PRESERVING THE PUBLIC TRUST: A VOYAGE THROUGH FLORIDA'S JURISPRUDENCE ON NAVIGABLE WATERS

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I. INTRODUCTION

"Navigable waters." It is a bedrock term for any coastal lawyer. Most attorneys equate "navigable waters" to Federal law. This is not surprising—the Federal Government regularly exerts authority over "navigable waters" pursuant to the Commerce Clause of the U.S. Constitution.[1] Federal courts also assert admiralty jurisdiction over "navigable waters" in maritime disputes.[2] Perhaps most newsworthy today, "navigable waters" are the benchmark for jurisdiction under the Federal Clean Water Act, wherein they are defined as "Waters of the United States" ("WOTUS").[3] In addition to the Federal Clean Water Act, "navigable waters" serves as the geographical crux for several other federal statutes.[4] Significantly, however, "navigable waters" is *not* universally defined across the Federal legal spectrum.[5]

The introduction omits a notable Federal doctrine—one that is central to this Article—the equal footing doctrine ("EFD"). The EFD provides that a State, upon joining the Union, gains title to the beds of navigable waters, subject only to rights surrendered to

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1. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979).

2. *See, e.g.*, Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982); *In re* Boyer, 109 U.S. 629, 632 (1884).

3. *See* 33 U.S.C. § 1362(7) (2008) (defining "navigable waters" as WOTUS); 33 C.F.R. § 328.3(a) (1993) (defining WOTUS).

4. *See, e.g.*, Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1947) (stating obstruction of navigable waters requires Federal permit); Federal Power Act of 1920, 16 U.S.C. § 817 (1986) (stating hydroelectric dam in navigable waters requires Federal permit); *see also* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 420 (1940) (finding that a Federal permit was required under both the Rivers and Harbors Act and Federal Power Act to build a hydroelectric dam in navigable waters).

5. *See* PPL Montana, LLC v. Montana, 565 U.S. 576, 592–93 (2012) (offering an insightful discussion on how the meaning of "navigable waters" varies with its application).

the Federal Government in the U.S. Constitution.[6] Beds of navigable waters are commonly referred to as "sovereign submerged lands" ("SSL").[7] Since its inception, the EFD has led to a patchwork of opinions from different state courts assessing the boundaries of SSL and the public interest in the "navigable waters" overlying them. This Article focuses on how Florida (state) courts have tackled these difficult issues.

II. THE EQUAL FOOTING DOCTRINE

The groundwork for the EFD was laid in *Martin v. Lessee of Wadell*.[8] In *Lessee of Wadell*, the U.S. Supreme Court ("SCOTUS") confirmed that the thirteen original states "hold the absolute right to all their *navigable waters*, and the soil under them, for their own common use, subject only to rights surrendered by the constitution to the [Federal] government."[9] Three years after *Lessee of Wadell*, in *Pollard's Lessee v. Hagan*, the SCOTUS carried over the same logic to states that joined the Union after the original thirteen states.[10] The SCOTUS reasoned that

> Alabama has been admitted into the Union on an equal footing with the original States, the [C]onstitution, laws, and compact, to the contrary notwithstanding. . . . Then to Alabama belong the navigable waters, and soils under them . . . subject to the rights surrendered by the Constitution to the United States.[11]

In putting states that joined the Union after 1776 on equal footing with the original thirteen states, the EFD was born.

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6. *Id.* at 590. The states "surrendered" the right to regulate interstate commerce to the Federal Government pursuant to the Commerce Clause of the U.S. Constitution. *See supra* notes 1–3 and accompanying text. The Federal Government exerts its Commerce Clause powers over navigable waters in numerous ways. *See, e.g.*, *Appalachian Elec. Power Co.*, 311 U.S. at 405 ("[T]here is no doubt that the United States possesses the power to control the erection of structures in navigable waters."). Most notably, the Commerce Clause permits the public to access "navigable waters" via the "Federal Navigational Servitude." *See, e.g.*, United States v. Cress, 243 U.S. 316, 320 (1917) ("The general rule that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the governmental control and regulation necessary to give effect to that right, is so fully established. . . .").

7. *See* State, Bd. of Trs. of Internal Improvement Tr. Fund v. Lost Tree Vill. Corp., 600 So. 2d 1240, 1241 (Fla. 1st Dist. Ct. App. 1992).

8. 41 U.S. 367 (1842).

9. *Id.* at 410 (emphasis added). In truth, however, the concept of sovereign ownership in submerged lands beneath navigable waters originated in English common law. *See* Shively v. Bowlby, 152 U.S. 1, 49 (1894) (noting how in both the U.S. and England, title to submerged land beneath navigable waters is held by the sovereign for the benefit of the public); The Daniel Ball, 77 U.S. 557, 563 (1870) (comparing the U.S.'s "navigable capacity" test with England's "ebb and flow of the tide" test).

10. Pollard's Lessee v. Hagan, 44 U.S. 212, 228–29 (1845).

11. *Id.* at 229.

