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The Origins of the American Public Trust Doctrine: What Really Happened in *Illinois Central*

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The Origins of the American Public Trust Doctrine: What Really Happened in *Illinois Central*

Joseph D. Kearney & Thomas W. Merrill†

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INTRODUCTION

The public trust doctrine has always been controversial. The general rule in American law favors ownership of natural resources as private property. The public trust doctrine, a jarring exception of uncertain dimensions, posits that some resources are subject to a perpetual trust that forecloses private exclusion rights. For environmentalists and preservationists who view private ownership as a source of the degradation of our natural and historical resources, the public trust doctrine holds out the hope of salvation through what amounts to a judicially enforced inalienability rule that locks resources into public ownership.¹ For those who view private property as the bulwark of the free enterprise system and constitutional liberty, the doctrine looms as a vague threat.²

Although proponents and detractors of the public trust doctrine dispute much, all agree that the leading case establishing the doctrine in the United States—the “lodestar” of the modern public trust doctrine³—is the United States Supreme Court’s 1892 decision in *Illinois Central Railroad Company v Illinois*.⁴ The decision arose out of a dispute over control of the bed of Lake Michigan east of downtown Chicago. Four contestants wrangled over this resource: the Illinois Central Railroad Company, the City of Chicago, the State of Illinois, and the United States government. Each had a plausible legal theory supporting its claims, and each had reason to fear the consequences should another gain supremacy over development of the lakefront. Their struggle, beginning in the late 1860s, resulted in the enactment of the Lake Front Act by the Illinois legislature in 1869, which awarded the Illinois Central both a portion of the lakeshore for a new depot and over one thousand acres of submerged land for the development of an

¹ See, for example, Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 UC Davis L Rev 269, 299 (1980) (crediting the public trust doctrine with preserving public resources).

² See, for example, Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 Cal W L Rev 239, 275 (1992) (arguing that the public trust doctrine undermines the security of property rights); James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 Envir L 527, 565 (1989) (stating that “the doctrine often permits non-democratic courts to overrule the decisions of theoretically democratic legislatures”).

³ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471, 489 (1970).

⁴ 146 US 387 (1892). For examples of testaments to the importance of *Illinois Central*, see Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment*, 64 Cornell L Rev 761, 764, 810 (1979) (calling the case one of “three famous cases on Anglo-American property doctrine” and noting that “[t]he debate over the case has raged for nearly ninety years”); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U Chi L Rev 711, 737 (1986) (describing *Illinois Central* as the “most famous assertion of the public trust theory”); Gerald Torres, *Seventh Annual Lloyd K. Garrison Lecture on Environmental Law—Who Owns the Sky?*, 19 Pace Envir L Rev 515, 520 (2002) (noting that the decision is “one of [the Supreme Court’s] most famous cases”).

outer harbor for Chicago. Just four years later, however, during the populist agitation known as the Granger Movement, the grant was repealed. For this and other reasons the legal dispute continued, leading to the litigation that eventually worked its way to the Supreme Court in 1892.

The *Illinois Central* decision, as an exercise in dispute resolution, provided something for everyone. The Court held that the State of Illinois, not the federal government or the owners of riparian lands abutting the lake, was given title to the bed of Lake Michigan when Illinois was admitted to the Union in 1818.⁵ It confirmed that the City of Chicago had title to the strip of land known as Lake Park (today expanded and renamed Grant Park) abutting the lake in the center of the City.⁶ It acknowledged that the Illinois Central Railroad was the riparian owner north and south of Lake Park, and intimated that the railroad's existing landfills and improvements in these areas as well as its right of way through Lake Park would be allowed to remain undisturbed.⁷ And it reaffirmed that the federal government had complete control over navigation in the harbor, to which the interests of all other property rights in the lakebed were subordinated.⁸

The most difficult issue—and the one whose resolution was to have consequences extending far beyond the specific controversy—concerned the Illinois Central's claim that the 1869 Lake Front Act had conveyed vested rights of property which the legislature was powerless to repeal in 1873. This was a forceful claim in the nineteenth century, as the Court had held in *Fletcher v Peck*⁹ that the Contracts Clause protected against repeal of a completed conveyance of property by a state government.¹⁰ Writing for a bare majority of four Justices in *Illinois Central* (only seven participated in the decision), Justice Stephen Field deflected this claim by holding that the State had no power to alienate the land in the first place.¹¹ Although the State held title to the bed of the lake, Justice Field explained, this title—given the surpassing public interest in preserving the lake for navigation—was held in trust for the people.¹² The State had violated this

⁵ *Illinois Central*, 146 US at 434–37.

⁶ *Id* at 462–63.

⁷ *Id* at 445–48.

⁸ *Id* at 463.

⁹ 10 US (6 Cranch) 87 (1810).

¹⁰ *Id* at 137. See also Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 *Ariz St L J* 849 (2001) (noting the importance of *Fletcher* to the railroad's argument and interpreting the Court's opinion as a response to that argument).

¹¹ *Illinois Central*, 146 US 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; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.”).

¹² *Id* at 452 (stating that the State's “title to the lands under the navigable waters of Lake Michigan, within its limits,” is “different in character” from other types of titles, for “[i]t is a title

trust when it conveyed ownership of the lakebed to the railroad in 1869. Justice Field wrote as follows:

The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.¹³

It followed that “[a]ny grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time.”¹⁴ Thus was the American public trust doctrine born.

Illinois Central is important for three reasons. Doctrinally, it was the first prominent decision squarely to hold that lands submerged under navigable waters are subject to a rule of inalienability.¹⁵ Earlier decisions and treatises suggested that navigable waters were impressed with a public *easement of access*, assuring that the public could use such waters for transportation or fishing purposes.¹⁶ Thus, the sovereign could alienate land beneath navigable waters, but a public easement would attach to the grant. The notion that the public interest in navigable waters disabled the sovereign from engaging in certain kinds of *alienations* of submerged land was an innovation, giving rise

held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties”).

¹³ *Id.* at 453.

¹⁴ *Id.* at 455.

¹⁵ See generally Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089, 1093, 1105–15 (1972) (distinguishing inalienability rules, which prohibit transfers of resources, from property rules, which permit only consensual transfers, and liability rules, which permit forced transfers). The holding in *Illinois Central* was anticipated by an early New Jersey decision (on which the Court relied, see 146 US at 456) addressing trespass on private oyster beds under tidal waters. See *Arnold v Mundy*, 6 NJL 1 (1821). However, *Arnold* had been effectively repudiated by the New Jersey courts, see Rose, 53 U Chi L Rev at 737 (cited in note 4), a point that the Court did not acknowledge and of which it quite possibly was not aware. The idea that tidal lands were impressed with a “trust” in favor of public use was also discussed in *Martin v Waddell*, 41 US (16 Pet) 367, 411–14 (1842), but it is clear from that opinion that this trust was primarily understood to be a public right of access to fish in navigable waters—that is, a public easement—not a rule of inalienability. See *id.* at 413. Justice Field’s opinion in *Illinois Central* was thus the first important holding of inalienability to survive and serve as the root of a new doctrine.

¹⁶ See Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 Sea Grant L J 13, 36–52 (1976) (discussing the common law rule that the public had a right to use the public land and stating that “[t]here was no concept of a public trust in the early common law—that is, of the idea that the *title* of certain lands was held inalienably by the Crown for the common use”). See also James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 Land & Water L Rev 1, 6 (1997) (arguing that *Illinois Central* transformed a prima facie theory of public ownership into a rule of strict inalienability).

to a unique American doctrine with no clear analogue in common law (or Roman law) antecedents.¹⁷

Second, *Illinois Central* is important because the facts of the case—or at least highly stylized versions of those facts—have been repeatedly invoked in modern cases and commentary as a justification for the very existence of the public trust doctrine. In their usual presentation, which draws heavily from Field's opinion, those facts assume the form of a classical cautionary tale: a corrupt, or at least exceedingly short-sighted, legislature transferred invaluable natural resources to a small but influential interest group, with no identifiable benefit to the public at large. What happened in *Illinois Central*, according to the standard narrative, tells us that elected officials cannot be trusted with the power to dispose of certain kinds of resources. If we are to protect the public interest in these resources effectively, we must resort to some kind of judicially enforced inalienability rule. And if we want to know why we need such an unusual rule, we start by retelling the story of *Illinois Central*.

The *Illinois Central* decision plays yet a third and more indirect role in the modern public trust doctrine. A number of serious ambiguities afflict this doctrine. What resources are covered by the doctrine? Does the doctrine rest on federal or state law? Is the doctrine absolute or merely a default rule subject to legislative modification? Does the doctrine permit intergovernmental transfers or transfers to non-profit corporations? Who has standing to enforce the doctrine? Nearly all these ambiguities inhere, and may be said to have their source, in Justice Field's majority opinion in *Illinois Central*.

In short, *Illinois Central* stands as an important precedent, as a powerful cautionary tale, and as a source of multiple doctrinal uncertainties. Given the importance of the decision, it is surprising that no one has undertaken to investigate the background of the case in any detail. Such a study, for example, could shed important light on the nearly universal use of the case as an object lesson in political failure. Is it true that the railroad sought the grant in order to secure monopoly control over the harbor, as Justice Field's opinion intimates? Or were there other, more sympathetic, motivations behind the railroad's lobbying efforts? Is it true that the Lake Front Act conferred no plausible benefits on the public, and hence must be regarded as an example of a pure "giveaway" of public resources?¹⁸ Or did some contem-

¹⁷ For a comprehensive review of American cases relying on the modern public trust doctrine, see Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L Rev 631, 643–56 (1986) (documenting public trust doctrine litigation since 1970).

¹⁸ See, for example, Ralph W. Johnson, et al, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash L Rev 521, 530 (1992) (stating that *Illinois Central*

porary observers believe that the Act was genuinely in the public interest? Is it true, as has long been maintained in Chicago folklore and assumed by many commentators, that the legislation was procured by mass bribery of the legislature?¹⁹ Or was this allegation fabricated by rival claimants of the resource to discredit the railroad and secure the Act's repeal?

In this Article, we examine the historical circumstances that gave rise to what came to be known as the "Lake Front Steal" of 1869,²⁰ and its repeal in 1873, in the hope of answering at least some of these questions. We are fortunate in that a rich documentary record exists that makes such a reconstruction possible. That record includes not only the briefs and documents generated by the marathon litigation, but also, among other sources, extensive newspaper commentary from the period, the correspondence among key officials of the Illinois Central Railroad preserved at the Newberry Library in Chicago, contemporary legal opinions prepared for the various contesting parties, and an extensive report on the lakefront controversy prepared for Congress by the U.S. Army Corps in the 1880s.

The Article proceeds as follows. Part I reviews the standard presentation of the facts of *Illinois Central*, from Justice Field's opinion through modern commentary. Part II sets the stage for a more detailed inquiry by reviewing the development of the Chicago lakefront up to the late 1860s, and the uncertainties about the relevant background legal principles. Part III traces efforts in the Illinois legislature in 1867 to secure a grant of the lakefront for private investors. Part IV reviews the public debate in 1868 about the future of the lakefront. Part V recounts the legislative history of the Lake Front Act of 1869, and considers its implications for three key questions: What were the motivations of the Illinois Central? Was there a perceived public in-

concerned "one of the more outrageous land giveaways of the 19th century"); Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 *Ecol L Q* 351, 358 (1998) (describing the statute at issue in *Illinois Central* as "a public giveaway to a railroad").

¹⁹ For examples of the insinuation of bribery, sometimes but not usually stated as outright fact, see David P. Currie, *The Constitution in the Supreme Court: The Second Century 1888–1986* 10 (Chicago 1990) (stating, of *Illinois Central*, that "[t]he Illinois legislature, under shady circumstances, had granted the land under Chicago's harbor to a railroad and then attempted to take it back"); Lois Wille, *Forever Open, Clear and Free: The Struggle for Chicago's Lakefront* 35–37 (Henry Regnery 1972) ("With the [civil] war's end came an era of legislative graft—nationwide—that connoisseurs consider without parallel. The Illinois General Assembly kept up with the worst of them. . . . In this setting, the Illinois Central came to Springfield to plead for land to expand along the lake."); 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* 4 (Illinois Anti-Monopoly League 1881) (stating of the Lake Front Act's provenance, "the usual methods of monopolies, bribery, intimidation, log-rolling and obstruction of all public business until their job was accomplished, were resorted to").

²⁰ See, for example, Bessie Louise Pierce, 3 *A History of Chicago: 1871–1893* 319 (Knopf 1957) (stating that the 1869 statute "was commonly known as the 'Lake Front Steal'").

terest rationale for the Act? Did the railroad use corrupt means to influence the passage of the Act? Part VI follows the course of events from 1869 to the repeal of the Lake Front Act in 1873. Part VII briefly recaps how *Illinois Central* and related decisions resolved the dispute over the Chicago lakefront. Part VIII considers the implications of our study for ongoing controversies about the public trust doctrine.

I. THE STANDARD *ILLINOIS CENTRAL* NARRATIVE

Throughout the lively debate about the public trust doctrine, one predicate has been almost universally assumed: the Lake Front Act of 1869 reflects a disturbing failure of the democratic political process. Nearly every commentator or court to broach the topic has seen the Act's grant of one thousand acres of land submerged under Lake Michigan to the Illinois Central Railroad Company as the quintessential example of what today would be called rent-seeking behavior: a small, well-organized private interest procured legislation that gave it monopoly privileges in order to extract wealth from the diffuse and unrepresented public.

This standard account is consistent with, and no doubt has been highly influenced by, Justice Stephen Field's opinion for the majority in *Illinois Central*. Every opinion writer must construct a narrative of the facts to support the legal conclusions he reaches. But Field had greater leeway than most in this regard. By the time the dispute reached the Supreme Court, the controversy was so multifaceted, and the critical events had receded so far in memory, that a wide range of narratives could be constructed from the materials at hand.

Field's chosen narrative drew a picture of a powerful and privileged corporation endowed by a short-sighted legislature with unprecedented powers over a traditionally public resource. He emphasized the status of the railroad as the recipient of extensive government land grants and charter privileges.²¹ He concentrated on the provisions of the Lake Front Act that had the least obvious public interest rationale, and hence made the Act seem like a giveaway.²² And although Field did not explicitly accuse the railroad of corrupting the legislature for prospective gain, he noted at one point that "[t]he circumstances attending the passage of the act through the legislature"

²¹ See *Illinois Central*, 146 US at 440–44 (describing the various privileges, permissions, and rights that the City of Chicago had granted to the Illinois Central even before the Lake Front Act).

²² See *id.* at 448–51 (discussing only certain aspects of the Lake Front Act and concluding that "[a] corporation created for one purpose, the construction and operation of a railroad between designated points, is, by the act, converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally").

had been “the subject of much criticism.”²³ Although in context this could be read to refer only to certain alleged violations of state constitutional procedures, the language hinted at darker allegations about the motivations of the legislature in agreeing to the scheme.

That Justice Field would be drawn to a narrative of monopoly privilege subverting the public interest is not at all surprising. As Charles McCurdy has pointed out, Field was a Jacksonian Democrat who throughout his career was deeply suspicious of legislatively conferred “special privileges” and “monopolies.”²⁴ His dissent in *The Slaughter-House Cases*,²⁵ where he argued that the grant of a monopoly charter to a butchering company violated the privileges and immunities of ordinary butchers to pursue a common occupation,²⁶ is the most enduring monument to this ideology.²⁷ Thus, we should be alert to the possibility that Field saw the dispute in *Illinois Central* through a worldview that was quick to detect and condemn capture of legislatures by powerful interest groups.

For many decades after *Illinois Central*, the public trust doctrine led a quiet life as a rule of state law associated with navigable watercourses.²⁸ This changed in 1970, when Joseph Sax published an influential article advocating the use of the doctrine as a general weapon for the budding environmental movement.²⁹ The *Illinois Central* story played a key rhetorical role in this proposal. Sax described the decision as “The Lodestar in American Public Trust Law,” and drew upon

²³ *Id.* at 451.

²⁴ See Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 *J Am Hist* 970, 973 (1975). See also Charles W. McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850–1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America*, 10 *L & Socy Rev* 235, 238–39 (1976) (noting twin themes of protection of property and equality of opportunity in Field’s opinions on the California Supreme Court).

²⁵ 83 US (16 Wall) 36, 83–111 (1873) (Justice Field dissenting).

²⁶ *Id.* at 88–89, 93–111 (noting that “[t]he act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively . . . in a single corporation”).

²⁷ To the same effect, see Field’s opinions in *Munn v Illinois*, 94 US 113, 136–54 (1877) (dissenting from a decision upholding state power to regulate warehouse rates), and *Powell v Pennsylvania*, 127 US 678, 687–99 (1888) (dissenting from a decision permitting the state to ban the sale of oleomargarine).

²⁸ See, for example, *Shively v Bowlby*, 152 US 1, 40–46, 57–58 (1894); *Appleby v City of New York*, 271 US 364, 381, 395 (1926).

²⁹ Sax, 68 *Mich L Rev* at 556–57 (cited in note 3). On the transformative role of Sax’s article, see, for example, Susan D. Baer, *The Public Trust Doctrine—A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, 15 *BC Envir Aff L Rev* 385, 392 (1988) (“The public trust doctrine languished somewhat in the early twentieth century. It was not until Professor Joseph Sax’s seminal and oft-quoted 1970 article that the doctrine was actively incorporated into modern jurisprudence. As a result of Sax’s article, a number of scholars have written articles about the public trust doctrine and arguments based upon trust imposed duties have appeared in both state and federal courts.”) (footnote omitted).

elements in Field's rendition of the facts to portray what happened as the quintessential example of legislative subversion by special interests.³⁰

The main point Sax advanced about the *Illinois Central* controversy was that the 1869 Lake Front Act appeared to lack any public interest rationale. Although he acknowledged that in some circumstances there may be "good reasons" for governmental reallocation of property rights,³¹ Sax could find no such justification for the Lake Front Act:

There appears to have been no good reason for taxing the general public in order to support a substantial private enterprise in obtaining control of the waterfront. There was no reason to believe that private ownership would have provided incentives for needed developments . . . ; and if the resource was to be maintained for traditional uses, it was unlikely that private management would have produced more efficient or attractive services to the public. Indeed, the public benefits that could have been achieved by private ownership are not easy to identify.³²

By depicting the Act as one lacking any conceivable public interest rationale, Sax laid the groundwork for his ultimate argument: the public trust doctrine should not be limited to problems associated with land under navigable waters, but rather should apply "in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals."³³ "In the ideal world," Sax wrote, "legislatures are the most representative and responsive public agencies."³⁴ But because legislatures are susceptible to the influence of organized pressure groups, courts must "promote equality of political power for a disorganized and diffuse majority."³⁵ In other words, the Lake Front Act was merely one example, albeit a particularly extreme one, of a much more general phenomenon: capture of government by industry, leading to the degradation of natural resources.

Sax also portrayed the public trust remedy adopted by *Illinois Central* as an anticipation of the types of solutions to industry capture emphasized in legal academic circles beginning around 1970. What the *Illinois Central* Court did, according to Sax, was to exercise "judicial skepticism" in the face of "dubious governmental conduct" in which

³⁰ Sax, 68 Mich L Rev at 489–91 (cited in note 3).

³¹ Id at 490.

³² Id.

³³ Id at 556.

³⁴ Id at 559.

³⁵ Id at 560.

the legislature “infringe[d] broad public uses in favor of narrower ones.”³⁶ In *Illinois Central*, this judicial skepticism was reflected in the judgment that the legislature was free to repudiate the original grant. But this was just one form of heightened judicial review authorized by the public trust doctrine. Other possible remedies would include judicial orders imposing increased rights of public participation, or judicial remands for more careful legislative consideration of competing interests.³⁷ In effect, Sax characterized *Illinois Central* as a precursor of the modern “hard look” doctrine in administrative law, which, at the time Sax wrote, was being developed by some federal courts in an effort to police problems of agency capture by industry.³⁸

Sax’s account of the facts underlying *Illinois Central* has remained influential among commentators, especially those who place more faith in collective than in market-based solutions to problems of environmental degradation.³⁹ But to a remarkable degree, an identical narrative also underlies the accounts of the public trust doctrine advanced by scholars sympathetic to private property and market ordering and hence generally skeptical about the doctrine.

Richard Epstein has authored the most interesting of these accounts, which we will take as illustrative of the point.⁴⁰ Contrary to Sax, Epstein argues that the transfer in the Lake Front Act was not necessarily “a losing proposition” in terms of efficient management of resources.⁴¹ Epstein in this regard emphasizes several facts not mentioned by Sax, including the provisions of the Act that prevented the railroad from obstructing navigation and that reserved power in the State to regulate rates charged by the railroad for the use of harbor facilities.⁴² Epstein concludes that “[a] categorical denunciation of the grant is hard to establish,” a point he uses to support a more general proposition: there is no reason to adopt an absolute rule of inalienability for public trust resources.⁴³

³⁶ Id at 491.

³⁷ Id at 560.

³⁸ The thesis of agency capture was much in vogue at the time Sax wrote. See Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 Chi Kent L Rev 1039, 1043 (1997).

³⁹ See, for example, Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 Envir L 515, 521–24 (1989); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 Envir L 425, 452 (1989). For a critique of the idea that perceived political failure serves as an adequate justification for the public trust doctrine, see William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L Rev 385 (1997).

⁴⁰ Richard A. Epstein, *The Public Trust Doctrine*, 7 Cato J 411, 422–26 (1987).

⁴¹ Id at 423.

⁴² Id.

⁴³ Id.

Epstein goes on to argue, however, that the Lake Front Act was flawed, and *Illinois Central's* application of a version of the public trust doctrine justified, because it is likely the State did not receive adequate compensation from the railroad in return for the grant.⁴⁴ Epstein notes that the Act called for the payment of \$800,000 to the City, and that any revenues earned by the railroad from development of the harbor would be subject to a 7 percent gross receipts tax.⁴⁵ Although he admits it is “extremely difficult” today “to make a judgment about how the adequacy of consideration issue should be ultimately resolved,” in the end Epstein thinks it likely that “the city had been ‘ripped off’ by the railroad.”⁴⁶

What is significant is Epstein’s explanation for the allegedly inadequate level of compensation under the Act. This he explains by invoking the same phenomenon identified by Sax: political failure. In Epstein’s view, the public trust doctrine should be reformulated to function as a judicially supervised liability rule rather than as a rule of inalienability. In effect, it should operate as a kind of mirror image of the Just Compensation Clause, authorizing courts to scrutinize transfers of resources from public to private hands to assure that the diffuse public has received “just compensation” for the patrimony that has been transferred. Both the Just Compensation Clause and the public trust doctrine (as reformulated) would in this way function to deter legislatures “from colluding with the various ‘rent-seekers’ who attempt to use the political process to redistribute the wealth of others to themselves.”⁴⁷ In the end, therefore, Epstein, no less than Sax, uses the facts of *Illinois Central* to connect the public trust doctrine to capture theory: “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.”⁴⁸

We can thus see how the standard narrative of the *Illinois Central* case reflects a convergence of views from the left and right. Both sides

⁴⁴ See *id.* at 424–25.

⁴⁵ Epstein’s account creates the impression that the \$800,000 was part of the consideration for the grant of the submerged land under the outer harbor. See *id.* at 424 (“[T]he 1869 statute called for the payment of \$800,000 in installments to the city *for the submerged lands.*”) (emphasis added). In fact, this payment to the City was solely in return for the conveyance of north Lake Park, to be used as part of a site for a new depot. See text accompanying notes 286–89. The consideration for the grant of the submerged land underneath the outer harbor—extension of the 7 percent charter tax to any *Illinois Central* operations in the harbor—was, though not negligible, in fact even less than Epstein implies.

⁴⁶ Epstein, 7 *Cato J* at 425 (cited in note 40).

⁴⁷ Rose, 25 *Ecol L Q* at 357–58 (cited in note 18) (paraphrasing Epstein’s arguments). For some further interesting observations on the relationship between the Just Compensation (or Takings) Clause and the public trust doctrine, see Barton H. Thompson, Jr., *Judicial Takings*, 76 *Va L Rev* 1449, 1507–08, 1520, 1532–33 (1990).

⁴⁸ Epstein, 7 *Cato J* at 425 (cited in note 40).

agree that ordinary political processes, insofar as they apply to control over valuable natural resources, frequently fail to protect the interests of the diffuse public. Both sides invoke the facts of *Illinois Central* as evidence that the body politic is so afflicted. The only disagreement is over the severity of the malady, and the nature of the cure.

Recently, signs of something of a revisionist understanding of what happened in *Illinois Central* have begun to appear. Eric Pearson, following Justice Harlan's analysis in the lower court, has argued that the Lake Front Act was intended to convey only a revocable license to improve the harbor, not a transfer of the fee. From this, he concludes that *Illinois Central's* far-ranging ruling on the public trust doctrine was inappropriate on the facts of the case.⁴⁹ James Rasband has mounted an even more fundamental challenge to the conventional wisdom.⁵⁰ Drawing out the implications of a single comment by Justice Field,⁵¹ Rasband suggests that *Illinois Central* reflects an application of nineteenth-century mistaken-improver doctrine. Since the doctrine applied only when the improver acted in good faith, Rasband believes that Justice Field did not in fact believe the grant to be the result of corrupt legislative activity.⁵²

These revisionist views, like the standard account, appear to rest on a reading of the published opinions in the case. Neither Pearson nor Rasband purports to have probed into the documentary record in investigating the background of the controversy. The revisionist accounts thus make it even more pressing to determine what really happened in *Illinois Central*. Are the traditional accounts associated with Sax and Epstein correct in drawing the conclusion that the "the public trust doctrine compensates for 'defects' in the democratic process"?⁵³ Or are the more recent revisionist accounts accurate in suggesting that what went on in the enactment of the Lake Front Act of 1869 was little different from ordinary politics, and that allowing judges to reject legislation on this basis would mean "there is little legislation that

⁴⁹ Eric Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 Va Envir L J 713, 734–35 (1996).

⁵⁰ James R. Rasband, *Equitable Compensation for Public Trust Takings*, 69 U Colo L Rev 331, 333–34 (1998).

⁵¹ See *id.* at 333 & n 12 (noting Field's "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'"), quoting *Illinois Central*, 146 US at 455.

⁵² Rasband, 69 U Colo L Rev at 354 (cited in note 50), citing Field's dissent in *Jackson v Ludeling*, 99 US 513, 537 (1878), which conditioned compensation for improvers on their having acted in good faith.

⁵³ Rasband, 69 U Colo L Rev at 352 (cited in note 50), quoting Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Envir L 573, 580 (1989), and referring to Sax, 68 Mich L Rev at 509, 521 (cited in note 3).

could not be rejected, particularly from the last 30 years of the nineteenth century”?⁵⁴

II. SETTING THE STAGE

The controversy that gave rise to the enactment of the Lake Front Act of 1869 was fueled by a unique combination of local geography, physical improvements constructed by the Illinois Central Railroad Company, and legal uncertainty. We begin with the geography and the improvements, and then turn to the legal uncertainty.

A. The Lay of the Land

The site that is today Chicago was identified by explorers and fur traders as early as the seventeenth century as a potentially valuable port. The south end of Lake Michigan had few natural harbors. The Chicago River was one, at least potentially. The river was also intriguingly close to the watershed of the Mississippi River, suggesting that a canal might be dug at this location that would connect the Great Lakes to New Orleans and the Gulf of Mexico.⁵⁵

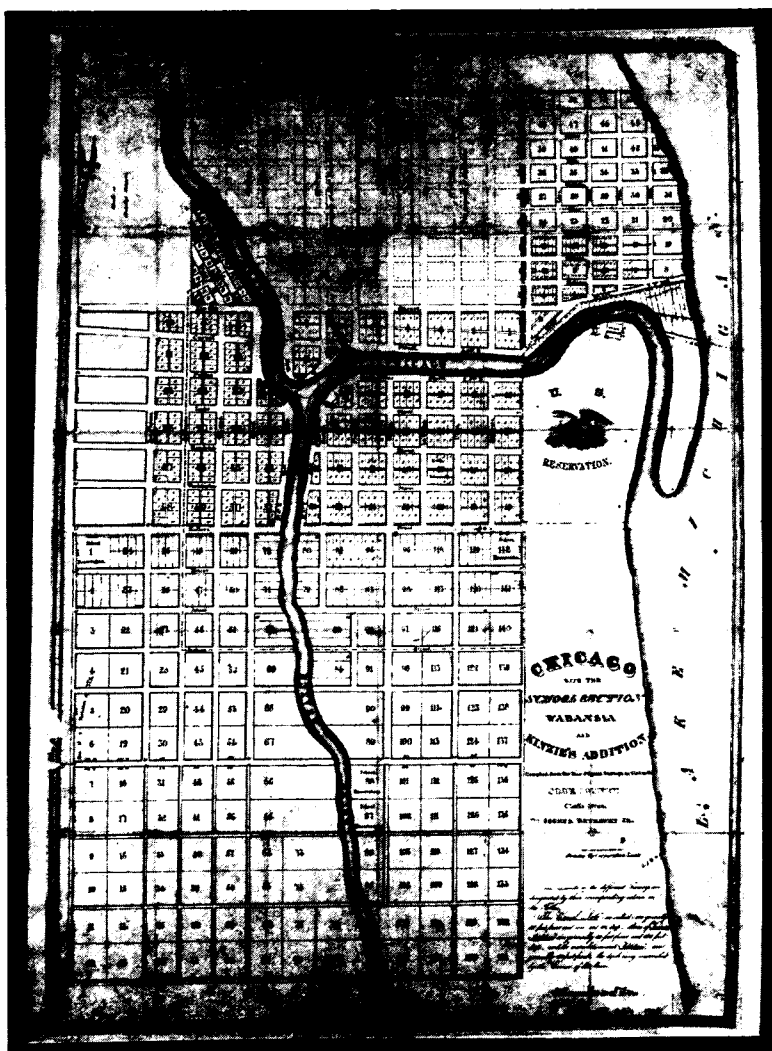
The principal problem with using the Chicago River as a port was the current in Lake Michigan. The water in the southern part of the

⁵⁴ Rasband, 69 U Colo L Rev at 354 n 101 (cited in note 50) (“To the extent there was ‘corruption’ in the legislative process, it was probably in [legislators’] solicitude toward large aggregations of capital with political clout, a problem that remains part of democracy to this day.”). Various mistaken premises about *Illinois Central* underlying some of the best public trust doctrine scholarship also make a comprehensive recounting desirable. Cohen, for example, asserts that the issue in *Illinois Central* was whether the railroad was entitled to compensation from the State for the repeal of the Lake Front Act. See Cohen, 29 Cal W L Rev at 246 (cited in note 2). In fact, the litigation was in the nature of a quiet-title action to determine which of the four contending parties had dominion and control over the submerged land. No issue of compensation was presented. Similarly, Rasband states that the Lake Front Act “was passed over the governor’s veto, and by a supermajority of the state legislature.” Rasband, 69 U Colo L Rev at 354 (footnote omitted). Actually, the Illinois Constitution of the day required only a simple majority to override a gubernatorial veto. See Ill Const of 1848 Art IV, § 21. The legislature’s action to override the particular veto of the Lake Front Act would have been insufficient under either a two-thirds or even a three-fifths supermajority requirement: the House vote, 52–30, would have satisfied only the latter requirement, and the Senate vote on override, 14–11, would have satisfied neither. See text accompanying notes 358–59. Another mistaken premise can be seen in the suggestion that the public trust doctrine arose in a context where “navigable waters and their waterfront represent a natural, physical bottleneck through which much commerce must pass.” Daniel R. Fischel and Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 Am L & Econ Rev 313, 341 (1999). In fact, the outer harbor contemplated by the Lake Front Act would not have been a bottleneck, as the existing harbor facilities along the Chicago River would have remained open to lake traffic. See text accompanying notes 374–78.

⁵⁵ See Wille, *Forever Open, Clear and Free* at 5–7 (cited in note 19) (describing the glowing accounts by Father Marquette and Louis Joliet in 1673–1674 of the Chicago River harbor and the short portage over Mud Lake to the Desplaines River); Harry Hansen, *The Chicago* 127–35 (Farrar & Rinehart 1942) (tracing briefly the history of interest in a canal from the late seventeenth century to 1836).

lake tends to circulate in a counterclockwise direction. As depicted in Figure 1, reproducing a map of Chicago as it existed in 1834, this had created a long sand bar at the mouth of the Chicago River curving south. It also meant that the water at the mouth was often too shallow for all but the most insignificant craft to enter the river without becoming grounded.⁵⁶

FIGURE 1



Chicago Historical Society

⁵⁶ See Douglas Schroeder, *The Issue of the Lakefront: An Historical Critical Survey 2* (Prairie School 1964).

Soldiers stationed at Fort Dearborn, which was located on the south bank of the Chicago River, made a number of attempts to improve access to the river by cutting a channel through the sandbar. But the sandbar always silted in again after winter storms. Some time after 1834, Army engineers more or less solved the problem by building piers on the north and south banks of the river. The twin piers functioned like a spout discharging the river's waters at a right angle into the lake, and thereby reduced the formation of sandbars at the entrance to the river.⁵⁷

Once the Chicago River became functional for use as a harbor, water traffic in and out of Chicago grew at exponential rates. Much of this growth was due to the completion of the Erie Canal in 1825, which created a continuous watercourse from New York City on the east via Buffalo to Chicago on the west.⁵⁸ To a lesser extent, it was also due to the long-delayed completion of the Illinois and Michigan Canal in 1848, linking the Chicago River with the Mississippi.⁵⁹ Water traffic continued to grow until by 1889 Chicago was said to be the busiest port in the world.⁶⁰ After that, water traffic began a slow but steady decline, as other modes of transportation, especially railroads, gained a comparative advantage. The significant point for present purposes is that throughout the middle decades of the nineteenth century, Chicago was an increasingly important port, and the Chicago River was the sole harbor for loading and unloading traffic. Not surprisingly, the river became incredibly congested, with water craft of all sizes and shapes jostling to enter the wharves and piers lining the north and south branches of the river.⁶¹

The land that was to become Chicago, like the rest of Illinois, was part of the Northwest Territories ceded by Virginia and other States to the general government during the Revolutionary War.⁶² Thus, all titles to land in the Chicago area derive from grants by the federal government. One early source of Chicago land grants was federal legislation enacted to promote the construction of the Illinois and Michigan Canal.⁶³ Congress granted odd-numbered sections of land along the route

⁵⁷ See William Cronon, *Nature's Metropolis: Chicago and the Great West* 55–56 (Norton 1991).

⁵⁸ See Harold M. Mayer and Richard C. Wade, *Chicago: Growth of a Metropolis* 12–13 (Chicago 1969).

⁵⁹ See Bessie Louise Pierce, 1 *A History of Chicago: 1673–1848* 70–72, 118–23 (Knopf 1937); Bessie Louise Pierce, 2 *A History of Chicago: 1848–1871* 37–40 (Knopf 1940); Cronon, *Nature's Metropolis* at 33 (cited in note 57).

⁶⁰ See Schroeder, *Issue of the Lakefront* at 9 (cited in note 56).

⁶¹ For some sense of the congestion on the river in the mid-nineteenth century, see Libby Hill, *The Chicago River: A Natural and Unnatural History* 90 (Lake Claremont 2000).

⁶² See Paul W. Gates, *History of Public Land Law Development* 49–57 (Zenger 1968).

⁶³ See *Illinois Central*, 146 US at 394–97.

of the canal to certain Canal Commissioners, who subdivided and sold the land to fund construction of the canal. One of these sections, section 9, formed the original area platted as the town of Chicago. It was bounded on the east by State Street, on the west by Halsted Street, on the south by Madison Street, and on the north by Kinzie Street. Another canal section, developed somewhat later, was fractional section 15, which extended from Madison Street on the north to Twelfth Street on the south, and from State Street on the west to the shore of Lake Michigan on the east.⁶⁴

A plat of fractional section 15, drawn up by the Canal Commissioners in 1836 for purposes of selling lots, is reproduced here as Figure 2.⁶⁵ Notice that the strip of land east of Michigan Avenue abutting Lake Michigan was not subdivided into lots. The plat does not indicate what, if anything, was the intended purpose of this strip. Within a few years, the strip came to be known as “Lake Park.”⁶⁶ Surviving accounts from the middle years of the nineteenth century vary as to whether the strip served more as an informal park or as a garbage dump.⁶⁷ Most likely, it was some of both—a classic commons.

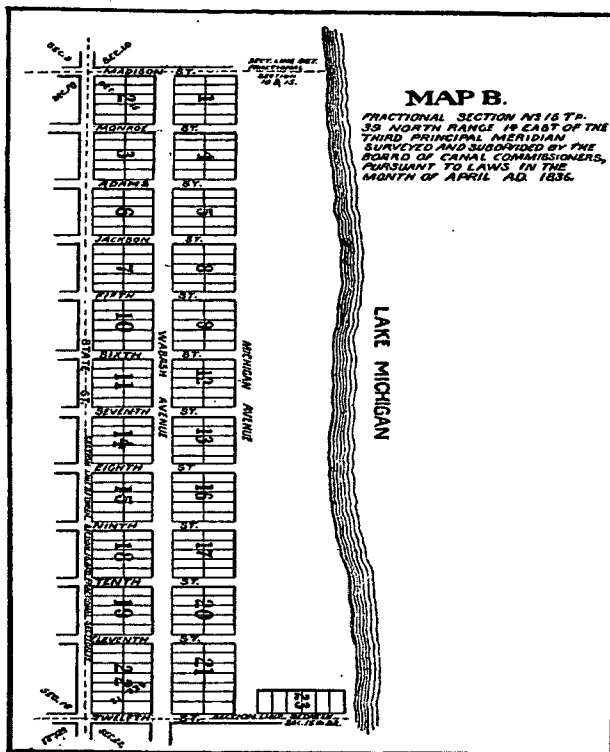
⁶⁴ It was known as a “fractional” section because Lake Michigan covered its eastern portion, preventing it from being subdivided over its entire range.

⁶⁵ Figures 2 and 3 are taken from the statement of the case set forth in *Illinois Central* by the Supreme Court’s Reporter of Decisions. See *Illinois Central*, 146 US at 392, 397. Figure 2 was there denominated Map B and was an exhibit from the record in the case, *id.* at 397; Figure 3 was Map A in the case, *id.* at 392. The Reporter essentially lifted the statement of the case itself from Justice Harlan’s opinion in the Circuit Court. See *id.* at 390 n 1 (statement of the case).

⁶⁶ See Dennis H. Cremin, *Building Chicago’s Front Yard: Grant Park 1836 to 1936* 36–39, unpublished Ph.D. dissertation, Loyola University Chicago (1999).

⁶⁷ See *id.*; Pierce, 2 *History of Chicago* at 340 (cited in note 59).

FIGURE 2



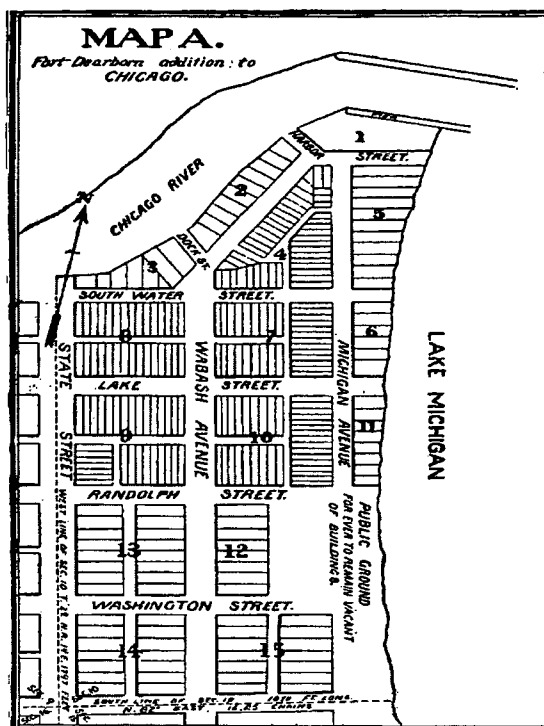
The area north of Madison Street and east of State Street, known as fractional section 10, has a slightly more complicated provenance. Originally, this area was reserved from the public domain for the use of Fort Dearborn. After treaties were signed with area Native Americans, and the threat of invasion from Canada subsided, the Fort lost its military rationale and fell into disuse. In 1837, as a kind of early base-closing exercise, the Army decided that the reservation would be better devoted to civilian purposes.⁶⁸ Thus, the area was opened to public sale as the “Fort Dearborn Addition to Chicago.”

An 1839 plat of the Fort Dearborn subdivision is reproduced as Figure 3. Notice that the area north of Randolph Street along the lake was subdivided into lots for sale. South of Randolph, however, the area next to the lake bears the notation: “Public Ground. For Ever to Remain Vacant of Buildings.”⁶⁹

⁶⁸ See *United States v Illinois Central Railroad Co*, 154 US 225, 236 (1894).

⁶⁹ A note in the margin of the plat signed by Matthew Birchard, the federal agent who negotiated the sale and recorded the plat, says: “The public ground between Randolph and Madi-

FIGURE 3



This plat notation, of ambiguous legal import, was to play a major role in disputes over the use of the lakefront for the remainder of the City's history. The "Public Ground" in fractional section 10 soon was assimilated to the strip of land east of Michigan Avenue in fractional section 15, and the whole of the strip of land from Randolph Street on the north to Park Row (just north of Twelfth Street) on the south came to be known as "Lake Park."⁷⁰ Although only the portion of the strip in section 10 from Randolph Street to Madison Street contained a plat notation restricting building, the idea somewhat imprecisely took hold in the public mind that all of Lake Park was to remain open and undeveloped.⁷¹ In the meantime, the platted lots in fractional sec-

son streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." *Illinois v Illinois Central Railroad Co*, 33 F 730, 734 n 1 (ND Ill 1888).

