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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, TRUSTEES OF THE BERNICE P. BISHOP ESTATE; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

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The public servitude was properly defined by the public commercial need.

The Great Lakes, the Mississippi River and other waters useful for commerce in their natural condition were held to be public navigable waters. But, shallow waterways not useful for commerce were held to be nonnavigable, such as the crevasse known as Red Pass in *Leovy v. United States,* 177 U.S. 621 (1900), and the upper reaches of the Rio Grande River in *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690 (1899). Navigability-in-fact thus marked the border between "public" waters subject to the federal servitude and other waters exempt from its burden.

Navigable waters have continued to be gauged by their susceptibility to commerce in their natural condition, although it is now recognized that obstructions capable of being overcome by reasonable efforts do not prevent a finding of navigability. *E.g., The Montello,* 87 U.S. (20 Wall.) 430 (1874) (rapids and bars capable of being overcome by artificial improvements); *Economy Light & Power Co. v. United States,* 256 U.S. 113, 123 (1921) (a river once navigable "is within the power of Congress to preserve for purposes of future transportation," even though navigation is not presently possible due to artificial obstructions); *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-08 (1940) (a water body is navigable if it can be made useful for interstate commerce by means of "reasonable improvements," balanced in terms of "cost and need").

This Court has not extended the limits of the navigation servitude beyond the facts of *Appalachian.* Fast lands are not subject to the servitude. *E.g., United States v. Virginia Electric and Power Co.,* 365 U.S. 624, 627-29

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(1961); *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 804-08 (1950); and *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-81 (1871). Nor are nonnavigable waters. In *United States v. Cress*, 243 U.S. 316, 320-27 (1917), this Court held that the navigation servitude does not extend to nonnavigable tributaries of navigable streams and allowed compensation for destruction of a ford and loss of water power resulting from a federal lock and dam project on adjacent navigable streams.[21]

The "public" highways over which the nation may exercise complete control are its "navigable waters." In them, the nation may erect dikes, construct piers, dredge chan-

[21] Subsequent cases have limited *Cress to* its facts, but have not overruled it, and have reaffirmed its validity *on* its facts. In *United States v. Chicago, M., St. P. & P. R.R. Co.*, 312 U.S. 592, 599 (1941), which held that no compensation was due for injury to structures located between high and low water mark of the Mississippi River, this Court remanded for resolution of the railroad's claim that two sections of embankment in question were located on a nonnavigable tributary. And in *United States v. Willow River Power Co.*, 324 U.S. 499, 505-07 (1945), which holds that no compensation is due for obstruction of a tailrace by raising of the level of a navigable river by means of a federal dam, this Court distinguished *Cress* as involving damage due to raising of the level of a nonnavigable stream and declined the government's invitation to overrule it.

United States v. Grand River Dam Auth., 363 U.S. 229 (1960), is sometimes claimed to have overruled *Cress*. However, this Court specifically declined to address the government's contention that the navigation servitude extended to nonnavigable streams; it ruled for the government upon the basis of express congressional determination that appropriation of the waters of the nonnavigable tributary was essential to a comprehensive flood control and navigation program. This Court had previously upheld the propriety of such a project, upon grounds of need to protect the navigable capacity of the navigable stream itself, in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941). *Grand River* is further distinguishable in that the property rights asserted were of dubious validity and no more than a noncompensable business expectancy in any event.

nels and place dams,[22] without regard for any private rights. The nation has "always" been interested in preserving these waters for actual or potential needs of commerce.[23]

No comparable national interest exists in fast lands or nonnavigable waters. They lack reasonable potential for commercial use; no public navigation servitude has ever existed over them. The purpose of the servitude limits the scope of its dominant power.

2. The scope of federal regulatory jurisdiction is as broad as full congressional commerce clause power.

The power of Congress to regulate commerce is plenary in nature; its scope is as broad as interstate commerce itself. Congress may regulate commerce wherever it goes, whether the highway on which it travels be water or land, natural or artificial. *See Monongahela Navigation Co. v. United States,* 148 U.S. 312, 341-42 (1893); *Dow Chemical Co. v. Dixie Carriers, Inc.,* 330 F. Supp. 1304, 1307-08 (S.D. Tex. 1971), *aff'd* 463 F.2d 120, 123 (5th Cir. 1972), *cert. denied,* 409 U.S. 1040 (1972). *Cf. Perry v. Haines,* 191 U.S. 17, 26-28 (1903) (admiralty jurisdiction). The power of Congress extends well beyond its power to regulate navigation on public navigable waters.

[22] *E.g., Gibson v. United States,* 166 U.S. 269 (1897) (dike); *Scranton v. Wheeler,* 179 U.S. 141 (1900) (pier); *Lewis Blue Point Oyster Cult. Co. v. Briggs,* 229 U.S. 82 (1913) (channel); and *United States v. Willow River Power Co.,* 324 U.S. 499 (1945) (dam).

[23] This Court has consistently voiced the view that navigable waters have "always" been subject to the navigation servitude, from its early decision in *Gibson v. United States,* 166 U.S. 269, 276 (1897), to its most recent decision in *United States v. Rands,* 389 U.S. 121, 123 (1967). This theory is hardly viable if applied to fast lands or nonnavigable streams to which the servitude has never applied.

