

## Recapturing Water for Sustainability Through Redefinitions of Navigability and Ownership

**Author :** Shelby D. Green

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Maureen Brady, *Defining “Navigability”: Balancing State Court Flexibility and Private Rights in Waterways*, 36 **Cardozo L. Rev.** 1415 (2015), available at [SSRN](#).

More than 86,000 square miles of inland waterways traverse and meander throughout the United States. Since ancient times, navigable waterways were not subject to private ownership, but were reserved to the public under the public trust doctrine. In contrast, non-navigable waterways could be privately owned. While riparian and littoral rights are firmly fixed in the common law, what has proven to be more fluid is the definition of “navigability.”

In *Defining “Navigability”: Balancing State Court Flexibility and Private Rights in Waterways*, 36 *Cardozo L. Rev.* 1415 (2015), [Maureen Brady](#) explains that over the last two centuries, state courts have broadened the concept of navigability, and applied the new definitions to alter existing land titles. As a consequence, many non-navigable waterways have become navigable waterways, increasing public ownership and extinguishing private rights.

Brady’s exhaustive historical analysis reveals that in judicial decisions resolving competing claims to control the use of waterways, the courts have unmoored the meaning of navigability from its early conception—touched by the tides or capable of commercial transport of people or goods—to the present liberal conception, in many states, that includes pleasure boating, floating and similar uses other than navigation. She identifies two significant movements in American history that were the driving forces for these changes: the industrial movement of the mid-nineteenth century that favored expansions of private rights and the environmental movement of the mid-twentieth century that urged greater public access.

What seems to concern Brady is not only that these shifts in the classification of waterways are occurring without notice to private owners, but that they are occurring without constraints and that some of the rationales offered have been strained, if not disingenuous. Her study is rich with cases that present both earnest and opportunistic claims to the waterways, sometimes erupting in violence that cowered even the judges. With perfectly circular logic, one case cited found a waterway to be navigable because purely recreational boating could be turned into commercial use by offering paid paddling tours. Though the trend is concerning, Brady shows that the shift has been neither linear, nor universal, as some courts have viewed the re-routing as a transmutation that portends a host of negative externalities, including noise from more users, loss of privacy and productivity to the private owners and harm to wildlife from disturbances to habitats. One court noted that in many spots in the waterways deemed navigable under the new rules, there was less water than in a bathtub.

Brady’s main aim is to question the authority of state court judges to reshape the common law definition of navigability, charging them with conducting “judicial takings” without compensation and deprivations of property without due process. Brady does not maintain that the line between navigable and non-navigable waterways can never be redrawn, for that would lead to the ossification of the common law, whose beauty is in its ability to flex and expand as society demands. On the contrary, she insists that state judges, by having leeway to revise and reshape common law definitions, occupy the

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singular position to mediate between private rights and larger public interests—in water recreation, protecting the environment and in the efficient allocation of water, and to act without the political constraints that compromise legislatures.

Practical wisdom having only limited sway, Brady is doubtful of the capacity of the Due Process and the Takings Clauses to curb judicial decisions that often seem a naked transfer of property from owners to neighbors or competitors, even as modes of commercial transport change. She plumbs the cases to reveal gaps and limitations in the constitutional jurisprudence as meaningful constraints. For example, the Supreme Court has not applied the Fourteenth Amendment to judicial actions to revise common law property rules, and existing takings doctrine is not structured to address novel forms of regulatory incursions.

The most recent case in which the Supreme Court discussed the philosophical plausibility of a “judicial taking,” [\*Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection\*](#), 560 U.S. 702 (2010), does not help to determine the extent to which adjustments at the margins of navigability would result in the elimination of “established rights.” While she does not predict what the world will be like if the trend continues, Brady’s analysis does conclude that the likelihood of successful takings challenges is fairly low, leaving state courts with almost unchecked power to affect property rights in waterways.

In the end, the vehicle Brady crafts for checking the abusive use of judicial power to recast rights, is both perceptive and evident. It uses the Due Process and Takings Clauses, not as discrete, mutually exclusive tests, but as interrelated parts of a whole analysis. A judicial redefinition would be invalidated if it does not conform to the requirements of the Due Process clause, ensuring that settled expectations are not unduly frustrated and that there is regard for reasonable reliance on prior law.

Even if it overcomes this hurdle, judicial redefinitions of navigability must still undergo a takings analysis, in which the owner might show, for example, that the stream on the property was a significant part of the value of the property. Though denominated as separate stages, Brady perceives that the two clauses overlap in significant respects—reliance on existing state law will simultaneously present a due process question and establish sufficient expectations to trigger the takings clause. But the difference is in the remedy—takings clause scrutiny will not prevent the change in judicial definition of such rights if a public use is present, but instead will only offer some measure of compensation.

Brady concedes that the interests on both sides are too important to offer a normative suggestion on where the line between private/public, majoritarian/individual, industry/environment, should be drawn, but the framework she develops helps to insure that at least both sides factor into the equation. She helps us to see that, in developing that calculus, the imperatives of sustainable land use in a rapidly changing world climate may require owners to cede some measure of control or accept new understandings of what it means to own property.

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