandler-Dunbar* blocked out the basic navigation-servitude theory, subsequent cases have dealt with two questions. One group of cases has identified kinds of riparian interests that the servitude affects. The other group has described the waters covered by the servitude or, we might say, its geographical extent. In the end, we shall see that the two questions tend to merge, but it is convenient at least to start out by discussing them separately.

97. E.g., Baldwin, *The Impact of the Commerce Clause on the Riparian Rights Doctrine*, 16 U. FLA. L. REV. 370 (1963); Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1 (1968); Comment, 31 WASH. L. REV. 271 (1956).

98. This may be the analysis preferred in Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963). Miss Morreale is critical of the existence of the servitude and, as the title of her article suggests, she prefers to speak of a bar to compensation. However, she does not make a frontal assault on the proprietary servitude analysis and would obviously be critical of the bar to compensation whatever the theory of its operation.

Gibson and Scranton held that the right of riparian access was subject to the servitude, as we have seen. There is no doubt this is so, although the 1926 case of *United States v. River Rouge Improvement Co.*⁹⁹ may be at least partially inconsistent. The Government deepened and widened a navigable river, partly flooding out the owner's adjoining upland. While the owner lost his original water access, he acquired new and better water frontage and access farther inland. Of course he was compensated for the part inundated, and the issue was whether his award should be offset by the value of the new access. The Court held it should be, thus recognizing access as valuable property. At least superficially, this seems inconsistent with saying the Government did not have to compensate for loss of access in *Gibson and Scranton*. If, after *River Rouge* was decided, the Government had again deepened and widened the river, no compensation would have to be paid for the new access, and the case has therefore been criticized as allowing the owner to be charged off for an item for which he would not have been paid had the Government taken, instead of created, the access.¹⁰⁰ The criticism overlooks one detail: the new riparian access did have some value—substantial market value. The owner could use the access. If the Government condemned it in the exercise of any power except the navigation power, *e.g.*, the war power,¹⁰¹ the owner would receive full compensation. The value of the access right was its full value, discounted by the probability the Government would destroy or diminish it in exercise of the navigation power, just as Blackacre still has value even though someone has an easement across it. That is apparently what the Supreme Court was driving at when it recently in *United States v. Rands*¹⁰² reconciled *River Rouge* with the other servitude cases. The offset should have been for the discounted value of the new access. *River Rouge* does not make it clear whether the offset was this discounted figure or the full value of the access. If the Court meant the latter amount, then the case is inconsistent with the other cases to the extent of the discount, which represents the value of the servitude.

From *Chandler-Dunbar* forward, most of the leading Su-

99. 269 U.S. 411 (1926).

100. See Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1, 22-23 (1968).

101. See *International Paper Co. v. United States*, 282 U.S. 399 (1931).

102. 339 U.S. 121 (1967).

preme Court cases have dealt with what is in essence a form of the riparian right to have the water remain and flow by. The question has been framed thus: Is a riparian owner entitled to compensation when, due to the Government's exercise of its navigation power, the flow or level of a navigable stream is so reduced that the owner loses water power, often called power-site value? *United States v. Twin City Power Co.*,¹⁰³ the leading case, provides an example. In connection with building a dam, an exercise of the power over navigation, the Government brought the action to condemn riparian uplands. No one denied that the owner was entitled to some compensation for the uplands—the navigation servitude does not extend that far—but the issue was whether that portion of value attributable to power-site value should be allowed. "No," said the Court, because that riparian property was impressed with the navigation servitude. As far as this increment of value went, the "impact" of the taking fell within the banks of the navigable stream. Justice Burton, dissenting, argued in substance that the impact had been made to fall upon the upland, so that the owner was wrongly denied compensation for his full market value. The decision generated a great deal of law review comment, much of it critical of the opinion.¹⁰⁴ However that may be, the rule of the case is well established.¹⁰⁵

In fact, power-site value was one of the items covered long before *Twin City* in *United States v. Chandler-Dunbar Water Power Co.*¹⁰⁶ The five-man majority in *Twin City* based its decision mainly upon *Chandler-Dunbar*. That case did indeed deny an award to the Chandler-Dunbar Company for power-site value on a parcel of land it owned and also denied an award to the St. Mary's Power Company for power-site value of another parcel it owned. Chandler-Dunbar's parcel also had an increment of value attributable to its being suitable as the site of a canal that could have been built around some rapids in the river. For

103. 350 U.S. 222 (1956).

