

FOREVER FREE: PUBLIC RECREATIONAL ACCESS TO INLAND WATER

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ABSTRACT

Conflict abounds on America's inland waterways. Many Americans believe they have the right to boat or fish on any waterway that can float a recreational vessel. Landowners often contend they own the beds of non-navigable waterways. Early American judges and jurists were often confused about the details of navigability doctrine in English common law and equally perplexed about how to apply that doctrine to waterways in the new republic. In response, during the nineteenth century, American courts developed a new test for determining proprietary title to submerged land called the highway of commerce test. American courts then relied on this test to exclude the public from "non-navigable" inland rivers and lakes, even though the waterways were easily accessible with small recreational boats. In the late-nineteenth and early-twentieth centuries, American courts started to reconceptualize public recreational use rights in inland waters. Building on a handful of foundational decisions, American judges began to redefine navigability in terms of a waterbody's capacity to sustain recreational boating, and then, in a spurt of jurisprudential innovation, began to hold that the public can enjoy an easement or servitude for recreational use in the water of an inland waterway even if it is non-navigable under the highway of commerce test and its bed is privately owned. This jurisprudence flourished in the second half of the twentieth century as state supreme courts in every region embraced what this Article calls the Public Recreational Servitude Approach to Inland Water (PRSA). The virtues of this jurisprudential innovation can be appreciated through a diverse range of contemporary property theories. This Article contends that the PRSA deserves to be celebrated, not feared.

The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other

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States that may be admitted into the confederacy, without any tax, impost, or duty therefor.¹

No man ever steps in the same river twice. For it is not the same river and he's not the same man.²

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1. ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT art. IV (July 13, 1787).

2. PLATO, SOCRATES, in 1 THE DIALOGUES OF PLATO 344–45 (B. Jowett trans., 3d ed. 1892). This quote is frequently attributed to Heraclitus, here paraphrased from Plato's *Cratylus*.

INTRODUCTION

Rivers, streams, lakes, ponds, passways, creeks, shallow swales. These are just some of the names Americans use to describe the innumerable inland waterways that cross the United States.³ They are places of beauty and repose, adventure and challenge, rejuvenation and wonder.⁴ But many of these watery places are sites of modern controversy. Members of the public often assert the right to enjoy water-based recreation on any waterbody that can sustain recreational use. Private landowners who own the shores of rivers and lakes that are “non-navigable,” under a mid-nineteenth-century understanding of a navigable waterway focused on commercial trade, argue that they own the land beneath these waterways and can exclude the public from enjoying the water. Some American courts still apply this archaic approach that results in a binary determination that a waterway is either entirely a private or a public place.⁵ Other American courts, following precedent that began to emerge in the late-nineteenth and early-twentieth centuries, have adopted a more nuanced approach; water bodies that do not satisfy the nineteenth-century conception of a navigable waterway can still be subject to public recreational access while adjacent landowners (called “riparian” landowners if they own land next to a river or stream and “littoral” landowners if they own land next to a lake, pond, or some other still water body) maintain ownership of the soil beneath these waterways.⁶ This Article is about the public’s vital relationship to these waterways and the development of this new, more flexible approach—what this Article calls the Public Recreational Servitude Approach to Inland Water (PRSA). Ultimately, this Article reconceptualizes this precedential development and praises the solutions it has produced because they honor the long-standing American commitment to free access to inland waterways capable of serving plural public purposes.

Contemporary controversies over waterways abound. In 2023, the Colorado Supreme Court rejected a recreational fisherman’s attempt to have courts recognize that a portion of the bed of the Arkansas River—

3. See Beatrix E. Beisner & Cayelan C. Carey, *Lake Name or Name Lake? The Etymology of Lake Nomenclature in the United States*, 61 FRESHWATER BIOLOGY 1601, 1602 (2016); N.H. DEP’T OF ENV’T SERVS., LAKE OR POND: WHAT IS THE DIFFERENCE? 1 (2019) (“The term ‘lake’ or ‘pond’ as part of a waterbody name is arbitrary and not based on any specific naming convention.”); Derek Watkins, *Inundated with Place Names*, WORDPRESS (July 25, 2011), <https://derekwatkins.wordpress.com/2011/07/25/generic-stream-terms/> (showing that terms for water bodies are regionally concentrated).

4. See EDGAR ALLAN POE, *To the River*, in AL AARAAF, TAMERLANE AND MINOR POEMS 63 (1829) (“Fair River! in thy bright, clear flow / Of chrystal, wandering water, / Thou art an emblem of the glow”); THE DOOBIE BROTHERS, *Black Water*, on What Were Once Vices Are Now Habits (Warner Bros. Recs. Nov. 15, 1974).

5. See, e.g., *Bott v. Comm’n of Nat. Res.*, 327 N.W.2d 838, 844–53 (Mich. 1982); *People v. Emmert*, 597 P.2d 1025, 1027–30 (Colo. 1979).

6. See *infra* Part II.

the sixth-longest river in the United States—belongs to the public.⁷ In 2022, the Illinois Supreme Court allowed one group of riparian landowners who own land adjoining the Mazon River, a 28-mile waterway popular for kayaking and fossil collecting, to block another group of riparian landowners from kayaking down the river with fossils they collected from portions of the riverbed next to their land.⁸ The same year, however, the New Mexico Supreme Court upheld the public's general right to use any river, stream, or lake in that state as long as the water flowing in the waterway can support recreational use.⁹

In these often-intense disputes over the public's right to boat, fish, and engage in other forms of recreation on our nation's inland waters, two questions typically arise. The first concerns who owns the subaqueous land—the land beneath the water. If a state owns the submerged land, the public generally has broad rights to recreate under the public trust doctrine.¹⁰ The second question arises if an adjacent landowner owns the submerged land. Then a court must often decide if that landowner can exclude non-owners from boating, fishing, or recreating on the water.¹¹ This Article focuses primarily on how state courts have answered this second question over the last 125 years.

To understand how various state courts have redefined public access rights to inland water when subaqueous land is privately owned, it helps to know how courts typically resolve disputes over ownership of such land. Generally, ownership of submerged land—the question of proprietary title as some scholars put it—depends upon applying a test that American courts constructed in the nineteenth century to determine locational admiralty jurisdiction, commerce clause jurisdiction, and a body of law known as the equal footing doctrine.¹² That test, which this Article calls the “historical highway of commerce test,” appears simple at first glance. A river, stream, or lake is regarded as “navigable” if it is “navigable-in-fact”; and it is navigable-in-fact if it is capable of being used, in

7. See *State v. Hill*, 530 P.3d 632, 633–36 (Colo. 2023). For more on this lawsuit, see Ben Ryder Howe, *Does This Fisherman Have the Right to Be in a Billionaire's Backyard?*, N.Y. TIMES (Sept. 2, 2022), <https://www.nytimes.com/2022/09/01/business/colorado-rivers-fishing-lawsuit.html>. See also U.S. GEOLOGICAL SUR., LARGEST RIVERS IN THE UNITED STATES 1-2 (1990) (showing that the Arkansas River, with a length of 1,460 miles, is a major tributary of the Mississippi River and flows across Colorado, Kansas, Oklahoma, and Arkansas).

8. *Holm v. Kodat*, 211 N.E.3d 310, 312–13, 319–20 (Ill. 2022). In this Article, I follow American legal conventions and refer to land adjoining a river or stream as “riparian” and land adjoining a lake or pond as “littoral,” although technically the latter term also encompasses land abutting an ocean or the sea. *Riparian*, BLACK'S LAW DICTIONARY (6th ed. 1990).

9. *Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n*, 519 P.3d 46, 51–52, 58 (N.M. 2022). See also *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421, 428–32 (N.M. 1945) (establishing that the right to use public waters includes recreational uses and fishing).

10. See *infra* Section III.D. See also HARRISON C. DUNNING, 2 WATER AND WATER RIGHTS § 30.01(b)(1) (Amy K. Kelly ed. 2024).

11. DUNNING, *supra* note 10, § 30.02(a).

12. See *infra* Section II.C.1.

its ordinary or natural state, as a highway of commerce to sustain customary modes of travel and trade.¹³ Crucially though, when a federal or state court uses this test to decide who owns subaqueous land, the court must assess a waterway's "navigability" at the "time of statehood," that is, at the moment when the state in which the waterway is located entered the Union.¹⁴ This historical highway of commerce test often traps courts and litigants in obscure and speculative adventures, searching for evidence of the kinds of vessels that customarily might have been used for commerce and the kinds of trade that might have occurred on rivers, streams, or lakes 100 or even 200 years ago.¹⁵

If a court finds that a contested waterway was navigable-in-fact at the time of statehood, the state will usually be the owner of the subaqueous land, and the public will have broad rights to navigate, fish, travel, and recreate in the water flowing in the waterway.¹⁶ Thus on our major waterways—our great transcontinental rivers and the Great Lakes—the public's rights to navigate, fish, and travel are paramount.¹⁷

The problem that leads to so much conflict in the United States today, however, centers on waterways that do not easily satisfy the historical highway of commerce test. If a court concludes, or litigating parties stipulate, that a contested waterway was *not* capable of serving as a highway of commerce, and therefore was "non-navigable," at the time of statehood, then several consequences follow. First, under the equal footing doctrine, the title to the subaqueous land remained with the United States at the time of statehood and, therefore, could later have been alienated to a private person, either by the federal government or by a state if that state subsequently acquired title from the federal government after admission to the Union.¹⁸

In these situations, courts will allow the current riparian or littoral owners to prove that they own the subaqueous land in dispute by tracing title to the sovereign or sometimes by applying various riparian rights doctrines like accretion and dereliction.¹⁹ If riparian or littoral owners

13. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591–92 (2012) (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1870)); *The Montello*, 87 U.S. 430, 440–41 (1874). For a detailed discussion, see *infra* Section I.C.

14. *PPL Mont.*, 565 U.S. at 592; *Utah v. United States*, 403 U.S. 9, 9–10 (1971); DUNNING, *supra* note 10, § 30.01(d)(3)(B).

15. Maureen E. Brady, *Defining "Navigability": Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415, 1424–25 (2015).

16. See *infra* Part I; DUNNING, *supra* note 10, § 30.01(b)(1). See also *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) (explaining that the "principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests").

17. DUNNING, *supra* note 10, § 31.01(b)(1) n.16.

18. *PPL Mont.*, 565 U.S. at 591; *United States v. Oregon*, 295 U.S. 1, 14 (1935); *United States v. Utah*, 283 U.S. 64, 75 (1930).

19. See, e.g., *Lamprey v. State*, 53 N.W. 1139, 1142–43 (Minn. 1893); *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

can prove their title to the beds of a contested waterway in an access dispute, courts in some states will then simply conclude that the owners of the subaqueous land have the right to exclude members of the public from the water even if access to the water is readily available from some public place or some other “navigable” public waterway.²⁰ Courts tend to justify this conclusion by applying the common law *ad coelum* doctrine and by emphasizing the centrality of the right to exclude in American property law.²¹ They also frequently assert that public rights to recreate in non-navigable waterways must be established by legislative prerogative or the exercise of eminent domain.²²

However, not all state courts follow this historical approach tethered to the traditional highway of commerce test, the *ad coelum* doctrine, and the right to exclude. At the end of the nineteenth century, some American courts began to assert that the public has a right to use a waterway for recreation even if it was not navigable under the historical highway of commerce test.²³ They also began to hold that the public enjoys a limited easement or servitude to engage in recreational activity on a waterway that could support recreational use even if the title of the subaqueous land remains in private hands.²⁴ This was the beginning of the PRSA.

Courts justified this innovative approach on many different grounds. Sometimes they invoked the common law public trust doctrine.²⁵ Sometimes they cited state constitutions or state statutes that declared that a state owns non-appropriated water in trust for its people.²⁶ Frequently, they cited the Northwest Ordinance of 1787 or other federal and state statutes echoing its call for inland waterways to remain “forever free” for

20. See, e.g., *Emmert*, 597 P.2d at 1027–30; *Bott v. Mich. Dep’t of Nat. Res.*, 327 N.W.2d 838, 841–42, 851 (Mich. 1982); *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1358, 1360–62 (Kan. 1990).

21. See, e.g., *Emmert*, 597 P.2d at 1027. The “ad coelum” doctrine is a feature of the general doctrine of accession, a body of rules originating largely in Roman law, and the abbreviated term stands for “cujus est solum, ejus est usque ad coelum et ad inferos,” which, roughly translated, means “to whomever the soil belongs, he owns also to the sky and the depths.” Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 467 & n.11 (2009).

22. See, e.g., *Emmert*, 597 P.2d at 1027; *Hays*, 785 P.2d at 1364–65; *Bott*, 327 N.W.2d at 842; *Mountain Props., Inc. v. Tyler Hill Realty Corp.*, 767 A.2d 1096, 1100 (Pa. Super. Ct. 2001).

23. See *infra* Section II.A.

24. See *infra* Section II.B.

25. *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 168 (Mont. 1984); *Ryals v. Pigott*, 580 So. 2d 1140, 1150 (Miss. 1990). For particularly comprehensive summaries of the development of the public trust doctrine in every U.S. state, see generally Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENV’T L. REV. 1 (2007); Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L. Q. 53 (2010).

26. *Adobe Whitewater Club of N.M. v. N.M. State Game Comm’n*, 519 P.3d 46, 51, 58 (N.M. 2022); *Mont. Coal. for Stream Access*, 682 P.2d at 170; *State ex rel. State Game Comm’n v. Red River Valley Co.*, 182 P.2d 421, 427 (N.M. 1945); *Day v. Armstrong*, 362 P.2d 137, 145 (Wyo. 1961). See cases discussed *infra* Section II.C.4.

use by inhabitants of a particular territory or state.²⁷ From time to time, they cited nineteenth-century precedents that stressed the importance of public rights to waterways, even as they worked out exactly what the concept of navigability should mean for contemporary society.²⁸ Occasionally, courts cited English common law judicial decisions or the writings of Matthew Hale.²⁹ Sometimes courts appealed to long-term customary use and local knowledge.³⁰ They also frequently worried about the excessive monopoly power that strict adherence to the historical highway of commerce test and the *ad coelum* doctrine approach would produce for an evolving American society in which public interest in recreation was intensifying and the need to use waterways for traditional waterborne commerce was waning.³¹

This Article contends that this extensive line of decisions represents admirable common law judicial creativity. Judges across the United States gradually built on each other's work to construct a new understanding of how private ownership of subaqueous land can coexist with public recreational use. Some scholars describe this line of cases as judicial adoption of a "pleasure boat test" for classifying navigable waters.³² Others describe it more grandly, seeing these cases as marking the rise of the "sovereign usufructuary [public trust doctrine]."³³ Others worry that at least some of these cases illustrate judicial overreach verging on a judicial taking.³⁴

This Article celebrates the judicial labor that created the PRSA and contends that it can be understood sympathetically through the lens of various strands of contemporary property law scholarship. Some prominent property scholars have argued that property law should feature crystalline and relatively invariant rules at its core and should restrict itself to modular, hard-edged packages of rights to indicate when a particular resource is subject to the realm of private exclusion and individual sovereignty. These scholars, however, also endorse contextualized governance regimes that feature muddier standards and opportunities for judicial or administrative discretion for harder cases at the periphery of prop-

27. *Elder v. Delcour*, 269 S.W.2d 17, 23–24 (Mo. 1954); *Coleman v. Schaeffer*, 126 N.E.2d 444, 445 (Ohio 1955).

28. *State v. Twiford*, 48 S.E. 586, 588 (N.C. 1904); *Smart v. Aroostook Lumber Co.*, 68 A. 527, 531–32 (Me. 1907); *Guilliams v. Beaver Lake Club*, 175 P. 437, 441–42 (Or. 1918); *Red River Valley*, 182 P.2d at 430.

29. *Red River Valley*, 182 P.2d at 428 (citing *Weston v. Sampson*, 62 Mass. 347, 354 (Mass. 1851)). See also Sir Matthew Hale, *De Jure Maris*, reprinted in STUART A. MOORE, A HISTORY OF THE FORESHORE, 374–77 (3d ed. reprinted 1993) (1888) (cited in *Weston*, 62 Mass. at 351).

30. *State v. McIlroy*, 595 S.W.2d 659, 662 (Ark. 1980); *Ryals*, 580 So. 2d at 1146–47.

31. See *Lamprey v. State*, 53 N.W. 1139, 1143 (Minn. 1893); *Twiford*, 48 S.E. at 588; *Luscher v. Reynolds*, 56 P.2d 1158, 1162 (Or. 1936).

32. DUNNING, *supra* note 10, § 32.03.

33. Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to Lamprey and Oswego Lake*, 43 VT. L. REV. 1, 1 (2018).

34. Brady, *supra* note 15, at 1440–43, 1446–47.

erty's domain.³⁵ Seen through the lens of these scholars' demands that property law prioritize efficiency and reduce information processing costs, the PRSA's adoption of a relatively simple test that intuitively links public recreation rights over inland water to suitability for recreational use represents an impressive accomplishment. In similar terms, by preserving adjacent riparian and littoral landowners' rights to use the banks of inland water bodies and exploit their beds while accommodating public use of the water itself, the PRSA is also consistent with at least one prominent natural law theory of property rights that stresses the importance of the productive use of resources and clear claim communication.³⁶

Seen through both of these lenses, the baseline rule of the PRSA is far easier to process and more consistent with the demands of productive use and clear claim communication than the historical highway of commerce test. As recreational fishermen often like to say, the rule is easy: if a fisherman can float a boat on a waterway and can get to the waterway from a public boat landing or some other traditionally navigable waterway, that waterway is subject to public access.³⁷ In addition, the PRSA illustrates why sometimes a "right to enter," as opposed to a "right to exclude," is a more efficient resource allocation rule not just for members of the public and landowners but also for local law enforcement officials who otherwise face the almost impossible task of regulating access under the mysteries of the historical highway of commerce test.³⁸

The PRSA has other virtues besides these utilitarian benefits. It illustrates how property law can enable people with potentially divergent interests in the same prized natural resource to establish property relationships based on principles of sharing and mutual accommodation.³⁹ It demonstrates how American property law can sometimes resist centrifugal forces that displace and disconnect people from land and communities and instead foster forms of positive place attachment that move us in the direction of "re-placing" property law.⁴⁰ It exemplifies how property

35. See generally Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 790–91 (2001).

36. Eric R. Claeys, *Natural Property Rights: An Introduction*, 9 TEX. A&M J. PROP. L. 415, 420, 437, 442 (2023) [hereinafter Claeys, *Natural Property Rights*]; Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413, 439–40 (2017) [hereinafter Claeys, *Labor, Exclusion, and Flourishing*].

37. Carl, Comment to *See What Is a Navigable Waterway?*, DUCKBOATS.NET (Aug. 5, 2007), <https://duckboats.net/community/threads/what-is-a-navigable-waterway.18084> (explaining the commonly held view that "waters that are 'navigable in fact' are also considered [sic] navigable water. In other words, if you can float a boat down it, it's navigable").

38. See Bethany R. Berger, *Property and the Right to Enter*, 80 WASH. & LEE L. REV. 71, 83, 86–87 (2023).

39. See generally Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647, 647 (2013).

40. See generally Jessica A. Shoemaker, *Re-Placing Property*, 91 U. CHI. L. REV. 811, 811 (2024).

law sometimes treats certain resources as neither classic private property nor state-owned public property, but rather as “inherently public property,” and how this shift overcomes hold-out problems, promotes cooperation and sociability, and generates impressive scale returns among its users.⁴¹

The PRSA also gives American law an important conceptual tool to confront the increasing consolidation of rural land ownership in America,⁴² and thus aligns with the long-held American tradition of preferring decentralized and democratic property relationships over monopolistic and quasi-feudal relationships that privilege concentrated power held by small elites.⁴³ Finally, retelling the story of how the PRSA originated in specific cases and then spread from judge to judge, court to court, over a period spanning more than 125 years reveals the importance of adapting property law over time and the dangers of doctrinal stagnation and the reification of one element of property above all others.⁴⁴

This Article proceeds in three main stages. Part I provides historical and doctrinal context by tracing the emergence of American conceptions of navigability and navigable waters from English law, outlining the equal footing doctrine and its consequences for ownership of subaqueous land, and explaining the development of the highway of commerce test in other contexts and its subsequent application to disputes over proprietary title of submerged lands.⁴⁵ It also provides background on the origins of the public trust doctrine and shows how some courts in the second half of the nineteenth century imbued the highway of commerce test with more flexibility to account for other uses of waterways, particularly their capacity to float timber and agricultural products to market without the aid of vessels.⁴⁶ Part II traces the development of the PRSA through three historical waves: a first wave, in the late nineteenth-century, in which courts signaled that recreational use of inland waterways was just as important as commercial trade and suggested that recreational access rights to inland water could be decoupled from ownership of subaqueous land;⁴⁷ a second wave, extending from 1900 to 1945, in which courts brought these core ideas to half a dozen more states;⁴⁸ and a third wave,

41. See generally Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 711, 712 (1986).

42. Shoemaker, *supra* note 40, at 815–16.

43. See Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1325–26 (2014).

44. See Joseph William Singer, *Living Property*, 49 SEATTLE U. L. REV. 111, 112, 119–20 (2025); Eric T. Freyfogle, *Property Law in a Time of Transformation: The Record of the United States*, 131 S. AFR. L.J. 883, 897, 901 (2014); STUART BANNER, *AMERICAN PROPERTY* 3 (2011) (“The basic message of th[is] book is that our ideas about property have always been contested and have always been in flux.”).

45. See *infra* Sections I.A, I.B, I.C.

46. See *infra* Sections I.C.2, I.D.

47. See *infra* Section II.A.

48. See *infra* Section II.B.

from 1945 to 2025, in which the PRSA blossomed in all regions of the United States, albeit with different flavors and characteristics.⁴⁹ Part II acknowledges, however, that the growth of the PRSA was not uniform, as a handful of states in each region rejected invitations to adopt it.⁵⁰ Part III takes stock of the PRSA and reconceptualizes it using the contemporary property scholarship frames mentioned above. It contends that the decisions establishing the PRSA are not judicial takings but rather exemplify the traditional work that we expect of courts in developing, adapting, and deepening the common law. This Article concludes that the work of the courts and judges who created the PRSA should be celebrated, not feared.

I. THE RISE OF THE HISTORICAL HIGHWAY OF COMMERCE TEST: SOURCES, LIMITS, AND MODIFICATIONS

During the nineteenth century, American courts developed an understanding of public and private rights in inland waterways that diverged from what judges and jurists perceived to be the English common law.⁵¹ At the end of that lengthy period of doctrinal development, two crucial rules emerged. First, through an alchemy of judicial decisions, the historical highway of commerce test—sometimes called “the federal navigability test”—emerged as the key rule of decision for determining proprietary title (or ownership) of submerged land.⁵² Second, despite the centrality of this test to ownership battles over subaqueous land, state courts and legislatures still had the power to establish their own rules governing access to and use of water in inland rivers, streams, and lakes.⁵³ The following discussion breaks down that complex doctrinal development in four digestible steps.

A. *From Tidal Influence to Navigability-In-Fact*

In the United States today, the individual states hold title to the beds of navigable waters, including inland rivers, lakes, and coastal tidewat-

49. See *infra* Section II.C.

50. See, e.g., *People v. Emmert*, 597 P.2d 1025, 1027–30 (Colo. 1979); *Bott v. Comm’n of Nat. Res.*, 327 N.W.2d 838, 841 (Mich. 1982); *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1361–63 (Kan. 1990); *Mountain Props., Inc. v. Tyler Hill Realty Corp.*, 767 A.2d 1096, 1099–1100 (Pa. Super. Ct. 2001).

51. See generally DUNNING, *supra* note 10, §§ 28–33; MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* 57–147 (3d ed. 2021); Eric T. Freyfogle, *Public Rights in Illinois Waterways under Federal and State Law*, 2024 U. ILL. L. REV. 229 (2024); Blumm & Engel, *supra* note 33; Brady, *supra* note 15; 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 (1975); Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13 (1976).

52. DUNNING, *supra* note 10, § 30.01(d)(2)(A.01), (d)(3)(A.01).

53. See *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603–04 (2012), discussed *infra* Section I.C.3.

ers.⁵⁴ This apparently simple rule belies a complex story of doctrinal evolution.

Many early American judges and jurists believed that English common law adhered to a simple, binary distinction regarding navigable waters: The English Crown owned the foreshore—the land between the high and low tide of the sea—and the beds of rivers influenced by the tide, whereas riparian proprietors owned the beds and waters of *non-tidal* inland rivers.⁵⁵ This simplistic picture, however, deviated from reality in several important ways. First, long ago, even as early as the thirteenth century according to some scholars, the English Crown had actually alienated most of the foreshore in England.⁵⁶ Nevertheless, through the intervention of Crown polemicists and treatise writers, and due in part to dubious decisions rendered by some possibly corrupt judges, many seemingly reliable authorities stated that English law had developed a presumption of Crown ownership of the foreshore.⁵⁷

The situation regarding inland rivers was even more complicated. While it is true that the Crown owned beds and waters in *tidal* rivers absolutely and the public thus had unfettered rights to navigate and fish in such “royal rivers,” tidal influence only created a presumption of navigability.⁵⁸ Meanwhile, *non-tidal* rivers were subject to a more complex ownership and use regime in which navigability-in-fact was the key criterion.⁵⁹ The owners of land adjoining non-tidal, “non-royal” rivers were regarded as the presumptive owners of the land beneath the water and thus were generally entitled to exclusive fishing rights in the waters above non-tidal riverbeds.⁶⁰ When a non-tidal river was small and practically incapable of sustaining travel, a riparian landowner’s dominion was

54. DUNNING, *supra* note 10, § 30.01(a)–(b).

55. See generally MacGrady, *supra* note 51, at 547–87 (explaining the historic English common law doctrines of riparian ownership). Key American figures who believed in this simple binary included Joseph Angell, Chancellor James Kent, and Justice Roger Taney. *Id.* at 547–49, 567 (foreshore); *id.* at 569–70 (equivalence between tidal and navigable rivers).

