

“COMMON HIGHWAYS” AND “FOREVER FREE”: THE
MISSISSIPPI CRISIS, THE NORTHWEST ORDINANCE,
AND EQUAL FOOTING AS THE SOURCE OF THE
AMERICAN PUBLIC TRUST

BY

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Federal lands and waters serve valuable conservation and public access purposes. As climate change results in increased wildfires, droughts, and hazardous weather conditions, protecting access to remaining public resources is becoming increasingly important. Despite those concerns, President Donald Trump and his administration seek to open federal lands and waters to oil, gas, and mining corporations. In several states, the public trust doctrine—a sovereign duty to hold key public resources in trust for the benefit of current and future generations—prohibits the state from leasing public lands and waters for oil and mineral extraction when that use would impair rights in public resources. But because the public trust doctrine is traditionally viewed as a state common law doctrine, courts have not recognized that the federal government has trust obligations to federal public lands and waters. Through a long overdue examination of proprietary equal footing’s linkage to the Admissions Clause of the U.S. Constitution, this Note argues that the public trust doctrine is a constitutional mandate under the Admissions Clause. It shows that the public trust doctrine was central to the republican ideology of the founding era by examining the Mississippi Crisis, the Northwest Ordinance, and the Ordinance’s effect after the Constitution’s ratification. Applying that historical context to the development of the public trust and equal footing doctrines in American jurisprudence, this Note argues that the public trust is inherent in the constitutional equal footing doctrine. Since the equal footing doctrine and republicanism are settled constitutional principles, a historical understanding grounds the public trust doctrine in the Admissions Clause. Recognizing the Northwest Ordinance as the source of the American public trust reveals it as a federal constitutional mandate of all republican

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governments, regardless of whether the government is state or federal.

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I. INTRODUCTION

“Eventually, all things merge into one, and a river runs through it.”
—Norman Maclean, *A River Runs Through It*¹

Although 2024 was the hottest year on record,² the Trump administration and its congressional allies have acted to increase oil and mineral leasing on federal lands and waters.³ Not only do these

¹ NORMAN MACLEAN, *A RIVER RUNS THROUGH IT AND OTHER STORIES* 104 (The Univ. of Chi. Press 1976).

² Nat’l Ctrs. for Env’t Info., *Global Climate Report*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 2025), <https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202413> [<https://perma.cc/7PZ4-93TR>].

³ See, e.g., Unleashing Alaska’s Extraordinary Resource Potential, Exec. Order No. 14,153, 90 Fed. Reg. 8347, 8347 (Jan. 29, 2025) (directing all executive departments and agencies to “efficiently and effectively maximize the development and production of the natural resources located on both Federal and State lands within Alaska” and “expedite the permitting and leasing of energy and natural resource projects in Alaska”); Unleashing American Energy, Exec. Order No. 14,154, 90 Fed. Reg. 8353, 8353 (Jan. 29, 2025) (stating that “[i]t is the policy of the United States . . . to encourage energy exploration and production on Federal lands and waters, including on the Outer Continental Shelf” and “to establish our position as the leading producer and processor of non-fuel minerals, including rare earth minerals”); Declaring a National Energy Emergency, Exec. Order No. 14,156, 90 Fed. Reg. 8433, 8433–34 (Jan. 29, 2025) (declaring a “national energy emergency” and directing federal agencies to “identify and exercise any lawful emergency authorities available to them, as well as all other lawful authorities they may possess, to facilitate the identification, leasing, siting, production, transportation, refining, and generation of domestic energy resources, including, but not limited to, on Federal lands”);

activities contribute to climate change,⁴ but they also obstruct public access for commercial fishing and recreation.⁵ In states such as Alaska,⁶ Arkansas,⁷ and Montana,⁸ the public trust doctrine⁹ protects trust resources from oil and mineral extraction when that use would impair public rights in trust resources. But because the public trust doctrine

Heather Richards, *Trump Admin Announces Plan for 30 Offshore Oil Lease Sales*, POLITICO: GREENWIRE (Aug. 19, 2025, at 01:26 EDT), <https://subscriber.politicopro.com/article/eenews/2025/08/19/trump-admin-announces-plan-for-30-offshore-oil-lease-sales-00514387> [<https://perma.cc/2WSK-BD66>]; Act of July 4, 2025, Pub. L. No. 119-21, §§ 50101–50404, 139 Stat. 137, 137–54 (2025); see also William Perry Pendley, *Department of the Interior*, in MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 517, 521–23 (Paul Dans & Steven Groves eds., 2023) (discussing oil and mineral leasing as an administrative priority for the incoming conservative administration).

⁴ Antoine Allanore & Elizabeth Gribkoff, *Mining and Metals*, MIT CLIMATE PORTAL (Oct. 19, 2020), <https://climate.mit.edu/explainers/mining-and-metals#:~:text=To%20extract%20mineral%20ore%2C%20large,also%20contributes%20to%20global%20warming> [<https://perma.cc/3F7G-X5T9>]; see also Brian C. Prest, *How Much Would Expanding Federal Oil and Gas Leasing Increase Global Carbon Emissions?*, RES. FOR THE FUTURE (Sep. 3, 2024), <https://www.rff.org/publications/issue-briefs/federal-permitting-reform-expand-oil-and-gas-leasing-carbon-emissions/> [<https://perma.cc/K2B5-7A4K>] (discussing impacts of estimated onshore oil development); Sarah Giltz, *Offshore Drilling Fuels the Climate Crisis*, OCEANA (Oct. 18, 2023), <https://usa.oceana.org/blog/offshore-drilling-fuels-the-climate-crisis/> [<https://perma.cc/G6QB-T266>] (describing offshore drilling's impact on climate change).

⁵ U.S. DEP'T OF THE INTERIOR, REPORT ON THE FEDERAL OIL AND GAS LEASING PROGRAM 5 (2021) (describing that “[w]hen land is under contract for potential oil and gas activity, the shared public lands cannot be managed for other purposes, such as conservation or recreation” and that “offshore areas also have shared uses, such as supporting marine wildlife habitat, coastal tourism, subsistence uses, recreational and commercial fishing, and national defense activities”).

⁶ ALASKA STAT. § 38.05.126 (2024) (“[T]he state holds and controls all navigable or public water in trust for the use of the people of the state.”); *id.* § 38.05.502 (“[A]ll land in the state and all minerals not previously appropriated are the exclusive property of the people of the state and the state holds title to the land and minerals in trust for the people of the state.”).

⁷ ARK. CODE ANN. § 22-5-815(a) (2025) (providing that the State of Arkansas may acquire title to submerged lands under artificially-created navigable waters; the former landowner retains title to oil, gas, and minerals under those lands); *id.* § 22-5-815(b) (“The private ownership of the oil, gas, and other minerals in and under lands covered by artificially created navigable waters . . . shall not be permitted to interfere with or impair, the rights of public navigation, transportation, fishing, and recreation in and upon such navigable waters.”).

⁸ *Jackson v. Burlington N. Inc.*, 667 P.2d 406, 408 (Mont. 1983) (concluding that Montana owns all minerals under the beds of navigable waters, given that “development of privately owned minerals underlying navigable waterways could interfere with the public’s right to navigate, whether for commercial or recreational purposes”).

⁹ In general, the public trust doctrine recognizes that the government has a sovereign obligation to hold key natural resources in trust for the benefit of current and future generations. MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* 3 (3d ed. 2021). For further discussion of the public trust doctrine, see *infra* Part III.A.

has been traditionally viewed as a state common law doctrine,¹⁰ the federal government does not yet have a judicially recognized trust obligation to prohibit public resource giveaways when they would impair public rights in trust resources.¹¹

To date, the American source of the public trust doctrine—and whether it applies to the federal government—remains unanswered.¹² Although legal scholars have argued that the public trust doctrine indeed applies to the federal government,¹³ those unanswered questions result in conflicting federal case law on the doctrine’s applicability to the federal government.¹⁴ This Note clarifies the connection, explaining that the source of the American public trust doctrine lies in the nation’s protracted sectional debate in the late eighteenth century over commercial access to major watercourses and its influence on the nation’s founding documents. Understanding the role of this history yields insight into the federal basis of the public trust doctrine.

Responding to Spain’s trade monopoly on the Mississippi River,¹⁵

¹⁰ See, e.g., *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012) (explaining in dicta that the public trust doctrine is rooted in English common law and “remains a matter of state law”).

¹¹ The federal leasing programs are subject to an environmental review process under the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4321 (2018). See *Leasing Process*, U.S. DEPT OF THE INTERIOR, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing> [<https://perma.cc/6LFT-BT78>] (last visited Oct. 19, 2025). But see *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (“Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.”).

¹² See, e.g., *Amicus Curiae Brief of Law Professors in Support of Granting Writ of Certiorari at 2, Alec. L. v. McCarthy*, 574 U.S. 1047 (2014) (No. 14-405), 2013 WL 6002107 (“Here, we wish to emphasize that the public trust doctrine has been misunderstood as merely a state common law principle.”); William D. Araiza, *The Public Trust Doctrine as an Interpretive Cannon*, 45 U.C. DAVIS L. REV. 693, 700 (2012) (“The public trust doctrine’s legal source remains unsettled. In addition to constituting a theoretical problem in itself, this uncertainty carries with it implications for the doctrine’s scope and legitimacy.”); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENV’T L. 425, 453 (1989) (“Today, nearly a century later, after all of the words on the subject, two foundational issues concerning the traditional doctrine have still not been decided. The first matter is the source of the trust—where does it come from?”).

¹³ See, e.g., Samuel H. Ruddy, *Finding a Constitutional Home for the Public Trust Doctrine*, 43 ENVIRONS: ENV’T L. & POL’Y J. 139, 152–53 (2020); Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENV’T L. 399, 401 (2015).

¹⁴ See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1259 (D. Or. 2016), *rev’d on other grounds*, 947 F.3d 1159 (9th Cir. 2020) (“I can think of no reason why the public trust doctrine, which came to this country through the Roman and English roots of our civil law system, would apply to the states but not to the federal government.”); *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012), *aff’d*, 561 Fed. Appx. 7 (D.C. Cir. 2014) (finding the U.S. Supreme Court’s dictum in *P.P.L. Montana* “persuasive,” and concluding that the public trust doctrine is not binding on the federal government).

¹⁵ See discussion *infra* Part II.B (discussing Spain’s closure of the Mississippi and the resulting sectional conflict between the states occasioned by the crisis).

Congress's passage of the Northwest Ordinance of 1787,¹⁶ and the Constitution's ratification¹⁷ centered free trade in the nation's vision of union and state equality.¹⁸ The Northwest Ordinance played a vital role in the expanding union, serving as the blueprint for westward expansion and codifying sectional compromises on free trade and state equality.¹⁹ Departing from the British colonial model, the Ordinance guaranteed that, once a territory achieved a population of 60,000, it could enter the union "on an equal footing with the original States, in all respects whatsoever."²⁰ Upon admission, the new state's government would, in turn, ensure that "[t]he navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free...without any tax, impost, or duty therefor."²¹

The Northwest Ordinance, preserved in the first volume of the *United States Code* alongside the Declaration of Independence, the Articles of Confederation, and the Constitution,²² is one of the formative documents of American government.²³ Among other things, the

¹⁶ Ordinance of 1787: The Northwest, Territorial Government, The Organic Laws of the United States of America, *reprinted in* U.S.C. at LVII–LIX (2018).

¹⁷ Constitution of the United States of America—1787, The Organic Laws of the United States of America, *reprinted in* U.S.C. at LXI–LXXV (2018).

¹⁸ SUSAN GAUNT STEARNS, EMPIRE OF COMMERCE: THE CLOSING OF THE MISSISSIPPI AND THE OPENING OF ATLANTIC TRADE 83–84 (Charlene M. Boyer Lewis et al. eds., 2024).

¹⁹ *See id.* at 84–86 (explaining that "language that would have both established the process of establishing new states and explicitly asserted a right to Mississippi trade...would have rendered the [Constitution] unratifiable" and that the compromises in the Northwest Ordinance "resolved such issues").

²⁰ Ordinance of 1787: The Northwest Territorial Government, The Organic Laws of the United States of America, *reprinted in* U.S.C. at LIX; *see also* Robert S. Hill, *Federalism, Republicanism, and the Northwest Ordinance*, PUBLIUS, Autumn 1988 at 41, 48 ("The population threshold for statehood was set at 60,000, a number probably thought to rank above Delaware's population and rapidly growing Georgia's and close to Rhode Island's in 1787."). *But see* Clarence E. Carter, *Colonialism in Continental United States*, 47 S. ATLANTIC Q. 17, 18–19 (1948) (calling the provision the Northwest Ordinance's "capstone" and explaining that "the principle of the creation of new states after a period of dependency became a permanent part of American policy").

²¹ Ordinance of 1787: The Northwest Territorial Government, The Organic Laws of the United States of America, *reprinted in* U.S.C. at LIX. The full text of the provision is as follows:

The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

²² *Id.*; Mathew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. STATE L.J. 409, 414 n.12 (2013).

²³ *See* Eric T. Freyfogle, *Public Rights in Illinois Waterways Under Federal and State Law*, 2024 U. ILL. L. REV. 229, 242 (2024); *see also* Festa, *supra* note 22, at 412 ("While it has received much less scrutiny than the product of the Philadelphia Convention, the Northwest Ordinance is a document of great historical significance and can also provide insight into the legal and intellectual history of the founding generation."); Matthew J.