104. See Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1, 14-16 (1968), where the law review writings are discussed and cited.

105. *Twin City* was relied upon, and its principle even extended to analogous situations, in *United States v. Rands*, 389 U.S. 121 (1967) (portsite value); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961) (valuation of flowage easement to be discounted by power-site value); and *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960) (power-site value on non-navigable tributary of navigable stream).

106. 229 U.S. 53 (1913).

this increment of value the trial court had awarded \$25,000, and the Supreme Court affirmed. Since the canal-site value arose out the presence of the running water in the river, just as did the power-site value, award of canal-site value seems inconsistent with denial of the power-site value. This inconsistency the Court tried to explain away in *Twin City*,¹⁰⁷ but the explanation is quite incomprehensible. So, while the non-award of power-site value is clear, the compensability of canal-site value, should that question be presented again, is in doubt.

If there is doubt about canal-site value, what about increments of value attributable to land's being the site of some other use of navigable water? Suppose it were useful as the site of wharves or of a road to reach a river. This question is probably answered by the 1967 case of *United States v. Rands*.¹⁰⁸ In connection with a lock and dam project on the Columbia River, the Government condemned uplands that had an increment of value for use as a port site. The Supreme Court reasoned that ports, like power dams, were within the power to control navigation and thus subject to the servitude, so that no award could be made for port-site value. It seems, therefore, that no increment of the market value of upland that is derived from the land's being a site for exploiting navigable water in any way is compensable. The award of canal-site value in *Chandler-Dunbar* apparently is a mutant, out of keeping with other similar cases.

So far it appears clear that the federal navigation servitude burdens all kinds of riparian rights: access, the right to have the water flow and remain in place (power-site value), and the right to use the water (port-site value). Beyond this, the servitude has been extended to the very bed of the stream in private ownership, which is not normally thought of as a riparian right. This was decided long ago in *Lewis Blue Point Oyster Cultivation Co. v. Briggs*.¹⁰⁹ The oyster company, which leased underwater oyster beds from the fee owner, sought to enjoin the Government from dredging a channel, contending the dredging would not only destroy oysters but would amount to an uncompensated destruction of the bed. Denying the injunction, the Supreme Court held that title to the beds of navigable waters,

107. 350 U.S. 222, 226 n.1 (1956).

108. 389 U.S. 121 (1967).

109. 229 U.S. 82 (1913).

though in private hands, was held subject to the power to improve navigation.

At this point we seem to be able to say the navigation servitude burdens the stream and the bed. It attaches to any increment of upland value that is attributable to the presence or potential use of waters that are subject to the servitude. These are the property interests to which it attaches. The question now to be considered has to do with what waters the servitude covers. Does it, for example, burden only the beds and waters of navigable waters, or does it possibly burden some nonnavigable waters, also?

We may as well begin with the 1917 companion cases of *United States v. Cress* and *United States v. Kelly*,¹¹⁰ since that is where most of the controversy is. Cress owned land on a non-navigable tributary of the navigable Cumberland River, and Kelly owned land on a nonnavigable tributary of the navigable Kentucky River. In each case a Government lock and dam project on the navigable river raised the water level of the non-navigable creek. The impact on Cress was to flood out a ford he owned across the creek and, on Kelly, to back water against his power dam on the creek and thus to shorten the drop and diminish power. In other words, in each case the impact was upon some riparian interest the owner had on the nonnavigable tributary, but the cause of the impact was a navigation improvement on the navigable main stream. Compensation was held to be due. In retrospect, the cases would seem to stand for the proposition that the navigation servitude burdens only interests lying within navigable waters. That, however, is not the way the Court reasoned. For purposes of its opinion, the Court assumed "that the right of defendants in error are no greater than if they had been riparian owners upon the rivers, instead of upon the tributary creeks."¹¹¹ Bear in mind that *Gibson v. United States*, *Scranton v. Wheeler*, *United States v. Chandler-Dunbar Water Power Co.*, and *Lewis Blue Point Oyster Cultivation Co. v. Briggs* had already been handed down by 1917. So, it was established that access right, power-site value, and title to the beds of navigable streams were subject to the servitude. Did the Court now mean

