JUST AND UNJUST COMPENSATION: THE FUTURE OF THE NAVIGATIONAL SERVITUDE IN CONDEMNATION CASES

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In 1967, the U.S. Supreme Court, in United States v. Rands*, expanded the navigational servitude doctrine governing the federal government's power over land adjoining a navigable waterway by severely qualifying the government's Fifth Amendment obligation to compensate the landowner. This Article address the issue in the following ways: Part I surveyes Congress' power to regulate navigable waters under the Commerce Clause. Part II summarizes the development of the navigational servitude doctrine and some of its inhibitory effects on waterfront development, especially under* Rands*. It explains the fundamental unfairness of the* Rands *principle and demonstrates why this constitutional rule represents an illegitimate extension of the original navigational servitude doctrine, which permits Congress to take private property within the waterway (i.e., below its high water mark) without incurring the obligation to pay just compensation. Part III turns to Section 111 of the Rivers and Harbors Act of 1970 and examines cases and statutory language to illustrate its operation. Finally, Part IV of this Article puts Section 111 in the context of instances in which Congress has acted to restore rights to property owners in other situations, and suggests revisions to Section 111 that would bring the rules governing the determination of just compensation in riparian condemnations into full conformity with those applicable to non-riparian condemnations.*

In the seminal case of *Gibbons v. Ogden*,[1] the Supreme Court established that Congress' power to regulate interstate commerce under Article I, Section 8 of the Constitution[2] embraced the power to regulate all of the nation's navigable waterways. This power has since been held to apply to any body of navigable water, including lakes, rivers, and streams, that has the requisite connection with interstate commerce. Navigable lakes, rivers, and streams that cross state boundaries are subject to congressional regulation, and even

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1. 22 U.S. (9 Wheat.) 1 (1824).
2. U.S. CONST. art. I, § 8.

navigable bodies of water that are wholly within the boundaries of one state may be regulated by Congress.[3]

The power to regulate navigable waterways has spawned the "navigational servitude" doctrine, which allows the United States to destroy or remove private property within the waterway. More significantly, invoking this power does not trigger its obligation under the Fifth Amendment of the Constitution to pay just compensation to the owner. In a series of decisions[4] that culminated in the Supreme Court's 1967 ruling in *United States v. Rands*,[5] the Court expanded the navigational servitude doctrine to numerous cases in which the federal government takes or otherwise affects land adjoining a navigable waterway. While the government's Fifth Amendment obligation to compensate the landowner was not completely undermined in this context, it was severely qualified.

Under *Rands*, the government is not constitutionally required to pay the landowner any portion of the condemned land's value attributable to its proximity to a waterway.[6] Since the location of land near a waterway often accounts for a significant portion of its market value, this decision resulted in a severe hardship on affected landowners, and received wide criticism as being unfair and economically unsound.[7] *Rands* helped establish one of the handful of constitutional doctrines in the takings context that authorizes payment of less than fair market value as just compensation for the property taken.[8]

In 1970, Congress enacted Section 111 of the Rivers and Harbors Act of 1970 (Section 111) in an effort to alleviate some, but not all, of the harshness of the *Rands* rule.[9] In the thirty years since the enactment of Section 111, only a few reported condemnation

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3. *See, e.g.*, United States v. Byrd, 609 F.2d 1204, 1210 (7th Cir. 1979) (holding that Congress may, as part of its power over navigable waterways, regulate wetlands that adjoin intrastate lakes where the lakes "are used by interstate travelers for water-related recreational purposes . . . .").

4. United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

5. 389 U.S. 121 (1967).

6. *Id.* at 123–24.

7. *See generally Omnibus Water Resources Authorizations: Hearing on S. 3815 Before the Subcomm. on Flood Control—Rivers and Harbors of the Senate Comm. On Public Works*, 91st Cong. (1970) [hereinafter *Senate Hearings*].

8. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 & n.16 (1992) (discussing situations in which the government has affected a "permanent physical occupation of land," but is nevertheless absolved of its obligation to pay just compensation).

9. *See* 33 U.S.C. § 595a (1994). For an excellent early treatment of the effect of Section 111 on this area of the law, see Kerry R. Brittain, Comment, *Navigation Servitude—The Shifting Rule of No Compensation*, 7 LAND & WATER L. REV. 501 (1972).

cases have addressed this provision.[10] From these cases, as well as the statutory language, the manner in which Section 111 affects the determination of just compensation in land condemnation proceedings is now generally clear. However, a few unanswered questions remain.

Part I of this Article provides an overview of Congress' power generally to regulate navigable waters under the Commerce Clause of the U.S. Constitution. Part II summarizes the development of the navigational servitude doctrine and some of its inhibitory effects on waterfront development, giving special emphasis to *Rands*. It explains the fundamental unfairness of the *Rands* principle and demonstrates why this constitutional rule represents an illegitimate extension of the original navigational servitude doctrine, which permits Congress to take private property within the waterway (i.e., below its high water mark) without incurring the obligation to pay just compensation.

Part III turns to Section 111 and examines cases and statutory language to illustrate its operation. Finally, Part IV of this Article puts Section 111 in the context of instances in which Congress has acted to restore rights to property owners in other situations, and suggests revisions to Section 111 that would bring the rules governing the determination of just compensation in riparian condemnations into full conformity with those applicable to non-riparian condemnations.

I. CONGRESS' POWER TO REGULATE NAVIGABLE WATERWAYS

Although the Constitution does not expressly give Congress the power to regulate the nation's navigable waterways, the Supreme Court ruled early on, in *Gibbons v. Ogden*,[11] that this power fell within Congress' Commerce Clause powers. The power to regulate is tied to "navigability" because this feature makes a waterway a channel of commerce.

10. United States v. 30.54 Acres of Land, 90 F.3d 790 (3d Cir. 1996); United States v. 320.0 Acres of Land, 605 F.2d 762 (5th Cir. 1979); United States v. 967,905 Acres of Land, 447 F.2d 764 (8th Cir. 1971); United States v. 13.20 Acres of Land, 629 F. Supp. 242 (E.D. Wash. 1986); United States v. 8,968.06 Acres of Land, 326 F. Supp 546 (S.D. Tex. 1971); Palm Beach Isles Assocs. v. United States, 42 Fed. Cl. 340 (1998), *rev'd on other grounds*, 208 F.3d 1374 (Fed. Cir. 2000). *See infra* discussion of these cases at notes 188–215.

11. 22 U.S. (9 Wheat.) 1, 193 (1824).

The judicial definition of "navigable" has, however, expanded considerably in the last two centuries. In *The Daniel Ball*,[12] the standard was whether a river or stream was "navigable in fact,"[13]—namely, whether it is "used, or [is] susceptible of being used, in [its] ordinary condition, as [a] highway of commerce . . . ."[14] If a waterway was navigable over any section, then Congress had the power to control non-navigable portions in order to control the navigable portions.[15]

That standard for navigability expanded significantly over the years. A waterway that was not navigable presently, but had been navigable at one time, would still be considered "navigable" for purposes of determining the application of the navigational servitude doctrine.[16] The Court significantly expanded the reach of navigability in *United States v. Appalachian Power Co.*[17] In that case, the Court held that a waterway that was not navigable in its present condition, but that might become navigable after the making of improvements to it, was "navigable" for purposes of the doctrine.[18]

Later, the Court found that the navigational servitude reached streams meeting none of these criteria of navigability, so long as they affected the navigability of some other connecting waterway.[19] The navigability of a waterway was no longer even a prerequisite to its regulation by Congress. One commentator suggested that in light of these two expansions in the power to regulate navigable waterways, "[t]heoretically, at least, there are no waters in the United States immune from the navigation power."[20]

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12. 77 U.S. (10 Wall.) 557 (1870).

13. *Id.* at 563.

14. *Id.*

15. *See* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).

16. *See* Arizona v. California, 283 U.S. 423, 453–54 (1931); *see also* Loving v. Alexander, 745 F.2d 861, 867 (4th Cir. 1984) (finding that a portion of a river met "the federal test of navigability" because it was once [although was no longer] navigable in fact); Alameda Gateway, Ltd. v. United States, 45 Fed. Cl. 757 (1999)(following *Loving*). *But see* Boone v. United States, 944 F.2d 1489, 1498–1500 (9th Cir. 1991) (rejecting the notion of a "dormant" navigational servitude).

17. 311 U.S. 377 (1940).

18. *See id.* at 407.

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

20. Eva Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES JOURNAL 1, 9 (1963). This is not necessarily an idle concern. Where a homeowner's lakefront property is located on a body of water that feeds into a navigable river, could the federal government condemn the property and then refuse to reimburse the homeowner for the value attributable to the lake view? Or where a farmer relies on a stream for irrigation, and the stream feeds into a navigable river, could the federal government condemn the farmer's property and then insist on paying only the fair market value of arid desert land? Constitutionally, the answer would appear to be "yes."

Congress' power to regulate navigable waterways has been increased in at least one other way since the Court's 1824 decision in *Gibbons*. At one time, it was assumed that Congress could only exercise the power for a navigational purpose.[21] As the law actually developed, however, it is no longer necessary to show that navigation is the sole or even the principal purpose of the governmental action.[22]

These developments in the law led the Supreme Court to acknowledge in 1979 that Congress' power to regulate the nation's waterways is "best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as 'navigable water of the United States.'"[23] Under the most recent Commerce Clause decisions, the test for determining whether Congress has the power to regulate an activity is whether the activity "substantially affects" interstate commerce.[24]

In a 1956 case, the Court stated that "[i]t is not for courts . . . to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation."[25] In light of a very recent Supreme Court decision,[26] however,

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21. *See id.* at 9–10.

22. *See* United States v. Twin City Power Co., 350 U.S. 222, 223 (1956) (upholding the limitation of compensation in connection with a project which the Report of the Chief of Army Engineers described as benefiting navigation only incidentally). Professor Morreale suggested that while the requirement of at least an incidental benefit to navigation imposes a theoretical check on Congress' regulation of the nation's waterways, the Court has "accept[ed] at face value congressional declarations that particular projects are necessary for or would 'benefit' navigation." Morreale, *supra* note 20, at 11–12. *See also* Twin City Power Co., 350 U.S. at 224 ("It is not for courts . . . to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation."). In light of two recent Commerce Clause decisions, the Supreme Court may be more willing today to carefully examine congressional findings regarding navigation or regarding the extent to which an activity to be regulated "substantially affects" interstate commerce. *See infra* text accompanying notes 25–29.

23. Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979).

24. *See* United States v. Lopez, 514 U.S. 549, 559 (1995). The Court in *Lopez* struck down a federal statute on Commerce Clause grounds for the first time since 1935. The federal statute made it a criminal offense for any individual to knowingly possess a firearm within a distance of 1000 feet from the grounds of a public, parochial, or private school. *Id.* at 551. The Supreme Court held that because the statute "has nothing to do with 'commerce' or any sort of economic enterprise," *id.* at 561, Congress exceeded its authority under the Commerce Clause in enacting it. *Id.* The last decision before *Lopez* to strike down a federal statute on Commerce Clause grounds was *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Five years after *Lopez* was decided, the Supreme Court again struck down a federal statute on Commerce Clause grounds. United States v. Morrison, 525 U.S. 598 (2000).

25. *Twin City Power Co.*, 350 U.S. at 224.

26. *Lopez*, 514 U.S. 549.

there is some reason to believe that the courts may not automatically accept congressional findings that a project benefits navigation or, to use the analysis favored in *Kaiser Aetna*, that it "substantially affects" interstate commerce. In *United States v. Morrison*,[27] the Court, in striking down a section of an act as outside the Commerce Clause power, found that congressional findings that the subject matter of the statute affected interstate commerce were inadequate. Because the five members of the Court who comprised the majority in *Morrison* have also adopted an expansive reading of the Takings Clause in the area of regulatory takings,[28] one should not automatically assume that the judiciary will continue to defer to congressional findings in cases involving the constitutionality of congressional regulation of navigable waterways.[29] It is likely that there will be waterway projects whose effects on interstate commerce will be so attenuated that the Court could declare them to be outside Congress' power to regulate interstate commerce.