Fourteen years after the SCOTUS birthed the EFD in *Pollard's Lessee*, the Supreme Court of Florida ("SCOF") recognized the doctrine in *Geiger v. Filor*.[12] The court explained that "[o]n the change of government which took place [on March 3, 1845] by the treaty of Spain transferring Florida to the United States . . . the right to the shores of *navigable waters* and the soils under them enured . . . to the State."[13] Thirty-four years later, the SCOF further characterized the nature of SSL in *State v. Black River Phosphate Co*.[14] Expounding upon the principles it articulated in *Geiger*, the court affirmed that SSL are not held "for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use and enjoyment of the same by all the people of the state for at least the purposes of navigation and fishing and other implied purposes. . . ."[15] The SCOF's characterization of SSL in *Black River Phosphate* had two notable outcomes: (1) it established Florida's public trust doctrine, which provides that the lands beneath navigable waters are held by the State in trust for the benefit of the public; and (2) it clarified that state statutes alienating such lands must be strictly construed in favor of the sovereign (public).[16]

It follows that the public enjoys certain rights over navigable waters pursuant to the public trust doctrine, and the State may not easily waive these rights. In Florida, the most commonly acknowledged public trust rights are "navigation," "fishing," and "bathing";[17] however, "commerce" and "other easements provided

12. Geiger v. Filor, 8 Fla. 325, 338 (Fla. 1859).

13. *Id.* (emphasis added). *Cf.* An Act for the Admission of the States of Iowa and Florida Into the Union, 75, 5 Stat. 788 (1845) (admitting Florida into the United States of America).

14. State v. Black River Phosphate, 13 So. 640, 648 (Fla. 1893).

15. *Black River Phosphate*, 13 So. at 648 (emphasis added). In *Black River Phosphate*, the SCOF concluded that the Riparian Act, 1856 FLA. LAWS 25 (repealed in 1921)—in which the State divested itself of title to SSL to riparian owners who built wharves and placed fill, *see infra* pt. IV—did not create a blanket right in riparian owners to unearth phosphate from the submerged land. As the Court observed, "it never was the purpose of the [Riparian Act] that any beneficial use of submerged land or bed or the waters distinct from that appertaining to any other member of the public should vest in the riparian owner, or be enjoyed by him, except and until there has been an application of the submerged land to the designated purposes of the statute by making improvements of the character indicated." *Black River Phosphate*, 13 So. at 649. *See* SARA WARNER, DOWN TO THE WATERLINE: BOUNDARIES, NATURE, AND THE LAW IN FLORIDA 25 (2005) for further analysis of the SCOF's interpretation the Riparian Act of 1856 in *Black River Phosphate.*

16. *See Black River Phosphate*, 13 So. 640 at 648 (explaining how government conveyances of land in the public domain must be strictly construed even more so than other government land grants); *see also* Board of Trs. of the Internal Improvement Tr. Fund v. Claughton, 86 So. 2d 775, 786 (Fla. 1956) (en banc) ("No authority need be cited for the proposition that a grant in derogation of sovereignty must be strictly construed in favor of the sovereign.").

17. *See* Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1109 (Fla. 2008) ("[T]he State holds the lands seaward of the MHWL, including the beaches between the mean high and low water lines, in trust for the public for the purposes of bathing, fishing, and navigation."); White v. Hughes, 190 So. 446, 449 (Fla. 1939) ("The

by law" are also cited.[18] Further examination of the rights protected under the public trust doctrine is beyond the scope of this Article; however, plentiful literature on the topic is available.[19]

In addition to being entrenched in the common law, Florida's public trust doctrine is memorialized in Article X, Section 11 of the State Constitution, which reads:

> The title to land under navigable waters, which have not been alienated, including beaches below mean high water lines, is held by the State, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private uses of portions of such lands may be authorized by law, but only when not contrary to the public interest.[20]

Note the last sentence regarding sale of SSL, which is discussed *infra* Part IV.

A. "Navigability" Under Florida Law

Thus far this Article has established the significance of navigable waters under Florida law. It has not, however, discussed what makes a waterbody "navigable." This question was first addressed by the Florida Supreme Court in *Bucki v. Cone*.[21] *Bucki* involved a part of the Suwanee River that was solely used to float logs eight to nine months of the year.[22] The *Bucki* Court explained, "[in] this country all rivers, without regard to the ebb and flow of the tide, are generally regarded as navigable, as far up as they may be conveniently used at all seasons of the year with vessels, boats, barges, or other watercraft, for purposes of commerce. . . ."[23] The

State holds the fore-shore in trust for its people for the purpose of navigation."); *supra* text accompanying note 15 (quoting *Black River Phosphate*, 13 So. at 648 (Fla. 1893)).

18. *See* Odom v. Deltona Corp., 341 So. 2d 977, 980 (Fla. 1976) ("[F]lorida holds the title to the waters, shores and beds of all navigable waters in trust for the people for the purposes of navigation, commerce, fishing, and bathing, and other easements allowed by law in the water."); Brannon v. Boldt, 958 So. 2d 367, 372 (Fla. 2d. Dist. Ct. App. 2007) ("The public has the right to use navigable waters for navigation, commerce, fishing, and bathing, and 'other easements allowed by law.'" (quoting Broward v. Mabry, 50 So. 826, 829 (Fla. 1909))).

19. *See, e.g.*, Sidney F. Ansbacher & Joe Knetsch, *The Public Trust Doctrine and the Sovereignty Lands in Florida: A Legal and Historical Analysis*, 4 J. LAND USE & ENVTL. L. 337 (1989); Karen Van Den Heuvel Fischer, *The Preservation of Florida's Public Trust Doctrine*, 11 NOVA L. REV. 227 (1986); Norwood Gay, *Tidelands*, 20 STETSON L. REV. 143 (1990); Jesse Reiblich, *Private Property Rights Versus Florida's Public Trust Doctrine: Do any Uses Survive a Transfer of Sovereign Submerged Lands from the Public to Private Domain*, ELULS REPORTER, Sept. 2013, at 1, 3.

