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**EQUITABLE COMPENSATION FOR
PUBLIC TRUST TAKINGS**

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INTRODUCTION

The Supreme Court's 1892 decision in *Illinois Central Railroad Co. v. Illinois*¹ is the foundation of the public trust doctrine.² Like *Marbury v. Madison*³ on judicial review, it is next to impossible to find a case or read an argument addressing the public trust doctrine without prominent reference to *Illinois Central*.⁴ Over the years, a number of commentators have argued

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1. 146 U.S. 387 (1892) (*Illinois Central*).

2. The public trust doctrine describes the state's fiduciary responsibilities with respect to land under navigable water and certain associated resources. See generally 4 WATERS AND WATER RIGHTS § 30.02(a) (1996) (Robert E. Beck ed., 1996) [hereinafter WATERS]. Originally limited to land under navigable water, the scope of the doctrine has expanded in more recent years to include water appropriated from navigable watercourses and recreational and ecological values associated with navigable waters. See *infra* notes 186-87 (describing this expansion of the so-called "trust resources"). In brief, under the trust doctrine, the state is said to hold title to trust resources in trust for the public. Although the state may alienate trust resources in fee in certain situations, see *infra* note 45, other grants of trust resources are said to be subject to revocation by the state without payment of compensation. This ability to circumvent the Fourteenth Amendment is the public trust doctrine's promise or its peril, depending on one's perspective.

3. 5 U.S. (1 Cranch) 137 (1803).

4. See Eric Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713, 719-20 nn.38-40 (1996) (noting that as of Sept. 25, 1996, 218 state court cases had cited *Illinois Central*); WATERS, *supra* note 2, § 30.02(b)(1) n.140 (listing cases citing to *Illinois Central* as the seminal public trust decision).

that *Illinois Central's* public trust doctrine, which allows states to revoke prior grants of trust resources without paying just compensation under the Fifth and Fourteenth Amendments,⁵ is analytically indefensible.⁶ It rests on a shaky historical foundation.⁷ It describes a trust relationship that does not fit general principles of trust law.⁸ And it is a common-law doctrine that courts use to reverse legislative decisions, an anti-majoritarian task generally reserved for state or federal constitutions.⁹ Notwithstanding its flaws, courts' use of the public trust doctrine has continued to grow in the last thirty years,¹⁰ due in no small part to the skillful advocacy of the doctrine's supporters.¹¹

5. See *supra* note 2 (summarizing the public trust doctrine). The Fifth Amendment's just compensation requirement has been applied to the states via the Due Process Clause of the Fourteenth Amendment. See U.S. CONST. amends. V & XIV; see also *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 233-35 (1897) (incorporating just compensation requirement).

6. I am among those commentators who have criticized the doctrine. See James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1 (1997) (reviewing historical origins of public trust doctrine).

7. See *infra* notes 133-41 and accompanying text (discussing the dubious historical origins and foundation of the public trust doctrine).

8. See James L. Huffman, *A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 534-45 (1989) (explaining how the public trust doctrine differs from general principles of trust law).

9. The Supreme Court, quite correctly, has emphasized that the public trust doctrine is a common-law doctrine that each state is free to adopt and adapt on its own. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) ("[I]t has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."); *Appleby v. City of New York*, 271 U.S. 364, 395 (1926) ("[T]he conclusion reached [in *Illinois Central*] was necessarily a statement of Illinois law."). In an effort to justify its anti-majoritarian impact, a number of commentators have proposed locating the public trust doctrine in either state constitutions or in the U.S. Constitution. See, e.g., Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 576-77 (1989) (inferring the public trust doctrine from state constitutional provisions making water the property of the state); Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 713-15 (1995) (discussing potential origins of trust doctrine); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989) (locating authority for the public trust doctrine in the Commerce Clause).

10. See *supra* note 2 and *infra* notes 186-87 and accompanying text (describing growth of public trust doctrine).

11. The proponents of the public trust doctrine are now legion but any list of its most articulate advocates would have to include Professors Blumm, Dunning, Johnson, Sax, and Wilkinson. For citations to some of their work and the work of others, both supportive and critical, see *infra* note 18.

Despite the attention lavished on *Illinois Central* and the public trust doctrine, one aspect of Justice Field's majority opinion has gone unexplored: his suggestion that where a state resumes control over a previously granted trust resource, the state "ought to pay" for any "expenses incurred in improvements made under such a grant."¹² Although Justice Field's language has been repeated without elucidation in three modern California public trust doctrine cases,¹³ it has otherwise failed to draw judicial notice. Field's compensation suggestion merits scrutiny, however, because it suggests a potential point of compromise between the public trust doctrine's critics and supporters, that is, between those who view the public trust doctrine as a circumvention of the Fourteenth Amendment's protection of private property and those who do not.¹⁴ Regardless of whether state exercise of a public trust easement requires just compensation under the Fifth and Fourteenth Amendments, it may merit some compensation as a matter of equity. To paraphrase an old maxim: a state which seeks equity must do equity.¹⁵

12. See *Illinois Central*, 146 U.S. at 455. In full, Justice Field stated: "Undoubtedly there may be expenses incurred in improvements made under such a grant, which the state ought to pay; but, be that as it may, the power to resume the trust whenever the state judges best is, we think, incontrovertible." *Id.*

13. See *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 723 n.22 (Cal. 1983) (*Mono Lake*); *California v. Superior Court*, 625 P.2d 256 (Cal. 1981); *City of Berkeley v. Superior Court*, 606 P.2d 362, 374 (Cal. 1980); see also *infra* Part II.A.3 (discussing these cases).

14. Courts and commentators adopting the public trust doctrine of *Illinois Central* have rejected the suggestion that the doctrine can work an unconstitutional taking, asserting that a public trust servitude was necessarily imposed on any grant and thus the exercise of that servitude takes nothing from the grantee. See, e.g., *Mono Lake*, 658 P.2d at 721; Blumm, *supra* note 9 at 584-87; Ralph W. Johnson, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 583-86 (1992). Other commentators have argued that an uncompensated revocation of a grant of overflowed lands or associated resources can constitute a taking. See, e.g., George A. Gould, *The Public Trust Doctrine and Water Rights*, 34 ROCKY MTN. MIN. L. INST. 25-1, 49 (1988); James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 190-91 (1987).

15. This equitable maxim should not be taken so literally as to allow for compensation only when the state pleads for equitable relief. Starting with New York's 1848 adoption of the *Field Code*, continuing in other states, then with the 1938 *Federal Rules of Civil Procedure*, and finally in additional state courts, law and equity were merged. See Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1270; GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 1.6 (3d ed. 1985). See generally Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1 (1988). "Only four states, Arkansas,

The project of Part I of the article is to explore potential sources and rationales for Justice Field's suggestion that the state ought to pay compensation for any improvements it takes or destroys when it resumes control over a public trust resource. This investigation exposes the broader foundations of the public trust doctrine to renewed scrutiny. Specifically, it weakens the argument upon which proponents of the doctrine have relied that grantees of trust resources have always been on notice of the state's public trust easement, and it buttresses the view that, if a trust doctrine does exist, grants of trust resources are not void but merely voidable. The investigation also lays the foundation for the article's suggestion that if the public trust doctrine is to be employed, it must include an equitable compensation obligation. Two rationales emerge as possible justifications. First, the compensation requirement can be viewed as an application of the common-law equitable principle that good faith, mistaken improvers should be compensated for the cost of their mistaken improvements. Alternatively, the compensation requirement can be viewed as part and parcel of the public trust doctrine itself, as a constructive condition placed on the state's right to revoke a grant of trust resources, which right is itself constructive.

Part I then discusses two potential obstacles to either rationale. It addresses the potential tension between an equitable compensation requirement and the no compensation rule of the federal navigation servitude, and it responds to the question whether requiring the state to pay equitable compensation runs afoul of sovereign immunity. On this latter issue, the article concludes that immunity problems can be overcome under either rationale but that conceiving of compensation as a condition of revocation more readily avoids the state's immunity because compensation thereby becomes an element of the state's claim.

Having articulated a defensible rationale for the equitable compensation principle of *Illinois Central*, Part II of the article argues that the same principle should be applied in modern public trust cases. Courts should begin awarding equitable

Delaware, Mississippi, and Tennessee, still have separate courts of equity." Morton Gitelman, *The Arkansas Courts: The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L.J. 215, 244 (1995). Thus, although prior to the merger, equitable compensation would only have been available if the state sought equitable relief, now the relief the state seeks generally is no longer determinative.

compensation either by way of equity or as a common-law refinement to the public trust doctrine itself. The article concludes by suggesting that states need not wait to see whether their courts will properly exercise their equitable power or properly interpret the public trust doctrine. They can and should enact legislation providing for equitable compensation where the state revokes or limits a previous grant of trust resources.¹⁶

I. *ILLINOIS CENTRAL* AND THE POTENTIAL SOURCES OF EQUITABLE COMPENSATION

A. *The Illinois Central Case*

Before addressing the origin and implications of the Court's compensation suggestion in *Illinois Central*, this section of the article reviews the *Illinois Central* case and the public trust doctrine it articulated.¹⁷ The review is intended to set the context for the exploration of the equitable compensation issue and makes no effort at detailed exploration of the prior history and

16. It is important to recognize at the outset that the public trust doctrine is not always used to revoke outright a prior grant of trust resources. Although that was the approach in *Illinois Central*, in many other cases the doctrine is used to limit a grantee's ability to use the full trust resource that she was actually granted. See, e.g., *Mono Lake*, 658 P.2d 709 (Cal. 1983) (ordering reconsideration of Los Angeles' original water right to the tributaries of Mono Lake); *State v. Central Vt. Ry.*, 571 A.2d 1128 (Vt. 1989) (limiting railroad's ability to use submerged and filled lands of Lake Champlain for anything other than railroad, wharf, or storage purposes), *cert. denied*, 495 U.S. 931 (1990); *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 366-67 (Mass. 1979) (prohibiting development of filled tidelands because under public trust conveyance the tidelands could only be used for marine commerce). See also Blumm, *supra* note 9, at 578 (surveying case law and describing four different types of public trust remedies: "(1) a public easement guaranteeing access to trust resources; (2) a restrictive servitude insulating public regulation of private activities against constitutional takings claims; (3) a rule of statutory and constitutional construction disfavoring terminations of the trust; and (4) a requirement of reasoned administrative decision making") (footnotes omitted). This article focuses on revocations of prior grants because it presents, in the clearest conceptual framework, the public trust doctrine's ability to circumvent constitutional takings protections and thus the need for equitable compensation. The equitable compensation principle, however, also has application in those circumstances where the grantee's rights in the trust resource are only limited and not entirely revoked because the principle is not dependent upon a takings analysis. See *infra* note 260.

17. For two other overviews of the background of *Illinois Central*, see WATERS, *supra* note 2, § 30.02(b)(1) and Pearson, *supra* note 4.

development of the public trust doctrine about which so much has already been written.¹⁸

In 1869, the Illinois legislature passed, over the governor's veto, what was commonly known as the Lake Front Act, granting to the Illinois Central Railroad ("Railroad") "all the right and title of the State of Illinois" to more than 1,000 acres of submerged lands extending out from the City of Chicago under Lake Michigan.¹⁹ The alleged consideration for the grant of the submerged lands was the Railroad's agreement to pay the State semi-annually, and in perpetuity, seven percent of its gross earnings derived from use of the submerged lands.²⁰ Following the grant,

18. The literature on the public trust doctrine is vast. Since Professor Sax's path-breaking article on the doctrine, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970), a number of articles have been written. See, e.g., Blumm & Schwartz, *supra* note 9, at 713; Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633-34 (1986); Harrison C. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony*, 30 ROCKY MTN. MIN. L. INST. 17-1 (1985); James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writing of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565 (1986); Symposium, *The Public Trust Doctrine in Natural Resource Law and Management*, 14 U.C. DAVIS L. REV. 181 (1980); Symposium, *The Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow*, 19 ENVTL. L. 425 (1989). For additional articles focusing on the history and development of the public trust doctrine prior to *Illinois Central*, see *infra* note 134.

19. See *Illinois Central*, 146 U.S. at 405, 448, 454. The Lake Front Act also confirmed in the Illinois Central Railroad title to certain lands previously filled by the Railroad in exercise of its riparian rights. See *Illinois v. Illinois Cent. R.R. Co.*, 33 F. 730, 772-73 (N.D. Ill. 1888) (discussing § 3 of the Act); 146 U.S. at 449-50 (same). The Act had several additional components which were not crucial to the outcome of the case. Section 1 granted certain submerged lands to the City of Chicago. Section 2 provided that the proceeds from the sale of those submerged lands were to be set aside as a park fund for the City of Chicago. Section 3 granted submerged lands to the Railroad and is the provision for which the case is typically cited. Sections 4 through 6, in consideration for an \$800,000 payment to the City of Chicago, granted certain other submerged lands to Illinois Central and to three other railroad companies and empowered the City of Chicago to quitclaim any rights it had in those submerged lands. See 146 U.S. at 405 (quoting the Lake Front Act in full). In the event, Chicago refused to quitclaim any of its interest and put the first \$200,000 payment by the railroads into escrow. See *id.* at 407-08.

20. See *Illinois Central*, 146 U.S. at 448-49. Whether the royalty provision constituted consideration is doubtful. The Railroad was not bound to make any use of the lands and "could not have been called upon to pay such per centum until after the lands were used and improved, and income derived therefrom." 146 U.S. at 461; *Illinois v. Illinois Cent. R.R. Co.*, 33 F. at 773. Moreover, the Railroad was already bound to make just such payments pursuant to its original charter. See Brief on Behalf of the State of Illinois at 54, *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892). In return for this dubious consideration, the Railroad received lands that

the Railroad began reclaiming portions of the submerged lands, building slips, wharves, and piers.²¹ In 1873, Illinois passed legislation repealing the 1869 Lake Front Act and revoking the title of the Railroad to the submerged lands.²² Disputing the repeal, the Railroad continued to build piers and assert ownership of the harbor lands.²³ Finally, in 1883, the State Attorney General filed suit in state court, seeking a declaration of its title to the disputed lands and an injunction requiring the Railroad to remove its wharves and piers and enjoining it from constructing others.²⁴ Upon the Railroad's motion, the case was removed to federal circuit court,²⁵ where it stayed after the State's motion for remand was rejected.²⁶

some estimated to have had a value as high as \$80,000,000, see *THE RAILWAY AGE AND NORTHWESTERN RAILROADER*, Mar. 10, 1893, at 203, although that figure may well have included the Lake Front Act's grant of lands in addition to the submerged lands at issue in *Illinois Central*. See *supra* note 19 (discussing the other sections of the Lake Front Act).

21. See *Illinois Central*, 146 U.S. at 446.

22. See *id.* at 410-11.

23. See *id.* at 410-13; see also Brief for Appellant at 29, *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) ("The improvements begun upon the granted lands before the repeal and not then completed, were prosecuted to completion afterwards; and between the date of the repealing Act and the commencement of this suit [in 1883] new works of considerable magnitude were undertaken and finished.")

24. See *Illinois Central*, 146 U.S. at 412, 433. The City of Chicago joined the suit, agreeing with the State that the 1869 Act was void but arguing that it, not the State, was the owner in fee of the disputed lands by virtue of prior grants. See *id.* at 412-14.

25. See *Illinois v. Illinois Cent. R.R. Co.*, 16 F. 881 (N.D. Ill. 1883) (discussing removal under the Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, which vested circuit courts, for the first time, with general federal question jurisdiction and allowed removal of cases arising under the Constitution or the laws of the United States). Justice Harlan said removal was appropriate because the case presented the following federal questions: whether Illinois had title to the submerged lands according to Virginia's act of cession and the acts of Congress creating the Northwest territory and admitting Illinois into the Union; whether the 1869 legislation constituted a contract between the State and the Railroad and whether the 1873 repeal was an unconstitutional impairment of that contract; and whether the 1873 repeal was a taking without compensation prohibited by the Fourteenth Amendment. See *id.* at 886-87. It is unlikely that the modern federal judiciary would have allowed removal of the case. In 1894, the Supreme Court ruled that a defendant could remove a case only where the *plaintiff* relies on federal law for its claim. See *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894) (construing Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, corrected by Act of Aug. 13, 1888, 25 Stat. 433, both of which were successor Acts to the removal provision of the Act of Mar. 3, 1875, 18 Stat. 470). In *Illinois Central* the primary federal questions were those relied on by the defendant—whether the 1873 repeal violated the Contract Clause, the Fourteenth Amendment, or both.

26. The removal to federal court and the subsequent adoption of the public trust

Performing his circuit-riding duties in the northern district of Illinois, Supreme Court Justice Harlan upheld the 1873 repeal of the Lake Front Act.²⁷ He did so, however, without reference to the public trust doctrine that Justice Field and the Supreme Court would subsequently adopt. Instead of suggesting that the State's power to grant the submerged lands was limited by a trust obligation that inhered in the state's title,²⁸ Justice Harlan interpreted the Lake Front Act as altering the Railroad's corporate charter so that it could act "as an agency of the state" in

doctrine by the Supreme Court should not be understood as supporting the project of some public trust doctrine supporters of grounding the doctrine in federal law, namely in the Constitution, so that its anti-majoritarian impact is legitimized. *See supra* note 9 (citing such efforts). As discussed in note 25, *supra*, the federal questions under the Contract Clause and Fourteenth Amendment were presented in the Railroad's case and not as part of Illinois' public trust argument. Although the federal question of Illinois' equal footing title was arguably also presented, there was little question that Illinois and not the United States had title to the submerged lands in question. *See Illinois v. Illinois Cent. R.R. Co.*, 16 F. at 886-87 (noting that the federal questions on which the case "mainly depends" were raised by the Railroad). If the question of equal footing title created a federal question, any property dispute in the western United States would create a federal question, a notion that has subsequently been rejected. *See Wisconsin v. Baker*, 698 F.2d 1323, 1327 (7th Cir. 1983) (citing numerous cases holding that the fact that "a right of property was at one time governed by federal law or first conveyed by the United States does not render a suit to enforce that right as one 'arising under' federal law"), *cert. denied*, 463 U.S. 1207 (1983). It is worth noting that the State itself argued that no federal question was presented. *Illinois v. Illinois Cent. R.R. Co.*, 16 F. at 881 (rejecting State's argument against removal). Seemingly, if the State thought that its right or obligation to repeal the 1869 grant was of constitutional origin, it would not have been so quick to oppose removal. Chicago, in its briefing to the Supreme Court also said that the validity of the Lake Front Act was not a constitutional question. *See Argument for the City of Chicago* at 9, *Illinois v. Illinois Cent. R.R. Co.*, 146 U.S. 287 (1892). Whatever the scholarly debate, the Supreme Court has now clearly located the public trust doctrine in state law. *See supra* note 9 (citing cases).

27. *See Illinois v. Illinois Cent. R.R.*, 33 F. 730 (N.D. Ill. 1888). Under the Judiciary Act of 1789, Supreme Court justices were obligated to "ride circuit" as judges of the circuit courts, which enjoyed both original and appellate jurisdiction. *See* CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 1 (5th ed. 1994); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 1.2 (1989). This continued in some form until 1911 when circuit courts were finally eliminated and their original jurisdiction was transferred to district courts. *See WRIGHT, supra* § 1. As discussed in note 25, *supra*, the Act of March 3, 1875 vested circuit courts with original jurisdiction over federal questions and allowed removal from state courts of cases presenting federal questions. Act of Mar. 3, 1875, ch. 137, §§ 1-3, 18 Stat. 470, 470-471. This was an expansion of the circuit courts' jurisdiction from the Judiciary Act of 1789 which gave circuit courts original jurisdiction only in diversity cases, most criminal cases, and larger cases to which the United States was a party. *See* Judiciary Act of 1789, ch. 20, §§ 9, 11-12, 1 Stat. 73, 77-79; *see also* WRIGHT, *supra* § 1.

28. *Illinois Central*, 146 U.S. at 455-60.

accomplishing the public purpose of improving the harbor.²⁹ To Harlan, the 1873 legislation merely "revoked the license which had been granted to the company to improve the harbor of Chicago."³⁰ Although Harlan cited no authority for his interpretation of the Lake Front Act, the basis of his reasoning is no mystery. Until *Illinois Central*, there was little question that states had power to grant submerged lands in fee as long as they did so in clear and unequivocal language.³¹ In those cases where the granting language was susceptible to a different construction, the rule was that the language should be interpreted in favor of continued sovereign ownership.³² As Harlan presumably saw it, the Lake Front Act did not unequivocally grant to the Railroad fee title to the submerged lands; and because the Act was susceptible to construction as only a license to act as a public agency, that was how it should be construed.³³ And because the Act merely enlarged the powers of "an agency of the state,"³⁴ the submerged lands could be taken away without impairing a contract or taking private property without just compensation.

Although Harlan perceived no Fourteenth Amendment violation, he nevertheless addressed the question of compensation. Sending a mixed message, he first observed that if the Railroad had made "extensive and costly improvements upon the faith of the grant of the submerged lands, . . . the court would not hesitate to hold that the company could not be deprived of the use of any structures erected or improvements made upon these lands . . . except upon compensation being made to it."³⁵ He then pointed out, however, that only one "insignificant" part of the submerged lands had been developed in reliance on the Lake

29. *Illinois v. Illinois Cent. R.R. Co.*, 33 F. at 772-73. At most, said Harlan, the Railroad owned "a qualified fee" in the submerged lands for purposes of accomplishing harbor improvements. *Id.*

30. *Id.* at 775.

31. See generally Rasband, *supra* note 6, at 14-17 & nn.51-52, 43 & n.171 (citing a variety of cases and commentators reiterating the basic principle that even though land under navigable water was *prima facie* in the sovereign, it was capable of conveyance into private ownership by clear and express words).

32. See generally *id.*

33. One commentator has suggested that viewing the 1869 legislation as a license is persuasive. See Pearson, *supra* note 4, at 735 (arguing that the Act's prohibition against the Railroad alienating its fee interest in the lake bed and the Act's requirement that the Railroad pay substantial sums to the state treasury in perpetuity are contrary to an intention to grant a fee simple property interest).

34. *Illinois v. Illinois Cent. R.R. Co.*, 33 F. at 773.

35. *Id.* at 774.

Front Act, seemingly suggesting, although never stating, that the breadth of reliance determined whether compensation was appropriate and not simply its amount.³⁶ In the end, he ruled that the 1873 repeal was not effective with respect to the small part of submerged lands filled by the Railroad in reliance on the Lake Front Act; the Railroad, he said, could continue to use and hold that ground.³⁷ Presumably, had the State wanted control of this small parcel, it would have been required to compensate the Railroad.

In extensive briefing before the Supreme Court, the parties,³⁸ like Justice Harlan, emphasized a favorable interpretation of the Lake Front Act over the public trust argument about Illinois' power to pass or repeal the Act. The Railroad contended that the unavoidable construction of the Act granted it fee title.³⁹ The State and the City of Chicago countered that the Act was properly interpreted as a license which did not grant fee title but at most a qualified title for accomplishing a public purpose.⁴⁰ Although

36. See *id.* All the other reclaimed lands, said Harlan, had been developed by virtue of the Railroad's riparian rights, pursuant to its charter, or with the consent of Chicago. *Id.* Those lands, therefore, were not implicated by the repealing legislation of 1873. See *id.* at 775. In its briefing before the Supreme Court, the Railroad disputed Harlan's version of the facts, claiming that it had expended "more than \$200,000" on various improvements in reliance upon the Act prior to its repeal in 1873. See Brief for Appellant at 28-29, *Illinois v. Illinois Cent. R.R. Co.*, 146 U.S. 387 (1892). Presumably, the Railroad could have developed the submerged lands in reliance on both the Lake Front Act and its riparian rights. The issue then became one of characterization.

