Land & Water Law Review

Volume 4 | Issue 2 Article 9

1969

The State Navigation Servitude

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THE STATE NAVIGATION SERVITUDE

INTRODUCTION

It is fundamental in American jurisprudence that private property shall not be taken by the state without just compensation, by virtue of the Fifth amendment to the United States Constitution.[1] A seeming exception to this general rule of compensation is the exercise of what is commonly referred to as the navigation servitude. Under this doctrine riparian rights subject to the servitude may be eliminated or their use limited without compensation.[2] Up to this point, writings on the doctrine of navigation servitude have generally dealt with the principles and application of the federal doctrine.[3] Only recently, especially since the California decision of *Colberg, Inc. v. State*,[4] has there been direct interest among legal scholars on the subject of the state navigation servitude doctrine.[5] In light of this apparent "discovery" of a state navigation servitude doctrine, analysis of the major cases involving this servitude will be needed to determine the general scope of its application.

Ever since Chief Justice Marshall, in *Gibbons v. Ogden*,[6] interpreted the commerce clause[7] to include navigation, the federal government has had the power to regulate all navigable rivers in the United States. Though this comment is not concerned with the navigation servitude of the federal government,[8] it must be made clear at the outset that the state navigation servitude is subordinate to that of the federal government.[9] Accordingly, if the federal government has not exercised its servitude, there is nothing in the federal constitution to prevent a state from regulating and controlling the ownership of the navigable waters within its boundaries and

1. U.S. CONST. amend. V.
2. For a complete overview of the Federal doctrine, *see* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1 (1963). For a review citing many of the state cases cited in this article *see*: Comment, 72 DICK. L. REV. 375 (1968).
3. Morreale, *supra* note 2. 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).
4. 62 Cal. Rptr. 401, 432 P.2d 3 (1967).
5. Comment, 72 DICK. L. REV., *supra* note 2; Comment, 19 CASE WESTERN RES. L. REV. 1116 (1968); Comment, 25 WASH. & LEE L. REV. 323 (1968).
6. 22 U.S. (9 Wheat) 1 (1824).
7. U.S. CONST. art. 1, § 8.
8. See: Morreale, *supra* note 2.
9. Gibson v. United States, 166 U.S. 269 (1897).

thus exercising a servitude over the land on which the waters flow.[10] It is with this in mind that we proceed to examine the scope and character of the navigation servitude.

State Navigation Servitude Defined

The rights of a riparian landowner in the waters of a navigable stream and in the underlying bed are subject to an easement in favor of the public to use the water for navigation. As a consequence, the rights of the riparian landowner can be defined only when the total effect of the navigation servitude upon his property is also clearly defined. This servitude or easement is defined in its generally stated and classically accepted form as follows:

> Whatever the nature of the interest of the riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.[11]

Given this general rule, one could logically infer there from the following general propositions: 1) a taking in the aid of navigation of riparian property, including a right of

10. Shively v. Bowlby, 152 U.S. 1 (1893); Pacific Gas Improvement Co. v. Ellert, 64 F. 421 (C.C. N.D. Cal. 1894).

11. Scranton v. Wheeler, 179 U.S. 141 (1900). Though this case concerned the federal navigation servitude, the definition is in accord with those offered by the state courts. *See, for example,* Colberg Inc. v. State, 62 Cal. Rptr. 401, 432 P.2d 3, 13 (1967): "Finally, we emphasize that the state servitude upon lands riparian or littoral to navigable waters, like the federal servitude burdening such lands, does not extend to cases wherein the proper exercise of state power results in actual physical invasion of or encroachment upon fast lands." *See also,* the following: Natcher v. City of Bowling Green, 269 Ky. 584, 94 S.W.2d 255, 256 (1936), "In and on a navigable stream, the title of riparian owners up to the ordinary high water mark, and particularly of the bed and islands therein, is a qualified one, for it is subject to the dominant rights of the public in the stream." Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124, 125 (1909)—"The waters and the land under them beyond the line of private ownership are held by the state, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public. The right of the Legislature in these particulars has been treated as paramount to all private rights, and subject only to the power of the government of the United States to act in the interest of interstate or foreign commerce."

access[12] below the high water mark, is a valid exercise of the servitude and no compensation is required; 2) that a taking, even though in the aid of navigation, which encroaches upon the fast lands is a taking of private property in the constitutional sense and compensation is required; 3) that a taking of a riparian landowner's property below the high water mark, when not in the aid of navigation requires just compensation. These are, however, general rules and state the status of the servitude in only a majority of our state jurisdictions. As will be shown, the scope of the navigation servitude in many jurisdictions is much broader than these propositions would indicate, as a result of either expanding the classical definition or by disregarding it and finding different sources of the power and deriving a broader scope therefrom.

