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Constitutional Protection for Group Legal Service Plans

Robert R. Rossi

NOTES

CONSTITUTIONAL PROTECTION FOR GROUP LEGAL SERVICE PLANS

I. Introduction

At some time in their lives most Americans find themselves in need of legal advice, yet many are unaware of any competent attorney who will provide that advice for a reasonable fee.[1] Faced with this situation, these people have, in the past, either neglected their problem, consulted a non-legal specialist,[2] or, at best, sought out an attorney's name in the listings of the telephone directory. Whatever their choice, the legal fees an attorney will charge for his services are of foremost concern to those in need of legal advice. Nearly twenty years ago, a solution to the dilemma of a public hesitant to retain an attorney — the group legal service plan — was suggested:

> The simplest, most immediate way of bringing the cost of legal service within the reach of large numbers of our people is to amend Canon 35 of the American Bar Association's Canons of Professional Ethics so as to permit nonprofit organizations of all kinds, such as trade unions, fraternal orders, consumers' cooperatives, mutual automobile clubs, and business and professional associations, to employ counsel to advise and represent members in their individual affairs.[3]

Though the Canons of Professional Ethics have withstood any change in their position of opposition to group legal service plans, the United States Supreme Court has taken significant steps toward the complete approval of such plans. In three decisions, the Court has held that the group legal service plans involved were constitutionally protected from state-imposed restrictions based on the Canons where the states had not shown that their restrictions were needed to protect the public's interest in high standards of legal ethics.[4] In *District 12, United Mine Workers v. Illinois State Bar Association,*[5] the most recent of these decisions, the Court stated the constitutional basis for upholding these group plans:

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1 *See generally* Masotti & Corsi, *Legal Assistance for the Poor,* 44 J. URBAN LAW 483, 486 (1967). The authors report that two-thirds of the lower class and one-third of the upper class American families have never employed an attorney.

2 "The middle class . . . do not buy legal services — except as a last resort. Instead, they have used the legal profession to develop a set of substitutes — a legal system which operates without benefit of LL.B. wherever possible." Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited,* 41 NOTRE DAME LAWYER 927, 937 (1966). The substitutes are insurance companies and claims adjusters in the tort field; title insurance companies and realtors in the real property field; informal agreements in the domestic relations field; banks, will forms and Dacey's *How to Avoid Probate* in the probate field; arbitration in the commercial law field; boiler plate agreements in the contract field; and plea-bargaining in the criminal field. *Id.* at 937-38. For a book devoted to the development in the insurance field, see D. BALDYGA, HOW TO SETTLE YOUR OWN INSURANCE CLAIM (1968). The author, an insurance claims manager, states that his book was prompted by the "abuses of the contingency fee system." *Id.* at 3.

3 Turrentine, *Legal Service For the Lower-Income Group,* 29 ORE. L. REV. 20, 29 (1949).

4 *See* District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

5 389 U.S. 217 (1967).

> We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner [District 12] the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.[6]

This Note will examine the early responses to group legal service plans and will trace the concurrent development of freedom of association as a constitutional right. It will then discuss the eventual convergence of these developments in effective group legal service operations, the suggested evils arising from such operations, and the recent approval of them by the Supreme Court. In concluding, mention will be made of the future prospects of group legal service plans.

II. Early Responses to Group Legal Service Plans

A group legal service plan is an employment or other arrangement between an attorney and an organization which has as its purpose the rendition of legal services to the members of such organization in respect to their individual affairs.[7] The plans can be as varied in form as are the organizations that devise them, yet condemnation of each finds its basis in the American Bar Association's Canons of Professional Ethics, the first of which were adopted in 1908.[8] Specifically, Canon 35, as a prohibitory force, reads:

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6 *Id.* at 221-22. A survey taken in 1951 under the auspices of the American Bar Association revealed that a majority of the responding attorneys in six states thought it was not unprofessional for a labor union to furnish legal services to its members in respect to their individual affairs. They also reported that such conduct was a common practice in their six states, despite its prohibition by Canon 35 of the Canons of Professional Ethics. McCracken, *Report on Observance by the Bar of Stated Professional Standards,* 37 VA. L. REV. 399, 400 (1951). In addition to the Brotherhood of Railroad Trainmen and the United Mine Workers, other unions which have experimented with group legal service plans include the United Auto Workers, United Steel Workers and the International Association of Machinists. Powell, *Extending Legal Services to Indigents and Low Income Groups,* 13 LA. B.J. 11, 12 (1965). For an example of legislative approval of such practice, see PA. STAT. ANN. tit. 17, § 1612 (1962) (labor union may give legal advice to its members in matters arising out of their employment). The principle underlying these plans has been used in other professions, see Markus, *Group Representation by Attorneys as Misconduct,* 14 CLEV.-MAR. L. REV. 1, 1-2 (1965) (group medical service plans; group funeral service plans).

7 *See Committee Report on Group Legal Services,* 39 CALIF. S.B.J. 639, 661 (1964).

8 A widespread and growing dissatisfaction with the 1908 version of the Canons is evident, however, and movement has been taken in the direction of their amendment. The current President of the ABA has written:

> The Association adopted these rules of professional conduct in 1908 and they have remained relatively unchanged since that time. To assure that the Canons truly reflect the responsibilities of today's lawyer, the Association recently established two special committees to study their present adequacy and effectiveness. One of these, the Special Committee on *Evaluation of Ethical Standards,* for the past three years has been reviewing the canons with a view to making recommendations as to possible amendments, and will issue a tentative draft early next summer. Another, the Special Committee on *Evaluation of Disciplinary Enforcement,* under the chairmanship of retired Justice Tom C. Clark, is studying all aspects of professional discipline, including current enforcement procedures and practices. Letter from Earl F. Morris, to Fellow Member[s] of the Legal Profession, March 1, 1968, inside the cover of ABA LAW STUDENT DIVISION, CANONS OF PROFESSIONAL AND JUDICIAL ETHICS (1968). The tentative draft is now expected in January, 1969. Letter from Virginia Shy to William Hassing, July 30, 1968, on file with the *Notre Dame Lawyer. See generally* Pye & Garraty, *The Involvement of the Bar in the War Against Poverty,* 41 NOTRE DAME LAWYER 860, 873-74 (1966), where the authors asserted:
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> In general, the Canons of Professional Ethics follow the traditional concept

> The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.
>
> A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested *but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.*[9] (Emphasis added.)

Supplementing this is Canon 47 which makes it clear that attorneys are professionally prohibited from taking part in group legal service plans: "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."[10] Three formal[11] and three informal[12] opinions of the Committee on Professional Ethics complete the American Bar Association's official condemnation of these plans.

By creating a legal aid department which began to function in 1930, the Brotherhood of Railroad Trainmen was one of the earliest organizations to establish a group legal service plan.[13] Under the guidance of its newly-created department, the country was divided into sixteen geographic regions and lawyers were employed in each region to represent all Brotherhood members who wished to assert workmen's compensation claims against their employers. The legal aid department solicited legal business for the regional counsel who charged a twenty percent contingency fee, one-fourth of which was paid over

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that the attorney should be passive in his relationship with society. This passive posture is based on several assumptions: that lay persons know when they have a legal problem; that they know a lawyer or can easily locate an attorney who can solve the particular legal problem; and that they are able to pay the lawyer at least a minimum fee. Although these assumptions might have been true in the rural society of yesteryear, it is doubtful that they have the same validity in the urban society of today.

9 ABA CANONS OF PROFESSIONAL ETHICS No. 35.

10 *Id.* No. 47.

11 ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 8 (1925) (lawyer may not accept employment with an automobile club to serve the club members individually); *Id.* No. 56 (1931) (attorney may not accept employment from a grange association to handle legal matters for its members at a stipulated net fee); *Id.* No. 98 (1933) (attorney may not accept employment from a bankers' association for the purpose of rendering legal services to member banks concerning questions submitted by said member banks to the association, the answers to which are printed in the association's bulletin).

12 ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 317 (unpublished) (lawyer employed and paid by an association of engineers may not advise the members); *Id.* No. 319 (unpublished) (lawyer may not be employed by a union to advise its members); *Id.* No. 469 (1961) (attorney may accept employment to represent a client where the attorney's fee is paid by the client's employer, labor union or private association but may not accept such employment if he is also selected by the employer, labor union or private association).

13 For discussion of two early forms of group legal service plans, see *In re* Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910), and People v. Merchants Protective Corp., 189 Cal. 531, 209 P. 363 (1922).

to the department. Initial objection to this operation came from the Cleveland Bar Association, which charged that the plan violated Rule 28 of the Ohio Supreme Court regulating solicitation by attorneys. In *In re: Petition of the Committee on Rule 28 of the Cleveland Bar Association,*[14] an Ohio appellate court held that the solicitation of legal business involved in the plan did violate Rule 28 and the general canon of ethics.[15]

During the same year that Ohio was condemning the Brotherhood's group legal service plan for solicitation, the Supreme Court of Illinois challenged another plan for a second reason.[16] In 1930 several Illinois real estate taxpayers had organized, as a non-profit corporation, the Association of Real Estate Taxpayers of Illinois. The association employed attorneys to represent its members in all litigation involving the validity of Illinois real estate taxes. Despite the fact that its membership drive emphasized beneficial litigation as well as remedial legislation, stirring-up litigation and solicitation were not the announced grounds for condemnation of the taxpayers' group legal service plan. Rather, the Court found the association guilty of contempt for engaging in the practice of law, since Illinois law did not allow a corporation to be licensed to practice law.[17] The opinion pointed out:

> That relation of trust and confidence essential to the relation of attorney and client did not exist between the members of the respondent association and its attorneys, and whatever relation of trust and confidence existed was between the membership and the association.[18]

Two years later in *People ex rel. Chicago Bar Association v. Chicago Motor Club,*[19] the same court found the Chicago Motor Club guilty of contempt for engaging in the unauthorized practice of law. The club employed attorneys on a salary basis to represent its members in automobile damage and traffic violation cases. The fundamental thrust of the court's condemnation was the possibility of commercialization of the legal profession.[20] Specifically, the court held "that no corporation, association or partnership of laymen can contract with its members to supply them with legal services, as if that service were a commodity which could be advertised, bought, sold and delivered."[21]

However, judicial interest in group legal service plans did not center solely on their negative unprofessional aspects. The Ohio court in *In re: Petition of the Committee on Rule 28 of the Cleveland Bar Association*[22] acknowledged that the Brotherhood had valid reason and good motive for establishing its group legal service plan, observing that the Brotherhood members' "claims

14 15 Ohio L. Abs. 106 (App. Ct. 1933).
15 *Id.* at 108. In 1950 the Supreme Court of California, Justices Carter and Traynor dissenting, condemned the Brotherhood's group legal service plan for solicitation. Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950).
16 People *ex rel.* Courtney v. Association of Real Estate Tax-payers, 354 Ill. 102, 187 N.E. 823 (1933).
17 *Id.* at 110, 187 N.E. at 826.
18 *Id.* at 109, 187 N.E. at 826.
19 362 Ill. 50, 199 N.E. 1 (1935).
20 *Id.* at 57, 199 N.E. at 4.
21 *Id.*
22 15 Ohio L. Abs. 106 (App. Ct. 1933).

sometimes fall into the hands of incapable, indolent, inexperienced or dishonest lawyers with resulting loss to the claimants. Sometimes the compensation exacted by lawyers is too much."[23] The Illinois Supreme Court in *Chicago Motor Club* recognized the motor club as "an active influence in the promotion of highway safety,"[24] with many beneficial purposes and services.