110. Reported together in 243 U.S. 316 (1917). *Cress* is the famous case and *Kelly* seldom mentioned, although the facts in *Kelly* are really more interesting.

111. 243 U.S. 316, 319 (1917).

to say that the right to have the water remain at its natural level, on navigable as well as nonnavigable streams, was not similarly subject? After all, that is the same riparian right from which power-site value is derived. If that is what the Court meant to say, it put the prior decisions in question or, at the very least, drew a finely conceptualized line between *Chandler-Dunbar* and *Cress-Kelly*.

Perhaps these ambiguities have been resolved, though others have taken their places. In 1945 *Cress* and *Kelly* were put to the test in *United States v. Willow River Power Co.*¹¹² The power company had a dam on the nonnavigable Willow River at its confluence with the navigable St. Croix River. The majority opinion says that the dam was "close to or upon the banks of the St. Croix." The difference between these two factual possibilities has divided students of the case ever since. When the Government built a dam downstream in the St. Croix, this raised the water level up the St. Croix and against the face of the dam, wherever the Court believed that was. As in *Kelly*, this caused a loss of water power, for which the Court of Claims had awarded \$25,000. Reversing, the Supreme Court distinguished *Cress* and *Kelly* on the factual basis that their impacts fell on the non-navigable tributaries, the majority obviously considering the impact in *Willow River* to be on the main stream. Justice Roberts and Chief Justice Stone, dissenting, contended that the impact was upon the tributary because (apparently) the face of the dam was there and only the tail race emptied into the St. Croix. Thus, the majority opinion seems to turn upon the factual conclusion that the impact fell at the mouth of the tail race on the navigable stream. Whether one agrees with that factual conclusion or not, as long as the Court accepted it as the basis for the decision, *Willow River* stands for the proposition that the navigation servitude applies only when the impact is upon navigable waters. And, whether or not one agrees with the Court's reading of *Cress* and *Kelly*, those cases were made to stand for the position that the servitude does not burden riparian interests on nonnavigable streams. Some scholars hold *Willow River* to be contrary to *Cress-Kelly*,¹¹³ thus in effect denying to the Court the power to settle the factual basis for its opinion.

112. 324 U.S. 499 (1945).

113. E.g., Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1, 32-33 (1968); Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1, 44-45 (1968).

*United States v. Kansas City Life Ins. Co.*¹¹⁴ is sometimes thought to reaffirm *Cress-Kelly*. Though there are factual similarities, and though the issues decided are related, the bases for the decisions are not the same. In *Kansas City Life* a Government dam on a navigable river backed water up the nonnavigable tributary upon which the plaintiff owned riparian farm land. This land was low and tended to be marshy, so that the plaintiff drained it by pipes and ditches that emptied into the creek. By the raising of the water level, these drainage devices were flooded and the land underflooded to some extent by seepage from the creek. The impact was thus outside the creek bed, the underflooding analogous to the overflowing in cases like *Pumpelly v. Green Bay Co.*¹¹⁵ Compensation was allowed, and would have been allowed, the Court indicated, even if the land had lain on a navigable river. So, *Kansas City Life* is an illustration of the principle that the navigation servitude does not burden land lying above the bed of a stream.