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The broad power of Congress over interstate commerce, including navigation, was established in *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824). However, in early history, when the needs of interstate commerce were in their incipient stage, this power of Congress lay largely "dormant," other than licensing acts and occasional action on bridges. So long as the power of Congress lay inchoate, the states retained plenary power over their internal waters.[24]

Not until this Court decided *Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1888), upholding Oregon's right to authorize a bridge obstructing navigation of the Willamette River, did Congress react. It then enacted the Rivers and Harbors Act of 1890 prohibiting unauthorized obstructions to navigable capacity of national waters. Congress later compiled and codified all existing laws for protection of navigable waters in the Rivers and Harbors Act of 1899,[25] which is presently codified as 33 U.S.C. § 401, *et seq.*[26]

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[24] *E.g., Willson v. Black Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245, 251-52 (1829) (dam across a navigable creek); *Gilman v. Philadelphia,* 70 U.S. (3 Wall.) 713, 725-32 (1865) (bridge across navigable river); *Pound v. Turck,* 95 U.S. 459, 463-64 (1877) (dam and boom across river); *Escanaba Co. v. Chicago,* 107 U.S. 678, 683-87 (1882) (closing of bridge draws during rush hour); *Cardwell v. American Bridge Co.,* 113 U.S. 205, 208-10 (1885) (bridge across river); and *Hamilton v. Vicksburg, S. & P. R.R.,* 119 U.S. 280, 281-82 (1886) (bridge over stream).

[25] This Court has analyzed the legislative history of the Acts in *United States v. Penn. Indus. Chem. Corp.,* 411 U.S. 655, 663-66 (1973); *United States v. Standard Oil Co.,* 384 U.S. 224, 226-28 (1966); and *United States v. Republic Steel Corp.,* 362 U.S. 482, 485-86 (1960). The 1899 Act was not intended to make any substantial change in existing law. However, Congress did add language to the 1899 Act to overrule this Court's construction of the 1890 Act as permitting state as well as federal authorization of obstructions. *See United States v. Bellingham Bay Boom Co.,* 176 U.S. 211, 214-15 (1900); and *North Shore Boom & Driving Co. v. Nicomen Boom Co.,* 212 U.S. 406, 412-13 (1909).

[26] Section 401 prohibits unauthorized construction of bridges, dams and dikes. Section 403 generally prohibits unauthorized ob-

The 1899 Act " . . . was obviously intended to prevent obstructions in the Nation's waterways." *Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 201 (1967). Until recently, the Act was usually applied to regulate structures obstructing navigation on naturally navigable-in-fact waterways. *E.g., Union Bridge Co. v. United States,* 204 U.S. 364 (1907); *Louisville Bridge Co. v. United States,* 242 U.S. 409 (1917).

As so applied, the scope of federal regulation was comparable to the scope of the navigation servitude. In recent times, however, the extent of regulation has been greatly expanded and now far surpasses the limits of the navigation servitude.

3. In light of recent history any claim that regulatory power and the servitude are identical in scope must fail.

Seeds of expansive regulation were present in the original Acts. This Court early construed the 1890 Act, in *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 708 (1899), to reach activities on nonnavigable streams substantially affecting the capacity of navigable waters. *See also Sanitary District of Chicago v. United States,* 266 U.S. 405, 428-29 (1925) (construing the 1899 Act). But regulation did not attain extended application until recent times.

Currently the 1899 Act is applied far beyond the bounds of the navigation servitude. It has ceased to be a limited

structions. Section 404 authorizes establishment of harbor lines. Section 407 prohibits deposit of refuse. Section 409 prohibits obstruction by vessels. The foregoing description is necessarily general and the words of each section must be referred to for a full appreciation of their scope.

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statute for protection of public navigation and has become an instrument of environmental protection.

This Court itself has charitably construed the 1899 Act and provided the impetus for expansive environmental regulation. *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (discharge of industrial solids); *United States v. Standard Oil Co.*, 384 U.S. 224 (1966) (discharge of aviation gasoline).

In December 1968, the Corps of Engineers published new regulations stating for the first time that pollution, environmental, and conservation factors would be considered in passsing upon permit applications. *See United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 672-73 (1973). Consideration of such factors, in the context of permits for work in navigable-in-fact waters, was expressly upheld in *Zabel v. Tabb*, 430 F.2d 199, 207-14 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

Thereafter, the Corps extended its environmental program by asserting jurisdiction over tidal marshes which were in no sense navigable-in-fact. This position was first upheld in *United States v. Baker*, 2 E.R.C. 1849 (1971) (unofficial report of oral decision). Subsequently, the Corps amended its regulations to assert jurisdiction over all tidal waters, regardless of navigability-in-fact. 37 Fed. Reg. 18291 (1972) (first codified in 33 C.F.R. § 209.260(k)(2), now § 329.12(b)). Favorable rulings were ultimately obtained from other courts.[27]

Moreover, the Fifth Circuit, in *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1296-99 (5th Cir. 1976),

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[27] *E.g., United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 604-06, 610 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *United States v. Cannon*, 363 F. Supp. 1045, 1050 and n. 3 (D. Del. 1973); and *United States v. Lewis*, 355 F. Supp. 1132, 1136-37 (S.D. Ga. 1973).

although unwilling to give the Corps jurisdiction over all waters subject to tidal fluctuations,[28] has resurrected *Rio Grande's* "affect" test to uphold Corps' jurisdiction over fast land activities which affect adjacent navigable waters.

Congress has authorized even broader regulatory jurisdiction in the Water Pollution Control Act of 1972. 33 U.S.C. § 1251, *et seq.* "Navigable waters" are defined in 33 U.S.C. § 1362(7) to include "the waters of the United States," a term courts have consistently interpreted to apply to discharges into nonnavigable as well as navigable waters. *E.g., United States v. Ashland Oil & Transportation Co.,* 504 F.2d 1317 (6th Cir. 1974); *Leslie Salt Co. v. Froehlke,* 578 F.2d 742, 753-56 (9th Cir. 1978); and *Wyoming v. Hoffman,* 437 F. Supp. 114 (D. Wyo. 1977). Even a discharge into municipal sewers has been held within the coverage of the Act. *United States v. Velsicol Chemical Corp.,* 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976).