56. MacGrady, *supra* note 51, at 552–54. MacGrady relies extensively on Stuart Moore’s 1888 treatise, *A History of the Foreshore*, for these factual claims. See MOORE, *supra* note 29, at 24, 27–28.

57. MacGrady, *supra* note 51, at 557–67. A key figure in the curious shift in English understanding of foreshore ownership was the sixteenth-century polemicist, “title hunter,” and treatise writer Thomas Digges, who tried to curry favor with the crown by asserting crown ownership of the foreshore. See *id.* at 552, 554, 559; MOORE, *supra* note 29, at 180–84, 214–16, 219, 222, 224. The most problematic decision was the 1631 case *Attorney General v. Philpot*, cited in *Attorney General v. Richards*, (1795) 145 Eng. Rep. 980, 981; 2 Anst. 603, 607, reported in MOORE, *supra* note 29, at 261–62 (recognizing Crown proprietary right in the foreshore), a decision whose shady circumstances and poor reputation is recounted in rich detail by MacGrady, *supra* note 51, at 562–65. For more details on the massive confusion over Crown ownership of foreshore, tidal rivers, other rivers, and fishing rights in England, see *id.* at 580–87.

58. See MacGrady, *supra* note 51, at 571, 574, 580–81; Hale, *De Jure Maris*, in A HISTORY OF THE FORESHORE, *supra* note 29, at 374.

59. See MacGrady, *supra* note 51, at 571–75; LOUIS HOUCK, A TREATISE ON THE LAW OF NAVIGABLE RIVERS 15, 19–25 (1868).

60. See MacGrady, *supra* note 51, at 581.

complete.⁶¹ But when a non-tidal river was navigable-in-fact, it was considered a “common highway,” and the public enjoyed the right to travel on the water.⁶² This legal situation explains why famous provisions in the Magna Carta and subsequent English statutes commanded riparian land-owners to remove fishing devices that obstructed navigation on these important non-tidal but nevertheless navigable common highways.⁶³ In a famous passage in his treatise *De Jure Maris*, Sir Matthew Hale summed up the complexity of ownership and use rights on English rivers in the following terms:

There be some streams or rivers, that are private not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king’s people. Again, there be other rivers, as well fresh as salt, that are of common or publick use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods or both from one inland town to another. Thus the rivers of Wey, of Severn, of Thames, and divers others . . . as well above the flowings of the sea as below, and as well where they are become to be of private propriety as in what parts they are of the king’s propriety, are publick rivers *juris publici*.⁶⁴

All this complexity was often lost on early-American judges and jurists who frequently repeated the idea that ownership of riverbeds depended on navigability and only tidal rivers were navigable.⁶⁵ Thus, quite often in the early republic, courts stated that the only rivers subject to a presumption of sovereign ownership were tidally influenced rivers.⁶⁶

61. See Hale, *De Jure Maris*, in A HISTORY OF THE FORESHORE, *supra* note 29, at 374; MacGrady, *supra* note 51, at 581.

62. See Hale, *De Jure Maris*, in A HISTORY OF THE FORESHORE, *supra* note 29, at 374; MacGrady, *supra* note 51, at 571–73.

63. MacGrady, *supra* note 51, at 571–72.

64. Hale, *De Jure Maris*, in A HISTORY OF THE FORESHORE, *supra* note 29, at 374.

65. Many early American decisions cited *The Case of the Royal Fishery of the Banne*, Le Case del Royall Piscarie de le Banne (1611) 80 Eng. Rep. 540 (KB), translated in JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS, app. at 35–42 (1826), for the general idea that ownership of a riverbed was linked to navigability and only tidally influenced rivers were navigable under English common law, but as Freyfogle and others have noted, that decision’s reasoning was quite garbled. Freyfogle, *supra* note 51, at 238–39; MacGrady, *supra* note 51, at 577–87 (critiquing *Royal Fishery of Banne* and subsequent confusing decisions and recounting examples of the early American tendency to accept the fallacy of English Crown ownership of all foreshores and the assumption that the only navigable rivers in England were “royal” or tidal rivers). Fortunately, aided by the scholarship of MacGrady and others, more recent American decisions present a more nuanced and accurate picture of English law regarding rivers. See, e.g., *Seneca Nation of Indians v. New York*, 382 F.3d 245, 270 (2d Cir. 2004) (noting the controversy surrounding Hale’s portrayal of riparian ownership and use).

66. A key decision that continued to follow the rule of presumed sovereign ownership of tidal riverbeds yet emphasized Hale’s point that non-tidal rivers were still subject to a public right of passage if the river was practically navigable was Chancellor James Kent’s decision in *Palmer v. Mulligan*, 3 Cai. 307, 318–19 (N.Y. Sup. Ct. 1805) (recognizing that a portion of the Hudson River upstream was a “fresh river” unaffected by the ebb and flow of the tide and thus non-navigable “in the [English] common law sense” and thus subject to a riparian owner’s proprietary title claims but

In time, however, American courts and commentators began to question the presumed restriction of sovereign ownership to tidally influenced rivers and began to hold that a presumption of state sovereign ownership should apply to *all* navigable waters, regardless of whether they were subject to the ebb and flow of the tide.⁶⁷ In *Carson v. Blazer*,⁶⁸ an important early exemplar, the Pennsylvania Supreme Court declared that the Susquehanna River “is a navigable river,” even if there was “no flow or reflow” of the tide,⁶⁹ and therefore a riparian owner could not prevent the public from fishing in its waters because “the right to fisheries . . . is vested in the state, and open to all.”⁷⁰ Other early decisions from South Carolina, Alabama, and North Carolina similarly recognized public rights in non-tidal rivers as long as they were navigable-in-fact.⁷¹ Courts and commentators frequently justified this expanding conception of navigable waters by pointing out that while the perceived English common law rule linking presumptive sovereign ownership of riverbeds to tidal influence might have made sense in England, where short estuarine rivers were important for trade and commerce, it made less sense in the United States where large inland rivers and lakes afforded ample opportunities for commercial navigation.⁷² By the end of the nineteenth century, it had become commonplace for American courts to recognize that state sovereign ownership of riverbeds was tied to a river’s navigability-in-fact rather than tidal influence.⁷³

that it was still subject to “the servitude of the public interest” and therefore public uses could not be entirely impeded by riparian landowners). According to some sources, by 1904, seventeen states followed *Palmer* and the so-called “common law” tidality rule to hold that a state only owns the submerged beds beneath tidally affected rivers. MacGrady, *supra* note 51, at 588 & n.403 (citing 1 H. FARNHAM, *THE LAW OF WATER AND WATER RIGHTS* § 51 (1904)).

67. *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 286 (1997).

68. 2 Binn. 475 (Pa. 1810).

69. *Id.* at 478.

70. *Id.*

71. *Executors of Cates v. Wadlington*, 12 S.C.L. (1 McCord) 580, 583 (1822) (recognizing that riparian landowner could own soil of a navigable river but that the legislature could declare such a river to be a public highway and give the public a right to use it for navigation); *Wilson v. Forbes*, 13 N.C. 30, 34–35 (1828) (rejecting English common law rule for navigability of rivers); *Bullock v. Wilson*, 2 Port. 436, 448 (Ala. 1835) (same); *Collins v. Benbury*, 25 N.C. (3 Ired.) 277, 282–84 (1842) (following *Wilson v. Forbes* and adopting rule that waters which are “sufficient in fact to afford a common passage for all people in sea vessels” are navigable, and recognizing common public right of fishing in all of state’s navigable waters regardless of tidal influence).

72. HOUCK, *supra* note 59, at 26–27, 31–35; *Packer v. Byrd*, 137 U.S. 661, 667, 669 (1891) (distinguishing perceived English common law rule linking navigability of rivers to ebb and flow of the tide and applying American “navigability-in-fact” rule to dispute over ownership of island in the Sacramento River in California). An estuary is “[t]hat part of the mouth or lower course of a river flowing into the sea which is subject to tide; especially an enlargement of a river channel toward its mouth in which the movement of the tide is very prominent.” BLACKS LAW DICTIONARY 552 (6 ed. 1990).

73. *Shively v. Bowlby*, 152 U.S. 1, 31 (1894); *Barney v. Keokuk*, 94 U.S. 324, 336 (1877); *Packer*, 137 U.S. at 666–67.

B. The Equal Footing Doctrine and Its Title Consequences

The rule that American states own all land beneath navigable inland waters and coastal tidelands gained constitutional significance under a series of cases known as the equal footing doctrine. Several important “title consequences” flow from that doctrine.

In an 1842 decision, *Martin v. Lessee of Waddell*,⁷⁴ the Supreme Court declared that as a result of the American Revolution, the people of the original thirteen colonies, acting through their respective governments, “hold the absolute right to all their navigable waters and the soils under them,” subject only to the rights and powers the Constitution granted to the federal government.⁷⁵ *Martin*, in effect, established that the original thirteen states acquired sovereignty over the waters and beds of all navigable waterways within their borders at the time of their independence from Britain.⁷⁶ Three years later, the Court extended the principle of state sovereign ownership of navigable waters and water bottoms to the states that were subsequently admitted to the Union in *Lessee of Pollard v. Hagan*.⁷⁷ The Court’s rationale is straightforward; to deny the other states sovereign ownership of the navigable waters and the submerged land within their borders would deny them equal dignity as coequal sovereigns under the federal Constitution.⁷⁸

After *Waddell* and *Hagan*, some courts suggested that individual states could establish their own rules for determining which submerged lands the state governments acquired and held for the people under the equal footing doctrine and which were reserved for the federal government and therefore subject to alienation by the federal government before or after statehood.⁷⁹ Eventually, the Supreme Court rejected this state-centric approach and held decisively that federal law must be used to resolve disputes about ownership of submerged land beneath interior

74. 41 U.S. 367 (1842).

75. *Id.* at 410.

76. PPL Mont., LLC v. Montana, 565 U.S. 576, 590 (2012) (quoting *Waddell*, 41 U.S. at 410).

77. *Lessee of Pollard v. Hagan*, 44 U.S. 212, 228–29 (1845).

78. *Hagan* concerned title to previously submerged land beneath Mobile Bay in Alabama. *Id.* at 220. Justice McKinley admitted that when “Alabama was admitted into the union,” the same basic bifurcation of property and sovereignty that had been recognized in the original thirteen colonies in *Waddell* must apply in Alabama. *Id.* at 223, 228–29. “To maintain any other doctrine,” Justice McKinley famously wrote, “is to deny that Alabama has been admitted into the union on an *equal footing* with the original states.” *Id.* at 229 (emphasis added). The Court ruled that because the land in dispute had previously formed part of Mobile Bay or the bed of the Mobile River, both of which were navigable waters at statehood, the land belonged to Alabama because the United States had held it in trust for the state. *Id.* at 229–30.

79. A key source of confusion was a statement at the conclusion of *Barney v. Keokuk*, 94 U.S. at 338, suggesting that determination of state sovereign ownership of submerged water bottoms should be resolved under state law. See DUNNING, *supra* note 10, § 30.01(d)(2)(A.01); Ralph W. Johnson & Russell A. Austin, Jr., *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RES. J. 1, 7 (1967) (noting that prior to 1926 state courts assumed that the test of navigability for deciding title to beds of lakes, rivers, and streams was based on their own state law).

waterways because of the constitutional dimensions of the equal footing doctrine.⁸⁰

Three important “title consequences” flow from the foundational equal footing doctrine decisions.⁸¹ First, upon statehood, each state acquires title within its borders to the beds of inland waterways or coastal waters that were at that time either navigable-in-fact or subject to tidal influence.⁸² The key implication of this principle is that the federal government must reserve submerged beds beneath inland navigable rivers, lakes, or coastal tidelands within the borders of future states until those states are admitted to the Union, subject to a few narrow exceptions.⁸³ The second crucial title consequence is that each state can govern the lands beneath navigable waterways within its borders and over which it thus exercises proprietary sovereignty, subject to the “paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.”⁸⁴ The third title consequence arises when a waterbody is determined to have been *non-navigable* and not subject to tidal influence at the time of statehood. In this last instance, the United States is said to have retained title to the submerged land and therefore can transfer or license that submerged land to a private person or some other entity.⁸⁵ Thus, a federal patent to a private individual or entity or a federal grant to a state—perhaps through one of the Swamp Land Grant Acts that transferred vast amounts of swamp and marshlands to Louisiana and other states in the middle of the nineteenth century—could be a valid source of proprietary title to submerged lands beneath a waterbody that was non-navigable and not subject to tidal influence at

80. *United States v. Holt State Bank*, 270 U.S. 49, 55–56 (1926) (requiring the application of federal law to determine the navigability of streams and lakes for purposes of establishing state sovereign ownership of submerged land to promote uniformity on a constitutional question); *United States v. Utah*, 283 U.S. 64, 75 (1931) (same); *United States v. Oregon*, 295 U.S. 1, 14 (1935) (same).

81. *PPL Mont.*, 565 U.S. at 591.

82. *Id.* See also *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476–80 (1988) (reaffirming long-standing rule that “States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide” and rejecting the suggestion that state dominion and ownership of tidelands could be restricted to navigable waters).

83. In *Shively v. Bowlby*, the Supreme Court recognized two exceptions to the equal footing doctrine rule that the federal government must preserve lands under navigable waters for conveyance to the states at statehood. 152 U.S. 1, 49–50 (1894). These exceptions are for pre-statehood conveyances that either (1) responded to a public exigency or (2) fulfilled an international duty. *Id.* Attempts by the federal government to assert these exceptions have only occasionally succeeded. Contrast *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197, 203 (1987) (rejecting purported pre-statehood reservation of reservoir sites on a Utah lake), with *United States v. Alaska*, 521 U.S. 1, 4, 40–41, 61 (1997) (finding clear intent to segregate submerged lands in Arctic National Refuge and National Petroleum Reserve prior to statehood), and *Idaho v. United States*, 533 U.S. 262, 265, 280–81 (2001) (holding that Congress intended to prevent passage of title to certain lands under navigable lake and river reserved for Coeur d’Alene Indian Tribe). See also DUNNING, *supra* note 10, § 30.01(d)(4).

84. *Oregon*, 295 U.S. at 14. See also *Montana v. United States*, 450 U.S. 544, 551 (1981); *Holt State Bank*, 270 U.S. at 54.

85. *Utah*, 283 U.S. at 75; *Oregon*, 295 U.S. at 14; *PPL Mont.*, 565 U.S. at 591.

statehood.⁸⁶ Because “navigability-in-fact” at the time of statehood is then the crucial issue in a dispute about proprietary title to submerged land under the equal footing doctrine, it is imperative to understand how American courts created a rule to determine navigability for this specific purpose.

C. The Highway of Commerce Test

1. Sources

Beginning in the middle of the nineteenth century, American courts and treatise writers began the crucial process of redefining navigability in terms of an inland waterway’s navigability-in-fact and its capacity to sustain trade and commerce rather than looking to tidal influence. This process began with *Propeller Genesee Chief v. Fitzhugh*,⁸⁷ an 1852 admiralty case involving a collision between a steamship and a sailing vessel on Lake Ontario.⁸⁸ In this case, the Supreme Court overruled several earlier decisions limiting admiralty jurisdiction to tidal waters⁸⁹ and held that federal courts’ admiralty jurisdiction extended to “any other public water used for commercial purposes and foreign trade.”⁹⁰ After contrasting the riverine geographies of England and the United States and tracing the expanding evolution of commercial trade in the United States,⁹¹ the Court held that admiralty jurisdiction would depend upon navigability-in-fact, and “not upon the ebb and flow of the tide.”⁹²

In the 1870s, after an influential treatise writer cleared up much earlier confusion by explaining that English common law had always been primarily concerned with navigability-in-fact in cases involving the public’s rights to travel on waterways,⁹³ the Supreme Court firmly established the highway of commerce test in the minds of American jurists in two seminal cases concerning federal regulatory power over inland wa-

86. See John A. Lovett, *Ownership of Submerged Land on the Louisiana Coast: Resolving the Dual-Claimed Land Dilemma*, 84 LA. L. REV. 905, 916–20 (2024) (discussing the effect of the 1849 and 1850 Swamp Land Grant Acts and subsequent state statutes authorizing alienation of swamp lands acquired by the state of Louisiana under these federal acts).

87. 53 U.S. 443 (1852).

88. *Id.* at 450–51.

89. See *id.* at 455–57. The Court’s decision in *Genesee Chief* overruled *The Steam-Boat Thomas Jefferson*, 23 U.S. 428 (1825), *The Steamboat Orleans v. Phoebus*, 36 U.S. 175 (1837), and *Waring v. Clarke*, 46 U.S. 441 (1847).

90. *Genesee Chief*, 53 U.S. at 457.

91. *Id.* at 453–56. Chief Justice Taney’s focus on the contrasting geographies of England and the United States was hardly original. See *Collins v. Benbury*, 25 N.C. (3 Ired.) 277, 282 (1842). It turns out that English admiralty jurisdiction was never really focused on navigability per se or “navigable waters,” but rather it was primarily focused on the high seas and thus English courts generally held that “locational admiralty jurisdiction equalled tidewaters—period.” MacGrady, *supra* note 51, at 576.

92. *Genesee Chief*, 53 U.S. at 457.

93. HOUCK, *supra* note 59, at 15–23 (comparing Bracton and *De Jure Maris* and concluding that Bracton’s view—that all navigable rivers are public—was closer to reality than the misleading statements in *De Jure Maris* appearing to distinguish tidal rivers from fresh rivers).

terways.⁹⁴ In these cases, the Court concluded that the federal government could inspect and license vessels traveling on inland waterways because the federal statutes that authorized these actions were enacted by Congress under the Commerce Clause and the vessels were travelling on “navigable waters” of the United States.⁹⁵

In *The Daniel Ball*,⁹⁶ the Court held that the waterway at issue, the Grand River, was a navigable river because of its “navigable capacity,” even though it was located entirely within Michigan and was unaffected by the tides.⁹⁷ In language that would soon be repeated in countless federal and state court decisions, Justice Field explained:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.⁹⁸

Although he recognized that state courts could define a state’s own navigable waters more broadly,⁹⁹ Field stressed that “navigable waters of the United States,” within the meaning of the congressional statutes at issue, exist “when they form in their ordinary condition by themselves, *or* by uniting with other waters, a continued highway over which commerce is or may be carried on with other [s]tates or foreign countries.”¹⁰⁰

In *The Montello*,¹⁰¹ the Court added a twist to the highway of commerce test to account for the fact that the river at issue—the Fox River in Wisconsin—originally featured natural obstacles to navigation that were later mitigated by man-made improvements.¹⁰² The Court emphasized that navigability-in-fact was determined not by reference to “the mode by which commerce is, or may be, conducted” or to “the difficulties attending navigation” in a river or stream’s natural state, but rather to the water

94. *The Daniel Ball*, 77 U.S. 557, 563 (1871); *The Montello*, 87 U.S. 430, 443 (1874).

95. *The Daniel Ball*, 77 U.S. at 558, 563–66 (upholding application of 5 Stat. 304 (1852)); *The Montello*, 87 U.S. at 439–45 (holding that steamboats travelling on the Fox River were subject to governmental regulation). *The Daniel Ball* concerned a steamship transporting merchandise and passengers between two Michigan cities on the Grand River. 77 U.S. at 558. *The Montello* involved a steamship that plied the Fox River in Wisconsin between Green Bay and a canal near Portage City. 87 U.S. at 431–32, 439–40.

96. 77 U.S. 557 (1871).

97. *See id.* at 563–66.

98. *Id.* at 563.

99. *Id.*

100. *Id.* (emphasis added). Applying this new test, the court determined that the Grand River was a navigable waterway of the United States because a steamer with passengers and substantial cargo could travel from Grand Rapids to Grand Haven, a port located on Lake Michigan, and from there travelers and cargo could move on to other states and countries. *Id.* at 564.

101. 87 U.S. (20 Wall.) 430 (1874).

102. In its natural state, the Fox River featured a two-foot rock ledge at one point and occasional rapids that challenged early navigators, although eventually locks and other improvements eliminated these obstacles. *Id.* at 436–37, 439–40.

body's capacity for use.¹⁰³ "It would be a narrow rule," Justice Davis explained, "to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway."¹⁰⁴ Elaborating further, Justice Davis stressed the protean flexibility of the emerging highway of commerce test by noting that "capability of use" by the public for transportation and commerce was the "true criterion" of a river's navigability, and therefore public rights could be established by the commercial use of "[v]essels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam."¹⁰⁵

In time, the *Daniel Ball* formulation of the highway of commerce test, as modified in *The Montello*, began to be used for many other purposes, including to determine the scope of federal authority under the Federal Power Act,¹⁰⁶ the Clean Water Act,¹⁰⁷ and most importantly for purposes of this Article, to resolve proprietary title disputes over water beds under the equal footing doctrine.¹⁰⁸ To be sure, subtle variations of the "federal navigability test" for proprietary title have emerged.¹⁰⁹ For instance, some courts have held that a water body can be navigable for purposes of determining proprietary title even if commercial use at statehood was limited to intrastate, as opposed to interstate, travel and trade.¹¹⁰ Crucially though, courts generally require that the navigability determination be made at the time of statehood, thus requiring a complex historical-legal analysis to resolve what are essentially contemporary title disputes.¹¹¹

103. *Id.* at 441.

104. *Id.* The initial obstacles to navigation on the Fox River were overcome through the use of "Durham boats"—long, relatively flat vessels, seventy to one hundred feet long and twelve feet wide, that could be loaded with cargo and propelled by poles, oars, or even dragged by horses and mules in very shallow water. *Id.* at 431, 441.

105. *Id.* at 441–42. Applying this highly flexible test for navigability-in-fact, the Court easily held that the Fox River was a navigable river of the United States. *Id.* at 443.

106. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 398 & n.2, 406 & n. 21, 407 (1940).

107. *Rapanos v. United States*, 547 U.S. 715, 730–31 (2006). *See also* *Sacket v. EPA*, 598 U.S. 651, 678 (2023) (examining *Rapanos* and holding that for wetlands to be qualified as "waters of the United States" under the Clean Water Act they must be "indistinguishable from" and have a "continuous surface connection" to adjacent water bodies that are themselves "waters of the United States in their own right").

108. *United States v. Utah*, 283 U.S. 64, 75–76 (1931); *Oklahoma v. Texas*, 258 U.S. 574, 583, 586 (1922); *United States v. Holt State Bank*, 270 U.S. 49, 55–56 (1926); *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591 (2012). *See also* DUNNING, *supra* note 10, § 30.01(d)(2)(A)–(3) (noting other examples of use of the highway of commerce test for proprietary title disputes such as *Bonelli Cattle Co. v. Arizona*, 413 U.S. 313, 322 (1973), and *Oregon ex rel State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977)).

109. DUNNING, *supra* note 10, § 30.01(d)(3)(A.01).

110. *Utah v. United States*, 403 U.S. 9, 11–12 (1971) (holding that Great Salt Lake was navigable at time of statehood though only susceptible for use to carry livestock and other commodities and for local excursions within the state). *See* DUNNING, *supra* note 10, § 30.01(d)(3)(A).

111. *Utah*, 403 U.S. at 9–10; DUNNING, *supra* note 10, § 30.01(d)(3)(B). In other contexts, navigability is measured as of the time of the litigation, *see Ex parte Boyer*, 109 U.S. 629, 631–32 (1884) (extending admiralty jurisdiction to waterways only currently made navigable such as an

2. Evolution

What counts as “commerce” for purposes of satisfying the federal navigability-in-fact test has evolved over the years. Initially, perhaps because of heavy reliance on the *Daniel Ball* formulation, courts focused on “the waterborne carriage of freight by a carrier whose purpose is to profit from the transportation.”¹¹² Over time, other means of commerce have occasionally satisfied the navigability-in-fact test; for example, the use of the Great Salt Lake by ranchers to bring cattle to market,¹¹³ and the use of a river in Alaska for guided fishing and sightseeing trips.¹¹⁴ The most prominent example of judicial expansion of the concept of navigability-in-fact occurred, however, in the second half of the nineteenth century when many state courts held that rivers and streams that could not sustain travel by conventional commercial vessels but were capable of floating logs to markets were still navigable.¹¹⁵

In *Moore v. Sanborne*,¹¹⁶ the Michigan Supreme Court held that inland waterways capable of floating logs or timber were navigable even if the water’s capacity to float logs was not continuous.¹¹⁷ Twenty years later, Michigan Supreme Court Justice Thomas Cooley would describe the rights of the public to run logs in a stream that might not be strictly navigable under the highway of commerce test as a right that was “concurrent,” but “not subordinate,” to a stream bed owner’s rights and explained that each set of rights “must be enjoyed reasonably, and without any unnecessary interference with the enjoyment of the other, and without negligence.”¹¹⁸ In *Morgan v. King*,¹¹⁹ the New York Court of Appeals observed that because New York had many streams that were not navigable by vessels used to transport commodities or people but could still move timber to market through log flotation, this commercial adaptability justified recognition of some public right.¹²⁰ In the end, courts in many states eventually embraced the log-flotation test for navigability,¹²¹ and only a handful rejected it when asked.¹²²

artificial canal), or defined to include waterways that might become navigable in the future thanks to reasonable improvements, *Appalachian Elec. Power Co.*, 311 U.S. at 407–09.