II. THE NAVIGATIONAL SERVITUDE

The power to regulate interstate commerce, as a general matter, is subject to the requirements of the Fifth Amendment Takings Clause. As such, the general rule is that if Congress takes private property in the exercise of its Commerce Clause powers, it must pay "just compensation" to the affected property owner.[30]

27. 525 U.S. 598 (2000).

28. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994) (finding that the city's requirement that a landowner dedicate a portion of her property in a flood plain as a public greenway and for a pedestrian/bicycle pathway easement as a condition of allowing development of the property violated the Fifth Amendment). The five Justices who formed the majority in *Morrison* (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas) also comprised the five-member majority in *Dolan*. Those same Justices made up the majority in *Lopez*.

29. The Supreme Court may be inclined to carefully review broad assertions of federal power over navigable waterways as a way of limiting federal control over environmental matters or water safety issues such as chlorination or dechlorination. *See, e.g.*, Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs., 531 U.S. 159, 174 (2001) (holding that Congress had not intended to extend federal jurisdiction for environmental protection purposes over small isolated ponds that have no direct impact on "navigable waters" [as the term is used in the Clean Water Act, 33 U.S.C. § 1251 (1994)], thus avoiding "the significant constitutional and federalism questions" [i.e., whether such an assertion of power would exceed Congress' authority under the Commerce Clause] raised by respondents' interpretation of the Act).

30. *See* Kaiser Aetna v. United States, 444 U.S. 164, 174, 177–78 (1979) (where Congress properly exercises its regulatory power under the Commerce Clause, and regulation amounts to a taking, the Fifth Amendment generally requires payment of compensation).

The Supreme Court has developed a different rule, however, to govern the situation where Congress takes private property in the exercise of its power to regulate waterways. In that circumstance, it is frequently said that the government has a "navigational servitude," which enables it to destroy or take private property without the necessity of paying compensation to the property owner.[31]

Under the Supreme Court's "navigational servitude" doctrine, private property is affected in two principal ways. One is that when the government forces the removal of, destroys, or simply takes personal or real property located below the high water mark of a navigable waterway, it has no constitutional obligation to pay any just compensation. The other is that when the government condemns land above the high water mark, it need only pay compensation which is adjusted to exclude any value attributable to the property's proximity to the waterway.

A. *The Rule of No Compensation*

The Supreme Court has described the "navigational servitude" as a "superior navigation easement"[32] and a "dominant servitude."[33] But the rule of no compensation that is the essence of the servitude does not apply to all exercises of the power to regulate navigable waterways in which private property is taken or destroyed. The Supreme Court "has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation."[34]

The "rule of no compensation" typically arises in one of two basic situations in which the regulation of a waterway results in damage to private property. One concerns the erection of structures in, or the

31. *See id.* at 175.

32. United States v. Grand River Dam Auth., 363 U.S. 229, 231 (1960).

33. United States v. Cherokee Nation of Okla., 480 U.S. 700, 704 (1987).

34. *Kaiser Aetna*, 444 U.S. at 172. In *Kaiser Aetna*, the Supreme Court held that even though a dredged pond owned by the defendant landowners fell within the definition of "navigable waters" as the Court had used that term in discussing Congress' power under the Commerce Clause, the landowners were entitled to compensation if the Army Corps of Engineers insisted on turning the pond into a public aquatic park, because "the Government's attempt to create a public right of access to the improved pond [went] so far beyond ordinary regulation or improvement for navigation as to amount to a taking . . . ." *Id.* at 178. *See also* Boone v. United States, 944 F.2d 1489, 1493 ("Though similarly grounded in the commerce clause, the navigational servitude is distinct from the power to regulate navigable waters.") (citations omitted).

dredging and filling of, a navigable waterway. The other concerns governmental action that denies a riparian landowner access to his or her property.

1. Regulation Regarding the Placement of Structures in or the Filling of Navigable Waterways—The Court has held that where regulation requires the removal of obstructions to navigation, such as bridges, wharves, and power plants, or prevents the erection of such structures, the government is not obligated to pay compensation under the Takings Clause, despite the obvious value of these structures to those who erected them.[35] As a general rule, any structure that lies below the high water mark of the waterway,[36] or above the waterway,[37] is subject to injury or destruction by governmental action without payment of compensation. The same rule applies when the federal government denies a landowner permission to erect a structure on a navigable waterway, or permission to dredge or fill part of a navigable waterway,[38] and the landowner alleges a regulatory taking.[39] The fact that the applicable state law recognizes private property rights in submerged land does not affect the operation of this rule.[40]

The rule of no compensation is particularly harsh insofar as it has been construed to apply to private property rights existing in land which was formerly part of a riverbed, but was later filled by

35. *See, e.g.*, Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251, 256, 258–64 (1915) (regulation requiring removal of wharves did not obligate government to pay compensation); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) (regulation requiring removal of power plant from waterway did not give rise to obligation to pay compensation); Union Bridge Co. v. United States, 204 U.S. 364 (1907) (no compensation required where government forced costly changes to existing bridge).

36. *See* United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 312 U.S. 592, 599 (1941) (railroad tracks).

37. *See* Union Bridge Co. v. United States, 204 U.S. 364, 397 (1907) (bridge over waterway).

38. *See* Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1384 (Fed. Cir. 2000); United States v. 30.54 Acres of Land, 90 F.3d 790, 796 (3d Cir. 1996). Section 10 of the Rivers and Harbors Act of 1899 requires a landowner to obtain a permit from the Army Corps of Engineers before engaging in dredging or fill operations in a navigable waterway. 33 U.S.C. § 403 (1994).

39. Under the Rivers and Harbors Act of 1899, anyone who wishes to perform work that affects a navigable waterway of the United States must first obtain a permit from the Army Corps of Engineers. 33 U.S.C. § 403 (1994). Section 404 of the Clean Water Act requires the Corps to take environmental concerns into account in deciding whether to grant such a permit. 33 U.S.C. § 1344 (1994).

40. *See Chicago*, 312 U.S. at 596 (stating "[w]hether, under local law, the title to the bed of the stream is retained by the State or the title of the riparian owner extends to . . . [the] low water mark, the rights of the title holder are subordinate to the dominant power of the federal Government in respect of navigation") (footnotes omitted).

natural or artificial means.[41] Nonetheless, the courts have held that private property rights in dry land formerly under the high water mark of a navigable waterway in 1794, when the United States Constitution was ratified, or in structures that have been placed on such land, may be destroyed or injured by governmental regulation without payment of just compensation.[42]

This aspect of the rule of no compensation has prompted concern that large parts of New York, Boston, and San Francisco could, at least in theory, be taken by the federal government without any constitutional obligation to pay just compensation.[43] That is because substantial parts of those cities were erected on filled land that was once a part of navigable waters.[44] While a 1949 decision of the United States Court of Appeals for the District of Columbia suggests that there would be no constitutional impediment to such a taking without compensation,[45] a more recent Third Circuit decision suggests otherwise.[46]

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41. United States v. Martin, 177 F.2d 733 (D.C. Cir. 1949) (holding that filled land beneath the 1794 high water mark of a portion of the Potomac River belongs to the United States).

42. *Id.* at 734 ("[a]ny structure is placed in the bed of a stream at the risk that it may be so injured or destroyed.") (quoting *Chicago*, 312 U.S. at 599). In other words, if a landowner chooses to place a structure in a waterway, he does so with the knowledge that the government may require the removal of the structure without the payment of compensation. The *Martin* Court added that, as such, the land that had been filled and a wharf that had been constructed on it "may at any time be taken without compensation, in the interest of navigation, provided the taking is not arbitrary." *Id.* The Court did not elaborate on what would constitute an "arbitrary" taking in this context.

43. *See Senate Hearings*, *supra* note 7 (reproducing the following article: John P. Turner, *The Navigation Servitude*, TITLE NEWS, Jan. 1969). John Turner was a former Senator and Vice-President and General Counsel, Chicago Title Insurance Co. These hearings were conducted in connection with a predecessor to the bill (introduced by the 92nd Congress) that ultimately became Section 111 of the Rivers and Harbors Act of 1970, which is discussed *infra* in text at notes 104–166.

44. *See id.* at 197.

45. *See Martin*, 177 F.2d 733, discussed *supra* in note 42.

46. *See* United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974). In *Stoeco Homes*, the federal government sought to enjoin Stoeco Homes from any dredge, fill, or construction activities on land that prior to 1927 was part of a saltwater marsh, subject to the ebb and flow of the tide. The court concluded that since the marshlands were subject to the ebb and flow of the tide, they were navigable waterways within the meaning of the Rivers and Harbors Act. *Id.* at 610. However, the court declared that the government's navigational servitude in the shoreward lands had "long since been surrendered" by 1951, when Stoeco purchased property that had been fast lands for twenty-four years. *Id.* at 611. The court observed that "[c]ertainly a construction [of Section 10] which would, after government inactivity from 1890 to 1970, cast doubt upon the property status of thousands of acres of former tidal marshes would present problems under [the Fifth] amendment," and reversed the trial court's injunction against construction. *Id. See also* United States v. Rands, 389 U.S. 121, 126 (1967) (discussing *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893),

Such sweeping applications of the no-compensation rule may be limited, however, by the requirement that the purpose of the regulation in question be related at least in some fashion to navigation. In other words, while navigation need not be the sole purpose or even the primary purpose, some navigational purpose is still required. In *Palm Beach Isles Associates v. United States*,[47] the Court of Appeals for the Federal Circuit considered whether the rule of no compensation applied to the denial of a permit to fill part of a navigable waterway. The property in question was located on and along a long spit of land in Florida situated between the Atlantic Ocean on the east and Lake Worth on the west.[48] It consisted of 49.3 acres of submerged land in the lake and 1.4 acres of shoreline wetlands.[49]

In 1988, the owners applied for a permit to fill the submerged lake bottom and contiguous wetlands, in accordance with Section 10 of the Rivers and Harbors Act of 1899.[50] In a letter to the landowners, the Army Corps of Engineers denied the request for a permit primarily on environmental grounds, but added in an accompanying memorandum:

> Navigation: Shallow water depths that already exist in the proposed project area have limited boating activities to shallow draft vessels. Therefore, other than the elimination of [49.3] acres of navigable waters, the project should not have a significant adverse impact on navigation, in general.[51]

The owners brought an inverse condemnation action, alleging that the denial of the permit amounted to a regulatory taking of their property insofar as it prevented any economically viable use of the 50.7 acre parcel.[52] They sought more than ten million dollars in just compensation from the federal government.[53] The government argued that regardless of the purpose of the regulatory imposition, there can never be a taking of property in a

and suggesting that the doctrine of estoppel may in certain circumstances preclude application of the rule of no compensation).

47. 208 F.2d 1374 (Fed. Cir. 2000).
48. *Id.* at 1377.
49. *Id.*
50. 33 U.S.C. § 402.
51. *Palm Beach*, 208 F.3d at 1378.
52. *Id.*
53. *Id.*

waterway subject to the navigational servitude.[54] The government argued alternatively that even if the regulatory purpose must be related to navigation for the government to avoid paying just compensation, this regulation served such a purpose.[55]

The court of appeals first held that under some circumstances, the government could invoke the navigational servitude doctrine as a defense to a regulatory taking claim.[56] "In order to assert a defense under the navigational servitude," the court said, "the Government must show that the regulatory imposition was for a purpose related to navigation . . . ."[57]

The opinion of the Fifth Circuit in *Palm Beach Isles* revealed that the court took seriously the requirement that the government show a regulatory purpose that was related at least in part to navigation.[58] It found that the memorandum contained contradictory findings regarding navigation, and that the "clarify[ing]"[59] affidavit of the individual at the Army Corps who prepared those findings was not consistent with the language of the memorandum.[60] As such, the court ruled that "the issue of whether the Government had a navigational purpose for its permit denial is a disputed material fact . . . ."[61] The court vacated the lower court's summary judgment in favor of the United States,[62] and remanded for further proceedings to determine whether bona fide navigational reasons existed for the permit denial.[63]

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54. *Id.* at 1384. The plain implication of the government's argument was that it could undertake a project to fill the submerged land itself and then appropriate the property without having to pay just compensation to the landowners.

