PUBLIC RIGHTS IN ILLINOIS WATERWAYS UNDER FEDERAL AND STATE LAW

*Eric T. Freyfogle**

To a degree poorly recognized, federal law provides robust protection for public rights to use inland waterways throughout the country, protection that displaces more constraining state laws. Federal protection is little needed in states where extensive public rights are recognized in a state's public trust doctrine or elsewhere in state law. But it can and does broaden public rights in states such as Illinois, where state law bows to landowner desires to curtail the waterways open to the public and public uses in them. This Article explores the public rights protected by the still-effective Northwest Ordinance of 1787, in language guaranteeing public access that Congress would later apply in varied forms to some two dozen states outside the old Northwest Territory. It considers also the similar public rights protected by the federal navigation servitude, a kind of federal public trust doctrine. Together, these bodies of federal law set the terms of the public's rights in Illinois waterways, overriding conflicting state common law and filling in the vast gaps in the state's undeveloped public trust doctrine. Finally, the Article examines a novel bill introduced in 2023 in the Illinois legislature, one that would expand and protect public rights by insisting simply that the public enjoy the full range of rights recognized by federal as well as state law, a bill specially crafted to avoid claims of unconstitutional takings. Advocates for expanded public waterway access in other states may find that federal law offers them better prospects than would further efforts to extend a state's public trust doctrine.

* Research Professor of Law and Swanlund Chair Emeritus, University of Illinois at Urbana-Champaign. This project began more than a decade ago only to be interrupted by many matters. Early work on it was much aided by Jillian Rountree, who is likely more surprised than I that the project has finally come together. Michael Blumm, a national expert on the issues covered here, provided thoughtful comments that led to many improvements. I thank them both.

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I. INTRODUCTION

Given the long importance of rivers as travel corridors, it is intriguing that the public's rights to use them—for boating, fishing, bathing, and the like—remain so murky, in Illinois and elsewhere. The situation has long been such, beginning with disputes among competing English courts and legal commentators that, in turn, bred confusion and misunderstandings among early American judges and treatise writers.

- Public rights had something to do with a waterway's navigability, but what did the term mean, and did it have more than one meaning in the varied legal contexts of travel, fishing, and riverbed ownership?[1]
- America's first state courts, aware of the geography of North America, were prone to question English definitions that limited navigability to tidal-influenced waters; too few rivers were subject to the tides for the limit to make sense.[2]
- The U.S. Supreme Court weighed in on the matter as it assigned meanings to the various provisions of the Constitution that implicated interstate rivers. One of them was the Commerce Clause, a provision that prompted the Court to insert the term "commerce" into definitions of navigability that had not previously mentioned it. In time, this added word would breed further confusion as its public meaning narrowed.[3]
- Meanwhile, states east of the Mississippi River followed the common law as then understood by granting ownership of riverbeds to riparian landowners—even in the case of the Mississippi and other grand rivers—fueling landowner beliefs that their property rights somehow constrained public liberties.[4]
- Litigating lawyers hardly helped matters when they framed river-related disputes solely as matters of state property law, pushing aside, or

1. *See infra* notes 44–49 and accompanying text.
2. *See, e.g.*, Carson v. Blazer, 2 Binn. 475 (Pa. 1810).
3. *See infra* notes 130–33 and accompanying text.
4. *See, e.g.*, Middleton v. Pritchard, 4 Ill. (3 Scam.) 510, 520 (1842) (owners of Illinois land along the Mississippi own submerged land out to the thread of the river).

perhaps unaware of, relevant federal law dating from before the Constitution.[5]

- Then there were the Supreme Court rulings, late in arriving, having to do with state versus federal title to riverbeds under the Equal Footing Doctrine, with the "public trust" that attached to certain riverbeds, and with the expanding reach of the federal navigation servitude.[6]
- In 1921 came the Supreme Court's pronouncement[7] that Illinois and other states carved out of the old Northwest Territory remained bound by a provision of the Northwest Ordinance of 1787 declaring that all navigable waters "shall be common highways, and forever free."[8]
- By the end of the twentieth century, recreation had become the dominant use of many rivers, facilitated by businesses that rented equipment and guided outings. Was the long-evolving law adequate to meet their needs? Many state courts said yes; others hesitated.[9]

These many layers and competing currents transformed these seemingly simple issues—what rivers are open to public use and how can the public use them—into something surprisingly complex. In Illinois, four distinct bodies of law play roles in answering these legal questions. It is not possible to resolve these two questions, not possible to determine the reach of public rights and hence the entitlements of riverbed landowners, without consulting and synthesizing all four. No Illinois court has taken on the task, nor has any commentator.[10]

A 2022 ruling by the Illinois Supreme Court illustrates the lingering uncertainties. The case, *Holm v. Kodat*, arose when riparian landowners along the Mazon River in Grundy County sought a declaratory judgment affirming their rights

5. *See, e.g.*, Beckman v. Kreamer, 43 Ill. 447, 448–49 (1867) (arguing the issue of fishing rights in Illinois rivers based solely on common law).

6. *See, e.g.*, Pollard v. Hagan, 44 U.S. 212, 234–35 (1845) (new states entering the Union gained ownership of submerged lands beneath navigable waters under the Equal Footing Doctrine); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 473 (1892) (submerged lands acquired by states are taken subject to public trust limitations); *See* Gibbons v. United States, 166 U.S. 269, 275 (1897) (government need not pay compensation for damage to private property caused by navigation improvements).

7. *See* Econ. Light & Power Co. v. United States, 256 U.S. 113, 120–21 (1921).

8. Ordinance of 1787: The Northwest Territorial Government, 1 U.S.C. LVII (July 13, 1787) [hereinafter Northwest Ordinance].

9. *See infra* notes 153–64 and accompanying text.

10. One of the four bodies of law, Illinois common law, is considered in Margit Livingston's *Public Recreational Rights in Illinois Rivers and Streams*, 29 DEPAUL L. REV. 353 (1980). The federal navigation servitude is considered, along with the common law, in an unpublished manuscript dating from around 1979, written by Mark W. Bortoli. *See generally* Mark W. Bortoli, Recreational Uses of Streams in Illinois (1979) (unpublished manuscript) (on file with *University of Illinois Law Review*). The Northwest Ordinance is briefly discussed in FRED L. MANN, HAROLD H. ELLIS & N.G.P. KRAUSZ, WATER-USE LAW IN ILLINOIS 279–83 (1964). This Article, although roaming widely, does not consider public rights acquired in specific locations based on the public's prescriptive use or dedication by a landowner. It also does not consider public rights to use reservoirs and harbor areas the beds of which are owned by particular governmental entities and, to some extent, subject to their regulatory control. *See, e.g.*, 65 ILL. COMP. STAT. ANN. 5/11-92-3(f) (West 2018) (noting that a city or village with a harbor can regulate water traffic in the harbor and within 1000 feet of the outer limits of the harbor but "shall not forbid the full and free use by the public of all navigable waters, as provided by federal law"). An identical limit applies in the case of harbors controlled by park districts. 70 ILL. COMP. STAT. ANN. 1205/11.1-3(f) (West 2018). For a thoughtful look at a related issue, public rights in beaches, see generally Josh Eagle, *On the Legal Life-History of Beaches*, 2023 U. ILL. L. REV. 225 (2023).

to navigate the river.[11] The action was brought against other riparians along the river who contended the plaintiffs trespassed when they kayaked over the defendants' privately owned riverbeds.[12] The plaintiffs' travel took place between a roadway and two riparian parcels that they owned, one accessible only by water.[13] From their landlocked parcel, they excavated and carried away fossils intended for commercial sale.[14] For reasons not apparent, the plaintiffs conceded that the river was non-navigable, which meant they had no right to use it simply as members of the public.[15] Instead, plaintiffs rested their claimed right of river access on an unusual legal claim: that their property rights as riparian landowners along the Mazon River included the ancillary right to make reasonable use of the entire river, even though non-navigable, a right they allegedly held in common with other riparians along the river.[16] Plaintiffs grounded their argument on a 1988 opinion of the Illinois Supreme Court that embraced a similar rule concerning rights to use the surface of non-navigable lakes.[17] The common law rule on that issue allowed a littoral landowner[18] to use only those portions of a lake surface, if any, overlying lakebed land owned by the landowner; rights to use the water surface, that is, were linked to and constrained by ownership of the underlying land.[19] In its 1988 ruling, *Beacham v. Lake Zurich Property Owner's Association*,[20] the Illinois court, as a matter of first impression, chose to embrace an alternative legal rule, commonly (though perhaps inaccurately[21]) termed the civil law rule. Under it, each owner of land bordering a non-navigable lake can make reasonable use of the entire lake surface in common with other similar

11. 211 N.E.3d 310, 312 (Ill. 2022).

12. *Id.* at 311–12.

13. *Id.* at 312.

14. *Id.*

15. *Id.* at 314.

16. *Id.* at 318.

17. *Id.* at 314.

18. Illinois courts are among those around the country that use the term "riparian" to cover land parcels that abut both rivers and lakes. *See* Alderson v. Fatlan, 898 N.E.2d 595, 599 (Ill. 2008).

19. *Id.* at 600.

20. 526 N.E.2d 154 (Ill. 1988). A similar approach was taken in *Johnson v. Seifert*, a ruling in which the court expressed amazement that a jurisdiction would follow a different rule: "Illogical as the rule may be, it must be conceded that a few states have taken the position that ownership of the bed of a nonnavigable or private lake carries with it complete and exclusive control and ownership of the overlying waters." 100 N.W.2d 689, 695 (Minn. 1960).

21. Several scholars have asserted that the rule adopted in *Beacham* was better described as the Scottish rule since it entered Anglo-American law from Scotland, which developed the rule in the late eighteenth century. Ancient Roman law, the root of civil law, apparently embraced the rule today known as the common law approach. Centuries later, English courts also embraced it. *See generally* Andrea B. Carroll, *Examining a Comparative Law Myth: Two Hundred Years of Riparian Misconception*, 80 TUL. L. REV. 901 (2006); Nicholas Harling, Note, *Non-Navigable Lakes and the Right to Exclude: The Common Misunderstanding of the Common Law Rule*, 1 CHARLESTON L. REV. 157 (2007).

landowners.[22] The plaintiffs in *Holm* invited the Illinois high court to embrace a similar rule applicable to non-navigable rivers, an invitation the court refused.[23]

In its ruling in *Holm*, the Illinois Supreme Court repeatedly referred to the Mazon as non-navigable, even though the lower court made no determination on the issue.[24] The claim rested, as noted, solely on the plaintiff's litigation posture.[25] The outcome of the dispute, denying the plaintiffs access rights, proved unsettling to two of the court's seven members even as they agreed with it.[26] Writing separately, they expressed hope that steps would be taken to redefine navigability, opening to recreational use all rivers capable of supporting it and displacing what they termed the "ancient common-law rule."[27] Other states had done it, they noted; Illinois should also.[28] Such an expansion, they proposed, could take the form of a "public domain declaration," by which they meant a declaration that identified waterways that were subject to the federal navigation servitude and thus publicly accessible.[29] Alternatively, they urged, the state legislature could intervene to update the state common law, expanding public access and reconfiguring the rights of riparian landowners.[30] The concurring opinion, while mentioning the navigation servitude, did not consider whether the Mazon River was subject to it and thus already open to public use.[31] Nor did it consider how public rights were affected by the State's public trust doctrine, which the Illinois Supreme Court for over a century had applied to protect public rights to the Lake Michigan shore.[32] Illinois rivers are no doubt also subject to that doctrine and (as explained below) the court's one alluring discussion of the issue suggests the doctrine broadly protects public access rights.[33] The state supreme

22. Shared use of the surface of a non-navigable, *man-made* lake exists only if the lake has been used for sufficiently long to become legally equivalent to a natural lake under the artificial-to-natural rule. *See Alderson*, 898 N.E.2d at 602–03 (former rock quarry had not become natural); Bohne v. La Salle Nat'l Bank, 926 N.E.2d 976, 987 (Ill. App. Ct. 2010) (reaching the opposite conclusion with respect to another former quarry). On similar facts, owners of lots around a man-made lake have established rights to the continued use of the lake surface based on implied easements. *See, e.g.*, Francis v. Irvin, No. 5-19-0543, 2020 WL 7231493, at *1–10 (Ill. App. Ct. Dec. 4, 2020).

23. 211 N.E.3d 310, 318 (Ill. 2022).

24. *Id.* at 314.

25. This litigation stance could have stemmed from a desire by the plaintiffs to gain access rights for themselves without opening the river more broadly for public use. The stance might also or instead have reflected a hope that a more limited legal claim could facilitate settlement with the defendants.

26. *Holm*, 211 N.E.3d at 320–24 (Neville, J., concurring).

27. *Id.* at 323.

28. *Id*.

29. *Id.* The opinion did not suggest how this might happen or what level or unit of government might do it.

30. *See id.* at 324.

31. *See id.* at 320–24.

32. *See id.*

33. *See infra* notes 42–64 and accompanying text. The concurring opinion in *Holm* cited this ruling. 211 N.E.3d at 320–24 (Neville, J., concurring) (citing People *ex rel.* Scott v. Chi. Park Dist., 360 N.E.2d 773 (Ill. 1976)). The court did not speculate whether it, or the Illinois public trust doctrine generally, cast doubt on the non-navigable status of the Mazon. *See id.* at 315. An earlier ruling by the court, *Wilton v. Van Hessen*, also stated that the public trust doctrine applied to inland waters, suggesting ambiguously that it protected there the full range of public access rights applicable to the Lake Michigan shore. 94 N.E. 134, 134–37 (Ill. 1911).

court, however, has yet to clarify how the doctrine applies to inland waters.[34] Apparently, no litigant in *Holm* mentioned it.[35]

Despite their implicit references to the navigation servitude and the public trust doctrine, concurring Justices Neville and Burke implied that public rights were set by Illinois law alone and without regard for the state's public trust doctrine. Their summary of that law drew upon several precedents, leading up to and including *People ex rel. Deneen v. Economy Light & Power Co.*,[36] a 1909 ruling that, as considered below, was called into question if not overruled twelve years later by the U.S. Supreme Court due to its conflict with federal law.

The ruling in *Holm v. Kodat*, with its unusual concurrence, stimulated several Illinois lawmakers to take up the call to act. Aided by the Illinois Environmental Council, a not-for-profit advocacy group, they introduced in late 2022 a bill to declare and protect broader public rights.[37] As expected, the bill (House Bill 5844, reintroduced in early 2023 as HB 1568) drew resistance, in part due to worries that an expansion of public access rights would run afoul of the Constitution's ban on the taking of private property without just compensation.[38] That danger seemed more vivid given the 2021 ruling by the United States Supreme Court in *Cedar Point Nursery v. Hassid*, which heightened landowner protections against statutes authorizing physical invasions of private lands.[39] According to some legal observers, including those advising the Illinois Department of Natural Resources,[40] the bill, if enacted, could amount to an uncompensated taking and was thus unwise.[41] That constitutional claim, like the ruling in *Holm*, presumed that public rights were set by Illinois common law and that any statute recognizing broader public access rights was constitutionally suspect.[42] The claim was advanced even though the introduced bill mostly confirmed already existing rights and made express reference to two bodies of federal law—the Northwest Ordinance of 1787 and the federal navigation servitude—and to the state's public trust doctrine.[43]

This study examines the scope of existing public rights in Illinois waters, drawing upon all four of the relevant bodies of law. It assesses them serially, and appropriately so, given their largely discrete historical trajectories. As will be seen, not one of them alone provides full guidance on both key issues: which rivers are publicly open, and in what ways can the public use them? The two bodies of federal law in combination, however, supply reasonably secure

34. *C.f. Holm*, 211 N.E.3d. at 320.

35. *Id.*

36. *Id.* at 316 (citing People *ex rel.* Deneen v. Econ. Light & Power Co., 89 N.E. 760 (1909)).

37. As a matter of disclosure, I assisted the Illinois Environmental Council in preparing a draft of this bill at the request of various House members.

38. *Deneen*, 89 N.E. at 770.

39. 141 S. Ct. 2063, 2080 (2021).

40. Personal Communication with Eliot Clay, State Program Director, Illinois Environmental Council (Feb. 23, 2023) (on file with author).

41. *Id.*

42. *See* Holm v. Kodat, 211 N.E.3d 310, 314 (Ill. 2022).

43. *See infra* Part VII.

answers by protecting the public's rights to travel on and fish in all waterways capable of supporting recreational watercraft.[44] The Illinois public trust doctrine might well do the same.[45] As for the one body of law to which observers typically turn, the dated Illinois common law, it clashes with federal law so that much of its guidance—for instance, on public rights to fish—seems preempted by conflicting federal rules.[46]

Although the discussion here dwells on the law of Illinois, the federal law parts of it are broadly relevant. Illinois is among the sizeable majority of states that do not, by state law, overtly protect recreational use rights.[47] As such, it is a jurisdiction—one of many—where the operative standards for judging public rights in effect are likely set by federal law, not state law. The discussion here of the federal navigation servitude is thus widely applicable, as is, in many states, the commentary on the Northwest Ordinance given that Congress later applied its navigation language, in slightly varied forms, to dozens of other states.[48] Finally, the bill introduced in the Illinois legislature could serve as a model for legislation wherever public rights remain insecure or unwisely confined.[49]

Because the murkiness of this law sinks such deep roots in history, it helps to start the story early—a full 400 years ago—and to note in passing legal and linguistic conventions that governed as the saga unfolded. The exploration begins in Part II with a look at the English and British background and its long-simmering disputes (mostly over riverbed ownership and public rights to fish) with a quick glance at the misunderstandings American lawyers had about that common law background. The American story starts in Part III with the Northwest Ordinance of 1787, viewed then and since as one of the nation's leading pronouncements on citizen rights. As the discussion reveals, the Ordinance, interpreted as written, provides rather clear guidance on public access rights for purposes of travel of any type. From the Northwest Ordinance the inquiry turns in Part IV to the other relevant body of federal law, the navigation servitude. It features a similar if not identical definition of navigability and hints at the broad range of public rights that it protects (fishing in particular), notwithstanding contrary state law.

From federal law the study turns in Part V to the public trust doctrine, beginning with a look at key U.S. Supreme Court rulings that undergird that doctrine, rulings that, for the most part, addressed issues other than public access.[50]

44. *See infra* Part VII.

45. H.R. 1568, 102d Leg., 1st Sess. (Ill. 2023).

46. *See infra* Part V; *see also* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 283 (1997).

47. Peter N. Davis, *Recreational Use of Watercourses*, MO. L. & POL'Y REV. 71, 86–87 (1996).

48. *Id.* at 86.

49. H.R. 1568, 102d Leg., 1st Sess. (Ill. 2023).

50. Although the public trust doctrine is often presented as a body of state common law, it is usefully explored separately. Even as states have freedom to develop the doctrine, the U.S. Supreme Court, as considered in Part IV, has often stressed that it contains a core content, somehow derived from federal law, that states are bound to respect, particularly in the instance of waterways the beds of which became state property as a state entered the union. *See* PPL Mont., LLC v. Montana, 565 U.S. 576, 591 (2012). Further, state legislatures can and do play roles in developing the doctrine. *See infra* Part V. As Part VII explains, the Illinois legislature has implicitly offered its own views on the doctrine in various sections of the state's Rivers, Lakes, and Streams Act.

Out of these rulings emerged an understanding that states, as they entered the union, gained title to river- and lake-beds subject to public rights to use the waterways, rights that state lawmakers were "bound to respect" even as it remained unclear, for many decades, where these public rights resided in American law (State law? Federal law? Common law? Constitutional law?).[51] Later rulings would describe the public trust doctrine as a matter of state law,[52] even as the Supreme Court admonished that state lawmakers were nonetheless duty-bound to respect those rights.[53] The inquiry here also takes up Illinois rulings on the public trust having to do with construction along or near the Lake Michigan waterfront. How the doctrine applies—as surely it does—to inland waterways remains undeveloped and thus open, leaving state lawmakers freer than they might otherwise be to invest the doctrine with content without worry over constitutional limits. A 1976 Illinois Supreme Court ruling features suggestive dicta on how that court will apply the doctrine to inland waterways when the time comes to do so.[54] In the meantime, the soundest legal assumption is that the public trust doctrine, like federal law, fully protects recreational uses in Illinois.