112. DUNNING, *supra* note 10, § 30.01(d)(3)(C).

113. *Utah*, 403 U.S. at 11.

114. *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990).

115. Brady, *supra* note 15, at 1427, 1429; DUNNING, *supra* note 10, § 32.02(a.01) & n.5.

116. 2 Mich. 519 (1853).

117. *Id.* at 524–26.

118. *See White River Log & Booming Co. v. Nelson*, 8 N.W. 909, 911 (Mich. 1881) (Cooley, J., concurring).

119. 35 N.Y. 454 (1866).

120. *See id.* at 459.

121. *Sigler v. State*, 66 Tenn. 493, 497 (1874); *Haines v. Hall*, 20 P. 831, 835 (Or. 1888); *Gaston v. Mace*, 10 S.E. 60, 63 (W. Va. 1889); *Gwaltney v. Scottish-Carolina Timber & Land Co.*, 16 S.E. 692, 696 (N.C. 1892) (Avery, J., dissenting) (identifying the increasing endorsement of the log-flotation test in other states); *Heyward v. Farmers’ Mining Co.*, 19 S.E. 963, 970–71 (S.C. 1894),

Interestingly, and setting an important precedent for the PRSA, many courts in this era recognized a split title in waterways and a mutual accommodation principle to implement the public's newly recognized log-flotation rights. Although some courts held that the beds of rivers and streams capable of floating logs or other products were actually owned by the state in its sovereign capacity,¹²³ many more decisions recognized that beds of rivers and streams not considered navigable under the historical highway of commerce test were nevertheless subject to a public easement permitting nonconsumptive use of the water for the purpose of transporting logs, timber, and other agricultural products.¹²⁴ Even though upstream timber harvesters no longer float logs to market on small rivers and streams, the log-flotation cases remain significant because they underscore that an inland navigable waterway is a pluralistic and dynamic resource, capable of change over time and responsive to the economic needs of wider communities, and because they introduced the idea that multiple parties, including stream bed owners and non-consumptive users, can have complimentary and mutually accommodating property interests in the same waterway.

Despite the flexibility inherent in the log-flotation cases, it is important to remember that judicial decisions applying the historic highway of commerce test can still exhibit a whiff of anachronism. In *PPL Montana, LLC v. Montana*,¹²⁵ the United States Supreme Court faced a dispute between the State of Montana and a power company that leased portions of three riverbeds from the federal government for the construction and operation of hydroelectric power generation facilities.¹²⁶ In that case, the Court applied a "segment by segment" version of the federal highway of commerce test and agreed with the power company that the

Monroe Mill Co. v. Menzel, 77 P. 813, 815 (Wash. 1904); McKinney v. Northcutt, 89 S.W. 351, 355 (Mo. Ct. App. 1905); Mayor of Havre de Grace v. Harlow, 98 A. 852, 855 (Md. 1916).

122. Olive v. State, 5 So. 653, 656 (Ala. 1888); Rhodes v. Otis, 33 Ala. 578, 597-98 (1859); Am. River Water Co. v. Amsden, 6 Cal. 443, 446 (1856); Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905). But see Blackman v. Mauldin, 51 So. 23, 25 (Ala. 1909) (citing Lewis v. Coffee County, 77 Ala. 190 (1884) (reiterating prior holding that a "stream of sufficient depth and width, in its natural state, to be used for the transportation of timbers or logs, though it may not be technically navigable, is subject to the public right of user").

123. Oregon v. Riverfront Prot. Ass'n, 672 F.2d 792 (9th Cir. 1982); State v. Bunkowski, 503 P.2d 1231, 1236-37 (Nev. 1972).

124. Gaston, 10 S.E. at 63; Harlow, 98 A. at 855-56; McKinney, 89 S.W. at 355; Miller v. State, 137 S.W. 760, 762 (Tenn. 1910); Fortson Shingle Co. v. Skagland, 137 P. 304, 305 (Wash. 1913). In 1889, the West Virginia Supreme Court recognized the split title approach and stressed that both public users of floatable streams and streambed owners would be obligated to exercise their respective rights reasonably. Gaston, 10 S.E. at 63-64. In 1904, the Washington Supreme Court echoed the same theme, explaining that while the beds of most of the streams subject to upstream users' log flotation rights were privately owned by adjacent landowners, "the lands are naturally burdened, if it be a burden, by the streams themselves" and the floating timber, provided log flotation did not damage the land. Menzel, 77 P. at 815.

125. 565 U.S. 576 (2012).

126. Id. at 580. The three rivers at issue were the Missouri River, the Madison River, and the Clark Fork River. Id. at 581. The Court described the three rivers' geography, exploration, and history in considerable detail. Id. at 581-86.

river segments at issue were *not* navigable at statehood because portages were once required to circumvent waterfalls and rapids and, therefore, the power company's leases with the federal government were valid.¹²⁷ Other examples of expensive, time-consuming, and ultimately speculative judicial examinations of historical evidence of commercial use by fur-trappers, indigenous communities, and early settlers reveal the ad hoc indeterminacy of the historical highway of commerce test.¹²⁸

3. Limits

One crucial limitation on the scope of the historical highway of commerce test for proprietary title has always been implicit in the case law discussed in the next part of this Article but was recently highlighted by the Supreme Court. In *PPL Montana*, even though the Court eventually rejected the State of Montana's title claims to the three riverbeds at issue by applying the historical highway of commerce test, the Court went out of its way to clarify that neither Montana's public trust doctrine obligations nor "public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses," would be jeopardized by the Court's recognition of the federal government's private leases to the power company under the equal footing doctrine.¹²⁹ Put more generally, this means that a state's duties and its citizens' rights under the state-law-based public trust doctrine, including the public's current recreational use rights in any non-navigable rivers in a particular state, are unaffected by a court's application of the federal test for proprietary title under the equal footing doctrine.¹³⁰ This must be the case, Justice Kennedy explained, because "[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine."¹³¹

127. *Id.* at 591–603. Although it noted that historical evidence about recreational use could be relevant to the question of susceptibility to commercial use at the time of statehood, the Court faulted the Montana Supreme Court for relying on "evidence of present-day, primarily recreational use" of one of the rivers because the state had not shown how that evidence "informs the historical determination whether the river segment was susceptible of use for commercial navigation at the time of statehood." *Id.* at 600–02.

128. *See, e.g., State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n*, 229 P.3d 242, 251–54 (Ariz. Ct. App. 2010); *Defs. of Wildlife v. Ariz. Navigable Stream Adjudication Comm'n*, 525 P.3d 641, 662 (Ariz. Ct. App. 2023); *Navigability Project*, ALASKA DEP'T OF NAT. RES., <https://dnr.alaska.gov/mlw/paad/nav/policy/#DISP> (last visited Jan. 3, 2026) (reporting on a variety of navigability disputes in title cases before Alaska tribunals, including *Appeal of Doyon*, which determined two rivers were navigable based on "use of a river or stream by an 18-24 foot wooden riverboat capable of carrying at least 1,000 pounds of gear or supplies" by fur trappers and historic and contemporary canoe use).

129. *PPL Mont.*, 565 U.S. at 603–04.

130. *Id.* Montana is one of the Western states that has adopted a particularly robust version of the PRSA. *See infra* note 334 and accompanying text (discussing *Mont. Coal. for Stream Access v. Curran*, 682 P.2d 163, 169–70 (Mont. 1984); *Mont. Coal. for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088, 1091, 1094 (Mont. 1984)).

131. *PPL Mont.*, 565 U.S. at 604.

These crucial statements in *PPL Montana* endorse and reaffirm the authority that numerous state courts have exercised for over a century to expand their state law conceptions of navigability for purposes of defining the scope of public recreational access rights to inland waters. Put most simply, as the Court has now clarified, even if a water body is non-navigable under the backward-looking, federal highway of commerce test, such a finding does not prevent a state from providing greater public use rights in such a waterway.

D. The Relevance of the Public Trust Doctrine

Although this Article is not concerned with the full extent of the public trust doctrine and its many contested applications to contemporary environmental controversies today,¹³² a few words about its origins and application to navigable water bodies will be helpful because the doctrine influenced the emergence of the PRSA. In *Arnold v. Mundy*,¹³³ an 1821 decision often cited as the origin of the public trust doctrine,¹³⁴ the New Jersey Supreme Court recognized that the public has a fundamentally inalienable, trust-protected right to fish in and use navigable rivers, a category of water body that the court then still associated with the ebb and flow of the tide.¹³⁵ Thirty years later, in *Waddell*, the first equal footing doctrine decision,¹³⁶ the Supreme Court also addressed the functional scope and temporal permanence of public rights in navigable waters. Citing Hale's *De Jure Maris*, Chief Justice Taney linked the public's right to use waterways to liberty itself, stating that "the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary."¹³⁷ Just as important, Justice Taney sought to enshrine public rights in water on a quasi-perpetual temporal plane and as extending to the entire community of a nation when he asserted that "the shores, and rivers, and bays, and arms of the sea, and the land under them," are effectively held "*as a public trust for*

132. See e.g., Erin Ryan, *From Mono Lake to the Atmospheric Trust: Navigating the Public and Private Interests in Public Trust Resources*, 10 GEO. WASH. J. ENERGY & ENV'T L. 39 (2019) (discussing the intersection between the public trust doctrine and current environmental and resource extraction issues). For a comprehensive account of the leading cases and scholarly debate over application of the public trust doctrine to the climate change crisis, see BLUMM & WOOD, *supra* note 51, at 377–424.

133. 6 N.J.L. 1 (1821).

134. Blumm & Engel, *supra* note 33, at 10 & n.45.

135. *Arnold*, 6 N.J.L. at 9–10, 12. In *Arnold*, the court rejected a riparian landowners' attempt to prevent oyster harvesting in a tidal bed in New Jersey's Raritan River. *Id.* at 38, 94. Writing for the majority, Justice Kirkpatrick recognized that the legislature can undertake many actions to enhance the public's right to use and benefit from a public waterway, but it "cannot make a direct and absolute grant, divesting all the citizens of their common right," as "such a grant, or a law authorizing such a grant, would be contrary to the great principles of our constitution, and never could be borne by a free people." *Id.* at 13.

136. See *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842).

137. *Id.* at 412 (quoting Hale, *De Jure Maris*, in A HISTORY OF THE FORESHORE, *supra* note 29).

the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish.”¹³⁸

In the late nineteenth century, the Supreme Court expanded on these early statements to establish what some scholars describe as the “proprietary” or “core” element of the public trust doctrine.¹³⁹ In *Illinois Central Railroad Co. v. Illinois*,¹⁴⁰ an 1892 decision famously labeled as the “lodestar” of the public trust doctrine,¹⁴¹ the Supreme Court addressed the validity of the Illinois legislature’s 1869 decision to grant a portion of the bed of Lake Michigan to a railroad company, a decision that the legislature came to regret and attempted to revoke four years later.¹⁴² The Court eventually upheld the legislature’s revocation of the 1869 grant by concluding that the state had owned the submerged bed of Lake Michigan next to downtown Chicago “in trust for the people” and must preserve its citizens’ right to navigate, engage in commerce, and fish on the lake’s waters free from “obstruction or interference of private parties.”¹⁴³

Two years later in *Shively v. Bowlby*,¹⁴⁴ the Supreme Court addressed a proprietary title dispute over lands that at one time had been submerged beneath the ordinary high water mark of the Columbia River and upon which wharves had been constructed in Astoria, Oregon.¹⁴⁵ While the Court ultimately ruled in favor of title claimants relying on a post-statehood Oregon grant rather than claimants relying on an earlier, pre-statehood federal grant,¹⁴⁶ the Court cited *Illinois Central* and other authorities to emphasize that all land submerged beneath navigable waters had been held in trust for the states under the equal footing doctrine for use by their citizens as highways of commerce for both navigation and fishing.¹⁴⁷ Some commentators suggest that this recognition—based largely in Hale—that public trust lands were conceptually divided between *jus privatum* (lands to which the state actually held proprietary title) and a sovereign *jus publicum* (an obligation to preserve public trust rights regardless of who holds title) laid the foundation for further expan-

138. See *id.* at 413 (emphasis added). Carol Rose attributes some of the support for the presumption of state ownership of submerged land and the public trust conception of that ownership in the equal footing doctrine cases to Joseph Angell, whom she calls a “good republican” and who believed that “royal ownership” of submerged lands in England did not mean “royal disposability” but rather “a trusteeship for the public.” Rose, *supra* note 41, at 728 & n.68 (citing ANGELL, *supra* note 65, at 17–18, 20–21).

139. Blumm & Engel, *supra* note 33, at 11, 13–15; Freyfogle, *supra* note 51, at 261.

140. 146 U.S. 387 (1892).

141. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970).

142. Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 800–01 (2004). For an explanation of why the initial grant by the Illinois legislature was likely tainted by corruption, see *id.* at 887–95, 913–19, 927–30.

143. *Ill. Cent.*, 146 U.S. at 452.

144. 152 U.S. 1 (1894).

145. *Id.* at 9.

146. *Id.* at 9–10, 58.

147. *Id.* at 46–49.

sion of the public trust doctrine and especially its sovereign usufructuary component associated with the PRSA.¹⁴⁸

Of course, scholars have identified many sources and justifications for the public trust doctrine.¹⁴⁹ Some attribute an “antimonopoly” rationale to the Court’s initial evocation of a public trust over navigable waters and the lands beneath them in cases like *Illinois Central* and *Shively*.¹⁵⁰ Others stress a more particular concern that government officials and private landowners might conspire in corrupt partnerships to “take over waterways, curtailing public rights to use them.”¹⁵¹ Whatever the precise justification for the public trust doctrine, judicial concern with preserving not just public ownership rights but also use rights associated with navigable waters was certainly in the air, or in the water to be more precise, in the late 1890s and early 1900s, a crucial time period, it turns out, for the establishment of the PRSA.

II. THE RISE OF THE PUBLIC RECREATIONAL SERVITUDE APPROACH TO INLAND WATER

The process started in the late-nineteenth century when courts in four states began to focus on the capacity of rivers, streams, and lakes to be used for recreation, rejected the notion that a waterway’s utility could be measured by commercial or pecuniary value alone, and worried about the danger of monopolizing potentially vital natural resources.¹⁵² Between 1900 and 1945 and building on these late nineteenth-century precedents, courts in six states either redefined navigability itself in terms of recreational use or adopted in some fashion what this Article calls the PRSA.¹⁵³ After 1945, this jurisprudential trend broadened significantly as more and more courts adopted one of these approaches to expand recreational access to inland water.¹⁵⁴

Courts justified this expansion of public access rights to inland waterways in numerous ways. Sometimes they relied on constitutional or statutory provisions establishing water as a vital public resource. Other times they emphasized customary use and practice. Often, they recognized that a waterway’s capacity to sustain recreational activity is no less

148. See Blumm & Engel, *supra* note 33, at 14–15.

149. See generally J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does it Support an Atmospheric Trust?*, 47 *ECOLOGY L.Q.* 117 (2020) (advancing a view of the public trust doctrine as requiring governments to regulate greenhouse gas emissions); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 *ENV’T L.* 425 (1989) (emphasizing the conflict between the traditional public trust doctrine and the growing collision of private property and public use rights).

150. Blumm & Engel, *supra* note 33, at 13. See also Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 *ENV’T AFFS.* 1, 14 n.83, 43 (2017) (explaining how the public trust doctrine prevents privatization and monopolization of land and waters).

151. Freyfogle, *supra* note 51, at 260.

152. See *infra* Section II.A.

153. See *infra* Section II.B.

154. See *infra* Section II.C.

deserving of legal protection than customary trade. Courts, however, frequently acknowledged that a waterway's capacity to support recreational use does not mean that a state owns the land beneath the water.¹⁵⁵ Instead, many courts simply recognized that the public should have a "right to use water in place" even when subaqueous lands are owned by riparian or littoral landowners;¹⁵⁶ that is, the public should enjoy an easement or servitude to float or travel over privately owned waterbeds, sometimes supplemented with other recreational rights to touch or walk on the bed or bank of a waterway.¹⁵⁷

A. *The First Wave: 1871–1900*

The first wave of judicial decisions that laid the foundation for the PRSA arrived in the last three decades of the nineteenth century in a quartet of decisions from Massachusetts, Minnesota, South Carolina, and Wisconsin. Each of the decisions dealt with public rights on a relatively modest waterway, but the jurisprudential seeds planted in these decisions later bore significant doctrinal fruit.

In *Attorney General v. Woods*,¹⁵⁸ the Supreme Judicial Court of Massachusetts confronted a suit concerning the Mystic River, a small stream flowing into Boston Harbor that had been used "from time immemorial for pleasure boating between the harbor and Mystic Pond."¹⁵⁹ A riparian landowner had constructed a dam across the river that was blocking public navigation, and the state attorney general responded by filing suit to enjoin the obstruction.¹⁶⁰ The court ruled in favor of the public, finding that the river was navigable not just because it was subject to the rise and fall of the tide but also because navigability embraced both the recreational and the commercial use of waterways.¹⁶¹

In language that has echoed in many subsequent decisions,¹⁶² the court rejected dicta from one of its own prior decisions that had heavily

155. See, e.g., *Willow River Club v. Wade*, 76 N.W. 273, 274–75 (Wis. 1898); *Smart v. Aroostook Lumber Co.*, 68 A. 527, 531 (Me. 1907) ("The Presque Isle stream above the bridge at Presque Isle for a distance of 30 miles is clearly shown by the evidence to be navigable in fact, and to possess the character which brings it within the class of streams, which, though, in point of property are private, are subject to the easement of public highways which individuals have no right unreasonably to obstruct."); *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421, 428–31 (N.M. 1945); *People ex rel. Baker v. Mack*, 97 Cal. Rptr. 448, 451–54 (Ct. App. 1971).

156. DUNNING, *supra* note 10, § 32.03.

157. See *Mack*, 97 Cal. Rptr. at 454; *Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n*, 519 P.3d 46, 53 (N.M. 2022). But see *Day v. Armstrong*, 362 P.2d 137, 146–47 (Wyo. 1961) (restricting public access to floating on surface and incidental touching of bed or bank but excluding wading or walking). See also Reed D. Benson, *Public Ownership, Public Rights: Recreational Stream Access Decisions in the Mountain West*, 23 WYO. L. REV. 73, 82–95 (2023) (detailing scope of public servitude rights under the PRSA in Mountain West states).

158. 108 Mass. 436 (1871).

159. *Id.* at 439.

160. *Id.* at 439–40.

161. *Id.*

162. Decisions adopting the PRSA and quoting or citing *Woods* include *Heyward v. Farmers' Mining Co.*, 19 S.E. 963, 972 (S.C. 1894); *State v. Twiford*, 48 S.E. 586, 588 (N.C. 1904); *Smart v.*

discounted recreational use of waterways,¹⁶³ and now suddenly equated recreational and commercial use:

Navigable streams are highways; and a traveller for pleasure is as fully entitled to protection in using a public way, whether by land or by water, as a traveler for business. Certainly fishing and fowling are as really regarded, on navigable waters, as trade and agriculture. . . . If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture.¹⁶⁴

With this new framework in place, the court easily concluded that the Mystic River was navigable, and the defendant's dam could not impede public navigation.¹⁶⁵

Because the result in *Woods* could also be explained in part by the tidal influence on the Mystic River, many commentators have viewed the Minnesota Supreme Court decision in *Lamprey v. State*,¹⁶⁶ authored by Justice William Mitchell, as the true lodestar for the pleasure boat test for navigability or the sovereign usufructuary public trust doctrine.¹⁶⁷ On one level, *Lamprey* was just a tricky proprietary title case in which the court rejected a state's assertion of ownership of the bed of a 300-acre, unnamed, but meandered lake under the equal footing doctrine and state law riparian right doctrines.¹⁶⁸ If the court had stopped there, the decision would have merited no more than a minor footnote at the intersection of these niche property doctrines.

Justice Mitchell's decision, however, extended well beyond those doctrines as he immediately recognized the significant public stakes of the dispute.¹⁶⁹ At the outset, Mitchell observed that determining the navi-

Aroostook Lumber Co., 68 A. 527, 532 (Me. 1907); *State v. McIlroy*, 595 S.W.2d 659, 664–65 (Ark. 1980).

163. *Woods*, 108 Mass. at 439–40 (quoting *Rowe v. Granite Bridge Corp.*, 38 Mass. 344, 347 (1838)) (acknowledging but limiting Chief Justice Shaw's statement in *Rowe* that it is not "every small creek, in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable . . . in order to have this character, it must be navigable to some purpose, useful to trade or agriculture").

164. *Id.*

165. *Id.* at 440–41.

166. *Lamprey v. State*, 53 N.W. 1139 (Minn. 1893).

167. *Blumm & Engel*, *supra* note 33, at 17–20.

168. *Lamprey* involved a partition suit. The two parties, Uri Lamprey and Oscar Metcalf, claimed title as tenants in common based on post-statehood patents issued by the federal government to their predecessors in title to lands bordering a meandered but unnamed lake. *Lamprey*, 53 N.W. at 1140. When Lamprey filed a partition suit against Metcalf, the State of Minnesota, which had become a party to the suit by statute, claimed the land had been submerged beneath a navigable lake at the time of statehood and therefore it owned the lakebed. *Id.* at 1139. Assuming for the sake of argument that the lake was navigable at statehood, the court rejected the state's title claim because the state common law rules for accretion and dereliction on rivers applied equally to lakes and thus the lake's littoral landowners, Lamprey and Metcalf, had acquired title to the dried up lakebed under state law. *Id.* at 1141–43.

169. In the introductory portion of his opinion, Mitchell observed that the species of lake in dispute numbered in the thousands in Minnesota and that "although most of them may not be

gability of waterways inevitably divides them into public and private spheres.¹⁷⁰ After stressing the importance of “navigability in fact,” and noting the American tendency to update navigability doctrine in light of “our changed conditions,”¹⁷¹ Mitchell declared it was time for American law on navigability to change once again, but this time to account for an even broader set of waterborne uses:

Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.¹⁷²

Here, two interlocking themes emerge. First, the measure of the public’s interest in waterways cannot be reduced to a single metric—pecuniary profit—because other public values—recreation and social interaction—are just as important as commerce.¹⁷³ Second, strict reliance on the historic highway of commerce test to resolve all questions of public use would allow riparian landowners to exert absolute dominion over both submerged land and running water and thus exert monopoly power over vital natural resources.¹⁷⁴ Mitchell closed his opinion by stressing that flexibility should be embedded in common law notions of navigability and announcing that his court was “satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule.”¹⁷⁵ Although *Lamprey* only technically resolved a title dispute over one dry, relicted lakebed, judges across the United States eventually embraced its vision of a widely expanding public recreational interest in waterways.¹⁷⁶

adapted for navigation, in its ordinary, commercial sense, [they] have been, from the earliest settlement of the state, resorted to and used by the people as places of public resort, for purposes of boating, fishing, fowling, cutting ice, etc.” *Id.* at 1140.

170. *Id.* at 1143.

171. *Id.* (noting American courts’ rejection of the tidal conception of navigability and the evolution of the commercial use concept to embrace log flotation).

172. *Id.*

173. *See id.*

174. *Lamprey*, 53 N.W. at 1143–44.

175. *Id.*

176. *See infra* Sections II.B, II.C. Although one scholar has questioned *Lamprey*’s significance and even its relevance in Minnesota, *see Brady, supra* note 15, at 1433 n.113, twenty years later the Minnesota Supreme Court relied on *Lamprey* to hold that a small, 150-acre lake adjacent to a small

Though less well known than *Lamprey*, two other late-nineteenth-century decisions also helped to establish the PRSA. First, in *Heyward v. Farmers' Mining Co.*,¹⁷⁷ the South Carolina Supreme Court heard a dispute between a riparian landowner and the State of South Carolina over who had the right to conduct phosphate mining on the bed of Shingle Creek, a short, relatively shallow waterway near the South Carolina coast.¹⁷⁸ After reviewing numerous decisions adopting the log-flotation test, stressing that capacity for use trumps actual use and connectivity to other highways, and pointing to the holdout risk that could result from reliance on the historic highway of commerce test,¹⁷⁹ the court announced that the “true test” for navigability is one that takes account of many kinds of commerce, including “the floating of vessels, boats, rafts, or logs.”¹⁸⁰ The court also specifically asserted that floating commerce means more than just moving goods for trade or agriculture.¹⁸¹ Channeling *Woods*, the court concluded that “a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or water, as a traveler for business” and, therefore, “[i]f water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has even been upon it for the purpose of trade or agriculture.”¹⁸²

A few years later, in *Willow River Club v. Wade*,¹⁸³ the Wisconsin Supreme Court decided that a fisherman who had caught ten trout while fishing in a portion of the Willow River, a waterway whose bed was

town that was naturally suitable for boating, bathing, hunting, fishing, and “other beneficial public uses” was a “public body of water” and therefore owners of land abutting the lake did not have the right to remove ore from beneath the lakebed. *State v. Korner*, 148 N.W. 617, 618, 622–23 (Minn. 1914). the first decision Brady cited to question the authority of *Lamprey*, *State v. Adams*, 89 N.W.2d 661, 665–66, 679 (Minn. 1957), was a proprietary title dispute regarding ownership of a lakebed and calling for application of the federal highway of commerce test and did not concern public access.