Hence, the most that can be said as an introductory note is that in order to ascertain whether there has been a taking of riparian property, one must look to the respective state law to find the status of the navigation servitude which will, in turn, define the limits of the riparian's property rights. For purposes of convenience and organization, the state doctrines of navigation servitude have been categorically grouped in the following scheme: 1) the general rule jurisdictions; 2) the public purpose jurisdictions; and 3) the Louisiana exception. These categories are by no means clear-cut, and indeed, as will become evident, there is much overlapping and consequent gray areas of the law. The scheme does provide, however, an appropriate tool for studying the state navigation servitude by putting each jurisdiction into perspective so as to make manifest the distinctions in the scope of the servitude.

General Rule:

The cases discussed in this section follow the general rule as to interpretation of the state navigation servitude, illustrated by the following statement from the Kentucky case of *Natcher v. City of Bowling Green*:[13]

12. 2 NICHOLS, THE LAW OF EMINENT DOMAIN, § 792 (3d ed. 1963); FARNHAM, THE LAW OF WATERS § 66 (2d ed. 1904); State v. Masheter, 1 Ohio St. 2d 71, 203 N.E.2d 325 (1964); State v. Preston, 2 Ohio Op. 2d 244, 207 N.E.2d 664 (1963); Marine Air Ways v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (1951), *aff'd* 280 App. Div. 1021; 116 N.Y.S.2d 778 (1952); Moore v. State Road Dept., 171 So. 2d 25 (Fla. 1965).
13. Natcher v. City of Bowling Green, 269 Ky. 584, 94 S.W.2d 255 (1936).

> If the sovereign in the exercise of its power improves the streams for purposes of navigation, the individual's rights of property recede before the paramount power of improvement and development.[14]

In the *Natcher* case, plaintiff's gravel bars, which were above the level of a river for a substantial amount of time each year, were submerged permanently when a city constructed a dam down-stream and backed up the river waters. The court awarded compensation to the plaintiff on the ground that since the primary purpose of the dam was to augment the city's water supply, and navigation would be improved only incidentally, the dam project was not "in aid of navigation"[15] and therefore the plaintiff was entitled to compensation.[16]

Several other state jurisdictions following very closely the "improvement of navigation" definition of the scope of the navigation servitude as outlined in the *Natcher* case, are Wisconsin,[17] Washington,[18] Rhode Island,[19] Ohio,[20] Virginia,[21] and Florida.[22]

14. 94 S.W.2d 255, 257.
15. *Id.* at 259-60.
16. It should be noted that a problem regarding the scope of the navigation servitude may have been created by certain language used in the *Natcher* opinion, that language being:
> When . . ., under the plea of improvement of navigation the property of a riparian owner is taken or its value diminished by a public work *unrelated to the purposes of navigation and not within but wholly without the channel of the river* and its public servitude, there is a clear case for compensation. 95 S.W.2d 255, 259-60. (Emphasis added)

After reading the above quote, one might be left with the impression that if the public project was in aid of navigation, compensation might *not* have been granted. If this was so, then the navigation servitude would be extended to the actual physical encroachment of fast lands (the gravel bars), which would be an unwarranted extension of the doctrine. However, it is highly doubtful that such an extension was intended. Also in *Natcher* the court noted: "[a] state may exercise plenary control over the navigable waters within its limits up to the ordinary high water mark." (*Id.* at 260). Further, it is an accepted principle of the law of eminent domain that "ownership of a riparian proprietor in such of his land as lies above the high water mark . . . is as full and complete as the ownership of any other private property . . . and the public may not take it except for public use and for just compensation." NICHOLS, *supra* note 12, at 238-39.
17. Green Bay Canal Co. v. Kaukauna Water-Power Co., 90 Wis. 370, 61 N.W. 1121 (1895).
18. Conger v. Pierce County, 185 Cal. App. 565, 198 P. 377 (1921).
19. Clark v. Pecham, 10 R.I. 35, 14 Am. R. 654 (1871).
20. State v. Preston, 2 Ohio Op. 2d 244, 207 N.E.2d 664 (1963); State v. Masheter, 1 Ohio St. 2d 11, 203 N.E. 2d 325 (1964).
21. Oliver v. City of Richmond, 105 Va. 538, 178 S.E. 48 (1935).
22. Webb v. Giddens, 82 So. 2d 743 (Fla. 1955). In this decision the court held that a state constructed highway which cut off a riparian's right of ingress and egress required compensation for the loss. While recognizing a riparian right of access vs. public right of navigation, the court failed to define the navigation servitude. More specifically, no mention was made of the con-

