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

Janice Kelly

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the other in a wrongful death action and reduce the awards accordingly. The reader of the *Martinez* case is left frustrated and concerned at the harsh result, one which approaches punishment of a bereaved parent who had no part in the tragic death of his child. His grief, and his loss of the child's companionship and love, was just as great regardless of the negligence of the other parent. Although comparative negligence has mitigated the total bar to recovery reached in *Klepper* and *Martinez*, results such as those reached by the trial court in *Singletary* will continue to plague the conscience of the court if the avenue of escape in the revised wrongful death act is not recognized.

If the *Singletary* view prevails, however, the courts can then award the non-negligent parent as survivor of his child, just as they do in personal injury actions.⁵⁸ This is a more logical and humane approach than reached under the *Klepper* rule. It is also in step with the majority of other jurisdictions which allow recovery by the non-negligent parent in both personal injury and wrongful death actions involving a minor child.

JULIA S. CHAPMAN

Water and Watercourses—PUBLIC USE—THE EFFECT OF PROPERTY LAW AS A LIMITATION ON FEDERAL NAVIGATIONAL SERVITUDE—*Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

In 1961, Kaiser Aetna entered into an agreement with Bishop Estate to develop a 6,000 acre area known today as Hawaii Kai on the island of Oahu, Hawaii.¹ The development agreement gave Kaiser Aetna the right to lease Kuapa Pond,² a 523 acre area

58. See *Acevedo v. Acosta*, 296 So. 2d 526 (Fla. 3d Dist. Ct. App. 1974); *Ward v. Baskin*, 94 So. 2d 859 (Fla. 1957).

1. *Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1979).

2. Brief for Petitioner at 6, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Fishponds, regarded under Hawaiian property law as private property, were frequently found within the boundaries of large land units called "Ahupua'as." Kuapa Pond, a fishpond, was included in the Ahupua'a that eventually vested in Bishop Estate.

In its original state, Kuapa Pond was a shallow body of water contiguous to Maunalua Bay and the Pacific Ocean but separated from the bay by a narrow barrier beach. The pond was subject to the ebb and flow of the tide because of two natural openings in the barrier beach and also because the tidal waters percolated through the beach into the pond.

For centuries prior to 1961, Kuapa Pond was used for aquatic agriculture. Early

within the estate, for the purpose of creating a marina-style community and providing improvements such as dredging, walls, and bridges.³

Kaiser Aetna signed a formal lease of Kuapa Pond on October 17, 1967.⁴ When Kaiser Aetna contacted the Army Corps of Engineers (the Corps) concerning development plans to dredge and fill the pond, it was advised by the Corps that no permit would be required.⁵ With the acquiescence of the Corps, Kaiser Aetna's dredging and filling ultimately resulted in navigational access from the pond to the bay.⁶

In 1972, after a dispute arose between Kaiser Aetna and the Corps, the United States filed suit for declaratory and injunctive relief in the United States District Court for the District of Hawaii.⁷ The United States sought a declaration that Kaiser Aetna

Hawaiians reinforced the barrier beach with a stone wall and installed sluice gates in the natural openings in order to allow small fish and water, but not large fish to escape. However, because of the barrier beach and stone wall, it was impossible to gain access to the bay even with flat-bottomed boats. *Id.* at 2-6.

3. *Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1979).

4. Brief for Petitioner at 7, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The lease was taken subject to earlier declared protective provisions which granted each waterfront lot lessee a nonexclusive easement to use the waters of Kuapa Pond. In addition, the protective provisions reserved to the lessor the right to adopt and enforce rules and regulations concerning the use of the pond and to impose reasonable assessments on every marina lot lessee to pay maintenance and operation costs.

Pursuant to such provisions, marina lot lessees were charged a yearly fee of \$72.00. Also, nonmarina lot lessees from Hawaii Kai and boat owners who were not residents of Hawaii Kai who used the marina paid the \$72.00 yearly fee.

