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COMPENSATION FOR LOSS OF ACCESS IN EMINENT DOMAIN IN NEW YORK: A RE-EVALUATION OF THE NO-COMPENSATION RULE WITH A PROPOSAL FOR CHANGE

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I. INTRODUCTION

THE location of a parcel of land with respect to adjoining streets or highways is without question a factor of great importance in appraising the property and arriving at its market value. Hypothesizing the appropriation of a parcel of land abutting on a highway, the measure of damages would, in the first instance, depend upon an analysis of the appropriation in light of the applicable constitutional eminent domain provision. Article 1, section 7 of the New York Constitution states in relevant part that "Private Property shall not be taken for public use without just compensation . . . ." The fifth amendment of the Federal Constitution contains a similar provision. If it can be said that an abutter's right of access is "private property" within the meaning of the New York constitutional provision, an assumption which we shall later see does not necessarily hold true, there should be no question that the state must compensate the abutting owner for the loss of this right. Of course, if the test of compensability turned upon what the condemnor got, it would be difficult to arrive at the conclusion that the state actually received the abutter's access rights since in most instances what was the abutter's right of access disappears into, *e.g.*, a highway widening, the erection of guardrails, the construction of new highways. This, however, does not appear to be the prevailing rule of valuation. Just compensation must be paid for what the owner has lost, not what the condemnor has gained, and this rule has been uniformly accepted, at least in theory, by the courts of New York.[1]

Another method of analyzing what property rights should be compensable in eminent domain focuses upon the factors that would be considered by a willing buyer and seller operating in an open real estate market in their evaluation of the subject property. There is no question that the general location of property with respect to adjoining streets and highways would be considered an important element by an arm's-length buyer or seller in arriving at a value for the property.[2] Thus, on the basis of either the pragmatic real estate market analysis summarized above or a simplified constitutional analysis, an abutting owner would seem to

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1. The measure of damages is fair market value at the time of the taking. Roberts v. New York, 295 U.S. 264 (1935). Special value to the owner may not be considered. Matter of Simmons (Ashokan Reservoir, Sec. No. 7), 130 App. Div. 356, 114 N.Y. Supp. 571 (3d Dep't), *aff'd*, 195 N.Y. 573, 88 N.E. 1132 (1909), *aff'd sub nom.*, McGovern v. City of New York, 229 U.S. 363 (1913); see also Jahr, Eminent Domain § 70 (1953).

2. See Schmutz, Condemnation Appraisal Handbook chs. 11, 12 (1963); McMichael, Appraising Manual 573-75, 580 (4th ed. 1951).

be entitled to just compensation when he is deprived of his rights of access by an appropriation or condemnation. In this last statement, however, is rooted the basis of the problem. The fact is that the simple constitutional schema for compensation assumes away all of the problems. The abutter is entitled to compensation only if he, in the first instance, can be said to have a right of access which has reached the level of a property right, and, assuming that he has this right, only if that right is in fact appropriated. Thus, loss of access under present constitutional provisions in New York has not been and cannot be considered in and of itself an act requiring the payment of just compensation by the state, absent an affirmative determination of the two questions posed above.

The courts have tended to consider loss of access as an incident to any number of factually differing situations involving appropriations or condemnations of land abutting highways. The so-called Elevated Railway cases[3] were concerned with damages accruing from loss of access, but only within the confines of the somewhat narrow and unique fact patterns involved in those cases. It should be noted that the schema of analysis used by the courts in several of the early Elevated Railway cases was as close as any New York court has come to the basic constitutional analysis stated above. These courts initially approached the problem of compensation for loss of access by categorizing the interest which the abutting owner had in the adjoining highway in terms of the *right* to access. Courts often came to the apparent conclusion that the right to access was an unqualified property right,[4] and some commentators continue to cite the New York cases in a misleading fashion to indicate the existence of an unqualified property right.[5] Several of the later Elevated Railway cases[6] reached the conclusion that it had not been the intention of the courts in the earlier cases to lay down any hard and fast rules governing compensation for loss of access regardless of the reason for the appropriation, but rather those courts had intended only to promulgate rules for compensation limited by the facts of the particular case involved, *i.e.*, the erection of elevated railways and the pattern of ownership of the streets. Still other courts approached the problem of compensation for loss of access from a somewhat different point of view. The classification of the particular interest or right taken was apparently deemed unimportant or

3. See *infra* at 633-37. The cases which fall within this class are numerous, and it would serve no useful purpose to collect them here. See South Buffalo Ry. v. Kirkover, 176 N.Y. 301, 305, 68 N.E. 366, 368 (1903); see also cases collected in 1 Lewis, Eminent Domain 265 n.59 (1909).

4. See, *e.g.*, Newman v. Metropolitan Elev. Ry., 118 N.Y. 618, 625, 23 N.E. 901, 902 (1890).

5. See, *e.g.*, 2 Nichols, Eminent Domain § 5.72(1) (3d ed. 1950).

6. See, *e.g.*, Sauer v. City of New York, 180 N.Y. 27, 72 N.E. 579 (1904), *aff'd*, 206 U.S. 536 (1907); Muhlker v. New York & H.R.R., 173 N.Y. 549, 556, 66 N.E. 558, 560 (1903), *rev'd*, 197 U.S. 544 (1905).

7. See, *e.g.*, Northern Lights Shopping Center, Inc. v. State, 20 A.D.2d 415, 420, 247 N.Y.S.2d 333, 338 (4th Dep't 1964), *aff'd*, 15 N.Y.2d 688, 204 N.E.2d 333, 256 N.Y.S.2d 134, *amended*, 15 N.Y.2d 960, 207 N.E.2d 521, 259 N.Y.S.2d 849, *cert. denied*, 382 U.S. 826 (1965).

was overlooked and emphasis was placed upon the method[7] and reason[8] for the taking. Again, the generality of this statement tends to complicate the problem in that an analysis of the means by or through which governmental power is exercised must, in addition, distinguish between the utilization of these means to "take" private property or to "regulate" that property and hybrid combinations of the two.

The police power, by definition, is not utilized to "take" property in the physical sense but rather is used only to "regulate."[9] Similarly, it is only through the exercise of the eminent domain power that a governing body can physically "take" property.[10] Where regulation or a combination of regulation and a taking were involved, the cases evolved an analysis whereby the interest of the general public in safe and convenient highway travel was weighed against the abutting property owner's right of access.[11] The fact that the police power was exercised as an adjunct to the eminent domain power was apparently considered of little or no importance in terms of providing a basis for compensating the abutting owner for a loss of access resulting primarily from regulation. More often than not, the abutting owner's loss of access was held to be a non-compensable element of damage incidental to the promotion of the public welfare through the supposedly lawful exercise of the police power. True, in the hybrid case involving both "regulation" and a "taking," the abutter was awarded compensation for the actual physical taking but this was and is small solace where the non-compensable regulation results in the destruction of a substantial part of the economic value of the property.

The fact patterns in the loss of access cases can be categorized in terms of pure regulation or a combination of regulation and a taking resulting in circuity of access, or a change of grade and resultant circuity or loss of access, or the complete destruction of the abutter's access to adjoining highways, or the alteration of the volume of traffic around the abutter's property,[12] or an interruption or re-routing of traffic in the highways abutting the subject property. With but two exceptions, the courts in each of the foregoing categories of cases protected what were deemed to be the paramount rights of the general public at the expense of the abutting owner. The change of grade cases were generally decided favorably

8. See, *e.g.*, Muhlker v. N.Y. & H.R.R., 173 N.Y. 549, 556, 66 N.E. 558, 560 (1903), *rev'd*, 197 U.S. 544 (1905) (public or private use).

9. 29A C.J.S. *Eminent Domain* § 6 (1955). See also Utah v. Dickenson, 275 App. Div. 120, 122, 88 N.Y.S.2d 478 (1st Dep't), *aff'd sub nom.*, Utah v. Baxter, 300 N.Y. 610, 90 N.E.2d 66 (1949); Kucera, *Eminent Domain Versus Police Power—A Common Misconception*, 1959 Institute On Eminent Domain 1. The basic distinction between the two was also made in Abbot, *The Police Power and the Right to Compensation*, 3 Harv. L. Rev. 189 (1889).

10. 29A C.J.S. *Eminent Domain* § 6 (1955).

11. See, *e.g.*, Northern Lights Shopping Center, Inc. v. State, 20 A.D.2d 415, 419, 247 N.Y.S.2d 333, 337 (4th Dep't 1964), *aff'd*, 15 N.Y.2d 688, 204 N.E.2d 333, 256 N.Y.S.2d 134, *amended*, 15 N.Y.2d 960, 207 N.E.2d 521, 259 N.Y.S.2d 849, *cert. denied*, 382 U.S. 826 (1965).

12. It has been suggested that flow of traffic is more valuable to roadside property than direct access. Gorman, *Access Loss Distinguished From Traffic Flow Diversion*, 3 Ariz. L. Rev. 48 (1961).

for the abutting owner[13] as were the total loss of access cases.[14] None of these cases utilized the basic constitutional analysis stated above, as indeed they could not in light of the "regulation-taking" distinction applied by the courts. Rather, the basis for compensation was generally found in statutes or ordinances specifically passed to facilitate compensation on the particular facts involved.[15]

This cursory summary demonstrates that the courts have, until recently, failed to isolate and emphasize the factor of loss of access as the touchstone for each decision and have been largely concerned with a piecemeal consideration of the different fact situations involved. The economic burden placed upon the abutting owner as a result of the courts' failure to compensate for damage incident to "regulation" and the adherence of the courts to a physical concept of "taking," has not often appeared to trouble the judiciary, at least in the reported opinions. Though results have differed depending upon the particular facts involved, the only unifying factor has unquestionably been the utilization of the police power as the rule of decision.

Simply stated, the purpose of this article is to bring some order to the diverse rules which have been developed in the many cases involving loss of access. The approach, though involving to a certain extent an empirical analysis and classification of the decisions, will be primarily concerned with the jurisprudential mechanics of change. Particular emphasis will be placed upon the interaction of the police power and eminent domain guarantee of compensation in the loss of access cases and the resultant economic burden which has been imposed upon the abutting owner by the balance struck between the two by the courts. The possibility that a recovery should vary with the particular type of "loss of access" involved, rather than depending solely upon the notion of "regulation" as opposed to "taking" will be explored. The *modus operandi* for effecting certain changes in the law with respect to compensation for loss of access resulting from an appropriation will be analyzed. The initial consideration will involve a determination of how and to what extent it will be possible to overcome the doctrine of stare decisis as it has evolved in the loss of access cases. The use of statutes to provide recoveries where the courts have apparently elected to deny compensation will also be considered. Necessarily involved in this analysis will be a determination of whether statutory revision dictating a result which in some instances will be contrary to the existing weight of judicial authority is likely to effect the changes contemplated by the draftsmen. Finally, a close analysis of the possibility of constitutional amendment as the basis for accomplishing certain changes in the law will be conducted.

13. See, *e.g.*, 240 Scott, Inc. v. State, 18 N.Y.2d 299, 221 N.E.2d 456, 274 N.Y.S.2d 673 (1966).

14. See, *e.g.*, O'Brien v. New York C. & H.R.R., 148 App. Div. 733, 738 (2d Dep't 1912). These cases are best viewed as concessions to equity, since they do not differ except in degree from cases where some access remains.

15. See, *e.g.*, N.Y. Highway Law §§ 197 (change of grade), 12 (street closing and consequent effect upon access). See also Note, 8 Brooklyn L. Rev. 242 (1939); Note, 12 Albany L.J. 53 (1875).

II. The New York Cases

Any analysis of the current state of the law in New York with regard to compensation for loss of access has its beginnings for practical purposes in the complex and extended litigation known as *Sauer v. City of New York*.[16] The series of cases referred to above as the Elevated Railway cases had already been decided—their holdings would be largely construed to be the product of unique fact patterns and, as such, of little or no value in disposing of later loss of access cases not similar on their facts.

The state court decision in the *Sauer* case was handed down in 1904 and involved the following fact situation: Plaintiff's property was situated at the corner of 8th Avenue and 155th Street in New York City. The city owned the bed of 155th Street in fee, in trust for the public as a highway. The Harlem River cut 155th Street east of plaintiff's property and 155th Street ascended a bluff west of plaintiff's property at St. Nicholas Place. Pursuant to an enabling statute of 1887,[17] the city constructed a viaduct or elevated thoroughfare over 155th Street from the Harlem River crossing to the peak of the bluff at St. Nicholas Place. The surface of 155th Street as it abutted plaintiff's property remained free and unobstructed for public travel except for the viaduct foundation abutments and a stairway leading to the viaduct from the street. Plaintiff brought suit against the city alleging consequential damages to his parcel resulting from the impairment of his easements of light, air, and access. With respect to plaintiff's allegations of damage, the Court stated:

> The Plaintiff has undoubtedly suffered consequential damages by reason of the construction and maintenance of the viaduct for which the legislature might properly provide. His ingress and egress, together with the free and uninterrupted circulation of air and light have been impaired, and the value of his property has been decreased by reason of dust, dirt and noise occasioned by the structure.[18]

Having concluded that plaintiff *in fact* had suffered damage by virtue of the city's construction, the Court turned to an analysis of plaintiff's legal right to compensation, if any. Decreeing that an abutting owner's title was subject "to all of the legitimate and proper uses to which the streets and public highways may be devoted,"[19] the Court concluded that, with the possible exception of what it termed "extraordinary changes made for some ulterior purpose other than the improvement of the street,"[20] any change in the "natural contour" of the street, including the construction of bridges and viaducts, necessary for the promotion of the "free and easy passage of the public" could lawfully be made without compensating the abutting owner. The implicit basis for the *Sauer* decision was the Court's conclusion that damages such as those alleged by

16. 180 N.Y. 27, 72 N.E. 579 (1904), *aff'd*, 206 U.S. 536 (1907).
17. N.Y. Sess. Laws 1887, ch. 576.
18. 180 N.Y. 27, 30, 72 N.E. 579 (1904).
19. *Id.* at 31, 72 N.E. at 579.
20. *Ibid.*

plaintiff were not compensable at common law and had not been made compensable by legislation.

The Court of Appeals decision in *Sauer* was appealed to the United States Supreme Court[21] on two grounds: (1) that plaintiff had been deprived of his property without due process of law, and (2) that the state's action contravened the constitutionally protected obligation of contracts. Both arguments were rejected. The latter argument was largely based upon the unique pattern of ownership of the bed of the street in *Sauer* and, as such, is of little significance for a consideration of later cases, but the Supreme Court's disposition of the former argument is, however, of great importance for an analysis of later cases. The holding of the New York Court of Appeals was first summarized in the following language:

> The Court of Appeals denied the Plaintiff the relief which he sought, upon the ground that under the law of New York he had no easements of access, light, or air, as against any improvement of the street for the purpose of adapting it to public travel. In other words, the Court in effect decided that the property alleged to have been injured did not exist.[22]

The Supreme Court then turned to an analysis of plaintiff's argument that he had been deprived of his property without due process of law. Observing that the law of New York governed the disposition of the question, the Court concluded that New York law did not permit ownership of an easement "as against the public use of the streets or any structures which may be erected upon the street to subserve and promote that public use."[23] Since the abutting owner "never owned the easements which he claimed,"[24] it followed that no violation of the fourteenth amendment was shown.

