The Navigational Servitude: The Role of a Categorical Exception Within a System of Ad-Hoc Review

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I. INTRODUCTION

The Fifth Amendment to the United States Constitution provides, in part, that private property shall not "be taken for

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public use, without just compensation."[1] Known as the Takings Clause, this provision limiting the government's sovereign power of eminent domain may appear to be straightforward, but in practice is not. Several categorical exceptions to this requirement have developed over time. One such categorical exception is the navigational servitude, which allows the federal government to exercise its power to regulate and control the nation's navigable waterways without paying compensation for the resulting economic loss.

This Note will argue that the availability of such a blanket exception is unjustifiable. First, it creates perverse incentives for the government to disproportionately take littoral land and produces inequitable results for landowners. Second, historically based in the federal government's power over interstate commerce, the policy justifications for the navigational servitude are no longer compelling in our modern economy where waterways are not the vital highways of commerce they once were. Therefore, the navigational servitude should not be an absolute defense to taking claims anymore. Instead, such claims should be analyzed within the fact-specific framework that applies to takings that occur on land and in non-navigable waterways. Such an analysis can limit the draconian nature of the current navigational servitude and encourage the federal government's equitable use thereof.

Part II of this Note will discuss how the navigational servitude emerged from the Commerce Clause and the different elements of the servitude that have developed over time. Part III will describe the limits and faults of the application of the navigational servitude in the takings context. Part IV will discuss the ad-hoc analysis courts employ in takings cases where the navigational servitude is not available as a categorical defense to a taking. Ultimately, this Note will argue that application of this ad-hoc review would be a more appropriate analytical tool for takings claims that involve the government's power over navigation.

1. U.S. CONST. amend. V.

II. BACKGROUND

A. The Navigational Servitude

i. Development of the Servitude

Although the Takings Clause is part of the Fifth Amendment, the navigational servitude emerged from the Commerce Clause, which is found in Article I, Section 8 of the Constitution. The Commerce Clause gives to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[2] In 1824, the Supreme Court heard *Gibbons v. Ogden*, the case often cited as paving the way for the development of the navigational servitude.[3] In this case, the Court held that Congress' power to regulate commerce among the states gave it power over the nation's navigable waterways.[4] *Gibbons* concerned a conflict between state and federal laws regulating steamships on the Hudson River in New York.[5] The Court invalidated a New York statute that created a steamboat monopoly within the state on the grounds that it contradicted the federal Navigation Act.[6] At the time of the decision, the Court declared that "[a]ll America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation."[7] This firmly established that power over navigation was essential to Congress' power over commerce. No takings claims or property rights issues were raised.

ii. Scope of the Servitude

This power over navigation eventually grew into a property right to which all lands under the high-water line of a navigable waterway are subject: the navigational servitude.[8]

2. U.S. CONST. art. I, § 8, cl. 3.
3. Gibbons v. Ogden, 22 U.S. 1 (1824).
4. *Id.*
5. *Id.*
6. *Id.*; *see generally* Norman R. Williams, *The Dormant Commerce Clause: Why Gibbons v. Ogden Should Be Restored to the Canon*, 49 ST. LOUIS U. L.J. 817, 820 (2005).
7. *Gibbons*, 22 U.S. at 190.
8. United States v. 30.54 Acres of Land, 90 F.3d 790, 793 (3rd Cir. 1996) ("But the United States is not constitutionally required to pay for economic losses resulting from the exercise of its 'navigational' servitude—its power to regulate the use of navigable

In *United States v. Rands*,[9] the Supreme Court explained that when Congress exercises its right to regulate navigation, it

> 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. Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream or otherwise impair or destroy a riparian owner's access to navigable waters . . . .[10]

Thus, the navigational servitude makes all federal actions affecting land under the high-water mark immune to the just compensation requirements of the Takings Clause. No taking can occur because the land below the high-water mark has always been held subject to this dominant servitude.[11] Therefore, a private property owner holds only a "qualified title, a bare technical title, not at his absolute disposal . . . but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."[12] For example, when the government constructs dikes or piers upon submerged land in a navigable waterway, the resulting redirected water and silt or the physical pier might cut off the riparian owner's access to deep water and use of the waterway.[13] While the landowner loses both riparian rights of water access and any viable economic value in the remaining dry land, no compensation is due to him.[14]

waterways—because navigable waterways have always been under the exclusive control of the federal government under the Commerce Clause.").

9. 389 U.S. 121 (1967).

10. *Id.* at 123 (internal citations omitted).

11. United States v. Cherokee Nation of Okla., 480 U.S. 700, 705 (1987) ("The Court did not rely on the particular use to which the private owners put the bed, but rather observed that their very title to the submerged lands 'is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require.' (citing Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 88 (1913))").

12. Scranton v. Wheeler, 179 U.S. 141, 163 (1900).

13. *Id.*

14. *Id.*

Similarly, when federal dredging destroys oyster beds[15] or mineral deposits in the streambed,[16] no compensation is due to owners of the commercial oyster beds. Thus, the navigational servitude serves as a powerful exception to the Takings Clause.

B. Limits on the Navigational Servitude

i. High-Water Mark

The navigational servitude is not without its limits.[17] First, the servitude is physically limited to the "stream and the stream bed below ordinary high-water mark" and "does not extend beyond the high-water mark."[18] Any lands located above the high-water mark ("fast lands") are still subject to the Takings Clause.[19] For example, if such fast lands are flooded as a result of the federal government's navigational improvements, the property owner must be compensated for the loss of those lands above the high-water mark.[20] Such flooding has long been recognized as constituting a taking.[21] However, disputes often arise, especially in areas with wetlands, over the extent and boundaries of navigable waterways and over the location of the high-water mark.[22]

ii. Navigable Waterways

The navigational servitude is further geographically limited to only "navigable" waterways. Originally, courts applied a

15. *Briggs*, 229 U.S. 82.