Ordinance's "articles of compact" prohibited slavery and guaranteed due process, compensation for private property takings, freedom of contract, and the free use of waterways in the Northwest Territory.²⁴ Indeed, the essential rights protected by the Ordinance informed the privileges and immunities guaranteed by the Fourteenth Amendment,²⁵ served as a model for admissions acts of thirty-one states,²⁶ and, as the U.S. Supreme Court would note in 1921, is the origin of the "public interest in navigable streams."²⁷

Although the Admissions Clause does not expressly mention the Northwest Ordinance's "equal footing" language,²⁸ the U.S. Supreme Court has held that the Admissions Clause requires that Congress admit new states on an "equal footing" with existing states.²⁹ In the seminal equal footing decision *Pollard v. Hagan*,³⁰ the Supreme Court extended equal footing to proprietary matters, concluding that newly-admitted states gain title to their submerged lands under the equal footing doctrine implicit in the Admissions Clause of the U.S. Constitution.³¹ Subsequent jurisprudence has also acknowledged that monopolization of those resources would jeopardize the public's rights in those resources.³² But despite *Pollard's* significance, the historical linkage between proprietary equal footing, the public trust doctrine, and the Admissions Clause has been understudied.

Notwithstanding the Mississippi Crisis's influence on equal footing language in the Northwest Ordinance and the Admissions Clause, the Ordinance has received little attention in scholarship evaluating the

Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820, 1827 (2011).

²⁴ Ordinance of 1787: The Northwest Territorial Government, The Organic Laws of the United States of America, reprinted in U.S.C. at LVIII-LIX.

²⁵ See Hegreness, *supra* note 23, at 1845-46 ("These privileges and immunities . . . were in force at one point or another in every territory (with the exception of Nevada) that became a state by 1868 and ratified the Fourteenth Amendment."); Freyfogle, *supra* note 23, at 243 ("But other provisions seemed intended for longer lives, those provisions that set forth individual rights and, in retrospect, provided perhaps the best distillation of what became known as the privileges and immunities of American citizens.").

²⁶ Freyfogle, *supra* note 23, at 242; Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 930 (1995).

²⁷ *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 118-20 (1921) (explaining that Article IV of the Northwest Ordinance is the "definite origin" of "[t]he public interest in navigable streams").

²⁸ Compare U.S. CONST. art. IV, § 3, cl. 1 (containing no language of "equal footing"), with Ordinance of 1787: The Northwest Territorial Government, The Organic Laws of the United States of America, reprinted in U.S.C. at LVIII, LIX ("And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever.").

²⁹ See, e.g., *Coyle v. Smith*, 221 U.S. 559, 566-69 (1911).

³⁰ 44 U.S. 212 (1845).

³¹ See *id.* at 228-30. For a thorough analysis of the Supreme Court's decision in *Pollard*, see *infra* Part III.B.

³² See, e.g., *Ill. Cent. R.R. Co. v. Illinois (Illinois Central)*, 146 U.S. 387, 453 (1892).

American public trust doctrine's origin.³³ This Note applies that historical understanding to a long-overdue³⁴ analysis of the linkage between the equal footing doctrine, public trust doctrine, and the Admissions Clause. The Mississippi Crisis's influence on the nation's founding documents³⁵ reveals the Admissions Clause as the constitutional home of the American public trust doctrine. Contemporary scholars of the American public trust doctrine often narrowly focus on English common law, not the Northwest Ordinance, as the source of the American public trust.³⁶

This Note argues that the historical context and lasting significance of the Northwest Ordinance is a forgotten source of the American public trust, revealing the public trust doctrine as a federal constitutional principle under the Admissions Clause. Part II begins by describing the historical context of the Northwest Ordinance's passage, focusing on the Mississippi Crisis as the impetus for the Ordinance's protection of public rights in waterways and entrance into the union on equal footing. Part III analyzes the traditional equal footing and public trust doctrines, with reference to nineteenth- and twentieth-century U.S. Supreme Court interpretations. Part IV applies a historical understanding to equal footing and republican governance, maintaining that the public trust doctrine is a federal constitutional principle under the Admissions Clause. This Note concludes that an understanding of the historical context of the Northwest Ordinance reveals public rights in navigable waterways as a core component of the Founders' republicanism. That context, therefore, reveals the public trust doctrine as a federal mandate under the Admissions Clause, requiring that both state and federal governments protect access to navigable waters and the submerged lands beneath them for long-term public benefit.

³³ See, e.g., Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 484 (1970) (comparing Britain's "historic public rights of fishery and navigation" to the "common highways, and forever free" provision in the Northwest Ordinance); Wilkinson, *supra* note 12, at 456–58 (discussing the Northwest Ordinance as support for guarantees of free use of waterways begin an implied condition of statehood).

³⁴ Although some legal scholars have explored the equal footing doctrine's connection to the property clause or the equal footing and public trust doctrine's connection, none have argued that the Admissions Clause is the constitutional home of the public trust doctrine. See, e.g., James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 2–7, 65 n.243 (1997); Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557, 563 (1995).

³⁵ See *infra* Part II.B–D.

³⁶ See, e.g., Sax, *supra* note 33, at 475.

II. THE NORTHWEST TERRITORY AND NAVIGATION IN THE EARLY REPUBLIC

In the 1780s, the United States was a struggling new nation.³⁷ Revolutionary war debt, geopolitical conflict, and regional tensions afflicted the nation.³⁸ Perhaps nowhere were those issues more evident than the debate over territorial expansion in the Northwest.³⁹ The Northwest Territory was “at the crossroads of empires.”⁴⁰ The region’s fertile soils and major waterways promised economic security for whatever nation exerted control over it.⁴¹

Eager to remedy the country’s financial crisis, Congress turned westward for a solution.⁴² After the Revolutionary War, thousands of Americans migrated to the fertile Old Northwest—what is now Illinois, Indiana, Michigan, Ohio, and Wisconsin.⁴³ American settlement in the Northwest relied on the Mississippi and St. Lawrence rivers, which were the cheapest and most essential routes into and out of the Northwest.⁴⁴ The idea was that territorial expansion, western land sales, and trade along the Mississippi and St. Lawrence rivers would ease the nation’s financial woes from the loss of trade with Britain after the war and expand its political domain.⁴⁵

However, when Spain closed American access to the Mississippi River in 1784, the resulting Mississippi Crisis frustrated policymakers’ westward commercial visions, stoking a sectional divide⁴⁶ in Congress between southern and northeastern delegates that threatened the nation’s westward expansion and union.⁴⁷ To quell that threat, Congress

³⁷ Gordon T. Stewart, *The Northwest Ordinance and the Balance of Power in North America*, in *THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY* 21, 23 (Fredrick D. Williams ed., 1989).

³⁸ *Id.*

³⁹ *Id.* at 22; see also Drew R. McCoy, *James Madison and Visions of American Nationality in the Confederation Period: A Regional Perspective*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 226, 229 (Richard Beeman et al. eds., 1987) (explaining that “this relationship between the quest for territorial integration and the presence of chronic regional conflict informed many, if not most, of the major political developments of the last two decades of the eighteenth century”); PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787* 158–60 (1983) [hereinafter *ORIGINS OF THE FEDERAL REPUBLIC*] (discussing sectionalism regarding the formation of new states).

⁴⁰ Stewart, *supra* note 37, at 21.

⁴¹ *Id.* at 22.

⁴² STEARNS, *supra* note 18, at 68.

⁴³ PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* 25–26 (2019) [hereinafter *STATEHOOD AND UNION*]; Festa, *supra* note 22, at 429.

⁴⁴ Stewart, *supra* note 37, at 22.

⁴⁵ See STEARNS, *supra* note 18, at 67–68; *STATEHOOD AND UNION*, *supra* note 43, at 1–2.

⁴⁶ See *infra* Part II.B for a thorough discussion of the Mississippi Crisis’s resulting sectionalism.

⁴⁷ *STATEHOOD AND UNION*, *supra* note 43, at 163.

needed to take action to control settlement in the region.⁴⁸ One response was the Northwest Ordinance's freedom of navigation and Equal Footing Clause. This part examines early settlement in the Northwest Territory, the Mississippi Crisis, the development of the Northwest Ordinance, and its effects after the U.S. Constitution's ratification.⁴⁹

A. Early Settlement: From the Public Lands Resolution of 1780 to the Land Ordinance of 1785

After the United States declared its independence, jurisdictional disputes⁵⁰ between the states with western land claims and states with fixed borders stalled the final ratification of the Articles of Confederation and threatened to jeopardize the Revolutionary War effort.⁵¹ After much debate, Congress adopted the Public Lands Resolution in 1780,⁵² resolving that the lands ceded to the United States: “[S]hall be disposed of for the common benefit of the United

⁴⁸ Eli Merritt, Thomas Green & John Campbell, *Sectional Conflict and Secret Compromise: The Mississippi River Question and the United States Constitution*, 35 AM. J. LEGAL HIST. 117, 128 (1991).

⁴⁹ This Note's historical analysis focuses on the Mississippi Crisis' influence on the Founders' republicanism and the development of the nation's founding documents. It does not seek to endorse the narrative that the Northwest Territory was an uncivilized wilderness available for westward expansion. See Michael Witgen, *A Nation of Settlers: The Early American Republic and the Colonization of the Northwest Territory*, 76 WM. & MARY Q. 391, 391–93 (2019) (explaining how westward expansion was influenced by the Lockean belief that native homelands were in an uncivilized “state of nature,” and that its goal was to establish civilized society in the “wilderness” of the republic). It was not. The Northwest Territory was home to nearly one-hundred-thousand native people. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 123 (David M. Kennedy ed., 2009). Settlement in the Northwest Territory cannot be separated from its consequences—subjugation, forced assimilation, and removal of native people from their homelands in the territory. See *id.* at 124–25; see generally Witgen, *supra* note 49 (so discussing).

⁵⁰ Because of the vague boundaries in states' colonial charters, seven states had western land claims, and six states did not. John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 504 (2018). The six “landless” states stymied ratification of the Articles of Confederation until the seven “landed” states agreed to cede their western land claims to the national government. *Id.* In 1780, Congress adopted the Public Lands Resolution of 1780, urging the “landed” states to cede their western land claims and compel the Articles' ratification. *Articles of Confederation and Land Cessions*, 807 (Oct. 1786) (on file with Libr. of Cong., Journals of the Continental Congress, 1774–1789), <https://www.loc.gov/resource/llscdam.lljc031?st=pdf&pdfPage=359> [<https://perma.cc/JCE8-7LAT>] (recommending that the states with western land claims “give their delegates in Congress such powers as may effectively remove the only obstacle to final ratification of the articles of confederation”).

⁵¹ *Articles of Confederation and Land Cessions*, *supra* note 50; *ORIGINS OF THE FEDERAL REPUBLIC*, *supra* note 39, at 3.

⁵² *Public Lands Resolution*, 915–16 (Oct. 1780) (on file with Libr. of Cong., Journals of Continental Congress, 1774–1789), <https://www.loc.gov/resource/llscdam.lljc018/?st=pdf&pdfPage=109> [<https://perma.cc/LN62-WB8R>] (edited from the original records in the Library of Congress by Gaillard Hunt, Chief, Division of Manuscripts); Hill, *supra* note 20, at 43.

States, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states . . .”⁵³

The resolution rejected England’s colonial model, which subordinated colonies and subjugated them to the discretion of the central government.⁵⁴ Instead, the resolution constituted Congress’s “first formal expression” of state equality,⁵⁵ setting the stage for the subsequent admission of new self-governing republics—joined equally in a national union.⁵⁶

From 1781 to 1802, the seven states with western land claims ceded those claims to the federal government, allowing Congress to create a national territorial framework in the Trans-Appalachian West.⁵⁷ A key cession was Virginia’s. On March 1, 1784, the state ceded its western land claim to the territory encompassing the Old Northwest.⁵⁸ Virginia’s cession echoed the republican ideals in the 1780 resolution,⁵⁹ breaking an impasse between Congress and landed states over western land claims.⁶⁰ With its expansive authority over the Old Northwest, Congress began contemplating a national territorial framework for the settlement and governance of the region that would resolve the nation’s economic crisis and culminate in the admission of new states that would expand the union.⁶¹

⁵³ Public Lands Resolution, *supra* note 52, at 915.

⁵⁴ Hill, *supra* note 20, at 43.

⁵⁵ Luis R. Dávila-Colón, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 CASE W. RESV. J. INT’L L. 315, 326 (1981) (“The earliest notion of the equality of States originates in the egalitarian rhetoric of the American Revolution and finds its first formal expression in the *Resolve of 1780*.”); see also ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 154 (“The western land cessions represented a first step toward resolving the problem of state inequalities without attacking the states themselves, while simultaneously underwriting the expansion of congressional power through the creation of a national domain.”).

⁵⁶ Hill, *supra* note 20, at 43; see Robert F. Berkhofer, Jr., *Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System*, 29 WM. & MARY Q. 231, 235 (1972).

⁵⁷ Michael C. Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 GEO. ENV’T. L. REV. 155, 159 (2016). The seven states with western land claims and their dates of cession were New York (1780), Virginia (1781), Massachusetts (1784), Connecticut (1786), South Carolina (1787), North Carolina (1789), and Georgia (1802). *Id.* at 159–60 n.15; PAYSON JACKSON TREAT, *THE NATIONAL LAND SYSTEM, 1785–1820*, at 14 (1910).

⁵⁸ Cessions of Western Lands, 112–17 (Mar. 1784) (on file with Libr. of Cong., Journals of the Continental Congress, 1774–1789), <https://www.loc.gov/resource/l1scdam.l1jc026/?sp=2&st=pdf&r=-0.429%2C-0.093%2C1.858%2C1.858%2C0&pdfPage=118> [https://perma.cc/TAS5-ZD6Y]; Hill, *supra* note 20, at 44; Festa, *supra* note 22, at 429.

⁵⁹ Hill, *supra* note 20, at 44.

⁶⁰ ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 160–61.