The expansion of jurisdiction effected by these cases is illustrated by this Court's opinion in *Leovy v. United States,* 177 U.S. 621 (1900). There, this Court considered the navigability of Red Pass, a crevasse created by Mississippi River overflow and which at one end had become a sea marsh; this Court discussed the question entirely in terms of navigability-in-fact and did not suggest that any tidal portion of the pass might on that ground alone be navigable.

In recent amendments to its regulations, the Corps of Engineers has also asserted jurisdiction over artificial water bodies subject to the ebb and flow of the tide pursuant to the Third Circuit opinion in *Stoeco Homes, supra,* by adding a new sentence to 33 C.F.R. § 329.8(a)(i) (formerly § 209.260(g)(1)(i)). *See* 42 Fed. Reg. 37133 (1977). The Corps recognizes that its regulatory authority and a right of public access are not coextensive, for it continues to concede that a privately constructed and operated canal not used in interstate commerce may remain private. 33 C.F.R. § 329.8 (a)(3) (formerly § 209.260(g)(1)(iii)).

[28] As the Court retorted, in the context of canals exhibiting tidal fluctuation after excavation: "If it did, every hole dug in South Florida would be within the Corps' jurisdiction." 526 F.2d at 1299.

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The scope of federal regulatory jurisdiction has been considerably extended in a comparatively short period of time. The commerce power has already overflowed the beds and shores of navigable waters and been extended far inland. The focus of regulatory authority has shifted from prevention of obstructions to navigation to a broad environmental protection program. Whatever coincidence there may once have been between the respective scopes of federal regulatory authority and the federal navigation servitude no longer exists. The regulatory power has now far surpassed the servitude.

III.

The Navigation Servitude Does Not Apply to a Private Nonnavigable Water Body Rendered Navigable-in-Fact Only by Extraordinary Private Efforts.

A. *Kuapa Pond in Its Natural Condition Was a Private Nonnavigable Water Body.*

Kuapa Pond in its natural condition[29] was an isolated inland water body cut off from the open sea by a barrier beach formation and had existed in this condition from as early as 1350 (Tr. 90, LL. 11-12). Its shallow waters restricted navigation to flat-bottomed boats; the wall of the pond made it impossible to navigate to adjacent ocean waters. It was never used commercially except for propagation of fish within the pond itself (R. 264-66).

Navigation by boats of so shallow a draft as the boats that tended mullet in Kuapa Pond has never sufficed for navigability purposes. *E.g., Leovy v. United States,* 177

[29] By "natural condition" is meant the condition of the pond as historically recorded. At some prehistoric time the area of the pond may have been fast land or sea or part of each.

U.S. 621, 633 (1900) (small luggers or yawls used by fishermen); *Pitship Duck Club v. Sequim,* 315 F. Supp. 309 (W.D. Wash. 1970) (small duck hunting boats); *North American Dredging Co. of Nevada v. Mintzer,* 245 F. 297 (9th Cir. 1917) (duck boats or punts for hunting or fishing); and *Toledo Liberal Shooting Co. v. Erie Shooting Club,* 90 F. 680 (6th Cir. 1898) (canoes and flat-bottomed ducking boats).

Nor was Kuapa Pond navigable under *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-08 (1940). Pursuant to that opinion, the potential improvements must be "reasonable" with "a balance between cost and need." As the District Court noted, the government presented no evidence on the need for or cost of improvement of the pond in its natural condition (Pet. App. 23a-24a). The record is devoid of any suggestion that there was ever a reasonable need to improve Kuapa Pond for navigation.[30]

The government's contention that Kuapa Pond was navigable simply because it exhibited tidal fluctuations is wholly inconsistent with the navigability-in-fact test.[31] This court characterized the ebb and flow test as not "any test at all" in *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871). While that case involved an inland river, the navigability-in-fact test it adopted is of uniform application to tidal and nontidal waters alike; it would be as arbitrary to classify shallow creeks as navigable solely because some tidal influence is present as to draw tidal lines across the Mississippi. Kuapa Pond was not part of the adjacent ocean;

[30] Petitioners did introduce evidence of the great expense involved in the actual improvement of Kuapa Pond to negate any suggestion that there was ever any reasonable economic need to improve it for navigation (Tr. 100-05; Defendants' Exhibit 31).

[31] This contention was not reached below. *See* note 1 *supra.*

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to hold it navigable solely on account of tidal flow would be an illogical application of the servitude's commercial needs.[32] The Corps consistent administrative treatment of the pond as nonnavigable, until the present litigation, is also "not without significance."[33] *United States v. Oregon,* 295 U.S. 1, 23 (1935).

Even assuming that the ebb and flow test may form a valid basis for a servitude over certain tidal waters, the government may make no claim on that ground to Kuapa Pond. By passage of § 95 of the Organic Act, Congress recognized unique exclusive rights in Hawaiian fish ponds, thereby surrendering any servitude it arguably might have had. This surrender was in fact recognized by the government until the early 1970's when it first asserted a right of public access to Kuapa Pond. An analogy is found in *United States v. Stoeco Homes, Inc.,* 498 F.2d 597, 610-11 (3d Cir. 1974), where land filled in 1927 was characterized as having "long since been surrendered" due to lack of Corps of Engineers objection prior to 1970. Likewise, the

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[32] The Government is wont to rely upon general language such as: "[Congress'] power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water." *Greenleaf-Johnson Lumber Co. v. Garrison,* 237 U.S. 251, 263 (1915); "[W]hatever rights [existed] in the land below the mean high-water line were subordinate to the public right of navigation. . . ." *Willink v. United States,* 240 U.S. 572, 580 (1916); and, "The dominant power of the federal Government, . . . , extends to the entire bed of a stream, . . ." *United States v. Chicago, M., St. P. & P. R.R. Co.,* 312 U.S. 592, 596-97 (1941).

