

December 1960

Constitutional Law--Navigable Waters--Extension of the Federal Prerogative

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Recommended Citation

Orton A. Jones, *Constitutional Law--Navigable Waters--Extension of the Federal Prerogative*, 63 W. Va. L. Rev. (1960).

Available at: <https://researchrepository.wvu.edu/wvlr/vol63/iss1/9>

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federal inquiry upon grounds of unconstitutionality would be uncertain and troublesome, to say nothing of the refusal of the federal courts to extend comity to the states' determinations of what constituted illegally seized evidence. Therefore, he does not believe that conflict between the federal courts and the state courts following the exclusionary rule will be reduced.

Nevertheless, by the *Elkins* decision, the pendulum has made a further movement away from the common law practice and in the direction of more civil rights for citizens under a constitutional government.

Esdel Beane Yost

Constitutional Law—Navigable Waters—

Extension of the Federal Prerogative

A state agency built and operated a hydroelectric power project in Oklahoma on the nonnavigable Grand River, a tributary of the Arkansas. Subsequently, the federal government, as part of a comprehensive plan for power production, flood control, and regulation of navigation on the navigable Arkansas River, constructed another project on the nonnavigable tributary at a location for which the state agency held a franchise. The agency demanded compensation for the "taking" of its water power rights and its franchise to develop electric power at that site. The Court of Claims held the government liable. On certiorari, the Supreme Court reversed the judgment, *holding* that, when the United States asserts its superior authority under the commerce clause to regulate the water flow of a navigable stream, there is no "taking" of "property" in the meaning of the fifth amendment, and, further, that under the commerce power Congress can treat watersheds as a key to flood control on navigable streams and their tributaries, and the power of flood control extends to the nonnavigable tributaries of navigable streams. *United States v. Grand River Dam Authority*, 80 S. Ct. 1134 (1960).

The expansion of the navigable stream concept, considered a progressive liberalization of the commerce clause by many legal scholars and a malignancy by others, has achieved a growth rate comparable to that of the expanding power of the federal government itself. A simple statement of the original rule, although outmoded, is that federal control of interstate commerce and admiralty extends to

all public navigable lakes and rivers. *In re Garnett*, 141 U.S. 1 (1891).

The rule in its present form is clearly outlined in the principal case in juxtaposition to an assertion of a more stable federal prerogative, the taking of water usage without eminent domain proceedings. It is well established that the United States has a superior navigation easement which precludes private ownership of the water or its flow as against the government. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913). Therefore, governmental acts which deprive riparian owners and other parties of the use of the water and its flow do not constitute seizures of property within the contemplation of the fifth amendment. There being no question of due process, it follows that the claimant is entitled to no compensation. *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). Although the result in the case at hand appears to be equitable, the awesome authority afforded the government by a combination of these two rules bears little semblance to the scope of the commerce power as enunciated by Mr. Chief Justice Marshall in 1824.

The basic navigable waters rule was established in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), where the Court held that navigation is an aspect of commerce, and therefore the federal government has power to regulate navigation and navigable waters. The expansive nature of the doctrine lies in the successive definitions of the term "navigable waters."

The Court at first embraced the "English rule," confining federal jurisdiction to tidal waters, the ebb and flow of the tide constituting the principal test of navigability. *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825). This test soon proved impractical, for it excluded many important navigable waters. The case was overruled in *The Genesee Chief*, 53 U.S. (12 How.) 443 (1851), which extended jurisdiction to the Great Lakes. The principle was later extended to navigable rivers, *The Belfast*, 74 U.S. (7 Wall.) 624 (1869); to canals, *Ex parte Boyer*, 109 U.S. 629 (1884); and to other bodies of water, *Wisconsin v. Illinois*, 278 U.S. 367 (1929).

Inevitably, the need arose for a concrete definition of a navigable stream that could be universally applied to commerce and admiralty situations. The first such definition was enunciated in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), where the Court said: "Those rivers must be regarded as public navigable rivers in law

which are navigable in fact." The case further held that a completely intrastate waterway, if it unites with other waters to form a continuous interstate waterway, is within the purview of the commerce clause.

The definition provided in *The Daniel Ball*, *supra*, was later subjected to the erosive effects of qualifications. In *Economy Light Co. v. United States*, 256 U.S. 113 (1921), it was held that, when a body of water is once found to be navigable, the waterway remains so. *United States v. Utah*, 283 U.S. 64 (1931), held that it is not necessary for navigability that the use be continuous. Even absence of use over a period of years does not affect the navigability of streams in the constitutional sense. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). It has also been established that the navigability may be of a part only of the stream in question. *Arizona v. California*, 287 U.S. 423 (1931).

In the next major decision in this area, *United States v. Apalachian Elec. Power Co.*, 311 U.S. 377 (1940), the United States sought to enjoin the power company from constructing a hydroelectric dam in the New River in Virginia. The district court held that the government had no jurisdiction, the river being nonnavigable. The circuit court affirmed. 107 F. 2d 769 (4th Cir. 1939). The Supreme Court reversed, holding that a waterway which by reasonable improvement can be made available for navigation in interstate commerce is a navigable water, and it is not necessary that the improvement shall have been already undertaken or completed, nor even that it shall have been authorized. 311 U.S. at 408.

The next major step was taken in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941), where the government built a flood control dam on a nonnavigable portion of the Red River above its navigable stretch. The Court there held that Congress may control nonnavigable parts of a river in order to preserve and promote commerce on the navigable parts.

The principle, the growth of which had theretofore been seemingly uninhibited, was limited, however, in the case of *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), which held that, even though it be assumed that the federal dam project bears some relation to control of navigation, if Congress elects to treat it as a reclamation project, state-created property rights will be recognized, thus requiring eminent domain proceedings. This holding obstructed any trend that tended to allow "control of navigation" to be employed

as a flimsy pretext for establishing broader fields of governmental activity. Another modification was provided in *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950), where it was held that the ordinary highwater mark is the limit of the stream bed, and the navigational servitude does not extend to land beyond the bed of the river.

No major pronouncements were found to change the definitive color of the rule since the *Phillips* case, *supra*. This decision, however, was relied upon rather heavily by the Court in reaching its decision in the principal case, which extended the doctrine from nonnavigable portions of a navigable stream to nonnavigable tributaries of a navigable stream.

In the instant decision the Court states that Congress, under the commerce power, can treat the watersheds as a key to flood control on navigable streams and their tributaries. 80 S. Ct. at 1136. Whether this statement is indicative of further liberalization of the rule in future decisions remains to be seen, but there are other indications that suggest an ever-broadening concept. The Court discusses a contention that the navigational servitude of the United States extends also to all nonnavigable waters, preempting state-created property rights in such waters, at least when asserted against the government. The point is dismissed, however, with the statement that “. . . in this case . . . it is not necessary that we reach that contention.” 80 S.Ct. at 1136.

The decisions thus far, appearing to enhance the governmental purposes of public welfare, manifest broad extensions of federal power and collectively indicate a trend toward a culminating rule that would afford the federal government a prerogative over all the streams in the country that could be classified as the watershed of a navigable waterway, without the inhibitions imposed by the fifth amendment. However extreme or remote this projection might seem, it appears certain that the final limitations of the navigable stream principle will ultimately be somewhat broader than those which the courts presently dare to establish.

Orton Alan Jones