DEFINING "NAVIGABILITY": BALANCING STATE-COURT FLEXIBILITY AND PRIVATE RIGHTS IN WATERWAYS

Maureen E. Brady†

Over the course of American history, state courts have eliminated property rights in waterways through a quirk of public trust law: declaring the water in question to be "navigable" makes it public property, while declaring it "non-navigable" leaves the water subject to private control. The historical record is flooded with examples of these declarations by state courts. While some navigability rulings have protected public rights in waters against irrational private claims, others have abused this peculiarity to seize private property to placate irate, and even violent, interest groups.

The scope of this authority to craft navigability doctrine—especially whether it gives state judges the ability to change the definition of "navigability" once declared—is unclear. Current law fails to curb abuses of navigability doctrine and pays scant attention to constitutionally protected property rights. These issues are particularly salient today: prompted by large-scale water diversions, droughts, and fears of water shortages, twenty-first century litigants wishing to prevent water privatization are increasingly seeking new judicial declarations of "navigable" waterways.

This Article provides an original history and analysis of state-law navigability doctrine and the limitations that should be implemented. First, it shows how this unusual common-law authority was created and how state courts exercised it during two moments in history when water rights became vitally important: the explosion of American development in the mid-nineteenth century and the rise of the environmental movement in the mid-twentieth century. Building on that history, this Article argues that to avoid abuses while permitting reasonable exercises of judicial power, navigability must be viewed through a national constitutional lens. The Takings Clause and Due Process Clause—independently or in

† Ph.D. in Law Candidate, Yale University. J.D., Yale Law School. For helpful conversations and comments on earlier drafts, thanks to Rebecca Crootof, Bob Ellickson, Bill Eskridge, Eric Fish, Kerry Monroe, Claire Priest, Robert Post, Carol Rose, David Schleicher, Reva Siegel, Gordon Silverstein, Rory Van Loo, and Jacob Victor. The author is also grateful to Gregory Wong and the editors of the *Cardozo Law Review* for thoughtful suggestions and edits.

combination—can provide guidelines that permit evolution while safeguarding individual rights.

TABLE OF CONTENTS

INTRODUCTION

For the past two hundred years, one of the most significant conversions of private to public property has gone on continuously and yet completely unnoticed. Since the early nineteenth century, state judges have been expanding the meaning of the word "navigable" to increase public ownership of inland waters under the common law, thereby eliminating private rights associated with them. This state-court authority to craft the definition of "navigable"—and to change it once declared—is poorly understood. Litigants who think more waters should be open to the public for commercial, recreational, or

environmental purposes argue that state courts should be free to bring the definition up to date to reflect modern needs for waterways.[1] This view, however, ignores the constitutional imperatives protecting private property from expropriation at the hands of the state.[2] And over history, navigability doctrine has been abused.

A vast area is affected by the uncertainties surrounding navigability law. Two percent of the territorial United States is comprised of inland water—a total of nearly 86,000 square miles.[3] Millions of people live along these waters or use and enjoy them. Yet multiple state courts have modified their definitions of "navigable" over time and have repeatedly adjusted private and public rights in these waters accordingly. If the same unpredictable rules plagued 86,000 square miles of land, that land would well exceed the size of all but ten states and cover a surface nearly twice the size of New York.[4]

Remarkably, there has been little scholarly study of the origins, effects, and limitations of navigability doctrine. This inattention is all the more surprising because many cases involving the doctrine raise red flags under the provisions of the Constitution that protect individual property interests: the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.[5] Individuals who have property in—or adjacent to—any water can be materially affected by a declaration that the water is navigable: in one case, for example, a change in the definition let hundreds of canoeists float through an owner's backyard.[6] On the other hand, navigability law is an important

---

1 *See, e.g.*, People *ex rel.* Baker v. Mack, 97 Cal. Rptr. 448 (Ct. App. 1971); Mich. Citizens for Water Conservation v. Nestlé Waters N. Am. Inc., 709 N.W.2d 174, 205 (Mich. Ct. App. 2005), *aff'd in part, rev'd in part*, 737 N.W.2d 447 (Mich. 2007).

2 Just three state courts and two dissenting opinions have expressed concerns that a change to the navigability definition would violate the Constitution. *See* State v. McIlroy, 595 S.W.2d 659, 665–71 (Ark. 1980) (Fogleman, C.J., dissenting); People v. Emmert, 597 P.2d 1025 (Colo. 1979) (en banc); Bott v. Comm'n of Natural Res., 327 N.W.2d 838, 849–53 (Mich. 1982); Kamm v. Normand, 91 P. 448 (Or. 1907); State *ex rel.* Cates v. W. Tenn. Land Co., 158 S.W. 746, 753 (Tenn. 1913) (Neil, C.J., dissenting).

3 *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, http://www.census.gov/geo/reference/state-area.html (last visited Mar. 13, 2015) (providing state area measurements as of January 1, 2010). This number does not include the Great Lakes.

4 *Id.*

5 *See* U.S. CONST. amends. V, XIV. The Takings Clause does not apply directly against the states. Though the key case, *Chicago, B. & Q. R. Co. v. Chicago*, is often cited for the proposition that the Fifth Amendment was incorporated against the states by the Fourteenth Amendment, it more precisely held that substantive due process requires the payment of "just compensation" when a state legislature takes property rights. *See* Chi., B. & Q.R. Co. v. Chicago, 166 U.S. 226, 236 (1897). Nevertheless, for convenience, this Article describes the Takings Clause—when applied against the states—as the Fifth Amendment.

6 *McIlroy*, 595 S.W.2d at 660. The functional legal effects of a finding of navigability may include giving the public any number of rights depending on the ruling, including the right to fish (*see, e.g.*, *Cates*, 158 S.W. at 753), boat and paddle (*see, e.g.*, Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192, 1195 (N.Y. 1998)), float logs or minerals (*see, e.g.*, Gwaltney v. Scottish-Carolina Timber & Land Co., 16 S.E. 692, 695 (N.C. 1892) (Avery, J., dissenting)); Heyward v.

component of much recent conservationist litigation. In the past two decades, litigants aiming to stop privatization of a watercourse or some deleterious activity in a waterway often claim that the water is navigable and, if the water is not navigable under the existing criteria set forth by the state's courts, ask the court to change the definition.[7] The problem, then, is to determine whether there is some guiding principle for navigability doctrine that would permit state courts to carry out the core judicial function of declaring and updating the common law while preventing constitutionally suspect deprivations of individual property rights.

This Article has two aims: one descriptive, one normative. First, it reveals how navigability doctrine has been used in American history: in some contexts, it has been a force for beneficial and wholly legitimate protection of public trust resources, and in others, a vehicle for disquieting collusion to eliminate an individual's dominion over his property without oversight. All state court invocations of navigability doctrine fall somewhere along this spectrum. The prescriptive question is how courts can modify out-of-date definitions while providing property owners the rights that the Constitution guarantees. This Article explains the current state of the law and concludes that the status quo of no constraint is untenable. It argues that navigability doctrine should be constrained by some constitutional provision, whether it is the Takings Clause, the Due Process Clause, or both.[8]

Farmers' Mining Co., 19 S.E. 963, 971 (S.C. 1894)), and prevent damming or filling (*see, e.g.*, State *ex rel.* Medlock v. S.C. Coastal Council, 346 S.E.2d 716, 717 (S.C. 1986) (no right to impound marsh)). Sometimes, state courts have unbundled these rights by, for example, permitting boating, but not fishing on the banks. *See, e.g.*, Douglas v. Bergland, 185 N.W. 819, 820 (Mich. 1921). Each of these public rights carries with it a potential private injury. The injuries to riparian owners may include possible damming or flooding, though this may be compensable (*see, e.g.*, Haines v. Hall, 20 P. 831, 837 (Or. 1888)), loss of exclusive fishing rights (*see, e.g.*, *Cates*, 158 S.W. at 753), loss of privacy, and potentially increased risk of trespass (*see, e.g.*, *McIlroy*, 595 S.W.2d at 660).

7 *See* Mich. Citizens for Water Conservation v. Nestlé Waters N. Am. Inc., 709 N.W.2d 174, 205 (Mich. Ct. App. 2005), *aff'd in part, rev'd in part*, 737 N.W.2d 447 (Mich. 2007); James Thorner, *Perrier Clears Water Rights Hurdle*, ST. PETERSBURG TIMES, Oct. 13, 1998, http://www.sptimes.com/Pasco/101398/Perrier_clears_water_.html.

8 As discussed in the introduction to Part II, various state-law constraints—constitutional, statutory, or even common-law—might also operate on navigability doctrine. There are good reasons to prefer that state law resolve intrastate property conflicts, leaving federal law—and federal courts—out of it. *See* Robert C. Ellickson, *Federalism and* Kelo*: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 762–63 (2009). Of course, because our nation's waters are interconnected in myriad ways, modifications to water law may raise more concerns than state use of eminent domain on a parcel-by-parcel basis; changes to one state's navigability law may impact water resources in ways that generate externalities outside the state. *Cf.* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992) ("The presence of interstate externalities is a powerful reason for intervention at the federal level . . . ."). Additionally, there are practical reasons to suspect that challenges to state navigability doctrine will be brought in federal court under federal constitutional law. *See infra* note 160.

Navigability comes into state law through operation of the public trust doctrine, which dictates that the public has property rights in some natural resources that can be asserted to prevent actions by individuals or the government that impinge on those rights.[9] For inland water resources, "the coverage of the trust depends on a judicial definition of navigability."[10] Surprisingly, though the public trust is a heavily researched doctrine in American property law, state-law navigability doctrine has not received nearly as much attention. The existing scholarship discussing navigability generally falls into two camps.[11] One focuses on the federal meaning of the word for purposes of admiralty law, federal statutory law, or Commerce Clause jurisdiction—concepts that bear almost no relationship to state navigability doctrine.[12] The other recognizes the authority of state courts to define navigability and suggests that environmental litigants might use the concept to seek additional protections for the climate, groundwater, or other elements of the natural world.[13] But because this scholarship does not address the history, development, or limits of navigability doctrine, it offers a one-

---

9 Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

10 *Id.* at 556. Very few states, all of which are in the West, do not tie public water rights to navigability; their state constitutions reserve all waters, navigable or not, for the public. *See* Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 166 (Mont. 1984); Parks v. Cooper, 676 N.W.2d 823, 832 (S.D. 2004); Conatser v. Johnson, 194 P.3d 897, 899–900 (Utah 2008); Day v. Armstrong, 362 P.2d 137, 150 (Wyo. 1961). A few states have both a common-law and a statutory definition that coexist. *See, e.g.*, TEX. NAT. RES. CODE ANN. § 21.001 (2013); *see also* State v. Bradford, 50 S.W.2d 1065, 1068–69 (Tex. 1932).

11 *But see* Daniel J. Hulsebosch, *Writs to Rights: "Navigability" and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1090–97 (2002) (discussing pre-1830 state-law navigability doctrine to support a substantive, rather than procedural, conceptualization of common law).

12 PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1234–35 (2012); *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, 597 (1975) ("The purpose of this discussion is not to catalog all the various state tests of navigability."); John F. Baughman, Note, *Balancing Commerce, History, and Geography: Defining the Navigable Waters of the United States*, 90 MICH. L. REV. 1028 (1992). A recent overview from Robin Kundis Craig describes the overlapping federal and state definitions of the word. *See* Robin Kundis Craig, *Navigability and its Consequences: State Title, Mineral Rights, and the Public Trust Doctrine*, 61 ROCKY MTN. MIN. L. INST. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2449374. While some states erroneously linked federal definitions of navigability to state-law navigability early on, that practice has slowed and stopped. *See* People *ex rel.* Deneen v. Econ. Light & Power Co., 89 N.E. 760, 771 (Ill. 1909); Hurst v. Dana, 122 P. 1041, 1044 (Kan. 1912); *see also* Ryals v. Pigott, 580 So. 2d 1140, 1152 n.22 (Miss. 1990).

13 Carol Necole Brown, *Drinking from a Deep Well: The Public Trust Doctrine and Western Water Law*, 34 FLA. ST. U. L. REV. 1 (2006) (advocating for this strategy); Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781 (2010) (same).

sided view of the doctrine without its dark side.[14] This Article fills the resultant void.

Moreover, this Article contributes to debates about constitutional limitations on judicial changes to state property law. The topic of "judicial takings" has received a great deal of attention in recent years.[15] Unfortunately, the scholarship typically fails to describe how the application of either the Takings Clause or the Due Process Clause would differently impact the substance of any future state-court proceedings.[16] The result is that most scholarship on judicial takings and due process constraints abstractly critiques existing Supreme Court decisions or suggests alternative decision rules in a vacuum. By examining Fifth and Fourteenth Amendment restrictions on state common lawmaking through an examination of navigability doctrine, this Article avoids that pitfall.

Part I of this Article traces the development of navigability doctrine on American shores. English courts did not have broad authority to define "navigability," but misinterpretations of English water law created this authority early in the history of the American republic. Once entrenched in American law, navigability doctrine took on a life of its own in each state, with deeply varied definitions developing in different contexts. The main problem took shape early on: state courts might well have the authority to declare the meaning of navigable within their state and thereby determine the scope of the public trust, but what power did they have to change that definition once it was created? This Part also explores uses of the power to change the definition during two

---

14 Because the trend has been for courts to expand the definition of "navigability" at the expense of private property owners, this Article focuses on that "dark side" of the litigation. Nevertheless, the law leaves open the possibility that courts could use the doctrine to constrict the definition of "navigability," if circumstances called for it. This would raise issues conventionally applied to legislatures under public trust law: what is the analysis when *courts* effectively alienate trust property? *Cf.* Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411 (1987) (discussing inalienability of trust resources and close relationship between eminent domain and public trust law). A full treatment of this "other side" must await further work, and as yet, no state court has interpreted navigability doctrine to contract the definition.

15 *See, e.g.*, Trevor Burrus, *Black Robes and Grabby Hands: Judicial Takings and the Due Process Clause*, 21 WIDENER L.J. 719 (2012); J. Peter Byrne, *Stop the* Stop the Beach *Plurality!*, 38 ECOLOGY L.Q. 619, 630–31 (2011); Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247 (2011); Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305 (2012); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379; Ian Fein, Note, *Why Judicial Takings Are Unripe*, 38 ECOLOGY L.Q. 749 (2011); Michael R. Salvas, Note and Comment, *A Structural Approach to Judicial Takings*, 16 LEWIS & CLARK L. REV. 1381 (2012); David Wagner, Note, *A Proposed Approach to Judicial Takings*, 73 OHIO ST. L.J. 177 (2012).

16 *But see* Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between the* Ius Naturale *and* Stop the Beach Renourishment, 6 DUKE J. CONST. L. & PUB. POL'Y 37 (2011) (discussing the avulsion doctrine); Peñalver & Strahilevitz, *supra* note 15, at 364–67 (applying their judicial takings rules to examples of a public-private boundary dispute and a hypothetical private-private boundary dispute).

periods where water rights became vitally important: (1) the explosion in infrastructural development in the mid-nineteenth century, and (2) the rise of the environmental movement in the mid-twentieth century.

Part II examines the extant constraints on navigability doctrine, particularly in light of relatively recent property decisions by the Supreme Court. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[17] at least six justices of the current Court expressed agreement with the basic premise that the Constitution forbids state courts from eliminating private property rights in certain circumstances.[18] But they disagreed over whether the Takings Clause or the Due Process Clause supplied the restriction. Accordingly, this Part examines the Takings and Due Process frameworks outlined in the *Stop the Beach* opinion and guidance from other relevant cases to determine what limitations on navigability doctrine may currently exist.

Part III appraises judicial options moving forward. It begins by explaining that, despite some benefits, having no constraint on the power is constitutionally impermissible and therefore not an option. Moving to the alternative constitutional lenses through which the power could be viewed, this Part outlines the substantive, remedial, and normative consequences of applying the Takings Clause, the Due Process Clause, or both clauses to navigability doctrine. After exploring the ways that each framework is likely to restrict or permit uses of the doctrine, this Article concludes that any of these three approaches would be an improvement.

I. NAVIGABILITY AND THE PUBLIC TRUST IN INLAND WATERS

A. *Historical Development of Navigability Doctrine*

The public has had the right to use navigable water since Roman times. Then, navigability meant susceptibility to use by watercraft for shipping.[19] Early English law adopted a similar definition for the word: the public had rights to navigate in waters capable of being used for commercial travel.[20] The public had other rights in other waters. Under

---

17 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010) (plurality opinion).

18 *Id.*

19 EUGENE F. WARE, ROMAN WATER LAW 35, § 28 (Fred B. Rothman & Co. 1985) (1905).

20 *See* MATTHEW HALE, DE JURE MARIS, *reprinted in* STUART A. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370 (3d ed. 1888) [hereinafter HALE, DE JURE MARIS]. For a much longer treatment of the history of navigability in the Roman and British empires than this Article provides, see MacGrady, *supra* note 12, and Earl F. Murphy, *English Water Law Doctrines Before 1400*, 1 AM. J. LEGAL HIST. 103 (1957).