The language used was apt for the facts of those cases as each involved delineation of the limits of a single river. No separate water body was involved in any of these cases; nor was the ebb and flow test applied. Such general language is hardly firm footing for resurrection of ebb and flow from a 100 years of repose as a qualification on the general navigability-in-fact test.

[33] It continued to do so even after development began and listed Kuapa Pond as a private facility in its 1964 report on Hawaiian coastal waters (Defendants' Exhibit 16).

Corps failed to express any interest in or concern over activities in Kuapa Pond from annexation until after 1970.

B. *The Navigation Servitude Does Not Apply to Privately Improved Nonnavigable Waters.*

This Court has never maintained that the navigation servitude is coextensive with commerce clause regulatory authority. Indeed, in *United States v. Kansas City Life Insurance Company,* 339 U.S. 799 (1950), the more limited nature of the servitude was expressly acknowledged:

> It is not the broad constitutional power to regulate commerce, but rather *the servitude derived from that power and narrower in scope,* that frees the Government from liability in these cases. . . . (Emphasis added.)

339 U.S. at 808.

The distinction between regulatory authority and the servitude has always existed. Regulatory power always had a broader scope as *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690 (1899), long ago settled in holding that the upper Rio Grande was nonnavigable but nonetheless subject to regulation. Recent expansion of the regulatory power merely highlights a fundamental distinction which has long existed.

The boundary of the servitude lies at the limit of "public" navigable waters. Although regulation has travelled far beyond these bounds, the servitude has not. This Court has never applied the servitude to fast lands, nor to nonnavigable waters, at least without an express determination by Congress that inclusion was essential to a comprehensive navigable waters improvement program. *United States v.*

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Cress, 243 U.S. 316, 325-26 (1917). *Cf. United States v. Grand River Dam Authority,* 363 U.S. 229, 232-33 (1960).

The justification for dominant national control over navigable waters has been the need "to preserve" them for present or future commercial needs. *See Economy Light & Power Co. v. United States,* 256 U.S. 113, 123-24 (1921); *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 404-05 (1940). For this purpose, the nation's navigable waters have been considered to have "always" been subject to the servitude. This view was expressed in *Gibson v. United States,* 166 U.S. 269, 276 (1897), and has been adhered to ever since. *E.g., United States v. Rands,* 389 U.S. 121, 123 (1967); *United States v. Commodore Park, Inc.,* 324 U.S. 386, 390-91 (1945). This Court expressed the same point in *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, at 808 (1950):

> The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. . . . This has applied to the stream and to the land submerged by the stream. There thus has been ample notice over the years that such property is subject to a dominant public interest. . . . (Citations omitted.)

The premises upon which the navigation servitude have been based—that the nation's waters must be "preserved" and that the private right in the underlying soil has "always" been subject to the servitude and "long has been limited" by the paramount public rights it represents—have no validity as to nonnavigable waters. The public has never been interested in their preservation and should not care whether they are improved for water traffic or allowed to deteriorate and become even less navigable than

before. *See United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 69-70 (1913) ("no public interest" in nonnavigable streams). There is no public expectation of their improvement nor any logical right to their uncompensated use as improved.

While this Court has not rendered an opinion directly on point, *Veazie v. Moor,* 55 U.S. (14 How.) 568 (1852), does come close to the mark. The Maine legislature had authorized private parties to undertake improvements on the River Penobscot to render upper stretches of the river navigable, granting an exclusive license to navigate the improved stretch for twenty years. The grantees' assignee completed the work and put steamboats into service. Veazie appeared with his own steamboat, properly enrolled and licensed for the coasting trade, and placed her on the river until enjoined. As opposed to *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824), *Veazie* involved an exclusive license for internal commerce on locally improved nonnavigable waters. This Court, in distinguishing *Gibbons* declared:

> A license to prosecute the coasting trade, is a warrant to traverse the waters washing or bounding the coasts of the United States. *Such a license conveys no privilege to use, free of tolls, or of any condition whatsoever, the canals constructed by a State, or the watercourses partaking of the character of canals exclusively within the interior of the State, and made practicable for navigation by the funds of the State, or by privileges she may have conferred for the accomplishment of the same end. The attempt to use a coasting license for a purpose like this, is,* in the first place, a departure from the obvious meaning of the document itself, and *an abuse wholly beyond the object and the power of the government in granting it.* (Emphasis added.)

55 U.S. at 575.
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55 U.S. at 575. While conceptions of federal power over local commerce are no longer as limited as then envisioned, this Court's discussion of the lack of public right to navigate privately improved nonnavigable internal waters remains as persuasive today as at that time.

More recently, the United States Attorney General reached the same conclusion. His opinion was requested as to the federal right to take over waterways owned by the State of Illinois in advance of a formal transfer of title. The Attorney General recognized such a right as to portions which were improved navigable streams.[34] As to wholly artificial portions, however, which like nonnavigable streams had never been subject to the servitude, he concluded that these could not be appropriated without compensation.[35]

> Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within admiralty jurisdiction, *it does not follow that the United States*

[34] In *United States v. Cress*, 243 U.S. 316, 326 (1917), this Court itself recognized that navigable rivers which were "canalized" by the government would remain navigable waters despite their improvement. Continued subjection of a navigable stream made more navigable at public expense is, of course, a quite different matter than subjecting a private nonnavigable water body improved at private expense to a public servitude.