In New York, a broader statement of the general rule is applied. In *Crance v. State*[23] the state had construted a highway along a lake which cut off access to the lake from certain riparian properties. The court awarded compensation to the riparians on the basis of the following statement: "Where the improvement, though for a . . . public purpose, does not involve an exercise of the sovereign reserve power over waterways as such, deprivation of riparian rights is compensable."[24] The court further explained that to be within the servitude, the improvement must bear a relation to the development of waterways,[25] and that projects "not in furtherance of the development"[26] of waterways were outside of the servitude. Thus, in New York, dam development and bank improvement projects, though for power or flood control purposes and hence not in aid of navigation, would come under the scope of the servitude because they would be in furtherance of the development of the waterway.

Another expansion of the general rule is illustrated by the Iowa case of *Peck v. Alfred Olsen Construction Co.*[27] In the *Peck* case, the court recited the typical "improvement of navigation" rule. However, in its application of the rule to the facts of the case, the court found that a bridge-like structure extending out over a lake which was designed as a turnaround area for automobiles was a structure in aid of navigation, and hence, riparian rights of access which were cut off by the structure were non-compensable.[28] To the court's credit, it should be noted that there was a small pier extending from the turnaround structure, but, even with that addition, it strains the imagination to envision the structure as an aid to navigation. If all projects were carte blanche considered as in the aid of navigation, the structures of the

stitutional taking of the right of access when done "in the aid of navigation," rather, the two rights were spoken of as if existing separately and absolutely. There is probably little doubt that Florida follows the general rule, but in light of the lack of navigation servitude language in two subsequent right of access vs. public right of navigation cases, *to wit*, Carmazi v. Board of Comm'rs, 108 So. 2d 318 (Fla. 1955), and Moore v. State Road Dept., 171 So. 2d 25 (Fla. 1965), the development of Florida's navigation law could present American jurisprudence with one jurisdiction which has no navigation servitude at all.

23. Crance v. State, 283 App. Div. 795, 128 N.Y.S.2d 479 (1954).
24. 128 N.Y.S.2d at 481.
25. *Id.*
26. *Id.*
27. Peck v. Alfred Olsen Constr. Co., 216 Iowa 519, 245 N.W. 131 (1932).
28. 245 N.W. 131, 137.

general rule would have no relevance, and the court could end up treating the general rule as a legal fiction, which would seem to be avoiding the issue of compensability to riparians under a cloud of legal dicta.

A far more conservative statement of the general rule was made in the Massachusetts case of *Michaelson v. Silver Beach Improvement Ass'n Inc.*[29] in which it was stated that there must be a "substantial and reasonable connection between the project and the public powers over navigation and the fisheries,"[30] before the project would be considered as within the navigation servitude. To determine whether multi-faceted projects should be within the servitude, the court set up a test under which the other projects within the general project must contribute to the part of the project involving navigation or the fisheries so that enjoyment of the navigation-fishery project would be substantially impaired without the creation of the other projects.[31] This test would appear to demand a strict interpretation of the general rule. Also, it establishes a definite judicial yardstick upon which to measure the probabilities that a proposed project will or will not fit under the servitude.