Among other things, the yearly assessments helped to finance the use of patrol boats to maintain the privacy and security of the pond. *Id.* at 7-8.

5. *Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1979).

6. *Id.*

7. *United States v. Kaiser Aetna*, 408 F. Supp. 42 (D. Haw. 1976), *rev'd*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 444 U.S. 164 (1979). A dispute arose between Kaiser Aetna and the Corps of Engineers over the issue of free public access. In its correspondence with the Corps, Kaiser Aetna specifically stated that its understanding was that there would be "no requirement for public use of any waters on the Kuapa Pond side of the bridge." The Corps never confirmed this particular point in return correspondence.

Although there is no direct evidence in either the court opinions or the parties' briefs concerning the specific origin of the dispute, one possible explanation may be that Kaiser Aetna's use of patrol boats to exclude unauthorized persons from Kuapa Pond apparently caused some outrage on the part of the Corps which helped to precipitate this suit.

In addition, although Kaiser Aetna complied with the Corps' requirement for a work permit in the pond after Kuapa Pond was connected to the bay and Pacific Ocean, Kaiser Aetna specifically stated that it felt no permit was necessary because, in its opinion, Kuapa Pond was not a navigable water of the United States. The combination of the above factors apparently motivated the Corps to have these questions settled by the courts. Brief for Respondent at 4-5, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

should be required to obtain the Corps' authorization, pursuant to section 10 of the Rivers and Harbors Act, which makes it unlawful to alter or modify the condition or capacity of a navigable water of the United States without permission.⁸ The United States also requested that an injunction be granted requiring Kaiser Aetna to refrain from interfering with public access to the pond.⁹

The district court declared that Kuapa Pond was subject to the Rivers and Harbors Act regulatory jurisdiction for two reasons: (1) Kuapa Pond was found to be a *navigable water* of the United States, and (2) the marina was "used in interstate commerce both to raise revenue for Kaiser Aetna and to transport residents and nonresidents by waterway into and out of Maunaloa Bay."¹⁰ The district court denied the request for injunctive relief, concluding that the right of public use did not necessarily follow from the government's right to regulate.¹¹ Relying on the private nature of fishponds under Hawaiian property law, the court further held that the government lacked authority to open the pond to the public without payment of compensation to the owner.¹²

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision that the pond fell within the scope of congressional regulatory authority but reversed on the is-

8. *United States v. Kaiser Aetna*, 408 F. Supp. 42, 45 (D. Haw. 1976), *rev'd*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 444 U.S. 164 (1979). Section 10 of the Rivers and Harbors Act provides:

Obstruction of navigable waters generally; Wharves; piers; etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is 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 structure 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 the 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 the Army prior to beginning the same.

33 U.S.C. § 403 (1976).

9. *United States v. Kaiser Aetna*, 408 F. Supp. 42, 45 (D. Haw. 1976), *rev'd*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 444 U.S. 164 (1979).

10. *Id.* at 53.

11. *Id.* at 54.

12. *Id.* at 51-54.

sue of free public access.¹³ The court of appeals held that regulatory authority and the navigational servitude¹⁴ cannot realistically be separated; it is the public right which necessitates the exercise of regulation. Therefore, Kaiser Aetna should be required to allow public access to the pond.¹⁵ The court also held that, since Kuapa Pond was subject to an overriding federal navigational servitude, no compensation was required.¹⁶

Certiorari was granted by the Supreme Court to determine whether the court of appeals had committed error when it held that the pond, by virtue of its improvements, had become subject to an overriding federal navigational servitude not requiring compensation.¹⁷ The Court's purpose in granting certiorari in *Kaiser Aetna v. United States*¹⁸ was to resolve a conflict in interpretations of the nature and scope of the federal navigational servitude.

The navigational servitude (or national sovereignty over navigable waters) which is ultimately derived from the commerce clause of the federal constitution gives rise to the governmental authority to guarantee "that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate

13. *United States v. Kaiser Aetna*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 444 U.S. 164 (1979).