20. FLA. CONST. art. X, § 11.

21. Bucki v. Cone, 6 So. 160, 161 (Fla. 1889).

22. *Id.* at 162.

23. *Id.* at 161.

court went on to clarify two critical points in a navigability analysis: (1) navigability by logs or rafts, not larger vessels, is all that is required; and (2) navigability during a "sufficient portion of the year," not the entire year, is all that is required.[24]

The SCOF expounded upon this analysis twenty years later in *Broward v. Mabry*.[25] In evaluating a large, shallow lake that periodically went dry, the SCOF clarified that so long as the lake is permanent in nature and useful for commerce in its ordinary and natural condition, it is navigable.[26] Further, the waterbody need only be "used for [commerce] purposes common to the public in the locality where it is located"—not necessarily the public at large.[27] Finally, the court confirmed that *capacity* for navigation, not actual usage, determines navigability.[28]

In addition to discussing navigability generally, the *Broward* Court also addressed the closely related doctrine of riparian rights.[29] Although riparian rights are beyond the scope of this Article, one point that the *Broward* Court recognized bears mentioning: Riparian rights are contingent upon owning uplands abutting "navigable waters"; if the waterbody abutting a waterfront owner's property is not navigable, that waterfront owner does not have riparian rights.[30] Note, however, that the abutting navigable waters do not have to overlie SSL for riparian rights to attach.[31]

The SCOF further refined its navigability analysis in *Odom v. Deltona Corp*.[32] *Odom* concerned the navigability of several non-meandered lakes in Volusia and Hernando counties.[33] The SCOF first republished the opinion of the Circuit Court, which had relied upon several statutes addressing SSL, in finding the lakes to be

24. *Id. But see* Baker v. State, 87 So. 2d 497, 498 (Fla. 1956) (explaining that a tributary that is four to ten feet wide, no more than two feet deep, and dry for long periods of time, is not navigable).
25. Broward v. Mabry, 50 So. 826 (Fla. 1909).
26. *Id.* at 830.
27. *See id.*
28. *See id.* at 831.
29. *Id.* at 830–31.
30. *See id.* at 830 ("Those who own land extending to ordinary high-water mark *of navigable waters* are riparian holders who . . . have in general certain special rights in the use of waters opposite their holdings. . . .") (emphasis added); *see also* Martin v. Busch, 112 So. 274, 287 (Fla. 1927) ("A riparian owner is one who owns to the line of ordinary high-water mark on navigable waters.").
31. *See* 5F, LLC v. Dresing, 142 So. 3d 936, 940 (Fla. 2d. Dist. Ct. App. 2014); *cf.* FLA. STAT. § 253.141(1) (2020) ("Riparian rights are those incident to land bordering upon navigable waters."). The paradox of navigable waters overlying privately-owned submerged lands is discussed *infra* pt. IV.
32. Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976).
33. *Id.* at 979.

non-navigable.[34] The SCOF then affirmed the ruling of the Circuit Court.[35] The SCOF held that just as how meandering—i.e., being depicted in the original government survey—creates a rebuttable presumption of navigability, non-meandering creates a rebuttable presumption of non-navigability.[36] The SCOF expressly deferred to government surveyors, noting that the Court was "not in a position to evaluate the work of those surveyors of many decades past."[37] In a 2001 Florida Bar Journal article, author Monica Reimer criticized the use of surveyed meander lines (or lack thereof), equating them to "haphazard navigability determinizations."[38] Reimer attributed the poor surveys to adverse conditions (e.g., snakes, alligators, Native Americans) and a lack of uniform guidance.[39]

After upholding the Circuit Court's judgment, the SCOF recounted the test by which Florida courts identify navigable waters under the EFD.[40] In so doing, the SCOF confirmed what had become apparent: the Florida test is no different than the test

34. *See id.* at 984 ("Considering all of these statutory and constitutional expressions, all of which are consistent, it is made to appear that nonmeandered lakes and ponds are not to be classified as navigable bodies of water." (quoting the lower (Circuit) court)). Note that the SSL statutes at issue in *Odom* have all been repealed, amended, or moved. The main statutes that the Circuit Court relied on, FLA. STAT. § 197.228(2) and (3), now reside at FLA. STAT. § 253.141(2) and (3).

FLA. STAT. § 253.141(2) reads:

> Navigable waters in this State shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps, or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the State without reservation of public rights in and to said waters.

FLA. STAT. § 253.141(3) reads:

> The submerged lands of any non-meandered lake shall be deemed subject to private ownership where [the state] conveyed the same more than 50 years ago without any deductions for water and without any reservation for public use and when taxes have been levied and collected on said submerged lands since conveyance by the state.

Analysis of FLA. STAT. § 253.141(2) and (3) and other statutes pertaining to SSL is beyond the scope of this Article.

35. *Odom*, 341 So. 2d at 990. In apparent dicta, the *Odom* Court also opined that the Marketable Record Title Act (MRTA) can extinguish the State's interest in SSL. *Id.* at 985. *See also* Coastal Petroleum Co. v. Am. Cyanamid Co., 492 So. 2d 339, 344 (Fla. 1986), cert. denied, 479 U.S 1065 (1987). Immediately after *Odom*, the Legislature adopted, exempting SSL from MRTA. In *Coastal Petroleum Co. v. Am. Cyanamid Co.*, the SCOF confirmed that this exemption applies retroactively (pre-1978). *Id. Am. Cyanamid* is discussed further *infra* pt. V.