States following the general rule (subject to the Iowa and New York exceptions previously discussed) will compensate riparian property owners for damages caused by projects not in aid of navigation. Once the determination has been made that the project is not in aid of navigation, a decision must be made as to whether any of the claimant's private property rights have been taken, and frequently, the decision comes down to whether claimant's right of access has been taken. While it is generally accepted that the right of access is a private property right and that it extends to the channel of the watercourse,[32] it is also generally accepted that the right of access does not extend to the navigation of the watercourse itself.[33] Therefore, since the private right of access

29. Michaelson v. Silver Beach Improvement Ass'n Inc., 342 Mass. 251, 173 N.E.2d 273 (1961).
30. 173 N.E.2d 273, 277.
31. *Id.*
32. NICHOLS, *supra* note 12, at 259.
33. *Id.* Marine Airways Inc. v. State, 104 N.Y.S.2d 964 (1951); Carmazi v. Board of Comm'rs, 108 So. 2d 318 (Fla. 1959); Moore v. State Road Dept., 171 So. 2d 25 (Fla. 1965).

is distinguished from the public right of navigation, the construction of bridges, built upstream or down stream across the main channel, though not in aid of navigation, have taken no compensable property, because the right of access does not extend beyond the edge of the channel.[34]

A rather extreme application of the limitation of the right of access is presented by the Ohio case of *State v. Preston*.[35] In that case, a manufacturer had property bordering a river. The river became harder to navigate the further inland it went. The manufacturer's plant was built well inland, so he got a federal permit and dreged a channel across his property to a connection with the river at a point where the river was more easily navigable. The state built a bridge across the channel, cutting off access to the river through the channel. The court refused compensation, on the grounds that the manufacturer still had access to the river from the front of his land, and also that the manufacturer had no such private rights in the channel as would entitle him to compensation from the state. Perhaps the most eloquent protest to this type of case was written in an earlier Ohio case, *State v. Masheter*[36] which also denied compensation on a right of access-right of public navigation theory. Dissenting judge Harbert stated:

> The majority opinion fails to recognize the importance of and impelling reasons for the development of navigable rivers in the industrial and agricultural growth of Ohio . . . The majority opinion sounds the death knell for substantial use of land in connection with the navigability of Ohio's rivers.[37]

As a sidenote to the argument that a private citizen cannot sue upon the public right of navigation, the cases of *Coleman v. Schaeffer* in Ohio[38] and *Day v. Armstrong*[39] in Wyoming indicate that a private citizen can sue another private citizen on the public right of navigation. Both cases involved obstructions to navigation on navigable streams in which plaintiffs were allowed standing to sue in order

34. NICHOLS, *supra* note 12, at 259.
35. 2 Ohio Op. 2d 244, 207 N.E.2d 664 (1963).
36. 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964).
37. 203 N.E.2d 325, 331; *also see* DICK. L. REV., *supra* note 5.
38. Coleman v. Schaeffer, 163 Ohio St. 202, 126 N.E.2d 444 (1955).
39. Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

that they might vindicate their rights to navigate the streams involved. Whether courts will ever construe such opinions so as to allow suits against the state is open to conjecture, but cases like *Brecton* would seem to indicate that the scales are not tipped for the private riparian in his attempt to extend the scope of his right of access.

"Public Purpose" Exception to the General Rule:

The following cases, which have been grouped together as the "public purpose" exception to the general rule of state navigation servitude, offer a broad interpretation of the scope of the servitude. Basically, the cases extend the no-compensation aspect of the navigation servitude to any government project purposes.

An important case illustrative of the "public purpose" exception is the California case of *Colberg, Inc. v. State*[40] which involved a situation wherein the state built two highway bridges across a riparian shipyard's harbor mouth, thus cutting off most marine access from the shipyard to deep water. The California court did not compensate the shipyard owner for the loss of his right of access, on the theory that "California burdens property riparian or littoral to navigable waters with a servitude commensurate with the power of the state over such navigable waters,"[41] and that pursuant to the exercise of that power "the state . . . may act relative to those waterways in any manner consistent with the improvement of commercial traffic and intercourse."[42] Compensation is not necessary if the act of the state "does not embrace the actual taking of property, but results merely in some injurious effect upon the property."[43]

The *Colberg* court made it very clear that the aspect of navigation servitude which requires that the taking of riparian property without compensation must be for some project in aid of navigation is no longer the law in California:

> The limitation of the servitude to cases involving a strict navigational purpose stems from a time when

40. Colberg v. State, 62 Cal. Rptr. 401, 432 P.2d 3, 11 (1967).
41. 432 P.2d 3 (1967).
42. *Id.*
43. *Id.*

> the sole use of navigable waterways for purposes of commerce was that of surface water transport . . . That time is no longer with us.[44]

