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THE NAVIGATION EASEMENT AND UNJUST COMPENSATION

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THE NAVIGATION EASEMENT

> Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization.[1]

Many people seek out land next to water: on rivers, lakes, streams, and ocean fronts. Because of the increased demand for such desirable property, its value is considerably higher than property not so favorably situated.[2] The Supreme Court, however, has clearly indicated that the premium value of water-front property is of no consequence when the United States is seeking the property as a condemnor; its value is not greater than if it was completely landlocked.

In a remarkable case, *United States v. Rands*,[3] the Supreme Court articulated its concept of just compensation for such property when the United States government is the acquirer. In *Rands*, the owners of ocean-front property were leasing their land to the State of Oregon with an option-to-purchase agreement. The state contemplated using the land as an industrial park and port, but before it exercised its option, the United States condemned the land for the John Day Lock and Dam Project. The Supreme Court ruled that, as condemnor, the United States could disregard any value attributable to the riparian location of the land. Thus, the United States was able to acquire the land at considerably less than the state's option price.[4] While an agreed purchase price in an arm's length transaction is considered good evidence of market value, even by the Internal

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1. Preamble to the Code of Ethics, National Association of Realtors.

2. *See generally* Skeen, *Water Rights in Relation to the Appraisal of Land*, 1979 THE APPRAISAL J. 373 (July).

3. 389 U.S. 121 (1967).

4. *Id.* at 122.

Revenue Service,[5] it was ignored by the Supreme Court.

The favorable treatment given the United States was justified on the basis of the navigational easement, traditionally retained by the United States, in all waters of the United States.[6] From its constitutional power to regulate navigation, the United States derives a dominant servitude in waters below the ordinary high water mark.[7] Exercise of this power is not an invasion of private property; it is a lawful exercise of power to which the interest of the riparian owner has always been subject.[8]

A navigational servitude does not extend beyond the high water mark. Hence, when fast lands[9] are taken, the government must compensate for them, albeit at a price which does not reflect the riparian location of the land.[10] According to *Rands*, the discounted price paid by the government is sufficient to satisfy the constitutional mandate that "just compensation" be awarded.[11] Thus, in the Court's view, a taking by the United States of a tract of land located in the middle of the Mojave Desert is no different from the taking of riparian ocean-front property that owes its value to its adjacency to the water.

More than ten years prior to *Rands*, the Court extended its concept of the navigation easement to the buyer of a power

5. [1982] 6 STANDARD FED. TAX REP. (CCH) ¶ 4460.511.

6. Gilman v. Philadelphia, 70 U.S. 713 (1865). "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States. . . . *For this purpose* they are the *public property* of the nation, and subject to all the requisite legislation by Congress." *Id.* at 724-25 (emphasis added).

It is not the intent of this paper to explore the history and myriad nuances of the navigation easement. For an excellent discussion of the subject, see Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1 (1963); Comment, *Navigation Servitude—The Shifting Rule of No Compensation*, 7 LAND & WATER L. REV. 501 (1972) [hereinafter cited as *Navigation Servitude*]. For a discussion of the havoc the easement causes title insurers, *see* Turner, *The Navigation Servitude*, TITLE NEWS, Jan. 1969, at 42.

7. United States v. Rands, 389 U.S. 121, 123 (1967); United States v. Chicago, M., St. P. & P.R. Co., 312 U.S. 592, 596 (1941).

8. The term "high water mark" has various meanings dependent upon the type of water involved. *See* BLACK'S LAW DICTIONARY 1763 (4th rev. ed. 1968). For our purposes, it is sufficient to consider it the highest point the water ordinarily reaches on the shore.

9. "Fast lands" are those lands above the high water mark.

10. United States v. Virginia Electric & Power Co., 365 U.S. 624, 629 (1961). The court "reasoned" that since the Government can deny the riparian owner access to the stream without compensation, it can disregard "value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." *Accord* United States v. Rands, 389 U.S. at 123-24.

11. U.S. CONST. amend. V.

plant site. In *United States v. Twin City Power*,[12] the Court made it unmistakably clear that the United States was under no obligation to pay the full value of a promising power plant site, since its special value was attributable to the flow of an adjacent stream. The *Rands* Court simply extended the *Twin City Power* rule from power sites to port sites.[13] The articulated rationale in *Twin City Power* was that to require the United States to pay for this "value would . . . create private claims in the public domain."[14] An owner cannot claim the value of a right that the government can grant or withhold as it chooses, thus, the value in water frontage is not property in the fifth amendment sense.[15]

The early concept of the navigation easement was straightforward. It was, quite simply, justified as a valid exercise of the police power of the United States to control traffic on the primary transportation arteries of a developing nation.[16] Government control of waterways is necessary for flood control, watershed development, power generation, and as consequently developed in *Rands*, for profitable commercial ventures.[17] Ultimately, the doctrine may be applied to any situation that Congress deems appropriate.[18] Indeed, the original definition of a

12. 350 U.S. 222 (1956). The Court stated that "to require the United States to pay for this . . . value would be to create private claims in the public domain." *Id.* at 228.