37. See *Illinois v. Illinois Cent. R.R. Co.*, 33 F. at 775-76.

38. Four briefs were filed in the Supreme Court. See Brief and Argument for Appellant, *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (108 pages); Argument for the City of Chicago (110 pages); Brief on Behalf of the State of Illinois (170 pages); Brief for Appellant (146 pages).

39. See Brief for Appellant at 82-86.

40. See Brief on Behalf of the State of Illinois at 128 ("An analysis of the third section of the Lake Front Act will show that it is susceptible of a construction which makes it a license, and not an irrevocable grant or contract."); *id.* at 154-55 (discussing revocability of licenses); Argument for the City of Chicago at 90 ("[I]t is plain that the railroad company did not take technically or substantially the fee to the bed of Lake Michigan with the lines claimed. The grant was merely of use and not of title."); *id.* at 77 ("[T]he principle uniformly adopted in the construction of legislation of this character—that nothing passes by implication from the sovereign, that nothing must be assumed against the State—should not be departed from, but rather adhered to with intelligent firmness and scrupulous fidelity."); *id.* at 83-84 ("The act did not create in the railroad company rights of private property in derogation of the public right. It granted the company powers to be exercised, subject to the public right . . ."); see *id.* at 67-91 (making rule of construction argument and citing cases).

the parties did dispute Illinois' power to make the grant, that argument was not the focus of the briefing. Instead, the argument of the State was rather apologetic in character, conceding the paucity of authority but arguing that the case was without precedent and necessitated a different result.⁴¹

In a 4-3 decision,⁴² the Supreme Court adopted the public trust doctrine in which the State itself had expressed so little confidence. Writing for the majority, Justice Field apparently accepted the Railroad's argument that the 1869 legislation was an express grant of fee title to the Railroad because he focused on the question of the State's power to make and repeal such a grant.⁴³ On that issue, he said that the State's title to lands

41. See *id.* at 130 ("[W]hile there is much apparent authority favoring the power [to grant these submerged lands], yet, as the case at bar is without precedent in many of its aspects, the matter as we maintain is by no means free from doubt."). Chicago's brief more aggressively argued that the State did not have power to convey fee title to the submerged lands. Argument for the City of Chicago at 42-67. But its focus was on the inability of the State to destroy the public right of navigation and commerce by virtue of the Commerce Clause, an issue not implicated by the Lake Front Act which prohibited the Railroad from interfering with navigation which was in aid of commerce. In the end, Chicago did not think the Court even needed to address Illinois' power. See *id.* at 83-84 ("The act did not create in the railroad company rights of private property in derogation of the public right. It granted the company powers to be exercised, subject to the public right. . . . Whether, had such an attempt been made, its validity could have been sustained, is a question which, happily, it is not necessary for this court to consider."). Interestingly, the Railroad devoted only two out of 146 pages to the issue. Brief for Appellant at 111-12. Apparently the Railroad was confident that the Court would follow the long-standing rule that a state had power to grant land under navigable water as long as it did so in clear and unequivocal language. Its confidence was no doubt aided by the fact that in its amended information Illinois had claimed that quieting title in the Railroad would do "great and irreparable injury to the State of Illinois as a proprietor and owner of the bed of the lake, throwing doubts and clouds upon its title thereto, and preventing an advantageous sale or other disposition thereof." *Id.* at 111 (emphasis added).

42. Justice Field's majority opinion was joined by Justices Lamar, Brewer, and Harlan. Justice Shiras dissented and was joined by Justices Gray and Brown. Chief Justice Fuller and Justice Blatchford did not participate in deciding the case. The Chief Justice had been of counsel in the court below and Justice Blatchford was a stockholder in the Illinois Central Railroad Company. *Illinois Central*, 146 U.S. at 464-65, 476; see also 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 756 app. at 761-62 (1926).

43. See 146 U.S. at 448-60. Toward the end of his opinion, Justice Field did add a paragraph observing that the circuit court had treated the Lake Front Act as a license. *Id.* at 460-62. If the Act created a license, said Field, the right of the State "to cancel the [Railroad's] agency and revoke its power is unquestionable." *Id.* at 462. This paragraph could be viewed as an alternative holding that the Lake Front Act never granted fee title, but if that is the case, its placement in the opinion is strange. Logically, before adopting the public trust doctrine, Field's first question

under navigable waters could not be sold and conveyed in the same manner as its title to fast lands because the former had always been held by the State in trust for the people for purposes of navigation, commerce, and fishing.⁴⁴ As trustee, the State could only grant away land beneath navigable water in certain limited circumstances;⁴⁵ otherwise such grants were "necessarily revocable."⁴⁶ And the 1869 grant, said Field, was certainly not of the permissible variety. To Field, the conveyance to the Railroad of the vast Chicago harbor was "a gross perversion of the trust"⁴⁷ and a "proposition that cannot be defended."⁴⁸ Concluding that the legislature's 1873 repeal of the 1869 grant was an appropriate exercise of its trust responsibilities and neither a taking under the Fourteenth Amendment nor an impairment of a valid contract, he quieted title in Illinois to the submerged lands in the harbor.⁴⁹ Thus was born the public trust doctrine.

Although by quieting title in Illinois Field furnished Illinois with the primary equitable remedy it sought, he, like Justice Harlan in the circuit court,⁵⁰ observed that "[u]ndoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay."⁵¹ Again, like Harlan, he

would have been whether the Lake Front Act even granted the Railroad title to the submerged lands. To the extent the Act did not grant title, there would have been no need to proceed to the public trust question. Thus, Field's reliance on the public trust doctrine suggests he did not accept the view of Chicago and the State that the Act created a mere license.

44. *See id.* at 452.

45. Forced by vast precedent, Field conceded that grants of land under navigable water had long been permissible. He distinguished those grants, however, by suggesting that they fell within either of two exceptions to a general prohibition on grants of land under navigable water. Specifically, the grants had been acceptable because the parcel conveyed actually promoted the public's interest in navigation, commerce, and fishing or did not substantially impair the public's interest in the lands and waters remaining. *See id.* at 453, 455-56.

46. *Id.* at 455.

47. *Id.*

48. *Id.* at 454.

49. *See id.* at 463-64. The Court held that "the act of April 15, 1873, repealing [the Lake Front Act] is valid and effective for the purpose of restoring to the State the same control, dominion and ownership of said lands that it had prior to the passage of [the Lake Front Act]." *Id.*

50. *See Illinois v. Illinois Cent. R.R. Co.*, 33 F. at 774; *see also supra* text accompanying note 35.

51. 146 U.S. at 455. There is no indication that the Railroad sought or was awarded compensation. There are a couple of reasons it may not have sought compensation. First, Harlan had decided that it could continue to use the area it had filled in reliance on the 1869 grant. *Illinois v. Illinois Cent. R.R. Co.*, 33 F. at 775-76.

cited no authority for his suggestion that Illinois "ought to pay."⁵² Given Field's rejection of the Railroad's Contract Clause and Fourteenth Amendment arguments, it is unlikely that he relied on either constitutional provision to support his assertion.⁵³ What is plausible is that he relied on the principle of equitable compensation. As explored in the next section, at the time *Illinois Central* was decided, courts were awarding equitable compensation in a variety of circumstances.

Before embarking on an exploration of potential rationales for Field's compensation suggestion, it is useful to recognize that the venture is necessarily speculative because of Field's failure to muster any citation or to offer any reasoning in support of a state obligation to pay compensation for improvements. In fact, some might contend that tracing the origins of Field's compensation suggestion is altogether unnecessary, arguing that the suggestion is mere hortatory dicta. After all, Field only stated that "there *may be* expenses incurred in improvements made under such a grant which the State *ought to pay*."⁵⁴ The language could also be read as referring not to Illinois but as dicta referring to states and grantees of trust resources more generally, although that

Second, there was no need to receive compensation for those improvements it had made pursuant to its common-law riparian rights because it retained those improvements without reference to the 1869 grant. See *Illinois Central*, 146 U.S. at 445-48. The common law traditionally gave a riparian the right to "wharf out" and build piers, wharves, and other improvements on tidelands and submerged lands adjacent to her property. See, e.g., *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1870). Thus, on remand, Field instructed the court below that if the Railroad's existing piers did not interfere with navigation, the court was to confirm title to the piers in the Railroad by virtue of its status as a riparian. See 146 U.S. at 464. If, however, the piers interfered with navigation, the court, said Field, could order that they be removed or that other proceedings be initiated in accordance with state law. See *id.*; see also *Illinois ex rel. Hunt v. Illinois Cent. R.R. Co.*, 91 F. 955 (7th Cir. 1899) (deciding on remand that piers did not interfere with navigation), *aff'd*, 184 U.S. 77 (1902). Although Field's instruction that the piers could be abated may appear to contradict his earlier instruction that the State "ought to pay" for such improvements, it does not. The Lake Front Act itself prohibited any "obstructions to the harbor" or anything that would "impair the public right of navigation." 146 U.S. at 405, 450. Thus, to the extent any pier had interfered with navigation it was not an improvement "made under such a grant which the State ought to pay." *Id.* at 455.

52. See 146 U.S. at 455.

53. The only sense in which compensation for improvements could have a constitutional basis is if that compensation is conceptualized as a portion of the grantee's property right. This issue is discussed, *infra*, text accompanying notes 184-85.

54. 146 U.S. at 455 (emphasis added).

conclusion seems unlikely given the vigorous dispute in the parties' briefs about the amount of the Railroad's investment in reliance on the Lake Front Act.⁵⁵ Whether hortatory or mandatory, dicta or decision, the examination of Field's compensation obligation in the context of *Illinois Central* furthers the article's project in two ways. First, it provides insight into the origins and validity of the public trust doctrine. Second, the exploration develops the various theoretical bases upon which equitable compensation can, and should, be awarded in current public trust cases.⁵⁶

B. Potential Rationales for Justice Field's Equitable Compensation Suggestion

1. Mistaken Improver Law

One potential source for Justice Field's compensation suggestion is the law with respect to mistaken improvers, that is, those persons who mistakenly improve land owned by another.⁵⁷ At common law, because they were considered fixtures,⁵⁸ improve-

55. Compare Brief for Appellant at 29 (claiming expenditure of \$200,000 on improvements) with Brief on Behalf of the State of Illinois at 158 (arguing that no substantial improvements were constructed prior to the repeal of the Lake Front Act in 1873). Perhaps Field only said the State "ought to pay" because he did not want to investigate the ramifications for Illinois' sovereign immunity. This issue is discussed in Part I.D, *infra*.

56. Of course, to the extent Field's compensation suggestion was directed not at Illinois and the Railroad but at states and grantees more generally, the specific references to Illinois law in the textual discussion that follows should be viewed merely as exemplary of the type of equitable decisions being made in other state courts. The focus on the specific compensation suggestion in *Illinois Central* can just as readily be viewed as a vehicle for exploring the broader issue of equitable compensation to grantees of public trust resources.

57. Mistaken improvement can actually occur in several ways:

First, an improver may acquire and improve land under a title that is mistakenly believed to be valid. Second, an improver may mistake the nature of his or her interest, believing it to be a fee simple when in fact it is a mere life tenancy. Third, an improver may mistake the location of his or her land. Last, an improver may have an expectancy in the land that never ripens into title.

Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37, 37-38 (1985).

58. The doctrine of accession, or the law of fixtures, has deep and complex roots in the common law. See John Henry Merryman, *Improving the Lot of the Trespassing Improver*, 11 STAN. L. REV. 456, 480-81 (1959) (describing the roots of the mistaken improver problem in the law of fixtures and the Latinate rule: *quicquid plantatur solo, solo cedit* or "what is attached to the land becomes part of it"); see also Robert

ments belonged to the owner of the land.⁵⁹ Nevertheless, by the time *Illinois Central* was decided, a number of courts, acting on the equitable maxim that he who seeks equity must do equity, had held that when the true owner sought an equitable remedy, the remedy was conditioned upon paying to the good faith improver the reasonable value of any improvements.⁶⁰ Illinois was one such jurisdiction.⁶¹ Typically, such remedies were available only to improvers who were able to show they had acted in good faith and under color of title.⁶²

Although equitable compensation for mistaken improvers was adopted in many courts, in others, improvements continued to be treated as belonging to the true owner of the property.⁶³ This relatively uneven protection of the common law, depending as it did on courts' exercise of their equitable discretion, did not

C. Casad, *The Mistaken Improver—A Comparative Study*, 19 HASTINGS L.J. 1039, 1039 (1968) (noting same); Dickinson, *supra* note 57, at 38-39 (discussing same and citing additional authority).

59. See Merryman, *supra* note 58, at 465; Casad, *supra* note 58.

60. Justice Story's statement in *Bright v. Boyd* captures the idea:

[S]o far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This . . . has the most persuasive equity, and, I may add, common sense and common justice, for its foundation. The "Betterment Acts" (as they are commonly called) . . . are founded upon the like equity, and were manifestly intended to support it, even in suits at law for the recovery of the estate.

Bright v. Boyd, 4 F. Cas. 134, 135 (C.C.D. Me. 1843) (No. 1876); see also *Preston v. Brown*, 35 Ohio St. 18, 28 (1878); *Flint & Pere Marquette Ry. v. Gordon*, 2 N.W. 648, 655-56 (Mich. 1879). See generally RESTATEMENT OF RESTITUTION § 42 reporters' notes (1937); 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 390, at 65-67 (5th ed. 1941); HON. MR. JUSTICE STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 1237-1238, at 856-57 (2d ed. 1836); Dickinson, *supra* note 57, at 40; Casad, *supra* note 58, at 1040-41; Merryman, *supra* note 58, at 465-66.

61. See *Williams v. Vanderbilt*, 34 N.E. 476, 479 (Ill. 1893); *Cable v. Ellis*, 11 N.E. 188, 196 (Ill. 1887); *Ebelmessenger v. Ebelmessenger*, 99 Ill. 541, 549 (1881).

62. See, e.g., *Williams*, 34 N.E. at 479 ("In proceedings instituted by the real owner it must appear that the party making the improvements did so under a claim of title which turned out to be defective, or under some mistake concerning his rights, or because he was induced to incur the expenditures through the fraud or deception of the owner."); *Smith v. Arthur*, 34 P. 433 (Wash. 1893) (denying compensation where occupant had notice that homestead entry had been allowed by inadvertence).

63. See Merryman, *supra* note 58, at 466; see also *Williams*, 34 N.E. at 479 (citing the "general rule" in Illinois that "improvements of a permanent character, made upon real estate, and attached thereto, without the consent of the owner of the fee, by one having no title or interest, become part of the realty, and vest in the owner of the fee").

accord with the general American public policy, operative from earliest settlement into the late nineteenth century, that land should be settled and resources put to productive use.⁶⁴ To insure that the law served the objectives of settlement and improvement, states early enacted so-called betterment acts and occupying claimant statutes which offered remedies to a good faith improver if the improver was able to meet certain conditions.⁶⁵ By the time of the *Illinois Central* decision, a number of states, again including Illinois,⁶⁶ had enacted such statutes.⁶⁷ Similar to the equitable principles adopted as a matter of common law, the two most common conditions in those statutes were that the improver have entered the property in good faith and under color of title.⁶⁸ The concept of "good faith," a common one in property law, generally prevents those who know, or in the exercise of reasonable care should know, of their lack of ownership from raising the equitable

64. See Casad, *supra* note 58, at 1041 (discussing this policy); Merryman, *supra* note 58, at 466 (same). See generally John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996) (discussing a nineteenth century anti-wilderness bias that still influences modern property law). Cf. John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816 (1994) (discussing how adverse possession laws reflect a pro-development nineteenth-century ideology that encourages exploitation of wild lands).

65. See Merryman, *supra* note 58, at 466. The earliest statute was enacted in Virginia in 1643. See *id.* (citing 1 Stat. 260 (2d ed. Henning 1823) (Va.)). Basically "the statutes make what is generally supposed to be the old equity rule—allowing the improver a positive judgment by way of counterclaim—available even in actions at law." Casad, *supra* note 58, at 1042.

66. See An Act in Regard to the Practice in Acts of Ejectments, 1872 Ill. Laws 370, §§ 48-56 (allowing an occupying claimant "the value of all such lasting and valuable improvements" which were erected without notice of the adverse claim).

67. See ALA. CODE §§ 2702-2705 (1886); 1883 Ark. Acts No. 69, §§ 1-4; 1851 Cal. Stat. ch. 5, § 257; GA. CODE § 3468 (1882); 1881 Ind. Acts ch. 38, § 694; IOWA CODE §§ 3151-3162 (1888); 1873 Kan. Sess. Laws, ch. 102 §§ 1-2; LA. CIV. CODE ART. 488-532 (1870); 1882 Mass. Acts, c. 173 §§ 15-39; MINN. STAT. ch. 75 §§ 13-24 (1878); 1880 Miss. Laws § 2512; 1889 Mo. Laws §§ 4645-4654; 1883 Neb. Laws, ch. 59 §§ 1-11; 1876 N.Y. Laws §§ 1496-1497; TENN. CODE ANN. § 3261 (1858); TEX. REV. CIV. STAT. ANN. arts. 4809, 4813-5816 (1879); 1820 Vt. Laws 35 §§ 15-16; W. VA. CODE § 1 (1882); 1878 Wis. Laws § 3096-3100. By 1985, 42 jurisdictions had "betterment" or "occupying claimant" statutes. See Dickinson, *supra* note 57, at 42 & n.28 (1985) (listing jurisdictions).

68. See Casad, *supra* note 58, at 1042 ("For the most part [the statutes'] provisions may be invoked only by improvers who acted in 'good faith' and under 'color of title,' although the meaning ascribed to these terms by judicial interpretation varies.") (citation omitted); Dickinson, *supra* note 57, at 43 (same); William L. Ziegler, Note, *Good Faith and the Right to Compensation For Improvements on Land of Another*, 6 W. RES. L. REV. 397, 398 (1955) (same).

defense.⁶⁹ The idea of "color of title" generally refers to taking title under some instrument suggesting title in the land.⁷⁰ Once the improver showed good faith and color of title, the statutes provided for a variety of remedies, the most popular of which was to give the true owner the option of selling the land to the improver or paying the improver compensation for the value of any improvements.⁷¹

Thus, one potential source of Justice Field's suggestion that Illinois "ought to pay" for improvements is this common-law and statutory framework for mistaken improvers. Equitable compensation for mistaken improvers, of course, was, and has continued to be, awarded under a variety of equitable headings. It was awarded on the basis of estoppel.⁷² It was awarded under mistake of law and quasi contract theories, as a counterclaim for recoupment or restitution.⁷³ At other times, it was awarded on the theory of a constructive trust—a trust that arises purely by implication of equity without regard to the intention of the

69. See *Clark v. Leavitt*, 166 N.E. 538, 539 (Ill. 1929) ("Whether he is a purchaser in good faith depends upon whether he had reason to suppose that his title was good."); Dickinson, *supra* note 57, at 59-60. The textual definition of good faith is, of course, a generalization. Court have adopted different definitions of good faith, in some cases requiring actual notice of adverse claims and in other cases requiring merely constructive notice. See *id.* at 57; see also Casad, *supra* note 58, at 1050 ("There are, however, widely variant views as to what 'good faith' is in this context [mistaken improver cases].").

70. See *Wright v. Mattison*, 59 U.S. (18 How.) 50, 56 (1855) (defining color of title "to be that which in appearance is title, but which in reality is no title."). See generally Casad, *supra* note 58, at 1052 (discussing definition of "color of title").

71. See Dickinson, *supra* note 57, at 44-45.

72. See generally Annotation, *Compensation for Improvements Made or Placed on Premises of Another by Mistake*, 57 A.L.R. 2D 263, 270 (1958) (citing cases). Estoppel would be the equitable basis for compensating a mistaken improver most often in situations where the true owner misled the improver or acquiesced in the improver's mistake. See *Preston v. Brown*, 35 Ohio St. 18, 28 (1878) ("[I]f an owner of an estate stands by and suffers another, acting in good faith and without notice of his title, to place improvements thereon, which add permanent value to the estate, such improvements will constitute a lien thereon."); Dickinson, *supra* note 57, at 61, 68-70. Cf. *Kirk v. Hamilton*, 102 U.S. 68, 76-77 (1880) (discussing application of estoppel principles to title disputes); *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, 354 (N.Y. 1815) (Chancellor Kent discussing same).

73. See RESTATEMENT OF RESTITUTION § 42(3) (1937) ("A person who has acquired an interest in land . . . as the result of an agreement with the owner made under a mistake of fact and avoided by the owner is entitled to restitution for the value of services rendered in their preservation or in making appropriate improvements thereon."); *id.* at § 53(3) (same).

parties.⁷⁴ Whatever the heading,⁷⁵ the basic principle was the same. The mistaken occupant was entitled to reimbursements for improvements if she acted without fraud and in good faith.

Under any of these equitable headings, Field could have concluded that because the state sought equity (quiet title and rescission of the 1869 legislative grant), it needed to do equity (pay compensation to the Railroad for any improvements). Of course, before suggesting that the Railroad was entitled to equitable compensation, Field would need to have concluded that the Railroad possessed the submerged lands in good faith and under color of title. There is little question that the Railroad possessed the lands under color of title. The Lake Front Act was certainly a legal instrument suggesting title to the submerged lands. The question of the Railroad's good faith, however, is closer and deserves scrutiny.

For purposes of analyzing whether the Railroad would have merited equitable compensation as a good faith improver, one useful definition of good faith is contained in two companion opinions Justice Field authored some seven years before *Illinois*

74. See GEORGE T. BISHAM, *THE PRINCIPLES OF EQUITY* §§ 78, 92 at 118, 132-34 (4th ed. 1887); *RESTATEMENT OF RESTITUTION* § 160 cmts. a & k (1937) (giving example of case where X mistakenly conveys property to Y and suggesting that Y holds the property upon a constructive trust); *RESTATEMENT OF RESTITUTION* § 178 cmt. a (1937) ("Where property is transferred as a result of a mistake of such a character that the transferor is entitled to restitution, the transferee holds the property upon a constructive trust for the transferor; but if the transferee, having no notice of the mistake, so changes his position that it would be inequitable to compel him to surrender the property, the transferor can no longer enforce the constructive trust.") (citation omitted); *Case v. Kelly*, 133 U.S. 21, 28-29 (1890) (Miller, J.) (concluding that the true owner must give a good faith constructive trustee either compensation for improvements or the right to remove the improvements). Identifying the grantee of a trust resource as a constructive trustee should not be confused with viewing the public trust doctrine as a subset of trust law. A constructive trust is a creature of equity akin to a quasi-contract. It is not truly a doctrine of trust law. See *RESTATEMENT OF RESTITUTION* § 160 cmt. a (1937). To the extent the public trust doctrine is a species of trust law, equity would still require the state to pay compensation for improvements. See *RESTATEMENT (SECOND) OF TRUSTS* § 292(1) & cmt. d (1959) (stating that if the trustee in breach of trust transfers trust property and no value is paid for the transfer, the gratuitous transferee who makes improvements without notice "can be compelled to surrender the property only if he is reimbursed for such expenditures, even though the property is not benefitted to the extent of the amount expended"); see also *RESTATEMENT (SECOND) OF TRUSTS* § 291(3) (1959) (allowing compensation for improvements that enhance the value of the trust corpus even where transferee took with notice of the trust).

75. For additional discussion of the equitable sources for awarding compensation to mistaken improvers, see *infra* note 232.