If *Willow River* has only twisted and limited *Cress* and *Kelly* and if *Kansas City Life* really deals with a different question, has *United States v. Grand River Dam Authority*¹¹⁶ finally laid them low? Some think so.¹¹⁷ That is not what the Supreme Court said, though an argument can be made that such are the case's implications. The plaintiff had had a federal license to build a dam on a nonnavigable tributary of a navigable river and also claimed, by virtue of a grant from the State of Oklahoma, to have a "vested interest in the waters" of the tributary. Instead of allowing the plaintiff to exercise its dam license, the Government itself built the dam, giving rise to the plaintiff's claim that it had been deprived of property without compensation. It had previously, in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Company*,¹¹⁸ been determined that the navigation power enabled the federal government to build dams on nonnavigable tributaries of navigable rivers, and *Grand River* reaffirmed this. The Government contended that the navigation

114. 339 U.S. 799 (1950).

115. 80 U.S. (13 Wall.) 166 (1871).

116. 363 U.S. 229 (1960).

117. Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1, 33 (1968); Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1, 61-62 (1968).

118. 313 U.S. 508 (1941).

servitude extended to the nonnavigable tributary, burdening riparian rights and barring the plaintiff's compensation.

The Supreme Court did deny compensation, but a close reading of the case shows this was not because of the navigation-servitude doctrine. In the first place, the Court expressly said, "In the view we take in this case, however, it is not necessary that we reach that contention."¹¹⁹ Further, the Court stated it as a fact that no riparian land was involved, and distinguished *United States v. Kelly* on that basis.¹²⁰ As to the plaintiff's claim that it had received a grant of water rights from Oklahoma, it was determined that neither that state nor the plaintiff had these rights.¹²¹ All the plaintiff had left was its Federal Power Commission dam license, and as to this the holding was that the Government had the superior right to build the dam itself despite the license. Mere frustration of the plaintiff's plans, the Court finally explained. Stripped naked, *Grand River* says only that no riparian or other property rights were affected; so, we obviously could not reach a servitude problem. The Supreme Court has not since clarified things.¹²²

Now, it may well be that *Cress* and *Kelly* are being ushered out. The navigation servitude is based upon the Government's commerce clause power to control and improve navigation. *Grand River*, and the *Phillips* case before it, extend the navigation power to nonnavigable streams in the watershed of navigable ones, at least when exercise of the power over the former affects navigation on the latter. Logically, the servitude ought to follow the power, so the argument goes. The case may arise to test this proposition, but *Grand River* was not that case.

Since the navigation servitude is derived from the navigation power, the defense should be available only when the Government's activities are carried out under that particular power. The power itself has been very liberally extended, as we have seen, to include, for instance, dams whose main purpose is to produce electric power, even dams on some nonnavigable tributaries. Still, if the Government operates under some other power,

119. *United States v. Grand River Dam Auth.*, 363 U.S. 229, 232 (1960).

120. *Id.* at 233 n.9.

121. *Id.* at 233-35.

122. Shepard's Citations shows the Supreme Court has cited *Grand River* only in *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627 (1961). The citation at that point sheds no light on *Grand River's* meaning.

such as the power to reclaim desert lands¹²³ or even the war power,¹²⁴ there is no servitude.

Perhaps it would be well to summarize what has been said regarding the federal navigation servitude. It is a servitude or easement in favor of the Government, burdening certain real property interests and obviating compensation for their diminution, destruction or appropriation. These interests are riparian rights and the title to the bed but nothing above the level of the bed. In other words, the impact of the governmental activity must fall below this line, although there may and probably will be a diminution of the value of the upland. According to the decided cases, the navigation servitude burdens only interests attaching to land that is riparian to navigable bodies of water. However, authority exists, on the basis of which it is possible that the servitude may be extended to land riparian to certain nonnavigable tributaries of navigable waters. And finally, the servitude applies only when the governmental activity that affects property rights is carried out under the power to regulate and improve navigation.