English rules, the public had the right to fish in both tidal water and navigable water,[21] and still other rights in smaller water bodies, like the right to prevent damming of "sewers" and the right to use small boats in "ditches" when winter melts made floating possible.[22]

The leading seventeenth-century English water law treatise also defined navigable water as water used for commercial transport. *De Jure Maris*, by Sir Matthew Hale, described "little streams and rivers that are not a common passage" as private waters, and those in "common or publick use for carriage" as public waters.[23] For Hale, the allocation of rights thus depended on the water's use: if the water was navigable by boats carrying men or goods from place to place, it belonged to the king, and thereby could be freely used by the people.[24] Hale's treatise was brought to America, and it became the main source of English water law on the continent.[25]

Hale's treatise was misread fairly early in American legal history.[26] After the American Revolution, the various state governments inherited the English king's sovereign authority, including the king's powers with respect to water and subaqueous soil.[27] The states, like the king before them, were expected to hold the public's rights in public waterways.[28] This necessarily required states to determine the scope of those rights, a task that fell to the state courts.

In *Palmer v. Mulligan*,[29] an 1805 case, the Supreme Court of New York adjudicated a dispute between two mill owners about whether the upstream mill was a nuisance. This provided them with an early occasion to discuss whether the public had rights in the Hudson River—

---

21 Carter v. Murcot, [1768] 98 Eng. Rep. 127, 127 (K.B.) ("The defendant pleaded that it is a navigable river; and also, that it is an arm of the sea, wherein every subject has a right to fish."); *see* THE READING OF THE FAMOUS AND LEARNED ROBERT CALLIS, ESQ., UPON THE STATUTE OF SEWERS, 23 HEN. VIII C.5, at 78–79 (William John Broderip ed., 4th ed. 1824) (1622) [hereinafter CALLIS ON SEWERS].

22 CALLIS ON SEWERS, *supra* note 21, at 80–81.

23 HALE, DE JURE MARIS, *supra* note 20, at 374. This classification was not as nuanced as the classifications of various private and public waters drawn by Callis, but Hale's main task in writing his treatise was "methodizing" the laws of England, not capturing the diversity of common law precedent. *See* 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND FROM MANUSCRIPTS, at x (Francis Hargrave ed., 1787).

24 *See* HALE, DE JURE MARIS, *supra* note 20, at 374.

25 *See, e.g.*, Palmer v. Mulligan, 3 Cai. 307, 315 (N.Y. Sup. Ct. 1805). Why did Hale's treatise achieve preeminence, at least among American jurists? The answer seems to be, simply, because it was published and widely available around the time that many of them were educated. *De Jure Maris* was included in Francis Hargrave's *Law Tracts*, a collection of legal texts published in London and Dublin and available in Boston, New York, and Philadelphia around 1800. *See* Hulsebosch, *supra* note 11, at 1070–71 & nn.81–82.

26 Hulsebosch, *supra* note 11, at 1083–84.

27 *See* Martin v. Waddell, 41 U.S. 367, 410 (1842); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 71 (2007).

28 *Martin*, 41 U.S. at 410.

29 *Palmer*, 3 Cai. 307.

in other words, whether it was navigable.[30] In his opinion on the case, Chancellor James Kent cited Hale's treatise to pronounce that "[t]he *Hudson* at *Stillwater* is a fresh river, *not navigable* in the common law sense of the term, for the tide does not ebb and flow at that place."[31] Kent thus conflated English law on the ownership of fisheries and subaqueous soil, which depended on whether the water was salt or fresh (in other words, tidal), with the criteria for determining whether the public was entitled to use water for navigation, which, according to Hale, depended on whether the water could be used as a common passage (in other words, was navigable). Though "navigable" never meant "tidal" in England, Kent interpreted Hale that way.[32]

American judges often treated "tidal" and "navigable" as equivalents because of this language in Kent's opinion. The mistake was repeated in Joseph Angell's *A Treatise on the Law of Watercourses*,[33] the preeminent American water law treatise of the nineteenth century. Only a few careful nineteenth-century readers noted that Kent's doctrine of English navigability had never existed at all.[34]

Many state judges, including Kent, grabbed hold of this misreading as license to stretch the meaning of the word. They reasoned that, in order for great rivers like the Mohawk, Ohio, Mississippi, and Missouri to be navigable by the public, they would have to jettison "English doctrine" and change the definition of "navigable" to encompass something more than the tides.[35] American courts also justified departures from the word's ordinary meaning by overstating differences between American and English geography. For example, in 1863, one Pennsylvania court tried to eliminate the constricting "tidal" definition by analogizing Pennsylvania geography to Rome, a land of "tideless" rivers where waters were navigable if "really so."[36]

---

30 *Id.* at 318–20.

31 *Id.* at 318.

32 Hulsebosch, *supra* note 11, at 1084 ("Again, no English source ever clearly equated navigable and tidal.").

33 JOSEPH KINNICUT ANGELL, A TREATISE ON THE LAW OF WATERCOURSES 552, § 535 (4th ed. 1850).

34 *See, e.g.*, LOUIS HOUCK, A TREATISE ON THE LAW OF NAVIGABLE RIVERS 8, § 12 (1868); *The Common-Law Doctrine of Navigable Waters*, 5 CASE & COMMENT 53, 53 (1898) ("[The English] doctrine as to navigability was emphatically repudiated, for, in the cases as they have been occurred in great numbers will be found Kent's statement as a premise, followed by the phrase, 'but such is not the law in this country.' That it is not the law in this country is true, and, so far as the reported cases show, it never was the law anywhere before Judge Kent stated it as law.").

35 *See* Packer v. Bird, 137 U.S. 661, 667–72 (1891).

36 *See* Monongahela Bridge Co. v. Kirk, 46 Pa. 112, 121 (1863) ("The Roman law, which has pervaded Continental Europe, and which took its rise in a country where there was a tideless sea, recognised all rivers as navigable which were really so, and this common-sense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth."). The view expressed by American courts that they were doing something different and innovative may derive from the uneasy reception of the

By the mid-to-late nineteenth century, even the Supreme Court sanctioned the conscious modification of the definition of "navigable" by state courts, noting "the broad differences existing between the extent and topography of the British island and that of the American continent"[37]—the presumed lack of important non-tidal rivers—as a basis for the "new" American doctrines. These American courts reasoned that if "navigable" meant "tidal," it was a word with a legal meaning separate from its natural meaning, and its definition could be adapted for new circumstances.

B. *Different Meanings in Different States*

Following this development, early in each state's history, state courts adopted different definitions of navigability. This Article categorizes these definitions into three broad groups: (1) historical definitions, (2) commercial definitions, and (3) floatable definitions.

The "historical" definitions are those that are incapable of evolving over time. In a few states, the misapplied English test for navigability persists: only tidal waters are considered navigable under the state's law.[38] In others, only waters that were capable of commercial transport as of the date of statehood are considered "navigable."[39] Proving navigability requires the production of evidence about historic use of the waterway[40] and historic forms of commercial transport in the region.[41] This test puts difficult burdens on those who seek to prove that a particular waterway is public. First, it requires the production of evidence about very old use of the waterway,[42] which is difficult to show without excellent written records. Even if such proof of historic commercial use exists, evidence about water vegetation,[43] waterfalls,[44] or driftwood[45] could be used to counter claims that a waterway was

English common law in the post-Revolutionary period. *See generally* William R. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1968) (providing a history of attitudes toward and influences of English common law in American colonial jurisprudence).

37 Barney v. Keokuk, 94 U.S. 324, 338 (1876).

38 *See, e.g.*, Hirsch v. Md. Dep't of Natural Res., 416 A.2d 10, 12 (Md. 1980); Att'y Gen. v. Woods, 108 Mass. 436, 439 (1871).

39 *See* Ariz. Ctr. for Law in Pub. Interest v. Hassell, 837 P.2d 158, 164–65 & n.8 (Ariz. Ct. App. 1991); State *ex rel.* Meek v. Hays, 785 P.2d 1356, 1358–60 (Kan. 1990); Orleans Navigation Co. v. Schooner Amelia, 7 Mart. (o.s.) 570, 604 (La. 1820).

40 *See* PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1227–28 (2012); United States v. Holt State Bank, 270 U.S. 49, 54–56 (1926).

41 United States v. Oregon, 295 U.S. 1, 23 (1935).

42 *See PPL Mont.*, 132 S. Ct. at 1231–33.

43 *Oregon*, 295 U.S. at 18.

44 *PPL Mont.*, 132 S. Ct. at 1224–25.

45 United States v. Utah, 283 U.S. 64, 84 (1931).

susceptible to transporting goods and people. Additionally, the test requires the production of evidence about how old modes of transportation traveled along the waterway (and, perhaps, what freight they carried).[46] This leads to absurd inquiries: courts asking about how trappers got around centuries ago[47] or poring over the diaries of western pioneers Lewis and Clark.[48] It can also leave courts engaging in odd line drawing between, for example, the travel of nineteenth-century "homemade boats of three or four to six inches draft"[49]—held to be insufficient to prove commercial boating in the mid-nineteenth-century[50]—and the travel of "flatboats," or floating log boxes[51]—which were held to prove that the water carried boats bearing merchandise at the state's founding.[52]

The most common definitions of navigability were, and still are, commercial definitions: in these states, waters are navigable only if they have the capacity for commercial transport (not simply pleasure boating), defined either as the ability of waters to be used "as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water"[53] or, quite similarly, the ability of waters to transport locally produced goods. The waters capable of commercial use can change. As one court put it "[t]he ordinary condition of waters evolves with time, albeit often imperceptibly. The customary modes of commerce and trade and travel on waters change as well."[54] If the waterway becomes susceptible to commercial use, for example, as a result of seasonal weather events or a dramatic geographic change, it might become "navigable."[55]

---

46 *PPL Mont.*, 132 S. Ct. at 1231–33.

47 *Oregon*, 295 U.S. at 21–23.

48 *PPL Mont.*, 132 S. Ct. at 1223–24.

49 *Oregon*, 295 U.S. at 21.

50 *Id.* at 21–23.

51 James Mak & Gary M. Walton, *The Persistence of Old Technologies: The Case of Flatboats*, 33 J. ECON. HIST. 444, 444 n.2 (1973).

52 United States v. Holt State Bank, 270 U.S. 49, 56 (1926).

53 *Id.*; *see* Rhodes v. Otis, 33 Ala. 578, 595 (1859) ("[W]henever they are found of sufficient depth to float the products of the mines, the forests, or the tillage of the country, through which they flow to market, [waters] have always been adjudged by our courts to be subject to the right of passage, independent of legislation." (quoting Browne v. Schofield, 8 Barb. 239, 243 (N.Y. Gen. Term 1850) (internal quotation marks omitted))); Lutesville Sand & Gravel Co. v. McLaughlin, 26 S.W.2d 892, 893 (Ark. 1930) (describing navigability as "usefulness of the stream to the population of its banks" in carrying local products from "fields and forests").

54 Ryals v. Pigott, 580 So. 2d 1140, 1152 (Miss. 1990).

55 *See McLaughlin*, 26 S.W.2d at 893; State *ex rel.* Cates v. W. Tenn. Land Co., 158 S.W. 746, 747–48, 753 (Tenn. 1913). Note, however, that later artificial enhancements do not necessarily make a waterway navigable. Courts in different states have interpreted the phrase "navigable in its natural condition," a part of many state tests, to both prohibit and permit artificial aids to navigability. *Compare* Bauman v. Woodlake Partners, LLC, 681 S.E.2d 819, 822 (N.C. Ct. App. 2009) (stating that "natural condition" means without artificial aid), *with* State v. Adams, 89

Additionally, if new modes of transportation come into vogue and additional waters are thereby useful for commercial transport, those waters might be open for public use.[56]

A third group of courts adopted "floatable" definitions: they declared the water navigable if it could float some object. In the mid-nineteenth and early twentieth centuries, these were usually special rules of navigability for water capable of floating logs.[57] There were slight differences in these early floatable tests. In some states, the objects must be able to float without human aid;[58] other states still find a waterway navigable when human intervention is needed to push them when they cannot float.[59] In some states, a stream is navigable if capable of floating single logs for a couple months out of the year;[60] in others, a stream capable of "floating only single logs, and not rafts or batteaux," is not navigable.[61]

Courts in the floatable usage states likely chose a broader definition in part to accommodate important local interests. Like commercial traffic carrying people and goods, logs had become valuable commodities, different only because of their ability to float without the use of a vessel. But unlike other forms of commercial transport, some lumbering had a distinctly regional flavor, particularly when taking place on smaller streams or freshets; if the waterway was disconnected from a lake or large river, the distance from forest to mill might be only a matter of miles.[62] Especially before 1900—and the widespread use of railways in the timber industry—a great deal of lumbering was in-state commerce, rather than interstate commerce involving large-scale transport of goods along larger rivers.[63]

While a floatable definition may encompass more waters than a definition requiring commercial usage, at least commercial definitions can withstand the test of time. The lumber industry has waned in importance, and the practice of floating logs downstream has waned

---

N.W.2d 661, 665–66 (Minn. 1957) (finding that "natural condition" means the volume and flow of the water, permitting aids to navigation).

56 *Ryals*, 580 So. 2d at 1152.

57 The first seems to have been Maine. *See* Brown v. Chadbourne, 31 Me. 9 (1849); *see also* Bott v. Comm'n of Natural Res., 327 N.W.2d 838, 862–63 (Mich. 1982); Shaw v. Oswego Iron Co., 10 Or. 371, 382–83 (1882).

58 Drainage Dist. No. 3 of Kings Cnty. v. Machias Mill Co., 177 P. 326, 327 (Wash. 1918).

59 Haines v. Hall, 20 P. 831, 839 (Or. 1888).

60 Gwaltney v. Scottish-Carolina Timber & Land Co., 16 S.E. 692, 696 (N.C. 1892); Morgan v. King, 35 N.Y. 454, 458–59 (1866).

61 Knox v. Chaloner, 42 Me. 150, 155 (1856).

62 *See* WILSON MARTINDALE COMPTON, THE ORGANIZATION OF THE LUMBER INDUSTRY 9, 27–34 (1916) (describing prevalence of "local manufacture for local use," particularly before 1850 and continuing to 1900).

63 *See id.*

with it. Railroads and trucks now carry lumber from forest to mill.[64] In any event, federal environmental legislation has drastically reduced the size of the American timber industry.[65] Many courts that measure navigability by floating logs are thus left with a definition that bears no relationship to actual or future use of waters.[66]

This presents the key conflict. Early precedents made clear that each state could set the bounds of the public trust in waters through its common-law definition of "navigability." But when, if ever, can the courts change their definitions if they have become outdated or otherwise undesirable?

C. *Problematic Evolution: Power to Declare, Power to Change*

Many courts were confronted with requests to change their definitions in moments when water resources became particularly important. Litigation over navigability doctrine was especially concentrated during two periods: (1) alongside the rise of the logging and railroad industries in the mid-to-late nineteenth century; and (2) alongside the environmental movement in the mid-twentieth century. This Section demonstrates how courts used navigability doctrine to change an existing definition and how they justified that authority. It also demonstrates that in many instances, little or no consideration was given to the effect of a change on property owners.

1. Logs and Industry

In the mid-nineteenth century, once most existing states had already adopted initial definitions of navigability, litigants in states with either historical or commercial definitions began pointing state courts to cases from other states that accepted the floatable definition of "navigability." Initially, courts were not receptive to changing the established rules, as evidenced by this case about the definition of a floating-log:

---

64 STEWART H. HOLBROOK, YANKEE LOGGERS: A RECOLLECTION OF WOODSMEN, COOKS, AND RIVER DRIVERS (1961).

65 *See, e.g.*, Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531 (2012); National Forest Management Act of 1976 § 2, 16 U.S.C. § 1601 (2012).

66 Bott v. Comm'n of Natural Res., 327 N.W.2d 838, 864 (Mich. 1982) (Williams, J., dissenting) ("Blind adherence to precedent by rote application of the log flotation test ignores the reality of current conditions and needs of the public. Accordingly, we reject continued adherence to the log flotation test as a suitable standard for modern determinations of navigability of inland waterways.").

> To . . . attribute navigable properties to a stream which can only float a log, is carrying the doctrine entirely too far, and is turning a rule which was intended to protect the public, into an instrument of serious detriment to individuals, if not of actual private oppression. The important uses to which the waters of non-navigable streams are constantly applied, would have no security or certainty under such a stretch of construction. Dams for the erection of mills, manufactories, canals, for the purpose of irrigation, supplying mines, or even to subserve navigation itself, would have to give way to the mere claim of the right to float a saw-log, and if a log, why not a plank, or a fishing-rod? The idea of navigation certainly never contemplated such a definition or such results.[67]

This quote from a California decision mirrors other contemporary discussions of navigability doctrine within state courts. The doctrine could be used to apply the existing definition to a disputed waterway, but not to stretch the word beyond the meaning it had been given and thereby upset individual property rights.

