



Commerce Clause - "Navigable In Fact"



Under the expanding authority of the ["Commerce Clause,"](#) the standard of "navigable in fact" began to play a role in regulation beyond the applicability of Admiralty and Maritime Law, acquiring further definition through various Supreme Court cases.

The foundational standard was given by Justice Field in [The Daniel Ball](#), 77 U.S. 557 (1870) stated:

"...The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. **A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water...**"



Justice Shiras reviewing prior cases defining "navigable waters of the United States" in [Levoy v. U.S.](#), 177 U.S. 621 (1900) cited another foundational case of [The Montello](#), 20 Wall. 441, sub nom. [United States v. The Montello](#), 22 L. ed. 394:

'The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river.'



Justice Brewer in [U. S. v. Rio Grande Dam & Irrigation Co.](#), 174 U.S. 690 (1899) clarified that navigational use of only a minor commercial value to trade and agriculture would not qualify a river to be designated as "navigable in fact":

"...Examining the affidavits and other evidence introduced in this case, it is clear to us that the Rio Grande is not navigable within the limits of the territory of New Mexico. **The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of**

high water does not make it a navigable river. It was said in The Montello, 20 Wall. 430, 439, 'that those rivers must be regarded as public navigable rivers in law which are navigable in fact; and **they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.'** And again (page 442): 'It is not, however, as Chief Justice Shaw said (Rowe v. Bridge Corp.] 21 Pick. 344), **'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'**



Justice Shiras reviewing prior cases defining 'navigable waters of the United States' in Levoy v. U S, 177 U.S. 621 (1900) cited the decision in Egan v. Hart, 165 U.S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300, to the effect that shallow seasonal water bodies without channels were categorized non-navigable, even though they could be artificially modified to become navigable:

"The [Louisiana] trial judge, as to the contention that Bayou Pierre was a navigable stream, said:

'From Grande Ecore, where it (Bayou Pierre) enters Red river, to a point some miles below its junction with Tonre's Bayou,-a stream flowing out of the river,- Bayou Pierre has been frequently navigated by steamboats. But from the point of junction to the dam in question it has never been navigated, and is unnavigable. Between these two points it is nothing but a highwater outlet, going dry every summer at many places, choked with rafts, and filled with sand, reefs, etc. It has no channel; in various localities it spreads out into shallow lakes and over a wide expanse of country, and is susceptible of being made navigable just as a ditch could be if it were dug deep and wide enough and kept supplied with a sufficiency of water.'

"And accordingly it was found by the trial court that Bayou Pierre was not a navigable water of the United States. Its judgment was affirmed by the supreme court of Louisiana, and the case was brought to this court and the judgment of the court below affirmed. Egan v. Hart, 165 U.S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300."



Justice Pitney in U S v. Cress , 243 U.S. 316 (1917), clarified **the term "ordinary condition," by a determination that to be considered a "public navigable river," the river must be "navigable in fact" in its natural state:**

"In Kentucky, and in other states that have rejected the common-law test of tidal flow and adopted the test of navigability in fact...numerous cases have arisen where it has been necessary to draw the line between public and private right in waters alleged to be navigable; and by an unbroken current of authorities **it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural**

condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation, with appropriate compensation for the private right.... We have found no case to the contrary...."

"This court has followed the same line of distinction. That the test of navigability in fact should be applied to streams in their natural condition was in effect held in The Daniel Ball, 10 Wall. 557, 19 L. ed. 999...The point was set forth more clearly in The Montello, 20 Wall. 430, 22 L. ed. 391, where the question was whether Fox river, in the state of Wisconsin, was a navigable water of the United States within the meaning of the acts of Congress. There were rapids and falls in the river, but the obstructions caused by them had been removed by artificial means so as to furnish uninterrupted water communication for steam vessels of considerable capacity. It was argued (p. 440) that although the river might now be considered a highway for commerce conducted in the ordinary modes, it was not so in its natural state, and therefore was not a navigable water of the United States within the purview of The Daniel Ball decision. The court, accepting navigability in the natural state of the river as the proper test, proceeded to show that, even before the improvements resulting in an unbroken navigation were undertaken, a large and successful interstate commerce had been carried on through this river by means of Durham boats, which were vessels from 70 to 100 feet in length, with 12 feet beam, and drawing, when loaded, from 2 to 2 1/2 feet of water. The court, by Mr. Justice Davis, declared (p. 441) that it would be a narrow rule to hold that, in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. **'The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway....'**



Justice Van Devanter in the State of Oklahoma v. State of Texas, 258 U.S. 574 (1922,) clarified that "exceptional" use for navigation confined to "irregular and short periods of temporary high water" did not meet the requirements for designation as "navigable":

"While the evidence relating to the part of the river in the eastern half of the state is not so conclusive against navigability as that relating to the western section, we think it establishes that trade and travel neither do nor can move over that part of the river, in its natural and ordinary condition, according to the modes of trade and travel customary on water; in other words, that it is neither used, nor susceptible of being used, in its natural and ordinary condition as a highway for commerce. **Its characteristics are such that its use for transportation has been and must be exceptional, and confined to the irregular and short periods of temporary high water. A greater capacity for practical and beneficial use in commerce is essential to establish navigability....**"



In United States v. State of Utah, 283 U.S. 64 (1931,) Justice Hughes provides a comprehensive summary of the basic meaning of "navigable in fact" as defined by the Court:

"...The test of navigability has frequently been stated by this Court. In The Daniel Ball, 10 Wall. 557, 563, the Court said: 'Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.' In The Montello, 20 Wall. 430, 441, 442, it was pointed out that 'the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation,' and that 'it would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.' The principles thus laid down have recently been restated in United States v. Holt State Bank, 270 U.S. 49, 56, 46 S. Ct. 197, 199, where the Court said:

'The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had-whether by steamboats, sailing vessels or flatboats-nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition **affords a channel for useful commerce.**' ...

"The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. The government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, but, where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. As the Court said, in Packer v. Bird, 137 U.S. 661, 667, 11 S. Ct. 210, 211: **'It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them.'** In Economy Light & Power Company v. United States, 256 U.S. 113, 122, 123 S., 41 S. Ct. 409, 412, the Court quoted with approval the statement in The Montello, supra, that 'the capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.'

