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THE NAVIGATION SERVITUDE: POST KAISER-AETNA CONFUSION

INTRODUCTION

The navigation servitude[1] is a judge-made doctrine. It allows Congress to impair or destroy private property interests without paying just compensation when it exercises its power to control and regulate navigable waters in the interest of commerce.[2] Although it has a weak theoretical foundation,[3] this century-old doctrine stands as an exception to the express fifth amendment proscription on the taking of private property for public purposes without just compensation.[4] The federal government has used the navigation servitude to destroy bridges, piers, tunnels, rights of access and riparian land values without compensating private owners.[5] The doctrine was confined to the removal of obstructions to navigation in the late 1800s, but has been expanded in conjunction with the expansion of federal control over the nation's water resources in the last 50 years.[6] This expansion has been so great that several courts have applied the doctrine to projects which did not aid navigation.[7]

The United States Supreme Court attempted in 1979 to restrict the scope of the doctrine and formulate a workable test for its ap-

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1. The navigation servitude has also been referred to as a "dominant servitude," Federal Power Comm'n. v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954) or a "superior navigation easement," United States v. Grand River Dam Auth., 363 U.S. 229, 231 (1960).

2. United States v. Rands, 389 U.S. 121, 124 (1967).

3. Harnsberger, *Eminent Domain with Water Law*, 48 NEV. L. REV. 325, 436 (1961), *substantially reprinted in* WATERS AND WATER RIGHTS § 305, at 97 (R. Clark ed. 1970). *See also* Note, *The Navigational Servitude and the Fifth Amendment*, 26 WAYNE L. REV. 1505, 1510 (1980).

4. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 52 (1964). Professor Sax and others have noted the *ipse dixit* development of the navigation servitude as a judge-made doctrine. Note, *supra* note 3, at 1507.

5. United States v. Twin City Power Co., 350 U.S. 222 (1956) (value of riparian land as a hydroelectric site held not compensable); United States v. Commodore Park, Inc., 324 U.S. 386 (1945) (pier); Union Bridge Co. v. United States, 204 U.S. 364 (1907) (bridge); West Chicago Street R.R. v. Chicago, 201 U.S. 506 (1906) (tunnel under river).

6. Federal systematic improvement of rivers began in 1879. Since then, federal projects have increased in size, number and complexity with the passage of the 1936 Flood Control Act. Since 1945 many multipurpose projects have been built in non-navigable tributaries with a stated objective of controlling navigation. Harnsberger, *supra* note 3, at 388-89.

7. United States v. Commodore Park, 324 U.S. 386 (1945) (tidal bay was dredged to improve the runway for naval seaplanes); *see infra* notes 112-14 and accom-

plication in *United States v. Kaiser-Aetna*.[8] Several lower court decisions since *Kaiser-Aetna* indicate that the doctrine is still confused; some cases seem to expand the doctrine while others restrict it.[9]

This note examines the scope of the navigation servitude prior to *Kaiser-Aetna* and thereafter. It begins by discussing the theoretical foundations and doctrinal development prior to 1979, and arguing that a weak theoretical foundation and mechanical application of the servitude led to an expansion in its scope which has paralleled the expansion of Congress' power to regulate navigation. *Kaiser-Aetna* and several cases since 1979 will then be analyzed to show that the limitations on the scope of the navigation servitude are still unclear. An historical explanation for the development of the doctrine, based on the necessity of water transportation will be introduced. This note will then advocate a balancing of the interests involved in order to minimize the conflict between public and private concerns and to insure that the doctrine will be applied only to advance those purposes for which it was developed.

THEORETICAL FOUNDATIONS

Supreme Court opinions have either failed to analyze or have been inconsistent in analyzing the exact theoretical foundations which have supported and justified the navigation servitude throughout the last century.[10] Therefore, the basis of the doctrine remains unclear.[11] Three different theories have been identified by the Court at various times; an English common law theory,[12] a commerce clause power theory[13] and a notice theory.[14] Standing alone, none of these theories

panying text; Loving v. Alexander, 548 F. Supp. 1079 (W.D. Va. 1982) (recreational fishing project); *see infra* notes 232-37 and accompanying text.

8. 444 U.S. 164 (1977). "There is no denying that the strict logic of the more recent cases limiting the government's liability to pay damages for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for 'just compensation' . . .[b]ut, as Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience." *Id.* at 178.

9. *See infra* notes 191-269 and accompanying text.

10. Typically, the courts assert that the commerce clause comprehends control of the navigable waters, and such control includes a dominant right to remove obstructions. United States v. Chicago, M., St. P. & P.R. Co., 312 U.S. 592, 596 (1941). The courts usually do not, however, explain why this dominant right to maintain or enlarge navigability allows Congress to do so without paying just compensation. *See infra* notes 30-45 and accompanying text.

11. Note, *supra* note 3, at 1507-14.

12. Shively v. Bowlby, 152 U.S. 1, 57 (1894).

13. *Chicago, M., St. P. & P.R.*, 312 U.S. at 596 (plaintiff's land and structures above and below high water mark were damaged when the federal government raised the water level).

14. Union Bridge Co. v. United States, 204 U.S. 364, 400 (1907) (Secretary

can justify the broad scope of the doctrine in its present state.[15]

Undoubtedly much of the present confusion in the case law is attributable to the lack of a firm doctrinal foundation created when the doctrine outgrew the foundation provided by English property law.

As early as 1215, the English public had the right to fish and navigate tidal waters.[16] The King held title to these public waters and their beds in an inalienable trust for the benefit of the public. The King also owned all other property rights in the stream but these others were both alienable and subordinate to the public right of fishing and navigation.[17] The King's title to these alienable rights, known as *jus privitum*, was not absolute. The *jus privitum* was burdened with the concept that the King, and therefore his grantees, could not use the property in a manner which would derogate the public trust in navigation and fishing. Since any structures in the navigable waters which obstructed navigation derogated the trust, the King as trustee had the right to remove these obstructions.[18] The King was not required to pay compensation for these seizures and removals because the obstructions themselves constituted a use beyond the scope of the *jus privitum* title.[19]

When the American colonies were settled, similar rights were passed to the colonial grantees through royal charters. The "trust" of the navigable tidal waters vested in the original states after the American Revolution and was ultimately transferred through the commerce clause of the Constitution to the federal government.[20] In this way the concept that navigable waters were public domain, held and preserved by the sovereign, was carried into American jurisprudence.[21]

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of Army required owner of congressionally licensed bridge over navigable river to redesign and rebuild the bridge without compensation).

15. *See infra* notes 25, 42, 52 and accompanying text.

16. Harnsberger, *supra* note 3, at 439. *See also* J. LEWIS, LAW OF EMINENT DOMAIN, 103-07 (3rd ed. 1909).

17. J. LEWIS, *supra* note 16, at 103-07.

18. *Id.*

19. *Shively v. Bowlby*, 152 U.S. at 16.

20. Harnsberger, *supra* note 3, at 444.

21. *See* Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724-25 (1865) (navigable waters of the United States are public property of the nation). One commentator argues that much of the existing confusion in the cases could be eliminated if the servitude were treated as an easement concept under existing property law. Bartke, *The Navigation Servitude and Just Compensation-Struggle for a Doctrine*, 48 OR. L. REV. 1 (1968). *See also* Munro, *The Navigation Servitude and the Severance Doctrine*, 6 LAND & WATER L. REV. 491 (1971).

The property concept proposal seems reasonable at first glance but on close analysis its problems become apparent. The use of an exclusive easement certainly does not confer upon the dominant tenant proprietorship or exclude ownership of the

The early English and American courts thought of the servitude as a property concept. In *Scranton v. Wheeler*,[22] for example, the Supreme Court spoke of the riparian owners' title to the submerged soil as being a "qualified title, a bare technical title not absolutely at his disposal . . ." and subject to the dominant servitude for navigation in favor of the United States.[23] The English common law served as a viable foundation so long as the servitude was used to maintain the navigability of existing navigable streams.[24] However, as the scope of the servitude expanded beyond its English antecedent, the common law proved to be an unsatisfactory theoretical foundation for the modern American navigation servitude.[25]

The common law property concept existed to preserve free navigation on English waters,[26] yet as the American doctrine expanded, the servitude was applied to further purposes other than navigation.[27]

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servant tenant. Supreme Court decisions however, have used exclusive, proprietorship language. United States v. Grand River Auth., 363 U.S. 229, 231-32 (1960) ("the United States has a superior navigation easement which precludes private ownership of the water or its flow. . . ."); United States v. Twin City Power Co., 350 U.S. 222, 224 (1956) (Congress may appropriate the flow of a river to the exclusion of any conflicting or competing interest). Moreover, under traditional property law, were the government to divert the stream through a canal parallel to the old bed, the easement would not relocate itself to burden the private owners upon whose property the canal was built. On these facts the navigation servitude was successfully asserted in Scranton v. Wheeler, 179 U.S. 141 (1900). The servitude therefore does not fit within the conventional property law concept of easements.

22. 179 U.S. 141 (1900).

23. *Id.* at 146.

24. E. MORREALE, WATERS AND WATER RIGHTS 19 (R. Clarke ed. 1967), *substantially reprinted from* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1 (1963) [hereinafter cited as Morreale] ("It seems . . . as though the rule has perpetuated itself from the days when free use of the waterways was an absolute necessity. . . . Today there are other, equally important arteries of commerce. Rationalization of the continued preference of waterways on the basis of reasons that are no longer applicable is of dubious utility.")

25. The English concept of the servitude was left far behind when the definition of navigability was expanded from tidal waters to include any water that was navigable-in-fact or could be made navigable with reasonable efforts. United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). After *Appalachian Power*, the scope of the servitude broadened such that it was utilized on rivers that did not actually support navigation. *See* United States v. Willow River Power Co., 324 U.S. 499 (1945).

26. J. LEWIS, *supra* note 16, at 101.

27. *See* United States v. Twin City Power Co., 350 U.S. 222 (1956); Federal Power Comm'n. v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954); United States v. Willow River Power Co., 324 U.S. 499 (1945). The projects in these cases were built primarily for flood control and hydroelectric purposes. However, in the enabling legislation for each project, Congress listed the aid to navigation as an incidental purpose.

For example, the Flood Control Act of 1944 financed the Clark Hill Dam project on the Savannah River for the primary purpose of flood control.[28] That project decreased navigability for flood control purposes and diametrically opposed the preservation of navigation concept. For this reason, the English common law foundation could not have justified such an application of the servitude. The federal government nevertheless successfully invoked the navigation servitude to escape paying compensation for the value of a hydroelectric plant site which it flooded.[29]

As the scope of the American servitude broadened, the opinions increasingly relied on the commerce clause to justify the doctrine.[30] *Gibbons v. Ogden*[31] established federal control over navigation as a necessary part of interstate commerce regulation.[32] This federal regulatory power over navigation is broad enough to extend to nonnavigable,[33] as well as navigable water[34] and probably extends to every stream in the United States.[35] The power is also said to confer upon the United States a navigation servitude and release the government from its obligation to pay just compensation when it appropriates land within the streambed.[36]

The cases have failed to satisfactorily explain how the commerce clause regulatory power exempts the government from the "takings" clause.[37] It is often explained that the commerce clause conveys to

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28. *Twin City*, 350 U.S. at 223-24.
29. *Id.* at 228.
30. Morreale, *supra* note 24, at 18-19.
31. 22 U.S. (9 Wheat.) 1 (1824). It is customary to trace the origin of the navigation servitude to *Gibbons*. However *Gibbons* was not a servitude case. It simply decided that the federal government has the ultimate responsibility to regulate interstate navigable rivers. Moreover, designating *Gibbons* as the origin of the American servitude ignores the English law on which the concept was first founded. *See also* Morreale, *supra* note 24, at 5.
32. "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.
33. United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899) ("[T]he jurisdiction of the federal government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country" even though the Rio Grande is nonnavigable throughout the entire state of New Mexico.).
34. *Id.* at 703. *See also* Note, *Determining the Parameters of the Navigation Servitude*, 34 VAND. L. REV. 461, 463 (1981).
35. Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RESOURCES J. 1, 14 (1967).
36. United States v. Rands, 385 U.S. 121, 123 (1967); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 62 (1913). *See also infra* note 38.
37. Morreale, *supra* note 24, at 17-18.

the government a superior power,[38] against which the riparian[39] owner holds merely a qualified title, subordinate to the public right of navigation.[40] Therefore, when Congress appropriates the bottom of a navigable river to aid navigation, it is not taking the private owner's property since that property was always subject to Congress' superior power to appropriate.[41]

The commerce clause superior power rationale fails to account for the distinction between the federal government's power to appropriate and the power to do so without paying compensation. Nowhere in the commerce clause or in the fifth amendment does language exist which excepts activities sanctioned by the commerce clause from the express proscription of the "takings" clause.[42] Moreover, the commerce power has no priority over other constitutional powers,[43] yet were the government to appropriate a river bed under the war power, property power or welfare power, it would unquestionably have to pay compensation.[44] Since the commerce clause neither expressly nor implicitly excepts the compensation requirement of the "takings" clause, the commerce clause cannot provide an adequate foundation for the navigation servitude.[45]

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38. *See, e.g.*, United States v. Grand River Dam Authority, 363 U.S. 229, 233 (1960) ("superior power"); United States v. Twin City Power Co., 350 U.S. 222, 224-25 (1956) ("The power is a dominant one which can be asserted to the exclusion of any competing or conflicting one."); Gibson v. United States, 166 U.S. 269, 276 (1897) ("the dominant right of government"); South Carolina v. Georgia, 93 U.S. 4 (1876) ("plenary power"). *See* Morreale, *supra* note 24, at 21.