14. The navigational servitude, a shorthand description for the national sovereignty over navigable waters or dominant public interest in navigation, is firmly established. *See United States v. Rands*, 389 U.S. 121, 123 (1967) (the United States has an inherent power to regulate navigation which, in turn, confers upon it a dominant servitude); *United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956) (the United States' power to assert its interests over navigable waters is a privilege which has been described by the Court as a dominant servitude or a superior navigation easement); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 736 (1950) (recognizing a superior navigation easement since the government's interest in navigable waters is considered to be predominant to that of a riparian owner); *United States v. Commodore Park*, 324 U.S. 386, 390 (1945) (in the interest of commerce, the government necessarily must have a dominant power to control and regulate navigable waters); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62 (1913) (an owner's title to fast land adjacent to navigable water is subordinate to the public right of navigation).

15. *United States v. Kaiser Aetna*, 584 F.2d 378, 383 (9th Cir. 1978), *rev'd*, 444 U.S. 164 (1979).

16. *Id.* at 383-84.

17. *Kaiser Aetna v. United States*, 444 U.S. 164, 169 (1979).

18. *Id.* at 164. The Supreme Court wished to resolve a conflict between the Louisiana Court of Appeals and the Ninth Circuit. In *Vermilion Corp. v. Vaughn*, 356 So. 2d 551, 555-56 (La. Ct. of App. 1978), the court held that a canal constructed on private property with private funds is a private canal and that the owner may rightfully exclude others. In *United States v. Kaiser Aetna*, 584 F.2d 378, 383 (9th Cir. 1978), the court held that a natural waterway on private property made navigable with private funds was subject to the right of public access without compensation.

commerce.”¹⁹ The government argued that disposition of *Kaiser Aetna* should have been based primarily upon whether or not Kuapa Pond could be classified as a “‘navigable water of the United States.’”²⁰ A finding of navigability would have invoked the federal navigational servitude which traditionally required no compensation.²¹ The Court found, though, that the paramount issue was not navigability, but rather, whether creating a free right of access to the pond would constitute a “taking” requiring just compensation.²² In addition, Kuapa Pond, prior to its improvements, was clearly incapable of being used as a highway for commerce.²³ Despite the fact that it was navigable water, the Court did not classify Kuapa Pond as the sort of “‘great navigable stream’” that was previously recognized as being “[in]capable of private ownership”²⁴

Although the Court did not question congressional authority to regulate activities on Kuapa Pond,²⁵ it considered “the Government’s attempt to create a public right of access [to be] so far be-

19. 444 U.S. at 177.

20. *Id.* at 170 (quoting Brief of the United States at 13). The Code of Federal Regulations sets out the definition of the navigable waters of the United States as follows:

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

33 C.F.R. § 329.4 (1979). *See also* *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) (navigable waters include all waters susceptible to use in their ordinary condition or by reasonable improvement to transport interstate or foreign commerce); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921) (navigable waters include all waters used in the past to transport interstate or foreign commerce); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870) (navigable waters include all waters presently used to transport interstate or foreign commerce).

The power to regulate commerce necessarily encompasses the power to regulate navigation. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

21. 444 U.S. at 170. *See generally* Morreale, *The Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1 (1963).

22. 444 U.S. at 174-75.

23. *Id.* at 178. In *United States v. Kaiser Aetna*, 408 F. Supp. 42, 53 (D. Haw. 1976), the district court found a connection to interstate commerce in the fact that use of Kuapa Pond and access to Maunaloa Bay through Kuapa Pond was not restricted solely to residents of Hawaii-Kai but extended to licensees of Hawaii-Kai. Such a tenuous connection to interstate commerce was implicitly rejected by the United States Supreme Court.

24. *Id.* at 179 (quoting *United States v. Chandler-Dunbar*, 229 U.S. 53, 69 (1913)).