The only limitation which the *Colberg* decision placed upon the navigation servitude was that (as noted previously) where "the proper exercise of state power [in connection with navigable waterways] results in actual physical invasion of or encroachment upon fast lands,"[45] compensation must be paid. Obviously, this limitation is not much of a concession to riparian landowners in California. Generally, damages to fast lands tend to be consequential, as in the *Colberg* situation, where a shipyard was injured consequentially by loss of access to the main river channel. While the California riparian is protected from physical invasions of property like flooding or construction of structures, in this day of vastly increased air, land, and water commerce, his greatest use for his property would logically seem to be its utility for navigation to trade routes. The non-compensation for the loss of these trade routes because of state development action involving a California river or bay, and covering an unlimited scope of public purposes would appear to be a bitter blow for California riparians.[46]

A different rationale was used in the Mississippi case of *Crary v. State Highway Comm'n.*[47] to support the *Colberg* concept of the wide scope of the state navigation servitude. In the *Crary* case the state constructed a highway bridge across a navigable bay. The bridge traversed an area of the bay in which plaintiffs, as riparian owners, by statute, had been granted the right to grow and gather oysters on the bed of the bay. The bridge destroyed part of the oyster bed, and the plaintiffs argued that the state had made a compensable taking of their property rights in the oyster bed. The court held that the destruction of the bed was non-compensable.

Since the court characterized the plaintiff's right to the oyster bed as a "revocable license,"[48] it is conceivable that the court could merely have found that in relation to the

44. *Id.* at 12.
45. *Id.* at 13.
46. For a complete criticism on those aspects of the *Colberg* decision, *see* 72 DICK. L. REV., *supra* note 5.
47. 219 Miss. 284, 68 So. 2d 468 (1953).
48. 68 So. 2d at 471.

state, the revocable license was not a property right as such, and held for non-compensation on that basis.

However, the court reached the result of the case using a theory which would encompass the taking of a private property right. First, the court stated that the water and beds of navigable waters "belongs to the state as trustee for the peoples of the state."[49] Next, the court noted:

> When the state implemented its title and responsibilities as trustee, for the public, by constructing this bridge, it was exercising its paramount and superior title in the water and soil of the bay, rather than taking the private property of anyone. It was imposing an additional public use on public lands.[50]

While the above quote specifically states the private property was not being taken in this instance because the oyster bed was a part of the bed of the bay, nevertheless riparians could lose rights of access plus other consequential private property rights as a result of any kind of state projects within the confines of the public lands. The term "additional public use" would seem to comprehend virtually any type of state project.

To support the "additional public use" basis for its decision, the court relied upon the rationale that public (navigable) waters and their beds are like public lands (especially school, district lands).[51] Public highways built across school district lands require no compensation to the holder of leases on the lands, because the highway building is merely an additional public use on the lands. Thus, if navigable waters are to be treated as public lands, an additional use on them also is non-compensable. It should be noted however, that the court fails to discuss compensation relating to surrounding private lands whose rights of access, etc. might be affected.

Finally, in a curious twist of logic, the court paid lip service to the traditional doctrine of navigation servitude, stating that the principle upon which the case was based was that:

49. *Id.* at 470.
50. *Id.* at 471.
51. *Id.*

> The United States or a state may construct works in aid of navigation in the bed of a navigable watercourse, which wholly cut off access from the riparian land to the water, without incurring any obligation to make compensation.[52]

This would seem to limit the scope of the navigation servitude to projects in aid of navigation, but the "additional public use" doctrine espoused by the court is much broader. Also, the state project involved in the Crary case, a highway bridge, was obviously not in aid of navigation.

In the *Crary* case, the court was concerned with developing a rationale to deal with the rights of the oyster bed owner whose property, if such it was, lay in the bottom of the bay. In developing this rationale, the court created an enormous scope of state activities in connection with navigable waters which come under the scope of the navigation servitude, and hence are non-compensable. Perhaps a fair case can be made for the equities of not compensating the oyster bed licensee in this case, but when the doctrine developed by the court is applied to riparian owners with rights of access and other property rights which are connected with the privately owned banks, away from the public land of the bay bed, the equities for compensation would appear to shift clearly to the riparians utilizing the banks.