The following Section, Part VI, turns finally to that body of law that might seem the logical starting point, the Illinois common law of waterway access. It is taken up last because the caselaw is sparse and dated and because it offers only modest guidance. Over the past two centuries, Illinois appellate courts have commented on public rights in a handful of opinions, mostly in dicta.[55] Only in two rulings, from 1870 and 1905, did a state appellate court (the Illinois Supreme Court) consider the navigability of a particular waterway for public access based on Illinois common law and make a decision about common law navigability based on the facts.[56] Those rulings, as noted, came before the Illinois Supreme Court had its hands slapped by the U.S. Supreme Court, which, in an important 1921 ruling, announced that the Des Plaines River was navigable and open to the

See infra Part VII. Finally, as Illinois caselaw illustrates, state court rulings based on the common law often ignore the state's public trust doctrine precedents, treating it thus as distinct. *See infra* Part IV.

51. *Coeur d'Alene Tribe*, 521 U.S. at 283. A taste of the active, late-twentieth-century debate on the legal grounding of the public trust can be gained from the work of several scholars who have published in this area. *See* Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 427–28 (1987) (explaining that the doctrine finds support in the Due Process and Equal Protection Clauses); James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 88 (1997) (arguing that public trust doctrine is a sibling of Equal Footing); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENV'T L. 425, 458 (1989) (explaining that the doctrine is rooted in the Commerce Clause). *See generally* Michael C. Blumm, Harrison C. Dunning & Scott W. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY L.Q. 461 (1997) (explaining that the doctrine is a fundamental attribute of sovereignty that draws substance from the Equal Footing Doctrine). The confusion is surveyed, with more examples offered, in Bennett J. Ostdiek, *Public Rights and Sovereign Power: Rethinking the Federal Public Trust Doctrine*, 51 TEX. ENV'T L.J. 215, 217–18 (2021).

52. *See, e.g.*, PPL Mont., LLC v. Montana, 565 U.S. 576, 603–04 (2012).

53. *Id.* at 604–05.

54. People *ex rel*. Scott v. Chi. Park Dist., 360 N.E.2d 773, 780–81 (Ill. 1976).

55. Paepcke v. Pub. Bldg. Comm'n, 263 N.E.2d 11, 16 (Ill. 1970).

56. As discussed above, the recent ruling in *Holm* did not entail a dispute about the navigability of a waterway and the court did not comment on navigability under Illinois law. *See supra* notes 11–18 and accompanying text.

public under federal law.[57] Only in passing did the U.S. Supreme Court mention the 1909 Illinois Supreme Court ruling, based on Illinois common law, that found the Des Plaines River non-navigable.[58] Given the paucity and age of these rulings—the Illinois court's silence for over a century is remarkable—the common law of Illinois seems ripe for reassessment.

Part VII takes up 2023 Illinois House Bill 1568 and its novel way of confirming broad public rights via express references to these relevant bodies of law. Preceding it is a brief look at the law of regulatory takings, including expanded landowner protections announced in *Cedar Point Nursery v. Hassid*.[59] The prospect of a regulatory taking—an invasion of protected private property rights—looms over any effort to revise public rights. One provision of HB 1568 aims to avoid that possibility.[60] As explained, HB 1568 at once invites the Illinois Supreme Court to provide much-needed guidance on the public trust doctrine and tips the legislature's hand on the issue, announcing what public rights the legislature believes the public trust doctrine ought to and does protect.[61]

The concluding part draws together the four bodies of relevant law to explain public waterway rights in Illinois today. While it finds clarity on both issues, chiefly based on federal law, it sees ample benefits in the further development of state law. The best legal path to gain those benefits, for public river users and landowners alike, is by means of a fleshed out public trust doctrine. As many states understand and apply it, the public trust doctrine encompasses all rights protected by other bodies of law, and often goes beyond them. The attractive outcome is that lawyers, river users, and landowners alike can then turn to that single body of law for guidance on the scope of public rights. Either the Illinois Supreme Court or the legislature could provide that needed clarity and certainty, with little reason to fear successful constitutional challenge.

The final part also takes up tangential issues, including how public nuisance law applies to waterway conflicts and the broad standing rules that apply in Illinois courts when citizens sue to enforce public trust duties. It examines an Illinois statute directing the State's Department of Natural Resources to identify and list the State's navigable rivers.[62] That provision, it concludes, might vest the agency with power to broaden public access rights but does not authorize it to restrict public rights by omitting a navigable waterway segment from its list.

Public rights in waterways for centuries have been valuable forms of public property, owned and used by people in common, often the landless and poor, people who, on a recurring basis, have turned to the government to defend their shared rights against landowners out to curtail them. As the Illinois Supreme Court observed in one waterway obstruction dispute, "Government was organized to protect the general and collective rights of the governed as fully as the

57. Econ. Light & Power Co. v. United States, 256 U.S. 113, 123–24 (1921).
58. People *ex rel*. Deneen v. Econ. Light & Power Co., 89 N.E. 760, 767–73 (Ill. 1909).
59. 141 S. Ct. 2063, 2071 (2021).
60. H.R. 1568, 102d Leg., 1st Sess. (Ill. 2023).
61. *Id.*
62. *Id.*

individual rights of each member of the body politic."[63] The power to do that, the Court continued, "has been exercised as a legislative function of the British parliament almost from the time of its organization, as well as by our State governments since their organization."[64] By many accounts, the time has come for Illinois lawmakers to fulfill that role again.

II. THE CONFUSING BRITISH BACKGROUND

The secondary literature on public rights in waterways has become massive over the years, including searching attempts to find the root source of today's public rights.[65] Here, we can put most of this aside, including (for instance) the Magna Carta's provision on waterway blockages[66] and the issue of whether Roman law did or did not have much influence on the early common law,[67] to highlight legal chapters of this legal narrative that give a sense of English law as the eighteenth century wound down.

A critical step in this legal journey unfolded in 1611 when England's Kings Bench used a dispute over salmon fishing rights in the River Banne in Ulster to explain who could fish in rivers.[68] The ruling, *The Case of the Royal Fishery of Banne*,[69] introduced two important ideas, although in garbled fashion. The right to fish generally was an attribute of ownership of the land beneath a river or other waterbody, the court opined.[70] Further, ownership of the submerged land was linked to the navigability of the river itself, which in turn was seemingly linked to whether the river was subject to the ebb and flow of the tides.[71] On one reading, the opinion appeared to say a river's navigability was determined by whether

63. Parker v. People, 111 Ill. 581, 589 (1884).

64. *Id.*

65. Modern explorations of the doctrine were much stimulated and shaped by Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–91 (1970). An important collection of early articles, considering possible expansions of the doctrine, appeared in an issue of the *U.C. Davis Law Review*. Harrison C. Dunning, *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium*, 14 U.C. DAVIS L. REV. 181, 182–83 (1980).

66. Magna Carta 1215, 17 John, c. 23 (Eng.) (ordering the removal of fish-weirs ("kidelli") from inland rivers). According to historian Richard Helmholz, the term kydells "encompassed all fixed contrivances that inhibited navigation." R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297, 355–56 (1999). The aim was not to interfere with fishing activities but instead "to secure free movement on the rivers." *Id.* The provision drew upon Roman law, under which "a legal action could be brought to compel removal of obstacles standing in the way of 'the convenience of navigation.'" *Id.* The Illinois Supreme Court spent time exploring this early English history in *Parker v. People*. 111 Ill. at 589–93.

67. *Compare* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENV'T L. & POL'Y F. 1, 12–19 (2007), *with* Bruce W. Frier, *The Roman Origins of the Public Trust Doctrine*, 32 J. ROMAN ARCHAEOLOGY 641, 642–43, 646 (2019), *and* J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L.Q. 117, 176 (2020).

68. The Case of the Royal Fishery of Banne [1611] 80 Eng. Rep. 540 (KB) (Eng.) (English translation reprinted in JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN THE TIDE WATERS App. 35–42 (1826)).

69. *Id.*

70. *Id.*

71. *Id.*

it was subject to the tides, but key language in the ruling was imprecise.[72] The dispute before the bar unfolded only two leagues from the sea in a river segment subject to the tides and clearly navigable in any sense. As for land ownership, so the Court stated, the Crown, as a matter of royal prerogative, owned land beneath tidal waters, subject to public rights to fish there. In the case of rivers that were not navigable or subject to the tides, the land was owned by adjacent landowners who, by virtue of that ownership, possessed exclusive rights to fish. But how did navigability and tidal influence fit together, and how exactly were they linked to the ownership of the underlying land? Later English rulings seemed to point in conflicting directions even as they made clear that, in the case of fisheries owned by the Crown, the public possessed the right to enjoy them.[73]

In the meantime, though, it became evident that the issue of navigability based on tidal influence, however important it might be for title to submerged lands and fishing rights, had nothing to do with rights to travel on rivers. As Sir Matthew Hale explained in his influential *De Jure Maris*, countless inland waterways were consistently used by people for travel, from one inland town to another.[74] All such rivers, without regard for tidal influence, were *juris publici* and open to public travel, "and therefore all nuisances and impediments of passages and boats and vessels, though in the private soil of any person, may be punished by indictments, and removed."[75] In his influential *Commentaries*, Chancellor of New York James Kent expressed the same view, considering the matter so clear (unlike fishing rights) that he could deal with it in less than two full sentences. Private titles to submerged waterbeds were:

> subjected to the *jus publicum*, as a common highway or easement, for many navigable purposes. The common law, while it acknowledged and protected the right of the owners of the adjacent lands to the soil and water of the river, rendered that right subordinate to the public convenience, and all erections and impediments made by the owners to the obstruction of the free use of the river as a highway for boats and rafts, are deemed nuisances.[76]

Early American judges had trouble making sense of English precedents, in part because their law libraries were limited, in part because rulings in Law

72. *See* DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 247–51 (2d ed. 2010).

73. Leading ones include, *e.g.*, *Lord Fitzwalter's Case* [1673] 86 Eng. Rep. 766 (KB) (by Chief Justice Hale, linking fishing rights to ownership of the soil, apparently without regard for navigability, and confirming public rights to fish in royal waters); Warren v. Matthews [1704] 87 Eng. Rep. 831 (KB) (by Chief Justice Holt, defining public fishing rights in terms of navigability with no suggestion that tidal influence was crucial; again, the public had rights to fish in royal waters); Carter v. Murcot [1768] 98 Eng. Rep. 127 (KB) (by Lord Mansfield, similarly tying fishing rights to navigability). The issue is explored, and the various types of fishing rights inventoried, in GOBLE & FREYFOGLE, *supra* note 72, at 247–53. The types of fisheries are briefly surveyed in 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *37–40.

74. Sir Matthew Hale, De Jure Maris, *reprinted in* Stuart A. Moore, A History of the Foreshore 374–75 (3d ed., 1888).

75. *Id.*

76. JAMES KENT, COMMENTARIES ON AMERICAN LAW 330–31 (O. Holsted ed., 1828).

French often went untranslated. The widely held American stance was that navigability in England was limited to tidal waters and that fishing rights depended on navigability.[77] Kent prominently adopted this view in his influential ruling in *Palmer v. Mulligan*,[78] relying heavily on *The Royal Fishery of Banne*. Joseph Angell treated the issue as clearly settled in his leading 1826 treatise.[79] Later American scholars, perhaps with better libraries, challenged this interpretive stance, at times sharply.[80] Navigability under English law, Louis Houck would claim in his own 1868 treatise, was based on navigability in fact—did the public actually travel on a waterway?—just as Chief Justice Holt and Lord Mansfield had seemingly declared. American courts, Houck asserted, had simply been misled by Hale and his treatise:

> Deprived of Lord Hale's great name, the law, as laid down in the treatise referred to, in relation to rivers, would hardly ever have been recognized in this country. It was the name of that great jurist that dazzled our judges, and caused some of them to disregard the plainest principles of common reason.[81]

Part of the confusion was linked to the different legal uses of the term navigable.[82] The tendency was to define navigability narrowly when the issue had to do with riverbed ownership and fishing rights but more broadly when the issue was about public travel. Modern scholars who have examined the English record have often concluded that Kent and Angell simplified English law unduly, giving it a clarity it lacked.[83] All early writers seemed to agree that waterways used for travel were open to public use, but were they, on that basis, considered navigable, and did it make a difference so long as they were open?[84]

77. *See e.g.*, Palmer v. Mulligan, 3 Cai. 307, 318–19 (N.Y. 1805).

78. *Id.*

79. *See* JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN THE TIDE WATERS 61–62 (1826).

80. *See, e.g.*, LOUIS HOUCK, A TREATISE ON THE LAW OF NAVIGABLE RIVERS 18–19 (1868).

81. *Id.*

82. The U.S. Supreme Court took note of that intellectual disarray in *Shively v. Bowlby*:

> The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Islands and those of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas, and, under the like influence, it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above the tide water at variance with sound principles of public policy.

152 U.S. 1, 43 (1894).

83. For a prominent, much-cited study, see Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water*, 3 FLA. ST. U. L. REV. 511, 568–87 (1975); *see also* Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 53–58 (1976) (providing a related line of interpretation).

84. Joseph Angell's influential treatise on waterways, a companion to his book on tidal waters, illustrates the verbal confusion. Angell used the term navigation and navigable, generally to include all waterways navigable in fact, waterways open to public travel. When speaking of waterways that met the legal definition of navigable, he put the word in quotations, referring to it as "'navigable' . . . in the technical sense," a definition "different from the common acceptation of that word." JOSEPH K. ANGELL, A TREATISE ON THE LAW OF WATERCOURSES 604 (5th ed. 1854). He summarized the law as follows: "[A]ll rivers entirely above the influence of the tide, if they are so large as to admit of navigation, and to be of public use for the passage of vessels, boats, &c., may, as well as those which ebb and flow, be under the servitude of the public interest, and be used as 'public highways' by water." *Id*. at 605.

Whatever the true historical trajectory on the matter, the U.S. Supreme Court, when it took note of the historical record, sided with the original understanding of Kent and Angell.[85] One such summary appeared in a 2012 ruling:

> A distinction was made in England between waters subject to the ebb and flow of the tide (royal waters) and nontidal water (public highways). With respect to royal rivers, the Crown was presumed to hold title to the riverbed and soil, but the public retained the right to passage and the right to fish in the stream. With respect to public highways, as the name suggests, the public also retained the right of water passage; but title to the riverbed and soil, as a general matter, was held in private ownership. Riparian landowners shared title, with each owning from his side to the center thread of the stream, as well as the exclusive right to fish there.[86]

This disagreement over English law rather quickly lost whatever practical importance it may have had. Britain finally resolved its lingering legal uncertainties by firmly embracing the tidal influence test for purposes of fishing rights[87] while American courts largely cast aside the tidal-influence definition to embrace broadly a navigability-in-fact definition for fishing as well as travel.[88] Among the early American rulings to do so was *Carson v. Blazer*.[89] In it, the Pennsylvania Supreme Court refused to apply the English common law as James Kent had described it because the law seemed inapplicable to "our local situation": it made no sense, the court asserted, to say that the busy, mile-wide Susquehanna River was not navigable.[90] The dispute had to do with fishing, not travel—the river was plainly open to travel under English common law.[91] The court's shift from a tidal definition of navigability to navigability-in-fact thus had the intended effect of expanding public rights to fish.

Yet, even with the widespread American embrace of navigability-in-fact, the clash did not entirely dissipate. Some states—New York prominently[92] and Illinois among them, as considered below[93]—claimed to expand public rights by shifting to the navigability-in-fact test but did so only in the case of public rights of travel; public fishing rights remained limited to waterways subject to the tides—which was to say, in the case of Illinois, nowhere—and to settings where a river- or lakebed was publicly owned. That legal stance, of course, displayed a

85. PPL Mont., LLC v. Montana, 565 U.S. 576, 589–90 (2012).

86. *Id.*

87. *See* David Guest, *The Ordinary High Water Boundary on Freshwater Lakes and Streams: Origin, Theory, and Constitutional Restrictions*, 6 J. LAND USE & ENV'T L. 205, 206 (1991).

88. *See* HARRISON C. DUNNING, 2 WATERS AND WATER RIGHTS, § 30.01 n.60 (Amy K. Kelly ed., 2022).

89. 2 Binn. 475, 484–85 (Pa. 1810).

90. *Id.* at 483–85.

91. *Id.* at 476.

92. *Compare* Douglaston Manor, Inc. v. Bahrakis, 678 N.E.2d 201, 203–05 (N.Y. 1997) (public rights to fish are limited to tide-influenced waters), *with* Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192, 1194, 1196 (N.Y. 1998) (all waterways navigable in fact are public highways open to travel and transport; recreational use suffices to establish navigability).

93. *See infra* notes 116–29 and accompanying text.

misunderstanding of what navigability was all about in English law as Kent and Angell had summarized it; navigability for them was about bed ownership and rights to fish, not rights to travel.[94] The whole point of expanding navigability in the New World, asserted the Pennsylvania Supreme Court (which accepted the Kent-Angell interpretation), was to broaden public fishing rights.[95]

This confusion surrounding English law would have little relevance today except insofar as it raises a cautionary flag. The term navigable, for centuries, possessed conflicting, disputed meanings within the legal community; sometimes it included nontidal inland waterways that were public highways, and in some usages the term did not.[96] As the decades unfolded, further interpretive complications and confusion would creep in.[97] Caution is thus in order when making sense of legal documents, dated or recent, that deploy the mischievous word.

III. THE NORTHWEST ORDINANCE OF 1787

The Northwest Ordinance of 1787 provided for the governance of the Northwest Territory (comprising what are today the States of Ohio, Indiana, Illinois, Michigan, and much of Wisconsin and Minnesota) and set the process for admitting new states.[98] It stands as one of the formative documents of American government, often linked in stature to the Declaration of Independence, the Articles of Confederation, and the Constitution.[99] Important standing alone, its influence broadened as Congress used it to guide territorial governance and statemaking in other parts of the expanding country.[100] Its major provisions, according to one study, ultimately applied to thirty-one of the fifty states.[101] Many of its provisions were meant as temporary ones, rules to govern territories until they

94. *See* ANGELL, *supra* note 84.

95. *Carson*, 2 Binn. at 485.

96. *See supra* notes 74–85 and accompanying text.

97. For an insightful recent consideration of current uses of navigability and, in some constitutional settings, their declining importance, see generally Robert W. Adler, *The Ancient Mariner of Constitutional Law: The Historical, Yet Declining Role of Navigability*, 90 WASH. U. L. REV. 1643 (2013).

98. 1 U.S.C. at LVII (2012). The statute's title as enacted was "An Ordinance for the Government of the Territory of the United States North-west of the River Ohio." *Northwest Ordinance (1787)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/northwest-ordinance (May 10, 2022) [https://perma.cc/H5S4-3WTS]. Today typically known as the Northwest Ordinance or Northwest Ordinance of 1787, it was commonly termed in the nineteenth century, including in appellate court rulings, simply as the "ordinance of 1787." *See, e.g.*, Jarrot v. Jarrot, 7 Ill. 1, 4 (1845); Phoebe v. Jay, 1 Ill. 268, 271–72 (1828). For a useful assessment, see generally Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409 (2013).

99. As explained in the leading history of the Ordinance, its early history was ensnarled in controversy over its ban on slavery, a matter that died down over time. *See* PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 109 (1987). "By the eve of the Civil War many northwesterners had come to see the Northwest Ordinance as one of the great state papers of the founding era, perhaps even—in its guarantees of freedom and civil liberty—the most authentically 'American production' of them all." *Id.* at 145.

100. Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 930 (1995). The U.S. Supreme Court had occasion to note some of these many provisions in *Shively v. Bowlby*. 152 U.S. 1, 33 (1894).

101. *See* Duffey, *supra* note 100, at 930.

entered the union as states on an equal footing with other states.[102] But other provisions seemed intended for longer lives, those provisions that set forth individual rights and, in retrospect, provided perhaps the best distillation of what became known as the privileges and immunities of American citizens.