16. *Cherokee Nation of Okla.*, 480 U.S. at 700.

17. *See generally* Genevieve Pisarski, *Testing the Limits of the Federal Navigational Servitude*, 2 OCEAN & COASTAL L.J. 313 (1997) (discussing the various limitations and qualifications of the navigational servitude).

18. United States v. Rands, 389 U.S. 121, 123 (1967).

19. *Id.*

20. Confederated Tribes of Colville Reservation v. United States, 964 F.2d 1102, 1105 n.5 (Fed. Cir. 1992) ("'Fast' lands are those above the high water mark, which when flooded are considered a taking and subject to just compensation.").

21. *See, e.g.*, Gibson v. United States, 166 U.S. 269 (1987); *see also* Pumpelly v. Green Bay Co., 80 U.S. 166 (1871).

22. *See, e.g.*, Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir. 2000) (finding that although the depth of water over the land in question could not support navigation, because the larger Lake Worth as a whole was navigable, the submerged land in question was subject to the servitude), *abrogated by* Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1369–70 (Fed. Cir. 2004).

strict "navigable in fact" test developed in *The Daniel Ball*.[23] Rivers "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[24] However, over time this test was relaxed and the definition of a navigable waterway expanded. Today, for purposes of the navigational servitude, the term "navigable waterway" encompasses non-navigable tributaries to navigable waterways;[25] waters that, though once navigable in fact, are no longer navigable;[26] and waters which may become navigable after reasonable improvements.[27] However, this expansion has not extended the navigational servitude to private, non-navigable waterways that, through private dredging efforts, have become connected to navigable waterways.[28]

iii. Easement

The servitude is also limited in that it is an easement only. As such, it "does not destroy or exclude all property rights in the beds and banks of navigable streams."[29] The rights of the titleholder of the submerged lands "continue to exist but are held subject to the governmental power in the nature of an easement."[30] Thus, even when the government is exercising the navigational servitude, the private landowner retains full title. When the government stops exercising its easement, control of the submerged lands reverts back to the private

23. The Daniel Ball, 77 U.S. 557, 563 (1870), *superseded by statute*, Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816, *as recognized in* Rapanos v. United States, 547 U.S. 715, 723–24 (2006).

24. *Id.*; *see also* United States v. Cress, 243 U.S. 316, 326 (1917) (applying the navigable in fact test to find that the Cumberland and Kentucky Rivers were navigable waters of the United States).

25. *See, e.g.*, United States v. Grand River Dam Auth., 363 U.S. 229, 232 (1960); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525–26 (1941).

26. *See, e.g.*, Arizona v. California, 283 U.S. 423, 453–54 (1931); Econ. Light & Power Co. v. United States, 256 U.S. 113, 122–23 (1921).

27. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408 (1940), *superseded by statute*, Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816, *as recognized in* Rapanos v. United States, 547 U.S. 715, 723–24 (2006).

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

29. Pub. Util. Dist. No. 1 of Pend Oreille Cnty. v. City of Seattle, 382 F.2d 666, 669 (9th Cir. 1967).

30. *Id.*

landowner. By contrast, if the government wanted not only to exercise its easement, but also to acquire full title in fee to the submerged riverbeds, a condemnation proceeding would be necessary, along with the payment of just compensation to the private landowner.[31]

iv. Express Authorization

For the federal government to exercise this power, it must have an express authorization.[32] Such an authorization has been found to be present in many cases. For instance, in *United States v. Chandler-Dunbar Water Power Co.*, the Supreme Court considered the Act of March 3, 1909, which forbade the construction of any dam, pier, or breakwater on the St. Marys River.[33] The Court concluded that the language of the Act "authorized the exercise of the dominant right of the United States to take all of a navigable river's flow for purposes of interstate commerce."[34]

Furthermore, if Congress intends to confer the authority to exercise the navigational servitude on non-federal parties, it must do so expressly. For instance, multiple cases have found that the Federal Power Act ("FPA")[35] does not confer the authority to exercise the navigational servitude upon parties that obtain permits to build on navigable waterways under the FPA.[36] Although in passing the FPA Congress had the ability to "vest any portion of its sovereign power in the permittee,"

31. *See* United States v. 11.48 Acres of Land, 212 F.2d 853, 855 (5th Cir. 1954) ("[A]ppellee's riparian rights were not simply subjected to the Government's dominant servitude over navigable waters, but those rights were permanently and irrevocably taken by the United States. For such taking the Fifth Amendment guaranteed to the appellee the right to just compensation.").

32. *Pub. Util. Dist. No. 1 of Pend Oreille Cnty.*, 382 F.2d at 670.

33. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

34. Fed. Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954) (citing *Chandler-Dunbar Water Power Co.*, 229 U.S. at 56 n.†).