36. *Odom*, 341 So. 2d at 988–89; *see also* Martin v. Busch, 112 So. 274, 284 (Fla. 1927). *But see* Baker v. State, 87 So. 2d 497, 498 (Fla. 1956) ("The fact that it was meandered . . . does not, with nothing more, establish navigability.").

37. *Odom*, 341 So. 2d at 988.

38. Monica K. Reimer, *The Public Trust Doctrine: Historic Protection for Florida's Navigable Rivers and Lakes*, 75 FLA. B.J. 10, 12 (2001).

39. *Id.*

40. *Odom*, 341 So. 2d at 988.

employed by federal courts to identify navigable waters subject to federal regulation and the Federal Navigational Servitude under the Commerce Clause.[41] Recall that the public enjoys access to "navigable waters" (1) in Florida via the public trust doctrine and (2) nationwide via the Federal Navigation Servitude.[42] Therefore, Florida's public trust doctrine and the Federal Navigation Servitude appear to guarantee public access to the same waterbodies.[43] In equating the two tests, the SCOF clarified that, like the Federal (Commerce Clause) "navigability" test, the Florida (EFD) "navigability" test does *not* account for artificial improvements; navigability is based upon the waterbody's ordinary and natural condition when Florida joined the Union in 1845.[44]

In sum, Florida's navigability test can be summarized as follows:

(1) At the time of statehood in 1845, was the waterbody
  (a) permanent in character and,
  (b) in its ordinary and natural state,
  (c) used or capable of being used by any sort of watercraft,
  (d) a sufficient capacity of the year,
  (e) as a highway for commerce,
  (f) by the people in the locality where the waterbody is located?
(2) Meandering creates a presumption of navigability; non-meandering creates a presumption of non-navigability.[45]

41. *Id.*; *see* United States v. Cress, 37 S. Ct. 380, 382 (1917).
42. *See* State v. Black River Phosphate, 13 So. 640, 648 (1893); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979).
43. *See supra* pt. II. However, Florida's public trust doctrine provides certain rights beyond access that are not similarly provided under the Federal Navigational Servitude. Therefore, insofar as the rights of the public are concerned, Florida's public trust doctrine is broader than the Federal Navigational Servitude. Moreover, at least one Florida court has opined that the geographical limits of the Federal Navigation Servitude may be narrower than the boundaries of (unalienated) SSL. MacNamara v. Kissimmee River Valley Sportsmans' Ass'n, 648 So. 2d 155, 160 (Fla. 2d Dist. Ct. App. 1994) ("Where Florida law excludes lands dry enough to cultivate an ordinary agricultural crop while including shallow vegetated areas that are a part of the lake or river, [F]ederal law apparently excludes from the [N]avigation [S]ervitude any shallow vegetated area, or area susceptible of livestock foraging.").
44. *Odom*, 341 So. 2d at 988; *see also* Fla. Bd. of Trs. of the Internal Improvement Tr. Fund v. Wakulla Silver Springs Co., 362 So. 2d 706, 711 (Fla. 3d Dist. Ct. App. 1978) (dredging of non-navigable channel does not make channel navigable).
45. *Odom*, 341 So. 2d at 981–83.

III. NON-NAVIGABLE TIDELANDS

Conspicuous by its absence in the navigability test outlined above is any reference to tidelands. Several Florida attorneys believe that any submerged lands that were inundated by the ebb and flow of the tide in 1845 (when Florida became a state) *ipso facto* underlie navigable waters in perpetuity. But that is not true. The confusion lies in the interplay between the Supreme Court of Florida's decision in *Clement v. Watson,*[46] and the Supreme Court's decision in *Phillips Petroleum Co. v. Mississippi*.[47] In *Clement*, the SCOF found that a cove that abutted a navigable sound—but was not itself navigable—did not constitute "navigable waters."[48] The *Clement* Court was not swayed by the fact that the sound historically flowed into the cove at high tide; as Justice Whitfield stated, "[w]aters are not under *our* law regarded as navigable merely because they are affected by the tides."[49]

The word "our" is emphasized in the preceding quotation to highlight that Justice Whitfield is referring to *Florida* law.[50] Notwithstanding the uniformity of the EFD, the laws pertaining to navigability, along with the related concepts of SSL and the public trust doctrine, vary across the states. This point was highlighted in *Phillips Petroleum*, where the SCOTUS held that the scope of submerged lands covered by the EFD includes, in addition to those lands underlying navigable waters, all lands inundated by the ebb and flow of the tide regardless of navigability.[51] Critically, Justice White qualified this holding by noting that "individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[52] Therefore, *Phillips Petroleum* does not prevent states from abandoning or conveying tidelands into private ownership; nor does it prevent states from defining the scope and extent of such ownership.[53]

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46. 58 So. 25 (Fla. 1912).
47. 484 U.S. 469 (1988).
48. *Clement*, 58 So. at 27.
49. *Id.* at 26 (emphasis added); *see also* Fla. Bd. of Trs. of the Internal Improvement Tr. Fund v. Wakulla Silver Springs Co., 362 So. 2d 706, 711 (Fla. 3d Dist. Ct. App. 1978) (stating waters are not navigable simply because they are affected by the tides).
50. *Clement*, 53 So. at 26.
51. *See Phillips Petroleum*, 484 U.S. at 476.
52. *Id.* at 475.
53. *Id.* at 494 (O'Connor, J., with Stevens and Scalia, JJ., dissenting). It should be noted that *Phillips Petroleum* sharply divided the SCOTUS 5-3 (Justice Kennedy abstained), with Justice O'Connor authoring a long, perceptive dissent. After observing that much of the nation's nine million acres of coastal wetlands are privately owned, Justice O'Connor explained that the majority's ruling would permit state courts to invalidate or restrict such