A key provision in Article IV of the Ordinance protected public rights in waterways, rights that traced their origins back to the Magna Carta and earlier:

> The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.[103]

With the adoption of the Constitution some two years later, the new Congress reaffirmed the Ordinance, in the process modifying it in minor ways to take account of the new structure of the national government.[104] Seven years thereafter Congress authorized the surveying and sale of lands in the Territory when and as native title was extinguished.[105] As the U.S. Supreme Court would later note, that 1796 statute "preserve[d] the rights of public highway in the navigable waters" with the following language: "That all navigable rivers, within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways."[106] Congress reiterated the point in an 1804 statute dealing with the "Indiana territory," which included present-day Illinois: "All the navigable rivers, creeks and waters within the Indiana territory, shall be deemed to be and remain public highways . . . ."[107] When authorizing the people of the Illinois territory to form a new state in 1818, Congress commanded that the new state constitution and government continue to abide by the Ordinance.[108]

The free public use of waterways was particularly important in the lives of migrants coming into the state from the south. As one historian of frontier Illinois has explained: "Rivers played huge roles in settlers' lives. Most settlers in early Illinois hailed from states south of the Ohio. Most migrated to Illinois via rivers,

102. *See* Econ. Light & Power Co. v. United States, 256 U.S. 113, 120 (1921).

103. Northwest Ordinance, *supra* note 8, at art. IV. *See also* 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1898 242, 274–75, 281–83, 310, 313–320, 333–343 (Rosco R. Hill ed., 1936).

104. Act of Aug. 7, 1789, 1 Stat. 50. The minor changes did not affect the navigation provision of Article IV.

105. Act of May 18, 1796, 1 Stat. 464, 467. While concluding that the statute had no application to the case at bar, the court in *Braxon v. Bressler* observed that it preserved for the public the right to enjoy the "free and uninterrupted navigation" of all navigable in fact rivers. 64 Ill. 488, 491 (1872).

106. *Econ. Light*, 256 U.S. at 119. Although the discussion here does not probe the possible legal effects of this statute, they could be substantial in that the statute read literally qualifies land titles in Illinois that are rooted in federal grants. In its ruling upholding expansive public use rights in even small streams, the Missouri Supreme Court concluded that landowners in the state took their lands subject to the terms of federal statutes setting up Missouri as a territory and then admitting it as a state. Elder v. Declour, 269 S.W.2d 17, 23–24 (Mo. 1954). Statutes that, like the 1796 federal statute applicable in Illinois, provided that all navigable waters were common highways and forever free. *Id.* A taste of the complexity of this issue can be obtained from *Shively v. Bowlby*. 152 U.S. 1, 9 (1894).

107. Act of March 26, 1804, ch. XXXV, 2 Stat. 277, 279–80.

108. Act of April 18, 1818, 3 Stat. 428, 430.

settled in wooded areas reminiscent of home, and tapped waterways for transportation, water, power, and food."[109]

The utility of rivers at the time was likely greater than today's rivers might suggest, according to another historical account:

> In its early years Illinois was a wetter state than it is today. Streams ran more slowly and at higher levels, while numerous ponds and sloughs held back the runoff. Especially in the wet seasons, the early boats navigated streams which, as a result of changes in drainage patterns, now carry little water.[110]

As noted, much of the Northwest Ordinance had to do with the internal governance of territories, regulatory provisions that were displaced when a territory became a state under a constitution submitted to, and approved by, Congress.[111] The provision of Article IV dealing with navigable waters, nonetheless, remained in place and binding on Illinois and other states; the provision, the U.S. Supreme Court would later make clear, was not "capable of repeal," particularly because it secured access to waters for citizens of all states, not just the inhabitants of Illinois.[112] A similar provision was made applicable to rivers within federal territories generally and remains in place,[113] and by another statute to all land covered by the Louisiana Purchase.[114]

Over the years, litigants in various states would seek to use Article IV of the Northwest Ordinance as a legal tool to halt construction of bridges and other transportation improvements and to resist taxes imposed to pay for them, almost always to fail. As the fullest historical account summarizes, courts hearing such challenges "built on the principle of state equality to hold that those provisions did not deprive the states of the power to provide improvements on the rivers,

109. JAMES E. DAVID, FRONTIER ILLINOIS 17 (1998). For a Pulitzer Prize-winning consideration of the movement toward the use of larger watercraft, see generally 1 R. CARLYLE BULEY, THE OLD NORTHWEST: PIONEER PERIOD 1815–1840 (1950).

110. ROBERT P. HOWARD, ILLINOIS: A HISTORY OF THE PRAIRIE STATE 16 (1972). Rivers adequate for travel by small boats, though, often posed difficulties for larger commercial vessels. *See, e.g.*, PAUL E. STROBLE JR., HIGH ON THE OKAW'S WESTERN BANK: VANDALIA, ILLINOIS 1819–39 101 (1992) (noting that efforts to improve navigation on the Kaskaskia River were not successful enough to support a profitable cargo business until 1840–41).

111. *Econ. Light*, 256 U.S. at 120.

112. *Id.* The ruling of the Indiana Supreme Court in *Gunderson v. State* is not to the contrary despite language that would seem to take a different view. 90 N.E.3d 1171, 1178 (Ind. 2018). That ruling dealt not with public rights in navigable waters but with claims that the public had rights to use adjacent private land bordering the water (Lake Michigan in this instance). *See id.* at 1174. In *Economy Light*, the Court held, rightly, that the Northwest Ordinance did not give access rights to land. 256 U.S. at 123–25. The dispute had nothing to do with "carrying places," the court explained. *Id.* at 120. Given the narrow facts of the case, the court did not quote the language that appears in this paragraph, language providing that public rights in waterways were not "capable of repeal" by a state. *Id.* at 120–21. Also not to the contrary, despite language suggesting otherwise (seeming to ignore *Economy Light*), is *Leitch v. City of Chicago*. 41 F.2d 728, 731 (7th Cir. 1930) (cert. denied) (concluding that the Northwest Ordinance, as an act of Congress, did not limit the power of Congress to authorize a state to fill in a section of a harbor).

113. 43 U.S.C. § 931 ("All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways . . . .").

114. 33 U.S.C. § 10 ("All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways.").

charge reasonable tolls to pay for the river improvements, or build bridges."[115] Article IV was about keeping waterways open to the public, not prohibiting their development and insulating users from sharing the costs.

Illinois courts first applied Article IV of the Ordinance in 1848 in *People v. City of St. Louis* when it decided that a riparian landowner who partially filled-in a waterway committed a public nuisance by blocking navigation.[116] Two later rulings validated the construction of a bridge over a navigable waterway[117] and the regulation by Chicago of uses of its swing bridges,[118] in each case finding that Article IV was not violated without expressly ruling whether the provision still applied.[119] In *Du Pont v. Miller*, the court discussed the Article IV language as a binding rule of law while concluding that a man-made harbor had been dedicated by its owner to public use.[120]

What court rulings have not made entirely clear is the scope of these public access rights and how the term "navigable waters" should be interpreted. The term navigable simply means capable of being navigated; that is, a river or lake allowing travel by boat from place to place.[121] This ordinary interpretation seems reaffirmed with the reference in the Ordinance to "common highways," a term similar to the "public highways" of England that encompassed all waterways actually used for travel, even if, under prevailing definitions, not navigable at law.[122] Native tribe members, early explorers, fur traders, and settlers all used

115. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 177 (2004) (citations omitted).

116. 10 Ill. (5 Gilm.) 351, 370 (1848) ("[T]he substance of the right secured, is, that of free transit."). In dicta taking the form of speculative questions, the court proposed that the object of the Ordinance provision "was the promotion of commerce, and the rights secured are purely commercial." *Id.* at 369. The dispute had to do with a private actor's deposit of fill material in a portion of the river. *Id.* at 351–53. Such an action, the court held, was a public nuisance if done without the state's prior approval, even if it left an ample channel for all river traffic. *Id.* at 371–75.

117. Ill. River Packet v. Peoria Bridge Ass'n, 38 Ill. 468, 474–75 (1865).

118. City of Chi. v. McGinn, 51 Ill. 266, 273–74 (1869).

119. For similar rulings, see McCormick v. Huse, 78 Ill. 363, 370–71 (1875) (treating Article IV as applicable); People *ex rel.* Hoyne v. Metro. W. Side Elevated Ry. Co., 120 N.E. 748, 752–53 (Ill. 1918) (treating Article IV as applicable).

120. 141 N.E. 423, 425–26 (Ill. 1923). The court's ruling came two years after and relied on the U.S. Supreme Court's opinion in *Economy Light. See* Econ. Light & Power Co. v. United States, 256 U.S. 113, 118–19 (1921) (confirming the continued validity of the navigation provision of Article IV). In a later ruling involving a navigable river, the Illinois Supreme Court, in a one-sentence aside, asserted that the Northwest Ordinance did not apply once Illinois entered the Union, without mentioning the U.S. Supreme Court's contrary guidance in *Economy Light*. The dispute involved a river section over which Congress had expressly relinquished control to Illinois to enable the state to fill in a portion of the river. Leitch v. Sanitary Dist. of Chi., 17 N.E.2d 34, 37 (Ill. 1938). In a factually related dispute, *Leitch v. City of Chicago*, the federal appellate court concluded that the Northwest Ordinance did not constrain a later Congress from empowering Illinois to authorize in-stream construction, asserting, without noting the language of *Economy Light*, that the Ordinance generally was not "a limitation upon the power of territory which afterwards became a state." 41 F.2d 728, 731 (7th Cir. 1930).

121. *See Navigable*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/navigable_adj? (last visited Oct. 11, 2023) [https://perma.cc/XPC8-ZZ9K] ("Able to be navigated; allowing the passage of ships or boats."); Adams v. Pease, 2 Conn. 481, 484 (1818) (Hosmer, J.) ("If the term navigable is construed according to its popular import, every river capable of being sailed upon by a boat, however small or shallow, is embraced by it.").

122. PPL Mont., LLC v. Montana, 565 U.S. 576, 589 (2012).

the rivers of Illinois as avenues for travel for all purposes, given the lack of improved roads.[123] A literal interpretation of the Northwest Ordinance language thus suggests it secures and protects public rights in all waterways suitable for travel for any purpose using any type of vessel. Such an expansive interpretation was given the Ordinance by the Illinois Supreme Court in *Illinois River Packet Co. v. Peoria Bridge Co.*, an 1865 ruling approving the construction of bridges over navigable waters so long as they did not materially block navigation.[124] Without expressly deciding whether the Northwest Ordinance applied—only that it was not violated—the Court paraphrased the Ordinance as follows:

> This river is a common highway, free to the Indian in his bark canoe, and to every other vessel floating upon water, whether propelled by animal power, by the wind, or by the agency of steam. It is a common highway, free, and so forever to remain to all citizens of the United States, no matter where residing, not one of whom, in the free use of it, can be compelled, under any pretext, to pay any tax, impost, or duty whatever therefor, nor against its use shall there be an obstruction.[125]

The reference in *Illinois River Packet* to "the Indian in his bark canoe" usefully highlights the need to factor in waterway uses by the various native tribes, often in small watercraft. Their uses—and those of French and British explorers and traders—would also seem protected with Article IV's language that waters were forever free to "the inhabitants" of Illinois as well as to all "citizens of the United States."[126] Another aid in defining navigability comes from Article IV's protection of not just navigable waters but "the carrying places between the same."[127] One scholar has commented on this language and its legal effects on waters in Wisconsin, a state that incorporated Article IV verbatim into its state constitution:

> The framers' inclusion of "carrying places" in the state constitution clarifies what vessels they envisioned navigating Wisconsin's waters. At the state's founding, the "voyageurs" transported furs across the state by canoe. These intrepid traders would canoe up a stream as far as it would take them and then "carry" their canoe and cargo to the next stream. From there, the voyage would continue. The framers thus made sure that the state constitution protected those "carrying places" as it did navigable waters. By including their reference to carrying places, the framers seemed to envision that canoes were the key vessels in defining which waters were navigable.[128]

123. DAVID, *supra* note 109, at 17.

124. 38 Ill. 468, 481 (1865).

125. *Id.* at 478.

126. Northwest Ordinance, *supra* note 8, art. IV.

127. *Id.*

128. Nicholas Bullard, *A Doctrine Adrift: Wisconsin's Public Trust*, 22 U. DENVER WATER L. REV. 1, 17 (2018) (citing, *inter alia*, Nekossa Edwards Paper Co. v. R.R. Comm'n, 228 N.W. 144, 146 (Wis. 1929)).

The Illinois Supreme Court in *Illinois River Packet* also drew upon this "carrying places" language, interpreting it as further evidence that the Northwest Ordinance protected travel by "frail barks" with "light paddles" and other such "light vessels" that could be carried on backs.[129]

Perhaps the most important ruling interpreting the Ordinance has been the U.S. Supreme Court's 1921 opinion in *Economy Light*, mentioned above.[130] That ruling held that the travel route from Lake Michigan, up the Chicago River and on to the Des Plaines and Illinois Rivers, was a public highway covered by the Northwest Ordinance and thus open. In so ruling, the Court clarified earlier opinions that implied the Northwest Ordinance lacked continuing validity:

> To the extent that it pertained to internal affairs, the Ordinance of 1787—notwithstanding its contractual form—was no more than a regulation of territory belonging to the United States, and was superseded by the admission of the state of Illinois into the Union "on an equal footing with the original states in all respects whatever." But, as far as it established public rights of highway in navigable waters capable of bearing commerce from state to state, it did not regulate internal affairs alone, and was no more capable of repeal by one of the states than any other regulation of interstate commerce enacted by the Congress . . . .[131]

When drafting the Northwest Ordinance, Congress drew upon multiple sources of its power, principally its Article IV, Section 3, Clause 2 power to make needful rules and regulations for federal territories. After the territories became states, so it appears, the only federal statutes that continued to bind the new states were those grounded and made legitimate also by the congressional power to regulate interstate commerce or by some other express congressional power.[132] In reaffirming the Northwest Ordinance's provision on rivers as "common highways," the Supreme Court in *Economy Light* based its continued validity on the Commerce Clause power.[133] That reliance showed up in the language the Court used to talk about navigable rivers, drawing upon the navigability test it had formulated for other purposes in *The Daniel Ball*[134] and *The Montello*,[135] long after the enactment of the Ordinance. The Court explained the test as follows:

> [T]he test whether the river, in its natural state, is used, or capable of being used as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water. Navigability, in the sense of the law, is not destroyed because the water course is interrupted by

129. *Ill. River Packet*, 38 Ill. at 482.

130. Earlier, the U.S. Supreme Court, in *Harmon v. City of Chicago*, drew upon Article IV of the Northwest Ordinance to invalidate a City of Chicago license fee imposed on tugboats. 147 U.S. 396, 409–13 (1893).

131. Econ. Light & Power Co. v. United States, 256 U.S. 113, 120–21 (1921) (internal citations omitted).

132. Biber, *supra* note 115, at 175–76 (citing Coyle v. Smith, 221 U.S. 559, 573–74 (1911)).

133. *See Econ. Light*, 256 U.S. at 121.

134. 77 U.S. 557 (1870).

135. 87 U.S. 430 (1874).

> occasional natural obstacles or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.[136]

The interjection of the word "commerce" into the definition of navigability has caused uncertainty about the scope of public rights, even though leading Supreme Court rulings appeared to state that mere travel, as well as trade, qualified as commerce. On this point, it needs noting that the word "commerce," as popularly understood and used in the nineteenth century and earlier, covered all manner of direct social interaction.[137] In an early Commerce Clause ruling, *Gibbons v. Ogden*, the U.S. Supreme Court found it "necessary to settle the meaning of the word" as used in the Constitution.[138] The appellee in the case sought to limit the term to "traffic, to buying and selling, or the interchange of commodities" and denied that it included "navigation."[139] The Court rejected this narrow view, which would, it said, "restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse."[140] "All America," it went on to state, "understands, and has uniformly understood, the word 'commerce,' to comprehend navigation."[141]

As the leading study of the issue explains, "commerce" at the time of the Northwest Ordinance and for a lengthy time thereafter "meant 'intercourse' and it had a strongly social connotation."[142] The author summarized:

> "Commerce" was interaction and exchange between persons or peoples. To have commerce with someone meant to converse with them, meet with them, or interact with them. Thus, commerce naturally included all trade and economic activity because economic activity was social activity. But the idea of commerce-as-intercourse was broader than economics narrowly conceived—it also included networks of transportation and communication through which people traveled, interacted, and corresponded with each other.[143]

Consistent with this common usage, the words "trade" and "travel" would seem to identify the two forms of "commerce" as the term was used in *The Daniel Ball*

136. *Econ. Light*, 256 U.S. at 121–22.

137. According to the unabridged Oxford English Dictionary, the term "commerce" through the nineteenth century included among its meanings "to have intercourse or converse, hold communication, associate *with*" and "to communicate physically." *Commerce*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (emphasis added).

138. 22 U.S. 1, 189 (1824).

139. *Id.*

140. *Id.*

141. *Id.* at 190. Later in its opinion, the Court reiterated the point, concluding that the term commerce, as used in the Constitution, "comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word 'commerce.'" *Id.* at 193. Similarly, the Court explained in *Gilman v. City of Philadelphia* that "[c]ommerce includes navigation. 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 which are accessible from a State other than those in which they lie." 70 U.S. 713, 724–25 (1865).

142. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 1 (2010).

143. *Id*.

and *The Montello*, with the word "travel" seemingly synonymous with "navigation" as used in *Gibbon v. Ogden.* On this point, guidance might be drawn from Chancellor Kent's Commentaries, quoted above,[144] even though they appeared a half-century later. Seeming to present a well-understood part of the law, Kent described the *jus publicum* simply as "a common highway or easement" for travel by "rafts and boats," with no reference to trade or economic motive.[145]

Given all of this—the literal language of the Northwest Ordinance, the original common meaning of "commerce," the definition offered in *Gibbons v. Ogden,* and the only dictionary meaning of navigability—navigable waters under the Ordinance most sensibly include all waters useful for travel; that is, all waters serviceable as common or public highways for any purpose.[146] The *Economy Light* Court, anxious to ground the Ordinance in an enumerated power unrelated to territorial governance, interpreted Article IV in light of the then-understood scope of the Commerce Clause by emphasizing the national gains produced by the free movement of goods. Congress's power under that Clause, however, has expanded considerably since 1921, far beyond the regulation of business-related travel,[147] allowing the Ordinance provision today to be interpreted and applied as written and, one presumes, originally intended. It would be anomalous to deviate from the provision's plain and original meaning due to limits on the Commerce Clause that appeared long after 1787 (and indeed after *Gibbons v. Ogden*), were embraced for a time, and then abandoned.[148]

The issue, however, may be of little importance now with the recognition in recent decades that recreation-type river uses can also be commercial, as when canoes or kayaks are commercially rented, or rivers are used by fishing guides and kayaking and canoeing instructors.[149] A waterway suitable for this new commerce would seem navigable, even using a narrow, economic definition of commerce, whether or not it has been so used.

144. *See supra* note 76 and accompanying text.

145. *See supra* note 76 and accompanying text.

146. Given that the Ordinance, when enacted, would have been based on the government's power over the territories under Article IV, Section 3, the business-nature of any particular travel would not have been relevant. *See* Shively v. Bowlby, 152 U.S. 1, 48 (1894) (The United States "[has] the entire dominion and sovereignty, national and municipal, federal and state, over all the territories.").

147. *See* Kaiser Aetna v. United States, 444 U.S. 164, 173–74 (1979) (Congress's Commerce Clause power over waters no longer depends on any notion of navigability).

148. It is possible today that the Ordinance, as originally and broadly understood, could be upheld also under the federal power to control territories and other federal property, U.S. CONST. art IV, § 3, cl. 2. (the Property Clause), which, like the Commerce Clause, is understood to confer on Congress far greater powers than originally believed. *See* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (noting that the power of Congress over federally owned land is essentially without limit). That broad power could include the capacity to impose enduring limits on land titles that are immune from state alteration, particularly given that government grants are strictly construed against the grantee. *Shively*, 152 U.S. at 10. *Cf.* Elder v. Delcour, 269 S.W.2d 17, 23–24 (1954) (land titles in Missouri are taken subject to territorial-era federal statute and the state's federal enabling act prescribing that all navigable waters are common highways and forever free). Conditions on land grants made to states at the time of territorial creation or statehood remain binding, as title limitations, after statehood. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 633 (1989) (Arizona remained obligated to comply with limits on lands given to it in trust to support state schools).

149. *See, e.g.*, Adirondack League Club v. Sierra Club, 706 N.E.2d 1192, 1195 (N.Y. 1998) (explaining that recreational boating has commercial aspects).