[35] Canals constructed at public expense were usually open to the public subject to payment of reasonable tolls. *See, e.g., Huse v. Glover*, 119 U.S. 543 (1886); *Sands v. Manistee River Improv. Co.*, 123 U.S. 288 (1887). They were public because they were public highways built by the states or under their charter, just as are modern freeways, not because of any dominant federal servitude. They therefore could be abandoned at any time. *See, e.g., Walsh v. Columbus, Hocking Valley & A. R.R. Co.*, 176 U.S. 469 (1900); *Kirk v. Maumee Valley Elec. Co.*, 279 U.S. 797 (1929).

could take possession of it, appropriate it, exclude the owner, and deprive the latter of any investment upon it. (Emphasis added.)

36 OP. U.S. ATT'Y. GEN. 203, 214 (1930).

Although Kuapa Pond now has also been held subject to federal regulation, there is no basis to burden it further with the navigation servitude and free public access. The servitude's rule of "no compensability" is harsh even as applied to public navigable waters. To apply the servitude to privately improved nonnavigable waters such as Kuapa Pond would be a particularly severe extension—one transforming a doctrine intended to preserve *public* waters into a device for expropriation of *private* waters.

C. *Application of the Navigation Servitude to Nonnavigable Waters Would Constitute an Unjustified Intrusion Into Local Real Property Issues.*

Extension of the navigation servitude to Kuapa Pond involves enormous implications. Nonnavigable water bodies located entirely within a single state, which heretofore have never been considered susceptible to commerce, will be potential objects of dominant federal power. The acknowledged legal distinction between public navigable waters and private nonnavigable waters will be abrogated. The servitude will extend to thousands of private waters never before within its reach.[36]

To subject these local waters to the servitude serves no valid federal interest. When the question is surface use

[36] In point of fact, the Corps of Engineers deems all water bodies subject to the Rivers and Harbors Act to be subject to the navigational servitude and has represented to this Court that all permits are now and will continue to be conditioned upon the permittee's agreement to permit "the full and free use by the public" (Opp. Brief at 19-20).

of internal waters, water highways, arbiters.

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of internal waters, as opposed to use of the public navigable water highways, the states themselves should be the arbiters.

This Court has often emphasized that the states are sovereign over navigable waters and the lands beneath them, subject only to the paramount need of the United States for purposes of control of interstate commerce. *E.g., United States v. Texas,* 339 U.S. 707, 716-17 (1950); *United States v. Oregon,* 295 U.S. 1, 14 (1935). The states are free to determine title rights of owners of lands abutting navigable waters. *E.g., Shively v. Bowlby,* 152 U.S. 1, 40-47 (1894). The states are also free to define the extent of riparian rights in navigable waters. *E.g., St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners,* 168 U.S. 349, 358-66 (1897).

State sovereignty was recently reaffirmed in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977), by its holding that state law generally controls issues relating to riparian property:[37]

> This Court has consistently held that state law governs issues relating to this property, like other real property, unless some other principle of federal law requires a different result.

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[37] This Court overruled its opinion in *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), which had applied federal common law to determine title to reemerged lands. This Court refrained from overruling *Hughes v. Washington,* 389 U.S. 290 (1967), which had applied federal law to determine title to accretions on ocean-front property, noting that the fact that ocean boundaries were there involved was sufficiently different to justify application of federal common law. *See* 429 U.S. at 377 n. 6. Whatever vitality *Hughes* retains is of no consequence here, however, where no dispute has arisen as to the boundary between land and ocean for boundary purposes.

> Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. . . .

429 U.S. at 378.

When the riparian property rights relate to private nonnavigable waters, as here, the reasons for applying state law are even more compelling. No pre-existing navigation servitude qualifies state control. No general public interest exists in private waters.

IV.

Mandating Public Access to Kuapa Pond Violates Fifth Amendment Protections Against Uncompensated Takings.

A. *Kuapa Pond Was Never Subject to Any Superior Public Navigation Servitude.*

Bishop Estate, and its lessee Kaiser Aetna, hold exclusive title to the beds, walls and waters of Kuapa Pond, and are entitled to exclude all others therefrom. Kuapa Pond is a private body of water which has never been subject to the navigation servitude.

As the District Court, the tribunal most familiar with the present problem, properly held:

> [T]he dominant federal navigation servitude arises from the common law *public* right to pass over *naturally* navigable waters.
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> . . .
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> Here, however, . . . there never existed any public rights in or to the waters of Kuapa Pond, nor did its transformation into the present marina, by private

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B. *This Court Has N Public Water Are of a Navigation S*

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> funding, create, *ipso facto,* any *public* rights therein or thereto.
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> [W]hile Congress may provide for the improvement and regulation of navigation, and take necessary action to prevent interference or obstruction to navigation, it cannot impose a *public* navigation servitude upon such a privately constructed waterway without paying a reasonable compensation for the use thereof.

(Pet. App. 31a-32a.) The Ninth Circuit cavalierly dismissed this proposition without analysis.

