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Pure Water, Pure Law, and Pure Nonsense: Outline

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OUTLINE

"PURE WATER, PURE LAW, AND PURE NONSENSE"

By

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WATER RESOURCES ALLOCATION:
LAWS AND EMERGING ISSUES

University of Colorado
School of Law

June 11, 1981
12 Noon

I. INTRODUCTION

A. Summary

On December 4, 1979, "the federal navigational servitude" became--briefly at least--a superfluous legal doctrine. Writing for a six-justice majority in Kaiser Aetna v. United States, 444 U.S. 164, 173, Justice Rehnquist declared that "reference to the navigability of a water adds little if anything to the breadth of Congress' regulatory power over interstate commerce." The Court's decision was that Kaiser Aetna, which had spent large sums developing a saltwater marina on the island of Oahu, might continue to charge boat owners \$72 per year to navigate the marina's waters. Before dredging, these waters had been a shallow native fishpond, navigable by canoe, but not without portage navigable to the ocean. By dictum, the Court affirmed the power of Congress to create a public aquatic park, but only if the United States pays the "just compensation" which the fifth amendment requires for private property taken for a public use. Dissenters--Justice Blackmun joined by Justices Brennan and Marshall--unsuccessfully invoked the navigational servitude which they insisted gives every person a right to navigate without charge all "navigable waters of the United States." These waters include, dissenters said, all tidal waters, including the saltwater fishpond before it was converted to a marina with the acquiescence of the Corps of Engineers.

The day might have been an occasion for bonfires of celebration. First, the retirement of the "navigational servitude" greatly simplifies the law. Kaiser Aetna might have been the last feckless judicial

argument among the justices about what waters are navigable, and for what purposes. There is no longer doubt that Congress can regulate commerce that rolls on land, flies in the air, vibrates in the electromagnetic spectrum, as well as commerce that floats on water. The protection which the Constitution affords to individual rights limits all such regulation. Congress cannot authorize or direct the construction of an interstate highway with slave labor, or on land taken without just compensation. Kaiser Aetna rejected the argument that navigable commerce is totally different.

Second, justice was demonstrably well served. Kaiser Aetna had made its investment relying on assurance from the regulatory agency, the Army Corps of Engineers, that Kaiser Aetna could charge the public fees to use its marina. A different result would have been outrageous.

Third, had the United States prevailed it would have destroyed every marina and every navigation facility in the United States which depends on user fees for essential maintenance. The Corps of Engineers had insisted that Kaiser Aetna admit the public to navigate its marina without charge, but the Corps had not offered and could not offer to undertake the costs of maintenance. Private pleasure boat owners are not likely candidates for new federal subsidies, or help from private charities like the Red Cross.

Unhappily, the Court left no time for celebration. It went on the same day to decide a supposed companion case, Vaughn v. Vermilion Corporation. Vaughn not only revived "the federal navigational servitude." It gave the doctrine a new and dangerous form which it had

never had in its days of fullest vigor. Vermilion came to the Court on petition for certiorari by three commercial fishers and shrimpers who had been enjoined from navigating privately constructed and privately maintained tidal canals dredged on fast lands in the vast marshland part of Louisiana adjoining the Gulf of Mexico where boats are the only means of surface transportation.

On the authority of Kaiser Aetna, the Court affirmed--this time by per curiam opinion--the state court's disposition of one issue, holding that the Vermilion Corporation could invoke state trespass to maintain privacy of the canals constructed on its land at private expense. A second issue, however, was peculiar to Vermilion. The state trial court had granted summary judgment, refusing to resolve a contention tendered by defendants that the canals they wanted to navigate had diverted water from and thereby interfered with navigability of a natural waterway. The state court said that contention, even if proved, was irrelevant. The Supreme Court said, however, that it could not say "as a matter of law" that defendants would not have a federal defense to the suit for trespass were the factual issue resolved in defendants' favor. Therefore, it reversed and remanded for reconsideration in the light of Kaiser Aetna--even though Kaiser Aetna involves no such issue on its facts or by dicta in the opinion of the Court.