39. A riparian owner is one who owns land on the bank of the river, or one who owns land along, bordering upon, bounded by, fronting upon, abutting or adjacent and contiguous to and in contact with the river. Buckson v. Pennsylvania R. Co., 228 A.2d 587 (Del. Super. Ct. 1967).

40. *Chandler-Dunbar*, 229 U.S. at 62-63.

41. *Id.*

42. Section 8. [1] The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

> [2] To borrow money on the credit of the United States.
>
> [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. art. I, § 8, cl. 1, 3.

43. Morreale, *supra* note 24, at 17.

44. *See* United States v. Gerlach Livestock Co., 339 U.S. 725 (1950) (Friant Dam built under authority of general welfare clause, navigation servitude not applicable); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330 (Wilson Dam built under authority of the property clause and the war power).

45. Most commentators agree that the commerce clause alone cannot justify the present navigation servitude doctrine. Harnsberger, *supra* note 3, at 134; Morreale,

Several decisions have attempted to justify the servitude on a theory that the riparian owners had ample notice that their property was subject to a paramount government interest.[46] In *Union Bridge Co. v. United States*, the Court ruled that the private owner erected a bridge with the knowledge that Congress could at any time exert its power to aid navigation.[47] Similarly, the decisions in *United States v. Kansas City Life Ins. Co.*[48] and *United States v. Rands*[49] based on the servitude on the theory that "riparian owners have always been subject" to the servitude.[50]

The Court's assumption that riparian owners know their property is subject to a paramount federal interest is strained. It assumes the owner has knowledge of not only the government's power to protect navigation, but also its power to do so without paying just compensation.[51] The Court's assumption fails when one considers the recent expansion of the servitude.[52] Since 1940,[53] the scope of the navigation servitude has expanded to include projects on waters that were previously considered not amenable to the doctrine.[54] The Court cannot assume that owners obtained their property with notice of the servitude when the servitude could not have previously applied to that property. Consequently, the notice theory provides little justification for this unique, rather anomalous doctrine.

Another justification, expressed in one case, but probably implied in most others, is the Court's fear that Congress' power to protect and improve navigation for interstate commerce purposes would be severely impaired if the government were required to pay com-

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supra note 24, at 17; Note, *supra* note 34, at 464-66; Note, *supra* note 3, at 1511-13. *But see* Munro, *supra* note 21, at 493.

46. United States v. Rands, 389 U.S. 121 (1967); United States v. Kansas City Life Ins., 339 U.S. 799 (1950); Union Bridge Co. v. United States, 204 U.S. 364 (1907); Gibson v. United States, 166 U.S. 269 (1897).

47. 204 U.S. at 400.

48. 339 U.S. at 805.

49. 389 U.S. 121 (1967).

50. *Id.* at 124.

51. Since the navigation servitude relieves the government of its duty to pay just compensation, those charged with notice would have to know (1) that their property might be taken and (2) that it might be taken *without compensation.*

52. *See generally* Note, *supra* note 3, at 1508.

53. The definition of navigability and therefore the scope of the navigation servitude was greatly enlarged in 1940 by the decision in United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). *See infra* notes 69-98 and accompanying text.

54. *See, e.g., Appalachian Electric*, 311 U.S. at 424-29 (the servitude would not have applied to the New River unless the Court expanded the definition of navigability); Johnson & Austin, *supra* note 35, at 14.

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pensation for every injury that resulted from an improvement to navigation.[55] This "subsidy" concept was probably a viable justification for development of the servitude in America when waterbound transportation was one of the two primary modes of interstate transportation. However, the "subsidy" concept fails to justify the present doctrine.[56]

Of the several theoretical foundations offered throughout the decisions, none have singularly been able to justify the navigation servitude and its rule of no compensation. The English common law model cannot justify the present scope of the doctrine. While the commerce clause can justify the present scope of the servitude, it cannot justify the rule of no-compensation. The notice theory was based on an assumption which is now impossible to make, and the fear of crippling Congress' power to nurture commerce is likewise unwarranted today. The lack of a firm theoretical foundation contributed to a confused expansion of the doctrine and a mechanical, territorial analysis which produced seemingly arbitrary results.

PRE KAISER-AETNA DOCTRINE: A HISTORY OF EXPANSION

Riparian owners possess certain property rights which are connected with the riparian land; if these rights are taken, the owner must be paid full compensation.[57] Generally these rights include: access to the water,[58] use of the water for domestic purposes,[59] construction of piers into the water,[60] extension of title to accretions[61] and certain usufructuary rights[62] depending on state law.[63] In its early

55. Scranton v. Wheeler, 179 U.S. 141, 165 (1900).

56. *See generally* Harnsberger, *supra* note 3, at 145-47.

57. Harnsberger, *supra* note 3, at 113-14.

58. *See* Yates v. Milwaukee, 77 U.S. 497 (1870).

59. *See* Montelious v. Elseu, 11 Ohio Op. 2d 57, 161 N.E.2d 675 (1959); 93 C.J.S. *Waters* § 12 (1956).

60. *See* United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).

61. "Accretion" is the process of gradual and imperceptible addition of solid material, called "alluvion," to the shore thus extending the shore line out by depositing water-borne material. "Reliction" is the gradual withdrawal of water from the land. *See* California ex. rel. State Lands Comm'n. v. United States, 457 U.S. 273 (1982); Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), *overruled on other grounds*, Oregon Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).

62. "A riparian does not own the water of a stream but owns a 'usufructuary right,' which is the right of reasonable use of the water on his riparian land when he needs it." Rancho Santa Margarita v. Vail, 561 Cal. 2d 501, 81 P.2d 533 (1938).

63. Generally, two doctrines exist in America regarding usufructary rights. The riparian use doctrine is followed in the eastern states and some form of the prior appropriation doctrine is followed in the western states. Whether the navigation servitude can extinguish private consumptive water rights is a question which has

stages of development, the navigation servitude denied compensation when the government appropriated structures in and denied access to the water.[64] The doctrine has been expanded to deny compensation when any water-related right is taken,[65] including the riparian value of "fast land".[66]

At one time, the scope of the navigation servitude was as broad as the federal government's power to regulate navigation under the commerce clause.[67] Both the power to regulate navigation and the navigation servitude have since been expanded considerably, but the navigation servitude is no longer coextensive with the commerce clause regulatory power.[68] An analysis of the doctrine's expansion must begin with a discussion of navigability.

Navigability

Prior to 1940, federal commerce clause power over navigation extended only to those streams which met the federal test of navigability.[69] The navigation servitude was thus limited to navigable waters.[70] As the definition of navigable waters was broadened, the

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engendered considerable comment and is unfortunately outside the scope of this note. *See generally* Morreale, *supra* note 24, at 42-49; *contra* Munro, *The Navigation Servitude and the Severance Doctrine*, 6 LAND & WATER L. REV. 491 (1971).

64. Scranton v. Wheeler, 179 U.S. 141 (1900) (riparian right to access denied); Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915) (removal of pier).

65. A private owner has no property rights in a navigable stream as against the federal government. United States v. Twin City Power Co., 350 U.S. 222, 226-27 (1956).

66. *Id.* "Fast lands" are lands above the ordinary high water mark, and are therefore not considered part of the stream bed. The government must still compensate when it floods "fast land" but it need not pay the increased value of the land due to its being riparian.

67. "Over the years, federal interests have expanded tremendously until today the United States is engaged extensively in irrigation reclamation projects, municipal water supply, pollution control, flood regulation recreation, and hydroelectric power generation and distribution." Harnsberger, *supra* note 3, at 140.

68. Prior to 1940, the scope of the commerce clause power to regulate navigation, and the navigation servitude were coextensive because both were limited to waters that were naturally navigable in fact. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 62-63 (1913). *See generally* Note, *supra* note 3, at 1515-16.

69. The Daniel Ball, 77 U.S. (10 Wall) 557, 563 (1870) (the commerce clause jurisdiction of the federal government extends to navigable waters, and waters which are navigable in fact are considered navigable in law).

70. Under the English common law theory and the commerce clause theory, the navigation servitude was limited by the then current test of navigability. The *jus publicum* in England was limited to public waters, and the only public waters were those which were tidal. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 90 (1951). *See generally* Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*,

scope of the servitude was also expanded.[71] Today the federal authority to control navigation extends to nonnavigable rivers that may affect navigable streams.[72] Whether the servitude also extends to these nonnavigable waters is debatable;[73] however, one certainty is that the American version of the servitude has outgrown the English doctrine from which it originated.[74]

The definition of navigability that originated in English law was limited to waters which were affected by the ebb and flow of the tide.[75] This definition was not suitable for a continent which had vast inland water resources.[76] Consequently, in 1870[77] the Court extended navigability to all waters which were navigable in fact in their natural condition.[78] Once part of a stream satisfied the navigability definition, federal power extended over its entire course including those parts which were nonnavigable in fact.[79] In the 1940 case of *United States v. Appalachian Electric Power Co.*,[80] the Court dropped the natural condition requirement and included within the definition any water that was navigable at any time in history,[81] and any stream that could

5 LAND & WATER L. REV. 391, 395-96 (1970). Under the commerce clause theory, the servitude could not constitutionally be broader than the commerce clause itself, which was limited by the navigability requirement during the nineteenth century. *Daniel Ball*, 77 U.S. at 563.

71. Note, *supra* note 3, at 1514-18.

72. United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899) (the Court enjoined New Mexico from damming nonnavigable portions of the Rio Grande river on the theory that navigable stretches in Texas would be adversely affected).

73. *See supra* notes 88-98 and accompanying text.

74. The English servitude is limited to tidal waters whereas its counterpart in America may theoretically extend to all water courses. *See infra* notes 69-98 and accompanying text.

75. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 455 (1851) (overruling The Steamboat Thomas Jefferson, 6 U.S. (10 Wheat.) 428 (1825) and The Steamboat Orleans v. Phoebus, 12 U.S. (11 Pet.) 391 (1831)). *Genessee Chief* extended admiralty jurisdiction to navigable in fact waters.

76. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide does not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters navigable in fact or at least to any considerable extent [exist] which are not subject to the tide.

The Daniel Ball, 77 U.S. at 563.

77. *Genesee Chief*, 53 U.S. at 455.

78. *The Daniel Ball*, 77 U.S. at 563 (this definition includes streams which are wholly located within one state; the Grand River is wholly located in Michigan and was deemed navigable).

79. United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1878).

80. 311 U.S. 377, 409-10 (1940).

81. *Id.* at 406. "[N]or is it necessary that improvements should be actually completed or even authorized." *Id.*

be made navigable with reasonable expense in the future.[82] Any water-course is therefore considered navigable in law if any part was, is or can be made navigable in fact.

Cases subsequent to *Appalachian* have extended federal authority to nonnavigable waters when Congress has expressly stated that some aspect of the project will aid navigation.[83] Today almost every river project is considered a multi-purpose project,[84] and Congress usually includes in the enabling legislation language that the project will aid navigation.[85] Since the Court defers to this legislative judgment of purpose,[86] every creek in the United States is potentially subject to federal control under the commerce clause.[87]

Expansion of the federal power to regulate navigation under the commerce clause is important to the navigation servitude because the servitude is usually applicable to all navigable waters.[88] An expansion of the navigability definition has usually caused an expansion of the servitude as well.[89] However, this expansion was not accomplished without a good deal of vacillation and confusion.[90]

An excellent example of both the expansion of the servitude and the confused analysis with which it has been applied is the 1960 case of *United States v. Grand River Dam Authority.*[91] The Authority

82. *Id.* at 407.

83. Oklahoma ex. rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941). *See also* United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

84. *See generally* F. TRELEASE, CASES AND MATERIALS ON WATER LAW, RESOURCE USE AND ENVIRONMENTAL PROTECTION 712-15 (2d ed. 1974).