Following *Phillips Petroleum*, arguments arose that *Clement* had been superseded.[54] Ten years later, Florida's Fifth District Court of Appeals ("the Fifth DCA") had a chance to address the issue in *Lee v. Williams*.[55] *Lee* involved a dispute between neighbors over a boatlift on non-navigable tidelands; the State of Florida filed an amicus curiae brief, arguing that such tidelands are open to the public by virtue of *Phillips Petroleum*.[56] In a vigorous defense of *Clement*—and Justice Whitfield in particular—the Fifth DCA held that *Phillips Petroleum* had not, in fact, superseded *Clement*, which remained good law.[57] After reiterating that *Phillips Petroleum* expressly preserved the ability of the states to define the limits of the public trust doctrine within their respective jurisdictions,[58] the Fifth DCA confirmed that "there is scant authority for the proposition that Florida has ever regarded non-navigable tidelands as sovereignty lands. . . ."[59] To buttress its position, the Fifth DCA cited the language of Article X, Section 11 of the Florida Constitution, which equates SSL to "lands under *navigable* waters"—with no mention of tidelands.[60] Significantly, the SCOF declined to invoke its discretionary jurisdiction to review the case.[61] Moreover, the holding in *Lee* has not been questioned by the SCOF or any other Florida DCA. It follows that the waters overlying non-navigable tidelands in Florida should not be considered "navigable"—at least for now.[62]

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private ownership. *Id.* ("To the extent that the conveyances to private parties purported to include public trust lands, the States may strike them down, if state law permits."). The degree to which Justice O'Connor's fears have materialized across the country is an intriguing subject for a future article.

54. *See, e.g.*, Gay, *supra* note 19; Rosanne Gervasi Capeless, *History of Florida Water Law: Tracing the Ebb and Flow of Florida's Public Trust Doctrine Through the Opinions of Justice James B. Whitfield*, 9 J. LAND USE & ENV'T L. 131, 147 (1993).

55. 711 So. 2d 57 (Fla. 5th Dist. Ct. App. 1998), *rev. denied*, 722 So. 2d 193 (Fla. 1998).

56. Daniel W. Peyton, *Sovereignty Lands in Florida: It's All About Navigability, Part II*, 75 FLA. B.J. 46, 47 (2002) [hereinafter Peyton, *Part II*].

57. *Lee*, 711 So. 2d at 59.

58. *See id.* at 60.

59. *Id.* at 63.

60. *Id.*

61. *Id.* at 57.

62. For a deeper dive into the implications of *Clement*, *Phillips Petroleum*, and *Lee*, see Peyton, *Part II*, *supra* note 56, at 49. Peyton argues that the SCOF got it right in *Clement*; per Peyton, overturning *Clement* would jeopardize longstanding private property rights in non-navigable tidelands with no clear public use/benefit. Peyton also authored a companion piece summarizing caselaw and secondary sources on navigability pre-*Lee*. *See* Daniel W. Peyton, *Sovereignty Lands in Florida: It's All About Navigability, Part I*, 76 FLA. B.J. 58, 58 (2002).

IV. THE BUTLER ACT

To paint a full picture of navigable waters, a word on the aforementioned paradox of privately-owned lands beneath them is required. Recall that the State is authorized by Article X, Section 11 of the Florida Constitution to sell SSL where in the public interest.[63] Given this high standard, the intent to convey SSL must be clear and unequivocal.[64] The State may also lease SSL.[65] Unlike SSL sales, SSL leases must only not be contrary to the public interest.[66] SSL leases are generally more common than SSL sales, however, SSL sales clearly do happen.[67] The (State) Board of Trustees of the Internal Improvement Trust Fund (commonly referred to as "TIFF"), which includes the Governor and his or her Cabinet, oversees the selling and leasing of SSL.[68] Proceeds from the selling and leasing of SSL are paid into the State Internal Improvement Trust Fund.[69]

63. *See* FLA. CONST. art. X, § 11; *see also* FLA. STAT. § 253.12(2)(a) (2020) ("The Board of Trustees of the Internal Improvement Trust Fund may sell and convey such islands and submerged lands if determined by the board to be in the public interest, upon such prices, terms, and conditions as it sees fit."); FLA. STAT. § 253.115(2) (2020) ("If the Board . . . determines that the sale, lease, exchange or granting of an easement is not contrary to the public interest, or is in the public interest when required by law, it may approve the proposed activity. The sale of sovereignty submerged lands shall require a determination that the proposed sale is in the public interest."); FLA. ADMIN. CODE r. 18–21.004(1)(a) (2020) ("[A]ll activities on sovereignty lands must not be contrary to the public interest, except for sales which must be in the public interest."). FLA. STAT. § 253 and FLA. ADMIN. CODE r. 18–21 both address SSL generally; FLA. STAT. § 253.12 and FLA. ADMIN. CODE r. 18–21.004 provide a checklist of sorts for SSL transactions.