⁷⁰ See Pierce, 2 *History of Chicago* at 340 n 119 (cited in note 59).

⁷¹ See text accompanying notes 161–62 (reflecting the *Chicago Tribune's* description of an 1863 state statute); Evidence on Behalf of Complainant (Apr 8, 1887), in *Record, Nos. 14,135, 14,414, 14,415, & 14,416: Illinois Central Railroad Co* 232, 233–34, 247 (United States Supreme Court) (reproducing testimony of Jonathan Young Scammon) (noting that Scammon and other Michigan Avenue property owners in the 1840s built a fence along the east side of Michigan Avenue, from Randolph Street south to Park Row, and agreeing that the area lying between the

tions 15 and 10 were sold (and resold), as part of the frenetic real estate speculation that characterized Chicago, like other American boom towns of the era.⁷²

It soon became clear that the relentless currents of Lake Michigan had not been tamed by the piers that channeled the Chicago River—only redirected. On the north side of the north pier, the currents of the lake began creating new land by accretion. Title to this land was greatly disputed, and the area, known first as “The Sands” and later as “Streeterville,” became a shanty town that served as the City’s principal red light district.⁷³ South of the south pier, the currents of the lake had the opposite effect—subtracting land by erosion.⁷⁴ By 1850, it was estimated that twenty of Lake Park’s original thirty-five acres had washed away. The west side of Michigan Avenue was, by that time, lined with fine residential structures, sometimes referred to as “Terrace Row,” where many of the City’s elite lived. The waters of the lake had encroached so far that these properties were in potential jeopardy. In the early 1850s, the sidewalk east of Michigan Avenue between Randolph and Washington Streets was supported on posts,⁷⁵ and on occasion residents had to sandbag through the night to prevent the street from collapsing into the lake.⁷⁶

The solution to the erosion problem south of the river was widely perceived to be the construction of a breakwater offshore in the lake. Three attempts to build such a structure were undertaken in the 1840s.⁷⁷ The first two proved inadequate to withstand the force of the lake. The third foundered in a dispute over funding. The preferred method of paying for local improvements at that time was the special assessment,⁷⁸ and many Chicagoans believed that a breakwater should be financed by an assessment imposed on residents of Terrace Row, who would be uniquely benefited. But many of these residents argued

fence and the lake “was merely public ground, and any person could walk in it as they pleased,” and that “[t]he understanding was it was to remain vacant of buildings”).

⁷² See Robin L. Einhorn, *Property Rules: Political Economy in Chicago, 1833–1872* 28–32, 42–44 (Chicago 1991).

⁷³ For examples of title disputes, see *Banks v Ogdan*, 69 US (2 Wall) 57 (1864); *Johnston v Jones*, 66 US (1 Black) 209 (1862); *Jones v Johnston*, 59 US (18 How) 150 (1856).

⁷⁴ For an example of a title dispute stemming from erosion, see *Bates v Illinois Central Railroad Co*, 66 US (1 Black) 204 (1862).

⁷⁵ See John N. Jewett, *The Lake Front Litigation—Part I*, 3 John Marshall L Q 23, 30 (1937).

⁷⁶ See Evidence on Behalf of Complainant at 232, 240 (cited in note 71) (reproducing testimony of Jonathan Young Scammon).

⁷⁷ See Robin L. Einhorn, *A Taxing Dilemma: Early Lake Shore Protection*, 18 Chi Hist 34, 35 (Fall 1989).

⁷⁸ See Einhorn, *Property Rules* at 75–103 (cited in note 72) (recounting how Chicago redesigned its municipal government to facilitate the use of the special assessment, “a one-time payment by a property owner [or property owners] to defray the cost of a specific improvement project,” as a tool of municipal finance).

that a breakwater, by preserving and possibly enhancing Lake Park, would provide significant benefits to the entire City. They insisted that the project be funded out of general property taxes. The matter reached an impasse in 1851, with no solution in sight.⁷⁹

At this point, the Illinois Central Railroad Company appeared on the scene. The Illinois Central was the creation of a two-step federal and state legislative process. The first step was the enactment of federal legislation in 1850 granting a two-hundred-foot right of way and alternate sections of land on either side, in checkerboard fashion, to the State of Illinois to facilitate the construction of a north-south railroad.⁸⁰ The total grant comprised nearly three million acres, including what was to become some of the richest farmland in the United States.⁸¹ The second step was the enactment by Illinois of a corporate charter authorizing the creation of the Illinois Central Railroad Company and conveying the granted lands to the new railroad to subsidize its construction.⁸²

The state charter specified that the railroad line would generally follow a “Y” shape, with its southern terminus at Cairo on the Ohio River and running north to the end of the Illinois and Michigan Canal near the town of Centralia, then splitting into two branches, one heading northwest to Galena and Dubuque, Iowa, and the other northeast to Chicago.⁸³ The charter contained several provisions bearing on how the railroad would acquire the needed right of way. Most of Illinois at this time remained federal public domain land. So by conveying to the railroad the two-hundred-foot right of way granted to the State by the federal government, the charter assured that the railroad could locate its right of way on any available public domain land. In addition, the charter conferred on the railroad the power of eminent domain, which would allow it to acquire by condemnation any land that had already been transferred into private ownership by sale or preemption, upon

⁷⁹ On these matters, see Einhorn, 18 *Chi Hist* at 35–36, 47–49 (cited in note 77); Einhorn, *Property Rules* at 21–22, 91–94 (cited in note 72).

⁸⁰ See Act Granting the Right of Way, and Making a Grant of Land to the States of Illinois, Mississippi, and Alabama, in Aid of the Construction of a Railroad from Chicago to Mobile (Sept 20, 1850), in 9 *Statutes at Large and Treaties of the United States of America* 466 (Little, Brown 1862) (George Minot, ed); John F. Stover, *History of the Illinois Central Railroad* 15–30 (Macmillan 1975). See also David P. Currie, *The Constitution in Congress: The Public Lands, 1829–1861*, 70 *U Chi L Rev* 783, 797–803 (2003) (discussing the congressional debate over the land grant’s constitutionality).

⁸¹ See Paul Wallace Gates, *The Illinois Central Railroad and Its Colonization Work* 280–302 (Harvard 1934) (discussing the land grant and the significance of the railroad for agriculture); Stover, *History of the Illinois Central Railroad* at 20–22 (cited in note 80) (discussing the land grant).

⁸² See Act to Incorporate the Illinois Central Railroad Company (Feb 10, 1851) (Illinois Central Charter), in *Private Laws of the State of Illinois* 61 (Lanphier & Walker 1851).

⁸³ Illinois Central Charter § 2 at 61 (cited in note 82).

paying just compensation.⁸⁴ Finally, the charter provided, rather imprecisely, that the railroad could “enter upon and take possession of, and use all and singular any lands, streams and materials of every kind” then owned by the State, for purposes of constructing depots, shops, and other railroad facilities, other than right of way.⁸⁵ These powers were subject to the constraint that, with respect to land within the jurisdiction of any municipality, the railroad was required to obtain the consent of the municipality to its location of right of way.⁸⁶

This last provision effectively gave the Chicago Common Council the power to veto where the Illinois Central could locate its right of way within the City of Chicago. The railroad initially favored a route that would lead to the south branch of the Chicago River, where most of the grain elevators were then located.⁸⁷ This posed a problem, however, in terms of crossing the lines of other carriers then entering Chicago from the south and east. The Illinois Central therefore proposed to the City that it be allowed to locate its right of way along the lakefront. As an inducement, the railroad offered the City a solution to the controversy then raging over how to save Lake Park: the railroad would build and pay for a breakwater.

Most Terrace Row residents strongly opposed the idea of a railroad entering along the lake.⁸⁸ A railroad would be noisy, smelly, and ugly, and hence would compromise their property values.⁸⁹ But a majority of the Common Council was more sympathetic, and evidently saw the railroad’s proposal as a fitting substitute for a special assess-

⁸⁴ Id § 3 at 61–62.

⁸⁵ Id.

⁸⁶ Id § 8 at 64.

⁸⁷ This was the beginning of the era in which Chicago served as the dominant transfer point for grain harvested in the upper Midwest. The grain was shipped by rail to Chicago, unloaded at storage elevators controlled by the railroads, and then reloaded on lake vessels for shipment to the East. See Edmund W. Kitch and Clara Ann Bowler, *The Facts of Munn v. Illinois*, 1978 S Ct Rev 313, 320–21. Since the Chicago River was the only port at Chicago, it was vital for any railroad serving Chicago to have terminal facilities abutting the Chicago River.

⁸⁸ This was not the first such controversy. In 1848, a number of leading citizens protested against a proposal to run a railroad “along the park east of Michigan avenue, for the reasons that it would destroy the park, impair the value of property on Michigan avenue, endanger the buildings by fire, &c.” *Railroads and Street Railways; A Chapter of the History of Municipal Legislation; All Acts of the Common Council on These Subjects Arranged in Chronological Order*, Chi Trib 2 (Dec 8, 1866). See also Remonstrance of N.B. Judd and Others against the Passage of Rail Road Ord. for Eastern Branch of R.R. along Mich. Ave. (submitted to Chicago Common Council on May 12, 1848), available in Illinois Regional Archives Depository, Northeastern Illinois University (objecting that “said ordinance would greatly impair the beauty of and advantage to be derived from said park”).

⁸⁹ Undeveloped lots fronting on Michigan Avenue with direct views of the lake sold in the late 1830s “for two or three, perhaps four, times as much” as lots one block to the west. Evidence on Behalf of Complainant at 248 (cited in note 71) (reproducing testimony of Jonathan Young Scammon). The appeal of lake views and lake breezes has been a constant throughout Chicago history.

ment imposed on the well-heeled residents. As the leading student of this episode has written: “If the Michigan Avenue owners would not pay for lake shore protection in cash, they would be forced to pay some other way.”⁹⁰ In negotiations with the railroad, the Common Council initially demanded not just a breakwater, but also that the railroad landfill the area between the shoreline and the breakwater to enlarge Lake Park. The railroad, however, refused to have anything to do with creating a “public promenade” for Chicago, which it viewed as “a perversion of [company] funds, as though the same amount were donated to the city for planking streets or endowing institutions of Charity.”⁹¹ The breakwater itself presumably was different, because it was necessary to protect the railroad’s improvements, and only incidentally provided a public good for the City.

Although the mayor sided with the Terrace Row residents and vetoed the plan, the council overrode the veto.⁹² Thus, on June 14, 1852, Chicago enacted an ordinance permitting the Illinois Central to enter the City along the lakefront.⁹³ From this point on, the railroad’s operations and the City’s desire for public parks and public access to Lake Michigan were inextricably intertwined. The ordinance also established an important precedent for the Lake Front Act of 1869: local authorities granted property rights to the railroad, and in return the railroad agreed to supply public goods that the local authorities were unwilling—or unable—to supply themselves.

The 1852 ordinance is key in terms of fixing the location of the railroad and establishing its powers and obligations on the lakefront. The ordinance granted the railroad the right to enter the City where its southern boundary (then Twenty-Second Street) met the shore of the lake.⁹⁴ The line would then proceed north, first along the lakeshore to Twelfth Street, then across the “open space known as Lake Park” to Randolph Street, and finally on to such grounds between Randolph and the Chicago River as the railroad might obtain to build a terminal.⁹⁵ The ordinance authorized the railroad to “enter upon and use in perpetuity for its said line of road” a three-hundred-foot right of way from Twelfth Street to Randolph Street.⁹⁶ This, of course, was one hundred feet wider than the right of way specified in the federal grant

⁹⁰ Einhorn, 18 Chi Hist at 49 (cited in note 77).

⁹¹ Id (internal quotations omitted).

⁹² See Stover, *History of the Illinois Central Railroad* at 43–44 (cited in note 80). See also Henry Justin Smith, *Chicago: A Portrait* 287 (Century 1931) (briefly describing political pressure in favor of the railroad from other parts of the City).

⁹³ Ordinance Concerning the Illinois Central Railroad (June 14, 1852), in *Charter and Ordinances of the City of Chicago* 348 (Cooke 1856) (George W. and John A. Thompson, eds).

⁹⁴ Id § 1 at 348–49.

⁹⁵ Id at 349.

⁹⁶ Id § 2 at 349.

and the state charter.⁹⁷ The reason for the difference is unclear, and the ordinance did not explain the source of the City's authority to grant the railroad a three-hundred-foot right of way when the federal and state legislation authorizing the creation of the railroad gave it only a two-hundred-foot right of way.

The ordinance further specified that the western edge of this right of way from Twelfth Street to Randolph Street was to be located four hundred feet east of the west line of Michigan Avenue.⁹⁸ Because of the erosion previously described, Lake Park was by this time a fairly narrow strip of land. At its southern edge at Park Row, Lake Park was about four hundred feet in width (including Michigan Avenue), but it gradually diminished in width as it ran north, until at the foot of Madison Street it was only ninety feet wide.⁹⁹ By its northern boundary at Randolph Street, it widened slightly to 112 1/2 feet.¹⁰⁰ The effect of the ordinance's location of the right of way, therefore, was that at Twelfth Street the railroad would be located at the very edge of the water, but as it ran north it would be in the water—indeed, more than three hundred feet offshore at Madison Street. The Chicago ordinance stipulated in effect that the railroad was to be built in the lake.

With respect to the portions of the line south of Twelfth Street and north of Randolph Street, the ordinance contemplated that the railroad would acquire the necessary rights on its own, either through purchase or condemnation. With respect to the critical area north of Randolph Street and south of the Chicago River, the ordinance gave the railroad the authority, starting with whatever riparian lands it acquired, to “extend [its] works and fill out into the lake” to a point four hundred feet west of the east end of where the south pier was then extended.¹⁰¹ It was expressly understood that upon this landfill “shall be located the depot of said railroad within the city, and such other buildings, slips or apparatus, as may be necessary and convenient for the business of said company.”¹⁰² The ordinance made no mention of landfills or other improvements by the railroad south of Twelfth Street.

For its part, the railroad agreed to erect within three years, and thereafter maintain along the eastern edge of its right of way,

a continuous wall or structure of stone masonry, pier-work or other sufficient material . . . of sufficient strength and magnitude to protect the entire front of [Chicago] between the north line of Randolph street and its southern boundary [at Twenty-Second

⁹⁷ See text accompanying notes 80–82.

⁹⁸ Ordinance Concerning the Illinois Central Railroad § 2 at 349 (cited in note 93).

⁹⁹ See *Illinois Central*, 146 US at 403 (statement of the case).

¹⁰⁰ See *id.*

¹⁰¹ Ordinance Concerning the Illinois Central Railroad § 3 at 349 (cited in note 93).

¹⁰² *Id.* § 1 at 349.

Street] from further damage or injury from the action of the waters of lake Michigan.¹⁰³

In deference to the interests of the Terrace Row residents, the ordinance explicitly prohibited the railroad from constructing any buildings or other improvements in front of Lake Park that might obstruct views of the lake from the shore, or even from allowing its locomotives or cars to remain standing on the tracks in this area.¹⁰⁴

The Illinois Central moved quickly to complete the improvements authorized by the ordinance. Although the ordinance did not specify how a railroad was to be constructed in a lake, the railroad solved the problem by driving piles into the lakebed, which supported a double line of track on trestles.¹⁰⁵ The railroad initially used only two hundred feet of the authorized right of way both to build these tracks and construct the breakwater.¹⁰⁶ North of Randolph Street, the railroad acquired some unsold riparian lots directly from the federal government, purchased others from private owners, and acquired still others by condemnation. The railroad began almost immediately to fill the lake east of this area, by walling it off and dumping earth and debris into the enclosed area.¹⁰⁷ The company began constructing an imposing terminal structure on part of this fill, approximately where the Prudential Insurance building is located today.¹⁰⁸ Known as the Great Central Station, it was the largest building in Chicago when it was completed in 1856.¹⁰⁹ South of Lake Park, between Twelfth Street and Sixteenth Street, the railroad also did some filling of the lake, on which it "built an engine house and some repair shops."¹¹⁰

Soon after the Illinois Central commenced service from its lakefront facilities, it became clear that the configuration of rights specified in the 1852 ordinance presented some operational difficulties. In 1855, the Common Council enacted an ordinance permitting the railroad to curve its tracks westward as they approached Randolph Street from the south.¹¹¹ This was to improve ease of access to the terminal

¹⁰³ Id § 7 at 351.

¹⁰⁴ Id § 8 at 352.

¹⁰⁵ See Stover, *History of the Illinois Central Railroad* at 44–45 (cited in note 80).

¹⁰⁶ See B.F. Ayer, *Rights of the Illinois Central Railroad Company on the Lake Front* 5 (Dec 1884) (*Ayer Opinion Letter*). Not until 1882 did the railroad seek to occupy the additional one hundred feet allowed under the 1852 ordinance; this, in fact, was the action that was to precipitate the *Illinois Central* litigation. See text accompanying notes 524–30.

¹⁰⁷ See Schroeder, *Issue of the Lakefront* at 4 (cited in note 56).

¹⁰⁸ See *id.*

¹⁰⁹ See Alan R. Lind, *Limiteds along the Lakefront: The Illinois Central in Chicago* 5 (Transport History 1986).

¹¹⁰ *Ayer Opinion Letter* at 8 (cited in note 106).

¹¹¹ See Ordinance Granting Right of Way for Approach to Passenger Depot (Sept 10, 1855), in *Charter and Ordinances of the City of Chicago* IV (cited in note 93).

building. In return, the Illinois Central promised to create a new street (named Central Avenue) in the landfilled area north of Randolph Street, and agreed to fill the triangular area where the curved tracks were located.¹¹² One year later, the Common Council enacted a similar ordinance permitting the railroad to curve its tracks eastward as they approached Randolph Street from the south.¹¹³ This gave the railroad better access to the grain elevators that were being constructed on further landfill jutting east along the line of the south pier. As in the case of the 1852 ordinance's grant of an extra one hundred feet of right of way to the railroad, neither the 1855 nor the 1856 ordinance explained the source of the City's authority to convey to the railroad these additional rights to develop and fill portions of the lakebed.

The panic of 1857 and the Civil War resulted in a pause in further development of the Illinois Central operations along the lakefront. With the end of the war and the return of prosperity, however, the lakefront again became the focus of attention in Chicago. Growing water traffic caused many to call for the construction of a new "outer harbor" in the area to the east of the breakwater constructed by the Illinois Central in 1853, in order to relieve the intense congestion in the Chicago River.¹¹⁴ Growing volumes of passenger traffic on the Illinois Central and affiliated lines gave rise to plans for a larger depot, perhaps in the area south of Randolph Street between Michigan Avenue and the Illinois Central right of way. To accommodate rising transshipments of grain and other commodities, the railroad forged ahead with new piers and sidings in the landfill area north of Randolph and east of its existing terminal building. Finally, both Terrace Row residents and public advocates wanted Chicago to follow in the footsteps of cities such as New York and Philadelphia and create a system of public parks, including an improved park along the lakefront.

¹¹² See *id.* at V.

¹¹³ See Ordinance Concerning the Illinois Central Railroad (Sept 15, 1856), in *Charter and Ordinances of the City of Chicago* 539 (cited in note 93).

¹¹⁴ These matters are taken up in considerable detail in Part IV.

Figure 5 is a photograph of the lakefront taken in 1868–1869, looking northward along Michigan Avenue. Terrace Row can be seen at the left. The narrow strip of land known as Lake Park is on the right, with the Illinois Central tracks standing on piles in the lake and leading to the Great Central Station and the railroad's grain elevators north of Randolph in the distance.

FIGURE 5



B. Legal Uncertainty over Property Rights in Submerged Lands

In 1902, John N. Jewett, the first Dean of the John Marshall Law School in Chicago, gave a series of lectures at that school on constitutional law. In an earlier phase in his career, Jewett had served as one of the principal lawyers for the Illinois Central Railroad Company. He was, for example, the railroad's leading advocate in Springfield in 1873 opposing the repeal of the Lake Front Act, and he represented the railroad in the Supreme Court in *Illinois Central*. Two of his lectures, entitled "The Lake Front Litigation," were published many years later in the *John Marshall Law Quarterly*.¹¹⁶ The most striking thing about these lectures is where they began. Jewett felt that to explain the *Illinois Central* case to his students, he had to start with an account of the rights of the King in tidal lands under the common law of England.¹¹⁷

Jewett was right. Without some understanding of the shifting sands of nineteenth-century law regarding ownership of submerged lands, one cannot comprehend the sequence of events that led to the construction of the Illinois Central Railroad on trestles in the bed of Lake Michigan in the 1850s, the motives of the various actors who played a role in the enactment of the Lake Front Act of 1869, or the legal theories advanced in the *Illinois Central* litigation. Indeed, it would not be an overstatement to say that the ultimate cause of both the Lake Front Act and the *Illinois Central* decision was legal uncertainty about who had dominion and control over Lake Park and the land beneath the waters of Lake Michigan east of the park. This uncertainty, at bottom, was created by the difficulty of assimilating certain features of English common law to the circumstances of the New World.

Under English common law, the concept of navigability was critical to resolving four distinct questions: (1) the right to travel by vessel on a body of water; (2) the right to fish in a body of water; (3) the ownership of land beneath a body of water; and (4) the jurisdictional line between the common law courts and the admiralty courts.¹¹⁸ The decisional law within each of these categories was thin, and there was considerable uncertainty about how far a determination in one context that a body of water was "navigable" would extend to another context, and, if so, what the consequences of that extension would be.

Perhaps because of the sparse decisional law, treatises took on an especially prominent importance in this area. The first and most im-

¹¹⁶ Jewett, 3 John Marshall L Q 23 (cited in note 75); John N. Jewett, *The Lake Front Litigation—Part II*, 3 John Marshall L Q 221 (1937).

¹¹⁷ Jewett, 3 John Marshall L Q at 23–24 (cited in note 75).

¹¹⁸ See Daniel J. Hulsebosch, *Writs to Rights: "Navigability" and the Transformation of the Common Law in the Nineteenth Century*, 23 Cardozo L Rev 1049, 1055, 1066–67 (2002).

portant of these was Matthew Hale's *De Jure Maris*,¹¹⁹ which was written in the late seventeenth century but not published until 1787. Hale presented a more tidy and integrated view of the law than the case law perhaps justified.¹²⁰ But it was Hale's restatement of English law that appears to have served as the starting point for American writers, most notably Joseph Angell and James Kent.¹²¹

As summarized by Kent and Angell, English law with respect to the ownership of submerged lands—the matter relevant to our inquiry—was relatively simple. The King as sovereign owned the submerged land under navigable waters. Navigable waters, however, were narrowly defined to mean those waters subject to the ebb and flow of the tides.¹²² Consequently, submerged land under rivers and lakes not affected by the tides was subject to private ownership. In that circumstance, absent a grant to the contrary, the owner of riparian land—that is, land bordering on a body of water—owned the submerged land to the thread of the current, or centerline, of the river or lake to which the land abutted.¹²³ Importantly, however, all waters, whether tidal or not, were subject to a general public easement of free navigation.¹²⁴ Thus, neither the King (as owner of submerged tidal lands) nor private riparians (as owners of lands abutting nontidal waters) could use their ownership of submerged lands to create obstructions that would block free navigation.

¹¹⁹ Matthew Hale, *De Jure Maris et Brachiorum ejusdem*, in Francis Hargrave, ed, 1 *A Collection of Tracts Relative to the Law of England* 1 (T. Wright 1787). See Hulsebosch, 23 *Cardozo L Rev* at 1070–71 (cited in note 118) (describing the treatise's influence on American water law).

¹²⁰ See Hulsebosch, 23 *Cardozo L Rev* at 1071–74 (cited in note 118) (analyzing Hale's arguments).

¹²¹ See Joseph K. Angell, *A Treatise on the Common Law in Relation to Water-Courses: Intended More Particularly as an Illustration of the Rights and Duties of the Owners and Occupants of Water Privileges* 14–20 (Wells & Lilly 1824); James Kent, 3 *Commentaries on American Law* 342–62 (O. Halsted 1828) (discussing English and American common law with respect to waterways). One especially well-done recent commentary has questioned whether English common law clearly equated “navigable waters” with “tidal waters.” See Hulsebosch, 23 *Cardozo L Rev* at 1071–74 (cited in note 118). But whatever the true state of English law, this was the understanding of English law reflected in the work of the leading early American commentators. See *id.* at 1083, 1090 n 162 (explaining that both Kent and Angell relied on Hale's scholarship). Thus, for our purposes, the statements that follow in the text can be assumed to be the starting point for the development of American law on the subject.

¹²² See Angell, *Treatise on the Common Law in Relation to Water-Courses* at 17 (cited in note 121) (stating that “the uniform mode of ascertaining [navigability], as well in this country as in England, (with one exception in the state of Pennsylvania []) has been by the *flowing of the tide*”); Kent, 3 *Commentaries on American Law* at 344 (cited in note 121) (linking the concept of navigability to the fact of tidal waters).

¹²³ See John M. Gould, *A Treatise on the Law of Waters* 15, 111 (Gallaghan 1883) (“According to recent decisions in England, the title of the riparian owners extends to the centre of all non-tidal streams.”).

¹²⁴ Joseph K. Angell, *A Treatise on the Law of Watercourses* 207–13 (Little & Brown 3d ed 1840).

In *Martin v Waddell*,¹²⁵ the United States Supreme Court took an important first step in adapting these understandings to the American context. The Court held that the original colonies succeeded to the position of the English crown with respect to ownership of submerged lands under tidal waters.¹²⁶ Thus, after the colonies gained independence, title to these lands vested in the state governments. Soon thereafter, in *Pollard v Hagan*,¹²⁷ the Court extended this reasoning to subsequently admitted States created out of federal territory. Given the “equal footing” language of these statehood grants, the Court reasoned that States carved out of federal territory inherited the same ownership rights to submerged lands under tidal waters as the original States owned by direct inheritance from the British crown.¹²⁸

These decisions addressed only lands under tidal waters, which Kent and Angell understood to be the full extent of “navigable” waters under English law. In England, with its long coast line and short rivers, the equation of navigable waters with tidal waters did not do great violence to commercial realities. The North American continent, in contrast, contains a large number of waterways that are not tidal but are navigable in fact, including of course the Great Lakes. By the 1840s, if not before, it was clear that these waterways were to play a vital role in the development of American commerce.

After *Martin v Waddell* and *Pollard v Hagan*, the courts of the various States divided over how the principles of those decisions should apply to land under waters that were not tidal but were navigable in fact. A majority of States adhered to the English common law, and held that state ownership was limited to land under tidal waters, while lands under other waters—including nontidal waters that are navigable in fact—were owned by adjacent riparian landowners (subject, of course, to a public easement or trust of free navigation).¹²⁹ A significant minority of States, however, concluded that the English law was unsuited to conditions in North America. These courts adopted what can be called the American view: submerged lands under all waters that are navigable in fact are owned by the State as sovereign.¹³⁰

¹²⁵ 41 US (16 Pet) 367 (1842).

¹²⁶ *Id* at 416–17.

¹²⁷ 44 US (3 How) 212, 229 (1845).

¹²⁸ *Id* at 229–30.

¹²⁹ See Joseph K. Angell, *Law of Watercourses* 607–09 (Little Brown 5th ed 1854) (counting New York, Massachusetts, New Hampshire, Connecticut, Maine, Maryland, Virginia, Ohio, and Indiana as having adopted this position).

¹³⁰ See *id* at 609–11 (counting Pennsylvania, Tennessee, Alabama, South Carolina, and North Carolina as embracing this view). In 1856, Iowa joined these States. See *McManus v Carmichael*, 3 Iowa 1, 22 (1856).

In its first confrontation with the issue, the Illinois Supreme Court, in *Middleton v Pritchard*,¹³¹ cast its lot firmly with the traditional English view. The case involved the right to gather timber on an island located on the Illinois side of the centerline of the Mississippi River.¹³² The court held that the owner of the land on the Illinois shore had full ownership rights to all resources associated with the bed of the river, including timber on an island.¹³³ These rights, the court cautioned, were subject to the paramount interest of the public in navigation. Thus, the riparian owner could cut and remove the timber, but had to do so in a way that avoided interfering with navigation on the river.¹³⁴

Illinois continued to adhere to the English view with respect to ownership of submerged land throughout the balance of the nineteenth century—at least with respect to land under navigable rivers.¹³⁵ To take but one example, in *City of Chicago v Laflin*,¹³⁶ the court rejected an attempt by the City to abate as a nuisance a wharf built out into the Chicago River from riparian land on the river not far from Lake Michigan. Citing *Middleton* and intervening decisions, the court said that the rule was

well settled, that the title of a riparian owner extends to the middle thread of the stream if it is called for as a boundary, and if he is the owner . . . there is no imaginable reason why he may not

¹³¹ 4 Ill 509 (1842).

¹³² The trial judge was Sidney Breese, who had previously been involved in efforts to put together a private undertaking for a central railroad from Cairo to Galena and was later to lobby for the federal grant in support of such a railroad as United States Senator (along with and in rivalry with his considerably more famous counterpart, Stephen A. Douglas). See Gates, *Illinois Central Railroad and Its Colonization Work* at 24, 26–27, 29–30, 32, 41, 58 (cited in note 81) (discussing the involvement and activities of Breese and Douglas); Stover, *History of the Illinois Central Railroad* at 7–8, 12, 16–17, 23 (cited in note 80) (describing the participants in lobbying efforts to found the Illinois Central Railroad Company). This circumstance makes it especially likely that the *Middleton* decision was known to the promoters and early officers of the Illinois Central. *Middleton* is also the only pre-Lake Front Act decision mentioned by name in Jewett's 1902 lectures. See Jewett, 3 John Marshall L Q at 25–26 (cited in note 75). It is perhaps of passing interest that, decades later, Breese would, as Chief Justice of the Illinois Supreme Court, author an important decision in favor of the Illinois Central. See note 514, discussing *People v Ketchum*, 72 Ill 212 (1874).

¹³³ See *Middleton*, 4 Ill at 519–22.

¹³⁴ See *id* at 521–22. Later, the Iowa Supreme Court adopted the American definition of navigability for use in determining rights to submerged land under the Mississippi. See *McManus*, 3 Iowa at 22–23. Thus, with respect to the segment of the Mississippi that divides Illinois and Iowa, the private riparian owned the submerged land to the center on the Illinois side, whereas the State of Iowa owned the submerged land to the center on the Iowa side. Jewett specifically noted this anomaly in his 1902 lecture, see Jewett, 3 John Marshall L Q at 25–26 (cited in note 75), and it undoubtedly lent an aura of uncertainty to the status of submerged lands in both States.

¹³⁵ See *Ensminger v People*, 47 Ill 384, 385, 388–89 (1868); *Board of Trustees of the Illinois and Michigan Canal v Haven*, 11 Ill 554, 556–57 (1850). Illinois switched to the American rule with respect to lakes in 1896. See note 154.

¹³⁶ 49 Ill 172 (1868).

use and enjoy it as his own in any legal manner, provided he does not obstruct or impair the enjoyment of the easement [of navigation] by the public.¹³⁷

If this were all of the law bearing on the question of ownership of the lakefront in Chicago, then the relevant legal principle would be clear, even if difficulties would arise in its application. The sole question would be this: Who owns the land on the shore? Lake Michigan is not regarded as tidal water. Hence, under the English view, the owner of riparian land would own the submerged land to the centerline of the lake.

Some circumstantial evidence suggests that this was in fact the assumed legal rule about ownership of the bed of Lake Michigan up through the 1850s. To take one telling example, in the deeds transferring a right of way to the Illinois Central south of Chicago over riparian lands owned by Senator Stephen A. Douglas, it was “distinctly stipulated and understood between the said parties that the said Douglas expressly reserves and the said Company expressly concedes to [Douglas] all title right and ownership to the land and water between the Eastern line of said Road and the Centre of Lake Michigan.”¹³⁸ In other words, Douglas—a renowned lawyer—assumed that at least a credible legal claim existed that he, as the owner of riparian lands on Lake Michigan, owned “all title right and ownership” to the “Centre of Lake Michigan.” Consequently, he wanted it made clear that by granting a right of way to the railroad along the edge of the lake he was not transferring ownership of the submerged lands to the railroad.¹³⁹

Soon, however, discordant elements began to emerge in the law that would eventually undermine any confidence legal observers might have had about the ownership of submerged lands under Lake Michigan. These elements arose in legal contexts one step removed

¹³⁷ *Id.* at 176.

¹³⁸ Article of Agreement between Stephen A. Douglas and the Illinois Central Railroad (Sept 29, 1852) (handwritten deed). This deed and the other Illinois Central documents cited in this Article are, with some exceptions, available in a special collection at the Newberry Library in Chicago. The exceptions are a few instances in which the material is available at the Chicago Historical Society or the Illinois State Archives.

¹³⁹ The assumption that the riparian landowner owned the bed of the lake is also reflected in the following account from an early history of Chicago:

In 1853, James H. Collins, one of the able and early lawyers in the city, applied to the Cook County Court of Common Pleas, presided over by Judge Skinner, for an injunction against the Illinois Central railroad company. Mr. Skinner [sic] owned a lot abutting the lake, and claimed ownership to the middle of the lake, and contested the right of way The litigation resulted in a compromise by which the railroad company paid Mr. Collins damages, and secured the right of way over his land.

John Moses and Joseph Kirkland, 2 *History of Chicago Illinois* 194 (Munsell 1895).

from the precise question of ownership of submerged lands; not surprisingly, therefore, their implications were not immediately generalized to the problem of ownership of submerged lands. Nevertheless, by the late 1860s, interested legal observers might well have concluded that if and when the issue were presented in litigation, the courts would likely hold that lands overflowed by the Great Lakes, no less than lands under tidal waters, are owned by the State rather than by riparian landowners.

The first discordant element emerged in 1851, when the United States Supreme Court, in *The Propeller Genesee Chief v Fitzhugh*,¹⁴⁰ overruled an earlier opinion by Justice Story and held that the admiralty jurisdiction of the federal courts was not limited to tidal waters but extended to all waters that are navigable in fact.¹⁴¹ In so ruling, the Court cited many of the same factors, including the greater importance of inland rivers and lakes to commerce in North America than in England, that had convinced some state courts to reject the English definition of navigability in disputes over the ownership of submerged lands.¹⁴² Although the Court cautioned that its decision involved only jurisdiction, not property rights,¹⁴³ in retrospect *The Genesee Chief* undoubtedly tipped the balance for the remainder of the century in favor of the American view regarding ownership of submerged lands, at least in those jurisdictions and circumstances where the issue was open.¹⁴⁴

The second discordant element emerged more gradually from the 1840s onward, and concerned a rule of boundary construction. It was well established that when a deed specified a river or stream as the boundary of property, courts would presume that the property extended to the centerline of the watercourse, unless the deed expressly stated the contrary. This of course was consistent with the English view of ownership of submerged lands under nontidal waters. Appar-

¹⁴⁰ 53 US (12 How) 443 (1852), overruling *The Thomas Jefferson*, 23 US (10 Wheat) 428 (1825).

¹⁴¹ *The Genesee Chief*, 53 US (12 How) at 457.

¹⁴² *Id.* at 453–58.

¹⁴³ *Id.* at 458–59.

¹⁴⁴ Iowa adopted the American view in 1856, see note 134 (discussing *McManus*), and the Supreme Court held that this was consistent with the principles of *Martin v Waddell* and *Pollard v Hagan* in *Barney v Keokuk*, 94 US 324 (1876). Wisconsin adopted the American view with respect to lakes in 1877. See *Delaplaine v Chicago & Northwestern Railway Co*, 42 Wis 214, 226 (1877) (holding that “the water’s edge is the boundary of the title of the riparian proprietor”). See also *Railroad Co v Schurmeir*, 74 US (7 Wall) 272, 283–86 (1869) (construing Acts of Congress referring to navigable rivers as meaning navigable in fact rather than navigable in the common law (English) sense, and on this basis ruling that a claimant did not own the bed of the Mississippi River in Minnesota). For an instructive Supreme Court opinion recognizing the evolution of the law in the direction of the American rule, and stressing the importance of *The Genesee Chief* in this process, see *Packer v Bird*, 137 US 661 (1891) (Justice Field).

ently there were no early decisions, English or American, applying this rule of construction to a deed naming a nontidal pond or lake as a boundary. But as American precedents about boundary disputes slowly began to accumulate, courts began to differentiate between the rules of construction applicable to rivers or streams, on the one hand, and ponds or lakes, on the other.

We can trace the evolution of views on this topic through successive editions of Joseph Angell's influential treatise on the *Law of Watercourses*. The second edition, published in 1833, noted the general rule presuming ownership to the centerline, and stated simply that it applied to any "grant of land described as being bounded by a watercourse."¹⁴⁵ In the third edition, published in 1840, Angell introduced a note of caution about deeds that describe land as bounded by a pond as opposed to a river or stream. He described decisions in New York and Maine that treated such a deed as inherently ambiguous, and noted that the Maine Supreme Court had cautioned against extending the general rule of construction to a deed naming a pond or lake as a boundary.¹⁴⁶ With the fourth edition, published in 1850, Angell added a new subsection devoted entirely to the "Difference between a Boundary on a Watercourse, and a Boundary on a Lake or Pond."¹⁴⁷ Here he expounded more fully on the problematic nature of ponds as boundaries. With respect to lakes, he stated emphatically: "The law of boundary, as applied to rivers, is without doubt inapplicable to the *lakes* and other large natural collections of fresh water in this country."¹⁴⁸ Citing decisions of New York and New Hampshire courts, Angell suggested that when a deed describes a lake as a boundary, the riparian landowner is presumed to own only to the shore or edge of the lake, and is presumed *not* to own the submerged land to the centerline unless such an intention appears clearly in the deed.¹⁴⁹

In 1860, the Illinois Supreme Court, in *Seaman v Smith*,¹⁵⁰ adopted the constructional rule set forth in the fourth (and succeeding) editions of Angell in interpreting a deed that named "Lake Michigan" as a boundary. The court held that "Lake Michigan" meant the shoreline, not the centerline, of the lake. The court observed that lakes are different from rivers and streams because they lack a current, and that because of the "circular shape" of most lakes, "it would be found ex-

¹⁴⁵ Joseph K. Angell, *A Treatise on the Common Law, in Relation to Watercourses* 4 (Hilliard Gray 2d ed 1833).

¹⁴⁶ Angell, *Treatise on the Law of Watercourses* at 10–11 (cited in note 124).

¹⁴⁷ Joseph K. Angell, *A Treatise on the Law of Watercourses* 35–38 (Little & Brown 4th ed 1850).

¹⁴⁸ *Id.* at 37. This sentence carried over without change in the Fifth Edition, published in 1854. See Angell, *Law of Watercourses* at 40 (cited in note 129).

¹⁴⁹ Angell, *Treatise on the Law of Watercourses* at 38 (cited in note 147).

¹⁵⁰ 24 Ill 521 (1860).

ceedingly difficult, if not impossible, to ascertain where the boundary should be fixed, or the shape it should assume” if anything other than the shoreline were chosen.¹⁵¹

No question was presented in *Seaman* about who in fact owned the bed of Lake Michigan. But the same considerations of logic and practicality that caused the court to adopt a different rule for construction of boundaries when expressed in terms of lakes rather than rivers would also seem to suggest a different rule for ownership of the lakebed itself. Certainly after 1860, a careful lawyer reviewing the state of the law in Illinois would have reason to doubt whether the English view of riparian rights to submerged lands, endorsed in *Middleton v Pritchard* with respect to navigable rivers, would be extended to riparian lands abutting Lake Michigan.

As it turned out, the answer to this legal question was to remain unresolved for most of the remainder of the nineteenth century. Authoritative word on the subject did not come until the *Illinois Central* litigation itself. Both the circuit court decision, authored by Justice Harlan as Circuit Justice, and the United States Supreme Court opinion, authored by Justice Field, ruled that the State of Illinois had title to the land under Lake Michigan.¹⁵² But this was far into the future. Although legal observers would become increasingly confident that this would be the outcome after 1860,¹⁵³ the issue remained shrouded in uncertainty until some time after 1892.¹⁵⁴

¹⁵¹ *Id.* at 525.

¹⁵² See *Illinois Central Railroad Co.*, 33 F at 755–56; *Illinois Central*, 146 US at 434–37.

¹⁵³ After the Lake Front Act was passed in 1869, the Illinois Central unequivocally embraced the position that the State owned the bed of Lake Michigan. See text accompanying note 372. Lawyers for the railroad continued to maintain this position after the Act was repealed. See Letter from B.F. Ayer, General Solicitor of the Illinois Central Railroad Company, to Robert Todd Lincoln, Secretary of War (July 25, 1881), reprinted in *Encroachments upon the Harbor of Chicago, Ill.*, HR Rep No 95, 47th Cong, 1st Sess 19 (1882) (*Encroachments upon the Harbor*). The United States Attorney for the Northern District of Illinois, in a particularly penetrating analysis in 1882, concurred in this assessment. See Joseph B. Leake, Report of the United States Attorney for the Northern District of Illinois (Jan 7, 1882), reprinted in *Encroachments upon the Harbor* at 27.