85. *See, e.g.*, H.R. DOC. NO. 657, 78th Cong., 2d Sess. (concerning the Clark Hill project in United States v. Twin City Power Co., 350 U.S. 222 (1956)).

86. This legislative judgment of purpose will not be reviewed unless it is unreasonable. Arizona v. California, 373 U.S. 546 (1963); *Twin City*, 350 U.S. at 224.

87. See also the charge that the majority empowered Congress to manufacture navigability. United States v. Appalachian Electric Power Co., 311 U.S. 377, 433 (1940) (Roberts, J., dissenting).

88. Under the mechanical, territorial analysis which characterized most of the pre-*Kaiser* cases the servitude would apply to any navigable stream. *See infra* notes 138-54 and accompanying text. The *Kaiser* opinion dispelled any notion that the servitude applied automatically upon a finding of navigability. *See infra* notes 200, 201 and accompanying text.

89. *See, e.g.*, *Appalachian Electric*, 311 U.S. at 377. The Court expanded the definition of navigability to include streams that could be made navigable. It then found that the New River was such a stream, applied the servitude to it, and so expanded the scope of the servitude. *Id.*

90. Justice Rehnquist lamented in United States v. Kaiser-Aetna, 440 U.S. 169, 177 (1979), that the shifting back and forth by the Court in this area made recent decisions bear the "sound of old, unhappy, far-off things, and battles long ago." *Id.*

91. 363 U.S. 229 (1960).

operated a power dam on the Grand River, a nonnavigable tributary of the navigable Arkansas River. The Corps of Engineers subsequently built a flood control dam downstream from the Authority's dam on the Grand River, which flooded the upper dam and reservoir.[92] Declining to compensate the Authority for lost power production value of the dam, the Corps argued that power production is a function of stream flow and, due to the navigation servitude, the public owns the value of the flow of a nonnavigable river.[93] Writing for the majority, Justice Douglas confused flood control jurisdiction with the power to appropriate property without compensation.[94] He bypassed the question of whether the navigation servitude was applicable,[95] and instead found the Corps had jurisdiction to regulate under the Flood Control Act.[96] The Court denied compensation relying on analysis from several servitude decisions and applying the navigation servitude to a nonnavigable stream under flood control jurisdiction.[97] The case stands as authority for the proposition that the servitude may be applied to a nonnavigable stream when Congress expressly invokes its power to regulate that stream. *Grand River* therefore represents a tremendous expansion of the doctrine.[98]

The scope of the navigation servitude was expanded through several redefinitions of the navigability concept. The servitude is no longer limited to tidal waters but is applicable to virtually any nonnavigable tributary upon a determination by Congress that the project will involve navigation. The often confused analysis applied by the Court has left the scope of the doctrine unclear. This lack of clarity

92. *Id.* at 231.

93. *Id.*

94. *Id.* The Court stated that "when the United States appropriates the flow of either a navigable or a nonnavigable stream pursuant to its superior power under the commerce clause, it is exercising established prerogatives and is beholden to no one." *Id.* at 233. This language is a paraphrase of the servitude analysis which constitutes the heart of United States v. Twin City Power Co., 350 U.S. 222, 226-27 (1956) and United States v. Commodore Park, 324 U.S. 386, 391 (1945).

95. *Grand River*, 363 U.S. at 232. The government contended that the servitude applied to the nonnavigable water but the Court replied: "In the view we take in this case, however, it is not necessary that we reach that contention." *Id.*

96. *Id.* at 233-34.

97. Flood control is an exercise of the commerce power; thus, its application under flood control legislation without a declaration that the project "will aid navigation" would be constitutionally permissible, yet it would represent the broadest extension of the doctrine to date.

98. One commentator argues that *Grand River* is limited to cases involving both the navigable capacity of the navigable mainstream, and an express congressional determination to exercise its power over a nonnavigable tributary. Morreale, *supra* note 24, at 8.

probably caused the Court to develop and apply a mechanical, territorial analysis in several recurring fact situations.

Private Property in the Streambed Taken or Destroyed

The strongest case for applying the navigation servitude exists when the private party places property in the stream and thereby obstructs navigation. The English version of the doctrine covered just this type of situation.[99] The United States Supreme Court long ago settled the question of compensation for the removal or destruction of private property in the stream,[100] but it based the servitude on several different theories.

The Court applied the doctrine using a common law property theory in *Lewis Blue Oyster Cultivation Co. v. Briggs*.[101] Lewis Co. leased oyster beds under the Great South Bay in New York state from a private owner. The company sought compensation for the destruction of some of its beds when the government dredged a channel through the leasehold. The Court denied compensation reasoning that the private owner held only a qualified title as against the government when the government improved the public right of transportation in the interests of commerce.[102] By using the qualified title reasoning, the Court based the servitude on a property theory derived from the English common law.[103]

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99. J. LEWIS, *supra* note 16, at 103-07.

100. The issue was basically settled by 1917. Louisville Bridge Co. v. United States, 242 U.S. 409 (1917), is the most recent "structures in the stream" case which this research has found.

101. 229 U.S. 82 (1913).

102. *Id.* at 86.

103. Another example of the Court using the common law property theory is West Chicago Street R.R. Co. v. Chicago, 201 U.S. 506 (1906), in which the government required the railroad to remove its tunnel from under the Chicago River at its own expense because the tunnel obstructed a government sponsored dredging operation. The Court used a property theory by reasoning that the railroad's title to the streambed was only so good as its use was consistent with the public right to free and unobstructed navigation. *Id.* at 520. The tunnel obstructed navigation because it limited the size of the ships that could have navigated the river.

The Court then buttressed its analysis with a notice theory when it said, "the city granted the right to construct the present tunnel under the river subject to the condition necessarily implied by the statute of 1874 in force when the ordinance of 1888 was adopted that the tunnel should not interrupt navigation." *Id.* at 523. In its next term, the Court again used the notice theory to justify the removal of a bridge over the navigable Allegheny River in Union Bridge Co. v. United States, 204 U.S. 364 (1907). For a discussion of the "notice theory" see *supra* notes 46-54 and accompanying text.

The Court also premised the navigation servitude on commerce clause and notice theories when it denied compensation for the taking of a pier in *Greenleaf Johnson Lumber Co. v. Garrison.*[104] The Greenleaf company owned title to land under the Elizabeth River in Virginia on which it built a pier. Some time later the Secretary of War changed the federal harbor lines and included the pier within the federal property. Responding to Greenleaf's compensation claim, the Court ruled that the owner "knew" Congress might at any time extend the harbor boundaries pursuant to its commerce clause power to regulate navigation.[105] The dissent argued that the commerce clause could not override the fifth amendment and balked at the power given to the Secretary of War to arbitrarily change these boundaries to include nonnavigable water.[106]

The obstruction decisions provide examples of the confusion which surrounds the navigation servitude. The removal of obstructions to navigation is probably the strongest case for the application of the navigation servitude, yet the decisions relied on different theories to justify the doctrines. In the next set of cases the Court will continue to rely on several theories when applying the doctrine. By denying compensation when the riparian owner's access was destroyed, the Court expanded the scope of the doctrine beyond that of its English counterpart.

Riparian Owner's Right to Access Denied

Under English common law, a riparian owner has a right of access to the water which cannot be obstructed when the Crown improves navigation.[107] In 1870 the Court expanded the scope of the

104. 237 U.S. 251, 255-58 (1915).

105. *Id.* at 260. In both *Union Bridge* and *Greenleaf* the Court went to great lengths to explain that the prior case of Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) in which the government was required to pay compensation, rested on the theory of governmental estoppel. *See infra* note 284.

The Court in *Greenleaf* ruled that Congress acted within its commerce power over navigation and since its superior power extends to the whole stream, and this property was within the stream, the no-compensation rule applied. *Id.* at 259-63. This logic will be used throughout the decisions and will be hereinafter referred to as the mechanical application of the servitude. Typically, the Court will talk about Congress' dominant power or the private owner's qualified title. Next it will define the territorial limits of the servitude and find that the particular case fits within those limits. The Court will then deny compensation without explaining why the application was necessary or justified and without reiterating the purpose behind the no-compensation rule.

106. *Id.* at 273-74 (Lamar, J., dissenting).

107. Annot., 21 A.L.R. 206, 211 (1922). One writer argued that the right of access should have been more fully protected in America than in England because of America's constitutional proscription against taking private property without making compensation. 1 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 297 (1904).

American servitude beyond that of the English doctrine in *Gibson v. United States.*[108] There, the Court denied compensation when a federally constructed dike in the Ohio River obstructed a riparian owner's right of river access. The Court ruled that the servitude in respect of navigation gave the government the power to deny access[109] and that no "taking" had occurred because the injury was merely an incidental consequence[110] of a legitimate exercise of government power.[111] While the English servitude only allowed the Crown to remove obstructions in the waterway, the American doctrine allowed the government to remove obstructions and devalue the riparian property by denying the owner access to the water.

An extreme example of the government denying access to the water is found in *United States v. Commodore Park.*[112] To improve facilities for naval seaplanes, the government dredged a tidal bay in West Virginia and deposited the debris at the mouth of a navigable arm of the bay, thereby obstructing the tidal flow and creating a stagnant pond.[113] The Court reduced the inquiry to a mechanical, territorial analysis by determining that the servitude precluded compensation when, as here, the injury was caused by a navigation project and it

108. 166 U.S. 269 (1897).

109. *Id.* at 272. The *Gibson* court relied on Shively v. Bowlby, 152 U.S. 1 (1894), which involved a dispute over title. *Shively* explained the common law concept of the public right to navigation, and the King's power to remove obstructions to navigation but did not explore matters of compensation. *Gibson* expanded *Shively* to read that the servitude attaches to public water and forecloses compensation.

110. *Gibson,* 166 U.S. at 273. Several earlier cases including Union Bridge Co. v. United States, 204 U.S. 364 (1907), and Lewis Blue Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913), relied on the fact that the "taking" was only an incidental consequence of a lawfully exercised power. Modern courts tend to discredit the incidental consequence theory and award compensation for such injuries. *See* United States v. Causby, 328 U.S. 256 (1946) (noise from low altitude military aircraft flyovers which disturbed a commercial chicken farm was held a compensable "taking").

111. Three years later in Scranton v. Wheeler, 179 U.S. 141 (1900), the Court used the property law analysis to deny compensation when the government precluded Scranton's access to the St. Mary River. Scranton was denied access to the water when the government built a pier which was wholly within the water and which ran parallel to the stream flow. The pier extended past Scranton's property on both sides and effectively cut off his access to the river. *Id.* at 142-44. The Court agreed that the injury was not merely incidental, and cited *Gibson* concluding that compensation could be denied because Scranton's title was qualified. Justice Harlan justified his position by expressing fear that the government's power to improve navigation would be crippled if it were required to pay compensation for every injury arising out of the exercise therefrom. *Id.* at 165. *Scranton* is thus one of the few cases in which the Court has attempted to express the economic policies behind the navigation servitude.

112. 324 U.S. 386 (1945).

occurred in the stream.[114] It buttressed the analysis by observing that the United States had commerce clause power to destroy navigation in one place in order to foster it in another.[115] The analysis was strained because the project was not actually intended to aid navigation.[116] Therefore, *Commodore Park* represents a broad expansion of the navigation servitude.

The scope of the American servitude exceeded the English version when riparian owners were denied access to the water and the government avoided paying compensation. The Court allowed the government to avoid paying compensation when it decreased the value of riparian property by undertaking a navigation project in the stream. The Court applied the servitude in a mechanical manner, denying compensation for any injury when the source of the injury was a navigation project and the injury occurred in the stream. This mechanical application reached its epitome when navigability itself was destroyed in order to advance a project only remotely related to navigation. The mechanical analysis will be readily apparent in the cases which define the limits of the servitude. The Court will automatically deny compensation on a showing that the injury is within the territorial limits of the servitude.

Territorial Limits: Banks and Tributaries

When analyzing servitude cases the Court will typically talk about Congress' dominant power or the owner's qualified title. Then it will define the territorial limits of the servitude and determine whether the particular injury complained of fits within those limits. If the case fits the territorial limitations, the Court will then deny compensation without explaining why the application was necessary or justified and without reiterating the purpose behind the no-

113. *Id.* at 389-90.

114. *Id.* at 390-93. *Commodore Park* was not the first case in which the Court used this type of analysis. The Court in Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915), ruled that Congress had acted within its commerce power over navigation and since its superior power extended to the whole stream, and the particular property was within the stream, the no-compensation rule applied. *Id.* at 259-63. The Court uses similar logic throughout the decisions. Typically, the Court will talk about Congress' dominant power or the private owner's qualified title. Next it will define the territorial limits of the servitude and find that the particular case fits within those limits. The Court will then deny compensation without explaining why the application was necessary or justified and without reiterating the purpose behind the no-compensation rule.