13. United States v. Rands, 389 U.S. at 125. It is interesting to note that the Court no longer speaks in terms of the need for navigation, it merely talks to the "power of Congress completely to regulate *navigable streams* to the total exclusion of private power companies or port owners." *Id.* (emphasis supplied). Thus, a power that originated as a necessity for navigation has been expanded to become a "complete power" over navigable streams, a public domain. For an analysis of the development of other "public interests" in private land, *see* Littman, *Tidelands: Trusts, Easements, Custom, and Implied Dedication*, 10 NAT. RESOURCES LAW. 279 (1977).

14. *See* United States v. Rands, 389 U.S. 121, 125 (1967); United States v. Twin City Power Co., 350 U.S. 222, 228 (1956).

15. United States v. Rands, 389 U.S. at 126.

16. *See, e.g.*, Gibson v. United States, 166 U.S. 269 (1897). The Court held there was to be no compensation paid for the loss in value to an island farm when its access to water was limited by the Government's construction of a dike built to improve transportation. The damage complained of was not the result of the taking of property or the direct invasion thereof. *Id.* at 275.

For a further analysis of the *Gibson* case in the context of the navigation easement, *see Navigation Servitude*, *supra* note 6, at 503.

17. United States v. Rands, 389 U.S. 121 (1967), did not involve commercial ventures alone; the land was actually condemned as part of a flood control project. The land, after being "purchased" at a reduced value, was ultimately leased to Boeing Aircraft for commercial use. The damages awarded were about one-fifth of the claimed value of the land if used as a port. *See generally* Snitzer, *The Law and Condemnation Appraising: The Navigational Servitude*, THE REAL ESTATE APPRAISER, May-June 1968, at 49.

18. *Navigation Servitude*, *supra* note 6, at 504.

navigable river as "navigable in fact"[19] has been expanded to include a river navigable at one time, one that could be made navigable, and a nonnavigable stream that impacts a navigable one.[20]

Rands, a telling example of how the no-compensation rule could be stretched, prompted legislative action. Section 111 was added to the Rivers and Harbors and Flood Control Act of 1970[21] in an attempt to legislatively overrule the *Rands* result. Section 111 provides that compensation for a public taking of land shall be its fair market value, based on all the uses to which the property can be put "including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters."[22] Congress clearly intended to legislatively neutralize *Rands* and its predecessors.[23] Indeed, it is difficult to conceive of language more explicitly directed toward that end.

POST-*RANDS*

After the passage of section 111, one federal court, with an almost audible sigh of relief, vacated its own earlier ruling which

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19. The Daniel Ball, 77 U.S. 557, 563 (1870).

20. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979); United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). Perhaps the test is whether a stream is "navigable enough to float a Supreme Court opinion." *The Navigation Servitude*, *supra* note 6, at 503 n.13.

21. River and Harbor Act of 1970, § 111, 33 U.S.C. § 595(a) (1980).

22. Section 111 reads in full:

> 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. 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. The compensation defined herein shall apply to all acquisitions of real property after the date of enactment of this Act, December 31, 1970, and to the determination of just compensation in any condemnation suit pending on [December 31, 1970] . . . .

Id.

23. *See Navigation Servitude*, *supra* note 6, at 512-13. It is not just the *Rands* decision but the whole line of cases embodied in *Rands* that should be considered overruled. *Twin City*, for example, is basically indistinguishable from *Rands*. *See* Weatherford v. United States, 606 F.2d 851, 853 (9th Cir. 1979).

had been based on *Rands*.[24] The case involved government acquisition of land with a riparian location which made its highest and best use a channel-cut subdivision. The first rulings prior to passage of section 111, subtracted all value attributable to the site's riparian location from the amount owed by the government. At the same time, however, courts anticipated flooding where applicable, a potential hazard resulting from the property's riparian location, and reduced compensation further. The court reasoned that although its result might be harsh, change would have to come from a different forum.[25] Upon enactment of section 111, the court was able to make the appropriate remedial ruling by vacating the earlier order.