A further clue on the interpretation of the Northwest Ordinance comes from states in which the Ordinance has been incorporated verbatim into state law. One such state is Wisconsin, which added the Ordinance to Article IX, Section 1, of its state constitution.[150] Its state supreme court has interpreted this language as imposing upon the state a broad public trust to protect public rights in waterways. The language, the court has ruled, secures public access to all waterways usable for any purpose:

> The public trust doctrine is premised upon the existence of "navigable waters." The test of navigability discussed in *Olson v. Merrill*, 42 Wis. 203, 212 (1877), whether a stream has the capacity to float logs to market (at least part of the year), has long since been replaced by the standard of "*navigable in fact for any purpose*." [S]ince 1911 it is no longer necessary in determining navigability of streams to establish a past history of floating of logs, or other use of commercial transportation, because any stream is "*navigable in fact*" which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.[151]

Similarly, the Wisconsin court has recognized a broad array of public rights in these waterways:

> This court has long held that the public trust in navigable waters "should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits." Broadly interpreting the public trust has resulted in recognition of more than just commercial navigability rights. Protection now extends to "purely recreational purposes such as boating, swimming, fishing, hunting, . . . and . . . preserv[ing] scenic beauty."[152]

These Wisconsin rulings and ones from other states that have similarly incorporated the Northwest Ordinance into state law[153] are useful as analogies but cannot be viewed simply as interpretations of the federal Ordinance. Once the Ordinance's language is incorporated into state law, state courts can give it a state law interpretation, as Wisconsin has done, at least when the state's interpretation does not curtail the federal statute.

More directly useful are analogous rulings from other states based not on state law versions of the Ordinance's language but on its incorporation into federal statutes governing the organization of territories and the admission of new states. In its leading ruling dealing with public waterway use, *State v. Sorensen*,

150. WIS. CONST. art. IX, § 1.

151. Rock-Koshkonomg Lake Dist. v. Wis. Dep't of Nat. Res., 833 N.W.2d 800, 818 (Wis. 2013) (footnotes and internal citations omitted).

152. *Id.* at 817 (footnotes and internal citations omitted).

153. For instance, South Carolina's constitution provides that "[a]ll navigable waters shall forever remain public highways free to the citizens of the State and the United States . . . ." S.C. CONST. art. XIV, § 4. According to the state supreme court, the provision requires no showing of commercial use; pleasure traffic is also protected. Brownlee v. S.C. Dep't of Health & Env't Control, 676 S.E.2d 116, 120–21 (S.C. 2009).

the Supreme Court of Iowa turned to the federal state admitting the state to the union, a statute containing language nearly identical to that of the Northwest Ordinance.[154] "The original act admitting Iowa," the court concluded, "requires that navigable waterways be given special status—one which has come to be known as 'public trust' property."[155] The Iowa public trust doctrine based on that federal statute was not "limited to navigation or commerce; it applie[d] broadly to the public's *use* of property, such as waterways, without ironclad parameters on the types of uses to be protected."[156]

A similar ruling based on a federal statute largely duplicative of the Northwest Ordinance is the leading ruling on public access from neighboring Missouri, *Elder v. Delcour*,[157] a dispute involving a stream capable of supporting canoes, rowboats, and other small watercraft but not navigable in fact by anything larger.[158] The court relied upon an 1812 federal statute authorizing the establishment of a territorial government and the 1820 federal statute admitting Missouri to the union—both declaring all navigable waterways common highways and forever free—to conclude that the property rights riparian landowners hold in submerged lands were subject to broad public use rights.[159] On the facts, the court found that the small stream was a public water and thus "a public highway for travel and passage by floating and by wading, for business or for pleasure."[160]

A final ruling worth noting is *Silver Springs Paradise Co. v. Ray*, in which a federal appellate court in 1931 upheld the right of a public company to use a Florida river to transport customers in glass-bottomed boats to see the river bottom.[161] The court did so based on an 1823 federal statute providing that "all the navigable rivers and waters" in what is now the State of Florida "shall be, and forever remain, public highways."[162] Drawing upon the statute, the court explained the public's river-use rights as follows:

> The public right of navigation entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as for carrying persons or property gratuitously or for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right to possess the common.[163]

154. 436 N.W.2d 358, 361 (1989).

155. *Id.*

156. *Id.* at 363. The court went on to cite favorably a law review summary of the public trust doctrine that included, within the scope of public rights, fishing, bathing, recreation, and enjoyment, as well as navigation and commerce. *Id.*

157. 269 S.W.2d 17, 19 (Mo. 1954).

158. *Id.*

159. *Id.* at 23–24.

160. *Id.* at 26. The court went on to confirm that public uses included fishing, noting that fish were owned by the state, not private landowners. *Id.*

161. 50 F.2d 356, 360 (5th Cir. 1931).

162. 3 Stat. 756 (1823).

163. *Silver Springs*, 50 F.2d at 359.

No Illinois court ruling aside from *Illinois River Packet*, considered above, has shed useful light on the meaning of "navigable waters" under the Northwest Ordinance, nor has any Illinois ruling explored—as the Wisconsin rulings have—the ways the public can use these "common highways." The literal language of the Ordinance, as discussed above, however, and rulings from federal courts and other states, strongly suggest that federal law protects public rights to travel in all waterways capable of supporting even the smallest of watercrafts. As for rights to fish in such waters, precedents are less clear but contain no suggestion that public fishing is banned in any waters covered by the Ordinance.[164] Travelers in the era of 1787 would certainly have felt free to fish as they went along, whether or not necessary for survival. Moreover, as discussed below,[165] the early American countryside was treated as a commons, open to all, except in the case of private lands that were fenced or cultivated; this spirit of openness and freedom would have given travelers a green light to hunt and fish as they liked, as a matter of right. On the other side, Article IV's description of rivers as "common highways" and the similar versions referring to "public highways" invite a direct comparison with common law understandings of public highways, usable in Britain for travel but not including rights to fish in nontidal waters.

As a final point, it is worth noting that one scholar and at least one federal appellate court have wondered whether the various individual rights set forth in the Northwest Ordinance, including Article IV's language on rights to use navigable waters, are among the "privileges and immunities of citizens of the United States" protected by the Fourteenth Amendment.[166] This stance builds on language in the fountainhead ruling on privileges and immunities, the *Slaughter-House Cases*,[167] which listed, among these privileges and immunities, a citizen's right "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government"; the "right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*," and the "right to use the navigable waters of the United States, however they may penetrate the territory of the several States."[168] If Article IV's navigation provision is among the privileges and immunities, it would possess a secure constitutional foundation apart from the Commerce Clause.

This issue on the reach of the privileges and immunities clause was raised in *Courtney v. Goltz*, a dispute in which a ferry operator resisted a state statute requiring operators to obtain a certificate of "public convenience and necessity" on the ground that such a regulatory requirement violated his federal

164. *See infra* notes 327–48 and accompanying text.

165. *See infra* notes 207–17 and accompanying text.

166. *See* Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820, 1826–27 (2011). A similar, broader perspective, looking at the constitutional dimensions of the Ordinance, is Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 933 (1995).

167. 83 U.S. 36, 79 (1872).

168. *Id.*

constitutional right to navigate public waters.[169] In rejecting the claim, the court distinguished between navigation—meaning, simple travel on a waterway—and the conduct of a commercial business on the water.[170] The federal right, if it existed, extended only to navigation in the sense of travel, leaving states free to regulate commercial activity except as preempted by congressional actions. "Thus," the court concluded:

> Even if we assume that the examples of rights deriving from national citizenship set forth by the Supreme Court in the *Slaughter-House Cases* are not mere dicta, we nevertheless find that the right "to use the navigable waters of the United States" does not include a right to operate a public ferry on Lake Chelan.[171]

With its distinction between travel and commerce—the former perhaps federally protected, the latter subject to concurrent state regulations—the ruling aligns with a literal reading of Article IV while leaving open an intriguing constitutional possibility.

IV. THE FEDERAL NAVIGATION SERVITUDE

A second source of public rights to use waterways is the federal navigation (or navigational) servitude, a special power the federal government retains over all navigable waterways and that, among other effects, secures a public right to access and use waterways covered by it. The servitude arises out of the Commerce Clause of the U.S. Constitution and supplies the government with particularly strong powers to manage navigable waters in the public interest, without regard for state-law property rights.[172]

Perhaps the most significant and controversial aspect of the navigation servitude is that it insulates the federal government from the duty to compensate owners of riparian and littoral lands when their land uses are disrupted or property values reduced by federal actions to aid navigation, by the construction of berms, locks, and dams, for instance.[173] As the cases discussed here illustrate, disputes arising under the servitude in recent decades have often dealt instead with public access rights and with the test used to decide which waterways are subject to the servitude and, as such, publicly open.[174]

The navigation servitude "exists by virtue of the Commerce Clause," the United Supreme Court explained in its most recent ruling on the issue, *Kaiser Aetna v. United States*.[175] It secures "the exercise of the public right of navigation" as well as "the governmental control and regulation necessary to give effect

169. 736 F.3d 1152, 1154–56 (9th Cir. 2013).

170. *Id*. at 1158.

171. *Id*. at 1159.

172. *See infra* notes 175–80 and accompanying text.

173. *See, e.g.*, United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950); United States v. Chicago, 312 U.S. 592, 596–97 (1941); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 62 (1913).

174. *See infra* notes 175–230 and accompanying text.

175. 444 U.S. 164, 177 (1979).

to that right."[176] It is more than simply a regulatory power. It is, as the Court has variously said, a "dominant servitude: on all submerged lands subject to it";[177] "a permanent easement that [is] a preexisting limitation" upon the title of all such submerged lands, including lands held by private owners.[178] "When a navigational servitude exists, it gives rise to the right of the public to use those waterways" to which it applies.[179] As the Court explained in *United States v. Twin City Power Co.*:

> It is no answer to say that these private owners had interest in the water that were recognized by state law. We deal here with the federal domain, an area which Congress can completely preempt, leaving no vested private claims that constitute "private property" within the meaning of the Fifth Amendment.[180]

The Supreme Court elaborated on this latter point in *Kaiser Aetna*, quoting an earlier ruling:

> "Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at such times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public rights of navigation."[181]

As the Supreme Court has pointed out in recent decades, federal law makes use of varied definitions of navigability—under the Federal Power Act, Clean Water Act, and Rivers and Harbors Act, for instance—which means readers must remain alert for definitional differences.[182] As the Court in *Kaiser Aetna* explained, the federal regulatory power under the Commerce Clause reaches beyond any definition of navigable waters and indeed beyond waterways of any type.[183] The current, broad scope of that power is thus not a guide for interpreting the reach of the navigation servitude, even as the Clause gave rise to that servitude.

The definition of navigable waters that frames the navigation servitude–or provides the starting point for it—is again the one set forth in *The Daniel Ball*[184]

176. United States v. Cress, 243 U.S. 316, 320 (1917).

177. United States v. Rands, 389 U.S. 121, 122–23 (1967).

178. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992). In a thoughtful study, Bennett J. Ostdiek concludes that "the navigation servitude is the public trust doctrine applied to the federal government." Ostdiek, *supra* note 51, at 237.

179. Dardar v. Lafourche Realty Co., 985 F.2d 824, 832 (5th Cir. 1993) (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979)).

180. United States v. Twin City Power Co., 350 U.S. 222, 227 (1956).

181. *Kaiser Aetna*, 444 U.S. at 175–76 (quoting Scranton v. Wheeler, 179 U.S. 141, 163 (1900)).

182. *See, e.g.*, PPL Mont., LLC v. Montana, 565 U.S. 576, 592 (2012) (surveying key differences in the application of the federal navigability test as used for various constitutional purposes).

183. *Kaiser Aetna*, 444 U.S. at 173–74.

184. 77 U.S. 557, 563 (1870).

and *The Montello*.[185] The Court in *Kaiser Aetna* drew upon these rulings indirectly when it confined the servitude to waters "that in their natural condition are in fact capable of supporting public navigation."[186] The *Cress* ruling, in turn, turned to *The Daniel Ball* and *The Montello*:

> "Those rivers must be regarded as public navigable waters in law which are navigable in fact. And they are navigable in fact when they are used, *in their ordinary condition*, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[187]

The ruling in *The Montello*[188] had to do with the meandering Fox River in Wisconsin, which the court found navigable—all the way to its source—even though rapids and falls obstructed travel on the river in its natural condition:

> There are but few of our freshwater rights which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox river, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but *the vital and essential point is whether the natural navigation of the river* is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand bars.[189]

In language not quoted in *Cress*, the court in *The Montello* elaborated:

> If [a river] be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode in which a vast commerce may be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river.[190]

In the case of a navigable stream, the servitude "extends to the entire stream and the stream bed below ordinary highwater mark."[191] The servitude reaches to the high-water mark even when the water at that point is too shallow to support any navigation.[192] On the other hand, wetlands adjacent to a navigable water may

185. 87 U.S. 430, 436 (1874).

186. *Kaiser Aetna*, 444 U.S. at 175 (citing United States v. Cress, 243 U.S. 316 (1917)).

187. *Cress*, 243 U.S. at 323 (quoting *The Daniel Ball*, 77 U.S. at 563).

188. *See The Montello*, 87 U.S. at 436–37.

189. *Cress*, 243 U.S. at 324 (quoting *The Montello*, 87 U.S. at 443).

190. *See The Montello*, 87 U.S. at 441–42.

191. United States v. Cherokee Nation of Okla., 480 U.S. 700, 704 (1987).

192. Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1382 (Fed. Cir. 2000) ("[T]he entire body up to the mean high water mark is subject to the navigational servitude, regardless of particular depths."). Under the Equal Footing Doctrine, states took title to all lands submerged by tidal waters, even when the waters were

not themselves be navigable.[193] The servitude applies to waterways which become navigable through erosion.[194] Also, as the court in *United States v. Harrell* explained, "it is clear that a stream, to be navigable, need not be open to navigation 'at all seasons of the year, or at all states of the water.'"[195] "However, as the district court correctly reasoned, 'susceptibility of use as a highway for commerce should not be confined to 'exceptional conditions or short periods of temporary high water.'"[196] In *Harrell*, the alleged waterway at issue was found non-navigable because it was grass covered and useable only when occasionally inundated by floodwaters backing up from a major river downstream.[197]

Aside from the cases mentioned, a handful of rulings have clarified the line between navigable and non-navigable in smaller rivers and streams. In *Loving v. Alexander*, the Army Corps of Engineers sought to provide public access for recreational users to a section of the Jackson River in Virginia, drawing upon the navigation servitude.[198] The court found the river at issue navigable based on evidence it was used to float logs to market in the 1880s up to 1907 at times when the river level rose high enough to support the logs.[199] The log floats "did not extend over a long period of time" but "were regular, not occasional, drives whenever the water level rose 18 inches or more, which happened in a somewhat predictable fashion several times each year."[200] This log floating showed the river's capacity to support commercial use, even as railroad competition undercut the practice.[201] It was "the capacity for use, not the actual extent and manner, that [was] determinative."[202] As the lower court in this case had found, the waterway segment at issue supported no commercial navigation nor could such navigation reasonably be expected for economic reasons. [203] Still, the court reported, "canoes can navigate the upper river without trouble except during late summer, and canoeing experts consider the Jackson to be a very fine canoeing stream, except for troubles with landowners along the river."[204]

The federal district court ruling in *Goodman v. City of Crystal River* involved the ability of boaters to gain access to a short stream, Three Sisters, that had not appeared on original land surveys and was never meandered.[205] Evidence in the case showed the stream had been accessed over the decades by canoe-

too shallow to be navigable in fact; all such lands were impressed with public trust duties. *See, e.g.*, Phillips Petrol. Co. v. Mississippi, 484 U.S. 469 (1988).

193. *See* Alameda Gateway, Ltd. v. United States, 45 Fed. Cl. 757, 757 (Fed. Cl. 1999).

194. *See* Dardar v. Lafourche Realty Co., 985 F.2d 824, 833 (5th Cir. 1993).

195. 926 F.2d 1036, 1040 (11th Cir. 1991) (quoting Econ. Light & Power Co. v. United States, 256 U.S. 113, 122 (1921)).

196. *Id.* (quoting United States v. Utah, 283 U.S. 64, 87 (1931)).

197. *Id.* at 1042.

198. *See generally* 745 F.2d 861 (4th Cir. 1984).

199. *Id.* at 867.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 866.

204. Loving v. Alexander, 548 F. Supp. 1079, 1085 (W.D. Va. 1982), *aff'd*, Loving v. Alexander, 745 F.2d 861 (4th Cir. 1984).

205. *See generally* 669 F. Supp. 394 (M.D. Fla. 1987).

length, flat-bottom boats of fourteen to eighteen feet in length, used to haul drinking water and for recreation, transportation, and occasional commercial fishing. The court made its determination drawing upon this history of use even while explaining that such use was not needed; it was not a history of use but rather "'the capability of use by the public for purposes of transportation and commerce'" that provided the "true criterion of the navigability of a river."[206]

A federal court ruling from Georgia provides further guidance on the servitude's navigability standard and the range of activities that qualify as commercial uses.[207] *Atlanta School of Kayaking, Inc. v. Douglasville-Douglas-County Water and Sewer Authority* involved a dispute over public recreational access to a whitewater river in northern Georgia.[208] The case was brought by a company providing kayaking lessons and a private canoe instructor seeking a preliminary injunction to halt interferences with their access to the river.[209] The river, they asserted, was "generally considered a high water run that is runnable on an infrequent basis at best" and provided a "particularly enjoyable whitewater experience only after rainfall."[210] The court found the segment could be used more frequently for less thrilling trips by "canoes, kayaks, rafts, innertubes, and similarly sized vessels" and that "at some water levels, larger watercraft also might be used."[211] The court issued the injunction upon concluding the plaintiffs were substantially likely to prevail in their claim that the river was open under the navigation servitude "because of the ability of kayaks and canoes to travel down the river"—despite "rapids, rocks, and shifting currents"—and given that kayak and canoe instructors could travel down the river with students for pay.[212]

Similar evidence on the meaning of "commerce" appears in *Utah v. United States* involving the Great Salt Lake in Utah.[213] The case had to do with the definition of navigability for a slightly different purpose—for determining whether Utah gained ownership of the submerged land under the "navigability for title" test—but the court nonetheless applied the basic standard, drawn from *The Daniel Ball*, also used in navigation servitude disputes.[214] Capacity for commercial use was adequately established, the Court ruled, by evidence that livestock owners from time to time hauled animals from the mainland to islands in the Lake.[215]

206. *See id.* at 400 (quoting Econ. Light & Power Co. v. United States, 256 U.S. 113, 122–23 (1921)).

207. *See generally* Atlanta Sch. of Kayaking, Inc. v. Douglasville-Douglas-Cnty. Water & Sewer Auth., 981 F. Supp. 1469 (N.D. Ga. 1997).

208. *Id.* at 1471.

209. *Id.* at 1469.

210. *Id.* at 1471.

211. *See id.*

212. *Id.* at 1473. This federal law ruling is usefully compared with a near contemporary ruling by the Supreme Court of the same state, *Givens v. Ichauway, Inc.*. *Compare Atlanta School of Kayaking*, 981 F. Supp. 1469 *with* Givens v. Ichauway, Inc., 493 S.E.2d 148, 151 (Ga. 1997) (suggesting that, as a matter of state law, a river was navigable only if capable of floating a barge that is 245 feet long, 35 feet wide, with a 7-foot, 6 inch draft). Considered together, the two rulings show starkly how federal law can deviate from state law.

213. 403 U.S. 9, 12 (1971).

214. *Id.* at 9–10.

215. *Id.* at 11.

It was irrelevant, the Court said, that the owners acted on their own behalf, not for hire by others.