B. *This Court Has Not Previously Considered Whether a Public Water Area Can Be Created Under the Guise of a Navigation Servitude.*

While the navigation servitude has been the subject of repeated litigation, a case by case review will not be of significant utility because the Court has not confronted circumstances comparable to the present case.[38] Hereto-

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[38] *Gibson v. United States,* 166 U.S. 269, 275-276 (1897) (no compensation need be paid where access to the Ohio River was cut off as an incidental consequence of construction of a federal dike); *United States v. Bellingham Bay Boom Co.,* 176 U.S. 211, 218 (1900) (compensation required when the government ordered abatement of a boom on the Nooksack River constructed prior to passage of the Rivers and Harbors Act); *Scranton v. Wheeler,* 179 U.S. 141, 164-65 (1900) (riparian proprietor not entitled to compensation when access to St. Mary's Falls ship canal waters destroyed by government project); *United States v. Lynah,* 188 U.S. 445, 470 (1903) (compensation required when property in cultivation inundated by dam raising water level of the Savannah River); *Union Bridge Co. v. United States,* 204 U.S. 364, 401 (1907) (no compensation awarded for incidental loss when alterations to a bridge over the Allegheny River were required by Secretary of War pursuant to Rivers and Harbors Act); *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 62, 68-69 (1913) (no compensation awarded when power company's plant on St. Mary's River and uplands were condemned in the interest of improving naviga-

fore, when governmental authorities invoked the servitude to avoid compensating a private entity or individual, a specific project existed. In this case, no dam, irrigation, reclamation or hydroelectric project will be facilitated; no

tion); *Lewis Blue Point Oyster Cult. Co. v. Briggs,* 229 U.S. 82, 88 (1913) (no compensation awarded for destruction of proprietor's oyster beds in Great South bay incident to government dredging in the interests of navigation); *Greenleaf-Johnson Lumber Co. v. Garrison,* 237 U.S. 251, 267-68 (1915) (no compensation awarded where wharves located within harbor on Elizabeth River were required to be removed); *Willink v. United States,* 240 U.S. 572, 580 (1916) (no compensation paid when proprietor prevented from renewing wharves necessary for ship repair business on Savannah River); *Louisville Bridge Co. v. United States,* 242 U.S. 409, 417-18 (1917) (no compensation awarded where bridge alterations were required to relieve an obstruction to navigation on Ohio River); *United States v. Cress,* 243 U.S. 316, 326 (1917) (compensation granted to property owner for decreased land value where government dam caused inundation of nonnavigable tributary; *United States v. Appalachian Power Co.,* 311 U.S. 377, 427 (1940) (no compensation need be paid when government, pursuant to Federal Power Act, takes over power project on New River because no private property right existed in the flow of a navigable stream); *United States v. Chicago, M., St. P. & Pac. R.R.,* 312 U.S. 592, 597 (1941) (no compensation for loss of embankment when government dam raised water level of Mississippi River); *United States v. Commodore Park, Inc.,* 324 U.S. 386, 390-93 (1945) (no compensation paid to riparian owner when navigability of creek adjacent to bay destroyed by government dredging for Hampton Roads Naval Base); *United States v. Willow River Power Co.,* 324 U.S. 499, 509-10 (1945) (no compensation when proprietor's channel from nonnavigable tributary to navigable stream was impeded by government dam project on Mississippi River); *United States v. Kansas City Life Ins. Co.,* 339 U.S. 799, 808-812 (1950) (compensation required for waterlogging private agricultural land bordering a nonnavigable tributary caused by dam and lock project on Mississippi River); *United States v. Twin City Power Co.,* 350 U.S. 222, 228 (1956) (no compensation payable for value of land as power site taken for flood control project for Savannah River Basin); *United States v. Grand River Dam Auth.,* 363 U.S. 229, 236 (1960) (no compensation awarded when development potential of nonnavigable stream was destroyed by government dam completed as an integral part of a comprehensive plan to regulate navigation, control floods and produce power); *United States v. Virginia Electric & Power Co.,* 365 U.S. 624, 629-30 (1961) (compensation awarded for loss of

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obstruction to navigation such as a wharf, dike or pier will be abated, and no environmental protection will be achieved with respect to Kuapa Pond which cannot be accomplished by regulation.

The Corps of Engineers is not acting to protect avenues of commerce when their activity results in the creation of a public water recreation area. In *Federal Power Commission v. Niagara Mohawk Power Co.*, 347 U.S. 239, 249 (1953), this Court recognized that an attempt to exercise the navigation servitude for nonnavigational purposes "requires clear authorization" in explicit terms. Congress has not specifically authorized the Corps of Engineers to pursue any project or purpose within Kuapa Pond.

This Court's decided cases may only be harmonized to the extent that when a private property right was recognized, payment of compensation was required. Conversely, when private property was held to have been burdened with a dominant servitude, and an authorized public project was advanced, the noncompensability rule was applied.

In the analogous case of *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 345 (1893), a private right to control access to a navigable water via a system of locks and tolls was taken by condemnation. The government was required to pay for the franchise, as well as for tangible personal property. The Court emphasized that congressional power to regulate commerce was limited by the fifth amendment just compensation clause. *Id.* at 336.

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an easement caused by dam on Roanoke River based on the nonriparian value of the property); *United States v. Rands,* 389 U.S. 121, 125-26 (1967) (compensation award pursuant to government's comprehensive Columbia River development plan could not include property value as port site).

While *Monongahela* has been distinguished as resting "primarily upon the doctrine of estoppel . . .," *e.g., United States v. Rands,* 389 U.S. 121, 126 (1967), it has not been overruled and remains a signal case concerning the proper exercise of the federal navigation servitude. Its principles of fairness and equity are applicable in the instant case. *See also United States v. Virginia Electric & Power Co.,* 365 U.S. 624, 631 (1961).

Petitioners' loss will be closely akin to that of the franchise owner in *Monongahela.* The franchisor maintained exclusive navigation rights and charged tolls in exchange for permission to pass. When the government condemned its right, compensation was awarded. In the case of Kuapa Pond, Petitioners charge maintenance fees, similar to tolls, in exchange for permission to use its privately maintained waters for limited recreational purposes.