¹⁵⁴ Although it is unclear whether the federal courts in *Illinois Central* were applying Illinois law, the Illinois Supreme Court moved quickly after 1892 to embrace the position that the American rule would henceforth be followed with respect to lakes in Illinois. Thus, in *People v Kirk*, 162 Ill 138 (1896), the court upheld a state statute authorizing the landfill of Lake Michigan to create the construction of Lake Shore Drive between the Chicago River and Oak Street (that is, Streeterville). The court said: “Where a navigable river is called for as a boundary line the grantee will take to the thread of the current of the stream. But the rule that governs our rivers has no application to our great lakes.” *Id.* at 146–47. The court cited *Seaman v Smith* and *Illinois Central* as authority for this proposition. *Id.* In *Fuller v Shedd*, 161 Ill 462, 489–90 (1896), the court extended the new rule regarding navigable lakes to a non-navigable lake (Wolf Lake on the border between Chicago and Indiana). In *Revell v The People*, 177 Ill 468, 488–91 (1899), the court upheld an injunction requiring a riparian landowner on Lake Michigan to tear down two piers extending two hundred feet into the lake. The court disavowed the proposition, taken for

If the rule of law that would determine ownership of the bed of Lake Michigan was uncertain, the identity of the riparian owner of the land known as Lake Park was even more so. This is revealed by a remarkable editorial and follow-on letters to the editor published by the *Chicago Tribune* in the summer of 1867. The editorial, entitled “Who Owns Lake Park?,” speculated that the park “is perhaps worth a million and a half of dollars today, and its inevitable connection with the future commerce of the city will increase its value hereafter to a price that would now be considered grossly exaggerated.”¹⁵⁵ The purpose of the editorial was to demonstrate that although “[i]t has been supposed that the city of Chicago had an unquestionable title to this important piece of property, . . . an examination of the subject will show that there are some interesting, if not doubtful, points in the case.”¹⁵⁶ In fact, it was unclear whether “the title to this land [is] in the city, the Trustees [of the Canal], the State, or the United States.”¹⁵⁷

The paper commenced its analysis with Congress’s 1827 grant of lands to the Canal Commissioners, which the paper characterized as a grant conditional upon the fulfillment of certain legal requirements.¹⁵⁸ With respect to fractional section 15, where Lake Park was primarily located, one of the conditions was that the section be “first laid off and subdivided into town lots, streets and alleys.”¹⁵⁹ Noting that “it is perfectly apparent that a public park is neither a ‘town lot,’ ‘street,’ or ‘alley,’” the *Tribune* wondered whether it was “illegal [for the Canal Commissioners] to set this ground aside as a park” and, if so, what the effect would be: “Would it not appears [sic] that the vital condition of the grant has been unfulfilled by Illinois, and would not the land revert to the United States for conditions broken?”¹⁶⁰

Later in the editorial, the *Tribune* considered the effect of a statute enacted by the state legislature in 1863, evidently at the behest of owners of lots on Michigan Avenue. This statute began by reciting, er-

granted in *Illinois Central*, that a riparian has as an incident of his land ownership the right to “wharf out” into the lake. *Id.* at 489.

¹⁵⁵ *Who Owns Lake Park?*, *Chi Trib* 2 (June 23, 1867).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* The case for the City’s ownership was that the strip of land had been dedicated to public uses by the recorded plats of fractional sections 15 and 10. An 1833 statute of Illinois provided that land on a plat designated for “streets, alleys, ways, commons, or other public uses” was to be “held in the corporate name” of the city or town in which it was located, “in trust to, and for the uses and purposes set forth, and expressed or intended.” An Act, Providing for the Recording of Town Plats (Feb 27, 1833) § 5, in *Revised Laws of Illinois* 600 (Greiner & Sherman 1833). Relying on this statute, the Illinois Supreme Court had ruled that cities held title to streets and the like in fee, subject of course to the trust obligation to devote the space “for the uses and purposes of the public.” *Haven*, 11 Ill at 557.

roneously, that “the State of Illinois, by its Canal Commissioners, [had] declared that the public ground east of said lots should forever remain vacant.”¹⁶¹ As the *Tribune* recognized, the Canal Commissioners had never included such a recitation in the plat to fractional section 15; the United States had included the restriction in the plat for the Fort Dearborn Addition in fractional section 10. Nevertheless, the 1863 statute went on to provide that “neither the Common Council of Chicago, nor any other authority, shall ever have the power to permit encroachments thereon, without the assent of all the persons owning lots or land on said street or avenue.”¹⁶² The *Tribune* thought that the effect of this statute, although founded on a mistaken premise, was to estop the State from asserting title to Lake Park as against the City.

At the conclusion of the editorial, the *Tribune* made clear that it was not merely seeking to raise questions. The newspaper had persuaded itself, based on its discussion of the facts and law, that “[i]f there be any adverse title to that of the city it would seem to be in the United States.”¹⁶³ Therefore, the editorial closed by “suggesting the expediency of applying to Congress for an act ceding to the City of Chicago all the right, title and interest of the United States in and to the land in question, without reservation as to its use, except that it shall not be sold.”¹⁶⁴

The *Tribune*'s 1867 editorial elicited some legally sophisticated responses from readers. One, who signed his letter “Index,” thought that the newspaper had drawn exactly the wrong inference from the 1863 statute, and that the statute showed that title remained in the State.¹⁶⁵ Another reader, who signed “R,” vigorously argued that title remained with the Canal Commissioners, and that their sole authority was to sell the land in aid of construction of a new canal.¹⁶⁶ R concluded that the Canal Commissioners owned not only “the strip between Michigan avenue and the railroad, 5,000 feet front and 200 to 400 feet deep, of an average value of above \$500 per foot, making over \$2,500,000 in the aggregate, but also, all beyond to a distance of a nautical league from the shore.”¹⁶⁷ At the end of this letter, the editor of the *Tribune* appended the following comment: “QUERY.—Where does

¹⁶¹ *Who Owns Lake Park?*, Chi Trib at 2 (cited in note 155).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See Letter to the Editor, *Who Owns Lake Park?*, Chi Trib 3 (June 25, 1867) (“So far from abandoning its title, the State asserts that title very clearly by prohibiting the city and others from permitting encroachments, without the consent of all the property holders owning land or lots on the avenue. The State therefore retains the title to the land, but is pledged to maintain it as vacant ground.”).

¹⁶⁶ See Letter to the Editor, *Who Owns Lake Park?*, Chi Trib 2 (June 27, 1867).

¹⁶⁷ *Id.*

our correspondent find any authority for the assumption that the title to the bottom of the lake, to a distance of one league from the shore, or any other distance, (unless it be a natural accretion), is vested in the riparian owner?"¹⁶⁸ The answer, of course, (which was not published in the paper) was that the Illinois Supreme Court's *Middleton* doctrine provided the authority.¹⁶⁹ But by 1867, at least insofar as newspaper editors were concerned, this answer was too implausible to be taken seriously with respect to Lake Michigan.

In short, by 1867 the legal title to the Chicago lakefront was deeply vexed. First, it was unclear whether the strip of land known as Lake Park was owned by the City, the Canal Commissioners, the State, or the federal government. Second, it was unclear whether the Illinois courts would apply the English rule of riparian ownership to the lands submerged under Lake Michigan or the American rule. If the American rule applied, then the submerged lands were owned by the State, subject to whatever rights the Illinois Central had acquired through its charter from the State in 1851. (The rights the railroad had obtained from the City would be of no value, unless the State had first granted its rights to the City, which it had not done.) If the English rule applied, then the submerged lands were owned by whoever was determined to be the owner of Lake Park—the City, the Canal Commissioners, the State, or the federal government—subject, again, to whatever rights the railroad had acquired from this party. It was a fine mess.

C. Implications for the Lakefront

In the next Part of the Article, we describe the opportunistic behavior unleashed by this morass of legal uncertainty. Before doing so, however, it is worth pausing to note how the legal story illuminates some of the behavior of the City and the Illinois Central in the formative period from 1851 to 1867.

As we have seen, in the 1850s a knowledgeable legal observer, following the Illinois Supreme Court's embrace of the English view of ownership of submerged lands in *Middleton*, would most likely assume that the bed of Lake Michigan was owned by riparian landowners. With respect to the submerged lands north of Randolph Street to the Chicago River, and south of Twelfth Street to Sixteenth Street, the riparian landowner was the Illinois Central. Thus, under the English view, the Illinois Central also owned the submerged lands offshore from these properties. This meant it presumably could use these lands for any purpose, including landfilling to build wharves and piers, pro-

¹⁶⁸ Id.

¹⁶⁹ See text accompanying notes 131–39.

vided these uses did not interfere with the public right of navigation.¹⁷⁰ With respect to the area between Randolph Street and Twelfth Street—Lake Park—the ownership issue was murkier. But the dominant assumption in the 1850s was, as we have seen, that the City of Chicago was the riparian owner.

Once we understand the assumptions about the law and the ownership of riparian lands that were current in the 1850s, a number of aspects of the early development of the Illinois Central that otherwise seem baffling become understandable. First, we can understand how the Chicago Common Council believed it could convey a three-hundred-foot right of way to the railroad for the portion of its operations in the lake, when the railroad was limited to two hundred feet by federal law and its state charter. The fact that explains this anomaly is that the Council assumed the City to be the owner of Lake Park. Hence, under the English view of riparian rights, the City also owned the bed of Lake Michigan off Lake Park, and could convey an interest in this lakebed to the railroad (provided it did not interfere with the public right of navigation). Similarly, we can understand how the Council, in 1855 and 1856, believed that it could grant additional rights to the railroad to curve its tracks in a westerly and easterly direction outside the three-hundred-foot right of way south of Randolph. As the owner of the submerged land in question, it was free to authorize the railroad to engage in additional filling of these areas.

Likewise, we can understand how it was that the Illinois Central felt free to engage in aggressive landfilling both north of Randolph Street and south of Twelfth Street, and why it sometimes did so without regard to whether it had the official blessing of the Common Council. The railroad was the owner of the riparian lands in these segments of the lakeshore, and under the English view it would be allowed to “wharf out” or otherwise engage in fills and improvements, provided it did not impair the public right of free navigation on the lake.

¹⁷⁰ The right of a riparian owner to “wharf out” to reach navigable water was reasonably well established at this time. See, for example, *Yates v Milwaukee*, 77 US (10 Wall) 497, 504 (1870) (stating that among the rights available to “a riparian proprietor whose land is bounded by a navigable stream” is “the right to make a landing, wharf or pier for his own use or for the use of the public”); *Dutton v Strong*, 66 US (1 Black) 23, 31 (1861) (stating that “[b]ridge piers and landing places, as well as wharves and permanent piers, are frequently constructed by the riparian proprietor on the shores of navigable” waters, and “where they conform to the regulations of the State, and do not extend below low-water mark, it has never been held that they were a nuisance, unless it appeared that they were an obstruction to the paramount right of navigation”). After *Illinois Central* was decided, however, the Illinois Supreme Court curtailed the right with respect to riparian land on Lake Michigan. See *Revell*, 177 Ill at 489 (holding that riparian owners do not have a right to “wharf out in order to protect the shore of their lands from erosion”).

By the late 1860s, however, the legal assumptions that explain this behavior had begun to crumble. Given the United States Supreme Court's decision in *The Genesee Chief*, and the Illinois Supreme Court's decision in *Seaman v Smith*, the drift of the law was strongly in the direction of recognizing the American view of ownership of submerged lands, at least with respect to large navigable lakes. This would mean that title to the lakebed had been given to the State in 1818 when it entered the Union, not to the riparian landowners. If title had been given to the State, then arguably it remained with the State, because there had been no grant by the State of submerged lands for purposes of constructing the Illinois Central's right of way, and at best only an ambiguous grant for purposes of constructing terminals and other railroad facilities. In effect, the legal uncertainty meant that the lakebed was in the "public domain"—open to capture by the first person to convince the General Assembly to convey the bed of the lake to him.¹⁷¹ This meant that the right to construct a new outer harbor for Chicago was up for grabs. Indeed, it was possible that even the Illinois Central's valuable improvements were up for grabs.

III. 1867: THE LAKEFRONT IN PLAY

The first manifestation of this legal uncertainty emerged in the 1867 session of the Illinois General Assembly. At that time, the General Assembly met in odd-numbered years, typically from January to March or April. When the 1867 session commenced, the Illinois Central appeared to have no particular desire or apprehension regarding the legislature. We can trace the attitude of the railroad during this period through the surviving correspondence between John M. Douglas, President of the Illinois Central, who maintained his office in Chicago, and William H. Osborn, a former President who held the title of Chairman of the Executive Committee of the Board of Directors, and who kept his office in New York. Douglas wrote to Osborn at the end of 1866, "I do not know of anything that we want of the legislature this winter except its good will."¹⁷² Indeed, he allowed that he did "not believe this Company has any enemies in the legislature or out of it" and that he was "inclined to think we are on good terms with the world generally legislature included."¹⁷³

It soon became clear that this assessment was much too sanguine. In early February 1867, a bill was introduced in the House to incorpo-

¹⁷¹ Compare Yoram Barzel, *Economic Analysis of Property Rights* 5–6 (Cambridge 2d ed 1997) (distinguishing assets subject to individual claims from assets in the public domain, which are subject to a rule of capture).

¹⁷² Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (Dec 27, 1866).

¹⁷³ *Id.*

rate an entity described as “the Chicago Harbor, Pier and Dock Company.”¹⁷⁴ The named incorporators of the proposed company included a number of Chicago’s leading citizens, lawyers being especially prominent.¹⁷⁵ These included Jonathan Young Scammon, who had interests in Michigan Avenue real estate and would be involved in virtually all lakefront intrigue up through the decision in the *Illinois Central* case, and Melville W. Fuller, the future Chief Justice of the United States Supreme Court.¹⁷⁶ The bill’s sponsor in the House was Henry M. Shepard, Fuller’s law partner. The proposed company would have the power “to enclose and protect, occupy and use, possess and enjoy, so much of the bed and waters of Lake Michigan” as lay east of Michigan Avenue from Sixteenth Street to the Chicago River.¹⁷⁷ The purpose of the grant was to allow the incorporators to construct a new outer harbor for Chicago, and to connect “the same by roadways across railroad tracks” to Michigan Avenue, using the power of eminent domain if necessary.¹⁷⁸

The Chicago Harbor, Pier and Dock Company can only be described as a classic rent-seeking scheme. The proponents of the scheme drew up articles of association to govern their lobbying activities.¹⁷⁹ The articles expressly stated that the purpose of the association was “to secure by legislative, and other grants” the right to develop the submerged land east of Chicago.¹⁸⁰ They further provided for pro rata assessments of the members to pay for the lobbying campaign, expulsion of any member who failed to pay assessments, and pro rata division of any property rights obtained from the legislature.¹⁸¹

¹⁷⁴ See *The Chicago Dock Bill*, Chi Trib 1 (Feb 15, 1867) (reproducing the bill in full).

¹⁷⁵ But see note 206 (noting the suggestion that some individuals’ names were misappropriated).

¹⁷⁶ Fuller would recuse himself in *Illinois Central* on the ground that he had “been of counsel in the court below.” 146 US at 476 (explaining why two justices “did not take any part in the consideration or decision of these cases”). This was true—Fuller had represented the City in the Circuit Court. See *Illinois v Illinois Central Railroad Co*, 33 F 730, 732 (CC ND Ill 1888). But it gave no hint of Fuller’s much more extensive involvement in the early history of the controversy in seeking to secure the same resource for a group of private investors.

¹⁷⁷ *Chicago Dock Bill*, Chi Trib at 1 (cited in note 174) (quoting section 5 of the bill).

¹⁷⁸ *Id* (same).

¹⁷⁹ The charter for an association formed by articles of agreement in 1866 called the “Chicago Harbor-and-Improvement Company” is reproduced in William K. Ackerman, *Historical Sketch of the Illinois Central Railroad* 96–98 (Fergus 1890). It seems reasonably clear that this is the same entity that sought to incorporate in 1867 as the Chicago Harbor, Pier and Dock Company. Ackerman describes the members of the association as “many of the leading citizens of Chicago,” *id* at 96, which is consistent with the identities of the named incorporators of the Chicago Harbor, Pier and Dock Company. We have found no explanation for why the name changed slightly between 1866 and 1867.

¹⁸⁰ *Id*.

¹⁸¹ *Id* at 97–98.

Reaction by the Chicago newspapers to the bill was fierce. The *Chicago Tribune* ran an editorial entitled "A Magnificent Fraud."¹⁸² Employing what may be the first use of the word "steal" in connection with lakefront legislation, the newspaper asserted that "a bolder or more infamous attempt to steal a vast property belonging to the public has never been attempted."¹⁸³ The paper said that the proposed grant would give the company the right "to build a city with water privileges upon the site belonging to Chicago, and not render any compensation therefor."¹⁸⁴ The *Chicago Times* was but a step behind in its condemnation. Focusing on a provision in the bill that permitted the City of Chicago to purchase the Harbor, Pier and Dock Company's works at a future date, at cost plus 10 percent annual interest, the *Times* predicted that the company would do just enough to obtain the land and then attempt to resell it to the City for cash.¹⁸⁵

The bill's sponsor, Henry M. Shepard, was a busy man during the session. He also introduced and obtained passage in the House (though not the Senate) of another bill that became known as the Skating Park Bill. According to one unfavorable review, this, too, was designed to secure the rights to the lakefront for its sponsors; it was characterized as "giving the Michigan Park basin in the city in fee to a company of private speculators, under the pretence of cutting ice, skating, yachting, and other festive employments."¹⁸⁶ In terms that would be sounded similarly in 1869, the *Chicago Times* referred to the matter as the "Michigan Park Steal."¹⁸⁷ Thus, by February 1867, it had become clear that substantial efforts were underway to wrest control of Chicago's lakefront via the mechanism of a grant from the state legislature.

The Illinois Central reacted to these events with understandable alarm. Its primary concern at the time was ensuring that its physical improvements and its right to use the lakefront were not imperiled by a grant of the submerged land to some other entity. On February 16, the railroad's president, Douglas, sent an apprehensive note to the company's Springfield representative:

Does bill 1037 affect the title in the lake or basin—Devote yourself entirely to lake matter. See that nothing is pending on the subject except what you make public—Better stay and see that nothing goes through surreptitiously—

¹⁸² *A Magnificent Fraud*, Chi Trib 2 (Feb 12, 1867).

¹⁸³ *Id.*

¹⁸⁴ *Id.* (branding the grant a "prodigious theft").

¹⁸⁵ See *The Great Harbor Swindle*, Chi Times 4 (Feb 13, 1867).

¹⁸⁶ *The Michigan Park Steal*, Chi Times 4 (Feb 13, 1867) (advising the Illinois legislature against the bill).

¹⁸⁷ *Id.*

Make the city keep a strong delegation there till the close of the session and see it out.

It will be a hard fight.¹⁸⁸

So that there could be no doubt about the importance he attached to this matter, Douglas closed this correspondence by calling off any efforts by the railroad on what up to then had been its focus in the legislature: defeating a bill to enact a state tax on certain Illinois Central lands.¹⁸⁹

Throughout the balance of the 1867 legislative session, the railroad's posture remained entirely defensive. For example, on February 19, 1867, Douglas telegraphed his lobbyist in Springfield, reacting to yet another bill that Shepard had introduced, this one back on January 31. The instructions were succinct: "Defeat bill no. 888—Chicago Elevator Company if it is to be located on the Lake."¹⁹⁰ Another telegram from Douglas that same day gave instructions to "[d]efeat any bill that confers authority upon any company to build anything in the lake south of the river."¹⁹¹

Indeed, just as it had seemed content with the status quo before the legislature convened, the railroad now threw its support behind an effort to secure greater control over the lakefront for the City. The means toward this end was a bill introduced in both the House and the Senate: "An act to establish the rights of the city of Chicago in and over the harbor thereof."¹⁹² Douglas opined to his agent who had taken up residence at the Leland Hotel in Springfield, "I think it would be well to pass the bill introduced . . . yesterday giving the city control."¹⁹³

As a defensive strategy, there was considerable logic in this position. If the City's grants to the railroad in 1852, 1855, and 1856 were defective because the City lacked title to the bed of the lake, then a grant of such title from the State to the City presumably would cure the defect. Although there would be uncertainty about what the City might do in the way of constructing an outer harbor, the railroad seemingly would at least be secure in the knowledge that its existing improvements would not be isolated by a grant to rival interests.

¹⁸⁸ Telegram from John M. Douglas, President, Illinois Central, to C.C.P. Holden, at the Leland Hotel, Springfield, Feb 16, 1867.

¹⁸⁹ *Id.*

¹⁹⁰ Telegram from John M. Douglas, President, Illinois Central, to C.C.P. Holden, at the Leland Hotel, Springfield, Feb 19, 1867.

¹⁹¹ Telegram from John M. Douglas, President, Illinois Central, to C.C.P. Holden, at the Leland Hotel, Springfield, Feb 19, 1867.

¹⁹² See *Journal of the Senate of the Twenty-Fifth General Assembly of the State of Illinois* 810 (1867) (S 658, introduced Feb 18, 1867); *Chi Times* 4 (Feb 27, 1867) (lauding an analogous bill in the House and lamenting its poor prospects for enactment).

¹⁹³ Telegram from John M. Douglas (cited in note 191).

Intrigue over the lakefront continued throughout the 1867 legislative session. In the end, however, none of the bills became law, albeit not for lack of effort on the part of Shepard and others. For instance, even after the Harbor, Pier and Dock Company bill died in the House—with one newspaper boasting that “[t]he first blast from the TRIBUNE trumpet sealed its fate”¹⁹⁴—another bill was introduced that was dubbed by the same newspaper “The New Pier and Dock Bill.”¹⁹⁵ Its contents, as summarized by the *Tribune*, appeared to bear out the claim that “[t]he bill is almost identical with the one which has been so unanimously condemned by the people of Chicago.”¹⁹⁶ The *Tribune*’s prediction that this bill, too, would not garner sufficient support proved correct.

As the 1867 legislative session drew to a close, the railroad breathed a sigh of relief. The president particularly noted in a letter to the chairman that “[n]othing [had been] done to interfere with us in the lake.”¹⁹⁷ While the matter was costly in terms of time and effort—Douglas reported that he had been “so engaged with this troublesome matter that I have pretty much neglected everything else”—he would soon thereafter report that he could turn some of his attention to “our contemplated improvements in the lake here.”¹⁹⁸

IV. 1868: DEBATING THE FUTURE OF THE LAKEFRONT

The 1867 legislative session, with its multiple attempts to secure grants of land associated with Lake Park and the bed of Lake Michigan, had the effect of stimulating a more wide-ranging public debate about the future of the lakefront. To facilitate understanding of this debate and the proposals that eventually led to the passage of the Lake Front Act, it will be useful to refer to the areas depicted on Figure 6.¹⁹⁹

¹⁹⁴ *The Chicago Dock Swindle Buried*, Chi Trib 1 (Feb 17, 1867).

¹⁹⁵ *The New Pier and Dock Bill*, Chi Trib 2 (Feb 19, 1867) (predicting that the new bill would have little success).

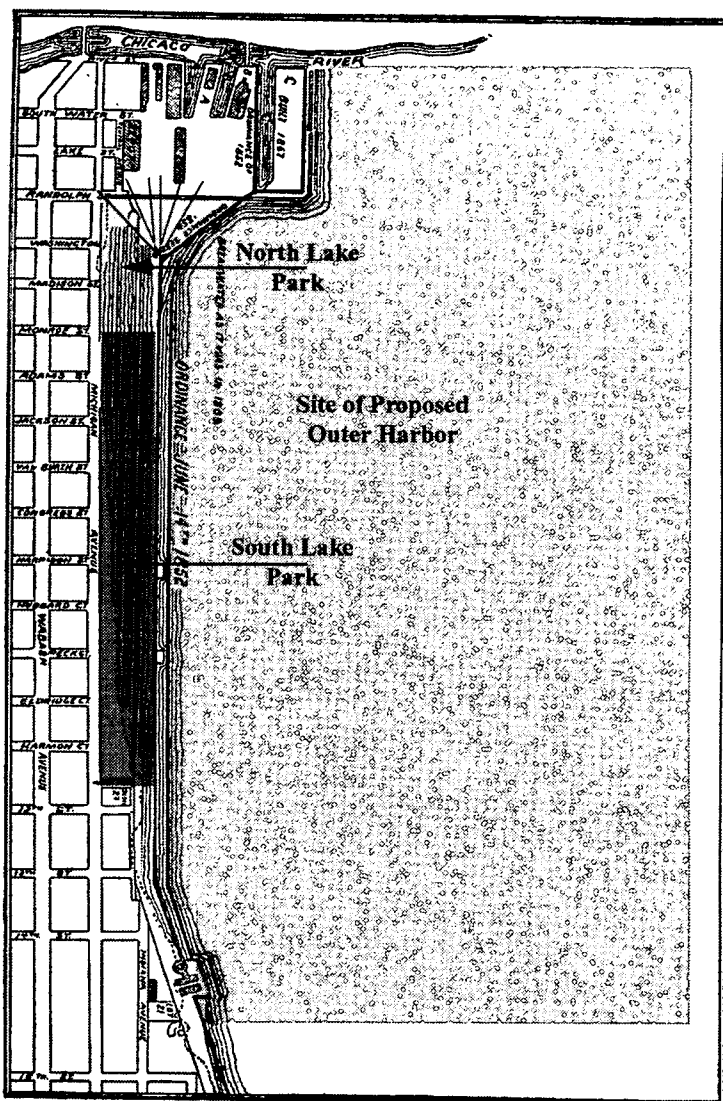
¹⁹⁶ *Id.*

¹⁹⁷ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (Feb 21, 1867).

¹⁹⁸ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (Mar 22, 1867).

¹⁹⁹ Figure 6 is an adaptation of the Morehouse map from *Illinois Central*. See note 523 and accompanying text (discussing Figure 7, the Morehouse map). Compare note 115 (discussing Figure 4, another adaptation of the Morehouse map).

FIGURE 6



“North Lake Park” (sometimes called “the three blocks”) refers to the solid land portion of the park from Monroe Street on the south to Randolph Street on the north, together with the submerged land lying between the solid land and the Illinois Central right of way. “South Lake Park” refers to the solid land portion of the park south of Monroe Street, together with the submerged land lying between the park and the right of way. “Site of Proposed Outer Harbor” refers to the area to the east of the railroad’s right of way, extending an indefinite distance into the lake, where it was assumed a new outer harbor would

be built, supplementing the Chicago River as a facility for loading and unloading commercial vessels plying the lake.

One concern that emerged early in 1868 was how to prevent future giveaways by the General Assembly of Lake Park or the site for an outer harbor. In an editorial entitled "The Future Harbor of Chicago," the *Tribune* again urged the City to make

[a]n application to Congress for a grant of the title to all land lying east of the present frontage of the city, and extending upon the bottom of Lake Michigan three miles into the lake, subject to all the conditions of the unobstructed navigation of the Chicago harbor and Lake Michigan²⁰⁰

The newspaper explained:

It has not been more than a year since a bill transferring all the land east of Michigan avenue, and for one mile eastward into the lake, and lying between Madison and Twenty-second streets, to half a dozen private persons, to be held by them and their heirs forever, was introduced into the Legislature of Illinois, and failed to pass only because this journal sounded the alarm in time. But there is not a day while the Legislature is in session when such a bill may not be pushed through corruptly, and it will then be too late to take those proper precautionary steps which ought to be taken now. The city of Chicago has too much at stake to submit to have a city two miles long and one mile wide planted between it and Lake Michigan, particularly when that city will be the property of a private corporation, having an irrepealable charter.²⁰¹

This was to be the first of many pleas throughout 1868 for federal legislation to forestall state legislation granting private rights in the lakefront. The legal understanding underlying these pleas was muddled at best. On the one hand, if the problem was the possibility that Lake Park and the lakebed had been reserved by the federal government when it agreed to the sale of land in fractional sections 15 and 10, then federal legislation would clear the matter up. But it was hard to see how, on this view of the problem, a grant of land by the state legislature was any threat; the State could not sell land belonging to the federal government. On the other hand, if the problem was that title to the bed of Lake Michigan had already been conveyed from the federal government to the State in 1818 by operation of the equal

²⁰⁰ *The Future Harbor of Chicago*, Chi Trib 2 (Jan 1, 1868). The paper had already urged federal legislation toward this end. See text accompanying notes 155–68 (discussing the paper's 1867 editorial exchange with its readers concerning ownership of Lake Park).

²⁰¹ *Id.*

footing doctrine, then it was hard to see how federal legislation would provide a solution. The federal government presumably could not retroactively revoke the grant after statehood and confer title on someone else. On this view of the problem, only the General Assembly could clear up the City's title by conveying the appropriate rights to the City through state legislation. For most of 1868, however, although the participants in the debate clearly understood that uncertainty about property rights was at the root of the controversy, they showed little sign of agreeing on or even comprehending the exact nature of the property rights problem.

Another issue that came to the fore about this time and complicated the debate was the desire for more Chicago parks. According to one source, it was "a generally conceded fact that Chicago is remarkably destitute of breathing places for its population."²⁰² The biggest stumbling block was money, both to acquire land and to make it suitable for public recreation.²⁰³

Lake Park was seen by many as presenting a possible solution to the dearth of parkland. Interestingly, north Lake Park—the area that the Fort Dearborn Addition plat had declared to be a "public ground" forever "vacant of buildings"—was not at this time thought to be fit for park purposes. As one account put it:

The limited area, and the noisy surroundings of this property, together with the receding movement of population, have rendered it almost useless as a pleasure-ground. In fact its only public utility has been that of a dumping-place for cellar excavations, street-sweepings, coal-ashes and other refuse material²⁰⁴

It was, however, possible to envision south Lake Park serving as a green spot for public recreation. Thus, the *Tribune*, among others, proposed that north Lake Park, augmented by landfill between the eastern edge of the existing park and the Illinois Central right of way, be sold, and the proceeds (which it was assumed would go to the City) used to augment south Lake Park. Such a sale, as the *Tribune* saw it, would "net a magnificent sum which would amply suffice to give Chicago the finest public park west of New York."²⁰⁵ Thus, even that newspaper—its credentials as a defender of the lakefront established from its opposition to Shepard's legislative efforts in early 1867²⁰⁶—

²⁰² *Important Park Project; Proposition to Sell a Portion of the Lake Park for Business Purposes*, Chi Trib 4 (Dec 10, 1867).

²⁰³ See, for example, *The Lake Park Report*, Chi Trib 2 (Jan 15, 1868).

²⁰⁴ *The Park Question*, Chi Trib 2 (Dec 4, 1868).

²⁰⁵ *Important Park Project*, Chi Trib at 4 (cited in note 202).

²⁰⁶ See text accompanying notes 182–84 and 195–96. Although we stand by the statement in the text, it is worth noting that the *Chicago Times* regarded its rival the *Tribune* as vulnerable on lakefront and park matters. In particular, the *Times* in 1867 delighted in noting that William

thought it “probable that the property will be offered for sale at an early day.”²⁰⁷

The proposal to sell part of Lake Park was not idle chatter. Some time in late 1867 or early 1868 the City entered into negotiations over a possible sale of north Lake Park to the Illinois Central and other railroads for purposes of constructing a new passenger depot. Three railroads were involved in the discussions, since the Illinois Central by this time had granted trackage rights to the Michigan Central Railroad and the Chicago, Burlington & Quincy Railroad, and each of the three carriers used the lakefront entrance and the Illinois Central depot and terminal facilities.

The matter underwent extensive consideration by a special committee of the Common Council. In January 1868, the committee reported that two meetings had taken place with officers of the Illinois Central and other railroads, which had offered \$800,000 for north Lake Park.²⁰⁸ The committee’s reaction was positive but carefully hedged: “our opinion would be that if the city could legally sell the aforementioned strip of land for what it is worth, without doing injustice to private interests, she ought to do so”²⁰⁹ The committee reasoned that the land would never be of much value for park purposes,

Bross was among those interested in a South Side park project. See, for example, *The Proposed Park; The Imbroglia about It at Springfield*, Chi Times 8 (Feb 20, 1867). Bross was a part owner of the *Tribune* and served as lieutenant governor of Illinois during 1867, and by virtue of the latter position presided over the Senate during that time. Bross’s name arose in Shepard’s 1867 efforts as well, but it is unclear whether his name (along with that of Scammon and others) had been included only in an attempt to give the initiative credibility, as the *Tribune* maintained, see *Chicago Dock Bill*, Chi Trib at 1 (cited in note 174) (“Mr. Scammon, Mr. Bross and Mr. Walker, and, we believe, one or two others, disclaim any participation in the preparation of this fraud upon the public, and denounce it roundly.”). The *Tribune* contended that “the real corporators are Mr. Melville W. Fuller, and his immediate circle.” *Id.* This response of the *Tribune* is unsurprising because, unlike Bross, a Republican, future Chief Justice of the United States Fuller was a Democrat (and thus more likely to receive favorable treatment from the *Chicago Times* than from the *Tribune*). See generally Part V.A (observing difficulties associated with extracting reliable information from partisan nineteenth-century newspapers). For a look into the fierce rivalry between the two newspapers, see Frederick Francis Cook, *Bygone Days in Chicago: Recollections of the “Garden City” of the Sixties* 51–58 (A.C. McClurg 1910), which recounts the brief military suppression of the *Chicago Times* during the Civil War and the consequent threat from its supporters to publication of the *Chicago Tribune*. President Lincoln himself rescinded the suppression order. See *id.*

²⁰⁷ *Important Park Project*, Chi Trib at 4 (cited in note 202).

²⁰⁸ The railroads actually made two proposals. Under the first, for which the railroads offered to pay the City \$400,000, the railroads would acquire north Lake Park for a new depot, and would undertake to fill in, bring to grade, and otherwise improve south Lake Park. The railroads estimated that this project would take four to five years. Under the second, for which the railroads offered to pay the City \$800,000, the railroads would acquire north Lake Park, and the City would undertake any renovations to south Lake Park on its own. *Lake Park; The Report of the Committee Appointed by the Council; Offer by the Railroad Companies to Fill the Basin, and Buy from Randolph to Monroe*, Chi Trib 2 (Jan 15, 1868) (reproducing the committee report).

²⁰⁹ *Id.*

given its location in a commercial area; that, with the proceeds of the sale, the City could make “out of what is now almost a barren waste and stinking pond [south Lake Park], a beautiful lakeshore park”; and that there would be enough money left over to purchase grounds for parks in outlying areas of the City, “without adding to our bonded debt or increasing the taxes for these necessary objects.”²¹⁰

The principal stumbling block identified by the special committee was whether the City had authority to sell the land north of Monroe Street. The committee found it “doubtful whether the city has a right to sell, even by quit claim,” the land in question; indeed, it conceded that the City’s claim to the title of *any* part of Lake Park was questionable.²¹¹ Accordingly, the committee “urge[d] that steps be taken at an early day for such legislation as shall be necessary to place the city’s title to the property beyond all question.”²¹² As to price, the committee regarded the railroads’ \$800,000 offer for north Lake Park as being merely an opening bid.²¹³

In mid-January 1868, the Common Council held a special meeting called by Alderman Wicker, who served on the special committee, to consider endorsing a proposed bill to be introduced in Congress. The purpose of the bill was “to secure the harbor interests of Chicago”²¹⁴ by providing “[t]hat all the right, title and interest of the United States in and to the lands and grounds constituting the bottom of Lake Michigan lying on the eastern frontage of the city of Chicago . . . for the space of one marine league eastward from the shore line of said lake” be ceded and conveyed to Chicago.²¹⁵

In a letter to the editor of the *Tribune* later that month, Wicker summarized the case for the proposed federal legislation.²¹⁶ Such legislation was a necessary step in securing a new depot, which “will not only be an ornament to the city, but a pride and convenience to our citizens”²¹⁷ More broadly, clarifying the City’s title to the lakefront

²¹⁰ *Id.*

²¹¹ *Id.* (limiting its discussion of the City’s rights to the land to raising the issue).

²¹² *Id.*

²¹³ See *id.* (“[W]e do not say that the offer . . . is such a one as the city ought to accept.”).

²¹⁴ *Common Council; Special Meeting—The Harbor and Lake Shore*, Chi Trib 4 (Jan 16, 1868).

²¹⁵ *Id.* (quoting section 1 of the draft bill). The permitted uses and purposes included “constructing docks or enlarging the harbor accommodations of said city,” with the Secretary of War and the Corps of Engineers to supervise the project, and “reserving or laying out [portions of the land] as a public park.” *Id.* (quoting sections 2 and 3 of the draft bill). The restrictions were that the entrance to the Chicago River could not be obstructed, that any construction of “docks, piers, breakwaters, or other works” had to be undertaken in “the manner most serviceable to the navigation of Lake Michigan,” and that none of the construction expense could devolve upon the United States. *Id.* (quoting section 2 of the draft bill).

²¹⁶ See Chas. G. Wicker, *The Lake Park Question*, Chi Trib 2 (Jan 26, 1868).

²¹⁷ *Id.*

would lay the foundation for a new outer harbor whose development would be securely controlled by the City and would yield “a revenue of hundreds of thousands of dollars a year” in leases.²¹⁸ Finally, the proposed legislation was imperative to head off attempts by private adventurers to wrest control of the site of the future harbor away from the City:

Twice within a few years bills have passed one branch of our State Legislature, granting to individuals the whole of Lake Park and outward harbor privileges. . . . The men that have been engaged in getting up these bills understand the whole question, and so long as its ownership is undecided, it will be a tempting bait for them.²¹⁹

As if to punctuate Wicker’s concerns, the publicity about a possible sale of north Lake Park caught the attention of the same forces that had sought to secure grants of the lakefront in the 1867 legislative session, with the result that a kind of bidding war broke out. Henry M. Shepard, Fuller’s law partner, who had been so active in efforts to obtain the submerged land as a member of the legislature in 1867, publicly offered to purchase north Lake Park for \$1,000,000, or \$50,000 annually for a ninety-nine-year lease.²²⁰ Two weeks later, another lawyer (making explicit reference to Shepard’s offer) upped the ante, offering “for the fee of said premises, the sum of \$1,250,000 in cash, or for a ninety-nine years’ lease thereof, an annual rent of \$60,000.”²²¹

Some others dissented from the idea of a sale of any part of Lake Park. A group of leading citizens—including a former mayor, John C. Haines, and such legendary names as Thomas Hoyne, John Wentworth, and Potter Palmer—signed a remonstrance sent to the Common Council opposing any sale. The remonstrance included perhaps the first invocation of the idea of a public trust with respect to the lakefront: it asserted that public grounds of the City “ought to be held forever sacred as the property of the public in *trust* for the enjoyment and use of all conditions and classes of poor, as well as the rich, among

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See *Common Council; Proposition from H.M. Shepard, Esq., to Buy a Part of Lake Park for \$1,000,000*, *Chi Trib* 4 (Feb 11, 1868) (quoting a letter from Shepard to the Mayor and Common Council). Shepard was careful, as a legal matter, to note that his offer was conditioned “upon the city being able to give a satisfactory title to the property named.” *Id.* And he was careful, as a political matter, to state that the offer was “made only upon the assumption . . . of its being the declared policy of the city authorities to dispose of the property in question for other than public uses.” *Id.*

²²¹ *Common Council; . . . Another Proposition to Buy a Portion of Lake Park*, *Chi Trib* 4 (Feb 25, 1868).

our people.”²²² This trust was said to extend to “future generations,” which “have in this regard far higher claims of property than whatever demand may arise out of the business necessities of railroad and other corporate monopolies”²²³ The remonstrators acknowledged the importance of parkland for the City, but thought that this counseled in favor of retaining all of Lake Park, as opposed to selling part of it with the proceeds to be used for other parks:

[I]t would seem that a sound policy imperatively demands that the Lake Park, on the front of our city, should be held according to the original conditions of the grant by the State and the United States, forever free and open, the principal and crowning natural beauty in the city we occupy—an open reservoir of fresh air among the otherwise crowded thoroughfares and compact masses of buildings.²²⁴

The remonstrators even opposed legislation conferring title on the City, for in their view “the title of said property is by operation of law according to the nature of such deductions, now clearly vested in the general public or whole people, and not the corporation of Chicago”²²⁵

No side had enough force entirely to prevail in the Common Council in early 1868—not those seeking to support federal legislation, nor those seeking to sell a portion of Lake Park to the railroads (there was some overlap in those groups), nor those opposed to either action. This stalemate greatly frustrated the editors of the *Tribune*, who continued to press their case for the need for federal legislation perfecting title in the City (whether some portion would then be sold to the railroads or not). They reminded their readers that “[I]ast winter certain parties went to Springfield with two or three cunningly devised bills to steal the ground constituting the lake basin, and to take away from the public the entire lake front outside of the breakwater.”²²⁶ They predicted similar efforts in the 1869 legislative session, and saw federal legislation perfecting title in the City as “at least render[ing] it more difficult for the light-fingered tribe to secure their

²²² *Common Council*, Chi Trib at 4 (cited in note 220) (quoting the remonstrance to the Mayor and Common Council) (italics in original). This was a relatively novel use of the term “trust.” The trust originated as a conveyancing device, see John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L J 625, 632 (1995) (discussing the medieval origins of the trust), and only in relatively recent times has come to be used as a term to describe a variety of fiduciary obligations, including duties owed by government to the general public.

²²³ *Common Council*, Chi Trib at 4 (cited in note 220).

²²⁴ *Id.*

²²⁵ *Id.* The word “deductions” here probably should have been “dedications.”