Vermilion may turn out to have been a kind of judicial misprint. Otherwise, the decision portends disaster of two different kinds. Amicus briefs filed by the National Audubon Society and by the Louisiana Department of Wildlife and Fisheries--to which the Court

appears to have paid no attention--make clear the potential immediate disaster in Louisiana. The Vermilion canals are part of a complex of navigable but privately constructed canals which permit maintenance of a vast system of wildlife refuges from which the navigating public has to be excluded. The wildlife is fragile, and resources to hire game wardens for its protection are not available. Even the wakes of powerboats accelerate the erosion of the canal banks and filling up of the waterways. And who or what impairs the navigability of other channels presents a fact issue difficult or impossible to determine. Elvis J. Stahr, Jr., former Secretary of the Army, former Dean of the Law School of the University of Kentucky, and distinguished conservationist, wrote the Audubon Society's brief advising the Court that the Corps of Engineers had caused impairment of navigability by depositing dredged spoil.

Probably immediate disaster in Louisiana is avoidable. The Audubon Society is influential. It is likely that if the parties cannot flail their way to a litigious solution, Congress can be persuaded to provide a legislative one. The larger disaster is more threatening. The Court--and this appears to be true of majority and dissenters--appears to have lost its grip on two principles that are indispensable to successful federalism in governing a country of continental dimensions like the United States.

The first principle has abundant and persuasive authority that can be mustered in its support. A court should never reach for a constitutional issue when a statutory ground for decision is available. There are at least three reasons. (1) If there is no clear-cut collision between constitution and statute, the court itself may not be

clear, or it may fail to make clear to others, what it has intended to decide. (2) Further experience may produce later a better decision when the constitutional issue is concrete and can no longer be avoided. (3) Judicial respect for the legislature dictates that confrontation between legislature and court should be avoided when avoidance is reasonably possible. That respect rests not only on abstractions about separation of powers but also on the legislature's better access to the facts. That better access to facts is most important when unusual physical conditions--like those in the Vermilion canals--are the subject of the dispute.

Kaiser Aetna flagrantly disregarded that principle. The constitutional issue decided was well "decided," but the Kaiser Aetna case did not offer a necessary or appropriate case for its decision. The only federal statute which the Court cited, 33 U.S.C. § 403, says nothing at all about who may navigate "navigable waters of the United States," nor does it purport to confer on the Corps of Engineers authority to decide. Kaiser Aetna's apparent holding is an unnecessary and necessarily unclear dictum. Congress can create a public aquatic park, but not in the circumstances of the Kaiser Aetna case unless it provides just compensation for private property taken in the process. There is no evidence in the text of the only statute cited, that statute's legislative history, or prior decisions interpreting it, that Congress intended to order or authorize the Corps of Engineers to order a public right of free navigation in Kaiser Aetna's marina.

The second principle is that the vast body of the common law in the United States--contracts, torts, property, the law of persons--is state law. State law is therefore the first line of protection by

government against irreparable injury to life, health, environment, and public resources. It is the only complete body of law in the United States. Congress can and frequently does intervene to alter or even to displace state law, including common law. However, Congress should never do so when state law is at all important unless Congress also substitutes federal law and federal administration of that law. There is no general federal common law to fall into place when state law is preempted. Therefore preemption with no effectively administered federal statutory law to substitute is dangerous. No court should find that preemption has occurred by inference unless the court assures itself that Congress has provided some law and administration by way of substitute. That principle was flagrantly violated in Vermilion. The Court appears to have held that state law is incompetent to regulate public access to navigable waters--even when that access threatens destruction of wildlife--and even though no federal and no federal administration was in sight to take the place of the state law rendered inoperative.

B. The Decisions

1. United States v. Kaiser Aetna, 444 U.S. 164 (1979). Opinions below: United States v. Kaiser Aetna, 408 F. Supp. 43 (D. Haw. 1976), aff'd and rev'd, 584 F.2d 378 (9th Cir. 1978).

The District Court held that Kaiser Aetna's Hawaii Kai Marina was "navigable water of the United States" within the meaning of §10 of the Rivers and Harbors Act of 1899, and therefore the owners required a permit from the Corps of Engineers for any further improvement. It said that a "navigation servitude" would give the public a right to

navigate the marina without charge, but for Hawaiian law which had always treated the Kuapa fishpond, which the marina (with the Corps' acquiescence) replaced, as private property. This had been true under the Hawaiian monarchy, under the annexed Territory of Hawaii, and after annexation, and it continues true under the State, with express federal recognition.