*Central: Sparks v. Pierce*⁷⁶ and *Deffebach v. Hawke*.⁷⁷ In *Deffebach*, the reasoning of which was held to wholly dispose of the same issue in *Sparks*,⁷⁸ the plaintiff claimed title to certain land by way of a mining law patent while the defendant claimed title to the same land under laws relating to entry of public land for use as a townsite.⁷⁹ Field rejected the defendant's title claim,⁸⁰ and then addressed the defendant's request to be compensated for improvements. After reviewing a Dakota territorial statute which provided for compensation in cases where the mistaken improver held the land "under color of title, adversely to the claim of the plaintiff, in good faith," Field declined to order compensation.⁸¹ On the good faith requirement, he opined that "there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation."⁸²

If Justice Field had in mind the definition of good faith from *Deffebach* when he suggested in *Illinois Central* that Illinois "ought to pay," Field arguably concluded that "under the law, which [it] is presumed to know,"⁸³ the Railroad could indeed have acquired title. This conclusion, however, undermines two basic tenets to which public trust doctrine advocates adhere: that the doctrine had, prior to *Illinois Central*, a long-established, common-law pedigree, and that the doctrine did not work a taking under the Fourteenth Amendment because the submerged lands were always impressed with an easement in favor of the public

76. 115 U.S. 408 (1885).

77. 115 U.S. 392 (1885); see also *Searl v. School District No. 2*, 133 U.S. 553, 561 (1890) (discussing a similar standard of good faith).

78. See *Sparks*, 115 U.S. at 413.

79. See *Deffebach*, 115 U.S. at 400. The defendant pointed to a land office entry made by a local probate judge. See *id.* at 405-06.

80. The Court rejected the claim because entry under laws relating to townsites was invalid where the land contained valuable minerals. Such lands could only be entered under the Mining Act. See *Deffebach*, 115 U.S. at 401-06.

81. *Deffebach*, 115 U.S. at 407. On the color of title requirement, Field elaborated that "[t]here can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title or to give him the right to possession." *Id.*

82. *Id.* (emphasis added). Although Field relied on a territorial statute in *Deffebach* and *Sparks*, three years earlier he had suggested that a similar good faith standard applied as a matter of equity. See *Steel v. Smelting Co.*, 106 U.S. 447, 456-57 (1882).

83. *Deffebach*, 115 U.S. at 407.

and thus the exercise of that easement did not take anything that was ever given.⁸⁴

In *Deffebach*, Field was unable to find good faith because the law, which the improver was presumed to know, did not allow the improver to acquire title. Applying the same standard in *Illinois Central*, his compensation suggestion implies a belief that the Railroad acted in good faith because, under the law at the time of the grant, there was no impediment to the Railroad acquiring fee title to submerged lands. Although this view of the law at the time of the grant was accurate,⁸⁵ it is certainly not the view of *Illinois Central* advocated by adherents to the modern public trust doctrine. If, as public trust adherents claim, the 1869 grant had from its inception been impressed with an easement in behalf of the public, and particularly if that easement was firmly rooted in the common law and, even further back, in Roman law,⁸⁶ how could the Railroad have acted in "good faith"? Why was it entitled to compensation?

Although Justice Field's definition of "good faith" in *Deffebach* suggested that no compensation was permissible where the party could not have acquired title "under the law, which [it] is pre-

84. See *infra* note 86 (citing arguments for a long public trust pedigree). See *supra* note 14 (citing cases and commentators which have suggested that the public trust doctrine does not work a taking because it takes nothing that was ever given to the grantee); see also Huffman, *supra* note 8, at 568 ("The wonder of the public trust doctrine is that it evades the takings issue by insisting that the public rights in question predate all private rights.").

85. See *supra* notes 31-32 and accompanying text (discussing how prior to *Illinois Central*, states were generally understood to have the power to grant land under navigable water or other trust resources in fee, as long as they did so in plain and explicit language); see also David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324, 331-33 (1985) (discussing the creative law-making of *Illinois Central*).

86. A number of articles and judicial decisions trace the origins of the public trust doctrine back to Roman law. See, e.g., *State v. Central Vt. Ry., Inc.*, 571 A.2d 1128, 1130 (Vt. 1989) ("The public trust doctrine is an ancient one, having its roots in the Justinian Institutes of Roman law."); *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987) ("The principle that the public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian, . . ."); Blumm & Schwartz, *supra* note 9, at 713 ("The trust doctrine's common-law origins can, in fact, be traced back to medieval England and ultimately to Roman law.") (footnote omitted). But see Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 16 (1976) (criticizing "recent writers in the field of public rights in coastal lands and waters" for holding up "Roman law as the paradigm of a lost Edenic state of perfect communal ownership of and public control over coastal area resources").

sumed to know,"⁸⁷ his compensation suggestion in *Illinois Central* may not have been premised on such a strict rule of good faith. Deffebach's suggestion that good faith could never exist where a party makes a mistake of law would eliminate a large number of claims for mistaken improvement. But equity often allowed, and still allows, compensation for improvements where a conveyance granted as a result of a mistake of law is revoked or rescinded.⁸⁸ Although it is generally the case that equity will not aid a person who enters land with knowledge that the land would need to be reconveyed upon a certain contingency, courts have not always denied compensation in such situations.⁸⁹ In fact, mistaken improver cases reveal a wide variety of approaches by courts to the issue of good faith.⁹⁰ Given this discretion-laden, case-by-case approach, which is a hallmark of equity courts, it is difficult to discern a clear demarcation between the instances in which compensation will or will not be allowed. Thus it is difficult to assert with certitude that Field believed a person could never make a mistake of law in good faith.

Nevertheless, if there is one common element that can be drawn from the cases where compensation is awarded, it is that the improver must have a *reasonable* belief that she has title.⁹¹ Thus, even if Justice Field concluded that the Railroad had made

87. 115 U.S. at 407.

88. See, e.g., *Searl v. School District No. 2*, 133 U.S. 553, 563-64 (1890) (giving a more liberal definition of good faith); *Bright v. Boyd*, 4 F. Cas. 127 (C.C.D. Me. 1841) (No. 1875) (setting aside probate court sale after eight years).

89. See Dickinson, *supra* note 57, at 56 (citing cases). Compare *Fee v. Cowdry*, 45 Ark. 410 (1885), and *Folsom v. Clark*, 72 Me. 44 (1881) (improver granted compensation where he improved land under agreement with life tenant thinking that life tenant was able to convey fee simple), with *Beard v. Dansby*, 2 S.W. 701 (Ark. 1887) (improver with knowledge that he does not own fee simple title not entitled to compensation), and *Gibson v. Hutchins*, 12 La. Ann. 545 (1857) (improver denied compensation because he occupied merely with the hope of securing a preemption).

90. See generally Casad, *supra* note 58; Dickinson, *supra* note 57; Ziegler, *supra* note 68.

91. See Casad, *supra* note 58, at 1051 (discussing the common definition of good faith that emphasizes "the improver's good faith belief in his own title and the absence of any suspicion that another may be challenging his claim") (citation omitted); Dickinson, *supra* note 57, at 55, 59-60; Ziegler, *supra* note 68, at 404 ("The test used by the courts is whether or not the occupant improved the land under the honest belief he owned the fee. He is also required to have based this honest belief on reasonable grounds.") (citation omitted). Unsurprisingly, an occupant's reasonable belief is often exhibited by showing color of title. See Dickinson, *supra* note 57, at 55.

a mistake of law, at very least he must have seen the Railroad's conduct as reasonable. What is again curious is that if the public trust doctrine were as firmly embedded in the law as some have argued, it would have been anomalous for Field to conclude that the Railroad reasonably believed it had fee title. Thus, even if Justice Field had in mind a broader "reasonableness" approach to good faith, the idea that the public trust doctrine was well-settled prior to *Illinois Central* is subtly undermined by Field's compensation suggestion.

If Field concluded that the Railroad acted in good faith, however defined, another part of the lore of *Illinois Central* that is undermined is an oft-repeated but little supported contention that the Lake Front Act was the product of corruption. Attempting to justify or explain the Court's adoption of the public trust doctrine, certain commentators have perceived corruption in the legislative process.⁹² This perception fits with the argument advanced by certain commentators that the public trust doctrine compensates for "defects" in the democratic process.⁹³ Those who see corruption in the 1869 grant often rely on the observation in Justice Field's opinion that "[t]he circumstances attending the passage of the act through the legislature were on the hearing the

92. See, e.g., GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 574 (1968); WATERS, *supra* note 2, § 30.02(b)(1) (repeating suggestion); Currie, *supra* note 85, at 331 ("The Illinois legislature had, under shady circumstances, granted virtually all the land under Chicago's harbor to a railroad and then attempted to take it back."); *id.* ("One cannot know to what extent the result in *Illinois Central* was influenced by the sense that the deal was less than honest."); Richard Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 425 (1987) ("When Justice Field struck down the grant to the railroad, he acted not to restrict the power of ordinary conveyances, but to prevent the abuse of legislative power that might well have transpired."); Ralph W. Johnson & William C. Galloway, *Biodiversity Symposium: Protection of Biodiversity under the Public Trust Doctrine*, 8 TUL. ENVTL. L.J. 21, 24 (1994) ("Despite duly (and probably corruptly) enacted state legislation, the title was at least voidable, if not void."). As Currie notes, Marshall's refusal to investigate legislative motive in the similar circumstances of *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), made it difficult for the Court to invalidate the grant on grounds of bribery or improper influence. See Currie, *supra* note 85, at 331. But once the public trust doctrine was identified as a power allowing revocation, if the Court found fraud it seems unlikely that it would have suggested compensation, unless that was simply a nod in the direction of *Fletcher's* broader holding.

93. See, e.g., Blumm, *supra* note 9, at 580 (calling the public trust doctrine "a democratizing force"); Sax, *supra* note 18, at 509 (arguing that the public trust doctrine is a "medium for democratization"); *id.* at 521 ("The 'public trust' has no life of its own and no intrinsic content. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process.").

subject of much criticism.”⁹⁴ But this reference is not one to corruption but to various technical challenges to the legislative process by Chicago and the State.⁹⁵ Among other things, they argued that the Lake Front Act violated state constitutional requirements that the bill be read on three different days in each house, that each house keep a journal of its proceedings, and that the title of the act express its subject.⁹⁶ Like Justice Harlan below,⁹⁷ Justice Field rejected these challenges finding that “the evidence was insufficient” to support the claims.⁹⁸ Not only did the Court have trouble finding corruption in the circumstances surrounding the passage of the Act, but also it is hard to believe that the Lake Front Act corruptly subverted the popular will

94. *Illinois Central*, 146 U.S. at 451. See, e.g., WATERS, *supra* note 2, § 30.02 (b)(1) (relying on this passage).

95. Actual allegations of corruption were made, but not in the parties’ briefs. In an 1881 pamphlet, the Illinois Anti-Monopoly League alleged:

[W]e come to what is known as the “Lake Front Steal,” perpetrated by this company, in 1869, with the aid of a Legislature of odorous memory.

The nature of this statute sufficiently indicates that infamous methods were employed to obtain it. Some of these were the retaining of divers “attorneys” in the counties of this State, shortly before the election, ostensibly for legitimate business of the company, but really to pack the Legislature. When it met, the usual methods of monopolies, bribery, intimidation, log-rolling and obstruction of all public business until their job was accomplished, were resorted to, and the act of April 16, 1869, was finally rushed through over the Governor’s veto.

A.S. BRADLEY, REPORT OF THE PRESENT STATUS OF THE CLAIMS OF THE ILLINOIS CENTRAL RAILROAD TO THE LAKE FRONT AND SUBMERGED LANDS ADJOINING, UNDER THE “LAKE FRONT STEAL” OF 1869 (Illinois Anti-Monopoly League, 1881). The Report’s failure to provide any specific instances of this corruption, however, suggests that it may have been hyperbole. Bessie Pierce, in her history of Chicago, also reports that the Lake Front Act “was commonly known as the ‘Lake Front Steal’.” 3 BESSIE PIERCE, A HISTORY OF CHICAGO 319 (1957). But she does not relate any instances of bribery or *sub rosa* activities. According to Pierce, the public’s ire was directed primarily at sections 4-6 of the Act which allowed Illinois Central and three other railroad companies to purchase certain lakefront property for a payment of \$800,000 to Chicago’s park fund. See *supra* note 19 (discussing this section of the Act). Those who opposed the Act argued that the property should be used for a park rather than a railroad depot. See *id.*; see also 2 BESSIE PIERCE, A HISTORY OF CHICAGO 296, 342 (1940).

96. See Brief on Behalf of the State of Illinois at 2-52; Argument for the City of Chicago at 2-8. The origin of these technical challenges was that as originally introduced, the Lake Front Act purported to give Chicago control of the submerged lands so that it could control and enlarge its harbor. 146 U.S. at 450-51. When the grantee was changed to the Railroad, questions followed about which reading of the bill counted. See *id.*

97. See *Illinois v. Illinois Cent. R.R. Co.*, 33 F. at 760-71 (reviewing Illinois precedent and rejecting these state constitutional challenges).

98. See 146 U.S. at 451.

when the Act was passed over the governor's veto,⁹⁹ and by a supermajority of the state legislature.¹⁰⁰ The Act, therefore, does not appear to have resulted from a defect in democracy, unless one believes that democracy itself is defective.¹⁰¹

Field's compensation suggestion confirms that he likely did not view the legislative process as corrupt or fraudulent. One aspect of mistaken improver law, and the definition of good faith, that appeared in almost every case, was that no compensation could be recovered where the improver had perpetrated a fraud or deception. Field's 1878 dissent in *Jackson v. Ludeling*,¹⁰² from an award of compensation for improvements is an example of just such an emphasis:

[C]ourts of chancery do not give to an occupant compensation for improvements, unless there are circumstances attending his possession which affect the conscience of the owner, and impose an obligation upon him to pay for them or to allow for their value against a demand for the use of the property. To a possessor whose title originates in fraud, or is attended with circumstances of circumvention and deception, no compensation for improvements is ever allowed.¹⁰³

99. See *id.* at 405. In its Supreme Court briefs, the Railroad finds support for its interpretation of the Lake Front Act in Governor John M. Palmer's veto message, observing that the governor criticized the Act because "the act, if passed, would conclude the state from claiming the proprietary and other rights granted by it." Brief and Argument for Appellant at 90-91 (discussing but not quoting the Governor's veto message).

100. See ILL. CONST. art. V, § 16 (requiring two-thirds of each house in the General Assembly to override a veto).

101. One might wonder whether this is at the bottom of many arguments that the public trust doctrine properly allows judges to remedy defects in the democratic process. To the extent there was "corruption" in the legislative process, it was probably in their solicitude toward large aggregations of capital with political clout, a problem that remains part of democracy to this day. Indeed, such "corruption" was likely at the heart of the Anti Monopoly League's criticisms of the Lake Front Act. See *supra* note 95. But if judges are to be allowed to reject legislation on this basis and without reference to the Constitution, there is little legislation that could not be rejected, particularly from the last 30 years of the nineteenth century.

102. 99 U.S. 513 (1878).

103. *Id.* at 537 (Field, J., dissenting) (citations omitted). Field dissented from the Court's decision to allow compensation because the Court had found that the improvers "were possessors in bad faith, having obtained control of the road fraudulently. . . . The defendants knew all the time the vice of their title; they knew they were not possessors in good faith; they concocted the scheme by which the fraudulent sale was made; and this court has so adjudged." *Id.* at 536-37.

Given this basic condition of equitable compensation, Field must, at very least, have concluded that the 1869 grant did not "originate[] in fraud," was not "attended with circumstances of circumvention and deception," and was sufficient to "affect the conscience" of the State and impose on it an obligation to pay.¹⁰⁴

Given that a finding of good faith—whether defined broadly or narrowly—undermines the public trust doctrine, one possible reading of Field's compensation suggestion is that it is purely instrumentalist. Under this view, there is no need to reconcile Field's support of the public trust doctrine with a finding of the Railroad's good faith. Although the ideas are contradictory, overall they accomplish rough justice. Given his view of the public injustice done by granting such a vast area of the harbor, Field presumably believed the Railroad was not entitled to the submerged lands. Yet, despite his effort to muster precedent supporting the public trust doctrine,¹⁰⁵ he could not quite swallow whole the notion that it had a long-established, common-law pedigree: he knew that courts generally had not limited state power to convey fee title to submerged lands.¹⁰⁶ Thus, whatever his beliefs about the injustice of the grant, Field surely knew that the Railroad had acted in good faith because the Railroad could not have known that the harbor lands were imposed with a public trust easement when they were transferred. Under this view of Field's thinking, although he was not willing to directly undermine his public trust conclusion by a thorough explanation of the Railroad's good faith, he was willing to quietly undermine it by suggesting compensation.

104. See *id.* at 537 (Field, J., dissenting). This conclusion could be inaccurate if the compensation suggestion were not directed at the case before him but at public trust cases more generally, which was probably not the case. See *supra* note 55 and accompanying text. Another argument against this conclusion is that Field departed from his *Jackson* dissent and decided that compensation was necessary even in the presence of corruption. This conclusion seems unlikely but in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87. (1810), Justice Marshall had decided that the Contract Clause forbade a state from reneging on a land grant even though that grant had been the result of fraud and corruption. Thus, although Field refused to follow *Fletcher's* admonition that legislation repudiating a prior grant was a violation of the Contract Clause, one could argue that he was following its precept with respect to compensation for improvements, again assuming he perceived corruption at all.

105. See *Illinois Central*, 146 U.S. at 455-59.

106. Field as much as admitted the weakness of his supporting precedent when he conceded that he could not "cite any authority where a grant of this kind [had] been held invalid." 146 U.S. at 455. See *infra* note 134 (citing articles critical of historical support for the public trust doctrine of *Illinois Central*).

Under such an instrumentalist reading of Field's reasoning, the public trust doctrine and compensation for improvements are arguably incompatible.¹⁰⁷ If states had always been without the power to make such large grants of submerged lands, no compensation for improvements was warranted because the Railroad's improvements were not erected in good faith.¹⁰⁸ And, if such grants had previously been permissible, Illinois' revocation constituted a Fourteenth Amendment taking and required compensation not just for improvements but for the lands themselves. To those who view the public trust doctrine as something of a fiction, this instrumentalist reading of Field's opinion clearly has some attraction in the way it "exposes" his own discomfort with the doctrine.

2. Equitable Compensation As Part and Parcel of the Public Trust Doctrine

Despite this attraction, Justice Field's compensation suggestion need not be read as quite so contrary to his reliance on the public trust doctrine. A different, and more appealing, reading of Justice Field's compensation suggestion is to conceptualize it as part and parcel of the public trust doctrine. The primary difference between this approach and that of mistaken improver law is that the compensation requirement becomes part of the public trust doctrine itself rather than arising as a separate equitable counterclaim or defense.

107. Presuming good faith by the Railroad is only compatible with the public trust doctrine where good faith is defined in the broadest sense. If, for example, good faith means nothing more than that "circumstances" exist which should "affect the conscience" of the state and impose an obligation upon it to pay, see *Jackson v. Ludeling*, 99 U.S. at 537 (Field, J., dissenting), then perhaps a grantee with notice of the public trust doctrine could still be said to have acted in good faith and be entitled to improvements. At bottom though, this view of good faith, is not significantly distinct from the view, discussed in the next section of the text, that compensation for improvements is part and parcel of the public trust doctrine. Essentially, the grantee of trust resources with notice of the public trust doctrine is relying in good faith upon compensation as a condition of revocation.

108. Again, it is a basic principle of mistaken improver law that one who improves land knowing it belongs to another is not entitled to compensation. See Dickinson, *supra* note 57, at 50; Ziegler, note 68, at 404 ("An occupying claimant who improves land with knowledge that he does not own the fee simple title is not usually entitled to compensation because he is in bad faith.").

In property law terms, under the trust doctrine the state retains a "right of entry" or a "power of termination."¹⁰⁹ The state's right of entry, however, is "constructive" because it is not a written term of the initial grant; it is instead imposed as a matter of policy.¹¹⁰ Thus, rather than conceptualizing compensation as an equitable limit on the state's exercise of its property right, compensation can be viewed as an additional constructive term of the initial grant. The harshness of the constructive public trust is meliorated by an additional constructive condition of compensation. Or, to put the two together, the state could be said to retain a constructive limited right of revocation: it may revoke a prior grant of trust resources as long as it pays compensation for improvements. If compensation is a constructive term of the initial grant, then in pleading terms the compensation requirement becomes an element of a public trust claim rather than a defense or counterclaim.¹¹¹ The state must prove that adequate compensation can be, or has been, made as a part of its *prima facie* public trust case, or it cannot revoke the grant.¹¹²

109. See generally ROGER A. CUNNINGHAM, ET AL., *THE LAW OF PROPERTY* 85-87 (2d ed. 1993) (setting forth basic types of future interests). Typically, under a right of entry or power of termination, the grantor conveys property to the grantee subject to the condition subsequent that if the grantee uses the property for a certain purpose—for example, as a liquor store, or other than for a school—the grantor may re-enter and take back the property. See *id.* See generally GRANT S. NELSON, ET AL., *CONTEMPORARY PROPERTY* 245-66 (1996) (discussing reversionary future interests).

110. See, e.g., *State v. Central Vt. Ry.*, 571 A.2d 1128, 1135 (Vt. 1989) (concluding that by virtue of the public trust doctrine the court can "infer a condition subsequent" that the State has a "right of re-entry" if certain lands along Lake Champlain are not used for railroad, wharf, or storage purposes), *cert. denied*, 495 U.S. 931 (1990); *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 366-67 (Mass. 1979) (viewing public trust as creating an implied condition subsequent that conveyed lands be used for marine commerce).

111. This view of compensation as an element of the state's public trust claim is perhaps easier to understand with reference to a basic reversionary interest hypothetical. Suppose that X grants property to Y so long as Y uses the property as a school. If Y ceases to use the property as a school, X may re-enter. Suppose that X brings an action to eject Y from the property. X would have the burden of proving that Y was no longer operating a school. Similarly, in the public trust case, before the state may re-enter or terminate a grant of trust resources, it must prove that adequate compensation has been or will be made.

112. For examples of cases where courts have refused to allow the grantor to re-enter because she failed to prove that the condition for reversion had been met, see *Springmeyer v. City of South Lake Tahoe*, 183 Cal. Rptr. 43 (Cal. Ct. App. 1982) (condition that reversion would occur if property not used for "government office purposes" not met where land used for county government instead of city government); *Miller v. Stoppel*, 241 P.2d 488 (Kan. 1952) (refusing to determine which grantor would take a reversion where land granted for use as a church was

One of the unresolved questions from *Illinois Central* is whether a grant of trust resources is voidable or void *ab initio*. There is language in *Illinois Central* suggestive of both concepts.¹¹³ And subsequent courts have taken different approaches.¹¹⁴ Justice Field's compensation suggestion lends additional credibility to the voidability interpretation of *Illinois Central*. If a grant of a trust resource is void from its inception, and if that rule is firmly grounded in precedent, it makes little sense to compensate an improver because an improver who acts contrary to known or knowable law is generally not acting in good faith. If, however, the premise of the public trust doctrine is that grants are revocable, payment of compensation is logical. A person negotiating with a state for a grant of trust resources that she knew would be revocable at the state's pleasure would surely insist on the minimum protection that she could recoup whatever investment she had made prior to revocation.¹¹⁵ If grants of trust

still being used as a church); *Priddy v. School District*, 219 P. 141 (Okla. 1923) (refusing to find reversion where land granted for use of schoolhouse was still being used as a schoolhouse although an oil well had also been added to the property).

113. Compare 146 U.S. at 455 ("Any grant of [this] kind is necessarily revocable."), with *id.* at 453 ("A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power . . ."). See generally WATERS, *supra* note 2, § 30.02(d) n.182 (discussing this dichotomy).