177. 19 S.E. 963 (S.C. 1894).

178. *Id.* at 964–66. The plaintiff, the riparian landowner, claimed that the defendant company had trespassed on its stream bed to conduct phosphate mining. *Id.* at 964–65. The State of South Carolina intervened, asserting state ownership of the stream bed and that the defendant was blameless because it was mining pursuant to a state license. *Id.* at 965. Ultimately, the South Carolina Supreme Court reversed a trial court judgment in favor of the riparian landowner and ordered a new trial. *Id.* at 973.

179. *See id.* at 971 (observing that an actual use test would “would exclude many large rivers in undeveloped sections of the county”); *id.* at 972 (quoting *Brown v. Chadbourne*, 31 Me. 9, 21 (1849)) (“If a stream could be subject to public servitude by long use only, many large rivers in newly-settled states . . . would be altogether under the control and dominion of the owners of their beds, and the community would be deprived of the use of those rivers which nature has plainly declared to be public highways.”).

180. *Id.* at 972 (quoting the Maine Supreme Judicial Court’s statement of the log flotation test in *Brown*, 31 Me. at 21).

181. *Id.* The court clearly intended to reject Chief Justice Shaw’s views on the irrelevance of accessibility by a “fishing skiff” or “gunning canoe” and his insistence that a navigable stream must be “useful to trade or agriculture.” *Id.* (quoting Shaw in *Rowe v. Bridge Co.*, 21 Pick. at 344–47 and stating, “this [Shaw’s] language is applied to the capacity of the stream, and is *not intended to be a strict enumeration of the uses to which it must be actually applied in order to give it that character*” (emphasis added)).

182. *See id.* (quoting *Att’y Gen. v. Woods*, 108 Mass. 436, 439–40 (1871)).

183. 76 N.W. 273 (Wis. 1898).

owned by a private club, was not trespassing because the river segment at issue had not only been used to float logs but also had been traversed by “wangans, bateaux, canoes, and rafts,” and because the fisherman had entered the river from a public highway.¹⁸⁴ Although the court acknowledged that riparian landowners in Wisconsin could own the soil beneath any river or stream, whether navigable or not, it clarified that riparian ownership of a submerged riverbed was “subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels.”¹⁸⁵ As that court would recognize nearly sixteen years later in another recreational access decision, private ownership of soil beneath waterways in Wisconsin does not prevent members of the public from engaging in recreation on the water.¹⁸⁶ These late-nineteenth-century decisions clearly evidence increasing judicial awareness of the social value of recreation, deepening fears over the potential for concentrated ownership of water resources, and an emerging recognition that use rights in water can be separated conceptually and practically from ownership of subaqueous land. All these judicial insights would prove to be influential in the following century as state courts built the PRSA.¹⁸⁷

B. *The Second Wave: 1900–1945*

In the first half of the twentieth century, supreme courts in at least six more states built on the foundations laid in *Woods*, *Lamprey*, *Heyward*, and *Willow River Club*. Some courts held that capacity for recreational use by itself could justify classifying a waterway as navigable.¹⁸⁸ Others advanced the theory that the public could enjoy a public recreational easement or servitude for boating or fishing on a waterway even if the land beneath the water was privately owned under the federal proprietary title test.¹⁸⁹

The decisions that appear to redefine the concept of navigability itself in terms of recreational use came from North Carolina, North Dako-

184. *Id.* at 273–74, 277.

185. *Id.* at 275.

186. *See Diana Shooting Club v. Husting*, 145 N.W. 816, 817, 820 (Wis. 1914) (holding that duck hunter who entered waters of a river and propelled his boat to a partially vegetated “flag” with shallow water did not trespass on land of private hunting club because club took title to the lands under the water subject to the public trust doctrine).

187. Subsequent South Carolina decisions built on *Heyward* to hold that use of small fishing or pleasure craft can satisfy the “valuable floatage” test for navigability and entitle the public to use a waterway even if its bed is privately owned. *See State ex rel. Medlock v. S.C. Coastal Council*, 346 S.E.2d 716, 719 (S.C. 1986); *Hughes v. Nelson*, 399 S.E.2d 24, 25 (S.C. Ct. App. 1990); *State v. Head*, 498 S.E.2d 389, 394–95 (S.C. Ct. App. 1997); *Brownlee v. S.C. Dep’t of Health & Env’t Control*, 676 S.E.2d 116, 120–23 (S.C. 2009), discussed *infra* Section II.C.1. *Woods* and *Lamprey* would both be cited innumerable times by subsequent decisions across the United States. *See infra* Sections II.B, II.C.

188. *Roberts v. Taylor*, 181 N.W. 622, 626 (N.D. 1921); *Hillebrand v. Knapp*, 274 N.W. 821, 822–23 (S.D. 1937); *State v. Twiford*, 48 S.E. 586, 588 (N.C. 1904).

189. *Guilliams v. Beaver Lake Club*, 175 P. 437, 439, 442 (Or. 1918); *Luscher v. Reynolds*, 56 P.2d 1158, 1161–62 (Or. 1936); *State ex rel. State Game Comm’n v. Red River Valley Co.*, 182 P.2d 421, 424–26, 434 (N.M. 1945).

ta, and South Dakota. In *State v. Twiford*,¹⁹⁰ the State of North Carolina charged two individuals working for a riparian landowner with criminal nuisance for erecting obstructions in Jean Guide Creek, used as a “passway” by the public between two sounds with a width of sixty to five hundred yards and a depth of nearly seven feet at its mouth.¹⁹¹ The North Carolina Supreme Court rejected the riparian landowner’s argument that he could exclude the public from the passway first by noting that the waterway had been used for fishing and as a harbor for vessels seeking protection from storms.¹⁹² Next, the court relied expressly on *Woods* for the proposition that use of pleasure boats was sufficient to classify a waterway as navigable.¹⁹³ Finally, the court recharacterized the attempts of past owners of the passway to charge fishermen for the right to fish in the water as relics of a bygone feudalism and a conscience-shocking attempt to monopolize water resources:

This no more proves ownership of a navigable stream than the exaction of toll by feudal barons on the Rhine proves ownership of that great artery of commerce today by those who have succeeded them in the ownership of the lands on which their castles once stood. Navigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public, and are reserved for free and unrestricted use by the public for all time. Whatever monopoly may obtain on land, the waters are unbridled yet.¹⁹⁴

Two decisions from the Dakotas were not quite as emphatic as the North Carolina Supreme Court’s bold statement in *Twiford*. In 1921, the North Dakota Supreme Court held that a lake six miles long and two miles wide, with an extensive history of hunting and boating use, was navigable because the public uses denominated by the concept of navigability “are not always to be measured by the sign of the dollar” and because “pleasure, public convenience, and enjoyment” may justify public rights in waterways just as well as “purposes of trade.”¹⁹⁵ Sixteen years later, while resolving a dispute about the right to cut and remove hay from the bed of a large but shallow lake that had temporarily dried up because of drought, the South Dakota Supreme Court cited *Lamprey* with favor when it concluded that the lake was navigable and therefore subject to public use despite its current non-navigability-in-fact.¹⁹⁶

190. 48 S.E. 586 (N.C. 1904)

191. *Id.* at 586–87.

192. *Id.* at 588.

193. *Id.* (quoting Att’y Gen. v. Woods, 108 Mass. 436, 439, 440 (1871).

194. *Id.*

195. *Roberts v. Taylor*, 181 N.W. 622, 624, 626 (N.D. 1921). In *Roberts*, the court remanded the case for more fact finding to permit the state’s attorney general to intervene to protect the public’s interest in the water body. *Id.* at 626–27.

196. See *Hillebrand v. Knapp*, 274 N.W. 821, 822–23 (S.D. 1937). More recent decisions make it difficult to assess the precise contours of public rights with respect to non-meandered South Dakota lakes whose dimensions can change rapidly over time. See *Parks v. Cooper*, 676 N.W.2d 823,

The twentieth-century decisions inaugurating a split-title or easement-based approach to recreational use of inland water initially began in Maine and then moved west to Oregon and New Mexico. In *Smart v. Aroostook Lumber Co.*,¹⁹⁷ an upstream riparian landowner on the Presque Isle Stream, a forty-mile-long waterway which previously had been used to float logs to a mill, sued a downstream sawmill owner whose dam and logs obstructed the plaintiff and others from travelling with boats or canoes to reach upstream summer camps and cottages.¹⁹⁸ Ruling in favor of the plaintiff, the Maine Supreme Judicial Court turned to *Woods* and *Lamprey*, among other decisions, to hold that the stream was navigable in some respect and thus should be free from unreasonable obstructions even though the mill owner could hold title to the relevant portion of the stream bed.¹⁹⁹

The first Oregon case to embrace an easement-based approach involved a suit to enjoin a riparian landowner from erecting and maintaining a dam and fence near the mouth of Beaver Creek, a three-and-a-half-mile-long waterway that passed through a lagoon before entering the Pacific Ocean.²⁰⁰ The Oregon Supreme Court held that even though the riparian owner held title to the creek bed, the waterway itself was subject to a public easement for navigation because it was capable of floating “skiffs and small boats.”²⁰¹ Citing *Lamprey*, the court explained that it failed “to see why commerce should not be construed to include the use of boats and vessels for the purposes of pleasure” and observed that a “vessel carrying a load of passengers to a picnic is in law just as much engaged in commerce as the one carrying grain or other merchandise.”²⁰²

Eighteen years later, the Oregon Supreme Court cemented the PRSA in Oregon law in a title dispute arising in connection with a con-

824–25, 839–41 (S.D. 2004) (holding that water in non-meandered lakes that have grown over time belongs to the state in accord with the public trust doctrine and can be converted to public use and developed for public benefit even though beds may be privately owned, but remanding for consideration of interests of landowners, the state, and the public regarding extent, if any, of public recreation rights).

197. 68 A. 527 (Me. 1907).

198. *Id.* at 531.

199. *Id.* at 531–33. In other portions of the decision, the court expanded its existing flotation test for navigability to embrace “the travel of summer residents and the transportation of merchandise for their accommodation” and recognized that “recreation is assuming features and incidents as valuable to the public as trade and manufacturing.” *Id.* at 531–32. Despite recognizing this new conception of navigability, the court clearly implied that a significant portion of the riverbed—the thirty-mile stretch at issue—was subject to private ownership under the old proprietary title test. *See id.* at 531 (“The Presque Isle stream above the bridge at Presque Isle for a distance of 30 miles is clearly shown by the evidence to be navigable in fact, and to possess the character which brings it within the class of streams, which, *though, in point of property are private*, are subject to the easement of public highways which individuals have no right unreasonably to obstruct.”) (emphasis added).

200. *Guilliams v. Beaver Lake Club*, 175 P. 437, 438–39, 442 (Or. 1918).

201. *Id.* at 441–42.

202. *Id.*

tract to sell land adjacent to Blue Lake, a small inland water body only one mile long and one-eighth mile wide, which was not navigable under the federal proprietary title test.²⁰³ Citing both its own earlier decision and *Lamprey*, the court clarified that, under Oregon law, this lake was “navigable in a qualified or limited sense”; that is, it was subject to a public easement for navigation and commerce despite title to the bed remaining with the adjoining landowners.²⁰⁴ Just as in *Lamprey*, the court stressed that waterborne commerce is not limited to activities that produce a “pecuniary profit,” and therefore, “[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.”²⁰⁵ The court also powerfully echoed Justice Mitchell’s concern in *Lamprey* about the risk that rigidly applying the historic highway of commerce test for navigability to public access disputes would lead to the private monopolization of countless waterways that Oregonians could otherwise use for recreation and travel.²⁰⁶

Finally, in *State ex rel. State Game Commission v. Red River Valley Co.*,²⁰⁷ a decision that would influence courts in several nearby mountain states,²⁰⁸ the New Mexico Supreme Court addressed a dispute over the extent of public recreational rights in the Conchas Reservoir, a federal reservoir whose creation had inundated privately owned lands in 1936 when the federal government built a dam.²⁰⁹ In 1940, an owner of some of the inundated lands entered into an agreement with the federal government to allow boating and fishing on a portion of the reservoir.²¹⁰ Later, after the State of New Mexico assumed control of the boating and fishing rights, which the federal government had acquired from the inundated landowner, the state brought a declaratory judgment action to determine whether it could open the rest of the reservoir to public access.²¹¹

Ruling in favor of the state, the New Mexico Supreme Court acknowledged the traditional common law rule that the owners of the beds of non-navigable streams have the exclusive right to hunt, fish, and boat on the waters of such a stream,²¹² but concluded that this rule was

203. *Luscher v. Reynolds*, 56 P.2d 1158, 1159, 1161–62 (Or. 1936). In *Luscher*, the court determined that under the prevailing rules for determining navigability and title under the equal footing doctrine, Blue Lake was non-navigable and thus defendants and their predecessors held title to a ratable part of the lakebed. *Id.* at 1161.

204. *Id.* at 1162.

205. *Id.*

206. *Id.* (noting the presence of “hundreds of similar beautiful, small inland lakes . . . well adapted for recreational purposes, but which will never be used as highways of commerce in the ordinary acceptation of such terms” and recognizing the public’s “paramount right to the use of the waters of the lake for the purpose of transportation and commerce”)

207. 182 P.2d 421 (N.M. 1945).

208. See *Benson*, *supra* note 159, at 82–95.

209. *Red River Valley*, 182 P.2d at 424–25.

210. *Id.* at 425.

211. *Id.* at 424–25.

212. *Id.* at 426.

not applicable in New Mexico because the state's constitution declared "unappropriated water of every natural stream . . . to belong to the public and to be subject to appropriation for beneficial use."²¹³ Expanding on this constitutional principle and drawing on older common law, civil law, Native American authorities, and *Lamprey*, the court reasoned that the unappropriated waters of the reservoir were public under state law, permitting recreational boating and fishing throughout, not merely on portions covered by the previous access agreement.²¹⁴ In short, the court held that public recreational use rights extend to any unappropriated surface water in New Mexico as long as the surface water can support recreational use, regardless of whether a water body is navigable under the federal proprietary title test.²¹⁵

These early twentieth-century decisions are significant because they articulate three distinct rationales to justify the expansion of the concept of navigability or the establishment of the PRSA. First, they emphasize the functional or utilitarian equation of recreational travel with commercial transportation on water and simultaneously discount "pecuniary profit" as the sole metric of public interest. Second, they repeatedly express fear of monopolization and the risk that holdout behavior could impede recreation on a vast number of waterways that could not be classified as historic highways of commerce under the federal proprietary title test. Finally, they illustrate the emergence of a public trust doctrine interest in non-appropriated water, an interest that is especially pronounced in the constitutions and statutes of states in the West.

C. *The Third Wave: 1945–2025*

After World War II, an increasing number of state supreme courts expanded recreational use rights in inland waters. The creative state-court decision-making in this third phase of development of the PRSA often followed regional patterns, with courts citing and building upon prior judicial innovations in nearby states that shared similar historical,

213. *Id.* at 427 (quoting N.M. CONST. art. XVI, § 2).

214. *Id.* at 428–31. Among the authorities cited were old New England cases influenced by English common law, *id.* at 428 (citing *Weston v. Sampson*, 62 Mass. 347, 354 (1851)), and not surprisingly Matthew Hale, *see* Hale, *De Jure Maris*, in *A HISTORY OF THE FORESHORE*, *supra* note 29, at 374–77 (cited in *Weston*, 62 Mass. at 351); the *Siete Partidas*, a compilation of Spanish-Roman civil law, *Red River Valley*, 182 P.2d at 429; and even the customary law of Native Americans, *id.* at 430. The court also cited *Lamprey* when it detailed the expanding notion of navigability under American law. *Id.* The court also quoted at length from *Nekoosa-Edwards Paper Co. v. Railroad Commission*, 228 N.W. 144, 147 (Wis. 1930), for the proposition that while public rights in waterways originated in traditional pecuniary forms of navigation, they can expand to include other purposes and uses. *Red River Valley*, 182 P.2d at 432.

215. *See id.* at 430–31; Benson, *supra* note 159, at 83. The decision in *Red River Valley* did not address whether recreational fishermen or boaters had a right to touch the bed or bank of a river subject to the public's recreational use servitude. *Id.* at 83–84. The New Mexico Supreme Court answered that question in the affirmative, with some limitations, in *Adobe Whitewater Club of New Mexico v. New Mexico State Game Commission*, 519 P.3d 46, 49, 56 (N.M. 2022), discussed *infra* notes 336–53 and accompanying text.

geographic, and hydrological backgrounds. These regional patterns, however, were not completely uniform. Some state supreme courts bucked the trend by rejecting invitations to adopt the PRSA or to rethink navigability doctrine more broadly.²¹⁶ Occasionally, state legislatures would intervene to cabin the effects of expansive judicial decision-making.²¹⁷ The following discussion surveys these developments and regional variations with views of four distinct regions: (1) the Northeast and Atlantic Coast; (2) the Upper Mississippi Valley, Great Plains, and Great Lakes; (3) The Southeast and Gulf South; and (4) the Mountain West and Pacific Coast. For each region, this discussion acknowledges the decisions and legislative actions that resisted the expansion of the PRSA.

1. The Northeast and Atlantic Coast

In states in the Northeast and along the Atlantic Coast, courts follow a wide spectrum of approaches to the question of whether the public can enjoy recreational access to waterways that would not qualify as navigable rivers or lakes under the historic highway of commerce test. In some states, courts still rely predominantly on that test to determine navigability, albeit sometimes supplemented with the log-flotation test for navigability, and thus do not recognize public recreation rights on non-navigable waterways at all.²¹⁸ Curiously, courts in Maryland and New Jersey still appear to rely upon the tidal test inherited from English common law to determine navigability.²¹⁹ Courts in Rhode Island grant broad

216. See, e.g., *Bott v. Comm'n of Nat. Res.*, 327 N.W.2d 838, 844–53 (Mich. 1982); *People v. Emmert*, 597 P.2d 1025, 1027–30 (Colo. 1979).

217. See, e.g., Public Waters Access Act, UTAH CODE ANN. §§ 73-29-101 to -208 (LexisNexis 2025); *Utah Stream Access Coal. v. Orange St. Dev.*, 416 P.3d 553, 559 (Utah 2017) (holding that the Public Waters Access Act adopted the federal navigability-for-title test for public access).

218. *Nies v. Conn. River Bridge & Highway Dist.*, 132 A. 873, 874–75 (Conn. 1926) (applying the highway of commerce test); *Ace Equip. Sales, Inc. v. Buccino*, 869 A.2d 626, 633–34 (Conn. 2005) (following common law rule that a riparian landowner has exclusive rights over the bed of non-navigable waterway and a littoral landowner can exclude other littoral landowners who own land adjoining same non-navigable lake); *Hagan v. Del. Anglers' & Gunners' Club*, 655 A.2d 292, 293 (Del. Ch. 1995); *Tulou v. Anderson*, No. 1483, 1994 WL 374311, at *1, *3–4 (Del. Ch. June 20, 1994); *Givens v. Ichauway, Inc.*, 493 S.E.2d 148, 150 (Ga. 1997) (noting statutory definition of navigability based on historic highway of commerce test and discounting mere rafting of timber or transporting wood in small boats); *Lakeside Park Co. v. Forsmark*, 153 A.2d 486, 487 (Pa. 1959) (applying the highway of commerce test); *Boerner v. McCallister*, 89 S.E.2d 23, 27 (Va. 1955) (applying the highway of commerce test for floatable streams as public interest is limited to navigation); *Boutwell v. Champlain Realty Co.*, 94 A. 108, 111 (Vt. 1915) (whether waters are of “common passage as highways” determines navigability); *New England Trout & Salmon Club v. Mather*, 35 A. 323, 325 (Vt. 1895) (affirming true test of navigability is highway of commerce test); *Campbell Brown & Co. v. Elkins*, 93 S.E.2d 248, 261–62 (W. Va. 1956) (adhering to traditional highway of commerce test but also recognizing another class of navigable rivers and streams—those that are “floatable, or capable of valuable use”).

219. *Day v. Day*, 22 Md. 530, 537 (1865) (showing an example of the old ebb-and-flow-of-the-tide test); *Van Ruymbeke v. Patapsco Indus. Park*, 276 A.2d 61, 64–67 (Md. 1971). In *Green v. Eldridge*, the Maryland Court of Appeals (at the time the state’s highest court) acknowledged that while the tidal test remains valid, some recent decisions have also recognized the “navigable in fact” or highway of commerce test. 187 A.2d 674, 676 (Md. 1963). New Jersey continues to rely exclu-

public access to all intertidal waters based on the public trust doctrine but do not otherwise seem concerned with inland water.²²⁰ Courts in Massachusetts, Maine, and New Hampshire still rely on versions of the historic highway of commerce test but sometimes supplement that approach by turning to specialized statutes or older common law precedents that recognize certain waterways, such as large ponds or intertidal waters, to be public spaces.²²¹

In three states on the Atlantic Coast, however, courts have taken significant steps to expand or confirm public recreational access to inland waterways even when the subaqueous land beneath those waterways is privately owned. In an often cited decision, *Adirondack League Club, Inc. v. Sierra Club*,²²² the New York Court of Appeals addressed whether twelve miles of the South Branch of the Moose River, which ran through a 50,000-acre parcel owned by a private hunting and fishing club, was navigable-in-fact and subject to public access for boating and canoeing.²²³ Initially, the court acknowledged its earlier adoption of the log-flotation test for navigability²²⁴ and emphasized that its navigability-in-fact determinations generally focus on a river's "practical utility to the public as a means for transportation" and thus the "paramount concern is the capacity of the river for transport, whether for trade or travel," even though the kinds of transportation occurring on rivers may be undergoing change.²²⁵ With this utilitarian framework in place, the court then made an interesting move. It stated that "recreational use should be part of the

sively on the tidal test to determine navigability. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 52 n.2 (N.J. 1972).

220. *Greater Providence Chamber of Com. v. State*, 657 A.2d 1038, 1039–42 (R.I. 1995).

221. For Massachusetts, see *Brosnan v. Gage*, 133 N.E. 622, 624 (Mass. 1921) (using the tidal test and holding that the river was not navigable); *Commonwealth v. Vincent*, 108 Mass. 441, 446, 447 (1871) (identifying the tidal test as a definition of navigable waters). For Maine, see *Stanton v. Trs. of St. Joseph's Coll.*, 233 A.2d 718, 720 (Me. 1967) (recognizing public rights in navigable waters which include tidal waters, lakes or ponds over ten acres in size); *Gratto v. Palangi*, 147 A.2d 455, 458 (Me. 1958) (stating that "members of the public have the right to make use of the great pond for swimming and boating," among other public trust rights); *In re Ops. of the Justs.*, 106 A. 865, 867 (Me. 1919) (stating that under the "law of Maine and Massachusetts, originating in the Colonial Ordinance of 1641–47, ponds of more than 10 acres in extent are designated as great ponds" and such great ponds are subject to the public trust doctrine). For Maine's statutory definition of "great ponds," see ME. STAT. tit. 38, § 480-B(5) (2025). However, it appears that Maine's Great Ponds Act has been repealed. See ME. STAT. tit. 38, §§ 380 to 390 (repealed 1977). Notably, access to great ponds is protected by an alternative statute. ME. STAT. tit. 17, § 3860 (2025). For New Hampshire, compare *St. Regis Paper Co. v. N.H. Water Res. Bd.*, 26 A.2d 832, 838 (N.H. 1942) (navigability based on capacity of a river or stream to serve some useful purpose in its natural state, including the ability to support trade, business, or transportation of property, such as floating logs), with *Concord Mfg. Co. v. Robertson*, 25 A. 718, 719, 720–21 (N.H. 1890) (holding that large natural ponds are held by the state in trust for public use).

222. 706 N.E.2d 1192 (N.Y. 1998).

223. *Id.* at 1193–94.

224. *Id.* at 1194 (discussing *Morgan v. King*, 35 N.Y. 454, 458–59 (1866)).

225. *Id.* at 1195. Rivers "are no longer primarily subjects of commercial exploitation" for purposes such as transporting logs, the court explained; instead, they are "valued in their own right as a means of travel." *Id.* The court also noted that "both plaintiff and defendants correctly recognize that recreational boating has commercial aspects." *Id.*

navigability analysis”²²⁶ but then explained that it was not necessarily broadening the standard for navigability-in-fact; instead, it was only recognizing “that recreational use fits within it.”²²⁷

What does this mean? On one hand, the court might be simply limiting the scope of its holding by explaining that the kind of waterborne traffic required to satisfy its traditional navigability-in-fact test “need not be limited to moving goods in commerce, but can include some recreational uses.”²²⁸ On the other hand, the court did reject the landowner’s argument that any judicial revision of the navigability-in-fact test would amount to a judicial taking.²²⁹ There was no taking, the court explained, because the club had always held its land subject to the public’s easement for travel over navigable waters.²³⁰ Perhaps the most that can be said about *Adirondack League Club* is that the court wanted to give public recreational advocates more opportunities to make arguments that a particular river or stream can sustain commerce under a more flexible conception of commerce.

Next door in Pennsylvania, however, an appellate court rejected an invitation to follow *Adirondack League Club* that would have expanded that state’s judicial definition of navigability to incorporate recreational boating.²³¹ The appellate court there observed that prior Pennsylvania case law had defined a navigable waterway solely in terms of its capability for use as a highway of commerce and deferred to the state supreme court or the legislature to enunciate new precepts of law or to expand existing ones.²³²

Further south on the Atlantic Seaboard, however, courts relied on earlier recreation-friendly precedents to embrace public recreation access claims. In South Carolina, recent decisions have upheld broad public recreational access to waterways by building upon the late-nineteenth-

226. *Id.*

227. *Id.*

228. *Adirondack League Club*, 706 N.E.2d at 1196.