B. State Navigation Servitudes

Under the commerce clause, the power of the Congress to control navigation is superior to any such power in the states. However, it has long been established that if Congress has not seen fit to exercise its power over a particular navigable waterway, the state may regulate navigation there.¹²⁵ It must be that waters open to state regulation are becoming few; nevertheless, a state navigation power exists. Likewise, though it has been written on less than the federal servitude, a state navigation-servitude doctrine also exists.¹²⁶ It is similar to the federal doctrine, so that, to avoid repetition, only the significant differences between the two will be discussed.

Though the federal doctrine is now better known, the state counterpart is much older. It seems to trace back to the 1829 New York case of *Lansing v. Smith*, which held that a riparian owner on navigable water was not entitled to compensation when

123. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

124. *International Paper Co. v. United States*, 282 U.S. 399 (1931).

125. *United States v. Bellingham Bay Boom Co.*, 176 U.S. 211 (1900); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

126. *See* Annot., 21 A.L.R. 206 (1922); Annot., 18 A.L.R. 403 (1922).

access to his wharf was impeded by a state-licensed pier.¹²⁷ The court reasoned that, when the owner received the grant of his riparian parcel, that grant was subject to an implied reservation of power to regulate navigation. This implied-reservation theory was adopted as the basis for similar decisions in the other well known nineteenth-century New York cases of *Sage v. Mayor, etc., of City of New York*¹²⁸ and *People v. New York & Staten Island Ferry Co.*¹²⁹ Several other state cases¹³⁰ recognized the servitude by roughly the time the federal doctrine was first established in *Gibson v. United States*.¹³¹

State courts have asserted the state servitude doctrine numerous times since then, but, curiously, almost always in dictum.¹³² Typically, these cases have recognized the doctrine but have found it inapplicable because the state's activity has been held not to be carried out under the navigation power. The net result is that the scope of state navigation power has been most narrowly constricted. By way of example, the following activities have been held not to be within that power: river straightening for flood control,¹³³ a power dam,¹³⁴ water diversion for a sewage system,¹³⁵ a dam for a water supply,¹³⁶ jetties to protect

127. 4 Wend. 9 (N.Y. 1829).

128. 154 N.Y. 61, 47 N.E. 1096 (1897).

129. 68 N.Y. 71 (1877).

130. *Holyoke Water Power Co. v. Connecticut River Co.*, 52 Conn. 570 (1884) (dictum); *Hollister v. Union Co.*, 9 Conn. 436 (1833) (alternate basis for decision); *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 90 Wis. 370, 61 N.W. 1121 (1895) (dictum); *Delaplaine v. Chicago & N.W. Ry.*, 42 Wis. 214, 24 Am. Rep. 386 (1877) (dictum); *Jones v. Pettibone & Hubbell*, 2 Wis. 307 (1853) (dictum).

131. 166 U.S. 269 (1897).

132. *Beidler v. Sanitary Dist. of Chicago*, 211 Ill. 628, 71 N.E. 1118 (1904) (dictum); *Natcher v. City of Bowling Green*, 264 Ky. 584, 95 S.W.2d 255 (1936) (dictum); *Michaelson v. Silver Beach Impr. Ass'n*, 342 Mass. 251, 173 N.E.2d 273 (1961) (dictum that doctrine existed by virtue of colonial ordinance); *Crary v. State Hwy. Comm'n*, 219 Miss. 284, 68 So.2d 468 (1953) (dictum); *Crance v. State*, 309 N.Y. 680, 128 N.E.2d 324 (1955), *reinstating decision in* 205 Misc. 590, 128 N.Y.S.2d 479 (Ct. of Claims 1954) (dictum); *Marine Air Ways, Inc. v. State*, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. of Claims 1951) (dictum); *State ex rel. The Andersons v. Masheter*, 1 Ohio St.2d 11, 203 N.E.2d 325 (1964) (dictum); *Conger v. Pierce County*, 116 Wash. 27, 198 P. 377 (1921). *See also* the earlier cases cited in note 130, *supra*, in all of which, except the *Hollister* case, statements about the state navigation servitude are dictum.