Dictum in *Scranton v. Wheeler,* 179 U.S. 141 (1900), is relevant, even though the riparian property owner was found not to be entitled to compensation when his access to a publicly navigable river was destroyed.

> Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that Amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this court has announced a rule that will embrace every case.

Id. at 153. The Court proceeded to discuss *Monongahela* as an instance requiring compensation because there was an actual taking of vested private rights, *i.e.*, locks, dams and the franchise to collect tolls, and distinguished Wheeler's claim to be entitled to access, because it found he had no such private right. If the Circuit Court decision herein is affirmed, both tangible and intangible property will be taken without compensation. *See also Louisville Bridge Co. v. United States,* 242 U.S. 409, 422-23 (1917).

The government never expressed any interest in Kuapa Pond until 1971 when it had been improved at great expense. These private efforts transformed Kuapa Pond from a shallow fish pond into a pleasant recreational haven and small boat harbor. The government seeks to appropriate these waters at no public expense.

C. *The Invasion of Petitioners' Private Property Is a Constitutionally Prohibited Taking.*

This Court recognized that private ownership of waters exists in *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 69 (1913). "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." *See also United States v. Twin City Power Co.,* 350 U.S. 222, 241 (1956) (separate opinion). Kuapa Pond is wholly upon the land of Petitioners, and does not qualify as a great navigable water body by any standard set forth by this Court.

The loss of the rights to control surface use and to charge maintenance fees will render Petitioners and the residential lot lessees the victims of the worst of two worlds. On one hand, costly original investment and improvements will be confiscated (Defendants' Exhibit 31; Tr. 100-05).

On the other hand, dredging and other maintenance activities will have to be continued if the Pond is to be preserved in its present condition.

Security problems may result from the loss of privacy. Until the Ninth Circuit decision, a patrol boat insured that unauthorized persons did not gain entrance to Kuapa Pond and possible access to homes, in a manner similar to a fast land restricted residential development with controlled private street access.

Environmental problems may result if private funding for the pond ceases. As the Corps of Engineers has no funds to maintain the pond (R. 260-261), termination of private dredging operations will cause silt to build-up in the channels (Tr. 101-02), and termination of patrol boat operations will result in an accumulation of debris and litter (Defendants' Exhibit 37).[39]

Finally, increased pollution and boat traffic may interfere with fishing and fish propagation which the government has consistently conceded to be Petitioners' exclusive right.

The result will be a *public* water playground. Yet, the government denies both the need to compensate Petitioners for their loss and any responsibility to maintain the pond.[40] If the public enjoys recreational surface uses, fairness and

[39] The dangers are illustrated by *Botton v. State*, 69 Wash.2d 751, 420 P.2d 352 (1966). There, the state's action in granting public access to a private lake created such major environmental problems and nuisance to private property owners that the court enjoined the state from permitting public access without compensation.

[40] The government candidly stipulated below that it had no intention of appropriating any funds for maintenance of Kuapa Pond (R. 261).

justice require the public to contribute to requisite maintenance and to pay for the costly improvements made by private funding.

1. Mandating public access is a taking, not an exercise of regulatory authority.

That which the government seeks to accomplish by exercising "regulatory" authority may properly be termed inverse condemnation, *i.e.,* the expropriation of private property absent employment of eminent domain proceedings, thus destroying Petitioners' exclusive enjoyment of its property rights.

In *Wilfong v. United States,* the Court of Claims set out:

> [T]he principle that to support a Fifth Amendment taking via inverse condemnation there must be not only a Federal activity or project which is permanent in nature, but that such activity or project must impose on private property certain consequences which are themselves permanent, and that their recurrence is inevitable even if only intermittent. By "permanent" we include a servitude of indefinite duration.

480 F.2d 1326, 1329 (Ct. Cl. 1973). This theme is echoed in *United States v. Dickinson,* 331 U.S. 745, 748 (1947). "Property is taken in a constitutional sense when inroads are made upon an owner's use of it to an extent that, . . . a servitude has been acquired. . . ."

Additionally, courts have distinguished taking and regulation by considering the purpose of the activity. For instance, where restrictions are placed on private property to prevent public harm, such restrictions are noncompensable police power exercises, while, on the other hand, restrictions through which the public attains benefits it did

not previously possess are takings requiring compensation. Justice Brandeis distinguished regulation and taking in *Nashville, Chattanooga & St. Louis Railway v. Walters,* 294 U.S. 405, 429 (1935):

> It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. (Citation omitted.) . . . But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. (Citation omitted.)

See also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-414 (1922); *Goldblatt v. Hempstead,* 369 U.S. 590, 594-95 (1962). *See generally* 1 NICHOLS, EMINENT DOMAIN § 1.42 (3d rev. ed. 1976). No public harm is sought to be prohibited in Kuapa Pond, rather the government seeks to attain for the public benefits it has not heretofore possessed.

The power of eminent domain is often exercised to establish public recreation and historic areas. *See, e.g., Shoemaker v. United States,* 147 U.S. 282 (1893); *United States v. Gettysburg Electric Railway Co.,* 160 U.S. 668 (1896); *Rindge Co. v. Los Angeles County,* 262 U.S. 700 (1923); *Roe v. Kansas ex rel. Smith,* 278 U.S. 191 (1929). Accordingly, if the government wants to provide the public with the recreational opportunities of Kuapa Pond, it should follow condemnation procedures and pay the defendants for the value of their private rights.

