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PUBLIC AND PRIVATE OWNERSHIP RIGHTS IN LANDS UNDER NAVIGABLE WATERS: THE GOVERNMENTAL/PROPRIETARY DISTINCTION

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INTRODUCTION

> Of all the difficult questions which have arisen in the application of the law to questions involving water rights, there is none which has produced more uncertainty, caused greater conflict of opinion, or produced more diverse results than that relating to the title to the land under the waters. This difficulty and diversity of result has arisen from either failure to perceive clearly the common-law principles applicable, or a hesitation to apply them for fear of the result.[1]

Lands covered by water historically have been considered a unique species of property.[2] Although the law applicable to submerged lands has grown increasingly sophisticated as property concepts have evolved into a more refined system of divisible rights,[3] the extent to which private rights may attach to such lands has remained dependent upon the water's usefulness for commercial boating, or "navigability."[4] Historically, navigable waters have been imbued with a public character, while nonnavigable waters have been treated as ordinary private property.[5]

In the United States, however, the simplicity of this general rule is deceptive in two respects. First, determining whether a particular body of water is navigable can be difficult.[6] The inherent vagueness of the concept is com-

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1. H. FARNHAM, THE LAW OF WATER AND WATER RIGHTS 165 (1904).

2. *See, e.g.*, Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 358 (Mass. 1979). For a thorough survey and analysis of Roman, French, and Spanish law concerning submerged lands, see MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U.L. REV. 511, 515-45 (1975).

3. *See infra* notes 15-16 and accompanying text.

4. MacGrady, *supra* note 2, at 606 (Roman concept of navigability, the capacity to support commercial boating, is followed in England and in American federal courts). A few American jurisdictions have adopted a more relaxed rule under which waters are deemed navigable merely by being useful for recreational boating. *See infra* note 149. Nonetheless, the prevailing test of navigability for the purpose of determining bed ownership under federal common law and in the overwhelming majority of states requires that waterbodies be susceptible to use "as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel over water." The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

5. *See infra* notes 46-55, 146-49, 287 and accompanying text.

6. The Florida Supreme Court recently agreed that the term navigable is "so vague that men of common intelligence must guess at its meaning and differ honestly as to its application." Odom v. Deltona Corp., 341 So. 2d 977, 987 (Fla. 1976). One commentator

plicated because the criteria employed for determining navigability can differ, depending upon whose rights are being decided[7] and for what purpose.[8] If title to the underlying lands is at issue, the problem is exacerbated by evidentiary obstacles arising from the need to determine the physical characteristics of the watercourse as it existed when the state entered the Union in order to establish the state's interest.[9] Second, each legal system since the Romans[10] has recognized distinct and severable classes of interests in lands under navigable waters and formulated special rules for determining to what extent these interests may be vested in the sovereign for public benefit,[11] possessed exclusively by private persons, or simultaneously divided between them. Due in part to the influence of those diverse legal systems, American decisions in this area reflect an inconsistent pattern in the acknowledgement, analysis, and application of governing principles.[12]

In the contemporary conflict over ownership of submerged lands, encounters between the antagonistic claims of government authorities seeking to protect public rights and private claimants asserting exclusive ownership have grown increasingly complex, primarily because there is no longer a consensual basis for public concerns about the use of navigable waters. A broader sensitivity to environmental considerations has reinforced opposition to private exploitation of wetlands and stimulated new protest against the use of navigable waters in ways customarily enjoyed by the public.[13] On the other hand, the realities of an economy dependent upon rapidly depleting, nonrenewable

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has suggested that the concept of navigability may be "so inherently unworkable that it can no longer be employed as a meaningful standard under which public and private rights are determined." Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters,* 5 LAND & WATER L. REV. 391, 393 (1970).

7. *See infra* notes 130-31 and text accompanying notes 141-42.

8. *See infra* note 136.

9. The date is critical because under the federal "equal footing" doctrine, title to the lands under all waterbodies that were navigable in fact passed by operation of law from the United States to the newly-formed state as an attribute of sovereignty immediately upon its admission to statehood. *See infra* notes 87, 136-42 and accompanying text. One Florida court characterized as "obvious" the fact that "with the passage of much time and the many changes which take place with the normal development of most areas of the state it may be difficult and speculative to attempt to prove or disprove that a particular fresh water area was 'navigable in fact' in its natural state. . . ." Odom v. Deltona Corp., 341 So. 2d 977, 984 (Fla. 1976).

10. Roman law treated submerged lands as being owned by no one. *See, e.g.,* Sullivan v. Richardson, 33 Fla. 1, 117, 14 So. 692, 709 (1894); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471, 475 (1970) (quoting R. LEE, THE ELEMENTS OF ROMAN LAW 109-10 (1956)).

11. The benefits of these rights, when held by the sovereign, may accrue to the public either directly (such as the rights of boating, bathing, and fishing in the waters) or indirectly (such as revenue from leases of submerged land). *See* Fraser, *Title to the Soil Under Public Waters — The Trust Theory,* 2 MINN. L. REV. 429, 434 (1918).

12. "In the United States, . . . the courts have established a great number of conflicting rules which are seldom of universal application and which have resulted in much needless litigation and hardship." H. FARNHAM, *supra* note 1, at 171.