The New York courts in the mid-nineteenth century shared this view. A case about the Callicoon River illustrates the point. The Callicoon is an off-shoot of the Delaware River that extends northeast from the Pennsylvania border into Sullivan County, New York. Around the year 1820, the Curtis family built and operated a dam and saw-mill on their property, which traversed the creek.[68] In 1852, Mr. Keesler—who was not a riparian owner—dropped a large quantity of hemlock logs onto a bank about three miles north of the mill with the intention of floating them to market over the Callicoon and the Delaware Rivers.[69] This threatened to destroy the Curtis dam.[70] When sued, Keesler urged the New York Supreme Court to find that the capacity of the creek to float rafts of logs, or even single logs, qualified the water for public use as a navigable stream.[71] The court had little sympathy, finding that the existing test—from *Palmer*[72]—required that the water be capable of use as a common passage.[73] The Callicoon was only used by a few people and was only intermittently capable of floating anything.[74] Moreover, Keesler had paid others to drive his logs over dams in the past; now he wanted that privilege for free.[75]

---

67 Am. River Water Co. v. Amsden, 6 Cal. 443, 446 (1856).
68 *See* Curtis v. Keesler, 14 Barb. 511, 511–12 (N.Y. Gen. Term 1852).
69 *See id.* at 513.
70 *Id.*
71 *See id.* at 519–20.
72 Palmer v. Mulligan, 3 Cai. 307, 315 (N.Y. Sup. Ct. 1805).
73 *See Curtis*, 14 Barb. at 518–19.
74 *See id.* at 519–20.
75 *See id.* at 520.

Keesler pointed to changing times, arguing that an adverse ruling about whether the Callicoon was public would "inflict irreparable injury upon the persons engaged in the business of lumbering."[76] Too bad, said the court:

> Possibly this may be so, but it is no adequate reason why the law should not be enforced. . . . It is not those only engaged in the business of lumbering that have a deep interest in a correct decision of the law. The plaintiffs in this case, and all owners of streams of the character of the Callikoon creek, have an interest in knowing whether they hold an absolute or qualified property.[77]

This respect for the expectations of property owners had a limited life in New York jurisprudence. Just fourteen years later, the New York Court of Appeals reversed course. The court of noted that the state had "many streams of considerable extent, not navigable by boats, lighters or rafts, but capable of floating to market single logs or sticks of timber."[78] Without giving the public uninhibited use of even trivially passable waterways, they reasoned, wood could not make it to market: "If it is so far navigable or floatable, in its natural state and its ordinary capacity, as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported."[79]

During the mid-to-late nineteenth century, many states that had previously chosen other definitions for navigability began adopting floatable definitions for navigability.[80] Many of these floatable definitions were even more expansive than the log-based tests: for example, some states found water navigable if it could float only railroad ties.[81] The courts' motives were often explicit: they intended to spur economic growth by opening the nation's waters for use in transporting timber for construction, logs that would be split to make railroads, and mineral resources.[82] The free use of the nation's waterways reduced the cost of transporting wood or minerals over land from forest to mill or city.[83]

Some of the most openly pro-development language came out of the North Carolina Supreme Court, in an opinion written by Justice

---

76 *Id.* at 519.

77 *Id.*

78 Morgan v. King, 35 N.Y. 454, 459 (1866).

79 *Id.*

80 *See, e.g.*, McKinney v. Northcutt, 89 S.W. 351, 355 (Mo. Ct. App. 1905); *Morgan*, 35 N.Y. at 458–59; Gwaltney v. Scottish-Carolina Timber & Land Co., 16 S.E. 692, 696 (N.C. 1892); Heyward v. Farmers' Mining Co., 19 S.E. 963, 970–71 (S.C. 1894) (distinguishing State v. Pac. Guano Co., 22 S.C. 50, 57 (1884)); Sigler v. State, 66 Tenn. 493, 497 (1874).

81 *See* Elder v. Delcour, 269 S.W.2d 17, 25 (Mo. 1954) (en banc); *McKinney*, 89 S.W. at 355.

82 *See* MOLLY SELVIN, THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789–1920, at 282–85, 289, 296–97 (1987).

83 *See Gwaltney*, 16 S.E. at 696.

Alphonso Avery.[84] Although the majority of the justices voted to adopt a log-floating test for navigability in North Carolina, thereby abandoning their definition requiring use by boats, Justice Avery wanted to include rocky seasonal streams in the definition, not just waterways capable of floating rafts throughout the year:

> The object being to develop vast forests of virgin trees, that are located remote from the centers of trade, by utilizing the natural force of the flowing water as a means of cheap transportation, the reasons offered for sustaining the right to the easement in a sluggish stream, where the logs can be floated in rafts, and delaying its existence in a water course of much greater volume and equal depth, because it is studded with immense rocks, and the fall is so great and the current so strong that rafts cannot be handled with safety, seem to me very unsatisfactory. The recognition of the distinction would prohibit the development of the mountain section, where there are generally strong currents and sudden falls . . . .[85]

Indeed, Justice Avery wrote that the court's rulings on the scope of "navigability" were integral to North Carolina's economic growth: "I am firmly persuade [sic] that the future development of all of western North Carolina . . . depends more upon the ultimate decisions of the points involved in this case than upon any or all other contingencies."[86]

How did courts adopting new floatable definitions characterize navigability doctrine? In his opinion, Justice Avery described navigability doctrine as a natural part of a state court's authority to change and create common law to respond to new circumstances: "This is one of many instances illustrating how, looking always to the reason upon which the common law was founded, its principles may be expanded so as to meet the exigencies arising in the development of a new country."[87] Some courts did not treat the expanded definition as a change at all. They pointed to the importance of logs, railroad ties, or minerals for the economy and reasoned that because navigability had always been tied to commerce, there was no reason to exclude these materials simply because they could float without boats.[88]

Occasionally, courts likened their expansion of the definition to the use of eminent domain power by the legislature. A spectacular example

---

84 This was technically a dissenting opinion—the plaintiff claimed that he had been damaged by log driving, but his case was summarily dismissed. The majority remanded because it found that the plaintiff had made out a prima facie case (assuming, favorable to the plaintiff, the non-navigability of the river). Justice Avery discussed all aspects of the case in his dissent, while acknowledging that the main point of divergence was his belief that the plaintiff had no case. *See id.* at 698 (Avery, J., dissenting).

85 *Id.* at 695.

86 *Id.* at 698.

87 *Id.* at 697.

88 Moore v. Sanborne, 2 Mich. 519, 524 (1853).

of this comes from Oregon. In the 1888 case of *Haines v. Hall*,[89] the Oregon Supreme Court was called upon to consider its definition of "navigability" as "capable of serving an important public use as a channel of commerce."[90] The plaintiff owned two forty-acre farms with a small creek running through them.[91] Owners of forestland upstream began trying to use his stream to float logs down to mills, though the creek was not capable of floating any craft.[92] And, as in other states, floating the logs in this manner saved the high expense of sending logs over the mountainous Oregon terrain.[93]

This caused problems for the plaintiff, including the damming of the creek and flooding of his land.[94] In 1886, after bringing suit against one of the individuals sending the logs downstream, he obtained a declaration from the Oregon Supreme Court that "if [a waterway] is only a brook, although it might carry down saw-logs for a few days, during a freshet, it is not, therefore, a public highway."[95] Two years later, in *Haines v. Hall*, he brought suit against another offender. This time, the injuries included "from 25 to 35 men with cant-hooks and other appliances" who were running around on his property alongside the creek "to prevent the logs from lodging."[96]

In the second case, the Oregon Supreme Court changed its tune:

> It would . . . be much more in consonance with the spirit and principles of our government to have left the matter to be regulated by the legislature, which has authority to pass laws for establishing public highways, and to provide for such compensation.
>
> We are, however, committed to the doctrine that a stream of water which is of sufficient extent and capacity to float logs and timber from mountainous regions to market, and can be utilized thereby for the benefit and advantage of the community at large, notwithstanding it is included within the land owned by private individuals, is, nevertheless, a public, navigable stream for such purposes; and we must accept that doctrine as the law.[97]

Although the Oregon Supreme Court found that the stream on the plaintiff's land was not navigable and thus vindicated the plaintiff's trespass claim, the new definition stood to fundamentally change the character of many others' lands. The Oregon court's ruling is as close as

89 Haines v. Hall, 20 P. 831 (Or. 1888).
90 *Id.* at 833.
91 *See id.* at 832.
92 Haines v. Welch, 12 P. 502, 502–03 (Or. 1886).
93 *Hall*, 20 P. at 835.
94 *See id.* at 836–37 (Strahan, J., dissenting).
95 *Welch*, 12 P. at 502–03.
96 *Hall*, 20 P. at 833.
97 *Id.* at 835.

it gets to an admission that the state court was doing by judicial decree something its legislature could only do through eminent domain and compensation.

At least one judge considering a navigability case expressly weighed the interests of the majority against the landholding few in expanding the definition of "navigability":

> [C]ourts [are inclined] to sustain the right of the owners of large forests or extensive mining districts to enjoy the privilege [to a waterway], when shown to be very valuable to them, at the comparatively insignificant sacrifice on the part of a riparian proprietor of using his property in subordination to it.[98]

This language evokes contemporary eminent domain rulings on railroads and other transport networks. Then, few landowners were compensated for extensions of public utilities through their lands.[99] Often, the courts dealing with railroad cases cited the benefits accruing to the affected owner's land as offsetting any harms.[100] Like railroads, waterways probably generated high agglomeration economies that increased local land values.[101] In both these cases and the navigability case, members of the judiciary might have perceived compensation as unnecessary because the public benefits were perceived to be so great—and the private sacrifices so minimal—that inequities were tolerable. This might explain the closely related language used in the navigability opinion and other transportation decisions from the same time frame.[102]

As this history shows, many nineteenth-century state courts exhibited views that navigability doctrine entitled them to change the definition when circumstances required it,[103] without any remedy to owners who may have expected to use or enjoy the water free of any public right. Optimistically, expanded definitions favored entrepreneurial growth by favoring creative, new uses of property with radiating benefits to the community and the society as a whole (over

---

98 Gwaltney v. Scottish-Carolina Timber & Land Co., 16 S.E. 692, 695 (N.C. 1892) (Avery, J., dissenting).

99 *See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 99 (1995).

100 *See generally id.* at 81; Harry N. Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, 7 PERSPECTIVES AM. HIST. 327 (1971).

101 *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 759–61 (1986).

102 *See* FISCHEL, *supra* note 99, at 99.

103 Only three states—Alabama, California, and Illinois—appear to have rejected floatable definitions when asked to adopt them during this period, although in several states where the timber industry was less important, the question was never directly presented. *See* Olive v. State, 5 So. 653, 656 (Ala. 1889); Rhodes v. Otis, 33 Ala. 578, 598 (1859); Am. River Water Co. v. Amsden, 6 Cal. 443, 446 (1856); Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905).

some holdout's rights).[104] Pessimistically, these doctrines redistributed wealth from politically weak landowners to the wealthy class, favoring commercial interests at the expense of individual property rights.[105] However the courts' motivations are characterized, it remains clear that many state judges viewed navigability doctrine expansively and did not consider the Constitution as a limit on their authority. Thus, when the nation's waters were needed for economic growth, affected individuals were left without recourse.

2. The Environmental Movement

In the mid-twentieth century, a second event prompted another period of activity surrounding navigability doctrine: the environmental movement.[106] Between the late 1950s and 1980,[107] the Environmental Protection Agency (EPA) was founded, and Congress passed nearly all of the statutes that act to conserve the nation's resources, including the Clean Water Act,[108] the Wild and Scenic Rivers Act,[109] and the National Parks and Recreation Act.[110] One of the drivers of the environmental movement was increasing interest in recreation far from urban space.[111] Wilderness was no longer something to be "feared, fought, and flattened": it was peaceful, something to be longed for.[112]

Prior to 1950, only two states included recreational boating or any other pleasure activity in the common-law definition of "navigability."[113] By 2000, ten states that formerly required either a

---

104 JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 24–27 (1956). In this instance, the radiating benefits might include the creation of a public circulation network, recreational opportunities, and efficiencies of scale in management of the waterway. *See generally* Rose, *supra* note 101, at 719–23.

105 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 253–54 (1977) ("By the middle of the nineteenth century the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society. . . . [L]egal doctrines . . . maintained the new distribution of economic and political power . . . [and law] actively promoted a legal redistribution of wealth against the weakest groups in the society.").

106 It is beyond the scope of this Article to provide a full history of the environmental movement. For a full discussion, see RODERICK FRAZIER NASH, WILDERNESS AND THE AMERICAN MIND (5th ed. 2014); CHRISTOPHER C. SELLERS, CRABGRASS CRUCIBLE: SUBURBAN NATURE & THE RISE OF ENVIRONMENTALISM IN TWENTIETH-CENTURY AMERICA (2012).

107 *See* Samuel P. Hays, *The Environmental Movement*, 25 J. FOREST HIST. 219, 219 (1981).

108 Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251–1387 (2012).

109 Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§ 1271–1287 (2012)).

110 National Parks and Recreation Act of 1978, 16 U.S.C. §§ 1a-1 to -8 (2012).

111 NASH, *supra* note 106, at 201–02; Joseph B. Gaudet, Comment, *Water Recreation—Public Use of "Private" Waters*, 52 CALIF. L. REV. 171, 171 (1964); Hays, *supra* note 107, at 220.

112 Char Miller, *Foreword* to NASH, *supra* note 106, at vii, ix.

113 *See* State v. Brace, 36 N.W.2d 330, 333–34 (N.D. 1949); Hillebrand v. Knapp, 274 N.W. 821, 822–24 (S.D. 1937). *Lamprey v. Metcalf*, 53 N.W. 1139 (Minn. 1893), is often cited as the first

floating log or commercial transport to prove navigability began accepting recreational use.[114] This meant that the passage of canoes or kayaks at certain times came to prove navigability in various state courts, even if the water would not be navigable under any other definition.

The acceptance of recreational definitions was not universal. To show courts' uses of—and attitudes toward—navigability doctrine during this period in the mid-twentieth century, this Section examines case studies on both sides of the issue: courts that used navigability doctrine to declare new waters open to the public for recreational purposes, and courts that found such declarations beyond their authority.

a. Using the Power to Expand Public Use of Waterways

States justified adopting recreational definitions in different ways. Some states interpreted their existing definitions to be flexible enough to account for recreation. For example, under South Carolina law, "to be navigable, a stream should have sufficient depth and width of water to float useful commerce."[115] In 1986, the South Carolina Supreme Court found that seasonal, recreational boating met the definition of "value" because "[v]aluable floatage is not necessarily commercial floatage."[116] Several states with definitions of "floatable" similar to South Carolina's have broadly interpreted the word "value" to create public rights in waters used solely for recreational purposes.

"recreational use" definition because it suggested travel for "pleasure" should prove navigability. *See Lamprey*, 53 N.W. at 1143. But subsequent Minnesota decisions have repeatedly stated that this dictum has no precedential value. *See* State v. Adams, 89 N.W.2d 661, 685 (Minn. 1957); State v. Bollenbach, 63 N.W.2d 278, 287 (Minn. 1954).

114 State v. McIlroy, 595 S.W.2d 659, 663–65 (Ark. 1980); Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983); Baker v. State *ex rel.* Jones, 87 So. 2d 497, 497–98 (Fla. 1956) (en banc); Ryals v. Pigott, 580 So. 2d 1140, 1145–46, 1152 (Miss. 1990); Gwathmey v. State *ex rel.* Dep't of Envtl. Health & Natural Res., 464 S.E.2d 674 (N.C. 1995); Coleman v. Schaeffer, 126 N.E.2d 444, 444–46 (Ohio 1955); White's Mill Colony, Inc. v. Williams, 609 S.E.2d 811, 815 (S.C. Ct. App. 2005); Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 519 (Wis. 1952); *see also* S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295, 1298 (Idaho 1974) (adopting recreational test as first navigability test in this period). A few clarifications are necessary. This does not include cases where the use of recreational boating is evidence that a waterway is capable of commercial usage—in other words, a state may not accept recreational use as sufficient to prove navigability in itself, but recreational travel may show capacity for useful commercial travel. *See, e.g.*, Rowe v. Granite Bridge Corp., 38 Mass. (21 Pick.) 344, 347 (1839); People v. Kraemer, 164 N.Y.S.2d 423, 429 (Police Ct. 1957) (finding use by fishing and oyster boats to indicate water's capacity for commercial traffic). It is also distinguishable from states where recreational use is permitted in navigable waters—in other words, where some other factor is required to prove navigability, but where recreation is then permitted in the public water. In Maine and Massachusetts, for example, "great ponds" are made navigable by legislation, but courts have held that the public has broad recreational rights in these waters. *See, e.g.*, Gratto v. Palangi, 147 A.2d 455, 458 (Me. 1958); Commonwealth v. Vincent, 108 Mass. 441, 446 (1871).