133. *Conger v. Pierce County*, 116 Wash. 27, 198 P. 377 (1921).

134. *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 90 Wis. 370, 61 N.W. 1121 (1895).

135. *Beidler v. Sanitary Dist. of Chicago*, 211 Ill. 628, 71 N.E. 1118 (1904).

136. *Natcher v. City of Bowling Green*, 264 Ky. 584, 95 S.W.2d 255 (1936).

a bathing beach,¹³⁷ and a road built on fill in a lake bed.¹³⁸ Obviously, most of these activities, if conducted by the federal government, would be considered under the navigation power. Whereas the Supreme Court has vastly extended the scope of the federal power, the state courts have, at least for purposes of the servitude, generally refused to find an exercise of the state power unless the activity was nearly exclusively to aid or regulate navigation.

So reluctant have state courts been to invoke the navigation servitude that one might question the vitality of the state branch of the navigation servitude. For the record, the state courts have not openly assailed the doctrine; so, we could not support a statement that it is on its way out. Still, it may not be too much to say the State doctrine is no judicial favorite, and the courts are not exactly looking for ways to extend it. Contrast this with the history of growth of the federal doctrine. The federal navigation servitude has made increasingly huge incursions into the availability of compensation; but in this century there has been an indisposition to extend the state servitude of the nineteenth-century New York cases, in practical effect a retrenching from it. In a larger sense, beyond rules, beyond doctrines, while the federal courts may be said to be resisting the overall trend toward recognizing riparian rights as "property" in eminent domain law, state courts are furthering the trend.

Contradictory to what the state courts seem to have been doing generally, we encounter the recent California case, *Colberg, Inc. v. State ex rel. Department of Public Works*.¹³⁹ If the doctrine of this decision should catch on, the case would become famous, for the doctrine is as original as it is far reaching. The plaintiffs owned riparian lands, on which they had shipyards, at the end of a tidal waterway that was about 5,000 feet long. State highway plans called for a fixed freeway bridge between the plaintiffs' lands and the mouth of the waterway, as a result of which ship access would be substantially diminished. The Supreme Court of California denied compensation, basing its decision on what it called the state navigation servitude. This the

137. *Michaelson v. Silver Beach Impr. Ass'n*, 342 Mass. 251, 173 N.E.2d 273 (1961). *But cf.* *Nelson v. DeLong*, 213 Minn. 425, 7 N.W.2d 342 (1942).

138. *Crance v. State*, 309 N.Y. 680, 128 N.E.2d 324 (1955), *reinstating decision* in 205 Misc. 590, 128 N.Y.S.2d 479 (Ct. of Claims 1954).

139. 62 Cal. Rptr. 401, 432 P.2d 3 (1967); Note, 72 Dick. L. Rev. 375 (1968).

court modestly termed broader than most state navigation servitudes, even broader than the federal servitude. The California servitude was said to apply whenever the state "dealt with" navigable waters. A freeway bridge, admittedly having nothing to do with navigation or the state's navigation power, was such a "dealing." In support of its decision the court asserted, incorrectly, that six states had similarly extended the servitude doctrine, citing six cases. Only one of them even partially supports the *Colberg* decision.¹⁴⁰

Is "monstrous" too strong a word? *Colberg* is not a mere extension of the navigation servitude; it proclaims a "servitude" for every form of governmental activity that affects navigable waters. Can anyone imagine a loss of riparian rights from state activity if the state does not in some way "deal with" the body of water? If the rule of *Colberg* is applied in California the way it is stated, no owner on navigable waters in that state will ever again receive compensation from the state for the taking of his riparian rights. Courts would do well to ponder whether they want to wipe out a hundred years of eminent domain progress.