Section 111 was again applied in *United States v. 967,905 Acres of Land*,[26] wherein the court ruled that resort land located on an inland lake was to be valued as water-front property.[27] The court applied section 111 broadly to include *all* takings or improvements by the government, rather than just those specified in Rivers and Harbors Act.[28] In *967,905 Acres*, the improvement sought was the preservation of the area as a wilderness (for the enjoyment of all), at the expense of a commercial enterprise.[29]

Despite the clearly stated purpose of section 111, and despite intelligent applications of the rule by a district court in the two cases discussed, the *Rands* no-compensation rule was almost immediately resurrected by the United States Supreme Court in *United States v. Fuller*.[30] The *Fuller* Court invoked the rule to justify the unconscionable taking of western grazing land owned by ranchers in fee. The land, condemned for a dam project, was adjacent to federally-owned lands which were leased out to the condemnees, as well as to other private ranchers,

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24. United States v. 8,968.06 Acres of Land More or Less, Situated in Chambers & Liberty Counties, Texas, 326 F. Supp. 546 (S.D. Texas 1971). The earlier ruling was vacated because section 111 was invoked during the appeal and specifically overruled *Rands* upon which the earlier case was decided.

25. United States v. 8,968.06 Acres of Land More or Less, Situated in Chambers & Liberty Counties, Texas, 318 F. Supp. 698, 704 (S.D. Texas 1970), *vacated*, 326 F. Supp. 546 (S.D. Texas 1970).

26. 447 F.2d 764 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972).

27. *Id.* at 770.

28. *Id.* at 771. Section 111 applies to any "improvement of rivers, harbors, canals, or waterways of the United States. . . ." An improvement includes all public interests, which are not limited to promotion of trade and commerce. They also include aesthetic, ecological and environmental interests. *Id.*

29. *Id.*

30. 409 U.S. 488 (1973).

under the Taylor Grazing Act.[31] The government's purpose, in leasing the land, was to develop the western cattle business.[32] In determining just compensation for the lands taken, the parties disagreed as to whether the jury could consider the increment in the value of the fee lands resulting from actual or potential use in conjunction with the federally leased lands. The condemnees argued that if the marketplace value of their land was augmented, because of its adjacency to the leased lands, the jury should consider that element of value. The government thought otherwise. The district court, however, adopted the condemnees' position in the jury charge and pretrial order and the government appealed.[33] The Ninth Circuit Court of Appeals affirmed the district court and distinguished the *Rands* rule by reasoning that the Taylor Grazing Act, unlike the navigational easement, created some private rights and privileges which the government was obliged to respect even though the private ranchers had no property rights in the land itself.[34] Without specifically relying upon Section 111 which, technically, is inapplicable to grazing lands, the Ninth Circuit reached an equitable determination consistent with the legislative purpose behind section 111.

When the Supreme Court ignored section 111 and reversed the court of appeals three years later, it became reasonable to assume that the misplaced reliance on *Rands*—stretching from the district court to the Supreme Court—was really a deliberate expression of judicial preference for the no-compensation rule; section 111 was rendered ineffectual by ignoring it. The majority justified its position at the outset and acknowledged that it had generally held, in accordance with good appraisal practices, that the highest and best use of property is found in conjunction with other parcels.[35] However, not every increment of fair market

31. 43 U.S.C. §§ 315—315r (1976).

32. United States v. Fuller, 442 F.2d 504, 507 (9th Cir. 1971), *rev'd*, 409 U.S. 488 (1973).

33. *Id.* at 505.

34. *Id.* at 507. Also, in *Fuller*, the court distinguished *Rands*, which involved the theoretical value of potential uses (*i.e.*, port site), from *Fuller* which concerned the actual investments by the user. The court pointed out that the Government had been required to pay "going concern" value when the Government had solicited private investment to build a lock and dam and later condemned the project. Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893). Therefore, the court concluded that under the Taylor Act, encouragement of private investment should also require full compensation for the lost investment. United States v. Fuller, 442 F.2d 504, 507 (9th Cir. 1971), *rev'd*, 409 U.S. 488 (1973).

35. *Id. See* AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 123-24 (6th ed. 1973) [hereinafter cited as THE APPRAISAL OF REAL ESTATE].

value is compensible in a condemnation action. The Court said, for example, that it has long been the rule that an increase or decrease in value attributable to a contemplated government project is not includable in determining just compensation.[36] The *Rands* rule was cited with triumphant approval as justification for the majority's position:

> If, as in *Rands*, the Government need not pay for value that it could have acquired by exercise of a servitude arising under the commerce power, it would seem *a fortiori* that it need not compensate for value that it could remove by revocation of a permit for the use of lands that it owned outright.[37]