55. *Id.*

56. *Id.*

57. *Id.* at 1385.

58. *Id.* at 1384–86.

59. *Id.* at 1386.

60. *See id.*

61. *Id.*

62. The district court's decision in *Palm Beach Isles* could have been influenced by a factual background unlikely to evoke the court's sympathy. The landowners in that case sold off 261 acres of prime "upland oceanfront property" on one side of a road, leaving them with 50.7 acres, all but 1.4 acres of which was submerged, on the other side. *Id.* at 1377. Thus, they sold off the better part of their property, leaving themselves with little more than a small spit of land and a potential inverse condemnation claim.

63. Deciding whether there is a navigational purpose underlying government action that affects use of a navigable waterway should not be confused with determining whether the action has a sufficient nexus with interstate commerce. A court could determine that a particular action is within Congress' power to regulate interstate commerce, but that it does not have an underlying navigational purpose, and hence that the rule of no compensation does not apply.

While the no-compensation rule may not, as a practical matter, make large parts of New York, Boston, and San Francisco subject to uncompensated seizures, the rule does have at least one deleterious real-world effect. The rule deters waterfront development because the threat of condemnation without compensation increases the risks for investors and real property lenders. As one commentator has stated, "[t]itle companies and lawyers list the [s]ervitude as a title exception and as a result lenders will not make loans which are subject to the [s]ervitude and title to such developments are unmarketable."[64]

Attempts to provide a principled justification for the rule of no compensation when private property located within a navigational servitude is destroyed or injured have been largely unavailing.[65] Longstanding common law principles provide only limited support for the Supreme Court's broad application of the navigational servitude doctrine.[66] Because Congress exercises its power over waterways in a manner that far exceeds the scope of regulation at common law, the "notice" theory (i.e., the theory that anybody who purchases property is "on notice" of common law restrictions regarding one's use of the property) likewise provides little support for the rule of no compensation.[67] Finally, the no-compensation rule seems less justifiable today than it might have been in an earlier era because waterways are no longer as essential to the movement of goods as they were when fewer alternative forms of transportation were available.[68]

2. Regulation Which Denies Access to Riparian Landowners—The second basic situation in which the no-compensation rule applies is when government regulation causes a riparian owner to lose access to a navigable waterway. In the first case of that kind, *Gibson v. United States*,[69] a riparian landowner sought compensation when the government's construction of a dike prevented her from using her landing for the shipment of products and supplies to and from her farm, which was located on the uplands portion of the Ohio River.[70] The construction of the dike did not result in any physical

64. *See Senate Hearings*, *supra* note 7, at 188 (Statement of Eugene J. Morris, Chairman, Special Committee on Federal Navigation Servitude, Section on Real Property, Probate and Trust Law, American Bar Association).

65. *See* Morreale, *supra* note 20, at 21-31 (surveying various theories and concluding that they are not persuasive).

66. *See id.* at 25-28.

67. *See id.* at 23-25, 31.

68. *See id.* at 31.

69. 166 U.S. 269 (1897).

70. *Id.* at 269-70.

invasion of Mrs. Gibson's property by water or otherwise, but instead prevented boats from traveling to and from her property.[71]

The Supreme Court affirmed a lower court ruling dismissing the landowner's suit on the ground that she was entitled to no compensation as a matter of law.[72] In so doing, the Court appeared to rest its holding on both ordinary eminent domain principles as well as the navigational servitude doctrine.[73] The Court ruled first that "the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power."[74] By emphasizing that there was no direct taking or physical invasion of land, the Court seemed to be saying merely that there had been no "taking" for purposes of the Fifth Amendment, which is a fairly unremarkable pronouncement.[75]

Later in the opinion, however, the Court invoked the navigational servitude doctrine as a ground for its ruling, when it observed that "riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard."[76] In a subsequent decision, *United States v. Commodore*

71. *Id.* at 270.

72. *Id.* at 276.

73. *See, e.g.*, United States v. Rands, 389 U.S. 121, 123 (1967).

74. *Gibson*, 166 U.S. at 275.

75. Even without a direct invasion of property, a property owner today can still seek compensation if the functional equivalent of a taking has occurred. That claim, however, requires the owner to demonstrate that the governmental action "go[es] too far . . . ." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992). *See also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (applying an "ad hoc" balancing test in concluding that no compensable taking had occurred as a result of the New York City Landmark Commission's refusal to approve plans for the construction of a 50-story office building over Grand Central Terminal). Based on the facts as related in the *Gibson* opinion, however, it seems doubtful that the landowner could have made the showing necessary to prove a regulatory taking in an inverse condemnation suit. Nonetheless, modern cases do suggest that a landowner in an inverse condemnation case will prevail where the regulation has effected a complete loss of access to his or her property. *See, e.g.*, Laurel v. State of Connecticut, 362 A.2d 1383, 1387 (Conn. 1975) ("[t]he destruction of the right of access to a parcel of land constitute[s] a taking of it in a constitutional sense . . . .") (citation and internal quotation marks omitted); Jordan v. Town of Canton, 265 A.2d 96, 98 (Me. 1970) ("Total deprivation of access is equivalent to a taking requiring compensation . . . ."); Burnquist v. Cook, 19 N.W.2d 394, 398 (Minn. 1945) ("Clearly, an owner of land abutting on a street cannot constitutionally be deprived of all access to his premises without compensation . . . .") (citation and internal quotation marks omitted). *See also* New Hampshire v. Shanahan, 389 A.2d 937, 938 (N.H. 1978) ("[A]t some point the right of access becomes so restricted by State action that it must be deemed 'taken,' and the State must compensate the landowner for such taking.").

76. *Gibson*, 166 U.S. at 276.

Park,[77] the Court held that "an owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as 'fishing and boating and the like,' for which rights the government must pay."[78]

Because these deprivation of access cases involved no physical invasion of upland property—i.e., no physical invasion of lands above the high water mark—there was no need for the Court to resort to the navigational servitude as a ground for denying compensation to the landowner. The traditional eminent domain principle denying compensation when there has been no appropriation or physical invasion of property would have been an adequate basis for the holdings. *Gibson* (and to a lesser extent, *Commodore Park*) relied in part on this principle. Nevertheless, the no-compensation rule in these cases has usually been viewed as an application of the navigational servitude doctrine.[79] So construed, these cases provided support for a major extension of the doctrine in *United States v. Rands*.[80] In *Rands*, the Court held that the just compensation due riparian landowners in formal eminent domain proceedings did not include any compensation for that portion of the value of the property attributable to its proximity to a waterway. This expansion of the navigational servitude eventually prompted corrective legislation by Congress intended to ameliorate the harshness of the *Rands* rule.

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77. 324 U.S. 386 (1945).

78. *Id.* at 391. *See also* Scranton v. Wheeler, 179 U.S. 141 (1900). In *Scranton*, the owner of land bordering a navigable river sued the defendant, an agent of the United States, when the federal government constructed a pier that effectively deprived him of access to the river. The Court held that the landowner was not entitled to compensation, stating:

> If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a *taking* of *private* property for public use, but only a consequential injury to a right which must be enjoyed . . . "in due subjection to the rights of the public"—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner.

Id. at 164.

79. *See, e.g.*, Morreale, *supra* note 20, at 33.

80. 389 U.S. 121 (1967).

B. *The Rule of Partial Compensation in Condemnations of Riparian Lands.*

In *Rands*,[81] the Supreme Court extended the navigational servitude doctrine to condemnation cases involving riparian land by establishing a rule under which landowners would not be constitutionally entitled to full compensation for the value of their property. In a unanimous opinion, the Court held that in formal eminent domain proceedings, the government need not pay for any portion of the property's value that was attributable to its potential use as a port site on a navigable waterway.[82]

In *Rands*, the respondents owned land along the Columbia River that was condemned by the federal government in connection with the John Day Lock and Dam Project.[83] The district court ruled that "the compensable value of the land taken was limited to its value for sand, gravel, and agricultural purposes and that its special value as a port site could not be considered."[84] The Ninth Circuit reversed, concluding that the government had taken a compensable right of access from the respondents and that "port site value should be compensable under the Fifth Amendment."[85] The Supreme Court granted certiorari and reversed, holding that no compensation need be paid to a landowner for value attributable to a property's proximity to a waterway. In so ruling, the Court stated that the "proper exercise" of the navigational servitude

> is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.[86]

The logic and language of the *Rands* opinion left no doubt that in condemnations of riparian land, any value attributable to the land's proximity to a waterway could be ignored in computing just

81. *Id.*
82. *Id.* at 124-25.
83. *Id.* at 121-22.
84. *Id.* at 122.
85. *Id.* (quoting from United States v Rands, 367 F.2d 186, 191 (9th Cir. 1966)).
86. *Id.* at 123 (citations omitted).

compensation, without running afoul of the Fifth Amendment. This is precisely how the lower courts have read the opinion.

For example, in *United States v. 8,968.06 Acres Of Land*,[87] the district court applied *Rands* in holding that the owners of land bordering the Trinity River were not entitled to compensation for the value attributable to the lands by contiguity to navigable waters. In doing so, however, the court expressed some concern as to the fairness of its ruling, and invited the landowners to seek redress from the legislative branch:

> The Court is aware that this decision reaches a result which is harsh upon the condemnees and which, superficially, appears to depart from the market value standard of just compensation. In their excellent brief, defendants have pointed out that the prospect of diminished compensation for riparian property may have an unsettling effect on the mortgage markets and may retard development of riparian lands. Although possibly valid, this argument implies a corrective which is available only through the political process, and is thus addressed to the wrong forum.[88]

The district court's 1970 decision in *8,968.06 Acres* was vacated on rehearing in 1971 as the result of the subsequent passage of Section 111 of the Rivers and Harbors Act of 1970,[89] which Congress made applicable to cases pending on its effective date.[90] Indeed, the harshness of the original ruling may have prompted the legislative initiative that culminated in the passage of Section 111.[91]

The broad rule announced in *Rands* represents the most conspicuous exception in our jurisprudence to the core principle of just compensation in eminent domain cases, which is that "[t]he owner is to be put in the same position monetarily as he would

87. 318 F. Supp. 698 (S.D. Tex. 1970) (holding that landowners were not entitled to value that would have accrued due to diversion or channeling of water, but landowners should be entitled to value attributable to "passive proximity" to water).

88. *Id.* at 704.

89. United States v. 8,968.06 Acres of Land, 324 F. Supp. 546 (S.D. Tex. 1971).

90. *See* 33 U.S.C. § 595a (1994).

91. *See infra* notes 150–226 and accompanying text (discussing the way in which Section 111 altered the rules for determining just compensation in cases where part of the land's value is attributable to its proximity to a navigable waterway); *see also* United States v. Birnbach, 400 F.2d 378 (8th Cir. 1968) (illustrating another example of how the lower courts have applied *Rands*).

have been [in] if his property had not been taken."[92] Instead of requiring the government to pay the landowner the fair market value of his or her property based on the potential "highest and best"[93] use of the property, *Rands* permits the government to pay a riparian landowner what one commentator has bluntly described as "a truncated and butchered version of market value that limits the property to certain specific uses and excludes certain other uses even though the property is completely adaptable for such other uses."[94]

The landowners in *Rands* owned land along the Columbia River in the State of Oregon.[95] They leased the land to the State with an option to purchase at a specified price.[96] The federal government took the land before the option was exercised in connection with a dam project.[97] Pursuant to 33 U.S.C. 578, the government sold the land to the State of Oregon at "a price considerably less than the option price . . . ."[98]

In the condemnation proceeding, the trial judge determined that the land had to be valued as if it were not in proximity with the Columbia River. Specifically, it could only be valued for "sand, gravel, and agricultural purposes,"[99] and could not be valued as a "port site."[100] The Ninth Circuit reversed on the basis that "port site value should be compensable under the Fifth Amendment."[101] As the court noted, the ultimate just compensation award was approximately "one-fifth the claimed value of the land if used as a port site,"[102] or, in other words, one-fifth of the market value of the land.