The Court of Appeals affirmed the District Court's decision that Kaiser Aetna must have a Corps of Engineers' permit to do further work in the marina. Kaiser Aetna sought no review of that issue by the Supreme Court. Only the claimed public's right to navigate without paying a charge was before the Supreme Court. No federal statute, and no federal regulation promulgated by the Corps so decides. Any relevant law had to be found in the federal "navigational servitude," naked and unashamed.

2. Vaughn v. Vermillion Corp., 444 U.S. 206 (1979), affirming and reversing, 356 So.2d 551 (La. App. 1978), review denied, 357 So.2d 558 (1978).

C. Federal Statutes

1. The only federal statute cited in either Supreme Court opinion (or by dissenters) is § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1976). The Supreme Court's Kaiser Aetna opinion reproduces this Act in a footnote, but without addressing how it can be relevant to the only issue before the Supreme Court for review:

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 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 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 of 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.

2. The statute which has been cited at least by the Court of Appeals and the dissenters—a congressional rejection of "the federal navigational servitude" insofar as it directs that compensation shall be paid for highest and best use of fast land taken for a navigation project, § 111 of the Rivers and Harbors Act of 1970, 84 Stat. 1821, 33 U.S.C. § 595a (1976):

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 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 December 31, 1970, and to the determination of just compensation in any condemnation suit pending on December 31, 1970.

II. THE "FEDERAL NAVIGATIONAL SERVITUDE"--THE PURPOSES IT ONCE SERVED

A. Before 1937, when President Roosevelt proposed to add six justices to the Supreme Court to alter its course of decisions, the power of Congress to do many commonplace and routine things, including authorizing internal improvements, was nonexistent or in doubt. This explains the readiness of Congress to recite a navigable purpose in a statute, and the Court to accept incredible statutory declarations about "navigability." Examples, before and after:

1. Pre-1937.

Arizona v. California, 283 U.S. 423 (1931), upheld Congress' power to build Hoover Dam because (Brandeis said) its purpose recited in the statute was to promote "navigation" and evidence to the contrary was incompetent.

2. Post-1937.

United States v. Gerlach Live Stock Co., 339 U.S. 725, 737 (1950). The issue to be decided was compensation for a federal taking of riparian water rights from the San Joaquin River. The Court, after 1937, recognized the recital of a "highly fictional navigational purpose" was not intended to invoke the servitude to permit an

unjustified taking without compensation. However, the Court avoided the constitutional issue by discovering that the project was authorized under Congress' power to spend money for the general welfare, not the commerce clause.

B. The servitude survived in some cases where it shelters the United States from paying at "highest and best use" for property taken valued at "highest and best use" when value depended on property's relation to navigable water. Rands v. United States, 389 U.S. 290 (1967), is the culminating decision. The Supreme Court, reversing the Court of Appeals for the Ninth Circuit, held that the United States can take fast land for a navigation project on the Columbia fast lands at a price which ignores its port site value. Congress reversed that result, 33 U.S.C. § 595a (1976). The Court of Appeals and the dissenters in the Supreme Court both relied heavily on Rands. They did so, however, without considering the implications of the congressional later statute, or, indeed taking notice of its enactment.

C. Kaiser Aetna, of course, did not involve calculation of the amount of payment that would have been required had the Corps of Engineers proceeded in condemnation under a federal statutory authorization. Probably notions about the servitude have survived in condemnations because of judicial apprehension that a state might seek to create a compensable property right in the flow of a great navigable river at its mouth, riparian in nature, and to get compensation for all upstream diversions. If so, forestalling such claims can be regarded as another useful office once performed by the servitude--a concept of federal property in water which makes it unnecessary for government

to pay for paper rights created by state law. Clearly, however, the servitude was in fact never necessary for this purpose. Other doctrines are available to perform the same function. State and federal interests are identical in most situations in rejecting concepts of water rights unrelated to beneficial use, or in awarding compensation except to the extent of reasonable "investment backed expectations." The meaning of "property" in the compensation clause of the fifth amendment is a federal question, although in answering that question the Court should always consider that state law is the source of rights which should be paid for when enough rights are destroyed to constitute a "bundle."