⁶¹ During the 1780s, the nation was thrust into an economic crisis because of its revolutionary war debt and loss of maritime trade due to Britain’s exclusion of American trade from its ports. STEARNS, *supra* note 18, at 67–68. Many policymakers believed that commodifying and commercializing the Trans-Appalachian West through either land sales or reestablishing trade on the Mississippi River was the most promising solution for recovering the nation’s economy. *Id.* Congressional debate about the idea of union during

On the same day Virginia ceded its western land claim, a committee headed by future president Thomas Jefferson reported a territorial government ordinance, formally proposed as the “Ordinance of 1784.”⁶² The proposal did not provide a method for conducting land sales.⁶³ Instead, it laid out as many as sixteen small states, which Jefferson reasoned would preserve the economic and political ideology of republicanism.⁶⁴ It also attempted to establish order in the region by directing settlers to form territorial governments that adopted the constitution and laws of one of the thirteen original states.⁶⁵ Importantly, the proposal provided that once a state’s population “equal[li]ed that of the smallest existing state,” it could enter the union “on equal footing with the said original states.”⁶⁶ However, growing concerns about the settlers’ loyalty to the United States caused Congress to rethink several features of the Ordinance shortly after its enactment—namely, that Congress was unable to ensure republican territorial governments and that the proposed states’ small size would

this period often linked the idea of union and trade. *Id.* at 70; IND. HIST. SOC’Y, THE NORTHWEST ORDINANCE 1787: A BICENTENNIAL HANDBOOK 66 (Robert M. Taylor, Jr. ed., 1987). Westward expansion would secure both inland and international trade along the Mississippi and St. Lawrence rivers—those trade opportunities, in turn, would economically bind the distinct regions of the nation, strengthening the union. *Id.*; STEARNS, *supra* note 18, at 70. In creating economic binds between the West, Northeast, and South, Congress could embrace westward expansion while maintaining republican governments. ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 159–61; *id.* at 159 (“A new, dynamic, and expansive conception of the union—and perhaps even the survival of the union itself—depended on the implementation of an effective western policy. It had to be shown that the expansion of the union through the formation of new states was not necessarily synonymous with disunion and anarchy.”).

⁶² 6 THOMAS JEFFERSON, PLAN FOR GOVERNMENT OF THE WESTERN TERRITORY (1784), reprinted in THE PAPERS OF THOMAS JEFFERSON: 21 MAY 1781 TO 1 MARCH 1784, at 613–16 (Julian P. Boyd ed., 1952); Festa, *supra* note 22, at 429; STATEHOOD AND UNION, *supra* note 43, at 25.

⁶³ Festa, *supra* note 22, at 429.

⁶⁴ Despite Congress’s claim of authority over the Northwest Territory, many residents of eastern states that were settling illegally in the Northwest defied Congress’s proclamations, laws, and treaties regarding the region. Andrew R. L. Cayton, *The Northwest Ordinance from the Perspective of the Frontier*, in THE NORTHWEST ORDINANCE 1787: A BICENTENNIAL HANDBOOK 1, 6–7 (Robert M. Taylor, Jr. ed., 1987). Both Congress and Eastern settlers viewed the illegal settlers’ incivility, barbarism, and disrespect toward authority as antithetical to the virtuous citizenry of a republican government. *Id.* at 7. Because of fear that illegal settlers would challenge or separate from the union, Jefferson and others believed that the western states should “be small enough to preserve homogeneity of the interests, opinions, and habits of the citizens” without broadening the strength and power of a centralized government beyond that which was “desirable for republicanism.” Berkhofer, *supra* note 56, at 244.

⁶⁵ Berkhofer, *supra* note 56, at 246; Festa, *supra* note 22, at 429.

⁶⁶ Festa, *supra* note 22, at 429; STATEHOOD AND UNION, *supra* note 43, at 46–47. The Ordinance of 1784 reaffirmed the principle of state equality in the Public Lands Resolution of 1780. Dávila-Colón, *supra* note 55, at 326–27.

make meeting the population requirements for statehood difficult, if not impossible.⁶⁷

Modeled on the 1784 Ordinance's plan for land distribution and settlement, Congress passed the Land Ordinance of 1785, which called for the survey and sale of western land.⁶⁸ Congress hoped that the western land sales would relieve the nation's revolutionary war debt.⁶⁹ But illegal settlement, survey delays, and the threat of warfare delayed its plan for western development.⁷⁰ Spain's closure of the Mississippi River to American navigation brought fears of western insurrection and growing sectionalist divides⁷¹ to a head, underscoring the importance of access to commercial waterways for westward expansion and the union.⁷²

B. The Mississippi Crisis

In 1784, the Spanish government in the Louisiana Territory closed the Mississippi River to American citizens, imposing a Spanish trade monopoly in reaction to American settlement west of the Appalachian Mountains.⁷³ In a letter to Thomas Jefferson, James Madison wrote that

⁶⁷ Jack E. Eblen, *Origins of the United States Colonial System: The Ordinance of 1787*, 51 WIS. MAG. HIST. 294, 302–03 (1968); STATEHOOD AND UNION, *supra* note 43, at 44–49; Hill, *supra* note 20, at 44; IND. HIST. SOC'Y, *supra* note 61, at 76; Duffey, *supra* note 26, at 936; *see also* WOOD, *supra* note 49, at 121 (explaining that the Ordinance of 1784 “left the settlers to govern themselves,” leading to uninformed and self-interested decision-making in the territory).

⁶⁸ IND. HIST. SOC'Y, *supra* note 61, at 76; STATEHOOD AND UNION, *supra* note 43, at 21; Festa, *supra* note 22, at 430.

⁶⁹ STATEHOOD AND UNION, *supra* note 43, at 4.

⁷⁰ *Id.* at 44.

⁷¹ For a discussion of the resulting sectionalism, *see infra* Part II.B.

⁷² *See* STATEHOOD AND UNION, *supra* note 43, at 58 (“The expanding scope of interest thus offered a solution to the conundrum of union: its survival would not have to depend on ‘paper engagements’—or on the exercise of despotic power—if the interests of easterners and westerners were developed reciprocally. This was the implicit message of the Mississippi furor.”); *see also* Merritt, *supra* note 48, at 128 (“From May to September 1786, the Mississippi River question emerged from a sectional debate to a full-fledged constitutional issue which threatened the dissolution of the Confederation.”); STEARNS, *supra* note 18, at 68 (explaining that the Mississippi closure “precipitated an imperial struggle within the states, as it threatened the viability of both territorial expansion and commercial restoration; as a result, the closure of the river tested the feasibility of union”); *see also* THE FEDERALIST NO. 11, at 73 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“There are rights of great moment to the trade of America, which are rights of the Union. I allude to the fisheries, to the navigation of the Western lakes and to that of the Mississippi. The dissolution of the confederacy would give room for delicate questions, concerning the future existence of these rights . . .”).

⁷³ Michael Allen, *The Mississippi River Debate, 1785–1787*, 36 TENN. HIST. Q. 447, 447 (1977); Merritt, *supra* note 48, at 124–25; WOOD, *supra* note 49, at 113 (“[I]n an effort to influence or to stop Americans moving into Kentucky and Tennessee, Spain closed the Mississippi River to American trade.”); *see also* Bruce Tyler, *The Mississippi River Trade, 1784–1788*, 12 LA. HIST. 255, 258 (1971) (“Spain had long wanted to close the Mississippi to all but Spanish trade . . .”).

“the importance of this matter is in almost every mouth.”⁷⁴ However, Congress’s reaction towards the closure was far from unanimous, splitting along southern⁷⁵ and northeastern⁷⁶ sections bent on responding to the closure in a manner that bolstered their respective regions’ economic interests.⁷⁷ On one side, the southern states’ economies relied on agricultural exports and favored westward expansion because of their western land claims and constituents’ economic investment in the region.⁷⁸ Because both their political and economic interests depended on westward expansion, the southern delegates aligned with western settlers in arguing that westward expansion relied on access to the Mississippi, viewing the use as a natural right.⁷⁹ The river was the only practical trade passage for western settlers, and the closure threatened both western settlers’ and southerners’ livelihoods.⁸⁰ On the other hand, northeastern states were driven into a recession after the Revolution when Britain closed its ports to American navigation.⁸¹ Facing economic and political consequences without access to new ports, northerners were willing to sacrifice American navigation of the Mississippi in exchange for access to Spanish ports and a military alliance.⁸²

In 1785, Don Diego de Gardoqui went to the United States on behalf of Spain to negotiate a commercial treaty between the nations.⁸³ The trade negotiations between Gardoqui and John Jay, the U.S. Secretary of Foreign Affairs, lasted until summer 1786.⁸⁴ In August 1785, a committee chaired by future president James Monroe instructed Jay to make no agreement with Gardoqui without “the free navigation of the Mississippi from the source to the ocean.”⁸⁵ But Gardoqui

⁷⁴ 2 JAMES MADISON, *Aug. 20, 1784, Letter from James Madison to Thomas Jefferson*, in WRITINGS OF JAMES MADISON, 1, 64 (Gaillard Hunt ed., 1991); see Merritt, *supra* note 48, at 125.

⁷⁵ The “southern” faction consisted of delegates from Virginia, North Carolina, South Carolina, and Georgia. STEARNS, *supra* note 18, at 68.

⁷⁶ The “northeastern” faction consisted of delegates from New England, New York, and Pennsylvania. *Id.*

⁷⁷ Merritt, *supra* note 48, at 128; Allen, *supra* note 73, at 455–56; STEARNS, *supra* note 18, at 68 (“These distinctive interests led to bitter divisions between the commercial states, intent on opening trade with Spanish markets, and the states engaged in westward expansion, which demanded the immediate reopening of the river.”).

⁷⁸ STEARNS, *supra* note 18, at 68.

⁷⁹ *Id.*; Allen, *supra* note 73, at 453–54; Merritt, *supra* note 48, at 128.

⁸⁰ Merritt, *supra* note 48, at 126–27.

⁸¹ Susan Gaunt Stearns, *Federalism on the Frontier: Secession and Loyalty in the Trans-Appalachian West*, in FROM INDEPENDENCE TO THE U.S. CONSTITUTION: RECONSIDERING THE CRITICAL PERIOD OF AMERICAN HISTORY 126, 139 (Douglas Bradburn & Christopher R. Pearl eds., 2022).

⁸² *Id.* at 139–40; Allen, *supra* note 73, at 448.

⁸³ Allen, *supra* note 73, at 447; Stearns, *supra* note 81.

⁸⁴ Stearns, *supra* note 81.

⁸⁵ 3 THOMAS B. WAIT, SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS, FROM THE FIRST MEETING THEREOF TO THE DISSOLUTION OF THE CONFEDERATION, BY THE ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 586 (1821).

refused.⁸⁶ In May 1786, Jay reported to Congress that the discussions had reached a stalemate.⁸⁷ Agreeing with northerners eager to access Spanish markets,⁸⁸ Jay returned to Congress in August with a treaty proposal: the United States would forbear the use of the Mississippi for twenty-five to forty years in exchange for trade reciprocity, free access to Spanish and American ports, and a consulate in Spain.⁸⁹

Thereafter, sectional debate regarding the Mississippi question culminated in a threat to the existence of the Confederation.⁹⁰ Although Article IX of the Articles of Confederation required nine states to approve of a treaty, the seven delegates from the northeastern states wanted to override the Articles and approve the treaty.⁹¹ But on August 16, South Carolina delegate Charles Pickney delivered an impassioned speech denouncing Jay's proposal.⁹² Pickney criticized the northeastern states' eagerness to override Article IX to pass the treaty, arguing that its passage would cede Americans' natural right to navigate the Mississippi to benefit the northeastern states.⁹³ Pickney warned that if Congress consented to a treaty that would "promote the interests of one part of the union at the expense of the other," it would, at best, destroy any prospect of granting Congress "additional powers" under a new constitutional framework and, at worst, dissolve the union altogether.⁹⁴ Pinckney's speech did not end the debate.⁹⁵ However, it revealed the gravity of the Mississippi Crisis: The fate of the union and its westward expansion lay in the resolution of the Mississippi Crisis.⁹⁶

⁸⁶ Merritt, *supra* note 48, at 127–28.

⁸⁷ *Id.* at 129; Stearns, *supra* note 81.

⁸⁸ WOOD, *supra* note 49, at 113.

⁸⁹ Merritt, *supra* note 48, at 130.

⁹⁰ *Id.* at 128; STATEHOOD AND UNION, *supra* note 43, at 57 ("According to one report, the threat of a treaty blocking the Mississippi produced 'political phrenzy' across the frontiers. 'The general voice of the western community . . . is EQUAL LIBERTY with the thirteen states, or a *breach of peace*, and a *new alliance!*'") (quoting From a Correspondent, N.Y.J., July 12, 1787).

⁹¹ Merritt, *supra* note 48, at 128.

⁹² See Charles Pinckney, Mr. Charles Pinckney's Speech, in Answer to Mr. Jay, Secretary for Foreign Affairs, on the Question of a Treaty with Spain, Delivered in Congress, August 16, 1786, at 935–48 (on file with Libr. of Cong., Journals of Continental Congress, 1774–1789), <https://www.loc.gov/resource/llscdam.lljc031/?st=pdf&pdfPage=487> [<https://perma.cc/JCE8-7LAT>]; Merritt, *supra* note 48, at 130.

⁹³ Pinckney, *supra* note 92, at 945 ("When once this right is ceded, no longer can the United States be viewed as the friend or parent of the new States, nor ought they to be considered in any other light, than in that of their oppressors.")

⁹⁴ Pinckney, *supra* note 92, at 945–48; Merritt, *supra* note 48, at 130–31.

⁹⁵ Merritt, *supra* note 48, at 132.

⁹⁶ Pinckney, *supra* note 92, at 947–48; McCoy, *supra* note 39, at 239–40 ("Although Jay's daring initiative aborted, he precipitated a fierce controversy that is immensely significant, both for what it reveals about the intensity of regional conflict in the 1780s and for its profound effect on the Confederation Congress and on the subsequent movement for national political reform.")