²²⁶ *The Lake Front*, Chi Trib 2 (Feb 12, 1868).

booty.”²²⁷ The paper had no use for the signers of the remonstrance, insofar as they opposed the legislation out of fear that it would then lead to a portion of the land’s being sold; the *Tribune* thought that inaction was more likely to result in Fuller’s and his cohorts’ gaining control of the lakefront. The paper wrote of the remonstrance:

If it had been a petition to invest the eminent law firm of Fuller & Shepard with the title to the lake basin and everything east of it, it would probably have been signed with equal alacrity, and it could not have been framed more effectually to put the title into the hands of private parties. Is it likely that the framers and beneficiaries of the Harbor and Dock bill, and of the Skating Park bill of last winter would leave the lake front open for purposes of ventilation, if they should ultimately carry their measure through the Legislature? . . . [D]oes anybody suppose that they went to Springfield last winter to secure a breathing-place for the people of Chicago?²²⁸

The newspaper held out hope that the Council “will maintain its propriety, notwithstanding this display of fireworks and gymnastics, and quietly do its duty.”²²⁹

As 1868 drew to a close, the Mayor and the Common Council began to bestir themselves. In early December 1868, prompted by the Mayor, a committee of the Common Council recommended that the City obtain from the State and from Congress “such legislation as will place the city’s title to [Lake Park] beyond all controversy, and secure also the submerged land, or the bottom of Lake Michigan, lying in front thereof, for the distance of one marine league from the shore.”²³⁰ The proposal would have afforded the City the ability to lease the submerged land and to sell at least part of Lake Park, the latter conditioned upon approval of three-fourths of the Common Council. Here we see for the first time the faintest glimmer of comprehension of the full complexity of the property rights problem. If the City were to obtain *both* federal *and* state legislation confirming the City’s title to Lake Park and the bed of Lake Michigan, this presumably would cover all the bases, which reveals that someone advising the City finally understood that there were a number of bases that had to be covered.²³¹

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Lake Park*, Chi Trib 2 (Dec 9, 1868). See also *The Council; Regular Meeting of the Board of Aldermen; . . . The Title to Lake Park—A Communication from the Mayor*, Chi Trib 4 (Dec 1, 1868) (quoting Mayor’s request that the council so recommend).

²³¹ Defenders of the proposed legislation sounded several by now familiar themes. First, they hearkened back to the 1867 legislative efforts on the part of private parties to secure the

Yet although the committee of the Common Council was willing to seek federal and state legislation securing title to the lakefront in the City, it was not prepared to endorse the proposed sale to the railroads. This caution seems to have been born partly from negotiating tactics and partly from political concerns. Those associated with the City had been reluctant throughout the year to name a price for the transaction. Undoubtedly, no one on the committee of the Common Council wanted it said that the railroads had gotten a “steal” from him in obtaining the land on terms that turned out to be too favorable. Further, with numerous prominent citizens being firmly on record as opposed to the sale of any portion of Lake Park, there was little margin in being the first to favor a sale.

At the end of 1868, the Common Council adopted the committee’s recommendation that the City seek federal and state legislation securing Chicago’s control over the lakefront.²³² Like the committee, the Council deferred any action on whether or on what terms north Lake Park might be sold to the railroads.²³³ As the first step in its legislative efforts, the City prepared to send to Springfield a deputation, headed by Alderman Joshua Knickerbocker, who also served in the Illinois House of Representatives, to seek the desired legislation in the upcoming legislative session.

What was the attitude of the Illinois Central toward the public debate in 1868 about the future of the lakefront? Unfortunately, the surviving correspondence for 1868 sheds little light on the views of the railroad. Some things are clear, however, either explicitly from the Common Council documents or implicitly from newspaper articles and editorials. On the one hand, we know that the railroad was eager to obtain north Lake Park for depot purposes,²³⁴ that it was directly in-

same land, with the *Tribune* reporting that “[w]e are now able to state as a fact that the scheme which failed then will be renewed this winter, and that a powerful combination has been formed to get possession of this land.” *The Lake Front*, Chi Trib 2 (Dec 2, 1868). Second, they emphasized the need for the construction of an outer harbor, and one whose revenue went to the City, not private parties. See *id.* See also *The Future Harbor of Chicago*, Chi Trib 2 (Nov 25, 1868). Third, they linked the sale to the railroads of any portion of Lake Park (and legislation perfecting title in the City was a condition precedent to any such deal) with the opportunity to secure funds for parkland throughout the City, which “is now practically destitute of park privileges.” *Park Question*, Chi Trib at 2 (cited in note 204). The *Tribune* compared Chicago unfavorably, with respect to the availability of park grounds, with eastern cities such as New York and Philadelphia. It acknowledged that “[t]he advantages afforded by a beach of unsurpassed beauty give promise of a magnificent future for Lincoln Park,” but noted that “it is not adapted to satisfy the wants of the South and West Divisions of the City.” *Id.*

²³² See *The Council; Regular Meeting of the Board of Aldermen; Another Park Project—The Proposed Sale of a Portion of Lake Park*, Chi Trib 2 (Dec 29, 1868).

²³³ See *id.*

²³⁴ There survives in the archives of the Common Council a petition from the railroads seeking a sale of the land in question. Petition of I.C. R.R. Co., C.B. & Q. R.R. Co. and M. C. R.R.

volved in negotiations with members of the Common Council concerning a price for the proposed transfer, and that it was aware of the efforts of others to obtain title to or a lease of this land. On the other hand, there is no evidence based on these sources that the railroad had any interest at this time in anything other than north Lake Park—no evidence, in particular, that it had any designs on the submerged land that was envisioned for an outer harbor.

The failure of the Common Council to reach an agreement on price with the Illinois Central, combined with the unsettling prospect of a bidding war for the rights to north Lake Park, undoubtedly caused the railroad to rethink its situation along the lakefront, and more particularly its support for the City's efforts to obtain legislation clarifying the City's title to the lakefront. The *Tribune*, in a remarkable analysis at the end of 1868 that appears to have reflected the views of the officers of the Illinois Central, warned the City's political leaders that their failure to nail down an agreement with the railroad might induce it to turn to Springfield, not as an ally but as a competitor:

The committee reported that it was inexpedient to take any action on the proposed purchase of these three blocks by the railroads. We think this was a mistake, for, if the railroads should go to the Legislature direct, instead of dealing with the Council, they could, perhaps, get the property for a good deal less money than they are willing to pay the city for [it]. . . . There has been a good deal of unnecessary shivering over this question. Probably some Aldermen are afraid that their motives will be misconstrued The philosophy of the case, as we understand it, is this: The railroads need the ground very much. The city does not need it at all. The railroad managers believe that it is cheaper in the long run to have a fair and square transaction with the city, consummated in the face of the whole world, rather than to incur public odium and hostility by going to Springfield this winter as competitors with the city in the effort to obtain a title to the ground. In our view the only point to be considered is the one of price. Here there will, perhaps, be a disagreement, and if the railroad men are not willing to pay what the ground is worth, there will be good reasons for ending the negotiation.²³⁵

With this commentary, the *Tribune* had gone halfway toward unlocking the logic that impelled the Illinois Central to seek the Lake Front Act of 1869. Two issues were on the table: the future of north Lake Park, and the future of the outer harbor. With respect to both is-

Co. (Nov 30, 1868), available in Illinois Regional Archives Depository, Northeastern Illinois University.

²³⁵ *Lake Park*, Chi Trib at 2 (cited in note 230).

sues, the railroad's general position theretofore had been that the City should get clear title, and then deal with the railroad on terms the railroad regarded as fair. But what if the City got clear title, and then held up the railroad? Or worse, what if the City got clear title and then dealt the property to a rival group of entrepreneurs? If the City could not be relied upon to deal with the railroad on advantageous terms, then would not the railroad be better off going to the legislature in an effort to get both sets of rights transferred to the railroad directly? It is unclear when exactly the Illinois Central reached this conclusion.²³⁶ However, once the new legislative session began in January 1869, it soon became apparent that this was the railroad's intention and plan.

V. 1869: CHICAGO AND THE ILLINOIS CENTRAL GO TO SPRINGFIELD

A. A Note on Newspapers and State Legislatures in the Mid-Nineteenth Century

Before turning to the critical events of the 1869 Illinois legislative session, we offer some preliminary observations about the sources on which we primarily draw in reconstructing those events, and the institution in which those events transpired—the Illinois General Assembly.

Our principal primary sources are contemporary newspaper accounts.²³⁷ These include not only the daily Chicago newspapers, which had a special interest in legislative matters touching upon the lake-front, but also the *Daily Illinois State Journal*, published in Springfield, as well as certain other downstate newspapers.

Two related problems arise for anyone who seeks to use mid-nineteenth-century newspapers in an effort to reconstruct a historical event. The first is that the papers of the day were overwhelmingly partisan. They perceived their role as being not just to inform but also to persuade, and this latter purpose suffused reporting and editing deci-

²³⁶ One intriguingly ambiguous letter from Douglas to Charles Joy, President of the Chicago, Burlington & Quincy Railroad, dated November 21, 1868, may suggest that the railroad chieftains had settled upon the plan by that date:

My Dear Sir:

I have your letter of the 19th Inst., and am delighted with its import.

You will not be embarrassed by our attitude; we shall maintain this upon its own merits. I see the posture of [the] Michigan Central interests. Again I say I am gratified by your letter beyond expression.

Yours very truly
John M. Douglas
Pres.

The letter to which Douglas was replying has been lost.

²³⁷ See text following note 20 (noting variety of sources).

sions to a much greater extent than today. Today's newspapers are structured so that readers can easily differentiate among news articles, official editorials, op-ed pieces, letters to the editor, and advertisements. All of those formats existed in the nineteenth century, but the distinctions among them were less perceptible to the reader—and probably to those producing the newspaper as well. Thus, it is not unusual, in reading a newspaper of the period, to find oneself uncertain whether a particular piece was intended to be a factual account of events in Springfield, or an expression of the newspaper's hopes and desires as to how a particular matter would come out, or some of both.

The partisan nature of the newspapers affected the style of writing, which was often shrill and accusatory. This is of particular importance to us because of the local tradition of referring to the 1869 Lake Front Act as the "Lakefront Steal," and the inferences that some authors have drawn from this.²³⁸ The description of the Act as a "steal" can be traced to contemporary newspaper reporting. For example, an 1869 article reported that the then-pending lakefront bill was "understood to be the biggest 'steal' and outrage that has ever been perpetrated upon any city, Chicago being in this case the victim, and the Illinois Central the thief."²³⁹ And an 1873 newspaper article cried, in part, "The Lake Front Steal—Let It Be Repealed!"²⁴⁰

It turns out, however, that the word "steal" was rather commonly used by mid-century Illinois newspapers to describe disfavored legislative proposals. Sometimes the word was employed to suggest that a legislative enactment had been procured through corrupt means. Other times the word suggested that a law was passed surreptitiously, or without adequate public debate or consideration.²⁴¹ At yet other times, all that was meant was that the measure would result in someone's getting unduly favorable treatment—what is today often termed a "sweetheart deal."²⁴² In fact, this last meaning of the word "steal"

²³⁸ See note 19 and accompanying text (collecting sources).

²³⁹ *The Illinois Legislature*, Peoria Daily Transcript 1 (Feb 23, 1869). This would not be this newspaper's ultimate view of the Lake Front Act. See note 363 and accompanying text.

²⁴⁰ *The Legislature and Mr. Reynolds; The Lake Front Steal—Let It Be Repealed!*, Inter-Ocean (Chicago) 2 (Mar 4, 1873).

²⁴¹ For example, in discussing the so-called Skating Park Bill of 1867, the *Chicago Times* termed it the "Michigan Park Steal." *Michigan Park Steal*, Chi Times at 4 (cited in note 186). Yet while denouncing the bill's leading proponent, Henry M. Shepard, in harsh terms, and suggesting that he was attempting to secure the land without adequate public consideration of the matter, the newspaper did not suggest that Shepard had resorted to bribery or other corrupt means. The idea, instead, seemed to be that the measure was illegitimate because of the surreptitious way in which it was introduced and promoted.

²⁴² In 1867, the Illinois legislature debated whether to build a new statehouse in Springfield, as opposed to moving the statehouse to another city. As described by one irate newspaper, Springfield had maneuvered to pay \$200,000 for the existing statehouse ("which is said by good judges to be less than half what the property is actually worth at the present time"), and then made "a condition of the purchase that the state shall erect a new state-house at a cost of

continues in use today in commercial settings, as in the sentence, “At this price, the car is a steal!”

A second and related difficulty presented by newspapers as sources is that sometimes they simply made things up.²⁴³ For example, it appears that newspapers would occasionally invent interviews with individuals that had not occurred, or even report interviews with people who did not exist.²⁴⁴ In an account of these practices, a Washington, D.C. correspondent for the *Tribune* called upon readers to stamp every interview of “great and little men” coming out of the nation’s capital “as three parts lie and one part eavesdropping,” and proceeded to provide evidence that other publications had fabricated interviews and statements of those said to have been interviewed.²⁴⁵

To be sure, there was considerable reason to doubt the integrity of some elected officials in the Gilded Age. The Credit Mobilier scheme, revealed in the early 1870s, which had involved, among other things, efforts of some associated with the Union Pacific Railroad to line the pockets of various Congressmen, is but one well-known example.²⁴⁶ But the reality remains that fabricated stories and overheated rhetoric were endemic to the newspapers of the era and require that much reporting be taken with a large grain of salt.

It is also useful to say a few words about the culture of Springfield, for which we draw upon the same sources—contemporary newspapers—with the same caveats. The men elected to serve in the Illinois General Assembly would descend upon Springfield generally only once or twice during their term of office, and usually for only two or three months early in the year in which a session was held. They came from a variety of walks of life, with the practice of law probably being the most common. It appears that many members did not stand for reelection; consequently, for these members their legislative experience consisted of one relatively brief interlude. Upon their arrival

\$3,000,000.” *Chi Times* 1 (Feb 9, 1867). The unsympathetic newspaper denounced this as “a real estate ‘steal’ of no ordinary size.” *Id.*

²⁴³ See Mark W. Summers, *The Press Gang: Corruption and the Independent Press in the Grant Era*, 17 *Cong & The Presidency* 29, 32 n 9 (1990) (collecting examples).

²⁴⁴ This is not to suggest that similar events never occur today. See, for example, Daniel A. Levin and Ellen Blumberg Rubert, *Promises of Confidentiality to News Sources after Cohen v. Cowles Media Company: A Survey of Newspaper Editors*, 24 *Golden Gate U L Rev* 423, 458 n 123 (1994) (recounting an infamous 1981 incident in which *Washington Post* reporter Janet Cooke fabricated an eight-year-old heroin addict and won a Pulitzer Prize for the reporting before the fabrication was uncovered); Howard Kurtz, *N.Y. Times Uncovers Dozens of Faked Stories by Reporter*, *Wash Post* A1 (May 11, 2003) (recounting the Jayson Blair saga at the *New York Times* and alluding to the Stephen Glass affair at *The New Republic*).

²⁴⁵ *Washington; . . . The Abuses of Interviewing*, *Chi Trib* 2 (Nov 26, 1870). For other evidence of the practice of attributing statements to individuals who had not made them, see James Parton, *Falsehood in the Daily Press*, *Harper’s New Monthly Mag* 269 (July 1874).

²⁴⁶ See David Howard Bain, *Empire Express: Building the First Transcontinental Railroad* 675–711 (Penguin 1999).

in Springfield, the legislators took up lodgings in boarding houses or at the Leland Hotel. During the day, they would run into lobbyists at nearly every turn—on the floor of the legislative chambers, in the hallways of the capitol. In the evenings, released from their daily routine and, in many instances, the watchful eye of wives and neighbors, liquor flowed freely, and cigars were consumed with equal gusto, in the dining room and bar at the Leland. The consumables—and perhaps a few other vices as well—were almost certainly underwritten by the lobbyists.

The lobbyists, many of whom were former legislators or elected local officials from throughout the State, constituted an integral part of the legislative process. Springfield was a city where there was money to be made, given the types of matters with which the legislature was dealing—chartering corporations, approving railroads, establishing park districts.²⁴⁷ How much influence did the lobbyists wield? The issue is addressed at length in a story published by the *Chicago Tribune* during the height of a pitched battle in 1867 over a proposed bill to regulate warehouses.²⁴⁸ The newspaper's Springfield correspondent, who signed his piece "A Looker on in Venice," purported to recount an evening conversation with "[a]n old and experienced lobbyist, who is retained by the elevator gang to help defeat the bill . . ."²⁴⁹

According to this account, the lobbyist allowed that legislators "are merely men, mostly poor—generally living on their wits; a majority of them lawyers, whose profession and practice require them to receive fees for advocating and defending wrongs as well as rights."²⁵⁰ He stated that "some of them are 'retained' to move amendments to the bill proposed to be beaten, under pretence of making it more per-

²⁴⁷ The importance of the lobby is captured in the following short article from an 1869 newspaper (which is instructive as well with respect to our previous discussion of the liberal use of the word "steal" in the newspapers); it is entitled, appropriately enough, "The Lobby":

Installments to this brench [sic] of the legislative department of Illinois have been unprecedentedly large this week. Every train brings fresh arrivals of old faces. The hotels, the bar rooms, the lobbies of both houses; in fact, in every place are to be seen, the manly and classic physiques of these disinterested public servants descanting to an overwhelmed [sic] statesman of one of the other houses on the popularity and importance of "my little bill," that "does not affect the interests of any one's constituents." St. Louis, Belleville, Alton, Carlinville, Jacksonville, Bloomington, Champaign, Quincy, Ottawa, Chicago and other "interior" towns have sent their "committees" to represent park measures, the Northwestern & Milwaukee and other railroads, gas, insurance companies, the Chicago baggage and omnibus monopoly [sic], Normal, Industrial and other universities, state institutions, court houses, county seats, ferries, etc., etc., until it is "railroads," "parks," "ferries," "bills," "d—d schemes," "steals," etc., on every side.

The Lobby, Ill St Register (Springfield) 1 (Feb 4, 1869).

²⁴⁸ *Springfield; . . . How Legislators Are Manipulated by the Lobby; A Powerful Combination to Defeat Anti-Monopoly Measures*, Chi Trib 2 (Feb 7, 1867).

²⁴⁹ Id.

²⁵⁰ Id.

fect.”²⁵¹ This was said to be “one of [the] favorite tactics” of Senator Alonzo W. Mack (on whom, more momentarily), as was getting matters recommitted for smothering or the addition of a hostile amendment.²⁵²

With respect to the specific matters of “honesty and bribery,” the unnamed lobbyist analogized legislators to “the metals and some other substances.”²⁵³ Just as different degrees of heat were required to melt iron, zinc, tin, or copper, at one end of the continuum, and gold or silver, at the other end, so were different amounts of money required to move legislators. To the question whether he could “buy the vote of any member” — “Are there no diamonds among them?” — the lobbyist is reported to have said, “Yes. We can purchase *any* member’s vote; but there are some who are like the diamond, and to buy them costs far more than their votes are worth. Even the *diamond* gives way before intense heat.”²⁵⁴ Of course, to say that a “cheap vote” was as useful in a roll-call vote as a “*dear* vote” was not to deny that “it is necessary to secure the services of some shrewd, sharp, experienced rascals, like Senator — —, (you know who I mean,) to pilot our bills, amendments, motions and parliamentary manoeuvres; else the whole craft might be shipwrecked and go to the bottom.”²⁵⁵ The correspondent reported that the conversation ended when, “after reaching the fourth pot of punch and the third ‘Havana,’ my lobby friend said that he guessed I had taken degrees enough for one sitting, and that it wasn’t best to learn too many things at one time.”²⁵⁶

What is one to make of this report? It is possible that the reporter faithfully recounted an actual conversation. It is possible as well that no such conversation ever occurred. We must take from this report, and others, what can be corroborated elsewhere and be cautious with the remainder.

It is also useful to discuss the background of the Illinois Central’s principal lobbyist in 1869, one Senator/Colonel/Captain/Doctor Alonzo W. Mack, and his role at the scene of much important backstage lobbying activity, the Leland Hotel. Mack was a native Vermonter who had moved west in stages, arriving in Illinois after completing medical studies.²⁵⁷ He became involved in Republican politics as well and took up the practice of law. He also served for a brief time

²⁵¹ *Id.*

²⁵² *Id.* (attributing such tactics to other legislators as well).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See Newton Bateman and Paul Selby, eds, *Historical Encyclopedia of Illinois* 348 (Munsell 1902) (providing a brief biography).

as the editor of the *Chicago Republican*. In 1862, Mack helped to organize at Kankakee the 76th Regiment Illinois Volunteers for participation in the Civil War. Commissioned a colonel, he served as commander until early 1863.²⁵⁸

Mack was elected to the Illinois House in 1858 and then to the Senate in 1860 and again in 1864. During the 1867 session of the legislature—his last term as a member—Mack played a central role in ensuring that the growing populist sentiment did not result in laws regulating the railroads.²⁵⁹ He was sufficiently impressive and influential that he received extraordinary committee assignments—so much so that the *Chicago Times* (a Democratic newspaper and thus not well-disposed toward Mack during his legislative career) expressed alarm over the extent to which he seemed to chair or serve on every significant committee. His chairmanship of the committee on railroads was especially concerning, as the *Times* regarded a majority of that committee's members as “[m]en who, on account of a plentiful lack of brains, will interpose no argumentative obstacles which Doctor Alonzo W. Mack will not find the way to overcome.”²⁶⁰ The newspaper went on to note that Mack was also on the next-most important committee, that on banks and corporations (where oversight by another member would be futile as “[n]o one man is capable of a task so great” as “doing all the watching which Mack needs”) and the committee on swamp lands.²⁶¹ “In fact, Mack is on all the committees where there is any selling or trading to be done, or any money to be made”²⁶²

In 1869, Mack was no longer a member of the Senate, but the Illinois Central retained him to represent its interests with respect to the Chicago lakefront. He set up shop at the Capitol during the day and

²⁵⁸ See *id.*

²⁵⁹ See George H. Miller, *Railroads and the Granger Laws* 68–70 (Wisconsin 1971). The 1867 legislative session was especially significant because it was the first full session since the Civil War had ended. See John H. Keiser, *Building for the Centuries: Illinois, 1865 to 1898* 39 (Illinois 1977) (noting post-war social and economic pressures on the legislature to pass private laws such as those chartering corporations).

²⁶⁰ *Significant Indications*, *Chi Times* 4 (Jan 9, 1867). This newspaper may have held particular enmity toward Mack because he “was one of the leading spirits in the establishment of ‘The Chicago Republican,’ in May, 1865” and briefly worked for that rival publication before resuming the practice of law in Chicago. Bateman and Selby, eds, *Historical Encyclopedia of Illinois* at 348 (cited in note 257).

²⁶¹ *Significant Indications*, *Chi Times* at 4 (cited in note 260).

²⁶² *Id.* Lest that statement be too subtle, the newspaper added this:

There is talk about appropriating \$500 to each member, in addition to salary, to enable him to pay whisky bills, and possibly in the hope of keeping him reasonably honest. There will be no need of any such appropriation to the chairman of the committee on railroads for the first-mentioned purpose, and as to the second, it would be both effort and money wasted.

residence at the Leland Hotel during the evening. One newspaper's correspondent described the latter scene thus:

Now, you must understand that there is no jumbling and mixing up of people at the Leland House dinner-tables. Each one is tenanted by a peculiar set, and, when a man leaves one and goes to another, it is understood that he has abandoned one class of opinions and adopted a different one. This is very convenient, and saves embarrassing mistakes. Thus there are a couple of tables reserved for the ladies. Of these I say nothing, since there is nothing to be said. At others sit strangers, chance visitors; at others, men who have business—legitimate business—with the Legislature; at another, members who claim to be honest; at another, men who are in the market. Of course, there is no sign out, but it is understood that “every article at this table is unconditionally offered for sale.” Then there is another for special lobbyists, at which presides—*sicut inter ignes, Luna minores*—Dr. Mack. When a person leaves the “honest men's” table and goes over to that of the “corruptibles,” it is an intimation that he is ready to listen to proposals. As some virgin, hitherto shy and coy, courting the domestic shade, plain in her attire, and flying the advances of men, suddenly becomes bold and forward, gaudy in her apparel, a frequenter of parties, and a pursuer of a husband, so does some member, forsaking his accustomed seat and the waiter he so long has feed [that is, tipped], seek a new table and new associates, and there are *vestigia nulla retrorsum*—ne'er a one of them goes back again.²⁶³

This description is of particular interest because it is set forth in the context of discussing one Senator Coy, from Kendall County, whom the newspaper denounced for supporting the lakefront bill. Shortly after the foregoing excerpt, the newspaper account continues concerning Senator Coy:

The business of the session commenced, and I began to see more nearly the course pursued by my man. The Lake Front bill came up, and he supported it, supported it zealously, for he had enjoyed the privilege of dining at Dr. Mack's table, and of learning from that person, just precisely how things stood. He was one of the first recruits—no eleventh hour convert, but an early believer in the doctrine of the poet: “Heaven sent us here to vote and trade.”²⁶⁴

²⁶³ *Springfield; Coy; Coy in the Dining Room—Like Seeking Like; Coy in the Legislative Hall and on Bills; Coy on Coy; Coy on the Tribune, Chi Trib 2 (Mar 10, 1869).*

²⁶⁴ *Id.*

One can see in this description the way in which newspapers could insinuate dishonesty, although in this one instance the correspondent allowed that “[i]t would be wrong to say [Senator Coy] was bought, for I am confident he has received no money.”²⁶⁵ By way of apparent explanation, however, it was noted that “[t]he Legislature has not yet adjourned, and the bill has not passed the Senate.”²⁶⁶ In other words, the railroad was not going to pay for anything short of the finished product.

B. The Lake Front Act of 1869

The City of Chicago made the opening bid for control of the lake-front in 1869. On January 13, Representative Knickerbocker, who, as noted previously, served also as an alderman on the Common Council, introduced House Bill 373, a bill designed to transfer whatever rights the State held in Lake Park and the submerged land east of Lake Park to the City.²⁶⁷ The first section would have given the City all of the State’s interest “in and to the submerged lands and grounds constituting the bottom of Lake Michigan, lying on the eastern frontage of the city of Chicago . . . for the space of one league eastwardly from the shore line of said lake.”²⁶⁸ The second section authorized the City, after consulting with the federal government, “to enter upon the said submerged lands and grounds, and build and construct any such docks, piers, breakwaters or other works or cause the same to be so constructed and built,” so as to “enlarge the harbor of said city, and promote and encourage the commerce upon, and the navigation of the said lake.”²⁶⁹ The third section specified that the lands so granted “are to be held in trust forever for the uses and purposes aforesaid”; more specifically, the City was forbidden to alienate the lands (although certain types of leases up to ninety-nine years would be permitted).²⁷⁰ The fourth section ceded to the City any interest the State had in Lake Park.²⁷¹ This section of the bill also permitted the City to sell all or part of Lake Park, so long as a supermajority of its aldermen (three-

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See 1 *Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Illinois* 239 (Springfield 1869) (1 1869 *Illinois House Journal*) (reflecting the introduction of “[a]n Act to enable the city of Chicago to enlarge its harbor, and to grant and to cede all the rights, title and interest in and to certain lands lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of said city”); *The Lake Park*, *Chi Republican* 1 (Jan 14, 1869) (providing the text of the legislation).

²⁶⁸ *Lake Park*, *Chi Republican* at 1 (cited in note 267).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See *id.*

fourths) concurred and the City advertised any proposed sale in newspapers for thirty consecutive days in advance.²⁷²

The City's newspapers were encouraged. Without predicting victory, the *Tribune* opined on January 16 that the City had not "acted an hour too soon": "Had the city delayed action, or had there been any serious division on the part of the Common Council, the probabilities are that at the adjournment of the Legislature, the Lake Park, as well as the bed of the lake three miles in front, would have passed into the hands of a Wall street corporation."²⁷³ After explaining that the City's proposals only perfected the City's title and "do not, as many people suppose, relate to the sale of any part thereof to railroad companies or others," the editors of the *Tribune* exhorted Cook County's delegation to vigilance and invoked the specter of 1867: "If the representatives of this county will vigorously guard the city against secret legislation, such as was attempted two years ago, until these bills are made laws, they will render the public a service which will be of perpetual value to this city."²⁷⁴

Meanwhile, the Illinois Central was busy plotting its own strategy. At the beginning of the year, Douglas had reported to Osborn that "[w]e are hard at work on the subject of the lake shore, and while the matter is undecided, the prospects are favorable."²⁷⁵ It is not entirely clear whether this referred to continuing efforts to come to terms with the City, or to newly hatched plans for separate legislation granting the lakefront directly to the railroad.²⁷⁶

The first visible sign of opposition to the City came not from the Illinois Central, but from legislators serving areas outside Chicago. Within days after the introduction of Knickerbocker's bill, "downstate"²⁷⁷ members began to question why such an economically valuable resource as the future harbor of Chicago should be reserved for the City. As the *Tribune* reported, some members of the legislature were opposed to the Chicago bill "on the ground that the harbor

²⁷² See *id.* Section four of the bill also authorized leases, but provided that they could not extend any longer than twenty years. *Id.*

²⁷³ *The Lake Park and Front Bills*, *Chi Trib* 2 (Jan 16, 1869).

²⁷⁴ *Id.*

²⁷⁵ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (Jan 4, 1869).

²⁷⁶ There is some indication that the railroad had not yet abandoned hope for a deal with the City. One of the newspapers reported—only a week after Knickerbocker's bill was introduced—that the Illinois Central was "offering the city of Chicago \$80,000 in cash for a quit claim deed for the property of the Lake Park from Randolph to Monroe streets." *Lake Park*, *Chi Republican* 1 (Jan 23, 1869). The offer may have been genuine, or—given the low amount (even for a quit-claim deed) and events that would soon be revealed—it may have been a feint.

²⁷⁷ In good Chicago tradition, we use the term "downstate" to refer to anything outside of northeastern Illinois, by which we mean Chicago and the surrounding six-county area of Cook, DuPage, Kane, Lake, McHenry, and Will Counties.

rights on the east front of the city belong to the State, and that if they possess any value they ought to be made a source of revenue to the State.”²⁷⁸ Indeed, within a week, Representative Merritt (of the southern Illinois town of Marion) introduced a competing measure in the House.²⁷⁹ The Merritt bill, which was expressly premised on the assumption that the State owned the submerged land under Lake Michigan, provided for the appointment of commissioners to appraise the value of the submerged land, determine the legal rights of the State to dispose of such lands, and report back at the next session of the legislature, to the end of “secur[ing] to all the People of the State, all benefit thereof.”²⁸⁰

For the next two weeks, downstate legislators increasingly spoke out against the City’s bill.²⁸¹ By January 25, the day that Knickerbocker’s bill was scheduled for discussion in the Committee on Municipal Affairs and Insurance, the *Chicago Republican* could report that “[s]hould this bill pass the committee it will probably meet with strong opposition by some country members, who have an idea that the bottom of Lake Michigan opposite the city belongs to the State of Illinois, and not to the city of Chicago.”²⁸²

The Illinois Central appears to have supported—and possibly organized—this opposition to the City’s bill. The *Chicago Republican* noted that “[t]he Illinois Central Railroad is hard at work through its lobbyists trying to convince the members of the Legislature that the city of Chicago has no title to the bottom of Lake Michigan opposite Chicago.”²⁸³ Here we have one of the first explicit suggestions that the railroad had designs on the entire harbor, as the paper speculated that if it succeeded at that persuasion, the Illinois Central’s next move would be “to try and convince the same men that the State of Illinois has no title in the lake” and that the railroad’s final step would be to “then attempt to prove, by virtue of its contract with the city of Chicago, [that] it owns the riparian right on the lake east of its own tract.”²⁸⁴

²⁷⁸ Chi Trib 2 (Jan 18, 1869).

²⁷⁹ See 1 1869 *Illinois House Journal* at 266 (cited in note 267) (reflecting introduction of House Bill 464, “An act to protect the State of Illinois in her rights to the soil covered by water of Lake Michigan in said State”).

²⁸⁰ HB 464, “An act to protect the State of Illinois in her rights to the soil covered by water of Lake Michigan in the State of Illinois,” 26th General Assembly (1869), available in the Illinois State Archives, Springfield, Ill.

²⁸¹ See Chi Trib at 2 (cited in note 278); *The Chicago Lake-Front*, Chi Times 2 (Jan 20, 1869); *Lake Michigan*, Chi Republican 1 (Jan 23, 1869).

²⁸² *Springfield*, Chi Republican 1 (Jan 25, 1869).

²⁸³ *Springfield*, Chi Republican 1 (Jan 24, 1869). See also *Chicago Lake-Front*, Chi Times at 2 (cited in note 281) (arguing that the Common Council’s decision not to sell land to the railroads for depot purposes compelled the railroads to appeal to the legislature).

²⁸⁴ *Springfield*, Chi Republican at 1 (cited in note 283).

But the Illinois Central was not content to play defense and rely on dubious claims that its right of way in the lake gave it riparian rights to all submerged land east of the right of way.²⁸⁵ In late January, a substitute bill that the Illinois Central had drafted—and that essentially constituted the Lake Front Act as finally enacted—was introduced in the House Committee on Municipal Affairs and Insurance.²⁸⁶ The substitute bill largely tracked the structure of the Knickerbocker bill, with four major exceptions. First, rather than giving the City title to the submerged land outside the breakwater for construction of a new outer harbor, the substitute bill conveyed this land to the Illinois Central, subject to the same prohibitions on alienation or impairing navigation as in the City bill.²⁸⁷ Second, rather than giving the City title to north Lake Park, under the substitute bill the State quit-claimed any interest it had in this land to the Illinois Central along with the other two railroads, and further directed that the City was to convey its interest in north Lake Park to the railroads, upon payment by the railroads to the City of \$800,000 in four installments.²⁸⁸ Third, the substitute added a provision directing that the Illinois Central was to remit to the state treasury 7 percent of the gross receipts from all leases or improvements to Lake Park or the submerged lands, in perpetuity,

²⁸⁵ Under the 1852 Ordinance, the right of way was clearly just an easement. It was highly implausible to suggest that an easement holder could claim riparian rights to submerged lands adjacent to the easement. The railroad revived the argument in the *Illinois Central* litigation, however, and it was specifically but rather summarily rejected by the Supreme Court. See *Illinois Central*, 146 US at 445 (“Nor did the railroad company acquire by the mere construction of its road and other works any rights as a riparian owner . . .”).

²⁸⁶ See *Lake Park*, Chi Trib 1 (Jan 26, 1869) (reporting that the Illinois Central intended to submit a substitute bill to the committee considering the City’s bill and that the railroad representatives—“men who have the reputation of understanding what they are about”—claimed “that they have a sure thing against the city of Chicago”); *Lake Front Bill*, Chi Times 1 (Jan 27, 1869) (setting forth reports of the contents of the Illinois Central’s substitute bill, which as of the writing had not yet been submitted); *Municipal Park Bill*, Chi Republican 1 (Jan 27, 1869) (reporting Mack’s handing Illinois Central’s substitute for Chicago’s bill to the chairman of the committee, who then read it, and Mack’s speaking in its favor with the committee’s permission). We know from the Illinois Central correspondence that the substitute bill was prepared in great secrecy. As Douglas reported to Osborn several days later:

I am in the midst of the lake shore matter; it is important and requires close attention

....

This is a great undertaking and will be a great success if accomplished.

It looks promising now;—we have reached the present point with as much silence and success as could have been looked for, and I think will get through the Legislature.

I must excuse myself for not having written more punctually within a few days, by saying that I have been almost constantly engaged in consultation, and my time more than usually engrossed.

Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (Jan 30, 1869).

²⁸⁷ HB 373, Amendment, § 3, 26th General Assembly (1869), handwritten copy available in the Illinois State Archives, Springfield, Ill.

²⁸⁸ Id §§ 5–6.

just as it was required by its charter to pay on its other operations within the State.²⁸⁹ Fourth and finally, the substitute contained a provision that “confirmed” the rights of the Illinois Central to operate along the lakefront in accordance with its original charter, and to maintain the various facilities constructed in accordance with its riparian ownership along the lakefront.²⁹⁰

By the end of January, it was reasonably clear to outside observers that the Illinois Central had the upper hand in the struggle.²⁹¹ To the extent Mack and others required direction, Douglas was calling the shots from Chicago. Thus, he telegraphed to J.W. Walker, one of the railroad’s lobbyists in Springfield, on February 3 that “[t]here is no objection to the following[:] ‘The grants to the Illinois Central Railroad Company by this act are made upon the express condition that the said Company shall forever pay into the State Treasury annually the seven percent upon its gross earnings as stipulated in its charter.’”²⁹² This seems to have been in response to concerns of Representative Bailey, the chair of the House committee about to report on the bill. But Douglas, confident of victory, would go no further, saying that “[i]f this does Mr. Bailey any good I see no objection to it, but admit of no other amendment whatever.”²⁹³

Douglas reported to Osborn in New York on the same date. After opening his letter with a discussion of a lease of the Dubuque and Iowa City line, he wrote as follows:

[A] matter of much greater interest and anxiety to me at the present time is this lake shore business—a thing more complicated with diverse interests I was never engaged in—Individuals, City, State—and it is perhaps our good fortune that these interests are antagonistical, and that they are unable to unite against us—Our prospects are good—I know it is a great deal when I say that I am confident of success.

...

²⁸⁹ *Id.* § 3.

²⁹⁰ *Id.*

²⁹¹ See, for example, *Chi Times* 2 (Jan 29, 1869). See also *The Lake Front*, *Chi Republican* 2 (Feb 4, 1869).

²⁹² Telegram from John M. Douglas, President, Illinois Central, to J.W. Walker, at the Leland Hotel, Springfield, Feb 3, 1869.

²⁹³ *Id.* Bailey evidently wanted to use the railroad’s eagerness for the Lake Front Act to exact an express recommitment by the railroad that its obligation to pay the State the charter tax of 7 percent of the company’s gross receipts was a perpetual one. In an intriguing conclusion to his telegram, Douglas stated (the scratching out and the inserts refer to the handwritten copy of the telegram in Douglas’s correspondence book) as follows: “Saw W [scratched out] our friend [inserted] last night and arranged matter alright.” *Id.*

I will send you the bill when it passes the House, and when it is secure from further amendments. My great trouble has been to keep quiet about this—not to overstate its importance—not to let these people know prematurely the estimate we place upon it, and above all to confine within our own knowledge the steps taken to secure it.²⁹⁴

Douglas was correct in his assessment of favorable prospects. On the evening of February 2 (even before his letter to Osborn), the House Committee on Municipal Affairs concluded its third three-hour session on the lakefront matter. It agreed to report the substitute bill to the full House. The committee was willing to wait until Thursday, February 4, so that Knickerbocker might prepare a minority report. Yet there was no doubt about the outcome: Knickerbocker was “standing alone upon the committee.”²⁹⁵

When the bill arrived for debate on the House floor, beginning on February 9, the members discussed other, related matters as well. One was a proposal by Representative Smith of McLean to sell the north portion of Lake Park to certain private individuals in Chicago for \$1,200,000—\$800,000 for the City and \$400,000 for the State.²⁹⁶ Another was the distribution of a remonstrance from Jonathan Young Scammon and Thomas Hoyne, who protested against the proposed sale of the lakefront land based both on their status as owners of residences on the west side of Michigan Avenue and on broader grounds.²⁹⁷ A third was Representative Merritt’s effort to offer as a substitute for the committee’s bill his proposal for appointing commissioners.²⁹⁸ Ultimately, no vote would be taken that day.

On February 10, Merritt’s proposal for the appointment of commissioners was defeated by a vote of forty-nine to twenty-four.²⁹⁹

²⁹⁴ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (Feb 3, 1869).

²⁹⁵ *The Lake Park Bill*, Chi Evening J 2 (Feb 4, 1869). The *Tribune* printed Knickerbocker’s minority report in full. See *The Chicago Harbor Bill; The Title to the Lake Frontage; Report of Mr. Knickerbocker*, Chi Trib 2 (Feb 10, 1869).

²⁹⁶ The *Chicago Times* charged that Knickerbocker was involved in Smith’s proposal. See *The Lake-Front Bill*, Chi Times 4 (Feb 6, 1869).

²⁹⁷ Letter from J. Young Scammon and Thomas Hoyne to Hon. Franklin Corwin, Speaker of the Illinois House of Representatives (Feb 8, 1869) (criticizing the Illinois Central Railroad), available in the Illinois State Archives, Springfield, Ill. The *Chicago Times* reported wryly concerning the remonstrance, which was submitted by individuals who both were property owners along Michigan Avenue and, whether with their consent or not, had been listed as incorporators in the 1867 bill to establish the Chicago Harbor, Pier and Dock Company. See *Some More Disinterestedness Relative to the Lake Front*, Chi Times 2 (Feb 10, 1869). See also note 206 (noting the suggestion of the *Tribune* that some individuals’ names had been used in 1867 without their consent).

²⁹⁸ See text accompanying notes 279–80 (discussing Merritt’s bill).

²⁹⁹ 1 1869 *Illinois House Journal* at 876 (cited in note 267).