35. Federal Power Act, 16 U.S.C. §§ 791a–828c (2012).

36. *See Niagara Mohawk Power Corp.*, 347 U.S. at 250 (holding that the Federal Power Act should not be given the same "drastic effect" of the Act of March 3, 1909); *Pub. Util. Dist. No. 1 of Pend Oreille Cnty.*, 382 F.2d at 673; United States v. Cent. Stockholder's Corp. of Vallejo, 52 F.2d 322, 332 (9th Cir. 1931) ("[I]n so far as the project of the permittee is in aid of navigation it is not clothed with any of the sovereign rights of the United States to control the navigation of the stream which may be in conflict with the riparian rights of the property owners to recover damages for losses of property due to such dam.").

courts have determined that "it was not the intention of the Government so to do."[37] Thus, when a permittee interferes with state-recognized property rights of other landowners for which the federal government would be immune from paying compensation due to the navigational servitude, no such defense is available to the permittee.[38] Unable to avail itself of the navigational servitude, the permittee must pay compensation although the Federal Government would not.[39]

v. The Purpose to Aid in Navigation

A more complex limitation on the navigational servitude is the requirement that the government's actions have a purpose to aid in navigation.[40] Because the servitude is a result of the federal government's ability to regulate navigation as an instrumentality of interstate commerce, the government's actions must have a purpose to aid in navigation to qualify.

The purpose to aid in navigation has been interpreted broadly by courts. The Supreme Court, in *United States v. Appalachian Elec. Power Co.*, described the vast reach of the term "navigability":

> Navigability, in the sense just stated, [operation of boats and improvement of the waterway itself] is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. . . . The point is that navigable waters are

37. *Pub. Util. Dist. No. 1 of Pend Oreille Cnty.*, 382 F.2d at 671 (citing *Cent. Stockholder's Corp. of Vallejo*, 52 F.2d at 332).

38. *See id.* at 670 ("[B]eyond mere silence as to such legislative intent, the language in the Power Act has been interpreted to constitute an express denial of the servitude.").

39. *Id.* at 672 ("Seattle as licensee of FPC may not assert the Government's dominant navigational servitude; that if shorelands are necessary to its projects they must be taken in the constitutional sense, and compensation for the taking must follow.").

40. *See* Scranton v. Wheeler, 179 U.S. 141, 145 (1900) (discussing the "right of Congress to regulate commerce, and, as an incident, navigation . . . ."); United States v. Gerlach Live Stock Co., 339 U.S. 725, 737 (1950) ("[T]his Court has never permitted the Government to pervert its navigation servitude into a right to destroy riparian interests without reimbursement where no navigation purpose existed."); *see also* Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56, 63 (1921) ("The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation.").

> subject to national planning and control in the broad regulation of commerce granted the Federal Government.[41]

Thus, projects such as the building of dams[42] are almost always found to be a valid use of the servitude, even if not strictly or primarily done to further navigation.[43] And although "[t]he precedents clearly establish that the government's purpose must be related to navigation if it wishes to avoid paying compensation for the regulation or control of private property,"[44] the determination of a purpose to improve navigation "is a matter entirely within the broad discretion of the legislative branch."[45] The Supreme Court has directed courts not to "substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation."[46] This deference suggests that judicial review of the navigational purpose provides at best a very weak check on the broad power of the navigational servitude.

Despite the breadth of this test, the courts have disagreed on where the outer limits lie. An interesting exception to the generally deferential interpretation of the purpose to aid in navigation can be found in the context of ecological conservation. In *Palm Beach Isles Associates v. United States*, the Federal Circuit denied the Government's use of the

41. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426–27 (1940), *superseded by statute*, Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816, *as recognized in* Rapanos v. United States, 547 U.S. 715, 723–24 (2006).

42. Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 516 (1941) ("We are of the view that the Denison Dam and Reservoir project is a valid exercise of the commerce power by Congress.").

43. *See, e.g.*, United States v. Commodore Park, 324 U.S. 386, 393 (1945) ("There is power to block navigation at one place to foster it at another. Whether this blocking be done by altering the stream's course, by lighthouses, jetties, piers, or a dam made of dredged material, the government's power is the same and in the instant case is derived from the same source—its authority to regulate commerce.") (internal citations omitted); Arizona v. California, 283 U.S. 423, 456 (1931) ("[T]he fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power.").

44. Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1384 (Fed. Cir. 2000), *abrogated by* Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1369–70 (Fed. Cir. 2004).

45. Mildenberger v. United States, 91 Fed. Cl. 217, 248 (Fed. Cl. 2010).

46. United States v. Twin City Power Co., 350 U.S. 222, 260 (1956).

navigational servitude as an absolute defense to a regulatory takings claim.[47] The Army Corps of Engineers denied a private land owner's application for a dredge and fill permit, citing environmental concerns including requirements of the Clean Water Act. The court held that the government could not invoke the navigational servitude for this environmental purpose alone. Citing a lack of evidence of a navigational purpose in denying the permit, the Federal Circuit remanded the case for further fact finding. Although on remand the Court of Federal Claims found that the Corps did have a sufficient navigational purpose in denying the permit, the Federal Circuit made it clear that such a purpose was necessary and concerns over conservation alone would not allow the government to invoke the servitude.[48]

This narrowing of the navigational purpose stands in contrast to the Fifth Circuit's 1970 ruling in *Zabel v. Tabb*.[49] In *Zabel,* denial of a dredge and fill permit was similarly challenged as an uncompensated taking. However, in that case the court quickly and summarily dismissed such an argument. The Fifth Circuit reasoned that the submerged land in question was subject to the federal servitude. However, the court began its analysis of Congress' authority over the waterway not with a discussion of the navigational servitude as developed by federal courts, but by going back to the Commerce Clause.[50] Citing the Commerce Clause's "expansive reach," the court noted that dredge and fill projects potentially have a "substantial, and in some areas a devastating, effect on interstate commerce" and Congress therefore had "the power to

47. *See Palm Beach Isles Assocs.*, 208 F.3d at 1384–85.