C. Creating the Northwest Ordinance

Amid the Mississippi Crisis, “Jefferson’s protégé” James Monroe believed that the northeastern delegates were conspiring to keep the West from joining the confederacy.⁹⁷ Monroe’s concern related to two policies: the state boundaries laid out in the Ordinance of 1784 and pressure from northeastern states “to increase minimum population requirements for statehood.”⁹⁸ The proposal for several small states in the 1784 Ordinance would deprive some prospective states of navigation altogether, while others would be without fertile land.⁹⁹ Monroe believed those inadequacies, combined with Spain’s closure of the Mississippi, would make it impossible for any western state to meet the population qualifications for admission to the union.¹⁰⁰

Congress could neither pass a plan for territorial governance nor create a workable path to statehood for the Northwest Territory without the acquiescence of northeastern states.¹⁰¹ But in the summer of 1787, many delegates’ attendance at the Constitutional Convention in Philadelphia paved the way for the first southern-dominated Congress in New York.¹⁰² With its new southern majority, Congress engaged in a series of sectional compromises, passing a document that asserted an

⁹⁷ ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 168 (“The controversy over the navigation of the Mississippi brought these fears to a head.”).

⁹⁸ *Id.*; WOOD, *supra* note 49, at 116 (explaining that the state boundaries in the 1784 Ordinance “took no account of the region’s complicated geographical contours”).

⁹⁹ See Government of Western Territory, 393–94 (July 1786) (on file with Libr. of Cong., Journals of the Continental Congress, 1774–1789), <https://www.loc.gov/resource/ljcdam.lljc030/?st=pdf&pdfPage=396> [<https://perma.cc/XR8T-ANAR>].

¹⁰⁰ ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 168; see also Important Letter from James Monroe to Governor Henry on This Subject (Aug. 12, 1786), in 2 PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 296–97 (William Wirt Henry ed., 1891) (“The object in the occlusion of the Mississippi on the part of” the Northeastern delegates was to “make it the interest of the people to separate from the Confederacy, so as effectually to exclude any new State from it.”).

¹⁰¹ See ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 169 (“A workable new state policy would have been impossible if only one section stood to gain by the admission of new states.”).

¹⁰² In the summer of 1787, fifty-five delegates were in Philadelphia debating the Virginia and New Jersey plans for the structure of the new national government. STEARNS, *supra* note 18, at 84; *Meet the Framers of the Constitution*, NAT’L ARCHIVES: AMERICA’S FOUNDING DOCUMENTS, <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/3KGD-5TAY>] (last visited Nov. 11, 2025). In June, only delegates from Massachusetts, New York, New Jersey, Virginia, and North Carolina were present at the Confederation Congress in New York. STEARNS, *supra* note 18, at 84–85. Because quorum required seven states to be present, Congress in New York was unable to conduct business. *Id.* Delegates from two southern states arrived in July, eager to use their new southern majority to advance policy favoring an American right to navigate the Mississippi. *Id.* at 85. The result was the Northwest Ordinance, a document codifying sectional compromises, like free navigation and equal footing, that were essential to the Constitution’s passage. *Id.* at 84.

American right to navigate the Mississippi and ensured the equality of new states admitted into the union.¹⁰³

In exchange for Mississippi navigation and lower population requirements for statehood, the document's other terms favored northeastern interests, such as prohibiting slavery in the Northwest Territory.¹⁰⁴ Moreover, Northern speculators would purchase vast swaths of western lands at depreciated prices, allowing for "systematic settlement" in the region by "industrious and virtuous" northeastern settlers.¹⁰⁵ After three uneventful readings, on July 13, 1787, the Continental Congress nearly unanimously passed "[a]n Ordinance for the government of the territory of the United States North West of the river Ohio," known today as the Northwest Ordinance.¹⁰⁶

The 1787 Northwest Ordinance's rules for territorial governance and "articles of compact" declaring territorial citizens' fundamental rights¹⁰⁷ represented a marked departure from its 1784 predecessor.¹⁰⁸ To promote orderly westward expansion, the Northwest Ordinance did away with the 1784 Ordinance's self-governance policies.¹⁰⁹ Instead, the assurances in the articles of compact induced northeastern settlers

¹⁰³ See, e.g., STEARNS, *supra* note 18, at 85; Staughton Lynd, *The Compromise of 1787*, 81 POL. SCI. Q. 225, 237 (1966) (explaining that "the negotiations that led to the Ordinance appear to have involved an agreement to speed the admission of new states from the Northwest by lowering the population required for admission" and that "together with the continued stalemate on the issue of Mississippi navigation, the Ordinance could well have seemed a Southern victory to the Southern congressional majority").

¹⁰⁴ STEARNS, *supra* note 18, at 84 ("In return for adopting the pro-eastern terms of the Ordinance, southern delegates received a valuable quid pro quo: an American insistence on the right to navigate the Mississippi."); see also ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 170–71 ("Southerners accepted the ban on slavery in order to curb competition in labor-intensive staple production; perhaps they expected even nonslaveholding new states to be drawn into their orbit.")

¹⁰⁵ Cayton, *supra* note 64, at 24–25; *id.* at 24 ("There was no conspiracy in the fact that the Ohio Company's purchase and the Ordinance of 1787 were completed in the same month; but it was no coincidence, either, for the interests and goals of both parties were the same."); STEARNS, *supra* note 18, at 86; see also ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 170 (explaining that to quickly sell western lands to northern-owned land companies, the Northwest Ordinance was necessary to rid "the painfully slow survey and sale of federal lands" under the Land Ordinance of 1785).

¹⁰⁶ STATEHOOD AND UNION, *supra* note 43, at 60; An Ordinance for the Government of the Territory of the United States North West of the River Ohio 334–44 (July 13, 1787) (on file with Libr. of Cong., Journals of Continental Congress, 1774–1789), <https://www.loc.gov/resource/llscdam.lljc032/?st=pdf&r=-0.498%2C0.031%2C1.901%2C1.901%2C0&pdfPage=344> [<https://perma.cc/MY6C-DS26>].

¹⁰⁷ See Hegreiness, *supra* note 23, at 1825 ("[T]he Ordinance's Articles of Compact are a declaration of the fundamental rights of citizens in the original thirteen states as well as a promise that the citizens of the territories will always be entitled to these rights.")

¹⁰⁸ See ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 170–71.

¹⁰⁹ See, e.g., STATEHOOD AND UNION, *supra* note 43, at 59 ("[P]rovisions for 'colonial' government were not only an administrative necessity: they were a necessary inducement to potential settlers."); Hill, *supra* note 20, at 46 (explaining that Congress decided "against a policy of 'leaving the settlers to themselves'").

westward with property rights guarantees.¹¹⁰ The territorial governance sections, in turn, imposed a strong, congressionally-appointed territorial government to protect settlers' rights and permit an easy transition to statehood.¹¹¹ Congress also eased the path to statehood by requiring only a simple majority in Congress for admission, in contrast to the 1784 Ordinance's requirement of two-thirds of the existing states' approval.¹¹² Once a state reached a population of 60,000 and agreed that its constitution and government would "be republican" in form, the Northwest Ordinance called for admission into the union "on an equal footing with the original States, in all respects whatever."¹¹³ Combined with new, enlarged state boundaries and property rights guarantees, territories would likely reach the population requirements for statehood earlier than under the 1784 Ordinance.¹¹⁴ The Ordinance's near-unanimous adoption symbolized a shift from the sectional debates between regional factions at the start of the Mississippi Crisis towards a union bound by interstate commerce.¹¹⁵

Congress's plan for westward expansion in the Northwest Ordinance included recognition of the right to navigate the Mississippi¹¹⁶ and assurances that the new states' rights would not be

¹¹⁰ See Ordinance of 1787: The Northwest Territorial Government, The Organic Laws of the United States of America, *reprinted in* U.S.C. at LVIII–LIX; ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 170 (noting that the "compact" provisions secured settlers' rights and "were designed to appeal to potential emigrants, particularly to the many New Englanders waiting impatiently in the wings"); see also Festa, *supra* note 22, at 434 ("[T]he Northwest Ordinance reflects not a dichotomy between republicanism and property rights but rather a strong regard in the founding era with protection of property as one of the key requirements for encouraging a virtuous, self-sufficient citizenry."); WOOD, *supra* note 49, at 121 ("As Richard Henry Lee, a Virginian much involved with congressional plans for the West, pointed out, something had to be done 'for the security of property' in the West.") (quoting Cayton, *supra* note 64, at 25).

¹¹¹ See Ordinance of 1787: The Northwest Territorial Government, The Organic Laws of the United States of America, *reprinted in* U.S.C. at LVII–LVIII; ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 171 ("Unlike the 1784 ordinance, the Northwest Ordinance took effect immediately, providing at last for the West's 'easy passage into permanent State Governments.'"); STATEHOOD AND UNION, *supra* note 43, at 58 (explaining that the compact of rights "required the effective exercise of congressional power during the territorial period"); WOOD, *supra* note 49, at 121 ("Congress realized that it would have to create what one congressman called 'a strong-toned government' to discipline the disorderly populace of the West. At the same time, it would have to provide for a gradual process by which settlements could grow into states.").

¹¹² Eblen, *supra* note 67, at 310.

¹¹³ Ordinance of 1787: The Northwest Territorial Government, The Organic Laws of the United States of America, *reprinted in* U.S.C. at LIX.

¹¹⁴ ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 171.

¹¹⁵ *Id.* at 168–69; see also Jack N. Rakove, *Ambiguous Achievement: The Northwest Ordinance*, in THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY 1, 12 (Fredrick D. Williams ed., 1989) ("But in a more basic sense, the deeper achievement of the Ordinance lay in the ease of its final passage.").

¹¹⁶ See IND. HIST. SOC'Y, *supra* note 61, at 66 ("Given the lack of the internal improvements in the unsettled West, most trade would necessarily move to the rivers and portages that Congress sought to free from commercial restriction in Article Four."); *cf.*

forfeited for the benefit of a faction of the original states.¹¹⁷ Article IV of the Northwest Ordinance's articles of compact rejected Spain's trade monopoly on the Mississippi,¹¹⁸ providing that "[t]he navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be *common highways*, and *forever free*... without any tax, impost, or duty therefor."¹¹⁹ That antimonopoly provision imposed a federal public easement for the benefit of the nation's current and future citizens.¹²⁰ The Congressionally-appointed territorial governments would ensure navigation and trade access along the Northwest's major watercourses.¹²¹ Upon admission, new states would be bound to the same.¹²²

On an immediate level, Article IV promised that both the territorial and future state governments would protect settlers' livelihoods in the territory¹²³ and promote a national commercial market.¹²⁴ But in a

STEARNS, *supra* note 18, at 93 ("To transform the West into a full partner within the union, the federal government had to solve the problem of the West's lack of trade.").

¹¹⁷ See, e.g., ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 170 ("Most important, the new sectional paradigm made it possible to see new states not just as potential problems or as a source of weakness but rather as auxiliaries in the struggle for national political power.").

¹¹⁸ Tyler, *supra* note 73, at 258; see also Blumm & Tebeau, *supra* note 57, at 165 ("The antimonopoly policy of the Northwest Ordinance was also evident in its reservation of free travel on navigable waterways in the region.").

¹¹⁹ Ordinance of 1787: The Northwest Territorial Government, The Organic Laws of the United States of America, reprinted in U.S.C. at LIX (emphasis added); see also Festa, *supra* note 22, at 460–61 (explaining Article IV's purpose of providing economic integration between the West and existing states).

¹²⁰ See Hill, *supra* note 20, at 48–49 (explaining that a new state's admission to the union on equal footing obligated it "to keep the navigable waters leading to the Mississippi and St. Lawrence free"); cf. BLUMM & WOOD, *supra* note 9, at 10 (explaining that the public trust doctrine "might be thought of as imposing an easement (allowing public access along tidelands, for example)"); see also Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) ("Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.").

¹²¹ Hill, *supra* note 20, at 48–49.

¹²² *Id.*

¹²³ Blumm & Tebeau, *supra* note 57, at 165 ("This provision was important to ensure that agricultural and other products could be freely transported on the major highways of the era, notably the Mississippi, Ohio, and St. Lawrence Rivers and their tributaries."); see also Freyfogle, *supra* note 23, at 243–44 (explaining that "[t]he free public use of waterways was particularly important in the lives of migrants coming into the state from the south" and that the provision "remained in place and binding on Illinois and other states" given that "it secured access to waters for citizens of all states").

¹²⁴ During this period, proponents of national reform argued for strong commercial bonds between the East and West as a solution to the dissolving union. See STATEHOOD AND UNION, *supra* note 43, at 57–58 (explaining that Congress created commercial bonds between the East and West as "a solution to the conundrum of union" implicit in the Mississippi Crisis). The Northwest Ordinance's reservation of free navigation of major commercial watercourses and the development of the Potomac River are two cases by which the republican government rejected conventional interstate conflicts of interest in favor of strengthening commercial bonds within the union. *Id.* at 7; Cathy Matson & Peter

broader sense, Congress recognized free trade as a necessary component of a republican government and a condition of statehood.¹²⁵ Once a state was admitted to the union “on an equal footing with the original States,” free trade was an unwaivable—and vital—obligation binding the state to the union.¹²⁶ Equal footing instituted a federal guarantee that the settlers would not be treated as colonists; instead, they would have the same property rights and civil liberties guaranteed to all citizens, ensuring their active participation in the republican government.¹²⁷

Those provisions were novel steps towards unity in a divided nation,¹²⁸ but the ideas dated back to ancient public trust principles—that is, key natural resources as common property.¹²⁹ The Founders’ republicanism was inspired by John Locke’s writings, which promoted civil engagement through property rights.¹³⁰ According to Locke, a person’s property ownership should be limited to its productive use.¹³¹ In that respect, Article IV’s antimonopoly principles reflect the

Onuf, *Toward a Republican Empire: Interest and Ideology in Revolutionary America*, 37 AM. Q. 496, 527–28 (1985).

¹²⁵ See Hill, *supra* note 20, at 48–49 (explaining that this condition recalled the revolutionists’ belief in the right of a nation’s citizens to navigate the entire length of a river within the nation’s borders); Merritt, *supra* note 48, at 122–23 (noting that “the American revolutionists,” “frontierspeople, land speculators and political figures had come to consider the use of the [Mississippi] river as essential to the prosperity of both existing and future settlements—an inalienable natural right”) (internal quotations omitted); Allen, *supra* note 73, at 453–54 (explaining that the Americans relied on “the Treaty of Paris, the sea to sea charters of the thirteen colonies, and the ‘natural right’ of a nation owning land on a river to navigate the entire length of that river” in negotiations with Spain).