A. *The "No Taking" Cases*

The rule of *Sauer* has many ramifications and many applications. The problem is presented in its purest form in the "no physical taking" cases insofar as these cases make unnecessary the isolation of noncompensable items of damages from admittedly compensable ones, as in the case of a taking of a part of a piece of property. It is commonly recognized that the simple before and after value often mentioned in the partial taking cases gives credit for noncompensable damages, and the complex problems of isolating the collectable from the uncollectable appear. In the no taking cases, however, the question is simplified: Can the owner of the damaged property state a cause of action? The question may arise where the grade of an abutting street is raised or lowered,[25] or the street is

21. 206 U.S. 536 (1907).
22. *Id.* at 542.
23. *Id.* at 548.
24. *Ibid.*
25. See, *e.g.*, Baldwin-Hall Co. v. State, 22 A.D.2d 747, 253 N.Y.S.2d 713 (4th Dep't 1964), *aff'd*, 16 N.Y.2d 1005, 212 N.E.2d 899, 65 N.Y.S.2d 664 (1965), *amended*, 17 N.Y.2d 661, 216 N.E.2d 601, 269 N.Y.S.2d 439, *cert. denied*, 385 U.S. 818 (1966); 240 Scott, Inc. v. State, 18 N.Y.2d 299, 221 N.E.2d 456, 274 N.Y.S.2d 673 (1966).

closed in one direction,[26] or, more simply, where guardrails are placed between the street and the property.[27]

1. *Use of Regulatory Devices*

Though not strictly speaking concerned with loss of access, *Perlmutter v. Greene*[28] is significant, because it raised the question of the means and extent to which the state could alter a highway abutting claimant's land and as a result adversely affect the commercial value of that land. Claimants, the lessees of land abutting a state highway, proposed to erect a billboard on their land for advertising purposes. The state erected a screen or shield on the highway in front of the billboard. Noting that the highway was owned in fee by the state, Chief Judge Pound stated, "When the fee of the highway has been transferred to the State, the State may use the highway for any public purpose not inconsistent with or prejudicial to its use for highway purposes."[29] The Court emphasized that:

> The mere disturbance of the rights of light, air and access of abutting owners on such a highway by the imposition of a new use, consistent with its use as an open public street, must be tolerated by them and no right of action arises therefrom, although such use interferes with the enjoyment of their premises. . . . This right to have the highway kept open for light, air and access as well as for travel has been termed an "easement" but it is the right deduced by way of consequence from the purposes of a public street.[30]

Commenting that the erection of the screens was intended by the Superintendent of Public Works "to make the highway free from sights which would offend the public" and to improve highway safety by shutting "out from view scenes which might distract the attention of the driver of a car,"[31] the Court upheld the state's action.

In subjugating the private owner's right of free and unlimited use of his property to the general public's right to safe and convenient travel, the Court took care to point out (1) that the state's modification of the highway was consistent with its use as a street, and (2) that the highway remained in all respects *open* to the abutting owner.

Perlmutter probably should be categorized as a "loss of view" case. Whether restriction of view is a compensable damage item is not a simple question, especially when it is realized that two separate aspects are involved—view *of* the subject property and view *from* the subject property. *Perlmutter* answered in the negative the question of whether loss of the view *of* a parcel of land was

26. See, *e.g.*, Licht v. State, 277 N.Y. 216, 14 N.E.2d 44, *reargument denied*, 278 N.Y. 733, 17 N.E.2d 144 (1938).
27. See, *e.g.*, Red Apple Restaurant, Inc. v. State, 12 N.Y.2d 203, 188 N.E.2d 137, 237 N.Y.S.2d 707 (1963).
28. 259 N.Y. 327, 182 N.E. 5 (1932).
29. *Id.* at 329-30, 182 N.E. at 5.
30. *Id.* at 330, 182 N.E. at 5-6.
31. *Id.* at 331, 182 N.E. at 6.

compensable. *Keinz v. State*[32] considered whether loss of view *from* a piece of property created compensable damage.

In *Keinz*, claimants' land was adjacent to Irondequoit Bay and overlooked the bay. The state appropriated a one foot strip of the claimants' land and used it in the construction of a thirty-foot high highway embankment. Claimants argued that they were damaged insofar as their view of the bay had been destroyed by the embankment. In addition, a claim was made for loss of riparian rights. Concluding that the market value of the land was considerably reduced by the obstruction of the view and the elimination of riparian rights, the Appellate Division for the Fourth Department held:

> We must determine the fair market value of the premises before and after the appropriation, and *if any factor having a bearing on that value is disregarded, then the constitutional requirement of just compensation is not satisfied.* We believe that reductions in value due to impairment in view must be considered. No appraiser could possibly isolate that factor in his mind. A "willing purchaser" would not do so. Two properties might be physically identical, yet their value markedly different because of the surroundings. . . . [T]he "view" might be a mountain side or a valley as well as a lake. In either event, the view augments the value of the premises, and if a portion thereof is taken and the view is spoiled, the market value of the premises remaining is reduced. The extent of the reduction is no more speculative than many other factors affecting value. It may be a matter of judgment but it is also a matter of dollars and cents, and a constitutional policy requires that such reduction in value not be born [*sic*] by the owner whose property is taken for a public purpose without his consent . . . .[33]

The *Keinz* analysis appears to be equally persuasive regardless of whether loss of view of or view from is involved. The courts, however, have not taken this position; in fact, the Appellate Division for the Third Department, in *Blair v. State*,[34] on facts identical to *Keinz*, reached the opposite conclusion.

It is quite interesting to substitute loss of access for loss of view in the court's analysis in the *Keinz* case. Significantly, the thrust of the constitutional argument does not appear to be diminished by the substitution. However, as we shall see, the courts have not elected to make this substitution in their consideration of loss of access cases. One must restrict the *Keinz* case to its facts and, *Blair* to the contrary notwithstanding, categorize the determinative factor in

32. 2 A.D.2d 415, 156 N.Y.S.2d 505 (4th Dep't 1956), *leave to appeal denied*, 3 A.D.2d 815, 161 N.Y.S.2d 604 (4th Dep't 1957). See also Matter of East River Drive, 264 App. Div. 555, 35 N.Y.S.2d 990 (1st Dep't 1942), *aff'd*, 298 N.Y. 843, 84 N.E.2d 148 (1949); Bopp v. State, 19 N.Y.2d 368, 227 N.E.2d 37, 280 N.Y.S.2d 135 (1967); Note, 19 Ala. L. Rev. 202 (1966).

33. Keinz v. State, *supra* note 32 at 417, 156 N.Y.S.2d at 507 (Emphasis added.).

34. 19 A.D.2d 937, 244 N.Y.S.2d 274 (3d Dep't 1963), *aff'd*, 15 N.Y.2d 700, 204 N.E.2d 338, 256 N.Y.2d 141 (1965). See also Feres v. State, 24 A.D.2d 661, 261 N.Y.S.2d 185 (3d Dep't 1965) (holding loss of view *in* not to be compensable).

awarding compensation as the damage resulting from the loss of view from the property.

The facts of *Jones Beach Blvd. Estates, Inc. v. Moses*[35] have been approximated in numerous cases in the expressway era. Plaintiff and its predecessor in title sold strips of land to the Long Island State Park Commission for highway purposes, reserving private driveway access rights to the roadway from the abutting land on each side. However, subsequent to contruction the commission ordered that U-turns were permitted only at a regular crossing. There was no regular crossing for cars entering the southerly lane for a distance of five miles. Thus a person entering from plaintiff's land west of the highway and intending to drive north had to travel five miles south, change lanes, and travel five miles north in order to cross the highway and begin his journey. Here were specifically reserved easements of access, and the plaintiff argued that the regulation was an unreasonable restriction upon both his common law and reserved rights. The Court's answer was that "although the abutting owner may be inconvenienced by a regulation, if it is reasonably adapted to benefit the traveling public, he has no remedy unless given one by some express statute."[36] A review of the factors considered by the commission showed reasonable adaptation to the public benefit, and plaintiff accordingly was denied injunctive relief.

The plaintiff seeking an injunction put forth a more tenuous argument in *Cities Service Oil Co. v. City of New York*[37] with a predictable result. Unreasonable interference with access was asserted in the placing of bus stops at the curb-cuts of the service station owned by plaintiff. As a result, buses, during rush hours, tended to stand in front of plaintiff's premises and obstruct the use of the curb-cuts. The over-all effect of this interference with the curb-cuts was to diminish the volume of plaintiff's business. Accordingly, the plaintiff contended "that [its] . . . right of ingress and egress is a 'paramount' property right and that the maintenance of the bus stops constitutes an unreasonable interference with that right."[38] In answer to this argument Judge Fuld stated for the Court that "on the contrary, it is the right of the public to the use of the streets which is 'absolute and paramount.' "[39] Continuing, Judge Fuld emphasized that:

> Any loss resulting from the interference with an abutting owner's enjoyment of his property is *damnum absque injuria* and the owner must bear it. . . . The interference here complained of must be shouldered by the plaintiffs as one of the inconveniences to be born [*sic*] by the individual for the larger benefit of the community and the public in general.[40]

35. 268 N.Y. 362, 197 N.E. 313 (1935).
36. *Id.* at 368, 197 N.E. at 315.
37. 5 N.Y.2d 110, 154 N.E.2d 814, 180 N.Y.S.2d 769 (1958), *cert. denied*, 360 U.S. 934 (1959).
38. *Id.* at 115, 154 N.E.2d at 816, 180 N.Y.S.2d at 772, quoting from Jones Beach Blvd. Estates v. Moses, 268 N.Y. 362, 368, 199 N.E. 313, 315 (1935).
39. *Ibid.*
40. *Id.* at 117, 154 N.E.2d at 817, 180 N.Y.S.2d at 774.

2. *Change of Grade and Circuity of Access*

In *Mirro v. State*,[41] a change of grade carried out pursuant to the terms of the New York City Grade Crossing Elimination Act[42] depressed the street in front of claimant's property by eleven inches. Claimant had improved his property in 1924 in reliance upon the grade as it then existed. Four years later the City of New York eliminated a railroad grade crossing with the resultant depression of the street. Although no part of claimant's property had actually been taken, the Court allowed the claimant damages. The decision was based upon the New York City Grade Crossing Elimination Act and the provision of the Greater New York Charter. Section 2047 of the act provided that, "If the work of such elimination causes damage to property not acquired as above provided, the State shall be liable therefore in the first instance, but this provision shall not be deemed to create any liability not already existing in law." Section 951 of the Greater New York Charter added that, "An abutting owner who has built upon or otherwise improved his property in conformity with the grade of any street or avenue established by lawful authority, and such grade is changed after such buildings or improvement have been erected, and the lessee thereof, shall be entitled to damages for such change of grade." The "exception" clause in the Grade Crossing Elimination Act could arguably have been used to deny compensation in *Mirro*. The existence of the charter provision, however, insured that claimant would be compensated on the facts of *Mirro*. Desirable though this result may be, *Mirro* serves (with the statutory cases to be subsequently discussed) as an example of the unpredictable disposition of claims, most often in terms of a refusal to compensate, which is possible within the framework of the many special statutes and charter provisions applicable to various types of loss of access cases. In short, *Mirro* may be the exception that proves the rule, of which *Selig v. State*[43] is the landmark example.

Selig is in all probability the most often cited of the modern access cases. The claim in *Selig* resulted from the construction of a portion of the New York State Thruway over a part of what had been the roadbed of Central Avenue in the City of Yonkers. The elevated Thruway and its retaining wall were constructed opposite the claimant's property. Prior to the Thruway construction, Central Avenue was a two-way downtown thoroughfare. The new Thruway was a limited access highway with service roads extending from each side of the roadbed. Claimant's property abutted on one of the service roads which were designed to accommodate south-bound traffic. Traffic in a northerly direction was forced to use the service road on the other side of the Thruway and to cross over two other streets in order to reach claimant's property. None of the claimant's property was actually appropriated or used for purposes of the Thruway construction and

41. 260 App. Div. 525, 23 N.Y.S.2d 852 (3d Dep't 1940), *aff'd*, 285 N.Y. 678, 34 N.E.2d 378 (1941).
42. N.Y. Sess. Laws 1928, ch. 677.
43. 10 N.Y.2d 34, 176 N.E.2d 59, 217 N.Y.S.2d 33 (1961).

the claim for damages was based upon change of grade and interference with the access, light and air to portions of the property.

Section 347 of the New York Highway Law provided that, "If the work of constructing, reconstructing and maintaining such state thruways and bridges thereon causes damage to property not acquired as above provided, the state shall be liable therefor, but this provision shall not be deemed to create any liability not already existing by statute." Conceding that the section of the Highway Law above quoted would permit compensation if there had been a change of grade resulting from the construction undertaken by the city, the Court pointed out that:

> It has long been the rule in this state that consequential damages may not be recovered by an abutting property owner for the diminution in value of his property because the state, in changing the course of an adjoining highway, interferes with the access to his land or diverts traffic therefrom. Damages resulting merely from circuity of access are considered as *damnum absque injuria* . . . .[44]

Stating that the claimant was left with free and uninterrupted access to the new Thruway by the service road which remained at the grade of the claimant's property, the Court concluded that there was no change of grade and no interference with any recognized vested property right. Implicit in this holding is the Court's acceptance of the "suitability" of the access provided by the service road notwithstanding the obvious diminution both qualitatively and quantitatively of access resulting from the substitution of the one way service road for the prior unlimited access on a main thoroughfare.

While the *Selig* case is unquestionably consistent with prior holdings, the Court's language indicates that there was some difficulty in resolving the damage claim presented. The opinion states that:

> In an attempt to afford claimant relief here, the chief judge now would abandon a well-established rule and treat the change of grade damages and the loss of access damages as one and the same. In his view, the award may be sustained on the ground that the loss in value of the property resulted directly from the change in grade. Our former decisions definitely and unquestionably hold to the contrary, and, as we said in *Coffey v. State of New York* . . . while this may "appear to be at variance with natural justice," our reversal "rests upon the soundest legal reasons."[45]

The impact of *Selig* was, of course, not innovative, but rather lies in the fact that the Court's opinion involved the collection and restatement of the theories and principles denying relief, with the net result that the avenue of common law change was closed. After *Selig*, the doctrine of stare decisis barred any break in the common law reluctance to award relief. In short, all later cases answer the problem with a single citation—*Selig*.[46]

44. *Id.* at 39, 176 N.E.2d at 61, 217 N.Y.S.2d at 36.
45. *Id.* at 41, 176 N.E.2d at 62-63, 217 N.Y.S.2d at 38.
46. See, *e.g.*, the *Oswego Boulevard Cases*: Baldwin-Hall Co. v. State, 22 A.D.2d 747,

3. *The Cul-de-Sac and Circuity of Access*

As an incident to the construction of Long Island's Northern State Parkway, certain roads were closed, including that which passed in front of the property of the claimant in *Licht v. State*.[47] All access to highways to the west was severed, but, fortunately for the claimant, a statute insured recovery of damages. The Court of Appeals concluded that the claimant presented a valid claim within the statutory assumption of liability:

> It is true that there has been no formal appropriation, but without formal appropriation all access to claimant's property from the west has been cut off physically by the fill placed upon the surface of the road to support the parkway. A cul-de-sac to the west replaces an exit to Marcus Avenue, to the new parkway, and to any highway or street. This was not a change of grade. It was more. It comprised a wiping out of the interest of the claimants in this highway to the west.[48]

Licht is an unusual case insofar as an assumption of liability by legislative act is unusual in this area. Although the statute made no specific mention of access restriction, the Court in *Licht,* by "interpretation," brought the claim for relief within the purview of the statute, something the New York courts, as in *Selig*, have been consistently unwilling to do.