The beneficial aspects carried the day in *Gunnels v. Atlanta Bar Association*,[25] where the good intentions of the organization providing legal services led the state supreme court to declare that the members of the organization "should be commended rather than condemned."[26] The organization under attack in that case, the Atlanta Bar Association, advertised its "offer to represent free of charge persons caught in the toils of the usurious money-lender in defending against such illegal exactions, and to represent them in bringing actions to recover amounts illegally paid under loan contracts."[27] The court held that this offer was neither solicitation of legal employment nor barratry.[28] As the court noted, the position of the lawyers in the community "makes it entirely appropriate that they undertake such a movement and assume such responsibilities in reference to the general welfare of the public."[29]

Gunnels may be distinguished from the Ohio and Illinois cases discussed previously since it did not involve a group legal service plan as defined earlier in this Note.[30] The bar association was rendering legal services to those members of the general public who were the victims of usury, not to members of the bar association itself, as would have been the case in a group legal service plan. A more basic distinction exists, however, in that the attorneys working for the associations' members were rendering legal services which other non-affiliated attorneys would have rendered for a fee had the group legal service plans not existed. In contrast, few, if any, legal fees could have been obtained from the helpless victims of usury.

The legal service plan in *Gunnels* was, in effect, a bar association legal aid society. Legal aid societies have been formed by attorneys as a response to pressures on them to fulfill public service objectives, and also as a response to a genuine sense of justice. Their purpose is to make legal services more readily available to indigents. Nevertheless, even this form of legal service plan has been challenged, most often unsuccessfully, as violative of the Canons of Professional Ethics.[31] It is evident that the standards of public service and equal

23 *Id.* at 107. See *District 12, United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967), where the Court reported that District 12 established its group legal service plan in 1913 because "the interests of the members were being juggled and even when not, they were required to pay forty or fifty percent of the amounts recovered in damage suits, for attorney fees." *Id.* at 219.

24 People *ex rel.* Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 54, 199 N.E. 1, 3 (1935).

25 191 Ga. 366, 12 S.E.2d 602 (1940).

26 *Id.* at 381, 12 S.E.2d at 610.

27 *Id.* at 382, 12 S.E.2d at 610.

28 *Id.*

29 *Id.* at 382, 12 S.E.2d at 611.

30 See note 7 *supra* and accompanying text.

31 *See, e.g.*, Azzarello v. Legal Aid Soc'y, 117 Ohio App. 471, 185 N.E.2d 566 (1962). For an informative discussion of the ethical objections to legal aid societies, see Note, *Ethical Problems Raised by the Neighborhood Law Office*, 41 NOTRE DAME LAWYER 961 (1966).

justice inherent in these societies weaken the moral and ethical arguments of the challengers, and the necessary requirement of indigency negates any opposition based on monetary loss to local attorneys.

The referral system has frequently been the bar association's answer to the need for group legal service plans. Under this system, those who can afford to pay for legal services or advice, but who do not know an attorney, are referred by the bar association or a group sponsored by the bar association to an attorney participating in the program.[32] Most assuredly, the introduction of client to competent attorney when made by a referral system is preferable to that made by the "yellow pages." It does not seem too great a step from this point to allow a labor union or other organization to introduce its membership to a selected, competent attorney. Yet the striking difference — and indeed the point of contention — between an attorney referral service and such a group legal service plan is the fee paid with regard to each. The fee charged by the referral service attorney is not excessive in light of the normal professional market. Often, however, anything other than a minimal fee can be excessive in light of the pecuniary means of many middle- and lower-middle class Americans, and it is because of this that group legal service plans effectively apply the insurance principle to legal expenses. Though each group can fashion a fee arrangement to meet its own needs, it was effectively argued in *United Mine Workers* that "[s]preading the cost of legal services among the group by paying an attorney's salary out of the union treasury eliminates reluctance by an impecunious injured workman to seek counsel."[33]

III. Development of Freedom of Association to Secure Legal Services

Beginning in 1937 with its decision in *De Jonge v. Oregon*,[34] the United States Supreme Court laid the foundation for the constitutional protection of group legal service plans. In *De Jonge*, the Court reversed the defendant's conviction under Oregon's Criminal Syndicalism Law[35] for assisting in the conduct of a public meeting held under the auspices of the Communist Party. Chief Justice Hughes, speaking for a unanimous Court, stated:

> These rights [guaranteed by the first amendment] may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed . . . .
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> . . . Peaceable assembly for lawful discussion cannot be made a crime.[36]

32 For a good discussion of lawyer's reference services, see *Committee Report on Group Legal Services, supra* note 7, at 702-07.

33 Brief of Petitioners at 35, District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

34 299 U.S. 353 (1937).

35 ORE. CODE ANN. tit. 14, §§ 3,110-12 (Supp. 1935).

36 De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937).

The constitutional right to peaceable assembly for lawful purposes became in *NAACP v. Alabama ex rel. Patterson*[37] the "constitutionally protected right of association."[38] In that case the Court, recognizing that free speech is enhanced by group association, held that the first and fourteenth amendments protected NAACP membership lists from state scrutiny where disclosure of the lists would make possible the taking of private action against NAACP members.[39]

The constitutionally protected rights of assembly and association established in *De Jonge* and *NAACP v. Alabama* were extended in *NAACP v. Button*[40] to include the constitutionally protected right of association to secure legal services. *Button* involved the Virginia State Conference of NAACP Branches, an unincorporated association which maintained a staff of fifteen attorneys. The Conference, not the NAACP itself, paid each staff attorney a per diem fee for his professional services. Any aggrieved Negro[41] could apply directly to the Conference or its legal staff for assistance. When litigation involved public school segregation, however, a local NAACP branch usually invited a member of the legal staff to explain the legal steps necessary to achieve desegregation at a meeting of parents and children. In such instances, the staff member often distributed forms authorizing him to represent the signers in legal proceedings to obtain desegregation. This procedure obviously amounted to solicitation and encouragement of litigation. Yet Justice Brennan, speaking for the Court, met, at the outset, the contention that such solicitation was wholly outside the area of freedoms protected by the first amendment:

> To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusions. In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.[42]

He noted further that such litigation might be a form of petition for redress of grievances, but added that it is not necessary to "subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly."[43] Accordingly, the Court held that NAACP activities in supporting litigation aimed at ending racial segregation in the Virginia public schools were

> modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate

37 357 U.S. 449 (1958).
38 *Id.* at 463.
39 *Id.* at 462-63.
40 371 U.S. 415 (1963).
41 Legal assistance was not restricted to the members of the NAACP or the Virginia State Conference. *See id.* at 443.
42 *Id.* at 429.
43 *Id.* at 430.

> the legal profession, as improper solicitation of legal business violative of Chapter 33 and the Canons of Professional Ethics.[44]

After deciding that the NAACP's activities were constitutionally protected, the Court reaffirmed the rule it had stated in previous decisions "that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment Freedoms."[45] Virginia urged that a possible conflict of interest between the NAACP and the Negro litigants was such a "compelling state interest."[46] Justice Brennan acknowledged that the NAACP was concerned that the outcome of the legal proceedings should be consistent with its policy of ending racial segregation in Virginia's public schools, but emphasized that there had been no showing of a serious danger of conflict of interest because "the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants."[47] Therefore, it was decided that "the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed."[48]

Solicitation and the possibility of a conflict of interest were present in *Button* as actual dangers, and the Court could have seized upon either, or both, as justification for striking the NAACP's legal service plan. It did not do so. Even after *Button* the Supreme Court might have limited the constitutional protection extended to legal service plans to those which involved political expression. The Court had emphasized that the entire NAACP arrangement employed constitutionally privileged means of expression "to secure constitutionally guaranteed civil rights."[49] Such a limitation, however, would run contrary to the theoretical approach stated in an earlier decision:

> Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.[50]

It was not likely that the Court would limit the protection of legal service plans

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44 *Id.* at 428-29.

45 *Id.* at 438.

46 For further discussion of this alleged conflict of interest, see note 71 *infra* and accompanying text.

47 NAACP v. Button, 371 U.S. 415, 443 (1963).

48 *Id.* at 444. It is interesting to note that thirteen years earlier, in a dissenting opinion in *Hildebrand v. State Bar*, 36 Cal. 2d 504, 225 P.2d 508 (1950), Justice Traynor had stated:

> Given the primary duty of the legal profession to serve the public, the rules it establishes to govern its professional ethics must be directed at the performance of that duty. Canons of ethics that would operate to deny to the railroad employees the effective legal assistance they need can be justified only if such a denial is necessary to suppress professional conduct that in other cases would be injurious to the effective discharge of the profession's duties to the public. *Id.* at 522, 225 P.2d at 519.

49 NAACP v. Button, 371 U.S. 415, 442 (1963). For an argument that the constitutional protection extended to group legal services should have been limited to plans involving civil rights or federal statutory rights, see Note, *Group Legal Services and the Right of Association*, 63 MICH. L. REV. 1089, 1092-93 (1965).

50 Thomas v. Collins, 323 U.S. 516, 531 (1945).

to those involving political expression or civil rights, or to those which aid that segment of the public which has limited financial resources and unpopular causes. The long-standing purpose of the legal profession has always been to serve all the public, regardless of financial standing or public support of particular causes.