114. Compare *Lake Mich. Fed'n v. United States Army Corp of Eng'rs*, 742 F. Supp. 441 (N.D. Ill. 1990) (reading *Illinois Central* as holding that the grant was void); *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773 (Ill. 1976) (same); and *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1117 (Alaska 1988) (holding that Illinois was free to revoke grant "because it had possessed no power to validly convey such land in the first place"), with *City of Berkeley v. Superior Court of Alameda County*, 606 P.2d 362, 365 (Cal. 1980) ("The court held that the grant was revocable."), *cert. denied*, 449 U.S. 840 (1980). See also WATERS, *supra* note 2, § 30.02(d)(1) (suggesting that the proper interpretation of *Illinois Central* and its progeny is not as limiting state power but as recognizing state power to revoke, modify, or limit prior grants).

115. This general statement may be subject to some exceptions. For example, a grantee may desire a grant of trust resources even if the state will not pay for improvements if the grantee believes that it can take advantage of the resource without any investment in improvements or if the cost of improvements is minimal compared with the return from exploiting the resource. This possibility is reflected in California's statute providing for compensation for improvements upon state repossession of tidelands or submerged lands. See CAL. PUB. RES. CODE § 6312 (West 1996) ("Nothing herein contained shall be deemed to prevent the parties to a grant or patent of tidelands from agreeing, as a part of such grant or patent, that there shall be no compensation paid for any improvement made on those tidelands to which such an agreement relates."). Presumably, such a situation would only arise if the grantee believed it would be allowed to exploit the resource for the length of time necessary to recoup its expenses plus some additional marginal benefit. And,

resources are merely voidable, then Field's compensation suggestion is best understood as a component of the public trust doctrine, as a condition of revocation. Specifically, a state may revoke a grant of trust resources so long as it pays compensation for any improvements erected in reliance upon the grant.¹¹⁶

Although the idea that revocation is conditioned upon compensation supports the concept that grants of trust resources are voidable, it does little to shore up the foundations of the public trust doctrine. The compensation obligation's validity extends only so far as that of the public trust doctrine. In other words, it does not eliminate one fiction (that a state can revoke previously granted fee title to land under navigable water without implicating the Fourteenth Amendment) to add another (as long as it pays compensation for improvements). Nevertheless, viewing compensation as an additional constructive term of the initial grant is superior to viewing compensation as an equitable defense or counterclaim. Instead of contradicting the public trust doctrine,¹¹⁷ equitable compensation merely refines its scope. Compensation and the public trust doctrine rise or fall together.¹¹⁸

where the state can revoke the grant at any time, any recoupment plan is subject to substantial risk. This idea that a grant can fairly be subject to revocation because the grantee can foresee its obsolescence and conduct its business accordingly has also been used to justify the no compensation rule with respect to the navigation servitude. See Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 35-36 (1963). It is an equally suspect rationale in that context. See *id.* at 36 ("[T]he most perspicacious of business judgments would have difficulty harmonizing the length of the recoupment period with the point in time at which Congress *might* decide to appropriate the entire flow of the river.") (emphasis in original).

116. Note that under this reading of the compensation requirement, the grantee's status as a "mistaken" improver is not particularly important. The state's power to revoke is conditioned on its willingness to pay for improvements. See *infra* Part II.A.1. (discussing this issue at greater length).

117. See *supra* notes 107-08 and accompanying text (explaining how awarding compensation for improvements made in good faith is in conflict with the idea of a long-standing and well-known public trust easement impressed upon the initial grant).

118. If one views the public trust doctrine not as a constructive but rather as an actual easement, then compensation should likewise be viewed as an actual and not as a constructive part of the grantee's property right. Alternatively, if one views the public trust doctrine as having a constructive and equitable origin which has since ripened into an actual property right, compensation should have ripened right along with it into an actual property right. Of course, to the extent compensation is viewed as a constructive condition on the state's actual property right, it would be little different than viewing it as an equitable defense, except perhaps for purposes of avoiding sovereign immunity. See *infra* notes 182-85 and accompanying text. The equity (good faith and lack of notice) supporting the constructive condition would still

In the final analysis, whatever the superior approach, once Field made the decision to allow states to revoke grants without regard for the Fourteenth Amendment, he was correct that equity demanded compensation.

*C. The Relationship Between Justice Field's
Compensation Suggestion and the No Compensation
Rule of the Navigation Servitude*

Another aspect of Justice Field's compensation suggestion worthy of inspection is its relationship to the no compensation rule of the federal navigation servitude. Under the no compensation rule, when the United States exercises its navigation servitude to destroy or devalue private property, it need not pay compensation under the Fifth Amendment.¹¹⁹ Thus, the United States need not pay compensation when it removes a riparian's access to a navigable waterway¹²⁰ or impairs the flow of a navigable waterway.¹²¹ And when the United States condemns fast lands adjacent to a navigable watercourse, it need not compensate the owner of the fast lands for the value of the land

be in conflict with the idea of a long-standing, well-known easement.

119. A commonly cited description of the navigation servitude is in *United States v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 312 U.S. 592 (1941):

The dominant power of the federal government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

Id. at 596-97 (citations omitted). See generally WATERS, *supra* note 2, §35.02(c); Morreale, *supra* note 115, at 19-21 (discussing the navigation servitude). The United States' navigation servitude which has been conceived of in the nature of an easement should be distinguished from its power to regulate navigation under the Commerce Clause, which, in turn, should be distinguished from Congress' even broader regulatory authority under the Commerce Clause generally. See *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950) ("It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the government from liability. . . .").

120. See, e.g., *United States v. Rands*, 389 U.S. 121, 123 (1967) (construction of federal dike blocked river access); *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945) (dredging and filling eliminated navigability of tidewater creek); *Scranton v. Wheeler*, 179 U.S. 141 (1900) (pier blocked access).

121. See, e.g., *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 74-76 (1913).

attributable to the presence of the navigable waterway.¹²² This general immunity from Fifth Amendment takings claims under the navigation servitude is much like the state's immunity from Fourteenth Amendment claims under the public trust doctrine. But the rule of the navigation servitude goes further. The United States has no obligation to compensate for improvements destroyed as a result of its exercise of its navigation servitude.¹²³ The equitable compensation obligation articulated in *Illinois Central* thus appears to partially contradict the no compensation rule for the navigation servitude. Why should the state have an obligation to compensate for improvements when it exercises its dominant public trust servitude if the United States has no obligation to compensate for improvements when it exercises its dominant navigation servitude?¹²⁴

It is difficult to see any reason why the two doctrines should come to a different result because the justification for the

122. See, e.g., *Rands*, 389 U.S. at 124-25; *United States v. Twin City Power Co.*, 350 U.S. 222, 225-26 (1956). Thus, even though property next to a navigable stream may be valuable chiefly as a potential portsite or hydroelectric site, that fact will not be part of the just compensation calculation. See *Twin City Power*, 350 U.S. at 225-26. See generally Morreale, *supra* note 115, at 47-62 (explicating the case law on this issue); WATERS, *supra* note 2, § 35.02(c)(1). This same reasoning has been applied in grazing cases. When the United States condemns property, it need not compensate for the increased value of that property which results from a neighboring grazing permit because the United States is free to terminate a grazing lease without compensation. See *United States v. Fuller*, 409 U.S. 488, 491-92 (1973). Were a similar principle incorporated into public trust law, the result could be dramatic. A state exercising its eminent domain would not need to compensate the owner because of the property's access to trust resources. Given the expanding list of so-called trust resources, see, e.g., *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987) (suggesting that the public trust doctrine applies not simply to land under navigable water but to "its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes"); Scott Reed, *The Public Trust Doctrine: Is It Amphibious?* 1 J. ENVTL. L. & LITIG. 107, 116-21 (collecting cases extending the public trust doctrine beyond its traditional scope), this could significantly diminish the compensation owed by the state.

123. See, e.g., *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 312 U.S. 592, 595-597 (1941) (railroad tracks and telephone polls); *Louisville Bridge Co. v. United States*, 242 U.S. 409 (1917) (bridge); *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915) (wharves); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913) (oyster beds); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (power plant); *United States v. Certain Parcels of Land*, 666 F.2d 1236 (9th Cir. 1982) (alteration of ferry terminal).

124. The navigation servitude has been alternately referred to as the "superior navigation easement," see, e.g., *United States v. Grand River Dam Auth.*, 363 U.S. 229, 231 (1960), and as the "dominant servitude." See, e.g., *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954).

navigation servitude is grounded in the same historical account commonly proffered for the public trust doctrine.¹²⁵ Under that common account, the English Crown is said to have held title to land under navigable waters in trust for the people for purposes of navigation, commerce, and fishery. The Crown could not alienate the land subject to this trust and was obligated to preserve the public's rights.¹²⁶ Upon the Revolution, the story goes, the American states took title to the land under navigable water subject to these same trust obligations and likewise could not interfere with the public's rights to navigate, conduct commerce, and fish upon navigable waters.¹²⁷

Under this account, the states never possessed the power to interfere with the public's right to navigation and the fishery. They had a trust obligation to the public. Because of that trust obligation, the states could not convey fee title in land beneath navigable water, including lesser grants of a several fishery or a private right of passage. The most that a grantee could receive would be title subject to an easement in favor of the state. And thus any subsequent exercise of the sovereign's dominant servitude could not be a taking of private property.¹²⁸ The United States then inherited from the states, via the Constitution's Commerce Clause, the dominant servitude with respect to navigation,¹²⁹ and, the story continues, the states maintained the dominant servitude with respect to the fishery, and any other interest associated with land under navigable waters that can be shoe-horned into the public trust.¹³⁰ When the United States

125. See WATERS, *supra* note 2, § 30.05 at 74-75 (discussing the striking similarities between the federal navigation servitude and the public trust doctrine).

126. A vast number of cases give this historical account. See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Illinois Central*, 146 U.S. at 456; *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410-11 (1842); *Caminiti* 732 P.2d at 993; *State v. Central Vt. Ry., Inc.*, 571 A.2d 1128, 1130 (Vt. 1989); *Mono Lake*, 658 P.2d at 718-19.

127. See generally *Shively*, 152 U.S. at 57; *Illinois Central*, 146 U.S. at 456; *Martin*, 41 U.S. (16 Pet.) at 410-11; *Caminiti* 732 P.2d at 993; *Central Vt. Ry., Inc.*, 571 A.2d at 1130; *Mono Lake*, 658 P.2d at 718-19.

128. See generally *Morreale*, *supra* note 115, at 19-21 (discussing the navigation servitude).

129. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824) ("The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word 'commerce.'").

130. Those states that subsequently entered the Union received title to their land under navigable water under the equal footing doctrine. See *Shively*, 152 U.S. 1, 26-28 (1894). See generally *Rasband*, *supra* note 6 (discussing origins of equal

exercises its dominant servitude in favor of navigation, it need not pay any compensation. And when a state exercises its dominant servitude in favor of other trust resources, it likewise need not pay compensation, except, that is, for improvements constructed in reliance upon a grant of those resources.

It is that last exception—providing for compensation for improvements—that seems to create a contradiction in Justice Field's reasoning. Why should a state pay compensation for improvements if the federal government does not need to do so? Although the initial inclination might be to answer this contradiction by labeling it as another example of Field's instrumentalist approach, it cannot be answered so facilely. Field cannot be accused of departing from the no compensation rule because at the time *Illinois Central* was decided the no compensation rule for the navigation servitude did not exist. The Court's first articulation of the no compensation rule was in 1897.¹³¹ And four years

footing doctrine); John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519 (1951) (same). Presumably, that title was burdened with whatever trust it had been burdened with during the United States' possession. In the case of the those public lands east of the Mississippi River acquired by the United States under deeds of cession from the landholding states, see Rasband, *supra* note 6, at 30-34, the United States' title bore the same encumbrances as had the title of the granting states. Thus, the United States' ability to transfer title burdened with a trust depended on whether the original states' title was so encumbered. With respect to the public lands west of the Mississippi, it is more difficult to locate a source for the encumbrance. The most likely candidate is federal common law which simply replicated whatever common-law encumbrance burdened the property of the original states. Of course, to the extent the original states' land beneath navigable water was never burdened with a public trust servitude, the land under navigable water in the territories would not have been encumbered. In fact, given the equal footing doctrine's recognition of the United States' power to make grants of land under navigable water, there is at least implicit recognition that during the territorial period the land under navigable water was not burdened with the same type of trust obligation as existed in *Illinois Central*. See generally Rasband, *supra* note 6 (exploring this issue).

131. See *Gibson v. United States*, 166 U.S. 269 (1897) (holding for the first time that the federal power to protect navigation constituted federal immunity from compensation). Progress toward the no compensation rule was not uniform, however, as the Court soon thereafter required the United States to pay compensation to remove a boom constructed with state authorization across Washington's Nooksack River. See *United States v. Bellingham Bay Boom Co.*, 176 U.S. 211 (1900). The no compensation rule was solidified in *Union Bridge Co. v. United States*, 204 U.S. 364 (1907), where the Court held that state authorization of an obstruction was no impediment to Congress' removing of that obstruction without compensation, pursuant to its navigation servitude. *Id.* at 400-01; see also *Louisville Bridge Co. v. United States*, 242 U.S. 409 (1917) (applying no compensation rule to situation involving previous congressional authorization). See generally Morreale, *supra* note

previously, in *Monongahela Navigation Co. v. United States*, which was argued only eleven days after *Illinois Central*, the Court had required the United States to pay just compensation where Congress had condemned a lock and dam along the Monongahela River which had been legislatively authorized by Pennsylvania.¹³²

The non-existence of the no compensation rule at the time *Illinois Central* was decided is odd, therefore, only if one accepts the common historical account of the public trust doctrine and the navigation servitude discussed above. In reality, the common account of the doctrines is based on two key fictions which shed light on why the no compensation rule had not been adopted: first, the common account partially errs in its description of the Crown's power; second, and much more importantly, it wholly fails to consider Parliament's power.¹³³ The suggestion that the Crown could not alienate the public trust is only partially true. In fact, the pre-Revolution common law in England was that the Crown was only *presumed* to hold land under navigable water in trust for the people; the Crown could defeat that presumption by a clear and unequivocal grant.¹³⁴ And, however unjust it may have been, the Crown conveyed into private ownership almost all of the land under navigable water in England, as well as numer-

115, at 32-33 (discussing origin and development of no compensation rule); Richard W. Bartke, *Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 OR. L. REV. 1 (1968); Bruce H. Johnson, *Enforcing the Federal Water Resource Servitude on Submerged and Riparian Lands*, 1977 DUKE L.J. 347.

132. 148 U.S. 312, 336 (1893) (*Monongahela*). The obstructions and improvements were also impliedly authorized by the United States which had appropriated funds for the improvement of the river. See *id.* at 334-35. This approval was emphasized in subsequent cases adopting the no compensation rule in an effort to distinguish *Monongahela* as an estoppel case. See *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 265-66 (1915); Morreale, *supra* note 115, at 32 (citing additional cases). But reading the opinion makes it clear that the key factor necessitating compensation was not the United States' invitation to build but Pennsylvania's authorization.

133. See *Gough v. Bell*, 22 N.J.L. 441, 457-58 (N.J. Sup. Ct. 1850) ("The objection to an alienation of the public domain by the king is, that he is but a trustee of the community. But the legislature are not mere trustees of common rights for the people The act of the legislature is the act of the people."), *aff'd*, 23 N.J.L. 624 (N.J. 1852).

134. See generally Rasband, *supra* note 6, at 8-25 (exploring the origins of the public trust doctrine); 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. 513 (1975) (same); Deveney, *supra* note 86, at 41-66 (same).

ous fisheries.¹³⁵ The only limitation on the Crown's power was that the Crown could not deny the public right of navigation, which was the extent of the *jus publicum* about which so much has been said.¹³⁶ So, even operating on the assumption that upon the Revolution the states inherited the power of the Crown, they would have inherited the right to convey land under navigable water and several fisheries subject only to the public's right of navigation.

But the states inherited more than simply the right, title, interest, and powers of the Crown, they also inherited the power of the Parliament. And there had never been any question that the Parliament, as representative of the people, could convey land under navigable water, grant several fisheries, *and* extinguish any public right of passage.¹³⁷ Thus, each state was free not only to alienate its land under navigable water and grant several fisheries¹³⁸ but also to extinguish public rights of passage.¹³⁹

135. See Rasband, *supra* note 6, at 9-10.

136. See *id.* at 10 n.25 (discussing extent of *jus publicum*). The whole division of property into a *jus privatum* and a *jus publicum* is a product of describing the Crown's unique interest in land under navigable water. The terms exist because of the monarchical system. Accordingly, their application to describe the right, title, and interest of the American states is inaccurate and only leads to confusion.

137. See sources cited *infra* notes 138-39 for authority regarding Parliament's power.

138. See JOSEPH ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOILS AND SHORES THEREOF 107 (Fred B. Rothman & Co. 1983) (1826) ("If the public right of fishery then, in an arm of the sea, is subservient to the will and power of parliament in England, it must, on the same principle, be subservient to the will and power of the legislatures in this country."); 1 HENRY P. FARNHAM, THE LAW OF WATER AND WATER RIGHTS § 44, at 213 (1904) ("There were no limitations upon the right to grant several fisheries, because the limitation which existed upon the power of the Crown was effected simply by transferring the power to Parliament, and the states had succeeded to all the power of Parliament.").

139. See, e.g., *Langdon v. Mayor of New York*, 93 N.Y. 129, 155 (1883) ("In England Parliament had complete and absolute control over all the navigable waters within the kingdom . . . and could interrupt and absolutely destroy navigation in them."); HUMPHREY W. WOOLRYCH, A TREATISE ON THE LAW OF WATERS 272 (1853) ("It was never doubted that an act of Parliament would operate to extinguish any public right of passage . . ."); Michael L. Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 569 (1982) (suggesting that the "rights of navigation and fishery . . . could only be conveyed by Parliament"); Deveney, *supra* note 86, at 50 ("[T]here has never been a doctrine of public trust in England. What the king alone might not be able to do after 1701 has never been beyond the power of the king and Parliament together to do, or beyond the power of Parliament alone."); *Gough v. Bell*, 22 N.J.L. 441, 457-58 (N.J. Sup. Ct. 1850), *aff'd*, 23 N.J.L. 624 (N.J. 1852); *The King v. Montague*, 107 Eng. Rep. 1183 (K.B. 1825); ALLEN S.

Upon the ratification of the Constitution, the states gave to the federal government the right to regulate commerce and with it the power to protect the public's ability to navigate in furtherance of commerce.¹⁴⁰ The states kept for themselves all remaining right, title, and interest in their land under navigable water. The people of each state were free to do as they wished with their land under navigable water subject to the federal power to limit those activities in the name of protecting commerce.¹⁴¹

The case law on the navigation servitude prior to *Illinois Central* largely bears out this historical picture. Although the federal government had been given the power to regulate commerce, and therefore navigation, it made no broad effort to do so.¹⁴² And in the absence of federal legislation, each state was free to authorize obstructions to navigable streams.¹⁴³ The

WISDOM, THE LAW OF RIVERS AND WATERCOURSES 63 (2d ed. 1970). See generally Rasband, *supra* note 6, at 8-25 (exploring the origins of the public trust doctrine).

140. See U.S. CONST. art. I, § 8; *supra* note 129. That the United States had the power to protect navigation does not necessarily mean that it could protect navigation without paying compensation. See *infra* note 146 (discussing this issue). Congress' power to act is separate and distinct from its obligation to compensate. Congress, for example, has power to pass laws under the Commerce Clause but still has the obligation to pay just compensation when those laws go "too far" and effect a taking. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.); see also *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (requiring compensation where the United States, pursuant to its power to spend for the general welfare, destroyed certain state-law riparian rights); *International Paper Co. v. United States*, 282 U.S. 399 (1931) (requiring compensation where the United States, acting pursuant to its war power, took a person's right to use water in a power canal).

141. See *infra* notes 143-47 and accompanying text; see also *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 725-26 (1865) (The states retain all regulatory powers "but such as they have surrendered. The power to authorize the building of bridges is not to be found in the Federal Constitution. It has not been taken from the States. It must reside somewhere. They had it before the Constitution was adopted, and they have it still.").

142. See generally Johnson, *supra* note 131, at 349 (discussing the lack of Congressional regulation of navigation throughout the nineteenth century). In the Rivers and Harbors Appropriation Act of 1890, Congress passed general legislation prohibiting the creation of obstructions to navigable waters, unless the obstruction was "affirmatively authorized by law." Act of Sept. 19, 1890, ch. 907, § 10, 26 Stat. 426, 454. But even in that Act, the reference to obstructions "authorized by law" was taken to include obstructions authorized by state law. See *United States v. Bellingham Bay Boom Co.*, 176 U.S. 211 (1900). Thus, it was not until the Rivers and Harbors Appropriation Act of 1899 that Congress required congressional authorization to build an obstruction. See Rivers and Harbors Appropriation Act of 1899, ch. 425, § 10, 30 Stat. 1121, 1151.

143. See *Willson v. Blackbird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829) (Marshall, C.J.) (affirming Delaware's power to authorize the damming of a

primary exception, which the Court articulated but did not seem to apply, involved situations where state interference with navigation was repugnant to the dormant Commerce Clause. In such cases, a state was without authority to approve an obstruction, even though Congress had not spoken.¹⁴⁴ Although the Court always insisted that Congress continued to have plenary power over state-authorized obstructions and improvements,¹⁴⁵ prior to *Illinois Central* the Court had not suggested that Congress' power could be exercised without regard for the Fifth Amendment.¹⁴⁶

navigable creek because no federal legislation on the subject had been enacted by Congress pursuant to the Commerce Clause and the act was not "repugnant to the power to regulate commerce in its dormant state"; *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 (1888) ("[T]here is no common law of the United States which prohibits obstructions and nuisances in navigable rivers."); *Gilman*, 70 U.S. (3 Wall.) at 728-31 (same).

144. See *Blackbird Creek*, 27 U.S. (2 Pet.) at 252 (affirming Delaware's power to authorize the damming of a navigable creek because Delaware's act was not "repugnant to the power to regulate commerce in its dormant state"); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184-85 (1938) (holding that the constitutional grant to Congress of power to regulate interstate commerce operates of its own force to curtail state power where the state regulation would either discriminate against out-of-state interests or unduly burden the free flow of commerce among the states). See generally Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 574-81 (tracing origins of dormant Commerce Clause). The dormant Commerce Clause idea provides the best explanation for the intermittent emphasis in the case law that a state was being allowed to authorize obstructions to intrastate navigable waters. See *Escanaba Co. v. Chicago*, 107 U.S. 678, 686-87 (1882) (holding that it is within a state's power to regulate the erection of obstructions in navigable streams wholly within its limits "until congress should interfere and by appropriate legislation control the matter"); *Pound v. Turck*, 95 U.S. 459, 462-64 (1877); *Gilman*, 70 U.S. (3 Wall.) at 732 ("The river, being wholly within her limits, we cannot say the State has exceeded the bounds of her authority."); *Blackbird Creek*, 27 U.S. (2 Pet.) at 252 (affirming Delaware's power to authorize the damming of a small intrastate navigable creek).

145. See, e.g., *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 335 (1893) (citing cases); *Willamette Iron Bridge Co.*, 125 U.S. at 12-13 ("[W]hen Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter."); *Escanaba*, 107 U.S. at 683 ("[U]ntil Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary."); *Pound*, 95 U.S. at 464; *Wisconsin v. Duluth*, 96 U.S. 379, 383 (1877).

