Michigan Journal of Environmental & Administrative Law

Volume 11 | Issue 2

2022

The Public Trust and the Chicago Lakefront: Review of Kearney & Merrill's *Lakefront: Public Trust and Private Rights in Chicago* (Cornell U. Press, 2021)

Michael C. Blumm
Lewis and Clark Law School

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Recommended Citation
Michael C. Blumm, *The Public Trust and the Chicago Lakefront: Review of Kearney & Merrill's Lakefront: Public Trust and Private Rights in Chicago (Cornell U. Press, 2021)*, 11 MICH. J. ENVTL. & ADMIN. L. 315 (2022).
Available at: https://repository.law.umich.edu/mjeal/vol11/iss2/4

https://doi.org/10.36640/mjeal.11.2.public

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THE PUBLIC TRUST AND THE CHICAGO LAKEFRONT:
Review of Kearney & Merrill's LAKEFRONT: PUBLIC TRUST AND PRIVATE RIGHTS IN CHICAGO (Cornell U. Press, 2021)

*Michael C. Blumm**

* Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School. Matthew Hebert '23 provided considerable help with the footnotes.

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INTRODUCTION

Joseph Kearney and Thomas Merrill's brilliantly illustrated LAKEFRONT[1] is sure to win American legal history awards for its riveting history of the machinations behind the preservation of the magnificent Chicago lakefront, now dominated by public spaces. The authors weave together a compelling account of how the law affected the development of the post-fire Chicago in the late 19th and 20th centuries—largely made by lawyers and courts and only ratified by legislatures. The book's title suggests that the story is largely about the public trust doctrine (PTD). But the doctrine is hardly the centerpiece of the authors' story. What they have to say about the doctrine is confined to the Illinois version of the PTD, and they do not endeavor to explain where it deviates from the modern direction of the PTD.[2]

The book's history of Chicago and its lakefront is groundbreaking legal history, buttressed by twenty years of exhaustive research, colorful characters, and interesting legal developments, of which the PTD played only a supporting role until the 1970s. The principal lesson of their story, one the authors do not emphasize enough, is a persistent struggle between public and private rights along the lakefront. What is unusual is how long this struggle endured, beginning with Illinois Central Railroad's dominance in the late 19th century and the so-called "Lake Front Steal" of 1869,[3] in which the Illinois legislature conveyed roughly one thousand acres of submerged Lake Michigan land to the railroad. The legislature soon thought better of the giveaway, and its rescission in 1873 culminated in a famous 1892 Supreme Court decision on the PTD, *Illinois Central Railroad v. Illinois*,[4] pronounced as the lodestar case of the doctrine by Professor Joe Sax a half-century ago.[5]

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1. *See generally* JOSEPH D. KEARNEY & THOMAS W. MERRILL, LAKEFRONT: PUBLIC TRUST AND PRIVATE RIGHTS IN CHICAGO (2021) (hereinafter LAKEFRONT) (compiling numerous photos and figures and two useful indices). The book builds on earlier articles by Kearney and Merrill: *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHIC. L. REV. 799 (2004), and *Private Rights in Public Lands: the Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine*, 105 NW. L. REV. 1417 (2015). The authors provide a series of blog posts explaining the book at the Volokh Conspiracy, which celebrates free markets. *See* Eugene Volokh, *Dean Joseph Kearney & Prof. Thomas Merrill Guest-Blogging About "Lakefront: Public Trust and Private Rights in Chicago"* (June 14, 2021, 10:38 AM), https://reason.com/volokh/2021/06/14/dean-joseph-kearney-prof-thomas-merrill-guest-blogging-about-lakefront-public-trust-and-private-rights-in-chicago/.

2. *See, e.g.*, MICHAEL C. BLUMM & MARY CHRISTIANA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW (3d ed. 2021).

3. The authors' chapter 1 is entitled "The Lake Front Steal." LAKEFRONT, *supra* note 1, at 8.

4. Illinois v. Ill. Cent. R.R. Co., 146 U.S. 387 (1892), discussed in LAKEFRONT, *supra* note 1, *passim*.

5. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970); *see also* Michael C. Blumm & Zachery A. Schwartz, *The Public Trust Doctrine Fifty Years After Sax and Some Thoughts on Its Future*, 44 PUBLIC LAND & RES. L. REV. 1 (2021) (tracing Sax's considerable influence). Without an attempt to deconstruct the Sax article, the book claims that it was about providing fora in which the public interest against public resources giveaways could be expressed, and those fora were supplied by federal legislation like the Clean Water and National Environmental Policy Acts. LAKEFRONT, *supra* note 1, at 275. Overlooked is *Illinois Central*'s proscription

The authors discuss the controversy over the lakebed conveyance and the Court's pathbreaking decision, but they view the effect of the PTD on the Chicago lakefront as less significant than other considerations like the public dedication doctrine, which nearby landowners invoked to restrict development of the lakefront and preserve their views of the lake.[6] Still, the *Illinois Central* Court focused public attention on what was an attempt to create a monopoly of the lake's outer harbor, and that attention has persisted for a century-and-a-quarter following the Court's decision. Today, the Chicago lakefront is largely public, the consequence of several factors that LAKEFRONT explains. This struggle between public and private rights over the Chicago lakefront existed long before the dawn of the modern environmental movement a half-century ago, influenced not only by the Court's surprising 1892 decision but also by the persistent oversight of neighboring landowners protecting their views of the lake. This public-private clash, in which private rights were subject to both public and neighboring landowner challenges, created the glorious Chicago waterfront of today.

This review of the Kearney and Merrill book focuses on the public trust doctrine, as articulated in the Lake Front case that culminated in the *Illinois Central* Court's decision. There is more to the book, mostly centering on local Chicago interest, so this review concentrates on the public trust. Though in the book's title, the authors maintain that the PTD was not as central to the story of the lakefront's preservation as other influences.[7] They remain public trust skeptics.