Justice Powell, writing for the four dissenters in *Fuller*, pointed out that the government must distinguish between its role as owner and its role as condemnor. An owner may ordinarily change the use of his property without paying compensation for loss in value suffered by his neighbors. A condemnor, however, does not have that luxury; it must pay the land's market value.[38] Here, the government's land was intact; there was no action to convert the land to another use. It was significant, to the majority, however, that the government had the power to do so.[39] The majority reasoned that the line of cases culminating in *Rands* establish the general principle that the government as condemnor need not compensate for an element of value which the government created.[40] Since the *Rands* no-compensation

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36. In United States v. Fuller, 409 U.S. 488, 491 (1973), there is another long standing rule that the value of parcels not included in an original taking for a completed public project is increased. *See* United States v. Miller, 317 U.S. 369 (1943). Those public projects, the Court declared, are open to the public; in *Fuller* the grazing lands were closed to the public. United States v. Fuller, 409 U.S. at 493. (Certainly the subject land was there adjacent to the Taylor Grazing Act lands before this taking. The value due to that location was already established before the taking began and, therefore, should be compensated.). *Cf.* United States v. Certain Lands in Truro, 476 F. Supp. 1031 (D. Mass. 1979) (court found that valuation should be based on three-fourths acre minimum lot size in effect at time project was contemplated, not three acre minimum government forced on area after project was planned).

It is well-established that neither the government nor the condemnee may take advantage of an "alteration in market value attributable to the project itself." United States v. Fuller, 409 U.S. 488, 491 (1973); United States v. Reynolds, 397 U.S. 14, 16 (1970). *Cf.* United States v. Virginia Electric & Power Co., 365 U.S. 624, 635-36 (1961); United States v. Miller, 317 U.S. 369, 377 (1943).

37. United States v. Fuller, 409 U.S. 488, 492 (1973).

38. *Id.* at 494-504 (Powell, J., dissenting). It is interesting to note that a similar distinction was made as long ago as 1897 in Gibson v. United States, 166 U.S. 269, 276 (1897) (the "assertion of a right belonging to the Government" as distinguished from a "right to appropriate private property").

39. United States v. Fuller, 409 U.S. 488, 494 (1973).

40. *Id.* at 492.

rule was overruled in the navigation easement context, it should not have been invoked, by analogy, in *Fuller*.

Despite the Court's expansive interpretation of *Rands*, it explicitly rejected the suggestion that the *Rands* principle could be pushed to its logical conclusion—the extension to any case in which the value of the land is attributable to a government-conferred benefit.[41]

Beyond this new and drastic rule proposed by the *Fuller* Court[42] is another equally disturbing principle which it derived from *Rands*: no longer is location an element of value.[43] The *Fuller* dissent zeroes in on this untoward result: "It hardly serves the principles of fairness as they have been understood in the law of just compensation to disregard what respondents could have obtained for their land on the open market in favor of its value artificially denuded of its surroundings."[44] Clearly, the location of the condemnees' property was strategic to the government's grazing lands, and although the grazing permits could be withdrawn, the location of the land remains permanent.[45] The logical conclusion of the Court's holding is that value, resulting from adjacency to any public improvement, will not be considered in determining "just compensation." Yet, the government has created many public improvements with locations prized in the market place: interstate highways, government office buildings, airports, etc.[46] Since the government, according to the *Fuller* majority, has the power to alter the use of such public lands, it need not consider any element of value attributable to their proximity. When the market place is thus discarded

41. *Id.*

42. Certainly there is a difference in the concept of property in the relationship of *owner-versus-government* as between that of *owner-versus-individual*. *See* Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CAL. L. REV. 596 (1954) [hereinafter cited as Kratovil & Harrison]. To consider all government-conferred benefits as non-compensible, however, is to emasculate the fifth amendment. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922). *See also* Marcus, *The Taking and Destruction of Property Under a Defense and War Program*, 27 CORNELL L.Q. 476, 515 (1942).

It is not herein suggested that the government give up all claims to police power. It is suggested that the *Rands* and *Fuller* cases have upset the balance between private interests and public welfare. For a review of recent struggles in state courts to balance these interests, *see* Payne, *Private Rights in Tidal and Riparian Lands*, 8 REAL EST. L.J. 166 (1979). Also, the *Fuller* concept that no value is to be paid for government-conferred benefits, is "far from being a general principle, much less a hard and fast rule." U.S. v. 320.0 Acres of Land, 605 F.2d 762, 783 (5th Cir. 1979).

43. 409 U.S. 497-98 (Powell, J., dissenting). Real estate people wryly emphasize this point by stating the three most important elements of value in descending order: location, location, and location.

44. *Id.* at 504.

45. *Id.* at 503.