146. See *Monongahela*, 148 U.S. at 336 ("[L]ike the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment."). The only hint that Congress would not be obligated to pay compensation for removal of a state-authorized obstruction can be found in the various references to Congress' power under the dormant Commerce Clause and the Court's emphasis on state authority to approve obstructions to intrastate streams. See *supra* note 144. These references left open the possibility that if a state

Thus, as a historical matter, it is not hard to comprehend the disparity between the public trust doctrine and the navigation servitude: the public trust doctrine was simply the first of the two doctrines to be sundered from its historical moorings.¹⁴⁷

Justice Field's individual view on compensation in navigation servitude cases is somewhat perplexing. Although he joined the unanimous opinion in *Monongahela* requiring the United States

authorized an obstruction that discriminated against out-of-state interests or severely hindered interstate commerce, the federal government could assert that the authorization was *ultra vires* and thus not subject to compensation upon its removal. This is arguably the reasoning behind Justice Lurton's suggestion for the circuit court in *Scranton v. Wheeler*, 57 F. 803 (6th Cir. 1893), *rev'd*, 163 U.S. 703 (1895), that state authorized obstructions to *intrastate* streams are distinct from obstructions to *interstate* streams because the former can only be taken for public uses upon just compensation. See *Scranton v. Wheeler*, 179 U.S. 141, 146 (1900) (Harlan, J.) (describing Justice Lurton's view). This view pointed the way toward a more limited navigation servitude, but it has not been adopted. Although the Supreme Court has made clear that the navigation servitude is not co-extensive with Congress' power over navigation, see *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979), the servitude does not appear to have been limited to interstate rivers. See, e.g., *United States v. Commodore Park, Inc.*, 324 U.S. 386, 389 (1945) (applying the no compensation rule to Mason Creek, a navigable tidewater extending four to five miles inland); *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915) (applying the rule to Elizabeth River wholly within Virginia). But see *Kaiser Aetna*, 444 U.S. at 175 (stating that the servitude grows out of "the important public interest in the flow of *interstate* waters that in their natural condition are in fact capable of supporting public navigation") (emphasis added). See generally *Boone v. United States*, 944 F.2d 1489, 1495 (9th Cir. 1991) (exploring the differences between Congress' power over navigation and its navigation servitude); *WATERS*, *supra* note 2, § 35.02(c)(2) (same). In some sense then, the growth of the no compensation rule can be viewed as a broadening of the reach of Congress' power under the dormant Commerce Clause to include even potential interference with interstate commerce, although it goes even further than that because it denies compensation even in cases where a *federal* license has been issued. See, e.g., *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 68 (1913) (compensation denied despite the Secretary of Army's issuance of license under the Rivers and Harbors Act).

147. Professor Morreale, now Hanks, who has written the leading article on the navigation servitude would surely disagree with the suggestion that the no compensation rule was a departure from history. In her view, it was the *Monongahela* decision (where compensation was awarded) that was aberrational. See Morreale, *supra* note 115, at 32 ("In view of the already then accepted idea of navigation as the historically paramount public right, *Monongahela* was erroneously decided."). But Professor Morreale's view of an historically paramount public right is based on the mistaken historical account described in the text above, particularly in the sense that the rights of the states over navigation are equated with those of the Crown. See *id.* at 25-31. It also seems to be based on the mistaken view that references to Congress' plenary power over navigation obstructions authorized by state law were an expression of immunity from compensation. See *supra* note 146 (discussing this issue).

to pay compensation for the exercise of its navigation servitude,¹⁴⁸ he seemed to have articulated a different view on the compensation issue some years prior in a vigorous dissent in *Bridge Co. v. United States*.¹⁴⁹ In *Bridge*, Kentucky and Ohio had enacted legislation giving the company authority to build a bridge across the Ohio River.¹⁵⁰ Congress also approved the bridge but, in the authorizing resolution, reserved "the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution"¹⁵¹ While the bridge was being constructed, Congress declared that the bridge would be unlawful absent changes.¹⁵² The company made the changes and then sued the United States which had consented to waive its immunity.¹⁵³ Relying on Congress' reservation, the majority denied compensation to the company.¹⁵⁴

In dissent, Field argued that the United States should pay compensation.¹⁵⁵ He asserted two grounds, the second of which is particularly interesting in light of his compensation suggestion in *Illinois Central*. Field first argued that Fifth Amendment compensation was due. But he did not contend, as did the *Monongahela* Court, that Congress' plenary power over navigation was subject to the Fifth Amendment.¹⁵⁶ Instead, he argued that Congress did not have the power to order the changes because the bridge was "lawful when erected, and in no way interfere[d] with the navigation of the river."¹⁵⁷ Congress' initial assent to construction, he concluded, insulated the company from any claim by Congress that the bridge interfered with navigation.¹⁵⁸ Although he suggested Fifth Amendment compen-

148. See *Monongahela*, 148 U.S. at 312. The *Monongahela* case was decided after *Illinois Central* but, as stated above, was argued a mere 11 days following *Illinois Central*. See *supra* note 132 and accompanying text.

149. 105 U.S. 470 (1882).

150. See *id.* at 470-71.

151. *Id.* at 473.

152. See *id.*

153. See *id.* at 475.

154. See *id.* at 484.

155. See 105 U.S. at 500-01.

156. See *supra* note 146 (discussing *Monongahela*).

157. 105 U.S. at 494 (emphasis added).

158. See *id.* at 494-95. To reach this conclusion, Field had to overlook the Court's prior holdings that Congress had plenary authority to determine what interfered with or improved navigation. See *South Carolina v. Georgia*, 93 U.S. 4 (1876) (Congress could obstruct navigation in one place to improve it in another);

sation was appropriate, the negative implication of Field's reasoning was that Congress could take without compensation a state-authorized project that *did* interfere with navigation. Thus, putting aside *Monongahela*, Field's view on the no compensation rule was perhaps not that far from his view on the public trust doctrine. The sovereign could remove obstructions without paying Fifth Amendment compensation if a court, presumably as a matter of federal common law,¹⁵⁹ decided that the obstruction interfered with the public's right to navigate.¹⁶⁰

The coincidence of Field's views on the two doctrines is even more apparent in the second ground Field proffered for paying the company compensation. In a passage foreshadowing his compensation suggestion in *Illinois Central* he stated:

It is not necessary, however, in order to charge the government with the expenditures forced upon the company, to rely upon this provision of the Constitution, further than to show the general spirit which should control the government in its legislation affecting the property of individuals. There is a general principle of justice pervading our laws, and the laws of all free governments, which requires that whoever unlawfully and wrongfully imposes upon another the necessity of an unusual expenditure of money or labor or materials for the protection and preservation of his property, shall make complete indemnity for the expenditure. The principle applies as fully to the acts of the government as to those of individu-

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431 (1855) ("The regulation of commerce includes . . . the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation.").

159. Field's dissent appears to operate on the presumption that the judiciary would be the arbiter of whether an obstruction so materially interfered with navigation as to be within Congress' power to remove it. See 105 U.S. at 490-97 (Field, J., dissenting). And Field apparently envisioned relatively rigorous judicial scrutiny of whether a particular obstruction truly interfered with commerce. See *id.* at 496 ("[B]y 'free navigation' is not meant a navigation entirely clear of obstructions."). This conclusion disregarded the Court's prior decisions suggesting Congress had plenary power to define what constituted an obstruction to navigation. See *supra* note 158 (citing cases).

160. Field's position that Congress could avoid Fifth Amendment compensation only when it acted to remove an obstruction that materially interfered with navigation can also be viewed as an assertion of Congress' dormant Commerce Clause power over navigation. See *supra* notes 144-46 and accompanying text (discussing this issue). In the absence of congressional legislation, states could only traduce the Commerce Clause if there were a material interference with an interstate stream.

als; and wherever suits can be brought in the tribunals of the country, such indemnity can be enforced.¹⁶¹

Field's view, therefore, was that compensation was owed as a matter of natural law whenever an individual incurred expenditures in reliance upon the sovereign. As far as Field was concerned, the Bridge Company should receive compensation for the cost of the changes to the bridge whether or not the Fifth Amendment applied.

In light of his *Bridge* dissent, Field's suggestion that Illinois was obligated to pay for the Railroad's improvements is at least consistent with his view of the navigation servitude. In both instances, even if constitutional protections for property were not applicable, compensation for expenditures made in reliance upon the grant was still appropriate as a matter of equity—namely, that “general principle of justice pervading our laws, and the laws of all free governments.”¹⁶² Although the navigation servitude is now construed to obviate any obligation to pay compensation for improvements,¹⁶³ the public trust doctrine has not yet taken that route. One of the purposes of this article, of course, is to suggest that it should not.

D. Awarding Equitable Compensation Against the Sovereign

Whatever the source of equitable compensation, one question that must be addressed is why Field concluded that compensation could be awarded against the *state*. As Field stated in *Bridge*, the basic principle of equitable indemnity could be enforced only “wherever suits can be brought in the tribunals of the country.”¹⁶⁴ Because the public trust doctrine is state common law,¹⁶⁵ the effort to enforce equitable compensation against the state will typically arise in state court. The common law of sovereign immunity is, however, that no suit, in law or equity, may be

161. 105 U.S. at 503 (Field, J., dissenting). In *Bridge*, the United States had waived its immunity from suit. See *supra* text accompanying note 153.

162. *Id.* at 503 (Field, J., dissenting).

163. See *supra* notes 119-23 and accompanying text.

164. 105 U.S. at 503 (Field, J., dissenting).

165. See *supra* note 9; see also *supra* notes 25-26 and accompanying text (explaining the since-rejected reasoning for removing the *Illinois Central* case to federal court).

maintained against a state in state court unless the state has given its consent to suit.¹⁶⁶ This immunity includes suits which involve a property interest of the state, such as actions to quiet title.¹⁶⁷ Unlike modern public trust cases, of course, *Illinois Central* was a federal court case. And in federal court, a state enjoys not only any substantive immunity afforded by state law but also the immunity offered by the Eleventh Amendment.¹⁶⁸

Thus, to award equitable compensation against a state in either state or federal court, there must be state consent to suit.¹⁶⁹ A state may consent to suit by a couple of different means. A state may waive its immunity, or a part of its immunity, by statute or in the state constitution.¹⁷⁰ Alternatively, a long-

166. See, e.g., Kenneth J. Wilbur, Comment, *Concurrent Jurisdiction and Attorney's Fees: The Obligation of State Courts to Hear Section 1983 Claims*, 134 U. PA. L. REV. 1207, 1228 (1986); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 538-39 (1978); 72 AM. JUR. 2D *States, Territories, and Dependencies* §§ 99-101 (1974).

167. See 72 AM. JUR. 2D *States, Territories, and Dependencies* § 100 (1974). Cf. *Idaho v. Coeur D'Alene Tribe*, 117 S. Ct. 2028 (1997) (recognizing Eleventh Amendment immunity for states, even from the *Ex Parte Young* exception for suits against state officials, from claims in the nature of quiet title actions).

168. Under the Eleventh Amendment, a federal court generally has no jurisdiction to award damages against a state, even for constitutional violations. See generally Field, *supra* note 166. The Eleventh Amendment, however, has been construed not to prohibit a federal court from issuing injunctive relief against state officials. See *Ex Parte Young*, 209 U.S. at 123. And that is true even if the injunction against a state official will require a state to pay out money from its treasury in the future. See *Quern v. Jordan*, 440 U.S. 332 (1979). But suits for retrospective monetary relief are not allowed. See *Edelman v. Jordan*, 415 U.S. 651 (1974). Compensation for improvements would seemingly be a form of retrospective monetary relief.

169. Absent consent, sovereign immunity could only be avoided if it were derived solely from the common law and the court decided to eliminate the protection it had itself created. See generally Note, *Governmental Immunity—The Doctrine of Immunity Judicially Abrogated and Legislatively Reinstated*, 50 J. URB. L. 154 (1972) (discussing that if a state's sovereign immunity is a product of its common law, and not a result of legislation or the state constitution, a state court, as part of the common-law process, may limit sovereign immunity); see also *infra* note 182 (citing cases).

170. See Annotation, *Consent to Suit Against State*, 42 A.L.R. 1464 (1926) (citing multitude of cases finding consent in state constitutions and statutes); Wilbur, *supra* note 166, at 1229 ("Under a common law theory of sovereign immunity, the state courts, the state legislatures, the federal courts, and Congress may limit a state's sovereign immunity."). State consent to suit in state court does not necessarily constitute consent to suit in federal court. See *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981); *Smith v. Reeves*, 178 U.S. 436, 441 (1900). State consent to suit in federal court must be express. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (establishing that for a state statute or constitutional provision to constitute a waiver

standing common-law limitation on sovereign immunity is the rule that when the state itself files suit, it consents to counterclaims for set-off or recoupment¹⁷¹ which are connected with the same transaction or subject of the action.¹⁷² This principle has been held to apply to counterclaims for quiet title to which a sovereign is typically immune.¹⁷³ It has also been held that by filing suit a state waives its Eleventh Amendment immunity with respect to recoupment counterclaims.¹⁷⁴ This rule of consent by

of Eleventh Amendment immunity, "it must specify the State's intention to subject itself to suit in *federal court*."; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here.").

171. Defined accurately, "set-off" is a "counter-claim demand which defendant holds against plaintiff arising out of a transaction *extrinsic* of plaintiff's cause of action." BLACK'S LAW DICTIONARY 372 (6th ed. 1990) (emphasis added). "Recoupment," by contrast, is not necessarily a counterclaim but a reduction or rebate by the defendant of part of the plaintiff's claim because of a right in the defendant arising out of the same transaction. *See id.* at 1275. Strictly speaking, therefore, by filing suit a state only consents to claims for recoupment and not set-off. Because courts have tended to use the terms loosely, and in some cases interchangeably, it is less important to focus on the name given recovery and better to analyze whether the counterclaim or defense arises out of, or is connected with, the same transaction or occurrence. Indeed, some jurisdictions have dissolved entirely the distinction between set-off and recoupment for pleading purposes. *See generally* 20 AM. JUR. 2D *Counterclaim, Recoupment, and Setoff* § 96 (1995).

172. *See, e.g.*, 72 AM. JUR. 2D *States, Territories, and Dependencies* § 95 (1974) ("[A] state, by bringing an equitable action, opens the door to any defense or cross complaint germane to the matter in controversy."); Annotation, *Consent to Suit Against State*, 42 A.L.R. 1464, 1480-83 (1926) (citing cases); 20 AM. JUR. 2D, *Counterclaim, Recoupment, and Setoff* § 61 (1995) (same); Note, *Counterclaims Against a Sovereign*, 36 HARV. L. REV. 871, 872 (1923) (same); *United States v. Ringgold*, 33 U.S. (8 Pet.) 150, 163-64 (1834) (waiver of immunity to claims arising out of same transaction); *United States v. Lindberg Corp.*, 686 F. Supp. 701, 704 (E.D. Wis. 1987), *aff'd*, 882 F.2d 1158 (7th Cir. 1989); *Commonwealth v. Todd*, 72 Ky. (9 Bush) 708, 716 (1873); *State v. Schurz*, 173 N.W. 408 (Minn. 1919); *Port Royal & A.R. Co. v. South Carolina*, 60 F. 552 (C.C.D. S.C. 1894). Recoupment counterclaims are denied, however, where they arise out of a separate transaction than the one sued upon by the state. *E.g.*, *People v. Corner*, 12 N.Y.S. 936 (N.Y. Sup. Ct. 1891), *aff'd*, 29 N.E. 147 (N.Y. 1891).

173. Although a state is generally immune from quiet title suits, several courts have held that when a state brings a suit attacking title, the defendant may set up his title and have the title claim litigated. *See, e.g.*, *Brundage v. Knox*, 117 N.E. 123 (Ill. 1917); *State v. Portsmouth Sav. Bank*, 7 N.E. 379, 396 (Ind. 1886); *Texas Channel & Dock Co. v. State*, 135 S.W. 522 (Tex. 1911); *Fulton Light, Heat & Power Co. v. State*, 116 N.Y.S. 1000 (N.Y. Ct. Cl. 1909).

174. *See* 3 JEREMY WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 13.50[4] (1997) ("By filing suit a state also waives its Eleventh Amendment immunity . . . with respect to compulsory counterclaims asserted defensively in recoupment for purposes of diminishing state's recovery. The waiver does not extend to permissive counterclaims or to claims seeking an affirmative judgment."); *Clark v. Barnard*, 108

filing suit would thus seem to cover the situation in *Illinois Central*. When Illinois filed its bill in equity against the Railroad, it was effectively consenting to any connected counterclaim for recoupment by the Railroad.¹⁷⁵ If Field's reasoning with regard to his compensation suggestion is attributed to this line of authority, it presents no conflict with sovereign immunity.

Attributing such reasoning to Field, however, has at least two potential difficulties. An initial problem is that the rule that a state's filing suit waives sovereign immunity to recoupment counterclaims has not always been applied in public lands cases. Several courts have held, both before and after *Illinois Central*, that mistaken improvers on public lands are not entitled to compensation for improvements because of sovereign immunity.¹⁷⁶ And, in some instances, those that have recognized

U.S. 436, 448 (1883) ("State . . . appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination."); *Woelffer v. Happy States of Am., Inc.*, 626 F. Supp. 499, 502 (N.D. Ill. 1985) ("[F]or a court to find an implicit waiver of Eleventh Amendment immunity, the court must make two findings: first, that the counterclaim arises from the same event; and second, that the counterclaim is defensive, typically in the nature of recoupment.").

175. One problem with this consent theory, in addition to those discussed below, see *infra* notes 176-80 and accompanying text, is that Illinois did not consent to federal court jurisdiction. It opposed removal to federal court. See *supra* note 26 and accompanying text. Although its objection was to federal question jurisdiction, see *id.*, it perhaps could also have objected to removal on Eleventh Amendment grounds, at least under current law. Although removal of claims barred by the Eleventh Amendment is generally precluded, see, e.g., *Kruse v. Hawaii*, 68 F.3d 331, 334 (9th Cir. 1995), there is some dispute in the district courts whether removing an action commenced by the state in state court even implicates the Eleventh Amendment which, by its words, applies to a "suit . . . against one of the United States." Compare *California v. Steelcase, Inc.*, 792 F. Supp. 84, 86 (C.D. Cal. 1992) (Eleventh Amendment applies), with *Banco y Agencia de Financiamiento de la Vivienda de P. R. v. Urbanizadora Villalba*, 681 F. Supp. 981, 982-83 (D. Puerto Rico 1988) (Eleventh Amendment does not apply). To the extent the Eleventh Amendment applied to the action, Illinois' failure to assert its immunity could be viewed as waiving it. See *In re Secretary of the Dep't of Crime Control & Pub. Safety*, 7 F.3d 1140, 1148 (4th Cir. 1993) (discussing how "[u]nder certain circumstances, a state named as a defendant in an action in federal court may waive its Eleventh Amendment immunity by voluntarily making a general appearance in that action and defending it on the merits"). Without belaboring this speculation, to the extent a case is removed to federal court without the state's consent, there is a significant chance that the state would retain its Eleventh Amendment immunity.

176. See *Swetman v. Sanders*, 20 S.W. 124, 126-27 (Tex. 1892) ("The land being vacant and the property of the state, at the time when the improvements were made, the state could not have been required, through the instrumentality of the courts, to make compensation for such improvements, in the absence of a statute authorizing such relief."); *Hiatt v. Brooks*, 22 N.W. 73 (Neb. 1885) (no compensation for

the equitable concerns of mistaken improvers have given the improver only the right to remove the improvements but not the right to demand compensation.¹⁷⁷ A second problem with grounding the compensation suggestion in state consent to recoupment counterclaims is that the Illinois Constitution made the state immune from all suits in law or equity.¹⁷⁸ To the extent this provision included recoupment counterclaims,¹⁷⁹ Illinois seemingly would have been immune from any counterclaim for compensation.¹⁸⁰

improvements placed on tract in unsuccessful effort to hold track under preemption and homestead laws); *Bradford v. United States*, 47 Ct. Cl. 141, 146 (1911) ("[T]he Government, in the absence of statutory authority therefor, can not be held responsible for improvements made on the public lands of the United States."). See Annotation, *Rights as Between Adverse Claimants to Improvements Placed on Public Lands*, 6 A.L.R. 95 (1920) (stating that by the "weight of authority, the purchaser from the government is entitled to improvements . . . as being part of the real estate, and a person making improvements on public lands has no right thereto as against the grantee of the government."). These cases denying compensation are generally distinguishable from public trust cases, however, because the occupant of the public lands did not take the land under color of title. Moreover, in other instances, compensation for improvements has been allowed. See *Flint & Pere Marquette Ry. Co. v. Gordon*, 2 N.W. 648 (Mich. 1879) (compensation for improvements when land was appropriated by railroad before patent received); *Wells v. Riley*, 29 F. Cas. 675 (C.C.D. Iowa 1872) (No. 17,404); *Litchfield v. Johnson*, 15 F. Cas. 590 (C.C.D. Iowa 1877) (No. 8387). See Annotation, *supra* at 100 (citing cases establishing "some conflict in the authorities as to whether persons making improvements on public lands which are subsequently acquired by another are entitled to compensation for the improvements, under Occupying Claimant's Acts.").

177. See *Wallbrecht v. Blush*, 95 P. 927, 928 (Colo. 1908) (mistaken occupier of public domain given reasonable time in which to remove improvements); *Bingham County Agric. Ass'n v. Rogers*, 59 P. 931, 931-32 (Idaho 1900) (same); *Winans v. Beidler*, 52 P. 405, 405-06 (Okla. 1898) (same); *Richardson v. Bohney*, 114 P. 42 (Idaho 1911) (recognizing mistaken improver's right to harvest crops mistakenly planted on public land).

178. Article IV, section 26 of the 1870 Illinois Constitution states: "The State of Illinois shall never be made defendant in any court of law or equity." In 1970, the Illinois Constitution was amended to abolish sovereign immunity. See ILL. CONST. art. 13, § 4.

179. An answer to this question is not apparent from a review of Illinois case law, although in 1904, the Illinois Supreme Court did rule that only the legislature and not the Attorney General could waive the State's immunity, see *People v. Sanitary Dist. of Chicago*, 71 N.E. 334 (Ill. 1904), suggesting that filing suit would not waive the State's constitutional immunity. On the other hand, the same court said that where the legislature authorized suit, sovereign immunity might be waived. See *id.*

180. Under current law, a third potential difficulty with overcoming sovereign immunity could arise. Some courts have suggested that the sovereign only waives its immunity to recoupment counterclaims that seek relief of the same kind or nature. Under this reasoning, where the sovereign seeks equitable relief in the form of quiet title or rescission, as would often happen in a public trust case, the sovereign

In the event that Illinois would have been immune from a recoupment counterclaim, why did Field suggest compensation? Again, the same two interpretive approaches to Field's opinion exist—either compensation was merely instrumentalist or it was intended to be part and parcel of the public trust doctrine. Under the instrumentalist reading, Field knew that Illinois enjoyed sovereign immunity but he also knew that Illinois should typically have been subject to a Fourteenth Amendment takings claim. According to this view, although the law Field stated was incorrect in both of its particulars, he accepted the contradiction because it accomplished his view of justice. There is more than a hint of this in Field's natural law argument in *Bridge*.¹⁸¹

Again, however, if compensation is viewed as part and parcel of the public trust doctrine, the case for circumventing sovereign immunity is stronger. First, to the extent the public trust doctrine does not exist independent of a compensation obligation, Field's suggestion can be read as articulating the contours of the State's immunity. Where immunity is a creature of judicial creation, courts plainly have the power to abrogate that immunity.¹⁸² Illinois' immunity with respect to the public trust doctrine

would still be immune to a recoupment claim for monetary compensation. See, e.g., *United States v. Ameco Elec. Corp.*, 224 F. Supp. 783, 786 (E.D.N.Y. 1963) ("The Government here is not seeking a judgment for a sum of money but is asserting title to certain chattels. The very nature of the action makes it impossible to reduce or discharge the claim by recoupment or setoff."); *United States v. 2116 Boxes of Boned Beef*, 726 F.2d 1481 (10th Cir. 1984) (rejecting defendant's recoupment counterclaim against the United States' seizure action). See 3 MOORE, *supra* note 174 § 13.50[2][c] (1997); cf. *id.* § 13.50[4] (stating that a state only consents to waive its Eleventh Amendment immunity with respect to compulsory counterclaims). By contrast, "other courts have rejected the narrow view that the recoupment claim must be identical to that sought by the government." *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1551 (E.D. Cal. 1992). The refusal of some courts to view a counterclaim for money damages as of the same kind as a claim for control of a chattel is a type of formalism that is hardly warranted in a general climate of declining solicitude for sovereign immunity. It also resurrects the distinction between law and equity which has largely departed with the merger of the two in the Federal Rules of Civil Procedure. See *supra* note 15. Money damages, moreover, can be a form of equitable relief. See, e.g., *Curtis v. Loether*, 415 U.S. 189, 196-97 (1974) (discussing how back pay in Title VII cases is an equitable remedy, a form of restitution). It should not matter what type of relief the claim or counterclaim seeks as long as the two claims arise out of the same transaction or occurrence.