¹²⁶ See Hill, *supra* note 20, at 48–49; IND. HIST. SOC’Y, *supra* note 61, at 66 (“In the largest sense trade thus became a bond of union that could reconcile the interests of citizens and states by giving them common economic ties and associations.”).

¹²⁷ IND. HIST. SOC’Y, *supra* note 61, at 66; see also WOOD, *supra* note 49, at 122 (“Settlers could leave the older states with the assurances that they were not losing their political liberties and that they would be allowed eventually to form new republics as sovereign and independent as the other older states of the Union.”).

¹²⁸ See, e.g., Festa, *supra* note 22, at 464 (explaining that the Northwest Ordinance’s “emphasis on property . . . demonstrates . . . the recognition that property rights were indeed central to republicanism—the American brand of republicanism that an expanding commercial republic required”).

¹²⁹ For a discussion of the public trust doctrine’s roots, see discussion *infra* Part III.A. See also THE INSTITUTES OF JUSTINIAN: WITH ENGLISH INTRODUCTION, TRANSLATION, AND NOTES 90 (Thomas Collett Sandars trans., Longmans, Green, and Co. 1900) (1898) (“By the law of nature these things are *common [property]* to mankind—the air, running water, the sea, and consequently the shores of the sea.”) (emphasis added).

¹³⁰ Festa, *supra* note 22, at 426.

¹³¹ Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust As an Antimonopoly Doctrine*, 44 B.C. ENV’T AFFS. L. REV. 1, 2 (2017) (examining the public trust doctrine’s basis in antimonopoly sentiment); see also JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 13 (Jonathan Bennett ed. 2017) (1690) (“Nature did well in setting limits to private property through limits to how much men can work and limits to how much they need.”).

Founder's vision of a republican union.¹³² The guarantee also evokes English common law, which recognized that the sovereign held title to tidal waters to protect the public's use of them for commerce, navigation, and fishing.¹³³ Given the commercial importance of inland waterways, Article IV's navigation guarantee and Article V's equal footing language commanded both prospective and newly-formed states to preserve public access to major watercourses.¹³⁴ Indeed, more than a century before the U.S. Supreme Court applied the public trust doctrine to the Great Lakes,¹³⁵ Congress responded to the Mississippi Crisis, guaranteeing inalienable public rights in navigable watercourses in the Northwest Ordinance.

The Mississippi Crisis is important context for understanding the Northwest Ordinance as a statute that codified republican property principles to advance national unity. Because Spain's monopolistic takeover of the Mississippi threatened to destroy the union, quelling settlers' discontent and resolving Congress's divide amid the crisis required an affirmative federal recognition of the natural right to navigation. The Northwest Ordinance's resolution of sectional disagreements, designed in the first instance to address the Mississippi Crisis, represents a shift in the conception of the union that underpins the federal Constitution¹³⁶—one bound through interstate and maritime trade. The Ordinance's protection of free navigation and principles of equal sovereignty rejected monopolism and English colonialism,

¹³² Cf. Blumm & Tebeau, *supra* note 57, at 165 ("Article 4's promise of navigation access laid the foundation for the development of the antimonopolistic public trust doctrine, whose American roots lie in the democratization of public access to waterways.") (citations omitted); Blumm & Moses, *supra* note 131, at 3 ("Preserving public rights to access natural resources, including navigable waters, served Jacksonian America's aversion to concentrated wealth and special privileges for elites.").

¹³³ See Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 798–800 (1951) (explaining that the original states adopted English common law after the Revolution through either the state legislatures or the judiciary); see also *Le Case de Royall Piscarie de la Banne* [The Case of the Royal Fishery of Banne] [1611] 80 Eng. Rep. 540, 541–42 (KB), *translated in* DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW* 272–73 (2002) ("Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and belongs to the king by his prerogative."); *Shively v. Bowlby*, 152 U.S. 1, 11 (1894) (summarizing English common law application); Wilkinson, *supra* note 12, at 430 (explaining English common law as a source of the American public trust doctrine).

¹³⁴ See Festa, *supra* note 22, at 460 ("[T]he equal footing doctrine was a decision that the land of the national domain would truly be the property of the United States, not as a possession of the central government, but by belonging to the people of the Union generally and specifically to those citizens of the equal new states."); *Sackett v. U.S. Env't Prot. Agency*, 598 U.S. 651, 692 n.3 (2023) (Thomas, J., concurring) ("The English rule tied navigability to the ebb and flow of the tides, but began to be eroded in America as early as the Northwest Ordinance of 1787 due to the superior commercial capacity of American inland rivers.").

¹³⁵ *Illinois Central*, 146 U.S. 387, 387–89 (1892).

¹³⁶ See ORIGINS OF THE FEDERAL REPUBLIC, *supra* note 39, at 171 ("This agreement presupposed the same dynamic and expansive conception of the union that underlay the new Federal Constitution.").

protected the livelihoods of western settlers, and ensured their active participation in the republican union.

D. The Northwest Ordinance Under a New Constitution

The Northwest Ordinance was perhaps the most significant accomplishment of the Confederation Congress.¹³⁷ However, Congress lacked authority under the Articles of Confederation to enact the Northwest Ordinance's guarantees.¹³⁸ Under the Articles of Confederation, Congress could not form and admit new states into the union without the consent of all existing states,¹³⁹ and it lacked revenue necessary to carry out the Ordinance's vision for westward expansion.¹⁴⁰ Without funds or a strong national government, Congress could not guarantee new states admission to the union on equal footing, nor could it stop Spain from closing the Mississippi.¹⁴¹ Unless the Constitutional Convention succeeded in restructuring the federal system, the Northwest Ordinance's policies attracting virtuous citizenry westward and forming commercial bonds between the West and the East could have been little more than empty promises, leaving the region susceptible to Spanish and British control.¹⁴²

The Constitution's ratification gave the new national government power to enforce the principles laid out in the Northwest Ordinance. Under the new governing document, Congress had the authority to protect American trade and commerce,¹⁴³ regulate federal territory,¹⁴⁴

¹³⁷ See, e.g., Michael C. Blumm & Olivier Jamin, *The Property Clause and Its Discontents: Lessons from the Malheur Occupation*, 43 *ECOLOGY L.Q.* 781, 794 (2016) (stating that the Northwest Ordinance was "the most significant legislation enacted by the Confederation Congress"); STATEHOOD AND UNION, *supra* note 43, at xxiii ("The Northwest Ordinance is one of the most important documents of the American founding period."); Wilkinson, *supra* note 12, at 457 (discussing the Northwest Ordinance as "one of this country's most luminous enactments"); CAROL BERKIN, *A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION* 23 (2002) (stating that the Northwest Ordinance was "without question, the government's finest peacetime accomplishment"); see also WOOD, *supra* note 49, at 122 ("Apart from winning the War of Independence, this ordinance was the greatest accomplishment of the Confederation Congress.")

¹³⁸ See THE FEDERALIST NO. 38, at 248 (James Madison) (Jacob E. Cook ed., 1961) (writing that Congress acted "without the least colour of constitutional authority").

¹³⁹ Hill, *supra* note 20, at 51.

¹⁴⁰ Rakove, *supra* note 115, at 12–13.

¹⁴¹ *Id.* at 13 ("Would the flood of migrants already streaming west maintain their loyalty to a union incapable either of defending the frontiers against the increasingly hostile tribes on both sides of the Ohio, or of forcing Spain to reopen the Mississippi to American navigation?"); see also Merritt, *supra* note 48, at 136 ("The very idea of reform could not be separated from the Mississippi River question.")

¹⁴² Rakove, *supra* note 115, at 12–13 (explaining that unless the Constitution endowed "the national government with the means to act on its intentions," "it was thus entirely conceivable that Britain and Spain would emerge as the dominant political forces in the interior of the continent").

¹⁴³ See Jason J. Heinen, *How the Constitution Draws a "Line in the Sand" for the Extent of Federal Control over Non-Navigable Waterways*, 5 *LIBERTY U.L. REV.* 115, 118 (2010)

and admit new states to the union.¹⁴⁵ Just a few months after ratification, the first Congress passed a resolution asserting an “essential right” to navigate the Mississippi¹⁴⁶ and reaffirmed its commitment to the Northwest Ordinance’s policies, reenacting the Ordinance consistent with the Constitution so that it would “continue to have full effect.”¹⁴⁷ Thus, Congress rejected monopolistic control over navigable watercourses and ensured that each new state would have the rights—and duties—of the original thirteen states,¹⁴⁸ including preserving public access to navigable waters. Indeed, the historical context of the Northwest Ordinance reveals the Founders’ consistent concern for free navigation to promote commerce, which, as argued in Part IV, provides a federal constitutional source of the American public trust doctrine.

III. “COMMON HIGHWAYS” AND “FOREVER FREE” AS THE HISTORICAL SOURCE OF THE PUBLIC TRUST DOCTRINE

The Northwest Ordinance, and its subsequent reenactment by Congress, reflect the importance of free navigation in the nation’s

“The members of the Constitutional Convention in Philadelphia inserted the Commerce Clause in the Constitution as a means of preventing many of the trade and commerce problems that plagued the Confederacy, such as interstate tariffs and tolls.”; Festa, *supra* note 22, at 462 (explaining that the Northwest Ordinance’s guarantee of free navigation portends “the constitutional authority to regulate interstate commerce, which became the bulwark of federal economic power in the twentieth century”).

¹⁴⁴ U.S. CONST. art. IV, § 3, cl. 2; MAX. M. EDLING, PERFECTING THE UNION: NATIONAL AND STATE AUTHORITY IN THE US CONSTITUTION 27 (2021) (“The right of Congress to make ‘Rules and Regulations’ to govern this common national domain was established by the Constitution (Article IV, section 3) and the rules themselves were spelled out in the Northwest Ordinance.”).

¹⁴⁵ U.S. CONST. art. IV, § 3, cl. 1; Landever, *supra* note 34, at 563–64 (discussing the Northwest Ordinance’s 1789 codification and Article IV, Section 3, Clause 1 of the Constitution as incorporating the equal footing doctrine into the Constitution).

¹⁴⁶ Congressional Resolution of Mississippi River Navigation 534 (Sep. 16, 1788) (on file with Libr. of Cong., Journals of Continental Congress, 1774–1789), <https://www.loc.gov/resource/llscdam.lljc034/?sp=535&st=pdf&r=-0.341%2C-0.083%2C1.681%2C1.681%2C0&pdfPage=544> [<https://perma.cc/9EA7-69DK>]; Merritt, *supra* note 48, at 165.

¹⁴⁷ The Ordinance’s guarantee of navigation and equal footing clause remained. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51, *reprinted in* LAUREL WENDT, ILLINOIS LEGAL RESEARCH GUIDE app. E, at 189 (2d ed. 2006); *see also* Hegreiness, *supra* note 23, at 1837 (“Nothing in the Act suggests that the Ordinance was nullified by the ratification of the Constitution by the states. The Act states that it is an attempt to ‘adapt’ several details of the Ordinance to the new structure of the government, namely gubernatorial succession and communication with Congress.”); Landever, *supra* note 34, at 563 (arguing that “the equal footing doctrine was accepted under the Constitution” by the Act).

¹⁴⁸ *See* DAVID O. STEWART, THE MEN WHO INVENTED THE CONSTITUTION: THE SUMMER OF 1787, at 135–36 (2007) (explaining that state equality was “embraced unanimously by Congress in New York, and more reluctantly by the [Constitutional] Convention,” which rejected a motion by Massachusetts delegates proposing a guarantee that the original states “would *always* have more representatives than all other states combined”) (emphasis in original).

founding era and Congress's intent to impose that condition on states upon entry into the union. Some legal scholars credit the Northwest Ordinance with establishing the American public trust doctrine¹⁴⁹ and the equal footing doctrine.¹⁵⁰ Despite the doctrines' common parentage,¹⁵¹ American courts have treated the transfer of title to submerged lands upon statehood¹⁵² and the public's access to trust resources as separate doctrines—the former governed under the federal title navigability test and the latter under state navigability tests.¹⁵³

This part illuminates the Northwest Ordinance as the source of the American public trust doctrine. It proceeds with a discussion of the traditional public trust and equal footing doctrines. In doing so, this part analyzes the development of the respective doctrines from a historical perspective, identifying their republican pedigree. Understanding the historical background of the Ordinance's free navigation and equal sovereignty guarantees demonstrates that the public trust doctrine is implicit in the equal footing doctrine, revealing the public trust as a federal mandate under the Admissions Clause of the U.S. Constitution.¹⁵⁴

A. *The Traditional Public Trust Doctrine*

The modern public trust doctrine recognizes that the government has a sovereign obligation to hold public trust resources in trust for the

¹⁴⁹ See, e.g., Festa, *supra* note 22, at 459 (“The Ordinance reflected a desire to promote free navigation, which also served as an important act establishing the public trust doctrine in the U.S.”); Blumm & Tebeau, *supra* note 57, at 165 (explaining that Article IV’s “promise of navigation access laid the foundation for the development of the antimonopolistic public trust doctrine, whose American roots lie in the democratization of public access to waterways”) (citations omitted); Sax, *supra* note 33, at 484 (explaining that Article IV’s public access right derives from “historic public rights of fishery and navigation”).

¹⁵⁰ See, e.g., Landever, *supra* note 34, at 563 (explaining that the equal-footing doctrine was established by the Northwest Ordinance); Rasband, *supra* note 34, at 33–34 (“The historical record thus reveals that the equal footing language arose out of a concern that if western territories were not promised admission to the Union on an equal sovereign footing, insurrection from within or influence from without could entice them away from the United States.”).