C. Criticism of the Servitude Doctrines

There is no great novelty in criticizing the existence of the navigation-servitude doctrines. In *Scranton v. Wheeler*¹⁴¹ Justice Shiras, dissenting, raised fundamental objections. They are as cogent now as then and have been freely drawn upon here. A number of writers since then have added their words of con-

140. The six cases cited are *Lovejoy v. City of Norwalk*, 112 Conn. 199, 152 A. 210 (1930); *Frost v. Washington County R.R.*, 96 Me. 76, 51 A. 806 (1901); *Nelson v. DeLong*, 213 Minn. 425, 7 N.W.2d 342 (1942); *Crary v. State Hwy. Comm'n*, 219 Miss. 284, 68 So.2d 468 (1953); *Darling v. City of Newport News*, 123 Va. 14, 96 S.E. 307 (1918), *aff'd*, 249 U.S. 540 (1919); and *Milwaukee-Western Fuel Co. v. City of Milwaukee*, 152 Wis. 247, 139 N.W. 540 (1913). *Lovejoy* and *Darling* are oyster-bed-pollution cases and hold only that riparian owners on salt water, including cities, have a riparian right to discharge sewage into the sea. *Frost* and *Milwaukee Western Fuel Co.* involve the federal, not state, power to regulate navigation. *Crary* has only some dictum about the state's superior power to regulate navigation; it holds the state could build a bridge on state-owned tidewater. *Nelson* is an extension of the state navigation servitude, for it holds municipal regulations against boating near a bathing beach, and the roping off of a swimming area, were exercises of state navigation power. Of course it does not even approach the lengths of *Colberg*.

141. 179 U.S. 141 (1900).

demnation.¹⁴² No evidence exists that the criticism has slowed the extension of the doctrine, particularly the federal branch of it, nor that one more criticism will do so. But just because the courts laid a goose egg, or even because the goose has grown very large, that is no reason to refrain from trying to cook the courts and their goose if they deserve it.

The early New York cases in which the servitude doctrine first appeared based it upon a reading of English cases.¹⁴³ It was a misreading. They said, in substance, that Parliament had had the power to impede navigation and that, upon formation of the Union, this power devolved upon the New York legislature. From this the court concluded the legislature, or those acting through its authority, could impede access to riparian lands on navigable waters without compensation. It is true that the English public had the right to navigate and not only up to the tide line, below which the Crown owned the beds, but up beyond that to the line of navigability in fact, where riparian owners owned the beds. It is true that Parliament had power to regulate navigation on behalf of the public. But it is not true that compensation was denied a riparian owner whose riparian rights were taken by an exercise of the navigation power. In plain, there is no navigation servitude in England.¹⁴⁴ In all fairness, it should be pointed out that this was settled more clearly after the early New York cases than before them.¹⁴⁵ However, the

142. 1 H. FARNHAM, *WATERS & WATER RIGHTS* 297 (1904); Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1, 19-31 (1963). Even A.L.R., which normally does not pass upon the worth of legal doctrines, sharply criticized the federal navigation servitude in Annot., 21 A.L.R. 206, 216 (1922). See also the note to *Scranton v. Wheeler* in 45 L.Ed. 126 (1900), in which it was stated (overstated) that the effect of *Gibson v. United States* was that the riparian right of access was no longer property.

143. *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71 (1877); *Lansing v. Smith*, 4 Wend.(N.Y.) 9 (1829).

144. *Attorney Gen'l v. Wemyss*, 13 App. Cas. 192 (1888); *Lyon v. Wardens*, 1 App. Cas. 662 (1876); 1 H. FARNHAM, *supra* note 142, at 293-95; Note to *Scranton v. Wheeler*, 45 L.Ed. 126 (1900).

145. Observe the dates of the cases cited in the preceding note. Statements in some high secondary authorities may have given reason to suppose private riparian rights could be invaded without compensation in England. See SIR MATTHEW HALE, *DE JURE MARIS* ch. 3 (early 17th century), which is printed in S. MOORE, *HISTORY OF THE FORESHORE* 374-76 (1888), said that the crown could remove "all nuisances and impediments of passages of boats and vessels, though in the private soil of any person. . ." 1 BLACKSTONE, *COMMENTARIES* 264-65, stated the king could erect navigation aids on private lands as well as royal lands.