In reversing the Ninth Circuit's ruling, the Supreme Court relied in part on the access cases discussed above (*Gibson v. United*

92. United States v. Reynolds, 397 U.S. 14, 16 (1970); *see also* United States v. Va. Elec. & Power Co., 365 U.S. 624, 633 (1961) (describing this rule as the "guiding principle of just compensation").

93. Awarding compensation on the basis of the "highest and best" use of a parcel is the standard rule. *See, e.g.,* United States v. Fuller, 409 U.S. 488, 490 (1973).

94. *Senate Hearings*, *supra* note 7, at 684 (prepared statement of Harold R. DeMoss, Jr.). Mr. De Moss's statement contains an outstanding critique of the *Rands* decision.

95. 389 U.S. at 121-22.

96. *Id.*

97. *Id.* at 122.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (quoting from *Rands v. United States*, 367 F.2d 186, 191 (9th Cir. 1966)) (internal quotation marks omitted).

102. *Id.*

States,[103] *Scranton v. Wheeler*,[104] and *United States v. Commodore Park, Inc.*[105]) for the proposition that the United States may "impair or destroy a riparian owner's access to navigable waters, even though the market value of the riparian owner's land is substantially diminished."[106]

The Court's reliance on those cases was somewhat dubious, however, because those cases did not involve actual physical invasions of land, and hence were not actual takings. As noted above, when viewed against the backdrop of established eminent domain principles, the holdings in these cases—that governmental regulation causing a loss of riparian access does not amount to a compensable taking of property—are unexceptional. Contrary to the Court's dictum in *United States v. Virginia Electric & Power Co.*[107] (which was cited in *Rands*), it hardly follows from these holdings that when the government actually takes property, the landowner is not entitled to the full market value of the property, including any portion of the value attributable to the property's access to a waterway.[108]

In support of its conclusion that the landowners before the Court were not entitled to compensation for their riparian land, the *Rands* Court also cited a case that arose in quite a different context, *United States v. Chandler-Dunbar Water Power Co.*[109] In that case, the government condemned, *inter alia*, a hydroelectric power company on the St. Mary's River, a waterway providing the only

103. 166 U.S. 269 (1897).

104. 179 U.S. 141 (1900).

105. 324 U.S. 386 (1945).

106. *Rands*, 389 U.S. at 123 (citations omitted).

107. 365 U.S. 624, 629 (1961) (indicating that "just 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") (citations omitted) [cited in *Rands*, 389 U.S. at 122-23]. In fact, there is no necessary relationship between the rules governing what types of losses are compensable where there is no physical invasion of land, and which losses are compensable when such an invasion occurs. *See, e.g.*, Alan T. Ackerman & Noah Eliezer Yanich, *Just Compensation and the Framers' Intent: A Constitutional Approach to Road Construction Damages in Partial Taking Cases*, 77 U. DET. MERCY L. REV. 241 (2000). In any event, as one commentator has pointed out, the rather far-reaching statement from *Va. Elec. & Power Co.* was mere unsupported dictum, because the flowage easement in that case did not create "any right of access to navigable waters . . . ." *See Senate Hearings*, *supra* note 7, at 691 (Prepared Statement of Harold De Moss, Jr.).

108. *See also* Herrington v. County of Sonoma, 834 F.2d 1488 (1988) (upholding use of due process and equal protection theories to support compensation for landowners affected by unreasonable zoning regulations without requiring a showing that the regulations effectively deprived the landowners of any reasonable use of their property).

109. 229 U.S. 53 (1913).

outlet for Lake Superior.[110] The Chandler-Dunbar Water Power Company (Chandler-Dunbar) owned an upland strip of land approximately 2500 feet long and from fifty to 150 feet wide, and had placed dams, dikes, and forebays in the water to harness water power for commercial purposes.[111] The federal government condemned the land for the purpose of enlarging the "Soo Locks" in order to better facilitate the passage of vessels between Lake Superior and Lake Huron.[112] The district court awarded Chandler-Dunbar not only an amount representing the value of the uplands, but also an amount representing the value of the water power of the river "in excess of the supposed requirements of navigation . . . ."[113] Chandler-Dunbar had claimed a "proprietary right . . . in the flow of the stream . . . to the extent that such flow is in excess of the wants of navigation . . . ."[114]

The Supreme Court held that because Chandler-Dunbar had "no property right in the river which has been 'taken,' "[115] the district court "erred in awarding $550,000, or any other sum, for the value of what is called 'raw water,' that is, the present money value of the rapids and falls to the Chandler-Dunbar Company as riparian owners of the shore and appurtenant submerged land."[116] The district court had awarded compensation for the value of the uplands which included the value attributable to the land's use for "canal and lock purposes,"[117] as well as its value for use as factory sites for generating power.[118] The Supreme Court affirmed the award insofar as it compensated for the land's use for canals and locks, but reversed insofar as the award reflected the land's use for power generation.[119]

The Supreme Court's denial of compensation for the "present money value of the rapids and falls" as used for power generation is perfectly consistent with settled valuation rules in condemnation

110. *Id.* at 66.
111. *Id.* at 68.
112. *See id.* at 67.
113. *Id.* at 59.
114. *Id.* at 61.
115. *Id.* at 74.
116. *Id.*
117. *Id.* at 75.
118. *See id.* at 74-75 (referring to this portion of the award as representing "additional value allowed in consequence of the availability of these parcels in connection with the water power supposed to be the property of the Chandler-Dunbar Company, and supposed to have been taken by the Government in this case").
119. *See id.* at 75.

cases.[120] While the potential use of land for operating a particular business affects the value of land, the effect is generally not measured—except indirectly (through the introduction of such evidence for a limited purpose)—by the present value of the expected stream of profits from business activity that can be engaged in on the land.[121] In ordinary condemnation settings, compensation for the value of land would not include a "present value" compensation for profits arising out of a potential (or actual) use of the land.[122]

Regarding the award for "additional value allowed in consequence of the availability of these parcels in connection with water power," it is not entirely clear what this actually represented. A fully informed buyer would presumably assign some value to a particular potential use of the land, though the buyer would have to discount that value by the possibility that such a use would be barred at some future time.[123] If this was the basis of the district court's reasoning, then it would be difficult to justify the Supreme Court's refusal to uphold that award.[124] In any event, this part of the Supreme Court's opinion is difficult to explain, because the Court unanimously affirmed the award of compensation for the value attributable to the property's use for canals and locks, which would inherently reflect the value of the probable use of the property for that purpose.[125] In light of this statement, one way to

120. *See, e.g.*, Detroit v. Larned Assoc. & Buckland Van-Wald, Inc., 501 N.W.2d 189, 191-92 (1993).

121. *See* 4 NICHOLS, THE LAW OF EMINENT DOMAIN § 13.4 (2001).

122. *See* Morreale, *supra* note 20, at 48-49. Professor Morreale assumes that the value of the water flow and the value it added to the adjoining land are identical concepts (and are therefore identical in dollar value), but this assumption is unsound, since these values may be significantly different.

123. Of course, that probability must be ascertained without regard to the threat of this particular condemnation. *Cf.* United States v. Va. Elec. & Power Co., 365 U.S. 624, 635-36 (1960) (suggesting that value of flowage easement being condemned is to be determined by "probability or improbability of actual exercise of the easement" and that "in assessing this improbability, no weight should be given to the prospect of governmental appropriation").

124. *See Chandler-Dunbar*, 229 U.S. at 76. Zoning presents analogies to the navigational servitude insofar as zoning changes can transform an impermissible use into a permissible (and hence "potential") use, and vice versa. Under settled condemnation law principles, the landowner is entitled to compensation for uses that are compatible with reasonably possible or probable zoning changes, though the value attributable to that use should be discounted by the probability that the zoning change will not occur. *See, e.g.*, Mackie v. Eilender, 108 N.W.2d 755, 756 (Mich. 1961).

125. With respect to the portion of the award based on "the availability of these parcels of land for lock and canal purposes," the Court said:

> That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be

reconcile the Court's reversal of the award based on "availability" for power generation purposes with its affirmance of the award based on "availability" for lock and canal purposes is to assume that the Court concluded that one use was reasonably probable while the other was not.[126] As such, the *Rands* Court's reliance on *Chandler-Dunbar* provides only a tenuous basis for its broad ruling regarding the compensation to which riparian landowners are constitutionally entitled.

The *Rands* Court's reliance on *United States v. Twin City Power Co.*[127] seems much more sensible, although that case was decided by a narrow 5 to 4 majority[128] and is itself at odds with longstanding valuation rules in condemnation cases. In *Twin City Power*, the United States condemned land owned by a power company for the purpose, *inter alia*, of hydroelectric power generation.[129] The landowner, Twin City Power Company, had not constructed (and was not operating) a hydroelectric plant on its land or the adjoining waterway (the Savannah River).[130]

In the condemnation proceeding, the commissioners found that the value of the land as a potential site for hydroelectric power operations was $267.02 per acre.[131] They also found that "for agricultural purposes or as wild forest land, without reference to their availability for development of water power, the lands would have had a value of around $37 per acre."[132] The district court awarded the higher amount, and the government appealed, arguing that " 'the value of land as a potential power site on a navigable stream is not an element of just compensation under the Fifth

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> needed to meet the increasing demands of lake traffic was an immediate probability . . . . Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose.

Chandler-Dunbar, 229 U.S. at 76-77.

126. *See* United States v. Twin City Power Co., 350 U.S. 222, 245 (1956) (Burton, J., dissenting) (suggesting that the *Chandler-Dunbar* Court's "rejection [of value based on potential use for power generation] . . . was due to the speculative nature of the proposed use . . . .").

127. 350 U.S. 222 (1956).

128. Justice Douglas delivered an opinion joined by Chief Justice Warren and Justices Black, Reed, and Clark, while Justices Frankfurter, Minton, and Harlan joined Justice Barton's dissenting opinion.

129. *Twin City Power*, 350 U.S. at 223.

130. *Id.* at 227.

131. United States v. Twin City Power Co., 215 F.2d 592, 594 (4th Cir. 1954).

132. *Id.*

Amendment.' "[133] The Fourth Circuit rejected this contention, and affirmed the lower court's award of just compensation.

On appeal, the Supreme Court reversed, holding that the case was controlled by the Court's decision in *Chandler-Dunbar*. According to the Court, the landowners in *Twin City Power* obtained the same kind of compensation that the Court rejected in *Chandler-Dunbar*.[134] As such, the Court agreed with the government's contention that the power company was not entitled to any compensation for its potential use as a site for hydroelectric power generation.

The *Twin City Power* Court's reliance on *Chandler-Dunbar* is unsound for a number of the same reasons referenced above. First, there is a logical distinction between the "present money value" of a potential land use, and the increment of additional value that the potential use confers on the market value of the land. These are different economic concepts, and there is no reason to expect the dollar values associated with each to be the same. Contrary to the Court's assertion, the district court in *Twin City Power* did not award the "present money value" of the use of the land for hydroelectric operations, but instead awarded the full market value of the land, some of which was attributable to its potential use as a site for a hydroelectric operation.[135]

Furthermore, and as Justice Burton suggested in his dissenting opinion in *Twin City Power*, the *Chandler-Dunbar* Court's affirmance of the portion of the award which included the value of the land based on its use for canals and locks is consistent with the view that the land in *Twin City Power* was properly valued for its potential use as a site for hydroelectric power generation.[136]

The majority also asserted that a compensation award predicated on the potential use of the land for power generation would have violated the eminent domain rule that the "special value [of

133. *Id.* (citation omitted).

134. 350 U.S. at 226.

135. *Id.* at 237 (quoting Commissioner's Report for the proposition that "the award to Twin City of $1,257,033.20 is not the value of its property for any particular purpose but represents the fair market value after considering all of the reasonable uses of the property which were not too remote or speculative . . . .") (Burton, J., dissenting); *see also id.* at 241 (acknowledging correctness of *Chandler-Dunbar* Court's denial of compensation for "water power rights") (Burton, J., dissenting).