229. *Id.* (stating that because riparian landowners still “retain their full panoply of rights, subject only to the long-recognized navigational servitude,” they “cannot complain that this rule works a taking for public use without compensation”).

230. *Id.* In the end, the court ruled that there were too many factual issues in dispute on the question of navigability-in-fact and thus affirmed a lower court’s denial of summary judgment ruling and remanded for a full evidentiary hearing. *Id.* at 1193, 1196–98.

231. *Mountain Props., Inc. v. Tyler Hill Realty Corp.*, 767 A.2d 1096, 1100 (Pa. Super. Ct. 2001). This case concerned a dispute over a water body called Laurel Lake. *Id.* at 1097–98. Plaintiff, a real estate company, owned 90% of the lake and the defendant, another company whose predecessor in interest operated a summer camp, owned the remainder. *Id.* at 1098. For years, the defendant’s access to the entire lake had been secured through a rental fee paid to the plaintiff. *Id.* The dispute arose when the plaintiff notified the defendant that the rental fee would increase, but the defendant continued to use the lake without paying the fee. *Id.* The defendant claimed the right to use the lake without paying more on various grounds, including that the lake was navigable because of its history of recreational use. *See id.* at 1097–98.

232. *Id.* at 1100.

century foundation laid by *Heyward*.²³³ In 1986, the South Carolina Supreme Court relied on *Heyward* to overturn a South Carolina Coastal Council decision that would have allowed the impoundment of small waterways providing recreational access to a 660-acre wetland area near the coast.²³⁴ Subsequent South Carolina decisions have continued to affirm that even if a waterway only supports use by small fishing or pleasure craft, it can, in the appropriate case, satisfy the “valuable floatage test” for navigability and justify public use even if the bed of the waterway is privately owned.²³⁵

Recall that the North Carolina Supreme Court in the early-twentieth century incorporated the use of recreational watercraft into its navigability doctrine when it held that an adjoining landowner could not block public access to a modest “passway” near the coast.²³⁶ In a more recent title dispute, *Gwathmey v. State ex rel. Department of Environment, Health, and Natural Resources*,²³⁷ the North Carolina Supreme Court built on that early precedent and other early public trust doctrine cases to hold that “[i]f water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture.”²³⁸ Viewed as a whole, the majority of courts in this region have adhered to the historical highway of commerce test or variations of it, perhaps because the more controversial public access disputes in these states have often focused on ocean front beaches rather than inland rivers and lakes.²³⁹ Nevertheless, the decisions of the New

233. 19 S.E. 963 (S.C. 1894).

234. *State ex rel. Medlock v. S.C. Coastal Council*, 346 S.E.2d 716, 717–19 (S.C. 1986). In that decision, the court pointed to *Heyward* for the propositions that “neither the character of the craft nor the relative ease or difficulty of navigation are tests of navigability,” that “[v]aluable floatage is not necessarily commercial floatage,” and that use of the waterways at issue “by the general public for boating, hunting, and fishing is a legitimate and beneficial public use.” *Id.* at 719.

235. *Hughes v. Nelson*, 399 S.E.2d 24, 25–26 (S.C. Ct. App. 1990); *State v. Head*, 498 S.E.2d 389, 392, 394–95 (S.C. Ct. App. 1997); *Brownlee v. S.C. Dep’t of Health & Env’t Control*, 676 S.E.2d 116, 121–22 (S.C. 2009).

236. *State v. Twiford*, 48 S.E. 586, 588 (N.C. 1904) (holding that evidence showing public use for “purposes of fishing, as a passway, and as a harbor for protection in time of storms . . . constitute[s] ample evidence of a navigable stream” and citing *Attorney General v. Woods*, 108 Mass. 436, to hold that “[i]f water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture”).

237. 464 S.E.2d 674 (N.C. 1995).

238. *Id.* at 682 (quoting *Twiford*, 48 S.E. at 588). In *Gwathmey*, the court also relied upon two even earlier public trust doctrine cases to support the proposition that “navigability in fact by useful vessels, including small craft used for pleasure, constitutes navigability in law.” *Id.* at 681–82 (citing and quoting from *State v. Narrows Island Club*, 5 S.E. 411, 412 (1888) and *State v. Baum*, 38 S.E. 900, 901 (1901)).

239. See *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 368–69 (N.J. 1984) (requiring quasi-public beach improvement association to allow members of the public to join association to give meaningful public trust access to dry sand portion of beach); *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 113 (N.J. 2005) (extending *Matthews* to require owner of private beach club to allow anyone to become a member and have access to upland sands of beach and prohibiting club from charging high membership fees); *Op. of the Justs.*, 313 N.E.2d 561, 566–68 (Mass. 1974) (limiting public access rights to tidal lands rather than dry sand areas of beaches and limiting scope of public trust rights); *Leydon v. Town of Greenwich*, 777 A.2d 532, 564 (Conn. 2001).

York Court of Appeals and the South Carolina and North Carolina supreme courts remain important landmarks in the development of the PRSA.

2. The Upper Mississippi Valley, Great Plains, and Great Lakes

In the Upper Mississippi Valley, Great Plains, and Great Lakes region, judicial decisions are more evenly split between those embracing the PRSA or new conceptions of navigability and those that have rejected innovation. Two early decisions from Missouri and Ohio, and recent decisions from Wisconsin, illustrate the first trend, while decisions from Michigan, Kansas, and Illinois illustrate the latter.

In 1954, the Missouri Supreme Court resolved a dispute between an individual who owned land adjoining the Meramec River and a recreational fisherman who claimed the right to canoe and fish in a portion of the river crossing the defendant's land.²⁴⁰ The parties stipulated that the relevant river segment had previously been used to float logs and timber; was "navigable in fact by canoes, rowboats, and other small floating craft" but not "by larger boats and vessels"; was "well stocked with fish"; and sportsmen regularly fished upstream and downstream by wading into the water, floating vessels, or standing on the bank.²⁴¹ Although the court concluded that the relevant river segment was not navigable under the federal proprietary title test and therefore its bed was owned by the defendant,²⁴² it still held that a public easement for navigation, wading, and fishing burdened the defendant's ownership.²⁴³ The court grounded this public easement in federal statutes and state constitutional provisions that mirrored the Northwest Ordinance of 1787 and guaranteed perpetual use of the "navigable waters" flowing into the Mississippi and Missouri Rivers,²⁴⁴ prior Missouri decisions,²⁴⁵ and, of course, *Lam-prey*.²⁴⁶

The very next year in *Coleman v. Schaeffer*,²⁴⁷ the Ohio Supreme Court went a step further and redefined the concept of navigable waterways under Ohio law when it held that Beaver Creek, a modest stream

240. *Elder v. Delcour*, 269 S.W.2d 17, 19–20 (Mo. 1954).

241. *Id.*

242. *Id.* at 23.

243. *Id.* at 26.

244. *Id.* at 23–24 (citing, *inter alia*, 2 Stat. 743, 747 (1812); 3 Stat. 545, 545–46 (1820); MO. CONST. art. XI, § 2 (1865); MO. CONST. art. I (1875)).

245. *Id.* at 24–25 (citing *Hobart-Lee Tie Co. v. Grabner*, 219 S.W. 975, 976–77 (Mo. Ct. App. 1920); *Weller v. Mo. Lumber & Mining Co.*, 161 S.W. 853, 857–58 (Mo. Ct. App. 1913); *McKinney v. Northcutt*, 89 S.W. 351, 355 (Mo. Ct. App. 1905)).

246. *Elder*, 269 S.W.2d at 26–27. The court in *Elder* also held that the plaintiff had a right to keep the fish he caught in the river. *Id.* at 26. The court bolstered this final holding by relying on a late-nineteenth-century Wisconsin Supreme Court decision establishing a public easement for navigation and fishing over streams that are otherwise non-navigable and whose beds are owned by riparian landowners. *Id.* at 26–27 (discussing *Willow River Club v. Wade*, 76 N.W. 273, 276–77 (Wis. 1898)).

247. 126 N.E.2d 444 (Ohio 1955).

that meandered through several townships before flowing into Lake Erie, was navigable and, therefore, ordered downstream riparian landowners to remove cables preventing upstream landowners from using the stream to access their property.²⁴⁸ The court in *Coleman* observed that navigability in American law had come to embrace not only log flotation but also non-pecuniary “boating or sailing for pleasure”;²⁴⁹ stressed, much as in *Elder*, that the Northwest Ordinance of 1787 commanded that navigable waters leading into the Mississippi and the Saint Lawrence be kept “forever free” for use by all inhabitants of the territories encompassed by the ordinance;²⁵⁰ and noted how congressional amendments to Section 3 of the Rivers and Harbors Act recognized that the term “commerce” includes “use of waterways by seasonal passenger craft, yachts, house boats, fishing boats, motor boats, and other similar water craft.”²⁵¹ In the end, the court held that Beaver Creek, which averaged eighty to ninety feet in width and six to eleven feet in depth and was traversed by “small pleasure craft” that both parties sometimes rented to customers, was navigable and could not be obstructed by the defendants.²⁵² Although one commentator sees a potential free-riding problem lurking beneath the surface in *Coleman* based on the fact that the father and son defendants, who attempted to block others from using Beaver Creek, had occasionally employed a dredge to clear the channel near their land,²⁵³ the court obviously saw economic equities on the plaintiffs’ side, too, as they had had been renting boats for use on the creek for at least fourteen years before the defendants erected cables and fences to block competition.²⁵⁴

In 2018, the Wisconsin Supreme Court confirmed a long line of prior decisions in that state, including an important 1914 decision adopting a pleasure boat test for navigability, to hold that the Wisconsin public trust doctrine gives members of the public the right to use all of the state’s navigable waters for recreational purposes, including swimming, fishing, and boating.²⁵⁵ Crucially, the court also emphasized that public

248. See *id.* at 445, 447.

249. *Id.* at 445–46. Not surprisingly, the court also quoted *Lamprey* and secondary sources that had begun to characterize its teachings as stating, “the better rule.” *Id.* at 446 (citing *Lamprey v. State*, 53 N.W. 1139, 1143 (Minn. 1893); 56 Am. Jur. § 181).

250. *Id.* at 445. For more on the Northwest Ordinance of 1787 and its broad influence, see Freyfogle, *supra* note 51, at 242–53.

251. *Coleman*, 126 N.E.2d at 445 (citing 33 U.S.C. § 541 (amended Feb. 10, 1932)).

252. See *id.* at 447.

253. Brady, *supra* note 15, at 1453 (citing *Coleman*, 126 N.E.2d at 447–49 (Hart, J., dissenting)).

254. See *Coleman*, 126 N.E.2d at 445, 447.

255. *Movrich v. Lobermeier*, 905 N.W.2d 807, 814–15, 818 (Wis. 2018) (citing *Diana Shooting Club v. Hustling*, 145 N.W. 816, 820 (Wis. 1914)). See also *Rock-Koshkonong Lake Dist. v. Dep’t of Nat. Res.*, 833 N.W.2d 800, 817 (Wis. 2013) (noting that the public trust in Wisconsin protects not just “commercial navigability” but also extends to recreational activities such as “boating, swimming, fishing, hunting . . . and . . . preserving scenic beauty”). As the court in *Rock-Koshkonong Lake District* explained, “the public trust doctrine in Wisconsin gives riparian owners along navigable streams a qualified title to the center of the stream, while the state holds the naviga-

trust rights in Wisconsin extend not only to traditional navigable waterways but also to waters flowing over privately owned water beds.²⁵⁶ In another recent decision, the court also clarified that the former log-flotation test of navigability has been replaced by the more expansive standard of “*navigable in fact for any purpose*,” a test that is satisfied if a waterway is “capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.”²⁵⁷ In effect, Wisconsin courts have not needed to adopt the PRSA expressly because they earlier adopted a broad conception of navigability that incorporated recreational use and have continued to adhere to that view ever since.

The primary examples of resistance to the PRSA in this region come from Michigan, Kansas, and, most recently, Illinois. The Michigan Supreme Court set the tone in *Bott v. Commission of Natural Resources*,²⁵⁸ a trespassing dispute concerning two waterways that connected several lakes.²⁵⁹ Admittedly, the waterways at issue were not large, and both were indisputably non-navigable under the historic highway of commerce test and arguably even under Michigan’s log-flotation test.²⁶⁰ However, both could also support travel between nearby lakes and in fact had been used by landowners who owned property on the shores of the lakes and by the indefinite public to pass back and forth between the lakes for many years.²⁶¹ Despite this history of use, several owners of land adjoining the connecting waterways brought declaratory judgment and trespass actions to block others from passing through the waterways.²⁶² Lakeside property owners who wanted to keep using the connecting waterways to travel between the lakes and the state’s Department of Natural Resources urged the Michigan Supreme Court to protect public access by adopting the PRSA.²⁶³

In spite of a vigorous, twenty-two-page dissent that focused on the flexibility, commitment to contextualization, and public trust values ex-

ble rivers in trust for the public,” but “[i]n reality, the state effectively controls the lands under navigable streams and rivers without actually owning it.” *Id.* at 819.

256. *Movrich*, 905 N.W. 2d at 818.

257. *Rock-Koshkonong Lake Dist.*, 833 N.W.2d at 818 (quoting *Muench v. Pub. Serv. Comm’n*, 53 N.W.2d 514, 519 (Wis. 1952)).

258. 327 N.W.2d 838 (Mich. 1982).

259. *Id.* at 839–40, 840 n.3. The decision in *Bott*, however, used the reasoning of the Colorado Supreme Court in *People v. Emmert*, 597 P.2d 1025, 1027–30 (Colo. 1979), discussed *infra* notes 357–62 and accompanying text.

260. *Id.* at 841. One waterway was an unnamed “outlet,” just 240 feet long, 100 to 15 feet wide, and 2 feet to 8 inches deep; the other, Burgess Creek, was 800 feet long. *Id.* at 839 n.2, 840 n.3.

261. *Id.* at 839–40; *id.* at 854–56 (Williams & Ryan, JJ., dissenting).

262. *Id.* at 838. One of the property owners, John Bott, owned an 800-acre tract of land entirely encompassing one lake, Linton Lake, and the “outlet” connecting to another lake, Big Chub Lake. *Id.* at 854 (Williams & Ryan, JJ., dissenting). The other property owners, William and Caroline Nicholas, owned 120 acres on both sides of Burgess Creek, which connected Burgess Lake and Dogfish (or Pine) Lake. *Id.* at 855 (Williams & Ryan, JJ., dissenting).

263. *Id.* at 839, 841; *id.* at 854–56 (Williams & Ryan, JJ., dissenting).

pressed in prior Michigan cases involving inland waterways,²⁶⁴ a majority of the Michigan Supreme Court rejected the invitation to adopt the PRSA for several reasons.²⁶⁵ First, the majority questioned the public need for access to these particular waterways, noting that the primary beneficiaries would be littoral property owners desiring recreational access to another lake.²⁶⁶ Second, the majority believed the legislature could always pass new laws to expand recreational access or use the power of eminent domain to acquire specific lands for recreational access.²⁶⁷ Somewhat confusingly, the majority also indicated, on one hand, that adoption of the PRSA might not increase public recreational access all that much because state courts had long ago adopted the log-flotation test, but it then speculated, on the other hand, that adoption of the PRSA might harm wildfowl, aquatic life, and rural vacationers by incentivizing too many people to recreate in waterways and leading to a tragedy of the commons.²⁶⁸ Finally, the majority worried that adopting the PRSA might amount to a judicial taking because prior Michigan caselaw had established a firm “rule of property” that had induced reliance by purchasers of rural tracts of land crossed by small streams.²⁶⁹

Eight years later, the Kansas Supreme Court used similar reasoning to reject the PRSA in a short opinion concerning a modest river in Kansas that had not been used as a highway of commerce at statehood but had been used extensively by a businessman who traveled the river to collect and sell native plants and by a business that rented canoes and ferried canoeists.²⁷⁰ After surveying case law both adopting and rejecting the PRSA,²⁷¹ the court opted to reject wider public access to Kansas waterways for reasons particular to Kansas statutes and recent legislative history.²⁷²

264. *Bott*, 327 N.W.2d at 853–75 (Williams & Ryan, JJ., dissenting).

265. *Id.* at 841–42, 847, 850–53.

266. *Id.* at 841–42, 847.

267. *Id.* at 842, 852–53.

268. *See id.* at 842, 847, 850.

269. *Id.* at 849–52. The dissenting justices specifically rejected the suggestion that a firm “rule of property” had emerged in Michigan preventing adoption of the PRSA. *Id.* at 858–73 (Williams & Ryan, JJ., dissenting). These justices believed the PRSA would be consonant with both previous Michigan cases addressing navigability, including the log flotation test adopted in *Moore v. Sanborne*, 2 Mich. 519, 524–26 (1853), and the existing category of “qualifiedly navigable” waters. *Bott*, 327 N.W.2d at 854–55 (Williams & Ryan, JJ., dissenting). They also thought the PRSA would respond to a significant public need and would be pragmatic and easy to administer. *Id.* Perhaps it was no coincidence that in stating its preference for legislative rather than judicial action, *Id.* at 853–54, the majority cited the United States Supreme Court’s then-recent decision in *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979), which emphasized the right to exclude in non-navigable watery places. *Bott*, 327 N.W.2d at 850 n.42.

270. *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1360 (Kan. 1990).

271. *Id.* at 1360–62. Just like the Michigan Supreme Court, the Kansas Supreme Court relied especially on *People v. Emmert*, 597 P.2d 1025, 1026–30 (Colo. 1979). *Hays*, 785 P.2d at 1361–62 (discussing *Emmert*).

272. *Id.* at 1364 (narrowly construing a state statute, KAN. STAT. ANN. § 82a-702 (Lexis 2025), which dedicated all water to public use, to mean only consumptive use and noting several unsuccess-

Finally, in its 2022 decision in *Holm v. Kodat*,²⁷³ the Illinois Supreme Court rejected an attempt to incorporate the PRSA in a fascinating case involving a dispute between competing groups of fossil hunters who owned riparian tracts of land adjoining the Mazon River.²⁷⁴ Initially, after exploring the intricacies of Illinois law regarding rivers and lakes, the court found that the Mazon was non-navigable under Illinois law.²⁷⁵ It then held that the state's "civil-law rule" allowing multiple owners of the bed of a private non-navigable *lake* reasonable use of surface waters did not apply to a non-navigable *river*.²⁷⁶ Finally, the court concluded that Illinois common law on the reasonable use of rivers did not provide the upstream landowners the right to use the entire length of the Mazon and cross the defendant's privately owned riverbeds without permission.²⁷⁷ In a special concurrence, however, one Illinois Supreme Court justice urged the Illinois legislature to move beyond its restrictive common law rules limiting the use of non-navigable rivers and lakes and embrace what he called "the recreational navigation doctrine,"²⁷⁸ an approach that at least one commentator has argued would be well supported by Illinois law and other sources.²⁷⁹

ful attempts by public access advocates to pass bills in the legislature expanding recreational access to rivers).

273. 211 N.E.3d 310 (Ill. 2022).

274. *Id.* at 312–13. In *Holm*, a group of upstream riparian owners along the Mazon River, a twenty-eight-mile waterway that was non-navigable under the traditional highway of commerce test, sought to vindicate a right to kayak along the length of the river. *Id.* at 312, 315. The plaintiffs, who were also professional fossil hunters, travelled on the Mazon between two different riparian parcels they owned, one of which had access to a public road (the "access" parcel) and another farther downstream that lacked such access (the landlocked parcel). *Id.* at 312. The plaintiffs typically entered the river from their access parcel, then collected fossils at their landlocked parcel, then travelled farther downstream in their fossil-loaded kayaks to a bridge that provided public access, where they would unload their kayaks and later sell the fossils to collectors and paleontologists. *Id.* The plaintiffs' river access claims were opposed by other riparian owners, one of whom allegedly operated a competing fossil business, who claimed to own the portions of the riverbed adjoining their properties and sought to prevent the plaintiffs from crossing their property in their kayaks. *Id.* at 312–13.

275. *Id.* at 315. In Illinois, a riparian landowner owns the bed of a river to its center, regardless of whether it is navigable. *Id.* If a river or stream is navigable, the riparian owner's riparian rights are subject to a paramount public easement to use the river or stream for navigation; if it is non-navigable, the riparian owner owns the bed "absolutely, free from any burdens in favor of the public." *Id.* Applying the historical traditional highway of commerce test, the court found the Mazon to be non-navigable. *Id.*

276. *Id.* at 316–18 (distinguishing and refusing to extend *Beacham v. Lake Zurich Property Owner's Ass'n*, 526 N.E.2d 154 (1988), because sub-surface private property boundaries are easier to demarcate in a non-navigable river or stream than in a non-navigable lake).

277. *Id.* at 319 (holding that Illinois's "reasonable use" doctrine only gives riparian owners "direct consumptive or diversionary uses" of water and "is not instructive on the issue presented here—the use of the surface water to enter the property of another riparian owner without their consent").

278. *Id.* at 320 (Neville, J., concurring). Justice Neville argued that Illinois public policy already supports the "recreational navigation doctrine," as expressed in earlier Illinois Supreme Court decisions and in existing Illinois legislation. *Id.* at 322–23. He also urged the legislature to codify the recreational navigation doctrine in a "public domain declaration" to avoid or minimize takings claims and instruct private property owners that any alleged deprivation of property rights they might claim refers to a "right they never truly possessed." *Id.* at 323–24.

279. See Freyfogle, *supra* note 51, at 265–87.

In other states in this region—namely Nebraska and Iowa—judicial decisions are contradictory, and thus considerable uncertainty still prevails.²⁸⁰ Nevertheless, the decisions discussed in this section that have embraced either the PRSA or a broad conception of navigability appear to have been influenced by both the legacy of the Northwest Ordinance and Justice Mitchell's call in *Lamprey* to embrace the values of recreational access and prevent the monopolization of a vast network of inland rivers and lakes which customarily provided routes of passage and opportunities for recreational boating and fishing. The judges who rejected the PRSA in this region were no doubt aware of those legacies but chose, largely based on a narrow view of the judiciary's law-making role, to preserve the status quo.

3. The Southeast and Gulf Coast

The evolution of navigability and the recognition of public recreational-access rights in the Southeast and along the Gulf Coast has followed a different path, with some courts redefining navigability itself and others struggling to bring clarity to the law. In *State v. McIlroy*,²⁸¹ a frequently cited 1980 decision, the Arkansas Supreme Court crystallized the modern trend recognizing public access rights based on a water body's suitability for recreational use regardless of ownership of the underlying water bottom.²⁸² *McIlroy* centered on public claims to fish and canoe in the Mulberry River, a northwest Arkansas waterway with significant recreational value that would have been classified as non-navigable under the historic highway of commerce test.²⁸³ In *McIlroy*, two riparian landowners holding title to 230 acres bisected by the river filed a declaratory judgment action against a conservation group and two canoe rental companies, asking the court to declare the river non-navigable and to deny the public any right to fish or boat in the river segment flowing through their land.²⁸⁴ After the State of Arkansas intervened to assert its ownership of the riverbed and the trial court ruled in

280. For example, Nebraska has not yet clearly adopted the public trust doctrine, and in a 1906 decision the Nebraska Supreme Court opted to follow the English common law tidal test for determining navigability, even though the federal highway of commerce test has been used to classify the Missouri River as a navigable waterway for purposes of public navigation. *Kinhead v. Turgeon*, 109 N.W. 744, 745–47 (Neb. 1906). *But see* *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 64 N.W. 239, 240–41 (Neb. 1895) (appearing to follow the highway of commerce test and holding Republican River to be non-navigable). In Iowa, some decisions imply that Iowa's version of the public trust doctrine gives the public a right of recreational access in any waterway that is navigable for recreational purposes, *see State v. Sorensen*, 436 N.W.2d 358, 363 (Iowa 1989), but others indicate that navigability is still determined primarily by use of a highway of commerce test, *see Orr v. Mortvedt*, 735 N.W.2d 610, 611, 615–16 (Iowa 2007) (characterizing thirty-acre landlocked lake formed in old quarry, which has never been used as a highway of commerce but only for recreation, as non-navigable).

281. 595 S.W.2d 659 (Ark. 1980).

282. *Id.* at 664–65, 667. For commentary on this decision, see, for example, Brady, *supra* note 15, at 1435–37.

283. *McIlroy*, 595 S.W.2d at 661, 663–64.

284. *See id.* at 660–61.

favor of the riparian landowners,²⁸⁵ the Arkansas Supreme Court reversed course and recognized public recreational access rights in a particularly sweeping opinion.²⁸⁶

The court began by taking a hard look at the Mulberry River itself, characterizing the river as an “intermediate stream,” not as deep and wide as other Arkansas rivers commonly used for commercial purposes, but not a small creek or branch just temporarily accessible by canoes or flatbottom boats either.²⁸⁷ As the court explained, the Mulberry River was “somewhere in between,” a river that for “about 50 or 55 miles of its length can be floated by canoes or flatbottomed boats for at least six months of the year.”²⁸⁸ It was also replete with fish—particularly small-mouth bass—and its course varied from long, flat, and relatively wide “holes” easily travelled by boats, to narrower gaps and shoals that provided “exciting” and sometimes even dangerous—water for canoeists.²⁸⁹ In a resonant understatement, the court observed that the Mulberry River “is not a stream easily possessed.”²⁹⁰ Just as important, according to the court, ample evidence proved that the river “had been used by the public for recreational purposes for many years,” and those uses included fishing, swimming, and canoeing.²⁹¹

Acknowledging that past Arkansas decisions had commonly employed the historical highway of commerce test for navigability,²⁹² the court also noted that in at least one earlier decision it had recognized that public uses indicating a river’s navigability could change over time and could involve activities other than transporting goods with pecuniary value.²⁹³ Finally, after noting many decisions from other states establishing the PRSA, the court finally held that the portion of the river passing through the plaintiffs’ land was navigable because it could sustain recreational use by the public in flatbottomed fishing boats and canoes.²⁹⁴ Emphasizing that the public’s use rights were limited to the river’s actual waters and that the public did not have a general right to disembark on

285. *Id.* at 660.