Mr. Justice Harlan, dissenting in *Button,* reminded the majority that the NAACP activities were similar in many respects to those engaged in by the Brotherhood of Railroad Trainmen, whose legal service practices had been condemned by every state court which had considered them.[51] Within one year, however, the Supreme Court destroyed the basis of this argument. In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,*[52] it held that the first and fourteenth amendments also protected the right of the Brotherhood to maintain and carry out its plan for advising injured workers to obtain legal advice from recommended lawyers. Justice Black, speaking for the Court, recognized the employees' constitutional right to join together in asserting their statutory claims under the Safety Appliance Act[53] and the Federal Employers' Liability Act[54] and reasoned:

> The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance — and, most importantly, what lawyer a member could confidently rely on — is an inseparable part of this constitutionally guaranteed right to assist and advise each other.[55]

The group legal service plan of the Brotherhood held to be constitutionally protected in 1964 was the same basic plan that it had employed for over 30 years. The Brotherhood admitted that the result of the plan was to channel legal employment to the particular lawyers which it approved as legally and morally competent to handle injury claims for members and their families, and relied successfully on the scope of the first amendment to relieve itself of the restraint of the state-imposed injunction.[56] Even after approving the channeling involved in the Brotherhood's plan and the solicitation involved in *Button,* the Court might have limited its grant of constitutional protection to those plans involving federal rights. Indeed, the purpose of the NAACP's legal service plan had been to secure constitutionally guaranteed civil rights, and the purpose of

51 *See* NAACP v. Button, 371 U.S. 415, 459-60 (1963) (dissenting opinion), where Mr. Justice Harlan cites five state court decisions striking down the Brotherhood's practices.

52 377 U.S. 1, 8 (1964).

53 27 Stat. 531 (1893), *as amended,* 45 U.S.C. §§ 1-43 (1964). This Act set up safety and equipment requirements on railroad engines and cars for the protection of employees and travelers.

54 35 Stat. 65 (1908), *as amended,* 45 U.S.C. §§ 51-60 (1964). The FELA established the liability of railroads in interstate or foreign commerce for injuries to employees caused by the railroad's negligence.

55 Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 6 (1964).

56 *Id.* at 5.

the Brotherhood's plan was to assert employee rights under two federal statutes. However, in *United Mine Workers* the Supreme Court made it clear that the first and fourteenth amendments, and not the supremacy clause, were the grounds for its earlier decisions.[57]

In *United Mine Workers,* District 12 employed one attorney on a salary basis to represent its members and their dependents in workmen's compensation claims before the Illinois Industrial Commission. There could be no doubt that the attorney was employed by the union to render legal services to its members in respect to their individual affairs, and that such an arrangement was in violation of Canon 35.[58] The Illinois Supreme Court viewed *Button* as concerned chiefly with litigation as a form of political expression, and, arguing that the *Brotherhood of Railroad Trainmen* did not protect plans involving an explicit hiring of attorneys, held that the District 12 group legal service plan constituted the unauthorized practice of law.[59] But the United States Supreme Court would not condescend to have its decisions so narrowly limited and held, on appeal, that *Button* and *Brotherhood of Railroad Trainmen* firmly established the right of an association to provide legal services for its members.[60] In the progress of the case, the Illinois court had upheld a lower court's decree prohibiting any financial connection between District 12 and the attorney.[61] Speaking to this result the Supreme Court said it

> substantially impairs the associational rights of the Mine Workers and is not needed to protect the State's interest in high standards of legal ethics. In the many years the program has been in operation, there has come to light, so far as we are aware, not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the Union and the attorney who represents its members. [T]he decree cannot stand . . . .[62]

Furthermore, there was absolutely no indication that any theoretical conflict of interest between the union and a member ever actually arose in the context of a particular lawsuit. The union's group legal service plan had been in operation in Illinois for fifty-three years, and in the most recent six years had handled two thousand claims entailing awards of over $2,000,000 with no suggestion in the record of even one case involving a conflict of interest.[63] With this decision on the books, there could be no further argument for the placing of a limitation on the right of association to secure legal services, except in instances of "compelling state interest."

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57 District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 223, 224 n.5 (1967). Argument has been advanced to the effect that the decision in *Brotherhood of Railroad Trainmen* should have been based on the supremacy clause. *See* Note, *supra* note 49, at 1093.

58 See note 9 *supra* and accompanying text.

59 Illinois State Bar Ass'n v. District 12, UMW, 35 Ill. 2d 112, 219 N.E.2d 503 (1966).

60 District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967).

61 Illinois State Bar Ass'n v. District 12, UMW, 35 Ill. 2d 112, 125, 219 N.E.2d 503, 510 (1966).

62 District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 225 (1967).

63 Brief of National Lawyers Guild as Amicus Curiae at 14, District 12, UMW v. Illinois State Bar Ass'n, 389 U. S. 217 (1967).

IV. Substantive Evils

In the trilogy of Supreme Court decisions discussed above, the associations involved showed that their activities fell within the first and fourteenth amendments' protection. The states failed to advance any substantial regulatory interest, in the form of substantive evils flowing from the associations' legal service activities, that could justify the broad prohibitions which had been imposed. Mention should be made, however, of the suggested substantive evils that are likely to arise from the operations of group legal service plans. These objections will appear in three possible contexts: (A) creation of the attorney-client relationship; (B) processing of the claim; and (C) financial considerations.

A. Creation of the Attorney-Client Relationship

Advertising of legal services has traditionally been seen as an unprofessional practice. Canon 27 declares: "It is unprofessional to solicit professional employment by circulars, advertisements" or by other direct or indirect means.[64] A good example of extensive advertising in the operation of a group legal service plan is witnessed in *People ex rel. Courtney v. Association of Real Estate Taxpayers.*[65] The defendant therein distributed approximately two million circulars describing its activities and soliciting membership, and also conducted a regular schedule of radio broadcasts. In sharp contrast was the conduct of District 12 in *United Mine Workers,* which made known to its members the availability of the legal services in much the same manner as it made known its other services and benefits for members. The different approaches can be explained by the fact that the primary purpose of the taxpayers' association was to gain the public support and financial resources necessary to provide legal services to taxpayers contesting the Illinois real property tax. District 12, on the other hand, provided a great number and variety of services as a modern labor union. While the Illinois court struck down the taxpayer association's conduct as an unauthorized practice of law, the United States Supreme Court upheld the advertising efforts of the labor union. The apparent conclusion is that any advertising of group legal services which is dignified and not excessive under the circumstances would not be considered a substantive evil, and therefore any statute, rule of court or canon dealing with advertising should be flexible.[66] Informal enforcement by a bar association committee, in the nature of suggestions or reprimands, may be the most effective enforcement of any limitation on advertising.

Closely related to advertising of legal services is the direct solicitation of clients in need of these services. Canon 28 states the traditional objection:

> It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it

64 ABA CANONS OF PROFESSIONAL ETHICS No. 27.
65 354 Ill. 102, 187 N.E. 823 (1933).
66 Proposed Rule 20 of the California Rules of Professional Conduct requires that a group legal service plan limit the advertising or publicizing of the plan in soliciting membership in the group to a dignified announcement of the availability of the legal services. A proposed amendment to Rule 2 declares that advertising within the group is not solicitation. *Group Legal Services,* 43 CALIF. S.B.J. 474, 474-76 (1968).

> his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable . . . to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes . . . .[67]

Yet the Supreme Court has permitted such action. The NAACP in *Button* openly solicited Negro parents and children to institute and maintain litigation challenging Virginia's public school segregation. This conduct was held lawful as frequently necessary in order to inform the Negro parents of their constitutional right to desegregated public schools.[68] In *United Mine Workers,* District 12 provided injured members with forms entitled "Report to Attorney on Accidents" and advised its injured members to fill out the forms and send them to the union's legal department. The Supreme Court found no impropriety in the distribution of the accident report forms. Thus an association participating in a constitutionally protected group legal service plan is not barred from encouraging members of the group to take advantage of the available legal services when needed.

Advertising and soliciting are only means to an end. The result of their use is the channeling of clients to a particular attorney, and such a result seems inevitable if group legal service plans are to perform their primary function, *i.e.* provide personal contact with competent attorneys to persons in need of legal services. It is the negative aspect of channeling that is objectionable to some members of the bar. Group legal service plans channel clients away from non-affiliated attorneys, notably those who depend on contingent fee litigation for their livelihood. By striking the balance in favor of these plans, the Supreme Court has created a situation where non-affiliated attorneys must either compete for this legal business, or seek affiliation themselves.

B. Processing Claims

The volume of claims processed in a group legal service plan may lead to mass production of claims. In this regard, the Illinois State Bar Association made the following statement concerning the plan operated by District 12 in *United Mine Workers:*

> Because of the volume of claims that this one attorney must handle (430-85 per year), it is obvious that a thorough and conscientious handling would consume all of his time, and in all probability if studied and presented on an individual basis, instead of a mass production technique, would probably reduce substantially the number of claims concluded each year.[69]

As the Supreme Court pointed out, however, the union-salaried attorney was regularly available for conferences with the members concerning their claims;

67 ABA CANONS OF PROFESSIONAL ETHICS No. 28.

68 NAACP v. Button, 371 U.S. 415, 422 n.6 (1963) (parents were not accustomed to reading newspapers or listening to the radio, and thus they had little grasp of what was going on in the community).

69 Brief of Respondents at 24, District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

in addition, the members were free to employ other counsel if they desired, and in fact the attorney frequently suggested to the members that they do so.[70] Mass production of claims is a potential danger in group legal service plans where the claims are of one type, as in *United Mine Workers*. On the other hand, one attorney specializing in handling only workmen's compensation claims could reasonably be expected to be more efficient and competent than an attorney who only occasionally handled such claims. Hopefully, one effect of group legal service plans is to provide the benefits of efficiency without sacrificing individual treatment.

Another substantive evil that is at least theoretically possible in a group legal service plan is the conflict of interest. For example, in *Button* the danger existed that the NAACP's interest in ending racial segregation in Virginia's public schools might conflict with the parents' interest in seeking better segregated schools once they thought desegregation was unobtainable. The Supreme Court, however, held that the possibility of conflicting interests was too speculative to justify the broad remedy invoked by Virginia.[71] Similarly, in *Brotherhood of Railroad Trainmen,* the theoretical possibility existed that the union, if its interests diverged from that of the individual litigant member, might cut off the attorney's referral business if he did not sacrifice the interests of his client; yet the court held there was no appreciable public interest to justify Virginia's complete prohibition of the Brotherhood's efforts to aid one another in assuring that each injured member would be justly compensated for his injuries.[72] The association that does sacrifice the interest of a member, without his knowledge and consent, in order to further its own interest, to punish a member or to test a new legal theory, should be admonished. But the membership should not be denied, by blanket prohibition of all group legal service plans, the beneficial aspects of such plans.

C. Financial Considerations

A real problem that might arise in the settlement of claims under a group legal service situation is the wholesaling of claims. The Illinois State Bar Association in *United Mine Workers* argued that the attorney employed by District 12 most likely dealt with the coal mining company's lawyers on a volume basis and that the individual union member's claims were compromised at figures far below what might have been secured if the company lawyers had bargained with independent attorneys.[73] "He becomes no better than the personal injury lawyer-broker who deals in volume with the insurance company and trades cases as a package deal, rather than by considering the injury aspect of each individual

70 District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 220-21 (1967).

71 NAACP v. Button, 371 U.S. 415, 443 (1963).

72 Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 8 (1964).