I. THE CONTROVERSIAL CONVEYANCE

The Lake Front Case involving Illinois Central Railroad might be the PTD's lodestar, but it came a half-century after the U.S. Supreme Court ratified the PTD in a case involving oyster harvesting in New Jersey's Raritan River.[8] The authors do not attempt to explain this history, confining the earlier cases to footnotes.[9] Nor do they examine in any detail the remarkable expansion of public

against "substantial impairment" of trust resources, a substantive requirement beyond supplying procedural fora. *See infra* note 73 and accompanying text.

6. LAKEFRONT, *supra* note 1, at 85-127 (discussing the public dedication doctrine).

7. LAKEFRONT, *supra* note 1, at 306.

8. Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842) (upholding the reasoning of the New Jersey Supreme Court in an earlier oyster harvesting case in the Raritan River); Arnold v. Mundy, 6 N.J.L. 1 (1821); *see* BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY (2d ed. 1998). The New Jersey Supreme Court's decision, which the U.S. Supreme Court considered to be persuasive in *Martin*, 41 U.S. at 417-18, relied heavily on Sir Matthew Hale's treatise, *De Jure Maris* (first published in 1787 but written over a hundred years before), which traced the English origin of public rights in navigable waters to the *Magna Carta*, Mundy, 6 N.J.L. at 90-91. On Hale's influence, unmentioned in LAKEFRONT, see Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to Lamprey and Oswego Lake*, 43 VT. L. REV. 1, 8-11 (2018).

9. LAKEFRONT, *supra* note 1, at 319-20 n.94. The authors do cite a recent article exploring the Roman history of the PTD. *Id.* (citing J.B. Ruhl & Thomas McGinn, *The Roman Public Trust Doctrine:*

rights that took place in the late 19th century from tidal waters (the so-called English rule) to include navigable-in-fact waters, reflecting the advent of steam power on the country's great inland waterways, like the Mississippi and Ohio Rivers (the so-called American rule).[10] The Supreme Court had approved this expansion in the scope of public rights to include navigable-in-fact waters years before its decision in the Lake Front case.[11]

With no explanation of the 19th century's rapidly expanding law of public rights in waterbodies, the book's discussion of the Supreme Court's decision makes Justice Field's decision appear to be more idiosyncratic than it was. The book inaccurately claims that the Court "adopted" the PTD in the decision upholding the Illinois legislature's revocation of the railroad grant.[12] Actually, the Court had adopted the public rights underlying doctrine a half-century before, although without naming it as "the public trust doctrine".[13] What the Court did in its 1892 decision was to expand the doctrine from a public ownership principle, protecting public access to waterbodies for navigation and fishing, to a nonalienation rule, restricting public conveyances to private parties like the Illinois Central Railroad.

The book's discussion of the long-running controversy over the Chicago Harbor is detailed, illuminating, and will forever affect the interpretation of the events that preserved the Chicago Harbor mostly for public uses. The authors explain Illinois Central's domination of the waterfront beginning with an 1852 city ordinance enacted over the objections of Michigan Avenue property owners, whose opposition to lakefront development would prove steadfast and become an essential component of the public lakefront that still exists 170 years later.[14]

What Was It, and Does It Support an Atmospheric Trust, 47 ECOLOGY L.Q. 117 (2020)). But they make no attempt to explain the Lake Front Case in light of the expanding scope of public rights that 19th century American courts had recognized before the Lake Front Case, *infra* note 10.

10. The authors claim that in cases before its *Illinois Central* decision, Illinois courts had decided that the state had adopted the so-called "English rule" of public ownership of the beds of navigable waters, which confined public rights to tidal waters. *See* LAKEFRONT, *supra* note 1, at 16. But in *Barney v. Keokuk*, 94 U.S. (2 Wall.) 389 (1877), fifteen years before its Lake Front decision, the Court invoked admiralty jurisdiction to uphold public rights in inland, nontidal waters. LAKEFRONT, *supra* note 1, at 74. The book does not mention *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), which overruled *The Steam-Boat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825), and announced that federal admiralty jurisdiction was not limited to tidal waters. *See* Blumm & Engel, *supra* note 8, at 12-13.

11. *See* cases cited *supra* note 10.

12. LAKEFRONT, *supra* note 1, at 31.

13. *See supra* note 8 and accompanying text.

14. LAKEFRONT, *supra* note 1, at 12 (noting that the 1852 ordinance was enacted over a mayoral veto). Also in 1852, a prominent landowner, Senator Stephen A. Douglas, granted the railroad a right-of-way over riparian land he owned in south Chicago, reserving "all title, right, and ownership to the land and water" to "the Centre of Lake Michigan." *Id.* at 308-09 n.21. According to one account, Douglas got rich off sales to the railroad he championed in Congress, suggesting that he acted out of self-interest:

> There was no northern Illinois to speak of. Chicago virtually did not exist until the 1850s, when it boomed because of the Illinois Central Railroad, which was created by Stephen A. Douglas through an act of Congress. He became very wealthy as a

The railroad's wish to expand in the post-Civil War era confronted the uncertainty over the ownership of the Lake Michigan lakebed. According to the authors, confusion over whether the lakebed was owned by the state, the federal government, or upland riparian landowners hindered the railroad's expansion plans.[15] Between the 1869 legislation and the Supreme Court's 1892 decision, the ownership question would be resolved in favor of state ownership before the Lake Front case was even filed.[16]

Local opposition to the railroad's development of the shoreland led it to seek approval from the state legislature. The ensuing lobbying—which the authors acknowledge included a fair amount of corruption and several close votes in the Illinois Senate[17]—led to the enactment of the 1869 statute, which passed over the governor's veto and conveyed roughly one thousand acres of Lake Michigan lakebed to the railroad, and was labeled by opponents as "the Lakefront Steal."[18] The governor's veto might have been influenced by a couple of prescient newspaper articles adumbrating the nonalienation rule that the Supreme Court would eventually adopt a quarter-century later.[19]

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result because he owned all the right-of-way real estate along Lake Michigan in Chicago that he sold to the Illinois Central.