This was regarded as demonstrating the strength of the railroads' forces.³⁰⁰ Representative Bailey successfully sought to have the bill amended, as per the agreement with Douglas, so that acceptance of the land deal committed the Illinois Central to continue to pay 7 percent of its gross receipts to the State.³⁰¹ The House also adopted a proposed amendment that permitted municipal taxation of any lands in question that the Illinois Central ultimately leased to other entities.³⁰²

Late in the day, the House voted (by a margin of forty-nine to twenty-nine as then roughly expected) to adopt the substitute bill in favor of the railroad, and by a similar vote (fifty to thirty) to set the bill for a required third reading.³⁰³

Victory for the Illinois Central could now be predicted, but still the opponents did not capitulate. On February 16, with the legislature temporarily adjourned, proponents of the City's position decided that a more visible show of public opposition was needed. A call went out for a "GREAT MASS MEETING!" to be held at Farwell Hall of "citizens of Chicago who are opposed to giving away the Lake front."³⁰⁴ The notice (evidently an advertisement) decried "The Great Swindle!" and the "Confiscation of Public Property and Private Rights Without Consideration!"³⁰⁵ The newspapers in their commentary on the rally saw the matter largely as a question of the adequacy of the consideration, with one noting that "[t]here is a deep feeling of opposition to the measure now before the Legislature for giving the Illinois Central Railway Company so much of this valuable property, with equally valuable privileges, for a merely nominal sum."³⁰⁶

Various speakers addressed the Farwell Hall rally, and a variety of resolutions were adopted, including one authorizing the chair (Thomas Hoyne) to appoint a committee of seven individuals, "to be delegated to go to Springfield to represent the action of the citizens, and to use their influence to prevent, if possible, action on the bill now

³⁰⁰ See *The Chicago Lake-Front*, Chi Times 5 (Feb 11, 1869) ("This was the first vote showing the relative strength of the friends of different propositions.").

³⁰¹ See 1 1869 *Illinois House Journal* at 877-78 (cited in note 267). See also notes 292-93 and accompanying text (discussing Douglas's statement that the railroad would accede to such an amendment).

³⁰² See 1 1869 *Illinois House Journal* at 906-08 (cited in note 267).

³⁰³ See *id.* at 910-11.

³⁰⁴ *Public Meeting; Great Mass Meeting!; Lake Shore Park!; The Great Swindle!; Confiscation of Public Property and Private Rights without Consideration!*, Chi Times 5 (Feb 16, 1869). Signatories included a number of prominent citizens, such as John C. Haines, John Wentworth, Joseph Medill, M.D. Ogden, Samuel W. Fuller, and scores of other named individuals, along with "fifteen hundred [unnamed] others." *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Our Lake Front*, Chi Evening J 2 (Feb 16, 1869).

pending.”³⁰⁷ But the rally did not quite provide the spark its sponsors had hoped. Even a sympathetic newspaper allowed that “[t]he meeting should and might have been larger, and given a wider representation of views and interests.”³⁰⁸ Newspapers supportive of the Illinois Central position, both within and outside the City, were dismissive, with one noting that “the meeting did not comprise more than one-third as many persons as (according to Mr. Knickerbocker) signed the call for it.”³⁰⁹ This newspaper maintained as well that the Farwell Hall rally “has greatly strengthened the chances of the success of the bill, as it demonstrated conclusively that the feeling of opposition to it in Chicago is neither so intense nor widespread as Little Knickerbocker has endeavored to make the legislature believe.”³¹⁰

On February 20, the substitute (that is, the railroad’s) bill passed the House by a vote of fifty-two to thirty (three members being absent or not voting).³¹¹ The correspondent for the *Tribune* expressed grudging admiration for Mack, noting that a month previously, when the bill scarcely had been seen by any member of either house, Mack had stated that he had secured fifty-five votes in the House and fifteen in the Senate, “and that no logic could change them.”³¹² The correspondent observed that “[t]he record of the House to-day shows how closely, shrewdly and intelligently [Mack] arranged his plan, and how faithfully his men fulfilled their agreement to stand by him,” particularly given that “[t]wo at least, if not all three of the absentees would have voted for the successful bill had they been present.”³¹³ Douglas

³⁰⁷ *The Lake-Front; The Question of a Cession of a Portion of the Property to the Illinois Central Railroad; Mass-Meeting of Citizens at Farwell Hall; Speeches by Messrs. Knickerbocker, Miller, Bross, Wentworth, and Anthony*, Chi Times 2 (Feb 18, 1869). See also *The Lake Front; The Scheme for Ceding the Property to the Illinois Central Railway; Strong Protest Against It—Mass Meeting of Citizens in Farwell Hall*, Chi Evening J 4 (Feb 18, 1869).

³⁰⁸ *The Lake Front*, Chi Republican 2 (Feb 18, 1869).

³⁰⁹ *The Knickerbocker Meeting*, Chi Times 4 (Feb 18, 1869) (“It was remarkable for being the dullest, driest, stupidest gathering of indifferent spectators that was ever seen in Chicago. Even Michigan avenue did not come out in force. Mr. Jonathan Young Scammon was present only by proxy, and ‘Terrace Row’ had no more important representative than his excellency the deacon and ex-lieutenant governor [Bross].”). See also *The Lake Front Bill*, Ill St Register (Springfield) 1 (Feb 19, 1869) (downstate newspaper stating that the Farwell Hall rally “proved to be, as the politicians say, an immense fizzle”); *The Chicago Meeting*, Daily Ill St J (Springfield) 2 (Feb 20, 1869) (“We assumed, from the manner in which the meeting was heralded [in Chicago newspapers], that it would be an almost unanimous protest of the people of that city against the proposition; and therefore we are astonished to learn that the meeting was in all respects a complete failure, the whole number present at the same not being more than a hundred, all told.”).

³¹⁰ *Springfield; . . . Probability That the Chicago Lake-Front Bill Will Be Passed To-Day*, Chi Times 6 (Feb 20, 1869).

³¹¹ See 2 *Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Illinois* 62–63 (Springfield 1869) (2 1869 *Illinois House Journal*).

³¹² *State Legislatures; Saturday’s Proceedings in the Illinois General Assembly; Passage of the Illinois Central Lake Park Bill in the House*, Chi Trib 1 (Feb 21, 1869).

³¹³ *Id.*

dutifully sent telegrams to Osborn and others, reporting the success in the House.

Although attention was about to shift to the Senate, the House had not yet finished. One of the substitute bill's opponents, Mr. Strawn, introduced the following dramatic resolution:

WHEREAS, Various reports are in circulation concerning supposed corruption of members of the General Assembly, which reports, if true, ought, in justice to the people of the State, to be established, and if untrue, ought, in justice to the members of the General Assembly, to be refuted and disproved; therefore,

Resolved by the House of Representatives, the Senate concurring herein, That a committee of three on the part of the House and two on the part of the Senate, be appointed to investigate, ascertain, and report at the earliest practicable time, whether any improper influence, pecuniary or otherwise, has been used or offered directly or indirectly to any member of the General Assembly to induce them or any of them to vote for or against any bill, resolution or measure, pending or heretofore pending before this General Assembly.³¹⁴

As one might imagine, the reading of the resolution "created some sensation in the House," and "friends of the Lake Front bill allege that the object is not to investigate, but to delay and interfere with, the passage of the bill in the Senate."³¹⁵ One newspaper, which was hostile to the Lake Front Act, reported "a general belief here, in the lobby and in the House, that a large amount of money has been successfully used for the passage of the bill."³¹⁶ Notwithstanding the rancor it generated, the resolution passed the House without any recorded dissent.³¹⁷

The Senate turned to the lakefront matter on February 22. One of its first acts of business was to adopt the House resolution to appoint a joint committee to investigate whether corrupt means had been deployed with respect to any measure in the legislature.³¹⁸ The vote was again unanimous. Although both houses had thus concurred unanimously in the need to appoint a joint committee to investigate allegations of bribery, it is unclear, based on the official legislative journals and newspaper accounts, whether such a committee ever met

³¹⁴ 2 1869 *Illinois House Journal* at 155 (cited in note 311).

³¹⁵ *From Springfield; An Investigation Ordered into Alleged Bribery and Corruption in the Legislature*, *Chi Evening J* 1 (Feb 22, 1869).

³¹⁶ *Id* (discussing passage of the resolution).

³¹⁷ See 2 1869 *Illinois House Journal* at 155 (cited in note 311).

³¹⁸ See 1 *Journal of the Senate of the Twenty-Sixth General Assembly of the State of Illinois* 711-12 (1869) (1 1869 *Illinois Senate Journal*).

or indeed was even appointed.³¹⁹ In any event, the matter of a legislative investigation of corruption quickly dropped from sight.

The Senate's attention then turned to the lakefront bill itself. As the *Tribune* put it, "Captain Mack moved his headquarters to the Senate chamber to-day, . . . and maintained it from early morn to dewy eve."³²⁰ The Senate determined in short order, by a vote of fifteen to ten, to order the bill to a second reading.³²¹ The *Tribune's* correspondent could not resist noting that fifteen was the number of votes that Mack had told him at the beginning of the legislative session that Mack had secured in the Senate.³²² Opposition continued in Chicago, with the *Tribune* adding to other arguments against the bill that it "does not require the Illinois Central Railroad Company to construct a harbor at all."³²³ The newspaper doubted that this was a mere oversight, and it maintained that the bill "ought to contain a provision requiring that the harbor be built within a certain specified time under penalty of forfeiture of the whole property."³²⁴ To this the paper added the inevitable suggestion that failure to include such an amendment would prove the dishonesty of the bill's supporters.³²⁵

Later in the week, the bill was read for the second time and referred to the Committee on the Judiciary. Some supporters of the bill opposed the referral, because the chairman of that committee, Senator Ward, was known to be opposed to the bill. The newspapers kept up a running commentary, with the *Tribune* now focusing on ideas to improve the bill and to some extent also looking past the Senate to the possibility of a gubernatorial veto.³²⁶

³¹⁹ Upon being informed of the Senate's concurrence in the resolution, the House tabled the matter. See 2 1869 *Illinois House Journal* at 165–66 (cited in note 311). It thus appears that although Senators Munn and Ward were named to this contemplated joint committee, no House members were ever appointed. But see *Another Charge of Bribery and Corruption*, Daily Ill St J 1 (Feb 25, 1869) (stating that an investigative committee had been appointed, "consist[ing] of Senators Ward and Munn and Representatives Bond, Merritt, and Kinyon").

³²⁰ *Lake Park*, Chi Trib 1 (Feb 23, 1869).

³²¹ 1 1869 *Illinois Senate Journal* at 736–37 (cited in note 318).

³²² *Lake Park*, Chi Trib at 1 (cited in note 320).

³²³ *The Big Thing at Springfield*, Chi Trib 2 (Feb 24, 1869).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ It editorialized thus:

Any Lake Front bill which may be passed by the present or any future Legislature must embody and secure the following points: 1. The construction of a harbor, under sufficient penalties to secure a fulfillment of the conditions by the grantee, within a specified time; 2. Common and equal rights to the public in the harbor so constructed, subject to the established charges, which charges shall be subject to State control and regulation; 3. The payment of a fair percentage of the receipts to the State for the use of the property; [and] 4. Municipal taxation of the property so created.

Chi Trib 2 (Feb 25, 1869). The *Tribune* allowed that it did not "believe that Governor Palmer will ever sign a bill which does not embrace these provisions." *Id.*

The Senate Judiciary Committee met on February 26, a Friday evening. After hearing from an opponent of the bill as well as from Mack in support, the committee determined by a margin of one vote (five to four) to recommend passage of the bill.³²⁷ Views on both sides remained sufficiently strong that the minority as well as the majority elected to prepare reports on the matter. While supporters' hopes for immediate passage of the bill by the Senate the next day were dashed, this was not for want of effort on their part. A special dispatch to the *Tribune* captured the scene:

Mr. Ward on behalf of the Judiciary Committee reported back a large number of House bills, recommending their passage. During the reading of the report, the chief lobbyist for the Lake Front bill, Dr. Mack, was seen running frantically between the seats of Senators Boyd and Woodson, while the latter came over to Mr. Ward and demanded that he report on the Lake Front and Harbor bill. He [Ward] replied that he would report it when he came to it, at the same time exhibiting a pile of bills that were ahead of it. The maneuver so manifest on the part of the lake front lobbyist Mack and his friends was occasioned by the knowledge that a special order was on the slate for half-past 10, which would likely consume the balance of the day, and thus postpone the desired report. During the suppressed "altercation" between Messrs. Ward and Woodson, which was carried on while the former was reporting bills at a two forty rate, the Speaker's gavel thumped upon his desk, while that functionary announced the special order. Messrs. Boyd and Woodson rose simultaneously, and moved a postponement of the special order, which, on being put to a vote, was declared lost by the Speaker. The Speaker at the same time called the attention of the Sergeant-at-Arms to a rule of the Senate which *prohibited ex-members of the Legislature from coming within the bar of the Senate*. After the Speaker had called the Senate to order, the Lake Front lobbyist Mack, seems to have taken the hint, as he was not seen in the chamber during the balance of the forenoon.³²⁸

Despite the result of this particular skirmish, even the hopeful *Tribune* correspondent thought the bill still likely to pass: "Captain Mack is at his post, and is as vigilant as ever. He will be a clever man that can out trick him."³²⁹

Whether scripted by Mack or on their own initiative, the Senators supporting the railroad did what was necessary to get around the re-

³²⁷ *The Chicago Harbor Bill*, Chi Trib 2 (Mar 1, 1869).

³²⁸ *Id.*

³²⁹ *Lake Front Bill*, Chi Trib 1 (Mar 1, 1869).

maining legislative roadblocks. The next Monday, March 1, Senator Boyd submitted the bill for a third reading “during the temporary absence, from their seats, of Senators Ward, Dore, and Fuller, who have been on the lookout for several days” against any such effort.³³⁰ The jousting continued in the newspapers, with the *Times* continuing to advocate in support of the bill,³³¹ and newspapers less hospitable to the bill publishing remonstrances and other material against the bill.³³²

The Senate spent the entirety of March 8 on the bill. Ward was one of those who spoke against it. “It was a legal argument, in which he attempted to show that the title to the riparian right existed in Chicago, and he read numerous extracts from authorities in support of his theory.”³³³ Even proponents of the bill thought it a powerful argument, but it did not prevail. The Senate voted fourteen to eleven to pass the lakefront bill already passed by the House.³³⁴

The battle was still not over. Even in reporting the Senate vote, the *Tribune* noted that “there seems to be a feeling creeping over the people here that Governor Palmer will veto this Lake Front bill.”³³⁵ Its correspondent allowed that “Dr. Mack does not feel that he is safely out of the woods.”³³⁶

During the wait for the governor’s veto decision, there emerged certain arguments that resembled the public trust doctrine that the Supreme Court would adopt in *Illinois Central* almost a quarter-

³³⁰ *State Legislatures; Proceedings at Springfield Yesterday; The Lake Front Bill Ordered to a Third Reading in the Senate*, Chi Trib 1 (Mar 2, 1869).

³³¹ See, for example, *The Great Harbor*, Chi Times 4 (Mar 2, 1869).

³³² See, for example, *The Lake Front; Argument of the Hon. L.L. Bond against the Railroad Companys’ Bill; The Argument of the Illinois Central Railroad Company—Their Reasons for Its Passage; A Citizen’s View of the Outside Harbor*, Chi Republican 1 (Mar 2, 1869) (reproducing Bond’s speech in the House, a protest against the bill signed by twenty-seven members of the House, and an argument by the Illinois Central in favor of the bill). See also *Protest against Lake Park Bill*, Chi Trib 2 (Mar 3, 1869) (similarly printing House members’ protest); *The Chicago Harbor; Interesting Communication from E.S. Chesbrough, the City Engineer*, Chi Evening J 4 (Mar 4, 1869) (reprinting a report of E.S. Chesbrough, City Engineer, concerning various questions that had been posed to him concerning the feasibility and necessity of constructing an outside harbor); *The Outside Harbor: Report on the Subject by City Engineer E.S. Chesborough* [sic], Chi Republican 2 (Mar 5, 1869) (reprinting the Chesbrough report); Chi Trib 2 (Mar 4, 1869) (touting Chesbrough’s report and noting that “[w]hile entertaining confidence in the present managers of the Illinois Central Railroad, he thinks that wise policy requires that this property be kept within public control”). But see *Mr. Chesbrough’s Opinions*, Chi Times 4 (Mar 5, 1869) (“Only one of the four questions put to Mr. Chesbrough came within the range of his professional knowledge. The three others might as well have been propounded to an intelligent sign-printer, whose opinion would have been just as valuable as that of the ablest engineer.”).

³³³ *Springfield; The Lake Front Bill in the Senate; A Vigorous Debate and a Triumph for the Railroads*, Chi Republican 1 (Mar 9, 1869).

³³⁴ See 2 *Journal of the Senate of the Twenty-Sixth General Assembly of the State of Illinois* 345 (1869) (2 1869 *Illinois Senate Journal*).

³³⁵ *State Legislatures; Proceedings at Springfield Yesterday; Passage of the Lake Front Bill in the Senate*, Chi Trib 1 (Mar 9, 1869).

³³⁶ *Id.*

century later. A writer to the *Chicago Tribune* developed this theory at some length, conceding the State's ownership of the submerged lands but denying its right to dispose of the lands. The writer pointed out that the Supreme Court had never determined "the manner in which the State was the owner, whether it was a proprietary right or sovereign right."³³⁷ After a somewhat convoluted analysis, the unidentified writer concluded that "[t]he shores of navigable waters and the soils under the water can never be granted by the United States, nor by the several states, to individuals, it being a sovereign and political right, and not a proprietary right," and that "navigable waters and rivers are never the subject of sale, but are inseparable from sovereignty."³³⁸ The *Chicago Republican* endorsed a similar analysis, specifically criticizing a separate *Tribune* article that apparently had contended that submerged lands could be granted to individuals.³³⁹

The newfound claim of inalienability was unquestionably a change of strategy on the part of those opposed to the lakefront bill. One writer to the *Republican* wryly responded as follows:

[The article entitled "No Right in the State to Sell or Grant Away the Navigation"] has set me to wondering who could have been its author.

It could not have been one of the aldermen, nor even our worthy Mayor, for they have, individually and collectively, declared, in words and acts, that the right in question does reside in the State. Did not the city formerly ask of the State a grant of this right?

...

Lastly, I am positive that the article does not reflect the view of the eminent legal gentlemen of our city—Hon. J. Y. Scammon, Hon. Thomas Hoyne, or Hon. Melville W. Fuller, who, with their associates, set their signatures to the contract to construct the private outside harbor for themselves IF THEY COULD GET THE RIGHT FROM THE STATE. Well, they did not get it, and that was probably the milk in the recent Farwell Hall cocoanut.

Thus it will be seen that it is too late, in the face of all the eminent authorities, to deny that the State has the right to do as it has done—locate its right where the people of Illinois can receive

³³⁷ Letter to the Editor, *Has the State the Right to Sell the Lake Front?*, *Chi Trib* 2 (Mar 13, 1869).

³³⁸ *Id.*

³³⁹ See *The Lake Front: No Right in the State to Sell or Grant Away the Navigation*, *Chi Republican* 2 (Mar 14, 1869).

seven per cent. of all the profits, whereof Chicago will get its share.³⁴⁰

After weeks of speculation about what he would do, Governor Palmer vetoed the lakefront bill on April 14, 1869, returning it to the House along with a lengthy explanation of his objections.³⁴¹ Those objections did not go to fundamental questions of constitutional authority or legal title to submerged lands. In particular, Palmer did not question that the State had title to the submerged lands, or that it could alienate these lands. Nor did he deny “that this property must be improved and prepared to subserve the purposes of commerce,” or that it was correct “to say that neither the State of Illinois nor the city of Chicago will undertake the work of improvement.”³⁴² Rather, Palmer focused on “[t]he pecuniary value of the public property which it is proposed to dispose of by this bill, and the grave questions of policy and good faith, on the part of the State, that underlie it”³⁴³ — the latter seemingly a veiled reference to the allegations of corruption surrounding the Act.

With respect to north Lake Park, Palmer stated that “the obligations of prudence and good faith require that the property shall not be sold for less than its full market value.”³⁴⁴ The governor concluded that the bill as presented to him failed to satisfy those obligations, as he had been “assured by the highest authorities upon the subject of the value of real estate in the city of Chicago, that the property [offered to the railroads] for the sum of eight hundred thousand dollars, has a market value of two millions, six hundred thousand dollars.”³⁴⁵ Palmer was thus not averse to a sale, but suggested the desirability of naming an independent commission to determine the proper price.³⁴⁶

Turning to the submerged lands, Palmer focused on the provision “confirm[ing]” the rights of the Illinois Central under the grant from the State in its charter and by virtue of its riparian ownership.³⁴⁷ He characterized this as too “vaguely enumerated” and subject to future

³⁴⁰ *The Lake Front: No Right in the State to Sell or Grant Away the Navigation*, Chi Republican 1 (Mar 15, 1869).

³⁴¹ See 3 *Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Illinois* 517–28 (1869) (3 1869 *Illinois House Journal*) (reprinting the April 14, 1869 message of Governor John M. Palmer returning House Bill 373 to the House of Representatives without his signature and approval). The bill was returned to the House because it originated there. See *id.* at 517. Palmer’s veto message was also reprinted in full in various newspapers. See, for example, *The Lake Front; Gov. Palmer’s Veto Message of the Lake Front Bill; He Objects to the Bill on the Ground of Expediency*, Chi Republican 2 (Apr 15, 1869).

³⁴² 3 1869 *Illinois House Journal* at 526 (cited in note 341) (veto message).

³⁴³ *Id.* at 517.

³⁴⁴ *Id.* at 522.

³⁴⁵ *Id.* at 523.

³⁴⁶ See *id.* at 524.

³⁴⁷ *Id.*

mischief and dispute.³⁴⁸ “Without some more precise information as to the nature, character and measure of these supposed rights, I am unable to concur in a proposition to confirm them.”³⁴⁹

Echoing some of the recent criticisms leveled by the *Tribune*, Palmer also criticized the bill for failing to “require the Illinois Central Railroad Company to do any act or thing with respect to the improvement of these navigable waters.”³⁵⁰ In addition, “[s]ome power of supervision and control over the prosecution and progress, as well as the plan of the works, to be constructed, should be reserved to the State,” and in particular the State should be able to regulate the net profits to be earned from operation of the harbor.³⁵¹ Finally, the land should be subject to state and municipal taxation.³⁵²

The matter seemed ripe for a compromise. And in fact, there appear to have been efforts at reaching one, at least on the part of the City. The *Tribune* reported “a long conversation on the subject” between Mayor Rice and Illinois Central President Douglas.³⁵³ That paper also reported that even if they overrode the veto, the railroad’s supporters “will then present a supplemental bill” responding to Palmer’s objections.³⁵⁴ Mayor Rice and a majority of the legislators were said to be in favor of such a bill.³⁵⁵

There is less evidence that the railroad had any real interest in a compromise. No railroad correspondence related to Palmer’s veto survives, perhaps because Douglas went to Springfield to tend personally to the override efforts.³⁵⁶ But the newspapers reported the Illinois Central’s confidence that the legislature would simply override Palmer’s veto, without any compromise. For example, the *Tribune* reported, after describing the City’s proposed compromise, that “Dr. Mack, who is here as manager of the affair, says he has counted 56

³⁴⁸ *Id.* at 524–25.

³⁴⁹ *Id.* at 525.

³⁵⁰ *Id.* at 526.

³⁵¹ *Id.* at 527.

³⁵² See *id.*

³⁵³ *Springfield; Reassembling of the State Legislature; A Large Batch of Veto Messages Sent in; A Number of the Vetoed Bills Fail to Pass; The Lake Park and Tax Exemption Vetoes Held for Future Consideration*, *Chi Trib* 1 (Apr 15, 1869) (discussing possible aspects of the matter, including a construction timeline, Illinois Central profit-making limitations, taxation provisions, and the appointment of Commissioners).

³⁵⁴ *Springfield; Arrival of Legislators; Outline of the Governor’s Veto on the Lake Front Bill; Course to Be Taken by the Friends of the Bill*, *Chi Trib* 4 (Apr 14, 1869).

³⁵⁵ See *The Chicago Harbor Bill*, *Chi Times* 4 (Apr 15, 1869) (discussing plans for a compromise).

³⁵⁶ See *Springfield*, *Chi Trib* at 4 (cited in note 354) (“Messrs. Walker, Douglas, Mack and other representatives of the Central Railroad are here in the interest of the bill . . . and are making preparations to put the bill through both houses, notwithstanding the objections of the Governor.”).

members of the House for it, four more than it had on its passage, and 15 in the Senate, one more than before.”³⁵⁷

In all events, the legislature overrode Governor Palmer’s veto. The House acted first, on Thursday, April 15, 1869.³⁵⁸ The Senate was not far behind. Hastening to finish and adjourn, the Senate voted for the bill by the same margin—fourteen to eleven—as it had before the governor’s veto.³⁵⁹ The reporter for the *Tribune* noted that this was one vote short of Captain Mack’s prediction and allowed that “[o]ne senator must have deceived him.”³⁶⁰

There was no formal effort to consider a supplemental bill. As the *Tribune* reporter observed:

The supplemental bill, which it was said was to follow the passage of this Lake Front bill, whereby its wrong features were to be righted, has not been heard from, and I suppose will not. The introduction of such a bill was, probably, never contemplated by the friends of the lake front, and it was talked over as a sort of soothing syrup to certain enemies of the measure to quiet them.³⁶¹

Adjournment followed the next day, and all seemed ready for it. The *Tribune*, for its part, did not regret the prospect, and sounded a bitter note about the Lake Front Act. Terming the legislature “reckless beyond precedent,” and decrying particularly both a provision requiring the State to assume municipal debts related to railroads and the Lake Front Act, the *Tribune* concluded an editorial analysis with the “hope that nothing may occur to keep the Legislature together any longer”: “Having seized upon the State revenues for ten years to

³⁵⁷ *Springfield, Chi Trib* at 1 (cited in note 353). This same newspaper stated that “Dr. Mack says nothing about a ring, but it looks as if one was forming embracing the tax-cheating railroad bill and the lake front, by which both will be sure of success.” *Id.*

³⁵⁸ The event was not without its moments. The reading of the governor’s veto message was interrupted in the afternoon because, as the *Tribune* explained:

This being the anniversary of the death of Lincoln by the assassin’s hand, the two Houses, by joint resolution, adjourned at 4 o’clock this afternoon for the purpose of visiting the martyr’s tomb at Oak Ridge. The Springfield Horse Railroad Company tendered the use of their cars to convey the members to the cemetery, and full one hundred persons availed themselves of the opportunity. After reaching the sacred grounds and gazing for a time upon its surroundings in silence, at the suggestion of Mr. Speaker Corwin, Rev. Mr. McLean, of the city, offered up a short and fervent prayer. The visitors then passed over to the tomb of Governor Bissell, and, after admiring that beautiful structure, entered the office of the Lincoln Monument Association, placed their names in the register, and quite a number deposited handsome notes in the treasury. . . .

Final Adjournment to Take Place on Saturday; Legislative Visit to the Tomb of Lincoln, *Chi Trib* 1 (Apr 16, 1869).

³⁵⁹ See 2 1869 *Illinois Senate Journal* at 922 (cited in note 334).

³⁶⁰ *Springfield; Yesterday’s Proceedings in the State Legislature; Final Passage of the Tax-Stealing and Lake Front Bills*, *Chi Trib* 1 (Apr 17, 1869).

³⁶¹ *Id.*

come, and attempted to sell two million dollars' worth of real estate for half its value, there is no available [pl]under in sight, and, hence, nothing to remain in session for."³⁶² The downstate *Peoria Daily Transcript* had a different reaction, stating that "[t]he present Legislature is one which in point of talent, will compare favorably with any of its predecessors, and the business done has been of the most important and generally of the most satisfactory character."³⁶³

The Illinois Central, in the words of Osborn's response to Douglas's telegram from Springfield, was "much rejoiced at your final success."³⁶⁴ For Douglas, there was a sense of relief as well. His letter to Osborn enclosing the Lake Front Act as passed allowed that he was "glad" that this "very difficult" matter had been satisfactorily ended: "Amendments were being made from time to time while the law was on its passage, and we were never able to tell what it would be until it was finally passed."³⁶⁵ He promised to write the chairman "more punctually now that this troublesome business is over."³⁶⁶ Osborn, upon seeing the final law, responded by reiterating his pleasure, noting that—"after all the delay and difficulty attending its final passage—it is so much simpler and more comprehensive that I supposed it possible for you to obtain," and that "[i]t has caused a good deal of comment here."³⁶⁷

As we shall soon see, the Illinois Central's euphoria was short-lived. In retrospect, the railroad probably committed a fatal—and all too familiar—error in turning its back on the City's overtures for a compromise after Governor Palmer issued his veto. If the railroad had moved even partway toward meeting the concerns of the City at that time, most likely the carrier would have proceeded to build its new depot and probably also some kind of outer harbor, and the Chicago lakefront would look a good deal different today. But as often happens, the victorious party succumbed to hubris at the moment of its triumph, thereby sowing the seeds of destruction of what it had gained. Due in large part to the enmity of the City, no depot was ever built south of Randolph Street, no part of Lake Park was ever sold, no outer harbor was ever constructed, litigation dragged on until the final

³⁶² *The Legislature*, Chi Trib 2 (Apr 17, 1869).

³⁶³ *The Legislature*, Peoria Daily Transcript 2 (Apr 19, 1869) (referring to the Lake Front Act, among other laws).

³⁶⁴ Letter from Wm. H. Osborn, Chairman, to John M. Douglas, President, Illinois Central (Apr 19, 1869).

³⁶⁵ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (Apr 20, 1869).

³⁶⁶ *Id.*

³⁶⁷ Letter from Wm. H. Osborn, Chairman, to John M. Douglas, President, Illinois Central (Apr 23, 1869). The Lake Front Act is reprinted in the statement of the case in the Supreme Court. See *Illinois Central*, 146 US at 405–08 n 1.

decade of the nineteenth century, and the Supreme Court created the public trust doctrine to legitimize the undoing of the railroad's victory.

C. The Motives of the Illinois Central

What more can be specifically gleaned from the newspaper commentary and the Illinois Central correspondence from 1869 about the motivations of the railroad in seeking enactment of the substitute bill?

We have already seen how the *Tribune*, writing in late 1868, speculated that the Chicago Common Council's reluctance to commit to selling north Lake Park to the Illinois Central might force the railroad to go directly to the legislature.³⁶⁸ Newspaper commentaries from early in 1869 continue and confirm this theme. The *Chicago Times*, for example, attributed the lakefront controversy to the "illiberal action of the common council, in refusing to consent to the use of a small portion of the land involved, for necessary depot purposes . . ."³⁶⁹ That paper also offered a sympathetic account of the railroad's substitute bill, observing that the Illinois Central "stands in constant peril of some legislative grant to a private corporation, which, if sustained by the courts, would divest it of its riparian rights in this property,—some three separate attempts having already been made, at different sessions of the legislature, to procure a grant of this property to a private corporation."³⁷⁰

These accounts suggest that, up through late January 1869, the railroad's motivations were seen by many outside observers as being largely defensive—to protect the railroad's extensive investments along the lakefront in the face of a potential legislative grab made possible by the uncertain status of property rights in submerged lands. As these observers saw it, the railroad concluded that it was necessary to secure a transfer of rights directly from the legislature, rather than from the City, because it could no longer trust the City to respect its existing interests along the lakefront in the event that the City won those rights. Only after the substitute bill passed the House (or it became clear that this was imminent), and the City's forces grew desperate, did the cries of "steal" and "fraud" emerge, conveying by implication the notion that the railroad was motivated by the prospect of earning large profits from gaining control over the outer harbor.

Even more instructive on the subject of the Illinois Central's motivations are two letters written by Osborn, the chairman residing in

³⁶⁸ See text accompanying note 235.

³⁶⁹ *The Title to the Chicago Lake-Front*, *Chi Times* 5 (Jan 15, 1869).

³⁷⁰ *Springfield; . . . The Chicago Lake-Front—Bill to Be Reported in the House; The Fee of All the Submerged Lands Outside of the Track to Be Vested in the Illinois Central Railroad Company*, *Chi Times* 2 (Jan 26, 1869).

New York, to European investors.³⁷¹ The first was written shortly after the governor's veto was overridden, and conveys the happy news of the enactment of the Lake Front Act. The letter attempts to explain the significance of this legislative victory to the ultimate owners of the railroad. Its body reads in full as follows:

Our President telegraphs that the Lake Shore Bill has become a law. It is conceded upon all sides that the State of Illinois held the water rights upon the Lake by a title superior to the City of Chicago or of individuals owning property adjacent to the shore. Our Company is not interested in the question whether the sovereignty of the Lake waters is vested in the General Government or in the State of Illinois, inasmuch as the original Act of Congress relinquished to the State the right (if any) of the General Government. The Company has obtained from time to time concessions from the City of Chicago, giving it authority to extend its depot-grounds into the Lake, and we have in this way made about fifty acres of land with great economy and admirably situated for the objects of our Railway. The President has addressed himself for several years past to securing legislation from the City of Chicago in harmony with legislation from the State which would confirm the title to that which we have hitherto acquired and which would authorize the Company to take possession of so large a surface from the shore of the Lake that any other individuals or corporations would be prevented from getting possession of this key to the outer harbor which the growing commercial importance of Chicago will demand at a very early day.

It is premature to estimate the outlay which it may be expedient to incur. The undertaking will be very remunerative, and is probably the most important step in the Company's affairs since the Act of Congress originating our Enterprise. Chicago is now a city of three or four hundred thousand population. The navigation upon the Lakes makes it one of the most important ports of entry and this outer harbor is a matter of necessity as apparent and will probably prove as conducive to the interests of Chicago as your splendid docks have proved conducive to the interests of London.³⁷²

³⁷¹ On the importance of European investors to the undertaking that was the Illinois Central, see Stover, *History of the Illinois Central Railroad* at 32–38 (cited in note 80) (noting an 1871 estimate “that over half of the stock was held by Englishmen, more than a quarter by Dutch investors, and perhaps less than 15 percent by Americans”).

³⁷² Letter from Wm. H. Osborn, New York, Chairman, Illinois Central, to Cunningham Borthwick, London (Apr 20, 1869).

The predominant theme here, even in the flush of victory, is defensive. Osborn stresses the problem of title security, and the need to “harmonize” the various permissions obtained from the City with the understanding (which was relatively new, a point Osborn does not make) that the State held title to the submerged land. Only in the second paragraph does Osborn turn to the prospect that the grant will be “very remunerative,” comparing the outer harbor to the “splendid docks” of London. But even here the talk is rather vague, with the caution that “[i]t is premature” to consider how much investment expenditure this might entail.

The second letter to European stockholders, sent in early June, was evidently prompted by concerns shareholders had expressed after reading accounts of the lakefront controversy in newspaper clippings sent to them by American correspondents. It appears from a cover note to Douglas enclosing the letter that the tenor of these clippings was highly critical of the railroad, and they apparently reported that litigation had already commenced against the carrier. In this missive, therefore, we find Osborn already referring to the matter as “the case,” a status it would retain, off and on, for the rest of time:

Inasmuch as it is probable that enquiries will be made of you from time to time regarding the position of the Illinois Central property on the Lake front at Chicago and the effect of the recent Act passed by the Legislature authorizing our Company to make improvements near their Depot, I have thought it well to write you of the present aspect of the case.

As you are aware, our Railway approaches Chicago on the margin of the Lake. Under the Charter, by permission of the City and by purchase we have extended our grounds into the waters of the Lake and have endeavored to maintain our position as riparian owners. Endeavors have frequently been made by individuals, latterly by parties professing to represent the City of Chicago, to obtain the privilege of filling up and making land outside of that now occupied by us. These efforts have now been defeated. The State of Illinois has vested in the Company a perfect title to all the property it has acquired or appropriated from the water and has further granted it the privilege of constructing works for a mile further into the Lake. This is opposed by the City of Chicago and the City may probably test in the courts the authority of the State to confer this privilege. We have no doubt that the State possessed entire sovereignty or proprietorship in these waters and that the title will be fully confirmed by the Courts. Until this is done, no expense whatever will be incurred. Our present Depot grounds are ample for the probable growth of the Company’s

business for the coming ten or fifteen years. What we were determined to prevent was the taking possession by anyone else of the Lake outside of us. In view of the present and future commerce of Chicago the grant is of very great value.³⁷³

Several points are worthy of comment about this letter. Note first that the justification for the Lake Front Act was now couched almost exclusively in defensive terms. The objective was to defeat efforts by rivals, including those “professing to represent the City of Chicago,” to grab the submerged land east of the railroad’s operations, thwarting its ability to continue to function and certainly to grow in the future. The thing the railroad was “determined to prevent” was “the taking possession by anyone else of the Lake outside of us.” Second, Osborn was confident that the State had the right to alienate the land to the railroad, and that the grant “will be fully confirmed by the Courts,” perhaps on a vested-rights theory. Third, Osborn downplayed any urgent need to develop the outer harbor or the depot, noting that existing facilities were adequate to handle anticipated traffic for “ten or fifteen years.” Fourth and finally, only as a minor afterthought did Osborn mention the potential future value of the grant to the company.

In short, the available evidence suggests that the Illinois Central’s principal motive was to protect and defend its existing investments on the lakefront. Given the uncertainty about property rights to Lake Park and the submerged lands that emerged in the late 1860s, and the repeated efforts by others to exploit this uncertainty to secure these resources for other enterprises, the railroad sought to have title to north Lake Park and the site of the proposed outer harbor conferred on the railroad itself. This was the safest way to avoid having its existing investments stranded. Only as a secondary matter, as the Illinois Central officers began to contemplate the significance of success in their legislative effort, did they begin to muse about the possible future profits to be earned from control of the outer harbor. As soon as their legislative success faced legal challenge, however, they reverted immediately to the defensive justification. The picture of the Illinois Central as a grasping plutocratic corporation, such as emerges in Justice Field’s opinion and is carried forward by implication in modern public trust accounts, is thus a caricature of a more complicated reality. The adage about fear’s being a more powerful motivator than greed in explaining economic behavior would seem to be fully applicable to the Illinois Central.

³⁷³ Letter from Wm. H. Osborn, New York, Chairman, Illinois Central, to Cunningham Borthwick, London (June 9, 1869).

D. The Public Interest

We are also interested in what light the archival materials shed on the question of whether participants in the legislative debates perceived any public interest rationale for the Lake Front Act. In this regard, two preliminary observations are in order.

First, it is commonly assumed today that the Lake Front Act gave the Illinois Central monopoly control over the entire Chicago harbor.³⁷⁴ Justice Field's opinion is no doubt responsible for this assumption. Early in his opinion, Field recognized that the Chicago River served as the existing harbor of Chicago, and that the growth of business and commerce had stimulated plans for the creation of a new "outer harbor for Chicago."³⁷⁵ But when he came to consider the grant of submerged land to the Illinois Central in Section 3 of the Lake Front Act, he wrote as if it encompassed the entirety of the harbor of Chicago.³⁷⁶ This was simply not true. The northern limit of the grant was "the south line of the south pier" of the Chicago River.³⁷⁷ Consequently, the railroad would have no control over the entrance to the Chicago River—and hence no control over access to the entirety of the existing harbor facilities located along the Chicago River. The practical effect of the Lake Front Act, in terms of the market for harbor facilities in Chicago, was to authorize the creation of a large, privately owned harbor facility in the lake that would act as a supplement to the harbor facilities that already existed and would continue to exist along the river. These existing facilities, from all accounts, formed a reasonably competitive market, as any riparian owner abutting the river could construct a pier or dock, provided it did not obstruct navigation.³⁷⁸ Thus, the Lake Front Act did not create a giant monopoly; it was more analogous to a bill authorizing a private toll road to be built on a route parallel to an existing (if congested) public highway.

Second, although Sax in his famous article could discern "no reason to believe that private ownership would have provided incentives

³⁷⁴ See, for example, note 54 (discussing Fischel and Sykes).

³⁷⁵ *Illinois Central*, 146 US at 437.

³⁷⁶ See, for example, *id.* at 451 ("A corporation created for one purpose, the construction and operation of a railroad between designated points, is, by the act, converted into a corporation to manage and practically control the harbor of Chicago."); *id.* at 452 (framing the issue as whether the legislature could deprive the State of "the submerged lands in the harbor of Chicago"); *id.* at 453 (indicating that the case involved "a grant of the whole property in which the public is interested").

³⁷⁷ See Lake Front Act § 3, reprinted in *Illinois Central*, 146 US at 406 n 1 (statement of the case).

³⁷⁸ See text accompanying notes 136–37, discussing *City of Chicago v Laflin*, 49 Ill 172 (1868).

for needed developments,³⁷⁹ it was in fact a universal assumption in 1869 that a new outer harbor could be built only with private investment capital. No one in the debates suggested that the State of Illinois could or would undertake such a project itself. The skeletal state government of that era lacked both the resources and the engineering and administrative capacity for any kind of major public works project.³⁸⁰ The City of course wanted a grant of the submerged land in order to assume control of the project. But it was widely understood that what this meant in practice was long-term leases to private entrepreneurs (such as the Fuller group), who would in turn raise the money and do the actual construction work, remitting rents to the City for the right of occupancy. The federal government was perhaps the most plausible candidate to undertake public construction of a new harbor. As we shall see, Congress would shortly appropriate money for a new breakwater for this purpose in the early 1870s.³⁸¹ But it is unclear whether this was foreseeable; there is no mention of federal construction of a new outer harbor in the legislative debates in 1869. Moreover, even after the federal breakwater was constructed, it was universally assumed, at least up to the time of the Supreme Court decision, that any construction of docks, piers, or wharves inside the new breakwater would have to be done by private enterprise.³⁸² Certainly, the federal government made no move to make such improvements during this time period.