48. *See* Palm Beach Isles Assocs. v. United States, 58 Fed. Cl. 657, 686 (2003) ("After further discovery and a hearing upon remand, this court finds that defendant has demonstrated a bona fide federal navigational purpose in the permit denial as to plaintiffs' 49.3 submerged acres. Therefore, as to the 49.3 acres, the permit denial by the Corps did not constitute a compensable regulatory taking.") (internal citation omitted), *aff'd*, 122 Fed. App'x. 517 (2005). *See also* Benjamin Longstreth, *Protecting "The Wastes of the Foreshore": The Federal Navigational Servitude and Its Origins in State Public Trust Doctrine,* 102 COLUM. L. REV. 471 (2002) (discussing the possibility of expanding the navigational servitude to include government regulation of waterways for conservation purposes).

49. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970).

50. *Id.* at 203.

regulate such projects."[51] While numerous cases also find that the Commerce Clause permits Congress to regulate navigable waterways for the purpose of environmental conservation,[52] *Zabel* goes beyond this to expand the navigational servitude to the full reaches of Congress' Commerce Clause power.[53] In so doing, the *Zabel* court removed all limitations from the navigational servitude except for the *Wickard v. Filburn* requirement that the activity being regulated have a substantial effect on interstate commerce.[54] While this is an intriguing expansion of the navigational servitude, as can been seen more recently in *Palm Beach Isles Associates,* other federal courts have not yet accepted it.

III. THE FAILURES OF THE NAVIGATIONAL SERVITUDE

A. The Common Law Servitude

The navigational servitude and the Takings Clause stem from two separate Constitutional foundations: the Commerce Clause and the Fifth Amendment. It is therefore not surprising that they are premised on different underlying policy rationales. The navigational servitude places navigable waterways under the ultimate control of the federal government so that it may effectively regulate interstate commerce. The Takings Clause, on the other hand, has traditionally been described by courts as a way of stopping 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."[55] However, as can be seen in cases such as *Rands,* use of the navigational servitude can do just that. This result is not only inequitable, but inefficient and inconsistent with the Takings Clause.

In *Rands*, the government took, through condemnation proceedings, riparian land for a port site on the Columbia

51. *Id.* at 203–04.

52. *See* United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978); United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974).

53. *Zabel*, 430 F.2d at 215 (describing the submerged lands as being subject to a "paramount servitude" that is "an incident of power incident to the Commerce Clause").

54. Wickard v. Filburn, 317 U.S. 111 (1942).

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

River.[56] The government argued that the compensable value of the land did not include its value as a port site and thus was about one-fifth the claimed economic value of the land.[57] This was because the economic value necessarily included the riparian owner's ability to access the Columbia River. Since this right of access could be abridged without compensation through use of the navigational servitude, the Court reasoned, the government could also "disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated."[58] In effect, the extra value of the land was something to which the riparian landowner had no right since it "does not 'inhere in these parcels as upland,' but depends on use of the water"—a use that the riparian owner is not guaranteed thanks to the navigational servitude.[59]

The practical result of *Rands* was that the government was able to acquire land for public use at one-fifth the market rate. Such an action goes against the stated equity goals of the Takings Clause and places a heavy burden on the riparian landowner. A closer look at the facts of *Rands* exposes just how troubling this result is. At the time of the condemnation, the landowner was leasing the land to the State of Oregon with an option to purchase.[60] However, the land was condemned by the United States at the deeply discounted price and then ultimately conveyed to the State of Oregon at "considerably less than the option price."[61] Through use of the navigational servitude, Oregon obtained the land at a far better price than if it had exercised the option.

If this parcel of land had not been adjacent to the Columbia River but instead was adjacent to a major highway or a mineral deposit, the added value derived from its location would be reflected in the fair market value of the property and would be taken into consideration for calculating just

56. United States v. Rands, 389 U.S. 121, 121–22 (1967).
57. *Id.* at 122.
58. *Id.* at 123–24 (citing United States v. Va. Elec. & Power Co., 365 U.S. 624, 629 (1961)).
59. *Id.* at 124 (citing United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 76 (1913)).
60. *Id.* at 122.
61. *Id.*

compensation.[62] In the open market, a purchaser would likely have to pay a price much closer to the option price in order to fairly acquire the parcel of land. The large discrepancy between the option price and the one-fifth received demonstrates the draconian effect of the navigational servitude. This effect is not only harsh, but inequitable. Riparian owners bear the burden of the public benefit and receive less money for their condemned properties than other landowners.

This result also contradicts the efficiency goals of the Takings Clause. By invoking the navigational servitude, taking riparian land becomes less expensive than taking non-riparian land. Thus, riparian land may become more attractive, incentivizing the government to take it over other land.[63] Such inefficiency is economically detrimental because it can result in a misallocation of resources.[64] This can also create an incentive to take property under the navigational servitude as opposed to other regulatory or police powers.[65]

For instance, in *United States v. 412.715 Acres of Land*, the United States sought to condemn a large parcel of land in California for use as a naval fuel supply depot under its power to maintain a navy and not under the navigational servitude.[66] While the government agreed to pay just compensation for all fast lands, it invoked the navigational servitude to claim that compensation for any submerged lands was not required.[67] The

62. United States v. Miller, 317 U.S. 369, 374 (1943) (noting that in calculating just compensation for takings claims, courts have adopted the concept of market value, or what price "it fairly may be believed that a purchaser in fair market conditions would have given").

63. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 58 (4th ed. 1992) (arguing that the compensation requirement prevents the government from ignoring costs and overusing the taking power); *see also* William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 269–70 (1988) (summarizing the "conventional economic wisdom" that "[t]he compensation requirement . . . serves the dual purpose of disciplining the power of the state, which would otherwise overexpand unless made to pay for the resources that it consumes").

64. *See* Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999).

65. Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1 (1963–1964).

66. United States v. 412.715 Acres of Land, 53 F. Supp. 143 (N.D. Cal. 1943).

67. *Id.* at 145 ("In view of the fact that certain portions of the lands named in the above mentioned condemnation proceedings are situated below the mean high water

landowners claimed "such use of the lands [was] a taking of private property for public use, for which compensation must be paid."[68] The Court recognized the overall validity of the navigational servitude, stating that, unquestionably, the government may "deepen channels, widen streams, erect lighthouses, build bridges, construct dams, and make similar improvements, without compensating the owners of land subject to the navigation servitude."[69] However, it found that the naval project in question was not one undertaken to aid or enhance navigation. Instead, in acquiring the land and excluding the public, the government had acted not "under its power to improve navigation as a public utility, but under its constitutional power to maintain a navy."[70] Therefore the actions of the government in this instance were subject to the Takings Clause. As a result, the government needed to pay just compensation for the submerged lands taken.[71] However, if the Court had found that the same actions had been an exercise of the servitude, no such payment would have been necessary.

A possible justification for the inequitable and inefficient results of the navigational servitude may be mitigated by the "notice theory."[72] While the Supreme Court has not laid out a fully developed notice theory for the navigational servitude, it has clearly established that all submerged and riparian lands have long been limited by the servitude and "[t]here thus has been ample notice over the years that such property is subject to a dominant public interest."[73] Critics point out that such a theory is flawed due to the vast expansion of the role of the federal government in development projects on navigable waterways, such as dams, as well as the expansion of the

line, this Department intends to exercise on behalf of the United States the right to use the land in the exercise of the sovereign power of the United States.").

68. *Id.* at 148.

69. *Id.*

70. *Id.* at 149.

71. *Id.*

72. Morreale, *supra* note 65, at 23–25 (discussing and criticizing a possible "notice theory" justification for the rule of no compensation).

73. United States v. Kan. City Life Ins. Co, 339 U.S. 799, 808 (1950).

number of waterways covered by the term "navigable" since the inception of the servitude.[74]

A separate flaw with perpetuation of the navigational servitude is that its underlying rationale may no longer be valid. Unlike at the time of *Ogden*, Americans no longer understand commerce to include navigation. Once the public highways of commerce, large rivers and watercourses are now valued mostly for their environmental and recreational uses.[75] Also, this exception to the Takings Clause has not been extended to any other instrumentality of commerce.[76] While rivers were once a vital and primary means of commerce, other arteries of commerce have emerged over time that are perhaps more important to our modern society. However, no dominant servitude has been extended to the federal government for highways, phone lines, or air space.[77] The navigational servitude endures as a vestigial reminder of the past importance of waterways in commerce. However, commerce no longer requires a strong federal authority over the nation's waterways. The historical need for the navigational servitude can no longer justify this large and glaring exception to the Takings Clause.

B. The Rivers and Harbors Act

Proponents of the navigational servitude often point to the Rivers and Harbors Act as solving some of the potential inequities addressed above. In fact, Congress enacted Section 111 of the Act in direct response to the harshness of the outcome in *Rands*.[78] While it may appear to address the many

74. *See, e.g.*, Morreale, *supra* note 65, at 24–25 ("Finally, the notice theory fails to take account of . . . the expansion of the word 'navigable.' Today that expansion subjects streams to federal control which not long ago would have been treated as non-navigable and thus as immune from the dominant federal power. To justify the no compensation rule by the idea of notice of a paramount federal right in navigable streams would require that navigability be defined as of the time the private right in question was acquired.").

75. *See, e.g.*, Brown v. Chadbourne, 31 Me. 9, 21 (1849) (discussing the servitude and its application to "those rivers, which nature has plainly declared to be public highways").

76. Morreale, *supra* note 65, at 31.

77. *Id.*

78. 33 U.S.C.A. § 595a (2012); *see* Alan T. Ackerman & Noah Eliezer Yanich, *Just and Unjust Compensation: The Future of the Navigational Servitude in Condemnation*

problems created by the navigational servitude, in reality it serves a limited purpose.[79] It provides, in relevant part:

> 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 it highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters.[80]

Thus, when fast lands are taken in connection with a navigation project, the compensation paid must include the value added to the land by the access to or use of the waterway.

The first limitation of Section 111 is that it only applies in "cases where real property shall be taken . . . ."[81] Thus, the first hurdle for landowners remains the need to prove that there has in fact been a taking.[82] In certain cases, such as *Rands*, where there is a direct condemnation proceeding, this may be a straightforward task.[83] Once the taking of the entire property has been established, the statute is then triggered and the value of the land derived from its proximity to the waterway will not be deducted from the equation.[84] However,

Cases, 34 U. MICH. J.L. REFORM 573 (2001) (discussing Section 111 of the Rivers and Harbors Act as a Congressional response to United States v. Rands, 389 U.S. 121 (1967), and calling for further legislative intervention to abolish the navigational servitude).

79. *See* Ackerman & Yanich, *supra* note 78.

80. 33 U.S.C.A. § 595a (2012).

81. *Id.*

82. United States v. 30.54 Acres of Land, 90 F.3d 790, 796 (3d Cir. 1996) ("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.").