Scott Horton, *Lincoln's Party*, HARPER'S MAGAZINE (Aug. 5, 2016), http://harpers.org/2016/08/lincolns-party/ (quoting Sidney Blumenthal, author of the Lincoln biography A SELF-MADE MAN (2016)).

15. LAKEFRONT, *supra* note 1, at 20-23 (explaining the controversy over the proposed sale of north Lake Park in 1867 to the railroad to site a passenger depot. The opponents claimed the parkland was or should be inalienable, as the lakefront "ought to be held forever sacred as the property in trust for the enjoyment and use of all conditions and classes of people of poor, as well as rich, among our people"); *see infra* note 19 and accompanying text.

16. *See* cases discussed in *supra* note 8.

17. The authors conclude that vote-buying in the Illinois legislature was commonplace, and that the evidence "clearly leans" in favor of Illinois Central's using "corrupt means" to secure passage of the Lake Front Act. LAKEFRONT, *supra* note 1, at 34-36; *see also id.* at 29 (discussing the close Senate votes).

18. LAKEFRONT, *supra* note 1, at 8. Although Chapter 1 of the book is entitled "The Lakefront Steal," the authors largely reject this label; *see also id.* at 28 fig.1.7 (depicting a notice of a "Great Mass Meeting" at Farwell Hall on Feb. 17, 1869 concerning the "The Great Swindle"). The authors suggest that the railroad primarily exercised its "corrupt means" in order to protect its existing investments in lakefront properties, not to secure future profits from control over the outer harbor; therefore, Justice Field's later characterization of it as "grasping plutocratic corporation" was inaccurate because "fear is a more powerful motive than greed." LAKEFRONT, *supra* note 1, at 32. They also argue that the 1869 grant did not give the railroad monopoly control over Chicago harbor, as it did not displace existing harbor facilities in the Chicago River, and they maintain that the widespread assumption about the limited role of government at the time meant that "perhaps most of those voting for the Lake Front Act sincerely perceived it to be in the public interest." *Id.* at 33. There is also the matter of the fact that one provision of the Lake Front Act promised a 7% gross receipts tax on developments from expanded railroad operators, providing revenue to fund downstate development projects that attracted downstate votes, whose support prevailed over the local opposition. *Id.* at 33-34 (characterizing the vote on the statute as "a fight between Chicago and downstate interests . . . won by the latter").

19. *See* LAKEFRONT, *supra* note 1, at 29 (recounting articles in the *Chicago Tribune* and *Chicago Republican* that argued for state ownership of the Lake Michigan lakebed and water and maintained that

The enactment of the Lake Front Act hardly ended the dispute over the lakefront. Litigation ensued, first instigated by Cyrus McCormick, the inventor of the mechanical reaper and founder of International Harvester, who was a Michigan Avenue resident. McCormick was soon joined by the U.S. Attorney, who claimed, without much foundation, that the railroad could not construct a new depot in north Lake Park because the federal government either owned the land or was a trustee of an 1852 dedication that the land be forever free of buildings, apparently due to the city's ordinance permitting operation of the railroad.[20]

District Judge Thomas Drummond enjoined the railroad from constructing a passenger depot in August 1869, ruling that the parkland was subject to a common law dedication, enforceable by the federal government.[21] The railroad chose not to appeal Drummond's decision and, as a result, never built the depot.[22] The authors suggest that this blocked shoreland development caused the railroad to shift attention to developing the lakebed that it secured in the 1869 Lake Front Act.[23] Lakebed development would require the railroad to defend the validity of the 1869 conveyance, which was under question by the Illinois legislature, and which introduced an 1871 bill to repeal the 1869 Act.

The same year, the U.S. Attorney filed another suit, this time challenging the railroad's proposed filling of the outer harbor as interfering with navigation without federal consent.[24] An ensuing settlement would establish that the federal government could set harbor lines protecting public navigation, which the authors maintain effectively curtailed the original grant of roughly one-thousand acres to just a "modest curtilage around the railroad's existing improvements."[25] A persistent

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the alienation of either would be inconsistent with state sovereignty). On the governor's veto, see *id.* at 30.

20. *See id.* at 36-37. This dedication was a condition of the city's grant of permission to the railroad to operate within the city limits. *Id.* at 37. In 1850, the federal government granted about 2.5 million acres to the state for a railroad running from the southern tip of the state to Chicago and beyond (the authors provide a useful map in figure 1.2). *See id.* at 10-11. A year later, the state-chartered Illinois Central Railroad and reconveyed the federal land grant to the railroad, but conditioned its operation within municipalities on local consent. *Id.* at 10. In 1852, Chicago gave permission to the railroad—over a mayoral veto, prompted by the opposition of Michigan Avenue residents. *Id.* at 12. That ordinance purported to give the railroad the right to fill the lake for its operations, which the authors suggest was of uncertain legal validity. *Id.* The ordinance also included a railroad promise to build a breakwater to protect the city and its residents from flooding, and importantly, a promise to the Michigan Avenue residents that no buildings and improvements east of Lake Park would block their views of the lake. *Id.* at 12-13.

21. *Id.* at 37 (noting that Judge Drummond held that the dedication was based on common law, not a statutory dedication under Illinois law).

22. *Id.*

23. *Id.* at 38.

24. *Id.* at 39. The federal government would settle this case in 1872, with the railroad consenting to the federal government establishing harbor lines beyond which the railroad could not obstruct navigation, and which, according to the authors, "severely restrict[ed] its ability to engage in further construction of harbor facilities without the consent of the federal government." *Id.*

25. *Id.* at 44.

theme throughout the book is an effort to reduce the stakes involved in the Supreme Court's affirmance of the state's legislative revocation of the Lake Front Act.[26] Much ado about relatively little seems to be the idea.

II. THE CONTEXT

Intervening was the Great Chicago Fire in October 1871. It decimated most of the downtown area, nearly one-third of the city's residences, including the Illinois Central Railroad passenger depot.[27] In the wake of the fire, the city decided to dump the resulting debris and fill in the lake between Lake Park and the breakwater that Illinois Central built under the 1869 Act.[28] The fills would begin the transformation of the lakefront.