III. THE SOURCE AND THE LIMITS OF THE RIGHT OF A MEMBER OF THE PUBLIC TO NAVIGATE

- A. The right of a member of the public to navigate (like the right to roll on wheels, to fly through the air, or to drink orange juice and whisky) comes either from the source of all rights ("the law of nature and nature's God" is a formulation in the Declaration of Independence) or from the sovereign, depending on one's jurisprudential view, theology, or habits of speech. Not everyone has found it necessary to stand up and be counted on this choice, or to explain fully the differences he thinks the choice of source might make. One reason is that the sovereign ("We the people of the United States" who ordained the Constitution, maybe) in any event imposes limits on the exercise of all rights, acting through both federal and state governments. Clearly nothing in the text of the Constitution differentiates rolling, flying or floating commerce, although there is no constitutional reason that prevents boat, truck, and

airplane registration from being somewhat different in each case.

B. Where water is scarce in the heartland of the former Great American Desert, the "Colorado doctrine" is probably the easiest and surely the most popular path to an acceptable result. Running water is not the subject of "ownership" by citizen or by government until it is appropriated for a beneficial use. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882). The "California doctrine," which has prevailed in the states on both sides of the Great American Desert, is based upon ownership of water, which individuals may appropriate for beneficial use when the sovereign permits. Lux v. Haggin, 69 Cal. 255, 4 Pac. 919 (1884), 10 Pac. 674 (1886). By this doctrine the owner of an appropriative water right traces title from the United States, resulting from diversion and beneficial use in response to permission granted by Congress. Resolution of that controversy need never take place. Any result is possible under either doctrine, except that the California doctrine is much more complicated than the Colorado doctrine. Originally it resulted in riparian and appropriative rights existing in the same state served from the same stream, but riparian elements in most western states have been largely leached out. Choice of doctrine has no necessary consequence for the United States. Under the supremacy clause the government is free to make its own rules, and it may use the syntax of appropriation, of riparian rights (water rights in owners of contiguous soil), or of aboriginal rights if the United States is asserting rights in behalf of Indian tribes. The government must pay for private property taken, but it has latitude in determining what is "property."

C. "Federal navigational servitude" is a phrase from property law. The property concept dates from a time when everything--including wild, international birds, who probably thought they belonged only to God--was assigned to ownership. Birds were owned by the states. Abrupt changes in their title while crossing state lines produced no ill effects in the birds, but the Court nevertheless rejected this quaint notion, when Hughes v. Oklahoma, 441 U.S. 322, 335 (1979), overruled Geer v. Connecticut, 161 U.S. 519 (1896). In the interim between these landmarks Justice Holmes opined, with reference to federal control of birds (which yielded to an international treaty): "To put the claim of the state upon title is to rest upon a slender reed." Missouri v. Holland, 252 U.S. 416, 434 (1920).

D. All Water Is Divided Into Two Classes--Navigable or Nonnavigable

Recital of that proposition should be enough to refute it, or to identify it as a legally invented fiction. The last great effort to muster support for it is probably Justice Blackmun's dissenting opinion in Kaiser Aetna. However, two other examples are in opinions by Court of Appeals for the Ninth Circuit, which decided a dispute between the Crow Indian Tribe and the State of Montana over right to operate a public fishing site on land owned by the State inside the Crow Reservation. A rational argument could be made on either side of the issue, but the argument based on whether the State or the Tribe owned the bed of the Big Horn is not among them. Pushed to the wall, the Court decided in favor of the State, but Justice Stewart, in the first sentence of his opinion, restated it in terms which identify what all such arguments should examine:

"This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians."

Montana v. United States, 101 Sup. Ct. 1245, 1249 (March 24, 1981).

Title and ownership of the bed of river--navigable or not--is not a rational handle on the issue to be decided. The fiction of navigability--the Big Horn is navigable for swimmers in inner tubes, or for jet boats (God forbid!) but it is not an artery for floating commerce. If the dispute relates to fish, the navigability issue is whether the water is navigable for fish. If it is not, the litigation is either moot, feigned, or--at the very best--a big mistake for all parties. The commerce power should relate to navigation--not navigability. The latter word no longer usefully communicates. To the extent it does communicate, the consequence is usually irrationally destructive--to sever control of a river's bed from not only ownership but the legislative and judicial sources of law established for the contiguous fast land.