> It is suggested that the carriage was also limited in the sense of serving only the few people who performed ranching operations along the shores of the lake. But that again does not detract from the basic finding that the lake served as a highway and it is that feature that distinguishes navigability and nonnavigability.[216]

Finally, the Ninth Circuit ruling in *State of Alaska v. Ahtna* considered the navigability of the Gulkana, an Alaskan river, doing so (as in *Utah v. United States*) for purposes of determining title but also applying *The Daniel Ball* test.[217] The river at issue was used for recreational purposes.[218] That use, the court concluded, provided ample evidence that the river was navigable:

> Ahtna and amicus argue that the principal uses of the Gulkana have always been recreational, and that recreational uses do not support a finding of navigability. This argument is unpersuasive. The test is whether the river was susceptible of being used as a highway for commerce at statehood, not whether it was actually so used.[219]

In recent decades, guided fishing and sightseeing trips were undertaken on the river by various entrepreneurs, activity that, for the court, qualified as commercial.[220] The court stated:

> To deny that this use of the River is commercial because it relates to the recreation industry is to employ too narrow a view of commercial activity. "[N]avigability is a flexible concept and 'each application of the [*Daniel Ball* test] . . . is apt to uncover variations and refinements which require further elaboration.'"[221]

The above rulings—which are not contradicted by others—seem to establish that canoe rentals qualify as a commercial use of a waterway, adequate to establish navigability for purposes of the navigation servitude, or at least adequate to demonstrate that other, more clearly commercial uses (guided trips, hired fishing guides, transport) would be feasible.[222] Again, a history of commercial use is not needed to establish navigability although it is useful for that purpose; it is the capacity of the river in its original condition to sustain such use,

216. *Id.*

217. 891 F.2d 1401, 1403–04 (9th Cir. 1989).

218. *Id.* at 1403.

219. *Id.* at 1405.

220. *Id.*

221. *Id.* (internal citations omitted).

222. *See generally* Loving v. Alexander, 745 F.2d 861 (4th Cir. 1984); Loving v. Alexander, 548 F. Supp. 1079 (W.D. Va. 1982), *aff'd*, *Alexander*, 745 F.2d. 861; Goodman v. City of Crystal River, 669 F. Supp. 394 (M.D. Fla. 1987); Atlanta Sch. of Kayaking, Inc. v. Douglasville-Douglas-Cnty. Water & Sewer Auth., 981 F. Supp. 1469 (N.D. Ga. 1997); Givens v. Ichauway, 493 S.E.2d 148 (Ga. 1997); Utah v. United States, 403 U.S. 9 (1971); Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989).

without regard for whether the river was or has ever been actually used.[223] The opinions also offer a perspective on the Illinois Supreme Court's recent ruling in *Holm v. Kodat* dealing with the Mazon River.[224] Evidence there showed that the plaintiffs (the Holms) used watercraft to transport fossils on the river for commercial purposes.[225] That evidence alone would seem sufficient to establish the river's susceptibility for commercial use and thus navigability so long as the kayaking was not made possible only by material physical improvements to the river. The river segment was thus subject to the navigation servitude (as well as the Northwest Ordinance of 1787) and open for public travel.[226]

A final matter: The above discussion has sought to get clear on which waterways are subject to the servitude. Importantly, public users in these cases, many of them, sought access to fish, not just travel.[227] In a further case, *Vaughn v. Vermilion Corp.*, commercial fishers sought access under the navigation servitude to canals that, although connected to navigable waterways, were non-navigable under state law and hence closed to public use.[228] Some of the canals were entirely human constructed; others, although also constructed, were allegedly created "in part by means of diversion or destruction of a preexisting natural navigable waterway."[229] Although agreeing that human-constructed canals generally were not covered by the servitude, the U.S. Supreme Court ruled that the servitude would apply, thereby granting access to the commercial fishers, whenever canals had destroyed or diverted naturally navigable waterways.[230] The servitude provided a federal defense for the fishermen to a state law trespass action.

The navigation servitude, in sum, seems largely to duplicate in Illinois the content of the Northwest Ordinance of 1787 in that it protects public rights to use all waterways capable of supporting travel in any form of craft, recreation boats included.[231] More firmly than the servitude, it also protects public rights to fish in such waters.[232]

V. THE PUBLIC TRUST DOCTRINE

The body of law that most strongly protects public rights in waterways in much of the country is the public trust doctrine, a vaguely titled collection of

223. *See* FPL Energy Maine Hydro LLC v. FERC, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (finding a river susceptible to commercial use, despite no history of any use, commercial or recreational, based solely on three test canoe trips made for purposes of the litigation) ("The statute and the case law make clear that evidence of *actual use* is not necessary for a navigability determination.").

224. 211 N.E.3d 310, 320; *see supra* notes 4–33 and accompanying text (discussing *Holm v. Kodat*).

225. *Holm*, 211 N.E.3d at 12.

226. *See Utah*, 403 U.S. at 11.

227. *See, e.g.*, Dardar v. Lafourche Realty Co., 985 F.2d 824, 826 (5th Cir. 1993); United States v. Harrell, 926 F.2d 1036, 1038 (11th Cir. 1991); *Alexander*, 745 F.2d at 863.

228. 444 U.S. 206, 207–08 (1979).

229. *Id.*

230. The Court's ruling on the issue comports with the common law, as presented in ANGELL, *supra* note 84, at 540.

231. Sax, *supra* note 65, at 513.

232. *See, e.g.*, *Dardar*, 985 F.2d at 826; *Harrell*, 926 F.2d at 1038; *Alexander*, 745 F.2d at 863.

precedents with deep historical roots. The subject of dozens or even hundreds of scholarly articles and books, the doctrine rests on both federal and state law to protect a varied mix of public rights in waterways and, in some states, in other parts of nature.[233] Illinois law on the subject is sparsely developed compared with the laws of other states, many of which have applied the doctrine broadly to protect a wide range of public use rights, recreation included.[234] The Illinois Supreme Court, over the generations, has applied the doctrine firmly to protect public rights in and along the shore of Lake Michigan.[235] It has said little about how the doctrine applies to the state's inland waterways. Its few comments on that issue, mostly in the course of a 1976 ruling dealing with the Lake Michigan shore, suggest the doctrine similarly applies to protect public rights in all of the state's waters.[236] The scope of that doctrine, however, remains unclear, leaving the field open for further judicial explanation and legislative action.

In a broad sense, the public trust doctrine builds upon and carries forward longstanding public fears that governments and private landowners might take over waterways, curtailing public rights to use them.[237] Early in American history it was understood that states owned lands beneath navigable waters but held such lands subject to public rights.[238] Title to these submerged lands passed to the original thirteen states (or their citizens) directly from the British Crown; they were an attribute of the sovereign's rights that the new states assumed as new sovereigns in America.[239] Thereafter, all new states obtained ownership of lands beneath navigable waterways within their borders when and as they joined the union on an equal footing with the original states.[240] They took title to this land subject to a "duty to preserve unimpaired those public uses for which the [submerged] soil is held."[241] Lands so obtained had a "unique status in the law" and "were infused with a public trust that the State itself [was] bound to respect," as the U.S. Supreme Court would explain in 1997 in *Idaho v. Coeur d'Alene Tribe*.[242]

In that leading ruling the Court sketched the doctrine's history:

> The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable

233. As noted, the legal writing that stimulated modern interest in the doctrine was Sax, *supra* note 65.

234. DUNNING, *supra* note 88, §§ 30.02, 32.03.

235. *See generally* Revell v. People, 52 N.E. 1052, 1053–60 (Ill. 1899); Scott v. Chi. Park Dist., 360 N.E.2d 773 (Ill. 1976); People *ex rel.* Moloney v. Kirk, 45 N.E. 830 (Ill. 1896).

236. *See infra* notes 270–73 and accompanying text.

237. For a probing discussion of the issue, see generally Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENV'T AFFS. L. REV. 1 (2017). For another broad account, see generally Connor Bartlett McDermott, *Monopolizers of the Soil: The Commons as a Source of Public Trust Responsibilities*, 61 NAT. RES. J. 125 (2021). For a now-standard survey of the public trust doctrine, see generally MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW (3d ed. 2015).

238. *See* Martin v. Waddell's Lessee, 41 U.S. 367, 406 (1842) (drawing upon the influential state court ruling in Arnold v. Mundy, 6 N.J.L. 1, 76–77 (1821)).

239. *Id.* at 410.

240. Pollard's Lessee v. Hagan, 44 U.S. 212, 228–29 (1845).

241. Smith v. Maryland, 59 U.S. 71, 74–75 (1855) (citations omitted).

242. 521 U.S. 261, 284 (1997).

> waters uniquely implicate sovereign interests. The principle arises from ancient doctrines. The special treatment of navigable waters in English law was recognized in Bracton's time. He stated that "[a]ll rivers and ports are public, so that the right to fish therein is common to all persons. The use of river banks, as of the river itself, is also public." The Magna Carta provided that the Crown would remove "all fish-weirs . . . from the Thames and the Medway and throughout all England, except on the sea coast." The Court in *Shively v. Bowlby*, summarizing English common law, stated: "In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King; except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage . . . and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing."[243]

Not surprisingly, American law adopted as its own much of the English law respecting navigable waters, including the principle that submerged lands are held for a public purpose. What is often termed the "lodestar" of public trust jurisprudence in the United States arose out of a dispute over land on the Illinois shore of Lake Michigan, a suit ultimately resolved by the U.S. Supreme Court in *Illinois Central Railroad Co. v. Illinois.*[244] Submerged lands along the shore, the Court ruled, were owned by the state but possessed:

> a title different in character from that which the state holds in lands intended for sale . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of any private parties.[245]

Later rulings by the Supreme Court would clarify that the core of the public trust doctrine attached to lands that states obtained under the equal footing doctrine. The lands so obtained were the submerged lands underlying waters deemed navigable under what became known as the federal-law, navigability-for-title test.[246] That navigability test begins with the classic ruling in *The Daniel Ball*, but is applied in a particular way, as the Court would explain in *PPL Montana v. Montana*:

243. *Id.* (citations omitted). It is useful to note that the sources cited by the Supreme Court all have to do with the protection of public rights to fish. *See, e.g.*, INSTITUTES OF JUSTINIAN, Lib. II, Tit. I, § 2 (T. C. Sanders transl., 7th ed.) ("Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common"); 2 HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ 40 (S. Thorne transl., 1968); MICHAEL EVANS & R. IAN JACK, SOURCES OF ENGLISH LEGAL & CONSTITUTIONAL HISTORY 53 (1984); *Waddell*, 41 U.S. at 420–34 (Thompson, J., dissenting) (concerning oyster fisheries).

244. 146 U.S. 387, 463–64 (1892).

245. *Id.* at 452.

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

> Returning to the "navigability in fact" rule, the Court has explained the elements of this test. A basic formulation of the rule was set forth in The Daniel Ball, a case concerning federal power to regulate navigation: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[247]

Having announced the general test, the Court proceeded to highlight the specific way the test applied for navigable-for-title purposes.[248] Navigability for this purpose was determined, the Court explained, at the time of statehood and based on the "natural and ordinary condition" of the water.[249] In addition, the test was applied to a river on a segment-by-segment basis; one segment could be navigable; the next, due to rapids or falls, might not be; and the segment further downstream might again be navigable—as was true on the facts in *PPL Montana*.[250] These were the waterway segments to which states took title upon statehood subject to the duty to respect and protect public rights to use them.

Importantly, the Court in *PPL Montana* went on to explain that this definition of navigability did not limit the ability of states, as they developed the public trust doctrine under state law, to use a different definition of navigability and to apply the doctrine to a wider array of submerged lands.[251] In its briefs, Montana worried that, if a segment of the river at issue was deemed non-navigable under the navigability-for-title test, then the state's public trust doctrine—which Montana had applied broadly to its waters—would no longer attach to that segment.[252] The Supreme Court quickly disagreed, making clear that states could develop the public trust doctrine as they saw fit.

> Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law, subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.[253]

247. PPL Mont., LLC v. Montana, 565 U.S. 576, 591–92 (2012) (citing 10 Wall. 557 (1871)).
248. *Id.* at 592–93.
249. *Id.* (internal citation omitted).
250. *Id.* at 580–86, 593–95.
251. *Id.* at 603–05.
252. Brief for Respondent at 20, 24–26, PPL Mont., LLC v. Montana, 565 U.S. 576 (2012) (No. 10-218).
253. *PPL Mont.*, 565 U.S. at 603–04 (citations omitted).

The public trust doctrine, in short, seems to include two components even as the components fuse into one doctrine. The doctrine applies to submerged lands obtained by a state under the equal footing doctrine. Having taken these lands in trust, states can then take charge of the doctrine and apply it to such additional lands, submerged or otherwise, as they see fit and to expand the range of public uses.[254] According to a recent survey, a now-common state-law stance is that the public trust doctrine applies to all waterways suitable for recreational use.[255] Among the states recognizing a wide range of public uses is New Hampshire, which opens its public waters to all useful purposes as justice and reason seem to dictate, including hunting, skating, and cutting ice.[256]

Illinois courts have vigorously applied the public trust doctrine to protect public rights in the Lake Michigan shore, critically reviewing attempts to transfer or physically alter submerged lands. Cases have typically involved actions by the legislature or some other government body that authorize the filling of lakeshore land to prepare for construction.[257] Other rulings have applied the public trust doctrine to publicly owned lands elsewhere, typically park lands, when a public owner that has dedicated land to a public use later decides to divert the land from that use.[258] Many of these decisions were carefully reviewed by the Illinois Supreme Court in *Scott v. Chicago Park District*.[259] After quoting extensively from the seminal *Illinois Central Railroad v. Illinois*[260] the court turned to its early ruling in *People ex rel. Moloney v. Kirk*, which considered the legality of a state statute authorizing Lincoln Park's commissioners to fill in waters of Lake Michigan to extend Lake Shore Drive.[261] The state held title to this special submerged land, the court reiterated, "in trust, in its sovereign capacity, for the people of the entire state, for the purposes of navigation and fishing. They [sic] governmental powers of the state over these lands cannot be relinquished or given away. The trust imposed upon the state must be kept and faithfully observed."[262]

254. Missouri is among the states that intentionally extend public rights beyond those stream segments deemed navigable for title purposes. Elder v. Delcour, 269 S.W.2d 17, 23 (1954) (upholding public rights in a small stream even though the stream was non-navigable for title purposes). For a useful, brief survey of the doctrine's application over the past half-century, in submerged lands and elsewhere, see generally Michael C. Blumm & Zachary A. Schwartz, *The Public Trust Doctrine Fifty Years After* Sax *and Some Thoughts on Its Future*, 44 PUB. LAND & RES. L. REV. 1 (2021).

255. *See* DUNNING, *supra* note 88, §§ 30.02, 32.03. For a somewhat dated but still largely accurate survey of the public doctrine as applied in the eastern half of the country, see generally Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENV'T L. REV. 1 (2007). For the author's corresponding survey of western states, see generally Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010).

256. Opinion of the Justices, 649 A.2d 604, 609 (N.H. 1994).

257. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 439 (1892).

258. In *Revell v. People*, the court ruled that owners of land along Lake Michigan had no right to build wharfs into the lake, even though this right was commonly possessed by riparian landowners. 52 N.E. 1052, 1060 (Ill. 1898).

259. 360 N.E.2d 773, 777–79 (Ill. 1976).

260. People *ex rel.* Scott v. Chi. Park Dist., 360 N.E.2d 773, 777 (1976) (citing Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892)).

261. 45 N.E. 830, 830–33 (Ill. 1896).

262. *Scott*, 360 N.E.2d at 778 (quoting People *ex rel*. Moloney v. Kirk, 45 N.E. 830, 833 (Ill. 1896)).

With these early rulings as foundation, the *Scott* court proceeded to synthesize Illinois public trust decisions applicable to the lakefront:

> It can be seen that the State holds title to submerged land, as is involved here, in trust for the people, and that in general the governmental powers over these lands will not be relinquished. It is within this general framework that we are called upon to decide whether the legislative grant here was valid. In two of the discussed decisions (*Illinois Central I* and *II*) direct grants of submerged lands to private interests were held void. In the one case (*People ex rel. Moloney v. Kirk*) in which a grant of private interests was upheld, it was observed that the main purpose of the statute was to allow public officials to construct a needed extension of Lake Shore Drive for direct public benefit. In none of these cases, nor in later cases decided by this court (*Fairbank v. Stratton*; *Bowes v. City of Chicago*), was a grant upheld where its primary purpose was to benefit a private interest.[263]

Transfers of submerged public land in Illinois are thus looked upon with suspicion. Their legality is upheld only when undertaken for a public purpose, when public rights in navigation and fishing are not appreciably affected, and when the transfer is not designed to promote private development.[264] In its application to other public lands, not submerged, the public trust doctrine is less restrictive even as it nonetheless requires courts to look over proposed transfers with care. Even in such instances, "the doctrine requires courts to ensure that the legislature has made a 'sufficient manifestation of legislative intent to permit the diversion and reallocation' to a more restrictive, less public use."[265]

These public trust doctrine rulings addressing the submerged shores of Lake Michigan do not transfer directly to inland waters. The submerged lands of Lake Michigan are owned by the state, subject to public use rights, which means transfers of them entail transfers of public land.[266] In contrast, land beneath inland waters (except meandered lakes, which are also state owned[267]) is owned by adjacent landowners; it is private land, although similarly subject to superior public use rights that might well be identical in scope to those applicable to the Lake Michigan shore.[268]

Jurisprudence having to do with the public trust doctrine and rivers has largely arisen in the United States over the past fifty years. The Illinois Supreme

263. *Id.* at 779–780 (internal citations omitted).

264. *Id.* at 778–79.

265. Protect Our Parks, Inc. v. Chi. Park Dist., 971 F.3d 722, 730 (7th Cir. 2020). *See generally* Joseph D. Kearney & Thomas W. Merrill, *Contested Shore: Property Rights in Reclaimed Land and the Battle for Streeterville*, 107 Nw. U. L. REV. 1057 (2013); Joseph D. Kearney & Thomas W. Merrill, *Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine*, 105 Nw. U. L. REV. 1417 (2011).

266. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455–56 (1892).

267. 615 ILL. COMP. STAT. ANN. 5/24 (West 2018) (confirming that the beds of Lake Michigan and all meandered lakes are "held in trust for the benefit of the People of the State of Illinois").

268. *Ill. Cent. R.R. Co.*, 146 U.S. at 445–46.

Court, as noted, has yet to consider directly the trust doctrine's application to its inland waters.[269] The court's firm application of the doctrine to the Lake Michigan shore suggests it might similarly apply the doctrine to protect public rights in rivers, perhaps soon, but the absence of rulings leaves the issue open.

The court's only real occasion to discuss the topic came in the 1976 *Scott* ruling, cited above.[270] There the court addressed the doctrine's application indirectly by quoting with favor a passage from a prominent California ruling endorsing an expansive view of the doctrine.[271] At its core, the public trust doctrine promotes the public interest, particularly in navigable waters, the court in *Scott* explained.[272] "And it may be pointed out," the court continued, "that, in considering what is the public interest, courts are not bound by inflexible standards.

> 'We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.' [273]

This favorable citation dealing with tidal waters, although now a bit dated, could set the foundation for an expansive view of the public trust doctrine when its application to inland rivers, lakes, and streams reaches the state's high court. The court's language also seems to invite engagement by the state legislature.

VI. ILLINOIS COMMON LAW

Future public trust doctrine rulings from the Illinois Supreme Court will doubtless take account, not just of the Lake Michigan waterfront rulings and of public trust opinions from other jurisdictions, but of the older common law rulings on waterway access that Illinois courts have issued. In some way, the Illinois Supreme Court will build on them, even as it infuses this law with the values and interests embedded in the public trust doctrine.

Given the importance of public rights to access waterways, it is perhaps startling that Illinois courts have handed down only two rulings directly on the issue, one in 1870, the other in 1905; rulings, that is, that (i) considered the navigability of a particular waterway for public access and (ii) reached a decision about that navigability on the facts.[274] Neither of the two rulings took account of

269. *See supra* notes 34, 54–58 and accompanying text.

270. *See supra* notes 259–63 and accompanying text.

271. People *ex rel.* Scott v. Chi. Park Dist., 360 N.E.2d 773, 780 (Ill. 1976) (quoting Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 309 (1972)).

272. *Id.* at 781.

273. *Id.* at 780 (internal citations omitted).