The problem of focusing on the situation of the oyster bed riparian as opposed to that of the bank riparian can be illustrated by the state of the law in regard to the scope of the navigation servitude in Virginia. In the case of *Darling v. City of Newport News,*[53] a municipality dumped sewage into a bay, polluting plaintiff's oyster bed. The loss of the oyster bed was held to be non-compensable because the dumping of the sewage was a "public right"[54] and the exercise of that right was not "the taking of private property for public use, but only a lawful exercise of a government power for the common good."[55] Therefore, the scope of the servitude with regard to Virginian waters would appear to be almost unlimited as to the type of activity permitted, as long as the

52. *Id.* at 472.
53. 123 Va. Rep. 14, 96 S.E. 307 (1918).
54. 96 S.E. 307, 308.
55. *Id.* at 307.

activity or project was "a lawful exercise of government power for the common good."[56]

However, in the later Virginia case of *Oliver v. City of Richmond*,[57] a bank riparian's right of access was taken for a state river project directly in aid of navigation. The court denied compensation on the basis that the project was in aid of navigation.[58] Recurrently throughout the opinion, the court stressed the idea that compensation was not granted because the project involved was in aid of navigation. Logically, the converse of this statement would be that if aid to navigation was not the purpose of the project (as in the *Darling* sewage dumping situation) compensation would be granted, and hence, the servitude would be limited to projects in aid of navigation. The *Oliver* case did not mention the *Darling* decision, so the Darling case would appear not to be overruled by *Oliver*.

Therefore, it would seem that Virginia has an inconsistent approach to the scope of the navigation servitude, such inconsistency very possibly being the result of segregation of the court's thinking in regard to the rights of bed versus bank riparians.

It is interesting to note that the Connecticut case of *Lovejoy v. City of Norwalk*,[59] based on the same essential facts as the *Darling* case, differentiated between the rights of bed and bank riparians. Though the court held that the oyster bed owner was not entitled to compensation, the court noted that "the ownership of such land [the oyster bed], as distinguished from the shore, would be subject to the natural [public] uses of the water."[60] Therefore, by placing the oyster bed owners in a special category, the State of Connecticut should be free to establish the limits of the navigation servitude in regard to bank riparians without being confronted, as in Virginia, with a broad doctrine which would appear to encompass the rights of bank as well as bed riparians.[61]

56. *Id.*
57. Oliver v. City of Richmond, 105 Va. 538, 178 S.E. 48 (1935).
58. 178 S.E. 48 (1935).
59. Lovejoy v. City of Norwalk, 112 Conn. 199, 152 A. 210 (1930).
60. 152 A. at 213.
61. For a later Connecticut decision which appears to limit arbitrary state action even in regard to the rights of the owners of the bed, *see*: Lovejoy v. Town of Darien, 131 Conn. 533, 41 A.2d 98 (1945).

The *Crary* case, with its public land analogy relating to the oyster bed[62] appeared to be about to make the bed-bank distinctions of the Connecticut court, but its final statement for the proposition that projects in aid of navigation can cut off riparian rights of access, which are rights held by bank riparians, without compensation,[63] would seem to include the rights of both bed and bank riparians within the scope of the servitude.

The final jurisdiction to be considered in this discussion of the "public purpose" exceptions to the general rule of state navigation servitude is that of Minnesota. The scope of the navigation servitude in Minnesota is illustrated by the statement of the court in *Nelson v. Delong*:[64]

> The state, as trustee for the people, holds all navigable waters and the lands under them for public use. Public use comprehends not only navigation by watercraft for commercial purposes, but the use also for ordinary purposes of life such as boating, fowling, skating, bathing, taking water for domestic or agricultural use, and cutting ice.[65]

An example of how Minnesota courts have construed the scope of the servitude is the case of *Minneapolis Mill Co. v. St. Paul Water Comm'rs.*[66] in which a city diminished the flow of a river by drawing off water for municipal purposes, depriving lower riparians of part of the flow. The court held that riparian rights were subject to all proper public uses, that using water for municipal purposes was such a use, and therefore, the riparians were not entitled to compensation. Construing the "public use" language of the *Minneapolis Mill* case along with the "domestic" and "agricultural" uses noted by the *Nelson* case would give an almost unlimited scope to projects protected by the navigation servitude. Clearly, the Minnesota court is in basic agreement with the "public purpose" concept of the cases considered as an exception to the general rule.