73 Brief of Respondents in Opposition to Certiorari at 6-7, District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967). The bar association based its argument on the difference between the average per case recovery ($1150) of the latest attorney and the average ($1400) of a prior attorney. *See* Objection of Respondent to Motion of AFL-CIO for Leave to File Brief as Amicus Curiae at 5, District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967). Average recovery figures do not, of course, reveal the incidence of routine cases vis-à-vis substantial cases involving sums far in excess of the average figures.

file."[74] The danger of wholesaling claims is increased where the opposing attorneys are identical in a substantial number of cases. Explicit prohibition of wholesaling claims by the union should be supplemented by careful selection of an honest attorney.

The relationship between payment of the fee and loyalty to client is brought into sharp focus in group legal service situations. In 1958 the Illinois Supreme Court had held impermissible any financial connection between the Brotherhood of Railroad Trainmen and its regional counsel with respect to personal injury claims of Brotherhood members.[75] That precedent was followed by the same court in *Illinois State Bar Association v. District 12, United Mine Workers,*[76] when it reasoned that

> [The attorney-client] relationship is pre-eminently personal in nature and the fundamental duty of an attorney involves undiluted loyalty to the client whom he serves and whose interests he protects, considerations we believe largely absent where the attorney has been selected and hired on a salary basis by a lay intermediary to represent individual clients.[77]

The Illinois court also feared that substantial commercialization of the legal profession might follow if the union were allowed to pay the attorney.[78] On appeal to the United States Supreme Court, District 12 answered these charges by arguing:

> [H]aving accepted employment by a client, and assumed the responsibility of representing him, a lawyer whose loyalty to his client would be affected by consideration of who paid his fee, or whether it was paid at all, would be unfit in character, ethics and morals to be a member of the bar at all.[79]

And on another occasion the union pleaded that by predicating "the desired personal relationship between attorney and client upon payment of an attorney fee, the legal profession is thus cast in terms of a business and reduced to such a status."[80] The record supported the contentions of District 12, since it contained no evidence of any form of commercialization or disloyalty on the part of the attorneys who had served in the group plan during its fifty-three years of operation.[81]

74 Brief of Respondents at 19, District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

75 *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 398, 150 N.E.2d 163, 167 (1958).

76 35 Ill. 2d 112, 219 N.E.2d 503 (1966).

77 *Id.* at 120-21, 219 N.E.2d at 508.

78 *See id.* at 125, 219 N.E.2d at 510.

79 Petition of Petitioners for Certiorari at 15a, District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

80 *Id.* at 24. One commentator has similarly argued:

> [I]n the context of outlawing group legal services the whole argument about commercialization seems quite false. If the reputation of the bar is really important, then lawyers should at least recognize the possibility that outlawing group legal services would hurt their reputation more than upholding the non-commercial image would help it, especially since it is possible for the public to view the fight against group legal services as nothing more than an organized monopoly's attempt to maintain its financial position. This view would not be completely unwarranted.

Zimroth, *Group Legal Services and the Constitution,* 76 YALE L.J. 966, 981 (1967).

81 Petition of Petitioners for Certiorari at 22, 16a, District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

V. Future of Group Legal Service Plans

The Supreme Court trilogy that has been discussed above did not decide whether an association could form a group legal service plan to provide *all* legal services,[82] or whether individual persons could form an association for the sole, or primary, purpose of providing legal services to its members.[83] The Illinois Supreme Court in *United Mine Workers* stated the possibilities:

> Arguably, if a labor union may hire salaried attorneys to represent its individual constituents in occupationally-caused injury litigation, it may expand such activity to encompass legal problems involving domestic relations, contracts, criminal law and other areas of the legal field, for the union collectively is interested in the total welfare of its individual members. It would seem possible and even likely, that any group of individuals with a similarity of interests would be allowed to associate for the purpose of hiring salaried attorneys to represent its individual members . . . .[84]

The Supreme Court of the United States has expressed no opinion on these possible developments. The legality of such extensive group legal service plans would depend first, on whether they were within the constitutional protection established in *Button* and subsequent decisions, and second, on whether the state could advance proof of any substantive evils flowing from the groups' legal activities.

Consideration should be given to one state's response to the development of group legal service plans. Following the decision in *United Mine Workers,* the Board of Governors of the California State Bar Association determined that the Supreme Court's thoughts were sufficiently crystallized to warrant the proposal of new rules and guidelines concerning these legal service plans.[85] Proposed Rules 20 and 21 of the California Rules of Professional Conduct authorize participation in group legal service plans provided the following conditions are met: (a) the group is a non-profit organization formed principally for common purposes other than the rendering of legal services and wherein the furnishing of legal services is merely incidental to the accomplishment of such purposes; (b) legal services are limited to matters related to the common principal purposes for which the group was formed; (c) advertising is limited to a dignified announce-

82 An example of such a plan was mentioned in the Motion of the NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent for Leave to File Brief Amicus Curiae at 22, District 12, UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967):

> For two years an affiliate of the New York Hotel Trades Council retained a a salaried lawyer to advise its members on the full range of legal problems that confronted them as members of society other than those arising from their employment.

83 *See* People *ex rel.* Courtney v. Association of Real Estate Tax-payers, 354 Ill. 102, 187 N.E. 823 (1933). For an analysis of prepaid legal insurance, see *Committee Report on Group Legal Services, supra* note 7, at 715-22. A proposed form of government-supported legal service plan for all has been offered in Note, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution,* 26 U. PITT. L. REV. 811, 841-46 (1965).

84 Illinois State Bar Ass'n v. District 12, UMW, 35 Ill. 2d 112, 125, 219 N.E.2d 503, 510 (1966).

85 *See* Finger, *President's Message: To Serve the Public Better,* 43 CALIF. S.B.J. 469, 472 (1968). For other suggested guidelines, see Zimroth, *supra* note 80, at 982-83.

ment of the availability of legal services; (d) professional employment is not solicited; (e) each member is free to obtain legal services at his own expense; (f) the attorney does not represent conflicting interests; (g) the group does not control or interfere with the attorney's performance of his duty to his client; and (h) the group derives no profit from the plan.[86] The terms of each proposed plan must be contained in a writing filed with the state bar, and a five-member committee of the state bar must determine that the proposed plan complies with the conditions set forth in Rules 20 and 21.[87]

As enumerated above, condition (a) clearly prohibits individual persons from forming a group with the sole, or primary, purpose of providing legal services, and condition (b) prohibits a group plan that provides *all* legal services to its members. It should be noted that in 1964, the California State Bar Association's committee on group legal services "found no persuasive reasons or argument to confine group legal service plans to . . . a particular kind of non-profit association [or to] an arrangement to provide legal services only for matters which are of peculiar common concern . . . ."[88] Apparently the California State Bar Association's Board of Governors thought that conditions (a) and (b) were *necessary* limitations on group legal service plans. If a case arises in which a group plan does not comply with the conditions in Proposed Rules 20 and 21, California may be required, under the recent trilogy of Supreme Court decisions, to effectively prove a substantial regulatory interest, in the form of a substantive evil, that justifies the boundaries imposed on the future growth of these plans. In addition to the substantive evils suggested earlier in this Note,[89] the state might attempt to show that such extensive plans will undermine the ethical and financial structure of the legal profession. It is upon the battlefield of legal compensation that the future growth of group legal service plans will probably find their ultimate challenge.

Regardless of the outcome of any future Supreme Court cases involving group legal service plans, the Court's recent trilogy on such plans demonstrates an increasing awareness that the traditional lawyer-client relationship is no longer adequate to meet modern needs and demands for legal services. Today, not only are indigents provided free services by legal aid societies, but members of the middle class can, with a foundation of constitutional protection, seek to associate to secure services at more reasonable fees. What form this association will be allowed to take and what services will be provided are important questions that must eventually receive judicial consideration. It is certain that the basic freedom to associate to secure legal services can no longer be denied; the states will have to prove that the traditional substantive evils embodied as objections in the legal canons are truly meaningful criteria of the state's interest.

William J. Hassing

86 *Group Legal Services, supra* note 66, at 474-75. For an earlier version of Proposed Rule 20, see *Committee Report — Group Legal Services,* 35 CALIF. S.B.J. 710, 724 (1960).
87 *Group Legal Services, supra* note 66, at 474, 476.
88 *Committee Report on Group Legal Services, supra* note 7, at 725.
89 See notes 64-81 *supra* and accompanying text.

The Public Right of Navigation and the Rule of No Compensation

The owner of land riparian to a navigable waterway possesses certain valuable rights, two of the most important of which are the right of access from the land to the navigable portion of the waterway adjacent to the land and the right of navigation once upon the waterway. A distinction, however, must be made between these two rights. The right of access, although subject to limitations,[1] is generally considered a *private right.*[2] The right of navigation, however, is considered a *public right,* one which the riparian owner shares with the general public.[3] Therefore, the latter is not his property in the constitutional sense and, by the weight of authority, he has no legal right to eminent domain compensation when a downstream bridge or dam, constructed under governmental sanction, cuts him off from the general system of waterways and the outside world.[4] Although the riparian owner may suffer great economic loss because of the obstruction to navigation, and thereby bear an undue proportion of the costs of improvements erected for the benefit of the public at large, his injuries are considered consequential and are therefore *damnum absque injuria.*[5]

This Note will examine the rule denying compensation, primarily in its constitutional foundation and with regard to the applicable peculiarities surrounding the use of navigable waters, and will also consider the possible solutions to the riparian owner's plight.

I. Constitutional Considerations

The extent to which consequential damages are allowed depends to a great degree upon whether the pertinent state constitution requires compensation only for "property" which is "taken" or in addition for "property" which is merely "damaged." Therefore, no serious discussion of the rule denying compensation for consequential damages resulting from the cutting off of naviga-

1 The right of access, along with other riparian rights, is subject to the public's right of navigation and the incidental right of the government to construct works in aid of navigation. 2 P. Nichols, Eminent Domain § 5.7914 [1] (3d rev. ed. 1963). *See also* the section of this Note entitled "Servitude in Favor of the Government When Exercising Powers in Aid of Navigation," text accompanying notes 59-87 *infra.*

2 *See, e.g.,* Carmazi v. Board of County Comm'rs of Dade County, 108 So. 2d 318 (Fla. Dist. Ct. App. 1959); Marine Air Ways Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. Cl. 1951); State v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964).