64. *See* Coastal Petroleum Co. v. Am. Cyanamid Co., 492 So. 2d 339, 343 (Fla. 1986) ("Sovereignty lands cannot be conveyed without clear intent and authority. . . ."); Martin v. Busch, 112 So. 274, 285 (Fla. 1927) ("Conveyances of uplands . . . do not include sovereignty lands . . . unless authority and intent to include such sovereignty lands clearly appear."). The rule that the sovereign must have clear intent to convey SSL is closely related to the rule that SSL conveyances are strictly construed in favor of the sovereign. *See* State v. Black River Phosphate, 13 So. 640, 648 (Fla. 1893); *supra* note 15 and accompanying text.

65. *See* FLA. CONST. art. X, § 11; FLA. STAT. § 253.12(2)(a); FLA. STAT. § 253.115(2); FLA. ADMIN. CODE r. 18–21.004(1)(a).

66. FLA. STAT. § 253.115(2); FLA. ADMIN. CODE. r. 18–21.004(1)(a).

67. A cursory search through TIFF meeting minutes revealed one instance where SSL was sold to a developer constructing a port facility; because the port was accessible to the public, and because the developer offered to perform significant environmental mitigation, TIFF determined that the sale was in the public interest. *See* Bd. of Trs. of the Internal Improvement Trust Fund, *Agenda: Board of Trustees of the Internal Improvement Trust Fund*, MYFLORIDA (Aug. 12, 1999), http://www.myflorida.com/myflorida/cabinet/agenda99/0812/bot.html (scroll down to "Item 20" on the agenda). In another case, TIFF sold SSL to resolve an enforcement case pertaining to mangrove alteration and illegal fill; because the sale was conditioned on exotic vegetation removal, and because the buyer was required to preserve the land in its natural state, TIFF determined that the sale was in the public interest. *See* Bd. of Trs. of the Internal Improvement Trust Fund, *Agenda: Board of Trustees of the Internal Improvement Trust Fund*, MYFLORIDA (May 23, 2000), http://www.myflorida.com/myflorida/cabinet/agenda00/0523/agenda_botiif.html (scroll down to "Substitute Item 2" on the agenda).

68. *See* FLA. STAT. § 253.02. For more background on TIFF, see Glenn J. MacGrady, *Florida's Sovereignty Submerged Lands: What Are They, Who Owns Them, and Where is the Boundary?*, 1 FLA. ST. L. REV. 596, 603–06 (1973). MacGrady's article—which is impeccably researched—details the history of SSL up to 1973.

69. FLA. STAT. § 270.22 (2020).

To be clear, the legal barriers to SSL sales in place today were not always there. Indeed, the State historically promoted the conversion of SSL into private property in order to bolster commerce and riparian development.[70] Recall that the Riparian Act of 1856, referenced *supra* at note 15, permitted riparian owners to gain title to abutting SSL over which they erected wharves or placed fill.[71] In 1921, the Legislature repealed the Riparian Act and replaced it with the Butler Act, which was retroactively effective as of 1856.[72] The Butler Act similarly permitted riparian owners to gain title abutting SSL that they "actually bulk-headed or filled in or permanently improved," so long as sufficient space was left for commerce.[73] In light of heightened environmental awareness, the Legislature repealed the Butler Act in 1957;[74] the Legislature did not, however, divest riparian owners of submerged lands previously acquired under the Butler Act.[75] It follows that many riparian owners today own the submerged lands underlying wharves and other structures extending from their riparian properties into navigable waters.

Years later, in the 1999 case *City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund*,[76] the SCOF had an opportunity to interpret the scope of improvements covered under the Butler Act. Finding that dredging alone was not sufficient to vest title under the Act, the SCOF concluded that a riparian owner must have "buil[t] wharves, fill[ed] in submerged lands and erect[ed] permanent buildings upon the fill, or, at the very least, erect[ed] permanent structures on the underwater

70. *See* City of West Palm Beach v. Bd. of Trs. of the Internal Improvement Tr. Fund, 746 So. 2d 1085, 1089 (Fla. 1999) ("As the Fourth District explained, the Legislature in the 1921 Butler Act re-enacted the Riparian Act of 1856 with the express purpose of improving and developing Florida's waterfront."); Jacksonville Shipyards v. Dep't of Nat. Res., 466 So. 2d 389, 391 (Fla. 1st Dist. Ct. App. 1985) ("Like the [Riparian] Act, the Butler Act had as its major objective the creation or evolution of commerce in connection with the ports of the State. Another purpose was to encourage upland owners to improve their waterfront property as specified in the Act."); WARNER, *supra* note 15, at 21 ("Although the early laws sought to protect navigable waters as part of Florida's public trust, from the beginning these sovereignty lands were inextricably linked with the duty of attracting 'growth and settlement.'"); Riparian Act, 1856 FLA. LAWS 25 (repealed 1921) ("It is for the benefit of [c]ommerce that wharves be built and [w]arehouses erected for facilitating the landing and storage of goods."); Butler Act, 1921 FLA. LAWS 332 (repealed 1957) ("It is for the benefit of the State . . . that [waterfront] property be improved and developed. . . .").

71. *See* Riparian Act, 1856 FLA. LAWS 25.

72. *See* Butler Act, 1921 FLA. LAWS 333–34.

73. *Id.* at 332–33.

74. *See* Bulkhead Act, 1957 FLA. LAWS 806–13; FLA. STAT. §§ 253.12, 253.126, 253.127, 253.128, 253.129, 253.135 (2020).