62. Crary v. State, 219 Miss. 284, 68 So. 2d 468 (1953).
63. 68 So. 2d 468 (1953).
64. Nelson v. Delong, 213 Minn. 425, 7 N.W.2d 342 (1942).
65. 7 N.W.2d at 346.
66. Minneapolis Mill Co. v. St. Paul Water Comm'n., 56 Minn. 485, 58 N.W. 33 (1894).

The Louisiana Exception

In the introduction to this comment, it was stated that under the doctrine of navigation servitude, one could infer as a general proposition that the state could not encroach upon the riparian landowner's property above the high water mark of the navigable river. Louisiana is in opposition to this rule. This exception is not a perversion of the common law navigation servitude, but rather finds its origins in the civil law of Spain and France. "By the civil law, the banks of a navigable river are private property, but are subject to an easement in favor of navigation almost as completely as the river itself, in that all persons may lawfully tie their vessels to the bank, unload their cargo thereon, or use the bank for a tow-path."[67] It is from this law that Louisiana has, through various constitutional and statutory provisions, developed the riparian servitude as it exists today.[68]

The source of this servitude in the State of Louisiana is Civil Code, which reserves to the state a space along land riparian to the navigable rivers "for the making and repairing of levees, roads and other public or common works."[69] That this is a valid exercise of the police power seems well settled in both the Louisiana courts[70] and the federal courts.[71] Being a valid exercise of the police power, when the servitude is exercised and land thereby taken or destroyed, compensation is not required.[72] Even though Louisiana has an eminant domain provision in its constitution[73] similar to that of the Federal Constitution,[74] there is no necessity, nor indeed any right to invoke the eminent domain provisions of either the

67. NICHOLS, *supra* note 12, at 237.
68. *See*: Wolfe, *The Appropriation of property for Levees: A Louisiana Study in Taking Without Just Compensation*, 40 TUL. L. REV. 233 (1966), for an excellent commentary on the source, history and development of the Louisiana law of levee servitudes.
69. LA. STAT. ANN. CIV. CODE § 665 (1952).
70. Bass v. State, 34 La. Ann. 494, 503 (1882).
71. Eldridge v. Trezevant, 160 U.S. 452, 468 (1896). "The subject-matter of such rights and regulations falls within the control of the State, and the provisions of the Fourteenth Amendment of the Constitution of the United States are satisfied if, in cases like the present one, the state law, with its benefits and obligations, is impartially administered."
72. 34 La. Ann. 496 (1882); Davis v. United States, 160 U.S. 469 (1895); 1 NICHOLS, THE LAW OF EMINENT DOMAIN, § 1.42 (3d ed. 1963).
73. LA. CONST. art. 1, § 2 (1921). "No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."
74. U.S. CONST., amend. V.

state constitution or the due process clause of the fourteenth amendment to the Federal Constitution.

However, if a riparian landowner has his land appropriated by the state, he does have recourse to compensation through Section 6 of Article 16 of the State Constitution, which provivdes that lands and improvements "actually used or destroyed for levee or levee drainage purposes . . . shall be paid for at a price not to exceed the assessed value for the preceeding year."[75] As a result of this provision, and only because of it, some compensation (but not necessarily market value) is required when the servitude is exercised.

> There is no question but that from earliest times riparian lands have been subject to this servitude. There is also no question that but for the provisions in Section 6 of Article XVI of the Constitution riparian owners throughout the state would be today entitled to no compensation whatever for lands taken, used, or destroyed for levee purposes.[76]

Consequently, Section 6 of Article 16 is looked upon the courts as "merely a gratuity."[77]

Perhaps the most interesting aspect of the riparian servitude in Louisiana is the scope of its power. Undoubtedly the most important case in this area is *Wolf v. Hurley*,[78] which involved the following situation: Because the Mississippi River was about to change its course, the state engineers proposed a levee to be built four miles back from the channel they predicted the Mississippi River would take. Though the boundary of plaintiff's ranch was two miles from the river, and the proposed levee two miles farther back from that boundary, the court held that the *scope* of the servitude attached this land because the servitude included "all of that which is within range of the reasonable necessities of the situation, as produced by the forces of nature, unaided by artificial causes."[79] It was argued that this rule, when taken in conjunction with the civil code, would result in destroying all of the land between the river and the levee and thus