E. Commerce Clause Doctrine

1. Before the servitude was invented.

a. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), is the first exposition of the commerce clause. Chief Justice Marshall said: "The power of Congress . . . comprehends navigation, within the limits of every State in the Union; so far as that navigation may be in any manner connected with 'commerce with foreign nations, or among the several states, or with the Indian tribes.'" Id. at 197. The Chief Justice noted the argument that the commerce power

was exclusive of any power over commerce in the states, and said the Court was not satisfied that the argument had been answered. However, he did not resolve it. The ground of decision was that Congress had legislated inconsistently with the legislative monopoly on steamboat navigation and, therefore, the monopoly failed. The decree in Gibbons v. Ogden is clear that the power of Congress relates to "navigation," not to "navigability." It refers to waters of the United States, and to waters of the state of New York, making clear that those terms alike refer to the water to which New York had attempted to apply its monopoly. The Court did not create a federal enclave on "navigable water" in which state law will not penetrate. Nor did it treat the monopoly differently because the commerce floated rather than rolled.

b. Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829), held that Delaware could authorize a dam barring navigation by the sloop Sally (95 tons) from commercial navigation in Black Bird Creek, in the absence of congressional legislation to the contrary. Justice William Johnson, author of a concurring opinion in Gibbons v. Ogden who would have held that preemption occurred by reason of the commerce clause itself and not a federal statute, was still a member of the Court, but he withheld dissent. Note that a sloop has two masts, and this one was engaged in commercial navigation, which means that its navigation was more important in almost every dimension than the pleasure boating in Hawaii Kai marina.

c. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). Barron's deep water access to his wharf in Baltimore Harbor was interfered

with by municipal activity, and he sued invoking rights under the fifth amendment. This was an excellent case to invoke the servitude, but John Marshall's holding is that the entire Bill of Rights did not apply to claimed rights against a state, but only against the United States. The servitude, rooted in the commerce clause, was unknown under any label to John Marshall.

It is clear that so long as John Marshall sat, "waters of the United States" and "waters of New York" were the same water. The decree in Gibbons v. Ogden, which concludes the 239-page summary argument and opinion, uses these terms interchangeably. It was not necessary to call either "navigable" since there is no need or excuse to argue about navigation of water that cannot be navigated. The concern was with "commerce" which comprehends navigation, but was never peculiarly isolated for federal attention.

IV. THE COOLEY FORMULA--AN ARTICULATED RECONCILIATION PRESERVING THE SUPREMACY OF FEDERAL LAW AND THE LAW-MAKING AUTHORITY OF STATE AND LOCAL GOVERNMENT UNTIL CONGRESS DISPLACES IT

- A. The first Congress expressly left regulation of harbor pilots to existing and future state law. This achieved its purpose as to then existing local laws on the subject, but future local laws were invalid because Congress cannot--it was thought--incorporate by reference a future law of a state. To do so would have been an unconstitutional delegation of the power to legislate which the Constitution places in Congress. In Cooley v. Port Wardens of Philadelphia, 53 U.S. (12 How.) 299 (1851), the justices wrote three opinions, all uniformly recognizing the necessity of the result Congress intended. Only the third, happily the opinion of the Court, works under present conditions:

1. Local regulation is permissible because local pilots are not in "commerce." Daniels, J., 53 U.S. at 325. This would have left what we know as the nation's commerce to the will of the states and cities with large seaports.
2. Congress should be asked and doubtless would approve local regulations. Justices McLean and Wayne, 53 U.S. at 321. A growing nation with legislative problems for Congress growing faster cannot get Congress' attention to shape laws for particular ports and cities.
3. The Court's solution by Justice Benjamin R. Curtis held that the commerce clause of its own force displaces state legislation only where the national interest requires a uniform rule, and pilots in local harbors are not an aspect of required uniformity.

B. The Cooley formula survives, even though modern examples of constitutionally required uniformity, where Congress has found uniformity undesirable, are impossible to discover.