Given these shared assumptions, the debates make it abundantly clear that many if not most of those voting for the Lake Front Act sincerely perceived it to be in the general interest. The argument reduced to a simple choice between the only two realistic candidates for future development of the lakefront: the City of Chicago and the Illinois Central. The Chicago proposal would enrich Chicagoans and, in particular, the aldermen of Chicago who would determine who was to be awarded the leases and contracts, but it would provide no direct financial benefits for persons living outside Chicago. The Illinois Central proposal, in contrast, would result in expanded Illinois Central operations, which would be subject to a 7 percent gross receipts tax, all of which would go into the State's coffers to be used for projects

³⁷⁹ Sax, 68 Mich L Rev at 490 (cited in note 3).

³⁸⁰ See text accompanying notes 342 and 387. See also Brief and Argument for Appellant at 84–88 (filed by Jno. N. Jewett), *Illinois Central*, 146 US 387.

³⁸¹ See note 472 and accompanying text.

³⁸² See Report of Board of Engineers (Aug 3, 1871), in *Record: Illinois Central Railroad Co* at 643–44 (cited in note 71) (report on the lakefront by the board of engineers stating that “the objects of the [federal] breakwater now in progress of construction at Chicago are, first, to afford the necessary anchorage grounds and, second, to enable owners of property on the lake shore to construct wharves and slips on the western side of the basin, which could not be done without such protection, and thus relieve the crowded condition of the river”).

throughout the entire State. For the typical downstate legislator, the choice was easy.³⁸³

The outlines of this argument are discernible in an editorial in Springfield's *Daily Illinois State Journal*, written even before the Illinois Central revealed its substitute bill. Specifically responding to an editorial in the *Tribune* in support of Knickerbocker's bill, which editorial had suggested the bill was simply an attempt to quiet title in the City, the editors of the *Daily Illinois State Journal* wrote that "[t]he *Tribune* is unfortunate in its assumptions," because the State, not the City, was the rightful owner of the harbor:

Under these circumstances we are not surprised that "certain members of the Legislature are opposed to the Chicago harbor bill." We should suppose that all of them would be opposed to such a measure. The property referred to is or may be valuable; and it should not be parted with by the General Assembly for nothing.

If possible it should be made a source of revenue to the State; and we believe the time will come when such disposition can be made of the water privilege as will return a large and constantly increasing per cent. to the State Treasury from wharfage and dockage. No such thing as this is contemplated by the "Chicago harbor bill," and hence the opposition to it.³⁸⁴

Once the Illinois Central substitute was unveiled, even some in Chicago could perceive why downstate members might prefer it over the City bill. As a correspondent for the *Times* observed:

[I]t is notorious that the harbor facilities of Chicago are becoming inadequate to its growing business The opening of the Pacific road, and the development of the vast interior regions traversed by the great railroad lines . . . will soon demand immense warehouse and wharfage facilities. . . . How much more to the advantage of the state, then, to vest this property in the Illinois Central Railroad company, under conditions that 7 per cent. of the gross receipts of these docks and warehouses shall be paid into the state treasury, than to vest it in a private corporation,

³⁸³ Some legislators also doubted the City's ability to build a harbor and even its attitude toward the Illinois Central. See *State Legislatures; Proceedings at Springfield Yesterday; The Illinois Central Lake Park Bill Passed in the House*, Chi Trib 4 (Feb 11, 1869) (summarizing downstate Representative Parker's floor argument as follows: "A harbor ought to be built there, and they could look with confidence to the railroads alone to do it. . . . He was opposed to leaving the question open, so that Chicago could ever get control of the harbor. Chicago seemed opposed to the Central railroad, which had done so much to build it up").

³⁸⁴ *The Lake Front, Chicago*, Daily Ill St J (Springfield) 2 (Jan 26, 1869).

or in the city of Chicago, which proposes to pay the state nothing. . . .³⁸⁵

To be sure, there were many voices in Chicago dissenting from this analysis. Yet even the *Chicago Republican*, which expressed greatest unhappiness with the downstate legislators, appreciated the force of the argument in support of the Illinois Central bill from their perspective. Its correspondent wrote thus:

With intelligent members of both Houses, the question seems to assume this shape—Chicago vs. the State. If to Chicago is given the immense franchise contemplated in the privilege of constructing an outside harbor with its systems of docks and wharves, yielding an incalculable revenue, the State reaps only that indirect benefit which a great maritime city yields to the people at large. If, on the other hand, the franchise be given to the Illinois Central railroad, seven per cent. of the entire revenue derived therefrom will flow into the State Treasury. Stripped of its legal bearings, the question is thus argued.³⁸⁶

We are not limited to newspaper commentary to see the appeal and power of this argument to the typical downstate legislator. The sentiments of one Representative Dinsmoor in support of the bill, as summarized in a newspaper, are illustrative:

The State not being able to avail itself of this property for any commercial purposes he saw no other road out, except the one proposed by the bill. It looked as if it was the best proposition ever submitted to the House by a railroad company. It proposed to convert property into capital, which was idle and must be idle for all time to come; and it proposed to pay the state seven per cent on the increasing value of that property. It proposed to invest money where the State could not invest money. These great commercial interests override all minor claims.³⁸⁷

Dinsmoor also addressed the arguments of the private property owners of Chicago who were opposed to the railroad's bill,³⁸⁸ and concluded with a rhetorical flourish that should not be lost to history: "The private gentlemen who remonstrated against the bill may shed a tear at parting with their splendid residences. He sympathized with them. But the House could not say to the great State of Illinois, you

³⁸⁵ *Springfield*; . . . *The Chicago Lake-Front—Bill to Be Reported in the House*, *Chi Times* at 2 (cited in note 370).

³⁸⁶ *Springfield*; . . . *Lake Park Harbor Bill*, *Chi Republican* 1 (Feb 1, 1869).

³⁸⁷ *The Lake Front*, *Daily Ill St J (Springfield)* 1 (Feb 10, 1869).

³⁸⁸ See, for example, text accompanying note 297 (Scammon and Hoyne remonstrance).

shall stand still because Mr. Scammon wants to catch a breeze from Lake Michigan.”³⁸⁹

In effect, then, the Lake Front Act was an early example of a phenomenon that would become familiar in later years: a fight between the City and downstate interests, in this case won by the downstate interests. An analysis of the pattern of voting on the final bill in each house, as summarized in the table below, confirms the City-downstate dichotomy.

TABLE
Analysis of Final Voting on Lake Front Act of 1869

	<u>House</u>		<u>Senate</u>	
	Y	N	Y	N
<u>All Voters</u>	52	31	14	11
<u>Political Party</u>				
Democrat	24	4	7	0
Republican	28	27	7	11
<u>Lawyers</u>	15	7	7	5
<u>Geography</u>				
Cook County	2	5	0	2
Other counties in six- county northeastern Illinois	3	3	1	2
Downstate	47	23	13	7
<u>Status of Illinois Central (down- state districts)</u>				
Served district	15	14	7	4
No IC service	32	9	6	3
<u>Status of competition (downstate districts)</u>				
District served by IC and another RR	11	14	7	4
Served by only IC	4	0	0	0
Served by RR but not IC	29	8	6	3
Served by no RR	3	1	0	0

³⁸⁹ *Lake Front*, Daily Ill St J (Springfield) at 1 (cited in note 387).

As can be seen, two factors appear to have some relationship to support for or opposition to the Lake Front Act. One is Chicago versus downstate interests. Cook County legislators opposed the substitute bill by a lopsided margin of more than three to one, and the other legislators from northeastern Illinois also voted against it, though by a narrower majority. By contrast, all other legislators (that is, those from downstate Illinois) supported the bill by a two-to-one margin. This is consistent with the divide we perceive in the debates and commentary over the public justification for the two bills, with downstate interests tending to verbalize support for the Illinois Central bill, and city interests tending to oppose.

The other is political party: Republicans divided essentially evenly on the bill, whereas Democrats overwhelmingly supported it. We are less certain what this means. One possibility is that it reflects greater hostility within the Democratic Party at this time toward government intervention in economic affairs, which was thought to lead to oppressive aggregations of wealth and corruption.³⁹⁰ The modern reader—conditioned by Justice Field’s depiction of the Act as amplified by the treatments of Sax, Epstein, and others—is likely to assume that those opposed to government-sponsored monopolies would recoil from the grant of the lakebed to the railroad. But, as we have noted, the Lake Front Act in fact did not confer a monopoly over harbor facilities in the railroad. Thus, it is possible that in 1869 the Democrats (as reflected in the views of the *Chicago Times*, for example) perceived the Illinois Central proposal to be the “private enterprise” solution to the lakefront problem, whereas the Chicago proposal was seen as a “governmental solution” presenting greater dangers of special interest intrigue. To be sure, if the Democrats’ support was based on a preference for private enterprise because it was presumed to be less corrupting than state enterprise, this support was vulnerable to quickly evaporating if Democrats became convinced that the Act had been procured by the railroad through corrupt means. Some such perceptual shift very likely did occur between 1869 and 1873, which may help account for the fact that Democrats overwhelmingly favored repeal in 1873.

In any event, no matter what the subjective motivations that induced a strong majority of legislators to vote for the Lake Front Act in 1869, there is no doubt that such legislators could look their constituents in the eye and provide a highly plausible public interest rationale for casting such a vote. Except for a few wealthy real estate owners on Michigan Avenue, and some Chicago aldermen, the argu-

³⁹⁰ See generally John Gerring, *A Chapter in the History of American Party Ideology: The Nineteenth Century Democratic Party (1828–1892)*, 26 *Polity* 729, 747–53 (1994).

ment went, the citizens of Illinois would be better off under the Illinois Central proposal than if the land were given to the City.

E. The Question of Corruption

By far the hardest question to answer is whether the enactment of the Lake Front Act was in fact facilitated by bribery or other corrupt action on the part of the Illinois Central and its agents. In sorting through the evidence here, it is first necessary to distinguish between the frequent charges of “fraud,” “swindle,” and “steal” — used as colorful expressions for private interest legislation — and actual charges of corruption. Allegations in the former category were plentiful, but for reasons already discussed one cannot simply take all the lurid charges of “frauds” and “steals” bandied about in mid-nineteenth century Illinois politics at face value.³⁹¹

In any event, these sorts of hyperbolic charges were by no means confined to one side in the debate. As the debate reached its climax in the House, for example, Knickerbocker took to the floor and made an extensive speech attacking the Illinois Central bill as “a stupendous fraud, and when he characterized it as stupendous, he failed to rise to the magnitude of the subject.”³⁹² Yet after a similar speech by another opponent, Taylor, a supporter of the measure, offered commentary described by the *Chicago Republican*:

He was surprised that his colleague, who was a member of the Common Council of Chicago, should talk about fraudulent and swindling schemes. The only scheme that he (Taylor) had seen that looked like a fraud, was the scheme by which it was proposed to give to thirty-two aldermen in the city of Chicago the unprecedented privilege of inaugurating a ten or fifteen million dollar dock system, with its attendant schemes of plunder and robbery.³⁹³

If “corruption” means lust for gain, there was ample basis to hurl the charge at partisans on all sides of the issue.

Allegations of actual bribery were far fewer in number. These tended to appear later in the legislative process, after it was clear that the Illinois Central bill would pass in the House. Although this timing perhaps suggests that embittered Chicago forces manufactured the charges, it is also possible, of course, that the charges emerged only once the railroad’s calumny became evident to close observers. In any

³⁹¹ See Part V.A. See also text accompanying notes 182–83 and 226.

³⁹² *Lake Front Bill Again*, Daily Ill St J 5 (Feb 10, 1869).

³⁹³ *Another Railroad Bill by Senator Fuller; Yesterday's Proceedings in the Legislature*, Chi Republican 1 (Feb 10, 1869).

event, the specific charges of bribery are obviously of much greater significance for our purposes.

One of the first occurred as the Lake Front Act was about to be taken up in the Senate. An opponent of the measure, Senator Ward, stated that “he had been told that vast sums of money had been brought here to be used by gentlemen who had been seen about the lobby.”³⁹⁴ Although he did not say so explicitly, in context it is clear that he was referring to the lakefront bill.³⁹⁵ Similarly, when the House took up consideration of an override of the governor’s veto,

Mr. Knickerbocker rose and objected, amid dead silence, to the vote of Mr. Bailey on the bill, because it was in evidence that Bailey’s law partner had received money to secure the passage of the bill. Mr. Bailey, after a moment, arose, and declared that any insinuation that he had received money for that, or any other purpose, was utterly untrue. The debate promised to become very exciting; but other members insisted on the call of the roll, and so the storm passed away, and the bill was passed, by 52 to 31.³⁹⁶

Notice that Bailey did not directly refute Knickerbocker’s charge that the Illinois Central had given money to his law partner; Bailey denied only that he had personally taken any money. Although this episode had no effect on the outcome, Bailey—who had steered the Illinois Central bill through committee and negotiated with Douglas through the railroad’s intermediary—ended up voting against override of the veto.

Knickerbocker’s insinuation that the Illinois Central carried out its corruption, at least in part, through the payment of bogus legal fees was to become a major theme of the debate over the repeal of the Lake Front Act in 1873.³⁹⁷ In order to consider the possibility that the

³⁹⁴ *Springfield; The Charges of Corruption against the Assembly*, Chi Republican 4 (Feb 23, 1869).

³⁹⁵ Ward was reported to have stated as follows:

Mr. Ward again said that legislation of a most extraordinary character was pending, which involved nothing more nor less than the surrender by the State of its right and title to property of vast value, to a private corporation. . . . The value of this property was incalculable. . . . He looked upon the measure as an attempt to take the property of the State to swell the profits of a private corporation

Id. Ward made his comments during the Senate’s discussion of the House’s resolution to appoint a joint committee to investigate corruption and bribery. See text accompanying notes 314–19. The House resolution itself was introduced and passed only after the Lake Front Act had passed the House, and many regarded it as intended as a sort of *in terrorem* deterrent to legislative enactment of the Act. See text accompanying note 315.

³⁹⁶ *The Lake-Front Bill*, Chi Times 2 (Apr 16, 1869).

³⁹⁷ See Part VI.C. A pamphlet widely distributed by an organization called the “Illinois Anti-Monopoly League” in 1881 alleged that the Illinois Central had secured passage of the Lake Front Act in part by “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 Leg-

Illinois Central was using retainers of lawyers (or their partners) to secure political support, we gathered data on how many members of the 1869 legislature were lawyers, and compared this to how they voted on the Act. As reported earlier in the Table, the members of the Senate and House who were lawyers divided over the Lake Front Act in proportions essentially indistinguishable from non-lawyer members.³⁹⁸ In neither the House nor the Senate do the small disparities appear to have been significant.³⁹⁹

Aside from direct charges of bribery, what are we to make of the enactment by both the House and Senate, immediately after passage of the lakefront bill by the House, of a resolution to create a commit-

islature." Bradley, *Report of the Present Status of the Claims of the Illinois Central Railroad to the Lake Front* at 4 (cited in note 19).

³⁹⁸ See Table following note 389.

³⁹⁹ We relied on the 1869 version of what might today be called the legislative "blue book" for information with respect to the legislators' occupations (and for much of the other information concerning the legislators). See John R. Howlett, ed, *Manual of the Twenty-Sixth General Assembly of the State of Illinois* 58-63 (Howlett & Adair 1869). Our separate research through the Illinois Supreme Court suggests that, at least in the House, a small handful of members whose "occupation" was not listed as "lawyer" in the 1869 manual nonetheless were admitted to the bar. In light of both some uncertainties with respect to the information provided by the Illinois Supreme Court and our interest in the assertion recounted in the text that fees to practicing lawyers were a means of corruption, it seemed better to us to use the information in the manual.

As the Table reveals, we also considered the relationship between a legislator's support for the Act and whether his district was served by the Illinois Central or other railroads. (To sharpen the influence of these variables, we considered only members from downstate legislative districts, where the presence of one or more railroads was likely to be of great economic significance to the district.) If one assumes that the Act was the product of the political influence of the Illinois Central, then one might expect that members from districts served by the Illinois Central (where the members and Illinois Central officials would have many opportunities for reciprocal interaction) would support the Act to a greater degree than members from districts not served by the Illinois Central. But, in fact, we found the opposite. Especially on the House side, members from districts served by the Illinois Central were *less* likely to support the Act than were members from districts not served by the Illinois Central. Overall, downstate House members supported the Act by a two to one margin; House members from districts not served by the Illinois Central supported the Act by about 3.5 to one. We are unsure what the explanation for this result might be. At the very least, however, the result is difficult to reconcile with the theory that the Act was simply "bought" by payments by the Illinois Central. We cannot think of any reason why it would be easier to make payments to members from districts not served by the Illinois Central than to members from districts served by the Illinois Central.

Although the following information is not reflected in the Table, we also examined the votes of those legislators whose place of boarding during the legislative session was the Leland Hotel, which enjoyed the largest number of legislator boarders and was also the headquarters of Alonzo Mack, the Illinois Central's principal lobbyist. See text following note 246 and accompanying notes 257-66. Among House members boarding at the Leland, the vote was fifteen to eight in favor of the Act. If one excludes the Cook County legislators staying there, the vote was thirteen to three in favor of the Act in the House. Senators staying at the Leland voted five to four in favor of the Act, although two of the four opposing the bill were from Cook County. These findings, although suggestive, are ambiguous. Even if legislators boarding at the Leland were more likely to support the Act than other legislators, it is unclear whether this is because they were more likely to receive favors from the Illinois Central, or because they had been exposed more fully to Mack's arguments on behalf of the legislation.

tee to investigate “whether any improper influence, pecuniary or otherwise,” had been used to induce any member of the General Assembly to vote for or against any bill?⁴⁰⁰ Surely, one would think, such an extraordinary resolution lends inferential support to the proposition that some kind of foul play was at work in the passage of the Lake Front Act.

One problem with this interpretation is the fact that the resolution passed both the House and Senate unanimously. This is perhaps not what one would expect if certain members of either body had in fact taken bribes and would be afraid of being exposed by such an investigation. The *Tribune*, however, offered an explanation for the unanimity, which was consistent with the hypothesis of corruption:

The lobby never pay their money until a job is perfected. It must go through both houses and over the Governor’s veto before greenbacks change hands. No cure no pay, is the rule of those astute gentlemen who practice before committees and among legislators. There are a good many bills “which have money in them” in various stages of progress, but no cash will be forthcoming until they are pronounced enacted. Hence, an investigation at this stage of legislation, where few or none of the bills “having money in them” are yet law, will discover no “corruption of members,” and a verdict of “not guilty,” or the Scotch verdict of “not proven” must be returned by the committee.⁴⁰¹

In effect, the *Tribune* was suggesting that the investigation resolution was a clever ploy on the part of the proponents of the bill to cover up promises of payoffs that would be made later in the spring—after the measure was signed into law. The paper did not explain how legislators could ensure payment in those circumstances.

The correspondent for the *Chicago Times* had a different take on the resolution, suggesting that its purpose was “solely to frighten timid senators into voting against the lake-front bill, for fear their motives might be misconstrued if they supported it.”⁴⁰² This reporter went on to express doubt whether any money had in fact exchanged hands in the House, noting that if it had, it was at most a “very small” amount.⁴⁰³ A better explanation for “[t]he liberal support the bill has received,” he suggested, “is due to the merits of the bill itself.”⁴⁰⁴

⁴⁰⁰ See text accompanying note 314.

⁴⁰¹ *Alleged Legislative Corruption*, Chi Trib 2 (Feb 22, 1869).

⁴⁰² *The Corruption Investigating Committee*, Chi Times 6 (Feb 23, 1869).

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* The *Chicago Tribune* quoted the *Times*’s statement in full and said that “[w]e should like to see a photograph of the countenance of Dr. Mack and E.S. Taylor, of Cook, while reading this paragraph.” Chi Trib 2 (Feb 24, 1869). The *Tribune* agreed that legislators had yet received little: “Liquor and cigars, and perhaps a few advances on account, are all that members have re-

A potentially more reliable source of information is the correspondence of the officers of the Illinois Central, including both Douglas's regular reports to Osborn in New York and Douglas's instructions to his lobbyists in Springfield. Based on information gleaned from this correspondence, there is no doubt that the Illinois Central, like other railroads of the era, sought to cultivate the goodwill of state politicians. For example, the Illinois Central routinely provided free passes to elected state officials during their service in office.⁴⁰⁵ And the Governor of Illinois routinely was appointed a member of the corporation's board of directors (although it was expected that he would give his vote by proxy to the chairman).⁴⁰⁶ We also strongly suspect, in

ceived." *Id.* But it reiterated its statement that payoffs would come later. "The three to five thousand dollar pecuniary acknowledgments for favors are reserved for distribution after the 'friends of a bill' have been invested with some valuable right or property filched from the people by their faithful legislative agents." *Id.*

⁴⁰⁵ See, for example, Letter from John M. Douglas, President, Illinois Central, to General John M. Palmer, Governor of Illinois (July 16, 1868) (enclosing a pass and explaining that in making up the list of recipients at the beginning of the year "[y]ours was accidentally omitted"). An even more intriguing example is an 1873 request from Greenbury Fort. See Letter from G.L. Fort, Congressman-Elect from Illinois, to John Newell, President, Illinois Central (Jan 17, 1873). Fort thanked Newell for sending him a pass, requested one for his wife as well, and asked that Newell pass along a similar request for passes for Fort and his wife for the Michigan Central Railroad. More intriguingly, Fort stated in apparent support of his requests that he had enclosed a copy of a letter he received "[w]hile I was a member of the State Senate [from] A.W. Mack, who seemed to have R.R. interest in charge." *Id.* The Mack letter appears not to have survived, but, given that Mack himself served in the Senate through 1868 and died at the beginning of 1871 (before the 1871 legislative session was held), was almost certainly written during the 1869 session.

Other, more mundane examples of the Illinois Central's dispensing free passes exist as well. See, for example, Letter from John M. Douglas, President, Illinois Central, to Col. A.C. Babcock, Canton, Illinois (Aug 12, 1868) (sending a free pass "[i]n recognition of past obligations"); Letter from John M. Douglas, President, Illinois Central, to Hon. John Rosette (Feb 23, 1869) (sending a free pass "as per your request"). The controversial practice was outlawed by Congress in the 1906 Hepburn Act, which "specifically forbade the continued issuance of free passes to politicians, newspapermen, and other possible friends of the industry." Stover, *History of the Illinois Central Railroad* at 260 (cited in note 80). For some recollections of the role of legislators' free passes in animating the Granger Movement in Illinois, see Edward F. Dunne, *2 Illinois: The Heart of the Nation* 128–29 (Lewis 1933). For further confirmation that there is nothing new under the sun, see Robert Becker, *State Trims Illini Passes from Legislative Perks; Even Blagojevich Sought Out [Football] Tickets*, *Chi Trib C1* (Mar 2, 2003).

⁴⁰⁶ In this regard (and particularly in light of Palmer's veto of the Lake Front Act just a few months later), the following excerpt of a letter from Osborn to Douglas in early 1869 is instructive:

When you see Governor Palmer again, please get his written authority for my acting as his proxy. I have acted in this capacity but it is better to have his expressed permission. Sometimes it is not convenient to make up the quorum of seven without this proxy. My holding the authority does not of course preclude his presence and participation at our Board meetings when he is in town. You may mention that I have held the proxy of every Governor of Illinois since Governor Bissell's term—say for 14 years.

Letter from Wm. H. Osborn, Chairman, to John M. Douglas, President, Illinois Central (Jan 12, 1869).

keeping with the newspaper account previously described about the “dining table” system at the Leland Hotel, that the Illinois Central picked up the tab for a large number of libations consumed by legislators willing to take their meals—and their marching orders—from Alonzo Mack.⁴⁰⁷

More probatively, the correspondence from 1869 contains two passages, both in letters by Douglas to Osborn, that provide some inferential support for the proposition that the railroad used illicit means to procure enactment of the Lake Front Act. The first is from a letter written in early January:

In case we get through with our business on the lake to our satisfaction, it may require more money than contemplated in the resolution passed by the Board.

However I shall proceed as economically as possible in matter, accepting success at almost any reasonable expense if we can't do better.⁴⁰⁸

The first sentence, standing alone, could be explained on innocent grounds. If Douglas had decided some time between late December and early January to seek a legislative grant of the outer harbor as well as the depot site, this clearly would “require more money” than merely building a new depot.⁴⁰⁹ The second sentence is more damning. It clearly suggests that Douglas is referring to additional expenditures that must be incurred without delay based on his own discretionary authority. Constructing a new outer harbor obviously could await the board's review and approval of additional funding. The “reasonable expense” to be incurred in connection with “our business on the lake” therefore refers to something else. The most likely supposition is that it refers to expenses to be incurred in procuring the legislation itself.

The second passage is from the letter of February 3, previously quoted. Recall that Douglas wrote in that letter: “My great trouble has been to keep quiet about this—not to overstate its importance—not to let these people know prematurely the estimate we place upon it, *and above all to confine within our own knowledge the steps taken to secure it.*”⁴¹⁰ Conceivably, the italicized passage could refer simply to some of the tactics employed by Mack, such as stimulating downstate

⁴⁰⁷ See text accompanying note 263.

⁴⁰⁸ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (Jan 14, 1869).

⁴⁰⁹ It would be useful to examine the Board resolution referred to by Douglas in evaluating this sentence, but unfortunately the Illinois Central did not transfer custody of the Board resolutions to the Newberry Library when the original gift of papers was made, and it appears that the resolutions of this general era have now been destroyed.

⁴¹⁰ Letter from Douglas to Osborn (Feb 3, 1869) (cited in note 294) (emphasis added).

opposition to the Chicago bill and perhaps even encouraging the Merritt bill, and then springing the substitute bill as a “compromise” between the Knickerbocker bill and the Merritt bill. But the revelation of any such tactics would be at most mildly embarrassing. Such a disclosure would not be one that the railroad must “above all” make sure does not take place. It is more plausible that the “steps taken to secure” passage of the bill were ones entailing some illegality or immorality, and thus ones that would be deeply damaging to the reputation of the Illinois Central (and its officers) if made public.

A final intriguing bit of evidence is that some time after the Act was passed, Mack “brought suit against one or more of the railroad companies interested, for his ‘services’ in connection with the passage of the bill.”⁴¹¹ Unfortunately, we do not know anything more about the suit, since Mack died before it went to trial, and it was discontinued by his representatives.⁴¹² The original complaint, if it was preserved, was destroyed in the Chicago Fire of 1871.

Whether the suit supports or undercuts the allegations of bribery is ambiguous. On the one hand, Mack provided other legal services to the Illinois Central later in 1869 in connection with litigation seeking to enjoin implementation of the Lake Front Act,⁴¹³ and it is possible that the suit was simply a disagreement over his fee for representing the railroad in that litigation. On the other hand, there is some indication that Mack was in financial straits and possibly in failing health when the suit was filed.⁴¹⁴ In these circumstances, he might have perceived no prospect of a continuing relationship with the railroad, and might have been willing to threaten the railroad with public disclosure of its chicanery in the hope of exacting a significant settlement from it.

In the end, although the documentary record from 1869 cannot be said definitely to establish that the Illinois Central used corrupt means to facilitate the enactment of the Lake Front Act, it probably leans in that direction. We do not mean to suggest that corruption was the sole or even the predominating factor in securing the passage of the Act. Consider, for example, the role of Representative Bailey. We have seen that Knickerbocker accused Bailey’s law partner of taking money from the Illinois Central in return for Bailey’s support for the

⁴¹¹ *Investigations at Springfield*, Chi Trib 4 (Mar 20, 1873).

⁴¹² See *id.*

⁴¹³ See *The Lake Front; Arguments before Judge Drummond*, Chi Trib 1 (Aug 15, 1869) (listing Mack as one of the attorneys representing the Illinois Central in the case filed by the United States after the Lake Front Act was passed, discussed in text accompanying notes 431–41).

⁴¹⁴ According to one account written many years later, Mack died on January 2, 1871, “in abject poverty, and without friends.” D.W. Lusk, *Eighty Years of Illinois Politics and Politicians* 430 (H.W. Rokker 3d ed 1889). But see *Dr. A. W. Mack*, Chi Trib 2 (Jan 5, 1871) (obituary reflecting a mixed opinion of Mack, but stating nonetheless that “[t]he news of his death will be received with sadness by thousands of friends”).

Act.⁴¹⁵ But we have also seen how Bailey used his position as chair of the House railroad committee to extract a concession from Douglas about the Act, to which Douglas reluctantly agreed.⁴¹⁶ This latter fact, which was presumably not known by Knickerbocker, suggests that the passage of the Act was not simply dictated by the railroad, but rather was accompanied at least to a degree by the ordinary give-and-take that characterizes nearly all legislation enacted by democratic legislatures. So the role of corruption is not only difficult to prove, but hard to assess. We will return to the issue of corruption in Part VIII, after reviewing additional evidence that comes to light from the 1873 legislative session.

VI. AFTER THE ACT

Once the Lake Front Act became law, the Illinois Central began almost immediately to plan for expansion of its existing facilities and development of the outer harbor. Osborn directed Douglas to obtain information from “the topographical bureau at Washington [concerning] plans of all the important harbor improvements and breakwaters of Europe.”⁴¹⁷ He explained that “[s]everal of the Board are very desirous to be possessed of some practical view or plan in relation to this improvement [and] the extent of the work demanded,” and indicated that he expected to hear Douglas’s views on these matters during Osborn’s upcoming annual visit to Chicago in mid-May.⁴¹⁸

The exuberance of the Illinois Central over the passage of the Lake Front Act was quickly tempered, however, when it became apparent that the matter was headed to the courts. On the last day of May 1869, Douglas wrote Osborn with the news that “the City is preparing for litigation on a large scale, which will probably be com-

⁴¹⁵ See note 396 and accompanying text.

⁴¹⁶ See notes 293, 301, and accompanying text.

⁴¹⁷ Letter from Wm. H. Osborn, Chairman, to John M. Douglas, President, Illinois Central (Apr 23, 1869).

⁴¹⁸ *Id.* Several sources indicate that the Illinois Central prepared a formal plan for development of the outer harbor, but if that plan was embodied in a written document, we have not found a copy of it. This is a description of the plan from an opinion letter written by the Illinois Central’s General Solicitor in 1884:

In 1869, soon after the passage of the Lake Front act, a plan was prepared by the railroad company for the construction of an outer harbor within the limits specified in the grant. It was proposed to construct a series of piers six hundred feet wide, separated by intervening slips one hundred and fifty feet wide, to be thrown into the lake from the company’s breakwater as a base, to the distance of about 3,225 feet from the west line of Michigan avenue, and extending from the river on the north to the southern limit of the grant. Four hundred feet beyond the ends of the piers, an exterior breakwater was to be constructed in front of the whole work, sufficient to make a secure harbor in any state of the weather for vessels lying inside.

Ayer Opinion Letter at 13 (cited in note 106).

menced within a few days.”⁴¹⁹ He conceded, “This I did not look for so soon!”⁴²⁰ Given the impending threat of litigation, Douglas canceled a planned June trip to Europe to see investors, and recommended that the railroad lie low “for a time” with respect to developing the harbor.⁴²¹ As we have seen, Osborn’s contemporaneous correspondence to European investors announced that until the litigation was resolved, “no expense whatever will be incurred” in developing the lakefront.⁴²²

A. 1869–1870: North Lake Park

When litigation commenced, it came from an unexpected source. The first suit was filed not by the City, but by Cyrus H. McCormick. The industrialist and Michigan Avenue resident sought an injunction against the City of Chicago and the three railroads to prevent the occupation of the three blocks intended for depot purposes (that is, north Lake Park). Although the Illinois Central was not unconcerned about the matter, Douglas emphasized to Osborn that “[t]his proceeding relates entirely to the three blocks and has nothing to do with what lies East of the breakwater.”⁴²³

The railroad’s focus instead was on its upcoming payment to the City. Under the terms of the Lake Front Act, the three railroads were required to make four staggered payments of \$200,000 for the depot land.⁴²⁴ The city clerk received the initial check from the railroads for that amount. After seeking instruction about what to do, he accepted the check, but only after the Common Council passed a resolution stating that his action was not binding on the City and that it would not receive any money from the railroads “until forced to do so by the courts.”⁴²⁵ The clerk placed the money in a special-deposit account in a bank (where it remained until 1874, when the railroads finally asked that it be returned).⁴²⁶

Several days later (in the summer of 1869), a deputation consisting of the Mayor and two aldermen called upon Douglas. As Douglas characterized the meeting privately in a letter to Osborn, the City’s representatives “wished to ascertain whether an adjustment could be

⁴¹⁹ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (May 31, 1869).

⁴²⁰ *Id.*

⁴²¹ *Id.* (“It is [in] our interest to let the excitement originating in the passage of the law subside—and with that view take no steps for a time.”).

⁴²² See text accompanying note 373.

⁴²³ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (July 1, 1869).

⁴²⁴ See text accompanying note 288; Lake Front Act § 5, reprinted in *Illinois Central*, 146 US at 407 n 1 (statement of the case).

⁴²⁵ *Illinois Central*, 146 US at 408 (statement of the case).

⁴²⁶ See *id.*

had upon the basis of arranging upon fair terms, the matter of the three blocks.”⁴²⁷ The Illinois Central insisted that the only matter that might be negotiated was the price. Osborn advised from headquarters in New York that, so long as Douglas could get another interested railroad to share in an increased payment, he should “commence by substituting \$900,000 for \$800,000 and dicker with them [the City] for some time.”⁴²⁸ Osborn was optimistic of ultimate success, reporting his belief that “they will take a million—and be glad to get it.”⁴²⁹ This confidence did not wane throughout the summer. While Douglas did not doubt that there would be a bump or two in the road (“as there is about everything of any importance in this world”), he also viewed the matter as proceeding “as well [as] or better than expected.”⁴³⁰

Before negotiations could proceed further, however, the local United States Attorney, G.O. Glover, filed a new and apparently unexpected lawsuit in federal circuit court on behalf of the United States.⁴³¹ This suit, like the McCormick action, sought a preliminary injunction barring the Illinois Central from commencing any construction in north Lake Park. The theory was that the United States government was still the owner of the portion of fractional section 10 east of Michigan Avenue, that this land was subject to a special dedication to the public that the land would remain forever free of buildings, and that the United States, either as owner of the land or as trustee for the public beneficiaries of the dedication, had standing to seek an injunction against violation of the terms of the dedication.

District Judge Drummond acted with dispatch in granting the requested preliminary injunction in August 1869, and issued a substantial opinion justifying his action.⁴³² With respect to the question of ownership, Drummond reasoned that the plat dedication did not create a “statutory dedication,” because “all the provisions required by law do not seem to have been complied with.”⁴³³ If it were a statutory dedication, Drummond acknowledged that its effect would have been “to vest in the public the fee to the streets and public grounds named

⁴²⁷ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (July 17, 1869).

⁴²⁸ Letter from Wm. H. Osborn, Chairman, to John M. Douglas, President, Illinois Central (July 19, 1869).

⁴²⁹ *Id.*

⁴³⁰ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (July 26, 1869).

⁴³¹ A political pamphlet circulated in 1881 stated that the suit was filed after Thomas Hoyne, the chair of the Farwell Hall rally, “having exhausted every other means of prevention and redress of this gigantic villainy, as a last resort, applied to the United States Government.” Bradley, *Report of the Present Status of the Claims of the Illinois Central Railroad to the Lake Front* at 5 (cited in note 19).

⁴³² *United States v Illinois Central Railroad Co*, 26 F Cases 461 (CC ND Ill 1869).

⁴³³ *Id.* at 462.

and designated upon the plat as such.”⁴³⁴ Rather, Drummond concluded that the United States had made a common law dedication. The consequence, he reasoned, was that the federal government “hold[s] the title in fee to the land subject to the dedication which had been affixed to it.”⁴³⁵

Given the ruling that the United States owned north Lake Park, subject to the dedication to the public that it would remain forever free of buildings, Drummond concluded that the only way the State or the City could redirect the use of the land was by bringing a formal action in eminent domain to condemn the land and the dedication. Drummond cited several New York and Massachusetts authorities holding that, in the case of land owned by an individual, the legislature could not transform a dedication for one purpose (for example, for use as a public street) to another purpose (for example, partly for a railroad track) “without accountability to the owner of the [property].”⁴³⁶ The same principle he thought applied to land owned by the United States. And it was clear that the Lake Front Act, which directed that the land in question be transferred to the railroads in return for a payment of \$800,000 to the City, did not qualify as a regular exercise of the power of eminent domain such as would legitimately take the rights of the United States and the public. A proper exercise of eminent domain “must be, not alone by an application to the legislature, but by an application in conformity with the law, and where the rights of the parties can be ascertained.”⁴³⁷

The only remaining question was “whether the United States is in a position to apply to a court of equity to prevent those acts from being done which the railroad companies seek to do under this law.”⁴³⁸ Drummond acknowledged that “[t]his is a question about which there may be, and is, some considerable difficulty.”⁴³⁹ But he concluded that the sounder view was that an owner who dedicates his property to the public upon a special condition can apply to a court of equity to enforce that condition, and that the principle should extend to the United States.⁴⁴⁰ He also alluded to a similar bill “filed by the owner of a lot abutting upon this ground” (presumably the McCormick action), and noted “I do not doubt the right of such owner to apply to a court of equity to prevent such a diversion as is contemplated here . . . , and

⁴³⁴ *Id.* Indeed, under an Illinois statute (not cited by Drummond), such dedications within a municipality resulted in the transfer of the fee to the city. See *Illinois Central*, 146 US at 440.

⁴³⁵ *Illinois Central*, 26 F Cases at 462.

⁴³⁶ *Id.* at 463.

⁴³⁷ *Id.* at 464.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

I suppose it is not very material in which case the order of the court is made, whether in this or the other.”⁴⁴¹

The Drummond injunction had the effect of freezing plans to construct a new depot on the north Lake Park site—as things turned out, for all time. The archival record does not indicate why the Illinois Central did not appeal. We can only conjecture that the railroad concluded it was better served putting off the matter of a new depot, and concentrating on preserving the grant of the outer harbor. Osborn had written to shareholders in June that the railroad could get by with Great Central Station for another ten or fifteen years.⁴⁴² On the other side of the ledger, acquiring the north Lake Park site was going to be expensive, however one cut it. If the Drummond decision were reversed on appeal, it would be necessary at a minimum to pay \$800,000 to the City under the terms of the Lake Front Act, or, if the City persisted in resisting the transfer and threatening litigation, something along the lines of \$1 million or more. If the Drummond decision stood, it would be necessary to use the power of eminent domain to condemn the site, and the cost might well be even higher. The benefits and costs of securing the grant of the right to develop the outer harbor may have appeared to be more auspicious.

In the biennial legislative session that commenced in Springfield in January 1871, some attempt was made to address the Drummond injunction. Senator Jackson (of Lawrence) introduced a bill to authorize municipal authorities, so long as the federal government agreed, “to sell, lease, or otherwise dispose of any tract of land lying within the limits of such city or town which has been heretofore dedicated or ceded by the General Government to such city or town, in trust for a public use,” and further provided that any inconsistent acts were repealed.⁴⁴³ The purpose of this bill was described as “to give power to the city of Chicago to sell the lake front.”⁴⁴⁴ The newspapers predicted that the bill would “no doubt create something of a flutter among the residents of Michigan avenue,”⁴⁴⁵ but the bill did not progress very far

⁴⁴¹ *Id.* This aspect of Judge Drummond’s decision foreshadowed the famous *Ward* cases decided by the Illinois courts later in the century and early in the next. These cases saw Montgomery Ward, who owned property on Michigan Avenue, obtain repeated injunctions against the construction of buildings in Grant Park based on the language of the dedication on the Fort Dearborn Addition plat. See *City of Chicago v Ward*, 169 Ill 392, 48 NE 927 (1897); *Bliss v Ward*, 198 Ill 104, 64 NE 705 (1902); *Ward v Field Museum of Natural History*, 241 Ill 496, 89 NE 731 (1909); *South Park Commissioners v Montgomery Ward & Co*, 248 Ill 299, 93 NE 910 (1910).

⁴⁴² See text accompanying note 373.

⁴⁴³ *State Legislatures; Business Transacted at Springfield Yesterday; . . . Disposal of Federal Land Grants*, *Chi Trib* 1 (Feb 8, 1871).

⁴⁴⁴ *Springfield; Proceedings of the General Assembly on Yesterday; Proposal to Authorize the Sale of the Chicago Lake Front*, *Chi Times* 2 (Feb 8, 1871).

⁴⁴⁵ *Id.*

in the legislative session. It is unclear whether the Illinois Central was behind or even supported the measure.