46. *See* THE APPRAISAL OF REAL ESTATE, *supra* note 35, at 145-46.

as the measure of just compensation, the only measure left is government whim which effectively discards the "just" in "just compensation."

Kaiser Aetna v. United States[47] is another Supreme Court application of the "dead" rule of *Rands*. In this case, private developers spent millions of dollars converting a pond into a marina-style subdivision. The pond was dredged out and the ocean became accessible.[48] The United States claimed that section 10 of the Rivers and Harbors Act applied,[49] and since the pond was opened to the navigable waters of the United States, it became part of the public domain. As a result, the developers no longer had the right to exclude anyone.[50] The Court, noting *Rands'* no-compensation rule stated, "the elements of compensation . . . remain largely settled,"[51] It did this, however, without noting the overruling impact of Section 111 on *Rands*.

The Court then qualified its conclusion by reiterating the fact that it never held that a navigational servitude creates a blanket exception to the "Takings Clause"[52] whenever Congress exercises its Commerce Clause authority to promote navigation.[53] Carried to its ultimate conclusion, Justice Rehnquist,

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47. 444 U.S. 164 (1979).

48. The Corps of Engineers had acquiesced to the dredging without requiring a permit. *Id.* at 167.

49. Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C. § 403 (1980), provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army] prior to the beginning the same.

The *Kaiser Aetna* Court ignored Section 111.

50. At the time of trial approximately 22,000 persons were living in the marina-style community surrounding the pond. Kaiser Aetna v. United States, 444 U.S. 164, 167 (1979). The navigational servitude and public access cannot be consistently separated. The authority of the United States over "its waters" is not limited to control for navigation; it includes all uses such as flood control, power, etc. *Id.* at 173.

51. *Id.* at 177.

52. U.S. CONST. amend. V.

53. *Kaiser Aetna*, 444 U.S. at 172.

speaking for the majority, as he did in *Fuller*, cautioned that the strict logic of decisions which limit the government's liability to pay damages for riparian access "might completely swallow up any private claim for 'just compensation.' "[54]

Section 111 was again ignored, although nine years had passed since Congress sought to extinguish the inherent unfairness of *Rands*. However, the Supreme Court did demonstrate an awareness of inherent unfairness in its articulation of a distinction between a taking and a regulation. It was determined that when a regulation goes so far that "justice and fairness" require compensation, it is a taking. The Court felt that the *Kaiser Aetna* facts were so atypical of most riparian condemnation cases that the public ought to be required to pay for access to the pond. Apparently, the facts in *Kaiser Aetna* would have qualified the case as an example of government regulation and not a taking, but for the government's waiting for plaintiff to finish the dredging, which resulted in an estoppel.[55] Once the injury was recognized, the Court did not go so far as to recognize the manifest injustice permeating the string of cases that permitted the Government to take without paying the owners fair market value. The Court failed to recognize that Congress, which has the real power to exercise the Commerce Clause,[56] had nine years earlier opted for justice by enacting section 111.[57]

Nothing apparent in the ordinary meanings of the words

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54. *Id.* at 177.

55. *Id.* at 178-80.

56. *Cf.* Gilman v. Philadelphia, 70 U.S. 713 (1866). "The navigable waters of the United States . . . are . . . subject to all the requisite legislation by Congress." *Id.* at 724-25 (emphasis supplied); Kaiser Aetna v. United States, 444 U.S. 164 (1979). "[W]henever *Congress* exercises *its* Commerce Clause authority to promote navigation . . . ." *Id.* at 172 (emphasis supplied).

57. Unfortunately, the *Fuller* and *Kaiser Aetna* cases are not unique in ignoring Section 111. Courts have been blissfully citing *Rands* as authority in a variety of areas. One surprising case, *Tektronix, Inc. v. United States*, 552 F.2d 343 (Ct. Cl. 1977), involves a patent infringement. The dissent cites *Rands* for the proposition that the patent owner need not be given the full market value for its patent since the Government previously had patents on similar devices. Another case, United States v. 100 Acres of Land, 369 F. Supp. 195 (W.D. Ky. 1973), held that *Rands* prevented an island in the Ohio River from being valued as a duck-hunting resort because that use was dependent on the navigable waters surrounding the island. In United States v. Weyerhaeuser Co., 538 F.2d 1363 (9th Cir. 1976), a government lease was not considered as an element of value although a knowledgeable buyer would have paid more for the land because of the lease. In Conservation Council v. Froehlke, 435 F. Supp. 775 (D.N.C. 1977), the destruction of a sewage disposal plant was held non-compensible. *Accord* Ford City v. United States, 345 F.2d 645 (3rd Cir. 1965) (taking of an eleven mile easement providing access to the Columbia River for the benefit of a dry farm held noncompensible); *Weatherford v. United States*, 606 F.2d 851 (9th Cir. 1979).