The Illinois legislature proceeded to revoke the 1869 grant in 1873 in the wake of the fire and amid an economic depression, for which the legislators were looking for scapegoats. The authors suggest that the motive for the repeal was to punish the railroad for its "presumed venality" in getting the 1869 legislation passed.[29] The railroad defended on the ground that it possessed "vested rights" under the 1869 Act.[30] But a populist, anti-railroad sentiment—newspapers alleged that the Senate vote on the repeal depended upon how many of its lawyers were paid by the railroads—overcame that argument.[31] The authors consider the repeal to be "largely symbolic legislation[,] a rebuke of railroads."[32] Perhaps it was also a reflection of the growing political power of the Granger movement.[33]

The railroad challenged the 1873 repeal, but not immediately because it was preoccupied with rebuilding after the fire and with combatting the effects of the

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26. *Id.* (discussing, for example, a so-called "dock-line settlement" with the U.S. Army Corps of Engineers, in which the railroad agreed to abide by the Corps' harbor lines to protect navigation; the authors conclude that the settlement "greatly reduced the scope of the rights conferred by the Lake Front Act" to the effect that the "Lake Front Act was now but a shadow of what it had seemed in 1869").

27. *Id.* at 41-42.

28. *Id.* at 41. The authors observe that "[i]t did not occur to anyone to ask the state's permission." *Id.*

29. *Id.* at 45.

30. *Id.* at 45–46.

31. *Id.* at 46-47 (explaining that the House vote on the repeal was 127-5, but the Senate vote was closer, 31-11, and that the railroad likely made cash payments to legislators).

32. *Id.* at 48 (noting that the public resented railroads for charging high rates "and [their] generally high-handed behavior," and observing that the repeal legislation did nothing to produce the public goods the Lake Front Act promised: an outer harbor, a new depot, and more parkland).

33. The populist Granger movement scored a big win in the Supreme Court in 1877, when the Court upheld the ability of state railroad commissions to regulate railroad rates and service, a revolutionary development in public rights. *See* Munn v. Illinois, 94 U.S. 113 (1877); Harry N. Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* PERSPECTIVES IN AMERICAN HISTORY (1971).

economic depression that began in 1873 and persisted until the end of the 1870s.[34] Then, in 1880, the railroad began "an aggressive expansion campaign" that included constructing large wharves north of Lake Park to facilitate unloading timber from the booming lumber industry in Wisconsin and Michigan, a kind of "less grandiose" outer harbor than envisioned in the 1869 Act.[35] But in 1881, when the railroad began filling one hundred feet of the lakebed to expand its tracks in Lake Park, the U.S. Army Corps of Engineers objected, and eventually the Secretary of War, Robert Todd Lincoln, the assassinated president's son, rejected the filling in 1882.[36] The result focused the railroad's attention on developing its outer harbor rights under the repealed Lake Front Act. But in 1883, its efforts were challenged by the state in what would become the Lake Front Case.

The state filed suit against the railroad, the city, and the federal government, claiming that it owned the submerged land of Lake Michigan, and that the Illinois legislature's repeal of the 1869 grant was effective.[37] The city claimed that as the riparian owner of Lake Park, it controlled development in the harbor.[38] The railroad, which removed the case to federal court, maintained that the 1869 Act validly transferred to it vested rights that the state could not repeal and that the railroad now owned the lakebed and controlled the harbor.[39] Thus began what was then called the "greatest case ever tried in Illinois."[40]

III. THE CASE

The Lake Front Case, like just about everything else involving the Chicago waterfront, was not straightforward. The federal government initially refused to appear, even though urged to do so by adjacent Michigan and Prairie Avenue landowners—and by the time the federal government acceded, four years had gone by, and it was too late for federal attorneys to participate in the trial and oral

34. LAKEFRONT, *supra* note 1, at 48–49 (noting that the 1869 judicial injunction against development in north Lake Park caused the railroad to build its passenger depot outside of the park).

35. *Id.* at 50. These wharves, or piers, extended 800 feet beyond the dock-line, but were approved by both the Corps of Engineers and the city. The state was not consulted. *Id.* at 51.

36. *See id.* at 52 (explaining that the railroad's right-of-way, granted in 1852 by the city, *supra* note 20, was for a width of 300 feet, but it had only used 200 feet). Secretary Lincoln rejected a board of inquiry's recommendation that the Corps approve the landfilling and extend it to include more piers because he thought it would exceed the government's authority and assumed that the railroad owned the lakebed, a matter in dispute. *Id.* at 53.

37. *Id.* at 54.

38. *Id.* at 55 (arguing for the so-called "English rule" of submerged land ownership, which was about to be resoundingly rejected by the Supreme Court). *See supra* note 10.

39. *Id.* at 54-55. The authors explain that the removal to federal court almost certainly would not be granted today. *Id.* at 316 n.37.

40. *Id.* at 54 (so-labeled by the authors).

argument.[41] The trial began in 1887, presided over by Justice John Marshall Harlan, riding circuit, along with Judge Henry Blodgett, although evidence was taken for nearly two months by a master in chancery court.[42] Illinois Central emphasized the significant improvements it had made in reliance on its Lake Front Act grant and the severe congestion in the harbor due to increasing traffic.[43] Oral argument consumed eight days.[44]

Justice Harlan's 1888 decision concluded that the state owned the lakebed; the city (not the federal government) owned Lake Park, including its filled lands; and the railroad could keep all its lakefront improvements.[45] The federal government, Harlan determined, had no property rights in Lake Park, having conveyed to the city all its rights.[46] The result rejected the reasoning underlying the 1869 injunction against the city's plans to sell the northern portion of Lake Park to the railroad for a passenger depot,[47] although the federal government did retain regulatory rights over Lake Michigan navigation.[48] The authors consider the court's declaration that the city's ownership of Lake Park included lakebed fills to be based on dubious grounds; since the basis of the railroad's right to improvements was grounded on riparian ownership and language in its state charter.[49]