25. *Id.* at 174. The Court stated that Congress could exercise its regulatory authority to any extent it deemed necessary in the interest of commerce or navigation. Yet, a separate issue arises as to whether that regulation amounts to a compensable taking. *Id.*

yond ordinary regulation . . . as to amount to a taking”²⁶ In examining the “taking” question, the Court pointed to three important factors: “the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental actions”²⁷

Interference with economic expectations and the Court’s recognition of “the right to exclude” others as a fundamental element of property rights were dispositive factors in this case.²⁸ The Court implied that the Corps, in acquiescing to the dredging operations in Kuapa Pond without requirement of a permit and without stipulation that such improvements would automatically result in public right of access, had led Kaiser Aetna to believe that multimillion dollar improvements to the pond could be made exclusively for the benefit of Hawaii Kai residents and authorized boat owners.²⁹ In light of these facts, the Court found that Kaiser Aetna’s economic expectations were of such a substantial nature that the government must refrain from interfering with those expectations or compensate for their invasion.³⁰ Imposition of a navigational servitude in this case would have resulted not in an insubstantial devaluation of private property, but rather, in “actual physical invasion” of private property requiring just compensation.³¹

The purpose of this note is to explore the nature and scope of the federal navigational servitude in light of the *Kaiser Aetna* decision. Previously, the Court found it “inconceivable” that anyone could obtain a proprietary interest in navigable waters.³² However, in *Kaiser Aetna*, where navigability was the end result of significant investments to improve a private pond and where the affected waters had not been used as highways for commerce, the Court found petitioners had established a fundamental property interest in the right to exclude others. Accordingly, the government’s attempt to create free public access to the navigable waters of the pond constituted a “taking” requiring just compensation.

26. *Id.* at 178.

27. *Id.* at 175 (citing *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

28. *Id.* at 179-80.

29. *Id.* at 179.

30. *Id.*

31. *Id.* at 180.

32. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913) (in a condemnation proceeding instituted for the purpose of improving navigation in a river, the Court denied the existence of private property interests in the water power potential of the river).

Not only *Kaiser Aetna*, but also its companion case, *Vaughn v. Vermilion Corp.*,³³ have focused attention on the federal government's control over navigable waters of the United States. Traditionally, the Court has viewed the public interest as the predominant interest in navigation and, consequently, no compensation has been required when the navigational servitude has been invoked in the name of that overriding public interest.³⁴ However, as a result of these two recent Supreme Court decisions, the very existence of the so-called rule of no compensation has been questioned. In *Kaiser Aetna* the Court stated, "this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation."³⁵ In other words, the Supreme Court has never officially recognized the rule of no compensation under the navigational servitude. Without giving lip service to the no compensation rule, prior decisions of the Court have certainly given support to such a concept and have led to the creation of a rule of no compensation in the minds of legal commentators.³⁶

In addition to the historical recognition accorded the navigational servitude, the commerce clause of the federal constitution provides another basis for recognizing the dominant public interest in navigable waters.³⁷ Here, congressional power to regulate navigation stems directly from the power to regulate commerce.³⁸

As an adjunct to the commerce clause authority, the Court has explicitly ruled that navigable waters are public property and thus subject to congressional regulation.³⁹ Additionally, through *United States v. Appalachian Electric Power Co.*,⁴⁰ it became evident that congressional authority was not limited to control for navigation but included control for other purposes such as flood protection

33. 444 U.S. 206 (1979). In *Vaughn*, the Court held that the public right of access did not extend to man-made navigable waterways that were constructed on private land through private expenditures even though the canals connected to pre-existing naturally navigable waterways.

34. See Morreale, *supra* note 20, at 19-63; Ericsson, *The Navigational Servitude and Reserved Indian Property: Does the Rule of No Compensation Apply to Indian Interests in Navigable Waters?*, 1979 UTAH L. REV. 57 (1979).

35. 444 U.S. at 172.

36. See Morreale, *supra* note 20, at 19-63; Ericsson, *supra* note 34, at 58-63.

37. See Morreale, *supra* note 20, at 1-19.

38. *Id.* See also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824) (state legislature's attempt to grant a steamboat navigation monopoly struck by the Court as violative of the commerce clause).