115 Heyward v. Farmers' Mining Co., 19 S.E. 963, 967 (S.C. 1894).

116 State *ex rel.* Medlock v. S.C. Coastal Council, 346 S.E.2d 716, 719 (S.C. 1986).

Other state courts have determined that even the commercial definitions of navigability can be read to include recreational traffic. One view is that recreation is actually a form of commercial usage because tourism and recreation can generate pecuniary value. As eloquently put by the Oregon Supreme Court, "[a] boat used for the transportation of pleasure seeking passengers is, in a legal sense, as much engaged in commerce as is a vessel transporting a shipment of lumber."[117] The *Adirondack League Club, Inc. v. Sierra Club* case[118] furnishes another example. There, an environmental group paddled twelve miles of the South Branch of the Moose River in two canoes and a kayak in order to prove navigability and thus seek public rights to cross the Club's land.[119] The South Branch is not passable without "portage," which, in boaters' terms, means stepping out of the water to carry craft over land.[120] The paddlers made no secret of their visit: members witnessed and filmed the stunt.[121] At the time, New York's test for navigability granted the public rights in waters that "afford[] a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water . . . hav[ing] practical usefulness to the public as a *highway* for transportation."[122] The New York Court of Appeals nonetheless determined that the group's strictly recreational boating showed susceptibility to commercial use, in part because the litigants had brought evidence that the Moose might be used to host paid paddling tours.[123]

Not every interpretation of navigability doctrine has claimed to fit within the existing law. Some state courts have consciously modified the definition. In 1967, battle lines were drawn over the Mulberry River, a seasonal stream flowing down the Ozark Mountains in northwest Arkansas.[124] The McIlroy family owned 230 acres of land on both sides of the waterway.[125] That year, the Ozark Society, a conservationist group, began promoting and hosting an annual canoeing trip through

---

117 Luscher v. Reynolds, 56 P.2d 1158, 1162 (Or. 1936); *cf.* Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192, 1195 (N.Y. 1998) ("We do not broaden the standard for navigability-in-fact, but merely recognize that recreational use fits within it.").

118 706 N.E.2d 1192.

119 *See id.* at 1193.

120 *Id.* at 1192–95.

121 *See* William N. Wallace, *OUTDOORS; What if a River Runs Through It?*, N.Y. TIMES, (Sept. 8, 1994), http://www.nytimes.com/1994/09/08/sports/outdoors-what-if-a-river-runs-through-it.html.

122 Douglaston Manor, Inc. v. Bahrakis, 678 N.E.2d 201, 203 (N.Y. 1997) (second alteration in original) (emphasis added).

123 *Adirondack League Club*, 706 N.E.2d at 1198; *see* Luscher v. Reynolds, 56 P.2d 1158, 1162 (Or. 1936) ("A boat used for the transportation of pleasure seeking passengers is, in a legal sense, as much engaged in commerce as is a vessel transporting a shipment of lumber.").

124 State v. McIlroy, 595 S.W.2d 659, 661 (Ark. 1980).

125 *Id.* at 660.

the McIlroy land during the rainy season, causing as many as 600 people to enter the McIlroy property and float on the rapids.[126] Not long after, in 1974, the Ozark Society published a fifteen-page pamphlet called "The Mighty Mulberry," a brochure that declared the McIlroy part of the Mulberry "an excellent stream for canoeing."[127] The McIlroys sued to enjoin publication of the brochure and for a declaration that their rights as riparian owners included the right to exclude members of the public from entering their property and canoeing on the water.[128] They claimed this right because the "navigable" waters under state law were defined as waters capable of carrying commercial traffic;[129] the Mulberry was non-navigable under this test. Unfortunately for the McIlroys, the Arkansas Supreme Court used their case to pronounce that the commercial test for navigability was "a remnant of the steamboat era" and that pleasure boating was sufficient proof of navigability to grant the public rights in the waterway.[130] The public got the right to float, and the McIlroys, for their part, were left without redress for a sudden change in state law that eliminated their right to exclude others from their property.

The state's existing definition of "navigability" gave no indication that recreational use would suffice, although the majority pointed to an earlier case, *Barboro v. Boyle*,[131] which it called "almost prophetic."[132] *Barboro* stated that "the waters of [a navigable] lake might be used to a much greater extent for boating for pleasure, for bathing, fishing, and hunting, than they are now used."[133] *Barboro* indicated that the public might use navigable waterways for purposes other than navigation; it did not suggest recreational travel sufficed to prove navigability. And it can hardly be read to have given the McIlroys notice that the law would change.

Intriguingly, in many of the cases adopting recreational definitions, other branches of the state government were heavily involved in the litigation—and not on the property owners' sides. The *McIlroy* case is a prime example. First, around the time that the Ozark Society published the pamphlet promoting recreation on the Mulberry, the State Department of Parks and Tourism officially designated the Mulberry

126 *Id.* at 660–61.

127 MARGARET HEDGES & HAROLD HEDGES, THE MIGHTY MULBERRY: A CANOEING GUIDE (1974).

128 *McIlroy*, 595 S.W.2d at 660.

129 Lutesville Sand & Gravel Co. v. McLaughlin, 26 S.W.2d 892, 893 (Ark. 1930) ("[Navigability] depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise.").

130 *McIlroy*, 595 S.W.2d at 664–65.

131 178 S.W. 378 (Ark. 1915).

132 *McIlroy*, 595 S.W.2d at 660.

133 *Barboro*, 178 S.W. at 380.

"Arkansas's finest whitewater float stream."[134] Second, the State of Arkansas officially intervened in McIlroy's declaratory judgment action against the Ozark Society to claim the water and the bed for the state.[135] The dissenting judge believed that, in expropriating the McIlroy's rights, the majority succumbed to the mob: "Judicial submission to public clamor is not in keeping with constitutional government."[136] In at least six other navigability cases from five other states, some state entity was a party or intervener and explicitly requested the court change the definition.[137]

b. Rejecting Changes to the Definition as Abuse of Navigability Doctrine

Not every court was open to accommodating to the "new" public need for water. In the same period that ten states began accepting recreational use, at least three other states rejected requests to adopt recreational definitions of navigability.[138]

In the Kansas case of *State* ex rel. *Meek v. Hays*,[139] the defendant built a fence across Shoal Creek to stop canoeists from trespassing through his land on both sides of a waterway in Cherokee County.[140] The Cherokee County Attorney, Christopher Meek, filed a petition for declaratory judgment to confirm the public's right to use Shoal Creek for recreational purposes.[141] He urged the state to "adopt a 'modern' view of navigability" and find the Shoal navigable, in part based on the operation of a canoe rental business on the Shoal and its use by the proprietor of a store who manufactured products using Shoal Creek plants.[142] But the Kansas Supreme Court affirmed the trial court's finding that the Shoal was not navigable.[143] The state test for navigability

134 Ark. River Rights Comm. v. Echubby Lake Hunting Club, 126 S.W.3d 738, 744 (Ark. Ct. App. 2003).

135 *McIlroy*, 595 S.W.2d at 664.

136 *Id.* at 668 (Fogleman, C.J., dissenting).

137 *See* City of Berkeley v. Superior Court, 606 P.2d 362, 364 (Cal. 1980); People *ex rel.* Baker v. Mack, 97 Cal. Rptr. 448, 453–54 (Ct. App. 1971); State *ex rel.* Meek v. Hays, 785 P.2d 1356 (Kan. 1990); Bott v. Comm'n of Natural Res., 327 N.W.2d 838 (Mich. 1982); Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192, 1193 (N.Y. 1998); State *ex rel.* Medlock v. S.C. Coastal Council, 346 S.E.2d 716, 717–18 (S.C. 1986); *accord* Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 164–65 (Mont. 1984). Because the government is entrusted with protecting public resources, participation is not unexpected; however, the legislature asking the court to change the law, rather than apply existing law, is what matters.

138 *See Hays*, 785 P.2d at 1364–65; Walker Lands, Inc. v. E. Carroll Parish Police Jury, 871 So. 2d 1258, 1266 (La. Ct. App. 2004); *Bott*, 327 N.W.2d at 849–53; *see also* People v. Emmert, 597 P.2d 1025 (Colo. 1979) (en banc) (declining to give public recreational rights in non-navigable waters; parties had stipulated to non-navigability).

139 785 P.2d 1356.

140 *Id.* at 1358.

141 *Id.*

142 *Id.* at 1360–61.

143 *Id.* at 1358, 1365.

required "capacity for transportation of passengers, goods, and merchandise."[144] The court declined to expand the definition, stating that "[i]f a change in long established judicial precedent is desirable, it is a legislative and not a judicial function to make any needed change."[145]

The Michigan Supreme Court declined a similar invitation to expand its definition of "navigability" in *Bott v. Commission of Natural Resources*.[146] The defendants—lakefront owners on Big Chub and Burgess Lakes, as well as the State Commission of Natural Resources—sought access to creeks leading to a third lake, over the objections of the Bott and Nicholas families, who owned land on either side of the creeks.[147] Since the early nineteenth century, Michigan courts had used a log-flotation definition of "navigability." The defendants termed it an "anachronism" in light of the trend toward accepting recreational use as proof of navigability in many states.[148]

To evaluate whether navigability doctrine permitted them to change the law, the Michigan Supreme Court looked at "whether the proposed change [was] consonant with widely shared societal values, fairly treat[ed] those who have relied on past law, and [was] appropriate for judicial implementation."[149] A majority of the court concluded that none of those factors was met. First, the majority was unpersuaded that the public need for recreation was significant in light of recreation's costs: noise, the privacy of littoral communities, and potential effects on wildlife.[150] Second, the court rejected the trend in other states as a persuasive reason to change Michigan's law.[151] It determined that many of the water bodies in other navigability cases were wider and deeper than the creeks at issue in the case,[152] and that, in any event, it was incomprehensible that any of those precedents would cover waters like the creeks, where "[a]t many spots, less water is to be found than in a bathtub."[153]

Third, the majority suggested that an appeal to the legislature was the proper avenue for reallocating public and private rights in waterways. The court opined that the legislature could expand public rights by broadly changing water entitlements or selectively opening a few waterways for public recreational use.[154] The court observed that the

144 Webb v. Bd. of Comm'rs of Neosho Cnty., 257 P. 966, 966 (Kan. 1927).

145 *Hays*, 785 P.2d at 1362 (quoting People v. Emmert, 597 P.2d 1025, 1025 (Colo. 1979) (en banc) (internal quotation marks omitted)).

146 *See* Bott v. Comm'n of Natural Res., 327 N.W.2d 838 (Mich. 1982).

147 *Id.* at 839–40.

148 *Id.* at 846.

149 *Id.* at 846–47.

150 *See id.* at 847–52.

151 *See id.* at 848–49.

152 *See id.*

153 *Id.* at 849.

154 *Id.* at 852–53.

legislature would be disciplined by having to pay compensation for taking the private rights, thereby "assuring that the loss inflicted on private parties will be considered, and that recreational access will be granted only if indeed highly prized. . . . Providing compensation will also vindicate riparian or littoral owner reliance on this Court's past decisions."[155]

Most significantly, the majority made its view on navigability doctrine clear: it had the common-law authority to define navigability once, but not to change that definition because "[t]he Court in [the first case to define navigability] was writing on a blank slate—we are not."[156] The justices pointed to "the unfairness of eliminating a property right without compensation" and expressly invoked "judicial takings" of private littoral property as reasons not to change the rule set out in its 125-year-old precedent.[157]

But the *Bott* decision was not unanimous. Three justices would have adopted a recreational use definition and found the creeks navigable, in part because they read Michigan precedents to hold that "determinations as to navigability must reflect prevailing public necessities for use of waterways."[158] These justices also expressed a different view on navigability doctrine:

> Upon admission to the Union, the courts of each state were free to adopt or reject the English common-law doctrines in determining navigability of waters located within the state's boundaries. Further, each state was free *and remains free* to fashion tests of navigability . . . .[159]

The judges in the majority had a much narrower view of navigability doctrine: one where constitutional protections for property owners prevented them from changing past precedents. This leads to the next question: what constraints *do* existing law place on navigability doctrine? And, if there are none, should there be?

II. CURRENT CONSTRAINTS ON NAVIGABILITY DOCTRINE

In the Sections that follow, this Article closely examines current law surrounding the two possible constraints on navigability doctrine that flow from the Federal Constitution. This Article focuses on these for two reasons. First, and obviously, federal constraints apply broadly to all state courts. Second, challenges to the legitimacy of actions of state

155 *Id.*
156 *Id.* at 850.
157 *Id.* at 848–51.
158 *Id.* at 872 (Williams, J., dissenting).
159 *Id.* at 858 (emphasis added).

courts—particularly the state's highest court—are likely to occur in federal courts and involve federal questions.[160]

State law could also constrain navigability doctrine within a particular state. Provisions of state constitutions (including clauses analogous to the Federal Constitution or other provisions that might be construed to apply to the doctrine),[161] state statutes that override or add to common-law rules of public and private rights in waters,[162] or even doctrines of state common law that restrict judicial decision-making authority[163] may also operate to limit navigability doctrine.[164] While these constraints may be important, they are not discussed here.

A. *The Fifth Amendment and Judicial Takings*

When the Michigan Supreme Court decided *Bott* in 1982, no controlling decision of the Supreme Court indicated that judicial modifications of property rights or rules could violate the Takings Clause of the Fifth Amendment.[165] A few times, though, members of the

160 *See* D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 959 (2011) ("[J]udicial takings claims are likely to be brought in federal court . . . ."); *see also* Hughes v. Washington, 389 U.S. 290, 295–97 (1967) (Stewart, J., concurring) (noting that judicial takings present federal questions); *cf.* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1254 (1978) (observing that in most cases "federal constitutional claimants are prepared to go to great procedural lengths in order to enjoy federal court adjudication of their federal claims because of the perception that the federal courts are more hospitable forums"). This is a practical assumption as well; after the courts in the state system have eliminated the owner's property rights, it makes sense that federal courts might be considered more neutral ground for a claim of unconstitutionality.

161 Some, but not all, states construe provisions of their state constitutions analogous to the Federal Constitution more broadly than the federal courts construe the federal provisions. *See* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 269–71 (2004).

162 *See, e.g.*, ALASKA STAT. § 38.05.965(13) (2015); IOWA CODE § 462A.2 (2013); MISS. CODE ANN. § 51-1-4(1) (2015); S.D. CODIFIED LAWS § 43-17-34 (2014).

163 *See Bott*, 327 N.W.2d at 849–51.

164 Federal courts are without jurisdiction to review state-court determinations of state law that rest on "adequate and independent state grounds." *See* Michigan v. Long, 463 U.S. 1032, 1037–41 (1983). In a recent note, E. Brantley Webb argues that the federal courts lack jurisdiction to review property rule changes by state courts that rest on an "adequate and independent ground"—in other words, that have "fair support" under existing state law. E. Brantley Webb, Note, *How To Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192 (2011). The fair-support rule is nearly identical to the analyses that might be performed under the Takings or Due Process Clauses. *See infra* Part III.B–C; *see also* Bouie v. City of Columbia, 378 U.S. 347, 354 (1964). But it is also a doctrine of Supreme Court review, not review that state courts or lower federal courts undertake: if judicial takings or deprivations cases can only be brought on certiorari to the Supreme Court, then that may prove to be an inadequate forum to address all constitutional violations. *See* Barros, *supra* note 160, at 949–51.

165 A few of the cases sometimes cited as precedents are not discussed here because they are of limited help in understanding judicial takings. *See, e.g.*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980) (stating that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks" and that "a

Court had expressed their support for such a judicial takings doctrine in separate opinions,[166] like Justice Stewart's concurrence in *Hughes v. Washington*.[167] Justice Stewart was worried by the Washington Supreme Court's ruling in the underlying case that all accretions of land after 1889 belonged to the public rather than adjacent waterfront owners, particularly because just twenty years prior, the state court had come out the exact opposite way in another decision.[168] Justice Stewart acknowledged that "the law of real property is, under our Constitution, left to the individual States to develop and administer" and that "any . . . State is free to make changes, either legislative or judicial, in its general rules of real property law," lest it be "frozen into the mold it occupied" as of some earlier date.[169] But Justice Stewart argued that certain changes violated the Takings Clause and required the payment of compensation.[170]

Justice Stewart would have measured judicial actions by their predictability under existing precedents:

> To the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.[171]

State, by *ipse dixit*, may not transform private property into public property without compensation," but finding that the Florida *legislature* had violated the Constitution); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 79 (1980) (summarizing *plaintiff's* argument that "judicial reconstruction of a State's laws of private property" might violate the Constitution); Muhlker v. N.Y. & Harlem R.R. Co., 197 U.S. 544, 570 (1905) (Contracts Clause case). This Article classifies judicial construction of statutory language in a manner that makes the statute violate the Constitution as a plain old legislative taking. *But see* Barros, *supra* note 160, at 910–11 ("The distinction between [judicial decisions construing state statutes and interpreting the common law] should not matter for the substantive question of whether a judicial taking has occurred.").

166 *See* Chi., B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 263 (1897) (Brewer, J., dissenting) ("[A]fter a declaration by this court that a State may not, through any of its departments, take private property for public use without just compensation, I cannot assent to a judgment which, in effect, permits that to be done.").