In the change of grade area, there are partial statutory assumptions of liability,[49] and other examples of legislation of a more or less limited nature.[50] To some, as we have seen, is attached the proviso that "this provision shall not be deemed to create any liability not already existing in law." It requires little insight to pick out the built-in ambiguity, if one chooses to view such a section as assumptive of liability, *i.e.*, if these acts were not intended to expand common law liability they presumably would not have been passed. Although the legislature may, by passage of these acts, have intended to broaden the spectrum of compensable damage resulting from deprivation of access, the courts have taken the contrary course in utilizing the limiting clauses to restrict the categories of compensable damage. *Dwornik v. State*[51] is an example.

Dwornik involved a grade crossing elimination. The Buffalo grade crossing statute provided that the state should be liable in the first instance for damage

253 N.Y.S.2d 713 (4th Dep't 1964), *aff'd*, 16 N.Y.2d 1005, 212 N.E.2d 899, 265 N.Y.S.2d 664 (1965), *amended*, 17 N.Y.2d 661, 216 N.E.2d 601, 269 N.Y.S.2d 439, *cert. denied*, 385 U.S. 818 (1966); National Biscuit Co. v. State, 14 A.D.2d 729, 219 N.Y.S.2d 905, *aff'd*, 11 N.Y.2d 743, 181 N.E.2d 457, 226 N.Y.S.2d 445, *cert. denied*, 370 U.S. 924 (1962); Hall & McChesney, Inc. v. State, 15 Misc. 2d 748, 182 N.Y.S.2d 560 (Ct. Cl. 1959), *aff'd*, 11 A.D.2d 899, 205 N.Y.S.2d 1023, *leave to appeal denied*, 11 A.D.2d 977, 209 N.Y.S.2d 542 (4th Dep't 1960); A. E. Nettleton Co. v. State, 11 A.D.2d 899, 202 N.Y.S.2d 102 (4th Dep't 1960).

47. 277 N.Y. 216, 14 N.E.2d 44, *reargument denied*, 278 N.Y. 733, 17 N.E.2d 144 (1938). See also Note, 18 Ala. L. Rev. 315 (1966).

48. 277 N.Y. 216, at 222, 14 N.E.2d 44, at 45 (1938).

49. N.Y. Highway Law § 197; N.Y. Second Class Cities Law § 99; N.Y. Village Law § 159.

50. See, *e.g.*, N.Y. Sess. Laws 1916, ch. 576 § 12.

51. 251 App. Div. 675, 297 N.Y. Supp. 409 (4th Dep't 1937), *aff'd*, 283 N.Y. 597, 28 N.E.2d 21 (1940). See also Bopp v. State, 19 N.Y.2d 368, 227 N.E.2d 37, 280 N.Y.S.2d 135 (1967).

to property resulting from a grade crossing elimination which had not actually been acquired by the state—with the proviso discussed above. The damage resulted from the incidental permanent closing of two streets which allegedly cut off access to claimant's premises from various other parts of these streets. The Court of Appeals held that since there was no "change of grade" and claimant's property was not cut off from all means of ingress and egress, there could be no common law liability of the state to the owner and, in light of the fact that the statute by its express terms did not create any new liability, there could be no recovery. The Court emphasized that where the street closing did not completely wipe out the claimant's access and the claimant was left with some minimal means of ingress and egress, there could be no common law liability. The primary consideration was the presence or absence of access with no attention being paid to the possible adverse effects upon the commercial or residential suitability of the property. The fact that claimant's right of action was statutory had no discernible effect upon the Court insofar as the "exception" clause was utilized to transform the suit into what might be called a "common law" case.

4. *Temporary Restriction of Access*

Temporary restriction of access can result from a number of construction activities of governmental units. It is the area in which the equities most highly and most often favor the "condemnor." Highway construction, with few exceptions, and all repairs, restrict someone's access. The number of people affected to some degree by each act could be vast. In many repair situations is the anomaly that the claimant could win or lose on the same argument whether or not the repair is made. Failure to perform the duty to repair restricts access as much as the usual blockage required to repair. For numerous reasons, only the most severe temporary restriction cases can be considered to be at all meritorious.[52] To date, even those have ended without recovery of damages.

Two claims for damage arising out of a railroad grade crossing elimination were considered by the Court of Appeals in *Coffey v. State*.[53] Railroad tracks were temporarily relocated in the street adjoining claimants' property and a new structure was erected to permanently elevate them. None of the claimants' property was actually taken. Claimants contended (1) that the rental value of their property was practically destroyed for a time, by the relocation of the railroad tracks in the street during the construction of the new structure to permanently elevate them, and (2) that permanent damage to the fee value of their premises resulted from the permanent obstruction and interference with the easements of light, air, and access to the premises. The state contested only the first claim. The governing statute was similar to the legislative enactments involved in *Mirro* and *Selig*. The Court first commented that the statutory provision had been interpreted to mean "that if there was a remedy available to such

52. See generally Netherton, Control of Highway Access 82 (1963).
53. 291 N.Y. 494, 53 N.E.2d 362 (1943).

injured property owner at the time the act took effect, the state agrees to pay; but if there was not, the statute is not to be taken as creating any new liability."[54] Applying this interpretation to claimant's first claim for damage (the only disputed claim), the Court concluded that claimant could not recover: "We do not find that there ever existed any right of action for temporary (or permanent) damage consisting of partial loss of access and resulting inconvenience to an abutting property owner caused by the erection of a grade crossing elimination structure in the adjacent street."[55]

While the conclusion of the Court is predictable and compatible with prior authority, *Coffey* is significant because it serves, with the other "statutory" cases discussed, as an example of the varying results possible under the grade crossing elimination statutes. Slight factual differences and minor differences in statutory language combine to produce diverse results in these cases. This is perhaps of even greater significance in that it points up the difficulties and shortcomings of the remedial statute methods of redressing a situation where hardship is created by the lack of a "common law" method of dealing with the problem.

Beck v. State[56] considered the question of whether an abutting owner whose land was made inaccessible for approximately nine months by State Thruway construction could collect damages for resultant business losses. Claimants operated an automobile agency and gasoline station on the subject parcel and there was no question that Thruway construction severely diminished the volume of their business. Conceding that both section 347 of the New York Highway Law and the Yonkers City Charter might impose liability upon the state regardless of the fact that none of claimant's land was in fact appropriated, the Court rejected the claim for damages on the ground that "the cases uniformly hold that there can be recovery *only if access is destroyed permanently* rather than temporarily . . . ."[57] The unfairness of the decision apparently did not sit well with the Court since it also stated that "it may well be that claimants suffered disproportionately because of their location or the nature of their businesses . . . ."[58] This fact notwithstanding, however, the Court was emphatic in its rejection of the damage claim in the absence of a showing of permanent loss of access.

The Court's insistence that a finding of constructive appropriation turned upon the permanency of the loss of access seems to be but another example of the generally mechanistic approach used by our courts in deciding access cases. The use of "permanency" as the standard may have the advantage of definiteness and ease of application but is inadequate, because it is totally divorced from

54. *Id.* at 497, 53 N.E.2d at 364, quoting from Askey & Hager, Inc. v. State, 240 App. Div. 451, 453-54, 270 N.Y. Supp. 704-07 (4th Dep't 1934), *aff'd*, 266 N.Y. 587, 195 N.E. 212 (1935). See also N.Y. Sess. Laws 1928, ch. 678 § 6.

55. *Id.* at 497, 53 N.E.2d at 364.

56. 21 A.D.2d 939, 251 N.Y.S.2d 288 (3d Dep't 1964).

57. *Id.* at 940, 251 N.Y.S.2d at 289 (Emphasis added.). *But see* O'Brien v. New York C. & H.R.R., 148 App. Div. 733, 738 (2d Dep't 1912) (Temporary complete landlocking may be compensable.).

58. 21 A.D.2d at 940, 251 N.Y.S.2d at 290.

the only real indicator of the impact of loss of access on a parcel of land, *i.e.*, damages resulting from the diminution of an industrial, commercial, or residential use. Loss of access may result in crippling or totally destroying a business use of property without being in fact "permanent." The unwillingness of the courts to apply this distinction to loss of access cases continues to result in this perplexing and unfair disposition of cases.

B. *The "Partial Taking" Cases*

Partial taking cases do not differ from no taking cases in concept but are made difficult by the necessity of discussing dollars and cents as a result of the actual appropriation. There is direct damage—the actual taking—for which compensation must be made. It is a temptation for claimants and sympathetic courts to enhance the direct damage figure by inclusion of a gratuity to cover loss of access. There may also be consequential damages (for example, severance damage) and it is even easier to conceal noncompensable damages under that heading. Four of the multitude of cases illustrate the problems.

Van Aken v. State[59] is the earliest of the four, and in it the question of recoverability of damages for circuity of access is posed, but with a twist, for a miniscule strip of land also was taken. The two sections of plaintiff's farm were divided by a railroad right of way and communication between the two parcels was possible only over the grade crossing in question. With the elimination of the grade crossing, communication between the two sections was possible only by traveling a distance of a half-mile over roads running along the outer fringes of claimant's land.

The Court first pointed out that the grounds for any recovery must be found in the Grade Crossing Elimination Act of 1928.[60] That act permitted an abutting owner to present a claim for the value of "such property appropriated and for legal damages," with the now familiar restriction to already existing liability. Emphasizing that the elimination of the grade crossing left plaintiff with access to a highway from each section of his land, the Court denied recovery. The rationale for the decision turned upon the Court's determination that within the meaning of the Grade Crossing Elimination Act, plaintiff's claim called for the creation of a "liability not already existing in law." The Court's determination that damages caused by circuity of access were not compensable at common law was not supported by the citation of authority and apparently turned upon the Court's finding that plaintiff was left with access to a highway from each section of his land. The finding of "access in fact" was thus sufficient to deny recovery without regard to the probable diminution in quantity and quality of the access. The technique of the Court in utilizing the legislative exception to the statutory right to recovery, though arguably correct, again points up the shortcomings of such legislation.

59. 261 N.Y. 360, 185 N.E. 497 (1933).
60. N.Y. Sess. Laws 1928, ch. 678.

One case which apparently approached the loss of access problem somewhat differently than the foregoing was *Board of Supervisors v. Wilkin.*[61] A part of claimant's land was condemned for use in the construction of a state parkway. The remainder of claimant's land, upon which was constructed a substantial residence, was left between an adjoining lake and the parkway without access to the parkway. Though the parcel in question might have had access to the parkway as a matter of law, the Court stated that "this parkway is a part of the State park system, and while it will have a road for travel running through it, nevertheless it is essentially a park."[62] More significantly, the Court stated: "The rule laid down in *Perlmutter v. Greene* . . . that the 'right to have the highway kept open for . . . access as well as for travel [is] an easement,' is not applicable to a parkway of the kind here contemplated . . . ."[63] Stating that the instant case was "wholly unlike" the cases considering damage resulting from change of grade, the Court emphasized that: "Here the damage is caused by the taking, not by what may or may not be done with the land. Cutting off a portion of the owners' land from access to a highway results in immediate damage. Its usefulness, and so its market value, is almost if not entirely destroyed."[64]

The Court's apparent utilization of the standard of "use" in terms of market value would seem to be an approach superior to that used in prior cases. The importance of *Wilkin* is still somewhat diminished by the fact that the state apparently did not provide claimant with a means of access to the parkway. Thus, insofar as the *Wilkin* case held that claimant was entitled to compensation because his property was completely cut off from surrounding highways, it is merely a "common law" application of the principles applied by way of statutory interpretation in the *Licht* case.[65]

The controlled access problem was again presented to the Court of Appeals in the leading case of *Red Apple Restaurant v. McMorran.*[66] Claimant's land fronted along both the east and west side of a highway and was used for various commercial purposes which included a restaurant, parking, service and rest areas, a gasoline station, and a vehicle repair shop. The state appropriated a part of

61. 260 App. Div. 366, 22 N.Y.S.2d 465 (4th Dep't 1940).
62. *Id.* at 368, 22 N.Y.S.2d at 466.
63. *Ibid.*
64. 260 App. Div. at 368-69, 22 N.Y.S.2d at 467.
65. The *Wilkin* case should be read against the background of cases such as Griefer v. Board of Supervisors, 246 App. Div. 385, 286 N.Y. Supp. 791 (3d Dep't 1936), *aff'd*, 273 N.Y. 515, 6 N.E.2d 606, *reargument denied*, 274 N.Y. 587, 10 N.E.2d 564 (1937), and Robinson v. State, 3 A.D.2d 326, 160 N.Y.S.2d 439 (3d Dep't 1957), in which it is made clear that in ordinary circumstances where property is taken for highway purposes, all of it is a highway. If a person owns land next to that highway land, he has whatever rights a highway abutter has—whether the immediately adjacent land is improved as a highway or not. An example is found in Idylbrook Farms, Inc. v. State, 49 Misc. 2d 10, 266 N.Y.S.2d 540 (Ct. Cl. 1963), *aff'd*, 22 A.D.2d 761, 253 N.Y.S.2d 747 (4th Dep't 1964), where an adjacent highway was moved away from claimant's land. The old abandoned highway strip separated claimant's property from the new highway. Because the abandoned highway site was still highway land, claimant retained the right to cross it to reach the new facility. This was subject, of course, to subsequent police power regulation. Claimant also retained the first rights against the abandoned highway site if it were sold for private use.
66. 12 N.Y.2d 203, 188 N.E.2d 137, 237 N.Y.S.2d 707 (1963) (per curiam).

claimant's land for highway purposes and erected guard rails which prevented access to and from the highway except at the entrances and exits provided through the guardrails. Again, the claimant argued that his property had unlawfully been deprived of its access to the arterial highway. The actual, if not apparent, basis for the claim was the potential reduction in traffic flow into claimant's property with its adverse impact upon the volume of business. Rejecting claimant's contention, the Court of Appeals held:

> We think, to the contrary, that under the Highway Law, and under the police power, and to effectuate a reasonably safe channelling of traffic, the State had a right to erect upon the property appropriated the guardrails in question. The guardrails, as erected, did not create a non access highway or bar access to the premises in question but left ample room for ingress and egress.[67]

Again, the establishment of the fact of access without regard to its quantitative diminution and the resultant impact upon the business use of the property was sufficient to defeat the landowner's claim for damages.

Northern Lights Shopping Center, Inc. v. State[68] presented the often repeated fact pattern of a commercial property, usually a shopping center with unlimited access on arterial highways, being left with restricted access service roads as a result of the actual appropriation of a narrow strip of highway abutting land and the construction of a limited access highway. Claimant's shopping center was bounded by three highways and a service road. Two of the highways were heavily travelled. The state appropriated a portion of claimant's land for purposes of constructing a traffic circle and elevating a new highway. The net result was that claimant's property, after the construction, fronted on a controlled access highway with guard rails which were intended to give preference to "through" traffic. Service roads were also provided. Claimant contended that the limitation of access and the alteration of the traffic pattern seriously damaged its business. Holding that claimant had no right to consequential damages resulting from the alteration of its access, the Court emphasized that the property was left with "reasonable" alternative means of access via service roads and that alleged damages resulting from circuity of access were not compensable. The underlying rationale for the opinion was that the "State's exercise of its police power in such situations [was] . . . predominant and controlling . . . ."[69] The property owner's right to direct and uninterrupted access was said to be "subject to the fullest reasonable exercise of the public's primary right of travel . . . ."[70] Again, the magnitude of the business losses involved was of no consequence in the determination of whether the alternative means of access were reasonable.

67. *Id.* at 206, 188 N.E.2d at 138, 237 N.Y.S.2d at 708.