39. *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1865).

40. 311 U.S. 377, 426-27 (1940).

and watershed development.

In the past, the rule of no compensation was applied in situations involving a riparian owner's "access to, and use, of navigable waters."⁴¹ The Court has held that no compensation is required for loss in water power due to impairment of a navigable water's flow. In *United States v. Twin City Power Co.*,⁴² a riparian owner sought compensation for the enhanced value of his land as a prospective site for a hydroelectric plant. The Court's view was that since there can be no private vested interest in the flow of navigable waters, the United States was not required to compensate for any special value of the land in relation to the use of the navigable water.

Also, no compensation has been required for loss of access to navigable water caused by necessary improvements.⁴³ Although access to navigable waters was permanently destroyed when the United States erected a pier which was essential to the use of a government-authorized canal and which was built on a riparian owner's land submerged under navigable water, the Court in *Scranton v. Wheeler*⁴⁴ disallowed compensation. The decision was founded upon the principle that the riparian owners acquire title to their lands subject to the paramount rights which the public has in the navigation of such waters. Similarly, in *United States v. Commodore Park, Inc.*,⁴⁵ a riparian owner's loss of access to navigable waters went uncompensated when the government's dredging operations in a bay for the purpose of creating suitable waters for the operation of large seaplanes resulted in obstructive silt and mud deposits in a formerly navigable tidal creek. The Court in *Commodore Park* explicitly stated that "an owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as 'fishing and boating and the like,' for which rights the government must pay."⁴⁶

In addition, the Court has not awarded compensation when obstructions, such as wharves or bridges, are removed or altered to

41. *United States v. Rands*, 389 U.S. 121, 124-25 (1967).

42. 350 U.S. 222, 226-27 (1956).

43. See *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945); *Scranton v. Wheeler*, 179 U.S. 141 (1900).

44. 179 U.S. 141, 163 (1900).

45. 324 U.S. 386, 388 (1945).

46. 324 U.S. at 391 (footnote omitted). Fast lands are "lands bordering on navigable waters but lying above the line of ordinary high water." Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1, 10 (1968).

improve navigation despite their value to those who built them. When Congress established a new harbor line which required destruction of waterfront wharves on the old harbor line, wharf owners were denied compensation.⁴⁷ And a requirement by the government that a bridge be altered so that navigation be rendered free and unobstructed did not constitute a taking within the meaning of the Constitution since the requirement was merely incidental to the exercise by the government of its power to regulate commerce among the states.⁴⁸

Previously, the amount of private investment which had been used to improve naturally existing navigable waters was not a decisive factor in the Court's decisions.⁴⁹ As aptly stated by Justice Blackmun in his dissenting opinion in *Kaiser Aetna*, "[a]ctions taken to improve their value for the many caused no reimbursable damage to the few who, by the accident of owning contiguous 'fast land,' previously enjoyed the blessings of the common right in greater measure."⁵⁰

There is unquestionably a fine line between a noncompensable loss and a compensable "taking" of property.⁵¹ The Court itself admitted that it has generally "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."⁵²

However, violations of rights regarding "fast land," lands adjacent to navigable water, and non-navigable tributaries generally have not called into play the rule of no compensation. Where the

47. *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1965).

48. *Union Bridge Co. v. United States*, 204 U.S. 364 (1907).

49. *Commodore Park*, 324 U.S. at 391.

50. 444 U.S. at 190 (citation omitted).

51. "Taking" is an expression for any type of publicly inflicted private injury for which the Constitution requires payment of compensation. Four factors have been recognized as critical in classifying a "taking" as compensable or not:

(1) whether or not the public or its agents have physically used or occupied something belonging to the claimant; (2) the size of the harm sustained by the claimant or the degree to which his affected property has been devalued; (3) whether the claimant's loss is or is not outweighed by the public's concomitant gain; (4) whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people.

Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967). U.S. CONST. amend. V provides in pertinent part: "[N]or shall private property be taken for public use without just compensation."

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

government has physically invaded fast lands or destroyed the economic value of such lands, compensation has generally been allowed. In *United States v. Virginia Electric & Power*,⁵³ where the government acquired by condemnation a flowage easement over 1840 acres of fast land for the purpose of a dam and reservoir construction project, the Court recognized the flowage easement as "property" within the meaning of the fifth amendment and ruled that it could not be appropriated for public use without compensating the owner. In *United States v. Cress*,⁵⁴ compensation was awarded to a millowner where the level of a non-navigable tributary was raised by the government's construction and maintenance of a lock and dam on the Cumberland River thus destroying the power of a milldam which was essential to the value of the mill.

Kaiser Aetna, *Virginia Electric* and *Cress*, all cases arguably involving actual physical invasion of private property, were construed as compensable takings. In each case a governmental act related to navigable waters resulted in a substantial and detrimental impact on economic expectations of private property owners. The important distinguishing factor is that, in *Virginia Electric* and *Cress*, the governmental acts affected private property in the form of adjacent fast lands, whereas, in *Kaiser Aetna*, the asserted private property interest which was affected was the navigable water at issue.

In essence, the *Kaiser Aetna* decision represents a repudiation by the Court of the existence of the no compensation rule in regard to private ownership of navigable waters under certain circumstances. The Court decided that the takings clause of the fifth amendment precludes the federal government from creating a public right of access to a privately developed marina which opened to the bay and ocean without paying just compensation.⁵⁵ This decision was reached in spite of the fact that the former inland pond now constituted "navigable water" and was recognized as such by the Court⁵⁶ and that *Kaiser Aetna's* interest in the pond was obviously in the use of such navigable waters, a previously noncompensable property interest.

As if to provide additional justification for its decision, the Court analogized *Kaiser Aetna's* interest in the dredged pond "to that of

53. 365 U.S. 624, 625, 627-28 (1961).

54. 243 U.S. 316, 322 (1917).

55. 444 U.S. at 165.

56. *Id.* at 171.

owners of fast land adjacent to navigable water"⁵⁷ thereby placing Kuapa Pond in the established category of compensable takings. Under Hawaiian property law Kuapa Pond was considered equivalent to fast land. In reality, though, Kuapa Pond's classification whether as "fast land" or "navigable water" was not determinative. The Court could have easily reached the opposite verdict by subjecting Kuapa Pond to the navigational servitude without payment of compensation merely on the basis that the pond now constituted navigable waters of the United States.

In *Vaughn*, the Court dispensed with any pretext of classifying the navigable water as "fast land" in order to justify its decision. In light of the *Kaiser Aetna* decision, the Court in *Vaughn* found that man-made navigable waterways (canals) which are built with private funds on private land and which are connected to naturally navigable water are not subject to a public right of access.⁵⁸ Although the Court did not elaborate, it can be assumed that the right to exclude others was again a dispositive factor.

The true significance of the *Kaiser Aetna* decision lies in the Court's recognition of that fundamental property right, the right to exclude others, as a limitation on the federal navigational servitude. While a finding of navigability will no longer activate an automatic rule of no compensation, the government's actual power to invoke the navigational servitude has not been curtailed. The practical effects of this decision will be felt particularly where it can be demonstrated "that the 'right to exclude others' is so essential to the use or economic value of . . . property" that government-authorized limitation of it may be adjudged to be a taking.⁵⁹

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57. *Id.* at 179.

58. 444 U.S. at 206.

59. *PruneYard Shopping Center v. Robins*, 100 S. Ct. 2035, 2042 (1980). The Court in *PruneYard*, a case relating to the exercise of free speech and petition on privately owned shopping center property, cited *Kaiser Aetna* for the proposition that it is necessary "to demonstrate that the 'right to exclude others' is so essential to the use or economic value of . . . property that the State-authorized limitation of it [will amount] to a 'taking.'" *Id.*