167 Hughes v. Washington, 389 U.S. 290, 294–95 (1967) (Stewart, J., concurring).

168 Ghione v. State, 175 P.2d 955, 962–63 (Wash. 1946).

169 *Hughes*, 389 U.S. at 295.

170 *Id.*

171 *Id.* at 296–97.

Justice Stewart believed that the earlier precedent made the *Hughes* court's new ruling "an unforeseeable change in Washington property law."[172] In his view, this violated Mrs. Hughes's constitutional rights.[173]

The issue of judicial takings did not come up again until 1994, when the Supreme Court was asked to review a case (again, involving beachfront rights) from Oregon: *Stevens v. City of Cannon Beach*.[174] Some background on Oregon law helps contextualize the problem. In the 1969 case of *State* ex rel. *Thornton v. Hay*,[175] the Oregon Supreme Court prevented beachfront tourist facilities from constructing improvements on the dry-sand beach on the grounds that custom gave the public the right to use the dry-sand area for recreational purposes.[176] In the 1989 case of *McDonald v. Halvorson*,[177] the Oregon Supreme Court denied the public the rights to access the dry-sand portion of a different beach, walked back from *Thornton*, and ruled that "nothing in [*Thornton*] fairly can be read to have established beyond dispute a public claim by virtue of 'custom' to the right to recreational use of the entire Oregon coast."[178] Premised on this apparent clarification of the law, the petitioners applied to their local zoning board to enclose portions of the dry-sand area on their properties.[179] Their petition was denied and they sued.[180] The trial court denied the complaint for failure to state a claim, citing *Thornton*.[181] The highest court affirmed on the basis that *Thornton* and the "well-established policy of public access to and protection of [Oregon's] ocean shores" controlled.[182] Neither opinion mentioned nor cited *McDonald* a single time.

The plaintiffs sought certiorari, which the Supreme Court denied, but not without a forceful dissent from the denial authored by Justice Scalia (and joined by Justice O'Connor).[183] In their words, "[t]o say that this case raises a serious Fifth Amendment takings issue is an understatement."[184] Citing Justice Stewart's concurrence in *Hughes*, the dissenters wrote that the Oregon court could not open the plaintiff's property to public use by "invoking nonexistent rules of state

172 *Id.* at 297.
173 *Id.* at 297–98.
174 854 P.2d 449, 450 (Or. 1993).
175 462 P.2d 671 (Or. 1969).
176 *See id.* at 676–77.
177 780 P.2d 714 (Or. 1989).
178 *Id.* at 724.
179 *See Stevens*, 854 P.2d at 451.
180 *See id.* at 451–52.
181 *Id.* at 450.
182 *Id.* at 455.
183 Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994) (Scalia, J., dissenting from the denial of certiorari).
184 *Id.* at 1335.

substantive law."[185] The dissenters did not copy Justice Stewart's unpredictability test, however; they feared that state courts would try to avoid constitutional scrutiny by concocting "background law" from their precedents that could not be derived from a fair reading of state cases.[186] While the details of the judicial takings analysis remained sketchy in this dissent, sixteen years later, Justice Scalia would have his chance to further elaborate on his view of the appropriate judicial takings construct in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection.*[187]

The *Stop the Beach* case began as a Takings Clause challenge to a Florida Supreme Court ruling that an avulsion on beachfront land belonged to the state, not adjacent property owners.[188] With Justice Stevens recused, the Supreme Court unanimously agreed that the Florida decision was not a taking.[189] But on the issue of judicial takings more broadly, the Court split four-two-two.[190] The four-justice plurality opinion authored by Justice Scalia argued that "the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking."[191]

The plurality elicited controversy not just by announcing the concept that the state judiciary could "take" private property, but also with the test it announced. The plurality stated that when "*a court* declares that what was once an established right of private property no longer exists, it has taken that property."[192] The plurality did not provide much more guidance on "establishment" than that, although the Court did announce that state courts would remain free to "clarify" unclear—and presumably non-established—property rights.[193]

Perhaps "established rights" are like "background principles," an aspect of state property law described in the 1992 "regulatory takings" case of *Lucas v. South Carolina Coastal Council*.[194] In that case, the Court announced that legislative "regulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property

185 *Id.* at 1334.

186 *Id.*

187 560 U.S. 702, 710–11 (2010).

188 *Id.*

189 *Id.* at 733.

190 *Id.* at 707 (plurality opinion of Justices Scalia, Thomas, Alito, and Chief Justice Roberts); *id.* at 733 (Kennedy and Sotomayor, JJ., concurring in part and concurring in the judgment); *id.* at 742 (Breyer and Ginsburg, JJ., concurring in part and concurring in the judgment).

191 *Id.* at 715 (plurality opinion).

192 *Id.*

193 *Id.* at 727 ("And insofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right.").

194 505 U.S. 1003 (1992).

and nuisance already place upon land ownership."[195] In *Lucas*, too, the Court did not state what, exactly, a "background principle" was, only that permissible and forbidden uses would be dictated by "existing rules or understandings" derived from state law.[196] Thus, where the legislature or the executive took an action that prevented a landowner from acting in some way and thus deprived a landowner of all economically viable use of his land, a court should examine whether the government would have had the authority to prohibit the use under common-law rules to determine whether the governmental restriction on the landowner's activity was constitutionally permissible.[197] "Established rights" might be like "background principles": they could be the rights flowing from existing rules of state property law.

Even if that is true, an "established right" in property law is really a concept without any meaning. Even the most "established" rights—say, the presumptive right of an owner in fee simple to exclude others from his property—are tempered by a combination of legislative and common-law restrictions that are not always clearly applicable to any given fact pattern.[198] Even the owner in fee could have the contours of his ownership altered by state rules of easements or adverse possession. Many property rights are expressly conditional;[199] when are these rights established or not?[200] The plurality has only this to say: "A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court."[201] If the measure of an established right is that it is not in doubt, looking at property rights is like trying to see the sun by staring at it: one can make out a discernable core of "establishedness," but the edges appear blurry and imprecise. And chances are, litigants who have invested in state-court property litigation are disputing the margins.

---

195 *Id.* at 1029.

196 *Id.*

197 *Id.* What if the existing common law did not clearly prohibit the now-regulated activity? In elaborating on this question the Court encouraged reviewing courts to look at several factors, such as the length of time the now-restricted practice had been ongoing and whether other similarly situated landowners were permitted to continue the now-prohibited use, both of which would indicate there was no common-law prohibition. *See id.* at 1030–31.

198 *See* Peñalver & Strahilevitz, *supra* note 15, at 346.

199 Riparian water rights are often conditional on reasonable use. *See, e.g.*, Carol M. Rose, *Riparian Rights*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 344, 344 (Peter Newman ed., 1998); Frank J. Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 WYO. L.J. 1 (1957); Barton H. Thompson, Jr., Note, *Judicial Takings*, 76 VA. L. REV. 1449, 1529–30 (1990).

200 *See, e.g.*, City of Barstow v. Mojave Water Agency, 5 P.3d 853, 863 (Cal. 2000); Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 1007 (Cal. 1935).

201 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 726 n.9 (2010).

Moreover, by defining impermissible modifications to the common law as those which interfere with an established property right, the *Stop the Beach* plurality articulated an incomprehensible rule that "cover[s] both too much and too little."[202] The "deprivation of an established right" test covers too much because the application of old law to new circumstances might interfere with even the most established right. The plurality was not troubled about the effect this might have on the task of judging: according to them, when the Constitution was drafted, "courts had no power to 'change' the common law. But in any case, courts have no peculiar need of flexibility."[203] Putting to one side the dubiousness of this premise as a historical matter, and its inconsistency with language in other Supreme Court opinions,[204] the Supreme Court has acknowledged the importance of legal flexibility in other takings-related contexts. In *Lucas*, for example, the Court remarked that "changed circumstances or new knowledge" might permit the legislature to proscribe conduct that previously had not been prohibited by the common law without running afoul of the Takings Clause.[205] Even accepting that state courts do not need the flexibility to wholly overrule their own cases, they do need flexibility to interpret the common law and statutes to apply to new fact patterns, which may disturb property owners' expectations about the extent of their ownership.[206] The plurality's "establishedness" test is so open-ended that it may hamper the exercise of this basic judicial function.

The "establishedness" test also covers too little because the deprivation of some not-so-established rights might nonetheless offend sensibilities about constitutionality and fairness. Take, for example, an imaginary state where littoral, or shoreside, rights have never expressly included the right to have one's parcel stay in contact with the water—under either legislation or the common law—but where feet of accretion have been incorporated into riparian owners' property deeds as recorded in the city records. Now, a state court rules that there is no right to have one's property in contact with the water, so the legislature can construct a transparent fence on the accreted land all along the coast.[207] Imagine that the state legislature filed a brief in the suit to

---

202 *Id.* at 728.

203 *Id.* at 727.

204 *See* Rogers v. Tennessee, 532 U.S. 451, 462 (2001) (arguing that courts "were fashioning and refining the law as it then existed in light of reason and experience" when the Bill of Rights was drafted).

205 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030–31 (1992).

206 *See* Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL'Y 107, 108 (2011) ("Any judicial decision addressing new facts could be characterized as a 'change' in the law.").

207 Assume that other common littoral rights, like the right of access to the water, are not affected. *Cf. Stop the Beach*, 560 U.S. at 702 (where the right of access to the water was at issue).

contend that the riparian owner had no rights; if the legislature were stuck paying for the oceanfront land, it would cost millions of public dollars. Does the fact that no positive law affirmed the right mean that it never existed? Do the filed deeds create a legitimate expectation of ownership? A case might be made that the state-court decision should be invalidated, even though the existence of the right is somewhat doubtful. As the Court said before *Stop the Beach*:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[208]

The *Stop the Beach* plurality leaves it unclear when or if "understandings" will ever suffice to "establish" property rights.

Relatedly, focusing the inquiry on the right creates strange questions about what makes a right established: a single instance of state judicial recognition, natural law, reaching some federal constitutional bar, or something else. If the answer is recognition by the state judiciary, then it

> raises metaphysical questions regarding whether once-recognized rights "existed" before courts determined they did not exist, or instead whether such rights never "existed" at all and prior judicial determinations to the contrary are void *ab initio*.[209]

Justice Scalia seems to adhere to the view that rights are either established or doubtful and, perhaps, members of the plurality might clarify what makes something "established" in future decisions. Of course, the insistence on a bright-line division between established and doubtful rights is not an unusual position for Justice Scalia to take; he has made no secret of his "abhorrence" for standards and strong preference for rules.[210]

If rights instead become established when they reach some federal constitutional bar, then additional complex questions arise. Several commentators have convincingly argued that the Constitution must set

---

208 Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

209 Walston, *supra* note 15, at 434 (emphasis added). The idea that a right is either established or not hearkens back to the days when law was considered little more than discovering the single right answer to any question, rather than adapting the law to changing experiences and norms. Indeed, Blackstone wrote that once the courts determined that rights did not exist, they could never have existed. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES, *69–71, *135.

210 *See* John D. Echeverria, Stop the Beach Renourishment*: Why the Judiciary is Different*, 35 VT. L. REV. 475, 481 (2010) (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989)).

some bar that makes an interest created by state law "property,"[211] but the Supreme Court has never adopted this notion of a federal benchmark.[212] Most problematic, the idea of a constitutional property rules suggests the resurrection of "federal common law,"[213] a concept that has generally been thought dead since *Erie Railroad v. Tompkins*.[214] If "established" rights must meet some federal bar, then certain state-created property interests would be recognized by federal law, certain interests would not, and certain interests insufficient under state law would nonetheless be considered property under the federal definition. This raises the same federalism concerns that motivated the *Erie* decision: displacement of state law by some "transcendental body of law outside of any particular State but obligatory within it."[215] The questions of whether there should be a constitutional property benchmark, and what it should be, are questions that are contentious and difficult to answer, but the *Stop the Beach* decision offers no guidance on their resolution.

All of these concerns about the "established right" test apply with full force if that test is used to evaluate navigability doctrine. What makes an individual's right to exclude someone from a waterway "established"? Perhaps the right could be considered "established" when the existing definition of "navigability" does not apply to the waterway in question. But, again, what if the old definition has to be applied to new circumstances? If a state had a commercial definition, and some new boat could now make use of more inland water, it is not clear whether affected owners' rights would be considered "established," or if they would be considered subject to evolutions of the commercial definition. And, if the latter, what evolutions are permissible, and what are forbidden? The "established right" test does not lead very far in answering these questions.

While some judges have expressed support for application of the Takings Clause to state-court applications or modifications of property law over the years, it remains that no controlling decision requires it. In

---

211 *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 329 (1993); Robert Jerome Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355, 355–58 (1978); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 890–92 (2000); *see also* James Y. Stern, *Property's Constitution*, 101 CALIF. L. REV. 277, 295 (2013).

212 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992); *Roth*, 408 U.S. at 577; *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980); Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944); Calder v. Bull, 3 U.S. 386, 394 (1798).

213 *See* Glennon, *supra* note 211, at 355–58.

214 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

215 *Id.* at 79.

the next Section, this Article examines whether the Fourteenth Amendment furnishes a constraint on navigability doctrine.

B. *The Fourteenth Amendment and Judicial Deprivations*

As in every other context, litigants in navigability cases are already protected from "typical" procedural due process violations, such as a situation where a state court announces, sua sponte, a new rule that neither of the parties requested or briefed.[216] Specifically, the question is whether—and how—procedural and substantive due process might operate to constrain state-court changes to state common law rights, or "judicial deprivations" of property.[217]

In general terms, due process "marks the outer boundaries of the State's legitimate power to act at all."[218] The federal courts have developed different standards to examine the actions of different branches of the government. For example, when evaluating legislation that affects an individual's property rights or economic interests,[219] the court examines the means and ends of the legislation: the legislation must have a "public purpose" and must not unduly oppress an individual.[220] For actions by executive officials that deprive an individual of property, the courts determine whether the action "shocks the conscience."[221] The judicial branch can violate due process guarantees when it awards excessive punitive damages,[222] but the Supreme Court has never explained where else these "outer boundaries" of state-court authority might be located.

Nonetheless, in *Stop the Beach*, Justice Kennedy strongly advocated that the Due Process Clause should prevent state-court changes to

---

216 *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85 n.9 (1980); *see also* Barros, *supra* note 160, at 940–43, 950.

217 This phrase comes from retired Justice John Paul Stevens, who said that "[i]f the Court is to adopt a new judge-made doctrine expanding its authority to review the constitutionality of state appellate court opinions, it should be called 'judicial deprivations' rather than 'judicial takings.'" *The Stevens Lecture: The Ninth Vote in the 'Stop the Beach' Case*, 88 CHI.-KENT L. REV. 553, 560 (2013).

218 Peñalver & Strahilevitz, *supra* note 15, at 324; *see* Fallon, *supra* note 211, at 311 (stating that Due Process keeps "government, overall and on average, tolerably within the bounds of law").

219 This Article uses this language to distinguish the test described here from the "strict scrutiny" test that applies to legislative deprivations of "fundamental" liberty interests. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499–500 (1977); Roe v. Wade, 410 U.S. 113, 163 (1973); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); *see also* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997) (arguing that some deprivations of property rights deserve strict scrutiny).

220 *See* Lawton v. Steele, 152 U.S. 133, 137 (1894).

221 *See* Rochin v. California, 342 U.S. 165, 172 (1952) (developing the "shocks the conscience" standard); *see also* Daniels v. Williams, 474 U.S. 327, 331–32 (1986) (applying the "shocks the conscience" standard to a deprivation of property case).

222 *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996).

property law in his concurrence.[223] Justice Kennedy contended that the Clause restrains courts from "abandon[ing] settled principles" of property law, but where "owners may reasonably expect or anticipate courts to make certain changes in property law," no relief would be warranted.[224] Justice Kennedy noted that "[s]tate courts generally operate under a common-law tradition that allows for incremental modifications to property law."[225] Accordingly, he wrote that a due process test that permits some reasonable changes would better balance the judiciary's ability to make common law and the rights of private property owners.[226]

To be sure, a few prior Supreme Court rulings have contained broad language about due process review of state-court changes to state law,[227] but just as many vaguely suggest that federal courts should not engage in such review.[228] Additionally, most of the cases that seem to support due process analyses in fact reject due process challenges to state court decisions on the basis that the state-court opinion rests on an adequate and an independent state ground.[229] While an incredible number of commentators have suggested that the Due Process Clause should apply to state-court changes to property law,[230] no controlling decision of the Court has applied the Fourteenth Amendment to judicial changes in property rules. The Due Process Clause is thus not a clear constraint on navigability doctrine at present.

III. OPTIONS MOVING FORWARD

If there are currently no clear federal constraints on navigability doctrine, then the question is whether there should be one. This Part explains the pros and cons of having no constraint. Particularly in view of historical abuses of navigability doctrine, it concludes that this is both unsatisfactory and unconstitutional.