3 *Id.*

4 Colberg, Inc. v. State, 432 P.2d 3, 62 Cal. Rptr. 401 (1967); Carmazi v. Board of County Comm'rs of Dade County, 108 So. 2d 318 (Fla. Dist. Ct. App. 1959); Depew v. Board of Trustees of the Wabash & Erie Canal, 5 Ind. 8 (1854); Frost v. Washington County R.R., 96 Me. 76, 51 A. 806 (1901); United States Gypsum Co. v. Mystic River Bridge Authority, 106 N.E.2d 677 (Mass. 1952); Blackwell v. Old Colony R.R., 122 Mass. 1 (1877); Marine Air Ways, Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. Cl. 1951); State v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964); Milwaukee Western Fuel Co. v. City of Milwaukee, 139 N.W. 540 (Wis. 1913); Clark v. Chicago & N.W. Ry., 70 Wis. 593, 36 N.W. 326 (1888); 2 P. Nichols, *supra* note 1, § 5.792 [1], at 264. *Contra, In re* Construction of Walnut St. Bridge, 191 Pa. 153, *reported sub nom.* Gumbes v. City of Philadelphia, 43 A. 88 (1899).

5 *E.g.,* Frost v. Washington R.R., 96 Me. 76, 51 A. 806 (1901); Marine Air Ways, Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. Cl. 1951).

tion can be attempted without an understanding of the constitutional provisions involved.

A. The Nineteenth Century

During most of the nineteenth century, the federal and state constitutions provided for compensation only where "property" was "taken." In determining what constituted a "taking" and what was "property", the courts initially adopted a rather restrictive approach.[6] Concerned more with the importance of public improvements in a developing country than with specific consequences to particular individuals resulting from the erection of such public improvements, the courts denied compensation unless there was an actual physical taking of property.[7] No matter how great the degree to which the use of the property was impaired or the value of the property diminished, the landowner was not, absent a taking, entitled to eminent domain compensation.[8]

This restrictive approach was no doubt facilitated in part by the natural meaning of the word "taking."[9] This is illustrated by the classic statement, in support of what has been termed the "physical concept" of eminent domain,[10] made by Chief Justice Gibson for the Supreme Court of Pennsylvania in *Monongahela Navigation Company v. Coons*.[11] In that case it was held that the plaintiff was not entitled to compensation for the flooding of his mill as a result of an obstruction in the stream. Emphasizing the natural meaning of "taking," Chief Justice Gibson explained that 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.[12]

The restrictive physical approach was also due in part to the tendency of courts "to emphasize concrete objects rather than abstract rights" in the development of a new concept.[13] In this respect, the physical approach made use of the word "property" as well as "taking." Thus, when a riparian owner was

6 *See generally* Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437, 442-43 (1962) and cases cited therein.
7 *See* Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 226 (1931).
8 *Id.* at 225-26.
9 Spies & McCoid, *supra* note 6, at 442.
10 Cormack, *supra* note 7, at 224.
11 6 W. & S. 101 (Pa. 1843).
12 *Id.* at 114.
13 Spies & McCoid, *supra* note 6, at 442. These two commentators observe that the doctrine of sovereign immunity also contributed to the narrow, restrictive approach to eminent domain. *Id.* at 443. *See also* Cormack, *supra* note 7, at 229.

deprived of the use of a navigable waterway by a public improvement, he was confronted with this reasoning:

> What must be understood by the term private property in the contemplation of the constitution?
>
> It appears to us that it applies to such property as belongs absolutely to an individual, and of which he has the exclusive right of disposition; property of a specific, fixed, and tangible nature, capable of being had in possession and transmitted to another, as houses, lands, and chattels.[14]

Because of the unfairness to landowners in failing to award compensation in cases such as this, particularly where flooding or land access was involved,[15] it was inevitable that use of the physical approach to determine what was a "taking" of "property" would be challenged. The leading state decision among those mounting a challenge to the restricted notion of "property" was *Eaton v. Boston, Concord, & Montreal Railroad*,[16] in which the Supreme Court of New Hampshire allowed compensation for damages resulting from the repeated overflowing of the plaintiff's land. In an opinion credited with establishing the "right in relation to property" approach to eminent domain,[17] Justice Jeremiah Smith cogently pointed out that the

> constitutional prohibition (which exists in most, or all, of the States) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read, — "No person shall be divested of the formal title to property without compensation, but he may, without compensation, be deprived of all that makes the title valuable." To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking of the property altogether." These views seem to us to be founded on a misconception of the meaning of the term, "property," as used in the various State constitutions.[18]

Continuing, Smith observed that

> [i]n a strict legal sense, land is not "property" but the subject of property. The term "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal significance "means only the *rights of the owner in relation to it.*"[19] (Emphasis added.)

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14 Commissioners of Homochitto River v. Withers, 29 Miss. 21, 32 (1855).

15 *See* Cormack, *supra* note 7, at 226-31.

16 51 N.H. 504 (1872). For other cases presenting challenges see Knowles v. New Sweden Irrigation Dist., 101 P. 81 (Idaho 1909); Nevins v. City of Peoria, 41 Ill. 502 (1866); Staton v. Norfork & C.R. Co., 111 N.C. 278, 16 S.E. 181 (1892); Gordon v. Village of Silver Creek, 127 App. Div. 888, 112 N.Y.S. 54 (1908).

17 For a discussion of this development see Cormack, *supra* note 7, at 238-40; Mayberry & Aloi, *Compensation for Loss of Access in Eminent Domain in New York: A Re-evaluation of the No-Compensation Rule With a Proposal for Change*, 16 BUFFALO L. REV. 603, 638 (1967).

18 Eaton v. Boston, C. & M.R.R., 51 N.H. 504, 511 (1872).

19 *Id.*

If one of these rights in relation to property is interfered with, "such interference 'takes,' *pro tanto,* the owner's 'property.' "[20]

Two recent commentators have noted that other courts have also utilized this expanded conception of "property" to liberalize eminent domain awards.[21] If the plaintiff before those courts could fit his claim into an established category of property such as leases, profits or easements, "even of a novel kind," a substantial governmental interference with such an interest might constitute a "taking" of "property."[22] However, none of the courts dealing with a compensation claim for injuries sustained as a result of the erection of a governmentally authorized obstruction to navigation have attempted to fit the "right" of navigation into one of the established categories of property.[23]

While a challenge to the physical approach to eminent domain was being made in the state courts by expanding the meaning of "property," a parallel challenge was being made in the federal courts by expanding the meaning of "taking".[24] The leading case in this respect was *Pumpelly v. Green Bay Company,*[25] decided by the United States Supreme Court in 1872. In that case, the erection of a dam resulted in permanent inundation of plaintiff's land, thereby destroying its value and substantially impairing its usefulness. In holding that this constituted a "taking" of property in the constitutional sense, the Court observed that it

> would be a very curious and unsatisfactory result, if in construing a provision of constitutional law . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.[26]

The language in this decision would indicate something of an abandonment of the physical approach to eminent domain. However, it must be pointed out

20 *Id.* Two recent commentators have remarked that the "right in relation to property" concept "in all probability is simply a judicial device for redressing economic inequities in situations where relief would otherwise be inappropriate under settled authority." Mayberry & Aloi, *supra* note 17, at 638. Regardless of whether the courts *should* use this device to redress economic inequities, the validity of this observation becomes apparent when a further statement by Justice Smith in the *Eaton* case is considered:

> If, on the other hand, the land itself be regarded as "property," the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. Eaton v. Boston, C. & M.R.R., 51 N.H. 504, 512 (1872).

21 Spies & McCoid, *supra* note 6, at 444.

22 *Id.*

23 Nor has the "right in relation to property" idea, a concept which is in essence that "damage" to property may constitute a "taking," gained great adherency. While it has found some limited following among the courts, see cases cited note 16 *supra,* and among the authorities, see 1 J. LEWIS, EMINENT DOMAIN §§ 63-68 (3d ed. 1909) and Cormack, *supra* note 7, it has been rejected by the United States Supreme Court, see Transportation Co. v Chicago, 99 U.S. 635, 642 (1879), and the principal text on the subject of eminent domain, 2 P. NICHOLS, *supra* note 1, § 6.38[1].

24 *See generally* Spies & McCoid, *supra* note 6, at 445-46.

25 80 U.S. (13 Wall.) 166 (1872).

26 *Id.* at 177-78.

that the Court limited its holding to cases "where real estate is *actually invaded* by superinduced additions of water, earth, sand, and other materials, or by having any artificial structure placed on it, so as to effectively destroy or impair its usefulness . . . ."[27] (Emphasis added.) Thus, the meaning of "taking" was expanded to provide compensation for destruction of value or impairment of use of land, ordinarily considered consequential injuries, but only insofar as such destruction or impairment was the result of permanent physical invasion directly attributable to the public improvement.[28]

B. Constitutional Amendment

Despite attempts by the federal courts to expand the meaning of "taking" and by some state courts to expand the meaning of "property," the "strong popular feeling"[29] that eminent domain was all too often resulting in the cost of public works falling unjustly upon the individual brought about a more serious challenge to the physical concept of eminent domain. In 1870, a constitutional provision was adopted in Illinois to the effect that private property should not be taken *or damaged* for public use without just compensation.[30] Since that time, over half of the states have amended their constitutions in a similar manner.[31]

Understandably, as the significance of "taken" ceased to be of practical importance in those states which amended their constitution,[32] the meaning of "damaged" became a very important inquiry. The leading case which advanced this inquiry was *Rigney v. City of Chicago,*[33] decided by the Supreme Court of Illinois. *Rigney* involved an action to recover damages sustained by the plaintiff by reason of the city's construction of a viaduct, some 220 feet west of plaintiff's premises, which permanently obstructed the street that passed in front of his land. There was no claim that the plaintiff's possession was disturbed, or that any direct physical injury was done to his property by the structure in question. Rather, the complaint was that by cutting off his travel in one direction, the city deprived him of a *public* right enjoyed by him *in connection with his premises,* and inflicted upon him an *injury in excess of that sustained by the public.*[34] The trial court, holding in effect that the plaintiff did not have an actionable injury, directed a verdict for the city, but this decision was reversed by the Illinois Supreme Court.

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27 *Id.* at 181. *See also* United States v. Cress, 243 U.S. 316 (1917); United States v. Lynah, 188 U.S. 445 (1903).

28 Sanguinetti v. United States, 264 U.S. 146 (1924). *See also* Manigault v. Springs, 199 U.S. 473 (1905); Bedford v. United States, 192 U.S. 217 (1904); Transportation Co. v. Chicago, 99 U.S. 635 (1879).

29 2 P. NICHOLS, *supra* note 1, § 6.38[4], at 456.

30 ILL. CONST. art. 2, § 13.

31 Divergent conclusions have been reached in totaling the exact number of states which now have "taken" or "taken or damaged" provisions. This is no doubt due to the fact that some constitutional provisions do not conform exactly to either the "taken" or "taken or damaged" terminology. Mayberry & Aloi, *supra* note 17, at 640. For a breakdown of existing provisions, see *id.* at 640 nn.185-91 and accompanying text.