136. 350 U.S. at 241-42 (Burton, J., dissenting). The *Twin City Power* majority's attempt to distinguish this aspect of the holding in *Chandler-Dunbar* is unpersuasive. In a footnote, the opinion suggests that the Court in *Chandler-Dunbar* may have been "influenced by the fact that, on the special facts of the case, the use of the land for canals and locks was wholly consistent with the dominant navigation servitude of the United States and indeed aided navigation." 350 U.S. at 227 n. 1. The Court did not explain why land should be valued on the basis of a potential use which aids navigation, but not on the basis of other potential uses of the land not related to navigation.

land] to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value."[137] That argument is fallacious because it assumes that the demand for land suitable for hydroelectric power generation is exclusively a governmental demand, when in fact the needs of power generation companies also stimulate a private demand for such land. In fact, the courts in one jurisdiction have held that where a particular "highest and best use" for a property can be carried out by either the government or by private entities, the property should be valued according to that use.[138]

If anything, it is the majority opinion in *Twin City Power* that appears to be inconsistent with the rule that property is to be valued as if there had been no condemnation, and without regard to any depreciating effects of the condemnation. By effectively requiring that the land in *Twin City Power* be valued as if it had no potential use as a site for power generation,[139] the *Twin City Power* Court was, in effect, using the fact of the condemnation to diminish the value of the land, insofar as the condemnation destroyed any possibility that the power company could use the land for power generation purposes.[140]

Alternatively, the *Twin City Power* Court may have been saying that compensation need not be paid for a use which Congress might preclude in the future. But as the dissenting opinion in *Twin City Power* suggested, the government cannot be "excused from paying just compensation measured by the value of the property at the time of taking merely because it could destroy that value by appropriate legislation or regulation."[141] It also ignores the economic reality that regardless of whether the government has the power to preclude a particular use (or to condemn), the market value for the land would reflect that potential use,[142] discounted by the possibility that the government would take such action.

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137. *Id.* at 228 (quoting *United States v. Miller*, 317 U.S. 369, 375 (1942)).

138. County of San Diego v. Rancho Vista Del Mar, Inc., 20 Cal. Rptr. 2d 675, 684 (1993); *see also* Ventura County Flood Control Dist. v. Campbell, 83 Cal. Rptr. 2d 725 (1999), *as modified on denial of rehearing, review denied* (July 14, 1999) (applying the foregoing rule).

139. *See supra* notes 131–33 and accompanying text.

140. *Twin City Power*, 350 U.S. at 227.

141. *Id.* at 240 (Burton, J., dissenting) (quoting from United States ex rel. T.V.A. v. Powelson, 319 U.S. 266 (1943)). Harold R. De Moss, Jr. made the same point with respect to the *Rands* decision in the Statement provided to the Senate in 1970. *See Senate Hearings*, *supra* note 7, at 683.

142. *See* 350 U.S. at 237 ("We cannot realistically imagine that such a negotiation [to purchase the property] would have been limited to a consideration of the land's timber and its minor value for agricultural uses.") (Burton, J., dissenting).

The logical and doctrinal shortcomings of the *Twin City Power* opinion necessarily infect the *Rands* decision, which relied heavily on *Twin City Power* to carve out a broad rule that precludes a condemnation jury from taking into account the value attributable to a riparian location in determining just compensation.[143] Quite apart from these defects, *Rands* is grossly unfair to riparian landowners by treating them differently than virtually all other landowners in eminent domain proceedings.[144] Waterfront property is often substantially more valuable than non-waterfront property, and excluding the value attributable to a waterfront location in a condemnation proceeding is obviously unjust to a landowner who paid for that value when he or she acquired the property. It seems impossible to square the *Rands* rule with the purpose of the Just Compensation Clause, which is to bar the 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."[145]

A subsequent case illustrates how the rule in *Rands* departs from traditional eminent domain principles. In *United States v. Reynolds*,[146] the Court considered the issue of whether the condemnation of a landowner's property was within the scope of a reservoir project that had been started years earlier. When the project was announced, the property did not adjoin a waterway; but the project for which the condemnation was undertaken created a waterway alongside the property at issue.[147] Later, the government decided to condemn that property, and the issue was whether it should be valued as riparian land, or as non-riparian land. The Court noted that "[t]he parties agree that if the acreage in issue was 'probably within the scope of the project from the time the Government was committed to it,' substantially less compensation is due than if it was not."[148] The Court then articulated that difference as follows:

> [I]f the property was probably within the project's original scope, then its compensable value is to be measured in terms of agricultural use. If, on the other hand, the acreage was out-

143. *See* United States v. Rands, 389 U.S. 121, 123-26 (1967).

144. *See e.g.* United States v. Miller, 317 U.S. 369, 373 (1943) ("The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken."). This rule has been described by the Supreme Court as the "guiding principle of just compensation." United States v. Va. Elec. & Power Co., 365 U.S. 624, 633 (1961).

145. Armstrong v. United States, 364 U.S. 40, 49 (1960).

146. 397 U.S. 14 (1970).

147. *Id.* at 14-15.

148. *Id.* at 18.

> side the original scope of the project, its compensable value is properly measurable in terms of its economic potential as lakeside residential or recreational property.[149]

The *Reynolds* Court was stating a truism when it observed that the value of the property as waterfront property would be greater than its value as non-waterfront property. Yet under the rule announced in *Rands* a few years earlier, the value attributable to proximity to a navigable waterway should have been excluded in determining just compensation. In light of the strangeness of the *Rands* rule, however, it is perhaps understandable that the parties in *Reynolds* (and, apparently, the Court) overlooked its applicability.

There is another possible way to reconcile the *Reynolds* analysis with the *Rands* rule. The rule in *Rands* is based on the notion that Congress should not have to pay for the riparian value of land it condemns because it has the independent power to destroy that riparian value under the navigational servitude doctrine. But the navigational servitude can only be invoked as a defense if two conditions are met: the regulation in question is within Congress' power to regulate interstate commerce and the regulation serves a navigational purpose. Because it is presumably more difficult for both conditions to be met with respect to an inland lake wholly within the borders of one state, the logical basis for the *Rands* rule may be absent in a situation like *Reynolds*.

In summary, after *Rands*, the navigational servitude presented numerous potential problems for landowners. Buildings built on land filled in beyond the 1794 harbor line were subject to uncompensated seizures. Even land on small non-navigable streams could be deemed subject to the servitude on the theory that the streams flowed into navigable waters. And most significantly, the government could seize such property without fully compensating landowners for its value.

Because the Supreme Court was indifferent to the plight of riparian landowners, congressional action was necessary. In a dramatic illustration of its power to address injustice where the Court deemed itself powerless to do so, Congress acted.

149. *Id.*

III. CONGRESS PROVIDES LEGISLATIVE RELIEF FROM THE *RANDS* RULE

The rule announced by the Supreme Court in *Rands* limited the government's constitutional obligation to reimburse riparian landowners for the true value of their property in condemnation actions. It did not, however, preclude Congress from providing, as a matter of legislative grace, for the recovery of the very elements of compensation that the Court had excluded from the reach of the Fifth Amendment.[150] Congress apparently had been willing to live with the Court's decision in *Twin City Power*, so long as that case was confined to its narrow facts. But when the *Rands* Court made it clear that *Twin City Power* would not be limited in this fashion, and instead carved out a broad exception to the generally applicable rules for determining compensation in condemnations of land on or near waterways, Congress took action almost immediately.

Within two years of the decision, Congress began to consider statutory reforms to ameliorate the harshness of the *Rands* decision, and to bring the rules regarding just compensation in riparian condemnation cases into conformity with those that applied in non-riparian contexts.[151] A bill seeking to institute such a reform was introduced in 1969, but quickly died in Committee.[152] In May, 1970, the House and Senate introduced identical reform bills, each of which died in committee following hearings.[153] On December 3, 1970, the House introduced another reform bill which ultimately became Section 111 of the Rivers and Harbors Act.[154] Before it became law, however, the Senate rejected the House bill and substituted a very weak bill which would have sim-

150. *See, e.g.*, United States v. 30.54 Acres of Land, 90 F.3d 790, 794 (3rd Cir. 1996) ("Congress can, of course, provide relief where the exercise of the navigational servitude causes economic loss, even though the United States is not constitutionally required to pay compensation.").

151. It is admittedly a bit of an oversimplification to suggest that *Rands* only applies to riparian landowners, and hence that the statutory relief provided by Congress was only directed at such owners. For in theory, the *Rands* decision would relieve the government of the obligation to pay for any element of value attributable to a parcel's *proximity* to a waterway, even if it does not actually abut a waterway. *See* Brittain, *supra* note 9, at 521.

152. *See id.* at 510. The full text of the bill is reproduced in an appendix to the Brittain comment at p. 543. The bill was arguably more favorable to riparian landowners than the bill that was eventually passed, because it contained no exception for partial takings.

153. *Id.* at 510. The bill introduced by both Houses of Congress is reproduced in an appendix to the Brittain comment at pp. 543-44. Similarly, this bill contained no exception for partial takings.

154. 33 U.S.C. § 595a (1994).

ply authorized the Secretary of the Army to conduct a study of the effects of the navigational servitude.[155] The two bills went into conference for resolution, and the Conference Report adopted the House bill in place of the Senate bill.[156] On December 31, 1970, the bill was enacted into law.[157] Neither the Senate nor the House held hearings on the bill that was enacted into law or on the Senate bill that was rejected in conference.[158]

As written, Section 111 consists of two principal parts. The first part describes the rule for determining just compensation with respect to any real property lying above the high water mark of a waterway that is taken by the United States "in connection with any improvement of rivers, harbors, canals, or waterways of the United States . . . ."[159] It unmistakably provides that, notwithstanding *Rands*, when property above the high water mark is condemned for any of several specified purposes, the landowner is entitled to full compensation for the part taken, including compensation for any value attributable to the property's access to or use of navigable waters.

> 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 in 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 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.[160]

There is one significant respect in which the traditional rule for determining just compensation remains inapplicable to riparian condemnations, and it is set forth in the second part of Section 111. Outside of the riparian context, the general rule regarding

155. *See* Brittain, *supra* note 9, at 510. The text of that bill is also reproduced in an appendix to the Brittain comment, at p. 544.

156. *Id.* at 511.

157. *Id.*

158. *Id.* at 510.

159. 33 U.S.C. § 595a (1994).

160. *Id.*

compensation in a partial taking case is that the landowner is constitutionally entitled to compensation for the value of the part taken plus "the incidental injury or benefit to the part not taken" (i.e., the "severance damage") that results from the condemnation.[161] Analytically, the total amount of just compensation in a partial taking case could be computed by adding the fair market value of the part taken to the injury to the remainder. But the usual formula for determining compensation in a partial taking case is to compute the difference between the fair market value of the entire parcel before the taking and the fair market value of the remainder after the taking.[162] While this "before and after" formula is arithmetically and functionally equivalent to the other approach, its ease of application makes it the preferred approach. In short, it involves fewer mathematical calculations, and thus is easier for jurors to apply.

In contrast, the second part of Section 111 provides that in a partial taking case, severance damages to a remainder parcel resulting from "loss of or reductions of access from such remaining real property to . . . navigable waters" will not be recoverable:

> In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized and no compensation shall be paid for any damages to such remaining real property which result from loss of or reduction of access from such remaining real property to such navigable waters because of the taking of real property or the purposes for which such real property is taken.[163]

This portion of Section 111 thus carves out an exception to the traditional eminent domain rule allowing severance damages to the remainder, by providing that no severance damages attributable to lost or reduced access to a waterway will be recoverable.

Section 111 has been described by two federal courts as having "legislatively set[] aside *Rands* and its predecessors,"[164] as having "in essence abrogate[d] the doctrine of non-compensation for ripar-

161. Bauman v. Ross, 167 U.S. 548, 574-75 (1897). This rule for determining compensation in partial taking cases has been recited in numerous federal cases since then. *See, e.g.*, United States v. 33.5 Acres, 789 F.2d 1396, 1398 (9th Cir. 1986) (indicating that in a partial taking case, the landowner is entitled to compensation "both for that which is physically appropriated and for the diminution in value to the non-condemned property").