115. *Commodore Park*, 324 U.S. at 393.

116. The bay was dredged so it could serve as a runway for naval seaplanes. *Id.* at 391.

compensation rule.[117] Central to this analysis is the Court's definition of the doctrine's territorial limits. Regarding the navigable mainstream, the servitude was historically limited to the high water mark. Regarding tributaries, however, the more recently adopted limits exemplify the inequities that can occur with such a mechanical analysis.

The 1893 decision in *Shively v. Bowlby*[118] established that in the navigable mainstream, navigation servitude extends to all property below the ordinary high water mark.[119] The Court later determined that the doctrine includes property which does not obstruct navigation and it applies even when the government artificially raises and maintains the water at or above the ordinary high water level[120] of the navigable mainstream.[121] A later group of cases then determined

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117. *See, e.g.*, United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Chicago, M., St. P. & P.R. Co., 312 U.S. 592 (1941); Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915); Lewis Blue Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913).

118. 152 U.S. 1 (1893).

119. Ordinary high water has been defined in various ways such as the average height of all high waters at a given location over a span of 18.6 years, United States v. Ray, 423 F.2d 16, 20 (5th Cir. 1970); as the line where the water stands sufficiently long to destroy vegetation below it, Kelley's Creek and Northwestern R.R. v. United States, 100 Ct. Cl. 396, 406 (1943); as the line below which the soil is so usually covered by water that it is wrested from vegetation and its value for agricultural purposes is destroyed, Harrison v. Fjie, 148 F. 781, 783 (8th Cir. 1906); as the line below which the waters have so visibly asserted their dominion that terrestrial plant life ceases to grow and, therefore, the value of agricultural purposes is destroyed, Borough of Ford City v. United States, 345 F.2d 645, 548 (3rd Cir.), *cert. denied*, 382 U.S. 902 (1965), or as the line below which the soil is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, Oklahoma v. Texas, 260 U.S. 606, 632 (1923).

120. United States v. Chicago, M., St. P. & P.R. Co., 312 U.S. 592, 599 (1941). The railroad owned an embankment on the west bank of the Mississippi River which was protected up to the high water mark by a layer of stone. Additionally the railroad had placed telegraph poles above and below the high water line. The government raised the water level above the high water line, flooding the poles and the embankment. The Court denied compensation for all damages inflicted below the high water line and remanded the case to determine which property was below that line. The Court thereby implicitly recognized that the government must pay compensation for those lands inundated above the ordinary high water line. *Id.* Neither the telephone poles nor the embankment obstructed navigation. *Id.* at 595, 599.

121. *Id.* at 598. *Chicago, M., St. P.* expressly overruled United States v. Lynah, 188 U.S. 445 (1903), which allowed recovery for property located between low and high water marks on a navigable river. It also expressly confined United States v. Cress, 243 U.S. 316 (1917) to its facts. *See infra* notes 138-44 and accompanying text. In 1972 the Court of Claims extended the *Chicago, M., St. P.* doctrine to include within the servitude property which was at all time "fast lands" but which was washed away as a result of federal harbor improvements. Pitman v. United States, 457 F.2d 975 (Ct. Cl. 1972).

to which tributary the navigation servitude extends when the government raises the water level of several streams by damming one stream.[122]

The earliest tributary case limited the servitude to rivers and tributaries that were navigable and whose water was at its natural level.[123] Thus, in *United States v. Cress*, compensation was allowed when a federal dam on the navigable Kentucky River raised the water level of a nonnavigable tributary and destroyed the power generating capacity of a mill.[124]

Cress was limited by *Chicago M. St. P.*[125] twenty years later when the Court eliminated any distinction between the natural and artificial level of a stream.[126] Together *Cress* and *Chicago M. St. P.* represent that the servitude applies to the navigable mainstream up to the high water mark but is not applicable to the nonnavigable tributary even though it may have been made navigable when the water was raised.[127] If the government were to raise the level to the high water mark and damage two properties below high water, one riparian to the mainstream and one riparian to the nonnavigable tributary, only the owner riparian to the tributary would be entitled to compensation.

This hypothetical was presented to the Court in *United States v. Willow River Power Co.*[128] The power company owned a hydroelectric plant at the confluence of the navigable St. Croix and the nonnavigable Willow Rivers. It built a power dam on the Willow River, the tail race[129] of which emptied directly into the St. Croix. When the government raised the St. Croix three feet, it decreased the powerhead[130] drop at the dam and thereby decreased its power

122. The river improvement project in this line of cases is usually situated in a navigable river. Congress does not expressly exert the navigation power over the nonnavigable tributaries to the mainstream as it did in United States v. Grand River Dam Auth., 363 U.S. 229 (1960). *See supra* notes 91-98.

123. United States v. Cress, 243 U.S. 316 (1917).

124. *Id.* at 318. *Cress* decided two fact situations. In the second, a federal dam on the navigable Cumberland river flooded a fording place. The Court awarded compensation because the doctrine did not, at that time, apply to a nonnavigable river. *Id.*

125. 312 U.S. 592 (1941). *See supra* notes 135-36 and accompanying text.

126. *Chicago, M., St. P.* held that the government could, with impunity, raise and maintain the navigable stream at ordinary high water level. *Id.* at 399.

127. Morreale, *supra* note 24, at 32.

128. 324 U.S. 499 (1945).

129. "Tailrace" is the lower mill race; the channel into which the water from a waterwheel or turbine is discharged. WEBSTER'S NEW INT'L. DICTIONARY 1569 (2d ed. 1939).

130. A "powerhead" or "waterhead" is a dammed-up body of water for supplying a garden, mill, etc. *See* WEBSTER'S NEW INT'L DICTIONARY 2884 (2d ed. 1939). When

generating capacity.[131] The only factual difference between *Willow River* and *Cress* is that the tail race in *Willow River* emptied directly into navigable waters, whereas the tail race in *Cress* emptied into nonnavigable waters.

The majority denied compensation arguing that since the tail race emptied directly into the navigable St. Croix, any injury occurred in the navigable mainstream.[132] The dissent argued that the injury occurred on a nonnavigable tributary and then questioned the wisdom of a distinction which would have required compensation if the dam had been located a few hundred feet further up the nonnavigable river.[133]

Willow River exemplifies how the Court uses the mechanical analysis to apply the navigation servitude based solely on the fortuitous circumstance of location. Under this mechanical formula one riparian owner may receive no compensation for damage caused by an increase in the water level while conceivably his neighbor who happened to be riparian to a tributary would. This analysis fosters inequitable decisions because it requires the Court to deny compensation without examining the competing policy considerations underlying the servitude and the "takings" clause. This analysis does not require the Court to determine whether the doctrine is necessary or justified in our present society. The Court's final expansion of the servitude's territorial limits came when it denied compensation for the riparian value of flooded "fast land."

Valuation of "Fast Lands"

Although the flooding of "fast lands"[134] was held a compensable taking as early as 1871,[135] in *United States v. Twin City Power Co.*

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the difference between the levels of the water above and below the dam is decreased, the power generating capacity of the impounded body of water is lessened.

131. United States v. Willow River Power Co., 324 U.S. 499, 500-01 (1945).

132. *Id.* at 504.

133. *Id.* at 514-15 (Roberts, J., dissenting). The territorial limits of the navigation servitude were again explained in United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950), as including any property within the banks of a navigable stream up to the ordinary high water mark. The 5-4 majority awarded compensation to an owner of land riparian to a nonnavigable tributary which was raised when the Corps of Engineers dammed the Mississippi River. The rise in water level elevated the water table and prevented the property from draining into the stream through its intricate system of ditches and pipes. *Willow River* was distinguished on the ground that the loss occurred in the nonnavigable tributary. *Id.* at 807. Thus, the Court affirmed *Cress* and its rule for determining compensation based on the arbitrary circumstance of location.

134. *See supra* note 66.

135. Pompelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

the Court denied compensation for riparian values of flooded "fast land."[136] Twin City Power Company owned "fast land" which had value as a hydroelectric site and which the government intended to flood.[137] The issue was whether the value of the power company's land as a hydroelectric site on the navigable Savannah River should have been included in the compensation computation.[138] In denying compensation, the Court reasoned that private ownership of the running water in a great navigable stream is inconceivable due to the navigation servitude.[139] The power company, therefore, could not claim value for the running water, because it held no property right as against the federal government. Since a hydroelectric plant receives all of its value from the unfettered flow of the running water, the power company could not claim the value of the site as a hydroelectric plant site.[140]

Four dissenters argued that by failing to compensate for the best use of the land, the majority had extended the navigation servitude beyond the streambed and applied it to "fast lands."[141] In a sense they were right; the servitude's boundary was still the bed of the stream, but any value which the land derives from the circumstance of being riparian was noncompensable. Even though *Twin City* may not have expanded the doctrine's territorial limits, the Court's use of the mechanical analysis certainly did expand the list of injuries which are noncompensable under the navigation servitude.[142]

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136. 350 U.S. 222 (1956).

137. The power company had been granted a federal power license which expired before the company began construction. *Id.* at 231-32.

138. *Id.*

139. This reasoning was taken directly from United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 66-67 (1913) (compensation was denied for the present value of future hydroelectric power to have been generated by a facility located within the banks of the stream). However, the *Chandler* court awarded compensation for the special location and adaptability of the land for a canal and set of locks. *Id.* The locks in *Chandler* and the facility in United States v. Twin City Power Co., 350 U.S. 222 (1956), both depended on water for their value, but in *Twin City* the property was not in the bed of the stream. *Id.* at 224. *Chandler* is therefore tenuous authority for the proposition that the value of "fast land" is solely a function of stream flow which is owned by the government, and therefore not subject to compensation.

140. *Twin City*, 350 U.S. at 222.

141. *Id.* at 245 (Burton, J., with Frankfurter, Minton, and Harlan, J.J., dissenting.)

142. Some commentators believed that the Court retreated from its *Twin City* decision in United States v. Virginia Electric and Power Co., 365 U.S. 624 (1961), by straining to find an alternative compensable value in an easement held by the power company to flood certain lands which was "taken" when the government flooded those lands. *See, e.g.*, Bartke, *supra* note 21, at 18-21.

The Court reaffirmed *Twin City* in the 1967 case of *United States v. Rands*[143] by not allowing for the valuation of "fast land" as a port site on the Columbia River. After analogizing to the riparian access cases,[144] the Court cited *Twin City* as controlling and allowed compensation only for the land's value for sand, gravel and agricultural purposes.[145]

In response to the considerable criticism evoked by *Rands*, Congress effectively overruled both it and *Twin City* with section 111 of the Rivers and Harbors and Flood Control Act of 1970.[146] Section 111 was effectively applied to compensate for the riparian value of lake front property which was "taken" for a wilderness park.[147] Accordingly, it appears that the *Twin City* expansion of the navigation servitude has been effectively halted.[148]

Paralleling the expansion of federal control over the nation's water resources, the navigation servitude has expanded from a doctrine limited to tidal waters to a rule applicable to all navigable, and some nonnavigable rivers.[149] The early obstruction cases applied the servitude using a property concept analysis, commerce clause power

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143. 389 U.S. 121 (1967).

144. "[J]ust as the navigational privilege permits the government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss . . . it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." *Id.* at 123-24 (quoting *Virginia Electric*, 365 U.S. at 629).

145. *Rands*, 389 U.S. at 124-25.

146. Section 111, which has been codified at 33 U.S.C. § 595(a) provides:

> In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and all condemnation proceedings by the United States to acquire lands or easements for such improvements, *the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all the uses to which such real property may reasonably be put*, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters.

33 U.S.C. § 595(a) (1982) (emphasis added).

147. United States v. 967.905 Acres in Minnesota, 447 F.2d 764 (8th Cir. 1971).

148. The *Twin City* analysis has since appeared in a context unrelated to water. The doctrine was applied in United States v. Fuller, 409 U.S. 488 (1973), to deny compensation for the increased value of a cattle ranch due to its contiguity to government property over which the rancher held a grazing license. The *Twin City* doctrine is by no means dead.

149. *See supra* notes 69-98 and accompanying text.

analysis, and a notice theory. These cases provide the foundation for confusion in the later decisions through the Court's application of the servitude without an explanation as to why it was necessary or justified.[150]

The scope of the servitude exceeded that of the English model when compensation was denied to riparians whose access to the stream had been blocked by a federal improvement to navigation. The original concept was completely distorted when compensation was denied for the loss of access occasioned by the destruction of a navigable stream.[151]

The physical limitations of the servitude have expanded from the natural level of the stream limitation to include all injury occurring below the ordinary high water mark even if the stream is artificially maintained at that level. A mechanical formula has been worked out by which compensation may depend on location alone.[152] Finally, the no-compensation rule has been expanded past the banks of the stream to include the riparian value of "fast land." So much criticism was leveled at this last expansion that Congress passed legislation designed to override *Rands* and *Twin City.*[153]

Against this backdrop of continued, confused expansion of the servitude between 1920 and 1979, and the criticism of that expansion, the Supreme Court decided *United States v. Kaiser-Aetna.*[154]

THE KAISER DECISION

The Supreme Court's decision in *United States v. Kaiser-Aetna* spawned considerable literary comment.[155] Most commentators applauded the decision as significantly limiting the scope of the servitude; some voiced concern that the opinion merely injected one more ele-

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150. *See supra* notes 99-106 and accompanying text.