There are three possible constraints on navigability doctrine that could be adopted moving forward: the Takings Clause, the Due Process Clause, or both. This Part explains the substantive frameworks that would apply to navigability doctrine under each constraint, as well as

---

223 *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 738 (2010) (Kennedy, J., concurring in part and dissenting in part).

224 *Id.*

225 *Id.* at 736.

226 *See id.*

227 *See, e.g.*, Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944); Broad River Power Co. v. South Carolina, 281 U.S. 537 (1930).

228 *See, e.g.*, Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 362 (1932); Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930).

229 *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1037–39 (1983).

230 *See supra* note 15.

the sorts of remedies and consequences that are likely to flow from the adoption of one framework versus another.[231] In light of the unconstitutionality of having no constraint, any of the three constitutional restrictions on navigability doctrine would be preferable. This is especially true because each approach leaves state judges some flexibility in updating the common law.

A. *No Constraint*

There are three major downsides to constraining navigability doctrine (or any state common lawmaking authority): the ossification problem, the anti-innovation problem, and the minority faction problem. First, broadly, if constitutional law prevents state courts from altering property law in any way, it may chill the courts' flexibility to respond to changed conditions.[232] Because judge-made law is ever-changing, the Constitution may not protect expectations based on prior case law: "'If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.'"[233] The ossification problem certainly would apply to navigability doctrine if narrowed: one need only look at the states where navigability is tied to logs of a certain length or breadth, even though no logs may ever float on those waters again. If those states' courts are powerless to adapt the law to modern times, then concepts of the public trust doctrine are gutted. Instead of being a pathway for judges to vindicate public interests on an ongoing basis, this area of the public trust doctrine amounts to nothing: judges must mechanically apply the rules.

Constitutional constraints may also deter judges from developing and adopting innovative rules.[234] Fear that a ruling might be invalidated or necessitate compensation could deter state courts from experimenting with rules of navigability that are fairer or more efficient than existing rules. In the absence of constitutional constraints, a proliferation of rules can flourish. Cooperation and competition

---

231 This Part does not take up some procedural problems with judicial takings or judicial deprivations, such as issue preclusion, state-court exhaustion requirements, and statutes of limitations. For a discussion of these issues, see Barros, *supra* note 160, at 940–58; Josh Patashnik, Note, *Bringing a Judicial Takings Claim*, 64 STAN. L. REV. 255, 259–60 (2012).

232 *See* Dogan & Young, *supra* note 206, at 113; James E. Krier, *Judicial Takings: Musings on* Stop the Beach, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 217 (2014); Daniel L. Siegel, *Why We Will Probably Never See a Judicial Takings Doctrine*, 35 VT. L. REV. 459, 461–62 (2010) (contending that judicial takings doctrine would offend state autonomy in developing property law).

233 Landgraf v. USI Film Prods., 511 U.S. 244, 270 n.24 (1994) (quoting LON L. FULLER, THE MORALITY OF LAW 60 (1964)).

234 *See* Mulvaney, *supra* note 15, at 748.

between jurisdictions over the best navigability rule may lead to increases in overall welfare.[235]

Finally, judicial flexibility may be especially desirable when the political process has failed to protect water resources that the public should own or wants to acquire. When the state legislature has been captured by a small number of property holders—commonly described as the "minority faction" problem—the state judiciary may be the only pathway to resetting the entitlements.[236] If courts are constrained from performing this function, the legislature is improperly motivated, the judiciary and public are powerless, and property owners will either demand extraordinarily high rents or irrationally demand that the inefficient rights allocation persist. Some theorists have postulated that judges should override "democratic" decisions using the common law in these circumstances, on the grounds that such overrides will increase fairness or efficiency.[237]

The case law provides an example. In *McBryde Sugar Co. v. Robinson*,[238] the Hawaii Supreme Court was tasked with determining the water rights between two sugar companies, but the Hawaii Court held that all surplus water belonged to the state.[239] The court announced that surplus water could not be claimed or appropriated to the state's detriment, although the companies could continue using the surplus water until then (they would just have no property claim to it).[240] This allocation matched the preferences of the majority of Hawaiians: water rights had a long and contested history, and most wanted communal rights to water restored.[241] The sugar companies pursued a federal action, claiming a judicial taking had occurred.[242] The case bounced around the federal and state courts due to certification and ripeness

---

235 *See* Abraham Bell & Gideon Parchomovsky, Essay, *Of Property and Federalism*, 115 YALE L.J. 72, 99 (2005); Ellickson, *supra* note 8, at 762; Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 891–92 (2006); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301 (1993); Sterk, *supra* note 161. *But see* Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53 (arguing that because land is an immovable asset, the benefits of interjurisdictional competition are not present).

236 Founder James Madison believed that minority factions would generally not pose a problem because the majority could "defeat [the minority's] sinister views by regular vote." *See* THE FEDERALIST NO. 10 (James Madison). But minority factions can be deleterious where they have undue sway over the state legislature due to superior organization or resources. *See* Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 73–74 (2003).

237 *See* Span, *supra* note 236, at 15–16.

238 504 P.2d 1330 (Haw. 1973).

239 *See id.* at 1345. The case also raised procedural due process issues, but these are not discussed here.

240 *See id.*

241 *See* Williamson B.C. Chang, *Judicial Takings:* Robinson v. Ariyoshi *Revisited*, 21 WIDENER L.J. 655, 682–706 (2012).

242 *See* Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977).

concerns,[243] and it was eventually dismissed by the Ninth Circuit as unripe for review a full thirty years after the original suit commenced—the merits of the takings claim were never resolved.[244]

Why not pity the politically strong sugar companies? Their rights were given over to the public, after all. Importantly, the legislature acted in the aftermath of the case to restore some, though not all, of the sugar companies' rights.[245] The judicial decision effectively pushed the reset button. It permitted the sugar companies to go on using the water while restoring control of the property to the public. Meanwhile, the sugar companies used the political process to reduce their losses.

Nevertheless, it is unclear how judges should identify and address minority faction problems. Just because existing entitlements favor a small group of people, it does not mean that there is a minority faction exerting disproportionate influence.[246] It would be difficult and undesirable for state courts to count the number of people benefitted when determining whether to modify existing property entitlements using navigability doctrine.[247] And, if there is disagreement about what is truly in the public interest, it is not clear how judges should go about deciding what the "public" wants.[248]

Moreover, there are significant constitutional problems with navigability doctrine if it is left unchecked. As the doctrine's history has shown, when courts change the definition of "navigable" water, the injuries to affected owners are often significant. The floatable object cases provide a plethora of examples. Individuals who previously had built livelihoods—for example, dams, mills, and farms—on the basis of the incidents to their riparian ownership lost those rights when it appeared more useful to open those waters to the public for exploitation.[249] While the legislature could certainly have acquired these rights from riparian owners by compensating them, the owners were

---

243 For a fuller discussion of all the litigation, see Bradford H. Lamb, Note, Robinson v. Ariyoshi*: A Federal Intrusion Upon State Water Law*, 17 ENVTL. L. 325 (1986).

244 *See* Robinson v. Ariyoshi, 887 F.2d 215, 219 (9th Cir. 1989).

245 *See* Stephanie Stern, *Protecting Property Through Politics: State Legislative Checks and Judicial Takings*, 97 MINN. L. REV. 2176, 2222–23 (2013).

246 *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 48–59 (1991).

247 *See* Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL'Y 91, 98 (2011) ("The Supreme Court has never sought to determine whether a taking was motivated by majoritarian pressures, lobbying by influential minority interest groups, or some combination of the two. Furthermore, nothing in the text or original meaning of the Takings Clause requires it to do so.").

248 *Cf.* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2082 (2010).

249 *But see* Lebanon Lumber Co. v. Leonard, 136 P. 891, 892 (Or. 1913) ("It is not sufficient [to prove navigability] if one man or corporation may be able to make use of [the water].").

instead often stuck seeking whatever trespass-related damages they could get from truly egregious behavior on the shoreline or waterbed.[250]

In other cases, owners who invested in the improvement of non-navigable waterways for their own purposes were forced to accommodate free riders who argued that the newly navigable water was public property. In Ohio, for example, the owner of a boat-rental company worked to fix up the section of the Beaver Creek River near him so that his passengers could access Lake Erie.[251] After a challenge by an upstream owner about the navigability of the water, the Ohio Supreme Court held that because the creek in its improved state could be navigated by recreational boats, it was open to the public.[252] This ruling opened the door for many upstream owners to open competing rental companies and drastically increased the value of lots along Beaver Creek—though only the original owner had spent money to make the water usable in the first place.

The history has also shown that navigability doctrine has not always been used to vindicate "public" rights. The judiciary has not often vindicated broad public interests against a minority faction of property owners; instead, state judges have often awarded rights to a small number of people interested in free use of the water and deprived some number of affected owners of rights in the process. Of course, the logging examples favoring a few companies or mills are the strongest. But even the environmental cases provide proof. Take, for example, the *Adirondack League Club v. Sierra Club* case.[253] On June 15, 1991, five paddlers set forth in two canoes and a kayak down the South Branch of the Moose River in upstate New York, heading toward the private property of the Adirondack League Club.[254] Over sections of rocks and trickling water,[255] they wandered around on the Adirondack League Club land to find segments capable of nominally floating their boats in order to demonstrate the water's navigability.[256] Anecdotal evidence suggests that because of both the difficulty level and seasonal drying, few

250 *See, e.g.*, Haines v. Hall, 20 P. 831, 833 (Or. 1888).

251 *See* Coleman v. Schaeffer, 126 N.E.2d 444, 447–49 (Ohio 1955) (Hart, J., dissenting).

252 *See id.* at 447.

253 615 N.Y.S.2d 788 (App. Div. 1994), *aff'd*, 706 N.E.2d 1192 (N.Y. 1998).

254 *See id.* at 789–90; John Pitarresi, *Canoe Trip Sparks Debate*, UTICA OBSERVER-DISPATCH, (Feb. 13, 2011, 12:01 AM), http://www.uticaod.com/article/20110213/NEWS/302139953; Wallace, *supra* note 121.

255 *See* Greg Smith, *The Battle for River Access Rights Continues: The Public Wins on the Moose, Loses on the Salmon*, ADIRONDACK PARK, http://www.adirondack-park.net/issues/river.rights-moose.html (last visited Mar. 14, 2015) (showing picture of this exceedingly rocky part of the waterway).

256 *See id.* ("[T]the paddlers had to leave their boats and carry around dangerous sections of the river, thus setting foot on private property[.]"); *see also Adirondack League Club*, 615 N.Y.S.2d at 794 (Yesawich, J., concurring in part and dissenting in part) (noting evidence from trial that a "person who attempted to canoe the river avers that his group had to carry their canoes, either wading or portaging, for approximately 75% to 80% of the distance").

members of the public have floated on the South Branch of the Moose since.[257] Was there really a public demand for that waterway? Who benefitted? More litigation is underway in New York to open additional waterways on the authority of *Adirondack League*, including one waterway with "rapids . . . [of] approximately 500 feet in length" and "rocky terrain," made shallow and narrow in part by "beaver dams, downed trees and dense vegetation growing out from the banks and up from the bed."[258]

Finally, the use of navigability doctrine to expand public access and use rights has often been accompanied by disquieting majoritarian pressures. One of the most colorful cases comes from Tennessee.[259] In the early 1900s, a number of individuals who owned shoreline on Reelfoot Lake formed the West Tennessee Land Company to protect their exclusive fishing rights in a lake that was three- to four-feet deep and full of vegetation, including full-grown trees.[260] Under existing law, the vegetation alone rendered the lake non-navigable, and a 1902 case had held Reelfoot non-navigable on that ground.[261] Following that decision, the state sued to determine their claim to the submerged land, and the chancery court found that the landowners of the West Tennessee Land Company had valid title and exclusive littoral rights.[262]

At that point, all hell broke loose. A group of Tennessee fishermen formed a mob that terrorized the littoral owners for years. The chancery judge was shot at twice and stopped sleeping at home.[263] Both lawyers for the West Tennessee Land Company were attacked: one was hanged

---

257 In a 2013 forum discussion, a local paddler advised another that he would "have a hard time finding enough water to paddle for large stretches" during the fall. *See* Alpine1, Comment to *South Branch Moose River Trip?*, ADIRONDACK F. (Sept. 17, 2013, 3:53 PM), http://www.adkforum.com/showthread.php?t=19234; *see also* MadMike, Comment to *S Branch Moose River*, ADIRONDACK F. (May 16, 2013, 12:35 PM), http://www.adkforum.com/showthread.php?t=18618 ("I have not paddled the South Branch yet, but I want to. I don't think there is enough water to do it."). In a 2009 forum discussion on paddling the Moose, one user wondered: "I'm wondering, just how far west can you go? I know you eventually run into [A]dirondack [L]eague [C]lub lands[,] but I don't know exactly where they start. Is it possible to paddle as far as the Indian River, and is this river navigable?" Madison, Comment to *South Branch Moose River*, ADIRONDACK F. (May 22, 2009, 10:56 AM), http://www.adkforum.com/showthread.php?t=11542. Another user replied: "There is a short section of deep slackwater just above [where the Adirondack League Club land begins], but in mid-summer it is quite shallow and gravelly where the Indian River enters." *See* Wldrns, Comment to *South Branch Moose River*, ADIRONDACK F. (May 22, 2009, 11:07 AM), http://www.adkforum.com/showthread.php?t=11542. The second user noted the need to carry one's boat overhead during the journey. *Id.*

258 Friends of Thayer Lake LLC v. Brown, No. 518309, 2015 WL 176289, at *6 (N.Y. App. Div. Jan. 15, 2015) (Rose, J., dissenting).

259 *See* State *ex rel.* Cates v. W. Tenn. Land Co., 158 S.W. 746, 748, 761 (Tenn. 1913); *Night Riders Slay Lawyers*, N.Y. TIMES, Oct. 21, 1908, at 1.

260 *Cates*, 158 S.W. at 761.

261 *See* Webster v. Harris, 69 S.W. 782, 786–88, 790 (Tenn. 1902).

262 *See Night Riders Slay Lawyers*, *supra* note 259.

263 *Id.*

at the water's edge, the other left for dead in the very lake in question.[264] The littoral owners' stores were set on fire, and the state militia was dispatched to try to stop the violence.[265] This all happened while the case was on appeal.

When the case reached the Tennessee Supreme Court, the judges—somewhat understandably—overthrew existing precedents and held the Reelfoot navigable.[266] While this may have appeased the murderous fishermen, the surviving members of the West Tennessee Land Company were left with no avenue for either compensation or invalidation of the decision. The (brave) dissenting judge expressed his view that while having open access to the Reelfoot Lake was desirable, the legislature should have paid to solve the problem:

> It is urged in behalf of the state, in view of the annual catch of fish, which is very large, and of the great number of ducks and geese annually killed on the lake, that this body of water should belong to the state, for the pleasure and profit of all of its citizens who may desire to resort thither. To this I agree. The state should buy it from the owners by private purchase, or, failing in that, should condemn it and pay for it, just as it obtains any other private property which it needs.[267]

While this case is extreme, there are other examples of more subtle majoritarian pressures. As discussed in Part I.C, in many of the recreational definition cases, state agencies actively urged the change in the law, despite the apparent conflict of interest: the state would have to pay to take the land under any other circumstance.[268] And, as the *McIlroy* case from Arkansas reminds us, mobs need not be overtly violent to be disruptive: imagine 600 canoeists showing up on your property, with the blessing of the state.[269]

To be sure, if state judges are free to update the definition of "navigability," they may in some cases best respond to the public's preferences and needs, protect the environment, or overcome legislative inertia that prevents efficient allocation of water rights. But the interests on both sides are too important to offer a normative suggestion based on these outcomes alone. While having no constraint on navigability doctrine has some desirable consequences, there are constitutional imperatives that must be honored. As the history of navigability doctrine has shown, private rights on waterways have not been given the protection the Constitution demands.

---

264 *Id.*; *see also State to Catch Night Riders*, CHI. TRIB., Oct. 21, 1908, at 2.

265 *Night Riders Slay Lawyers*, *supra* note 259.

266 State *ex rel.* Cates v. W. Tenn. Land Co., 158 S.W. 746, 751–52 (Tenn. 1913).

267 *Id.* at 769–70 (Neil, J., dissenting).

268 *See supra* note 137 and accompanying text.

269 State v. McIlroy, 595 S.W.2d 659, 660–61 (Ark. 1980).

B. *Navigability Doctrine as a Takings Clause Problem*

If the Fifth Amendment provides the constraint on navigability doctrine, it leads to two questions. The first is what substantive criteria should be employed to analyze uses of the power. The second is what remedial consequences flow from the application of the Takings Clause. Each of these questions is discussed in turn.

1. Revising the "Established Right" Test

The first step to considering navigability doctrine as a Takings Clause problem is to determine what makes something a judicial taking. The existing case law on judicial takings is not much help. As discussed in Part II.A, the "established right" test from *Stop the Beach* is problematic when applied to navigability doctrine or any other rule for determining rights. Its focus on "establishment" hampers some reasonable common-law changes while under-protecting other property interests. And "establishment" raises metaphysical questions, regardless of whether the measure of "establishment" is a single instance of state judicial recognition or some federal benchmark.