¹⁵¹ Rasband, *supra* note 34, at 88; see, e.g., Sean Morrison, *Public Trust or Equal Footing: A Historical Look at Public Use Rights in American Waters*, 21 HASTINGS W. NW. J. ENV'T L. & POL'Y 69, 74 (2015) (“The equal-footing and the public trust doctrines have sparked extensive scholarship devoted to the doctrines’ legal history and common parentage. It is reasonable to speculate that some of the scholarship aims to prove the superiority of one doctrine or the infirmity of the other.”).

¹⁵² See *Pollard*, 44 U.S. 212, 228–29 (1845).

¹⁵³ See, e.g., *PPL Montana, LLC*, 565 U.S. 576, 604 (2012) (“Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.”).

¹⁵⁴ See *infra* Part II.C (discussing the historical context of equal footing and free navigation).

benefit of current and future generations and ensures public access to those trust resources.¹⁵⁵ The public trust is a property principle dating back to the *jus publicum* in the Justinian code,¹⁵⁶ which declared: “By the law of nature these things are common [property] to mankind—the air, running water, the sea, and consequently the shores of the sea.”¹⁵⁷ Five hundred years later, the 1215 Magna Carta¹⁵⁸ adopted *jus publicum* principles, as did the Charter of the Forest¹⁵⁹ and English common law.¹⁶⁰ After the American Revolution, the United States recognized the public trust doctrine through the original states’ reception of the English common law¹⁶¹ and later confirmed its application to new states under the Admissions Clause.¹⁶²

The early American public trust doctrine’s core purpose was to promote commerce through public access to navigable waterways.¹⁶³ Inspired by John Locke’s writings,¹⁶⁴ resistance to monopolistic power—

¹⁵⁵ BLUMM & WOOD, *supra* note 9, at 3; *Illinois Central*, 146 U.S. 387, 452–53 (1892) (explaining that the state’s title to submerged lands “is a title 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” and that “[t]he control of the State for the purposes of the trust can never be lost”).

¹⁵⁶ THE INSTITUTES OF JUSTINIAN: WITH ENGLISH INTRODUCTION, TRANSLATION, AND NOTES, *supra* note 129, at 90. The Justinian code codified Roman common law commissioned by Emperor Justinian. See J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does it Support an Atmospheric Trust?*, 47 *ECOLOGICAL L.Q.* 117, 129–31 (2020).

¹⁵⁷ THE INSTITUTES OF JUSTINIAN: WITH ENGLISH INTRODUCTION, TRANSLATION, AND NOTES, *supra* note 129, at 90.

¹⁵⁸ Erin Ryan, *A Short History of the Public Trust Doctrine and Its Intersection with Private Water Law*, 38 *VA. ENV’T L.J.* 135, 143–44 (2020); *id.* at 144 (“Chapter 33 of the Magna Carta required the removal of all weirs in the Thames and Medway Rivers ‘throughout the whole of England’ that interfered with fishing or navigation.”).

¹⁵⁹ *Id.* (“The Charter of the Forest, added to the Magna Carta in 1217 . . . further protected public rights to access natural resources on certain undeveloped royal lands (not just forests), and it remained in effect for centuries thereafter.”).

¹⁶⁰ *Id.* at 145 (“Early British common law also made reference to public trust principles in a series of cases and authorities affirming sovereign authority over submerged tidelands.”); see also *The Case of the Royal Fishery of Banne*, *supra* note 133 at 273 (asserting the king’s right and ownership of navigable rivers and explaining the interests aligned with said authority); Matthew Hale, *A treatise de Jure Maris et Brachiorum Ejusdem*, reprinted in STUART A. MOORE, *A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO: WITH A HITHERTO UNPUBLISHED TREATISE BY LORD HALE, LORD HALE’S “DE JURE MARIS,” AND HALL’S ESSAY ON THE RIGHTS OF THE CROWN IN THE SEASHORE* 370, 371–72 (1888).

¹⁶¹ Ryan, *supra* note 158, at 149. See Hall, *supra* note 133, at 798–801 (explaining that the original states adopted English common law after the revolution through either the state legislature or judiciary).

¹⁶² See *infra* Part III.B for a discussion of the public trust doctrine’s acceptance under the Admissions Clause.

¹⁶³ Blumm & Moses, *supra* note 131, at 8.

¹⁶⁴ *Id.* at 2; see also LOCKE, *supra* note 131, at 22 (“Nature did well in setting limits to private property through limits to how much men can work and limits to how much they need.”).

from Jefferson's advocacy for a wide distribution of resources¹⁶⁵ to the Northwest Ordinance's preservation of public rights in navigable waters¹⁶⁶—was a central tenet of the Founders' republicanism.¹⁶⁷ Starting in the nineteenth century, American courts recognized the public trust doctrine to preserve public access to both tidal and navigable-in-fact waters and the submerged lands beneath them.¹⁶⁸

In *Arnold v. Mundy*,¹⁶⁹ the New Jersey Supreme Court in 1821 established the state's sovereign ownership of tidal waters and the submerged lands beneath them.¹⁷⁰ The court reasoned that the State held those tidal waters in trust for the public, "for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products."¹⁷¹ Two decades later, the U.S. Supreme Court extended the *Arnold* Court's reasoning to all of the thirteen original states in *Martin v. Waddell*.¹⁷² The Court determined: "[W]hen the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use."¹⁷³ Three years after *Martin*, the Supreme Court recognized the equal footing doctrine implicit in the Admissions Clause,¹⁷⁴ extending state sovereign ownership of submerged tidal lands to newly admitted states in *Pollard v. Hagan*.¹⁷⁵

The Supreme Court's decisions in *Martin* and *Pollard* recognized that the sovereign holds title to navigable waters to protect the public's use of them for commerce, navigation, and fishing, but they adopted the English common law navigability test to determine which waters were navigable for the purpose of public trust protection.¹⁷⁶ Under English common law, navigable waters were only those waters that were subject

¹⁶⁵ Blumm & Moses, *supra* note 131, at 3.

¹⁶⁶ See discussion *infra* Part II.C.

¹⁶⁷ Blumm & Moses, *supra* note 131, at 3; Festa, *supra* note 22, at 426.

¹⁶⁸ BLUMM & WOOD, *supra* note 9, at 57.

¹⁶⁹ 6 N.J.L. 1 (N.J. 1821).

¹⁷⁰ *Id.* at 78.

¹⁷¹ *Id.* at 12.

¹⁷² 41 U.S. 367, 417–18 (1842).

¹⁷³ *Martin*, 41 U.S. at 410.

¹⁷⁴ *Pollard*, 44 U.S. 212, 228–29 (1845) ("Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states . . ."). For a thorough discussion of the development of the equal-footing doctrine in American jurisprudence, see Part III.B. *infra*.

¹⁷⁵ *Pollard*, 44 U.S. at 230 (concluding that "[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively" and that "new states have the same rights, sovereignty, and jurisdiction over this subject as the original states").

¹⁷⁶ See *Shively*, 152 U.S. 1, 11 (1894) (summarizing English common law application); see also Wilkinson, *supra* note 12, at 430 (explaining that English "common law is the most direct source of our public trust doctrine").

to the ebb and flow of the tide,¹⁷⁷ which were commercially significant.¹⁷⁸ Unlike those of England, America's vast inland waterways were significant commercial highways.¹⁷⁹ Because the ebb-and-flow test left those waterways subject to privatization and monopolization, state courts soon rejected the English's limiting definition in favor of expanding the trust to all waterways that were navigable-in-fact.¹⁸⁰ At the same time, the U.S. Supreme Court extended federal admiralty jurisdiction to navigable-in-fact waterways.¹⁸¹ By 1877, the Court extended state ownership to submerged lands under "all navigable waters."¹⁸²

In the United States's "lodestar"¹⁸³ public trust case, *Illinois Central Railroad Co. v. Illinois*,¹⁸⁴ the Supreme Court resolved a dispute over the Illinois legislature's decision to revoke its earlier grant of submerged lands under Lake Michigan to the Illinois Central Railroad.¹⁸⁵ Upholding the legislature's revocation, the Supreme Court determined that the public trust doctrine applied to the Great Lakes.¹⁸⁶

¹⁷⁷ The Case of the Royal Fishery of Banne, *supra* note 133, at 273 ("Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and belongs to the king by his prerogative."); Ryan, *supra* note 158, at 145.

¹⁷⁸ Ryan, *supra* note 158, at 145 ("British law primarily applied the sovereign ownership principle to submerged lands beneath coastal tidelands, the navigable waterways of primary value there.")

¹⁷⁹ See BLUMM & WOOD, *supra* note 9, at 101 (explaining that in America, "rivers like the Ohio, the Mississippi, and the Potomac—as well as the Great Lakes—were essential transportation hubs, the privatization of which would create expensive monopolies").

¹⁸⁰ See, e.g., Carson v. Blazer, 2 Binn. 475, 477–78 (Pa. 1810) (rejecting English tidal navigability test); Ingraham v. Wilkinson, 21 Mass. (4 Pick.) 268, 271 (1826) (declaring that all navigable waters "invariably and exclusively belong to the public"); McManus v. Carmichael, 3 Iowa 1, 30 (1856) (concluding that public waters were those that were navigable-in-fact); see also Blumm & Moses, *supra* note 131, at 14.

¹⁸¹ The Propeller Genesee Chief v. Fitzhugh (The Genesee Chief), 53 U.S. 443, 457 (1851).

¹⁸² Barney v. Keokuk, 94 U.S. 324, 338 (1876) (determining that the principles in *Martin* and *Pollard* "enunciate principles which are equally applicable to all navigable waters"); see also Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479 (1988) ("This Court's decisions in *The Genesee Chief* and *Barney v. Keokuk* extended admiralty jurisdiction and public trust doctrine to navigable freshwaters and the lands beneath them.")

¹⁸³ See Sax, *supra* note 33, at 489 (describing *Illinois Central* as the United States "lodestar" public trust case); Freyfogle, *supra* note 23, at 261 (stating *Illinois Central* is often termed the "lodestar" jurisprudence of public trust in the U.S.).

¹⁸⁴ *Illinois Central*, 146 U.S. 387 (1892).

¹⁸⁵ *Id.* at 463–64.

¹⁸⁶ *Id.* at 436–37 (holding "that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters"); see also *Econ. Light & Power Co.*, 256 U.S. 113, 120 (1921) (stating that "it is curious and interesting that the importance of these inland waterways, and the inappropriateness of the tidal test in defining our navigable waters, was thus recognized by the Congress of the Confederation more than 80 years before" the Court adopted the navigable-in-fact test); *Sackett*, 598 U.S. 651, 692 n.3 (2023) (Thomas, J., concurring) ("The English rule tied navigability to the ebb and flow of the tides, but began

Invoking the public trust doctrine's antimonopoly roots, the Court determined that the state could no more "abdicate its trust over property in which the people are interested, like navigable waters and soils under them," than it could its police powers.¹⁸⁷ Thus, more than a century after the Northwest Ordinance's enactment, the Supreme Court rejected another monopolistic takeover of navigable waters in the Old Northwest, establishing a preference for public access and control of commercial watercourses.¹⁸⁸

By the end of the nineteenth century, the Supreme Court's public trust jurisprudence largely mirrored the commercial concerns underlying the Northwest Ordinance's equal footing language and the Admissions Clause of the U.S. Constitution.¹⁸⁹ From antimonopoly sentiments, to providing that newly admitted states enter the union with the same sovereignty as the existing states, to the American navigable-in-fact test, the Northwest Ordinance was the source of the nation's public trust. Yet, the Northwest Ordinance is rarely, if at all, cited in federal case law¹⁹⁰ or legal scholarship¹⁹¹ on the source of the public trust doctrine.

to be eroded in America as early as the Northwest Ordinance of 1787 due to the superior commercial capacity of American inland rivers.").

¹⁸⁷ *Illinois Central*, 146 U.S. at 453; see Blumm & Moses, *supra* note 131, at 16–18.

¹⁸⁸ See Blumm & Moses, *supra* note 131, at 18 ("Thus, before the turn of the twentieth century, American public trust case law established a preference for public ownership and control of key natural resources and an aversion to private monopolies."). The *Illinois Central* Court suggested that the preference against alienation of trust resources could be overcome where doing so would improve public access to navigation and commerce and would not "substantially impair the public interest in the lands and waters remaining." *Id.* at 17, 17 n.104 (quoting *Illinois Central*, 146 U.S. at 452); see also *Glass v. Goeckel*, 703 N.W.2d 58, 74 (Mich. 2005), *cert. denied*, 546 U.S. 1174 (2006) ("Even before our state joined the Union, the Northwest Ordinance of 1787, art. IV, protected our Great Lakes in trust . . .").

¹⁸⁹ See *supra* Part II.

¹⁹⁰ Although the Northwest Ordinance is largely absent from federal public trust case law, some state courts have acknowledged the Ordinance as the source of the state's public trust. See, e.g., *Glass*, 703 N.W.2d at 74 (acknowledging the Northwest Ordinance as the source of the Michigan public trust and stating "[g]iven that we must protect the Great Lakes as 'common highways,' we acknowledge that our public trust doctrine permits pedestrian use-in and of itself-of our Great Lakes, up to and including the land below the ordinary high water mark"); *Lake Beulah Mgmt. Dist. v. State Dept. of Nat. Res.*, 799 N.W.2d 73, 83 (Wis. 2011) (explaining that "[w]hile originally derived from the Northwest Ordinance," the public trust doctrine in Wisconsin derives from an identical provision in Wisconsin's constitution). *But see* *Kaiser Aetna v. United States*, 444 U.S. 164, 186 (1979) (Blackmun, J., dissenting) (explaining that "the navigational servitude symbolizes the dominant federal interest in navigation implanted in the Commerce Clause," and "[t]o preserve this interest, the National Government has been given the power not only to regulate interstate commerce by water, but also to control the waters themselves, and to maintain them as 'common highways, . . . forever free'").