32 2 P. NICHOLS, *supra* note 1, § 6.38[4], at 456.

33 102 Ill. 64 (1882).

34 *Id.* at 70.

Speaking for the latter court, Justice Mulkey pointed out that, under the previously existing constitutional provision of Illinois, only an actual physical invasion of the land which impaired its use or value was regarded as a "taking" of private property for which compensation was required.[35] This construction of "taking," he continued, resulted in great hardship where "there was no actual physical injury to the property, yet the approaches to it were so cut off and destroyed as to leave it almost valueless."[36] It was with a view to affording relief in such cases of hardship that the new Illinois constitutional provision was framed; "[t]he addition of the words 'or damaged,' can hardly be regarded as accidental, or as having been used without definite purpose."[37] Rather, the addition indicated a deliberate purpose to change the organic law of the state[38] and to abolish the old test of direct physical injury to the corpus or subject of the property affected.[39] The new constitutional provision, Justice Mulkey concluded, required compensation in all cases where it appeared that

> there has been some direct physical disturbance of a *right*, either *public or private*, which the plaintiff enjoys in *connection with his property*, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.[40] (Emphasis added.)

In view of the broad language in *Rigney* and in other early cases interpreting the new "damage" provisions,[41] and considering the fact that the United States Supreme Court accepted the Illinois court's interpretation of the constitutional terminology,[42] it would have appeared that all consequential damages from eminent domain activities, including consequential damages resulting from a government-sanctioned obstruction to the *public* right of navigation, could be recovered.[43] Indeed, after the city of Philadelphia constructed a bridge across a river in such a way as to destroy all access to the riparian owner's wharf by masted vessels, the riparian owner was awarded compensation for the diminution in market value of his property caused by the structure.[44] Referring to the applicable provision of the Pennsylvania Constitution as amended in 1874,[45] the Supreme Court of Pennsylvania stated:

35 See *id.* at 72, 74 & 78.
36 *Id.* at 75.
37 *Id.*
38 *Id.*
39 *Id.* at 78.
40 *Id.* at 81.
41 *See* cases discussed in Spies & McCoid, *supra* note 6, at 447-48.
42 Chicago v. Taylor, 125 U.S. 161, 168 (1888).
43 This is especially true if, in fact, words in a constitution "are to have their plain, popular, obvious and natural meaning." Monongahela Navigation Co. v. Coons, 6 W. & S. 101, 114 (Pa. 1843) (C. J. Gibson).
44 *In re* Construction of Walnut St. Bridge, 191 Pa. 153, *reported sub nom.* Gumbes v. City of Philadelphia, 43 A. 88 (1899).
45 PA. CONST. art. 16, § 8. It is noteworthy that this provision is not applicable against the state government but is limited solely to "municipal or other corporations and individuals" invested with the power of eminent domain. The state must make compensation only where property is "taken or applied" for public use. PA. CONST. art. 1, § 10. Hence, if the state, rather than the City of Philadelphia, had erected the bridge, the riparian owner would not have been entitled to compensation.

> Since the adoption of the present constitution it cannot be doubted that *mere injury* to a private property or franchise entitles the owner to compensation, whether there be a taking or not. The distinctions upon this subject between taking and injury, which formerly prevailed, have been obliterated by the new constitution, and they no longer prevail.[46] (Emphasis added.)

This opinion, although not extensive, might well have become the foundation for allowing compensation to riparian owners suffering great consequential damages as a result of a government-sanctioned obstruction to navigation. Curiously, however, no subsequent claim for consequential damages involving this situation arose in a jurisdiction where the constitution provided for recovery for "damaged" property until very recently.[47]

In the meantime, the early, liberal judicial attitude toward the constitutional "damage" provisions evidenced by *Rigney*[48] became more restrictive. Although it was obvious that the "damage" terminology was intended to require compensation for consequential damages, it was also clear that a literal interpretation of the new constitutional language would lead to "unwarranted results by way of the totally irresponsible expansion of the categories of compensable damage."[49] What evolved was a rule that damages in the constitutional sense must occur to the property owner particularly,[50] *i.e.*, the damage to the property owner must be different in kind and degree from that sustained by the public in general.[51] Thus construed, this rule allows compensation for diminution in value and impairment of the use of the property.[52] More speculative, though real, injuries, such as interference with the business conducted on the land, are not compensable unless such injuries are factors causing depreciation in the value of the land.[53]

In 1967, the Supreme Court of California decided *Colberg, Incorporated v. State*[54] on facts somewhat similar to those in *In re Construction of Walnut Street Bridge*,[55] but reached a contrary result. The plaintiffs operated neighboring shipyards on land riparian to a navigable channel at a place where the channel ended in a *cul-de-sac*. Oceangoing and smaller craft used the channel to navigate between the plaintiffs' shipyards and, by other interconnecting channels, the Pacific Ocean. Both shipyards were improved with marineways, buildings, docks and allied facilities, and both had been operated for over sixty years. In conformity with federal law,[56] the state obtained a permit to construct twin,

46 191 Pa. 153, 156, *reported sub nom.* Gumbes v. City of Philadelphia, 43 A. 88, 89 (1899).

47 Colberg, Inc. v. State, 432 P.2d 3, 62 Cal. Rptr. 401 (1967). For a discussion of the *Colberg* case, see text accompanying notes 54-58 *infra*.

48 See text accompanying notes 33-40 *supra*.

49 Mayberry & Aloi, *supra* note 17, at 641. *See also* Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 611-12 (1942).

50 *See* Lenhoff, *supra* note 49, at 612-13.

51 Mayberry & Aloi, *supra* note 17, at 642. *See also* 2 P. NICHOLS, *supra* note 1, § 6.441[3], at 495-96.

52 2 P. NICHOLS, *supra* note 1, § 6.4432[2], at 512.

53 *Id.* at 515.

54 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

55 191 Pa. 153, *reported sub nom.* Gumbes v. City of Philadelphia, 43 A. 88 (1899). See text accompanying notes 44-46 *supra*.

56 See notes 108-09 *infra* and accompanying text.

stationary freeway bridges across the channel with a vertical clearance of forty-five feet above the waterline. Since eighty-one percent of one plaintiff's business and thirty-five percent of the other's business involved ships which would be unable to reach the shipyards because of this low clearance, the value of their yards and consequently their businesses would be greatly diminished. Despite a provision in the California Constitution that "[p]rivate property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner,"[57] the Supreme Court of California held that the plaintiffs were not entitled to eminent domain compensation. It was clear, the court noted, that the plaintiffs must assert the taking or damaging of a "private" right in order to bring themselves within the protection of the California Constitution. "Thus, they cannot ground their claim in the right of navigation, for this is a public right from the abridgement of which *plaintiffs will suffer no damage different in character from that to be suffered by the general public.*"[58] (Emphasis added.)

II. Servitude in Favor of the Government When Exercising Powers in Aid of Navigation

The plaintiffs in *Colberg* did not rest their case upon the public right of navigation. Instead, they based their claims upon the private right of an owner of land riparian to a navigable waterway to have access from his land to the navigable portion of the channel, in spite of the fact that their access had not actually been cut off. They pointed out that the low-level bridge in question would render their private right of access useless with respect to vessels with fixed structures more than forty-five feet above the waterline, *i.e.*, "that after such construction they 'can launch their ships, but they can go nowhere.' "[59] It was their theory, therefore, that governmental action which renders a right valueless effectively "takes or damages" that right.[60] The court did not take up the merits of this argument, deeming it "unnecessary to decide" the question.[61] Instead, it held that the plaintiffs' right of access from their respective riparian properties to the waters of the channel was burdened with a "servitude" in favor of the state when it properly exercised its power to "regulate, control and deal with its navigable waters."[62] Since there had been a proper exercise of this power, the plaintiffs' right of access had to "yield without compensation."[63]

In view of the constitutional provision requiring compensation for "private" property taken or damaged, and a general recognition that the right of access is a private right, the holding in *Colberg* appears to be preposterous. However, there is a peculiar development in the law governing both federal and state powers over navigable waterways that accounts for the decision.

57 CAL. CONST. art. 1, § 14.
58 Colberg, Inc. v. State, 432 P.2d 3, 8, 62 Cal. Rptr. 401, 406 (1967).
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.* at 14-15, 62 Cal. Rptr. at 412-13.
63 *Id.* at 8, 62 Cal. Rptr. at 406.

In *Gibbons v. Ogden,*[64] Chief Justice Marshall stated that "[a]ll America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation."[65] Thus the federal *navigation power* was recognized as part of the control over interstate commerce that was entrusted to the federal government by article I, section 8 of the United States Constitution.[66] Although it has been stated that the navigation power may be properly exercised only in aid of navigation,[67] it appears that an exercise of the power for other purposes will be sustained if there is at least some incidental benefit to navigation.[68]

Inherent in this navigation power is the *navigation servitude,* "a shorthand expression for the rule that in the exercise of the navigation power certain private property may be taken without compensation."[69] In this respect, the navigation power differs greatly from other aspects of the federal power over interstate commerce and is unquestionably unique among other regulatory powers.[70] In the exercise of other regulatory powers, the government may take private property only upon the payment of just compensation as is required by the fifth amendment. When the government exercises the navigation power, however, it may "destroy or impair with impunity certain private rights and values in water courses — for which it would have to pay full compensation were it to destroy the same, identical rights in exercise of a different power."[71] The navigation servitude therefore represents the very antithesis of the fifth amendment's requirement that private property be taken for public purposes only upon the payment of just compensation. Through the exercise of the navigation power, the "basic inhibitory principle against the taking of private property without compensation is said in effect to break down."[72]

Despite this anomaly in the law, the courts have been unable to develop a satisfactory explanation of the reason for the navigation servitude.[73] Perhaps the best explanation lies in the historical development surrounding the protection of the public's right of navigation. Under the law of England, the public had a right of navigation in navigable waters that was paramount to any rights which even the Crown might have in the navigable waters. The Crown could do nothing in derogation of the public's right of navigation and a fortiori neither could a private grantee of the Crown. The individual's property was subject to the public right of navigation.[74] This concept of the public right of navigation was not changed with the establishment of a federal government in this

64 22 U.S. (9 Wheat.) 1 (1824).
65 *Id.* at 190.
66 Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation,* 3 NATURAL RESOURCES J. 1, 3 (1963).
67 Port of Seattle v. Oregon & W.R.R., 255 U.S. 56, 63 (1921); *See* United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).
68 *See* United States v. Twin City Power Co., 350 U.S. 222, 224 (1956); Morreale, *supra* note 66, at 9-19.
69 Morreale, *supra* note 66, at 19.
70 *See* Powell, *Just Compensation and the Navigation Power,* 31 WASH. L. REV. 271 (1956); Sato, *Water Resources — Comments Upon the Federal-State Relationship,* 48 CALIF. L. REV. 43 (1960); Note, *Federal-State Conflicts Over the Control of Western Waters,* 60 COLUM. L. REV. 967 (1960).
71 Morreale, *supra* note 66, at 20.
72 *Id.*
73 *See generally,* Annot., 21 A.L.R. 206, 216-26 (1922); Morreale, *supra* note 66, at 21-25.
74 Morreale, *supra* note 66, at 26-27.

country, and private rights in navigable waters remained subject to this public right. Moreover, private rights were subject to the power of the federal government to regulate navigable waters in the protection of the paramount right of the public to navigation.[75] Unhappily, however, although an historical examination of the navigation servitude may explain its origins, it still does not explain why private rights are subject to destruction without compensation. The rule nevertheless remains firmly established in federal law.