151. *See supra* notes 107-16 and accompanying text.

152. *See supra* notes 117-33.

153. *See supra* notes 134-48.

154. 444 U.S. 164 (1979).

155. Brady, *The Navigation Easement and Unjust Compensation,* 15 J. MAR. 357 (1982); Want, *The Taking Defense to Wetlands Regulation,* 14 ENVT'L L. REP. 10169 (1984); Note, *Taking Without Just Compensation,* 94 HARV. L. REV. 205 (1980) [hereinafter cited as *Takings*]; Note, *Navigable Water Not Always Subject to Free Public Access,* 21 NAT. RESOURCES J. 161 (1981) [hereinafter cited as *Public Access*]; Note, *Freedom from the Navigation Servitude Through Private Investment,* 59 NEB. L. REV. 1073 (1980) [hereinafter cited as *Freedom*]; Note, *supra* note 34, at 461; Recent Decision, *Should Public Works Projects Anchor the Navigation Servitude: Kaiser-Aetna v. United States,* 41 MD. L. REV. 156 (1981).

ment into an already confused doctrine; and some construed the opinion narrowly, predicting that it would be limited to its facts.[156] The remainder of this note analyzes the *Kaiser-Aetna* decision and its application in the last five years, arguing that the scope of the navigation servitude is still uncertain and that the significance of *Kaiser-Aetna* remains unclear.

The subject of the *Kaiser-Aetna* dispute, Kuapa Pond, was a two-foot deep, nonnavigable, in fact, fish pond in Hawaii.[157] Prior to its improvement, it was separated from a navigable bay by a barrier beach which contained two openings to the bay.[158] Through these two openings, the pond was subject to the influx of the high tide which cleansed the pond and made it suitable to raise fish.[159] In the late 1960s Kaiser-Aetna dredged and improved the pond into a private, navigable marina,[160] after which the Army Corps of Engineers sought an injunction to compel public access to the marina. The injunction was denied at the trial level, but was granted by the Ninth Circuit Court of Appeals.[161] The Supreme Court then reversed the Ninth Circuit and specifically held that the navigation servitude does not automatically apply to a previously nonnavigable pond rendered navigable through private expenditure. Even though the pond is subject to regulation under the navigation power of the commerce clause, a balancing test must be employed to determine the applicability of the servitude.[162]

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156. *See supra* note 155.

157. Kuapa Pond covered 523 acres and extended approximately 2 miles inland from Mounahua Bay and the Pacific Ocean on the island of Oahu, Hawaii. United States v. Kaiser-Aetna, 408 F. Supp. 42, 46 (D.C. Haw. 1976), *rev'd*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 444 U.S. 164 (1979).

158. *Id.*

159. The district court described the tidal pond as follows:

> The fishpond's managers placed removable sluice gates in the stone walls across these openings. During high tide, water from the bay and ocean entered the pond through the gates. During low tide, the current flow reversed toward the ocean.
>
> The Hawaiians utilized the tidal action in the pond to raise and catch fish, primarily mullet. During ebb tides, the sluice gates allowed water but not large fish to escape, thus "flushing" and enriching the pond while preserving the crop. Water depths in the pond varied up to 2 feet at high tide. Large areas of land at the inland end were completely exposed at low tide. The fishermen harvested the pond with the aid of shallow-draft canoes or boats, but the barrier beach and stone walls prevented boat travel directly therefrom to the open bay. *Id.*

160. *Kaiser-Aetna*, 444 U.S. at 168.

161. *Id.* at 170.

162. *Id.* at 180.

Justice Rehnquist, speaking for the majority, sidestepped the question of whether the pond was legally navigable because prior to the improvement it had been subject to the ebb and flow of the tide. He impliedly ruled that navigability for servitude purposes means waters that are navigable in fact regardless of whether they are subject to the ebb and flow of the tide.[163] Having disposed of the government's threshold argument,[164] Rehnquist positioned himself to address the issue of whether a nonnavigable pond, made navigable by a private effort, is automatically subject to the navigation servitude.[165]

Rehnquist made the most important ruling in the case in holding that the navigation servitude does not automatically apply when Congress regulates navigation under the commerce clause. Even though the Corps of Engineers had the power to regulate Kuapa Pond under the Rivers and Harbors Act, that the servitude automatically applied did not follow.[166] By so ruling, the Rehnquist majority was free from the mechanical application of the servitude which had characterized many of the decisions and was thereby able to balance the policies and equities of the case.[167]

The servitude, explained Rehnquist, "exists by nature of the commerce clause in navigable streams [and] gives rise to an authority in the government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in in-

163. As the dissent points out, Rehnquist skipped the issue of the pond's navigability in its natural state. The opinion clearly states that the pond was subject to the ebb and flow of the high tide and would thus be navigable under the ebb and flow test which had been affirmed as recently as 1974 in United States v. Stoeco Homes, 498 F.2d 597 (3d Cir. 1974). Since Rehnquist had to get past navigability in the natural state before he could deal with the artificial navigability produced by private effort, the opinion must be read as impliedly rejecting the ebb and flow test for application of the servitude.

164. Brief for Respondent, United States at 20, Kaiser-Aetna v. United States, 444 U.S. 164 (1979).

165. Rehnquist had at this point reduced the *Kaiser-Aetna* issue to the same one as in the companion case of Vaughn v. Vermillion Corp., 444 U.S. 206 (1979), namely, whether a nonnavigable water made navigable by private effort, is subject to the no-compensation rule of the navigation servitude when the waterway is "taken" by the government.

166. "[T]his Court has never held that the navigational servitude [which] creates a blanket exception to the "takings" clause [applies] whenever Congress exercises its commerce clause authority to promote navigation." *Kaiser-Aetna*, 444 U.S. at 173.

167. The government and the dissent made the traditional argument that the servitude attaches automatically upon a finding of navigability. *Id.* at 184-87. Since Rehnquist rejected this contention, he was faced with deciding under what circumstances the doctrine should apply. At this point he could have either formulated a new test or applied a balance. He chose the latter. *Id.* at 177-81.

terstate commerce."[168] He then examined Kuapa Pond and found that due to its incapability of being used as a continuous highway for the purpose of navigation in interstate commerce, it was not the sort of great navigable stream which has been recognized as being incapable of private ownership.[169] In addition, he ruled that Kaiser-Aetna's expenditures in the face of government silence led to the fruition of a number of "investment backed expectancies."[170] Thus, the balance resulted in favor of Kaiser-Aetna and the servitude did not apply. Rehnquist then reiterated that since the pond was subject to commerce clause jurisdiction, the Corps could require it to be opened to the public; however, to do so the Corps would have to invoke the eminent domain power and pay just compensation.[171]

Justice Blackmun's dissent argued that the pond was navigable prior to its improvement under the ebb and flow test, and certainly thereafter under the *Appalachian* test.[172] He then argued that the servitude extended to the limits of interstate commerce by water and thus extended to Kuapa Pond whether or not it was considered navigable prior to its improvement.[173] Finally, he charged that the majority decision would enable private developers to claim that their improvements to a waterway had transformed that highway for interstate commerce into private property and thereby had allowed them to restrict access.[174]

Kaiser-Aetna is unique in two respects. First, it does not involve an inland stream as do most servitude cases, but rather a lagoon contiguous to the Pacific Ocean.[175] An ocean lacks the physical restrictions of a river and therefore should not be subject to the same degree of regulation required to insure the free flow of commerce.[176] Second,

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168. *Id.* at 178.

169. *Id.* at 179-80.

170. *Id.* at 180.

171. *Id.* at 181.

172. *Id* . at 182-84 (Blackmun, J., with Brennan and Marshall, J.J., dissenting).

173. *Id.* at 184-87.

174. *Id.* at 192. The dissent and several commentators argued that the majority used the status of Kuapa pond under state law, which was something similar to "fast lands," to defeat the servitude. The majority was indeed unclear as to the importance of Hawaiian property law. However, that law cannot be considered a factor. In Vaughn v. Vermillian Corp., 444 U.S. 206 (1979), *Kaiser-Aetna*'s sister case which was decided upon the controlling principles in *Kaiser-Aetna*, no such private property rights existed to transform navigable water into "fast land." *Id.* at 208.

175. *See supra* notes 157, 159.

176. It would be much harder to obstruct navigation in the ocean than it would be in a river. The government therefore has a greater interest when the servitude is asserted over a river site than when it is asserted over an ocean site.

the government action involved in *Kaiser-Aetna* was initiated solely by the Corps of Engineers. It was neither initiated by Congress[177] nor executed under congressional authority pursuant to a specific improvement project, as have been most other recent servitude cases.[178] If Congress had initiated the action, and therefore been more directly involved in the action, Rehnquist might have had difficulty convincing a majority of the Court that the navigation servitude did not automatically apply. These factual distinctions have prevented *Kaiser-Aetna* from being the water shed case which several commentators predicted it would be.[179]

Kaiser-Aetna's importance lies in the territorial and theoretical limitations it placed on the navigation servitude. The Court rejected the notion that nonnavigable in fact tidal waters are subject to the servitude.[180] Consequently, the United States may not be able to raise the navigation servitude as a defense to inverse condemnation claims arising from regulation under the Wetlands and Clean Water Acts.[181] Moreover, the servitude may not apply to tidal waters close to the shore that are nonnavigable due to the surf. Thus, private owners may now have a defense to the denial of dredge and fill permits and other federal regulation when the property is not navigable in fact.[182]

The *Kaiser-Aetna* decision flatly rejected any contention that the servitude is co-extensive with the commerce clause power over navigation.[183] Justice Rehnquist cautioned against the continued expansion of the doctrine arguing that under the strict logic of the earlier cases, the servitude could conceivably be applied to any exercise of commerce clause power.[184] The most profound impact, however, involves

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177. The action was initiated by the Corps of Engineers under the Rivers and Harbors Act, 22 U.S.C. § 403 (1899) which is "blanket" legislation giving the Corps power to keep navigable waters free of obstructions. United States v. Kaiser-Aetna, 444 U.S. 164, 169 (1979).

178. *See, e.g.*, United States v. Rands, 389 U.S. 121 (1967) (John Day Lock and Dam project); United States v. Virginia Electric and Power Co., 365 U.S. 624 (1961) (Dam River project); United States v. Grand River Dam Authority, 363 U.S. 229 (1960) (Ft. Gibson project).

179. *See* Recent Decision, *supra* note 155, at 1092.

180. *See supra* note 163 and accompanying text.

181. *See* Want, *supra* note 155, at 10171. *See also infra* notes 226-33 and accompanying text.

182. *See infra* notes 191-205 and accompanying text.

183. United States v. Kaiser-Aetna, 444 U.S. 164, 173 (1979).

184. Rehnquist said:

> There is no denying that the strict logic of the more recent cases limiting the Government's liability to pay damages for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for "just compensation" under the Fifth Amendment even

the majority's disregard of the absolute, mechanical analysis that had characterized the servitude decisions for many years.[185] Instead, the Court used a balancing test to decide whether the doctrine was applicable, weighing the government's interest in avoiding payment of compensation, against the private economic and estoppel interests.[186] After the Court found that the servitude did not apply, it used a traditional eminent domain analysis to determine whether the regulation was sufficient to constitute a compensable taking.[187]

Critics justifiably point out that while the Court narrowed the definition of navigability and discredited the mechanical application of the doctrine, *Kaiser-Aetna* left the doctrine in a state of confusion.[188] The Court failed to expressly overrule prior precedent; it also failed to explain the importance of Kaiser's investment, or of the prior status of Kuapa Pond under Hawaiian law, or the significance of the Corps' prior consent to dredge, or the value of the "expectancies" created in Kaiser. Thus, the lower courts are now required to strike a balance without guidance as to the relative values of the factors.[189]

Other commentators have argued that since the *Kaiser-Aetna* facts are unique to previous servitude decisions, and since the majority failed to give clear direction for future application of the doctrine, the decision may not have precedential value in the river context and therefore may be limited to its facts.[190] An examination of the post *Kaiser-Aetna* cases will demonstrate that the prophesy of these latter critics has been borne out. The lower courts are not using the balancing analysis in river cases and the future scope of the navigation servitude is still unclear.