68. 20 A.D.2d 415, 47 N.Y.S.2d 333 (4th Dep't 1964), *aff'd*, 15 N.Y.2d 688, 204 N.E.2d 333, 256 N.Y.S.2d 134, *amended*, 15 N.Y.2d 960, 207 N.E.2d 521, 259 N.Y.S.d 849, *cert. denied*, 382 U.S. 826 (1965).

69. *Id.* at 420, 247 N.Y.S.2d at 338.

70. *Id.* at 421, 247 N.Y.S.2d at 339.

C. *The "Constructive Taking" Cases*

The constructive taking cases are those rare cases in which the restriction upon access is so severe as to in effect cut off all suitable access. A non-taking or a partial taking becomes a complete taking. The extreme is a complete landlocking,[71] and there the answer is clear. The land has an after-appropriation value of roughly zero, with sale to an adjoining landowner as the only good prospect in most cases. What is the dividing line between that and the mere non-compensable restriction case? The cases on that point are inconclusive and may not even be correctly decided. Possibly only a substantial reduction in the "best" use is required, but even that is doubtful.

Holmes v. State[72] ushered in what might be called the modern line of cases dealing with loss of access resulting from an eminent domain taking. The state appropriated a perpetual easement over a very small portion of claimants' land in connection with a railroad grade crossing elimination. As a result of this appropriation, claimants' land, upon which was operated a feed business, was deprived of the direct access it had previously enjoyed to an adjoining avenue, although it was still possible to reach the avenue from claimants' land by a circuitous route. The trial court held that the deprivation of access may have in fact resulted in damages, but that any such damage to claimant was *damnum absque injuria*. On appeal, the Appellate Division agreed with the trial court that consequential damages did not flow from the appropriation of the perpetual easement, but questioned the finding below that claimants were left with a suitable means of access to the property. The court found that prior to appropriation, ninety per cent of the claimants' feed business was transacted by farmers calling at the feed mill to make purchases, whereas after the appropriation of the perpetual easement and the commencement of construction on the grade crossing elimination the claimants were compelled to deliver more than ninety per cent of the merchandise to their customers. Notwithstanding that "new inconvenience does not stamp a means of access as unsuitable,"[73] the court nonetheless was "constrained to hold that the finding of the court below to the effect that claimants were not cut off from all other suitable means of ingress and egress is against the weight of evidence."[74] The judgment below was reversed and a new trial was ordered.

When the case again reached the Appellate Division,[75] the issue before the court was stated as follows: "This appeal involves only consequential damage from loss of business because of the difficulty of access."[76] The court again stated

71. 2 Nichols, Eminent Domain § 6.32(2), at 420 (3d ed. 1950).
72. 201 Misc. 640, 111 N.Y.S.2d 627 (Ct. Cl. 1951), *rev'd*, 279 App. Div. 489, 111 N.Y.S.2d 634 (3d Dep't 1952).
73. 279 App. Div. at 491, 111 N.Y.S.2d at 636.
74. *Id.* at 492, 111 N.Y.S.2d at 637. See also Giarrusso v. State, 19 A.D.2d 582, 240 N.Y.S.2d 579 (4th Dep't 1963).
75. Holmes v. State, 282 App. Div. 278, 123 N.Y.S.2d 170 (3d Dep't 1953), *affirming* 204 Misc. 9, 123 N.Y.S.2d 161 (Ct. Cl. 1952).
76. *Id.* at 279, 123 N.Y.S.2d at 171.

the rule with regard to the closing of a street as follows: "When a street is closed, if suitable means of access is not left to an owner of property, he is entitled to damages caused by the closing. . . ."[77] In holding that the damage was more than inconvenience and that the street closing deprived the claimants' property of a suitable means of access, the court stated that: "The evidence overwhelmingly establishes that claimants suffered substantial damage. The only remaining access, after the street closing, was round-about, narrow, involved difficult turns and meeting places, to which claimants' former customers would not submit."[78]

The finding by the Appellate Division in *Holmes* that the claimant who is deprived of access must be left with an alternative method of access which is reasonable within all the circumstances is of course consistent with prior holdings, and does not present any novel legal analysis. However, *Holmes* type cases are significant in that the courts took into consideration an alteration in the claimants' method of business and volume of business as an indicator of the suitability of the alternative means of access provided the claimants after the destruction of the original means of access. In addition, and contrary to the rules that would be stated in later cases, the Appellate Division seemed to be premising their holding that the alternative means of access was insufficient primarily upon the fact that claimants' customers were forced to take a more circuitous route in reaching claimants' property. *Holmes* antedated all of the modern definitive access cases. Would the result be the same today? We think not.

Meloon Bronze Foundry, Inc. v. State[79] was a change of grade case involving a fact pattern not covered by any of the change of grade statutes. The fact that the property was left, after an appropriation, without a suitable substitute means of access was found by the court to constitute a "virtual taking" which reduced the fair market value of the property. The court awarded damages in the amount of the reduction.[80] *Meloon* left unanswered a number of questions. For example, given the fact that a great number of the cases in which recovery was denied presented a loss of value exceeding ten per cent of the market value, why was compensation awarded in *Meloon,* a case involving less than a ten per cent loss? The question might be posed whether *Meloon* stands for the proposition that access can be unsuitable even if the value is not substantially diminished. If this is true, it is possible that the determinative factor in *Meloon* was a diminution of what might be called the underlying economic value of the property. The court did not say this and an explanation of *Meloon* on this basis must remain conjecture.

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77. *Ibid.*

78. *Ibid.*

79. 8 Misc. 2d 286, 166 N.Y.S.2d 586 (Ct. Cl. 1957), *rev'd*, 6 A.D.2d 993, 176 N.Y.S.2d 452 (4th Dep't 1958), *on remand*, 18 Misc. 2d 403, 191 N.Y.S.2d 3 (Ct. Cl. 1959), *modified*, 10 A.D.2d 905, 200 N.Y.S.2d 563 (4th Dep't 1960).

80. Meloon Bronze Foundry, Inc. v. State, 10 A.D.2d 905, 200 N.Y.S.2d 563 (4th Dep't 1960).

The various fact patterns involved in the foregoing cases[81] make it abundantly clear that the courts of New York have generally elected not to award abutting owners compensation for damages resulting from deprivation of access. The many remedial statutes and municipal legislative acts have by and large failed to expand the range of compensation for want of clear draftsmanship and because of judicial emasculation of the apparent legislative intent. The remainder of this article will consider whether a reversal of this case law trend is possible from within the judiciary and, if not, whether other avenues for change are available.

III. Constitutional Considerations

A. *In General*

The foregoing sections have been devoted to a case by case examination of the development of the New York law as it relates to damage claims arising out of loss of access in the various senses in which that term has come to be understood. With the possible exception of the cases recognized as dependent upon statute, each claim for compensation was at least partially based upon either or both the federal and state constitutional mandates of compensation for public takings of private property. An evaluation of the prior law and any suggestions for future changes in the law cannot seriously be advanced without a full understanding of the scope and limitations of the constitutional provisions. The possibility, both theoretical and practical, of the invocation of constitutional limitations by the United States Supreme Court to reverse the trend of the New York cases must also be explored.

The last clause of the fifth amendment to the Constitution of the United States, not by its terms applicable to the state governments, reads "nor shall private property be taken for public use, without just compensation."[82] The due process clause of the fourteenth amendment has been held by the United States Supreme Court to impose a similar limitation upon the states.[83] The present New

81. Somewhat beyond the scope of this article, although restriction of access is a major consideration, are the "potential taking" cases. See, *e.g.*, Jafco Realty Corp. v. State, 18 A.D.2d 74, 238 N.Y.S.2d 66 (4th Dep't 1963), *aff'd*, 14 N.Y.2d 556, 198 N.E.2d 39, 248 N.Y.S.2d 651 (1964), *and* Clark v. State, 20 A.D.2d 182, 245 N.Y.S.2d 787 (4th Dep't 1964), *aff'd*, 15 N.Y.2d 990, 207 N.E.2d 606, 260 N.Y.S.2d 10 (1965), involving the taking of an easement for public benefit with the fee owner being left with the rights of a user as long as the use did not interfere with the easements. In both cases access across the easement was vital to the claimant(s). The *Clark* case, three cases argued together, was a test case. Power Authority easements were taken from 894 owners and about 180 cases remain unsettled. State financial exposure, if the easements were held to deprive the owners of suitable access, was huge. In *Jafco* all access to the property could be severed. The courts held that the easements did not presently deprive the owners of access, but that future exercise by the state of any rights under the easements to deprive the owners of their property would be considered new de facto appropriations. Because the damage, if any, would accrue in the future, so too would the cause of action.

82. U.S. Const. amend. V.

83. U.S. Const. amend. XIV; United States *ex rel.* TVA v. Powelson, 319 U.S. 266 (1943); Chicago, B. & O.R.R. v. Chicago, 166 U.S. 266 (1897); Scott v. Toledo, 36 Fed. 385 (C.C.N.D. Ohio 1888); see also 1 Nichols, Eminent Domain § 1.3 (3rd ed. 1950).

York Constitution, article 1, section 7(a) reads similarly: "Private property shall not be taken for public use without just compensation."[84] The New York document, with familiar pervasiveness, leaves nothing to be implied, declaring in Article 1, section 10, that while all land is allodial, "the people of the state, in their right of sovereignty, possess original and ultimate property in and to all lands within the jurisdiction of the state."[85] Within the meaning of these provisions, it must now be determined whether and to what extent the rights of the abutting owner are protected.

The prevailing rationale of many, if not all, of the cases discussed previously can be summarized in accordance with a general rule of priority, the ease of statement of which tends to obscure its difficulty of understanding. On the one hand, there is the private right of the abutting landowner to unlimited access to a highway. Conflicting with this right is the right of the public to regulate highway access in order to facilitate safe and efficient transportation. Where these countervailing public and private rights clash, as they often do, the courts generally hold, in one way or another, that the right of the public to safe and unlimited use of the highways "predominates"[86] over the subordinate rights of the abutting owners with the consequence that damage or inconvenience to the abutting owner incidental to government regulation of highways for the public benefit is not compensable and must be borne by the abutting land owners. Stated in another way, the rule is that the public's right to safe and convenient travel on public highways is "paramount."[87]

It is generally agreed that the denial or restriction of access, whether or not there is an ordinarily protectable property interest in access, must, at least in theory, be considered a police power regulation.[88] Certainly, the valuable attribute has been destroyed rather than appropriated to public use.[89] Without question,

84. N.Y. Const. art. 1, § 7(a).

85. N.Y. Const. art. 1, § 10. It might be questioned whether § 10, except insofar as it allows escheat, is necesary at all in view of the judicial opinion that the power of eminent domain is an "inherent attribute of sovereignty." Matter of Board of Water Supply of New York, 277 N.Y. 452, 455, 14 N.E.2d 789, 790 (1938), citing Heyward v. Mayor, 7 N.Y. 314 (1852); Drake v. Hudson R. Ry., 7 Barb. 508, 552 (N.Y. Sup. Ct. 1849). Of course, it might also be questioned whether the constitutional "just compensation" mandate is required since compensation may be ordered as an aspect of "natural equity." See Gardner v. Village of Newburgh, 2 Johns. Ch. 161 (N.Y. 1816); People *ex rel.* N.Y. C. & H.R.R. v. Priest, 206 N.Y. 274, 289, 99 N.E. 547, 552 (1912) ("natural right and justice"). The United States Supreme Court in Pumpelly v. Green Bay Co., 80 U.S. 166 (1871), expressed the view that the various constitutional provisions merely placed a common law right "beyond the power of ordinary legislation to change or control." *Id.* at 178-79.

86. See, *e.g.*, Covey, *Right of Access and the Illinois Highway Program*, 47 Ill. B.J. 634 (1959).

87. See *supra* notes 16-18 and accompanying text.

88. Comment, *Eminent Domain v. Police Power as Related to the Abutting Owner's Right of Access*, 14 Baylor L. Rev. 70 (1962).

89. See Campbell, *The Limited Access Highway—Some Aspects of Compensation*, 8 Utah L. Rev. 12, 19 (1962). This police power theory is identical to the one upon which rests the law of zoning. Application of the theory here should be much less objectionable to many conservative minds since access regulation may be obviously and closely related to the needs of public safety, while use and area restrictions are generally applied to aesthetic or at least more abstract public welfare purposes.

where there has been no taking of tangible real property at all, this analysis cannot be faulted. Although more often criticized, the same analysis would seem to be equally applicable in the partial taking cases.[90] The simplest case involves the taking of land from one side of the property with the simultaneous cutting off of access to a highway abutting the property. In this situation, the government actions falling under the police power and eminent domain power may be separated, both temporally and spatially. The last case does not differ in concept from that in which a narrow strip of land is taken and put to use as a limited access highway (replacing a free access highway) or even for a row of interconnected guardrails which effectively severs access.

Conceptually then, the taking of real property is compensable when it is put to public use; the cutting off of access is non-compensable if it is a separate regulatory act. The economic realities, however, of both the hybrid and pure regulation cases make the accuracy of this entire schema, in terms of explaining the New York cases, suspect. The conceptually separate taking and regulation have an economically inseparable impact upon the property. If, as the cases and authorities uniformly state, the property owner must be compensated for what he lost rather then for what the governmental authority has obtained,[91] it is difficult to rationalize the cases in terms of the police power-eminent domain dichotomy when the regulation may strip the property of ninety per cent of its economic worth, notwithstanding the fact that the actual physical taking may have negligible consequences. If regulation rather than actual taking has the primary economic impact upon the property value, it becomes essential to define the constitutional limitations, if any, upon the police power basis for regulation.

B. *The Scope of the Police Power and Possible Limitations*

While the police power has been variously defined, all of the courts and commentators agree, subject only to slight semantic differences, that the police power is an inherent attribute of sovereignty through which the state acts to protect or promote the public welfare.[92] So essential is the police power to the maintenance of the orderly processes of government and communal living, that it has been held on numerous occasions to be the "least limitable"[93] of governmental powers and, once exercised, "well-nigh conclusive"[94] in its effect. The inevitable conflict between the police power and the rights of private citizens and the generally accepted resolution of this conflict is succinctly stated in one of the treatises

90. It is suggested, erroneously it would seem, in Havran, *Eminent Domain and the Police Power*, 5 Notre Dame Law. 380, 384 (1930), that the distinction is only clear at a distance, and fades as one draws nearer.

91. See, *e.g.*, Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910) (per Holmes, J.). The warning must continually be restated that the measure of damages is fair market value absent any factor of special value to the owner.

92. See generally 16 Am. Jur. 2d *Constitutional Law* § 259 (1963); 9 N.Y. Jur. *Constitutional Law* § 143; 16 C.J.S. *Constitutional Law* § 174 *passim* (1955); Cushman & Cushman, Cases On Constitutional Law 568 (1st ed. 1958).

93. 6 McQuillan, Municipal Corporations § 24.03, at 446 (3d ed. 1949). See also Freund, Police Power § 1 (1904).