274. In *People v. City of St. Louis*, the court took judicial notice of the fact that the Mississippi River was navigable for purposes of public travel based on federal statutes and treaties that predated the creation of Illinois as a territory; the river's navigability was not disputed in the case. 10 Ill. (5 Gilm.) 351, 372–73 (1848). The court

federal law nor, as noted, did either consider the scope and effects of the public trust doctrine. Beyond these two, only a few Illinois rulings shed any light on the legal definition of navigability as applied to particular rivers. In two later rulings discussed below, one from 1925 and the other from the 2022 *Holm* ruling, the Illinois Supreme Court heard cases in which the parties and, hence, the court assumed the non-navigability of a particular river.[275] Finally, an unreported federal court ruling from 2015 applied Illinois law in upholding the navigability of the Green River.[276]

The earlier of the two rulings on navigability for public access was *Hubbard v. Bell*, having to do with the ability of a riparian timber harvester to float logs down a small creek.[277] As the court described it, the creek was "an inconsiderable stream, nearly or wholly dry in the summer season, and carrying a volume of water sufficiently powerful to float lots or rafts only in seasons of freshets, and then for a few days or weeks only"; it was a creek that "only in its abnormal state, in times of freshets or melting of snows, makes a show of navigable water. In its normal state, it is shrunken to the smallest measure, and that state continues, perhaps, ten months out of the twelve."[278]

The court found the creek non-navigable.[279] It did so without setting forth a precise test for navigability.[280] Instead, expressing support for various rulings from other jurisdictions, the court opined simply that navigability required proof that a waterway was useful to trade or agriculture.[281]

The second ruling on public access was *Schulte v. Warren*, a case involving 2,800 acres of floodplain land along the Illinois River, land that, in its original

pushed aside an argument that minor channels of the Mississippi were not navigable if steamboats were unable to get through:

> A stream may be navigable for one class of boats, and not for another. Should we hold that this part of the river is not navigable, because all classes of boats cannot pass there, then by the same rule should we have to determine that those parts of the river, where the water is so strong that they can only be navigated by steamboats, are not navigable. One is only capable of being navigated by one class of boats, and the other, by another. The only feasible and practicable rule is, to hold all parts of the river navigable which may be navigated by any class of vessels habitually in use on the river.

Id. at 373. The navigability of the Illinois River near Peoria for purposes of travel was presumed by the court in *David M. Swain & Son v. Chicago, Burlington & Quincy R.R. Co*., 97 N.E. 247, 247–48 (Ill. 1911). The navigability of a wide section of the South Branch of the Chicago River was alleged without challenge in *Leitch v. Sanitary District of Chicago*, 17 N.E.2d 34, 36 (Ill. 1938) (involving riparian rights in which the court observed in passing that a river's navigability did not affect the scope of riparian rights, meaning that its comments on navigability were dicta).

275. *See infra* notes 310–13 and accompanying text.

276. Quad Cities Waterkeeper Inc. v. Ballegeer, No. 4:12-CV-4075-SLD-JEH, 2015 WL 6541181, at *6 (C.D. Ill. Oct. 27, 2015).

277. 54 Ill. 110, 112–14 (1870).

278. *Id.* at 114, 119.

279. *Id.* at 114, 119, 123.

280. *Id.*

281. The Illinois Supreme Court adopted a somewhat different tone in *Parker v. People*, when commenting on the effect of a state statute declaring the Fox river navigable; the statute, the court observed, "merely declared the common law in that regard" given that "[i]f there were any places in the Fox river capable of application in any useful navigation, the public, by the common law, had a right of way over such parts of the river." 111 Ill. 581, 628 (1884).

condition, was dry and used as pasture except when inundated in the spring and occasionally at other times.[282] Nearly half of it was wooded; some fifteen or twenty acres were cultivated.[283] Later, construction of a lock and dam and a sanitary district canal raised the water level five feet, leaving much of the private land economically useful only for hunting and fishing.[284] Even with the higher water level, "timber, buck-brush, and willows" covered much of the swamp.[285] Access was sought by hunters who were able, with the higher water, "to run their boats into such places and conceal themselves for the purpose of hunting."[286]

Late in its opinion, the court ruled, as a matter of Illinois common law, that public uses of navigable-in-fact waters did not extend to hunting.[287] That being so, the navigability of the disputed waters was not relevant. Before reaching that legal conclusion, however, the court took time to discuss navigability.[288] Whether a waterway was navigable, it explained, depended on whether it possessed "sufficient depth to afford a channel for useful commerce."[289] It was not enough for the water merely to float "rowboats or small launches" or to allow hunters and fishermen to "pass over it."[290] On the other hand, it was "not necessary that the waters should be navigable in all their parts in order that the public may have a right of navigation, where the waters are deep enough and fit for such use."[291] Parsing the facts, the court found that "considerable spaces" on the plaintiff's lands were "permanently submerged to such a depth that there [was] a right of navigation in the public."[292] The court did not identify those spaces, presumably because it had no need: since public rights did not include hunting, navigability was irrelevant, and its comments on navigability, for purposes of the dispute, arguably dicta.[293]

Several aspects of *Schulte* deserve note, beyond its principal legal proclamations. For one, the court undertook to decide navigability based on the changed physical conditions and on the water level as artificially raised and found unspecified parts of them navigable.[294] The court did not look to water levels under the land's original conditions or with reference to some specific date in the past. A second point: the court approached the issue as one of state common law alone, taking no note of federal statutes or federal precedents; overlooking them, it did not observe that title to the lands at issue had not passed to the state under the equal footing doctrine. Third, the court did not ask whether

282. 75 N.E. 783, 783–84 (Ill. 1905).
283. *Id.* at 784.
284. *Id.*
285. *Id.* at 785.
286. *Id.*
287. *Id.* at 787.
288. *Id.* at 785–86.
289. *Id.* at 785.
290. Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905).
291. *Id.*
292. *Id.*
293. Identification of the navigable portions would, of course, have aided public users not involved in hunting.
294. *Schulte*, 75 N.E. at 784.

hunting or fishing might itself be commercial activity, a possibility other courts would later acknowledge. Finally, one is left to wonder how much the court's navigability discussion was influenced by the dispute's peculiar facts—that the clash involved artificially created wetlands, far from the main Illinois River channel (miles perhaps) and the possibility (the facts are not clear) that the landowner suffered the inundation—a clear taking of private property—without compensation.

The navigability of a particular waterway also confronted the Illinois Supreme Court a few years after *Schulte* in *People ex rel. Deneen v. Economy Light & Power*, mentioned above.[295] The dispute had to do, not with public access directly, but with whether a private landowner could construct a bridge across the Des Plaines River without unlawfully obstructing public navigation.[296] As in *Schulte*, evidence revealed that artificial construction had raised the water level.[297] This time, citing federal as well as state rulings (but not federal statutes), the court announced that navigability "is to be determined with reference to its natural condition."[298] "A stream to be navigable, must in its ordinary, natural condition, furnish a highway over which commerce is or may be carried on in the customary modes in which such commerce is conducted by water."[299] On the other hand, the court noted, it was not necessary that the stream be "navigable in its entirety" or that "the navigable portion of such stream" be "open for use all the year round."[300]

On the facts, the Illinois Supreme Court decided the Des Plaines River was not navigable.[301] That determination was, in effect, brushed aside a dozen years later when the same question arose in federal court and worked its way to the U.S. Supreme Court.[302] Drawing upon the Northwest Ordinance and other federal statutes, the Court ruled the Des Plaines River and its Chicago River tributary were navigable and open to the public.[303] Two years after this U.S. Supreme Court ruling, navigability returned to the Illinois Supreme Court in *DuPont v. Miller*.[304] This time, the issue was whether a private landowner could construct a bulkhead across the entryway of a privately constructed boat slip.[305] Was the slip a public waterway because it had long been navigated, or did it instead remain private because privately constructed? As it addressed the issue, the Illinois court showed it had learned from its implicit rebuke by the U.S. Supreme Court. This time, it took note of the Northwest Ordinance and relied on leading federal

295. 89 N.E. 760, 763 (Ill. 1909)*; see supra* note 36 and accompanying text.

296. *Econ. Light*, 89 N.E. at 763.

297. *Id.* at 773–74.

298. *Id.* at 769.

299. *Id.* at 771.

300. *Id.* at 767; *see also* Sanitary Dist. of Chi. v. Boening, 107 N.E. 810, 813 (Ill. 1915) (reiterating this interpretive stance).

301. *Econ. Light*, 89 N.E. at 773.

302. Econ. Light & Power Co. v. United States, 256 U.S. 113, 123–25 (1921).

303. *Id*.

304. 141 N.E. 423, 423–24 (Ill. 1923).

305. *Id.*

rulings on navigability, even as it suggested its earlier opinion in *Schulte* was consistent:

> By the Ordinance of 1787 establishing the Northwest Territory, the state of Illinois has full and complete jurisdiction over all navigable waters within its borders, subject only to the power of the federal government to enact such legislation and make such regulations as relate to interstate commerce. Under the common law, navigable waters were limited to those affected by the ebb and flow of the tide. This rule does not obtain in this country. Since the cases of *The Daniel Ball* and *The Montello*, the test has been whether or not the water in its natural state is used or capable of being used as a highway for commerce, over which trade and travel may be conducted in the customary modes of travel on water. The rule in this state is that the public have an easement for purpose of navigation in waters which are navigable in fact, regardless of the ownership of the soil. Whether such waters are navigable depends upon whether they are of sufficient depth to afford a channel for use for commerce.[306]

On the facts, the court found the private owner had dedicated the private waterway to public use.[307] The waterway was therefore open to the public based on dedication rather than, and without regard for, its navigability.[308]

The *DuPont* ruling, now nearly a century old, is the last opinion of the Illinois Supreme Court to engage meaningfully in the definition of navigation for public access. In an eminent domain case in 1925, *Central Illinois Public Service Co. v. Vollentine*, the court asserted the Sangamon River was not navigable without considering any facts.[309] The river's navigability only affected which state agency had jurisdiction over the eminent domain action, a matter the parties did not dispute.[310] The ruling would seem to have little precedential value. The same can be said about the 2022 ruling in *Holm v. Kodat*,[311] involving the Mazon River. Both parties assumed the river was non-navigable, and the court did not engage the issue.[312]

Public rights to use the Green River arose in a federal court action in 2015. Parties using the river for recreation and fishing challenged a riparian landowner who had dumped concrete on the riverbank, spilling into the river.[313] Whether the plaintiffs had standing to challenge the action depended on whether they had lawful access to the river.[314] Citing the Illinois rulings in *Schulte* and *Du Pont*,

306. *Id.* at 425 (citations omitted).
307. *Id.* at 426.
308. *Id.* at 425–26.
309. 149 N.E. 580 (Ill. 1925).
310. *Id.*
311. 211 N.E.3d 310, 320 (Ill. 2022).
312. *Id.* at 315. Related rulings are considered *supra* notes 149–52 and accompanying text.
313. Quad Cities Waterkeeper v. Ballegeer, No. 4:12–cv–4075–SLD–JEH, 2015 WL 6541181, at *1 (C.D. Ill. Oct. 27, 2015).
314. *Id.* at *6.

the court concluded the waterway was open.[315] In a footnote, the court insisted a waterway could be navigable and open even if the land beneath it had not passed into state hands under the equal footing doctrine.[316] Public access, that is, did not depend on trust duties imposed on the riverbed when Illinois took title; it could and did extend to particular waterways even though they failed to satisfy the navigability-for-title test.[317] The court reiterated this conclusion in a later ruling in the same dispute.[318]

As for the rights the public enjoys in waterways navigable in fact, Illinois courts have offered occasional comment. In *Alexander v. Tolleston Club of Chicago*, the court observed that "wherever there is the right of navigation there is the incidental right to use the banks of the stream, to a greater or less extent, as the purposes of navigation may require."[319] Incidental use, however, does not include the right to unload commercial cargo, particularly on a wharf constructed by a private riparian.[320]

The *Schulte* ruling, considered above, concluded that public rights to use navigable-in-fact waters did not include a right to hunt.[321] Although that dispute did not involve a claimed public right to fish, the court surveyed its earlier rulings on the issue, all concluding that fishing rights attached to ownership of the soil and were not a matter of public right unless the underlying land was publicly owned.[322] Illinois apparently first embraced this rule in *Middleton v. Pritchard*, a dispute over timber harvesting rather than fishing.[323] The rule was reiterated with some qualification in *Beckman v. Kreamer*,[324] a fishing dispute,[325] and reaffirmed in *Parker v. People of Illinois*[326] and in *Schulte*, above, in 1905, the court's most recent pronouncement.[327]

These Illinois rulings on fishing overlook federal law, particularly the federal navigation servitude, commonly understood to protect public fishing rights. More surprising, they ignore too the state's acquisition of lands beneath navigable waterways under the equal footing doctrine, lands that, as the U.S. Supreme

315. *Id*.

316. *Id.* at *7.

317. *Id.*

318. Quad Cities Waterkeeper v. Ballegeer, No. 4:12-cv-4075-SLD-JEH, 2016 WL 287013, at *6 (C.D. Ill. Jan. 22, 2016) ("There is no dispute that the Green River where it passes through Defendant's property is navigable by canoes and other small craft. Thus, the public has an easement of navigation through it . . . .").

319. 110 Ill. 65, 75 (1884).

320. Ensminger v. People *ex rel.* Trover, 47 Ill. 384, 391–92 (1868); Missouri is among the states with more expansive, clearly developed ancillary rights. *See, e.g.*, Elder v. Delcour, 269 S.W.2d 17, 24 (Mo. 1954) (landowner "could not cut loose or set adrift a raft or boat or canoe tied to a tree on the banks of the stream, although he owned the banks").

321. Schulte v. Warren, 75 N.E. 783, 787 (Ill. 1905).

322. *Id*.

323. 4 Ill. (3 Scam.) 510, 519 (1842).

324. 43 Ill. 447, 448 (1867) (landowner's exclusive right to fish exists "unless restricted by some local law or well-established usage of the State where the premises may be situate[d]").

325. This rule was also assumed or implied in several cases. *See, e.g.*, Braxon v. Bressler, 64 Ill. 488, 493 (1872); People v. Bridges, 31 N.E. 115, 117–18 (Ill. 1892); Fuller v. Shedd, 44 N.E. 286, 296 (Ill. 1896).

326. 111 Ill. 582, 608–18 (1884).

327. 75 N.E. at 787.

Court explained in *Coeur d'Alene* considered above, "were infused with a public trust that the State itself [was] bound to respect."[328] Even as and after the Supreme Court announced this land transfer, Illinois courts continued to apply the common law as received from England without change, law (as noted) that recognized the sovereign's ownership of land beneath tidal waters and that protected public fishing rights in them while vesting fishing rights in nontidal waters in private streambed owners.[329] Illinois courts, in short, ignored this major legal change brought on by the equal footing doctrine—most likely, one suspects, because it was never brought to the court's attention in a dispute involving public access or fishing. Having no occasion to consider the nature of this "public trust," the court *sub silento* assumed the old common law remained valid.

Much the same story can be told about the state's redefinition of navigability to include rivers navigable in fact. Although an obvious, indeed dramatic change to the common law, this legal reform too seemed to bring about no shift in Illinois caselaw. Before navigability was thus redefined, Illinois recognized public fishing rights only in tidal waters and those publicly owned.[330] After the legal redefinition, it did the same, or has so far.

Illinois courts, of course, were hardly unaware that the state gained title to submerged inland waterways that satisfied the navigability-for-title test. In disputes over the Lake Michigan shore, the Illinois Supreme Court would repeatedly recognize the importance of state ownership. As the court explained in *People v. Kirk*,[331] the state held title to this submerged lakefront land "in trust in its sovereign capacity for the people of the entire state, for the purposes of navigation and fishing," a trust that "must be kept and faithfully observed." That trust, in the instance of Lake Michigan shoreline, protected an array of public use rights. As Illinois transferred inland riverbed titles to riparian purchasers, it did so subject to public rights, as the Court explained in its early ruling, *Middleton v. Pritchard*.[332] If so, were these public rights the same as those the public held in the submerged lands along the Lake Michigan shore? Given that the state took title to inland submerged lands in trust with a duty to protect public rights, then the rights should logically have remained in effect, fishing rights included, when the state transferred title to riparian owners.

Much of the relevant legal history here was summed up in *Wilton v. Van Hessen*, handed down six years after *Schulte*, a ruling with language that the Supreme Court might well draw upon as it reexamines Illinois law on inland waters:

> A clear and correct exposition of this policy is given in *Broward v. Mabry*, where it is said: "Under the common law of England the crown, in its sovereign capacity, held the title to the beds of navigable or tide waters, including the shore or the

328. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 283–84 (1997).

329. Holm v. Kodat, 211 N.E.3d 310, 320 (Ill. 2022).

330. 111 Ill. at 612–13.

331. 45 N.E. at 833.

332. 4 Ill. (3 Scam.) 510, 520 (1842) (riparian landowners took title to submerged lands subject "to the public easement of navigation. And this latter, Chancellor Kent says, bears a perfect resemblance to public highways.").

> space between high and low water marks, in trust for the people of the realm, who had rights of navigation, commerce, fishing, bathing, and other easements allowed by law in the waters. This rule of the common law was applicable in the English colonies of America. After the Revolution, resulting in the independence of the American states, title to the beds of all waters navigable in fact, whether tide or fresh, was held by the states in which they were located, in trust for all the people of the states, respectively. When the Constitution of the United States became operative, the several states continued to hold the title to the beds of all waters within their respective borders that were navigable in fact, without reference to the tides of the sea, not for purposes of disposition to individual ownerships, but such title was held in trust for all the people of the states, respectively, for the uses afforded by the waters as allowed by the express or implied provisions of law, subject to the rights surrendered by the states under the federal Constitution. * * * New states, including Florida, admitted 'into the Union on equal footing with the original states, in all respects whatsoever,' have the same rights, prerogatives, and duties with respect to the navigable waters, and the lands thereunder, within their borders as have the original 13 states of the American Union."[333]

Wilton involved a dispute about title to the bed of a pond; it addressed, that is, navigability for title purposes.[334] Its wide-ranging comments on public rights in waterways were thus not essential to its holding. Yet the court's opinion makes clear that, in the case of tidal-influenced waters, the public enjoys "rights of navigation, commerce, fishing, bathing" and "other [unnamed] easements allowed by law in the waters."[335] The court's discrimination here between "navigation" and "commerce" is revealing; a further suggestion that navigation was about simple travel and thus different from commercial activity. Having described the scope of public rights, the court proceeded to explain how the redefinition of navigability, from tidal-influenced waterways to all that were navigable in fact, meant that under the equal footing doctrine the state took title to all lands beneath such navigable-in-fact waters, subject to trust duties.[336] *Wilton* does not explain these trust duties, yet it implies (by not saying otherwise) that public uses of such inland waters are the same as those the public enjoys in tidal waters.[337] If that is so, then the court's dicta would seem to contradict its earlier rulings on fishing rights. *Wilton* might, in fact, stand as the first application to Illinois' inland waters of the public trust doctrine.

Given their dates, peculiar facts, and limited ranges of inquiries, these early Illinois common law rulings likely leave the Illinois Supreme Court reasonably

333. 94 N.E. at 136 (citing 58 Fla. 398 (1909)).
334. *Id.* at 134.
335. *Id.* at 136.
336. *Id.*
337. *See generally id.*

free today to craft the law as it sees fit, particularly to develop and apply the public trust doctrine in a way that (as the court said in *Scott*) meets the "changing conditions and needs of the public it was created to benefit."[338] In like manner, the Illinois legislature would seem empowered itself to play a role in developing the doctrine, as state legislatures elsewhere have done.[339]

VII. HB 1568 AND THE TAKINGS RISK

The legislation introduced in the Illinois House in response to the concurring opinion in *Holm* drew upon these four strands of public access law directly by providing as follows:

> The public right to access and use navigable waters includes all rights recognized by State or federal law, including the rights set forth in the Northwest Ordinance of 1787 and the federal navigational servitude, and all rights arising under the public trust doctrine, which shall be understood and applied in a manner consistent with the spirit of Section 26 to maximize the full and free enjoyment of State waters by the public.[340]

Section 26 of the Rivers, Lakes, and Streams Act (the statute to which HB 5844 would have added), entitled "Rights of the People," provides that nothing in that Act should be "construed or held to be any impairment whatsoever of the rights of the citizens of the State of Illinois to fully and in a proper manner, enjoy the use of any and all of the public waters of the State of Illinois."[341] It further provides that the jurisdiction of the state Department of Natural Resources "shall be deemed to be for the purpose of protecting the rights of the people of the State in the full and free enjoyment of all such bodies of water, and for the purpose of preventing unlawful and improper encroachment upon the same" and "every proper use which the people may make of the public rivers and streams and lakes of the State of Illinois shall be aided, assisted, encouraged and protected by the Department of Natural Resources."[342]

Section 26 plainly seeks to protect the full reach of waterway rights held by the citizens of Illinois. That aim stands out when one unpacks the term "public waters" and compares it with the more constrained term, navigable waters. Section 18 of the Act defines public waters by identifying its component parts. Public waters include:

> a. all open public streams and lakes capable of being navigated by water craft, in whole or in part, for commercial uses and purposes, and,

338. People *ex rel*. Scott v. Chi. Park Dist., 360 N.E.2d 773, 780 (Ill. 1976) (citation omitted).

339. For a sense of the active roles played by the legislatures of Western states, see Craig, *supra* note 255, at 71–91.