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

84. *See, e.g.*, United States v. 967,905 Acres of Land, 447 F.2d 764, 771 (8th Cir. 1971) ("Since the taking involved in this case was a total taking, we think that section 111 of the Act is applicable and should be followed . . . . That means that the [appellees'] lands and the fixed improvements thereon are to be valued as riparian

in cases where it is unresolved whether a taking has occurred, Section 111 does not provide assistance. Moreover, courts have shown that they are unwilling to extend Section 111 beyond the very specific situation encountered in *Rands*.[85]

The second limitation is that Section 111 retains the harsh *Rands* rule for calculating severance damages. It states:

> 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.[86]

Thus, in cases where the government condemns only part of the riparian land, Section 111 applies to that land taken (allowing the value derived from water access and use to be included) but does not apply to the land that remains. The landowner is left with land that is now worth much less since it has been cut off from the valuable water source, but is in no way compensated for the difference.[87]

Therefore, the second half of Section 111 limits the purported generosity of the first. It carves out severance damages in the case of partial takings from the general rule that proximity to a waterway may be used in the calculation of just compensation. Partial takings are takings in which the government does not condemn an entire parcel, but only the part it needs.[88] Traditionally, in calculating the amount of compensation owed, the value of the part actually taken "is not the sole measure of

lands and that their access to the Lake is to be taken into consideration in fixing their value . . . .").

85. *See, e.g.*, United States v. 30.54 Acres of Land, 90 F.3d 790, 796 (3d Cir. 1996) ("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.").

86. 33 U.S.C.A. §595a (2012).

87. *See, e.g.*, United States v. 13.20 Acres of Land, 629 F. Supp. 242, 247 (E.D. Wash. 1986) (awarding just compensation including the "current market value of the condemned parcels, taking into consideration the access to Lake Roosevelt" but declaring that "no severance damages may be awarded for loss of access from the remaining lands to the water").

88. *See, e.g.*, Bauman v. Ross, 167 U.S. 548 (1897).

the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered."[89] Thus, if "the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account."[90] Severance damages can be an important portion of the total amount of compensation.[91]

The decision over how to parcel out land and how much land to take is wholly up to the discretion of the government. Such a compensation structure could lead to the same harmful incentives identified above. Moreover, the categorical treatment of the navigational servitude means that most cases will not reach the damages computation stage and thus will not receive the protection of Section 111.[92] Specifically, since the landowners will rarely be able to prove a taking occurred once the navigational servitude has been invoked, they will not proceed past the opening of Section 111. While Section 111 helps in computing just compensation in a straightforward condemnation of land adjacent to a navigable waterway, it does not reach the vast majority of cases and therefore inadequately addresses the inequities the navigational servitude creates.

IV. APPLYING THE *PENN CENTRAL* TEST TO THE NAVIGATIONAL SERVITUDE

As discussed above, the navigational servitude has long been a blanket, categorical exception to the Takings Clause's requirement of just compensation. However, this exception has created results that are inequitable, inefficient, and inconsistent with the policies underlying the Takings Clause. These results can be avoided and more equitable and rational outcomes are possible if the navigational servitude is seen not

89. *Id.* at 574.

90. *Id.*

91. In practice, to calculate these severance damages, courts determine the "difference between the value of the [entire] tract before the taking and its value after the taking." United States v. 8.41 Acres of Land, 783 F.2d 1256, 1257 (5th Cir. 1986).

92. *See* Ackerman & Yanich, *supra* note 78, at 607–12 (discussing how the Court in United States v. 30.54 Acres of Land, 90 F.3d 790 (3d Cir. 1996), rejected an argument that a regulatory taking could qualify as a taking under Section 111).

as a complete and absolute defense to takings claims, but as one of many factors in an ad-hoc analysis of those claims.

A. The *Penn Central* Test: An Ad Hoc Approach

In *Penn Central Transportation Co. v. City of New York*, the Supreme Court established a framework for evaluating takings cases where there was no permanent physical occupation of the property.[93] At issue in the case was New York City's Landmarks Preservation Law and the restrictions it placed on development of Grand Central Terminal.[94] While zoning laws had long been considered a part of state and local governments' police power, and thus a categorical exception to takings,[95] the Court recognized that overall it "quite simply[] has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[96] Instead of using a categorical approach, the Court, by looking at many takings cases, distilled the elements to be weighed in an ad-hoc takings analysis.[97] The ad-hoc analysis of *Penn Central* looks at (1) the economic impact of the Government's action; (2) its interference with reasonable investment backed expectations; and (3) the character of the government action.[98] The Court then went on to apply this analysis to the landmark regulations at issue and found that they were not a taking but a permissible use of the police power.[99]

First, the Court found that the government's landmark designation "does not interfere in any way with the present uses of the Terminal."[100] Therefore, the current economic impact was minimal. Second, the railroad terminal would continue to operate as it had "for the past 65 years," so the governmental action did "not interfere with what must be

93. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

94. *Id.*

95. *See* Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926).

96. *Penn Cent.*, 438 U.S. at 124 (citation omitted).

97. *Id.*

98. *Id.*

99. *Id.* at 138. *See generally* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS (2002).

100. *Penn Cent.*, 438 U.S. at 136.

regarded as Penn Central's primary expectation concerning the use of the parcel."[101] Not only did the designation allow the terminal to continue to operate, but the landowners were also able to "obtain a 'reasonable return'" on investment.[102] Finally, the governmental action "not only permit[ted] reasonable beneficial use of the landmark site but also afford[ed] appellants opportunities further to enhance not only the Terminal site proper but also other properties."[103] Instead of quickly dismissing the case by shoehorning it into a single categorical exception, the Court was able to address the various goals and consequences of the governmental actions in question.