POST KAISER DOCTRINE

In five years since the *Kaiser-Aetna* decision, the lower courts have inconsistently applied the navigation servitude. The decisions

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in a situation as different from the riparian condemnation cases as this one. *Id.* at 177.

185. *See supra* notes 166, 167 and accompanying text.

186. *Kaiser-Aetna*, 444 U.S. at 179-81.

187. The servitude is an exception to the "takings" clause. If the servitude does not apply, the next step is the conventional "taking" analysis under Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). The Court in *Kaiser-Aetna* concluded that the government's attempt to create a public right of access was sufficient to amount to a "taking." *Kaiser-Aetna*, 444 U.S. at 179.

188. *Takings*, *supra* note 155, at 213-14.

189. *Id.* This commentator argues that the ad hoc analysis begun by the Court will make outcomes unpredictable and property interests insecure. He calls for a clear rule that the "takings" clause applies to waters made navigable by private parties.

involving the doctrine as a defense to Clean Water Act (C.W.A.) and Rivers and Harbors Act (R.H.A.) regulation have adhered to the principles advanced in *Kaiser-Aetna*,[191] while decisions involving the more conventional river settings have mechanically applied the servitude with little mention of *Kaiser-Aetna*.[192] Some courts seem willing to restrict the scope of the doctrine, while at least one other court has applied the servitude to further a public recreation project.[193] The navigation servitude is as confused as ever and is therefore unpredictable.[194]

The Court of Claims rejected an attempt to use the navigation servitude as a defense to regulation under the R.H.A. in *Laney v. United States*.[195] Laney claimed a regulatory "taking" when the Corps refused to issue him the required permit to build a pier to access his small island in the Atlantic Ocean.[196] The Corps argued that the servitude precludes any compensation award when the government denies a riparian's right of access. Citing *Kaiser-Aetna*, the court ruled that the servitude is intended to promote navigation, and is not to be used as a tool to regulate the uses to which an island may be put by denying the only feasible method of access.[197] It then distinguished the earlier access denial decisions[198] because in those cases the government was improving navigation whereas in *Laney* the Corps was regulating the island.[199] The court declined to automatically apply the doctrine to a government action involving navigable waters and instead inquired whether the proposed application would be consistent with the doctrine's purpose.[200] Since the Corps'

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190. *Freedom*, *supra* note 155, at 1092.

191. The Clean Water Act (formerly the Federal Water Pollution Control Act) is codified at 33 U.S.C. §§ 1251-1376 (1982). The Rivers and Harbors Act comprises virtually all of title 33. 33 U.S.C. §§ 1-1251 (1982). *See infra* notes 195-205 and accompanying text.

192. *See supra* notes 206-52 and accompanying text.

193. Loving v. Alexander, 548 F. Supp. 1079 (W.D. Va. 1982), *aff'd*, 745 F.2d 861 (4th Cir. 1984).

194. Unpredictability in a doctrine is undesirable for attorneys who must counsel clients about the legal consequences of various decisions. Unpredictability in the navigation servitude doctrine can also cause insurance, mortgage, and market valuation problems for riparian owners.

195. 661 F.2d 145 (Ct. Cl. 1981).

196. *Id.* at 145-47. It appears that the Corps denied the required permit because the Corps wanted the island kept in its pristine state.

197. *Id.* at 149.

198. The decisions in which the government successfully denied a riparian owner's right of access to the water are discussed *supra* in the text accompanying notes 107-16.

199. *Laney*, 661 F.2d at 147-49.

200. *Id.*

regulation was unrelated to navigation, the court avoided expanding the doctrine by declining to apply the servitude.

The United States District Court for the Eastern District of Virginia also followed *Kaiser-Aetna* and avoided expanding the servitude in *1902 Atlantic Limited v. Hudson.*[201] The property owner had claimed a "taking" when the Corps refused to issue it a permit to fill a man-made borrow pit which was nonnavigable in fact but subject to the ebb and flow of the tide.[202] Responding to the government's navigation servitude defense, the court cited *Kaiser-Aetna* and ruled that the mere ebb and flow of the tide is an insufficient basis to invoke the navigation servitude.[203] It then applied the traditional "takings" analysis and awarded compensation.[204] Through 1985, the lower courts have not expanded the navigation servitude by applying it as a defense against "taking" claims under C.W.A. and R.H.A. regulation.[205]

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201. 574 F. Supp. 1381 (E.D. Va. 1983).

202. The "borrow pit" consisted of 22 acres of sand and mudflat bottom area and of less than 3/4 acres of wetlands. It was completely contained within man-made embankments and was subjected to inundation by tidal flow from a creek. *Id.* at 1384.

203. *Id.* at 1405.

204. *Id.*

205. In two other cases, the Court of Claims sidestepped the government's assertion that the navigation servitude was a defense to the developer's claim that the Corps' denial of dredge and fill permits amounted to a taking. In both Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981), and Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981), the developers owned properties which were subject to the ebb and flow of the tide and which were thus subject to federal jurisdiction. The properties were not navigable in fact, so when the Corps of Engineers denied the required dredge and fill permits, the developers claimed that the denial constituted a "taking." The Court apparently viewed the imposition of the servitude as a close question even though *Kaiser-Aetna* disapproved of the ebb and flow test for servitude purposes. The Court expressly declined to address the issue and denied compensation in both cases by holding that the mere frustration of reasonable investment-backed expectancies did not constitute a "taking." *Deltona*, 657 F.2d at 1194; *Jentgen*, 657 F.2d at 1214. *See also* Want, *supra* note 155, at 10172.

The District Court of Idaho also exhibited an unwillingness to automatically apply the doctrine in Swanson v. United States, 600 F.Supp. 802 (D. Idaho 1985). The court ruled that the Corps' regulatory jurisdiction extended to the entire surface area of a lake which the Corps had enlarged. In a dictum, the court noted that it had not decided whether the newly flooded areas were subject to a public right of access. It said:

> A careful reading of the *Kaiser* opinion reveals that though a body of water is a navigable water of the United States subject to Congress' regulatory authority under the commerce clause, it does not necessarily follow that the body of water in question is also subject to the public right of access. In so holding, the Supreme Court reversed the court of appeals' determination that federal regulatory authority over navigable waters and the right of public access could not consistently be separated (citations omitted).

Though the courts have not extended the servitude to relieve the government of its obligation to compensate owners for certain regulatory takings, the courts are using the mechanical analysis in traditional types of servitude cases. These lower courts seem unwilling to apply the *Kaiser-Aetna* balancing approach and seem uncertain as to whether the doctrine should be expanded to other nontraditional areas.

An excellent example of a court's reliance on pre-*Kaiser-Aetna* analysis is *United States v. Certain Parcels of Land in Valdez.*[206] At issue was a state-owned ferry terminal in Valdez Harbor on which the government wished to place a Coast Guard station.[207] During the condemnation proceedings, the state claimed compensation for the dock. The Ninth Circuit Court of Appeals observed that Congress had invoked the navigation power by stating in the appropriation legislation that the project was to improve and protect navigation.[208] The court then cited *Kaiser-Aetna* and stated that the navigation servitude does not automatically apply whenever the navigation power is invoked.[209] Instead of balancing the equities involved, the court merely distinguished the facts from *Kaiser-Aetna* on the ground that no private investment was present. The court applied the territorial analysis of *Chicago, M., St. P.* and thus denied compensation.[210]

The result of the *Valdez* decision was correct, however, the reasoning was wrong. *Kaiser-Aetna* teaches that the court should determine whether the particular watercourse serves as a "continuous highway for the purpose of navigation in interstate commerce" and then balance that interest against the equities that favor the private owner.[211] The Ninth Circuit merely distinguished *Kaiser-Aetna* and applied *Chicago, M., St. P.*[212] The fault with this analysis is that *Chicago,*

Id. at 809. Thus the court declined to automatically apply the servitude solely on a finding of navigability.

206. 666 F.2d 1236 (9th Cir. 1982).

207. The existing ferry terminal facility consisted of the wooden ramps used as a dock and twelve clusters of closely driven pilings used as a fender or mooring guide. This terminal was built by the Corps of Engineers with federal funds though it was owned by the State of Alaska. *Id.* at 1238.

208. The court did not dispute Congress' stated purpose. "We may not second guess Congress' decision that the action will aid navigation." *Id.* at 1239.

209. *Id.* at 1239-40.

210. *Id.* at 1240.

211. United States v. Kaiser-Aetna, 444 U.S. 164, 177-80 (1979). *See also supra* notes 166-71 and accompanying text.

212. The court applied pre-*Kaiser* precedent stating:

> We are persuaded that the instant case if governed by the line of cases holding that private improvements connected to fastlands but located in

M., St. P., *Rands*, *Commodore Park* and similar decisions made no inquiry whether the servitude was necessary for that particular water course.[213] Once jurisdiction was found, these earlier cases only asked whether the property was below the high water line and whether the stream was navigable. The Court simply applied the servitude whenever these questions were answered affirmatively.[214] *Kaiser-Aetna* rejected such a mechanical approach and instead mandated a balancing approach.[215] Therefore, the court should not have employed *Chicago, M., St. P.* to determine the applicability of the servitude to this water course. The prior decisions are helpful to determine the territorial limits of the servitude once it is applied, but not to determine its applicability in the first instance.

The *Valdez* decision would have probably been the same if a balance analysis had been used. For example, the watercourse in question was a boat harbor[216] where some interstate commerce was likely to have been carried on. The government interest in not paying compensation to protect that flow of commerce is therefore moderately strong.[217] The private interest is conversely weak because although the state owned the dock, it was built with federal funds.[218] Accordingly, the servitude should apply.

The Claims Court likewise abandoned the balance approach in *Miller v. United States*.[219] Miller owned land riparian to the Arkansas

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navigable waters may be altered or removed by the Government to improve navigation without compensating the owner. *See, e.g.*, United States v. Rands, 389 U.S. 121 (1967); United States v. Commodore Park, 324 U.S. 386 (1945); United States v. Chicago, M., St. P. & P.R. Co., 312 U.S. 592 (1941); Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915); Union Bridge Co. v. United States, 204 U.S. 364 (1907).

Valdez, 666 F.2d at 1240.

213. Since the servitude applied to all navigable streams, a finding of navigability precluded inquiry into the necessity of applying the servitude to each particular stream. *See* United States v. Chicago, M., St. P. & P.R. Co., 312 U.S. 592 (1941).

214. *See supra* text accompanying notes 109-54.

215. *See supra* notes 166-71 and accompanying text.

216. United States v. Certain Parcels of Land in Valdez, 666 F.2d 1236, 1238 (9th Cir. 1982).

217. The stimulation of water based transportation in interstate commerce is the end for which the navigation servitude doctrine is but a means. Therefore when a given watercourse is more important, in terms of its impact on navigation in interstate commerce than another watercourse, the government's interest in not paying compensation to protect the flow of commerce, on the former watercourse is greater than the same interest in the latter watercourse.

218. *Valdez*, 666 F.2d at 1238.

219. 550 F. Supp. 669 (Cl. Ct. 1982), *aff'd*, 714 F.2d 160 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 343 (1983).

River which resembled a peninsula because of a loop in the river bed. The government purchased land from Miller and diverted the river across the peninsula.[220] The old bed then became farmable land to which Miller obtained title.[221] In 1969 the Corps built a multi-purpose dam and raised the water level downstream from the Miller property making the old channel property unfit for farming.[222] When the parties stipulated that the land had been subject to the servitude prior to the diversion, the issue became whether the servitude remained attached to the land even though the land was no longer a river bed. The Claims Court treated the servitude as a property interest and ruled that the diversion was an avulsive change.[223] Citing traditional property law, it ruled that the government's property interest did not shift with the river as long as a navigational purpose existed in the exposed land.[224] The court found the requisite navigational purpose in the parties' stipulation: "It is necessary to flood the lands in controversy to permit navigation on the Arkansas River." So the court ruled that the servitude still applied to the old river bed and thus denied compensation.[225]

The *Miller* decision exemplifies the confusion with which the doctrine is applied. The court treated the servitude as though it were

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220. The Corps of Engineers was concerned that the river would cut its own channel across the "neck" of the peninsula. This natural change would have hindered navigation because the new channel would have contained sharp bends and obstructions. The Corps bought Miller's land, dug a straight channel across the peninsula, and diverted the river in 1952. *Id.* at 671.

221. The old bed became a nonnavigable lake and eight hundred acres of farmable land. The case report does not specify how Miller subsequently acquired title to the 800 acres. *Id.* at 672.

222. *Id.* at 672. Miller alleged that the land was subject to increased and prolonged flooding. He also claimed that the downstream impoundment raised the water table beneath his land which made it so soggy that he was unable to machine farm part of it. These are the same type of injuries for which compensation was allowed in United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950). *See supra* note 133.