¹⁹¹ See Duffey, *supra* note 26, at 929 ("For its part, Volume One of the U.S.C. does virtually nothing to educate its users on the subject, and so most of those who notice the Ordinance there are probably unsure about why it appears where it does, right before the text of the Constitution."); Hegreiness, *supra* note 23, at 1823 (describing the Northwest

B. The Equal-Footing Doctrine in American Jurisprudence

Although the Admissions Clause does not expressly mention “equal footing,”¹⁹² Congress has admitted every newly created state to the union with a guarantee of that state’s equality with all existing states.¹⁹³ At the same time, Congress has also imposed conditions on almost every new state admitted into the union.¹⁹⁴ The U.S. Supreme Court has held that the Admissions Clause requires that Congress admit new states on an “equal footing” with existing states.¹⁹⁵ Under the Admissions Clause, newly admitted states gain title to their submerged lands beneath navigable waters upon entry to the union,¹⁹⁶ and Congressionally-imposed admission conditions are valid only when Congress could impose those conditions on existing states.¹⁹⁷ This Part draws from historical background to analyze proprietary equal footing jurisprudence.

The Supreme Court determined that a state’s admission to the union on equal footing with the existing states is implicit in the Admissions Clause for the first time in *Pollard v. Hagan*—a case concerning whether the federal government reserved ownership of Alabama’s submerged lands, allowing it to grant the lands to private owners.¹⁹⁸ In the Circuit Court of Mobile County, the plaintiffs sought to eject the defendants, claiming they owned the submerged lands under Mobile Bay based on a federal patent issued in 1836.¹⁹⁹ The defendants

Ordinance as “[l]argely forgotten by a nation whose century of territorial expansion is now a faded memory”).

¹⁹² U.S. CONST. art. IV, § 3, cl. 1.

¹⁹³ The first two new states’ admissions acts provided that the states were “a new and entire member of the United States of America.” Act of Feb. 18, 1791, ch. 7, 1 Stat. 191 (admitting Vermont); Act of Feb. 4, 1791, ch. 4, 1 Stat. 189 (admitting Kentucky). Starting with the admission of Tennessee, all new states’ admissions acts provided that their state was admitted to the union “on an equal footing with the original states in all respects.” See, e.g., Act of June 1, 1796, ch. 47, 1 Stat. 491 (admitting Tennessee); Act of June 23, 1836, ch. 120, 5 Stat. 50 (admitting Arkansas); Act of Sep. 9, 1850, ch. 50, 9 Stat. 452 (admitting California); Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 4 (admitting Hawai‘i).

¹⁹⁴ Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 129 (2004) (“Conditions have been imposed on some of the earliest states to be admitted to the Union and on the most recent, from Ohio in 1803 to Hawaii in 1959.”).

¹⁹⁵ *Coyle v. Smith*, 221 U.S. 559, 566–73 (1911).

¹⁹⁶ *Pollard*, 44 U.S. 212, 228–29 (1845) (explaining that ownership of submerged lands is an essential aspect of state sovereignty and transfers to states upon entry to the union); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977) (“[T]he State’s title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself.”).

¹⁹⁷ *Coyle*, 221 U.S. at 572–74 (explaining that Congress cannot impose conditions upon admission that would place new states on unequal footing with existing states); see also *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013) (explaining that “[T]he fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States”).

¹⁹⁸ *Pollard*, 44 U.S. at 216, 220–24.

¹⁹⁹ *Id.* at 213–14, 219.

claimed that the patent was invalid because Alabama gained title to the submerged lands when it entered the union in 1819.²⁰⁰ A jury decided in favor of the defendants, and the Alabama Supreme Court affirmed.²⁰¹

The U.S. Supreme Court upheld the Alabama Supreme Court, rejecting the plaintiffs' argument that the United States acquired title to the lands at issue from Spain, and held that under a condition imposing free navigation in the Alabama Enabling Act,²⁰² Alabama disclaimed all title to the lands.²⁰³ Analyzing the equal footing language in Virginia and Georgia's deeds of cession and the Northwest Ordinance, the Court determined that under the Admissions Clause, Alabama "succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession."²⁰⁴ Stipulations in admissions acts reserving those rights to the United States "would have been void and inoperative" under the Constitution because they would deprive new states of the municipal and sovereign rights held by existing states.²⁰⁵ Put another way, the Court concluded for the first time that Congress must admit new states to the union on an equal footing with the existing states.²⁰⁶

²⁰⁰ *Id.* at 220.

²⁰¹ *Id.*

²⁰² Act of Mar. 2, 1819, ch. 47, § 6, 3 Stat. 489, 492 ("[A]ll navigable waters within the said state shall for ever remain public highways, free to the citizens of said state and of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said state.").

²⁰³ *Pollard*, 44 U.S. at 220–21, 230.

²⁰⁴ *Id.* at 222–23. Virginia's cession stated that "the states so formed, shall be . . . admitted members of the federal union; having the same rights of sovereignty, freedom, and independence, as the other states." *Cessions of Western Lands*, 114 (Mar. 1784) (on file with Libr. Of Cong., Journals of the Continental Congress), <https://www.loc.gov/resource/llscdam.lljc026/?st=pdf&pdfPage=119> [<https://perma.cc/8RTJ-EB7N>]. Georgia's cession stated that "the territory thus ceded shall form a State, and be admitted as such into the Union . . . with the same privileges, and in the same manner, as is provided in the [Northwest Ordinance]." *Georgia Cession* (7-1), 114 (Apr. 26, 1802) (on file with Libr. of Cong., American State Papers: Public Lands), <https://www.loc.gov/item/97080286/resource/llscdam.llsp028> [<https://perma.cc/G28R-JCTR>]. As detailed in Part II.C, the Northwest Ordinance provided that states formed from the Northwest Territory "shall be admitted . . . on an equal footing with the original States, in all respects whatsoever." *See* discussion *supra* Part II.C; Northwest Ordinance of 1787, *reprinted in* U.S.C., *The Organic Laws of the United States of America* LIX.

²⁰⁵ *Pollard*, 44 U.S. at 223–24.

²⁰⁶ Some legal scholars have asserted that *Pollard* was an interpretation of the Alabama Admission Act, not the Admissions Clause. *See, e.g.*, NIKOLAS BOWIE, *FEDERAL CONSTITUTIONAL LAW* 455 (Found. Press ed., 2022). However, to argue that *Pollard* did not incorporate equal footing into the Admissions Clause is to assume that the Court did not examine the constitutionality of statutory equal footing language in its interpretation. In no way did the Court indicate that its decision should be limited to Alabama's Admission Act. *See Pollard*, 44 U.S. at 230 (concluding that "the shores of navigable waters and the soils under them. . . were reserved to the states respectively" and "new states have the same rights, sovereignty, and jurisdiction over this subject as the original states") (emphasis added). In fact, the Court's direct statement that admissions conditions which deprive new states of the same sovereign and municipal rights are unconstitutional shows that the

The Court explained that ownership of submerged lands is a sovereign right that new states are entitled to upon admission under equal footing principles. Citing its holding in *Martin v. Waddell*²⁰⁷ that the original thirteen states inherited the sovereign right to navigable waters and the soils beneath them after the Revolution, the Court then determined that Alabama held title to her “navigable waters, and soils under them . . . subject to the rights surrendered by the Constitution to the United States.”²⁰⁸ According to *Pollard*, a contrary decision would “deny that Alabama had been admitted into the union on an equal footing with the original states.”²⁰⁹ Thus, in determining that Alabama gained title to its submerged lands upon admission,²¹⁰ the Court extended equal footing to proprietary matters.²¹¹

However, *Pollard* does not suggest that equal footing principles require states hold unencumbered title to their submerged lands. The Court referenced *Martin v. Waddell* in its conclusion that Alabama held title to its submerged lands, revealing the character of sovereign ownership of submerged lands.²¹² *Martin v. Waddell* explained that the original states hold submerged lands in trust for public rights, such as navigation, fishing, and commercial access.²¹³ Thus, *Pollard*'s holding requires that a new state similarly hold its submerged lands in trust for public rights. A contrary interpretation would not only contradict *Pollard*'s reliance on *Martin* in concluding that a state's ownership of its submerged lands is an essential aspect of sovereignty, but also grant new states an unequal right to monopolize and prevent public access to its navigable waters and submerged lands.²¹⁴ That reference is significant because it supports the notion that the Admissions Clause mandates that the conveyance of submerged lands to newly admitted states be encumbered by the same public trust duties as an existing state's submerged lands.

The *Pollard* Court's extension of state equal sovereignty principles to land ownership has received criticism from some legal scholars as

Court interpreted the Admissions Clause to require that Congress admit new states to the union on an equal footing with the existing states. *See id.* at 223–24.

²⁰⁷ *Martin v. Waddell*, 41 U.S. 367, 410 (1842) (“For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use.”).

²⁰⁸ *Pollard*, 44 U.S. at 229.

²⁰⁹ *Id.* at 229.

²¹⁰ *Id.* at 222–23.

²¹¹ *See* Peter S. Onuf, *New State Equality: The Ambiguous History of a Constitutional Principle*, PUBLIUS, Fall 1988, at 53, 63.

²¹² *Pollard*, 44 U.S. at 228–29.

²¹³ *Martin*, 41 U.S. 367, 410–14 (1842).

²¹⁴ *See also* *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (explaining that a state's sovereign control over submerged lands is “infused with a public trust the State itself is bound to respect”).

inconsistent with historical concerns for equal footing.²¹⁵ However, that criticism disregards the Founders' belief that union necessitates republican state governments that ensure public access to commercial watercourses.²¹⁶ Although it is true that equal footing arose out of a concern for political equality,²¹⁷ the doctrine cannot be removed from its purpose—that is, equal participation *in the union*.²¹⁸ The Founders believed that union required commercial and trade bonds between the states. Thus, equal footing language and the Admissions Clause protected public access to commercial watercourses in two ways. First, Congress's ability to condition a prospective state's admission on the adoption of a republican government and constitution ensured that the state would protect public access to its commercial watercourses.²¹⁹ Second, admission to the union on an equal footing prevented existing states from using unequal political power to enact laws that economically benefitted their states to the detriment of new states.²²⁰ Because newly admitted states could not act to ensure public access to their commercial waters without ownership of their submersed lands, the commercial concerns underlying equal footing compel the *Pollard* Court's holding.

Subsequent U.S. Supreme Court decisions reaffirmed *Pollard's* equal footing conclusion, bolstering the holding's consistency with historical concerns and constitutional legitimacy.²²¹ In 1911, the U.S. Supreme Court recognized the constitutional nature of the equal footing doctrine and clarified the doctrine's limitations on Congress's power to impose admissions conditions in *Coyle v. Smith*.²²² The Court concluded that the Admissions Clause²²³ required that Congress admit new states to the union on equal footing with existing states,²²⁴ but determined the Admissions Clause prohibits Congress from including conditions in a state's enabling act that would deprive the state of political or sovereign equality with existing states.²²⁵ The Court declared, however, that equal

²¹⁵ See, e.g., Rasband, *supra* note 34, at 34–38 (arguing that political equality was the historical purpose of equal footing and that “ownership of land under navigable water was no more an essential aspect of sovereignty than ownership of non-overflowed lands”).

²¹⁶ See *supra* Part II.C (discussing Mississippi Crisis's influence on the Northwest Ordinance's equal footing and free navigation guarantees).

²¹⁷ See *supra* Part II.C.

²¹⁸ See *supra* Part II.C.

²¹⁹ See *supra* Part II.C.

²²⁰ See discussion *supra* Part II.C; see also STEARNS, *supra* note 18, at 88 (explaining that access to navigable waters would allow new states to “be fully able to participate in the union, contributing to it financially and giving it their loyalty”).

²²¹ See, e.g., *Knight v. U.S. Land Ass'n*, 142 U.S. 161, 183 (1891); *Shively*, 152 U.S. 1, 26–31 (1894); *Coyle*, 221 U.S. 559, 573 (1911); *United States v. Texas*, 339 U.S. 707, 716 (1950); *Oregon ex rel. State Land Bd.*, 429 U.S. 363, 377 (1977).

²²² *Coyle*, 221 U.S. at 566–69, 573.

²²³ U.S. CONST. art. IV, § 3, cl. 1.

²²⁴ *Coyle*, 221 U.S. at 566–69.

²²⁵ *Id.* at 568; cf. *Shelby Cty.*, 570 U.S. 529, 544 (2013) (“Not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of equal

footing neither precludes Congress's power to impose admissions conditions that would otherwise be within its constitutional power to impose on existing states,²²⁶ nor to require new states adopt republican forms of government prior to admission.²²⁷ Likewise, in *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, the Supreme Court concluded that the Constitution, presumably the Admissions Clause, conferred absolute title to submerged lands on states upon admission.²²⁸

Consistent with historical concerns underlying equal footing,²²⁹ the Admissions Clause restricts both Congress and the states upon admission to the union. Under the equal footing limitation, Congress cannot impose conditions on a state's entry that would deprive the state of political and sovereign equality with other states. In turn, Congress can require states to adopt republican governments and constitutions before admission. Moreover, once a state is admitted, the Admissions Clause grants the state sovereign ownership of its submerged lands. The state holds that ownership, however, in permanent trust for public use.

IV. RECLAIMING THE NORTHWEST ORDINANCE'S PLACE IN AMERICAN PUBLIC TRUST JURISPRUDENCE

This Note has focused on how understanding the historical background of equal footing and navigation access can inform legal understandings of the source of the public trust and equal footing doctrines. But today, over two centuries after the First Congress codified the Northwest Ordinance,²³⁰ courts mostly consider the public trust to be a matter of state common law.²³¹ Indeed, the questions of the source of the trust, and whether it applies to the federal government, remain unanswered.²³² This part addresses those questions, arguing that a

sovereignty' among the States.") (emphasis in original) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

²²⁶ *Coyle*, 221 U.S. at 570. *But see*, Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1121 (2016) (arguing that the equal footing doctrine establishes that "even when Congress operates within its legitimate spheres of authority, it cannot limit or remove the sovereignty of *some* states, but not others") (emphasis in original).

²²⁷ *Coyle*, 221 U.S. at 568; *see also* U.S. CONST. art. IV, § 4.