162. United States v. Miller, 317 U.S. 369, 376 (1943).

163. 33 U.S.C. § 595a. The two sentences quoted above comprise all of the substantive provisions of Section 111. There is a third sentence, not quoted above, which sets forth the effective date of the Section.

164. United States v. 8.968.06 Acres of Land, 326 F. Supp. 546, 547 (S.D. Tex. 1971).

ian access found in . . . *Rands* . . . ,"[165] and as having "repealed"[166] the "rule of *Rands*."[167] This is not quite accurate, even as to the first part of Section 111, because Congress cannot "abrogate" or "set aside" or "repeal" a decision of the Court regarding the government's obligations under the Just Compensation Clause. A more precise characterization of the first part of Section 111 is that it provided by legislative grace some of the compensation rights which the Court in *Rands* held that the Constitution did not compel Congress to provide.[168] In any event, the practical effect of Section 111 is that, at least with respect to property actually taken, compensation will be paid in accordance with the usual constitutional rules regarding just compensation, and not in accordance with the rules announced in *Twin City Power* and *Rands*. As such, the just compensation paid to landowners should include any component of value attributable to their property's proximity to a navigable waterway.[169] With respect to total (as opposed to partial) takings, the implementation of Section 111 in determining value has been described as "fairly straightforward and unambiguous."[170]

The second part of Section 111 creates a "caveat"[171] or qualification to the first section insofar as it provides, in effect, that

165. United States v. 13.20 Acres of Land, 629 F. Supp. 242, 247 (E.D. Wash. 1986).

166. United States v. 967,905 Acres of Land, 447 F.2d 764, 770 (8th Cir. 1971).

167. *Id.*

168. *See* United States v. 320.0 Acres of Land, 605 F.2d 762, 784 n. 27 (5th Cir. 1979) (indicating, in reference to Section 111, that although decisions of the Court "firmly establish that the *Constitution* does not require compensation for value inherent in condemned riparian fast lands by virtue of their access to navigable waters, Congress has nonetheless decided *legislatively* to award that element of fair market value denied judicially in *Rands* and its predecessors") (emphasis in original).

169. Thus, while the *Rands* rule is still a part of our constitutional jurisprudence, its importance has been greatly reduced in light of the passage of Section 111. Indeed, in cases involving complete (rather than partial) takings of property above the high water mark, *Rands* is in practical terms an irrelevancy. Curiously, despite the crucial importance of Section 111 to riparian takings, the lengthy discussion of the *Rands* rule by the Supreme Court in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), made no reference to Section 111.

170. UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 45 (1992).

171. United States v. 13.20 Acres, 629 F.Supp. 242, 247 (E.D. Wash. 1986). The Court in *13.20 Acres* invoked Section 111 only in connection with its analysis of compensation for the remainder parcel. *Id.* It concluded correctly that under this section, "no severance damages may be awarded for loss of access from the remaining lands to the water." *Id.* In ruling that just compensation for the parcel taken "must be measured by current market value of the property, taking into consideration the value as enhanced by the proximity of [the lake]," *id.* at 246-47, the Court cited only *United States v. Fuller*, 409 U.S. 488, 492 (1973), and made no reference to Section 111. Presumably, the district court was relying on the *Fuller* Court's statement that "[i]n *United States v. Miller*, *supra*, the Court held that 'just compensation' did include the increment of value resulting from the completed project to neighboring lands originally outside the project limits, but later brought within them." 409 U.S. at 492. What the district court was alluding to here was the "scope of the project rule." Under this rule, if

compensation for damage to the remainder will continue to be paid in accordance with the rule set forth in *Rands*.[172] This means that the "before and after" method of determining just compensation in the typical partial taking case cannot be used in cases involving property on or near a waterway. Instead, the approach recommended by the Uniform Appraisal Standards for Federal Land Acquisitions Regarding Navigational Servitudes, which are followed by most appraisers in this context, is "to separately value the portion of the property taken and separately assess the depreciation, if any, in the value of the remaining property resulting from the taking, and add the two for total just compensation."[173] In this situation, the before-and-after rule would not represent an accurate calculation, because it would yield a damage figure reflecting the loss of riparian value. These standards also say that in determining the depreciation to the remainder, no depreciation "which results from loss of or reduction of access . . . to the navigable waters because of the taking of the subject property or the purposes for which the property is taken" shall be taken into account.[174]

The legislative history of Section 111 is effectively nonexistent. There were no hearings on the bill that became Section 111, and there was no floor debate on the bill. The Conference Report to the Rivers and Harbors and Flood Control Acts of 1970 contains two paragraphs regarding Section 111. The Report summarizes almost verbatim the substance of the House bill that became Sec-

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a condemnation is within the scope of the original project, then the government is not obligated to compensate for any increase in the value of the land attributable to the project itself. *13.20 Acres*, 629 F. Supp. at 243-44. If, however, a subsequent condemnation is deemed to be outside the scope of the original project, then the government must compensate for any increase in the value of that land attributable to the project. In *13.20 Acres*, the court concluded that the subject property was not within the scope of the original project to create a reservoir, and hence that the government was required to pay for the increase in value attributable to the property's proximity to the reservoir which the government had created before the condemnation. *Id.* at 246-47. But under the broad rule of *Rands*, it would seem that even if the condemnation is outside the scope of the original project, the government would nevertheless be under no constitutional obligation to compensate for any element of value attributable to the project's proximity to the waterway. From an analytical standpoint, the district court should, therefore, have cited Section 111 (as well as *Fuller*) in order to justify its ruling with respect to the parcel that was taken.

172. *See* United States v. 30.54 Acres of Land, 90 F.3d 790, 796 n. 4 (3rd Cir. 1996) ("[T]he second sentence of Section 111 unequivocally states that severance damages are unavailable.").

173. UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 46 (1992). These standards also provide that the depreciation, if any, in the remainder may be determined by ascertaining "the difference in market value of the residue before and after taking . . . ," except that the "before value" of the remainder "shall not be based on any highest and best use that is dependent upon access to or utilization of the navigable waters." *Id.*

174. *Id.*

tion 111 and notes without explanation that the conference decided to retain the House bill instead of the Senate bill. The only statement of any real significance in the Conference Report about Section 111 is as follows:

> The Conferees wish to stress for purposes of clarification that any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.[175]

This is a restatement of a fundamental constitutional rule that has been applicable to eminent domain cases for many years.[176] If the government's initiation of a condemnation action has the effect of depressing or enhancing the value of the property being taken, those effects should be disregarded for purposes of determining just compensation. The Conference Report may have set forth this rule here because, as Congress had been told earlier, the *Rands* holding contravenes this well-established rule.[177] Insisting on adherence to this basic rule of takings jurisprudence when land on or near a waterway is condemned is another way of saying that the *Rands* approach to just compensation should not be followed in such cases. Another explanation is suggested by the phrase "prior to the date of valuation." The mere announcement of a project may often be enough to cause a decrease (or an increase) in the value of property that is later made the subject of an eminent domain proceeding.[178] The conferees may have wanted to foreclose the possibility that the government might attempt to circumvent Section 111 by arguing that the value on the date of taking is controlling, even if that value has been diminished by the announcement of a project or by other pre-taking activities undertaken in connection with the project.

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175. H.R. CONF. REP. NO. 1782, at 23 (1970).

176. *See, e.g.*, United States v. Va. Elec. & Power Co., 365 U.S. 624, 633 (1961).

177. *See supra* notes 102–03 and accompanying text; *see Senate Hearings*, *supra* note 7, at 684 (prepared statement of Harold R. DeMoss, Jr.).

178. *See* United States v. 8,968.06 Acres of Land, 326 F. Supp. 546, 549 (S.D. Tex. 1971) (stating that effects of pre-taking activities that inform the public of the impending occurrence of a taking, including "discussion, planning, authorization [and] funding," must be disregarded in determining market value).

The other relevant legislative history is contained in the House Report regarding the Rivers and Harbors and Flood Control Acts of 1970.[179] Since the House bill was enacted into law as Section 111 without change, the brief commentary in the Report regarding that bill is pertinent. After a straightforward summary of the bill which is virtually identical to the language of the Conference Report, the House Report makes the following substantive comments about pre-existing law:

> Under existing law, when riparian property adjacent to a navigable waterway is acquired by the United States for a water resource development project, the valuation of the property taken does not include any use of that property associated with access to and use of the waterway. However, when only a partial taking occurs, and some property remains adjacent to the waterway, there is deducted from the just compensation that would otherwise be paid the value of special benefits accuring [sic] to the remaining real property because of its access to or use of the waterway.[180]

The Report then goes on to suggest that this is an "inequitable" result, and explains how the bill would alter it:

> The Committee feels that this is an inequitable situation. The section accordingly provides for the valuation of the real property taken based upon its access to or use of the navigable waterway when, in fact, the use to which such property may reasonably be put is dependent upon such access to or utilization of the navigable water. This section makes no change in existing law with respect to the offsetting of special benefits to remaining real property against the just compensation that would otherwise be paid for the real property taken and for damages to remaining real property resulting [from] the taking and the purpose for which the real property is taken.[181]

The most important part of this excerpt from the Report is the final sentence. Another section of the Rivers and Harbors Act already provided that benefits to the remainder are to be offset against the just compensation to be paid for the property taken.[182]

179. H.R. REP. No. 91-1665, at 31 (1970).
180. *Id.*
181. *Id.*
182. Rivers and Harbors Appropriation Act § 6, 33 U.S.C. § 595 (1994).

The Report confirms that Section 111 is not intended to alter the existing rule authorizing offsets.[183] By indicating broadly that damages to the remainder "resulting from the taking" are to be governed by existing law, the House Report could be read to mean that no severance damages whatsoever should be recoverable in takings that fall within the scope of Section 111. The text of the statute is far narrower, however, insofar as it provides that "no compensation shall be paid for any damages to such remaining real property *which result from loss of or reduction of access from such remaining real property to such navigable waters* because of the taking of real property or the purposes for which such real property is taken."[184] Thus, it is clear that severance damages are generally available to remainder property in takings governed by Section 111, but that no severance damages attributable to "loss of or reduction of access" to a navigable waterway will be recoverable.

The Conference Report and the House Report state that Section 111 applies "when the United States acquires real property above the normal high water mark of the navigable waters of the United States . . . ."[185] The statute applies somewhat more broadly to "real property *taken* by the United States above the normal high water mark of navigable waters of the United States . . . ."[186] As such, Section 111 does not alter the "rule of no compensation" with respect to real property or structures below the high water mark.[187]

Only a handful of reported cases have applied Section 111,[188] and only two of those have involved anything other than straightforward

183. The Court held many years ago in *Bauman v. Ross*, 167 U.S. 548, 574-75 (1897), that the Fifth Amendment permits the government in partial taking cases to offset the just compensation due for the property taken by any increases in value to the remaining parcel that result from the condemnation. *See also* 33 U.S.C. § 595 (1994) (authorizing offsets of this kind involving riparian takings).

184. 33 U.S.C. § 595a (1994) (emphasis added).

185. H.R. CONF. REP. NO. 1782, at 23 (1970); H.R. REP. NO. 91-1665, at 30 (1970).

186. 33 U.S.C. § 595a (1994) (emphasis added). This distinction in terminology may have implications regarding an important issue of statutory construction involving Section 111. *See supra* notes 161–74, and accompanying text.

187. *See* Brittain, *supra* note 9, at 519-20, 534-35 (drawing the same conclusion); *see also supra* notes 30–68 and accompanying text (discussing the rule of no compensation that derives from the navigational servitude). If a taking included property both below and above the high water mark, Section 111 would govern the just compensation to be paid only with respect to property lying above the high water mark.