Harlan's opinion examined in some detail the issue of whether the legislature could revoke the 1869 grant. He distinguished between the alleged existing shoreland rights the statute confirmed in the railroad and the lakebed acres of the outer harbor. The former were vested and constitutionally protected, but not the latter because Harlan concluded that the statute gave the railroad only discretionary authority to construct the outer harbor, and the railroad had not done so before the legislative revocation of 1873.[50] He also concluded the railroad's request that the city return the money the railroad had paid for building its planned passenger depot in Lake Park was evidence that the grant was revocable.[51]

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41. *Id.* The authors list several prominent lawyers involved, including former Senator Lyman Trumbull, representing Illinois Central, and Melville Fuller, soon to be appointed Chief Justice of the Supreme Court, for the city. *Id.* at 55.

42. *See id.*

43. *Id.*

44. *Id.* (July 5-13, 1887).

45. *Id.* at 55-57.

46. *Id.* at 57.

47. *See* text accompanying *supra* note 22.

48. LAKEFRONT, *supra* note 1, at 57.

49. *Id.* at 57-58. The city's lakebed filling was justified on grounds that its charter authorized construction of a breakwater (even though the railroad constructed it), but it said nothing about filling the lakebed. *Id.* The railroad's riparian rights included the right to wharf out. *Id.*

50. *Id.* at 58 (quoting Harlan to the effect that the railroad had only a revocable "license," a conclusion he reached despite, as the authors point out, language in the 1869 act that conveyed the harbor to the railroad in "fee").

51. *Id.* at 58–59.

Harlan's decision ratified the status quo of existing possessory rights, what the authors' claim was an exercise in "pragmatic accommodation."[52] By recognizing the railroad's rights to all its improvements, the decision gave the railroad much of what it wanted, including what the authors' claim is de facto control of the outer harbor due to aggressive recent developments. But two-and-a-half years after Harlan's decision, the railroad decided to appeal.[53]

IV. THE APPEAL

While the appeal was pending before the Supreme Court, the 400th anniversary of Christopher Columbus' "discovery" was about to be celebrated, and Congress selected Chicago as the site for the World Columbian Exposition.[54] The siting of the fair at what was to become Jackson Park, seven miles south of the city, instead of at Lake Park in the city center, involved protracted negotiations among the parties to the Lake Front case, particularly about how to transport what turned out to be nearly nine million passengers to and from Jackson Park, the details of which will not be recounted here.[55] One consequence of those negotiations was to ask for and receive Supreme Court acceptance of an expedited hearing in the pending Lake Front Case, although the Court's decision came too late to be consequential in terms of transportation planning for the fair.[56]

A Court of only seven justices held three days of oral argument in October 1892.[57] Justice Stephen J. Field—the longest-serving justice of the 19th century—

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52. *Id.* at 59. The authors describe this status quo as

> [t]he railroad got to keep all its track, terminals, yards, wharves, and piers, over which it had active control. All it lost was future development rights. The city got to keep all of Lake Park, over which it episodically exercised control. All it lost was the power to oust the railroad from the lakefront. The federal government got to keep its breakwater and to continue to exercise a veto power over new facilities in the harbor. All it lost was its abstract claim to north Lake Park, over which it had long ago relinquished control. The only party given nothing but abstract rights was the state, which was declared to be the owner of the submerged land—over which it had never exercised effective control.

Id.

53. *Id.* (noting that the railroad's lawyers thought its vested rights argument would be well received by the Supreme Court).

54. *Id.*

55. The authors explain the negotiations over the world's fair at some length, which eventually produced agreements on steamer piers and viaducts to get passengers to and from the fair. *See id.* at 59–72. The railroad proceeded to build a new passenger depot, Central Station, south of Lake Park, which was finished just weeks before the fair opened, enabling the railroad to profit handsomely from the ten-cent tickets it sold. *Id.* at 71–72.

56. *Id.* at 72.

57. Chief Justice Fuller did not participate, since he had been counsel to the city in the case. *See supra* note 41. Justice Blatchford, who was a stockholder in Illinois Central, also recused. *Id.* at 73. The

wrote the opinion for a divided 4-3 Court.[58] He ratified the lower court's decision on state lakebed ownership, announcing that the lakebeds of the Great Lakes were similar to tidal submerged lands, which the Court had long recognized as state-owned.[59]

Field also agreed with Harlan that the railroad's existing developments (some on filled land) were vested in light of state and city approvals.[60] But he disagreed with Harlan's interpretation that the outer harbor grant was a revocable license until developed.[61] Instead, Field decided that the grant was inherently revocable, developed or not, because the state's title was held in trust for the public for navigation, fishing, and commerce purposes.[62] This was "a title different in character from that which the State holds in lands intended for sale."[63] The idea that title to submerged Lake Michigan land was held by the state in trust for the public was, the authors note, a position that had been mentioned in the press in 1869—perhaps this opposition influenced the governor's earlier veto of the Lake Front Act, and the city briefed the claim of public ownership in the Lake Front case.[64] Public ownership of land submerged beneath navigable waters was actually a fairly well-established proposition by 1892.[65]

The authors observe that formulating public ownership as a trust was reflective of Field's "deep[] suspicio[ns] of legislatively conferred special privileges and monopolies."[66] Field characterized Illinois Central as a "corporation created for one purpose, the construction and operation of a railroad between designated points, is, by the [1869] act, converted into a corporation to manage and practically control

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participation of Justice Harlan, who was reviewing his own circuit court decision, "passed without question." *Id.* at 74.

58. Justice Field, appointed by President Lincoln in 1863, served until 1897, a record length until broken by Justice William O. Douglas in 1975.

59. LAKEFRONT, *supra* note 1, at 74. This result was predictable based on the Court's reasoning in *Barney v. Keokuk*, 94 U.S. 324 (1877), in which it recognized state ownership of submerged inland waters. *See supra* note 10.