223. "Avulsion" is a quick, perceptible, violent change in the river channel and is opposed to "accretion" which is an imperceptibly slow change in the channel. Federal common law and most states' law provide that an owner's title to riparian land will shift and change with the accretions, however no shift in title is caused by an avulsive change. *See* Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), *overruled on other grounds*, 429 U.S. 363 (1977).

224. The *Bonelli* decision introduced to the federal common law the proposition that the navigation servitude may attach to exposed riverbed if the land is necessary for navigational purposes. *Bonelli* was relied on by the Claims Court to dispose of the *Miller* case. Miller v. United States, 550 F. Supp. 669, 673 (Cl. Ct. 1982).

225. *Id.*

a property concept using title doctrines[226] to decide the case even though the Supreme Court explained that the servitude is a power concept, not a property concept.[227] Furthermore, the *Miller* court relied on overruled authority for the novel proposition that so long as a navigational purpose existed, the servitude would apply to a former streambed under the avulsion doctrine.[228]

Even assuming the navigation servitude is a property concept, the court's analysis was strained. If the servitude is a property interest, it must have burdened the exposed riverbed during the entire time the bed was exposed.[229] Since the court's determination that the servitude remained with the property depended on whether a navigational purpose existed, it should have asked whether such a purpose existed when the government transferred fee title to Miller. That question would have been answered in the negative, because the dry streambed had no navigational purpose once the diversion was completed.[230] Instead, the court inquired whether a navigational purpose presently existed.[231] Since the land was already flooded, *Miller* necessarily answered in the affirmative; yet, that interrogatory was irrelevant because if the servitude did not continuously burden the streambed, title to the land was unencumbered.

If the servitude is a power concept, the court unnecessarily considered the accretion and avulsion doctrines. The only question under a power analysis is whether the servitude should apply. This question is answered by employing either a mechanical application or a

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226. Avulsion and accretion are title doctrines used to determine whether a change in the riverbed alters the ownership of both the newly submerged and the newly exposed land. The *Bonelli* decision itself is a title decision. *Bonelli*, 414 U.S. at 313.

227. Justice Douglas in *Twin City* said "[t]he interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property." United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).

228. The Court overruled *Bonelli* in Oregon Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (state law should have been applied in the *Bonelli* case instead of federal common law).

229. Since Miller hadn't granted a new easement or servitude, the earlier servitude must have burdened the land the entire time. *See* W. BURBY, REAL PROPERTY 72-75 (3d ed. 1965).

230. Presumably, the government would never have transferred the land if the Corps had required it for a navigational purpose. Even if the Corps had anticipated using the dry bed for a purpose relating to navigation, they could have reserved an appropriate interest. It therefore appears that a navigational purpose did not exist in the streambed between the time of the diversion and the subsequent reflooding. Nor does it appear that such a purpose was forseen by the parties.

231. Miller v. United States, 550 F. Supp. 669, 674 (Cl. Ct. 1982).

balancing analysis. Using a mechanical analysis, the only questions are whether the river is navigable and whether the injury occurred between the banks, below the high water level.[232] The court's decision under a balancing analysis would be based on a consideration of the policies underlying the no-compensation rule. In neither case would the court need to rely on title doctrines and a "navigational purpose" test enunciated in a case of marginal precedential value.

The *Kaiser-Aetna* analysis was again disregarded in *Loving v. Alexander*,[233] where the court expanded the scope of the navigation servitude by applying it to aid a project which was unrelated to improving navigation. When the Corps of Engineers built the Gathright Dam on the Jackson River in Virginia, it destroyed an eleven mile, state-stocked, public access trout fishery. The Corps proposed to relocate the trout fishery in a nineteen mile section downstream from the dam. The owners riparian to the proposed site along the stream sought injunctive relief or compensation for the "taking" of their rights of exclusivity.[234] The district court found that the river was navigable based on historic use, but then ruled that the Corps of Engineers lacked regulatory jurisdiction due to a 1976 amendment to the Rivers and Harbors Act.[235] The court cavalierly applied the navigation servitude on the ground that the river was subject to commerce clause regulation because future use of the proposed fishery by out-of-state fishermen would affect interstate commerce.[236] It distinguished *Kaiser-Aetna* on grounds that the Jackson River, unlike Kuapa Pond, was historically navigable and used a notice theory to justify its decision.[237] The government therefore required riparian owners to allow public access to the river and streambed without being paid compensation, even though the government was without jurisdiction to regulate that access to the river.

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232. *See supra* note 114.

233. 548 F. Supp. 1079 (W.D. Va. 1982), *aff'd*, 745 F.2d 861 (4th Cir. 1984).

234. *Id.* at 1081.

235. 33 U.S.C. § 59*l* enacted in 1976 provides:

> The prohibitions and provisions for review and approval concerning wharves and piers in waters of the United States as set forth in sections 403 [403 gives the Corps of Engineers regulatory jurisdiction over all navigable waters of the United States] and 565 of this title shall not apply to any body of water located entirely within one state which is, or could be, considered a navigable body of water of the United States solely on the basis of historical use in interstate commerce.

The district court found that the Jackson was located entirely within Virginia and that the determination of navigability was based solely on historical use. Therefore, the court concluded that the Corps of Engineers lacked jurisdiction. Loving v. Alexander, 548 F. Supp. 1079, 1090 (W.D. Va. 1982).

236. *Id.* at 1090-91.

237. *Id.*

The Fourth Circuit Court of Appeals affirmed,[238] ruling that the Jackson was legally navigable (though not presently navigable) since it had been used to float logs several times in the early 1900's.[239] Based on the navigability ruling, the court then applied the servitude and commented only that the servitude had existed since the ratification of the Constitution.[240] In a dictum, the court cautioned that its decision only granted public access to the *surface* of the river not the bed and banks.[241]

The Fourth Circuit opinion exemplifies the apparently absurd results which can be reached when courts mechanically apply the doctrine based solely on a finding of navigability. Under Virginia law, riparian owners hold fee title to the bed and banks of the stream.[242] Since the *Alexander* court granted public access only to the surface of the river, the public may not fish standing on the banks or in the stream itself. The only practical way that the public can use the river is by boat, yet the river is not presently navigable. Therefore the public may not be able to enjoy the fishery at all.

The *Alexander* opinions represent the greatest expansion of the navigation servitude since *Twin City* and *Grand River Dam Authority* because the *Alexander* courts applied the servitude in a context unrelated to maintaining navigation. Congress did not intend the Gathright Dam to aid navigation;[243] the Jackson River is not presently navigable;[244] and the Corps did not even have jurisdiction to attempt to make it navigable.[245] The navigation servitude was applied solely to protect a proposed public recreation interest. Such a purpose is lofty, but it is not and never has been the intended purpose of the doctrine.[246] The procurement of public recreation facilities has always involved the payment of just compensation.[247] *Alexander* undoubtedly falls within Justice Rehnquist's admonition that under the strict logic of the recent decisions, the no-compensation rule could

238. Loving v. Alexander, 745 F.2d 861 (4th Cir. 1984).

239. *Id.* at 264-67.

240. *Id.* at 267.

241. *Id.*

242. *Id.* at 268.

243. "In 1946 Congress authorized construction of the Gathright Dam on the Jackson River, Virginia, for purposes of flood control, water quality control, and recreation." *Alexander*, 548 F. Supp. at 1082.

244. *Id.* at 1085.

245. *See supra* note 235 and accompanying text.

246. Harnsberger, *supra* note 3, at 145.

247. Shoemaker v. United States, 147 U.S. 282 (1895) (upholding the power to condemn land for recreational purposes as long as just compensation is paid); Tennessee Valley Auth. v. Welch, 327 U.S. 546 (1946).

theoretically be applied to any regulation under the commerce clause no matter how unrelated to navigation.[248] By failing to apply any type of balancing analysis in *Alexander*, the Fourth Circuit arguably confined the *Kaiser* analysis to similar fact situations. Moreover, *Alexander* represents an unwarranted expansion of the navigation servitude.

The Fourth Circuit also abandoned the *Kaiser* balance and ruled in *Ballam v. United States* that the servitude applies to all naturally navigable waterways.[249] Ballam claimed a "taking" when the banks of a man-made navigable canal created and maintained by the United States eroded her property. The court first ruled that if the canal were a natural waterway, the servitude would automatically apply.[250] It then construed the deed granting an easement for the canal as intending the canal to be treated as though "it had always existed as a product of natural forces".[251] Lastly, the court applied the servitude and denied compensation.[252] The decision disregarded the *Kaiser* analysis and evidenced the Fourth Circuit's apparent intention to limit *Kaiser-Aetna* to its facts.

Even though many courts automatically apply the servitude in traditional river context cases, at least one court has declined to mechanically deprive the owner of compensation and has looked to the equities involved. The Corps of Engineers in *119.67 Acres v. United States*[253] instituted condemnation proceedings under congressional directive to acquire a "spoil servitude"[254] for improvement of the Mississippi River in Louisiana. Eventually the government and the owner reached an agreement which was entered as a consent judgment in 1974.[255] In 1978, the Corps ignored the judgment alleging that it was void because the navigation servitude exempted the Corps from paying compensation.[256] Before reaching the servitude question, the court ruled that the government had surrendered its right to assert the navigation servitude.[257] The Fifth Circuit emphasized that the 1974 agree-

248. United States v. Kaiser-Aetna, 444 U.S. 163, 177 (1979).

249. Ballam v. United States, 747 F.2d 915 (4th Cir. 1984).

250. *Id.* at 918.

251. *Id.* at 919.

252. *Id.*

253. 663 F.2d 1328 (5th Cir. 1981).

254. The land was condemned in order to guarantee locations for the placement of special materials dredged from the Mississippi River by the Corps of Engineers in their continuing efforts to maintain the navigability of the river. *Id.* at 1329 n.1.

255. *Id.* at 1329.

256. *Id.* at 1330.

257. The decision is unique because only two other navigation servitude cases have used government estoppel or similar principles. In United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974), the court ruled that the government surrendered

ment required eighteen months of negotiation and was authorized by the Department of Justice and the Secretary of the Army.[258] Congress had authorized condemnation proceedings, and the private owner had foregone a considerable compensation award. The court ruled that after four years the government must keep its word, so it upheld the 1974 consent judgment.[259] The Fifth Circuit Court of Appeals declined a mechanical application of the servitude which would have been warranted under *Chicago, M., St. P.*[260] and applied an equitable defense even though the courts are historically reluctant to estop the government.[261] The *119.76 Acres* decision consequently represents at least one court's attempt to restrict the navigation servitude.

The post-*Kaiser-Aetna* cases involving R.H.A. and C.W.A. regulation have not expanded the navigation servitude.[262] At least one decision declined to apply the mechanical, territorial analysis. Instead, the Court of Claims inquired whether the doctrine was intended to be used to deny the only feasible access to a particular island. That court found that the doctrine was not so intended and denied compensation.[263]

In the more traditional river cases, the courts are not applying a balancing approach but are applying dogmatic precedent to decide servitude questions.[264] In one instance, the results would probably have

its servitude over a marsh land when it allowed a developer to fill the marsh in without reserving the servitude. These facts are strikingly similar to Miller v. United States, 550 F. Supp. 669 (Cl. Ct. 1982), however, completely different analyses in both cases led to opposite results. *See supra* notes 219-32 and accompanying text.

The *Monongahela Navigation* court earlier had relied on estoppel by ruling that the United States implicitly invited Monongahela to build a dam which the government then took. The Court estopped the government from arguing the servitude and awarded compensation for the lost toll franchise. Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893). Judicial reluctance to estop the government is undoubtedly the reason that only two prior cases have relied on the estoppel defense even though it is raised in most every case. For an interesting analysis see Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979).

258. *119.67 Acres*, 663 F.2d at 1337-38.

259. *Id.*

260. The land in question was presumably below mean high water mark of the navigable Mississippi River; therefore, under *Chicago, M., St. P.*, the navigation servitude would have applied to the case. *See supra* notes 117-21 and accompanying text.

261. *See supra* note 257.

262. *See supra* notes 195-205 and accompanying text.

263. Laney v. United States, 661 F.2d 145 (Ct. Cl. 1981). *See supra* notes 195-200 and accompanying text.

264. *See* Ballam v. United States, 747 F.2d 915 (4th Cir. 1984); Loving v. Alexander, 745 F.2d 861 (4th Cir. 1984), *aff'g*, 548 F. Supp. 1079 (W.D. Va. 1982); United States v. Certain Parcels of Land in Valdez, 666 F.2d 1236 (9th Cir. 1982); Miller v. United States, 550 F. Supp. 669 (Cl. Ct. 1982). *See also supra* notes 206-52 and accompanying text.