So matters stood with respect to north Lake Park until the dramatic events of October 8 and 9, 1871, when unusually dry weather and high winds set the stage for the worst fire in Chicago history. About one-third of the City, including most of the downtown area, was consumed by the flames.⁴⁴⁶ After devouring the mansions along Terrace Row on Michigan Avenue, the fire jumped easily onto the roof of the Great Central Station north of Randolph Street, reducing it to a mere shell.⁴⁴⁷ But the main line of the Illinois Central tracks was spared—an unforeseen benefit of a railroad in the lake—and this allowed most of the rolling stock to be rescued by moving it south of the City. And the fortuitous presence of a fire engine on a flat car destined for Wisconsin allowed one of the two grain elevators to be saved.⁴⁴⁸

Of greater significance for our story is what happened immediately after the Great Fire. In determining what to do with the massive debris, Mayor Roswell B. Mason—a former chief engineer of the Illinois Central—together with other leading citizens quickly decided that it should be used to fill in Lake Michigan in the area between Lake Park and the Illinois Central breakwater. Thus, “[s]lowly the water area west of the tracks, which had been extensive enough to provide sailing room for small craft, was filled in. Within months the trestle work was completely filled in, and the tracks of the railroad were on solid ground.”⁴⁴⁹

This unexpected event evidently changed the cost-benefit calculus about building a new depot south of Randolph Street. Not only was some sort of new depot now badly needed, but the costs of constructing such a facility in north Lake Park had been reduced significantly, since the landfilling had already been done by the City with the aid of a largely volunteer work force. The immediate problem was that the time to appeal Judge Drummond’s injunction against building in the three blocks had long passed. The railroad’s response was to prepare an elaborate petition to the Attorney General of the United States, asking that he direct the United States Attorney to withdraw the request for injunctive relief, thereby eliminating any federal court impediment to moving forward with a new depot.⁴⁵⁰ For reasons that

⁴⁴⁶ See Pierce, 3 *History of Chicago* at 3–6 (cited in note 20) (discussing the course of the Great Chicago Fire).

⁴⁴⁷ See Herman Kogan and Robert Cromie, *The Great Fire: Chicago 1871* 113, 203 (G.P. Putnam’s Sons 1971); Stover, *History of the Illinois Central Railroad* at 182 (cited in note 80).

⁴⁴⁸ See Stover, *History of the Illinois Central Railroad* at 182 (cited in note 80).

⁴⁴⁹ *Id.* at 184. For a glimpse of how this area had previously appeared, see Figure 5 (preceding note 116).

⁴⁵⁰ See Statement and Argument Addressed to the Attorney General in Reference to Dismissal of the Bill in Case of *The United States v. The Illinois Central Railroad Co. and Others*

do not appear in the archival record, however, the petition effort failed, and the preliminary injunction remained undisturbed.

The upshot was that the Illinois Central and affiliated lines had to make do without using the north Lake Park site for a new depot. The Illinois Central first operated out of a temporary structure at Twenty-Second Street, then reopened a depot on South Water Street north of Randolph Street in 1872. This depot, hemmed in by limited space, was deemed inadequate by the affiliated lines, with the result that some of them employed a variety of temporary stations of dubious legality south of Randolph Street throughout the 1870s and 1880s.⁴⁵¹ In 1878, to relieve some of the pressure on the depot, the City adopted an ordinance permitting the Illinois Central to build a small brick passenger depot in Lake Park at Van Buren Street.⁴⁵² Finally, in 1893 the Illinois Central opened a grand depot and general office building on land it owned at Park Row and Michigan Avenue just south of Lake Park (soon renamed Grant Park). Known as Central Station, this remained a major Chicago landmark until it was razed in 1974.⁴⁵³ Today, the Metra commuter stations serving the Illinois Central tracks at Randolph Street and Van Buren Street are discreetly tucked below ground level. What was north Lake Park is now Chicago's new Millennium Park. Its features include the McCormick Tribune Ice Rink—ironically located exactly where the Skating Park Bill of 1867, which the *Tribune* had denounced, would have created a private enterprise devoted to similar ends⁴⁵⁴—and a flamboyant outdoor music pavilion designed by Frank Gehry.

B. 1870–1872: The Outer Harbor

While the Illinois Central equivocated about whether to seek to utilize the Lake Front Act's grant of the three blocks, it displayed no hesitation about the value of the grant of submerged land for an outer harbor. In part, this may have been due to a perception that, legally speaking, the path toward achieving secure property rights in the outer harbor seemed more straightforward. Osborn's letters indicate that the railroad was now wholly committed to the idea that the American view of ownership of submerged land would be applied to

(Nov 5, 1872) at 5 (arguing that after the "great fire of October last" a "new passenger depot is now absolutely required").

⁴⁵¹ See Lind, *Limiteds along the Lakefront* at 5–6 (cited in note 109) (describing the construction of new stations following the Chicago fire).

⁴⁵² Ordinance Permitting the Illinois Central Railroad Co. to Erect a Fence on the East Line of Lake Park, Etc. (Nov 22, 1878), in *Journal of the Proceedings of the City Council of the City of Chicago for Municipal Year 1878–9, Being from Apr. 29, 1878, to Apr. 28, 1879* 284–85, 294 (Dunn & Heggie 1880).

⁴⁵³ See David Lowe, *Lost Chicago* 56 (Houghton Mifflin 1975).

⁴⁵⁴ See, for example, text accompanying notes 186–87 and 226–27.

Lake Michigan.⁴⁵⁵ Once this premise was accepted, then the fact that the United States might be deemed to be the owner of north Lake Park would not affect the State's ownership of the submerged lands, or its power to convey them to the railroad. Moreover, the vested-rights doctrine of *Fletcher v Peck* seemed to say that as long as the Illinois Central accepted the grant of the outer harbor, and especially if it took steps to act in reliance on that grant, the courts would not permit the legislature to change its mind and repeal the grant.⁴⁵⁶ Finally, the outer harbor was without doubt the bigger prize, both in terms of protecting the railroad's existing investments along the lakefront from some future grant to another corporation and in terms of future revenue growth.

The railroad's correspondence reveals that virtually from the date of enactment of the Lake Front Act, the outer harbor was the higher priority.⁴⁵⁷ For example, in reporting on his settlement negotiations with the mayor and aldermen, Douglas related that one element of the City's proposal was to divide authority over the outer harbor. Specifically, the City proposed that it would "conced[e] to the Ill. Central what lies outside of the breakwater north of Monroe St. [and] the Ill. Cent. conced[e] what lies south of Monroe St. and north of Park Row."⁴⁵⁸ Douglas had responded "that the matter of the three blocks concerned the three companies and must come up separately for negotiation and adjustment" but in his view "the outside could not in any way be connected with that negotiation."⁴⁵⁹ "[O]f course," Douglas wrote to Osborn soon thereafter, in the summer of 1869, "we cannot relinquish one foot, and can never listen to any negotiations proceed-

⁴⁵⁵ See Letter from Osborn to Borthwick (June 9, 1869) (cited in note 373) ("The State of Illinois has vested in the Company a perfect title to all the property it has acquired or appropriated from the water and has further granted it the privilege of constructing works for a mile further into the Lake. . . . We have no doubt that the State possessed entire sovereignty or proprietorship in these waters and that the title will be fully confirmed by the Courts.").

⁴⁵⁶ *Fletcher* had also involved a state land grant followed by a repeal when the original grant was discredited by allegations of corruption. See 10 US (6 Cranch) 87. Although exceptions to Contracts Clause protection were increasingly recognized as the nineteenth century advanced, see generally Benjamin Wright, *The Contract Clause of the Constitution* ch 8 (Harvard 1938), the Illinois Central could take comfort that the core holding of *Fletcher* seemed secure in this era. See, for example, *Davis v Gray*, 83 US (16 Wall) 203, 232 (1873) (holding that Texas could not rescind the grant of public land to a railroad without violating the Contracts Clause).

⁴⁵⁷ This was also the perception of some of the railroad's political opponents, looking back on its behavior during this era. See Bradley, *Report of the Present Status of the Claims of the Illinois Central Railroad to the Lake Front* at 8 (cited in note 19) (noting that the Illinois Central for ten years had borne "the risk and inconvenience of the slab shanties which have sufficed for its main depot . . . rather than waive its claim to the submerged lands").

⁴⁵⁸ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (July 17, 1869).

⁴⁵⁹ *Id.*

ing upon such a basis.”⁴⁶⁰ In September, Douglas reported to Osborn that “[w]e have had some little litigation about the three blocks, but I have encountered no serious discouragement in the way of our lake shore matters.”⁴⁶¹

It also appears that the Illinois Central embarked on a plan to fortify its claim that the grant of the outer harbor was a vested right, perhaps in anticipation of future litigation. Thus, the Illinois Central undertook a number of initiatives during 1869 and 1870 that required construction activity outside the existing breakwater. For example, the company laid the groundwork for building new piers north of Randolph Street, “by laying a new track on piles driven into the lake on a line a short distance outside that part of the breakwater then extending southwesterly from Randolph street.”⁴⁶² About the same time, the railroad constructed a new breakwater from Park Row to a point two blocks south.⁴⁶³ The importance to the railroad of these investments can be seen in the emphasis that management placed on moving forward with them in 1870, even in the midst of economic conditions that Douglas found increasingly “alarm[ing].”⁴⁶⁴ Thus, New York headquarters issued a general directive to operations in Chicago “to cut your construction expenses right down,” but specified that this was “with the exception of the Lake Shore protection, which must be prosecuted.”⁴⁶⁵ One possible motivation for pressing forward with these improvements was to establish that the railroad had acted in reliance on the grant of rights to the outer harbor under the 1869 Act.

There is also the matter of the “acceptance” of the Lake Front Act by the Illinois Central. On July 6, 1870, the Board of Directors adopted a resolution formally accepting the Lake Front Act.⁴⁶⁶ The Act did not itself require any such action. The delayed acceptance (and the further delay in communicating the acceptance until November 1870) may have been prompted by a perceived need to comply with a provision of the new Illinois Constitution adopted in 1870.⁴⁶⁷ Whatever the

⁴⁶⁰ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (July 26, 1869).

⁴⁶¹ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (Sept 20, 1869).

⁴⁶² *Ayer Opinion Letter* at 13–14 (cited in note 106).

⁴⁶³ See *id.*

⁴⁶⁴ Letter from John M. Douglas, President, to Wm. H. Osborn, Chairman, Illinois Central (Apr 20, 1870) (“This is the hardest time in traffic I have ever seen. There has probably never been in this state, according to the area planted, such an entire failure in the corn crop. I am myself alarmed for our own affairs.”).

⁴⁶⁵ Letter from Wm. H. Osborn, Chairman, to John M. Douglas, President, Illinois Central (Apr 14, 1870).

⁴⁶⁶ See *Illinois Central*, 146 US at 408–09 (statement of the case).

⁴⁶⁷ This provision stated:

All existing charters or grants of special or exclusive privileges, under which organization

reasons for the delayed acceptance, it is interesting to note that the resolution “direct[ed] the President of the company to give notice to the State of such acceptance, and that the company had commenced work upon the shore of the lake at Chicago under the grants referred to.”⁴⁶⁸ It is thus possible that the formal acceptance was also motivated in part by a desire to buttress the railroad’s claim that its rights under the 1869 grant were fully vested.

The Illinois Central had good reason to be apprehensive about the status of the grant of the outer harbor. The legislative session that commenced in the winter of 1871 brought a renewed challenge to the railroad’s interests in the lakefront. Senator Woodard of Cook County introduced a bill that would have repealed the Lake Front Act outright.⁴⁶⁹ While the railroad undoubtedly noticed this bill, little evidence survives of the company’s response.⁴⁷⁰

In any event, Senator Boyd, who had championed the Lake Front Act in 1869, reported unfavorably on the bill on behalf of the Judiciary Committee. The committee’s view was that “rights had actually accrued under that law which made it wrong to attempt to repeal it,” and a majority of the Senate concurred.⁴⁷¹ Newspaper coverage of the

shall not have taken place, or which shall not have been in operation within ten days from the time this constitution takes effect, shall thereafter have no validity or effect whatever.

Ill Const of 1870 Art 11, § 2. The Constitution took effect on August 8, 1870, so any grant that could be characterized as a “special or exclusive privilege” had to be “in operation” by August 18, 1870, or risk forfeiture. The State of Illinois, in its brief in *Illinois Central*, argued that the Board’s resolution of July 6, 1870, was inadequate for technical reasons to place the grant in the Lake Front Act “in operation.” See Brief on Behalf of the State of Illinois at 78–93, *Illinois Central*, 146 US 387. Justice Field did not address this argument in his opinion.

⁴⁶⁸ *Ayer Opinion Letter* at 12 (cited in note 106) (discussing Illinois Central’s adoption of a resolution accepting grants made to the company under the Lake Front Act).

⁴⁶⁹ See *State Legislatures; Business Transacted at Springfield Yesterday; . . . Lake Front Bill*, Chi Trib 1 (Feb 10, 1871) (predicting Woodard’s submission of such a bill); *Springfield; . . . The Proposed Sale of the Chicago Lake Front; The Chicago Lake Front*, Chi Times 1 (Feb 13, 1871) (quoting the bill in full); *Journal of the Senate of the Twenty-Seventh General Assembly of the State of Illinois* 211 (1871) (1871 *Illinois Senate Journal*) (reflecting Woodard’s introduction of the bill and its referral to the judiciary committee).

⁴⁷⁰ See Letter from Wm. H. Osborn, Chairman, to John Newell, President, Illinois Central Railroad (Feb 13, 1871) (“I notice that Senator Woodard presents a bill to repeal the Lake Shore. This agitation will be used to affect our stock. Please send me the newspapers giving the debate on his motion and any further allusions to it which may appear in the press to enable me to answer the questions which will soon be made in this office on the subject.”). The only other possible reference to the matter in surviving Illinois Central correspondence is a cryptic statement in early March, which may or may not have concerned the Lake Front Act. See Letter from Wm. H. Osborn, Chairman, to John Newell, President, Illinois Central (Mar 8, 1871) (“Senator Jewett’s news is extremely gratifying, and [has] taken quite a load off my mind—we have enough to do to get a fair return from our lines—even without being pestered and affected by such adverse legislation.”).

⁴⁷¹ *State Legislatures; Business Transacted at Springfield Yesterday; The Lake Front Bill Tabled in the Senate*, Chi Trib 2 (Apr 6, 1871). See 1871 *Illinois Senate Journal* at 498 (cited in note 469).

proposed repeal was relatively scant, which may reflect the fact that the opposition to the railroad's development of the outer harbor remained weak at this time.

But the Illinois Central had little time to savor its success in staving off legislative repeal. In July 1871, United States Attorney Glover brought yet another civil action against the railroad, this time concerning the outer harbor. The theory of this action was that the railroad's construction work in the outer harbor was threatening navigation in the lake, authority over which was committed exclusively to the federal government. The action seems to have been precipitated, in part, by an appropriation of \$150,000 by Congress in 1870 to the United States Army to draw up plans for "enlargement of harbor facilities at Chicago, Illinois" and for construction of "a harbor of refuge."⁴⁷² This appropriation, the first of many over the years to come, essentially injected a federal agency—the U.S. Army Engineers—into the mix along the lakefront. The information filed by the United States Attorney alleged (1) that the U.S. Army had exclusive authority under the federal appropriations legislation to establish the lines of the outer harbor at Chicago; (2) that the railroad was filling with earth part of that harbor and had built a railroad track on piles in the navigable waters of the lake; (3) that the company intended to continue the work of filling to a point at least six hundred feet east of the land it had already made; and (4) that this would obstruct the navigation of the lake and damage the new outer harbor.⁴⁷³ The parties apparently agreed to a preliminary injunction.⁴⁷⁴

After the Great Fire intervened, the case was settled, in January 1872, pursuant to a stipulation filed with the court. The settlement drew an imaginary line, "[c]ommencing at the pier on the south side of the entrance to the Chicago River, 1,200 feet west of the Government breakwater aforesaid; thence south to an intersection with the north line of Randolph street extended eastwardly; thence due west 800 feet; and thence south to the east and west breakwater proposed to be constructed by the United States 4,000 feet south of the pier first above mentioned."⁴⁷⁵ Inside this line, the Illinois Central was permitted to construct docks and wharves consistent with the authority granted by the Lake Front Act, provided that it followed "the directions which might be given in reference to the proper construction of said docks

⁴⁷² Appropriation for Public Works on Rivers and Harbors (July 11, 1870), 41 Cong Ch 240, 16 Stat 223, 226 (1870).

⁴⁷³ See Information, *United States v Illinois Central Railroad Co* (filed July 3, 1871), reprinted in *Encroachments upon the Harbor* at 22 (cited in note 153).

⁴⁷⁴ See *Ayer Opinion Letter* at 14–15 (cited in note 106).

⁴⁷⁵ Stipulation, *United States v Illinois Central Railroad Co* (Jan 1872), reprinted in *Encroachments upon the Harbor* at 23 (cited in note 153).

and wharves by the proper officers of the Engineer Bureau of the United States.”⁴⁷⁶ Outside the line, it was forbidden to undertake any construction without the express consent of the United States.

The settlement had far-reaching effects. It effectively fixed for twenty years the line of division between open access rights and private exclusion rights along the Chicago lakefront: outside the settlement line, a rule of open access and free navigation would apply; inside the line, the Illinois Central could potentially exercise private exclusion rights. It thus had the effect of greatly reducing the scope of private rights conferred by the Lake Front Act. Although discussions of the Act to this very day emphasize the extraordinary scope of the grant in the original Act—over one thousand acres in total—the settlement essentially trimmed the area under Illinois Central control back to a modest curtilage around its existing improvements. Combined with the effective abandonment of plans to develop the north Lake Park site as a new depot site after 1872, the practical import of the Lake Front Act was now but a shadow of what it had seemed in 1869.

During 1872 and the following year the railroad resumed at least some of its construction activities within the now-reduced outer harbor. For example, the company continued its work on Pier One, east of its existing warehouses and adjacent to the river, although this was not completed until after the Lake Front Act was repealed in 1873. The railroad also filled in a triangular piece of land between Madison and Washington Streets to allow a better curve of its tracks and thus better access to the expanding terminal facilities. All in all, the railroad was said to have expended some \$230,000 between 1869 and 1873 in developing various facilities in the outer harbor area along the lakefront.⁴⁷⁷

C. 1873: Repeal

The early 1870s were a time of great economic distress in the rural Midwest. Falling crop prices made many farmers unable to meet expenses, including what the farmers perceived to be unreasonable and unfair railroad charges for shipping grain and livestock to market. The result was the Granger Movement, a form of rural populism that made railroads a particular focus for political agitation.⁴⁷⁸ Although regional in its composition and nationwide in its influence, the Granger

⁴⁷⁶ *Id.*

⁴⁷⁷ See Evidence on Behalf of Defendant Illinois Central Railroad Company (May 5, 1887), in *Record: Illinois Central Railroad* at 350, 355–56 (cited in note 71) (reproducing testimony of L.P. Morehouse).

⁴⁷⁸ For an excellent study of this movement and the conditions that inspired it, see Miller, *Railroads and the Granger Laws* (cited in note 259).

Movement was nowhere more important than in Illinois.⁴⁷⁹ The Illinois Constitution of 1870, the impetus for which came in part from the movement, had declared the authority of the State to regulate the services and rates of railroads. The Illinois Central was the object of particular scrutiny, a clause even being included in the 1870 Constitution to prohibit the company's release, ever, from any contract or obligation "to pay any money into the state treasury."⁴⁸⁰

Given the widespread popular distrust and clamor for further regulation of the railroads, it is inconceivable that, with the advent of the 1873 legislative session, the Illinois Central could have been indifferent to what might transpire in Springfield. Yet virtually no direct evidence of the railroad's reaction exists. The railroad's new president, John Newell, was much less given to confiding about political matters in correspondence with Osborn. In any event, when the legislature convened in 1873, it did not take long before Senator Reynolds introduced a bill to repeal the Lake Front Act of 1869.⁴⁸¹ The bill was referred to the Committee on Municipalities.⁴⁸² One of the Illinois Central's lobbyists in Springfield would report to the company's president that the three Cook County members on the committee strongly urged passage and, indeed, that the committee had voted unanimously to recommend repeal.⁴⁸³

The tenor of the legislative deliberations in 1873 was very different from 1869. Whatever corrupt inducements may have facilitated the passage of the Lake Front Act in 1869, the thrust of the legislative debates and the newspaper commentary in that year was largely pragmatic, the focus being how best to assure the construction of a new passenger depot and a new outer harbor for the City of Chicago. In 1873, there was no discussion about how to obtain a new depot or build an outer harbor. The deliberations were negative and recriminatory in nature. Probably because of the state of the economy, all participants in the debate tacitly recognized that there would be no new depot or outer harbor in the foreseeable future. The sole question was whether to punish the Illinois Central and its supporters for their assumed venality in 1869 by repealing the Lake Front Act.

⁴⁷⁹ See *id.* at 59–76.

⁴⁸⁰ Ill Const of 1870, sections separately submitted.

⁴⁸¹ See *Journal of the Senate of the Twenty-Eighth General Assembly of the State of Illinois* 185 (1873) (1873 *Illinois Senate Journal*) (reflecting introduction of Senate Bill 180, "An act to repeal an act entitled 'an act in relation to a portion of the submerged lands and Lake Park grounds lying in and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago,' in force April 6 [sic], A.D., 1869").

⁴⁸² See *id.* at 188.

⁴⁸³ See Letter from George W. Wall, writing from the Leland Hotel in Springfield, to John Newell, President, Illinois Central (Feb 25, 1873).

A brief account in the *Inter-Ocean*, which supported repeal, is indicative of the new tone. The Chicago paper reported that former Representative Merritt, whose bill to appoint a commission to consider the lakefront had been soundly defeated by the Illinois Central's forces in 1869, made a return appearance at the Capitol.⁴⁸⁴ He reportedly "gave an amusing account of the way in which the Lake Front swindle was passed by the Legislature of 1869. He states that some Chicago papers received \$75,000 to keep quiet. The highest sum paid for a vote and influence was \$20,000, and the lowest \$25."⁴⁸⁵ This brief comment, appearing in a partisan paper (whose proprietor was Jonathan Young Scammon) and purporting to quote one of the losers in 1869, should be taken with all the qualifications about newspapers as sources. Whatever the truth of the account, however, the story illustrates the tenor of the public argument in support of repeal.

In this environment, it is not surprising that the Illinois Central took the high road, meaning in this case arguments grounded in constitutional law. Rather than relying solely on former legislators as lobbyists, the railroad dispatched its counsel, John Jewett, to Springfield. Although the municipalities committee had already voted to recommend repeal, Jewett was able to persuade its chairman not to report the bill back to the Senate before he could address the committee. Jewett appeared before the committee on March 9 and had a considerable effect. Taking up what one skeptical newspaper described as "that old familiar strain about the Dartmouth college, and the other worn-out tune about 'vested rights,'"⁴⁸⁶ Jewett was variously reported as "seem[ing] to convince some of the Committee that it would be simply absurd to pass an act that would be null and void"⁴⁸⁷ and as making the committee "afraid to do anything."⁴⁸⁸ Thus, notwithstanding its previously having voted unanimously to report the bill favorably to the Senate, the committee deferred final action on the bill until its next meeting. One senator's motion to have the bill reported immediately did not even receive a seconding request.

The proponents of repeal began to look to the House for a more sympathetic audience, shifting their attention back and forth between the two legislative chambers. On March 11, Representative Herrington of Kane County introduced a measure in the House to re-

⁴⁸⁴ *Lake Front*, *Inter-Ocean* (Chicago) 1 (Mar 12, 1873).

⁴⁸⁵ *Id.*

⁴⁸⁶ *Lake Front*, *Chi Times* 2 (Mar 13, 1873). The reference is to the famous decision holding that corporate charters are contracts protected by the Contracts Clause against legislative impairment. See *Trustees of Dartmouth College v Woodward*, 17 US (4 Wheat) 518 (1819).

⁴⁸⁷ *The State Capitol; The Railroad Bills—Passage of the Lake Front Repeal Bill Very Doubtful*, *Chi Trib* 5 (Mar 10, 1873).

⁴⁸⁸ *Lake Front*, *Chi Times* at 2 (cited in note 486).

peal the law.⁴⁸⁹ It was referred without opposition to the Committee on Railroads.⁴⁹⁰ Back in the Senate, meanwhile, Reynolds threatened to introduce another measure if the Committee on Municipalities did not report back his bill. The next day, on March 12, more than two weeks after it had agreed unanimously to report the repeal bill back favorably, the Senate's Committee on Municipalities finally discharged the bill—but did so without recommendation.⁴⁹¹ The *Chicago Times* reported that “the committee appeared to be very glad to get rid of it in any way.”⁴⁹²

A few days later, the House railroad committee took up Herrington's bill. Jewett's brother-in-law, a member of the committee, requested that the committee defer action on the matter until Jewett could return to Springfield to testify before the House committee.⁴⁹³ It was agreed to hold the matter temporarily.

On March 18, a member of the House “caused a little excitement in the House by introducing a bill providing for the appointment of a special Committee of three Senators and four Representatives to investigate the means used to pass the Lake-Front bill through the Legislature of 1869.”⁴⁹⁴ The work was to be “for the guidance of this General Assembly, in legislating upon the repeal of said Lake Front Bill.”⁴⁹⁵ Under this proposal, the committee of investigation would have full subpoena powers and by the fall would provide the General Assembly a report “contain[ing] a full and detailed statement of the history and passage of said Lake Front Bill, so far as the same can be ascertained, with the means and influences used to accomplish the same.”⁴⁹⁶

The motivation behind the investigation bill, as in 1869, was ambiguous. On the one hand, some evidence suggests that the investigation was devised by the proponents of repeal as a sort of *in terrorem* device to induce the railroad to drop its opposition to the repeal effort in exchange for the dropping of the investigation bill. Thus, the propo-

⁴⁸⁹ See *Journal of the House of Representatives of the Twenty-Eighth General Assembly of the State of Illinois* 341 (1873) (1873 *Illinois House Journal*) (reflecting introduction of House Bill 483, “An act to repeal an act entitled ‘an act in relation to a portion of the submerged lands and lake park grounds, lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago,’ in force April 16, 1869”).

⁴⁹⁰ See *id.*

⁴⁹¹ See 1873 *Illinois Senate Journal* at 307–08 (cited in note 481).

⁴⁹² *Lake Front*, *Chi Times* at 2 (cited in note 486).

⁴⁹³ See *The Lake Front Steal*, *Inter-Ocean* (Chicago) 2 (Mar 17, 1873).

⁴⁹⁴ *The State Capital; . . . The Lake-Front Act*, *Chi Trib* 5 (Mar 19, 1873). See 1873 *Illinois House Journal* at 402 (cited in note 489) (reflecting the introduction of House Bill 525).

⁴⁹⁵ A Bill for an Act for an Investigation into the Means Used to Secure the Passage of an Act entitled “An Act in Relation to a Portion of the Submerged Lands and Lake Park Grounds, lying on and Adjacent to the Shore of Lake Michigan, on the Eastern Portage of the City of Chicago,” in force April 16, 1869, commonly called the Lake Front Bill, HB 525, 28th Assem, § 10 (1873), available in the Illinois State Archives, Springfield, Ill.

⁴⁹⁶ *Id.*

ment of the investigation also was a supporter of the repeal, and the railroad lobbied actively against the investigation.⁴⁹⁷ On the other hand, the bill may have served as a delaying tactic by opponents of repeal, given that the investigation was intended in part to determine “the present value of the property granted [and] the value of the same at the time said grant was made”—inquiries that could not have been completed during the current legislative session.⁴⁹⁸ One newspaper thus averred that the investigation bill was a smokescreen “under cover of which the repealing bill may be fatally stabbed.”⁴⁹⁹

Whatever the truth concerning the investigation bill, it became clear that the railroad would be hard pressed to stave off the forces favoring repeal. By the time Jewett arrived to address the House committee, it was too late: the committee had reported the repeal bill favorably.⁵⁰⁰ Largely conceding the matter in the House, the railroad refocused its attention on the Senate. The vested-rights argument, which had succeeded in prompting the Committee on Municipalities to back off its favorable recommendation of the repeal bill, was expected to get a more favorable reception in the Senate because of the number of lawyers in the upper body. Consistent with this view, the railroad sought to have the repeal bill referred to the Senate’s Committee on the Judiciary. One of its lobbyists, who had already left Springfield thinking he had done all he could, received a telegram from Newell in Chicago, apparently instructing him to return to the capital. He then responded to the president that “you should send *all the forces at your command* to Springfield at once—for it will require an immense influence to make a successful fight in an open field.”⁵⁰¹ The lobbyist concluded that he was “strongly inclined to think we can smother the Bill if we can get it to the Judiciary Committee.”⁵⁰²

The *Tribune* observed these machinations and reported that “[t]he programme of the anti-repealers is to recommit the bill to the Senate Judiciary Committee, where it is expected Mr. Jewett’s arguments will overwhelm his legal brethren.”⁵⁰³ Others thought that something other than the quality of the Illinois Central’s legal arguments was causing movement among the senators. The *Chicago Evening Journal*, for example, contended that, “by-and-by, when a vote is

⁴⁹⁷ See 1873 *Illinois House Journal* at 445–46 (cited in note 489); *The Lake Front Repeal Bill Passed in the House*, 127 to 5, *Chi Trib* 5 (Mar 28, 1873).

⁴⁹⁸ HB 525 § 10 (cited in note 495).

⁴⁹⁹ *The Lake Front Repealing Bill; No Prospect of Its Passage; The Railroad Lobby; . . . The Lake Front Bill*, *Chi Evening J* 2 (Mar 24, 1873).

⁵⁰⁰ See *Lake Front*, *Chi Trib* 5 (Mar 21, 1873).

⁵⁰¹ Letter from George W. Wall, writing from Du Quoin, Ill, to John Newell, President, Illinois Central (Mar 23, 1873).

⁵⁰² *Id.*

⁵⁰³ *Lake Front*, *Chi Trib* at 5 (cited in note 500).

reached, if ever, we may ascertain how many of the Senate's twenty-five lawyers are the paid attorneys of the railroads."⁵⁰⁴ Based on this, it concluded: "The bill will pass the House, but not the Senate, for there are too many lawyers there. Mark the prediction."⁵⁰⁵

The prediction concerning the House was correct. On March 26, the House took up the matter and, after a bitter debate, overwhelmingly rejected an effort to refer the repealer to its judiciary committee.⁵⁰⁶ The next day, by an even more overwhelming vote (127 to 5), the House voted to repeal the Lake Front Act.⁵⁰⁷

The prediction concerning the Senate was almost correct. The upper body took up the matter the day after the vote by the House. One newspaper observed that "[t]he fight waxes warm, and, by the middle of the week, will be quite exciting."⁵⁰⁸ This paper predicted that "[w]hatever chance there is for the Repealing bill, the Investigation bill will hardly pass, on account of a repugnance on the part of many to 'raking up dead men's bones.'"⁵⁰⁹

The fight waxed warm, indeed. One senator moved for referral of the bill to the Judiciary Committee.⁵¹⁰ The referral was opposed by Senator Whiting from Bureau County, who argued that

the act should be wiped off the statute books as a rebuke to the corruption by which it was passed. He knew the Legislature in 1869 was filled with the elite of the bar of the State, all in favor of the bill. The press of the State was muzzled, and it was run through the Legislature with money.⁵¹¹

Warming to the subject, the senator roundly denounced the Lake Front Act: "Inequity presided over the conception of the scheme, fraud was present at its birth, and honesty would rejoice at its death. This was worse than Credit Mobilier, salary steal, and all the inequities perpetrated by Congress."⁵¹² Referral, that is, anti-repeal, had its proponents as well, many of whom sought to defend the Judiciary Committee against the charge (or at least the implication) that its members were largely attorneys in the employ of the railroad. The ultimate vote was close: nineteen senators voted in favor of referral, and twenty-two

⁵⁰⁴ *Lake Front Repealing Bill*, Chi Evening J at 2 (cited in note 499).

⁵⁰⁵ *Id.*

⁵⁰⁶ See 1873 *Illinois House Journal* at 440–41 (cited in note 489) (reflecting defeat of the motion to refer by a vote of 109 to 14).

⁵⁰⁷ See *id.* at 445–46.

⁵⁰⁸ *The State Capital; The Lake Front Repeal Bill Passed in the House, 127 to 5*, Chi Trib 5 (Mar 28, 1873).

⁵⁰⁹ *Id.*

⁵¹⁰ See 1873 *Illinois Senate Journal* at 448–49 (cited in note 481).

⁵¹¹ *The State Capital; Exciting Debate on the Lake-Front Repeal Bill in the Senate*, Chi Trib 1 (Mar 29, 1873).

⁵¹² *Id.*

voted against.⁵¹³ A swing of two votes would have caused the repeal bill to be referred to the Judiciary Committee, which very likely would have meant its defeat. Now, most observers predicted its passage.

In fact, the railroad appears at this point to have focused its energies rather more on defeating the investigation bill.⁵¹⁴ When this latter bill came up for discussion in the House, its reception was different from that for the repeal bill, which had passed with more than 95 percent of the vote. The House considered a motion to strike out the investigation bill's enacting clause—a motion that was made by a representative who had voted in favor of repeal. The essential argument in favor of the motion was that the legislature “should not take up the time and money of the State to go back four years to wash the dirty linen of a preceding Legislature,” and that the representatives “had already done more than was asked by the people in passing the repealing bill through the House.”⁵¹⁵ It was also allowed that “[t]hose who wanted investigation were disappointed in stealing the land themselves.”⁵¹⁶

To be sure, the investigation bill had proponents. One member “thought the men who were bought like steers in the market should be exposed and held up to public scorn, especially as some of them since were candidates for office.”⁵¹⁷ Another maintained that the question of whether the Lake Front Act had been procured by fraud would continue to have practical importance, even if the repeal bill passed. The railroad argued “vested rights” with respect to the lakefront grant, he noted, but “[f]raud violated [sic] all contracts.”⁵¹⁸ The motion to defeat the investigation bill resulted in a rare tie and thus failed to carry the House by a single vote out of the eighty-eight cast.⁵¹⁹

With its lobbyist advising that the investigation bill would eventually run aground, the railroad made a final effort to forestall the repeal bill in the Senate. It dispatched Jewett once again to Springfield, and along with some former senators, he worked against the bill. The

⁵¹³ See 1873 *Illinois Senate Journal* at 449 (cited in note 481).

⁵¹⁴ The railroad also had other concerns in this Granger-era legislature. For example, it lobbied against a bill enacted on March 28, 1873, entitled “An Act to compel the trustees of the lands granted the Illinois Central to execute their trust.” The law required the railroad twice annually to offer for sale in each county all its lands located therein until all had been sold and to accept any bid of \$2 or more. The railroad ultimately triumphed on the matter when the Illinois Supreme Court refused to grant the writ of mandamus that the law contemplated. See *People v Ketchum*, 72 Ill 212 (1874) (Chief Justice Breese); Gates, *Illinois Central Railroad and its Colonization Work* at 307–08 (cited in note 81) (describing the court's decision).

⁵¹⁵ *The State Capital; The Lake-Front Investigation Bill Ordered to a Third Reading in the House*; . . . *Lake Front Investigation Bill*, Chi Trib 5 (Apr 1, 1873).

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* Based on the rest of the article, the word probably should have been “vitiating.”

⁵¹⁹ See 1873 *Illinois House Journal* at 477–78 (cited in note 489).

bill's opponents maintained both that to repeal the Lake Front Act would be implicitly to charge the 1869 legislature with corruption and that rights had vested in favor of the railroad under the 1869 grant, which could not be repealed.

These arguments were not availing. On April 9, 1873, the Senate voted thirty-one to eleven to repeal the Lake Front Act.⁵²⁰ On April 15—one day shy of four years after it had been enacted over a predecessor's veto—Governor John L. Beveridge signed the repeal bill into law.⁵²¹

VII. THE LAKE FRONT CASE

The immediate practical effect of the repeal was negligible. Construction of a new depot in north Lake Park had already been frozen by a federal court injunction premised on the proposition that the United States had a retained property interest in this land. Development of the outer harbor had already been restricted by a settlement agreement stipulating that the Illinois Central could undertake construction only inside a harbor line established by the U.S. Army, and only so long as the Army did not object. Other than the Army's new breakwater, no progress had been made in constructing an outer harbor. No docks or piers had been established east of the existing Illinois Central tracks, and the repeal did not designate any entity to take the place of the Illinois Central in developing such facilities. The repeal was basically symbolic legislation: a rebuke to the railroads for all they did that was resented, including charging high rates for the transport of grain and livestock to market and general high-handed behavior.⁵²² It did not offer any alternative vision as to how to create the public goods that the 1869 Act, however imperfectly, had sought to bring forward—a new depot, an outer harbor, and more and better parks.

All the Granger legislature of 1873 really accomplished by repealing the Lake Front Act was further to muddy an already convoluted legal picture. By its terms, the repeal nullified any clarification of rights accomplished in 1869, and returned matters to where they had stood before the Lake Front Act's enactment. As we have seen, this status quo ante was a confusing *mélange* of arguments over whether the English rule or American rule applied to ownership of lands underneath Lake Michigan, combined with at least four different

⁵²⁰ See 1873 *Illinois Senate Journal* at 505 (cited in note 481).

⁵²¹ See 1873 *Illinois House Journal* at 570 (cited in note 489).

⁵²² For a general introduction to these matters, see Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 *Colum L Rev* 1323, 1330–34 (1998), and sources cited.

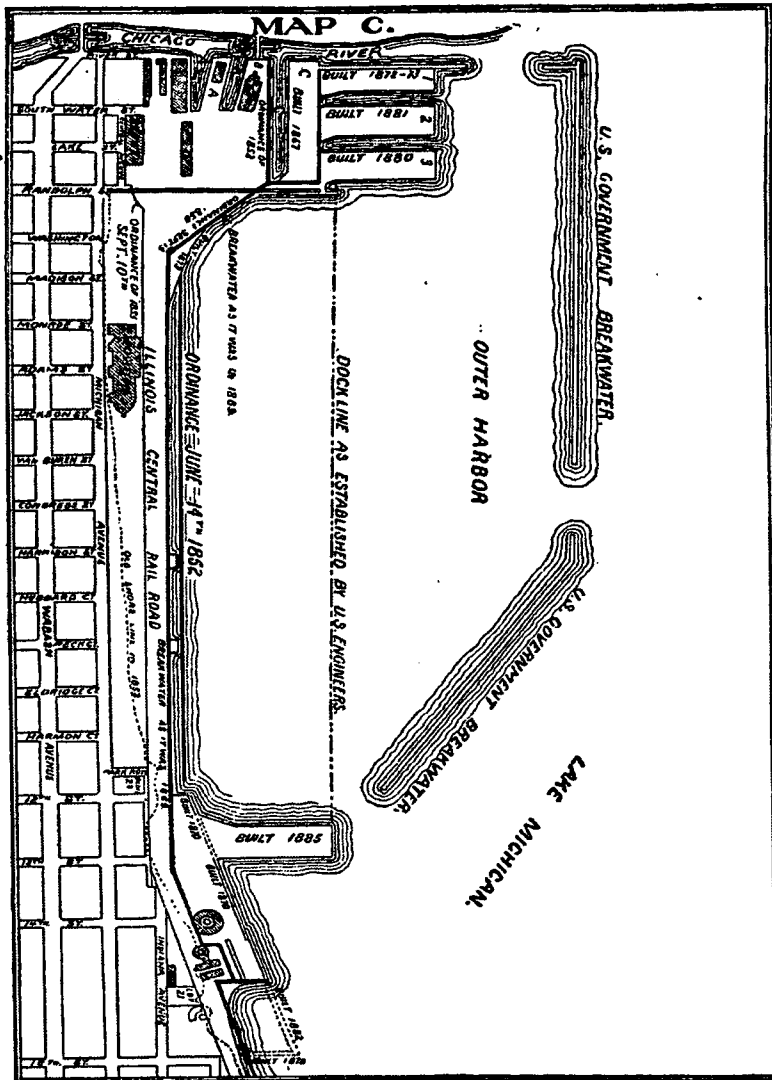
theories as to who was the owner of the now-enlarged Lake Park (five if one gives any credence to the Illinois Central's occasional claim that its right of way made it a riparian owner). To this, the repeal added a new argument about whether the legislature could constitutionally abrogate whatever rights the Illinois Central had obtained in 1869.

Looking back, it seems surprising that a full decade would elapse before the matter erupted into litigation among the contesting parties, and that more than another full decade would pass before that litigation would be finally resolved. Part of the explanation for the long delay is the economic collapse that occurred in the early 1870s. The Illinois Central was fully preoccupied for much of the decade rebuilding its terminal facilities destroyed by the Great Fire and trying to cover its dividend, and had few resources left over to invest in constructing anything like a new harbor. Another part of the explanation is the completion of the new breakwater by the Army outside the original breakwater constructed by the Illinois Central. Although this did not provide additional docks and wharves for lake traffic, it did allow ships to sit at anchor in a sheltered environment outside the Chicago River until space opened up along the river, and thus relieved river congestion to a degree. A third part of the explanation was the sheer intractability of the legal issues as they stood after 1873.

Eventually, the economy recovered, commercial traffic resumed its growth, and congestion became an irritant both in the river and within the rail yards and operations of the Illinois Central. Figure 7, which is the so-called Morehouse map introduced in the *Illinois Central* litigation, shows the Illinois Central operations and the improvements on the lakefront as they existed in the early 1880s.⁵²³

⁵²³ The Morehouse map, Figure 7 here, was denominated Map C in the Supreme Court. See *Illinois Central*, 146 US at 412–13 (statement of the case). Compare note 65 (discussing Figures 2 and 3 here, respectively denominated Maps B and A in the Supreme Court). See also notes 115 and 199 (discussing Figures 4 and 6 here, which are our adaptations of the Morehouse map).