181. See *supra* note 161 and accompanying text.

182. In *Molitor v. Kaneland Community Unit District No. 302*, 163 N.E.2d 89 (Ill. 1959), for example, the Illinois Supreme Court abrogated the immunity for school districts which it had created in an extension of the 1870 state Constitutional grant of State immunity. The court emphasized:

was indeed a judicial creation. In both the State and federal constitutions, Illinois had consented to be sued for just compensation whenever it took private property for public use.¹⁸³ In effect, Field's creation of the public trust doctrine was a common-law grant of immunity to the State by which it avoided a suit to which it had otherwise consented. Thus, if compensation is part of the public trust doctrine, the whole doctrine can simply be viewed as a limited grant of common-law immunity. To the extent a court creates a common-law doctrine that benefits the state, nothing should prevent the court from articulating the contours of that doctrine to reduce the windfall.

Viewing compensation as part and parcel of the public trust doctrine also avoids sovereign immunity for a second, and closely related, reason. When compensation is understood as an element of the state's public trust claim, the grantee's right to compensation can be viewed as part of the property right enjoyed by the grantee, one stick in the bundle.¹⁸⁴ And to the extent compensa-

The doctrine of school district immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity. We closed our courtroom doors without legislative help, and we can likewise open them.

Id. at 25 (internal quotations and citation omitted); *see also* *Stone v. Arizona Highway Comm'n*, 381 P.2d 107 (Ariz. 1963) ("[T]he doctrine of sovereign immunity was originally judicially created. We are now convinced that a court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack. This doctrine having been engrafted upon Arizona law by judicial enunciation may properly be changed or abrogated by the same process."); *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457 (Cal. 1961); *Smith v. State*, 473 P.2d 937 (Idaho 1970) (abrogating sovereign immunity); *Carroll v. Kittle*, 457 P.2d 21 (Kan. 1969); *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977); *Johnson v. Municipal Univ. of Omaha*, 169 N.W.2d 286 (Neb. 1969) (same); *Hicks v. State*, 544 P.2d 1153 (N.M. 1975).

183. *See* U.S. CONST. amend. XIV, § 1; *see also* ILL. CONST. art. I, § 15 (original provision at ILL. CONST. art. II, § 13 (1870)) (requiring just compensation where "[p]rivate property [is] taken or damaged for public use").

184. As an explanation of how the right to compensation can be conceptualized as a property right of the grantee, it is useful to expand upon the hypothetical discussed in note 111, *supra*. Suppose the state grants property to Y so long as Y uses the property as a school. If Y ceases to use the property as a school, the state may re-enter. Suppose then that the state brings an ejectment action seeking to remove Y, despite the fact that Y is still operating a school. The court would refuse to eject Y because the state cannot prove the condition subsequent has been met. To the extent the state went ahead and took the property by eminent domain, the court would surely award Y compensation. Of course, that compensation would be limited to the value of Y's property right, that is, the right to have a school on the property. By analogy, if the state attempts to revoke a grant of trust resources without paying

tion is itself a property right, it is protected by state and federal constitutional provisions that explicitly waive sovereign immunity.¹⁸⁵ Finally, if compensation for improvements is an element of the state's public trust claim rather than a counterclaim or defense, sovereign immunity is avoided altogether. Where a state seeks to revoke a prior grant of trust resources, it has the burden of proving that it has offered or will offer the grantee compensation for improvements.

In the end, although it is difficult to identify the specific rationale Justice Field had in mind for overcoming sovereign immunity, to the extent he considered the issue at all, it is at least fair to conclude that a persuasive rationale existed. The same is true, more generally, with respect to a rationale for awarding compensation. Although Field did not offer one, convincing rationales were available. And among the rationales, the most persuasive is that compensation is a necessary concomitant of the public trust doctrine. This is particularly true if the public trust doctrine is perceived, not as rendering grants of trust resources void *ab initio*, but as allowing a state to make voidable grants. In that case, compensation is simply a condition of termination. Although the compensation obligation renders suspect the justification for the public trust doctrine that the grantee had notice of the underlying servitude, it fits well with the more principled view that grantees of trust resources acted in good faith and in reliance on the sovereign's power to make the grant.

Having explored the validity and basis for *Illinois Central's* compensation obligation, it is time now to turn to the modern application of the compensation principle. During the last roughly thirty years, judicial reliance upon the public trust

compensation, it has failed to satisfy a condition of termination and to go forward would result in a taking of the grantee's property right—the right to maintain the property until such time as equitable compensation is paid. See ROGER BERNHARDT, *REAL PROPERTY IN A NUTSHELL* 214 (3d ed. 1993) (“[T]he benefit of the condition is itself an interest in land, and does not run with any other land. It is transferable in its own right.”). In this sense, the right to compensation is part of the grantee's reliance interest in the background property law that cannot be undone without resulting in a taking. Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992) (holding that regulation that goes beyond background principles of nuisance and property law may result in a taking). Of course, conceiving of compensation as a property right assumes that the state's public trust easement is itself an actual, and not a constructive, property right. See *supra* note 118.

185. See *supra* note 183.

doctrine has burgeoned. While even *Illinois Central's* fictional trust was limited to *land* under navigable water, the doctrine has been expanded in some states to include water rights obtained by prior appropriation.¹⁸⁶ And whereas the trust was designed to protect navigation, commerce, and fishery, some courts have now said that it also protects the public's interest in the recreational and environmental values associated with navigable waters.¹⁸⁷ With this expansion of the public trust doctrine, which has necessarily compounded the due process problem of lack of notice to grantees of trust resources,¹⁸⁸ the need for recurrence to the compensation obligation first articulated in *Illinois Central* has grown apace. Unfortunately, Field's basic message that a state which seeks equity must do equity has largely been forgotten. The next section argues that Field's equitable compensation principle can, and should, be adopted by modern courts as a matter of equity or as a common-law refinement to the public trust doctrine itself. Alternatively, state legislatures should require equitable compensation by statute.

186. See *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983) (*Mono Lake*); *Shokal v. Dunn*, 707 P.2d 441 (Idaho 1985); *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976). But see Gregory S. Weber, *Articulating the Public Trust: Text, Near Text and Context*, 27 ARIZ. ST. L.J. 1155, 1156 (1995) (concluding that *Mono Lake's* "marriage of the public trust doctrine and the western water rights system has produced few [judicial] offspring" and discussing administrative development of the doctrine).

187. See, e.g., *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971); *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987) (public trust includes the right of navigation "together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters"); *Menzer v. Village of Elkhart Lake*, 186 N.W.2d 290, 296 (Wis. 1971) (public trust encompasses all public uses of water). See generally Scott Reed, *The Public Trust Doctrine: Is It Amphibious?* 1 ENVTL. L. & LITIG. 107, 116-21 (1986) (collecting cases extending the public trust doctrine beyond its traditional scope).

188. Obviously, each time the category of trust resources grows, the number of grantees subject to potential revocation grows. Such newly burdened grantees can only be said to be on notice if notice consists of knowledge that the public trust doctrine is enlarging its reach. The grantee's lack of notice of the potential for state revocation is the primary equitable flaw in the public trust doctrine. Equitable compensation would alleviate that flaw, at least to some extent.

II. EQUITABLE COMPENSATION UNDER THE MODERN PUBLIC TRUST DOCTRINE

A. *Courts May Award Equitable Compensation for Public Trust Takings*

Although much of the foregoing analysis of the origin of Justice Field's compensation suggestion necessarily relied on case law contemporaneous with the *Illinois Central* decision, the same equitable doctrines remain viable tools for current courts. Equity still allows compensation for improvements mistakenly erected in good faith reliance on the validity of a conveyance.¹⁸⁹ But whatever the approach in current mistaken improver cases (which are, of course, quite variable), equitable compensation in public trust cases remains appropriate because it is best viewed as part and parcel of the public trust doctrine. This is certainly true as long as the public trust doctrine is viewed as allowing states to make voidable grants of trust resources. If that is the case, compensation for improvements is simply a condition of voidability. Equitable compensation is built into the public trust doctrine and is not a separate, external principle of equity that a court must reach out to use.

Courts may adopt either approach. And regardless of whether a court recognizes compensation for improvements as a separate equitable counterclaim dependent upon the good faith reliance of the grantee, or as a necessary concomitant of state revocation of a prior grant of a trust resource, it would be a significant and useful advance over current doctrine.

1. The Implications of the Different Approaches to Equitable Compensation

It is nevertheless important to recognize that the two approaches to equitable compensation are not identical. As discussed above, for general equitable defenses or counterclaims of mistaken improvement, good faith reliance on title is a *sine qua*

189. See Dickinson, *supra* note 57 (citing modern mistaken improver cases). See, e.g., *Mooring v. Brown*, 763 F.2d 386, 387 (10th Cir. 1985) (relying on RESTATEMENT OF RESTITUTION § 42(1) (1937)); *United States v. Francis*, 623 F. Supp. 535, 536 (D.V.I. 1985) (same).

non of compensation.¹⁹⁰ Thus, a court that treats compensation as a separate equitable defense will necessarily entangle itself in a good faith inquiry with its inevitable tension between the fact of lack of notice to the grantee and the purported justification for the public trust doctrine that no taking has occurred because the grantee received the trust resource subject to the state's public trust easement. By contrast, a court that views compensation as a component of the public trust doctrine (as an additional constructive term of the grant or as a part of the grantee's property right) will not expose itself to this same criticism. It also will more easily be able to answer any sovereign immunity objections on the part of the state.¹⁹¹

Even if these difficulties can be overcome, the two approaches may lead to different results. To the extent a court regards compensation as a separate equitable defense, the number of situations in which compensation will be awarded may be less, particularly over time. As the use of the public trust doctrine increases and expands, the likelihood that a court could properly find a grantee to have had notice of the public trust easement also grows. Accordingly, over time, the separate good faith analysis might result in fewer and fewer cases of compensation. Where compensation is regarded as part and parcel of the public trust doctrine, however, notice would not be such a factor because grantees would simply be on notice that their property right included the right to be compensated for improvements upon revocation of the grant.

In addition, by treating compensation as a separate equitable defense and thereby necessitating a factual inquiry into the grantee's good faith, a court would undermine the notion that grants of trust resources are voidable and not void *ab initio*. Specifically, where a court inquires into whether a grantee took the trust resource with or without notice, its implicit assumption is that the grant was void to begin with.¹⁹² And the problem with

190. See *supra* notes 62-75 and accompanying text.

191. See *supra* Part I.D. (discussing the sovereign immunity issue).

192. If a grant is only revocable, the factual question of notice and good faith is irrelevant. To explain, if a grantee lacked notice that a state could revoke a grant, he would be entitled to compensation. But even if a grantee had notice of the state's revocation power, the court would need to decide as a matter of law whether compensation was part of the public trust doctrine. In other words, notice of the possibility of revocation only begs the question of whether the grantee understood that compensation would be paid upon revocation. And a decision to award

that assumption is that it carries with it the heavy burden of explaining the vast number of state grants of trust resources.¹⁹³ If state grants of trust resources are invalid at their inception, why are there so many of them? On the other hand, if grants of trust resources are merely voidable, there is at least some foothold for an explanation of the numerous state grants. Thus, to the extent a court seeks the intellectual shelter provided by the voidability interpretation of the public trust doctrine, it should be wary of addressing compensation as a separate equitable defense.

2. Awarding Equitable Compensation Where the State Is Not the Plaintiff

Regardless of whether equitable compensation is viewed as a condition of revocation built into the public trust doctrine or as a separate defense, recognizing the need for equitable compensation presents a court with one additional difficulty: its jurisdiction over public trust plaintiffs other than the state. Courts have generally held that any person has standing to raise a claim of harm to the public trust.¹⁹⁴ As a putative beneficiary of the trust, a citizen has an interest in preventing the state from dissipating the corpus of the trust in a way that does not benefit the public. Thus, even before the liberalization of standing requirements that

compensation upon revocation simply builds compensation into the public trust doctrine. Thus, unlike the "void *ab initio*" interpretation of the public trust doctrine which inquires into good faith as a matter of fact, the voidability interpretation needs no such inquiry.

193. Arguably, the large number of conveyances could be explained by reference to *Illinois Central's* suggestion that the state may make grants if the parcel conveyed promotes the public's interest in navigation, commerce, and fishing or does not substantially impair the public's interest in the lands and waters remaining. See 146 U.S. at 453, 455-56. Under this theory, there are few grants which actually are void *ab initio*. Such a narrow view of the reach of the public trust doctrine does not, however, fit the public trust doctrine of *Mono Lake* where the court indicated that the state retained "continuing supervisory control" over all its navigable waters. See *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 727 (Cal. 1983) (*Mono Lake*). This supervisory notion accords much more closely with the theory that grants of trust resources are voidable but not void.

194. See, e.g., *Mono Lake*, 658 P.2d at 716 n.11; *Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.*, 605 P.2d 1 (Cal. 1980); *Marks v. Whitney*, 491 P.2d 374, 381-82 (Cal. 1971); *Paepcke v. Public Bldg. Comm'n*, 263 N.E.2d 11, 18 (Ill. 1970); *State v. Deetz*, 224 N.W.2d 407, 413 (Wis. 1974). See generally *Blumm & Schwartz, supra* note 9, at 712-13 (discussing standing in public trust cases); *Lazarus, supra* note 18, at 658-60 (same).

coincided with the rise of the environmental movement,¹⁹⁵ the public trust doctrine created in each member of the public a beneficial interest that provided standing to sue.¹⁹⁶ Even if private persons have standing to sue, however, a court is not without jurisdictional concerns. If the state must pay equitable compensation to revoke a grant of trust resources, a question arises whether the state is a necessary and indispensable party to public trust litigation.

Consider a public trust suit brought by a citizen alleging harm to the public's interest by a private grantee's use of some trust resource (an appropriative water right or land beneath a navigable river, for example). Assuming that compensation for the grantee is in the nature of an equitable defense or counterclaim, how is the grantee to obtain compensation for any improvements erected in reliance upon the grant? Perhaps the grantee could file a third-party claim against the state for equitable compensation,¹⁹⁷ or seek to have the state joined as a plaintiff.¹⁹⁸ Under an alternative scenario, the grantee could seek compensation directly from the citizen plaintiff, even though the improvi-

195. Prior to the environmental movement, the Court had generally required a plaintiff to show some harm to a legal interest in order to have Article III standing to sue. See *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137-38 (1939) (denying standing in the absence of a legal right, either "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege"); *Lazarus*, *supra* note 18, at 658-59. In the early 1970s, however, the Court abandoned the legal interest test and merely required that plaintiff prove an injury in fact. See *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *Association of Data Processing Servs. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). As long as a plaintiff could show that she was asserting an interest within the zone of interests sought to be protected by the statute or doctrine in question—including interests in "aesthetic, conservational, and recreational as well as economic values"—the plaintiff would have standing. *Id.* at 153-54 (internal quotations and citations omitted). In more recent years, the Court has seemed to make some effort to constrict standing in environmental cases, although even those efforts appear to be easily navigable with a well-pleaded complaint. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).

196. See generally *supra* note 194; *Lazarus*, *supra* note 18; at 658-60 (arguing that the rise of modern standing doctrine has contributed to the obsolescence of any need for a public trust doctrine).

197. See FED. R. CIV. P. 14 ("At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.").

198. See, e.g., FED. R. CIV. P. 19(a) (describing circumstances under which a person may be joined as a party in an existing action).

dent grant was not the fault of the citizen. In a number of mistaken improver cases, the true owner must pay compensation to eject the mistaken improver irrespective of whether the owner was at fault for the improver's mistake.¹⁹⁹ But those cases do not fit the situation of a citizen or group bringing a public trust claim where the plaintiff is not the sole owner of the property or even the primary beneficiary of the trust resource. It would be odd to force such an individual plaintiff to pay for a benefit enjoyed by the entire public.

Assuming instead that equitable compensation is part and parcel of the public trust doctrine—a condition of termination—how is the citizen to proceed? Unless she could pay for the improvements herself,²⁰⁰ she could not satisfy a crucial element of the public trust claim. Thus, the citizen's first step, prior to initiating the suit, presumably would be to convince the state to revoke the grant itself. If she failed in that endeavor, she could file suit not only against the grantee but also against the state, alleging that it had failed in its public trust responsibilities. Or, she could seek to join the state as an additional plaintiff. Whatever the procedural approach, the reason for bringing the state into the lawsuit would again be to assure compensation for the improvements erected by the grantee.

Under either approach to equitable compensation, the state would likely fit the description of a necessary party under Rule

199. See, e.g., *Somerville v. Jacobs*, 170 S.E.2d 805, 813 (W. Va. 1969) (requiring landowner to pay compensation "even though free from any inequitable conduct in connection with the construction of the building upon his land"); *Topham v. Hodges*, 221 S.W.2d 27 (Ark. 1949) (requiring true owner to pay compensation to mistaken improver even though state had mistakenly sold the property in two separate tax sales); *Peck v. M.C. Developers, Inc.*, 618 A.2d 940 (N.J. Super. Ct. Law Div. 1992) (allowing mistaken improver to remove house built on wrong lot without true owner's knowledge). More often, however, one of the factors courts emphasize in decisions requiring the true owner to pay compensation is the owner's failure to take action despite an awareness that another is mistakenly erecting improvements on the property. See, e.g., Howard C. Joyce, Annotation, *Estoppel by Apparent Acquiescence in or Silence Concerning Improvements of Real Property to Assert Antagonistic Title or Interest*, 76 A.L.R. 304 (1932) (citing multitude of cases); Dickinson, *supra* note 57, at 40 & n.20.

200. As a matter of property law, there does not seem to be any impediment to allowing a person other than the state to pay compensation. Unlike a covenant, a condition is simply a statement of fact. See, e.g., Amy B. Cohen, "Arising Under" *Jurisdiction and the Copyright Laws*, 44 HASTINGS L.J. 337, 392 (1993) (describing this distinction). Termination cannot occur until compensation is made.

19(a) of the Federal²⁰¹ Rules of Civil Procedure.²⁰² Because the state is a necessary party, Rule 19(a) requires that it be joined, if possible.²⁰³ Ordering joinder of the state, however, may present problems because of sovereign immunity. As discussed above, absent state waiver of sovereign immunity, a court may not award compensation against the state.²⁰⁴ Although state consent to a recoupment counterclaim can be inferred from a state's decision to file suit,²⁰⁵ in this situation the state would not itself have filed suit. Accordingly, the state may retain its immunity and the court would lack jurisdiction over it.²⁰⁶ If a court could

201. Even though the public trust doctrine is a state common-law doctrine, reference to FED. R. CIV. P. 19 is appropriate because it and the rest of the Federal Rules of Civil Procedure have been adopted in large part in most of the states. See generally John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986). Thus, in the discussion in the text and notes above and below, reference is made to the federal rules and federal cases interpreting the federal rules.

202. Under Rule 19(a) of the Federal Rules of Civil Procedure, a party is considered necessary to the action if:

(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

FED. R. CIV. P. 19(a). In the hypothetical case described, the state is a necessary party because without it complete relief cannot be accorded the grantee defendant.

203. Presumably, the grantee of trust resources could bring a third-party claim against the state, or seek to join the state as a party, and if the state successfully avoided the court's jurisdiction, the grantee would then move to dismiss the case for plaintiff's failure to join an indispensable party. Alternatively, the grantee could forego suing the state and simply move to dismiss on the ground that the private plaintiff failed to join an indispensable party by failing to sue the state or join it as a plaintiff.

204. See *supra* Part I.D.

205. See *supra* notes 171-74 and accompanying text.

206. The plaintiff could perhaps circumvent the state's sovereign immunity by styling the action as one against a state official, to require the official to revoke a grant of trust resources. Although the revocation would trigger a compensation obligation, the plaintiff could argue that payment of compensation is merely incidental to the official's responsibility to carry out her duties and thus falls within a state law immunity exception analogous to the Eleventh Amendment exception articulated in *Quern v. Jordan*, 440 U.S. 332 (1979). On the other hand, because the compensation is not truly prospective relief but payment for a past abuse of trust responsibilities, it seems more likely that the state, absent consent, would in fact be immune from a compensation obligation. Cf. *Edelman v. Jordan*, 415 U.S. 651 (1974) (holding that federal court suits against a state for retrospective monetary relief are not allowed).

not order the state's joinder, it would need to address whether the state was an indispensable party without whom the suit could not go forward.²⁰⁷ Rule 19(b) sets forth the factors to consider:

[F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.²⁰⁸

Applying these factors, it is not at all clear that a public trust lawsuit should proceed in the absence of the state.²⁰⁹ The grantee could persuasively argue for dismissal because any judgment rendered against her in the absence of the state would likely be inadequate and prejudicial to her entitlement to equitable compensation, unless the court could shape its relief to require

207. Of course, to the extent the state is not immune from suit, a court will not need to address the indispensability question. As discussed *infra* Part II.B, a state could remove any jurisdictional obstacles by passing legislation making the state amenable to suit for compensation for improvements.

208. FED. R. CIV. P. 19(b). The application of each of these four factors involves considerable discretion and none of the four factors is intended to be dispositive. The four factors are intended only to guide the court in its broader determination of "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." *Id.* See *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995) ("The rule calls for a pragmatic decision based on practical considerations in the context of particular litigation.") (citing *Provident Tradesman Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116-17 n.12, 118 (1968) and *WRIGHT, ET. AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D* § 1601, at 10, 14 (1986)).