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been similar under either approach.[265] In another instance, the court used a confused property analysis relying on questionable authority to reach a decision that could only be justified under a power theory of the navigation servitude.[266] In still another case, the court simply followed the formula of prior precedent and denied compensation without considering for what purposes the doctrine was being invoked.[267] Finally, at least one court of appeals has shown that it intends to employ the *Kaiser* analysis only in situations similar to the facts in *Kaiser-Aetna.*[268]

The recent decisions exhibit inconsistent analyses. Some courts inquire into the purposes for which the doctrine is being applied. Other courts, especially in the river context, automatically apply the doctrine on a finding of navigability. These latter courts rest their decisions on a mechanical formula which according to one accomplished jurist "is a slumber that, prolonged, means death."[269] The courts should apply the rule only to further the purposes for which it was developed: to promote and ease water travel.

PROPOSAL

The concept that the federal government holds an interest or power over our nation's water courses, which is so dominant that the government is not obligated to pay just compensation when private property rights are taken or destroyed, is unique in American law.[270] The United States is required to pay compensation when it appropriates private property under other constitutional powers which are certainly not inferior to the power to regulate and control navigation.[271] Compensation is paid when property is taken to build airports,[272] highways,[273] pipelines,[274] railroads[275] and other projects which aid interstate commerce; yet, water travel is uniquely protected.

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265. *Valdez*, 666 F.2d 1236. *See supra* notes 206-18 and accompanying text.
266. *Miller*, 550 F. Supp. 669. *See supra* notes 219-32 and accompanying text.
267. *Alexander*, 548 F. Supp. 1079. *See supra* notes 233-48 and accompanying text.
268. *Ballam*, 747 F.2d 915. *See supra* notes 249-52 and accompanying text.
269. Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 3 (1915).
270. Morreale, *supra* note 24, at 16, 17.
271. Note, *supra* note 3, at 1523-24.
272. United States v. 1177 Acres in Florida, 51 F. Supp. 84 (S.D. Fla. 1943) (compensation for land for airport). *See also* United States v. Causby, 328 U.S. 256 (1946) (aircraft overflights established a compensable taking).
273. Dohany v. Rogers, 281 U.S. 362 (1930) (compensation paid for land for highway).
274. Texas-New Mexico Pipeline Co. v. Linebery, 326 S.W.2d 733 (Tex. Civ. App. 1959) (compensation for a pipeline easement).
275. Secombe v. Milwaukee & St. P.R. Co., 90 U.S. 108 (1874) (compensation for a railroad right-of-way).

A two-fold explanation for this unique doctrine lies in American history. First, the English common law had developed the concept of a servitude from its *jus publicum* concept that private rights in the stream could not be asserted in derogation of the public right to navigation.[276] This concept was imported to the thirteen colonies and became a starting point for later decisions which developed the American version of the navigation servitude.[277] Second, throughout the nineteenth century, water travel was a most important method of transporting goods in interstate and foreign commerce.[278] As the United States industrialized, it became increasingly necessary to develop and maintain America's network of inland rivers so that they might be utilized as highways for transportation.[279] This sense of necessity, combined with the limited nature of the federal government at the time, prompted the development of the navigation servitude because the compensation liabilities which the government would incur without such a rule would cripple its ability to facilitate transportation and promote commerce.[280] Thus, the American navigation servitude was developed as a result of a common law "seed," and a strong government interest in promoting navigation without incurring excessive liability. The purpose of the doctrine was only to develop watercourses as public highways and nothing more.[281]

Today the government's interest in water has expanded to include reclamation projects, flood control, recreation, and power generation.[282] The servitude has also been expanded, though not to the limits of the commerce clause.[283] Other measures of transportation have become more important to interstate and foreign commerce than water-based transportation.[284] Similarly, the federal government has become much more powerful and stable since the mid-nineteenth century. Thus, the public interest in maintaining this judge-made excep-

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276. *See supra* notes 17-20 and accompanying text.

277. Shively v. Bowlby, 152 U.S. 1, 16 (1894). *See* Harnsberger, *supra* note 3, at 108; Morreale, *supra* note 24, at 18-19.

278. F. TRELESE, *supra* note 84, at 711-12.

279. B. MORRELL, OUR NATIONS WATER RESOURCES—POLICIES AND POLITICS 37-38 (1972); D. PEGRUM, TRANSPORTATION ECONOMICS AND PUBLIC POLICY 57-59 (3d ed. 1973); E. STARR, FROM TRAILDUST TO STARDUST 99 (1945).

280. The Court in Scranton v. Wheeler, 179 U.S. 141, 164-65 (1900), felt that allowing compensation claims by riparians who had lost their access to the river would cripple the government's efforts to improve navigation on navigable waters. *See supra* note 111.

281. J. LEWIS, *supra* note 16, at 99, 101.

282. F. TRELEASE, *supra* note 84, at 711-12.

283. *See supra* note 183 and accompanying text.

284. Inland waterways including the Great Lakes carried only 15% of the freight traffic in the United States in 1952. S. DAGGETT, PRINCIPLES OF INLAND TRANSPORTATION 39 (4th ed. 1955).

tion to the fifth amendment which applies only to navigation is not as strong as it once was when the doctrine was first developed. Yet, the scope of the servitude has been expanding since its inception.[285]

The essence of the problem is that the courts must find a workable and reasonable boundary between Congress' power to control navigation in the public interest and the rights of riparian land owners to compensation for injuries caused by the exercise of that power. The problem is one of harmonizing the public right to navigation with the private property rights guarantee of the fifth amendment. In order to harmonize the two, the public right must be asserted as sparingly as possible and only when necessary.[286] The courts must decide whether the public interest in controlling navigation is sufficient to outweigh the private property rights guaranteed by the fifth amendment.

To determine the public interest in each proposed application of the doctrine, the courts should initially examine whether the purpose of the doctrine is being served. The Supreme Court recently defined this purpose as assuring that "such streams retain their capacity to serve as continuous highways for navigation in interstate commerce."[287] This definition is composed of a two-part analysis. First, the body of water should be examined to determine whether it is, or has potential to become, a continuous highway in interstate commerce. Using this analysis, the Mississippi River would have more potential than the Valdez small boat harbor. Second, the proposed project should be examined to determine whether it would increase the capacity of the particular body of water to serve as a highway for interstate commerce. For example, the removal of a pier in the Ohio River aids navigability more than the removal of that same pier on an island in the ocean.[288]

The private property interest in compensation will always be substantial because of the fifth amendment guarantee; however, in some instances it may be more compelling. Private investment and reliance on governmental actions may add to the private interest.[289]

285. *See supra* notes 67, 68 and accompanying text.

286. Not only does the navigation servitude conflict with commonly recognized property rights, but it conflicts with the express proscription of the fifth amendment. Therefore, it should be used as sparingly as possible.

287. United States v. Kaiser-Aetna, 444 U.S. 163, 178 (1979).

288. The amount of public interest in removing an obstruction to navigation depends on where that obstruction is located, and to what degree that obstruction hampers navigation.

289. Kaiser-Aetna's interest was compelling because of what Justice Rehnquist called "investment backed expectancies." *Kaiser-Aetna*, 444 U.S. at 180. *See also supra* note 257 and accompanying text.

An example is where an individual purchases land from the federal government, which purported to convey a fee without reservation or notice of the servitude.[290] In these situations, the private property interest will almost always outweigh the governmental interest.

When the court has completed its balance and decided to apply the servitude to a particular claim, the prior precedent should then be relied on to determine the territorial limits of the servitude. These precedents should not be used to determine whether the servitude applies, because the courts typically decided these cases without inquiring into the purposes for which the servitude was invoked.[291] The application of these precedents would undermine the entire balancing process.

A balance must also be struck when Congress authorizes projects which "aid navigation." The courts would properly defer to Congress' decision to invoke the navigation regulatory power, but since the navigation servitude is not automatically applied when Congress exercises its navigation power, the courts must still decide whether to apply the servitude. The congressional determination of purpose should then be considered as a factor which would increase the government's interest.[292]

The balancing test will bring the public-private tension to the forefront of the analysis every time application of the navigation servitude is proposed. Such a policy of ad hoc case determination would admittedly generate some uncertainty, but generally the equities involved would lead to a narrowing rather than an expansion of the servitude. With the acquisition of precedent, the uncertainty surrounding this unique doctrine would diminish.[293]

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290. *See* Miller v. United States, 550 F. Supp. 669 (Ct. Cl. 1982). *See also supra* notes 219-32 and accompanying text.

291. *See supra* notes 117-50 and accompanying text. As pointed out in the text and notes, most of the prior cases mechanically applied the servitude if it fell within the prescribed boundary limitations.

If the Court adopts the balancing of interests analysis suggested by this note, the cases decided using only a boundary analysis should not be substituted for this balancing of interest. They may be used to determine the territorial boundary of the servitude once the Court finds it applicable.

292. The judiciary should not defer to the congressional declaration that a given project is intended to aid navigation, such that the declaration would amount to an unreviewable congressional decision to apply the servitude. It would seem anomalous to allow Congress unreviewable authority to except the fifth amendment simply by stating that the purpose of a project is, among others, to aid navigation.

293. As long as the purpose of the servitude is defined as assuring that streams serve as continuous highways for transportation, cases in which the proposed project has no relation to water transportation will not result in an application of the servitude and thus the present scope of the doctrine will be narrowed. *See, e.g.*, United

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The navigation servitude is unique in our law as a judge-made exception to the fifth amendment. One explanation for the development of this doctrine is that it was a necessary government subsidy.[294] The necessity for this subsidy is no longer clear, therefore in order to harmonize the public right to navigation with private property rights, both competing interests should be balanced in every case before the servitude is applied.[295]

The government's interest should be measured by determining how much the proposed action will improve the watercourse as a highway for commerce. The private interest should be determined by the fifth amendment. Prior precedent should only be used after the servitude is found applicable, and then only to define its territorial limits. Similarly, congressional determination to invoke the commerce clause power over navigation should not be conclusive regarding application of the servitude, but merely persuasive of Congress' attempt to balance the equities.[296]

The goal of this balancing approach is to inject into the analysis a tension between all the interests involved and to escape a mechanical application of the doctrine based on ill-defined terms such as "dominant power," and "superior easement." As Mr. Justice Frankfurter said: "The eternal struggle in the law between constancy and change is largely a struggle between history and reason, between past reason and present needs."[297] When applying the navigation servitude, the courts should now consider present needs.

CONCLUSION

The navigation servitude is a judge-made exception to the "taking" clause of the fifth amendment. Several theoretical foundations have been advanced by the Court to justify this unique doctrine. None of those foundations, however, can adequately justify the servitude in its present state. The scope of the navigation servitude has been greatly expanded through the Court's expansion of the navigability definition and through the Court's mechanical use of a territorial analysis. The decisions exhibit a lack of direction which is probably due to the uncertain theoretical foundation.

States v. Grand River Dam Auth., 363 U.S. 229 (1960); United States v. Commodore Park Inc., 324 U.S. 386 (1945); Loving v. Alexander, 745 F.2d 861 (4th Cir. 1984). *See also supra* notes 91-98, 112-16, 233-52 and accompanying text.

294. *See supra* notes 276-85 and accompanying text.

295. *See supra* note 286 and accompanying text.

296. *See supra* notes 287-93 and accompanying text.

297. F. FRANKFURTER, MR. JUSTICE HOLMES AND THE CONSTITUTION 40 (1977).

The 1979 *Kaiser-Aetna* decision can be viewed as an attempt to limit the doctrine, but due to its unique fact situation and lack of clarity, *Kaiser-Aetna* has only increased the confusion surrounding the navigation servitude. The post-*Kaiser* courts have adopted the *Kaiser* balancing analysis in the non-river servitude cases, but the *Kaiser* approach has only been given minimal attention in the traditional river situations. The fundamental theory behind the doctrine is still unclear; some lower courts insist that the servitude is a power concept while others apply a property law analysis. The confusion within this doctrine is exemplified by two decisions which recently applied the servitude to further recreational fishing interests in a presently non-navigable stream.[298]

The navigation servitude should be seen as a government subsidy for the improvement of navigation, but the need for the subsidy is no longer clear. In every case, the government interests in the continued subsidy should be balanced against the private property interests protected by the fifth amendment. The balancing approach will insure that the scope of this unique doctrine is narrowed to include only those projects which substantially improve navigation. It will also help harmonize the public and private interests by focusing the analysis on the conflict between the two interests. The decisions would then turn on the resolution of this important tension instead of on whether a proposed application fits within a territorial rule. The navigation servitude could then become a living doctrine, sensitive to present policies and interests instead of reflecting past considerations which are no longer applicable.

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298. Loving v. Alexander, 745 F.2d 861 (4th Cir. 1984), *aff'g*, 548 F. Supp. 1079 (W.D. Va. 1982).