94. See Berman v. Parker, 348 U.S. 28, 32 (1954) (per Douglas, J.).

as follows: "all businesses and occupations and all movements and activities of the citizen in public relations are carried on subject to the reasonable exercise of the police power. Obviously individual freedom must yield to the enforcement of just regulation for the public good."[95]

The validity of an exercise of the police power depends in the first instance upon whether it is being used to conserve the health, safety, morals, or general welfare of the public. If this query is answered in the affirmative, it must then be determined whether the means employed have a "substantial relation to the public objects which the government may legally accomplish . . . ."[96] An affirmative answer to this inquiry seems to indicate that the exercise of the police power in question is prima facie valid. The crucial question then becomes whether it follows as a necessary conclusion from this line of reasoning that any damage to the property of a private citizen incidental to a valid exercise of the police power is *damnum absque injuria.*

As was discussed previously, the apparent conflict between the promotion of the public interest via the police power and the protection of private rights through the eminent domain mandate of compensation for a taking is reconcilable conceptually if not "economically."[97] This observation suggests the question whether police power regulation can ever be said to be so severe as to amount to a taking and as such entitle the private property owner to compensation. This question was anticipated by Justice Holmes in *Noble State Bank v. Haskell*[98] where he cautioned against an overly-strict application of the due process prohibitions in the exercise of the police power:

> [W]e must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme . . . . We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power.[99]

This language is, of course, a recognition that social, economic, and political growth are to a great extent dependent upon the ability of the state to make dynamic and imaginative use of the police power. Mr. Justice Holmes later had occasion to reconsider the problem in *Pennsylvania Coal Co. v. Mahon*[100] where he commented that:

> As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the *contract and due process clauses are gone.*

95. 6 McQuillan, *op. cit. supra* note 93, at 449.
96. *Id.* at § 32.04, at 572.
97. See Covey, *Frontage Roads: To Compensate or Not To Compensate*, 56 Nw. U.L. Rev. 587 (1961); Covey, *Highway Protection Through Control of Access and Roadside Development*, 1959 Wis. L. Rev. 567; Comment, *Distinguishing Eminent Domain From Police Power and Tort*, 38 Wash. L. Rev. 607 (1963).
98. 219 U.S. 104 (1911).
99. *Id.* at 110.
100. 260 U.S. 393 (1922).

> One fact for consideration in determining such limits is the *extent* of the diminution. When it reaches a *certain* magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. . . . The general rule at least is, that *while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.*[101]

In applying Justice Holmes' test, the "extent" of the diminution of the private citizen's property value must first be determined. If regulation reaches a "certain magnitude" so that it is reasonable to conclude that the "regulation goes too far," the examining court must conclude that there has been a taking. The use of this formula is apparently not dependent upon the finding of a "direct" or "actual" taking. Thus, the Supreme Court held in *Portsmouth Harbor Land & Hotel Co. v. United States*[102] that "if the acts amounted to a taking, without assertion of an adverse right, *a contract would be implied* whether it was thought of or not."[103] It remains to be determined whether the test proposed by Mr. Justice Holmes continues to be a viable standard for ascertaining whether police power regulation has become a taking.

It will be recalled that Justice Holmes stated in the *Mahon* case that the limitations on the exercise of the police power were to be found in the contract and due process clauses of the United States Constitution.[104] The possibility of utilizing the contract clause in this respect must be considered in terms of several Supreme Court cases involving the question of whether the police power could be used to facilitate governmental action which arguably encroached upon the constitutional prohibition against the impairment of contracts.[105] These decisions, dating from the early nineteenth century and culminating in the landmark opinion of Chief Justice Hughes in *Home Bldg. & Loan Ass'n v. Blaisdell*,[106] apparently sanctioned a limited legislative encroachment on the vested property rights supposedly protected by the contract clause. In addition, it should be recognized that the practical importance of substantive due process as a device for regulating governmental exercise of the police power has greatly diminished from its nineteenth century zenith. An unbroken line of Supreme

101. *Id.* at 415 (Emphasis added.). See also Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55 (1937) (Brandeis, J.), and the excellent collation and analysis of Mr. Justice Holmes' opinions in this area in Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964).

102. 260 U.S. 327 (1922).

103. *Id.* at 330. (Emphasis added.). See also Corwin, The Constitution of the United States of America 864-72, 1062-68 (2d ed. 1952).

104. See generally Corwin, Liberty Against Government (1948); Corwin, The Twilight of the Supreme Court, ch. 2 (1934); Hale, *The Supreme Court and the Contract Clause*, 58 Harv. L. Rev. 512, 621, 852 (1944); Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv. L. Rev. 943 (1927); Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366 (1911).

105. See Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); Stone v. Mississippi, 101 U.S. 814 (1880). See generally Wright, The Contract Clause of the Constitution (1938).

106. 290 U.S. 398 (1934). See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967).

Court cases have rejected attempts to overturn legislation regulating commodity prices, working conditions, public health, minimum wages, and land use on the ground that such legislation is violative of due process.[107] These cases certainly do not overrule *Mahon* but it is only within their frame of reference that *Mahon's* present potential as an inhibiting force on the exercise of the police power can be assessed.

Assuming without conceding that substantive due process remains at least in theory a limitation upon the unlimited exercise of the police power by a state or its instrumentalities, it becomes of great importance to fix the scope of the constitutional prohibition in terms of the nature and extent of the property rights protected.[108]A subsequent section of this article considers the question of whether the abutter's easement of access is in fact an "interest" or "right" in property.[109] The conclusion reached with respect to New York law is that though the early Elevated Railway cases appeared to recognize the easement of access as a property right, later cases restricted those holdings to the unique facts presented and apparently repudiated any general judicial interpretation in favor of the existence of such a property right.[110] On the basis of an examination and analysis of the treatises, it is suggested that the right of access might be categorized as a negative easement incidental to the ownership of the abutting parcel.[111] There is, however, some indication that the Supreme Court, in applying the constitutional prohibitions of the fifth and fourteenth amendments, has elected to take a somewhat broader view of the definition of property "rights" or "interests."

It has been suggested that the prohibition against "taking" private property for public use without paying just compensation contained in the fifth amendment is designed to protect the "economic interest" of the individual in his property. Thus, in *Armstrong v. United States*,[112] the Supreme Court held that the destruction of liens on property through government acquisition constituted a "taking" and stated that: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was to bar government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole."[113] Similarly, the Court in

107. See Munn v. Illinois, 94 U.S. 113 (1877); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Muller v. Oregon, 208 U.S. 412 (1908); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Hamilton, *The Path of Due Process of Law*, in The Constitution Reconsidered (Conyers Reed ed., 1938). It is of some interest to compare what can be termed the national decline of substantive due process as an inhibiting force on legislative exercise of the police power with what is viewed by some as the persistence of substantive due process in the states. See McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34; Paulson, *The Persistence of Substantive Due Process in the States*, 34 Minn. L. Rev. 92 (1950).

108. See Sax, *supra note* 101, at 43-46; Miller, *An Affirmative Thrust of Due Process of Law*, 30 Geo. Wash. L. Rev. 399 (1962); see also Mason & Beaney, American Constitutional Law 289-377 (3d ed. 1964).

109. See *infra*. notes 140-77 and accompanying text.

110. See *infra* notes 146-68 and accompanying text.

111. See *infra* notes 169-70 and accompanying text.

112. 364 U.S. 40 (1960). *Cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

113. *Id.* at 49.

United States v. General Motors Corp.[114] stated the nature and limits of a fifth amendment "taking" in the following language:

> It . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . . In other words, it deals with what lawyers term the individual's "interest" in the thing in question . . . . Governmental action short of acquisition of title or occupancy has been held if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.[115]

Finally, the Court in *United States v. Causby*,[116] quoting from *United States v. Cress*,[117] stated that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

Each of the foregoing cases, though primarily concerned with the definition of the term "taking" seem to analyze the term "property" against the backdrop of a liberal standard of fair dealing. In emphasizing that the constitutional prohibitions apply to the citizen's right to "possess, use and dispose" of property,[118] it is tempting to suggest that the Court is extending constitutional protection not only to the property itself but also to what might be termed "rights in relation to property." As stated in one of the treatises:

> The rule is that an owner cannot be deprived of any of the essential attributes which belong to the right of property, and that included within the right of property which is constitutionally protected are *the right to acquire, hold, enjoy, possess, manage, insure and improve property and the right to devote property to any legitimate use.*[119]

The enjoyment of property or the ability to put that property to a legitimate use certainly is greatly diminished if the state can without liability alter or destroy that property's access at will. Notwithstanding the fact that the abutting owner may not own the easement of access, his enjoyment of or ability to utilize his property is dependent upon his right of access. Thus, while the easement of access may not strictly speaking be a property right, it is arguably a "right in relation to property" and as such entitled to constitutional protection. Regardless of the logical possibilities of this analysis as a means of predicting the future course of Supreme Court decisions in this area, the fact must be recognized that this "right in relation to property" is at best a crystallization of judicial equity power

114. 323 U.S. 373 (1945).
115. *Id.* at 378.
116. 328 U.S. 256, 266 (1946).
117. 243 U.S. 316, 328 (1917).
118. United States v. Causby, 328 U.S. 256, 266 (1946). *Cf.* Griggs v. Alleghany County, 369 U.S. 84 (1962); Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955, *reargument denied*, 372 U.S. 925 (1963); Note, 49 Cornell L.Q. 116 (1963).
119. 16 Am. Jur. 2d *Constitutional Law* § 366, at 695 (1963) (Emphasis added.). See also Powell, *The Relationship Between Property Rights and Civil Rights*, 15 Hastings L.J. 135 (1963); Reich, *The New Property*, 73 Yale L.J. 733 (1964).

which will be of little or no force or effect unless the Supreme Court elects to invoke due process as an ultimate prohibition on the exercise of the police power. Unfortunately, the circumstances under which the Court will apply that prohibition remain unclear.

Sauer v. City of New York,[120] discussed previously, [121] is the only Supreme Court opinion dealing directly with the constitutionality of a deprivation of access resulting from state action. In *Sauer*, claimants argued that both the contract and due process clauses prohibited the state action. The contract clause argument was ostensibly rejected because the pattern of ownership of the street in question precluded the invocation of the protection of that clause. What is more likely is that the *Sauer* opinion, insofar as it deals with the contract clause, is simply an extension of the Court's reluctance, decisively demonstrated in the previously discussed contract clause cases, to utilize that clause to set aside the action of a public authority. The due process argument was avoided by the Court's finding that under the law of New York, no "property right," whether a fee or an easement, existed in the abutting owner to access in the adjoining street. It then followed a fortiori that due process was inapplicable. Recent action taken by the Court indicates its continued unwillingness to squarely face the due process argument on facts involving an actual or constructive taking.

Both *National Biscuit Co. v. State*[122] and *Northern Lights Shopping Center, Inc. v. State*[123] involved constitutional challeges based upon the due process and contract clauses to state action resulting in deprivation of access. Petitions for certiorari were made in both cases and were rejected on each occasion by the Supreme Court. Similarly, in *Consolidated Rock Prod. Co. v. Los Angeles*[124] the Court dismissed an appeal in a case presenting the question of whether a zoning ordinance which completely destroyed the economic value of plaintiff's land amounted to a taking of real property without compensation. It is, of course, possible that the Court's case load was such that it simply could not hear these cases. But it is more likely that the Court has elected to maintain its hands-off position and does not want to become involved in the flood of litigation which inevitably will result if cases like *Sauer* are overturned. Given this judicial "policy" the possibility of the existence of a constitutional right is apparently insufficient to afford protection to the property owner. Legislative action or con-

120. Sauer v. City of New York, 180 N.Y. 27, 72 N.E. 579 (1904), *aff'd*, 206 U.S. 536 (1907).

121. See *supra* notes 18-24 and accompanying text.

122. 11 N.Y.2d 743, 181 N.E.2d 457, 226 N.Y.S.2d 455, *cert. denied*, 370 U.S. 924 (1962).

123. 15 N.Y.2d 688, 204 N.E.2d 333, 256 N.Y.S.2d 134, *amended*, 15 N.Y.2d 960, 207 N.E.2d 521, 259 N.Y.S.2d 849, *cert. denied*, 382 U.S. 826 (1965).

124. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962); Note, 50 Calif. L. Rev. 896 (1962). See also Baldwin-Hall Co. v. State, 16 N.Y.2d 1005, 212 N.E.2d 899, 265 N.Y.S.2d 664 (1965), *amended*, 17 N.Y.2d 661, 216 N.E.2d 601, 269 N.Y.S.2d 439 (The Court of Appeals stated that it had considered the constitutional questions and found no denial of appellant's constitutional rights.), *cert. denied*, 385 U.S. 818 (1966).

stitutional amendment on the state level may afford the only possibility of redressing this perplexing situation.

IV. Redefinition Within the Constitutional Formula for Compensation

Given the broad spectrum of constitutional limitation and governmental power sketched in the previous section and the apparent unwillingness of the courts to disturb the balance created in the *Sauer* case and rationalized by the theory that we have labelled the police power-eminent domain dichotomy, it would seem to be of some use to briefly focus upon the component parts of the applicable constitutional provisions. We shall continue with a view to determining whether the scope of constitutional protection in the access cases can perhaps be expanded by a redefinition of one or more of these component concepts.

The core concepts of both the federal and state constitutional provisions include "private property," "taken," "public use," and "just compensation." Of these four, the third, although helpful in explaining some earlier cases,[125] is not vital to our topic: public use may be assumed in an appropriation or condemnation for highway purposes.[126] Similarly, we need not be concerned with the term "private," since for our purposes it matters not who is the condemnee. Thus the problem is narrowed: just compensation is required when property is taken. We may also assume in this case that just compensation is a factual matter open to proof in any case which fits the definition to be given "property" and "taken." The questions therefore become (1) what is meant by "taken," and (2) is there a "property right" in access to an abutting highway and, if so, what is its scope.

A. *Taken*

Ordinarily the definition of "taken" has the greatest significance in terms of the disposition of claims in cases where consequential damages are sought notwithstanding the absence of any taking of tangible property. The traditionally accepted definition of "taken" is quite restrictive, and it has been stated that "acts done in the proper exercise of governmental functions, or pursuant to valid legislative authority, although they may impair the use or diminish the value of private proprety, are not generally regarded as a 'taking' by eminent domain."[127] The classic judicial statement of this view is that of Chief Justice Gibson for the Supreme Court of Pennsylvania in 1843.[128] Emphasizing that the term "taken" as used in the constitutional eminent domain provisions means exactly what it says as it is commonly used, he explained:

125. See the Elevated Railway Cases, *infra* notes 146-68 and accompanying text.

126. On the topic of additional servitudes caused by non-street or highway use, see Heyert v. Orange & Rockland Util., Inc., 17 N.Y.2d 352, 218 N.E.2d 263, 271 N.Y.S.2d 201 (1966); Bloomfield & Rochester Nat. Gas-Light Co. v. Calkins, 62 N.Y. 386 (1875); Note, 4 Wash. & Lee L. Rev. 192 (1947).