75. *See* FLA. STAT. § 253.129 (2020) ("The title to all lands heretofore filled or developed is herewith confirmed in the upland owners and the trustees shall on request issue a disclaimer to such owner.").

76. 746 So. 2d 1085 (Fla. 1999).

property."[77] In so holding, the SCOF harkened back to *Black River Phosphate*, where it deduced that conveyances of SSL must be strictly construed in favor of the sovereign (i.e., public).[78] Nevertheless, submerged lands that *have* been permanently improved per the Butler Act are subject to unqualified fee simple interest—at least according to Florida's First District Court of Appeals ("The First DCA").[79] In *Anderson Columbia Co.,* the First DCA found that the plain language of the Butler Act is clear in this regard[80] and, more importantly, does not run afoul of the public trust doctrine.[81]

V. SWAMP DEEDS

It is worth taking a moment to reconcile *Anderson Columbia Co.* with the Florida judiciary's historic reluctance to sever SSL from the public domain. This reluctance is best evidenced by the SCOF's historic treatment of "swamp deeds."[82] In 1850, the Federal Government deeded approximately twenty-million acres of swamp lands (primarily in and around the Everglades) to the State of Florida—with the intent that the State would deed such lands to large corporations for drainage and reclamation.[83] These swamp lands were often poorly surveyed and therefore often included SSL.[84] The State passed on many of these "swamp deeds" to

77. *Id.* at 1089.

78. *See id.* at 1090–91 ("Land under open water can never be subject to divestiture under the Act, even where it has been dredged incident to a permanent improvement. *Black River Phosphate* teaches that titles to lands subject to the public trust cannot pass unless 'denoted by clear and special words.'" (quoting State v. Black River Phosphate Co., 13 So. 640, 648 (Fla. 1891))).

79. *See* Anderson Colum. Co. v. Bd. of Trs. of the Internal Improvement Tr. Fund, 748 So. 2d 1061, 1066 (Fla. 1st Dist. Ct. App. 1999) ("[T]he Butler Bill . . . operate[s] to divest the State of its sovereign lands just as effectively as though a grant thereof without such limitation had been made to the riparian owner." (quoting Trs. of the Internal Improvement Fund v. Claughton, 86 So. 2d 775, 786 (Fla. 1956) (en banc)). Furthermore, "[w]hen a riparian owner bulkheads and fills in the submerged area in the manner and within the limitation specified in the Riparian Act of 1921 the title to the filled in land becomes absolute and equal to that of the upland." *Id.* at 1065 (quoting Holland v. Fort Pierce Fin. & Constr. Co., 27 So. 2d 76, 81–82 (Fla. 1946)).

80. *See Anderson Colum. Co.*, 748 So. 2d at 1064 ("The plain language of the Butler Act provides for acquisition of *title* to submerged lands by bulkheading, filling, or permanently improving." (citing Jacksonville Shipyards v. Dep't of Nat. Res., 466 So. 2d 389, 393 (Fla. 1st Dist. Ct. App. 1985) (emphasis added))).

81. *See id.* at 1066 ("[A]mple space was left for the purpose of navigation and for the requirements of commerce. . . .").

82. *See* Coastal Petroleum Co. v. Am. Cyanamid Co., 492 So. 2d. 339, 341 (Fla. 1986) (swamp deed conveying SSL at issue); Martin v. Busch, 112 So. 274, 277–78 (Fla. 1927) (swamp deed conveying SSL at issue); State *ex rel.* Ellis v. Gerbing, 47 So. 353, 354 (Fla. 1908) (swamp deed conveying SSL at issue).

83. *See* Swamp Land Grant Act of 1850, 43 U.S.C. §§ 981–94 (2020); Reimer, *supra* note 38, at 13; MacGrady, *supra* note 68, at 603–04 n.49; Ansbacher & Knetsch, *supra* note 19, at 337.

84. *See* Reimer, *supra* note 37 at 14; *cf.* City of West Palm Beach v. Bd. of Trs. of the Internal Improvement Tr. Fund, 746 So. 2d 1085, 1089 (Fla. 1999); State v. Black River Phosphate Co., 13 So. 640, 648 (Fla. 1891).

developers but failed to exclude or effectively reserve SSL.[85] This oversight predictably led to significant litigation, culminating in the 1986 SCOF case *Coastal Petroleum Co. v. American Cyanamid Co*.[86]

The SCOF reached the same conclusion in *American Cyanamid* as it did fifty-nine years earlier in *Martin v. Busch*[87] and seventy-eight years earlier in *State ex rel. Ellis v. Gerbing*:[88] Swamp deeds do not convey SSL.[89] In reaching this conclusion, the SCOF reasoned that Congress had no authority to convey SSL in 1850 because SSL had already vested in the State via the EFD when Florida joined the Union in 1845.[90] As the Court bluntly stated in *Gerbing*, the Swamp Land Grant Act of 1850 "did not include lands the title to which was not then in the United States."[91] Moreover, recall that the State's intent to convey SSL must be clear;[92] and as a general matter, such intent is not clear from swamp deeds.[93] Accordingly, private submerged landowners tracing title back to the Swamp Land Grant Act of 1850 should be on high alert that their title may be invalid.