75. LA. CONST. art. 16, § 6 (1921).
76. Dickson v. Board of Comm'rs, 210 La. 121, 26 So. 2d 474, 479 (1958).
77. 26 So. 2d at 522.
78. 46 F.2d 515 (W.D. La. 1931), *aff'd per curiam*, 283 U.S. 801 (1931).
79. *Id.* at 522.

requiring compensation under Article 16, Section 6. The reasoning was that since the code provides that the beds of the navigable rivers in the state are public property[80] and that where there are levees, the levees form the banks of the river,[81] the only logical conclusion would be that the servitude would extend so as to take all of the property between the levees and the river; consequently, Section 6 of Article 16 required compensation for all of this property. But the court disagreed and said that the legislative intent in enacting Section 6 of Article 16 extended compensation only to what was "actually used or destroyed" for levee purposes.[82] The remainder of the property between the levee and the river is still owned by the landowner, still subject to the servitude.

At first glance, the result of the *Wolfe* rule is indeed shocking. But in light of the flat topography of Louisiana it is understandable why the state has retained such a broad levee power. The problem which arises is how to decide when, if ever, land between the river and the levee is destroyed for purposes of Section 6 of Article 16. The *Wolfe* court convincingly argued that ". . . it is beyond all reason to say that where, as here, the levee is moved back four or five miles, all of the intervening land is actually destroyed."[83] The court was, however, realistic enough to foresee situations where the intervening property might be destroyed for purposes of Article 16, Section 6. "For instance, if the line of the levee and its drainage, in a farming community, ran through the middle of a narrow stretch, taking all of it but a small fraction on either side, the same would be effectively and actually destroyed as a farming unit and the board would be required to pay therefore."[84] Though no reported Louisiana cases have held that compensation must be given for property other than that actually destroyed for levee purposes, the recognition of the possibility of a compensable situation by the Wolfe court at least offers hope to situations which involve an actual destruction of the fastland in between the levee and the river by the exercise of the servitude. Out-

80. LA. STAT. ANN.-CIV. CODE, § 453 (1952).
81. LA. STAT. ANN.-CIV. CODE, § 457 (1952).
82. *Supra* note 78, at 523.
83. *Id.*
84. *Id.*

side of this possibility, the *Wolfe* rule remains as broad as the Louisiana courts want to interpret it.[85]

CONCLUSION

Though this comment has essentially limited itself to a discussion of the scope of the state navigation servitude doctrine, it should be noted that at least implicitly involved in any such discussion of the servitude are considerations of the economic wisdom of the doctrine and its fundamental equities. The navigation servitude has been referred to as an exception to the fifth amendment guarantee of just compensation for property taken for public use. What should be questioned is whether this exception is justified.

It is hopefully manifest that any determination of the wisdom behind the navigation servitude depends upon the scope of the doctrine as defined in each particular state; the more encompassing the scope of the doctrine, the less apparent is the wisdom. It is common sense that a potential investor would be less likely to invest in an enterprise involving riparian property when the very use for which the investment was made could be swept away by a single legislative enactment. The extreme example of this would be the Public Purpose exception, which only needs a public purpose to deprive the riparian property owner of certain of his valuable property rights, especially his right of access. Another situation is under the Louisiana exception where the state can take property miles from the actual banks of the river and thereby appropriate without compensation all the property in between. On the other hand is the General Rule, which at least guarantees the riparian that his rights cannot be infringed by the legislature, unless the project is in aid of navigation.

85. This rule is subject to a somewhat academic limitation which was imposed by Delaune v. Board of Comm'rs, 230 La. 117, 87 So. 2d 749 (1956). The case lays down two conditions that a parcel of land must satisfy before the state can exercise its servitude thereon: 1) "If that grant shows that the tract was riparian property when separated from the public domain,"; 2) and if yes, then the inquiry becomes "whether the property taken 'is within the range of the reasonable necessities of the situation, as produced by the forces of nature, unaided by artificial causes." This appears to be the law in Louisiana today as it has been cited with approval and applied to the facts of two subsequent cases; *to wit*, Board of Comm'rs v. Baron, 236 La. 846, 109 So. 2d 441 (1959), and Jeanerette Lumber and Shingle Co. v. Board of Comm'rs, 249 La. 508, 187 So. 2d 715 (1966).

The alternative to this mass of multi-scope decisions is that the legislature should take the reins from the courts and articulate more deliberate and defined law based upon considerations which better reflect the policies of our complex, modern society.

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