286. *Id.* at 661–65. Because the court found that the Mulberry River was navigable under its new recreational use test, the court declined to address other arguments that the defendants and the state had raised on appeal—namely that the public had acquired a prescriptive easement in the river and that the congressional act admitting Arkansas into the Union placed the river in the public domain. *Id.* at 660–61, 665.

287. *Id.* at 661.

288. *Id.*

289. *McIlroy*, 595 S.W.2d at 661

290. *Id.*

291. *Id.* at 662. This evidence included testimony from the Director of Arkansas State Parks and Tourism and two employees of the Arkansas Game and Fish Commission describing the Mulberry River’s popularity for fishing and floating in canoes. *Id.*

292. *Id.* at 663 (citing and quoting *Lutesville Sand & Gravel Co. v. McLaughlin*, 26 S.W.2d 892, 893 (Ark. 1930)).

293. *Id.* at 664 (citing and quoting *Barboro v. Boyle*, 178 S.W. 378, 380 (Ark. 1915)). *Barbaro* involved a lake, 178 S.W. at 378, just as in *Lamprey v. State*, 53 N.W. 1139, 1140 (Minn. 1893).

294. *McIlroy*, 595 S.W.2d at 664–65.

the river's shores (and, of course, could not litter on or otherwise damage the plaintiffs' property), the court urged the state and all others who used the river to embrace an ethic of stewardship and care to keep Arkansas not only "a beautiful state, [but also] a good place to live."²⁹⁵ The court's holding and this statement of mutually accommodating public and private rights in a river remains the law in Arkansas today.²⁹⁶

In the decades since *McIlroy*, courts in two other Southeastern states have also recognized or expanded public recreational access rights in rivers. A decade later, the Mississippi Supreme Court concluded that the Bogue Chitto River is a navigable waterway and that riparian owners cannot prevent canoeists and water tubers from using its waters.²⁹⁷ In that decision, the court stressed the widespread social understanding in Mississippi that this particular waterway was navigable,²⁹⁸ the flexibility of Mississippi's version of the public trust doctrine,²⁹⁹ and the court's own dynamic, evolutionary understanding of navigability.³⁰⁰ Significantly, the court concluded its analysis by stating that "[t]hose waters are navigable in fact which are navigable by loggers, fishermen and pleasure boat-ers."³⁰¹

Next door in Alabama, the Alabama Supreme Court recently reached a similar result in a curious land annexation dispute between two neighboring cities when it held that the Cahaba River is navigable because it had an "aptitude for beneficial public use, even if that use is merely recreational as opposed to commercial."³⁰² Notably, other Alabama decisions have emphasized that mere "occasional use by 'fishing boats' and 'canoes' during some parts of the year is not sufficient" to demonstrate the capacity of a waterway to serve a "beneficial public use."³⁰³

Curiously, in Louisiana, where inland water is especially abundant, courts in the past have often rejected public access claims by sportsmen

295. *Id.* at 665.

296. *See* *State v. Hatchie Coon Hunting & Fishing Club, Inc.*, 279 S.W.3d 56, 62 (Ark. 2008); *Nichols v. Culotches Bay Navigation Rts. Comm., LLC*, 387 S.W.3d 199, 202–03 (Ark. Ct. App. 2011).

297. *Ryals v. Pigott*, 580 So. 2d 1140, 1142, 1145–52 (Miss. 1990).

298. *See id.* at 1146.

299. *See id.* at 1150.

300. *Id.* at 1150–52.

301. *Id.* at 1152 (emphasis added). In another part of the decision in *Ryals*, the Mississippi Supreme Court cleared away various state constitutional and statutory objections raised by the riparian landowners. *Id.* at 1152–56.

302. *City of Irondale v. City of Leeds*, 122 So. 3d 1244, 1245, 1250 (Ala. 2013). In *City of Irondale*, the court acknowledged that it was not required to apply the "federal navigability test" to define navigability for state law purpose and was "free to apply a less stringent test." *Id.* at 1250. The court cited, *inter alia*, *People ex rel. Baker v. Mack*, 97 Cal. Rptr. 448, 451 (Ct. App. 1971), discussed *infra* notes 327–32 and accompanying text, and *State v. Korrer*, 148 N.W. 617, 618 (Minn. 1914), a post-*Lamprey* decision that also recognized the pleasure boat test in Minnesota. *City of Irondale*, 122 So. 3d at 1250.

303. *See, e.g.,* *Wehby v. Turpin*, 710 So. 2d 1243, 1250 (Ala. 1998).

who seek to boat, fish, or hunt on water bodies deemed to be non-navigable under the historical highway of commerce test.³⁰⁴ Recent developments, however, suggest growing judicial discomfort with this narrow approach. In a highly contentious recent case, a large, corporate landowner convinced the local sheriff to bring a criminal trespass charge against a well-known recreational bass fisherman who had visited shallow open water near the Gulf Coast which the landowner asserted was not-navigable under the historic highway of commerce test.³⁰⁵ After the fisherman was convicted of criminal trespass and an appellate court vacated the conviction in a brief and opaque ruling,³⁰⁶ the Louisiana Supreme Court denied an application for certiorari despite pleas by the landowner and the state's most powerful landowners association that the appellate court's action, if left to stand, would lead to chaos in the state's vast wetlands.³⁰⁷

In Florida, Texas, and Tennessee, courts still apply the historic highway of commerce approach, but navigability determinations can sometimes become more complicated. In Florida, courts generally follow the traditional test to determine both proprietary title and public recreational access rights to waterways,³⁰⁸ but occasionally they have signaled that use of pleasure boats and flat bottom boats might be an indication of navigability.³⁰⁹ Courts in Texas can find a waterway to be navigable and

304. In fact, Louisiana courts routinely hold that public ownership of "running waters" in the state does not give the public enjoys a right to travel or fish in waters flowing in "non-navigable" waterways. *See Walker Lands, Inc. v. E. Carroll Par. Police Jury*, 871 So. 2d 1258, 1261–62, 1265–66 (La. Ct. App. 2004) (rejecting public access claims to small lake enclosed by private land and only connected to the Mississippi River by a drainage ditch); *Parm v. Shumate*, 513 F.3d 135, 142, 144–45 (5th Cir. 2007) (rejecting fishing access claims in relation to the same water body arising under federal and state law theories); *Buckskin Hunting Club v. Bayard*, 868 So. 2d 266, 267, 273–75 (La. Ct. App. 2004) (prohibiting hunters from entering 14,000-acre area leased by private hunting club that was traversed by private canals and non-navigable waterways); *State v. Barras*, 615 So. 2d 285, 286–88 (La. 1993) (upholding criminal trespassing conviction of defendants engaged in commercial crawfishing who entered 600-acre tract of private land crossed by canals and other waterways that was submerged up to six months a year and that could be reached from a public boat launch).

305. *See* Transcript of Sentencing Hearing, *State v. Wagley*, No. 831167 (La. Jud. Dist. Ct. June 8, 2022) (on file with author); Continental Land & Fur Co.'s Response to Defendant Wagley's Pretrial Memorandum at 1, 3, 4, *State v. Wagley*, No. 831167 (La. Jud. Dist. Ct. Apr. 13, 2022) (on file with author). Additional facts about Robert Wagley's now-famous fishing trip are found in the account provided by the Louisiana Sportsmen's Coalition. *True Stories of the Harm Caused by Posted Water in Louisiana's Bayous*, LA. SPORTSMEN'S COAL., <https://www.joinlasc.com/stories/> (last visited Jan. 8, 2026).

306. *State v. Wagley*, No. 2022-KW-0668 (La. Ct. App. Aug. 18, 2022).

307. *State v. Wagley*, 352 So. 3d 81, 81 (La. 2022) (denying application for writ of certiorari). *See also* Brief for Louisiana Landowners Ass'n as Amicus Curiae Supporting Applicant at 3, *Wagley*, 352 So. 3d 81 (No. 2022-KK-01409). (on file with author).

308. *Bd. of Trs. of Internal Improvement Tr. Fund v. Fla. Pub. Utils. Co.*, 599 So. 2d 1356, 1357 (Fla. Dist. Ct. App. 1992) (stating that "Florida's test for navigability is similar, if not identical, to the federal title test"); *Odom v. Deltona Corp.*, 341 So. 2d 977, 986 (Fla. 1976) (noting that Florida jurisprudence generally follows federal title test and noting that Florida has not yet adopted recreational test for navigability).

309. *Internal Improvement Tr. Fund*, 599 So. 2d at 1358 (stating that facts relevant to the determination of navigability include "other conditions that would make the water body useful for public purposes," including "[t]he manner and extent of public or private commercial or recreational

open to public use under either of two complimentary tests: the historical highway of commerce test, which seems to incorporate log flotation,³¹⁰ or simply if a stream retains an average width of thirty feet above its mouth.³¹¹ In Tennessee, the law is even more difficult to interpret. Courts often recognize that a river can be navigable in a “legal sense,” meaning that a river satisfies the historical highway of commerce test and thus the state owns its bed, but they also note that a river can also be navigable in an “ordinary sense,” meaning that it is capable of floating logs, rafts, flatboats, or small vessels, and, therefore riparian proprietors can own the bed while that the public has “an easement to use the waterway.”³¹²

In sum, the striking trend in the Southeast and Gulf Coast is that courts in several states—Arkansas, Mississippi, and Alabama—have all redefined navigability itself without adopting the split title structure of the PRSA. Meanwhile, courts in Louisiana are increasingly reluctant to wade into difficult and highly charged access disputes bubbling up in the state’s marshes, swamps, and increasingly open coast.³¹³ Finally, courts in the remaining states have made gestures in the direction of flexibility but have struggled to bring clarity to the law.

4. The Mountain West and Pacific Coast

In the Mountain West and along the Pacific Coast, state courts once again expanded recreational use rights to inland waters, primarily by

usage”); *Baker v. State ex rel. Jones*, 87 So. 2d 497, 498 (Fla. 1956) (evidence that it was difficult to cross water body with a flat-bottomed row boat refuted the claim of navigability); *McDowell v. Trs. of Internal Improvement Fund*, 90 So. 2d 715, 716–17 (Fla. 1956) (determination of navigability was based at least in part upon evidence that the lake was useful for fishing); *Lopez v. Smith*, 145 So. 2d 509, 514 (Fla. Dist. Ct. App. 1962) (evidence of pleasure boating recognized as sufficient under the federal test to establish susceptibility to similar types of commercial use).

310. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Carroll*, 106 S.W.2d 757, 758–59 (Tex. Civ. App. 1937). Some Texas courts have taken a wide view of what counts as public utility in determining navigability. See *Welder v. State*, 196 S.W. 868, 873 (Tex. Civ. App. 1917) (noting references to carrying produce and merchandise, floating logs, and even pleasure boating as being “proper public uses”).

311. See TEX. NAT. RES. CODE ANN. § 21.001(3) (West 2025); *State v. Bradford*, 50 S.W.2d 1065, 1068–69 (Tex. 1932) (discussing what was then known as Article 5302, R.S., 1925); *St. Paul Fire*, 106 S.W.2d at 758–59. See also *Texas River Guide*, TEX. PARKS & WILDLIFE DEP’T, https://tpwd.texas.gov/publications/nonpwdpubs/water_issues/rivers/navigation/riddell/navigability.phtml (last visited Jan. 3, 2026).

312. *City of Townsend v. Damico*, No. E2013-01778-COA-R3-CV, 2014 WL 2194453, at *4–5 (Tenn. Ct. App. May 27, 2014) (citing *Webster v. Harris*, 69 S.W. 782, 784 (Tenn. 1902)). Because *Damico* was an unreported decision and the court’s ultimate disposition of a trespass conviction did not turn on whether the river in question was navigable in the legal or ordinary sense, *id.* at *5–6, it is not clear if Tennessee has fully adopted the PRSA. See also *State ex rel. Cates v. W. Tenn. Land Co.*, 158 S.W. 746, 748–49 (Tenn. 1913) (crystalizing the distinction between a river that is navigable in a legal sense or an ordinary sense).

313. A recent federal court decision has also cast doubt on the stability of Louisiana law on navigability. See *Thibodeaux v. Bernhard*, No. 23-30405, 2024 WL 3181458, at *1, *3, *6 (5th Cir. June 26, 2024) (holding that Lost Lake, a “perched lake” situated in the Atchafalaya Flood Basin and connected to the Atchafalaya River by a 10-to-20-foot-wide canal and accessible by water roughly 110 days a year during crawfishing season, is navigable-in-fact and provides the locational element for admiralty jurisdiction). For details on the controversy over ownership of submerged land on the Louisiana coast, see generally Lovett, *supra* note 86.

holding that rivers, streams, and lakes that do not qualify as navigable under the historical highway of commerce test are subject to a public easement for recreational boating and fishing—in short, by adopting the PRSA. Two important decisions from the early 1960s and 1970s sparked the doctrinal transformation in this region. A recent New Mexico decision has powerfully restated that state's public-trust-doctrine-inspired version of the PRSA, while Colorado remains the regional outlier having rejected an invitation to adopt the PRSA.

The Wyoming Supreme Court initiated the post-World War II doctrinal development in this region in *Day v. Armstrong*,³¹⁴ a 1961 decision involving a fisherman who claimed that the bed of a portion of the North Platte River was public property because the river was capable of floating small recreational watercraft.³¹⁵ Adjacent riparian landowners, however, asserted exclusive control over the riverbed and the river's waters because the river was non-navigable under the historical highway of commerce test.³¹⁶ Wyoming's attorney general, appearing as amicus curiae, conceded that the river was non-navigable under that test but still claimed the river could be used by the public for floating recreational watercraft, fishing, and other lawful purposes.³¹⁷ Eventually, the Wyoming Supreme Court agreed with the attorney general's view and held that even though the portion of the river in dispute was non-navigable under the federal proprietary title test, and thus its bed belonged to the riparian landowners,³¹⁸ the river was still subject to a public easement for boating and fishing.³¹⁹

The court justified its adoption of the PRSA by turning to state constitutional law inspired by the public trust doctrine and by drawing analogies with other areas of natural resource law. The court first observed that the Wyoming constitution and federal statutes establish that the state owns all waters in trust for the people.³²⁰ Next, it asserted its authority to determine the use and control of those waters, even if a riverbed is private under the federal proprietary title test.³²¹ Then the court found that the relevant portion of the North Platte River could sustain recreational

314. 362 P.2d 137 (Wyo. 1961).

315. *Id.* at 140, 142. For the court's description of the relevant portions of the North Platte River and its capacity to support floatage, see *id.* at 140.

316. *Id.* at 141–42, 147.

317. *Id.* at 138, 142. Other intervenors claimed only the right to float and fish in the river, but wool growers and stock growers supported the riparian landowners. *Id.* at 138, 141–42.

318. *Id.* at 144–45.

319. *Id.* at 143–45. The court stated its key holding in this passage: "The title to waters within this State being in the State, in concomitance, it follows that there must be an easement in behalf of the State for a right of way through their natural channels for such waters upon and over lands submerged by them or across the bed and channels of streams or other collections of waters." *Id.* at 145.

320. *Day*, 326 P.2d at 145 (citing WYO. CONST. art. 8, § 1 ("natural streams, springs, lakes or other collections of still water . . . are hereby declared to be the property of the state")) and 26 Stat. 222 (1890)).

321. *Id.* at 144.

boating at least part of the year.³²² Finally, the court explained that recognition of a public recreational easement over a privately owned water bed would not create a novel property relationship because, after all, horizontal segregation of property rights was already commonplace in Wyoming and other mining states when the surface ownership of land is burdened with a subsurface mineral right and both interest holders are subject to duties of mutual accommodation.³²³ In the end, the court chiseled down the scope of the public's recreational easement on a non-navigable river in Wyoming by specifying that a member of the public could boat and fish in a non-navigable river's waters under the easement but could not wade or walk in such a river or use its banks.³²⁴

Ten years later, in *People ex rel. Baker v. Mack*,³²⁵ a California appellate court consolidated much of the preceding case law and announced a broad public recreational access right in inland water bodies in a case concerning public access to the Fall River in Shasta County.³²⁶ The court justified its ruling here by quoting *Lamprey* at length, discussing cases from other states, and synthesizing California case law that had already been moving in the direction of a broader understanding of navigability.³²⁷ Noting that private ownership of the riverbed at issue under the federal proprietary title test was immaterial,³²⁸ the court held that the relevant segment of the river was nevertheless "navigable in fact" and embraced what it called the "modern tendency" to recognize public use rights in "any stream capable of being used for recreational purposes."³²⁹ Summing up, the court restated California's navigability test for public recreational access in broad terms: "[M]embers of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor-propelled small craft."³³⁰

322. *Id.* at 141.

323. *See id.* at 145.

324. *Id.* at 145–46 (distinguishing *Elder v. Delcour*, 269 S.W.2d 17, 23–24, 26 (Mo. 1954), which held that the public had a right to navigate, fish and *wade* in rivers and streams capable of sustaining recreational use). For more details on the precise scope of public recreational use rights in rivers that are non-navigable in the federal sense in the Mountain West and distinctions between the right "to float" or the right "to float and touch," see Benson, *supra* note 159, at 82–95.

325. 97 Cal. Rptr. 448 (Ct. App. 1971).

326. *Id.* at 449–51, 454. In this case, the local district attorney in Shasta County filed a public nuisance suit against riparian landowners who had erected booms, fences, wires, cables, and low bridges to restrict public access to the Fall River, a waterway 107 to 292 feet wide and 2.7 to 17 feet deep. *Id.* at 450–51.

327. *Id.* at 451–53. The key California precedent was *Bohn v. Albertson*, which had relied on *Lamprey* and held that boating for pleasure was sufficient to establish navigability even though the water body at issue could not sustain heavier barge traffic. 238 P.2d 128, 132–35 (Cal. Ct. App. 1951).

328. *Mack*, 97 Cal. Rptr. at 454. The riparian landowners contended the Fall River was not navigable under the federal proprietary title test despite some evidence of log flotation fifty years earlier and despite navigation by recreational fishing boats. *Id.* at 450–51.

329. *Id.* at 451.

330. *Id.* at 454.

In the years that followed, state courts throughout the Mountain West and Pacific Coast region relied on *Day* and *Mack*, along with various state constitutional and statutory provisions declaring public ownership of unappropriated water, to uphold public recreational use rights for fishing and boating in rivers, streams, and lakes, even when the water bottoms are privately owned under the federal proprietary title test. In 1974, the Idaho Supreme Court, citing *Mack*, broadly affirmed a public right to use water for fishing, boating, swimming, hunting, and “all recreational purposes” on any stream, “which, in its natural state, will float logs or any other commercial or floatable commodity, or is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes.”³³¹ In 1984, in two cases decided only a few weeks apart, the Montana Supreme Court recognized broad public recreational use rights in rivers and streams even if the stream beds are privately owned.³³² In the 1980s, the Utah Supreme Court also recognized significant public recreational use rights in rivers and streams whose beds and banks are privately owned based on public ownership of water, even though the Utah legislature narrowed those rights in 2010.³³³

The New Mexico Supreme Court’s recent decision in *Adobe White-water Club of New Mexico v. New Mexico State Game Commission*³³⁴ culminated this expansive regional trend by holding that the public enjoys a broad right founded in the state’s constitution and the public trust doctrine to fish, boat, and wade in the bed of any river or lake in New Mexico, even if the water body is classified as non-navigable under the federal proprietary title test.³³⁵ Unlike many other cases reviewed in this Article, *Adobe Whitewater* did not concern a particular waterway. Instead, the case stemmed from a 2015 amendment to a state statute that sought to prevent people who engage in any recreational activity that might involve publicly owned water from walking or wading “onto pri-

331. *S. Idaho Fish & Game Ass’n v. Picabo Livestock, Inc.*, 528 P.2d 1295, 1297–98 (Idaho 1974).

332. *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 168, 170 (Mont. 1984) (holding that under the Montana Constitution and the public trust doctrine, a river or stream’s capability for use determines its availability for use); *Mont. Coal. for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088, 1092, 1094 (Mont. 1984) (holding that a private stream or riverbed owner’s title has no impact on the public’s use of a stream that is suitable for recreational use and that navigability for recreational use is limited, under the Montana Constitution, “only by the capabilities of the waters themselves for such use”). In *Hildreth*, the Montana Supreme Court emphasized, relying on California cases like *People v. Mack*, that title to the underlying stream bed is immaterial to determining navigability for recreational use. *Id.* at 1092.

333. *See J.J.N.P. Co. v. State ex rel. Div. of Wildlife Res.*, 655 P.2d 1133, 1136–37 (Utah 1982) (holding that public ownership of water gives the public an easement over water, including a right to float, fish, and “participate in any lawful activity,” regardless of bed and bank ownership); *Conatser v. Johnson*, 194 P.3d 897, 899–902 (Utah 2008) (finding a right to float upon water and touch the beds and banks of a river subject to the public’s recreational easement), *superseded by statute*, Public Waters Access Act, UTAH CODE ANN. §§ 73-29-101 to -208 (West 2025), *as recognized in*, *Utah Stream Access Coal. v. Orange St. Dev.*, 416 P.3d 553, 555, 557 (holding that statute essentially adopted the federal navigability for title test for public access).

334. 519 P.3d 46 (N.M. 2022).

335. *Id.* at 52–53, 56–57.

vate property through non-navigable public water or [from] access[ing] public water via private property” without a landowner’s written permission.³³⁶ Restrictive regulations enacted by the New Mexico State Game Commission pursuant to this amendment threatened to subject anyone who touched the bed of a non-navigable private waterway in New Mexico with prosecution for criminal trespass.³³⁷

After the regulations were promulgated, outdoor recreation and environmental organizations filed a petition for mandamus with the New Mexico Supreme Court to challenge landowners’ ability to obtain enclosure certificates and to stop the commission from enforcing its regulations.³³⁸ The petitioners argued that the regulations violated Article XVI, Section 2 of the New Mexico Constitution, which establishes the public’s constitutional right to use unappropriated water in every natural stream in the state.³³⁹ Landowners intervened, arguing that the regulations did not privatize or close public waters but merely expressed “the existing right to exclude trespassers on privately owned riverbeds.”³⁴⁰ Eventually, the New Mexico Supreme Court ruled decisively in favor of the petitioners.³⁴¹

The cornerstone of *Adobe Whitewater* was the court’s recognition that the state constitution and its own 1945 decision in *State ex rel. State Game Commission v. Red River Valley Co.*³⁴² established a property right held by the public: a right “to recreate in the waters of New Mexico” that was equal in rank and dignity to the rights of landowners who own land adjacent to or underneath the state’s waters.³⁴³ According to the court,

336. *Id.* at 49 (quoting and discussing N.M. STAT. ANN. § 17-4-6 (2015)).

337. Under the regulations, a landowner could obtain a certificate and official signage indicating that subaqueous land is non-navigable private property and threatening criminal trespass prosecution for those who walk, wade, or merely touch the now-closed water bottom without landowner consent. *Id.* at 50 (discussing and quoting N.M. CODE R. § 19.31.22.6, .13(F) (LexisNexis 2018)). To obtain the necessary certificate and signage, a landowner had to prove that the watercourse was “non-navigable” at statehood on a “segment by segment basis,” under the historical highway of commerce test. *Id.* (discussing and quoting N.M. CODE R. § 19.31.22.8(B)(4), .7(G) (LexisNexis 2018)).

338. *Id.* at 49–50.

339. *Id.* at 50–51. Article XVI, § 2 of the New Mexico Constitution, which articulates principles dating back to New Mexico’s 1907 Territorial Water Code and to Mexican and Spanish law, provides: “[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.”

Id. at 51 (quoting N.M. CONST. art. XVI, § 2 (emphasis added)).

340. *Adobe Whitewater*, 519 P.3d at 50. Other interested persons entered the lawsuit, including the state attorney general and the state’s sitting governor, who both sided with the landowners, and United States Senators and other wilderness and environmental groups, who filed amicus briefs on the side of the petitioners. *Id.* at 48.

341. *Id.* at 58.

342. 182 P.2d 421 (N.M. 1945).