B. The *Lucas* Exception: Recognition of Categorical Exceptions

In *Lucas v. South Carolina Coastal Council*, the Supreme Court held "categorical treatment [of a potential taking] appropriate . . . where regulation denies all economically beneficial or productive use" to the landowner.[104] In these cases, the government almost inevitably must compensate the landowner. However, the Court in *Lucas* also noted that this categorical approach would be inapplicable "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[105] The Court then explicitly cited the navigational servitude as an example of a valid, "pre-existing limitation upon the land owner's title."[106] Once it is found that the landowner did not have a property right in what was allegedly taken—because it was always subject to the navigational servitude—the analysis ends and no taking can be found.

101. *Id.*
102. *Id.*
103. *Id.* at 138.
104. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).
105. *Id.* at 1027.
106. *Id.* at 1028–29.

C. The Typical Takings Case

Under the current Takings Clause framework, the initial step is to determine if the plaintiff has a property right.[107] Such a property right is not created by the Constitution, but is defined by reference to "'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law. . . ."[108] This is where the *Lucas* analysis of the navigational servitude is often invoked, leading to dismissal of the case. If a case moves beyond this stage, the next question is whether or not there has been a taking.[109] There are two different ways that a taking can then be shown. Either a landowner can meet the *Lucas* test by showing that he or she has been denied all economically beneficial or productive use of the land as a result of the government's actions,[110] or he or she can prevail under the ad-hoc determination set forth in *Penn Central*.[111]

The takings analysis established in *Lucas* was used in *United States v. 30.54 Acres of Land* to hold that even if the government's actions deprived the landowners of all economically reasonable use of their land there could be no taking since the land had always been "subject to the navigational servitude and the possibility that the Government might exercise the servitude to prohibit their use. Exercise of the servitude did nothing more than realize a limitation always inherent in the landowners' title."[112] In this case, the landowners had operated a coal loading facility on a tract of land along the Monongahela River since 1914.[113] At this facility, coal was loaded into barges on the river using "a coal tipple, grounded on the property, [that] extended

107. *See, e.g.*, Arctic King Fisheries, Inc. v. United States, 59 Fed. Cl. 360, 370 (Fed. Cl. 2004).

108. Maritrans Inc. v. United States, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (citing *Lucas*, 505 U.S. at 1030).

109. *See, e.g.*, Mildenberger v. United States, 643 F.3d 938 (Fed. Cir. 2011); *Arctic King Fisheries, Inc.*, 59 Fed. Cl. at 373–86.

110. *Lucas*, 505 U.S. at 1027–30; *see also* Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1379 (Fed. Cir. 2000), *abrogated by* Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1369–70 (Fed. Cir. 2004).

111. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

112. United States v. 30.54 Acres of Land, 90 F.3d 790, 795 (3d Cir. 1996).

113. *Id.* at 792.

approximately one hundred feet into the . . . [r]iver."[114] In 1992, the United States acquired and paid for just 30.54 of the landowners' over 132 acres, which was used in constructing a dam on the river.[115] The government did not acquire the remaining land, facility, and tipple, and the Army Corps of Engineers subsequently prohibited the coal loading operation all together.[116] The Corps claimed that the tipple's close proximity to the dam posed a safety hazard and a hazard to navigation.[117] The court found that the Corps' decision was not a taking—rather, it was merely an exercise of the navigational servitude.[118]

D. Reformulating the Doctrine

Draconian results, such as those in *30.54 Acres of Land* and *Rands*, can be avoided by viewing the navigational servitude not as an absolute bar to the takings claims, but as one factor in an ad-hoc analysis of a takings claim. To do this, courts must move away from the *Lucas* analysis and toward the ad-hoc *Penn Central* analysis,[119] while also embracing the words in *Kaiser Aetna* that the Supreme Court "has never held that the navigational servitude creates a blanket exception to the Takings Clause . . . ."[120]

In *Kaiser Aetna*, decided shortly after *Penn Central*, the Court looked at many factors in deciding that the government's actions amounted to a taking.[121] This analysis allowed the Court to consider the context in which the navigational servitude was being exercised. Specifically, the waterway in question was not always subject to the navigational servitude, but instead was a private pond that, through the landowners' dredging efforts, became connected to navigable waterways.[122] By attempting to create a public right of access to the waterway, the government went "so far beyond ordinary

114. *Id.*
115. *Id.*
116. *Id.* at 792–93.
117. *Id.* at 793.
118. *Id.* at 795.
119. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
120. Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979).
121. *Id.* at 178 ("More than one factor contributes to this result.").
122. *Id.* at 166–70.

regulation or improvement for navigation as to amount to a taking . . . ."[123]

Several courts have followed the ruling in *Kaiser Aetna* by not allowing the government to invoke the navigational servitude as a complete defense to a takings claim.[124] For example, in *Laney v. United States*, the U.S. Army Corps of Engineers denied an application by a landowner to build a concrete pier on his island property.[125] Such a pier would be the landowner's only means of accessing the island's fast lands.[126] The court rejected the government's "boldly assert[ed] . . . right pursuant to the navigational servitude to prevent any use whatsoever of the island, through its control over the only possible means of access."[127] Indeed, the court reasoned that if allowed to use the navigational servitude in this way, the government could, in the name of navigation, block all access to islands located totally within navigable waterways.[128] As a result, the government could condemn islands for use as scenic preserves without paying the required just compensation.[129] The Court of Claims was unwilling to allow such takings to occur without compensation, even in the face of the navigational servitude.