188. United States v. 30.54 Acres of Land, 90 F.3d 790, 792-96 (3rd Cir. 1996); United States v. 967,905 Acres of Land, 447 F.2d 764, 770-71 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972); United States v. 13.20 Acres of Land, 629 F. Supp. 242, 247 (E.D. Wash. 1986); United States v. 71.29 Acres of Land, 376 F. Supp. 1221, 1225-26 (W.D. La. 1974); United States v. 8,968.06 Acres of Land, 326 F. Supp. 546, 547-48 (S.D. Tex. 1971); Palm Beach Isles

applications of that section.[189] In *United States v. 967,905 Acres of Land*, the federal government exercised its power of eminent domain to acquire private land in Minnesota to create a wilderness area in which commercial activities would be prohibited.[190] The land in question bordered a navigable lake, and for many years the landowners had operated a fishing and hunting resort on the land which made use of the lake.[191] The government argued that the language in Section 111 which referred to the "'improvement[]' of rivers, harbors, canals, and waterways" meant that the section only applied to takings effected for "'conventional' improvements such as the construction of locks and dams and projects for bank stabilization or for the stabilization or deepening of the channels of navigable streams."[192]

In rejecting that construction of Section 111, the court noted that the "interests" that the navigation power is intended to serve are "not limited to the promotion and fostering of trade and commerce along and upon our waterways or to the control or prevention of destructive floods."[193] The court said that "[t]hey include . . . those interests which are aesthetic, ecological, and environmental as well as those which are economic and commercial."[194] Accordingly, it construed Section 111 to apply to the taking of the land alongside the lake for the creation of a wilderness area:

> We think that the Congress and the Executive Branch of the Government may properly conclude that the encroachment of civilization and commercial enterprise upon a wilderness area and the navigable waters found therein militates against the broad public interests that have been mentioned, and that when the Government commands civilization and business to retreat from a given area so that it may be preserved in its natural state for the enjoyment and refreshment of all of us, it may fairly be said that the Government is acting to "improve" the area and the waterways therein. We so hold.[195]

Assocs. v. United States, 42 Fed. Cl. Claims 340, 352-53 (1998), *rev'd*, 208 F.2d 1374 (Fed. Cir. 2000).

189. *30.54 Acres*, 90 F.3d at 792-96; *967.905 Acres*, 447 F.2d at 770-71.
190. 447 F.2d 764, 766 (8th Cir. 1971).
191. *Id.*
192. *Id.* at 771.
193. *Id.*
194. *Id.*
195. *Id.*

The upshot of the court's construction of Section 111 was that the land's "access to the Lake [was] to be taken into consideration in fixing [its] value"[196] in the eminent domain proceeding. This seems to be a reasonable reading of Section 111.[197]

In *United States v. 30.54 Acres of Land*, the Third Circuit considered another issue regarding the construction of Section 111—namely, whether a "taking" of real property under the statute encompasses only direct appropriations of land (through formal condemnation proceedings) or whether it also encompasses so-called regulatory takings.[198] In *30.54 Acres*, the government condemned a portion of a 132.55-acre tract of land in Pennsylvania in connection with a project to create a lock and dam on the Monongahela River.[199] The landowners had a coal-loading facility on the remainder property as well as a tipple, which is an apparatus used for emptying coal from a car by tipping it.[200] The tipple was grounded on property above the high water mark of the Monongahela River, but it extended approximately 100 feet into the river.[201] Although the government did not acquire the property on which the coal-loading facility was located and on which the tipple was grounded, it did issue an order prohibiting their operation.[202] In support of this prohibition, the government indicated that because of its close proximity to the lock and dam, the operation of the coal-loading facility would pose a " 'safety hazard' "to riverboat pilots and a " 'hazard' " to the operation of the lock and dam.[203]

The landowners did not contend that the government failed to comply with Section 111 in paying just compensation for the 30.54

196. *Id.*

197. The court in *967,905 Acres* mentioned the statutes pursuant to which the condemnation was undertaken, *id.* at 765 n. 1, but did not indicate whether any of those statutes made reference to congressional power over navigable waterways. Congress' power over navigable waterways undoubtedly includes the power to prohibit watercraft or other vessels from using those waters. At least to that extent, the taking in *967,905 Acres* would appear to represent an exercise of Congress' powers to regulate navigable waterways, even though the taking primarily served the much broader interests identified in the court's opinion. One could argue, however, that these broader interests are of such a nature as to render the taking in *967,905 Acres* an exercise of the Commerce power that does not implicate Congress' power to regulate navigable waterways. If that were the correct characterization, then it would appear that the *Rands* rule would not apply to the taking at all, and therefore that resort to Section 111 to obtain compensation for that element of value attributable to the land's proximity to the waterway would be unnecessary.

198. 90 F.3d 790 (3rd Cir. 1996).

199. *Id.* at 792.

200. *Id.*

201. *Id.*

202. *Id.* at 792-93.

203. *See id.* at 793 (citations omitted).

acres taken, but they did argue that the government had not done so with respect to the remainder parcel.[204] In *Lucas v. South Carolina Coastal Council*,[205] the Supreme Court held that regulation of property can amount to a per se taking for Fifth Amendment purposes in those cases where it deprives the owner of "*all* economically beneficial uses in the name of the common good."[206] In such a case, the government may enforce the regulation, but it must pay just compensation if it does. The landowners in *30.54 Acres* maintained that the "prohibition on the use of the tipple and coal loading facility stripped the 102 acres remaining in their possession of all economically reasonable uses," and, as such, amounted to a regulatory taking of the remainder parcel.[207] They further argued that Section 111 rendered this regulatory taking compensable because the property had been "taken" within the meaning of that section, thereby precluding application of the navigational servitude.[208] The district court ruled that the landowners were entitled to no compensation for any economic loss traceable to the regulation.[209] The Third Circuit affirmed. The court first observed that the *Lucas* case itself had cited the government's power to create a permanent easement under the navigational servitude doctrine as "a pre-existing limitation upon the landowner's title," which is not compensable under the Fifth Amendment.[210] As such the Third Circuit said there was no "taking" of the remainder parcel in the constitutional sense.[211] The

204. *See id.* at 796 n.4.

205. 505 U.S. 1003 (1992).

206. *Id.* at 1019 (emphasis in original); *see also supra* note 75.

207. 90 F.3d at 795. What is not clear from the facts of *30.54 Acres* as recited by the court is whether the landowners were prohibited from operating the coal-loading facility and tipple anywhere on the 102-acre remainder parcel, or just in one particular location. If the government's order allowed for the possibility of relocating the facility and tipple and operating it somewhere else on the remainder parcel, then it would seem almost impossible for the landowners to prove that they had been deprived of all beneficial or productive use of that parcel.

208. The landowners in *30.54 Acres* did not argue that the prohibition on the use of the loading facility and tipple was compensable as a form of severance damage to the remainder. *See* 90 F.3d at 796, n.4. As the court noted, such an argument would have been foreclosed by the second part of Section 111, which "unequivocally" precludes recovery for severance damages resulting from loss or reduction of access to a navigable waterway. *Id.*

209. *Id.* at 793.

210. *30.54 Acres*, 90 F.3d 790 at 795.

211. The court said that the "[e]xercise of the servitude did nothing more than realize a limitation always inherent in the landowners' title. It was not a taking." *Id.* The Court of Appeals for the Federal Circuit expressed essentially the same idea, but in different words, when it held that the United States government may invoke "the federal navigational servitude as a defense against a regulatory takings claim." Palm Beach Isles Associates v. United States, 208 F.3d 1374 (Fed. Cir. 2000). *See supra* text at notes 47–63 for a discussion of the *Palm Beach Isles* case.

court noted that "[t]here is no reason to suppose that Congress referred to takings in Section 111 in any other than a constitutional sense."[212] It then observed that the statutory phrase "real property taken by the United States above the high water mark" could in no event be read to cover a prohibition on the use of a structure (the tipple) that jutted 100 feet out into a waterway that was unaccompanied by the taking of any land other than the 30.54 acres.[213]

Finally, the court held that Congress "did not express an intent to abolish the navigational servitude or to provide compensation for all economic losses occasioned by regulation of navigable waterways."[214] Its intent, the court said, was "to modify the rule of . . . *Rands* only to the extent of paying full compensation based on riparian location in cases of actual acquisition of above the high-water mark real property."[215]

Both the court's analysis and its holding in *30.54 Acres* are open to serious question. First, the court seemed to blur two distinct questions: (1) what constitutes a regulatory taking and (2) what kinds of damages are payable to a riparian landowner whose land has been subjected to a regulatory taking? Section 111 is relevant to the second issue, but does not seem relevant to the first.

The court appeared to conclude that no regulatory taking of land alongside a body of water could ever result from an exercise of Congress' power to regulate navigable waterways. But that sweeping proposition seems highly dubious. Indeed, *Lucas*, the seminal case in regulatory takings law, involved beachfront property as to which all development had been prohibited by a state entity.[216] If the federal government[217] rather than a state agency had enacted a comparable regulation, and could plausibly contend that it served some navigational purpose, it seems doubtful that the navigational servitude could be the basis for a finding that no taking had occurred. This is because the essence of the Supreme Court's takings jurisprudence is that regulatory takings have the same legal effect as direct appropriations of property.[218] Thus, if there is a finding that a regulatory taking has occurred, there is no

212. 90 F. 3d 790 at 796.
213. *See id.* at 795.
214. *Id.* at 796.
215. *Id.*
216. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006 (1992).
217. *Lucas* involved a state regulation; the navigational servitude may only apply in the case of federal regulation.
218. *See, e.g.*, *Lucas*, 505 U.S. 1003 at 1014–15.

principled reason why the Section 111 rule for calculating just compensation should not also be applicable. In other words, the owner should be entitled to the full measure of just compensation, including any value of the land attributable to its location on navigable water, and should not be limited to some artificially truncated version of just compensation.[219]

The court's holding in *30.54* Acres would be more defensible if it had simply declared that Section 111 does not affect particular exercises of the navigational servitude doctrine involving the rule of no compensation. The no-compensation rule discussed in Part II.A of this Article confers on the government the power to order the removal of structures, and to prohibit activities in or above the riverbed that affect navigation.[220] Thus, for example, the Supreme Court has held that the government may order a bridge which spans a river to be altered (or even torn down).[221] Because the coal tipple in *30.54 Acres* protruded into the space above the navigable waterway, prohibition of its use would fall under the traditional rule, and there would be no obligation to compensate for the value of the coal itself.

However, there is nothing inherent in the rule of no compensation that would preclude the landowner in *30.54 Acres* from maintaining that the regulation of the coal tipple resulted in a regulatory taking of the adjoining land because, for example, it had the effect of depriving the land of all of its economically beneficial uses. As such, there is no sound reason for reading the statutory words "real property shall be taken" in Section 111 to exclude regulatory takings. As a matter of constitutional law, the rule in Rands would presumably render most or all of the damages for such a regulatory taking non-compensable. But since Section 111 legislatively abrogates the *Rands* rule, then if the landowner in *30.54 Acres* was able to demonstrate that the coal tipple regulation resulted in a regulatory taking of his land, it should have been

219. Another hypothetical case will help illustrate this point. Suppose the federal government enacted a prophylactic regulation that prohibited waterfront landowners from entering their property (in order to prevent them from engaging in boating or swimming activities that the government regarded as a hindrance to use of the navigable waterways), and the landowners demonstrated that this amounted to a regulatory taking of their property. In that event, it would be difficult to justify a reading of Section 111 that would make it inapplicable to the determination of their just compensation.

220. *See supra* notes 32–40 and accompanying text.

221. *See, e.g.*, Union Bridge Co. v. United States, 204 U.S. 364, 397 (1907). Presumably, the government only has the power to destroy (without payment of compensation) that part of the bridge which spans the navigable waterway, and may not touch the portion which lies shoreward of the high water mark. Of course, this limitation on its power would in most cases have little practical significance.

permitted to recover the full measure of just compensation for that taking.[222] And the legislative history of Section 111 demonstrates that any "decrease or increase in the fair market value of real property . . . caused by the public improvement for which such property is acquired . . . will be disregarded in determining the compensation for the property."[223] Thus, the fact that the government has in fact exercised its power to prohibit a particular use should not preclude payment of compensation where the prohibition deprives the landowner of all beneficial and productive use of his or her property.