"just" and "compensation"[58] explains the application of "just compensation" by the Supreme Court in *Rands* and its kin. The Court's interpretation in *Rands* runs counter to the traditional definition. "Just compensation," as applied by the Court, means the best possible deal the government can get when acquiring the land of its citizens. It means the ability of the government to ignore the value in the market place in order to protect national resources. At least one commentator agrees with the court's justification. Because of the growing shortage of water, the temporary financial set-back an owner would suffer by reduced compensation for his land would be balanced, in the long run, by the over-all benefits to the nation as a whole.[59]

The Supreme Court has, in various other contexts, interpreted the meaning of Fifth Amendment "just compensation." In *United States v. Reynolds*,[60] a condemnation proceeding with the scope of the project at issue, defined "just compensation" as "the full monetary equivalent of the property taken. The owner has to be put in the same position monetarily as he would have occupied if the property had not been taken."[61] And again, in *United States v. Klamath and Moadoc Tribes*, a suit against the government on a claim for land taken from an Indian reservation, the Court characterized just compensation as the "value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."[62] Earlier, in *Monongahela Navigation Co. v. United States*,[63] the Court did some grammatical exegesis with "just" and "compensation," and it was held that the government was required to pay the going concern value of a toll lock and dam built at the implied invitation of the government. Thus, according to the Supreme Court "just compensation" ordinarily means full indemnity,[64] *i.e.*, putting the owner in the position, monetarily, that he was in before the taking. Moreover, the court will

58. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969).

59. It is important that the riparian rights doctrine be altered to remove the concept of absolute water use and property "rights." This would enable a more efficient use of the available water supply. Baldwin, *The Impact of the Commerce Clause on the Riparian Rights Doctrine*, 1964 THE APPRAISAL J. 422 (July).

See also Munro, *The Navigation Servitude and the Severance Doctrine*, 6 LAND & WATER L. REV. 491 (1971).

60. 397 U.S. 14 (1970).

61. *Id.* at 16.

62. United States v. Klamath and Moadoc Tribes of Indians, 304 U.S. 119, 123 (1938). *See* United States v. Reynolds, 397 U.S. 14, 16 (1970); United States v. Miller, 317 U.S. 369, 373 (1943) (just compensation means the full and perfect equivalent in money of the property taken).

63. 148 U.S. 312, 326 (1893).

64. 3 NICHOLS ON EMINENT DOMAIN, § 8.6 (3d ed. 1964).

usually defer as much to "equitable principles of fairness as it does from technical concepts of property law."[65]

To achieve equity, the Supreme Court has articulated the principle that the condemnor must pay fair market value, ascertained from what a willing buyer would pay to a willing seller.[66] A willing buyer will consider the highest and best use of a parcel; that is, the "available use and program of future utilization which produces the highest present land value."[67] As a consequence, the Court has generally held that a parcel's highest and best use must be determined in relation to other parcels.[68] A proper and equitable evaluation of real estate is impossible without considering its location.

The Supreme Court has thus approved the application of equitable principles to eminent domain. The Court has piously pronounced that equitable fairness is its guidepost. Quite incongruously, the Court applies the *Rands* rule and denies the owner the fair pecuniary equivalent of his land.

ABERRATION OR PREDISPOSITION

One would like to think that the *Rands* rule was an isolated aberration. In other areas, however, condemnation awards have been significantly reduced below the expectations of the average reasonable person. This is perhaps an indication that the Supreme Court is predisposed to penuriousness when the United States government is the taker.[69] In the area of airport

65. United States v. Fuller, 409 U.S. at 488, 490 (1973); United States v. Certain Lands in Truro, 476 F. Supp. 1031, 1035 (D. Mass. 1979). *Cf.* Kratovil & Harrison, *supra* note 42, at 607 (in a partial taking, the court is required to consider all damages caused by taking: past, present, and future).

66. Almota Farmers Elevator and Warehouse Co. v. United States, 409 U.S. 470, 474 (1973); United States v. Miller, 317 U.S. 369, 374 (1943).

67. THE APPRAISAL OF REAL ESTATE, *supra* note 35, at 43. It is well-settled that the highest and best use of the property is a consideration of the courts in arriving at fair market value. *See* Olson v. United States, 292 U.S. 246, 255 (1934). United States v. 44 Acres of Land, 121 F. Supp. 862, 866 (E.D. S.C. 1954). Because the Court would not consider a port site the highest and best use of the property in *Rands*, the owner received about one fifth of the estimated fair market value. *See supra* note 15. *Cf.* United States v. Twin City Power Co., 350 U.S. 222, 227 (1956) (the owners proved their property, as a power site, was worth about $1.25 million; they were offered $150,000 as compensation for the land based on its use for timber and farming). *But see* the requirement of Section 111 that the highest and best use of the property is not to be artificially ignored. *See supra* note 15.