If more courts embraced the language of *Kaiser Aetna,* the navigational servitude could be reined in and used more appropriately. By not viewing it as a blanket exception to the Takings Clause, use of the servitude could then be analyzed in a more nuanced way. Further, the servitude and the power of the federal government to regulate navigation as part of its power over commerce would easily fall into the holistic and context specific framework of *Penn Central*.

123. *Id.* at 178.

124. *See, e.g.*, Fla. Rock Indus., Inc. v. United States, 791 F.2d 893, 900 (Fed. Cir. 1986) ("[T]he effect of Kaiser Aetna v. United States, 444 U.S. 164 (1979) is that "the old 'navigation servitude,' often used to excuse what looked suspiciously like takings, is no longer available for that duty in regulatory takings cases."); Laney v. United States, 228 Ct. Cl. 519, 525–26 (Ct. Cl. 1981) (*Kaiser Aetna* "is helpful in its indication that there is no special mystique in exercise of the navigation servitude that permits uncompensated takings when compensation would be required in other contexts.").

125. *Laney*, 228 Ct. Cl. at 521.

126. *Id.* at 525.

127. *Id.* at 522.

128. *Id.* at 523.

129. *Id.* at 526.

For example, if the Third Circuit in *30.54 Acres of Land* had not treated the navigational servitude as an absolute defense to takings claims, it could have proceeded to an analysis of the facts under this framework. The court could look at the economic impact of the Corps' ruling and see if it truly deprived the remaining land of all economically viable use. Further, the court would be able to make inquiries into whether the Corps' actions interfered with reasonable investment-backed expectations. *Penn Central* itself mentions navigational servitude cases in its discussion of reasonable expectations.[130] The notice theory could then come into the fact-specific consideration.

This approach would balance the interests of both the government and affected parties. First, it would permit courts to review the reasonableness of the government's assertion of the servitude. Second, it would still take the navigational servitude's long history into account, which would serve to prevent the floodgates from opening too wide. Thus, the navigational servitude would survive and remain a powerful tool for the federal government. Last, an analysis of the nature of the government's action, such as that in *Kaiser Aetna*, would ensure room for consideration of equity and fairness concerns. Use of this factor would allow courts to curtail federal abuse of the servitude.

Under such a framework, the navigational servitude can become more like the other regulatory powers of the federal government: powerful, rational, and equitable. The servitude would be subject to the same judicial review as other government actions that interfere with private property rights. The navigational servitude would no longer be a magic talisman to rid the federal government of its obligation to pay just compensation for the taking of private property.

130. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (citing United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913)). Although the Court mentions these cases as ones where the governmental action "did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes," this does not necessarily deny any interests subject to the navigational servitude from being considered a property right for Fifth Amendment purposes in the future. *Id.*

Another example of how this analysis would be beneficial can be found in *Allen Gun Club v. United States*.[131] In this case, the U.S. Army Corps of Engineers dredged a channel and used the excavated material to build a dike on the landowner's submerged land.[132] This caused a delta to form in the bay and filled in the submerged land until it was too dry for fishing and duck hunting—for which the land was being used—and too wet for agriculture.[133] Before the dredging and excavation, the bay was mostly covered with a depth of water about five to six feet that could support moderate-sized watercraft.[134] This allowed the plaintiffs to use the land for a successful fishing and hunting business. However, since the construction of the dike, the resulting "delta forming effect" caused the plaintiff to lose "a substantial part of its land as concern[ed] its use for duck hunting and fishing, which appear[ed] to be the highest and best use."[135] If the land in question had been above the high-water mark, destruction of the land's ability to be used for its highest and best use would present a strong case for compensation pursuant to the takings clause.

By disallowing the navigational servitude to act as an absolute and blanket exception to a takings claim, cases such as *Allen Gun Club* would permit landowners to submit evidence showing that the governmental action denied the land its prior economically beneficial use. If this deprivation were found to be insufficient to rise to the standards of *Lucas*, then the analysis would continue using the ad-hoc review of *Penn Central*. Instead, courts are refusing to recognize a legitimate property right merely because it is subject to a navigational servitude, and are therefore prematurely ending the takings analysis.[136]

131. Allen Gun Club v. United States, 180 Ct. Cl. 423 (Ct. Cl. 1967).

132. *Id.* at 425.

133. *Id.* at 427–28.

134. *Id.* at 426.

135. *Id.* at 427–28.

136. *See* Pub. Util. Dist. No. 1 of Pend Oreille Cnty. v. City of Seattle, 382 F.2d 666, 669 (9th Cir. 1967) ("[T]he navigational servitude, by its nature, does not destroy or exclude all property rights in the beds and banks of navigable streams. Such rights continue to exist but are held subject to the governmental power in the nature of an easement.").

V. CONCLUSION

The Takings Clause has resulted in a complex and inconsistent body of law. While the Supreme Court has recognized that takings claims require a nuanced and fact-specific analysis, categorical exceptions to such an analysis still exist. The navigational servitude remains one such vast and powerful categorical exception. However, by recognizing its historical underpinnings in the Commerce Clause, this servitude can be seen as an exercise of governmental power. And like any other exercise of power, it should be subject to the ad-hoc *Penn Central* test. By refusing to allow the servitude to be a blanket exception to the Takings Clause, the Federal Government will still be able to obtain land for public purposes, but will be forced to do so in a more equitable and just way consistent with the policy considerations underlying the Takings Clause.