340. H.R. 1568, 102d Leg., 1st Sess. (Ill. 2023). The bill did not advance far in the state's brief legislative session. According to its main sponsor, it will be reintroduced in the next session.

341. 615 ILL. COMP. STAT. ANN. 5/26 (West 2018).

342. *Id.*

> b. all lakes, rivers, and streams which in their natural condition were capable of being improved and made navigable, or,
> c. that are connected with or discharged their waters into navigable lakes or rivers within, or upon, the borders of the State of Illinois, together with
> d. all bayous, sloughs, backwaters and submerged lands that are open to the main channel or body of water and directly accessible thereto.[343]

The definition could hardly be broader, seeming to exclude only isolated waters, not themselves navigable for commercial purposes, that do not now and did not in the past ultimately flow into a navigable body of water or one capable of being made navigable. Also excluded would be non-navigable wetlands that lack sufficient water and connection to allow a watercraft to gain access to the main channel or body of a navigable water to which they are adjacent. Put simply, the definition includes not just actual or potential navigable waters but all tributaries of them and adjacent wetlands that share a surface connection.[344] In so drafting the statute, the legislature might well have been influenced by the actions of states such as Minnesota, that had much earlier expanded public access rights and shifted its language from navigable waters to public waters:

> But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit . . . If the term "navigable" is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature and adopt the classification of public waters and private waters.[345]

With this broad definition of public waters—reaching beyond any definition of navigability—the legislature has forcefully expressed its desire to expand public access rights as far as possible consistent with federal law. It has similarly made clear its desire, in the Section 26 language quoted above, that the state Department of Natural Resources exercise its full powers to recognize and

343. 615 ILL. COMP. STAT. ANN. 5/18 (West 2018).

344. Ill. Att'y. Gen., Formal Opinion Letter on Definition of "Public Waters or Public Bodies of Water", (Aug. 10, 1987) (on file with the *University of Illinois Law Review*).

345. Lamprey v. Metcalf, 53 N.W. 1139, 1143–44 (Minn. 1893). A similar interpretive approach was taken in *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.* 163 N.E.2d 373, 375 (Ohio 1950) ("The division of watercourses into navigable and nonnavigable is merely a method of dividing them into public and private, which is the more natural classification.").

defend those rights.[346] Going yet further, the Illinois Act reiterates the point in Section 27, which provides as follows:

> At all times this act shall be construed in a liberal manner for the purpose of preserving to the State of Illinois and the people of the State, fully and unimpaired, the rights which the State of Illinois and the people of the State of Illinois may have in any of the public waters of the State of Illinois, and to give them in connection therewith, the fullest possible enjoyment thereof, and to prevent to the fullest extent, the slightest encroachment or invasion upon the rights of the State of Illinois, or any of its citizens with reference thereto.[347]

HB 1568 follows up the language quoted above with the following sentence:

> Any segment of a lake, river, or stream that is capable of supporting use by commercial or recreational watercraft for a substantial part of the year, or that is actually so used, shall be deemed navigable under such laws and this Act, and shall be open to public access and use, unless the contrary is proven in litigation by a preponderance of the evidence.[348]

This language, in effect, synthesizes the relevant bodies of federal and state law to embrace a recreational use definition of the waterways open to the public. For the most part its synthesis rests on federal law. To the extent it goes beyond federal law it does so by embracing existing state law, both the public trust doctrine considered in Part V and the legal guidance provided by Sections 18, 26, and 27 of the Illinois Rivers, Lakes, and Streams Act.[349]

As explored in Part V, the U.S. Supreme Court has given green lights to the states to develop the public trust doctrine as they see fit, expanding it beyond waterways overlying submerged lands governed by the federal navigability-for-title test. Sections 18, 26, and 27 have arguably done that already; they have already pushed public rights under the state's public trust doctrine as far as possible.[350] If that is so, then HB 1568, in the provisions quoted, would confirm but not expand existing public rights based directly on Illinois statutes. If the existing statutes are not interpreted so broadly, HB 1568 can be understood, as seems intended, as giving content to the state's public trust doctrine, a task the state Supreme Court has left undone and that the legislature has the capacity to undertake. In neither instance does it bring about a change in Illinois law; in one view it merely reiterates it, in the other it adds content to a longstanding limitation on land titles that has remained uncertain.

The final few words of HB 1568 quoted above link to the possibility that the statute, on its face or as applied in a particular case, might effect a taking of

346. 615 ILL. COMP. STAT. ANN. 5/26 (West 2018).
347. 615 ILL. COMP. STAT. ANN. 5/27 (West 2018).
348. H.R. 1568, 102d Leg., 1st Sess. (Ill. 2023).
349. *See supra* Part V.
350. *See supra* Part V.

private property without payment of just compensation.[351] That could happen, of course, only if a waterway not now open under federal or state law, including under the public trust doctrine or the Illinois Rivers, Lakes, and Streams Act, is first opened to lawful use by the bill.[352] The bill provides, to quote again, that waterways capable of supporting recreational use shall be deemed open to the public under existing law "unless the contrary is proven in litigation by a preponderance of the evidence."[353] The bill thus allows a party (a riparian landowner, most likely) to aver that a particular waterway is not open to the public. Such a claim could take two forms. It could be made, without questioning the validity of the bill, with a factual showing that a waterway segment is not "capable of supporting use by commercial or recreational watercraft for a substantial part of the year" and is not "actually so used."[354] Such a claim, if successful, would mean simply that HB 1568 does not apply, as it doubtless would not, to countless miles of small streamlets and ditches. Alternatively, a landowner could claim that the public, in fact, has no legal rights to a waterway segment under existing federal or state law, even in the instance of a particular waterway segment that is capable of supporting recreational boating or that in fact supports such boating.

It is this second kind of claim that might pose a constitutional challenge to the bill. A successful challenger would need to show that (i) the four relevant bodies of current law do not recognize a public right of access in a particular waterway segment and (ii) HB 1568 has the effect of taking private property by granting such a right of access. The bill anticipates that possibility—likely highly remote—by expressly authorizing a landowner to raise the constitutional issue.[355] If the landowner is successful, proving by a preponderance of the evidence that a particular waterway segment is not open under current law as clarified, then the application of HB 1568 comes to an end. Existing law, recognizing the landowner's right to exclude, would govern, and no taking has occurred.[356] Understood and applied this way, HB 1568 poses no discernible chance of a court concluding it has taken private land.

Takings law, as noted, has become more protective of landowner rights to exclude.[357] Current law of regulatory takings divides cases into three categories: those that fit within one of the two "*per se*" takings tests and those that are subject instead to the so-called multi-factor test set forth in *Penn Central Transportation Co. v. New York City*.[358] Of the three tests, two of them have little relevance in this setting: a recognition of public access would rarely, if ever, deprive riparian

351. H.R. 1568, 102d Leg., 1st Sess. (Ill. 2023).

352. The takings risk is illustrated by Opinion of the Justices, 649 A.2d 604, 611 (N.H. 1994) (opining that a proposed state law granting the public access to dry sand beaches above the high-tide line would amount to a taking of private property).

353. H.R. 1568, 102d Leg., 1st Sess. (Ill. 2023).

354. *Id.*

355. *See id.*

356. *See id.*

357. *See infra* note 404 and accompanying text.

358. 438 U.S. 104, 123–28 (1978).

land of all economic use by the owner (the *Lucas* or "total-takings" *per se* test[359]); also, the modest decline in property value, if any, associated with the recognition of public access together with the lack of any noticeable interference with landowner activities or with investment-backed expectations would likely undercut any claimed taking under the multi-factor, *Penn Central* test.[360] That leaves, for application, the third test, one of the two *per se* taking tests, the one originally termed the "permanent physical occupation" test and now transformed into the easier-to-satisfy physical takings test.[361]

The physical takings test first saw light as a *per se* rule in the Supreme Court ruling *Loretto v. Teleprompter Manhattan CATV Corp*.[362] The dispute had to do with a regulation requiring apartment building owners to allow a cable TV company to place cable TV boxes on their rooftops.[363] The Supreme Court ruled that this was a *per se* regulatory taking because it authorized an outsider to invade particular space on the private land *and* because the landowner was no longer able to use that space; it was permanently occupied by the outsider.[364] Later rulings emphasized the independent important of a physical invasion of private land, whether or not the invasion displaced the owner's own activities.[365] Drawing together these rulings, the Supreme Court reformulated the *per se* text in *Cedar Point Nursery v. Hassid*[366] by dropping the idea that a physical invasion qualified as a *per se* taking only if it left a landowner unable to use a portion of what she owned.[367] The physical invasion itself was enough—in this case, a regulation mandating that farmland owners allow labor union organizers to enter their lands to solicit support for unionization by farm workers.[368] As it announced its reformulated rule, however, the Court stressed that it was not invalidating longstanding limits on an owner's power to exclude, including those based on "background restrictions on property rights."[369]

Cedar Point Nursery needs to be put in the context of just compensation law generally to see how it might apply to Illinois waterways. That constitutional clause protects property rights but does not create them nor give them form.[370] As the Supreme Court has said, it protects only property arising under some other body of law, state law in the case of private land.[371] It is state law, as the Court

359. Originating in and named after the Supreme Court's ruling in *Lucas v. S.C. Coastal Council*. 505 U.S. 1003, 1030–31 (1992).

360. 438 U.S. at 125.

361. *See infra* notes 365–72 and accompanying text.

362. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

363. *Id*. at 421–22.

364. *Id.* at 438.

365. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2076 (2021).

366. *See id.* at 2072.

367. *See id*.

368. *Id.* at 2074.

369. *Id.* at 2079.

370. *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("[P]roperty interests . . . are not created by the Constitution.").

371. *See, e.g., id.*; Fox River Paper Co. v. R.R. Comm'n of Wis., 274 U.S. 651, 657 (1927) (the Fourteenth Amendment "affords no protection to supposed rights of property which the state courts determine to be nonexistent").

stated in 2010, that "defines property interests . . . including property rights in navigable waters and lands underneath them."[372] Given this, the Takings Clause in such a setting "only protects property rights as they are established under state law, not as they might have been established or ought to have been established."[373] What complicates this seemingly simple arrangement is that private property, as defined by law, has for centuries been an evolving institution, shaped by generations of common law rulings and modified many times by state statute.[374] The Just Compensation Clause protects particular landowners from the confiscation of rights recognized and protected by state law.[375] But it does not, across the board, keep state legislatures and courts from making broadly applicable updates to that state law; it does not, that is, bring an end to the centuries-long process of aligning the relative rights of ownership with current needs and values. Courts have often recognized this reality and found it easily applicable to judicial rulings that rework understandings of navigability to include waters that support recreational uses. Typical is the treatment of the issue by the New York Court of Appeals in *Adirondack League Club v. Sierra Club*:

> Appellant's fear that consideration of recreational use unduly broadens the common-law standard and threatens private property rights is unfounded. We do not broaden the standard for navigability-in-fact, but merely recognize that recreational use fits within it. . . . [P]roperty rights are not materially altered by this holding. Riparian owners retain their full panoply of rights, subject only to the long-recognized navigational servitude. . . Having never owned the easement, riparian owners cannot complain that this rule works a taking for public use without compensation.[376]

On this subject, it is worth noting too that the right of landowners to exclude did not exist in anything like its current form at the time the Fifth Amendment, with its Just Compensation Clause, was added to the Constitution. In early America, private lands were open to public use—not just to travel but for hunting, foraging, and livestock driving—without regard for the wishes of the landowner.[377] Landowners who sought to exclude had to fence their lands (costly, in the era before wire fencing) or, in some states, cultivate them.[378] Illinois was

372. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 707 (2010).

373. *Id*. at 732.

374. I offer a survey of changes in U.S. property law from the Revolutionary Era to the Civil War in Eric T. Freyfogle, *Property Law in a Time of Transformation: The Record of the United States*, 131 S. AFR. L.J. 883, 886 (2014).

375. In a part of the *Stop the Beach* opinion expressing the views of four of the eight Justices participating in the decision, Justice Scalia (writing for Justices Alito and Thomas and Chief Justice Roberts) noted a possible limitation on the Constitution's protection of even settled property rights: "We must not say that we are bound by the Constitution never to sanction judicial elimination of clearly established property rights. Where the power of this Court is concerned, one must *never* say never." *Stop the Beach Renourishment, Inc.*, 560 U.S. at 725.

376. 706 N.E. 2d 1192, 1195–96 (N.Y. 1998) (citing, *inter alia*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992)).

377. *See* Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 674–79 (2011).

378. *Id*. at 681–82.

among the states that rejected a literal application of the English common law of trespass.[379] In *Seeley v. Peters*, a landowner complained about wandering livestock that entered his land and consumed his grass without permission.[380] His trespass action was cast aside by the court.[381] The court acknowledged that, in the English common law, owners of livestock were required to keep them fenced.[382] Yet, Illinois only adopted the common law, the court reminded readers, "where that law is applicable to the habits and conditions of our society and 'in harmony with the genius, spirit and objects of our institutions.'"[383] Under both Illinois common law and state fencing statutes, it was the duty of farm-field owners to fence out the livestock of their neighbors; the old common law rule to the contrary did not govern. The court stated:

> Perhaps there is no principle in the common law so inapplicable to the condition of our country and people as the one which is sought to be enforced now for the first time since the settlement of the State. It has been the custom in Illinois so long, that the memory of many runneth not to the contrary, for the owners of stock to suffer them to run at large.[384]

That rule continued to prevail in Illinois after the Civil War but met increasing resistance as the state legislature authorized counties to require livestock owners to keep them fenced, leading, over time, to a state-wide fencing law for most livestock.[385]

The ruling in *Seeley* usefully highlights that even major elements of private landownership are subject to change over time.[386] Helpful here, too, is the U.S. Supreme Court's ruling by Justice Holmes in *McKee v. Gratz*, in which a tort action was brought against several individuals who entered the owner's lands and removed mussels from a submerged mussel bed.[387] The mussel harvesting

379. *Id*. at 674.

380. 10 Ill. (5 Gilm.) 130, 138 (Ill. 1848).

381. *Id.* at 148.

382. *Id.* at 130–31.

383. *Id.* at 141 (quoting Boyer v. Sweet, 4 Ill. 120 (3 Scam. 120), 121 (Ill. 1841)).

384. *Id.* at 142.

385. *See* Headen v. Rust, 39 Ill. 186, 190–92 (1866). In fact, though, early American law still lingers here and there, as the Illinois Supreme Court ruled in *Raab v. Frank*. 157 N.E.3d 470, 475–78 (Ill. 2019). The case involved a cow that wandered on to a road and was hit by a motorcyclist, who was injured. *Id.* at 473. The court held that, in Illinois, livestock owners still had no common law duty to control their livestock. *Id.* at 475–76. Their sole duty arose from the state's Animals Running Act, which instructed owners to control their livestock but allowed them to avoid liability in tort for resulting damages if they lacked knowledge of the livestock escape and used "reasonable care in restraining such animals from so running at large." *Id.* at 477 (quoting 510 ILL. COMP. STAT. ANN. 55/1 (West 2010)). While the statute does not limit the ability of a landowner to exclude wandering livestock (Illinois law never did that) it does limit the ability of a landowner to recover for damages caused by breach of the "right to exclude" and thus imposes a continuing, further limit on that right. *Id.* at 476–78. On a more minor note, one might consider also *McPherson v. James*, in which the fencing law for livestock did not seem to cover turkeys. 69 Ill. App. 337, 339 (1896). Owners of turkeys could, thus, let them roam at will but were liable for actual damage, if any, that they might cause. *Id.* at 339–40.

386. For an overview of how the major elements of private land ownership evolved from the eighteenth century into the twentieth, see ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 37–99 (2003).

387. 260 U.S. 127, 134 (1922).

was an improper conversion, and the defendants had to pay for their value.[388] But the court noted that those who took the mussels, although entering the private land without permission, were not trespassers:

> The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country.[389]

The story of the closing of the rural countryside has not been fully told. One of the darker chapters unfolded in the American South, which in the antebellum period had strongly embraced the rule that unenclosed lands (including waterways, navigable or otherwise) were open to public use.[390] An illustrative ruling came in the 1860 case of *Macon v. Western Railroad Co. v. Lester*, in which a railroad, seeking to avoid liability for killing a horse that had wandered onto its tracks, claimed the horse was trespassing.[391] The railroad pressed the claim even though state law was sharply against it. As the court understood the railroad's bold demand, it called for change, not just to Georgia trespass law, but to Southern ways of inhabiting the landscape:

> Such Law as this [viewing the horse as trespassing] would require a revolution in our people's habits of thought and action. A man could not walk across his neighbor's unenclosed land, nor allow his horse, or his hog, or his cow, to range in the woods nor to graze on the old fields, or the "wire grass," without subjecting himself to damages for a trespass. Our whole people,

388. *Id*. at 135–36.

389. *Id.* at 136. A small sign of the continuance of old practices appears in Illinois trespass law. Illinois wildlife law makes it a trespass to hunt on the land of another without permission. 520 ILL. COMP. STAT. ANN. 5/2.33(t) (West 2023). The provision differs from the state's general statute on criminal trespass to real property, which only penalizes entry "after receiving, prior to the entry, notice from the owner or occupants that the entry is forbidden" and remaining on such property "after receiving notice from the owner or occupant to depart." 720 ILL. COMP. STAT. ANN. 5/21-3(a) (West 2023). In *People v. Fenwick*, the court ruled that, in a prosecution of a hunter for trespass, the prosecution had to prove lack of consent. 484 N.E.2d 915, 917–18 (Ill. App. Ct. 1985). Illinois common law was even more permissive; criminal trespass occurred only when the behavior of the person entering or remaining without permission was accompanied by or tended to create a breach of the peace. *Id.*; Busick v. Ill. Cent. R.R. Co., 201 Ill. App. 63, 67–68 (1915) (drunken man peaceably sitting on rail fence did not commit criminal trespass despite being told to depart). As the quote here suggests, American law for generations tended to distinguish between lands that were enclosed or cultivated and lands that were not. The latter lands carried with them a lesser bundle of landowner protections, a stance reflective of Lockean thought that full ownership only arose when and as an owner mixed her labor with the land and added value to it; in the case of land not enclosed or cultivated, value had not yet been added. The rule reflects also, again vaguely, an older natural law understanding that challenged land hoarding by a "need and use" limit on landed property rights. Owners could fully claim title only to lands that they had put to use and needed for their support. Under this view—widely held in early America—vacant, unimproved lands ought to be open for use by outsiders. *See* FREYFOGLE, *supra* note 386, at 101–34; ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 29–60, 91–95 (2007).

390. *See* Brian Sawers, *Race and Property After the Civil War: Creating the Right to Exclude*, 87 MISS. L.J. 703, 706 (2018).

391. 30 Ga. 911, 911 (1860).