In addition to discrediting swamp deeds, the *American Cyanamid* Court—changing course from apparent dicta in *Odom*[94]—ruled that the State's interest in SSL (i.e., the public trust doctrine) may not be extinguished by the Market Record Title Act (MRTA).[95] The SCOF also concluded that the State cannot be estopped from asserting title to SSL.[96] In reaching this conclusion, the SCOF reminded its audience that even where conveyances of SSL are authorized and intended, the public must retain use of the waters.[97] On its face, this proposition appears to be inconsistent

85. *See* Ken Vinson, *No End to the Murky Depths-Hold on to Your Old Swamp Deed*, ORLANDO SENTINEL, Nov. 15, 1986, https://www.orlandosentinel.com/news/os-xpm-1986-11-15-0270240218-story.html; *see also* Coastal Petroleum Co. v. Am. Cyanamid Co., 492 So. 2d. 339, 341 (Fla. 1986) (swamp deed conveying SSL at issue); Martin v. Busch, 112 So. 274, 277–78 (Fla. 1927) (swamp deed conveying SSL at issue); State *ex rel.* Ellis v. Gerbing, 47 So. 353, 354 (Fla. 1908) (swamp deed conveying SSL at issue).

86. 492 So. 2d at 339.

87. 112 So. at 274.

88. 47 So. at 353.

89. *Am. Cyanamid*, 492 So. 2d at 344.

90. *See id.* at 342–43 (citing *Martin*, 112 So. at 286–87; *Gerbing*, 47 So. at 355).

91. *Gerbing*, 47 So. at 357.

92. *See supra* text accompanying note 83 (discussing intent and swamp deeds).

93. *See Am. Cyanamid*, 492 So. 2d at 343 (citing *Martin*, 112 So. at 285–87).

94. *See* Odom v. Deltona Corp., 341 So. 2d 977, 989 (Fla. 1976) (opining that the State should be subject to MRTA like any private citizen (citing Sawyer v. Modrall, 286 So. 2d 610, 613 (Fla. 4th Dist. Ct. App. 1974), *cert. denied*, 297 So. 2d 562 (Fla. 1974)); *see also supra* note 34 (discussing *Odom*).

95. *Am. Cyanamid*, 492 So. 2d at 344.

96. *Id.* at 343.

97. *See id.* ("[C]onveyances [of sovereignty lands], where authorized and intended, must retain public use of the waters." (citing Broward v. Mabry, 50 So. 826, 830 (Fla. 1909); *Martin*, 112 So. at 285–87)); *see also* Trs. of Internal Improvement Fund v. Claughton, 86

with *Anderson Columbia*. However, recall that the Butler Act required riparian owners to leave "full space for the requirements of commerce,"[98] a fact that was not lost on the *Anderson Columbia* court.[99] It follows that the Butler Act did not, in theory, divest the public of its right to access navigable waters. More significantly, the condition that "full space [be left for] the requirements of commerce"[100] appears to keep the Butler Act from interfering with the Federal Navigational Servitude and therefore running afoul of the Commerce Clause.[101]

VI. CONCLUSION

This Article summarized the key concepts of "navigability" under Florida law. It has traced the origins of navigable waters to the equal footing doctrine and demonstrated the interplay between navigable waters and the public trust doctrine. It has recapped the Florida Supreme Court's benchmarks for navigability and reaffirmed the Court's longstanding position on tidelands. Finally, this Article has unveiled how sovereign submerged lands—if not necessarily the navigable waters overlying them—historically have come into private ownership. This paradox of privately-owned submerged lands underlying navigable waters leads to several questions:

1. Will the Florida Supreme Court, or a Florida District Court of Appeals ("DCA") other than the First DCA, ever expressly confirm that *Phillips Petroleum* did not overturn *Clement*?

2. Will the Florida Supreme Court, or a DCA other than the Fourth DCA, ever expressly confirm that submerged lands gained by a riparian owner under the Riparian Act or Butler Act are vested in fee simple?

So. 2d 775, 786 (Fla. 1956) (en banc) ("[S]tate[s] may by appropriate means grant to individuals the title to limited portions of the lands [under navigable waters], or give limited privileges therein, but not so as to divert them from their proper uses [for the public welfare]. . . .") (quoting State *ex rel.* Ellis v. Gerbing, 47 So. 353, 356 (Fla. 1908)); Pembroke v. Peninsular Terminal Co., 146 So. 249, 254 (Fla. 1933) ("It is not my purpose to contend that the trust doctrine, with reference to lands under navigable waters in this state, would preclude the state from transferring to private ownership limited portions of such lands when the rights of the people of the state for which the state holds the title in trust are not invaded or impaired." (quoting Deering v. Martin, 116 So. 54, 65 (Fla. 1928))); *accord* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 483–84 (1988) ("[E]ven where States have given dominion over tidelands to private property owners, some States have retained for the general public the right to fish, hunt, or bathe on these lands." (footnote omitted)). *But see* FLA. STAT. § 253.141(2) (2020) (text of statute can be found *supra* note 34).

98. *See supra* text accompanying note 70.
99. *See supra* text accompanying note 79.
100. Butler Act, 1921 FLA. LAWS 332.
101. *See supra* note 6.

3. What is the full scope of rights protected under Florida's public trust doctrine? What are the "other easements provided by law"; for example, is duck hunting one such easement? How broadly should "commerce" be interpreted? Does "navigation" include prolonged anchorage?

4. Do *all* of the rights protected under the public trust doctrine survive where sovereign submerged lands are transferred to private ownership? Although it is incontrovertible that rights similarly protected under the Federal Navigation Servitude—navigation and commerce—survive, it is less clear whether the rights to "fish," bathe," and "[enjoy] other easements provided by law" survive.