343. *Adobe Whitewater*, 519 P.3d at 51. Recall that in *Red River Valley*, the New Mexico Supreme Court found a public right to use water in place even when waters flow over privately owned, non-navigable water beds and determined that those public rights include fishing and recreation. 182 P.2d at 427–28, 430–31, discussed *supra* notes 209–217 and accompanying text. In

the commission's regulations violated the state constitution and the principles articulated in *Red River Valley*.³⁴⁴ What's more, the public's right to use publicly owned, non-appropriated water, even water in a non-navigable water body whose bed is privately owned, includes not just the right to recreate and fish but also "the privilege to do such acts as are reasonably necessary to effect the enjoyment of such right," in other words, activities like "[w]alking and wading on the privately owned beds."³⁴⁵

As in so many other decisions studied in this Article, the court implemented its property sharing vision by recognizing that the public holds an easement "*upon the water*" of the state, floating over privately owned water beds, and encompassing all "lawful activities that *utilize* the water."³⁴⁶ The court did impose some limits on the public's recreational easement by providing that the public must exercise its rights in a manner that has "minimal impact" on the real property interests of riparian landowners and by specifying that the public cannot walk or wade onto privately owned riparian land *adjacent* to a river or stream and cannot access public water by crossing privately owned riparian property.³⁴⁷

Finally, the court in *Adobe Whitewater* rejected the suggestion that its decision was a judicial taking merely because some landowners could trace their riverbed titles back to the United States under the equal footing doctrine.³⁴⁸ The court's response to the judicial takings argument was simple—the public's easement in unappropriated water in New Mexico stems from prior existing law recognized by federal courts.³⁴⁹ In other words, New Mexico's public trust doctrine establishing public recreation rights in New Mexico waters is a background principle of law and a landowner's private riverbed title is held "subject to the public's easement in public waters."³⁵⁰ Put quite simply, *Adobe Whitewater* did not take anything away from New Mexico's riparian or littoral landowners; it merely clarified the scope of a preexisting public easement and made "explicit what was already implicit in *Red River*."³⁵¹

Adobe Whitewater, the New Mexico Supreme Court also cited the United States Supreme Court decision in *PPL Montana* and "accepted principles of federalism," to stress that the states retain "residual power to determine the scope of the public trust over waters within their borders" even though federal law determines riverbed title." *Adobe Whitewater*, 519 P.3d at 52 (quoting *PPL Mont., LLC v. Montana*, 565 U.S. 576, 604 (2012)).

344. *Adobe Whitewater*, 519 P.3d at 56.

345. *Id.* at 53–54.

346. *See id.* at 54–56. Here the court also relied upon judicial decisions from other states, including especially *Day v. Armstrong*, to justify its affirmation of the public's recreational easement over inland waters. *Id.* (discussing *Day v. Armstrong*, 362 P.2d 137, 140, 146–47, 151 (Wyo. 1961); *Conatser v. Johnson*, 194 P.3d 897, 902 (Utah 2008); *Hartman v. Tresise*, 84 P. 685, 689–90, 692 (Colo. 1905) (Bailey, J., dissenting)).

347. *Id.* at 56–57.

348. *See id.* at 57.

349. *Id.*

350. *Adobe Whitewater*, 519 P.3d at 58.

351. *Id.*

The expansion of public recreation access rights under the PRSA has reached its zenith in the Mountain West and Pacific Coast region. In Oregon, a state that helped launch the PRSA through two pre-World War II decisions,³⁵² the state supreme court recently reaffirmed the principles established in those landmark cases and denominated them as Oregon’s “public use” doctrine (as distinct from its “public trust” doctrine), while holding that the public’s easement to use water in a river or lake for navigation and recreation does not include a right to access water from city-owned land abutting a meandered lake that may or may not be navigable under the federal proprietary title test.³⁵³ In Alaska, the PRSA has also had a strong influence on that state’s long history of constitutional and statutory protection of public recreational rights to waterways.³⁵⁴

However, there is one significant outlier in this region—Colorado. In *People v. Emmert*,³⁵⁵ a dispute between recreational river rafters and a riparian owner of a portion of the Colorado River that was non-navigable under the historical highway of commerce test, the Colorado Supreme Court expressly declined an opportunity to adopt the PRSA.³⁵⁶ In *Emmert*, the court stressed that Colorado’s constitutional provision declaring

352. See *supra* notes 202–08 and accompanying text (discussing *Guilliams v. Beaver Lake Club*, 175 P. 437, 441–42 (Or. 1918); *Luscher v. Reynolds*, 56 P.2d 1158, 1161–62 (Or. 1936)).

353. *Kramer v. City of Lake Oswego*, 446 P.3d 1, 8–11 (Or. 2019), *modified*, 455 P.3d 922 (Or. 2019). In other portions of this decision, however, the court held that the public does have a right to access public water from abutting public land under the proprietary component of the public trust doctrine, subject to objectively reasonable rules interfering with that right, and remanded for resolution of the factual determination of whether the lake at issue was subject to the public trust doctrine under the equal footing doctrine, and if so, whether the city’s restrictions on entering the lake from waterfront parks unreasonably interferes with the public’s rights under the public trust doctrine. *Kramer*, 446 P.3d at 6, 12–18, 25–26. For more on the Oregon-specific background to *Kramer*, see Blumm and Engle, *supra* note 33, at 23–26. Blum and Engel contend that the bed of Lake Oswego, the water body at issue in *Kramer*, is likely owned by the state of Oregon because it was meandered at statehood. *Id.* at 23 & n.139.

354. Alaska’s state constitution guarantees “[f]ree access to the navigable or public waters of the State.” ALASKA CONST. art. VIII, § 14. A statute defines “navigable water” to mean any waterway in the state capable of sustaining “any useful public purpose, including water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes,” ALASKA STAT. § 38.05.965(14) (2025), and defines “public waters” in similarly broad fashion, *id.* § 38.05.965(21). Although the state of Alaska often clashes with the federal government over ownership of submerged land beneath waterways under the federal highway of commerce test, see *Navigability Project*, *supra* note 128, Alaska courts have routinely applied the state’s constitutional and statutory provisions to classify rivers as navigable to protect the rights of recreational users, such as teenage rafters assaulted by an angry riparian landowner who claimed he owned the bed of the Chickaloon River. *Harrison v. State*, No. A-13276, 2022 WL 1769132, at *1, *3–4 (Alaska Ct. App. June 1, 2022). Public officials in Alaska cite the influence of the public trust doctrine as developed in decisions like *People ex rel. Baker v. Mack*, 97 Cal. Rptr. 448 (Ct. App. 1971), for the strong protections established in Alaska legislation. See *Navigability Project*, *supra* note 128.

355. 597 P.2d 1025 (Colo. 1979).

356. *Id.* at 1026–28. The defendants in *Emmert* were rafters who entered the Colorado River from public land and floated downstream in rafts and only touched the riverbed during their float trip though leg holes in their raft. *Id.* at 1026. The owner of a ranch bordering both sides of the river erected barbed wire across the river and had the defendants arrested and prosecuted for criminal trespass after they notified the defendants they were not welcome to float down the river through the ranch. *Id.*

state ownership of unappropriated water was narrower than the constitutional provision animating the Wyoming Supreme Court decision in *Day*.³⁵⁷ In addition, the court claimed to be constrained by the *ad coelum* doctrine and a 1906 Colorado precedent holding that the owner of a non-navigable riverbed enjoyed exclusive fishing rights in the waters flowing over those beds.³⁵⁸ Finally, even though it acknowledged that courts in many other states had decoupled riverbed ownership from public recreational use rights in surface waters, the court refused to follow that trend as a matter of institutional competence, indicating it was the legislature's prerogative to make changes in Colorado water law.³⁵⁹ The decision in *Emmert* continues to cast its influence over public recreation access disputes over inland water in Colorado, including a recent controversial case in which the Colorado Supreme Court held that a recreational fisherman who sought judicial recognition that the state owns a portion of the bed of the Arkansas River because the river was navigable at statehood lacked a "legally protected interest" affording him standing to assert his claim.³⁶⁰

III. PROPERTY THEORY JUSTIFICATIONS FOR THE PRSA

State courts across the United States have justified their adoption of the PRSA on numerous grounds, including the growing economic and social value of recreational use of waterways, common law and state constitutional versions of the public trust doctrine, the historical legacy of the Northwest Ordinance of 1787, and concerns about the monopolization of waterways by riparian landowners, to name just a few. The work of these courts can also be justified under several innovative property law theories advanced by scholars over the past three decades. Some of those theories are utilitarian in nature and highlight the efficiency of property rules in comparison to other areas of private law. Some are rights-based. Others are grounded in historical analysis of property law doctrine. Some borrow from the social sciences. All of them, however, provide useful lenses to appreciate the practical and normative advantages of the PRSA.

357. *Id.* at 1028.

358. *Id.* at 1027 (citing *Hartman v. Tresise*, 84 P. 685, 687 (Colo. 1906)).

359. *Id.* The Colorado Supreme Court also bolstered its holding in *Emmert* by citing a handful of state statutes that collectively indicated legislative acceptance of private landowner's right to deny access to non-navigable streams flowing through their lands. *Id.* at 1029–30.

360. *State v. Hill*, 530 P.3d 632, 633, 635–36 (Colo. 2023). Had the Colorado Supreme Court recognized the PRSA in *Emmert*, the plaintiff in *Hill* would never have needed to try to prove state title to the riverbed in question. For more on the controversy in *Hill*, see Howe, *supra* note 7.

A. Modularity, Information Processing Efficiency, and Enforcement Costs: From the Right to Exclude to the Right to Enter

In his classic article, *Property as the Law of Things*, Henry Smith articulates an “architectural or modular theory of property.”³⁶¹ For Smith, property law’s particular role within the broader realm of private law is to provide an easy-to-use platform for managing the complexity of interactions between private parties and to minimize the costs of delineating the rights and interests we all have in using things.³⁶² Property law accomplishes these tasks in a number of ways. First, it requires property interests to be formed into “lumpy packages” or “modules.”³⁶³ Second, it restricts or standardizes the forms of these packages or modules.³⁶⁴ Finally, it provides different kinds of rules or “strategies” for managing different kinds of resources in different contexts.³⁶⁵

Distinguishing property law’s rules from other areas of private law in this third resource management dimension is what Smith calls “exclusion strategies,” relatively simple, on–off, black–white rules that tell an anonymous, wide, and indefinite class of non-owner duty holders to “keep off” and that simultaneously instruct outsiders and market participants who they must deal with to gain access to a privately owned thing.³⁶⁶ Prime examples of rules within this cluster of exclusion strategies are the right to exclude in trespass law, the *ad coelum* doctrine, and other simple accession rules.³⁶⁷ Smith is quick to point out that exclusion strategies like the right to exclude do not have any inherent moral value but are useful to property law instrumentally because of their relative invariance—that is, because they do not require case by case contextual analysis.³⁶⁸ Property law’s modular structure is also useful, Smith explains, because lumpy modules or packages of rights can be used recur-

361. Smith, *supra* note 35, at 1700.

362. *Id.* at 1693–99, 1704–05; *see also* Merrill & Smith, *supra* note 35, at 809 (examining how property law organizes private parties and manages their interactions); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 963–69, 971–75 (2009) (arguing that property law must pay particular attention to the means of managing complex relationships rather than just focusing on the ends).

363. Smith, *supra* note 35, at 1693.

364. *Id.* at 1706. *See also* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3–9 (2000).

365. Smith, *supra* note 35, at 1702–03.

366. *Id.* at 1693, 1700–02, 1706–07.

367. *Id.* at 1700–03; THOMAS W. MERRILL & HENRY E. SMITH, OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 6–7, 30–33 (2010). When the resource at issue is land, it is not always obvious who an outsider has to deal with to gain access rights because the land may be owned by an absentee owner, to say nothing of a corporation or a trust. Public records examinations, corporate investigations, and land surveys might all be required to determine who is the effective gatekeeper of the land. If a tract of land is bounded by or crossed by a water body, the task of determining the extent of private land ownership can become even more challenging requiring application of the historical highway of commerce test.

368. Smith, *supra* note 33, at 1705 (stating that “exclusion” is “*not a value at all*,” but just “a rough first cut” aimed at “serving the purposes of property”); *id.* at 1704, 1710–11 (explaining comparative advantages of exclusion strategies and modularity in terms of “decontextualization” and “relative invariance”).

sively to create more complex patterns by nesting one module within another and by allowing easy interface between modules in the same way that simple grammar rules allow for the flowering of complex communication in language and literature.³⁶⁹

Of course, not all of society's interests in the use of things are well served by exclusion strategies. Some potential resources, water and information to name two prime examples, lack inherent thing-like qualities, and multiple parties can use them simultaneously.³⁷⁰ For these types of resources, "governance strategies"—more complex, contextualized property rules established by contract or government regulation—may be more efficient and useful.³⁷¹ Governance strategies may also be superior when the object of property is actually quite thing-like—say a parcel of land, or a building—but parties want to create more complex, interdependent relationships, for example, through interlocking covenants, conditions, and restrictions managed by a homeowners or condominium association or a large shopping center with common spaces and multiple tenants of varying sizes and needs.³⁷² Finally, some property relationships, Smith notes, are best served through an intermediate-level strategy in between the simplicity of a fee simple interest in land protected by the right to exclude or basic accession doctrines and the complexity of a shopping center development governed by leases and interlocking covenants or a region-wide air pollution emissions regulatory scheme.³⁷³ Tellingly, Smith's paradigmatic example of an intermediate-level strategy are the rules used to govern a parcel of land owned by *O* and burdened with an access easement in favor of *A*.³⁷⁴

Armed with Smith's architectural or modular theory of property and its insights into the importance of reducing information processing and interest delineation costs, we can now visualize the efficiency gains that result from the PRSA. The test for determining whether a non-owner member of the public can canoe, kayak, sail, boat, or fish in a disputed waterway only requires interested parties to ask whether a person can travel on the water body in question in a typical recreational vessel—a pleasure boat.³⁷⁵ Unlike the historic highway of commerce test used to

369. *Id.* at 1704, 1707–08.

370. *Id.* at 1703, 1711. For an even more detailed account of the complexity and hybridity of water management regimes, see generally Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 445 (2008).

371. Smith, *supra* note 35, at 1703, 1704.

372. MERRILL & SMITH, *supra* note 369, at 123–29.

373. Smith, *supra* note 35, at 1714; MERRILL & SMITH, *supra* note 369, at 123–129 (discussing complex property arrangements separating ownership and management rights to achieve efficiency gains in shopping centers and common interest communities).

374. Smith, *supra* note 35, at 1710; Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL. STUD. S453, S455 (2002) (locating easements toward the middle of the spectrum between pure exclusion and pure governance strategies).

375. As many fishermen like to say in jurisdictions that follow this approach, if a river or lake can float a boat, it is open for fishing. See *What Is a Navigable Waterway*, *supra* note 37.

determine proprietary title under the equal footing doctrine, but more like other easements which Smith places roughly halfway between pure exclusion and pure governance strategies, the PRSA does not require professional surveys, expensive title examinations tracing title of subaqueous land back to the sovereign, or historical explorations of the kinds of commercial activities that might have occurred on a waterway at the time of statehood. Instead, if the waterway in question can be traversed by typical recreational boats, the scope of the public's rights under the PRSA is relatively clear: The public can travel and fish in the water, engage in activities incidental to navigation, like touching the water bottom or briefly touching the bank, but cannot cross private land to get to the water and cannot exit from the water and cross onto private land.³⁷⁶ As Smith would put it, the intermediate-level resource allocation strategy of the PRSA interfaces rather easily with other property modules including a riparian or littoral property owner's fee simple interest in land and any subordinate interests nested within it such as a lease, life estate, or another easement in favor of a neighboring property owner.³⁷⁷

To get a sense of the comparative efficiency of the two dueling tests, let us compare a few leading cases. First, take the United States Supreme Court's application of the historical highway of commerce test in *PPL Montana*, where the court was required to explore, in fascinating but excruciating detail, the historical record of early-nineteenth-century explorers and trappers in Montana and speculate on the effect of rapids and waterfalls on transportation more than one hundred years ago.³⁷⁸ Compare that complex analysis with *McIlroy*, where the Arkansas Supreme Court quickly concluded that the Mulberry River was subject to the PRSA because it could sustain recreational use by the public in flat-bottomed fishing boats and canoes,³⁷⁹ or *Day*, where the Wyoming Supreme Court concluded that the portion of the North Platte River in dispute was subject to the PRSA because it could sustain recreational boating for at least part of the year.³⁸⁰ In the latter two cases, the PRSA produces a clear, relatively intuitive classification result that is easy for non-owners and others to predict and observe on their own.

Another valuable insight emerging from Smith's theory—this time relating to institutional competence in property law rulemaking—also

376. As discussed previously, a state might impose additional limits on touching the bed of a waterway or stopping on the bank, as the Wyoming Supreme Court did in *Day v. Armstrong*, 362 P.2d 137, 146–47 (Wyo. 1961), or as the Oregon Supreme Court did in *Kramer v. City of Lake Oswego*, 446 P.3d 1, 9–11 (Or. 2019) (restricting public use rights to waterways that are navigable “in a qualified or limited sense” but not in the federal proprietary title sense to use of water itself and limiting access to abutting lands to activities that are incidental to navigation and temporary in nature). See Benson, *supra* note 159, at 82–95 (describing variations in the extent of public access permitted under six Mountain West states' recreational access approaches).

377. Smith, *supra* note 35, at 1704, 1707–08, 1714.

378. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 581–87, 591–603 (2012).

379. 595 S.W.2d 659, 664–65 (Ark. 1980).

380. *Day*, 362 P.2d at 140, 142, 144.

bears upon the PRSA. Smith argues that when new property forms need to be created through the process of “remodularization,” concerns about information processing efficiency explain why legislatures rather than courts generally take the lead because they can broadcast the contours of a new module more widely and can bind parties prospectively with more efficiency than courts.³⁸¹

A few of the decisions rejecting the PRSA have made a similar point.³⁸² Advocates of the PRSA can answer this institutional choice argument, however, by observing that the PRSA is not really a new property module at all. It simply recognizes that a riparian or littoral proprietor’s fee simple interest in subaqueous land is burdened by a public easement, the same basic arrangement that English common law courts recognized centuries ago for non-tidal (i.e., non-royal) but navigable rivers and that American courts began to recognize in the early-twentieth century.³⁸³ The fact that the servitude is not held by a neighboring property owner or even a distinct individual or juridical entity is hardly novel either, as easements in favor of the public, established by prescription or implied or formal dedication, have long been recognized at common law and by statute.³⁸⁴ Finally, the occasional legislative claw back of the PRSA suggests that legislatures certainly know how to unwind a judge-made property law innovation they do not like.³⁸⁵ In fact, decades of legislative passivity in the wake of so many landmark decisions recognizing the PRSA may be a sign of tacit legislative approval in many states.³⁸⁶

One more way to appreciate the efficiency gains that can result from the PRSA is to visualize the rule not so much as an exception to the right to exclude but rather as a manifestation of a positive right to enter.³⁸⁷ As Bethany Berger has recently explained, perhaps more often than many realize a *right to enter* can be just as or even more efficient than a *right to exclude* if the enforcement costs associated with the latter are too high to justify the purported gains from exclusion.³⁸⁸ Yes, exclusion strategies like the right to exclude and the *ad coelum* doctrine can help manage and

381. Smith, *supra* note 35, at 1724; Merrill & Smith, *supra* note 35, at 58–68.

382. Mountain Props., Inc. v. Tyler Hill Realty Corp., 767 A.2d 1096, 1100 (Pa. Super. Ct. 2001); Bott v. Comm’n of Nat. Res., 327 N.W.2d 838, 842 (Mich. 1982); People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979).

383. See Hale, *De Jure Maris*, in A HISTORY OF THE FORESHORE, *supra* note 29, at 374; MacGrady, *supra* note 51, at 571–72.

384. See Rose, *supra* note 41, at 723–27, 731–34, 739–53, 762–66, discussed *infra* notes 419–428 and accompanying text.

385. See Conatser v. Johnson, 194 P.3d 897, 899 (Utah 2008), *superseded by statute*, UTAH CODE ANN. §§ 73-29-101 to -208, as recognized in, Utah Stream Access Coal. v. Orange St. Dev., 416 P.3d 553, 555 (Utah 2017), discussed in Benson, *supra* note 159, at 94.

386. As Reed Benson points out, the hesitancy of state governmental actors to “wade into” the value-driven clashes between public-access advocates and “influential streamside landowners” often forces the courts to resolve conflicts over recreational access to rivers and lakes that have not historically been considered navigable water bodies. Benson, *supra* note 159, at 108.

387. See Berger, *supra* note 38, at 95–101.

388. *Id.* at 83.

divide certain resources and keep communication costs to a minimum, but these strategies, and their apparently bright-line rules, can also backfire if individuals routinely violate the rules and officials refuse to enforce the rules because they “diverge from community ideas about justice.”³⁸⁹

Something like this appears to be happening right now in Louisiana, for instance, where an appellate court recently vacated a criminal trespass conviction of a fisherman caught fishing on an easily accessible but technically non-navigable waterway, and the Louisiana Supreme Court refused to intervene despite dire warnings from the state’s largest landowners.³⁹⁰ Similarly, in Nebraska, the state attorney general issued an opinion in response to complaints by riparian landowners along the Platte River about air boaters who stop and fish in the river, allegedly disturbing landowners on the adjacent banks but who claimed the right to come and go on the waters as they wish.³⁹¹ Noting that the navigability of the Platte River under the historical highway of commerce test had never been definitively determined and that the state constitution, state statutes, and earlier Nebraska judicial decisions recognized that running water is “publici juris” and could be interpreted broadly to create public recreational rights even over the bed of a non-navigable water body, the attorney general advised county attorneys not to attempt to solve these conflicts through the use of criminal law and invited the legislature to take action instead.³⁹² At the end of the day, property governance strategies like the PRSA, which create a limited or conditional “right to enter” and which “conform to customary or intuitive norms” more than a rigid right to exclude, may—at least in the context of inland waterways that can easily sustain recreational use—reduce information processing and delineation costs “not because they are simple but because the people bound by them know and understand them.”³⁹³

B. Natural Law: Productive Use, Claim Communication, and the PRSA

In several articles and a new book, Eric Claeys has advanced a prominent rights-based theory of property grounded in natural law reasoning.³⁹⁴ In some ways, Claeys’s theory of natural property rights, just

389. *Id.* at 86.

390. *See State v. Wagley*, 352 So. 3d 81 (La. 2022), discussed *supra* notes 307–09 and accompanying text.

391. Neb. Att’y Gen., Opinion No. 7 (Jan. 11, 1971).

392. *Id.* (citing NEB. CONST. art. XV, § 5; NEB. REV. STAT. § 46-202 (2025); *Kirk v. State Bd. of Irrigation*, 134 N.W. 167 (Neb. 1912)). The Nebraska legislature has also adopted the following provision implementing its constitutional declaration of state ownership of running waters, which only creates more uncertainty: NEB. REV. STAT. § 28-1401 (2025) (providing that the people of Nebraska “shall have access by boat to any cutoff, chute, backwater, or bayou connected with any navigable stream located in the State of Nebraska, but that nothing in this section shall serve to allow trespass upon the lands of any person”).

393. Berger, *supra* note 38, at 86.

394. *See Claeys, Natural Property Rights*, *supra* note 36, at 427–38; Claeys, *Labor, Exclusion, and Flourishing*, *supra* note 36, at 420.

like Smith's utilitarian theory, aims to be architectural in scope by identifying the essential property law rules that form the building blocks of a property law system, justifying those rules, and then using those basic rules to explain more complex property arrangements and solve conflicts over use.³⁹⁵ Claeys's theory begins with the proposition that a person can legitimately claim a natural property right in a thing—a separable or ownable resource distinct from an individual's personality—if that person, first, *uses* the resource in a manner that contributes to someone's "preservation or flourishing," and, second, if that person's use gives other persons in the property claimant's community recognizable *notice* that the person is using or planning to use the claimed resource and wants others not to interfere with that person's actual or planned use of the resource.³⁹⁶ In short, a natural property right in Claeys's property theory is founded upon "productive use" and clear "claim communication," regardless of whether the property interest takes the form of a usufructuary right or a more complete ownership right.³⁹⁷

Drawing on Grotius and Locke, Claeys also contends that in some situations people who do not hold a conventional property right in a thing—outsiders or non-owners—should be given a temporary right to use a resource that belongs to another.³⁹⁸ These property limitations, which Claeys calls "provisos," function like safety valves and relieve pressure on a property system when the more rigid, formal nature of property rights would otherwise deny outsiders or non-owners access to important resources at crucial moments.³⁹⁹ The first limitation, the "necessity proviso," gives outsiders or non-owners temporary access to a resource in an emergency when the immediate need to preserve human life and safety requires the boundaries of property rights to yield.⁴⁰⁰ The second limitation, the "sufficiency proviso," requires that owners share or grant access to resources when the property system writ large fails to provide a minimum amount of resources ("enough, and as good") to a large segment of a community and, in particular, when it fails to give all members of a community "a reasonable opportunity to acquire and use goods for their own preservation and self-government."⁴⁰¹ Yes, there will always be difficult line-drawing questions when it comes to determining

395. See generally Claeys, *Natural Property Rights*, *supra* note 36 (identifying general property law principles and applying them to a case study).

396. *Id.* at 420, 437.

397. See *id.* In a recent essay, I explain my own reading of Claeys' natural property rights theory and the importance of these two basic features of a property right. See John A. Lovett, *Oil, Trees, and Water: Evaluating the Transition from Natural Property Rights to Property Conventions*, 9 TEX. A&M J. PROP. L. 613, 617–19 (2023).

398. Claeys, *Natural Property Rights*, *supra* note 36, at 420, 428, 437.

399. Lovett, *supra* note 399, at 619.

400. Claeys, *Natural Property Rights*, *supra* note 36, at 420, 437.

401. Lovett, *supra* note 399, at 619 & n.30; Claeys, *Natural Property Rights*, *supra* note 36, at 420, 437–38.

the scope of these provisos,⁴⁰² but for Claeys the key features of his vision of property are the moral legitimacy of property rights founded on productive use and effective, clear claim communication, as well as the idea that property rights can be limited when necessity or sufficiency concerns become severe.