FIGURE 7



The specific bottleneck that precipitated litigation was the Illinois Central's double track that originally sat on trestles in the lake and now was more firmly supported by landfill from the Chicago Fire. This track utilized only two hundred feet of the three hundred feet of right of way the railroad was authorized to occupy under the 1852 city ordinance allowing it to enter along the lakefront. By 1880, the track was used not only by the Illinois Central and its original partners (the Michigan Central and the Chicago, Burlington & Quincy) but also by the Baltimore & Ohio Railroad and the Nickel Plate Railroad. Up to

170 trains, 90 transfer trains, and numerous locomotives and switch engines used this segment every day.⁵²⁴ Frustrated by the operational delays associated with funneling all this traffic into just two tracks, in 1881 the Illinois Central began driving rows of piles parallel to, and outside, the existing tracks in order to begin filling in the additional one hundred feet of right of way for a third line of track.

In a matter of hours, the Army engineer in charge of the Chicago harbor, one Major G.J. Lydecker, ordered a halt to the project until the legality of such a move could be reviewed by authorities in Washington. There ensued an elaborate, military-style inquiry to determine whether the Illinois Central would be allowed to fill the additional one hundred feet.⁵²⁵ The Secretary of War, Robert Todd Lincoln (the late President's son), asked the Attorney General for his legal opinion about the Illinois Central's right to engage in the fill. Attorney General Brewster advised that the question of title was of no concern as far as the United States was concerned. The critical question, he said, was one of fact for the War Department to decide: whether "the construction of the 'dock line' will obstruct, encroach upon, or interfere with the harbor improvement, and thus injuriously affect its usefulness in the interest of navigation."⁵²⁶

Lincoln thereupon appointed a formal board of inquiry, consisting of three generals, to consider the facts. After holding hearings in Chicago, the board reported in June 1882, outlining a plan that would have allowed additional landfilling both to expand the Illinois Central's existing track and to construct new piers in a new outer harbor. Lincoln, however, disapproved the report, finding that it would require the War Department to impose conditions it did not have au-

⁵²⁴ Letter from Ayer to Lincoln (July 25, 1881) at 18 (cited in note 153) (describing the "urgent" need for additional track).

⁵²⁵ Most of the relevant documents, from Major Lydecker's stop order to the final decision of the Secretary of War, are collected in a report that the War Department submitted to Congress about the episode. See *Encroachments upon the Harbor* (cited in note 153). The events after the congressional report are described in *Ayer Opinion Letter* at 18-22 (cited in note 106). These particular matters are also taken up in the railroad's centennial history. See Carlton J. Corliss, *Main Line of Mid-America: The Story of the Illinois Central 165-67* (Creative Age 1950).

⁵²⁶ Letter from Attorney General Brewster to Secretary of War Lincoln (Feb 6, 1882), in *Encroachments upon the Harbor* 71 (cited in note 153). Before offering his opinion, the Attorney General had referred the matter to Joseph Leake, the United States Attorney for the Northern District of Illinois. Leake had concluded that the question of title did matter, and had drafted one of the more penetrating analyses of the vexing property rights problem. His opinion was that only the State, not the City, had authority to grant the Illinois Central property rights in the bed of Lake Michigan; since the State had granted the railroad only a two-hundred-foot right of way in its charter, the City's attempt to authorize a three-hundred-foot right of way in 1852 was *ultra vires*. See Report of the United States Attorney for the Northern District of Illinois, in *Encroachments upon the Harbor* 25-32.

thority to make, and that it presupposed that the railroad had title to the submerged land, which was in dispute.⁵²⁷

The Illinois Central and other advocates of a new outer harbor were obviously disappointed with Secretary Lincoln's decision. With lake traffic reaching record levels, expansion of Chicago harbor facilities was perceived by many to be more imperative than ever. Yet given the legal imbroglio over title to the lakebed, it was impossible for the Illinois Central—or anyone else—to move ahead with development of the outer harbor. The *Chicago Tribune*, writing with obvious frustration, concluded that litigation was the only answer:

[E]ither State authorities or officers of the Illinois Central [should] take steps to bring the question of ownership before the proper court in order that the title to the submerged lands may be judicially determined and that the work of construction, in accordance with some plan . . . [,] may be commenced at once.⁵²⁸

The wish for litigation was soon fulfilled, even if the desire for construction of a harbor was not. On March 1, 1883, the Attorney General of Illinois filed suit against the Illinois Central Railroad Company, naming also the City of Chicago and the United States as parties defendant. The Illinois Central answered and filed cross claims against the other parties. The case was removed to the federal circuit court, on the ground of the presence of federal questions.⁵²⁹ The United States refused to enter an appearance in the case, but filed its own complaint against the Illinois Central and affiliated railroads, seeking both permanently to enjoin any construction of buildings in Lake Park and a declaration that the United States could veto any construction in the outer harbor that might interfere with public navigation. The matters were consolidated before Justice Harlan, sitting as Circuit Justice.⁵³⁰

⁵²⁷ See *Ayer Opinion Letter* at 20–21 (cited in note 106) (summarizing the board of inquiry report and Lincoln's decision rejecting it).

⁵²⁸ Corliss, *Main Line of Mid-America* at 167 (cited in note 525) (quoting the newspaper).

⁵²⁹ See *Illinois v Illinois Central Railroad Co*, 16 F 881 (CCND Ill 1883). The “federal questions” related to possible issues of construction of the act of cession creating the Northwest Territories and the act admitting Illinois as a State in 1818, together with the Illinois Central's vested-rights defense grounded in the federal Constitution. See *id* at 886–87. This, of course, was before the Court's adoption of the “well-pleaded complaint” rule for the exercise of federal question jurisdiction in *Louisville & Nashville Railroad Co v Mottley*, 211 US 149 (1908), under which approach it is doubtful that federal court jurisdiction would have been proper in *Illinois Central*.

⁵³⁰ The onset of litigation unleashed a round of legal opinion letters as various parties tried to sort through the issues and come up with a coherent legal position. We uncovered five such opinion letters dating from about this time in various archives: *Ayer Opinion Letter* (cited in note 106) (opinion by the general solicitor of the Illinois Central); Lyman Trumbull, *Rights of the Illinois Central on Shore Waters of Lake Michigan* (1884) (commissioned by the Illinois Central); John Nelson Jewett, *Letter to James C. Clarke, Esq., Prest. of Ill. C. R. R. Co.* (1884) (commissioned by the Illinois Central); Richard S. Tuthill, *Opinion and Suggestions to the Secretary of the*

In the circuit court, each of the claimants set forth sweeping claims in support of its control and authority over the lakefront. The State claimed that it owned the submerged land under the equal footing doctrine and that the grant by the State to the railroad had been validly repealed in 1873. Thus, any landfilling by the railroad beyond that necessary for railroad purposes as authorized in the 1851 charter was unlawful and should be enjoined.⁵³¹ The City claimed that it owned Lake Park and thereby enjoyed all the rights and privileges of riparian ownership with respect to the portion of the lake offshore from Lake Park. Hence, the City had control over development of the harbor.⁵³² The Illinois Central claimed that the 1869 Lake Front Act represented a valid transfer of the State's property rights in the submerged land and that, under the vested-rights doctrine, the State was powerless in 1873 to repeal this completed grant of property. Thus, the railroad owned the submerged land and had the right to control the harbor.⁵³³ The United States claimed, only slightly more modestly, that it owned Lake Park as an implied reservation from the sale of public domain land in fractional sections 10 and 15—essentially the theory accepted by Judge Drummond in 1869—and that it could enjoin any construction of buildings on this site; in addition, the United States asserted the right to veto any filling or construction of works in the lake that, in its opinion, would constitute an interference with the public right of navigation.⁵³⁴

The circuit court appointed a magistrate to preside over an elaborate trial, featuring as its star witness Jonathan Young Scammon, testifying in his capacity as the oldest inhabitant of Chicago with personal

Treasury Touching Alleged Encroachments by the Illinois Central Railroad upon the Lake Front at Chicago (1886) (opinion by the local United States Attorney commissioned by the Secretary of the Treasury); Lawrence, Campbell, and Lawrence, *Opinion upon the Title to That Part of Fractional Section 15, 39, 14, Lying East of the East Line of Michigan Avenue* (1879) (commissioned by the Board of Canal Commissioners). Even apart from these formal analyses, the lakefront litigation attracted a significant amount of attention from some of the most important quarters of Chicago's growing bar. See, for example, James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller* 11 (South Carolina 1995) (describing Fuller's prominence in the local bar and his representation of Chicago in the lakefront litigation in the circuit court); Herman Kogan, *Traditions and Challenges: The Story of Sidley & Austin* 34–35, 48–51 (R.R. Donnelley & Sons 1983) (recounting the undertakings of John Leverett Thompson, initially at the request of J. Young Scammon, on behalf of civic groups that were opposed to the Lake Front Act and supportive of its repeal).

⁵³¹ See Information (Mar 1, 1883), in *Record: Illinois Central Railroad Co* at 3, 10–11, 15 (cited in note 71).

⁵³² See Amendments to the Answer of the City of Chicago to the Amended Information (June 20, 1887), in *Record: Illinois Central Railroad Co* at 104, 106–07 (cited in note 71).

⁵³³ See The Separate Answer of the Illinois Central Railroad Company, One of the Defendants, to the Information in [*Illinois v Illinois Central Railroad Co*] (Apr 7, 1883), in *Record: Illinois Central Railroad Co* at 17, 26–29 (cited in note 71).

⁵³⁴ See *United States v Illinois Central Railroad Co*, 154 US 225, 225–27 (1894) (summarizing the information filed by the United States in the circuit court).

knowledge of the development of the lakefront stretching back to the 1830s.⁵³⁵ In 1888, Justice Harlan issued a comprehensive opinion resolving all issues.⁵³⁶ The State was given title to the submerged lands. The City was given title to Lake Park. The railroad was allowed to keep all of its existing track, facilities, piers, and wharves, largely as an incident to its riparian rights north of Randolph Street and south of Twelfth Street (Park Row). The United States was denied standing to block construction of any buildings in Lake Park.

With respect to the critical vested-rights argument raised by the railroad, Harlan offered two responses, neither entirely persuasive. The first was that the doctrine of *Fletcher v Peck*—prohibiting legislative repeals of completed grants of property—was limited to suits filed by subsequent good-faith purchasers for value, and hence did not apply to an original grantee such as the Illinois Central that did not give valuable consideration for the grant.⁵³⁷ The suggested distinction was consistent with the facts of *Fletcher*, but would seem to justify repeal only if the State had demonstrated some cause that would justify rescission of the grant, such as fraud. Although the legislative history of the 1873 repeal, with its many allegations of corruption in 1869, would suggest that such proof might have been offered, it was not. The second argument was that the Lake Front Act had conveyed only a license to the Illinois Central to develop the harbor, and it is inherent in the nature of a license that it can be revoked by the licensor at any time.⁵³⁸ This, however, flew in the face of the language of the Act conveying the harbor to the railroad in “fee,”⁵³⁹ and failed to account for the railroad’s argument that it had relied to its detriment on the grant in making expenditures to improve the area outside the original breakwater.

The Harlan ruling, inevitably, was appealed to the Supreme Court.⁵⁴⁰ Only seven of the nine Justices participated in the decision. The reporter noted that “The CHIEF JUSTICE, having been of counsel in the court below, and MR. JUSTICE BLATCHFORD, being a stockholder in the Illinois Central Railroad Company, did not take any part in the consideration or decision of these cases.”⁵⁴¹ Justice Harlan’s right

⁵³⁵ Evidence on Behalf of Complainant at 232–58 (cited in note 71) (reproducing testimony of Jonathan Young Scammon).

⁵³⁶ *Illinois v Illinois Central Railroad Co*, 33 F 730 (ND Ill 1888).

⁵³⁷ *Id* at 774–75.

⁵³⁸ *Id* at 775.

⁵³⁹ See *Illinois Central*, 146 US at 407 n 1 (statement of the case), quoting Lake Front Act § 4.

⁵⁴⁰ *Illinois Central*, 146 US 387.

⁵⁴¹ *Id* at 476.

to sit in judgment of his own decision rendered on circuit passed without question.⁵⁴²

Justice Field, writing for the majority, made a valiant effort to untangle the knot of legal issues in coherent fashion. He began with the background understanding about ownership of the submerged land of Lake Michigan. The Court in previous decisions had acknowledged that the choice between the English and American views was a matter of state law,⁵⁴³ and had specifically recognized that Illinois had chosen to follow the English rule.⁵⁴⁴ Yet without advertent to whether the question was governed by federal or state law, Justice Field proceeded to declaim on title to all lands under “the Great Lakes,” implicitly treating this as a *sui generis* category.⁵⁴⁵ Relying especially on *The Genesee Chief*, he concluded that the Great Lakes were indistinguishable in all relevant respects from land under tidal waters, which *Pollard v Hagan* had said belong to the state. Consequently, the Court held, the same doctrine as to the dominion and sovereignty over, and ownership of, submerged lands applied to the Great Lakes.⁵⁴⁶ In short, the State of Illinois had owned the bed of Lake Michigan since 1818.

Justice Field then turned to the question of whether the Illinois Central’s existing two-hundred-foot right of way and the various depots, docks, piers, wharves, elevators, and engine houses it had built on landfill in the lake had encroached on the State’s property rights. He concluded that, for the most part, they had not. He relied in part on the broad powers the State had given the railroad in its 1851 charter, and in particular on the provision conditioning the location of the railroad within a city upon the city’s consent. The City of Chicago’s consenting to the location of the Illinois Central’s right of way in the lake therefore constituted constructive permission from the State. With re-

⁵⁴² This would not have been the case either early in the Court’s history or today. See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789–1888* 76 n 88 (Chicago 1985) (noting that in the nineteenth century “[t]he Justices were soon to abandon their early practice (now required by [statute]) of refusing to review their own decisions,” but also observing that “in England judges habitually sat in review of their own decisions”).

⁵⁴³ See *Barney v Keokuk*, 94 US 324, 338 (1876) (opining that the American rule is “sound[er],” but whether to abandon the English rule “is for the several States themselves to determine”).

⁵⁴⁴ See *Hardin v Jordan*, 140 US 371, 386 (1891); *Packer v Bird*, 137 US 661, 669 (1891). Both decisions are of interest from the perspective of our story. In *Hardin*, the Court split six to three over the question of whether Illinois was still committed to the English rule with respect to navigable ponds and lakes. Writing for the majority, Justice Bradley concluded that Illinois remained among the common law faithful as to lakes as well as rivers. But twice in dicta he suggested that Lake Michigan should be regarded as being in a special category as an “internal sea,” see 140 US at 386, 391, thereby clearly anticipating *Illinois Central*. *Packer* is of interest because it was authored by Justice Field, who wrote that the “courts of Illinois” had adopted the English view “to its fullest extent.” 137 US at 669.

⁵⁴⁵ *Illinois Central*, 146 US at 435–37.

⁵⁴⁶ *Id.* at 436–37.

spect to the depots, docks, piers, wharves, elevators, and engine houses constructed both north of Randolph and south of Twelfth Street, Field concluded that these were encompassed within the common law right of a riparian owner to “wharf out” to reach navigable waters.⁵⁴⁷ The only doubt on this score was whether the railroad had extended its facilities beyond the point of “practical navigability.”⁵⁴⁸ The case was remanded with specific directions to conduct further proceedings to resolve this particular question.⁵⁴⁹

With respect to the difficult vested-rights contention, Justice Field solved the problem by invoking the idea that the State’s title to the submerged lands was held in trust for the public. The idea was not entirely new. As we have seen, a similar notion had been raised occasionally in remonstrances and in letters to newspapers by those opposed to further expansion of the Illinois Central along the lake-front.⁵⁵⁰ The basic substance of the argument, and the authorities relied upon, were drawn from the brief filed by John S. Miller, the City’s Corporation Counsel.⁵⁵¹ But Field gave the idea his own unique Jacksonian-Democrat twist. The core of his argument was a distinction between grants of submerged land for wharves, piers, and docks that serve as an aid to navigation, and the grant of an entire harbor, which he suggested by implication was what the Lake Front Act had done. The former grants were permissible because they advanced the purposes of the trust obligation—assuring public access to navigable waters. The latter was impermissible, because it represented an abdication of the trust.⁵⁵² Field admitted that he could not “cite any authority where a grant of this kind has been held invalid.”⁵⁵³ But he thought this was because such an extreme grant had never previously been considered by the courts. He characterized the Act as an attempt by the Illinois General Assembly to convey the entire harbor of Chicago to a

⁵⁴⁷ Id at 445–46.

⁵⁴⁸ Id at 464.

⁵⁴⁹ Id at 446–47, 464. This disposition of the railroad’s improvements failed to account for two parcels: the triangles created by the curvature of tracks east and west approaching Randolph Street from the south, as authorized by city ordinances in 1855 and 1856. See notes 111–13 and accompanying text. Field ratified these by *ipse dixit*: “[W]e do not perceive any valid objection to [the railroad’s] continued holding of the same for the purposes declared—that is, as additional means of approaching and using its station grounds.” *Illinois Central*, 146 US at 448.

⁵⁵⁰ See notes 222–25, 337–40.

⁵⁵¹ Brief and Argument for City of Chicago at 42–67, *Illinois Central*, 146 US 387. The State Attorney General’s brief also included a version of the public trust argument, but it was buried near the end of the brief and less well developed. See Brief on Behalf of State of Illinois at 130–54, *Illinois Central*, 146 US 387. Remarkably, although the Illinois Central filed two lengthy briefs, neither offered a rebuttal of the public trust argument. See Brief for Appellant (filed by Benjamin F. Ayer), *Illinois Central*, 146 US 387; Brief and Argument for Appellant (filed by Jno. N. Jewett), *Illinois Central*, 146 US 387.

⁵⁵² *Illinois Central*, 146 US at 455–56.

⁵⁵³ Id at 455.

private corporation; this was clearly a breach of trust, the reasoning went, and hence could be revoked at any time by subsequent legislation.

Appended as a kind of coda to the discussion of the trust obligation was a long paragraph addressing Justice Harlan's theory in the court below that the Lake Front Act had conveyed a mere revocable license.⁵⁵⁴ It would not be accurate to describe this as an alternative holding; the theory was described, but not expressly endorsed. Perhaps the passage was added in order to secure Justice Harlan's agreement to join in making a bare majority for the Field opinion, although this is speculation on our part.

Turning finally to the claims of Chicago, Justice Field concluded that under Illinois law all land marked on plats as being reserved for public uses is owned by the city where the land is located.⁵⁵⁵ Thus, Chicago had title to Lake Park. As a riparian owner of this land, it too had a common law right to wharf out and develop the harbor outside the park, including the right to expand Lake Park by filling in the area to the original breakwater, as had happened after the Great Fire in 1871. The City thus had good title to Lake Park, as against the State and the Illinois Central.

The outcome of the case was close, especially as to the central issue whether the State had acted unconstitutionally in repealing the Lake Front Act in 1873. Three Justices joined in a dissenting opinion by Justice Shiras which argued that the Lake Front Act was a valid conveyance of property to the Illinois Central and the repeal an unconstitutional interference with vested rights.⁵⁵⁶ Justice Shiras did not disagree with the "able and interesting statement" by Justice Field about "the rights of the public in the navigable waters, and of the limitation of the powers of the State to part with its control over them."⁵⁵⁷ But he doubted the "pertinency" of that discussion, given that the Lake Front Act had prohibited the railroad from interfering with the public right of navigation and had preserved the power of the State to regulate the railroad's construction of improvements in the harbor. The dissent concluded, "It will be time enough to invoke the doctrine

⁵⁵⁴ *Id.* at 460–62.

⁵⁵⁵ The relevant statute was ambiguous on this point, providing that title was to be held "in the corporate name" of the city "in trust" for the stated public purposes. See note 160. But Justice Field cited Illinois Supreme Court authority interpreting the statute as conferring fee simple ownership on the city in which the public dedication was located. See *Illinois Central*, 146 US at 462, citing *Board of Trustees of the Illinois and Michigan Canal v Haven*, 11 Ill 554 (1850), and *City of Chicago v Rumsey*, 87 Ill 348 (1877).

⁵⁵⁶ Oddly, neither the majority nor the dissent cited *Fletcher v Peck*, an omission that may have obscured for later generations of commentators the key legal issue in the case.

⁵⁵⁷ *Illinois Central*, 146 US at 474 (Justice Shiras dissenting).

of the inviolability of public rights when and if the railroad company shall attempt to disregard them.”⁵⁵⁸

The Court in *Illinois Central* did not address the claims of the United States, apparently because the Solicitor General moved that the United States be excluded from the case since it was not technically a party.⁵⁵⁹ But the United States also filed its own writ of error from Harlan’s circuit court decision, which had resolved the claims of the United States together with those of the other three parties in a single opinion. After an unexplained delay of two years, the Court in 1894 finally got around to disposing of the federal government’s appeal.⁵⁶⁰ Writing again for the majority in a divided decision, Justice Field rejected the Drummond theory of retained federal rights in Lake Park. The dedication of public ground in fractional section 10 by the United States, Field reasoned, sufficed under Illinois law to transfer the fee to the City of Chicago. Because the United States had conveyed away its entire interest in the property, the federal government did not have standing to enforce the limitation that the land was to remain forever free of buildings.⁵⁶¹ With this ruling, the last cloud on the City’s title to Lake Park was lifted.

In 1896, the federal circuit court in Cook County concluded the trial on remand from the decision in *Illinois Central* to determine whether the railroad’s landfills had extended so far into the lake as to interfere with navigation. Sitting as a judge in chancery, Judge Showalter had taken extensive evidence from experts about how far out into the lake a pier would have to be constructed in order to accommodate the deep draft commercial vessels then plying the waters of Lake Michigan. Based on this evidence, he concluded that the *Illinois Central*’s extensive piers and wharves north of Randolph Street and its pier south of Twelfth Street did not extend “into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake.”⁵⁶² This

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.* at 433 (“The United States were also named as a party defendant, but they never appeared in the suit.”). See Motion to Strike Out, Etc., *Illinois Central*, 146 US 387 (filed on behalf of the United States on October 11, 1892) (requesting an order that “none of the rights of the United States may be affected” pending a determination of whether it is a party to the action).

⁵⁶⁰ *United States v Illinois Central Railroad Co.*, 154 US 225 (1894).

⁵⁶¹ *Id.* at 238. The Court stated in dictum that “[t]he owners of abutting lots may be presumed to have purchased in part consideration of the enhanced value of the property from the dedication, and it may be conceded they have a right to invoke, through the proper public authorities, the protection of the property in the use for which it was dedicated.” *Id.* at 238–39. This dictum, along with the 1871 injunction decision of Judge Drummond, fueled the chain of rulings by the Illinois Supreme Court, in actions brought by Montgomery Ward, enjoining the construction of any buildings in the area that became Grant Park. See note 441.

⁵⁶² *Illinois v Illinois Central Railroad Co.*, 184 US 77, 90 (1902) (quoting the circuit court judgment).

judgment was affirmed by the Court of Appeals for the Seventh Circuit in 1899.⁵⁶³

The Illinois Central railroad was not going to give up its claim to further development of its facilities in the lake without one more fight. Soon it commenced a new lawsuit against the State, based on the theory that the 1873 repeal was an unconstitutional impairment of its contractual rights under its original 1851 corporate charter.⁵⁶⁴ The railroad observed that, under section 3 of its charter, it was empowered to “take possession of and use all and singular any lands, streams and material of every kind” owned by the State for the construction of stations, repair shops, and other facilities, and that the charter further provided that “[a]ll such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes.”⁵⁶⁵ The Illinois Central argued that since the State was now deemed to own the bed of Lake Michigan, this resource was necessarily included in the grant of “lands, waters, materials and privileges.”⁵⁶⁶ The charter was a contract, the argument went, and any action by the State preventing the railroad from using the lakebed to construct railroad facilities was an unconstitutional impairment of this contract. In 1900, the Supreme Court, speaking now through Justice Brown, put an end to this collateral litigation. The Court treated the contract impairment argument with due respect, but determined, after a close reading of the charter language and the history of its implementation, that the charter was not intended to convey to the railroad any grant of rights in the bed of Lake Michigan.⁵⁶⁷

The final chapter of this litigation epic was written in 1902, when the Supreme Court affirmed the decision on remand that the Illinois Central’s various piers and wharves did not extend beyond the point of practical navigability.⁵⁶⁸ In a fitting bookend, the Court spoke through Justice Harlan, who had written the original decision of the circuit court in the opening round of litigation back in 1888. Since the question was “largely, if not entirely,” one of fact, Justice Harlan wrote, it would not be disturbed unless clearly in conflict with the evidence.⁵⁶⁹ No such conflict being found, the judgment that the railroad’s existing improvements did not interfere with navigation was affirmed.⁵⁷⁰ Justice Harlan cautioned that the railroad could not go any farther into the

⁵⁶³ *Illinois v Illinois Central Railroad Co*, 91 F 955 (7th Cir 1899).

⁵⁶⁴ See *Illinois Central Railroad Co v Chicago*, 176 US 646 (1900).

⁵⁶⁵ *Id* at 657 (emphasis removed) (quoting section 3).

⁵⁶⁶ *Id*.

⁵⁶⁷ *Id* at 657–67.

⁵⁶⁸ *Illinois v Illinois Central Railroad Co*, 184 US 77 (1902).

⁵⁶⁹ *Id* at 98.

⁵⁷⁰ *Id* at 97.

lake: his original decree of 1888 had enjoined the railroad from erecting structures or filling with earth or other materials any portion of the bed of Lake Michigan, and this had not been disturbed by the 1892 Supreme Court decision in *Illinois Central*, except as to existing structures and improvements provided that they did not go beyond the point of practical navigability.⁵⁷¹ In short, everything the railroad had done in the past was grandfathered. As to the future, the untouched areas of the lakebed were to be under the exclusive control of the public authorities.

With this judgment, the vexing legal issues that had given rise to the lakefront controversy were settled, at least for the time being, by the federal courts. Thirty-three years had elapsed since the Lake Front Act had been adopted; it had taken a mere nineteen years since litigation had commenced to confirm the validity of the Act's repeal.

VIII. WHAT *ILLINOIS CENTRAL* REALLY TELLS US ABOUT THE PUBLIC TRUST DOCTRINE

It remains to consider some of the implications of our investigation for broader questions about the public trust doctrine. As we stated in the Introduction, *Illinois Central* is important for at least three reasons: as a font of new doctrine, as a justification for that doctrine, and as a source of confusion about the doctrine. A more complete understanding of the case sheds light on all three scores.

First, we can see how the central doctrinal innovation of *Illinois Central*—transforming a public easement in navigable waters into a rule that the State cannot alienate the bed of the lake—was primarily a product of the exigencies of litigation. The reason the public trust idea emerged as the dominant theme in Justice Field's opinion was that he needed some doctrinal basis to defeat the *Illinois Central*'s powerful vested-rights argument. Absent the peculiar circumstances of the enactment and repeal of the Lake Front Act, there would have been no cause to invest the State's ownership of the lakebed with a rule of inalienability that made the transfer in the Lake Front Act voidable.

We can also see how the public trust doctrine was not deployed in the litigation in order to forestall development of the lakefront. Justice Field did not think that submerged land should remain frozen in its original condition. He was all in favor of isolated grants of lands for wharves and docks. What he opposed was what he imagined to be the conferral of a monopoly over the Chicago harbor on a private corporation. His public trust doctrine was designed to preserve access to the

⁵⁷¹ *Id.* at 98.

lake for commercial vessels at competitive prices, not to preserve Lake Park or the shoreline from further economic development. Moreover, Justice Field was not alone in these preferences among the federal judges who ruled on aspects of the controversy. When the dust finally settled, all of the Illinois Central's massive landfills and improvements had been ratified by the federal courts as being consistent with the nebulous trust identified in *Illinois Central*. Thus, the public trust doctrine, as invoked in the *Illinois Central* litigation, was scarcely an anti-development doctrine.

To be sure, the preservationist position was not entirely absent in the run up to the litigation. The residents of Terrace Row, anxious to preserve their views of the lake and acting in alliance with some of the local leaders who wanted to see more and better parks, did from time to time invoke the idea of a public trust in their efforts to forestall further landfilling by the Illinois Central. This was almost certainly a minority position. A widespread consensus existed in the second half of the nineteenth century about the need for a new depot and a new outer harbor. The main point of controversy was over what form the development would take and who would control it, not whether there should be any development of the lakefront at all. The argument that the park should take precedence over further development was often greeted with sarcasm by other participants in the debate, who regarded it as a cover for the selfishness of wealthy residents lucky enough to live on Michigan Avenue.

Of course, the fact that the preservationists were a small minority in the late nineteenth century does not mean that they were wrong. As things turned out, they were probably right: the highest and best use of the Chicago lakefront today is probably as an open public park. But whether the public trust doctrine is responsible for the large quotient of parkland on the Chicago lakefront relative to other cities is less clear. The doctrine, from its inception in *Illinois Central* down to today, has been a rule prohibiting alienation of trust lands, not a rule prohibiting development of those lands.⁵⁷² Because the City and the Park District face complicated political and financial constraints, public ownership has probably meant less development than what would have occurred if privatization of these lands had been permitted. Nevertheless, significant development has occurred in recent years, as witnessed

⁵⁷² The Illinois courts applying the public trust doctrine have placed great weight on whether a public entity retains legal title to the property. So long as title remains in public hands, rather extensive development of trust resources is permitted. See *Friends of the Parks v Chicago Park District*, 203 Ill 2d 312, 786 NE2d 161 (2003) (upholding the rebuilding of Soldier Field on public trust land to the specifications of the Chicago Bears, primarily on the ground that the Chicago Park District retained legal title to the stadium, and distinguishing *Illinois Central* as involving transfer of title to a private entity).

by the new Navy Pier, the rebuilding of Soldier Field, and the construction of Millennium Park. But this takes us well beyond our story here.

What is less clear is why Justice Field felt compelled to reach for the blunderbuss of the public trust doctrine to defeat the Illinois Central's vested-rights claim, rather than a more fact-specific argument, such as Justice Harlan's characterization of the grant of the outer harbor as a revocable license. We can only speculate that Justice Field was incensed by what he imagined to be a power grab by a privileged corporation, shutting out all competition from potential rivals. One reason he had this reaction to the case was that none of the railroad's briefs or arguments explained the railroad's motivations for seeking the Lake Front Act in 1869, or why a reasonable legislator in 1869 would likely have supported the Act. And perhaps one reason the railroad lawyers did not offer such an explanation—here we are really speculating—may have been that so much time had elapsed that the railroad's lawyers did not know about these things. Thus, the Lake Front Act and its repeal were presented as an abstract exercise in vested-rights doctrine, not as part of a desperate struggle that threatened the railroad's existing investments and pitted the City against downstate interests.

The excavated story also sheds significant light on the use of the facts of *Illinois Central* as a justification for the very existence of the public trust doctrine. According to the standard account, the Illinois Central sought to obtain a grant of the submerged lands in order to earn monopoly profits from control over the Chicago harbor. As we have seen, Illinois Central officials were not immune to ruminating about the potential profitability of the grant. But the basic reason they went to such lengths to secure the grant, and fought so hard to preserve it, was to secure their existing investments against being expropriated or isolated by a grant of the harbor to someone else. Economists often say that out-of-pocket losses are no different from forgone opportunities.⁵⁷³ Human actors, however, consistently seem to regard out-of-pocket losses as the more alarming prospect.⁵⁷⁴ Courts follow suit, weighing "reliance interests" more heavily in equitable balancing than the loss of prospective benefits. Thus, the fact that the railroad was largely motivated to protect its longstanding investment in the lakefront makes its position seem much more sympathetic than the caricature that comes through in the standard account.

⁵⁷³ This is a key assumption of the Coase Theorem. See generally R.H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1 (1960).

⁵⁷⁴ See Elizabeth Hoffman and Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 Wash U L Q 59, 66–85 (1993).

The standard account, as reflected for example in the seminal article of Joseph Sax, also depicts the Lake Front Act as having no public interest rationale. This, as we have seen, is untrue. The typical legislator who voted for the Lake Front Act was sympathetic to the pleas of Chicago for a new depot, a new outer harbor to relieve congestion in the Chicago River, and more and better parks. The Knickerbocker Bill supported by the City would have provided these things, but would have done so in a way that provided no material benefit to citizens of Illinois living in other parts of the State. The substitute bill sponsored by the Illinois Central also promised to provide these things, and in addition would generate additional revenue for the State by application of a 7 percent gross receipts tax to the railroad's additional earnings. Small wonder that downstate legislators overwhelmingly preferred the Illinois Central bill. Once we understand the public interest rationale for the Lake Front Act, it becomes impossible to continue to characterize the statute as an example of pure private interest legislation of the sort that cries out for a judicial corrective.

Finally, the standard account strongly implies that the Lake Front Act was adopted because of bribery or other corrupt acts undertaken by the Illinois Central. Here, we think on balance that this conventional account is more likely than not correct. We have already described, in Part V.E, how the evidence from the 1869 legislative history leans toward this conclusion. Several aspects of the post-1869 story reinforce this judgment. First, there is the fact that serious proposals were made in two separate sessions of the Illinois General Assembly (1869 and 1873) to launch a formal investigation of bribery in connection with the Lake Front Act. We can imagine how such a proposal might be used strategically once to try to intimidate supporters of a measure, or to cause delay. But it is harder to imagine such a trick's being used twice. It is more likely that the idea did not die because the proponents of an investigation had genuine reasons to suspect misconduct. Second, the legislative history of the 1873 repeal suggests that the Illinois Central was deeply concerned about the prospect of a formal investigation, and fought to defeat it. This, too, tends to suggest that the railroad had something to hide. Third, the allegations about the exact nature of the corruption—such as Representative Merritt's claims of hush money paid to newspapers and cash payments ranging as high as \$20,000 to legislators—became more specific after 1869.

The likelihood that the Lake Front Act was procured corruptly does not vitiate our previous conclusions. One can have sympathetic reasons for seeking something and yet use illegal or immoral means to achieve it. Indeed, people desperately trying to preserve what they have may be more likely to cheat than people angling for some new advantage. And it is not at all unusual for legislators to have sincerely

held policy reasons for taking a particular position, which are reinforced by purely venal considerations such as promises of contributions from interest groups. To be sure, the strong odor of corruption surrounding the Lake Front Act is highly significant. It helps explain, we think, why a majority of the Supreme Court in *Illinois Central* was hostile to the railroad's vested-rights argument, in an era otherwise sympathetic to such claims.⁵⁷⁵ But the possibility of corruption in procuring the Lake Front Act does not support a generalized belief that all proposals to privatize natural resources are inherently suspect, or that they require a special type of judicial supervision of legislatures. Justice Field's development of a rule of inalienability to defeat the vested-rights argument appears from this perspective to be a classic case of overreacting to "bad facts"—in this case, one bad fact filtered through a worldview that was too quick to see plutocratic greed at work even when something far more complicated was really going on.

Our excavation of *Illinois Central* also has implications for some of the ambiguities that afflict the modern public trust doctrine. There is, first, the question of what kinds of resources should be subject to the doctrine. The understanding of the public trust doctrine as a rule of inalienability emerged in the context of a struggle to define property rights in submerged land under navigable waters. It is possible that this is a uniquely vexed resource, in the sense of one afflicted by an extraordinarily high degree of legal uncertainty. It is not clear how many other resources are vexed in a similar way or, if they are, whether a strong rule of inalienability is the correct answer to the dilemma. So caution is perhaps in order before extending the doctrine to consumption rights in water, old growth forests, works of art, or cyberspace.⁵⁷⁶

Our story also sheds some light on whether the doctrine implicates federal interests in such a way as to justify grounding it in federal rather than state law.⁵⁷⁷ The federal government played a much larger role in the Chicago lakefront controversy than would appear

⁵⁷⁵ On the general appeal of vested-rights claims during this era, see generally Arnold N. Paul, *Conservative Crisis and the Rule of Law: Attitudes of the Bar and Bench, 1887-1895* (Cornell 1960).

⁵⁷⁶ Compare *National Audubon Society v Superior Court (Mono Lake)*, 33 Cal 3d 419, 658 P2d 709 (1983) (applying the public trust doctrine to reallocate appropriated water rights); *Paepcke v Public Building Commission of Chicago*, 46 Ill 2d 330, 263 NE2d 11 (1970) (applying the public trust doctrine to the diversion of a public park for use as a public school); Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 Loyola LA L Rev 123, 156-58 (2002) (suggesting the application of the public trust doctrine to an extension of intellectual property protection to forms of expression in the public domain).

⁵⁷⁷ For examples of attempts to ground the public trust doctrine in federal law, see Epstein, 7 Cato J at 426-28 (cited in note 40) (arguing that the trust may be grounded in the Due Process or Equal Protection Clauses); Wilkinson, 14 UC Davis L Rev 269 (cited in note 1) (arguing that the trust may be derived by implication from modern statutes regulating uses of federal lands).

from just reading the *Illinois Central* opinion, where, for peculiar reasons, the United States asked that the Court not rule on the issues that it had presented in the court below. The State's ownership of the lakebed had its roots in a doctrine of federal statutory interpretation—namely, the *Pollard* rule growing out of the equal footing language of federal statehood grants. Both Lake Park and the Illinois Central Railroad were creatures of federal land grants. A federal agent had authored the dedication of north Lake Park as public ground forever free of buildings. All parties and courts had acknowledged that the federal government had ultimate control over navigation in the Chicago harbor, and the desire to preserve free navigation was the root policy underlying the public trust doctrine. The federal government had filed three lawsuits that played a critical role in the evolution of the controversy, and a federal regulator had made the decision that precipitated the litigation that finally reached the Supreme Court. Whether any of these facts, or all in combination, might justify a federal rule of decision is a topic for another day. But they surely suggest that the possibility is not frivolous—at least if the doctrine is confined to controversies over lands beneath navigable waters.

Finally, we think that our study raises questions about whether the public trust doctrine is the right answer to the problem of maintaining the optimal level of public access to resources. A resource such as submerged land under navigable waters requires a kind of blend of open access and exclusion rights.⁵⁷⁸ On the one hand, we want navigable waters to remain an open access resource in order to promote maximum use by the public. On the other hand, we need to demarcate private exclusion rights in at least some of the land beneath navigable waters in order to promote the development of docks, wharves, and other facilities that make public access to the resource possible. Giving riparian owners exclusion rights to the submerged land (the English rule) may result in too many docks and wharves and not enough public access; requiring that the submerged land remain in public hands (the public trust rule) may result in too few docks and wharves and no way to make public access meaningful. Justice Field had an intuitive appreciation of this reality, and sought to distinguish between small grants for building wharves and piers, and large grants that would convey away control of the entire harbor. But he offered no principle that would guide courts in the future in distinguishing between access-enhancing and access-diminishing grants, and this aspect of his decision has fallen by the wayside in favor of a rather mindless (but easily

⁵⁷⁸ Compare Epstein, 7 *Cato J* at 417 (cited in note 40) (“Navigable rivers are therefore a mixed asset, some of whose attributes should remain private and others should be public.”).

administered) distinction between alienation of the fee and long-term leases.⁵⁷⁹

What may be needed are more “contractual”-type rules that can be tailored to the requirements of different bodies of water, along the lines of the settlement agreement between the Illinois Central and the United States in 1872. Such a case-by-case approach points to the need for something like an administrative agency to superintend the problem. An administrative agency solution, in turn, requires legal rules that presuppose a degree of trust in government to control the use of resources, not radical skepticism in the form of judicially enforced inalienability rules.

CONCLUSION

Great cases have the power to shape attitudes about the law in a way that goes far beyond the particular legal propositions for which they stand. Witness the power of *Marbury v Madison*⁵⁸⁰ in supporting an expansive power of judicial review, or of *Brown v Board of Education*⁵⁸¹ in undermining the legitimacy of invidious racial classifications. *Illinois Central Railroad Company v Illinois* plays a similar role in the public trust doctrine. The force of *Illinois Central*, however, derives not so much from its fine phrases or the courage that it took for the Court to reach the decision it did. Rather, *Illinois Central* is a compelling precedent largely because of its facts, or at least what are presumed to be its facts. The Illinois legislature granted the entire Chicago lakefront, over one thousand acres, to a private railroad corporation! Small wonder that the legislature quickly repented of this deed, or that the Court was compelled to say that this valuable resource is impressed with a public trust that means it can never be sold to a private entity.

We have tried to show how the Lake Front Act of 1869 came to be passed, why the railroad’s motives were not as pernicious as they are usually portrayed to have been, and how a conscientious legislator might have decided to vote in favor of the Act. We have also concluded that most probably the railroad used corrupt means to procure the legislation. So the reality is more complex than the standard story

⁵⁷⁹ This at least is what has become of the public trust doctrine in Illinois. Compare *Friends of the Parks v Chicago Park District*, 203 Ill 2d 312, 786 NE2d 161 (2003) (upholding the long-term lease of a lakefront stadium to a professional football team even though the team would control and regulate public access to the stadium), with *Lake Michigan Federation v United States Army Corps of Engineers*, 742 F Supp 441 (ND Ill 1990) (invalidating the transfer of fee to a nonprofit university even though transfer was subject to restrictions designed to preserve and even enhance public access to the lake).

⁵⁸⁰ 5 US (1 Cranch) 137 (1803).

⁵⁸¹ 347 US 483 (1954).

even begins to intimate. None of this is to suggest that the public trust doctrine is necessarily a bad idea or a good one. But it does suggest that the doctrine should be assessed using arguments more probing than a retelling of the standard narrative of the *Illinois Central* case. That story is a fable, and can justify the doctrine only if we already believe in it for reasons independent of the lesson the case supposedly teaches.