68. United States v. Fuller, 409 U.S. at 498, *citing* Olson v. United States, 292 U.S. 246, 256 (1934).

69. *See, e.g.*, United States v. California, 381 U.S. 139 (1965). The Supreme Court redefined ownership of the land under the territorial sea (3 mile limit) which resulted in a transfer of ownership from the states to the federal government. This caused a political furor forcing Congress once again to come to the rescue. What followed was the Submerged Lands Act

law, for example, the federal courts have limited awards in inverse condemnation to direct overflight cases. If a plane does not fly directly over an owner's property, the owner has no valid complaint, despite the damage done to that property. In *Batten v. United States*,[70] dirt, oily deposits, vibrations, and sound waves bombarded the plaintiff's property. The Court, nevertheless, held that no taking had occurred because the flights were in the navigable airspace designated by Congress and were, therefore, public domain.[71]

A similar invasion of property rights occurred in *Laird v. Nelms*.[72] This time it was by military aircraft which allegedly caused a sonic boom resulting in property damage to the plaintiff. The Supreme Court held that there was no compensable invasion of property by the aircraft because it was impossible to say whether the aircraft actually trespassed on plaintiff's airspace. The concept of invasion by the sound waves themselves was too "attenuated" to consider.[73] Over a strong protest by the

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of 1953, 43 U.S.C. §§ 1301—1315 (1980), which re-vested ownership in the states. *See* Krueger, *An Overview of Changes Occurring in the Law of the Sea*, 10 NAT. RESOURCES J. 207, 228 (1977).

70. 306 F.2d 580, 584 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1962).

71. The sound waves measured at the plaintiff's property were measured from 90 to 117 decibels. Ear plugs are recommended for Air Force personnel at 85 decibels and required at 95. *Id.* at 582 (ear damage can occur at 85). *Cf.* Nunnally v. United States, 239 F.2d 521 (4th Cir. 1956) (recovery denied for diminution in value of recreational cottage by practice bombing on adjoining ground).

Though the trial court in *Batten* found diminution in value from $4,700 to $8,800, the appellate court decided that without physical invasion no compensation is required. 306 F.2d at 583. The court based its decision on the distinction between a "taking" and "consequential damages." *See* Transportation Co. v. Chicago, 99 U.S. 635, 642 (1878). The Supreme Court actually allowed recovery in Griggs v. Allegheny County, 369 U.S. 84 (1962) but there was a physical invasion: the bottom of the glide path and the top of plaintiff's chimney was a distance of 11.36 feet!

The term "substantial interference" connotes a balancing of the interests of the public in general against those of the individual. Inherent is the idea that the individual must bear a certain amount of inconvenience and loss of peace and quiet as the cost of living in a modern, progressing society. These elements of damage are cognizable in a tort action, and such a balancing would thus be necessary. The measure of recovery in inverse condemnation, however, is injury to market value alone. Such lowering of market value does not reflect personal injury to the individual, but reflects the lesser desirability of the land to the general public. When the land of an individual is diminished in value for the public benefit, justice and a constitutional mandate require that the public pay. Martin v. Port of Seattle, 64 Wash. 2d 309, 318, 391 P.2d 540, 546 (1964).

72. 406 U.S. 797 (1972).

73. *Id.* at 800. For the view that the government should be held strictly liable for sonic booms, *see* the dissenting opinion by Justice Stewart. *Id.* at 804. The question has received considerable attention from commentators, most of whom have concluded that there should be such recovery, at least under certain conditions. *See, e.g.*, W. PROSSER, LAW OF TORTS 516 (4th ed.

dissent, the majority held that direct overflight was the necessary, and in this case, missing element.