2. When private property is taken for public use, just compensation is required.

The fifth amendment prohibits taking of private property for public use without due process of law and payment of just compensation. This Court affirmed that the fifth amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). If the Corps of Engineers, under the guise of regulatory authority pursuant to the commerce clause, is permitted to mandate public surface use of Kuapa Pond, Petitioners will be forced to bear what should be a public burden.

D. *The Navigation Servitude Has Been Expanded Beyond Its Intended Scope and Merit Clarification.*

Petitioners do not quarrel with a properly limited notion of superior federal power over water bodies traditionally considered to have been subject to a public right of way. However, usurpation of Petitioners' private right to Kuapa Pond on the pretext of the navigation servitude creates an unwarranted exception to the fifth amendment, representing a dramatic departure from every other exercise of authority under the commerce clause or alternative constitutional power.

Public policies distinguishable only on the basis of land and air versus water are irrational and illogical. The government argues, and the Ninth Circuit holds, that taking private water rights by tacking the navigation servitude to regulatory power is noncompensable. Yet, courts have consistently held that to obtain public or common rights to land or air space, presumably equally sacrosanct, requires compensation. *See United States v. Causby,* 328 U.S. 256 (1946); *Griggs v. Allegheny County,* 369 U.S. 84 (1962);

Richards v. Washington Terminal Co., 233 U.S. 546 (1914); *Shoemaker v. United States, supra; United States v. Gettysburg Electric Railway Co., supra; Rindge Co. v. Los Angeles County, supra; Roe v. Kansas ex rel. Smith, supra.*

The Ninth Circuit and the government recite the history of the servitude by way of justifying its expanded application in the present case. The government claims that no obligation to pay compensation exists because it is merely invoking the navigation servitude. Therefore, nothing has been "taken," *i.e.*, waters deemed subject to the servitude were always subject to an easement in favor of public use, simply awaiting determination of when and where it might be exercised with impunity to destroy private rights.[41] The foregoing rationale is unsatisfactory in this and similar circumstances, where private water bodies exist which were never subject to a public right of way.[42] *See generally*

[41] In some cases, the riparian proprietor of a water body is said to have been on notice that its property is subject to a dominant public interest, therefore, it is not entitled to compensation and invests funds for improvements at its own risk. *See United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950); *Union Bridge Co. v. United States*, 204 U.S. 364, 400 (1907). *See also* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1, 23-5 (1963).

Public use of Kuapa Pond cannot be sustained on a "notice theory" as no one ever considered Kuapa Pond public, and Petitioners could not have been on notice that a servitude might one day be invoked to destroy their investment. A notice theory may support the servitude doctrine in some cases, but in all instances its scope must be limited to waters deemed navigable pursuant to tests applicable when the servitude first attached.

[42] The inequity of such an action was recognized in *Sneed v. Weber*, 307 S.W.2d 681 (Mo. App. 1957), wherein the owner of the lands underlying a fresh water lake had undertaken privately to effect improvements so that boating was possible. Although difficult, access to the Mississippi River was available. The argument that the owner had transformed the lake into public waters was rejected on several grounds in an opinion analyzing both state and federal

MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water,* 3 FLA. ST. U. L. REV. 513 (1975).

The expansive American application is even more difficult to understand because the servitude has been characterized as derived from and narrower than the commerce clause. *See, e.g., United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, 808 (1950). In any case, nowhere does the Constitution provide that the commerce clause, however contorted its application may become, is superior to the fifth amendment. *See Monongahela Navigation Co. v. United States,* 148 U.S. 312, 336 (1893); *Scranton v. Wheeler,* 179 U.S. 141, 153-54 (1900).

Originally, the no compensation rule may have been a reasonable consequence of the government's need to protect publicly navigable waters. Critical, however, to contemporary evaluation of attempts to invoke the servitude is the knowledge that when the Constitution was adopted and early decisions established the servitude's existence, virtually all American commerce was by water. Until the advent of the railroad in the Nineteenth Century, "commerce" and "navigation" were nearly synonymous, with only visionary thinkers dreaming of overland and air "highways" supporting the bulk of contemporary commerce. *See* Stolz, *Pleasure Boating and Admiralty: Erie at Sea,* 51 CALIF. L. REV. 661, 671 (1963).

In these circumstances to deny compensation on the ground that the servitude is merely the exercise of a public

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cases. "To declare the drainage ditch and Weber Lake navigable waters would be to turn a rule intended for the benefit of the public into an instrument of serious detriment to individuals, if not of actual private oppression." (Citation omitted.) 307 S.W.2d at 689.

right is an abuse of power, and should not be done in the absence of an unquestioned historic foundation for the public right claimed. No such historic foundation exists here. As one commentator has pointed out: "It is of doubtful propriety to rationalize the continued preference of waterways on the basis of reasons that are no longer applicable." Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation,* 3 NAT. RES. J. 1, 31 (1963). *See also Note,* 19 CASE WEST. RES. L. REV. 1116, 1122-23 (1968).

In the case of Kuapa Pond, the attempted noncompensable taking of private property cannot be justified as incident to a noncompensable exercise of regulatory powers pursuant to commerce powers. If Petitioners' property were taken in the exercise of a different power for a different purpose, compensation would be mandatory. *See* 2 CLARK, WATER AND WATER RIGHTS § 101.5 (1967).

The public navigation servitude is uniquely severe. This power over waters has no parallel on land. The servitude has been subject to severe criticism even as traditionally applied; so harsh a doctrine should be strictly limited. The nation's commercial needs can be satisfied without destroying private rights.

CONCLUSION

The judgment of the Circuit Court reversing the District Court's denial of an injunction mandating public access to Kuapa Pond should be reversed.

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