127. Jahr, Eminent Domain 51, at 73-74 (1953).

128. Monongahela Nav. Co. v. Coons, 6 Watts & S. 101 (Pa. 1843).

> And the reason for it is an obvious one. A constitution is made, not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is consequently expressed in the terms that are most familiar to them. Words, therefore, which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious, and natural meaning; and, applying this rule to the context of the Constitution, we have no difficulty in saying that the state is not bound beyond her will to pay for property which she has not taken to herself for the public use.[129]

This explanation has and continues to be one of the clearest statements of what has been termed the "physical concept" of eminent domain.[130]

Judicial statements may be found in New York which, if taken at face value, indicate acceptance of the physical concept. Two of three judges writing in an 1849 case so indicated.[131] One said, "The prohibition of the constitution is against taking private property without compensation, and not against injuries to such property, where it is not taken."[132] The other refused to equate "injuriously affected" with "taken."[133] Some cases may be read to require a "physical invasion" of the property.[134] Other decisions set less rigid requirements:

> [I]t is just as much a taking of property within the spirit of the Constitution to deprive the owner of land of its free use, or to diminish its value by the construction of an embankment, as it is to enter into physical possession and occupation therof; and, consequently, upon no other principle can the provision of the Constitution forbidding the taking of private property for public purposes without just compensation be satisfied.[135]

The foregoing quotation is illustrative of the increasingly recognized view that the strict definition of taking can and will be expanded to cover the so-called "constructive taking"—*i.e.*, so severe an injury that the landowner is left with valueless land or land suitable only for sale to adjoining landowners.[136] The "constructive taking" may also be theorized in terms reminiscent of the law of nuisance,[137] *i.e.*, injuries may be *damnum absque injuria* until the degree of inconvenience caused by the public action reaches the plateau of a taking.[138]

129. *Id.* at 114.
130. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 Yale L.J. 221, 224 (1931).
131. Drake v. Hudson R. Ry., 7 Barb. 508 (N.Y. Sup. Ct. 1849).
132. *Id.* at 554-56.
133. *Id.* at 559.
134. Benner v. Atlantic Dredging Co., 134 N.Y. 156, 162, 31 N.E. 328, 329 (1892); Huffmire v. City of Brooklyn, 162 N.Y. 584, 591, 57 N.E. 176, 177 (1900); United States v. Dow, 357 U.S. 17 (1958).
135. Rome, W. & O.R.R. v. Gleason, 42 App. Div. 530, 533, 59 N.Y. Supp. 647, 649 (4th Dep't 1899).
136. See generally Sax, *supra* note 101.
137. See, *e.g.*, United States v. Causby, 328 U.S. 256 (1946) (constant flying of airplanes over property at low altitude); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (firing of artillery shells over adjacent land).
138. Lenhoff, *Development of the Concept of Eminent Domain*, 42 Colum. L. Rev. 596, 637 (1942).

Left open to judicial interpretation is the determination of the "height" of that plateau in any individual instance.

The theoretical potential of the "constructive taking" concept for expanding the range of compensable damage in loss of access cases is obvious. The pattern of decisions in New York, however, appears to limit the utility of this concept. New York, unfortunately, has applied the "constructive taking" theory only to cases involving the denial of all access or the landlocking of property. By limiting the "constructive taking" to these rather infrequent types of cases, the New York courts have greatly diminished the usefulness of the concept as a mechanism through which recoveries might be allowed in the great majority of loss of access cases. The net result is the elimination of the "constructive taking" as a possible device to bridge the logically sound though economically suspect gap between the police power "regulation" and eminent domain "taking" dichotomy. It remains to be seen whether traditionally used concepts of "private property" can or should be redefined to expand the range of compensable damage to property resulting from deprivation of access.[139]

B. *Private Property*

The discussion of "private property" as it relates to the deprivation of access cases can readily be subdivided into two interrelated problem areas: (1) whether there is an easement of access which has reached the level of a property interest and, if so, what its nature and limitations are, and (2) whether the application of the "bundle of rights" or other contemporary property theories would make access such a vital part of the property whole as to be indispensable and compensable as such in eminent domain?

A beginning point for analysis should be consideration of the nature of an easement in the law of eminent domain. Preliminarily, it should be noted that an easement is an intangible, an incorporeal hereditament in the inscrutable jargon of the early common law.[140] Fair market value at the time of the appropriation is the universal compensation standard for complete takings.[141] But like most easements, the easements in the situation here presented have no fair market value because they have no value at all to any but one individual—the abutting owner. They die a natural death when divorced from the dominant tenement. Therefore, they must be valued by viewing the dominant tenement before appropriation, as enhanced by the easements, and after appropriation, divorced from the easements.[142] This valuation process then becomes remotely similar to a unity of use problem.[143] A severance damage is allowed to one piece of property for the taking

139. It is the view of Cormack, *supra* note 130, at 247, that the answer to the overly rigid taking concept is best avoided by a flexible definition of property.

140. 1 Thompson, Real Property § 23 (1964); Hohfeld, Fundamental Legal Conceptions 29-30 (1923).

141. Roberts v. New York, 295 U.S. 264 (1935).

142. Bohm v. Metropolitan Elev. Ry., 129 N.Y. 576, 585, 587-88 29 N.E. 802, 804-05 (1892).

143. See Rezzolla, *Unity of Use and Unity of Ownership in Eminent Domain*, 70 Dick.

of another which was used in conjunction with it and increased its value. Because the easements have no separate market value, direct damages are nominal.[144] The true damage is consequential to the tangible property, and should be so viewed.[145]

1. *The Genesis of the Property Right*

A good many law review articles and student notes briefly trace the history of the supposed easements of light, air, access, and view.[146] Each returns to the series of New York Court of Appeals cases known as the Elevated Railway cases as the true genesis of the "property right."[147] The Elevated Railway cases all

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L. Rev. 139 (1966); County of Erie v. Lafayette Hotel, 16 A.D.2d 866, 228 N.Y.S.2d 783 (4th Dep't 1962); 4 Nichols, Eminent Domain § 14.31(1) (3d ed. 1950).

144. Matter of City of New York (Exterior St.), 285 N.Y. 455, 35 N.E.2d 39 (1941).

145. Consequential damages absent some direct damage ordinarily cannot be recovered. Radcliff's Ex'rs v. Mayor, 4 N.Y. 195 (1850). Judge Peckham in Bohm v. Metroplitan Elev. Ry., 129 N.Y. 576, 587, 29 N.E. 802, 805 (1892), explains the theory of creation of a property right in access as follows: "By this mode of reasoning, the difficulty of regarding the whole damage done to the adjacent owner as consequential only (because none of his property was taken), and, therefore, not collectible from the defendants, was overcome." For discussions of the problems which arose when the elevated railways were themselves condemned see Notes, 40 Yale L.J. 779, 1074, 1309 (1931).

146. See, *e.g.*, Clarke, *The Limited-Access Highway*, 27 Wash. L. Rev. 111 (1952); Covey, *Control of Highway Access*, 38 Neb. L. Rev. 407 (1959); Covey, *Frontage Roads: To Compensate or Not To Compensate*, 56 Nw. U.L. Rev. 587 (1961); Duhaime, *Limited Access to Highways*, 33 Ore. L. Rev. 16 (1953); Gibbes, *Control of Highway Access—Its Prospects and Problems*, 12 S.C.L.Q. 377 (1960); Knowles, *Loss of Access: A Twentieth Century Enigma*, 6 St. Louis U.L.J. 204 (1960).

147. Some refer to Matter of Lewis-Street, 2 Wend. 472 (N.Y. 1829). In *Lewis-Street*, Chief Justice Savage faced the difficulty of fixing compensation to the fee owner of the street bed upon extension of the street. The owner had previously sold lots abutting the street, retaining only the street itself. Compensation was sought from the abutting owners on the recognized principle that they benefited most directly from the public improvement. The Court recognized, however, that a premium had already been paid the street owner for the privilege of owning street-abutting lands and commented that:

> The court are therefore of opinion that when a building lot is sold, bounded on a street in the city of New York, designated as such upon the map of the city, or on a map made by the owner of lands in reference to which sales are made, although the street remains at the time unopened under the authority of the corporation, a covenant may well be implied that the purchaser shall have an easement or right of way in the street to the full extent of its dimensions, and that when the same is subsequently opened, on the application of the corporation, the purchaser is not liable to pay the owner for the value of the land thus appropriated, but only for the fee subject to the easement. [*Id.* at 475].

Abutting owners were also said in an 1839 Kentucky case to have a "peculiar interest" in a street different from that of the public in general which achieves the status of an incorporeal hereditament. Lexington & O.R.R. v. Applegate, 38 Ky. (8 Dana) 289, 294 (1839). See also Rowan's Ex'rs v. Town of Portland, 47 Ky. (8 B. Mon.) 232 (1848); Lackland v. North Missouri R.R., 31 Mo. 180, 187-88 (1860). In addition, it is possible to find change of grade cases, among the purest of access-loss problems, in the British common law as early as the eighteenth century. Damages for the change were allowed in Leader v. Moxon, 3 Wils. K.B. 461, 95 Eng. Rep. 1157 (1773). Whatever one's opinion on the advisability of allowing such damages, the court in *Leader* gave no indication that serious consideration was given the problem. The case was subsequently discussed and overruled in Governor & Co. of the Brit. Cast Plate Mfrs. v. Meredith, 4 T.R. 794, 100 Eng. Rep. 1306 (K.B. 1797). The arguments of the members of the court demonstrated remarkable foresight.

> If this action could be maintained, every turnpike act, paving act, and navigation-act, would give rise to an infinity of actions. If the Legislature think it necessary,

involved somewhat similar facts, the differences being found in the wording of conveyances and the identity of parties thereto. The basic similarity in facts is that each of the Elevated Railway cases involved the use of the center area of a public street in New York City for construction of a railway viaduct by or for a private company. Although theoretical arguments may be made on each side, the proposed use was considered by the courts to be private rather than public.

The first of the cases is *Story v. New York Elev. R.R.*[148] in which the magnitude of the problem faced might be best expressed by the fact that the two majority opinions total thirty-eight pages, to which must be added the dissenting opinions of three of the seven judges. The case may be easier than others because in it the predecessors of the abutting owners purchased from the city itself. While the fee to the street was in the city, the deed declared that the street "shall forever thereafter continue and be for the free and common passage, and as public streets and ways, for the inhabitants and all others . . . ."[149] On the basis of this language, the Court found that a trust was created restricting any actions of the city which might diminish or obstruct the street use by the abutting owner. Holding for the claimant, Judge Danforth, in the first majority opinion, characterized the right of access acquired by the abutting owner as a "perpetual encumbrance upon the land burdened with it. From the moment it attached, the lot became the dominant, and the open way or street the servient tenement."[150] Observing that the value of the lot was enhanced by its frontage on the street, Judge Danforth further noted that "it is to be presumed that the grantee paid, and the grantor received an enlarged price by reason of this added value. There was thus secured to the plaintiff the right and privilege of having the street forever kept open as such."[151] Of particular interest in this statement is the argument that the grantor had already once been paid for the added benefit of street frontage.[152] This language may suggest that *Story* was simply a case in which an estoppel was applied.

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as they do in many cases, they enable the commissioner to award satisfaction to the individuals who happen to suffer. But if there be no such power, the parties are without remedy, provided the commisioners do not exceed their jurisdiction. But it does not seem to me that the commissioners acting under this act have been guilty of any excess of jurisdiction. Some individuals suffer an inconvenience under all these acts of parliament; but the interests of individuals must give way to the accommodations of the public. [*Id.* at 796, 100 Eng. Rep. at 1307 (Lord Kenyon, Ch.J.)]

There are many cases in which individuals sustain an injury, for which the law gives no action; for instance, pulling down houses, or raising bulwarks, for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed say, that the individuals who suffer have a right to resort to the public for a satisfaction: but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. This is one of those cases to which the maxim applies, *salus populi suprema est lex.* [*Id.* at 797, 100 Eng. Rep. at 1307-08 (Buller, J.)]

148. 90 N.Y. 122 (1882).
149. *Id.* at 144.
150. *Id.* at 145.
151. *Id.* at 144-45.
152. The same argument was made fifty years earlier in Matter of Lewis-Street, 2 Wend. 472 (N.Y. 1829).

It is difficult to cull from the majority opinions in *Story* the precise limits of the easement of access, if in fact such an easement existed. Judge Danforth emphasized that the basis of the easement was to have the street kept open so that light, air, and access would be available to the abutting lot. Only surface street uses predominated over the abutter's interest: any use of the street above the surface could not lawfully obstruct "the access or light and air, to the detriment of the abutting owner. . . . To hold otherwise," admonished Judge Danforth, "would enable the city to derogate from its own grant, and violate the arrangement on the faith of which the lot was purchased."[153] Judge Tracy, on the other hand, limited the question to whether private property was taken for public use in the constitutional sense. He stated:

> As we have seen, the plaintiff acquired nothing more than a right to have the street kept as a public street, and this must be deemed to be held subject to the power of the legislature to regulate and control the public use of the street.[154]
>
> * * * *
>
> Conceding that this trust is for the benefit of the abutting owner, as well as for the public, the only right which he has in the street is the right to insist that the trust be faithfully executed. So long as the street is kept open as a public street, the abutting owner cannot complain.[155]

Though the majority opinions are not the picture of clarity, it seems fair to say that the predominant concern of the Judges in *Story* was with the trust theory and, in addition, with estoppel considerations, rather than with a property right in the easement of access. The question then becomes how much further, if at all, did the later Elevated Railway cases go in declaring an easement of general existence.

Lahr v. Metropolitan R.R.[156] was decided by the Court of Appeals in 1887. It is easy to read the *Story* case to apply only to the situation in which an express trust may be found to have been assumed to keep the street open for street purposes. Chief Judge Ruger considered *Lahr* to be a sequel to *Story* and considered that case to be determinative of most of the issues. *Lahr* differed only insofar as the title of the plaintiff had been derived differently, and no deed language guaranteed continuance of a public street. However, the statute which authorized the original taking promised that the property would be held "in trust . . . and kept open for or as part of a public street . . . forever . . . ."[157] Thus, insofar as compensation was based upon a trust theory, the result conformed to that in *Story*. The Court's adherence to the trust theory is vividly demonstrated by the lengths to which it went to find the trust in the later case of *Kane v. New York Elev. R.R.*[158] In *Kane* the trust was found in the general scheme of city

153. 90 N.Y. at 145-46.
154. *Id.* at 168.
155. *Id.* at 172.
156. 104 N.Y. 268, 10 N.E. 528 (1887).
157. *Id.* at 289, 10 N.E. at 532.
158. 125 N.Y. 164, 26 N.E. 278 (1891).

charters and legislation notwithstanding that the fee in the street had vested in the government during the period when New York was a Dutch colony.

A very critical distinction was being made throughout the twenty-five years following *Story*,[159] a period which witnessed great changes in metropolitan transportation systems. *Fobes v. Rome, W. & O. R.R.*[160] considered the following problem: If an elevated railway now caused compensable damage to abutting owners, what effect did this have upon the accepted rule that a railway at street surface level did not? The Court in *Fobes* found no violation of the trust, the surface railway being a street purpose, with compensation to abutters therefore not being required. On this point it is appropriate to compare *Reining v. New York, L. & W. Ry.*[161] with *Talbot v. New York & H.R.R.*[162] The former involved a viaduct to be used primarily for a street railway, and compensation was allowed. The latter disallowed compensation in the case of an elevated street bridge. The theoretical distinction forming the basis for these and other cases was that stressed by Judge Tracy in *Story*: that the gist of the trust was that the property be used for street purposes and an elevated railway was not such.

The case of *Sauer v. City of New York*,[163] discussed previously in regard to constitutional limitations, put the entire problem to rest in an interesting manner. In *Sauer*, a street viaduct was constructed similar to the railway viaducts in the Elevated Railway cases. The use of the viaduct for railways was expressly prohibited. Applying the principles stated in *Story* and its progeny, the Court of Appeals found the proposed construction a "street use" designed to improve public travel. The abutter's title was found to be subject to such uses and compensation was therefore denied. The decision of the United States Supreme Court includes the statement that within the meaning of the applicable New York law no easement existed to protect injury to light, air and access for a public or street purpose. Therefore, it followed a fortiori that there was no property and consequently no taking. This rule has been uniformly followed in New York since *Sauer*.