209. Courts commonly dismiss lawsuits where a sovereign is a necessary party but not available because of its sovereign immunity. See, e.g., *Kescoli v. Babbitt*, 101 F.3d 1304, 1310-12 (9th Cir. 1996) (dismissing suit because Indian tribes were necessary and indispensable parties but immune from suit); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 478 (7th Cir. 1996) (same); *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1496-99 (D.C. Cir. 1995) (dismissing suit where Kansas was a necessary and indispensable party but immune from suit); *Enterprise Management Consultants, Inc. v. United States*, 883 F.2d 890, 893-94 (10th Cir. 1989) (dismissing case when a tribe could not be joined to a suit on account of sovereign immunity); *Texas v. New Mexico*, 352 U.S. 991 (1957) (dismissing because of inability to join United States); *Arizona v. California*, 298 U.S. 558 (1936) (same); cf. *Cherokee Nation v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997) (reversing the district court's Rule 19(b) dismissal because although the Delaware tribe was a necessary and indispensable party to a lawsuit the tribe lacked sovereign immunity). But see *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380 (1980) (allowing suit to proceed despite inability to join United States).

the citizen plaintiff to pay the compensation. On the other hand, the citizen plaintiff could argue against dismissal for non-joinder on the grounds that she would lack any remedy if the public trust action were not allowed to proceed.²¹⁰ This argument against dismissal is not, however, as convincing. Where the state has decided not to join in the litigation, the safest assumption is that the public (by way of its representatives) has affirmed its current resource allocation and determined that revocation or alteration is inappropriate, or at least should wait for another day.

Because the state is best viewed as an indispensable party, if it is immune from joinder, by whatever procedural mechanism, a private plaintiff's public trust claim should be dismissed unless she is willing to pay the grantee's compensation herself. Plainly, this conclusion upsets, albeit indirectly, the accepted notion that private plaintiffs have standing to bring public trust claims. Yet the notion of individual public trust suits has never sat easily alongside the principle that grants of trust resources are not void but merely voidable. Surely the right to void a grant of trust resources, to the extent it exists at all, resides in the state, as representative of the public, and not in any member of the public who may differ on the appropriate time for revocation.²¹¹ It is only if grants are void *ab initio* that it makes sense that any

210. An analogous case on which a public trust plaintiff might try to rely is *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976). There, the plaintiff Indian tribe filed suit against Rhode Island and various individuals and businesses seeking to establish its right to possession of certain lands which it claimed had been acquired by the defendants in violation of the Indian Non-Intercourse Act. *See id.* at 809. The defendants sought to join the United States as a plaintiff under FED. R. CIV. P. 19(a) because they were concerned that a judgment in their favor would not be binding on the United States in a later proceeding (the United States clearly had the right to bring an action under the Non-Intercourse Act as trustee for the tribe). *See id.* at 810. The court found that the United States was a "necessary" party within the meaning of Rule 19 but that the court was without jurisdiction because of the United States' immunity. *See id.* The court, however, concluded that the United States was not indispensable and that the suit could proceed because a contrary decision would "effectively prevent plaintiff from ever bringing its case without the voluntary assistance of the United States." *Id.* at 811-12. *Narragansett* and the standard public trust case are, however, distinguishable in that the public trust plaintiff is only one of many beneficiaries represented by the state whereas the tribe was the sole beneficiary of the United States' trust responsibility. *See also Kickapoo Tribe*, 43 F.3d at 1499 ("[A]bsence of an alternative remedy alone does not dictate retention of jurisdiction under Rule 19.").

211. Although a citizen could bring a mandamus action against the state to require it to revoke an improvident grant of trust resources, such an action could run afoul of the state's sovereign immunity. *See supra* note 206 (discussing this issue).

member of the public can file suit against a grantee of trust resources. But again, the conclusion that grants of trust resources were void from their inception is scuppered by the reality that such grants are many and long-standing.²¹²

Even if the state is not immune from an obligation to pay compensation, a court would seemingly want to exercise caution before ordering the state to pay compensation as a result of a private plaintiff's public trust action.²¹³ Unless the state is joined and then supports the plaintiff's position, a court could end up revoking or altering a grant and requiring the state to pay compensation even though the state actually supports the grantee's current use of the trust resource, or at least acquiesces in it. Of course, a court wedded to the anti-majoritarian task of rejecting the conveyancing decision of a prior legislature is not likely to be detained by concern about requiring a current majority to pay compensation without its consent. But the court should be. That concern should not, however, lead a court to go ahead and revoke a grant of trust resources while declining to order compensation. Ordering an unconsenting state to pay compensation to the grantee is the lesser of two evils, given that the state will likely benefit from the court's public trust decision. In the end, if the state is not a willing participant in a public trust claim, the better conclusion is that an individual citizen does not have a right to seek revocation of a prior grant of trust resources.²¹⁴

212. See *supra* note 193 and accompanying text.

213. As discussed below, a state could, of course, signal its desire to pay compensation in such instances by passing legislation making clear that the state will pay compensation even if it is not a party to a decision invalidating or restricting a grant based on the public trust doctrine. See *infra* Part II.B.

214. It is important to recognize that this analysis of the compensation question continues to operate on the premise that a trust resource can be taken from a grantee without implicating the Fourteenth Amendment. If exercise of the public trust doctrine does implicate the Constitution, then judicial revocation of a trust resource upon motion of a private plaintiff would constitute the clearest form of judicial taking. Although he questions whether a court has such power to take property, in his seminal article on judicial takings Professor Thompson suggests that a court does have authority to award compensation in such instances. See Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1515-16 (1990). He observes, however, that if the court is concerned about its power or practical ability to order the legislature to automatically pay compensation as a result of the court's decision to take property, the court could instead condition its public trust ruling on the legislature's being willing to provide compensation within some set period of time. See *id.* at 1520-21. If the legislature appropriates compensation, the ruling stands, but otherwise the grantee would continue to control the trust resource. Applying this

3. The Forgotten Equitable Compensation Principle

The procedural complications introduced by equitable compensation should not obscure the basic point that equitable compensation should be a part of public trust litigation. If a court concludes that grants of trust resources are void *ab initio*, it can, and should, award compensation to a grantee as part of an equitable defense or counterclaim. And if a court makes the more palatable and defensible conclusion that grants of trust resources are merely voidable, compensation should be an element of a public trust claim, a constructive condition of termination. Unfortunately, despite these different conceptual justifications for awarding equitable compensation, there is sparse mention of equitable compensation in the case law.

In three cases the California Supreme Court has cited *Illinois Central* for the proposition that the state owes a grantee compensation for improvements, but the court also relied on a California statute²¹⁵ mandating compensation for improvements where the

"legislative choice" approach to the issue of equitable compensation rather than Fourteenth Amendment compensation may have merit. It would eliminate both the sovereign immunity concern and the fear that the state would be ordered to pay compensation where it actually supports the current resource allocation. In essence, the court would be allowing the legislature its opportunity to revoke a prior grant of trust resources upon payment of compensation. If the court is to leave the decision up to the legislature, however, it would perhaps make more sense to simply require that the state bring the claim in the first instance.

215. Section 6312 of the California Public Resources Code provides, in relevant part:

Neither the state, nor any political subdivision thereof, shall take possession of lawful improvements on validly granted or patented tidelands or submerged lands without the tender of a fair and just compensation for such lawful improvements as may have been made in good faith by the grantee or patentee or his successors in interest pursuant to any express or implied license contained in the grant or patent.

Nothing herein contained shall be deemed to prevent the parties to a grant or patent of tidelands from agreeing, as a part of such grant or patent, that there shall be no compensation paid for any improvement made on those tidelands to which such agreement relates.

Nothing herein contained is intended to increase, diminish, or affect the title of any person in any validly granted or patented tidelands or submerged lands.

This section shall not be construed to require compensation for any change in the use of tidelands or submerged lands as a result of governmental regulation that prohibits, restricts, delays, or otherwise affects the construction of any planned or contemplated improvement.

CAL. PUB. RES. CODE § 6312 (West 1996).

state resumes possession of land under navigable water.²¹⁶ Moreover, in each case compensation for improvements was not directly at issue.²¹⁷ Thus, the cases do not necessarily evidence a conviction that compensation is warranted by way of recoupment or as a condition of revocation. They could just as easily be read as offering dicta that compensation is only available where the state has passed legislation agreeing to pay. Beyond California, the case law is barren of the suggestion that equitable compensation should be paid where the public trust doctrine is the vehicle

216. In *State v. Superior Court (Fogerty)*, 625 P.2d 256 (Cal. 1981), a case involving application of the public trust doctrine to lands between high and low water mark in Lake Tahoe, the court stated:

Landowners who have previously constructed docks, piers and other structures in the shorezone may continue to use these facilities unless the state determines, in accordance with applicable law, that their continued existence is inconsistent with the reasonable needs of the trust. In that event, both statute and case law require that plaintiffs be compensated for the improvements they have constructed in the shorezone.

Id. at 261 (citations omitted); *see also* *City of Berkeley v. Superior Court*, 606 P.2d 362, 373 (Cal. 1980) ("[A]ny improvements made on [tidelands or submerged lands] could not be appropriated by the state without compensation."); *id.* at 374 ("We appreciate also that there may be some improvements upon tidelands areas, such as docks, in which a landowner's reliance interest should be recognized to some degree."). In *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983) (*Mono Lake*), the court only mentioned the compensation issue in a footnote and merely cited *Fogerty* and *Berkeley*. *See id.* at 723 n.22. It did not expressly rely on § 6312 of the California Public Resources Code. To the extent it intended to rely on the statute, that reliance seemingly would have been misplaced because the statute's language covers only grants of tidelands and submerged lands and not water rights. *See supra* note 215 (quoting statute).

217. In *Berkeley*, the compensation question had not yet arisen because the court had only decided which lands were subject to the public trust. The court only offered that "there *may be* some improvements upon tideland areas, such as docks, in which a landowner's reliance interest should be recognized to *some degree*." 606 P.2d at 374 (emphasis added). In *Fogerty*, the court likewise merely held that the land at issue was impressed with the public trust and did not divest or restrict the landowners' use of any improvements. *See* 625 P.2d at 261. In *Mono Lake* the court was reviewing a summary judgment on the question of whether the public trust doctrine applied to water rights and the court's reference to compensation appears to be nothing more than a footnote filling out the court's description of its earlier decision in *Berkeley*. *See* 658 P.2d at 723. The only sense in which the California Supreme Court has applied equitable compensation principles was by its holding in *Berkeley* that where tidelands had been filled or improved to the point where they were no longer "physically adaptable" to trust uses, they became free of the trust. *See* 606 P.2d at 363, 373. In a sense, deciding that the grantee could have fee title in such situations is like an award of equitable compensation. The court simply decided that the state's right to revoke should be offset completely by equity. *See infra* notes 235-37 and accompanying text (discussing this issue). Unfortunately, there is no evidence that the court self-consciously based this part of its ruling on the compensation obligation of *Illinois Central* or the California Public Resources Code.

by which a grantee's use of a trust resource is diminished or eliminated.

There are a variety of reasons why courts have paid such little attention to the equitable compensation principle. In some cases, compensation has not been an issue because no improvements have been erected in reliance upon the grant.²¹⁸ In other cases, improvements exist but the state has not sought to take them, perhaps because the improvements are built in reliance on riparian rights rather than the public trust conveyance,²¹⁹ or perhaps because wharves, docks, and other such improvements are often permissible under *Illinois Central* because they fulfill a trust objective: furthering waterborne commerce.²²⁰ Still another reason compensation has not been an issue is that courts may have viewed the principle as limited to compensation for actual physical improvements and as not including compensation for expenditures made in reliance upon the grant of trust resources which are also recoverable in equity.²²¹

A final reason for the lack of equitable compensation cases is that actual judicial application of the public trust doctrine,

218. See, e.g., *State v. Superior Court (Lyon)*, 625 P.2d 239 (Cal. 1981) (finding no development at time of public trust dispute); *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988) (holding public trust doctrine prohibits owner from excluding fisherman from unimproved tidelands); *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club*, 671 P.2d 1085, 1094 (Idaho 1983) (holding that a lease for the construction of private docking facilities on Lake Coeur d'Alene did not violate the public trust doctrine but may at a future date; not addressing whether compensation would be due if the doctrine were later invoked); *Caminiti v. Boyle*, 732 P.2d 989 (Wash. 1987) (deciding the constitutionality of a state statute allowing owners of residential property to install private recreational docks).

219. See, e.g., *Illinois Central*, 146 U.S. at 445-48 (recognizing the Railroad's right in the wharves it built pursuant to its riparian rights); *supra* note 51 (discussing this aspect of *Illinois Central*).

220. See *Illinois Central*, 146 U.S. at 452 ("It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks and other structures in aid of commerce . . . that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust . . ."); see also *People v. California Fish Co.*, 138 P. 79, 82, 94 (Cal. 1913) (noting that parties withdrew by stipulation any issue as to compensation for various improvements erected in reliance upon the grants at issue). Courts have also avoided the compensation question by suggesting that the grantee may continue to use existing docks and wharves because they fulfill the original marine commerce purposes of the grant but that any other use of the property is disallowed. See, e.g., *State v. Central Vt. Ry., Inc.*, 571 A.2d 1128 (Vt. 1989).

221. See *infra* notes 224, 254 and accompanying text (noting additional expenditures, including property taxes and purchase price, for which courts and legislatures have awarded equitable compensation).

particularly in the context of appropriative water rights, has been more limited than the vast academic commentary might suggest.²²² And it is in the application of the public trust doctrine to water rights that the idea of equitable compensation has some of its greatest merit. Although a state may often assert its public trust interest in tidelands without requiring the removal of wharves and docks, when it asserts its public trust interest in water so as to eliminate or diminish an appropriative right, a variety of improvements (conveyance systems, crops, treatment plants, pumping stations, and the like) could be affected. Thus, to some extent, this discussion about equitable compensation, like so many others about the public trust doctrine, is a discussion about the doctrine's potential uses and abuses. In any event, whether as a corrective to flaws in the current application of the public trust doctrine, or as a means of avoiding unjust expansion of the doctrine in the future, grantees should request and courts should award equitable compensation.²²³

4. The Components of an Equitable Compensation Award

With regard to the nature of equitable compensation courts should award, it is not the goal of this article to detail the

222. Professor Weber states this point with particular eloquence. Arguing that the public trust doctrine is largely existential with respect to revocations of appropriative water rights, he states:

We know the doctrine exists and might compel potentially massive water reallocations. Absent the doctrine's application by a court of law to a concrete situation, however, we simply know almost nothing about when these reallocations can occur. The doctrine's potential judicial articulation remains almost fully inchoate. In this virtually unbridled potential lies much of the doctrine's mystique and some of its power.

Weber, *supra* note 186, at 1235.

223. One argument sure to be made against awarding equitable compensation for improvements is that doing so would create an incentive for persons to spend on improvements to the detriment of the environment. See Sprankling, *supra* note 64 (making this argument about the impacts of laws awarding compensation to mistaken improvers). It could also be said that imposing a compensation obligation on the state will make the state less likely to revoke grants of trust resources, allowing further harm to the environment. It is hard to dispute either argument but neither one is a persuasive reason for treating the grantee unjustly. The real question is whether the public or one citizen should pay the price for improvident historical resource allocations. Compensation for improvements is a small price to pay for a state obtaining the large, otherwise cost-free benefits of the public trust doctrine.

particular improvements and expenditures for which compensation is appropriate. In mistaken improver cases, courts have compensated for a wide variety of improvements,²²⁴ have adopted different valuation methods,²²⁵ and have adopted different forms of remedial relief.²²⁶ This variety is not surprising because the very nature of equity dictates that the type and amount of compensation will vary depending on the particular equitable circumstances before a court.²²⁷ Thus, if compensation in public trust cases arises as a separate equitable defense or counterclaim, it would be inappropriate to select one definitive equitable compensation remedy. On the other hand, if compensation is a permanent fixture of the public trust doctrine, as the more persuasive interpretation would suggest, some sort of consistent definition of equitable compensation is more desirable. Both the grantee and the state would benefit from knowing the value of the

224. Among the improvements for which courts have granted compensation are: buildings; substantial additions to buildings; fences; crops; trees and shrubbery; widening and improving of streets by grading, paving, resurfacing, and constructing curbs, gutters, and storm sewers; the clearing and draining of land; the preparation of land for building sites or for planting of crops; wells affording a permanent water supply; lasting systems of drains and ditches for irrigation and carrying off surface water; and mines and oil wells. See J.E. Macy, Annotation, *Measure and Items of Recovery for Improvements Mistakenly Placed or Made on Land of Another*, 24 A.L.R. 2D 11, §§ 3-14 (1952). Property taxes are another expenditure that fits in the category of improvements. See *Notelzah, Inc. v. Destival*, 537 N.W.2d 687, 692 (Iowa 1995) (awarding "property taxes paid in the good-faith belief it was the owner"); *Macaulay v. Howard*, 94 S.E.2d 393, 396-97 (S.C. 1956) (same); *Rise v. Steckel*, 652 P.2d 364, 372 (Or. Ct. App. 1982) (allowing the mistaken improver to set-off taxes paid against the owner's claim for rents and profits); *Miceli v. Riley*, 436 N.Y.S.2d 72, 75 (N.Y. App. Div. 1981) (same); *Haight v. Pine*, 42 N.Y.S. 303, 305 (N.Y. App. Div. 1896) (same). See generally Dickinson, *supra* note 57, at 49 n.59 (noting that because taxes paid by the mistaken improver release the owners of tax liability, the mistaken improver is entitled to relief under modern restitutionary principles) (citing RESTATEMENT OF RESTITUTION §§ 43(1), 54(1) (1937)); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1202 (1995) ("One who mistakenly pays taxes assessed on a neighboring tract has a claim in restitution against the neighbor . . .").

225. See Dickinson, *supra* note 57, at 62-64 (discussing different valuation methods employed by courts and state legislatures).

226. See *id.* at 64-68 (describing the various types of remedies employed by courts, including: giving the mistaken improver a lien on the property, allowing the true owner to elect to pay the improver or sell the land to the improver for its fair market value in an unimproved state, allowing the improver to remove the improvements, and ordering a cotenancy); Merryman, *supra* note 58, at 467-68 (discussing different forms of relief).

227. See Dickinson, *supra* note 57, at 64 ("The search for an appropriate remedy, one that will do substantial justice to the owner and provide the improver with a measure of restitution, has been a difficult one. There are several methods for accomplishing restitution, although none is perfect for all cases.").

constructive condition placed on the state's constructive power of termination. The state could weigh in advance the cost of revoking a grant and the grantee could better calibrate the risks and benefits associated with investment in and use of a trust resource.

Unfortunately, the very nature of a constructive condition makes it unamenable to consistent application, just as the public trust doctrine itself has been so inconsistent in its application and expansion.²²⁸ This insusceptibility argues in favor of a legislative resolution, the possibility of which is discussed below.²²⁹ To the extent courts are to give further definition to the constructive condition of equitable compensation, beyond the basic injunction that the state should pay the grantee for improvements built in reliance upon the grant of trust resources,²³⁰ fairness suggests two refinements. First, courts should determine the amount of compensation with reference to the cost of the improvements rather than the enhanced value of the property, as is more often done in mistaken improver cases.²³¹ Although paying for enhanced value makes sense if the only equitable goal of compensation were avoiding unjust enrichment, it is inappropriate in a public trust case where the concern is avoiding injustice to the grantee.²³² Moreover, in a public trust case, the state typically

228. See Blumm, *supra* note 9, at 579 (describing the public trust doctrine as "chameleon-like").

229. See *infra* Part II.B.

230. See *Illinois v. Illinois Cent. R.R. Co.*, 146 U.S. 387, 455 (1892) ("Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay . . .").

231. See Dickinson, *supra* note 57, at 62 (noting that the typical compensation formula in betterment acts is to compensate the mistaken improver for the value of the improvement, "that is, of the difference in the fair market value of the land with and without the improvement"); see also *Uhlhorn v. Keltner*, 723 S.W.2d 131, 137 (Tenn. Ct. App. 1986) ("The amount that can be recovered as compensation for improvements is the amount by which the improvements enhance the value of the land. This is not the same as the actual cost of the improvements."); *Green v. Bambrick*, 49 N.W.2d 160, 163 (Mich. 1951) (same).

232. Avoiding unjust enrichment is only one of the equitable factors to consider in deciding on the appropriate form and amount of equitable compensation. The court must also consider the equities of the mistaken improver. See Dickinson, *supra* note 57, at 74 (suggesting that in developing a remedy, "the starting point must be an assessment of the equities of both parties"). Thus, even though mistaken improvers most often recover only the increased value of the land and not the actual costs of their improvements, see *supra* note 231, that is not always the case. See Dickinson, *supra* note 57, at 68 (observing that where "a property owner deliberately misleads the improver or acquiesces in the improver's mistake" the improver is entitled to relief regardless of increase in market value); *id.* at 61, 69-70; see also

desires to resume control over a trust resource so that it can return it to a more "natural" condition. In such situations, existing improvements generally do not enrich the state, and may in fact be to its detriment. Thus, if equity is to be accomplished, payment should be based on expenditure rather than on increased property value.²³³ Of course, equitable compensation for expenditures should in no case exceed the just compensation that would have been payable had the state simply exercised its eminent domain power.²³⁴

Second, as suggested in the *Illinois Central* litigation, where the trust property has been so altered that it is no longer useful for trust purposes, the trust will not apply to the property and fee simple title will vest in the grantee.²³⁵ Other courts have taken

RESTATEMENT OF RESTITUTION § 53(3) (1937) (suggesting compensation for "appropriate improvements" without respect to the increased value of the land where the land was acquired from the owner only to see the grant later avoided by the owner because of a mistake of law); *id.* at § 42(3); RESTATEMENT (SECOND) OF TRUSTS § 292(1) cmt. d (1959) (stating that if the trustee in breach of trust transfers trust property and no value is paid for the transfer, the gratuitous transferee who makes improvements without notice "can be compelled to surrender the property only if he is reimbursed for such expenditures, even though the property is not benefitted to the extent of the amount expended"). By not tying compensation to the increased market value of the trust resource, a court would also avoid the difficult valuation questions raised by comparing the value of improvements to the recreational or ecological value of a trust resource.

233. The amount of compensation also should not be offset by the benefit afforded the grantee during the time she used the trust resource. Although this is a remedy that has been employed in some mistaken improver cases, *see, e.g.,* *Roesch v. Wachter*, 618 P.2d 448, 451 (Or. Ct. App. 1980), it is not appropriate in the public trust context. In many instances, a public trust grantee will already have paid the state for the benefit of using the trust resource, albeit typically a small amount. Thus, to diminish a grantee's equitable compensation by the benefit received would only double the inequity of revocation. If grants of trust resources are revocable, the implicit contract is that the grantee will benefit from the trust resource until such time as the state chooses to revoke the grant, in which case the state will pay for improvements. Finally, it is worth noting that Arizona has addressed this question by statute, providing that the state will not claim compensation from a grantee "for any good faith use of public trust lands" where certain conditions are met. *See* ARIZ. REV. STAT. ANN. § 37-1155 (West 1993).

234. *See infra* note 258 and accompanying text (discussing this issue in the context of an Arizona statute providing for compensation where a state revokes a prior grant of a navigable streambed).

235. *See Illinois v. Illinois Cent. R.R. Co.*, 33 F. 730, 775-76 (N.D. Ill. 1888) (recognizing the Railroad's title to the portion of the submerged lands which it had already filled). Basic principles of equity support such an outcome. *See generally* RESTATEMENT OF RESTITUTION § 69(1) (1937) ("The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be

this approach, holding that where "the tidelands ha[d] been rendered substantially valueless" for trust uses, those tidelands were no longer subject to the trust.²³⁶ Although there is some concern that such a general rule would create an incentive to fill, drain, and otherwise severely alter trust lands, in truth, the principle would largely apply to areas long ago altered. The potential for current activities irrevocably altering trust lands should be adequately controlled by state and federal environmental regulations.²³⁷ And in the case of lands long ago altered in reliance upon a grant of trust resources, the most equitable solution is simply to recognize the fee title truly intended by the original grant, particularly if the lands are in fact no longer useful for trust purposes.