English law was clear by the time the federal servitude was established in *Gibson v. United States*.¹⁴⁶

It may be that the navigation servitude grew originally out of a play on the word "servitude." English authorities spoke of a public servitude or right in common to travel on navigable rivers, analogous to a highway easement.¹⁴⁷ No doubt the public did have and does have such a right, and no doubt the riparian owner may not interfere with its exercise. The early New York cases seem to have confused the public servitude with the governmental power to regulate the public's exercise of it. As far as the public servitude goes, it is only to travel upon the waters, and this does not imply a right in public or state to do more than that. Specifically, it does not imply a right or immunity to destroy or adversely affect private riparian rights in the stream. To return to the highway analogy, certainly the public has a highway easement, but this does not mean the state may block the private abutter's access to the road.¹⁴⁸

Underlying the navigation servitude, there is the policy argument that (a) governmental power to control navigation is supreme—especially sacred in some way—and (b) that to grant compensation would cripple the power. Consider first the second part of this supposed reason. Assuredly, the state and federal governments may take riparian property rights. They may take any property rights in any thing real or personal if necessary to achieve some governmental object, be it the building of roads, post offices, school, parks, fortifications, lighthouses, dams, and so on. All these objects are in furtherance of some power of government; yet compensation must generally be paid. Does anyone argue that having to pay for land for a highway or post office "cripples" the power to build these things? Is compensation denied for the takings? Of course not. Why? Because the constitutional clauses requiring compensation coexist with the powers granted or reserved to the governments. We say to our governments, "Yes, of course you may do these things, but if you do them you must pay for them." And so with the navigation power. Of course the federal and state governments may,

146. 166 U.S. 269 (1897).

147. See HALE, *supra* note 145 at ch. 3.

148. See Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEXAS L. REV. 733 (1969).

within their respective spheres, regulate and improve navigation, but they should pay compensation for property, including riparian rights, taken in the process.

Consider now the argument that the navigation power has some special sacredness about it. Of course it is "supreme" in the sense that no citizen may block its exercise. So are all the powers of government, including the powers to build roads and post offices, to defend the nation—to do everything government may do. What is so special about the power to regulate and control navigation? Who will contend that the navigation power is of a higher order than the war power, in the exercise of which the Government must compensate for riparian rights.¹⁴⁹ Even if there is utility in pigeonholing and labeling the powers of government, there is no logic to setting apart the navigation power as more sacrosanct than the others.

An alternative choice would be to say the other powers are as sacred as the navigation power. The implications of this choice boggle the mind, for this would mean to extend to the exercise of every power an immunity from compensation. Land for roads, post offices, and all the rest would be taken without compensation, so that the compensation clause of the fifth amendment and of every state constitution would become a nullity. The possibility is not pure fantasy, for it was precisely this kind of extension that occurred in the *Colberg* case,¹⁵⁰ which created a servitude for every state activity "dealing with" navigable waters. And whether or not the navigation servitude is extended, to the degree it exists at all, it is by just that much a negation of the constitutional guarantee of compensation.

Finally, the navigation servitude is an atavism. The doctrine runs counter to the historical process by which eminent domain law has increasingly come to recognize and protect intangible property, including riparian rights. It is as though the courts wished to retain a string onto the past.

Born out of a mistake in reading English law, nourished by a misconception of the powers of government, sustained by misunderstanding of the relationship between powers and the principle of compensation, the navigation servitude is an anacron-

149. *International Paper Co. v. United States*, 282 U.S. 399 (1931).

150. *Colberg, Inc. v. State ex rel. Dep't of Public Works*, 62 Cal. Rptr. 401, 432 P.2d 3 (1967).

ism. If it is too much to hope that the courts will abandon the servitude doctrine, could it not at least be limited? Jurisdictions that do not have it should not adopt it. Those that have it should limit it. Statutes authorizing navigation projects should expressly allow compensation for riparian rights. Certainly the doctrine should be among the most disfavored in the law.