²²⁸ *Oregon ex rel. State Land Bd.*, 429 U.S. 363, 374 (1977).

²²⁹ *See* discussion *supra* Part II.B–D (discussing the Mississippi Crisis and its influence on the Northwest Ordinance and Constitution).

²³⁰ Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (codifying the Northwest Ordinance).

²³¹ *See, e.g., PPL Montana, LLC*, 565 U.S. 576, 603–04 (2012) (explaining in dicta that the public trust doctrine is rooted in English common law and "remains a matter of state law").

²³² *See, e.g., Araiza, supra* note 12, at 700 ("The public trust doctrine's legal source remains unsettled. In addition to constituting a theoretical problem in itself, this uncertainty carries with it implications for the doctrine's scope and legitimacy."); Wilkinson, *supra* note 12, at 453 ("Today, nearly a century later, after all of the words on the subject, two foundational issues concerning the traditional doctrine have still not been decided. The first matter is the source of the trust—where does it come from?"); *contrast, e.g., Juliana*, 217 F. Supp. 3d 1224, 1259 (D. Or. 2016), *rev'd on other grounds*, 947 F.3d

historical understanding of equal footing provides a constitutional home for the public trust doctrine.

Notwithstanding the public trust obligations attached to a state's ownership of its submerged lands, the U.S. Supreme Court has held that when no other principle of federal law applies, state law governs subsequent dispositions of those lands.²³³ However, the principles of equal footing long precede the Constitution, permeating the Founders' concept of union itself.²³⁴ The historical backdrop reveals that equal footing and free navigation conditions arose from a need to address the resulting factionalism from Spain's trade monopoly and strengthen commercial bonds between states.²³⁵ It is no coincidence, then, that Congress conditioned admission upon compliance with the Northwest Ordinance for more than thirty years after the Mississippi Crisis.²³⁶ A possible explanation for current judicial non-recognition of the trust as a principle of federal law is the *Pollard* Court's misunderstanding of the free navigation condition in Alabama's Enabling Act. Despite determining that the free navigation condition was valid under the Admissions Clause because it was within Congress's Commerce Clause power,²³⁷ the *Pollard* Court's conclusion that the condition did not grant

1159 (9th Cir. 2020) ("I can think of no reason why the public trust doctrine, which came to this country through the Roman and English roots of our civil law system, would apply to the states but not the federal government."), *with, e.g., Alec L.*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012), *aff'd*, 561 Fed. Appx. 7 (D.C. Cir. 2014) (finding the U.S. Supreme Court's dictum in *PPL Montana LLC* "persuasive," and concluding that the public trust doctrine is not binding on the federal government).

²³³ See, e.g., *Oregon ex rel. State Land Bd.*, 429 U.S. 363, 378 (1977); *PPL Montana, LLC*, 556 U.S. 576, 591 (2012); *Montana v. United States*, 450 U.S. 544, 551 (1981).

²³⁴ See discussion *supra* Part II.A.

²³⁵ See discussion *supra* Part II.C–D.

²³⁶ See Biber, *supra* note 194, at 135. The states admitted under either compliance with the Northwest Ordinance or with free navigation conditions were Alabama, Arkansas, California, Illinois, Indiana, Iowa, Louisiana, Minnesota, Mississippi, Missouri, Ohio, Oregon, and Wisconsin. See Act of Mar. 2, 1819, ch. 47, §6, 3 Stat. 489, 491–92; Arkansas Admission with the same requirements as Missouri); Act of Sep. 9, 1850, ch. 50, § 3, 9 Stat. 452 (admitting California); Act of Apr. 18, 1818, ch. 68, §§4, 6, 3 Stat. 428 (admitting Illinois); Act of Apr. 19, 1816, ch. 57, §§4, 6, 3 Stat. 289 (admitting Indiana); Act of Mar. 3, 1845, ch. 48, 5 Stat. 742, 743 (admitting Iowa); Act of Feb. 20, 1811, ch. 21, §3, 2 Stat. 641 (admitting Louisiana); Act of Feb. 26, 1857, ch. 60, 11 Stat. 166 (admitting Minnesota); Act of Mar. 1, 1817, ch. 23, §4, 3 Stat. 348 (admitting Mississippi); Act of Mar. 6, 1820, 3 Stat. 545, 546 (admitting Missouri); Act of Apr. 30, 1802, ch. 40, 2 Stat. 173 (admitting Ohio); Act of Feb. 14, 1859, ch. 33, § 2, 11 Stat. 383 (admitting Oregon); Act of Aug. 6, 1846, ch. 89, §3, 9 Stat. 56 (admitting Wisconsin); see also Act of Nov. 1789, ch. 3, 1789 N.C. Laws, 1, 4 (North Carolina's cession required that Tennessee be governed by the Northwest Ordinance). However, as several historical and legal scholars have noted, the Northwest Ordinance ultimately informed territorial governance and path to statehood for thirty-one of the fifty states. See, e.g., Duffey, *supra* note 26, at 930; Freyfogle, *supra* note 23, at 242.

²³⁷ *Pollard*, 44 U.S. 212, 229 (1885). The Court cited Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. 1, 75 (1824), which explained that Congress's power under the Commerce Clause "is the power to regulate" and "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." *Pollard*, 44 U.S. at 229.

a power or right to the United States or Alabama²³⁸ fundamentally mischaracterized the historical purpose of free navigation clauses.²³⁹ The clauses were not to grant the federal or new state's government title to the lands. Instead, free navigation clauses transferred sovereign trust obligations in submerged lands from the federal territorial governments to the new states' governments.²⁴⁰ Those conditions, grounded in republican antimonopoly sentiments, imposed a duty upon admitted states to maintain free access to navigable watercourses for now and for the future—a duty essential to both protect citizen's livelihoods and preserve the union.²⁴¹

Following *Pollard*, courts narrowly interpreted admission conditions imposing free travel on navigable waterways, determining that under equal-footing principles, states retained authority to build bridges, improve rivers, or charge reasonable tolls to pay for the improvements.²⁴² Favoring state equality, the courts did not suggest that Congress lacked the power to impose such conditions as part of statehood; instead, they explained that the federal conditions were intended to prevent states from subjecting citizens to unreasonable tolls and needlessly obstructing navigation solely to raise revenue.²⁴³ But according to those courts, states could voluntarily adopt Congress's navigation conditions, and, unless Congress intervened, states had the right to regulate navigable watercourses within their state to control internal commerce.²⁴⁴

In 1921, however, the U.S. Supreme Court concluded in *Economy Light & Power Co. v. United States*²⁴⁵ that states formed out of the Northwest Territory remained subject to the Northwest Ordinance's

²³⁸ *Pollard*, 44 U.S. at 230.

²³⁹ See *supra* Part II.C.

²⁴⁰ See Hill, *supra* note 20, at 48–49 (explaining that the Northwest Ordinance provided that new states would enter the union on equal footing and ensured that those new states would abide by republican principles by ensuring free navigation, among other conditions); Marks, 491 P.2d 374, 380 (1971) (describing the public trust doctrine as a “public trust easement”); *Coeur d’Alene Tribe*, 521 U.S. 261, 283–84 (1997) (“The importance of [submerged] lands to state sovereignty explains our longstanding commitment to the principle that the United States is presumed to have held navigable waters in acquired territory for the ultimate benefit of future States . . .”).

²⁴¹ *Coeur d’Alene Tribe*, 521 U.S. at 283–84.

²⁴² See Biber, *supra* note 194, at 177 (citing *Sands v. Manistee River Improvement Co.*, 123 U.S. 288, 295 (1887)); see also *Cardwell v. Am. Bridge Co.*, 113 U.S. 205, 208 (1885); *Escanaba Co. v. Chicago*, 107 U.S. 678, 680–81 (1882); *Withers v. Buckley*, 61 U.S. 84, 92 (1857); *Huse v. Glover*, 119 U.S. 543, 543 (1886); *Depew v. Bd. of Trs. of Wabash & Erie Canal*, 5 Ind. 8, 12 (1854); *Duke v. Cahawba Navigation Co.*, 10 Ala. 82, 85 (1846). But see *Spooner v. McConnell*, 22 F. Cas. 939–40, 942, 947 (C.C.D. Ohio 1838) (No. 13,245), *Hogg v. Zanesville Canal & Mfg. Co.*, 5 Ohio 410, 421–22 (1832), and *In re Crawford Cnty. Levee & Drainage Dist.*, 182 Wis. 404, 409, 415 (1924), *cert denied*, 264 U.S. 598 (1924), for cases determining that those admission conditions could not be abrogated.

²⁴³ Biber, *supra* note 194, at 177–78.

²⁴⁴ *Coyle*, 221 U.S. 559, 570, 572–74 (1911).

²⁴⁵ *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 120–21 (1921).

protection of public rights in waterways.²⁴⁶ The Court declared that the origin of the “public interest in navigable streams” originated in Article IV of the Northwest Ordinance.²⁴⁷ Moreover, referencing the First Congress’s intent for the Ordinance to “continue in full effect,” the Court determined that the Ordinance’s free navigation article “was no more capable of repeal by one of the states than any other regulation of interstate commerce enacted by the Congress.”²⁴⁸ Thus, to the extent that prior cases implied that free navigation conditions remained dormant unless Congress used its commercial power to regulate interstate waters,²⁴⁹ *Economy Light* precludes that implication because it recognized that the condition established public rights in commercial watercourses in states formed from the Northwest Territory.²⁵⁰

A historical understanding of free navigation clauses—one that recognizes the public trust as a republican principle—grounds the public trust in the Admissions Clause. Both the states’ trust ownership of submerged lands and Congress’s ability to condition admission on a state’s adoption of a republican government are settled principles of constitutional law.²⁵¹ As explained in Part II,²⁵² the Founders viewed public access to navigable waters as an inherent obligation of a republican government. Free navigation conditions are an explicit enumeration of the trust principle inherent in republican governance, not an unequal limitation on a newly admitted state’s control over its submerged lands. Recognizing the public trust doctrine as a republican principle is important because it reveals the public trust as an obligation conveyed from the federal government to the states through the Admissions Clause, regardless of whether Congress enumerates the condition in a state’s enabling act. This understanding provides the foundation for the public trust doctrine as a constitutional obligation not only under the Admissions Clause, but also as an inherent aspect of republican governance itself.

If the public trust doctrine is a constitutional principle, the doctrine cannot be understood as inapplicable to federally-owned lands and waters.²⁵³ Considering the commercial concerns precipitating the equal footing doctrine and Admissions Clause,²⁵⁴ it would be inconsistent with those concerns to conclude that the federal government imposed trust duties on the states while abdicating itself of those same responsibilities. Instead, the Northwest Ordinance and the Constitution would never have been ratified if the federal government could

²⁴⁶ *Id.* at 120–21.

²⁴⁷ *Id.* at 118–19.

²⁴⁸ *Id.* at 119–20.

²⁴⁹ See, e.g., *Escanaba Co.*, 107 U.S. 678, 688–89 (1882).

²⁵⁰ See *Econ. Light & Power Co.*, 256 U.S. at 120–21.

²⁵¹ See *Coyle*, 221 U.S. 559, 566–69, 573 (1911).

²⁵² See *supra* Part II.

²⁵³ *Juliana*, 217 F. Supp. 3d 1224, 1256 (D. Or. 2016), *rev’d on other grounds*, 947 F.3d 1159 (9th Cir. 2020).

²⁵⁴ See *supra* Part II.

disregard public access to commercial waterways. The Admissions Clause reflects the public trust doctrine as a duty of *all* republican governments—irrespective of whether the government is state or federal.

V. CONCLUSION

This Note argues that the public trust doctrine did not, as current law and scholarship may suggest,²⁵⁵ travel across the pond straight to nineteenth-century American courts as part of common law. Through the Northwest Ordinance, the Founders depicted the same principles of equal sovereignty and public access to navigable waterways²⁵⁶ as the bedrock American trust principles. This historical understanding reveals the public trust doctrine as an Admissions Clause obligation, founded in republican principles. As the Trump administration opens America's public lands and waters to oil, gas, and mining corporations,²⁵⁷ recognizing the public trust as a constitutional principle could provide an important limit on the federal government's authority to give away public resources. That recognition would prevent the current administration from giving away trust resources unless the giveaway either (1) improves current and future generations rights to those resources, or (2) does not substantially impair the remaining public interests in those resources.²⁵⁸

The American public trust doctrine is rooted in the Mississippi Crisis's influence on the Northwest Ordinance and the U.S. Constitution. The Founders believed that protection of public access to commercial watercourses is a vital and unwaivable obligation of *all* republican governments. A historical understanding of the Founders' republicanism and path for statehood informs the long-overlooked linkage between the public trust doctrine, equal footing doctrine, and the Admissions Clause. Public trust advocates seeking to enforce the doctrine in both state and federal courts should ground the public trust doctrine in the Admissions Clause. The underexplored connection between the Mississippi Crisis, the Northwest Ordinance, and the equal footing doctrine reveals that the public trust doctrine is federal mandate under the Admissions Clause.

²⁵⁵ See *supra* notes 12–14 and accompanying text (discussing the ambiguous origin and application of the public trust doctrine).

²⁵⁶ See discussion *supra* Part II.C (describing the creation of the Northwest Ordinance and its protection of property and new state's rights).

²⁵⁷ *Secretary Doug Burgum Signs First Round of Secretary's Orders to Unleash American Energy*, U.S. DEP'T OF THE INTERIOR (Feb. 5, 2025), <https://www.doi.gov/pressreleases/secretary-doug-burgum-signs-first-round-secretarys-orders-unleash-american-energy> [<https://perma.cc/ULB2-WDAY>].

²⁵⁸ See *Illinois Central*, 146 U.S. 387, 452 (1892) (a sovereign may alienate a public trust resource when: (1) “the interest of the people” in that resource “may be improved” or (2) the alienation does “not substantially impair the public interest in the lands and waters remaining”); Blumm & Moses, *supra* note 131, at 17.