The establishment of the federal navigation power and its corollary, the navigation servitude, did not mean, however, that the states were pre-empted from exercising powers over navigable waterways within their borders. It is clear that in the absence of a conflicting act of Congress, which would, of course, be constitutionally supreme in the regulation of navigable waters, the states may exercise powers over their navigable waterways.[76] As might be expected, the state courts, like their federal counterparts, also developed the doctrine that in the exercise of their powers over navigable waterways, certain private rights could be destroyed or impaired without compensation. As explained by one authority, the American Revolution vested in the respective states the Crown's right to regulate navigable waters for the benefit of the public.[77] Private property remained subject to the public right of navigation and, therefore, to the right of the states to exercise powers in aid of navigation.

In describing thus far the rule of no compensation existing under both federal and state law,[78] it has been said that it applies to "certain" private rights. Among those private rights burdened with a servitude in favor of both the federal and state governments is the right of access from the riparian land to the navigable portion of the channel.[79] Therefore, either the United States or an individual state may construct works "in aid of navigation" in a navigable waterway which completely cut off access from the riparian land to the water without, absent physical appropriation of the land, any obligation to make compensation.[80] While this is clearly the law today, the significant issue which naturally arises is whether the riparian owner's right of access must also "yield without compensation"[81] to the exercise of governmental powers over navigable waters *not* in aid of navigation.

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75 *Id.* at 30.

76 Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866); Morreale, *supra* note 66, at 30 n.157.

77 *See* Morreale, *supra* note 66, at 29. It has earlier been observed that the public had a paramount right to navigation. *See* text accompanying notes 74-75 *supra.*

78 See text accompanying note 69 *supra* and text following note 76 *supra.*

79 *See* Scranton v. Wheeler, 179 U.S. 141 (1900); Gibson v. United States, 166 U.S. 269 (1867); 2 P. NICHOLS, *supra* note 1, § 5.7914[1], at 252 and cases in n.6; Annot., *supra* note 73, at 215.

80 2 P. NICHOLS, *supra* note 1, § 5.7914[1], at 250-52. The author goes on to state that the

> reason for the immunity of the public authorities from liability to make compensation, when private property is invaded or valuable riparian rights destroyed by the construction of works in aid of navigation, is not based upon the fact that such injury is not severe enough to constitute a taking, but that it is an exercise of the public easement, and a use by the public of the public domain. There are no private rights in navigable waters that are not held subject to the public easement or which conflict with or encroach upon the rights of the public in respect to navigation. *Id.* at 253.

81 Colberg, Inc. v. State, 432 P.2d 3, 8, 62 Cal. Rptr. 401, 406 (1967).

Most of the cases in which compensation was demanded for injuries resulting from a public obstruction to navigation have involved obstruction by way of the construction of bridges,[82] which obviously are not in aid of navigation. If the servitude has no application when works not in aid of navigation are constructed, then the compensation claim of a riparian owner for injuries resulting from a loss of navigation based upon a "taking" or "taking or damaging" of the private right of access will have to be decided on its constitutional merits. Admittedly, in jurisdictions where the constitution requires compensation only if property is "taken" and the restrictive physical approach to the term "taken" is followed, the riparian owner would still be denied recovery.[83] On the other hand, in jurisdictions requiring the payment of compensation for property which is "damaged" as well as for property which is "taken," the riparian owner might very well succeed where the plaintiffs in *Colberg* failed.

As to this question of whether the riparian owner's right of access may be cut off without compensation by the exercise of governmental powers over navigable waters but not in aid of navigation, the answer is somewhat inconclusive. One authority has taken the emphatic position that the right of access, along with other riparian rights, cannot be interfered with under legislative sanction for purposes not in aid of navigation without payment of compensation.[84] The majority rule among the jurisdictions would appear to be in accord with this view.[85] However, another authority points out that this question is really one of local law and that each state may determine the extent of its interest in its navigable waters.[86] In this respect, the *Colberg* decision is quite significant. The riparian owners therein incurred business losses due to the erection of an obstruction to navigation, not in aid of navigation, and based their compensation claims on a "damaging" of their private right of access. The court was of the view that not only must the right of access yield without compensation to the exercise of state powers over navigable waters when in aid of navigation, but also when such powers are exercised in aid of any kind of "commercial intercourse."[87]

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82 *E.g., id.;* Frost v. Washington County R.R., 96 Me. 76, 51 A. 806 (1901); United States Gypsum Co. v. Mystic River Bridge Authority, 106 N.E.2d 677 (Mass. 1952); Blackwell v. Old Colony R.R., 122 Mass. 1 (1877); Marine Air Ways, Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. Cl. 1951); State v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964); *In re* Construction of Walnut St. Bridge, 191 Pa. 153, *reported sub nom.* Gumbes v. City of Philadelphia, 43 A. 88 (1899); Milwaukee Western Fuel Co. v. City of Milwaukee, 139 N.W. 540 (Wis. 1913); Clark v. Chicago & N.W. Ry., 70 Wis. 593, 36 N.W. 325 (1888).

83 *See, e.g.,* State v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964).

84 1 J. LEWIS, *supra* note 23, §§ 84, 101 & 102. *See generally* Annot., 18 A.L.R. 403 (1922).

85 *See* Beidler v. Sanitary Dist., 211 Ill. 628, 71 N.E. 1118 (1904); Natcher v. City of Bowling Green, 264 Ky. 584, 95 S.W.2d 255 (1936); Michaelson v. Silver Beach Improvement Ass'n, 173 N.E.2d 273 (Mass. 1961); Crance v. State, 205 Misc. 590, 128 N.Y.S.2d 479, *modified,* 284 App. Div. 750, 136 N.Y.S.2d 156 (1954), *reinstated,* 309 N.Y. 680, 128 N.E.2d 324 (1955); Marine Air Ways, Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. Cl. 1951); Conger v. Pierce County, 116 Wash. 27, 198 P. 377 (1921); 2 P. NICHOLS, *supra* note 1, § 5.792, at 260.

86 *See* 2 P. NICHOLS, *supra* note 1, § 5.792, at 261-63.

87 Colberg, Inc. v. State, 432 P.2d 3, 10, 14-15, 62 Cal. Rptr. 401, 408, 412-13 (1967). Author Morreale observes:

> A choice between two courses of conduct seems to exist: extend the rule of no

If, in the future, other jurisdictions decide that the servitude in favor of the government applies when the government exercises its power over navigable waters in aid of any public purpose and not just when exercised in aid of navigation, then there will be no possibility of a riparian owner recovering for injuries resulting from an obstruction to navigation erected under proper legislative authorization. Regardless of whether the pertinent constitutional provision requires compensation for property "taken" or "taken or damaged," and regardless of whether the riparian owner claims a *private* right of navigation or the impairment of his private right of access, he will be forced to bear an inordinately large proportion of the costs of the improvements erected for the benefit of the public as a whole.

III. Redefinition and Change

The basic principle of fairness, as enshrined in the eminent domain provisions of the federal and state constitutions, suggests that the riparian owner's loss be recognized and be borne by the public as part of the cost of the public project. However, if the public is to bear the riparian owner's loss, there must be a redefinition of certain legal concepts and a shift of emphasis in the law. Since compensation has most often been denied the riparian owner on the basis of restrictive interpretations of such constitutional terms as "property" and "taken,"[88] the solution naturally suggested is a judicial expansion or redefinition of either or both of these terms.

A judicial redefinition and expansion of the term "property" to include a *private* right of navigation in riparian owners, in addition to the right of navigation that they share with the public, would of course go the farthest toward relieving the riparian owner of his disproportionate share of the costs of public improvements. The dissenting opinions in two recent cases favor such a redefinition, analogizing to the highway access doctrines in their respective states.[89] Under these doctrines, owners of land have been awarded compensation when their access to the general system of streets has been cut off by publicly sanctioned structures being placed across adjacent streets. In his dissent in the *Colberg* decision, Justice Peters agreed with the appellate court's opinion that the

> street access doctrine represents an expanded notion of the constitutional concept of private property whose invasion or damage is compensable in eminent domain. It means that 'property' in an eminent domain sense includes not only a piece of the earth's surface but an intangible right of movement between it and the outside world; that, although the channels of movement are shared with the public, they are 'private' and com-

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compensation to all arteries of commerce on the basis of their supreme importance to the welfare of the nation, or have the community as a whole bear the cost of "free and unhindered passage." Morreale, *supra* note 66, at 31.

88 As one authority has observed, "[t]he words 'property' and 'take' . . . have . . . been encysted in the heart of this branch of the law." Cormack, *supra* note 7, at 221.

89 Colberg, Inc. v. State, 432 P.2d 3, 15, 62 Cal. Rptr. 401, 413 (1967) (Peters, J.); State v. Masheter, 1 Ohio St. 2d 11, 15, 203 N.E.2d 325, 328 (1964) (Herbert, J.).

> pensable when a public improvement devalues a particular piece of land by substantially impairing these channels.[90]

He also adopted the appellate court's view that "[n]avigable waterways are channels of movement no less than streets and highways"[91] and that "[t]here is no difference in principle or policy between land and sea access which affirms an easement of access by land and denies it by water."[92]

Although there would appear to be some historical difference in theory between land and sea access,[93] there should be no present difference in policy. If there are legitimate policy reasons supporting the distinction, they have not been adequately explained.[94] A policy consideration which might be offered as a basis for the distinction is that the injuries to abutting land owners are generally more severe than those to riparian owners who have been cut off from the outside world. However, a comparison of the cases in which compensation was demanded for the loss of highway passage with those cases in which compensation was demanded for injuries resulting from an obstruction to navigation reveals that injury is often more severe in the latter type of case than in the former.

A question which frequently arises in highway cases is whether the abutting owner has a private right of travel in *both directions*. Although the majority of states disallow recovery when passage in only one direction is cut off, a substan-

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90 Colberg, Inc. v. State, 432 P.2d 3, 17, 62 Cal. Rptr. 401, 415 (1967) (dissenting opinion).