> with their present habits, would be converted into a set of trespassers. We do not think that such is the Law.[392]

After the war, with slaves freed and plantation owners in need of cheap labor, counties and states began embracing fencing-in rules that kept poor people from running hogs, hunting, and fishing, which is to say surviving without having to submit to coercive farm tenancy arrangements.[393] The right to exclude as it arose over time thus became an element in social control and labor recruitment.[394]

In *Cedar Point Nursery* and rulings leading up to it, the Supreme Court has spoken highly of the landowner's "right to exclude," but that term is best understood as merely a short-hand expression.[395] No law creates or recognizes a right to exclude as such. Rather, landowners are empowered to bring state-law trespass and private nuisance actions to protect against interferences with their land uses.[396] Trespass laws have changed significantly over the generations, as *Seeley* illustrates.[397] Much of the statutory tinkering has had to do with hunting, often requiring landowners to post no trespassing signs in order to exclude while authorizing hunters to enter private land in hot pursuit of game or to retrieve downed game.[398] In fact, property law features numerous rules that limit the ability of landowners to bring trespass actions.[399] A little-known example is the right of descendants to visit family graves on private property, notwithstanding the opposition of the landowner.[400]

The point to emphasize is that property law has evolved over time; lawmakers (judicial and legislative) have changed it—even with respect to the "right to exclude"—and change is needed to keep private property morally legitimate so that it does not become, as it has often been, a tool of oppression.[401] While *Cedar Point Nursery* strongly advises lawmakers to act with caution as they continue tinkering with trespass law, the dispute did not involve (so the Court

392. *Id.* at 914.

393. Sawers, *supra* note 390, at 751–56.

394. The story has been most fully explored by Brian Sawers in some of his articles. *See id.* at 763; Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 LAW & HIST. REV. 351, 352 (2015). Other factors were also at work in the closing of the range, including the cost of fencing (driven up by deforestation) and the ugliness, to many viewers, of the damage done by rooting hogs. *See* FREYFOGLE, *supra* note 386, at 44–45.

395. 141 S. Ct. 2063, 2072 (2021).

396. I explore more fully the Court's references to a landowner's "right to exclude" in Eric T. Freyfogle, *The Democratic Forebodings of the "Right to Exclude,"* (forthcoming) (on file with the *University of Illinois Law Review*), concluding that the term is best understood as an expression of the special value and protection that the constitution, as a matter of federal law, places on the state-law power of landowners to exclude.

397. 10 Ill. (5 Gilm.) 130, 148 (1848).

398. *See, e.g.*, State v. Corbin, 343 N.W.2d 874, 874–76 (Minn. Ct. App. 1984) (parsing multiple state trespass statutes addressing hunting). For a useful survey of current law, see Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 558–68 (2004).

399. Sawers, *supra* note 377, at 671–74.

400. *See generally* Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. REV. 1469 (2006).

401. *See* FREYFOGLE, *supra* note 389, at 101–34. *See generally* Eric T. Freyfogle, *Private Property and Human Flourishing: An Exploratory Overview*, 24 STELLENBOSCH L. REV. 430 (2013) (considering the morality of private property and possibilities for reform in the context of South Africa); Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090 (2011).

assumed) a generally applicable change to state law; the regulation at issue seemed to single out particular landowners for different, unfair treatment.[402] It would seem wrong to read the ruling, then, to prohibit prospectively the kind of law reform work states have performed for generations.[403]

Both judicial and legislative flexibility seems particularly secure in the context of protecting public uses of waterways.[404] In announcing the "total takings" *per se* takings test in *Lucas*, Justice Scalia included the navigation servitude as one of the background principles of state law, one of the pre-existing limits on title, which empowered the government to limit property entitlements to the point of depriving land of nearly all value.[405] Even more forcefully, the court in *PPL Montana*, discussed above, made clear that state lawmakers are authorized to determine the scope of public rights under the public trust doctrine and are not limited by the federal definition of navigability used for title purposes.[406] In the years since the *Lucas* ruling in 1992, courts have reiterated that court rulings and statutes that give clarity to longstanding limitations on property rights—to background principles of property law—are insulated against claims of regulatory takings. Since *Lucas* recognized the background-principles defense in the context of a "total takings" claim, it has been applied also to takings claims based on the *Penn Central*, multi-factor takings test and to physical invasion cases.[407] The U.S. Supreme Court in *Cedar Point Nursery* highlighted its application in physical-invasion takings disputes.[408] Many precedents expressly recognize the public trust doctrine as one of property law's background principles.[409]

The bottom line is that HB 1568 poses no measurable risk of a successful landowner claim based on the just compensation clause.[410] The bill is crafted to

402. 141 S. Ct. 2063, 2075–76 (2021).

403. That law reform work, in fact, continued among states even with the announcement of the *per se* taking rule in *Loretto*, as evidenced by state court rulings. *See, e.g.*, Moon v. N. Idaho Farmers Ass'n, 96 P.3d 637, 646 (Idaho 2004) (upholding a change to trespass law removing a landowner's ability to complain about invading soot); Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 26 (Tex. 2008) (restricting a landowner's ability to complain of subsurface trespass). It is possible, though hardly certain, that lawmakers, exercising their law reform powers, could embrace something like the right to roam adopted in Scotland and England—the latter, of course, the originating home of the common law rule of strict property protection that the Supreme Court has embraced with such enthusiasm. A call for the United States to head in that direction is put forth in KEN ILGUNAS, THIS LAND IS OUR LAND: HOW WE LOST THE RIGHT TO ROAM AND HOW TO TAKE IT BACK (2018).

404. *See, e.g.*, *supra* notes 269–73 and accompanying text.

405. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992).

406. 565 U.S. 576, 604–05 (2012); *see also supra* notes 170–72 and accompanying text.

407. Michael C. Blumm & Rachel G Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1203–06 (2020).

408. 141 S. Ct. 2063, 2079 (2021) ("[M]any government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights . . . .").

409. Blumm & Wolfard, *supra* note 407, at 1183–86. Takings claims of any sort in the context of submerged lands are problematic given that, as the United States Supreme Court has stated, navigable waters "are the public property of the nation." Gilman v. City of Philadelphia, 70 U.S. 713, 724–25 (1865). Because of the navigation servitude, the federal government can take submerged lands from owners without compensation, while state grants of title to such land to private owners are subject to later recission by the state if it determines that a grant conflicts with public trust values. *See also* Ostdiek, *supra* note 51, at 239–41.

410. It is significant also that HB 1568 does not propose physical changes to historically non-navigable waterways to make them navigable, by deepening channels, diverting water into them, or other "artificial means,"

avoid opening private lands in settings in which landowners can prove they are not suitable for recreational use or not already open under current law. Under existing law, submerged lands have long been subject to the Illinois public trust doctrine, a body of law that might well (we await Supreme Court guidance) already open to the public all inland waters suitable for recreational use.[411] If it does, if landowners today have no right to exclude, then a takings challenge would fail,[412] particularly given that a new understanding of the public trust doctrine would simply clarify public and private rights that were not yet clear.[413] To these are added the longstanding powers of state lawmakers to redefine trespass and the Supreme Court's affirmation in *PPL Montana* of the state's special power, and indeed duty, to safeguard public rights to use waterways. In combination these factors provide ample support for the proposed legislative enactment and for any similar statute, or any ruling, that recognizes broad public recreational rights in inland waters.

Despite the vagaries of the four bodies of law governing public rights in Illinois waterways today, they nonetheless fit together in such a way as to provide clear guidance. That guidance, in the case of each of them, might be summarized as follows:

- The Northwest Ordinance, read literally and (so far as we know) in accordance with its original meaning, opens to public use all waterways that are capable of being navigated by watercraft of any type, without regard for the purpose of that travel. For the reasons discussed, it seems inappropriate to constrain that right by grafting on limits drawn from nineteenth-century Commerce Clause jurisprudence, limits that arose decades later only to be abandoned, particularly given the broad meaning that the term commerce then had.[414] As for what public uses are protected in such waterways, we have little to go on for guidance. Should the issue arise in litigation a court could say that it protects only rights to travel, not to fish, given the provision's similarity with English law dealing with public highways. The opposite conclusion, however, comports better with the culture of the day and the tendency,

actions that could amount to an unconstitutional taking much as a government would commit a taking by building "a railroad or a public highway over farmlands without paying for the right of way." People *ex rel*. Deneen v. Econ. Light & Power Co., 89 N.E. 760, 769 (Ill. 1909), *invalidated by* People *ex rel.* Dunne v. Econ. Light & Power Co., 234 U.S. 497 (1914). Dicta in the ruling suggests that the Illinois Supreme Court would then have applied the ban on uncompensated takings broadly to protect riparian owners along non-navigable waters, at least in the context of improvements that allowed navigation not otherwise possible; the court did not specify whether its comments related to federal or state constitutional law. *Id.*

411. *See supra* notes 269–73 and accompanying text.

412. Fox River Paper Co. v. R.R. Comm'n of Wis., 274 U.S. 651, 657 (1927) (the Fourteenth Amendment "affords no protection to supposed rights of property which the state courts determine to be nonexistent").

413. *See* Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env't Prot., 560 U.S. 702, 727 (2010) (Scalia, J., concurring) ("And insofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established right."). Justice Scalia's opinion repeated the point two paragraphs later, explaining that this flexibility for state courts applied even when a new state ruling seemed surprising: "A decision that clarifies property entitlements (or the lack thereof) that were previously unclear might be difficult to predict, but it does not eliminate established property rights." *Id*. at 728.

414. *See supra* notes 132–48 and accompanying text.

drawing on English law, to assume that the public could fish in all waters deemed navigable.

- The federal navigation servitude by all accounts employs a similar if not identical definition of navigability and has been repeatedly construed, as noted, to protect public rights in waterways suitable for recreational use. In addition, available precedent suggests it protects rights to fish in waterways subject to it.[415]
- As for the public trust doctrine, its application to inland waters awaits judicial clarification. That the doctrine does apply is clear, and dicta in the 1976 *Scott* ruling, together with the firm protection of public rights accorded the Lake Michigan shoreline, suggest the doctrine strongly protects public rights in Illinois waters. As explained, the legislature plays a role also in developing this body of law, and the legislature took an impassioned, pro-public stance in multiple provisions of the Illinois Rivers, Lakes, and Streams Act. Those statutory provisions, paired with the language in *Scott*, might be enough to conclude that existing law already protects recreational users. The public trust doctrine, as noted, covers a wide range of public uses—travel, fishing, bathing, and perhaps more. As for fishing and bathing, they are independent, lawful activities, not mere incidents of travel. Thus, fishing can take place by standing in riverbeds, and swimming and wading can similarly be done apart from any water vessels.
- As for the Illinois common law, it has the least content to it—considered apart from the public trust doctrine—and does nothing to expand citizen rights. It embraces federal definitions of navigability but without providing any clarity about them. Its claim that public rights do not include fishing seems inconsistent with federal law and thus preempted.

Despite the reasonable clarity of federal law, Illinois would do well to incorporate its provisions into state law by doing what so many other states have done, recognizing broad public rights—boating, fishing, tubing, swimming, and wading at least—in all waterways capable of supporting recreational craft.[416] In the process, state law can provide more clear guidance on the ancillary rights associated with these public property entitlements, rights to portage around obstacles for instance.[417] Clear guidance from the state, in the form of legislation

415. *See, e.g.*, Elder v. Delcour, 269 S.W.2d 17, 36 (Mo. 1954).

416. When, in due course, the Illinois Supreme Court takes up the issue, it may find useful guidance from the important ruling of the Wyoming Supreme Court in *Day v. Armstrong*, in which the court drew upon the state's ownership of flowing waters themselves to recognize broad public rights to access and use waterways without regard for their navigability:

> Irrespective of the ownership of the bed or channel of waters, the public has the right to use public waters of this State for floating usable craft and that use may not be interfered with or curtailed by any landowner. It is also the right of the public while lawfully floating in the State's waters to lawfully hunt or fish or do any and all other things which are not otherwise made unlawful.

362 P.2d 137, 147 (Wyo. 1961).

417. Among the common law rights was the ability of the public to travel on ice. ANGELL, *supra* note 84, § 538. On the former importance of ice harvesting and disputes over it, see Washington Ice Co. v. Shortall, 101 Ill. 46, 50–57 (1881).

or judicial ruling, would allow Illinois citizens to get straight on their respective rights without need of extensive legal research, particularly if the guidance is easy to apply. Such broad public rights would prove especially beneficial for the poorest Illinois citizens within reach of waterways, people unable to afford more expensive recreational options and perhaps in need of supplementing their food supplies with fish. Broad recreational access could also provide an economic boost to many rural areas of the state, as it has in Missouri and elsewhere. Given these points—the benefits of access to the poorest citizens and the tourism gains—rural interests in the state have reason to endorse this legal stance.

A concluding word about the Illinois Department of Natural Resources: This agency has undertaken over the years to prepare a list of navigable and non-navigable waters, as the legislature instructed it to do in Section 5 of the Illinois Rivers, Lakes, and Streams Act.[418] Various provisions of the Act call upon the Department to protect navigation.[419] Other provisions require the agency to be diligent in finding and warding off encroachments or interferences with public use rights in the much broader category of waters deemed public waters.[420] These provisions supplement the ones quoted earlier that call upon DNR to do all possible to expand public rights.[421] Section 16 similarly tasks DNR with preserving and "beautifying" public waters while "making the same more available for the use of the public."[422]

These provisions, considered in light of federal law and the public trust doctrine, would hardly seem to give DNR authority to diminish public rights, whether by omitting waterways from its list of navigable or public waters or otherwise. The agency could not, consistent with the Supremacy Clause, curtail any rights secured by federal law, even if tasked to do so by the legislature. As for public rights secured by the Illinois public trust doctrine, the agency again could not curtail public rights given how scrupulously the state supreme court has safeguarded public trust interests along Lake Michigan. To do that, the agency would require a clear mandate from the legislature—which has, to the contrary, pushed DNR in the direction of expanding public rights. As for whether DNR could expand such rights, the issue is less clear.[423] Certainly, the quoted provisions of the Rivers, Lakes, and Streams Act call upon it to do so to the maximum extent possible. If this guidance is understood (as it could be) as a legislative effort to fulfill state trust duties under the public trust doctrine, then DNR might rightly claim it possesses the power to push public rights as far as they can be pushed. The limits of that power seem unclear, but it could well extend to the recognition of public

418. 615 ILL. COMP. STAT. ANN. 5/5 (West 2023).

419. *See, e.g.*, 615 ILL. COMP. STAT. ANN. 5/9–5/12 (West 2023).

420. *See, e.g.*, 615 ILL. COMP. STAT. ANN. 5/7, 5/8, 5/13 (West 2023).

421. *See* 615 ILL. COMP. STAT. ANN. 5/26–5/27 (West 2023).

422. 615 ILL. COMP. STAT. ANN. 5/16 (West 2023).

423. The possibility was raised, without reaching a conclusion, in one of Margit Livingston's articles. *See* Livingston, *supra* note 10, at 371–72.

rights in many waters long considered non-navigable.[424] In any event, the DNR list of navigable waterways seems mostly, if not entirely, intended for its internal use, guiding its compliance with other statutory provisions. It should not be read as undercutting public rights in rivers and streams not listed.

By longstanding common law rule, any obstruction of a waterway open to the public qualifies as a public nuisance.[425] As for whether self-help (direct abatement) of such a nuisance is possible, the only available precedents seem to allow it but are dated. The most extended discussion of the issue by an Illinois court came in an 1880 ruling, *McLean v. Mathews*, a dispute involving the removal without the owner's permission of a partially sunken vessel that obstructed navigation:

> It is a settled principle of the common law, that whatever obstructs travel in public highways and navigable streams is a common or public nuisance, which may be removed and abated by any of the king's subjects. In Comyn's Dig. Tit. Action on the Case for a Nuisance, D. 4, it is said "If it be a common nuisance, as a gate erected across a highway, every one may throw it down." In Bacon's Ab. Tit. Nuisance, 6: "Any one may pull down or otherwise abate a common nuisance, as a new gate, or even a new house, erected in a highway . . . ."[426]

McLean may be the only ruling on the issue of self-help in the specific context of waterways.[427] Rulings by the Illinois Supreme Court have endorsed the practice in other factual settings.[428]

As for statutes, Illinois law makes obstruction of a waterway a criminal public nuisance subject to misdemeanor penalties.[429] Federal law also prohibits obstructions in the case of waterways deemed navigable under the applicable definition (likely the one governing the Rivers and Harbors Act).[430] Federal criminal penalties are imposed if an obstruction is continued, with "each week's continuance" defined as a separate offense.[431] Public enforcement of access rights is also possible in the case of violations of public trust duties, even when a plaintiff sues simply as a member of the public. In an important public trust

424. H.B. 1568 resolves half of this issue (DNR's power to curtail public rights) by providing that "no action or inaction by the Department of Natural Resources shall create a presumption, in any civil or criminal litigation, against the navigability of any waterway segment." H.B. 1568, 102d Leg., 1st Sess. (Ill. 2023).

425. *See, e.g.*, David M. Swain & Son v. Chicago, Burlington & Quincy R.R. Co., 97 N.E. 247, 248 (Ill. 1911) ("An obstruction of a navigable stream, so as to interfere with the free enjoyment of the public easement therein, is a public nuisance, both under the common law and the statutes of this state."); People v. City of St. Louis, 10 Ill. (5 Gilm.) 351, 371–75 (Ill. 1848) (holding that a deposit of fill material in a navigable channel is a public nuisance even when it leaves an ample channel for river traffic); ANGELL, *supra* note 84, at 554.

426. 7 Ill. App. 599, 602 (1880) (internal citations omitted). *See also* ANGELL, *supra* note 84, at 563.

427. 7 Ill. App. at 602–05.

428. *See, e.g.*, Buck v. McIntosh, 140 Ill. App. 9, 14–15 (1908) (involving an embankment that caused an unnatural water flow); Calef v. Thomas, 81 Ill. 478, 480–81 (1876). Waterway obstruction disputes typically involved claims that bridges were obstructions. *See, e.g.*, Columbus Ins. Co. v. Peoria Bridge Ass'n, 6 F. Cas. 191, 191 (C.C.D. Ill. 1865).

429. 720 ILL. COMP. STAT. ANN. 5/47-5, 47-25 (West 2023).

430. 33 U.S.C. § 403.

431. *Id.* at § 403(a).

ruling, the Illinois Supreme Court concluded that plaintiffs in such an action need not satisfy any special injury standing requirement to bring the action; there was no need to show that one suffered "special damage, different in degree and kind from that suffered by the public at large."[432] In doing so, the court expressly overruled *Droste v. Kerner*,[433] handed down four years earlier, as well as "any other former decisions of this court" to the same effect.[434] In the intervening few years, the court had apparently become more sensitive to the importance of the public trust doctrine: "If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public . . . must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time."[435]

The same relaxed standing requirements apply also to claims brought under Article XI of the Illinois Constitution and its recognition of an individual right to a healthful environment, a right the Illinois Supreme Court has narrowly construed as applicable only to claims of pollution and toxic contamination.[436]

These nuisance laws and provisions of the Rivers, Lakes, and Streams Act, in combination, impose on the Department of Natural Resources a duty to protect waters open to public uses against interferences, particularly those qualifying as nuisances. The agency may well lack the resources to do so, in which event it might prudently consider ways to enlist citizens in the process, identifying obstructions and encroachments and reporting them to DNR, the Attorney General's office, or the county State's Attorney if not filing civil suits themselves.

VIII. CONCLUSION

Illinois is among those states where the landowner interest wields political power and has typically done so. State agencies and, according to anecdotal evidence, local law enforcement largely side with them. Yet, as illustrated by the quoted provisions of the Illinois Rivers, Lakes, and Streams Act, public river users do occasionally get the upper hand and the Illinois Supreme Court, in its public trust rulings, has stood willing to protect their vested rights. Measures such as House Bill 1586 put the matter again back before the state legislature: Will it give in to the many pressure groups supporting landowners, or will it instead pursue its statutorily set aim of protecting public rights in full?

432. Paepcke v. Pub. Bldg. Comm'n, 263 N.E.2d 11, 18 (Ill. 1970).

433. 217 N.E.2d 73, 79 (Ill. 1966).

434. *Paepcke*, 263 N.E.2d at 18.

435. *Id.* This decision would seem to also overrule *David. M. Swain & Son v. Chicago, Burlington, & Quincy R.R Co*., which imposed a special injury standard requirement on plaintiffs seeking to challenge waterway obstructions as a public nuisance. 97 N.E. 247, 248–49 (Ill. 1911). This Illinois approach to standing, applicable in Illinois courts, does not insulate Illinois plaintiffs filing in federal court from satisfying federal standing requirements, including demonstration of a concrete, particularized injury. Protect Our Parks, Inc. v. Chi. Park Dist., 971 F.3d 722, 730–32 (7th Cir. 2020).

436. Glisson v. City of Marion, 720 N.E.2d 1034, 1044–45 (Ill. 1999).