In a previous essay, I argued that Claeys's account of natural property rights can help sort out disputes over resources like subsurface oil reserves that cross surface property boundaries, timberlands subject to temporally divided property rights, and emerging conflicts over coastal land becoming submerged beneath rising seas.⁴⁰³ Disputes over recreational access to inland rivers and lakes can also, I suspect, be understood through a Claeysian natural property rights lens, particularly with reference to the two foundational requirements of productive use and clear claim communication. On one hand, under the PRSA, the water flowing in a modest river that is not navigable under the historic highway of commerce test can still be used productively by a riparian landowner under the applicable riparian rights or prior appropriation regime for consumptive use.⁴⁰⁴ On the other hand, once the riparian landowner takes the water allocated for that person's consumptive use under the relevant use regime, the riparian landowner has little need to prevent a recreational boater or fishermen from traveling on the water, provided the recreational user avoids interference with the riparian landowner's use of the adjoining land or the river's banks.

Concerns about clear claim communication also point toward the superiority of the PRSA. When a littoral or riparian landowner claims to own the soil beneath a river or lake that is not navigable under the historic highway of commerce test and then asserts the right to exclude the public, there is no obvious or easy way for an outsider to know that the river or lake is subject to private exclusion rights unless some public official has reviewed a proprietary title analysis under the equal footing doctrine and then sanctioned the posting of signs reflecting the title claims of the respective riparian or littoral landowner. In the *Adobe Whitewater* case in New Mexico, the New Mexico State Game Commission tried to devise regulations to operationalize just this kind of clunky claim communication regime by requiring proof of proprietary title to subaqueous lands, sign posting, and then criminal trespass enforcement.⁴⁰⁵ Of course, the New Mexico Supreme Court eventually found that the regulatory regime violated the state constitution's declaration of

402. Lovett, *supra* note 399, at 619.

403. *Id.* at 620–35.

404. For a detailed analysis of the traditional riparian rights and appropriative rights systems for consumptive use and the recent movement toward regulated riparianism management systems and linking the latter to the public trust doctrine, see Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENV'T L.J. 315, 321–336 (2009).

405. *Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n*, 519 P.3d 46, 49–50 (N.M. 2022).

public rights in non-appropriated water and then returned New Mexico law to the more intuitive and efficient claim communication regime established by the PRSA.⁴⁰⁶ If a river, stream, or lake is deep and wide enough that a member of the public can float a recreational vessel on the waterway, then that person is entitled to access the waterway provided he or she respects the adjoining landowner's privacy and use interests in the bank, does not cross over private land to get to the water, and does not interfere with the landowner's consumptive use rights in the water.⁴⁰⁷ In short, a natural rights property theorist like Claeys might find something to admire in the PRSA.

C. Sharing Property Interests and the Outcome-Interest Approach

In *Sharing the Cathedral*, Rashmi Dyal-Chand has articulated another prominent new theory of property law that helps to illuminate the virtues of the PRSA.⁴⁰⁸ Dyal-Chand draws on the practice of medieval jurists and judges who developed the writ system in early English common law, the writings of Oliver Wendell Holmes, and contemporary law and economics scholars who have emphasized the importance of remedies over substantive rights in private law decision-making to argue that property law would benefit from adopting a sharing, rather than an exclusion, model for organizing resource allocation rights in some contexts.⁴⁰⁹ Dyal-Chand contends that a sharing model could produce more stable and just outcomes by focusing on how property law can accommodate multiple legitimate interests in use and possession of a resource rather than the zero-sum, winner-take-all outcomes that tend to result from an exclusion-based model geared toward identifying a single owner or "title" to a resource.⁴¹⁰

At the core of Dyal-Chand's remedy-focused sharing model is a three-step inquiry that she recommends courts or decision-makers use when confronted with a difficult dispute over a resource.⁴¹¹ First, the decision-maker should define the "legitimate interests" on both sides of a property dispute.⁴¹² In a dispute about recreational access to an inland water body, for instance, these interests would include the adjoining property owner's interest in using water for irrigation, industry, or consumption consistent with the applicable water use regime, that person's interest in controlling constructions or mining on privately owned subaqueous land, and their interests in privacy and autonomy on the rest of their land. However, the legitimate interests would also include the public's interest in using water in the river or lake for non-consumptive rec-

406. *Id.* at 53, 56.

407. *Id.* at 52, 53, 56.

408. *See* Dyal-Chand, *supra* note 39.

409. *Id.* at 655, 657–76.

410. *Id.* at 650–56.

411. *Id.* at 677.

412. *Id.*

reation. Next, Dyal-Chand would have a decision-maker “consider outcomes that could best accommodate each party’s legitimate interests.”⁴¹³ Finally, in step three, Dyal-Chand would bring formal entitlements back into the picture and consider their utility and relevance for solving the dispute at hand.⁴¹⁴

In the context of disputes over recreational access to inland waterways that are not navigable under the historic highway of commerce test, courts adopting the PRSA seem to have intuitively performed all of these steps, and in particular, step two.⁴¹⁵ Rather than simply declaring that the riparian or littoral property owner has absolute dominium over all the soil and water in a non-navigable river or lake based on her proprietary title and the *ad coelum* doctrine, and rather than just erasing the interests of the adjoining landowner by declaring a water body and its bed to be entirely a public thing because of its suitability for water-based recreation, the PRSA avoids these winner-take-all outcomes. Instead, it recognizes that the interest of the propriety title holder of the subaqueous land and the interests of the public can both be accommodated by giving the public a limited right to use the water for recreational purposes provided the public accesses the water from a public landing place, does not cross over private land, and does not stop along the banks of the waterway except for reasons incidental to navigation or out of extreme necessity.⁴¹⁶

D. Inherently Public Property: Holdouts, Sociability, and Scalable Community Benefits

In her famous article, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, Carol Rose attempts to explain why Anglo-American law sometimes treats certain key resources—roads, town squares, beaches, and, most important for this Article, navigable waterways—not as private property subject to an individual proprietor’s right to exclude, nor as state-owned public property subject to a single governmental actor’s right to determine use, but rather as “inherently public property,” that is, things “open to the public or at least subject to what Roman law called the ‘jus publicum’: the ‘public right.’”⁴¹⁷ Rose offers a rich tapestry of explanations for why these kinds of resources are often subject to judicially recognized access rights in favor of

413. *Id.*

414. Dyal-Chand, *supra* note 39, at 677.

415. Dyal-Chand’s examples of areas of property law where a similar intuitive “outcome-interest” based solution to disputes sometimes arise and could improve decision are negative easement cases involving interference with light and views, adverse possession disputes, trespass cases, and implied easement cases. *Id.* at 684–99, 715–22.

416. See, e.g., *Adobe Whitewater Club of N.M. v. N.M. State Game Comm’n*, 519 P.3d 46, 56–57 (N.M. 2022) (detailing restrictions on the PRSA in New Mexico); *Kramer v. City of Lake Oswego*, 446 P.3d 1, 10–11 (Or. 2019) (same for Oregon). See Benson, *supra* note 159, at 82–93 (surveying varying scope of the PRSA in Mountain West states).

417. Rose, *supra* note 41, at 713, 716, 720, 723.

a general “unorganized public.”⁴¹⁸ One cluster of explanations concerns the role of custom and how rules for sharing these resources can be established through long-term practices and norms that define a particular geographic community and set limits on use to prevent tragic resource depletion.⁴¹⁹ Another cluster concerns the risk that these kinds of resources are uniquely subject to the threat of monopolization and hold-out behavior.⁴²⁰ Sometimes this risk of monopolization and hold-out behavior arises because of a resource’s *physical characteristics*—think of a river that literally cannot be moved or a customary road or path conveniently linking two villages; other times a *particular place*, though theoretically exchangeable with other places in its physical capacity to serve some use, has nevertheless become deeply integral to a community’s identity through long periods of customary use—think of a village green that traditionally hosts maypole dancing, a cricket game, or an annual festival.⁴²¹ Denying public access rights to such places that invoke strong emotional attachment, Rose theorizes, would severely disrupt powerful community investments in place.⁴²²

Rose’s third cluster of explanations moves in the direction of utilitarian calculations about the tradeoffs between the “demoralization costs” of uncompensated police power regulation of private property—that is, the psychological harms property owners experience when the state takes their property for a public use without compensation and the tendency for this threat to lead property owners to reduce investment in the things they own—and the “settlement costs” of creating and administering a payment system to compensate private property owners whenever public interests impinge on private property.⁴²³ After introducing this utilitarian framework, Rose notes that common examples of inherently public property—navigable waterways, of course, but also roadways and paths established by custom or implied dedication—tend to fare well in these tradeoffs because they serve a large and indefinite class of users (strangers typically) who would have great difficulty negotiating and

418. *Id.* at 721.

419. *Id.* at 739–49. Some of the memorable British cases recognizing customary claims over this kind of property involve recreational activities like may-pole dancing, horse racing, and cricket games. *Id.* at 740–41. In America, similar customary rights often emerged in “the law of the road,” rules governing travel on roads, canals, railroads, and to resolve conflicts about fishing and navigation on navigable waterways. *Id.* at 744–45 (roads); *id.* at 747–48 (fishing). For an account of the information processing tradeoffs involved in relying on custom in resource management regimes, see Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES IN L. 5, 15 (2009).

420. Rose, *supra* note 41, at 749–50, 753–54.

421. *Id.*

422. As Rose puts it, “[r]eturning to the recreational uses of water, perhaps the custom of using particular places for recreation eventually led courts to find that these uses were uniquely valuable to the public: the old swimming hole or fishing spot might be especially vulnerable to rent-seeking behavior.” *Id.* at 760.

423. *Id.* at 761 (citing and applying Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214–15 (1967)).

overcoming the hold-out power of multiple private owners,⁴²⁴ and because demoralization costs remain low given that public use rights are limited to an easement and a landowner's underlying fee simple estate is preserved.⁴²⁵ Finally, and most important for Rose, the uses of inherently public property, whether playing a game or maypole dancing on a village green, traveling on a path or road, or sharing a navigable river with others engaged in fishing and navigation, create valuable "scale returns," particularly in a social sense, because they give people opportunities to experience "solidarity and fellow-feeling," chances to practice sharing a common resource and treating others with neighborly respect, and occasions to engage in the "democratic give-and-take" that makes our entire system of property function.⁴²⁶

One can easily detect all these interests at play in some of the leading decisions establishing the PRSA. Consider once again the Arkansas Supreme Court's evocation of the long history of customary recreational use of the Mulberry River in *McIlroy*,⁴²⁷ the Mississippi Supreme Court's identification of the widespread social understanding that the Bogue Chitto River was navigable in *Ryals v. Piggot*,⁴²⁸ and the Missouri Supreme Court's acknowledgment of the long history of recreational use of the Meramec River in *Elder v. Delcour*.⁴²⁹ And, of course, concerns about monopolization and hold-out behavior have animated PRSA decisions from the outset, as seen in Justice Mitchell's opinion in *Lamprey* and many of the other early PRSA cases.⁴³⁰

424. *Id.* at 764–65. On the "settlement cost" side of the Michelman equation, Rose points out that public prescription and implied dedication doctrines, in particular, are sensitive because they generally require that a road or waterway be a "throughway," rather than a "cul-de-sac," thus guaranteeing that they benefit a large and indefinite group of public users who would normally be unable to overcome the collective action challenges of finding each other and arranging a consensual bargain with the relevant landowners. *Id.* at 762–64. Perhaps this observation explains a case like *Bott*, where the Michigan Supreme Court refused to adopt the PRSA because only a handful of other littoral property owners would benefit from a "public" right to travel on the two small waterways that connected otherwise entirely enclosed lakes. *Bott v. Mich. Dep't of Nat. Res.*, 327 N.W.2d 838, 841 (Mich. 1982).

425. Of course, the landmark PRSA decisions accomplish the exact same feat by granting the public a servitude or easement merely to boat or fish in the water in a river or lake that might not be navigable under the historic highway of commerce test while preserving the riparian or littoral owner's title to the waterbed. See *supra* Part II.

426. Rose, *supra* note 41, at 767–68, 775–76, 778–80. It is these largely social and political returns to scale and the process through which inherently public property is opened for use by a large and indefinite group of individuals in the form of an unorganized public that produces, not a "tragedy of the commons," but a "comedy of the commons," meaning that the more participants there are, the better the outcome for all. *Id.* at 768. Interestingly, Rose observes that in the middle of the nineteenth century, influential thinkers and planners like Frederick Law Olmstead rejected the older idea that recreation should be reserved for the rich and instead "argued that recreation had scale returns in a much more expansive sense" because it has "a socializing and educative influence, particularly helpful for democratic values." *Id.* at 779.

427. 595 S.W.2d 659, 662 (Ark. 1980).

428. 580 So. 2d 1140, 1145–46 (Miss. 1990).

429. 269 S.W.2d 17, 19–20 (Mo. 1954).

430. *Lamprey v. State*, 53 N.W. 1139, 1143 (Minn. 1893); *Coleman v. Schaeffer*, 126 N.E. 2d 444, 446 (Ohio 1955) (quoting *State v. Twiford*, 48 S.E. 586, 587 (N.C. 1904)).

E. The Value of Place

Jessica Shoemaker recently articulated a new analytical approach to “placemaking” and the role of “place-based attachments” in property law.⁴³¹ Although Shoemaker defines “land” and “property” in rich and pluralistic fashion, she explains that geographers and social scientists use the term “place” to refer to “the human layers of meaning that become, over time and lived experience, embedded in a physical space,” or, put more poetically, “a geographically tethered sense of understanding and connection derived from direct knowledge.”⁴³² For Shoemaker, “place” means human engagement with land and buildings and refers to a process that “transforms abstract ‘space’ into meaningful ‘place.’”⁴³³ Shoemaker contrasts places infused with meaning through human experience with “generic and homogenized spaces,” whether endless fields of industrially grown crops or “cookie-cutter concrete, corporate self-storage facilities.”⁴³⁴ Shoemaker’s vision of “[p]lace attachment” is thus based on human experience and means a “sense of belonging, loyalty, or affection that a person feels for one or more places.”⁴³⁵ To be sure, place attachment can operate on different scales and implicate individuals and groups; it can be either thin and fleeting or deep and enduring.⁴³⁶ Place attachments can also change over time, just as people can be meaningfully attached to more than one place at a time (a feeling that some might call “place-polygamy”).⁴³⁷ Different people might also have distinct, overlapping, or even competing attachments to the same place at the same time.⁴³⁸

Shoemaker provides many illustrations of how place and place attachment figure in the creation and enforcement of property law default rules, and she explores how positive place attachment can contribute to individual human flourishing and can improve community well-being.⁴³⁹ But she also acknowledges that excessive and exclusive forms of place attachment (or lack of regard for place attachment) can lead to division, hoarding, severe distributional inequality, or even violence.⁴⁴⁰ In short,

431. Shoemaker, *supra* note 40, at 811, 819–20.

432. *Id.* at 823–27.

433. *Id.* at 827.

434. *Id.*

435. *Id.*

436. *Id.* at 827–28.

437. Shoemaker, *supra* note 40, at 828. See TSUYOSHI SEKIHARA & RICHARD MCCARTHY, KUNI: A JAPANESE VISION AND PRACTICE FOR URBAN-RURAL RECONNECTION 63–64, 122–25 (2022) (explaining the theory of “place-polygamy”).

438. Shoemaker, *supra* note 40, at 828.

439. *Id.* at 828–44.

440. Shoemaker’s examples of lack of regard for place-attachment include the fight over a planned oil pipeline beneath Lake Oahe, a place with deep ancestral meaning for the Standing Rock Sioux Tribe, the mass commodification of “built-to-rent” developments, and the plight of poor or immigrant communities targeted for blight condemnations and slum clearance. *Id.* at 844–853, 886–87. Her examples of excessive, exclusive, or even “toxic” place attachment include the armed occupation and violent stand-off between federal agents and Western ranchers at the Malheur National

place and place attachment become a lens through which many different kinds of property relationships are brought into sharper focus. Shoemaker's placemaking lens reveals how in so many of the decisions that established the PRSA courts were particularly attentive to the specific experiences of a community and the place attachments that resulted from a community's engagement with a river or lake. Pick almost any decision from the long line of authorities establishing the PRSA and one can find strong hints of judicial recognition of Shoemaker's notion of positive place attachment, from the unpossessable but locally cherished Mulberry River in *McIlroy* to the rivers and lakes where public recreational access has been preserved by *Lamprey* and *Willow River Club*⁴⁴¹ and their progeny.⁴⁴²

F. The Anti-Feudalism Norm in American Property Law

Another prominent interpretation of American property law stresses the intentional break from English feudalism that legislatures, courts, and citizens acting independently managed to achieve in the late-eighteenth and nineteenth centuries.⁴⁴³ As Joseph Singer explains, the American anti-feudalism norm has two core elements. One focuses on the importance of widespread and decentralized access to and management of resources rather than highly concentrated ownership in a king, a small feudal nobility, or wealthy capitalists or entrepreneurs.⁴⁴⁴ The other concerns the quality of property relationships among citizens and, in particular, the importance of horizontal equality and democratic relationships.⁴⁴⁵ Many episodes of American property law demonstrate the operation of both components of this anti-feudalism norm. In the late-eighteenth and early-nineteenth centuries, New Jersey settlers refused to honor the large land grants made by Charles II to the Duke of York and refused to pay fealty and rent to the Duke of York's assignees.⁴⁴⁶ In the early-nineteenth century, New York tenants and New York courts rejected the attempt by Killian van Rensselaer and others to establish a feudal regime in New York's Hudson Valley through the imposition of "quarter-sale" provi-

Wildlife Refuge and confrontations between white homeowners shouting and waving guns from the front yards of gated communities at passing Black Lives Matter protestors. *Id.* at 884–87.

441. 76 N.W. 273 (Wis. 1898).

442. See *State v. McIlroy*, 595 S.W. 2d 659, 661–62 (Ark. 1980), discussed *supra* notes 283–97 and accompanying text; *Lamprey v. State*, 53 N.W. 1139, 1143–44 (Minn. 1893), discussed *supra* notes 168–78; *Willow River Club v. Wade*, 76 N.W. 273, 277 (Wis. 1898), discussed *supra* notes 185–87 and accompanying text.

443. JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION 32–51 (2015).

444. *Id.* at 42, 54–56 (arguing in favor of widespread homeownership); Singer, *supra* note 43, at 1308–12 (arguing that reducing information processing costs to the lowest possible level cannot be the only value served in a property system because then we would give one person, such as Larry Ellison who is the sole owner of 98% of the land on Lanai Island in Hawaii, ownership of all the land in a large area and arguing that instead we prefer decentralized and disbursed landownership to achieve other goals of a property system).

445. SINGER, *supra* note 445, at 36–46; Singer, *supra* note 43, at 1303–08 (discussing the many kinds of property forms that have been abolished in the United States).

446. SINGER, *supra* note 445, at 36–38.

sions in deeds that sought to restrain or at least tax the free sale of land.⁴⁴⁷ Over the course of decades, American legislatures abolished the English fee tail estate and established the fee simple estate as the most common and alienable form of land tenure.⁴⁴⁸ Later, through the abolition of slavery during the Civil War, the Thirteenth Amendment, the adoption of Married Women's Property Acts in the mid-nineteenth century, and the eventual embrace of anti-discrimination laws in the twentieth century barring racial discrimination in public accommodations all contributed to ending hierarchical, caste-based relationships in America and created the ground rules for a free and democratic society.⁴⁴⁹ As Singer sums up, we need law to achieve both of the core elements of a free and democratic system of property arrangements. We need law—and often government regulation—to achieve a “widespread distribution of property ownership” and to “prohibit the enforcement of contracts that establish differences of status or which tie people to the land through master-servant relationships.”⁴⁵⁰

In many of the leading decisions establishing the PRSA, American judges similarly worried about the quasi-feudal relationships that would follow from strict application of the highway of commerce test and the *ad coelum* doctrine if individual or corporate landowners could assemble large tracts of land and block individuals from using rivers and lakes for activities as diverse as floating logs to market,⁴⁵¹ transporting goods to summer homes,⁴⁵² or just enjoying the pleasures of canoeing, boating or fishing.

G. The Virtue of Adaptability in American Property Law

One more virtue of the PRSA appears when it is viewed from an even broader historical perspective, one that embraces American property law's protean ability to evolve in response to new social, economic, and environmental conditions. From the beginning, American courts have constantly tweaked and modified rules, established new forms of property and terminated others, and sometimes abruptly innovated to establish entirely new rules or standards, to reconfigure an existing property relationship, or to invite outsiders into a previously closed property law space.⁴⁵³ The PRSA exemplifies this kind of flexibility embedded in

447. *Id.* at 38–40.

448. *Id.* at 41–42.

449. *Id.* at 45–46.

450. *Id.* at 41–42.

451. *See, e.g.,* *Moore v. Sanborne*, 2 Mich. 519, 524 (1853); *Morgan v. King*, 35 N.Y. 454, 459 (1866).

452. *Smart v. Aroostook Lumber Co.*, 68 A. 527, 531–32 (Me. 1907).

453. For a comprehensive account of changes in American property law spanning more than two hundred years, see generally Singer, *supra* note 44. In Singer's view, neither property law nor property rights have ever been static in America. *Id.* at 114. Instead, property has a history, and that history is one “of evolution and modernization over time.” *Id.* For another survey of changes in American property law from Revolutionary Era to the Civil War, see generally Freyfogle, *supra* note

American property law. Although some American courts have rejected the PRSA because they believe that any widening of public rights to use inland water must originate in legislatures or should require payment of just compensation,⁴⁵⁴ and although one scholar has suggested that any expansion of the concept of navigability should be subject to a case-by-case, constitutional balancing test and a post-decision conditional compensation requirement,⁴⁵⁵ many American courts have properly viewed their work in establishing the PRSA as part of the daily task of case-by-case adaptation of the common law, particularly in an area of law that has been evolving from the very beginning of our republic.

In a recent article on the need for clarification of public access rights to inland waterways in Illinois, Eric Freyfogle makes just this point in explaining why that state's political and judicial leaders should embrace public recreational access rights to any waterbody "capable of supporting use by commercial or recreational watercraft for a substantial part of the year" or that is "actually so used," and should not fear arguments that such a declaration would constitute a taking of private property without just compensation under the Fifth Amendment.⁴⁵⁶ Not only does his position find support in the Northwest Ordinance, the federal navigational servitude, and Illinois's version of the public trust doctrine,⁴⁵⁷ argues Freyfogle, but American property law writ large has been evolving for more than two hundred years and the just compensation clause has generally not stood in the way of this change.⁴⁵⁸ After all, Freyfogle observes, the Takings Clause "protects property rights but does not create them nor give them form."⁴⁵⁹ It does not "across the board, keep state legislatures and courts from making broadly applicable updates to that state law; it does not, that is, bring an end to the centuries-long process of aligning the relative rights of ownership with current needs and values."⁴⁶⁰ Many of the judicial decisions examined in this

44. See also BANNER, *supra* note 44, at 4–22 (narrating dramatic changes in American property law from the 1770s to 1829 and emphasizing that "Americans in the early nineteenth century, especially lawyers, expected property to change over time").

454. *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979); *Bott v. Mich. Dep't of Nat. Res.*, 327 N.W.2d 838, 841–53 (Mich. 1982); *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1358, 1362 (Kan. 1990).

455. See Brady, *supra* note 15, at 1449–64 (weighing advantages and disadvantages of constitutionalizing changes in American navigability doctrine, arguing for a case-by-case, multi-factor balancing form of constitutional scrutiny based on *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and suggesting that when state courts change navigability rules they should condition expanded public use or new navigation rights on legislative approval of compensation).

456. Freyfogle, *supra* note 51, at 276 (quoting H.B. 1568, 103d Gen. Assemb., Reg. Sess. (Ill. 2023)).

457. *Id.* at 242–65, 283–84.

458. *Id.* at 277–78.

459. *Id.* at 277. As the Supreme Court itself recognizes, the Takings Clause "only protects property rights as they are established under state law, not as they might have been established or ought to have been established." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 732 (2010).

460. Freyfogle, *supra* note 51, at 278.

Article illustrate American property law's persistent responsiveness to change as they have modified and updated the concept of navigability to include waterways that can sustain recreational use.⁴⁶¹

CONCLUSION

This Article has argued that the PRSA represents a remarkable achievement of American state court judges. Emerging from early-American misconceptions about navigability doctrine in English law and working alongside the development of the historical highway of commerce test for proprietary title to submerged land, American courts began to reconceptualize public use rights in inland waters in the late-nineteenth and early-twentieth centuries. Building on foundational decisions like *Lamprey*, American judges began to redefine navigability in terms of a waterbody's capacity to sustain recreational boating, and then, most creatively, began to recognize that the public could enjoy an easement or servitude for recreational use in inland waterways that would otherwise be classified as non-navigable under the historical highway of commerce test. This jurisprudence flourished in the second half of the twentieth century as state supreme courts in every region embraced the PRSA. Although the PRSA will undoubtedly remain controversial to some, the merits of this jurisprudential movement can be appreciated through a diverse range of contemporary property theories. In short, the PRSA deserves to be celebrated, not feared.

461. Freyfogle cites *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E. 2d 1192, 1195–96 (N.Y. 1998) for this proposition and suggests that the New York Court of Appeals certainly viewed its adaptation of the concept of a navigable water body as being consistent with background principles of property law and thus well outside the scope of a per se regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). Freyfogle, *supra* note 51, at 278.