The court in *30.54 Acres* also invoked legislative history in support of its construction of Section 111:

> The legislative history of Section 111 indicates that Congress intended to modify the rule of *United States v. Rands* only to the extent of paying full compensation based on riparian location in cases of actual acquisition of above the high water mark real property. Section 111 "makes no change in existing law" with respect to other aspects of the navigational servitude.[224]

The House Report and the Conference Report do indeed use the phrase "when the United States *acquires* real property above the normal high water mark of the navigable waters of the United States,"[225] and to that extent, they support the Court's conclusion that Section 111 does not apply to takings other than direct appropriations. The reference to "existing law" in the Report does not, in its full context, provide any support for the Court's holding, however. The House Report refers specifically to "existing law with respect to the offsetting of special benefits to remaining real property against the just compensation that would otherwise be paid for the real property taken and for damages to real property resulting [from] the taking and the purpose for which the real property is

222. The Supreme Court held even before development of its regulatory taking jurisprudence that "[w]here the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment," even though the government has not directly "appropriate[d] the title." United States v. Cress, 243 U.S. 316, 328 (1917). If land subjected to this kind of flooding derived some of its value from its proximity to a navigable waterway, then it would seem reasonable to apply Section 111 in such a fashion as to allow the landowner to recover the full pre-taking value of his or her property.

223. H.R. CONF. REP. NO. 1782, at 23 (1970).

224. 90 F.3d at 796 (citing H.R. REP. NO. 91-1665, at 31 (1970)).

225. H.R. REP. NO. 91-1665, at 30 (1970) (emphasis added).

taken."[226] Thus, the reference to "existing law" is limited to the offsetting of special benefits in connection with the valuation of remainder property.

IV. SECTION 111 AS AN EXAMPLE OF CONGRESSIONAL ACTION INTENDED TO RECTIFY THE SUPREME COURT'S RESTRICTIVE READING OF CONSTITUTIONAL PROTECTIONS FOR PROPERTY OWNERS, AND SUGGESTIONS FOR FURTHER REFORMS

Section 111 is not the only instance in which Congress acted to provide protections for property rights that the Supreme Court has declined to recognize as a matter of constitutional law. The statutes that authorize civil forfeiture of property connected to a drug offense are another important example of this kind of congressional action. The first statute that authorized civil proceedings to forfeit property used (or intended to be used) to facilitate a violation of the criminal provisions of the federal drug laws was enacted in 1970.[227] This statutory provision, which is codified at 21 U.S.C. 881(a)(4), has been used to forfeit vast numbers of "conveyances," including automobiles, trucks and boats. As originally enacted, the statute contained no requirement that the government prove that the owner of the property had some culpability in the misuse of property. Nor did it provide a defense to owners who could prove they had no such culpability. This meant that property owned by one person could be forfeited on the basis of acts committed by another person, even if the owner had no prior knowledge of or involvement in the wrongful use.[228]

The absence of statutory protection for innocent owners in a Puerto Rican statute that was nearly identical to the federal drug forfeiture statute was challenged in the early 1970's in *Calero-Toledo v. Pearson Yacht Leasing Co.*[229] In that case, a yacht owned by a yacht leasing company was forfeited to Puerto Rican authorities after the lessees of the yacht were found with a small quantity of marijuana on board. The yacht company challenged the forfeiture as a violation of the Takings Clause of the Fifth Amendment, as applied to

226. *Id.* at 31.

227. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276-78 (codified at 21 U.S.C. § 881(a)(4)(1994)).

228. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974).

229. As the Court observed in *Calero-Toledo*, the Puerto Rican forfeiture statute was modeled after section 881 and differed from it in "unimportant" respects. *Id.* at 686-87, n.25.

the states by the Fourteenth Amendment. The Supreme Court rejected the constitutional claim of the yacht company, citing prior *in rem* forfeiture cases and the "punitive and deterrent" purposes served by the statute.[230]

The Court's decision in *Calero-Toledo* was a harsh one in a number of respects. As a practical matter, the yacht leasing company could have done very little to prevent the lessees from bringing marijuana on board the boat. There is no suggestion in that case that the company acted negligently in entrusting the yacht to the lessees. Moreover, the Court in *Calero-Toledo* recognized that "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive" if an owner could prove "not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property . . . ."[231]

Congress acted to remedy by statute the Court's unfortunate inability in *Calero-Toledo* to identify any protection for innocent owners in the Constitution. In 1988, Congress amended section 881(a)(4) to provide for an innocent owner defense.[232] If an owner could establish that the acts or omissions which gave rise to the forfeiture were committed without his or her "knowledge, consent, or willful blindness," forfeiture would be avoided.[233] In 2000, Congress enacted additional amendments to the federal drug forfeiture law that were designed to increase protections for property owners.[234]

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230. *Id.* at 683-88. More recently, in *Bennis v. Michigan*, 516 U.S. 442 (1996), the Supreme Court rejected an innocent owner challenge to a forfeiture based on both the Takings Clause (as applied to the States by the Fourteenth Amendment) and the Due Process Clause. The *Bennis* decision was subjected to nearly universal criticism in the press and, later, in scholarly articles. *See* Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1945 n.156 (1998) (discussing and citing op-ed pieces criticizing the decision).

231. 416 U.S. at 689-90.

232. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6075(3), 102 Stat. 4324 (codified as amended at 21 U.S.C. § 881(a)(4)(C)(1999)).

233. *Id.* Additional forfeiture provisions were also added to cover forfeiture of real estate and forfeiture of the proceeds of illicit drug transactions. Congress enacted each of these provisions with an innocent owner defense, even though the decision in *Calero-Toledo* engendered some doubt as to whether the Court would have required such a defense as a matter of constitutional law. *See* 21 U.S.C. § 881(a)(6) and 21 U.S.C. §§ 881 (a)(6)–(7)(1999).

234. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202-25 (1994). Among other things, this law changed existing law by placing the burden of proving that property is forfeitable on the government, rather than placing the burden to disprove forfeitability on the property owner. To be sure, there have been criticisms that Congress' reforms of the drug forfeiture laws do not go far enough. Voters in three states, namely

Forfeiture and condemnation actions, while very different, both involve the destruction or seizure of private property rights. Congress has acted in both areas because the Supreme Court has been unwilling to recognize basic constitutional protections for property rights in these contexts. These statutory enactments demonstrate how Congress can play a vital role when the Court shirks its responsibility to enforce those provisions of the Constitution that expressly mention property—namely, the Takings Clause of the Fifth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments.

With regard to the navigational servitude, there are additional steps that Congress should take to alleviate the oppressive effects of that doctrine. First, Congress should amend Section 111 of the Rivers and Harbors Act so that the severance damages paid to a landowner in a partial takings case will include compensation for any reduction in value to the remainder resulting from its reduced proximity to a navigable waterway. As discussed above,[235] Section 111 currently provides that severance damages shall not include any amounts for lost or reduced access to a navigable waterway. However, if landowners are to be guaranteed a full measure of just compensation for the property rights they have lost, then they should also receive full compensation for any injury to the remainder parcel. The standard counter-argument—i.e., the suggestion that this will put a greater burden on the governmental treasury in connection with public projects—would require its proponent to assume that it is appropriate to treat one class of landowners different from another class in order to benefit the entire public.

In addition, Congress should amend Section 111 to provide that the navigational servitude shall not apply to private property rights existing in land which was formerly part of a riverbed, but was later filled by natural or artificial means. This has not proved to be much of a problem in practical terms, but there is no reason why this potential cloud on titles should not be removed. As discussed above,[236] this aspect of the doctrine has given rise to concerns that parts of New York City and San Francisco which were formerly underwater, but have since been filled and developed, could be taken without compensation.

Massachusetts, Utah, and Oregon, are considering initiatives that would actually abolish civil forfeiture and replace it with criminal forfeiture. Generally speaking, criminal forfeiture statutes require the government to convict the owner of a crime before it can forfeit that person's property. *See* Karen Dillon, *Forfeiture Reforms Go Before Voters: Proposals on Ballots in Three States*, KANSAS CITY STAR, Oct. 8, 2000, at A1.

235. *See supra* notes 161–63 and accompanying text.

236. *See supra* notes 43–44 and accompanying text.

Finally, Congress should legislatively overrule the decision of the Third Circuit in *United States v. 30.54 Acres of Land*,[237] which held that Section 111 applied only to formal eminent domain proceedings, and not to so-called regulatory takings. For the reasons discussed above, that interpretation of Section 111 is highly dubious. First, Congress should make it clear that contrary to the Third Circuit's holding, a regulation of navigable waterways which would not otherwise require the payment of compensation may require compensation if it deprives the landowner of all economically beneficial use of his or her adjoining land or otherwise amounts to a regulatory taking of that land. This would not constitute a complete abrogation of the navigational servitude, since the doctrine would still bar compensation when its exercise does not deprive landowners of all beneficial use of their land. Second, Congress should specifically provide that if a regulation made pursuant to Congress' authority to regulate navigable waterways goes so far as to amount to a regulatory taking of property, then the landowner should receive the benefit of the Section 111 rule for computing damages. Once again, the counter-argument that this would impose too great a burden on the public treasury would require its proponent to assume that it is appropriate to treat two similarly situated groups of landowners in a disparate fashion.

CONCLUSION

The navigational servitude doctrine's no-compensation rule represents one of the very few judicially-created exceptions to the federal government's Fifth Amendment obligation to pay just compensation when it takes property. Perhaps the most onerous and indefensible outgrowth of this rule has been the Supreme Court's holding in *Rands*. Under the *Rands* rule, when the federal government condemns land on or near a navigable waterway, it has no obligation to pay the full measure of just compensation to the landowner. Instead, it is permitted to exclude from the measure of just compensation any element of value attributable to the land's access or proximity to a navigable waterway.

Congress responded to the Court's decision in *Rands* by enacting Section 111 of the Rivers and Harbors Act, which provides, as a matter of legislative grace, a right to compensation which the Supreme

237. 90 F.3d 790 (3d Cir. 1996).

Court has declared that Congress is not constitutionally obligated to provide. Section 111 requires that the amount of just compensation paid to any landowner for land appropriated by the government must include any value attributable to the land's proximity to a navigable waterway.

Section 111 effectively demonstrates Congress' power to remedy the hardship and injustice that result from the Supreme Court's unwillingness to adequately enforce the clauses of the federal constitution that expressly protect property rights, including the Fifth Amendment's Takings Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments. It would be appropriate for Congress to consider additional legislation to ameliorate the harshness of certain aspects of the navigational servitude that remain even after the passage of Section 111.

The Supreme Court's recent treatment of federalism and regulatory taking issues[238] suggests that the Court may be inclined to undo some of the harsher effects of the navigational servitude doctrine as it has developed over the past two centuries. In light of the Court's recent federalism cases, which, for the first time since the 1930s, invalidated federal statutes as beyond Congress' power to regulate interstate commerce, the Court may be more willing to carefully examine whether a particular regulation of a navigable waterway is within that power. The Court may decide that certain waterway regulation is so local in its focus that it is within the sole province of the individual states. If a particular form of regulation is impermissible, then the government would not be able to invoke the navigational servitude as a defense.

Under the Supreme Court's recent regulatory taking cases, even if the Court concludes that a particular regulation is within the power of the federal government, it may at least be willing to limit the scope of the navigational servitude doctrine. The essence of the Court's approach to regulatory takings has been that if regulation goes too far in its impact on a landowner, the government must pay just compensation to the landowner.[239] This general approach suggests that the Court may be more willing than it was in the past to scrutinize regulation or other governmental activities to determine whether such activities serve traditional navigational purposes, and, thus, whether the rule of no compensation is applicable. If the Court concludes that a regulation goes well beyond traditional navigational purposes, as it did in *Kaiser Aetna*, it may be willing to hold that the navigation servitude is not applicable, and

238. *See supra* notes 26–29 and accompanying text.
239. *See supra* note 75.

hence that the government must pay just compensation to the affected landowner. Such an approach would enable the Court to avoid the rather drastic step of invalidating a regulation with only a tenuous relationship to interstate commerce, while at the same time protecting the property rights of landowners.

Section 111 and the view of the navigation servitude reflected in the *Rands* case may no longer represent an appropriate balance of the competing public and private interests implicated in this area. Even if a Supreme Court newly sensitized to the need to protect private property interests against governmental intrusion and overextension of federal authority is unwilling to readjust the balance, Congress may step in again to ensure that property rights are adequately protected.