The question might now be asked whether the creation of the so-called "property interest" in the easement of access was necessary to the disposition of the Elevated Railway cases. In *Story* and *Lahr* it was not. The covenants there could have been enforced without giving them new names. In any situation where the roadbed is taken from the abutter for highway uses whether in fee or by taking an easement only, a covenant to apply it to street purposes only could be implied much as it was in *Kane v. New York Elev. R.R.*[164] This type of analysis

159. The easement of access history includes a refusal of the United States Supreme Court to allow a retreat from the rule in an elevated railway case on the ground that property owners had justifiably relied on the established rule to their detriment. Muhlker v. N.Y. & H.R.R., 197 U.S. 544 (1905), *reversing*, 173 N.Y. 549, 66 N.E. 588 (1903).

160. 121 N.Y. 505, 24 N.E. 919 (1890).

161. 128 N.Y. 157, 28 N.E. 640 (1891).

162. 151 N.Y. 155, 45 N.E. 382 (1896).

163. 180 N.Y. 27, 72 N.E. 579 (1904), *aff'd*, 206 U.S. 536 (1907).

164. 125 N.Y. 164, 26 N.E. 278 (1891).

makes unnecessary the creation of an "easement." This is especially true where only a highway easement is taken. Any non-highway use thus imposes upon the fee an additional servitude for which additional compensation must be paid.[165] This conclusion follows from the assumption expressed in some cases that the initial compensation paid when the land was first put to use as a street remained adequate to cover subsequent use for any and all street purposes, but only those purposes.[166] If it is assumed, as indeed it must be, that the condemnor will develop the land taken to the highest degree possible within the purposes of the taking,[167] any street use or public use must therefore be covered by the original compensation claim.

Although subsequently expressly limited, *Story* and *Lahr* somehow in the eyes of many still stand for the abstract proposition that the abutting property owner has an actual property interest called an easement of light, air and access. The fact of the matter is that the so-called "property interest" in the easement of access was nothing more than a creation of judicial fiat for use as an equity balancing device and was recognized as such by the Court of Appeals in *Bohm v. Metropolitan Elev. R.R.*[168] The grade of a roadway may be raised or lowered, the highway may be moved, closed, or access to it may be denied, and all without directly damaging any property interest of the abutting owner. It is only where the public denies all access that there is a taking for public purposes, and that is a taking of the abutting land and not of an easement of light, air and access. Generally applied principles of real property law do nothing to detract from this analysis and, in fact, support these conclusions.

2. *Contemporary Property Concepts*

The easement of light, air and access, while not conceptually unusual, is not what it would seem to be from its title. The title indicates possibly an affirmative easement. In fact, it is one of a far more limited and limitable nature—it is a negative[169] or negative equitable easement.[170] In the situation in which an affirmative easement allowed access across a given piece of property, the right would not seem to depend upon the identity of the persons challenging or infringing upon it. The negative easement is in fact merely a veto power for the benefit of the dominant tenement.[171] Enforcement of the easement allows the owner to

165. Heyert v. Orange & Rockland Util., Inc., 17 N.Y.2d 352, 218 N.E.2d 263, 271 N.Y.S.2d 201 (1966).

166. *Id.* at 364, 218 N.E.2d at 269, 271 N.Y.S.2d at 210.

167. Moody, *Condemnation of Land for Highway or Expressway*, 33 Texas L. Rev. 357, 358 (1954).

168. 129 N.Y. 576, 585-88, 29 N.E. 802, 804-05 (1892).

169. 3 Powell, Real Property ¶¶ 404, 405 (1966); Restatement, Property §§ 451-52 (1944).

170. 2 Thompson, Real Property § 382 (1961); Restatement, Property § 452 (1944).

171. An unsuccessful example of an attempt to create a negative easement by appropriation may be seen in Shulman v. People, 10 N.Y.2d 249, 176 N.E.2d 817, 219 N.Y.S.2d 241 (1961) (attempt to prohibit roadside advertising without specific enabling legislation). For comments on the topic of acquisition of roadside development restriction rights see Netherton, Control of Highway Access 266-70 (1963).

prohibit certain uses of the servient tenement which would injure the dominant tenement. In the situation here presented, the easement is implied from the totality of circumstances to allow vetoing of, or compensation for, non-street or highway uses only. This easement looks much more like a restrictive covenant than the commonly recognized easement. Indeed, this type of interest is treated by Judge Clark in his classic work under the heading equitable restrictions.[172]

It is suggested by one writer that access cannot be considered property in and of itself, but should be thought of as only one of a "bundle of rights," the totality of which constitutes property.[173] The idea of property as a complex of rights is interesting, and has been discussed often and in some depth in the past half century.[174] However, it is difficult to see how this categorization or new semantic framework aids in the analysis of the problem. It does not help us to determine against whom the right is enforceable, nor does it in any way diminish the logical force of the police power-eminent domain dichotomy as the accepted rule for decision in deprivation of access cases. Moreover, it fails completely to put relative values upon each or any of the rights in the bundle. All of the rights in the bundle cannot be of equal value. The right of access, if such exists, may in certain situations have a value substantially equal to the entire value of the real property—as in the landlocking cases.

Brief mention should also be made of a related concept previously discussed in relation to constitutional limitations, *i.e.*, the "right in relation to property."[175] It would seem that categorizing this "right" in terms of what has traditionally been recognized as "property," insofar as the easement of access is concerned, is simply not possible in New York, especially in light of the general thrust to the contrary of the Elevated Railway cases. This so-called "right in relation to property" would seem to be a judicial recognition, thus far neither adopted nor disapproved in New York that the actual ownership of property carries with it incidental rights without precedent in the law of property which in some instances are so basic as to be assumed by the property owner. Under these circumstances, the "right" in all probability is simply a judicial device for redressing economic inequities in situations where relief would otherwise be inappropriate under settled authority.[176] As provocative as this concept may be in relation to the previously discussed constitutional limitations, there is no question that the judicial recognition of this concept has been at best spotty. The basic problem remains, therefore, how to initiate a change in the present pattern of decision on some uniform and rational basis.

172. Clark, Covenants and Interests Running With Land, ch. 6. (2d ed. 1947).
173. Note, 1959 Wash. U.L.Q. 310, 315-16; see also Cormack, *supra* note 130, at 238-39.
174. Hohfeld, Fundamental Legal Conceptions 29-30 (1923); 1 Powell, Real Property ¶¶ 7, 96 (1949); 1 Thompson, Real Property § 1 (1964).
175. Eaton v. Boston, C. & M. Ry., 51 N.H. 504 (1871).
176. Of course, any court sufficiently innovative to create a property right as suggested by Judge Peckham in Bohm v. Metropolitan Elev. R.R., 129 N.Y. 576, 587, 29 N.E. 802, 805 (1892), should already have been able to give birth to a mere "right in relation to property." For a discussion on the "right in relation to property" see 16 Am. Jur. 2d *Constitutional Law* § 366, at 695-96 and cases collected (1963).

Regardless of one's predisposition for or against the so-called property interest in the easement of access, there does not appear to be any real argument that, notwithstanding the isolated dicta in *Story* and *Lahr,* the Elevated Railway cases, viewed as a whole, did not represent any new departures in compensation for loss of access based upon any real or imagined property interest in the easement of access. The theoretical possibilities of the "bundle of rights" approach to property or the "right in relation to property" as a new conceptual framework within which to clearly define a new property interest or expand the scope of the term "property" to include the easement of access must remain only a possibility in light of the uniform pattern of decisions in New York either rejecting or simply ignoring these notions. The conclusion seems inescapable that redressing the economic inequities of the loss of access decisions cannot be accomplished from within the judicial framework. The logically consistent constitutional balance struck between police power "regulation" and eminent domain "taking" has become the prevailing rule of decision in the vast majority of loss of access cases. The unwillingness of the United States Supreme Court to disturb this balance is amply demonstrated by the numerous refusals by that Court to directly consider the question via the writ of certiorari.[177] In addition, the impossibility of expanding the range of compensable access losses through a redefinition of any or all of the component parts of the constitutional formula for recovery has been demonstrated above. It becomes abundantly clear that if there is to be a change, it must take the form of a new rule of decision imposed via institutions or instrumentalities outside of the judiciary.

V. Possible Solutions

If compensation for interference with access is an end to be achieved, as we believe it is, one cannot look for an answer in the decisional law. All of the above conclusively shows that decisional law in New York consistently denies recovery. It is also beyond question now, we think, that there is no rational justification for an argument that compensation should be allowed based upon common law property concepts or interpretation of what constitutes a taking. In other words, notwithstanding the resultant inequities, we agree at least conceptually with the New York courts and their interpretations. The answer must be sought in the form of constitutional or statutory enactment.

A. *Constitutional Amendment*

Prior to 1870 purely consequential damages were universally held to be *damnum absque injuria.*[178] In that year, Illinois enacted the first constitutional provision requiring compensation for taking or damaging private property as opposed to the usual taking provision. Since that time thirty states have changed

177. See *supra* notes 122-24 and accompanying text.
178. Stubbs, *Access Rights of an Abutting Landowner,* 1963 Institute On Eminent Domain 59, 61.

their constitutions accordingly.[179] The spectrum of constitutional eminent domain language now ranges from none at all in North Carolina, where compensation is based upon natural justice theories,[180] to states in which municipalities or the state itself must compensate where property is "taken, injured or destroyed."[181]

The commentators have reached divergent conclusions in totaling the exact number of states which now have "taken or damaged" provisions.[182] This is probably due in part to different classifications of those constitutions which do not conform exactly to either "taken" or "taken or damaged" terminology. The principal text on the subject guesses that these hybrid and variant forms do not differ in substance from the more common terminology.[183] States such as Alabama may also cause difficulties, since the state is liable only for a taking while municipalities face broader liability.[184] There are eighteen states whose constitutions require compensation only for takings.[185] Twenty allow recovery for taking or damaging.[186] Seven compensate where property is "taken or applied to public use(s)."[187] The remaining five are unusual situations, including North Carolina and Kansas, the latter providing in the corporations article of its constitution for compensation for property "appropriated to the use of any corporation."[188] Arkansas and Minnesota improved upon Illinois with "taken, appropriated or damaged,"[189] and "taken, destroyed or damaged"[190] respectively. Texas lumped everything together, demanding allowance of damages where property is "taken, damaged or destroyed for or applied to public use."[191] Of some significance is the fact that of the thirty-seven states which have substantially reviewed and revised their constitutions since 1870, only eight have retained the taking provision.

In construing the 1870 Illinois constitutional change, state and federal

179. See generally the tabulation in Cromwell, *Loss of Access to Highways: Different Approaches to the Problem of Compensation*, 48 Va. L. Rev. 538, 548-54 (1962).

180. Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 Va. L. Rev. 437, 441 (1962), citing Shute v. City of Monroe, 187 N.C. 676, 683, 123 S.E. 71, 74 (1924).

181. Ala. Const. art. 2, § 235; Ky. Const. § 242; Pa. Const. art. 16, § 8. These sections apply against municipalities but not against the states. See discussion in Note, 18 Ala. L. Rev. 315, 316-17 (1966). See generally Bishop, *Non-Compensable Damages In Eminent Domain Proceedings*, 19 Ala. Law. 172 (1958).

182. Spies & McCoid, *supra* note 180, at 446 (23 states); Stubbs, *supra* note 178, at 88 (31 states); Note, 96 U. Pa. L. Rev. 256, 260 n.36 (1947) (26 states at that time).

183. 2 Nichols, Eminent Domain § 6.44 n.1 (3d ed. 1950).

184. Bishop, *supra* note 181, at 173; Note, 18 Ala. L. Rev. 315, 318-19 (1966), discussing Ala. Const. art. 1, § 23; art. 2, § 235.

185. Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Maine, Maryland, Michigan, Nevada, New Jersey, New York, Ohio, Oregon, Rhode Island, South Carolina, Vermont and Wisconsin. The possibility of error in our tabulation is not to be discounted.

186. Alaska, Arizona, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Virginia, Washington, West Virginia and Wyoming.

187. Alabama, Delaware, Massachusetts, New Hampshire, Pennsylvania and Tennessee.

188. Kan. Const. art. 12, § 4.

189. Ark. Const. art. 2, § 22.

190. Minn. Const. art. 1, § 13.

191. Tex. Const. art. 1, § 17.

courts could not determine anything other than that the addition of the words "or damaged" was intended to change existing law. The existing law was that purely consequential damage inflicted by government edict gave no claim for damages—*i.e.*, only a physical invasion of property brought the constitutional mandate into play. The Illinois Supreme Court in *Rigney v. City of Chicago*[192] recognized that the change intended by the amendment was to compel payment for consequential damages. The holding of *Rigney* was specifically applied to the loss of access problem in *City of Chicago v. Union Bldg. Ass'n.*[193] On the basis of the new constitutional provision, the court held that,

> property holders bordering upon streets have, as an incident to their ownership of such property, a right of access by way of the streets, which can not be taken away or materially impaired by the city without incurring legal liability . . . . But in no other respect do the property owners or citizens of the municipality have a right in the street other or different than that of the public generally.[194]

Brief study of the background of the 1870 Illinois revision, demonstrates conclusively that the amendment was, as stated in the *Union Bldg.* case, devised (or viewed by the courts to have been devised) primarily to remove inequities in the area of access restrictions. Significantly, the United States Supreme Court accepted the Illinois construction of the new language in the 1888 case of *Chicago v. Taylor.*[195]

It is obvious that wherever the "taken or damaged" formulation has been accepted the result should have been to allow damages in more cases than would have been possible under a "taken" form of constitutional provision. It is equally true that to construe the new language literally would have led to unwarranted results by way of the totally irresponsible expansion of the categories of compensable damage.[196] Although advocates may be found for a construction allowing broad risk distribution,[197] even that view is tempered to require a showing of a clearly demonstrable pecuniary loss proximately caused by the acts of the sovereign.[198] Recognition must be and is given to the already fantastic costs of condemnation even without an additional expansion of public liability. Whether this results from the sheer volume of land taken, the possibility that the best land is often taken, or factors such as the recognized phenomenon that the best use of much land is for public appropriation, need not be considered here.

The accepted limitation upon recovery under an "or damaged" provision is

192. 102 Ill. 64 (1881).
193. 102 Ill. 379 (1882).
194. *Id.* at 397.
195. 125 U.S. 161 (1888).
196. See Lenhoff, *Development of the Concept of Eminent Domain*, 42 Colum. L. Rev. 596, 610-12 (1942).
197. See, *e.g.*, Spies & McCoid, *supra* note 180, at 449-55; Cormack, *supra* note 173, at 224; Note, 12 Albany L.J. 53, 54 (1875).
198. Spies & McCoid, *supra* note 180, at 455. This is not to suggest that damage to access is not clearly demonstrable, but other types of purely consequential damage may be highly speculative.

that the damage must accure to the property owner specifically[199]—that it must differ in kind and degree from that suffered by the public in general.[200] And, of course, remote and highly speculative damages are still denied.[201] One cannot proceed far beyond the general without encountering difficulties. The "or damaged" wording has not been a cure-all for the ills seen by some in condemnation compensation practice. It would of course be desirable to be able to say that "taking" and "taking and damaging" provisions achieve similar results in all cases of listed types and dissimilar results in all cases of other listed types. However, the jurisdictions involved are far too numerous to even hope for such a lucky coincidence. A survey of very few modern cases dispels any feeling that the newer formula is a panacea.[202]

A recent student note collects law on recovery for the creation of a cul-de-sac by cutting off a street some distance from the claimant's land.[203] The ultimate question is whether there is a private right of travel in *both directions* from abutting land. The cases collected show fourteen courts allowing recovery and twenty-three disallowing it. Of the jurisdictions which have, since 1955, reviewed their stands or taken them for the first time, the count was eleven to six against recovery. Of the seventeen recent decisions, twelve were in states having pure "taking" or pure "taking or damaging" provisions absent extraneous phrases or words. Of the "taking" states, two allowed recovery and two denied it. Six "taking or damaging" states denied compensation and two allowed it.