C. Two other examples of federal law accommodating to a need for local adaptation:

1. United States v. Sharpnack, 355 U.S. 286 (1958). The perceived dilemma which produced the Cooley formula disappeared in this case which held that Congress can accept the surrounding state's criminal law for federal administration of a federal enclave, not as it existed on enactment of the federal statute but as the state may change its law from time to time. Sharpnack should dispel the notion that the "federal navigational servitude" creates a discrete and definable area of "navigable waters of the United States" from which state law is

banished. The fact is that federal law is often practically and conceptually inadequate because (1) there is little occasion for federal legislation on common law subjects even where Congress clearly can legislate, and (2) few if any would wish to restore the federal-state disharmonies under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

2. The textual recognition of the principle which would avoid displacement of state law until Congress provides federal law and its administration as a substitute is illustrated by Constitution, art. I, 10, cl. 3. Both foreign affairs and war are an almost exclusive federal preserve. However, a state can in emergency defend itself even without the consent of Congress in certain circumstances:

No state shall, without the consent of Congress
. . . engage in war, unless actually invaded, or in
such imminent danger as will not admit of delay.

Nothing so express says that Louisiana may not defend its wildlife from total destruction but it is not needed. It was needed with respect to war, because the power to engage in war and diplomacy, with this most notable exception, was totally federalized.

V. SOURCE OF THE PUBLIC'S RIGHT TO NAVIGATE DISCOVERED IN VERMILION

A. Clearly the source is not in the Constitution. Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845), has undeviatingly been followed and reaffirmed by Congress in the tidelands legislation, that the state is the sovereign which succeeds to ownership of beds of navigable rivers and tidelands to low tide.

B. The source is not Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1976), the only statute referred to by the

Supreme Court.

1. That statute is limited to prohibition of construction in "navigable waters of the United States" and has nothing to do with who may navigate such waters.
2. The reason for that statute was to give the federal agency power to eliminate the right to build structures which interfere with navigation, enacted after Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888), decided by a unanimous court that no federal common law exists "which prohibits obstructions and nuisances in navigable rivers." In California v. Sierra Club, CCH Sup. Ct. Bull. on April 28, 1981, opinion by Justice Rehnquist, the Court reaffirmed that the statute creates no private right of action. This is inconsistent with a view that § 403 creates a defense to an action for trespass under state law. Willamette Iron Bridge was expressly reaffirmed.
3. The Court has held that § 403 is not a source of right; that the source of right to construct or improve navigable waters is found in state law or some other Act of Congress.

E.g., Kake Village v. Egan, 369 U.S. 60, 63 (1962):

Like a certification by the Interstate Commerce Commission, [the Corps of Engineers' permit under § 403] is simply an acknowledgment that the activity does not violate federal law, and not an exemption from state licensing or police power requirements. Cf. Maurer v. Hamilton, 309 U.S. 598; South Carolina Highway Dept. v. Barnwell Bros., 303 U.S. 177. The Engineers have no objection under . . . 33 U.S.C. § 403 to the obstruction of navigable streams incident to the operation of fish traps at Kake and Angoon; . . . [The Corps] did not attempt to exempt these traps by state law.

(Frankfurter, J.)

C. The Solicitor General of the United States--representing the United States in Kaiser Aetna but appearing as an amicus curiae in Vermilion--conceded that in "exceptional cases it is appropriate to exclude the public from a discrete body of water." On such occasions the Secretary of the Army has statutory authority to prescribe regulations for "navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property." 33 U.S.C. § 1 (1976), discussed in second Brief for the United States Amicus Curiae in Vermilion, p. 33. (The first brief by the Solicitor General, invited by the Court before it granted certiorari, advised the Court to deny review. The Court rejected that advice.) Regulations promulgated under this section refer to military or naval firing ranges and the like. There is no indication that the birds, alligators, and other denizens of the Louisiana wet lands are the "life and property" the statute refers to. Indeed, the Solicitor General embraced Hughes v. Oklahoma, 441 U.S. 322, 335 (1979) (then only citable in slip opinion), to invite the Court to reject that line of decisions, beginning with Marshall's opinion in Black Bird Creek Marsh Co., on which federal-state relations to navigable waters has always rested. Here is the footnote:

During the Nineteenth Century, a number of states authorized dams or bridges within their borders across navigable waters of the United States, thereby completely or partially blocking public navigation. The Court sustained such laws on the ground that, until Congress exercised its dormant power, the states were free to regulate commerce within their borders at least to the extent of authorizing dams and bridges which might, in the judgment of the states, best serve local commerce. Willson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (dam built to drain marsh); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865) (non-drawbridge over Schuylkill River); Pound v. Turck, 95

U.S. 459 (1877) (dam); Escanaba Co. v. Chicago, 107 U.S. 678 (1882) (regulation of hours of day that drawbridge must be opened and closed); Cardwell v. American Bridge Co., 113 U.S. 205 (1885) (non-drawbridge over American River); Hamilton v. Vicksburg, S. & Pac. R.R., 119 U.S. 280 (1886) (state navigation improvements destroyed prior channel); Sands v. Manistee River Improvement Co., 123 U.S. 288 (1887) (state navigation improvements destroyed prior channel); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888) (state drawbridge across Willamette River).

It may be questioned whether all of these decisions would survive today. Cf. Hughes v. Oklahoma, No. 77-1439 (Apr. 24, 1979). . . .

Ironically, the National Audubon Society's amicus brief was written by Elvis J. Stahr, Jr., former Secretary of the Army, former law school dean, and distinguished conservationist. He told the Court that the alleged interference with natural waterways had been caused by the Corps of Engineers' careless disposition of spoil from its dredging operations.

VI. CONCLUSION

- A. Water law in the west is largely explainable on the basis of necessity and experience--not doctrines. That characteristic accounts for most of its development, including the exorcism of the riparian principles which turned out in the west to be unworkable.

- B. The most recent unworkable concept is the federal common law of nuisance, which the Court opined might be employed in the lower federal courts--wisely, the Supreme Court refused to exercise its original jurisdiction--in Illinois v. Milwaukee, 406 U.S. 91 (1972). Object of the plaintiffs was to restrain the City of Milwaukee from polluting Lake Michigan. The Court on April 28, 1981, brought nine years of

litigation to a frustrated determination that, back in 1972 just after the Milwaukee case had been decided by the Supreme Court, Congress had displaced the federal interstate common law of nuisance of enacting the Federal Water Pollution Control Act Amendments. Milwaukee v. Illinois and Michigan, 41 CCH Sup. Ct. Bull. B2231 (4/28/81).

Vigorous dissent by Justice Blackmun, joined by Marshall and Stevens, JJ., one suspects is largely result oriented, based on a decision below more protective of pure water than resulted from proceedings under the federal act. Constitutional principle may be more important than purity of water even if the purity is assessable from what judicial opinions say on the subject. The integrity of the legal process which will produce tomorrow's law, its enforcement, and comprehension by those who enforce and those who obey is more important.

The federal common law of nuisance administered by lower federal courts is a more impossibly difficult subject than allocating rights to the use of water of the Colorado River. Dean Charles J. Meyers has recounted enough of the story of Arizona v. California, 373 U.S. 546 (1963), 376 U.S. 340 (1964), to make clear why only a congressional apportionment is likely to work. Meyers, The Colorado River, 19 Stan. L. Rev. 1, 46-58 (1966). The task does not get easier when it is to be performed by a United States District Judge who must read and accommodate to his understanding of decisions gleaned from multiple opinions of Supreme Court Justices--who find it increasingly difficult to agree on an "opinion of the Court."

Interstate and intrastate problems of water allocation and quality must be resolved by law which is legislated by the only legislature with jurisdiction to perform the task, administered by those with the

technical competence and the resources to handle their task, and enforced by a judiciary not required to serve as law maker, fact finder, and enforcer administering a "common law" of public nuisance.

Problems of federalism are paramount. But--and this is the largest and most important fact--they would all be worse if flexibility permitted by functions of 50 states did not exist. The ultimate disaster to the solution of any constitutional problem is threatened by a misunderstanding of how law must of necessity be administered in a nation of continental proportions. Adaptation to diverse conditions must start in our country and often end with state law concepts, and with state administration. State law must be subject to effective judicial review for federal constitutional error and subject to congressional preemption when federal interests are threatened. A decision which says no user charges for yacht owners using marinas; or the public's right to navigate Niagara Falls is federally protected; is of the essence of pure nonsense, for a myriad of doctrinal reasons. The reason overriding all others, however, is that demonstrably any such laws, whatever the source, will not work.