B. Legislation Requiring Compensation for Improvements

Unfortunately, waiting on the courts may not insure that equitable compensation is a condition of revoking or limiting a prior grant of trust resources. Not only might courts fail to

inequitable to require the other to make full restitution."); *id.* at § 178 ("The right to enforce a constructive trust may be terminated as a result of the defendant's change of position."); Joyce, *supra* note 199, at 320-27 (listing a variety of cases supporting the proposition that a vendor or other person claiming an interest in land may be estopped if he had knowledge of improvements being made but acquiesced in them).

236. See *City of Berkeley v. Superior Court*, 606 P.2d 362, 373 (Cal. 1980); see also *Opinion of the Justices*, 424 N.E.2d 1092, 1099-100 (Mass. 1981) ("[T]he Legislature has authority to surrender any so-called vestigial or residual public rights in lawfully filled, formerly submerged, land."); *Opinion of the Justices*, 437 A.2d 597, 607 (Me. 1981) (same); *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1044 (R.I. 1995) (same); *City of Long Beach v. Mansell*, 476 P.2d 423, 450-51 (Cal. 1970) (estopping state from asserting trust in tidelands long-developed by homeowners); *Atwood v. Hammond*, 48 P.2d 20 (Cal. 1935) (allowing state to free filled tidelands from the public trust). See generally WATERS, *supra* note 2, § 30.02(d)(3) (discussing this issue). In other instances, however, courts have held that even filled tidelands which are no longer physically adaptable to trust uses remain subject to the public trust. See, e.g., *City of Alameda v. Todd Shipyards Corp.*, 632 F. Supp. 333, 341 (N.D. Cal. 1986) (citing cases for the proposition that "filling alone does not terminate the trust"); *Hayes v. A. J. Assocs., Inc.*, 846 P.2d 131, 133 (Alaska 1993) (same). For a state statute that establishes a procedure for determining when land under navigable water should be released from its public trust status, see ARIZ. REV. STAT. ANN. § 37-1151 (West 1996) (enumerating a variety of factors for determining if the property "is no longer of material use for protecting public trust values").

237. See, e.g., *Clean Water Act*, 33 U.S.C. § 1344 (1994) (setting forth permit requirements for the discharge of dredged or fill material); *Forest Properties, Inc. v. United States*, No. 92-851L, 1997 U.S. Claims LEXIS 163 (Fed. Cl. Aug. 6, 1997) (denying a permit to fill certain submerged lands of Big Bear Lake).

recognize the principle, but also, even if recognized, the procedural and immunity questions raised by the compensation issue²³⁸ might make courts reluctant to act. The best way to avoid such concerns is for states simply to enact legislation providing for equitable compensation whenever the state resumes possession or control of a public trust resource.

A couple of states have taken steps in that direction. California, as mentioned above,²³⁹ has a statute providing that whenever the State resumes possession of tidelands or submerged lands, it must pay compensation "for such lawful improvements as may have been made in good faith by the grantee or patentee or his successors in interest pursuant to any express or implied license contained in the grant or patent."²⁴⁰ The statute, however, is inadequate because it is limited to complete repossession of tidelands and submerged lands. Thus, it fails to provide compensation in those instances where the public trust doctrine has been expanded beyond its traditional bounds to appropriative water rights, as it has in California.²⁴¹ The statute also includes a needless "good faith" requirement. Although the requirement is softened by recognition that the grantee's right to improve could have been either "express or implied," the good faith inquiry is not helpful. As explained above,²⁴² not only does the inquiry entangle the decision-maker in the embarrassing conundrum of how the public trust easement could be long-standing and yet unknown to the grantee, but also it is inconsistent with the proposition that grants are not void *ab initio*.²⁴³ Thus, absent an agreement between the state and a grantee that no compensation

238. See *supra* Part II.A.2. (discussing these procedural and jurisdictional issues).

239. See *supra* notes 215-16 and accompanying text.

240. CAL. PUB. RES. CODE § 6312 (West 1977); see also *supra* note 215 (quoting statutory language in full).

241. See *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983) (Mono Lake) (extending the public trust doctrine to appropriative water rights); see also *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976) (holding that the public trust doctrine requires the state to engage in water planning).

242. See *supra* Part II.A.1.

243. See *supra* notes 192-93 and accompanying text.

is necessary,²⁴⁴ any grant of trust resources should require compensation as a condition of revocation.

California's equitable impulse to compensate grantees affected by exercise of the public trust doctrine is also reflected in special legislation it passed to help settle the *Mono Lake* litigation, which had resulted in substantial limits to Los Angeles' diversions from the tributaries feeding Mono Lake.²⁴⁵ To offset the impact of the public trust taking, the State appropriated \$36 million to contribute to a \$55 million waste-water re-infiltration project²⁴⁶ of the Los Angeles Department of Water and Power.²⁴⁷

244. Cf. CAL. HARB. & NAV. CODE App. II § 78 (West 1978) (granting certain tidelands and submerged lands to the Humboldt Bay Harbor, Recreation, and Conservation District subject to a variety of conditions, including the state's right to retake the lands for purposes of a highway without paying compensation except for improvements erected thereon); Board of Port Comm'rs of Oakland v. Williams, 70 P.2d 918 (Cal. 1937) (interpreting Tideland Act of 1911, 1911 Calif. Stat. ch. 654, which provided for 25 year leases of tidelands terminable at will by the City of Oakland but, in certain instances, required payment of compensation for improvements).

245. Although the California Supreme Court handed down its *Mono Lake* decision in 1983, 658 P.2d 709 (Cal. 1983), it was not until 1989 that an injunction was entered preventing Los Angeles from diverting water. See generally Blumm & Schwartz, *supra* note 9, at 715-16 (discussing the aftermath of the Mono Lake litigation). And it was 1994 before the state water board amended Los Angeles' water rights to establish a permanent plan for raising the level of Mono Lake. See *id.*; Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 ECOLOGY L.Q. 541, 571-76 (1995) (same). The state water board estimated that the annual costs of replacement water and lost hydropower would be \$36.3 million over the next twenty years and \$23.5 million per year after the lake reached the designated level. See Blumm & Schwartz, *supra* note 9, at 719-20 (citing Decision and Order Amending Water Right Licenses to Establish Fishery Protection Flows in Streams Tributary to Mono Lake and to Protect Public Trust Resources at Mono Lake and in the Mono Lake Basin, Decision 1631, Cal. State Water Resources Control Board, Sept. 28, 1994, at 180); Koehler, *supra* at 574-76 (discussing same cost figures).

246. The re-infiltration project is designed to "provide 35,000 acre-feet a year of highly treated wastewater to recharge a natural underground reservoir in the north San Fernando Valley." *San Fernando Valley Briefly: City Receives Grant for Water Recycling*, L.A. DAILY NEWS, Feb. 25, 1995, at N3; see also Tim May, *Van Nuys Water Project Gets Initial Federal Funds*, L.A. TIMES, Feb. 25, 1995, at 2 (describing project).

247. See CAL. WATER CODE § 12929.14 (West 1994) (appropriating money); Environmental Water Act of 1989, CAL. WATER CODE § 12929.20 (West 1989) (initially authorizing appropriation); see also *San Fernando Valley Briefly: Water Conservation Money Received*, L.A. DAILY NEWS, Aug. 29, 1995, at N3; May, *supra* note 246; *San Fernando Valley Briefly: City Receives Grant for Water Recycling*, *supra* note 246, at N3; Pamela J. Podger & Mark Grossi, *Board Votes to Protect a Dying Mono Lake from L.A. Water Districts Watch to See If Decision Sets a Precedent for Erosion of Other Water Rights*, THE FRESNO BEE, Sept. 29, 1994, at A1 (describing

And the Bureau of Reclamation agreed to contribute another \$12.8 million.²⁴⁸ Although it is hard to quibble with this compensation outcome, particularly given its conservationist objectives, such an *ad hoc* and *post hoc* approach to compensation remains unsatisfactory. Whether the state compensates should not depend on the political clout of the grantee or the visibility of the public trust taking. Instead, both the state and the grantee should be able to estimate *ex ante* the costs of state assertion of its public trust easement. That will only occur if the payment of compensation is a condition of termination.

Another approach to equitable compensation is that adopted by Arizona. In 1987 Arizona enacted a statute quitclaiming to the record title owners any interest of the State "based on navigability" in the beds of all rivers in Arizona save four.²⁴⁹ The statute was challenged and struck down.²⁵⁰ In response, in 1994, Arizona passed new legislation²⁵¹ which established a commission to

agreement with Los Angeles for the receipt of state funds); Sandy Harrison, *City Loses Battle Over Mono Lake: L.A. to Pay More for Other Sources*, L.A. DAILY NEWS, Sept. 29, 1994, at N1 (same).

248. See Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 1613, 106 Stat. 4600, 4667-68 (codified in scattered sections of 43 U.S.C.) (authorizing expenditures on Los Angeles Area Water Reclamation and Reuse Project); see also *supra* note 247 (citing articles discussing payment).

249. See WATERS, *supra* note 2, § 30.02(d)(3), at 58 (citing and discussing statute). The statute excluded the Colorado, Gila, Salt, and Verde rivers. See *id.* The statute had been enacted to relieve the supposed threat to existing title caused by various statements by state officials, including then governor, now Interior Secretary, Bruce Babbitt, that the state was prepared to re-assert its equal footing title to land under navigable water in Arizona which had previously been conveyed out of state ownership. See *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 162 (Ariz. 1991).

250. See *Hassell*, 837 P.2d at 158. The court concluded that the quitclaim of public trust lands violated the gift clause of the Arizona Constitution, which prohibited the State from making any donation to "any individual, association, or corporation," absent a public purpose and fair consideration. *Id.* at 169 (citation omitted). The court opined that the quit-claim of trust property did not clearly provide for fair consideration because the statute failed "to provide a mechanism for particularized assessment of (1) the validity of the equal footing claims that it relinquishes; (2) the continuing value of land subject to such claims for purposes consistent with the public trust; (3) equitable and reasonable consideration for claims that may be relinquished without impairing the public trust; and (4) conditions that may be necessary to any transfer to assure that public trust interests remain protected." *Id.* at 173.

251. See ARIZ. REV. STAT. ANN. §§ 37-1101 to 37-1156 (West 1993 & Supp. 1997). Although only portions are reviewed here, the statute is quite detailed in its effort to respond to the judicial message of *Hassell* and to the reliance interests of the owners of land under navigable water. For a more thorough overview of the statute,

determine the navigability of streams within the state and to identify any public trust values associated with those navigable watercourses.²⁵² In those situations where the state has conveyed land under navigable watercourses, the state land department may, with the legislature's authorization, commence a quiet title action.²⁵³ If the "state's ownership of a parcel or portion of a parcel of property is confirmed in a quiet title action," the statute requires the state to pay compensation to the grantee as follows:

1. Refund all property taxes ever paid on the property.
2. Compensate the person for all improvements to the property.
3. Refund the purchase price paid for the property, plus interest at the legal rate, if the property was purchased from this state by the person or any predecessor in title.²⁵⁴

Like California's statute, Arizona's is limited to compensation for state revocation of conveyances of land under navigable waters. In the case of Arizona, however, this may simply reflect the legislature's desire that the public trust doctrine should not be expanded beyond its traditional base to other natural resources, such as water. To that extent, the statute wisely refrains

see Tracey Dickman Zobenica, *The Public Trust Doctrine in Arizona's Streambeds*, 38 ARIZ. L. REV. 1053 (1996). Zobenica relates that the statute has not yet been subject to judicial review although "some groups have openly challenged its constitutionality." *Id.* at 1068 (citations omitted).

252. See ARIZ. REV. STAT. ANN. §§ 37-1121 to 37-1132 (West 1993 & Supp. 1997).

253. Before the state land department may act, the legislature must enact legislation authorizing the department to claim the land and bring a quiet title action. See ARIZ. REV. STAT. ANN. §§ 37-1128, 37-1131 (West Supp. 1997). Arizona has thus addressed the procedural questions of standing, joinder, and immunity by providing that the decision on whether to revoke a grant of trust resources is for the state land department with the authorization of the legislature. See *id.* As discussed above, to the extent that under the public trust doctrine grants are merely voidable and not void *ab initio*, this limitation is appropriate. See *supra* notes 211-12 and accompanying text. But see Zobenica, *supra* note 251, at 1068-71 (arguing that limiting judicial action to cases authorized by the legislature violates the separation of powers doctrine).

254. ARIZ. REV. STAT. ANN. § 37-1132 (West Supp. 1997). The statute also calls for the land department, upon the petition of the record title owner, to determine whether to release particular lands from their public trust status if they are "no longer of material use for protecting public trust values." *Id.* § 37-1151. If the department decides that any portion of the bed of a navigable stream should be released from the public trust, it is to appraise the land and put it up for sale or public auction. See *id.* § 37-1152. In another effort to compensate the grantee, the amount of the appraised value of "reasonable improvements . . . made in good faith" is credited and applied to the bid of the grantee. *Id.*

from offering courts an additional basis on which to expand the public trust doctrine.²⁵⁵ If the doctrine is applied to additional natural resources, however, the statutory framework should be extended to include them. An advantage of the Arizona statute over the California approach is that it does not inquire into the good faith of the grantee,²⁵⁶ thus avoiding the difficulties attendant to that effort.²⁵⁷ From the grantee's perspective, of course, the greatest benefit of the Arizona statute is its generosity. In fact, the statutory compensation could be greater than the just compensation that would be due if Arizona simply exercised its power of eminent domain. To the extent that proved true—which seems unlikely given that the land department and legislature would have the incentive to adopt the less costly of the two alternatives—the compensation provision could run afoul of the gift clause in the state constitution.²⁵⁸ Barring a violation of the

255. Arizona has not yet extended the public trust doctrine to appropriative water rights. See Blumm & Schwartz, *supra* note 9, at 733-34.

256. Although the statute does not inquire into the good faith of the record title owner for purposes of compensation following a quiet title action, it does require that the record owner or lessee have made the improvements in good faith before she will be credited with the cost of those improvements toward her bid on any land subject to sale or auction because of its release from the trust. See ARIZ. REV. STAT. ANN. § 37-1152 (West 1993). It seems likely, however, that in this particular statutory provision "good faith" refers to the time at which the improvements were constructed (before or after the Commission's determination of navigability and before or after the petition to release the land from its public trust status) rather than the time at which the land was conveyed to the grantee.

257. See *supra* notes 242-43 and accompanying text (discussing this problem with the California statute).

258. The gift clause prohibits the State from making "any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." ARIZ. CONST. art. IX, § 7. Presumably, to the extent the state paid more compensation than obligated to pay by its eminent domain powers, it would constitute an improper donation. One commentator, however, has asserted that paying the grantee any compensation at all would violate the gift clause. See Zobenica, *supra* note 251, at 1077-78. Her position relies on the standard argument that state exercise of its public trust easement does not implicate the just compensation requirements of the Fifth and Fourteenth Amendments and thus the payment of any compensation would amount to a gift. See *id.*; see also *supra* note 14 (discussing this argument). Setting aside the merits of this constitutional argument, its flaw is that it fails to consider the possibility of equitable compensation. And if equitable compensation is permissible, if not required, the statute's compensation provision would only violate the gift clause if the compensation paid was "so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity." Arizona Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 169 (Ariz. 1991) (internal quotations and citations omitted). Perhaps, in keeping with *Illinois Central* and the preponderance of mistaken improver laws, this line could be drawn at compensation for improvements and would exclude the property tax refund and

gift clause, however, the provision is an acceptable exercise of state power.²⁵⁹

Other than Arizona and California, states have not passed legislation awarding compensation to grantees harmed as a result of the state's exercise of the public trust doctrine.²⁶⁰ But Arizona and California's statutes are at least exemplary of approaches that legislatures could take to implement an equitable compensation requirement. Again, it is not this article's goal to design specific legislation. While some legislatures, such as Arizona's, may seek to be more generous, at a minimum legislation should follow *Illinois Central's* recommendation of compensation for improvements constructed in reliance upon the grant of trust resources. Any legislation would also do well to address procedural questions with respect to who may bring a public trust claim.²⁶¹

the purchase price refund. See ARIZ. REV. STAT. ANN. § 37-1132 (West Supp. 1997). On the other hand, a court would hardly do an injustice if it deferred to the legislature's understanding of equity and declined to limit compensation short of the amount of just compensation, itself the most basic definition of equity in cases where a person loses her property to the state.

259. See *supra* note 258; see also *infra* notes 262-65 and accompanying text (discussing the viability of compensation statutes more generally).

260. At least, a variety of LEXIS searches have revealed no other state statutes. A number of other states, however, have passed or have had introduced so-called "takings legislation." See generally Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOLOGY L.Q.* 187, 190 (1997) ("In the past three years at least seventeen states have enacted some type of takings legislation. Moreover, proposed takings legislation has been introduced in almost every state, with legislation still pending in committee in a number of states."); David A. Thomas, *The Illusory Restraints and Empty Promises of New Property Protection Laws*, 28 *URB. LAW.* 223 (1996) (reviewing private property protection legislation from 14 states). In those states where the takings legislation expands the scope of compensable takings, see Cordes, *supra* at 190 & n.16 (listing four states with statutes and twenty other states where such bills have been introduced), it arguably could be a source of compensation for a public trust taking, but only if the grantee enjoys a property right in the trust resource. Thus, application of the takings legislation simply returns to the base question of whether the grantee ever had a property right in the trust resource, and under current public trust law, the answer to that question would be in the negative. The utility of the equitable compensation principle is that it is not dependent upon the answer to that question. Of course, if the right to compensation for improvements is itself understood as a property right, see *supra* text accompanying notes 184-85, such takings legislation would surely apply, but would hardly be necessary because the Constitution itself would require compensation. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987) (just compensation due when any stick in the bundle of property rights is taken).

261. Legislation could, for example, vest in the state the sole right to revoke grants of trust resources, as Arizona has done. See ARIZ. REV. STAT. ANN. §§ 37-1128, 37-1131 (West Supp. 1997); see also *supra* note 253 (discussing this issue).

Whatever approach a legislature chooses to adopt, it is clear that it has power to require equitable compensation. Congress and state legislatures generally can choose to grant greater protection to private property than the Federal Constitution or a particular state constitution demands.²⁶² This has been the impetus behind the takings legislation introduced in recent congressional sessions,²⁶³ and introduced or passed in a number of states.²⁶⁴ States can also alter their common law to grant compensation in situations where it might not otherwise be due, witness the various betterment and mistaken improver statutes.²⁶⁵

If there were any question about legislative power to compensate, it is answered by the closely analogous situations where Congress has legislated to grant compensation when the United States exercises its navigation servitude, even though the no compensation rule would otherwise apply. For example, although

Alternatively, it could give state consent to joinder in private plaintiff public trust litigation. California, for example, has enacted legislation requiring joinder of the state to any tidelands dispute to which a political subdivision of the state is a party. See CAL. PUB. RES. CODE § 6308 (West 1977) (providing, however, that the State will not be liable for any costs). That statute could be expanded to include all public trust disputes.

262. See *United States v. 50 Acres of Land*, 469 U.S. 24, 30 n.14 (1984) ("Congress, of course, has the power to authorize compensation greater than the constitutional minimum.") (citations omitted). For example, because a grazing permit does not create a property right in the permittee, Congress may terminate the permit without paying compensation. Cf. *United States v. Fuller*, 409 U.S. 488, 491-94 (1973) (holding that when the United States condemns property, it need not compensate for the increased value of that property which results from a neighboring grazing permit because the United States is free to terminate a grazing lease without compensation). Nevertheless, Congress has decided that where the United States cancels a rancher's grazing permit, compensation for improvements shall be provided. See Federal Land Policy and Management Act, 43 U.S.C. § 1752(g) (1994) (providing for the permittee to recover compensation for "permanent improvements placed or constructed by the permittee or lessee on lands covered by such permit or lease, but not to exceed the fair market value of the terminated portion of the permittee's or lessee's interest therein"); see also 43 C.F.R. § 2310.3-5 (1997) (requiring compensation for improvements to holders of record of permits, licenses, or leases terminated or revoked by a withdrawal of public lands).

263. See, e.g., S. 781, 105th Cong. (1997) (requiring, among other things, compensation for diminutions in value of 33% or more); S. 605, 104th Cong. (1995) (same); H.R. 925, 104th Cong. (1995) (providing compensation when certain types of federal agency action reduced property value by 20% or more). See generally Cordes, *supra* note 260, at 189 (discussing federal takings legislation and citing other articles doing so).

264. See *supra* note 260 (discussing such takings legislation).

265. See *supra* notes 65-71 and accompanying text.

the Supreme Court had ruled that no compensation was due owners of shellfish beds whose beds were destroyed by the United States' exercise of its servitude,²⁶⁶ Congress passed legislation assuring compensation in such situations.²⁶⁷ Likewise, after the Supreme Court confirmed that when the United States exercises its eminent domain over fast lands adjacent to a river, the owner is not entitled to compensation for any value that derives from the owner's access to, or use of, the navigable waterway,²⁶⁸ Congress legislatively provided for compensation for value created by "access to or utilization of such navigable waters."²⁶⁹ Several other instances exist where Congress has legislatively consented to pay compensation despite the existence of its navigation servitude.²⁷⁰ Just as Congress can choose to pay compensation where it has an underlying servitude, so too can a state legislature pay compensation where it has an underlying public trust servitude. In truth, compensation in the public trust context is even more compelling given that equitable compensation is best viewed as an integral part of the doctrine. When a legislature acts, it does so not gratuitously but to fulfill an obligation.

266. See *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913).

267. See 28 U.S.C. § 1497 (1997) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages to oyster growers on private or leased lands or bottoms arising from dredging operations or use of other machinery and equipment in making river and harbor improvements authorized by Act of Congress.").

268. See *United States v. Rands*, 389 U.S. 121, 124-25 (1967) (no constitutional right to compensation for port-site value lost as a result of United States' exercise of its navigation servitude); see also *United States v. Twin City Power Co.*, 350 U.S. 222, 225-26 (1956) (no constitutional right to compensation for power site value).

269. See *Rivers and Harbors Act of 1970*, 33 U.S.C. § 595a (1997).

270. See *WATERS*, *supra* note 2, § 35.02(c)(1), at 154-55 (referring to "a number of instances where Congress has provided relief from the navigation servitude"). See generally NATIONAL WATER COMMISSION, *FEDERAL-STATE RELATIONS IN WATER LAW* 175-96 (1971) (Legal Study No. 5, Frank J. Trelease) (reviewing limitations upon no compensation rule of navigation servitude). The National Water Commission's final report to the President and Congress recommended that the no compensation rule be eliminated and that the United States should pay compensation whenever it "takes, destroys, or impairs any right acquired under the laws of a State, to the diversion, storage, or use of any water, in connection with or as the result of any Federal project for development of navigable or nonnavigable water or for altering its flow or level." See NATIONAL WATER COMMISSION, *WATER POLICIES FOR THE FUTURE* 468-69 (1973) (Recommendation 13-7).

CONCLUSION

Although the public trust doctrine's detractors and supporters may not be able to agree on a single conception of the doctrine, they should be able to concur on the principle of equitable compensation. If one views the doctrine as a bald circumvention of constitutional protections for private property, compensation is a step in the direction of fairness. It is one constructive condition on a grant of trust resources that meliorates another. If, on the other hand, one sees in the public trust doctrine a long-standing, common-law rule grounded in the principle that certain resources are by their very nature public, then compensation for improvements is a small equitable price to pay for reversing the improvident natural resource grants of the past. In the final analysis, if states and courts continue to employ and expand the public trust doctrine of *Illinois Central*, however unwise that may be, they would only compound their error by failing to heed the whole message of *Illinois Central*: that where the public trust doctrine is employed, it necessarily includes equitable compensation for the grantee.