In contrast to the federal courts, the state courts are far more reasonable and fair: "If we accept . . . that a noise coming straight down from above one's land can ripen into a taking if it is persistent and aggravated enough, then logically the same kind and degree of interference with the use and enjoyment of one's land can also be a taking even though the noise vector may come from some direction other than the perpendicular."[74] The better reasoned state view is grounded upon two considerations. First, was the owner deprived of the practical enjoyment of his property? Second, was it manifestly unfair for the owner to suffer measurable loss in property value which the general property-owning public did not suffer? Recovery for trespass should not depend on anything as incalculable as whether the wingtip of an aircraft touches the airspace directly over plaintiff's land.[75]

Thus, the federal court's denial of an award of damages unless there is a physical invasion of the property[76] indicates not only a faulty sense of just compensation, but also an antediluvian concept of the nature of property. Contemporary society no longer conceives of property in the physical sense only:

> If policy factors are to play their proper part in eminent domain decisions, it should be understood that 'property' describes a constantly changing institution, not a closed category of immutable rights. The term property, it is clear, must have a degree of flex-

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1971); Comment, *Federal Liability for Sonic Boom Damage*, 31 S. CAL. L. REV. 259, 266-74 (1938); Note, *Sonic Booms—Ground Damage—Theories of Recovery*, 32 J. AIR L. & COM. 596, 602-05 (1966); Note, *Offenses and Quasi-Offenses—Sonic Boom—Governmental Liability Under the Federal Tort Claims Act*, 39 TUL. L. REV. 145 (1964). But the Federal courts in allowing recovery only to those property owners directly below the flight path are taking an approach that "more nearly resembles the trespass theory . . . than the nuisance theory. . . ." Alevizos v. Metropolitan Airport Comm'n, 298 Minn. 471, 481, 216 N.W.2d 651, 659 (1974). When there is an invasion (as by nearly-invisible particles) the energy and force must be considered, not the visible mass. Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1959).

74. Thornburg v. Port of Portland, 233 Or. 278, 376 P.2d 100, 106 (1962).

75. Alevizos v. Metropolian Airport Comm'n, 298 Minn. 471, 481, 216 N.W.2d 651, 659 (1974); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964).

76. *See* United States v. General Motors Corp., 323 U.S. 373, 378 (1945). *See also* Smith v. Erie R. Co., 134 Ohio St. 135, 142, 16 N.E.2d 310, 313 (1938).

> The broader view which now obtains generally, conceives property to be the interest of the owner in the thing owned, and the ownership to afford the owner the rights of use, exclusion and disposition. Under this broad construction there need not be a physical taking of the property or even dispossession; any substantial interferences with the elemental rights growing out of ownership of private property is considered a taking.

Id.

> ibility, allowing courts to weigh interests, to evaluate ends, and to shape the law with purpose in view as well as precedent. The interests of individuals must be weighed against the purposes and needs of society. The formulas employed in this process must have breadth of view and flexibility of adaption. Compensation may thus be awarded that is 'just' both to the property owner and to the public.[77]

For many years the Supreme Court has held that a substantial destruction of property value is a compensable taking within the scope of the fifth amendment even though the government does not directly appropriate title.[78] To hold otherwise is arbitrary and out of touch with human experience. It is clear from the plethora of zoning and planning ordinances that society considers freedom from unreasoanble sound and vibrations a protectable property right.[79] The Supreme Court must now determine whether its primary role is that of the ultimate protector of the people or "the self-constituted guardian of the Treasury."[80]

CONCLUSION

The Supreme Court's decision in *Rands* could never be reconciled with the requirement of just compensation. To contend that the *Rands* ruling puts the owner in the same position monetarily that he was in prior to the taking is absurd. Our founding fathers never intended that justice be jettisoned in order to shelter the federal purse. The decision is contrary to modern property notions and accepted valuation principles. It violates the concepts of justice and fair play that ought to characterize a government's dealings with its citizens.

The phrase "navigational servitude" does not appear in the Constitution; it was contrived by the Supreme Court. The phrase "just compensation" does appear in the Constitution. It must not give way to the artificial concepts embroidered onto the Constitution by the Court.

Perhaps the Supreme Court's most recent decision involving a navigation servitude, *Kaiser Aetna*, indicates some change of heart. Although it did not expressly overrule *Rands* or even acknowledge section 111, the Court, in dicta, took a step toward fairness. The majority opinion departed from the concepts of "capability of navigation" and of "no compensation for any value

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77. Kratovil & Harrison, *supra* note 42, at 604.

78. United States v. Cress, 243 U.S. 316, 328 (1917), *citing* United States v. Lynah, 188 U.S. 445, 470 (1903).

79. Alevizos v. Metropolitan Airport Comm'n, 298 Minn. at 487, 216 N.W.2d at 661-62.

80. Laird v. Nelms, 406 U.S. 797, 808 (1922) (Stewart, J., dissenting).

attributable to the water." In referring to its earlier decisions as the "old, unhappy, far-off things,"[81] the majority's definition of "just compensation" was, at least in spirit, a departure from no-compensation.

A process of distinguishing the *Rands* rule out of existence is eminently preferable to allowing it to wreak unlimited injustice. It is to be hoped that the Court will expressly reverse *Rands*, and reestablish the constitutional mandate of just compensation.