91 *Id.*

92 *Id.*

93 Although there is some doubt as to the origin of the right of highway access, which includes the right of access not only to the street on which the property abuts but also to the general system of streets, the commentators most often point to the "land service road" concept as its basis, *i.e.*, roads were built primarily for the purpose of giving access to the abutting owner, who dedicated a portion of his land for the road, rather than primarily for the purpose of serving the public which traveled over them. *See* Covey, *Frontage Roads: To Compensate or Not to Compensate*, 56 Nw. U.L. Rev. 587, 596-97 (1961); Gibbes, *Control of Highway Access — Its Prospects and Problems*, 12 S.C.L.Q. 377, 380-81 (1960); Sackman, *Access — A Problem in Liability*, Proceedings of the Fourth Annual Institute On Eminent Domain 1, 4 (1962); Comment, *Freeways and the Rights of Abutting Owners*, 3 Stan. L. Rev. 298, 300 (1951); Note, 38 So. Cal. L. Rev. 689, 690 (1965). On the other hand, it has always been conceived that the right of navigation was primarily for the purpose of serving the public rather than for the purpose of serving the riparian owner. The latter's right of navigation is only as a member of the public. See text accompanying note 74 *supra*.

94 In the *Colberg* case, the plaintiffs also contended that the California highway access cases required that compensation be paid for the substantial impairment of their right of access to the navigable channel. In rejecting this contention, the court noted that the right of highway access had its basis in the "land service road" concept and stated that the

> [p]rinciples applicable to such a right cannot be reasonably extended to the case of navigable waterways, which constitute a natural resource retained within the public domain for the purpose of serving public traffic in accordance with the greatest common benefit.

Colberg, Inc. v. State, 432 P.2d 3, 13, 62 Cal. Rptr. 401, 411 (1967). This statement may pass as explanatory of the historical difference between land and water access, but it cannot pass as an explanation of the difference in policy. In *State ex rel. Anderson v. Preston*, 2 Ohio. App. 2d 244, 207 N.E.2d 664 (1963), a riparian owner complained of loss of navigation in a situation similar to that in *Colberg* and relied upon the highway access cases. The court merely stated that "[w]hile there are some obvious similarities between rights as to highways and those in waterways, there are equally obvious differences both factually and in legal contemplation." *Id.* at 250, 207 N.E.2d at 668.

tial number do allow recovery in such a situation.[95] On the other hand, the obstruction-to-navigation cases have in reality involved a right to navigate in only *one directon.* In other words, the riparian owner's only interest in these cases has been navigation in the direction that leads to deep water and the outside world.[96] Navigation in the opposite direction has generally been meaningless.[97] Thus, the navigation situation is more analogous to the highway cases in which, as a result of a public improvement, the abutting owner becomes completely landlocked. In such a land case, there seems to be little doubt that the abutting owner can recover; indeed, it has been said that "there is undoubtedly damage in the legal sense, if not indeed a taking . . . ."[98]

To be of any real value to the riparian owner, a judicial recognition of a private right of navigation in riparian owners, analogous to the highway access doctrine, would have to be accompanied by a judicial restriction of the government's exercise of the navigation servitude to its traditional boundary, *i.e.,* that the exercise of such powers be in aid of navigation. Admittedly, the force of stare decisis in this area of the law would still prevent awards of compensation to riparian owners injured through the loss of navigation by the erection of structures in aid of navigation. However, since loss of navigation cases most often involve structures erected for purposes other than to preserve or protect navigation, a restriction of the servitude to its traditional bounds would secure a meaningful private right of navigation in most cases.

Although a judicial expansion of the meaning of "property" to include a private right of navigation is a possible solution to the riparian owner's plight, the question arises: how probable is such a judicial expansion? In jurisdictions where the constitution requires compensation only when property is "taken," the restrictive physical approach to eminent domain, looking for an actual physical invasion or appropriation of land and not recognizing intangible but significant "rights in relation to property," remains largely intact. Furthermore, the fact that those states have failed to add the "or damaged" terminology to the word "taken" in their constitutions would no doubt make a court reluctant to deviate from its former position.[99] Moreover, the addition by some states of the "or damaged" terminology, the purpose of which was to require compensation for consequential damages,[100] has been of no value to a riparian owner in asserting his compensation claims for injury resulting from the destruction or impairment of private or public rights connected with his land. Here too,

95 *See* cases collected in 44 N.C.L. REV. 850 (1966). *See also* Mayberry & Aloi, *supra* note 17, at 642.

96 *E.g.,* Colberg, Inc. v. State, 432 P.2d 3, 62 Cal. Rptr. 401 (1967); State *ex rel.* Anderson v. Preston, 2 Ohio. App. 2d 244, 207 N.E.2d 664 (1963).

97 In fact, the plaintiffs' shipyards in *Colberg* were located on a natural *cul-de-sac.* Colberg, Inc. v. State, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

98 2 P. NICHOLS, *supra* note 1, § 6.4443, at 578. *See also id.* § 6.32[2], at 420.

99 Commentator Nichols is of the view that

> in the states in which the amendment has not been adopted, it is the will of the people to reserve in their hands the right of constructing public improvements without paying the owners of private property for incidental injury thereby caused, whenever they feel that the public necessities require the exercise of such right, so that the question whether that right exists is now no longer considered to be open.

2 P. NICHOLS, *supra* note 1, § 6.38[4], at 457.

100 See section of this Note entitled "Constitutional Amendment," text accompanying notes 29-58 *supra.*

there is no compensation in the absence of some physical invasion of or encroachment upon the riparian land.[101] Thus, in view of the force of stare decisis and judicial intransigence in this area of the law, the probability of expanding the meaning of "property" by court decision to include a private right of navigation is not, to say the least, encouraging.

Judicial opposition to change in this area leaves only one realistic alternative: statutory change. State legislation has been enacted in the past, on a limited scale, to allow compensation for injuries resulting from impairment of street access.[102] There would appear to be nothing prohibiting the enactment of state legislation which would require compensation in the impairment of navigation situation under discussion. Moreover, this may be the most appropriate approach to the problem since it has been aptly pointed out that "compensation in eminent domain is simply a quesion of policy" and that the policy decision becomes one simply of the practicalities."[103] The long-range practicality, or feasibility, of awarding compensation in these cases depends upon economic information which is beyond the reach of the courts and which can be more satisfactorily explored by the legislatures.[104]

There is a twofold problem, however, connected with any future enactment of state legislation in this area. One is typical state legislative inaction[105] and the other is a danger that any statutory change in favor of compensation awards will be too strictly construed by the judiciary to accomplish its intended purpose.[106] These two problems could be overcome, however, through federal legislation.

The power of the federal government over navigable waters is unquestionably "superior" to that of the states; consequently, when the federal navigation power is exercised, the states must yield.[107] Recognizing this supremacy, Congress has declared it unlawful to construct or commence to construct any bridge, dam, dike or causeway in or over navigable waters until its consent shall have been obtained and until plans for the particular structure have been approved by the Chief of Engineers and by the Secretary of the Army.[108] In granting their approval of location and plans, the latter two may impose specific conditions relating to the maintenance and operation of the structure and these conditions have the force of law.[109] If the bridge is to be built between two states, any individual, firm, corporation, state, or political subdivision receiving such approval is vested by Congress with a power of eminent domain over all real and other property needed for the construction of the bridge, but only insofar as just compensation is made *according to the laws of the state* in which the property is located.[110] The point of all of this is that Congress could condition its consent to the construction of bridges, for example, upon not only

101 Colberg, Inc. v. State, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).
102 *See* Mayberry & Aloi, *supra* note 17, at 644.
103 Spies & McCoid, *supra* note 6, at 457.
104 *Id.* at 457-58.
105 *Id.* at 458.
106 Mayberry & Aloi, *supra* note 17, at 645.
107 Morreale, *supra* note 66, at 30.
108 33 U.S.C. § 401 (1964).
109 33 U.S.C. § 525(b) (1964).
110 33 U.S.C. § 532 (1964).

the approval of the Chief of Engineers and the Secretary of the Army but also upon the awarding of compensation for consequential damages sustained by riparian owners as a result of the erection of the structure in question.[111] Compensation awards could thus be required in accordance with federal standards as to compensable consequential damages, rather than being left for determination to the laws of the various states.[112]

IV. Conclusion

There is no question that the riparian owner of land, the value and use of which are dependent upon free navigation, may suffer great injury when a downstream obstacle, constructed with legislative authorization, cuts off navigation. Although his land and the right of access from his land to the channel remain intact, both may be of little value to him if he cannot navigate down the waterway. By the denial of any compensation for such injury, the riparian owner is made to bear an undue proportion of the costs of improvements constructed for the benefit of the public. The basic concept of fairness, as embodied in the eminent domain provisions of the federal and state constitutions, suggests, if not dictates, that the loss suffered by the riparian owner should be borne by the public. However, if the public is to compensate the riparian owner for his loss, as it is asserted should be the case, then there must be a meaningful redefinition and change in the law. Although the judiciary could effect such a redefinition and change, if it chose to do so, the present judicial intransigence to change in this area makes such a development highly improbable. The only remaining means of effecting the needed redefinition and change, and, notwithstanding the foregoing, perhaps the most appropriate means, is legislation. Although the individual states could legislate in favor of the riparian owner, such legislation faces the danger of a hostile judiciary interpreting such legislation too restrictively to accomplish its intended purpose. This danger could be obviated almost entirely through appropriate federal legislation requiring that compensation be based on a federal, not a state, standard of what constitutes compensable injury. Absent meaningful legislation of this kind, or an unexpected change in judicial attitude, the riparian owner suffering injury from a public improvement that cuts off his navigation will continue to unjustly shoulder a disproportionate share of the costs of projects which benefit the entire public.

Robert R. Rossi

111 The objection to such a condition would no doubt be that "a bridge in Louisiana would logically subject that state to claims by all owners on the Mississippi and its many tributaries." State *ex rel.* Anderson v. Preston, 2 Ohio St. 2d 244, 252-53, 207 N.E.2d 664, 669 (1963). However, "[u]nless the federal officials abdicate their responsibilities, a low level, drawless bridge across the . . . mouth of the Mississippi is a theoretical but not practical possibility." Colberg, Inc. v. State, 432 P.2d 3, 19, 62 Cal. Rptr. 401, 417 (1967) (dissenting opinion). In other words, potential injury to a great number of riparian owners would, no doubt, result in denial of the federal permit.

112 A possible standard — one flexible enough to prevent awards for slight inconveniences but to allow awards for real, though consequential, injuries — is that suggested by Spies & McCoid: "To be compensable consequential loss must be (1) pecuniary, (2) proximately caused by eminent domain activity, and (3) clearly demonstrable." Spies & McCoid, *supra* note 6, at 455.