60. *Id.* at 74.

61. *See supra* note 50 and accompanying text.

62. LAKEFRONT, *supra* note 1, at 76.

63. *Id.* (quoting Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892)).

64. *Id.* The state had made the trust argument before Justice Harlan in the circuit court case, and city made the argument in its briefs to the Supreme Court. *Id.* at 319-20 n.94 (citing Arnold v. Mundy, 6 N.J.L. 1, 10 (1821) and Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842)); *see also supra* notes 15 and 19 and accompanying text (describing earlier trust arguments).

65. *See* cases cited *supra* note 10.

66. LAKEFRONT, *supra* note 1, at 76.

the harbor of Chicago . . . for its own profit generally."[67] This antimonopoly sentiment animates public trust jurisprudence to this day.[68]

The authors do not subscribe to Field's theory of the railroad as a monopolist, describing the railroad's efforts leading up to the 1869 act as defensive, attempting to ward off other competitors seeking access to the lakefront.[69] But monopolists fear just such competition. That fear does not make them non-monopolistic.

LAKEFRONT quotes the famous line of the Supreme Court's opinion that the state of Illinois could no more abdicate the public trust in property in which "the whole people are interested" like the Chicago harbor than it could renounce its police power, but they quickly note that Justice Field could cite no authority for the proposition.[70] They make no attempt to assess the implications on sovereign authority from the parallel Field saw between the police power and the public trust. A logical conclusion would be that both the police power and the public trust are inherent in sovereignty, the former an affirmative power, the latter a limitation. Several courts have ruled that the public trust is indeed an inherent limit on sovereignty.[71] The authors do not see the public trust in this light.

Field's anti-monopolistic concerns led to his holding that the 1869 grant was beyond the Illinois legislature's authority,[72] although smaller grants, that do not substantially impair remaining trust properties, or which serve trust purposes, are permissible.[73] The grant was, consequently, "if not absolutely void on its face . . .

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67. *Id.* (quoting *Illinois Central*, 146 U.S. at 451).

68. *See* Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENV'T AFFS. L. REV. 1 (2017).

69. LAKEFRONT, *supra* note 1, at 77 (quoting *Illinois Central,* 146 U.S. at 453)..

70. *Id.* Justice Field stated: "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils underneath them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers . . . ." *Id.*

71. *See, e.g.*, Mineral Cnty v. Lyon Cnty, 473 P.3d 418, 425 (Nev. 2020) (public trust "derives from inherent limitations on a state's sovereign powers"); Robinson Twp v. Commonwealth, 83 A.3d 901, 947 (Pa. 2013) (public trust provision in the state constitution created no new rights but enumerated pre-existing rights of such "'general, great and essential' quality as to be ensconced as 'inviolate'"); Ariz. Center for L. in the Pub. Int. v. Hassel, 837 P.2d 158, 168 (Ariz. App. 1991) (public trust is "an inabrogable attribute of statehood itself"); Esplande Props. v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002) ("It is beyond cavil that 'a public trust has always existed in Washington,'" only "partially encapsulated in the language of [Washington's] constitution . . . .") (citing Orion Corp. v. State, 747 P.2d 1062, 1072 (Wash. 1987) and Rettkowski v. Dep't of Ecology, 858 P.2d 232, 239 (Wash. 1993)).

72. LAKEFRONT, *supra* note 1, at 77 ("A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power.") (quoting Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892)).

73. The authors do not include Field's language concerning the exceptions to the nonalienation rule, but it is worth quoting here: "The control of the state for purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Illinois Central*, 146 U.S. at 453. The book does suggest that there is a distinction between "small, commerce-promoting grants of submerged land, needed for wharves, docks, and piers, and large monopolistic grants

subject to revocation."[74] The Court also upheld the city's title to Lake Park, even as expanded by filling, against claims by the railroad and the state, due to the city's riparian right to wharf out.[75]

A three-member dissent, in an opinion authored by Justice George Shiras, did not challenge the majority's view of the PTD but would have ruled that the 1873 revocation was an "unconstitutional interference with vested rights," requiring payment of just compensation to the railroad.[76] Shiras also questioned the ripeness of the case. He would also have waited "to invoke the doctrine of the inviolability of public rights when and if the railroad company shall attempt to disregard them."[77] But the majority found the grant of the outer harbor invalid, and the railroad's motion for reconsideration failed twice.[78]

V. THE RESULT

Thirty-three years after the Lake Front Act, nineteen years of litigation ended with the Court essentially grandfathering all of Illinois Central's developments but preserving public control over future development. The authors recognize the Lake Front Case as "one of the most important cases about property rights in American law."[79] That is true for the PTD that the Court recognized, for it interjected some public balance into an overwhelming privatized system of property rights.

But the authors' discussion of the case seems halting and truncated. They use adjectives like "nebulous" and "blunderbuss" to describe the PTD, and explain in some great detail that the preservation of the public lakefront in the wake of the Lake Front case and into the 20th century, at least until 1970, was due not to the public trust but to the public dedication doctrine.[80] The public dedication doctrine was

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of submerged land, which could be used arbitrarily to restrict the public's access for navigation and fishing." LAKEFRONT , *supra* note 1, at 77.

74. *Id.* The distinction between void on its face and voidable could be significant if the latter required revocation by the state.

75. *Id.* at 78.

76. *Id.* at 78-79.

77. *Id.* at 79 (quoting *Illinois Central*, 146 U.S. at 474 (Shiras, J., dissenting)).

78. *Id.* The Court did not address the federal issues in the Lake Front case because the federal government did not join in the expedited appeal. But in 1894, the Court rejected the notion that the federal government retained rights in Lake Park, and therefore lacked standing to enforce any limitations, although the Court suggested that the Michigan Avenue landowners had standing because they purchased in reliance on the adjacent public dedication of the parkland. The effect of the latter ruling would spawn considerable litigation over construction of building in Lake Park, soon to be renamed as Grant Park. *See id.* at 79-80. In 1902, the Supreme Court affirmed lower court decisions that that the railroad's existing piers and wharves did not extend beyond "practical navigability," thus upholding Illinois Central's existing improvements. Any future developments, however, would require public approval. *See id.* at 80.