Arizona is a "taken or damaged" state,[204] while Arkansas has gone a bit farther to cover property "taken, appropriated, or damaged."[205] In April, 1960, the highest courts of both states decided circuity of access cases involving somewhat similar facts. In each case claimant owned commercial highway-abutting property. In each case the state chose to appropriate a strip of the claimant's property in order to redesign the highway as limited access and provide other abutting owners with a frontage. In *State* ex rel. *Morrison v. Thelberg*,[206] decided by the Arizona Supreme Court, access to defendants' motel after condemnation could be had via the service road, which in turn could be reached from the main highway at points 170 feet to the west and one mile east of the motel. The defendants in *State Highway Comm'n v. Bingham*,[207] the Arkansas

199. Lenhoff, *supra* note 196, at 613.
200. See, *e.g.*, 4 Nichols, Eminent Domain § 14.24 (3d ed. 1950).
201. *Id.* at § 14.241 *passim*.
202. Of course, consistency is not even found in the remaining "taken" jursidictions. An example is found in change of grade. The New York rule is clear: absent statute, no recovery. Michigan is also a "taken" state, retaining this formulation through the latest major constitutional revision in 1963, Mich. Const. art. 10, § 2. Contrary to the New York "common law" position, the Michigan Supreme Court held in Thom v. State, 376 Mich. 608, 135 N.W.2d 322 (1965), that a change of grade is a taking, and compensation is therefore required.
203. Note, 44 N.C.L. Rev. 850 (1966).
204. Ariz. Const. art. 2, § 17.
205. Ark. Const. art 2, § 22.
206. 87 Ariz. 318, 350 P.2d 988 (1960). See also Stubbs, *Compensable and Noncompensable Items in Condemnation*, 1967 Institute On Eminent Domain 137-160.
207. 231 Ark. 934, 333 S.W.2d 728 (1960).

case, were the owner and lessee of a gasoline station. The nearest access to the service road from the through road was over a mile from the premises. The Arizona court allowed damages for diversion of traffic; the Arkansas court did not. New York, despite its different constitutional provision, would agree with Arkansas.[208]

Regardless of these apparent inconsistencies, it can be stated generally that the newer terminology agrees with the old wherever compensation was allowed, and extends coverage of the right to compensation through almost all limitations of access. Obviously, all jurisdictions have not limited the range of compensable damage identically. But this is a problem of judicial construction facing each court, and the responsibility for the answers devised must be placed with the courts, not the constitutional wording.

The problem inherent in any fundamental constitutional change is that a complete body of law, developed over many decades, must be re-examined and possibly discarded. That some inequities presently exist is beyond question. But predictability is considered a virtue of some value. If it could be unequivocally stated that a change in terminology would affect the result in only those cases in which inequities are seen by the draftsman, then this is a predictability all its own. But this cannot be said of a change as fundamental as that made by Illinois in 1870 and many other states since. "Or damaged" could cover many problems beyond limitation of access, and certainly does not contain an express limitation of application even in the access area—as illustrated by the cul-de-sac cases. Regardless of the difficulties the very pervasiveness of the problem and the obvious inequities of present judicial interpretation may compel the utilization of the mechanism of constitutional amendment as the only vehicle through which the problem areas in loss of access cases, and indeed, other problem areas in the law of eminent domain, can be reconsidered and hopefully eliminated by the courts. The doctrine of stare decisis effectively prevents the judiciary from taking the initiative in redefining the limits of compensation in the loss of access cases.[209] Each case in this chain of authority, standing alone, might be said to have presented the deciding court with a choice between the speedy completion of admittedly important public highway improvements or slowing the pace of highway expansion and improvement in order to redress what could easily have appeared (on a single case basis) to be an isolated economic injustice to the victimized abutting owner. But viewing this body as an organic whole, one is confronted with a massive chronicle of injustice to property owners, albeit for the purpose of improving the sinews of public transportation. The fact is that these

208. See, *e.g.*, Bopp v. State, 19 N.Y.2d 368, 227 N.E.2d 37, 280 N.Y.S.2d 135 (1967); Baldwin-Hall Co. v. State, 22 A.D.2d 747, 253 N.Y.S.2d 713 (4th Dep't 1964), *aff'd*, 16 N.Y.S.2d 1005, 212 N.E.2d 899, 265 N.Y.2d 664 (1965), *amended*, 17 N.Y.2d 661, 216 N.E.2d 601, 269 N.Y.S.2d 439, *cert. denied*, 385 U.S. 818 (1966).

209. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334 (1944); Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A.J. 501 (1945); Radin, *The Trail of the Calf*, 32 Cornell L.Q. 137 (1946); Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735 (1949).

public and private ends are not necessarily mutually exclusive. The probable catalytic force of the constitutional amendment as providing the impetus necessary to overcome this judicial impasse must in and of itself be viewed as a desirable result. Once the stumbling blocks to re-evaluation of the access cases have been thus removed, the resolution of the admittedly perplexing question of the scope and interpretation of the new amendment should be left where it rightly belongs, with the judiciary.

B. *Statutory Change*

Other routes than changing to a "taking or damaging" constitutional provision are available. In New York one which many might accept is the enactment of a constitutional provision specifically allowing compensation for limitation of access as a result of a public improvement. This is, of course, the basic reason why New York has a constitution the size of a dictionary, and the reason why constitutional revision by convention is necessary at approximately thirty year intervals. Such specificity is better left to statute, the alternative which we now consider as a possible solution to the access problem.

While a statute denying compensation for the taking of property by eminent domain would be unconstitutional, obviously, money damages may be awarded by statute in cases where not so mandated by the constitution.[210] Iowa, a "taking" state,[211] allows compensation by statute for damages to right of ingress or egress or deprivation of light, air or view occasioned by street construction whether a change of grade occurs or not.[212] California, one of the "taking or damaging" jurisdictions,[213] has enacted a change of grade compensation statute.[214] New York Highway Law section 197 requires compensation for damages resulting from change of highway grade in any town.[215] Section 54-a of the same law mandates reconstruction of damaged access in certain instances where caused by changes in road level in the state highway system. An example of other constitutionally unrequired damage provisions is found in New York Laws 1916, ch. 576, an amendment to the Buffalo Grade Crossing Elimination Act. Section 12 of the act allows compensation for creation of a cul-de-sac to an owner of property abutting a street between the point of closing and the intersection of the nearest public thoroughfare.

A statutory system of compensation for changes in highway grade was advocated at least as early as 1875.[216] A great number of New York cases make it abundantly clear that there can be no recovery absent such a statute.[217] The forms possible for any such statutory system are many in number, thus sug-

210. *Cf.* Comment, 63 Dick. L. Rev. 163 (1958).
211. Iowa Const. art. 1, § 18.
212. Iowa Code § 389.29 (1962).
213. Cal. Const. art. 1, § 14.
214. Calif. Sts. & H'ways Code §§ 8000-62 (1956).
215. See also N.Y. Second Class Cities Law § 99; N.Y. Village Law § 159.
216. Note, 12 Albany L.J. 53 (1875).
217. See cases cited in Note, 8 Brooklyn L. Rev. 242 (1939).

gesting a flexibility not available in constitutional change. Highway Law section 197 is the rather simple system chosen by New York in the change of grade situation. Almost all of the other types of access impairment cases could, at least in theory, be lumped into a single almost equally simple statute. There is, however, one serious drawback to statutory change which becomes apparent upon consideration of New York's previous statutory experience in this area. Each of the statutes and municipal ordinances and charters analyzed in the survey of the law set forth at the beginning of this article included the limiting provision that the statute was not intended to create any new liability not already existing at common law. The cases demonstrate that this provision effectively, and perhaps purposefully, restricts the range of application of the particular statute. Regardless of the reason for this restrictive policy, whether rooted in the ambiguity of the statutes or what might be called the negative conditioning of the judiciary in the common law cases, it must, for purposes of assessing the future utility of statutes in this area, be recognized that the New York judiciary has consistently refused to expand the range of compensable damage under statute in deprivation of access cases. This, in addition to what some of the commentators designate as a general judicial tendency to strictly construe any statute creating or limiting a right in derogation of the common law,[218] makes it likely that any statutory change in favor of increased compensation will be far too strictly construed to accomplish the intended purpose. The simplicity of the language contemplated for constitutional amendment, the general applicability of the constitutional provision, and the superiority of constitutional amendment in terms of the judicial recognition of it as the fundamental law of the state rather than as a single legislative act in derogation of the common law, in addition to the shortcomings of legislative change pointed out above, combine to suggest the potential superiority of constitutional amendment as the vehicle for change in this area. Finally, and most importantly, regardless of variations in interpretation, it has been the uniform experience of other states adopting the "taking or damaging" provision that such an amendment has effectively overcome judicial intransigence to change.

VI. Conclusion

Perhaps the most forceful method of demonstrating the desirability of a redefinition or change in the law as it relates to compensation for deprivation of access is to consider the shortcomings of the policy arguments advanced to support the present status of the law. The arguments against allowing compensation appear to reduce to just three: (1) The abutter is on notice when he purchases

218. Cardozo, The Paradoxes of Legal Science 9-10 (1928); Landis, *A Note On Statutory Interpretation*, 43 Harv. L. Rev. 886 (1930); Thorne, *The Equity of a Statute*, 31 Ill. L. Rev. 202, 214-15, 217 (1936); Willis, *Statute Interpretation in a Nutshell*, 16 Can. B. Rev. 1, 17-18 (1938); Frankfurter, *Some Reflections on Reading Statutes*, 47 Colum. L. Rev. 527 (1947); Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 Vand. L. Rev. 438, 439, 447-48 (1950).

his property that the road may in the future be removed or replaced;[219] (2) The sovereign is in the same position as any other neighbor who possesses the absolute privilege to remove his improvement, *i.e.*, the streets, which may be highly beneficial to his neighbor's property;[220] and (3) The courts must recognize the practical difficulties borne by the sovereign in paying the cost of improvements, and balance the interest of the abutter and the public in favor of the public.[221]

The first argument makes little or no sense. We have not heard of or read the opinion of any appraiser who discounts the value of highway abutting property by the percentage probability that in the future it will no longer abut.[222] In all likelihood, the probability is incalculable. Mr. Justice Holmes recognized a "practical expectation of continued access,"[223] but rebelled at elevating it to the status of a right. This "practical expectation must be considered, and has been since some of the earliest comments on the subject. Most men lack the ability to accurately predict the future and, because of this failing, drop the remotest of possibilities from their thinking altogether. Loss of access usually falls into the category of extremely remote possibilities, and does not enter into the formulation of the market price for the particular piece of abutting property. Moreover, even if loss of access were contemplated, that contemplation is irrelevant. No man is prevented from purchasing land known to be subject to condemnation at some time in the future. To prevent denying the seller full market value, which he would recover if the land were appropriated from him, the future condemnation is not given great consideration. That loss of access is contemplated is no reason for disallowing compensation for the loss, any more than compensation should be denied simply because a purchaser knows of an impending appropriation of tangible property. The inequity of applying this risk is heightened when we ask the abutter to not only expect the loss of his property but also to very accurately adjust his purchase price to allow for amortization at the time of the taking[224]—a time completely within the knowledge and control of the sovereign.

The reasoning behind the second argument—that the sovereign is like any other neighbor—neglects to consider the special relationship between the citizen-abutting owner of property and his government. That this relationship is com-

219. Note, 14 Rutgers L. Rev. 202, 205 (1959), citing Paul v. Carver, 24 Pa. 207 (1855). *But see* Note, 12 Albany L.J. 53, 54-55 (1875).

220. Bishop, *supra* note 181, at 178; Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 74-75 (1964).

221. Duhaime, *Limiting Access to Highways*, 33 Ore. L. Rev. 16, 40 (1953).

222. See, *e.g.*, Schmutz, Condemnation Appraisal Handbook, chs. 11, 12 (1963); McMichael, Appraising Manual 573-75, 580 (4th ed. 1951).

223. Muhlker v. N.Y. & H.R.R., 197 U.S. 544, 572-73 (1905) (dissenting opinion). See Bopp v. State, 19 N.Y.2d 368, 227 N.E.2d 37, 280 N.Y.S.2d 135 (1967), where the Court apparently applied the first of these no-compensation theories to deny recovery. *Cf.* New York State Thruway Auth. v. Ashley Motor Court, Inc., 10 N.Y.2d 151, 157, 176 N.E.2d 566, 569, 218 N.Y.S.2d 640, 644 (1961).

224. Compensation based upon an amortized access value has been suggested. Note, 109 U. Pa. L. Rev. 120 (1960). This answer, however, appears to be practically unworkable.

pletely different from that of private neighbors seems obvious. The argument was very early accepted by New York courts in change of grade cases.[225] There it was argued that, like the private owner who may grade his property almost as he sees fit, even to the detriment of his neighbor, so may the state regrade a street without consideration of the detrimental effect upon abutting owners. It is often stated that the purpose of an eminent domain law is to accurately distribute the costs of public improvements among the public.[226] The sovereign acts not as the private neighbor, but as a trustee for the benefit of the public. The analogous argument is made in a partial taking context that had the abutter sold a strip of land to a private party he would have lost access across it. Therefore, it is suggested, the same result should apply where the state is the "purchaser." The argument is specious, in that it refuses to consider that the abutter would have taken this loss of access into account in fixing the sale price, precisely the computation the law of New York disallows in the "forced sale" to itself.

The final argument of increased cost to the state is the most difficult to rebut. Yet it seems that the public should be expected to bear the costs of any improvement it makes, through the sovereign, for its own benefit. The total cost includes the amount in dollars of access lost by the abutter as well as all of the other costs incurred in construction and maintenance. The addition of the value of loss of access by abutters into the total cost picture would provide a more accurate figure, and might impel planners to work in such a manner as to minimize these damages. It is at least arguable that in some cases state planners have acted in utter disregard of the damage they cause due to circuity of access alone.[227]

The foregoing theories in support of the "no compensation" rule in loss of access cases simply do not afford a satisfactory "policy" reason for the rule. The nineteenth century political consensus based upon the primacy of private property interests has been supplanted by a new welfare state orientation which is presently involved in what might be called civil libertarian growing pains at its outer fringes. The areas of obvious conflict are the definition of one's personal rights vis-à-vis the state, for example, the rights of the criminally accused. The present abhorrence for the real or imagined inequities of what were deemed by some to be the class conscious "good old days" of private property, though perhaps justifiable, has affected us with a myopic inability to comprehend that personal rights have and are being severely abused in the backyard of the discarded consensus. This country and its state and municipal instrumentalities simply would not under other circumstances tolerate the taking of a man's livelihood under the guise of the police power. Yet this is exactly what has happened

225. Radcliff's Ex'rs v. Mayor, 4 N.Y. 195 (1850); Waddell v. Mayor, 8 Barb. 95 (N.Y. Sup. Ct. 1850). See also Note, 96 U. Pa. L. Rev. 256, 258 (1947).

226. See, *e.g.*, Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 Yale L.J. 221, 224 (1931); Note, 12 Albany L.J. 53 (1875).

227. See the fact pattern in Sukiennik v. State, 26 A.D.2d 169, 271 N.Y.S.2d 684 (4th Dep't 1966).

in some deprivation of access cases. The police power can be exercised to pauperize. We think that a change is warranted, and recognize that the possibility of a change purely by judicial overruling of precedents is so remote as to be unworthy of consideration. The possibility of constitutional amendment must be seriously considered.