If we look to other Takings case law for guidance—specifically, the sorts of takings that the Court has recognized in the past—the two most relevant to navigability doctrine are the "*Loretto* permanent physical occupation" and the "*Penn Central*" takings.[270] In *Loretto*, the Court held that, *per se*, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[271] Subsequent cases have held that a permanent physical occupation exists

> where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[272]

If *Loretto* is applied to navigability doctrine, then almost every invocation of the doctrine would violate the Constitution. But this seems like whittling a piece of wood with a hatchet. What if the modes of commercial transport change in a state with a commercial

---

270 A third type of taking is one that deprives an owner of all economically viable use of his property. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538–39, 543 (2005). While anything is possible, it is unlikely that the creation of a public easement over a waterway on a parcel of land would meet that bar. On the other hand, if navigability doctrine is used to eliminate appropriated water rights—like those in the West—that might qualify.

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

272 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987).

definition—would the creation of that easement-like public right in a new waterway qualify as a permanent physical occupation, even though the law long contemplated such a possibility? *Loretto* does not offer much guidance on when, if ever, a judge's application of old law to new circumstances would be accepted. Moreover, the Court has generally been reticent to expand *per se* Takings tests like *Loretto*'s beyond a narrow set of circumstances that closely resemble the facts of the precedential case.[273]

Penn Central takings are far more flexible. In *Penn Central*, the Court noted that it lacked any "'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[274] However, it observed that the (1) regulation's "economic impact . . . on the claimant and, particularly, [(2)] the extent to which the regulation has interfered with distinct investment-backed expectations[,] . . . . [and (3)] the character of the governmental action" would all be relevant to the determination of whether a taking had occurred.[275] Though this multi-factor test has only been applied to regulatory takings, the *Penn Central* language is broad and could certainly be applied to judicial takings.[276]

Each factor of *Penn Central* can be used to analyze whether invocations of navigability doctrine constitute judicial takings. Courts could estimate the "economic impact"—typically the effect on market value—of the recognition of a navigable waterway across the affected parcel. Under the "investment-backed expectations" prong, courts would look to the reasonableness of the owner's claim to exclusivity in light of existing law.[277] In *Hughes v. Washington*[278]—the first opinion to propose a judicial takings doctrine—Justice Stewart's concurrence suggested a similar approach: state-court judges can modify property law so long as the decision "arguably conforms to reasonable expectations," but decisions that are "unpredictable" or "constitute[] a sudden change in state law" are suspect.[279] This analysis, when placed under the "investment-backed expectations" prong of the *Penn Central* test, dovetails nicely with the concept that "background principles" of

---

273 *See* Echeverria, *supra* note 210, at 481.

274 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (citation omitted).

275 *Id.*

276 This approach has been suggested in other work. *See, e.g.*, Michael B. Kent, Jr., *More Questions Than Answers: Situating Judicial Takings Within Existing Regulatory Takings Doctrine*, 29 VA. ENVTL. L.J. 143, 166–67 (2011); Peñalver & Strahilevitz, *supra* note 15, at 358.

277 *See* Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring).

278 Hughes v. Washington, 389 U.S. 290 (1967).

279 *See id.* at 296–97 (Stewart, J., concurring).

state law limit a property owner's ability to claim the Takings Clause has been violated.[280]

When applied to navigability doctrine, the "investment-backed expectations" prong distinguishes between foreseeable changes to the definition and unforeseeable ones. Each state-law definition has a different level of potential for evolution, and this potential serves as a limitation on the exercise of the doctrine within that state. Take, for example, "tidal" states. In those states, under existing law, only tidal waters are navigable and therefore subject to public rights. Barring the sudden appearance of tidal water on an individual's property, the waters that are "navigable," and the property rights affected by that designation, cannot change. If some public group sought the rights to use non-tidal water on an individual's property, the judges of the state court could not find that water to be navigable if faithful to the existing state precedents. On the other hand, in commercial definition states, owners might be deemed to be on notice that modes of commerce can change and affect the balance of rights.[281] It is equally possible that if a state court consistently expressed its intent to update its definition in light of modern uses for water, an owner's expectations about the exclusivity of his or her riparian property might be considered unreasonable.[282]

The "character of the government action" prong can also be applied to judicial actions. This prong has been interpreted to deter government from "singling out" property owners for unfair burdens that "should be borne by the public as a whole."[283] A property owner is "singled out" when a government action is inflicted on an individual or

---

280 *See Lucas*, 505 U.S. at 1030.

281 In the analogous context of the federal navigational servitude, which uses a commercial definition of navigation to define the waters that the federal government is entitled to use and maintain, the Court has held that "riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government." Scranton v. Wheeler, 179 U.S. 141, 157 (1900) (internal quotation marks omitted).

282 Some have argued that the entire public trust doctrine is a "background principle" that puts property owners on notice that their interests are subject to a dominant public claim. *See* Martin H. Belsky, *The Public Trust Doctrine and Takings: A Post*-Lucas *View*, 4 ALB. L.J. SCI. & TECH. 17 (1994); John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931 (2012); Blake Hudson, *The American Takings Revolution and Public Trust Preservation: A Tale of Two Blackstones*, 5 SEA GRANT L. & POL'Y J. 57 (2013); Julia K. Bramley, Note, *Supreme Foresight: Judicial Takings, Regulatory Takings, and the Public Trust Doctrine*, 38 B.C. ENVTL. AFFAIRS L. REV. 445 (2011). Similarly, other commentators have suggested that "exigencies" might make judicial rule changes confiscatory non-takings and environmental or conservationist concerns might qualify as exigent. *See, e.g.*, Lee Anne Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57, 101 (2012).

283 Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–48 (1991); Peñalver & Strahilevitz, *supra* note 15, at 358.

a few owners by a "purposive" majority,[284] or, put another way, when there has been a "process failure" that makes it unlikely that property claims have been considered fairly.[285] When applied to actions by the state judiciary, courts could look skeptically at judicial decisions where the changed rule has been made at the behest of the state legislature or a state agency, suggesting possible majoritarian influence. Additionally, the reach of the opinion might be relevant. If, as in some cases, the changed definition only affects a few individuals, it is more likely to be questionable than a broad change that affects many riparian owners.[286]

The Takings Clause may also address an additional problem with past invocations of navigability doctrine: the "private taking."[287] The government may only take property for public use; it may not use its powers to compel a transfer from one private party to another.[288] As the history of navigability doctrine shows, sometimes the power has been used to open a waterway to a few other riparian or littoral owners, rather than the public at large.[289] Decisions that burden downstream owners only to benefit a few individuals or companies upstream would run afoul of the Takings Clause.[290]

If the Takings Clause is applied to navigability doctrine, it may prevent some beneficial changes to state law. If navigability doctrine is used to enhance the environment or improve social welfare, this loss of flexibility is a cost. But this problem may not be as serious as it first appears. Empirical study has shown that, at least under the *Penn Central* framework, the private owner loses his Takings claim over ninety percent of the time.[291] If that pattern holds, courts will still have a fair degree of power to modify their law within reasonable parameters, but the Takings Clause will prevent the most egregious eliminations of property rights.

---

284 *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1217 (1967).

285 *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 854 (1995).

286 *See* Peñalver & Strahilevitz, *supra* note 15, at 358.

287 *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005).

288 *Id.*

289 *See* Coleman v. Schaeffer, 126 N.E.2d 444, 447–49 (Ohio 1955) (Hart, J., dissenting) (quoting lower court opinion to describe how public's access was limited to mouth of river, in effect meaning that navigability declaration benefitted only upstream owners).

290 *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).

291 *See* F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of* Penn Central Transportation Company*?*, 14 DUKE ENVTL. L. & POL'Y F. 121, 141–42 (2003); *see also* Somin, *supra* note 247, at 104.

2. Compensation or Invalidation as Remedy

The Takings analysis brings up a second question: if the Takings Clause furnishes the mode of analysis, what is the remedy? The *Stop the Beach* plurality indicated that invalidation of the offending decision would be the default remedy for a judicial taking.[292] But this has been a major point of controversy. Some commentators read Supreme Court precedent to indicate that the normal remedy for a taking is compensation, subject to several narrow exceptions.[293] Others consider both invalidation and compensation to be ordinary Takings Clause remedies.[294] At minimum, all these commentators agree that the boundaries between state actions requiring invalidation and actions requiring compensation are unclear. Though invalidation-only is a potential option under the Takings Clause after *Stop the Beach*, I reserve exploration of the consequences of that approach for the discussion of the Due Process Clause.[295] Accordingly, this Section discusses potential consequences if compensation is available in at least some cases for a judicial takings claim.[296]

There are two potential mechanisms for compensation: (1) the state courts could change property rules and the state could automatically owe compensation unless or until the legislature acts to undo the decision; or (2) the state courts could change property rules but make these changes contingent on legislative approval and compensation.[297] If the state courts could change property rules to

---

292 *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 723 (2010).

293 *See* Echeverria, *supra* note 210, at 482 ("[T]he normal remedy for a taking is compensation, and equitable relief is not an available option, at least so long as the usual compensatory relief is available in some forum.").

294 *See, e.g.*, Barros, *supra* note 160, at 956–57.

295 *See infra* Part III.C.

296 In the judicial takings cases, a utilitarian calculus might suggest that changing the law is preferable and defensible *without* compensation when the benefits of a change exceed the costs and when—given the administrative costs of providing compensation—the losers should be able to see that the change in the law is in their long-term interest (as members of the public who, presumably, will enjoy the waterway in question and others). *See generally* Michelman, *supra* note 284 (outlining utilitarian test for calculating when government should exercise eminent domain power and compensate affected owners). This calculation may militate against compensation in some waterway cases, but probably not all. Michelman's framework deliberately balances benefits against the harm to owners (including the presence or absence of "invasion," the duration of invasion, and the extent to which the claimant can be said to have "owned" the right before the offending state action). *See id.* at 1228, 1232 n.110.

297 Buzz Thompson suggested both the "automatic compensation" and "legislative choice" approaches in his original article on judicial takings. *See* Thompson, *supra* note 199, at 1518–20. A third option is to remedy "private takings"—those that are not truly in the public interest—with invalidation. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."). But because several federal court decisions

automatically require compensation, the consequences for navigability doctrine would be similar to having no constraint but without the attendant disadvantages. Courts would be able to break legislative inertia over acquiring the rights and to develop innovative rules. But the major downside is that the decision to take property for the public presupposes the careful balancing of the costs of compensation against the benefits to the public from reallocation of the right,[298] and this analysis is traditionally part of the legislative function.[299] While judges may be aware of the policy implications of their decisions on navigability, and the public sentiment surrounding them,[300] the decision whether to exercise the eminent domain power—and thus incur compensation obligations—often requires consideration of more factors than those needed to resolve any particular property dispute. While courts routinely require legislatures to pay compensation for legislative or executive actions that constitute takings, it would be quite different for courts to order the legislature to pay compensation when the *courts* are unilaterally responsible for the taking in the first instance.[301] Indeed, "[d]epriving the [legislature] of th[e] choice [to exercise the eminent domain power] . . . may force substantial and unexpected monetary liability on the public."[302]

Of course, legislatures disapproving of the change could pass legislation overruling the court's decision and reinstate the old rule,[303] but there are many serious consequences associated with adopting an automatic compensation approach even with this safeguard in place. Some courts might be deterred from making a change because of the uncertain eminent domain authority of courts and the discomforting prospect of forcing the public to pay for their decisions. Moreover, if the legislature is deadlocked, then there may be a "standoff": the legislature refuses either to pay or to override the decision, causing a legitimacy

consider "private takings" a due process problem, I discuss those in the next Section. *See* Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896); Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464–66 (7th Cir. 1988).

298 *See* Kelo v. City of New London, 545 U.S. 469, 483 (2005); Richard A. Epstein, *Property Rights, Public Use, and the Perfect Storm: An Essay in Honor of Bernard H. Siegan*, 45 SAN DIEGO L. REV. 609, 620 (2008); Michelman, *supra* note 284.

299 *See* BLACKSTONE, *supra* note 209, at *135; Walston, *supra* note 15, at 433–34.

300 *See Kelo*, 545 U.S. at 482 ("Emphasizing the great respect that [the Court] owe[s] to state legislatures *and state courts* in discerning local public needs." (emphasis added) (internal quotation marks omitted)).

301 *See* Thompson, *supra* note 199, at 1518–19. Lee Anne Fennell has raised the interesting possibility of alternatives to monetary compensation, like in-kind compensation. *See* Fennell, *supra* note 282, at 101–02.

302 Barros, *supra* note 160, at 956–57.

303 *See* Thompson, *supra* note 199, at 1519; First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304, 335–36 (1987) ("On the other hand, if the court requires compensation for a permanent taking, the Executive or Legislative Branch may still repeal the regulation and thus prevent the permanent taking.").

crisis.[304] Finally, though not as much of a concern in the context of navigability doctrine, the "automatic compensation" approach presents a "temporary taking" issue if it is applied more broadly to all judicial takings. The Court made clear in *First English Lutheran Church of Glendale v. County of Los Angeles*[305] that temporary takings which, prior to invalidation, "deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[306] Though few uses of navigability doctrine would qualify as depriving riparian owners of "all use" of property, some might very well do that—and the "automatic compensation" approach means that even if the legislature undoes the rule change, it will have to pay affected owners for the period between the state-court decision and the invalidation by legislation.

Additionally, if federal courts are asked to intervene to order payment, there is a state sovereign immunity problem.[307] While parties that litigate over navigability in state court might seek compensation in the state court (despite the awkwardness of asking the alleged "taker" to compensate for the alleged taking), litigants who seek compensation in federal courts would run straight into the Eleventh Amendment, which grants states immunity from suits for monetary relief in those forums unless they consent.[308] Though some commentators—and a Supreme Court footnote[309]—have suggested that the Fifth Amendment trumps Eleventh Amendment protections,[310] other commentators disagree, claiming that plaintiffs still cannot expect to obtain compensation from states in federal court.[311] Because invocations of navigability doctrine and other decisions giving rise to judicial takings would undoubtedly be brought against the state,[312] this issue may be a serious roadblock to an "automatic compensation" approach.

---

304 *See* Thompson, *supra* note 199, at 1519.

305 482 U.S. 304.

306 *Id.* at 318.

307 *See* Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493 (2006); Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067 (2001).

308 *See* U.S. CONST. amend. XI; *Ex parte* Young, 209 U.S. 123 (1908).

309 *See First English*, 482 U.S. at 316 n.9.

310 *See* Berger, *supra* note 307, at 498; Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 243 (2006); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 485 (2002).

311 *See, e.g.*, Patashnik, *supra* note 231, at 280–83.

312 Most takings suits are against a county, town, or other sub-state entity, possibly to avoid Eleventh Amendment issues. *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 n.54 (1978).

There is an alternative to the "automatic compensation" and invalidation-only approaches: the legislative approval approach.[313] The state judiciary can change the rule, but make the public's use or acquisition of the navigation rights conditional on legislative approval of compensation. In the context of navigability doctrine, it might look like this: when a riparian owner's exclusive rights are challenged, the owner could assert that any change to the definition of "navigable" would constitute a taking of his property. If the court nonetheless decided to change its definition, it could issue a provisional ruling that the water rights belonged to the state, provided that the state compensate affected owners by legislation (possibly within a certain time period).[314] Only after the compensation was authorized would the court's decree become effective. Though the authority for state courts to issue such conditional orders is not well established,[315] state courts often stay changes in the "common law to give the legislature the opportunity to address the issue,"[316] and a judicial order changing a property entitlement could be structured that way.

The legislative approval approach may encourage courts to change the definition because when the legislature affirmatively acts, and thus indicates its approval of the payment of compensation, it takes away some of the concerns associated with unilateral judicial use of eminent domain. While the state judiciary may not be able to break either legislative inertia or legislative capture by property holders, a judicial rule change will at least force the issue with legislatures, perhaps causing either a spur to action or increased public attention.

One notable objection to permitting *any* form of compensation for judicial takings is the "underinvestment" problem, though it is not a serious one when it comes to navigability doctrine. Eduardo Peñalver and Lior Strahilevitz have pointed out that permitting a compensation remedy for judicial takings may induce underinvestment problems in some circumstances: party A could pay party B $5 to under-defend in a lawsuit in state court by A about a disputed parcel, then party B could bring a judicial takings claim and be awarded $10 in compensation by a federal court; party A will be happy because he paid $5 for a property worth $10, party B will be happy because he will have received $15 for a

313 Buzz Thompson originally suggested this "legislative choice" approach, though it has remained comparatively underexplored in the twenty-five years since his article was published. *See* Thompson, *supra* note 199, at 1518–20.

314 *See* Thompson, *supra* note 199, at 1520–21.

315 *See* Thomas O. Main, *Judicial Discretion to Condition*, 79 TEMP. L. REV. 1075, 1098 (2006).