79. *Id.* at 81.

80. *See id.* at 83-127.

enforced by wealthy Michigan Avenue property owners like the mail-order retailer Aaron Montgomery Ward.[81] That assessment is no doubt true as to the Chicago lakefront. But the PTD that the Lake Front Case helped formulate is the most notable reason for its characterization as an important decision over a century-and-quarter later. Consequently, the book's persistent attempt to diminish the doctrine seems incongruous given the title of the book and may undermine an otherwise exceptionally important contribution to urban legal history.[82]

VI. THE LEGACY

The authors' apparent ideological antipathy for the PTD seems to lie in the uncertainty it interjects into the overwhelmingly private rights ordering of American property law, which they seem to think unwise.[83] They explain the resurrection of the PTD three-quarters of a century after the Lake Front Case, coinciding with the nascent environmental law movement of the early 1970s, and they point to Professor Sax's arguments as especially influential.[84] So they were.[85] But the authors complain that the PTD had a haphazard effect on the lakefront, allowing Northwestern University to expand by filling the lake, while disallowing Loyola University from doing virtually the same thing a few years later.[86] Similarly, the PTD was not offended by construction of a public middle school in Washington Park or the renovation of Soldier Field in Burnham Park, but disallowed the expansion of the U.S. Steelworks by a planned filling of nearly 200 acres of Lake Michigan.[87] And while George Lucas was dissuaded from pursuing his museum on the lakefront, the Obama Foundation is proceeding with its proposed library.[88] The authors emphasize

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81. Ward, referred to as the "watchdog of the lakefront," where his store on Michigan Avenue store was situated, had an outsized influence keeping the lakefront free of buildings through a long series of lawsuits. *See id.* at 95-117.

82. The book's contribution to the history of Chicago includes chapters on the filling and private development of "Streeterville," now home to the campus of Northwestern's Pritzker School of Law; the reversal of the Chicago River over the objections of the state of Missouri, affirmed by the Supreme Court in *Missouri v. Illinois*, 200 U.S. 496 (1906); and the extension of Lake Shore Drive both north and south. *See* LAKEFRONT, *supra* note 1, at 128-243.

83. Merrill's casebook on property law is one of the leading treatments of the subject. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (3d ed. 2017).

84. *See* LAKEFRONT, *supra* note 1, at 263–68. The authors discuss Sax's article, *supra* note 5, and its effect on decisions like *Paepcke v. Public Bldg. Comm'n of Chicago*, 263 N.E.2d 11 (Ill. 1970) (allowing a school in Washington Park as consistent with the PTD), and *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773 (Ill. 1976) (rejecting a statute approving the grant of 194 acres of lakebed to U.S. Steel to expand its South Works steel mill as inconsistent with the PTD). LAKEFRONT, *supra* note 1, at 263–68. The book is quite critical of the latter decision, complaining about the PTD "theory" as a source of authority, since the court did not tie the PTD to the state's constitution. *See id.* at 268-69.

85. *See generally* Blumm & Schwartz, *supra* note 5.

86. LAKEFRONT, *supra* note 1, at 274.

87. *Id.* at 266.

88. *Id.* at 292.

the uncertainty and the apparent random nature of these results.[89] The inference is that the variability in outcomes is undesirable because it undermines property rights, a frequent claim of PTD critics.[90]

Yet recognition of the existence of substantial, if uncertain public rights in the midst of an overwhelmingly private property rights system infused a kind of pluralism into the Chicago lakefront that created a substantially different lakefront that would have been created by an exclusively private rights system. The authors overlook the important role played by the PTD in moderating the private rights system: requiring a kind of accommodation between public and private rights.[91] Instead, they criticize the application of the PTD for not producing consistent results. But property doctrine often produces such results. Consider nuisance law, prescriptive easements, riparian rights, or takings law, none of which produce results that are particularly predictable.[92]

The authors also emphasize that, under the Illinois PTD, court interpretations are subject to override by the state legislature.[93] That might be the law of Illinois, but a substantial number of jurisdictions consider the PTD to be inherent in sovereignty, and therefore not subject to legislative repeal.[94] The Lake Front decision at the center of the book clearly equated the PTD with the inalienable state police power.[95] A logical interpretation of the Supreme Court's interpretation would be that, like the police power, the public trust is inherent in sovereignty. The

89. *Id.* at 297.

90. Among the most prominent of these critics is my friend and former dean, Jim Huffman. *See, e.g*, James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENV'T L. & POL'Y F. 1 (2007) (claiming that the PTD's Roman and English roots are mythical, a claim refuted at least in part by Ruhl & McGinn's article, *see supra* note 9); James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENV'T L. 527 (1989) (claiming that the PTD is inconsistent with a constitutional democracy, although a number of courts have disagreed); *see, e.g.*, John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENV'T L. 263 (2015); Kacy Manahan, *The Constitutional Public Trust Doctrine*, 49 ENV'T L. 463 (2019); *see also* cases cited in *supra* note 71.

91. *See, e.g.*, Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENV'T L. REV. 649 (2010).

92. *See. e.g.*, Michael C. Blumm, *A Dozen Landmark Nuisance Cases and Their Environmental Significance*, 62 ARIZ. L. REV. 403, 407-08, 444 (2020) (explaining the flexibility of nuisance law, in particular the rise of reasonableness criterion at the heart of nuisance doctrine in the 20th century, giving courts broad authority to decisions about alleged nuisances and to fashion nuisance remedies base on "balancing of the equities"); John A. Lovett, *Restating the Law of Prescriptive Easements*, 104 MARQ. L. REV. 939 (2021) (examining the split among jurisdictions as to whether an unexplained use is presumed to be adverse to the owner and advocating for a hybrid approach to the issue); Joseph W. Dellapenna, *The Scope of Riparian Rights*, *in* 1 WATERS AND WATER RIGHTS § 6.01(a) (Amy K. Kelley, ed., 3d ed. 2022) (discussing the uncertainties in the scope of riparian water rights); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2077-78 (2021) (expanding considerably the scope of "permanent physical occupations" that are per se takings of property rights).