316 Thompson, *supra* note 199, at 1520 n.273; *see* Lawrence Baum & Bradley C. Canon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, *in* STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 83, 94 (Mary Cornelia Porter & G. Alan Tarr eds., 1982); *see also* Thomas E. Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or Sunbursting*, 51 MARQ. L. REV. 254, 262 (1968).

property worth $10, and the state is out $10.[317] Of course, while the underinvestment problem is a legitimate concern with judicial takings doctrine as a whole, it does not have much application to navigability doctrine. The state, as trustee for the public, is the party that acquires the rights: "party A" in the above example. While it is theoretically possible that a state might pay a defendant extra to under-defend a lawsuit, the Takings Clause only demands that the land be for public use and that affected individuals receive compensation. Putting aside potential corruption concerns, there is nothing (constitutionally) that prevents the state from paying the owner extra for property that then becomes public.

With regard to navigability doctrine, then, the Takings Clause offers both a substantive framework for separating judicial rule changes that require a remedy from those that do not and multiple alternative structures for providing that remedy. The legislative approval approach appears preferable to automatic compensation. It avoids some theoretical problems, ensures that owners receive payment if the public does obtain access, and encourages state judges to adopt effective common-law rules that are in the public interest without fear of unilaterally burdening the state legislature with monetary obligations. Nevertheless, requiring affirmative action from the legislature may mean that some beneficial common-law changes never get through—and the consequences of that failure may be extreme where water resources are concerned.

C. *Navigability Doctrine as a Due Process Problem*

1. Developing a Due Process Test

The Due Process Clause provides an alternative constraint to the Takings Clause. Not all deprivations of property rights are protected by the Fourteenth Amendment—just those that have occurred without "due process of law."[318] The Due Process Clause has been interpreted to require individuals be afforded notice and certain procedural safeguards before losing a property interest ("procedural due process").[319] More controversially, it has also been interpreted to protect individuals from the deprivation of fundamental rights ("substantive due process").[320]

---

317 *See* Peñalver & Strahilevitz, *supra* note 15, at 335–40.

318 U.S. CONST. amend. XIV, § 1.

319 Fallon, *supra* note 211, at 330.

320 *See, e.g.*, McDonald v. City of Chi., 561 U.S. 742, 811 (2010) (Thomas, J., concurring); United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) ("If I thought that 'substantive due process' were a constitutional right rather than an oxymoron, I would think it

One of the most basic guarantees of the Due Process Clause is the directive that litigants must be afforded an impartial decisionmaker, and this protection could certainly be applied to interpretations of navigability doctrine.[321] Impartiality is a case-specific inquiry: "justice must satisfy the appearance of justice."[322] The requirement of impartiality is designed to prevent egregious violations of litigants' rights, and some navigability cases may come close. Where the judge appears motivated by factors external to the case, his impartiality may be questioned. Nevertheless, the situations where courts have found a "partial" decisionmaker are few and far between.[323]

The Due Process Clause is also concerned with "fundamental fairness" and "the prevention of the arbitrary and vindictive use of the laws."[324] While these are almost totally malleable factors, with respect to the actions of the judiciary, they have been interpreted to prevent retroactivity and require adherence to the principle of stare decisis.[325] When a "court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct," there is a retroactivity problem.[326] Fundamental fairness protects an individual's reasonable reliance on prior law, and some invocations of navigability doctrine seem to run afoul of this protection.

The due process protection against retroactive lawmaking was recently explored in *Rogers v. Tennessee*.[327] There, the Supreme Court took up the issue of whether the Tennessee Supreme Court could abolish the common-law "year and a day" rule that a person could not be convicted of murder if the victim died more than a year and a day after the crime.[328] The Tennessee Supreme Court used Rogers's case to abolish the rule, and he argued that the Tennessee decision violated his due process rights because the change in the law was unpredictable.[329]

---

violated . . . ."); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980).

321 Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

322 Offutt v. United States, 348 U.S. 11, 14 (1954).

323 *See* Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 515–18 (2013).

324 Rogers v. Tennessee, 532 U.S. 451, 460–62 (2001).

325 *See* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994); Gibson v. Am. Cyanamid Co., 760 F.3d 600, 618 (7th Cir. 2014) ("Due Process protects against arbitrary and irrational legislation, and if a law is fundamentally unfair because of its retroactivity, then it is arbitrary." (citing E. Enters. v. Apfel, 524 U.S. 498, 557 (1998))); Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 855–57 (2003).

326 *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534 (1991). While retroactivity is often raised in the criminal context, it applies with full force in civil law. *See id.* at 534–35.

327 532 U.S. 451.

328 *Id.* at 451.

329 *See id.* at 453.

To resolve Rogers's case, the Supreme Court examined a number of factors under its due process precedents, including the abolition of the same rule in most other jurisdictions, the failure of the state legislature to codify the rule, the fact that the rule had not once been enforced, and the fact that it had been described in only one Tennessee case from 1907.[330] On balance, the Court concluded, the elimination of the rule was neither unexpected nor indefensible.[331]

Similar factors could be incorporated into the analysis of whether a court's interpretation of navigability doctrine violated the anti-retroactivity principle. To examine whether the property owner reasonably relied on the status quo, courts could examine: (1) how long the rule of decision has been a part of state law; (2) how frequently it has been invoked; (3) language in the controlling precedents on the issue; and (4) possibly, even how common or uncommon the rule is in other jurisdictions. If the modification to navigability doctrine is unexpected and indefensible under existing law, it would be a Due Process violation. If the state court instead foreseeably updates the definition to bring it up-to-date—say, abandoning a logging definition in a state where there is no longer any logging, or perhaps after repeated warnings that it plans to change the definition—then it might not cause a constitutional problem.

Courts that want to abandon outdated and irrelevant navigability rules but avoid due process retroactivity problems could try another option besides sudden change: they could prospectively override existing precedents. State courts might be able to make a new rule of navigability that applies only to parties that acquire riparian property after some certain date.[332] However, prospective overruling is unlikely to

---

330 *See id.* at 463–67.

331 *See id.* at 462–63.

332 *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 536 (1991). Selective prospectivity, where the new rule applies to the parties in the case immediately but only to third parties prospectively, has both never been applied in the civil context and has been rejected by a majority of the Court. *See id.* at 538; *id.* at 548 (White, J., concurring); *id.* at 549 (Scalia, J., concurring). The Supreme Court has said that the Federal Constitution has "no voice" upon state courts prospectively changing state law in this way. *See* Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932). But the authorities are divided on whether the Constitution really has "no voice" on changes in state law when the interest is specifically protected by the Constitution (as property interests are). *See* John Martinez, *Taking Time Seriously: The Federal Constitutional Right to Be Free from "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297, 298–99 (1988). Moreover, prospective judicial lawmaking still causes separation-of-powers concerns: typically, only legislatures can freely make and amend rules. *See* Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 424–27 (1924). Like retroactive rule changes, prospective rule changes abandon the principle of *stare decisis*. When past decisions are not guaranteed to be followed, it threatens deeply held values of our common-law system—like legal stability and uniform treatment of litigants. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 568–69 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

eliminate the constitutional problem. At least in the context of the Takings Clause, the Supreme Court has held that an owner is still entitled to bring a Takings claim even if he purchases property after the enactment of the offending rule or regulation and was thus on notice of the effect it might have on the property's use and value.[333] It is hard to imagine the Court reaching a different result when examining a state court's prospective changes to property rules under the Due Process Clause.

Nevertheless, assuming for now that the typical retroactive case will be considered under the Due Process Clause, there are three additional substantive hurdles to applying it. First, both procedural and substantive due process may only apply in the absence of a more specific constitutional guarantee (and the Takings Clause may meet that bar).[334] Second, once due process is applied to judicial deprivations of property rights, it may lead to a flood of litigation about judicial deprivations of various liberty and pseudo-property interests.[335] Finally, while concerns about fundamental fairness and reasonable reliance are often linked to procedural due process,[336] they have also been described as substantive due process entitlements.[337] Many courts and judges disagree about whether substantive due process exists, let alone whether it applies to economic interests like property rights at all.[338]

Still, it should be apparent from this Section and the preceding one that, substantively, the Takings and Due Process frameworks are nearly identical. The due process "considerations of fair notice, reasonable reliance, and settled expectations"[339] look very similar to the Court's regulatory takings jurisprudence, which protects owners' "reasonable investment-backed expectations" and prohibits the state's "unfairness" and the "upset" of "settled transactions."[340] The main consequence of

---

333 *See* Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

334 *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 721 (2010). *But see* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005) (stating that questions about a regulation's "underlying validity" under the Due Process Clause are "logically prior to and distinct from the question whether a regulation effects a taking").

335 *See Stop the Beach*, 560 U.S. at 743–44 (Breyer, J., concurring in part and concurring in the judgment); Gryger v. Burke, 334 U.S. 728, 731 (1948) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.").

336 *See* Medina v. California, 505 U.S. 437, 446 (1992); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 320–21 (1985); *see also* Town of Castle Rock v. Gonzales, 545 U.S. 748, 791 n.20 (2005) (Stevens, J., dissenting).

337 *See* Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012) (Thomas, J., concurring); Norris v. Engles, 494 F.3d 634, 637–38 (8th Cir. 2007); Martinez, *supra* note 332, at 329.

338 *See* Gosnell v. City of Troy, 59 F.3d 654, 657 (7th Cir. 1995); Polenz v. Parrott, 883 F.2d 551, 558 (7th Cir. 1989); Schaper v. City of Huntsville, 813 F.2d 709, 716–18 (5th Cir. 1987); Krotoszynski, *supra* note 219, at 568.

339 Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994).

340 E. Enters. v. Apfel, 524 U.S. 498, 532–35 (1998).

choosing the Fourteenth Amendment, then, is that compensation is ordinarily unavailable to remedy the constitutional wrong; invalidation is the sole redress.

2. Invalidation as Remedy

A violation of the Due Process Clause cannot be remedied with compensation: the traditional remedy is an injunction or invalidation of the offending state act.[341] At minimum, having an invalidation-only remedy avoids entirely the Eleventh Amendment problem of federal courts ordering states to pay compensation. But when invalidation is the only remedy for an abuse of navigability doctrine, as it would be under the Due Process Clause and may be under the Takings Clause, there are other pros and cons.

If the legislature is self-interested or improperly motivated in some way that makes it unlikely to approve of the rule change or agree to pay compensation (as a Takings framework might require), even though the public desires (and may be willing to pay for) the change, then an invalidation-only approach may be desirable. An invalidation-only remedy avoids state legislatures entirely. Courts will either uphold or invalidate the rulings of other courts, meaning that there is hope that the desired change will be upheld if within constitutional parameters—which would not be the case if the legislature had to approve the change.

But assuming that the legislature is not so motivated, the invalidation-only approach shares some advantages and disadvantages with the legislative approval approach to compensation under the Takings Clause. If the state-court decision is invalidated by another court, the state legislature is free to adopt the proposed rule itself and pay for the rights it acquires. Like the legislative approval approach, this ensures that the separation of powers is maintained, and the attempted judicial rule change may provide a valuable signal to the legislature that it should act (or at least focus public attention on the issue).

But unlike the legislative approval approach, under an invalidation-only system, the state court cannot demand the legislature respond through either its action or silence. Without a direct court order affecting the legislature, other parties will be responsible for bringing the matter to the legislature's attention. And problematically, an invalidation-only remedy disables the state courts from making changes that would be possible and even desirable (with compensation) under a Takings approach.

---

341 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005); Barros, *supra* note 160, at 953–54; John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 706 (1993); Walston, *supra* note 15, at 436.

D. *Navigability Doctrine Subject to Both*

A compromise would be to use both the Fourteenth Amendment and the Fifth Amendment as constraints on navigability doctrine.[342] The Due Process Clause would operate first, because "if a government action is found to be impermissible—for instance because it . . . is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action."[343]

The Due Process Clause would bar decisions that were made by an impartial judge, resulted from mob influence, or constituted "private takings" (transfers that are effectively from one private party to another but premised on dubious claims of public use, which have often been considered a due process problem anyway).[344] These would be invalidated. If the decision surpassed the due process inquiry, then a court reviewing the rule change could proceed to a Takings Clause analysis. Either the automatic compensation or legislative approval approaches could be used, with the attendant benefits and problems. If the rule change survived both analyses, the state courts could adopt the new rule without compensating anyone.

The problem is properly characterizing the inquiry into the change in state law. If the owner's reliance on existing state law presents a due process question, then it seems only a small number of judicial rule changes will qualify as takings but present no due process problem; in other words, it is hard to imagine how the property owner could not have reasonably relied on state law (in other words, the rule change presents no retroactivity problem), but nonetheless have sufficient expectations to trigger the compensation requirement. It is possible, though, that proving reasonable reliance could be set as a higher bar for property owners to meet than the *Penn Central* factors of high economic impact, investment-backed expectations, and the character of the government action.[345] For example, the owner of a parcel might not be able to reasonably rely on the existing law for the proposition that only water for commercial travel is navigable if it was only mentioned in one prior case from a century ago. But if the stream on the lot is on a major part of the property and meets other *Penn Central* factors, then the property owner could claim that there was significant economic impact and that he had investment-backed expectations that the water would

---

342 A two-pronged approach was also suggested by Wagner, *supra* note 15, at 179. This approach differs slightly because Wagner accepted the *Stop the Beach* "established right" test. *See id.*

343 *Lingle*, 544 U.S. at 543.

344 *See* Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896); Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

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

remain private. In such a situation, the owner might be entitled to compensation.

If the inquiry into the foreseeability of the rule change instead falls under the Takings Clause, and its protection of property owners' "investment-backed expectations," then a majority of cases will move to that prong. The legislature may be asked to pay more compensation as a result, and the Eleventh Amendment problem will rear its head.

Drawing the boundary between Due Process and Takings claims ends up being a balancing act between the two clauses. If the Due Process Clause is the primary locus of review, then the attendant benefits and burdens result: the courts are disabled from unilaterally changing the law or directly bringing the outdated rule to the legislature's attention, but courts may also feel more comfortable changing the law if invalidation, as opposed to compensation, is the worst-case scenario. If the Takings Clause is the primary locus of review, then the courts can force the issue with legislatures, but may be deterred from making new rules for fear of forcing monetary liability on the public. Nevertheless, using both clauses may be an attractive option where navigability doctrine is concerned. The Due Process Clause will invalidate all decisions that truly overstep the boundaries of the judicial power, curbing the worst abuses. Meanwhile, the Takings Clause will permit the courts to change and update the law within certain parameters, while creating an avenue for compensation when the judiciary has interfered with an owner's constitutional property rights.

CONCLUSION

Navigability doctrine has been used both to prevent privatization of that which is rightly public and to deprive individuals of vested property rights without constitutional protections. The goal of this Article is to provide that untold history. From accidental beginnings, navigability doctrine has shaped the use and ownership of the inland waters that comprise a huge swath of American territory. Until now, it has been a matter of disaggregated state law. This has helped to obscure systemic abuses.

By examining navigability doctrine nationwide, it is clear that some constitutional oversight is necessary to protect the owners of water rights and riparian land against egregious uses of the doctrine. When rights holders are subjected to majoritarian elimination of their property, unforeseeable changes in legal definitions, or transfers of their rights to a few neighbors or business competitors, they are at their most vulnerable. The Takings Clause, the Due Process Clause, or a combination of both clauses can provide the substantive framework for

preventing these problems. The difference is likely a matter of remedy: either compensation will be available in some cases, or not. Because whatever clause constrains navigability doctrine will presumably affect other areas of state-court lawmaking authority, this study alone cannot counsel for one clause over another. Each framework has its costs and benefits and each permits similar judicial flexibility to update the definition within constitutional parameters. This analysis thus suggests that, at least with respect to navigability doctrine, any of these three federal options (or options under state law with similar effects) would be an improvement.

Navigability doctrine is not just about misuses. It is also a critical way for the public to enforce its rights in waterways, and it is important that any constraint not eliminate state-court flexibility entirely. A new period of litigation over navigability is underway,[346] this time, prompted by large-scale water diversions and fears of water shortages.[347] Understanding navigability doctrine—and its limitations—can only help litigants on both sides of these battles moving forward.

Constitutional property rights and the public trust are two of the most sacred entitlements held by American citizens. Navigability doctrine implicates them both. Guidance in future cases may eliminate, restrain, or leave navigability doctrine unchecked. Whatever path is chosen, those decisions will have profound consequences for the ownership and use of the nation's water resources in the future.

346 *See* Mich. Citizens for Water Conservation v. Nestlé Waters N. Am. Inc., 709 N.W.2d 174, 205 (Mich. Ct. App. 2005), *aff'd in part, rev'd in part*, 737 N.W.2d 447 (Mich. 2007); Thorner, *supra* note 7.

347 Editorial, *Where Water Is Gold*, N.Y. TIMES, Sept. 19, 2013, at A30; Stephanie Strom, *Big Powers Like Coke and Pepsi Face Threat from Bottled Waters*, N.Y. TIMES, Oct. 26, 2013, at B1.