93. LAKEFRONT, *supra* note 1, at 245.

94. *See supra* note 71.

95. *See supra* notes 69-71 and accompanying text.

book instead endorses legislative override,[96] although curiously the authors seem to regret the Illinois legislature's override of the public dedication doctrine that the authors believe was central to the public preservation of the lakefront.[97]

Any discussion of the PTD and Professor Sax's article should have mentioned its significant influence internationally.[98] The authors do not. The reader is left with the sense that the doctrine was an idiosyncratic interpretation of an odd decision that actually had very little real effect on the modern Chicago lakefront. Actually, the Lake Front Case and Professor Sax have had enormous influence throughout the world.[99] But there is no mention of this legacy in LAKEFRONT.

CONCLUSION

LAKEFRONT is an engrossing read, at least as legal analyses go, and will prove to be an enduring contribution to urban legal history. But its effort to diminish the effect of the PTD is misguided. The book not only largely misses the long history of the PTD before the Lake Front case that evolved out of Roman and English law,[100] it also seems surprised at the doctrine's recent success in preserving the Chicago lakefront.[101] The book does therapeutically link the doctrine to Justice Field's Jacksonian antimonopoly views,[102] and it points out that the fills that make up the Chicago lakefront today were persistently upheld by the courts.[103]

Yet the book lacks any discussion of the adverse environmental effects of the fills on the Lake Michigan ecology; the assumption seems to be that the fills were costless. Ignoring these environmental effects of lake fills makes the book seem anachronistic. Part of the PTD's aim is to protect public trust resources against

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96. LAKEFRONT, *supra* note 1, at 298. This affinity for legislative control of the PTD conflicts with the notion that the doctrine is inherent in sovereignty. *See* cases cited in *supra* note 71. It also is inconsistent with the *Illinois Central* Court's rejection the vested rights of the railroad, since if the legislature could create vested rights in Chicago Harbor, it "would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated." Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 455 (1892).

97. *See* LAKEFRONT, *supra* note 1, at 126-67, 283-87.

98. For a discussion on the expansion of the PTD internationally, see Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law, and Constitutional Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741 (2012) (discussing the PTD in India, Pakistan, the Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, Ecuador, and Canada).

99. *See id.*

100. *See supra* notes 9-13 and accompanying text.

101. LAKEFRONT, *supra* note 1, at 291-98 (discussing litigation over proposed fills by U.S. Steel and Loyola University and the use of parkland by the proposed Lucas museum).

102. *Id.* at 76 (noting Field's antipathy to what he perceived to be "a powerful and privileged corporation"); *see supra* text accompanying note 67.

103. *Id.* at 55-57, 73-78, 81-82 (upholding the fills of the railroad prior to the *Illinois Central* decision). The only structure that the courts required removed was the National League champion Chicago White Stockings stadium in Lake Front Park, as inconsistent with the public dedication doctrine. *Id.* at 92-94

"substantial impairment" of trust resources.[104] Despite the mention of public trust in its title, LAKEFRONT makes no attempt to explain what "substantial impairment" of trust resources demanded by the PTD actually is. In discussing the failed proposal to fill lakebed to expand U.S. Steel's South Works, the authors discuss the Illinois Supreme Court decision without giving any consideration to the environmental effects of filling 194 acres of lakebed.[105] Similarly, explaining the effect the so-called "boundary-line" agreements that effectively ratified numerous illegal lakebed fills, the authors suggest that the "cost was barely a hundred acres of lakebed, a tiny fraction of the area of the vast lake."[106] This cavalier dismissal of environmental externalities is a major oversight.[107]

As a case study of the development of Chicago, LAKEFRONT may be unmatched. It should be featured in Chicago bookstores as history at its best: a great story about the triumph of public rights in preventing monopolization and producing an unmatched waterfront. But the title of the book is misleading; it may be about public rights, but the authors' cramped view of the PTD hardly deserves the title page.[108] And its halting treatment of the PTD undermines the legal value of LAKEFRONT, despite its considerable historic value.

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104. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892); *see supra* note 73.

105. The authors instead emphasize the "scant evidence" that the filling would interfere with on navigation, commerce, and fishing, and the lack of deference the court gave to the Illinois legislature's approval of the conveyance in 1963. LAKEFRONT, *supra* note 1, at 266-67.

106. *Id.* at 242.

107. Another oversight is the failure to emphasize the parallel between the public trust's migration from submerged lands to upland parklands in the 20th century, as reflected in cases like *Paepcke v. Pub. Bldg. Comm'n of Chicago*, 263 N.E.2d 11 (Ill. 1970) (LAKEFRONT, *supra* note 1, at 260-66) or the Lucas Museum project, *id.* at 291-98, to the earlier, dramatic expansion in public rights in inland navigable waters in the 19th century, *see supra* notes 8-11 and accompanying text. The Illinois parkland trust cases have been prominent among cases, including from other jurisdictions, which have divorced the public trust from waterbodies. *See* BLUMM & WOOD, *supra* note 2, ch. 8.

The exhumation of the Lake Front case by Professor Sax has, over the past quarter-century, also led to a surprisingly international revolution in public trust doctrine in places as diverse as India, Pakistan, Uganda, Kenya, South Africa, Colombia, Ecuador, and the Philippines. *See id.* ch. 11. The book makes no mention of the significance of these developments.

108. Perhaps the opportunity to insert a reference to a doctrine opposed by private property interests was too irresistible in terms of promoting book sales. At any rate, readers expecting the book to show how the 19th century Lake Front case, energized by Professor Sax, has become a powerful force in both domestic and international law, are likely to be disappointed by the book's jaundiced view of the public trust.