13. For example, efforts are being made to restrict the common public right of navigation in certain areas by prohibiting or restricting the operation of motorboats. *See* Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd., 407 So. 2d 189 (Fla. 1981).

resources has given impetus to a countervailing movement advocating greater development of previously untapped areas, such as submerged lands, to meet future needs. In the context of these seemingly irreconcilable yet equally significant objectives, it is increasingly difficult to formulate policies that will best serve the public interest.

By examining the evolution of the law governing ownership rights in lands under navigable waters, this article identifies a viable legal theory through which controversies between public and private claimants can be consistently and satisfactorily resolved. This theory rests upon recognition of a distinction between powers that necessarily inhere in the government as protector of the public rights in navigable waters, and proprietary rights in the underlying lands which may properly be alienated to private persons. Although English common law and early American courts recognized this distinction between governmental powers and proprietary rights, it has been integrated into and obscured by the so-called "public trust" doctrine.[14]

Judicial application of the trust theory, however, has seldom contemplated the simultaneous enjoyment of both public and private rights. The problem is attributable primarily to the misconception that the state's authority to protect public rights is coextensive with, and inseparable from, its title to the underlying lands. Recent developments in Florida law, however, suggest a renewed judicial appreciation of the distinction between governmental and proprietary interests, which may provide a solution that will adequately accommodate both public and private rights.

This article first reviews the historical development of legal principles governing ownership of submerged lands, with emphasis on the common law origins of the governmental/proprietary distinction and its role in formulating the American public trust doctrine. The second portion of the article focuses on Florida law, tracing its movement from the original common law framework, to a strict public trust theory, to reaffirmation of private property rights. Finally, the prospect for a new analytical framework, derived from a synthesis of the public trust theory and current concepts of police power, is explored in light of recent Florida decisions.

HISTORICAL BACKGROUND

Perhaps the most effective means of defining and distinguishing ownership interests in lands under navigable waters is to view the collective body of rights as a "bundle of sticks."[15] From this perspective, the historical develop-

14. Under the public trust doctrine, the sovereign state is regarded as the owner of all navigable waters and the underlying lands, which are held in trust for the benefit of all the people. The object of the trust is to ensure that the public rights of navigation, fishing, and bathing in the waters are not impaired, except for an overriding public purpose. *See, e.g.*, Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892); State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908).

15. The "bundle-of-sticks" approach to the problem of delineating public and private rights in submerged lands has not only been a popular device of legal commentators, *see, e.g.*, Leighty, *supra note* 6, at 395 & n.10, but has recently been employed for this very purpose by the United States Supreme Court. Kaiser Aetna v. United States, 444 U.S. 164,

ment of property rights in submerged lands has proceeded from a single "stick" under Roman law to an expanding "bundle" of interests in contemporary American jurisprudence.[16] Analysis of this evolutionary process from the early English common law reveals that despite the tension pervading the struggle for primacy among public and private interests under American law, proper recognition of the difference between governmental powers and proprietary rights refutes the notion that the simultaneous exercise of public and private interests must inevitably result in conflict.[17]

English Common Law

Prefeudal English property law was uncomplicated: ownership was coextensive with possession, which was acquired and maintained by force of arms.[18] In time, however, an orderly scheme of property rights evolved in the form of the feudal system, whereby the king theoretically held title to all land and could convey it at his pleasure.[19] The English sovereign's title to lands under navigable waters did not arise from a perceived need for a "public trust" enforceable by the crown; rather, it emerged from the feudal notion that all property rights emanate from the sovereign and the common law pre-

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176 (1979). As one writer has observed in this context: "[I]t must be remembered that ownership is not itself a thing, it is not a fact. It is a useful device, a vessel into which we may put many things, but it has no independent meaning aside from that which we put into it." Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638, 639 (1957).

16. It has been suggested that, under current American law, the bundle of rights in navigable waters "is composed of federal powers exercised under the supremacy clause, federal proprietary interests, state proprietary interests, state exercises of internal sovereignty, public rights to surface use, private controls over surface use, and private proprietary interests." Leighty, *supra* note 6, at 395 n.10. Of course, each of these specific interests is merely a broad category that can be further subdivided. For example, public rights in navigable waters are generally held to include, at a minimum, the use of the waters for purposes of boating, fishing, and bathing, but any one or more of those distinct usages may be restricted or altogether prohibited without impairing the others. *See* Sax, *supra* note 10, at 488-89.

17. H. FARNHAM, *supra* note 1, at 248.

> Such inconsistencies . . . could not arise were the true common-law principles kept in mind, and they seem to have been caused by the failure, which was so apparent in early times, to distinguish between property rights and sovereignty. . . . Due regard for the distinction existing between a public right and a public use, and also those between a servient and proprietary right, is essential to a just consideration of the rights of parties in a navigable watercourse. . . . A neglect to observe these distinctions has been the cause of much error in treating of these rights.

Id.

18. *See* Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313, 316 (1918); *see also* H. FARNHAM, *supra* note 1, at 165.

19. H. FARNHAM, *supra* note 1, at 176. Under this theory, all land was held mediately or immediately from the king. *Id.* Farnham notes that this theory "was probably not true in fact, but it was necessary to assume its truth to support the recognized system of land law." *Id.*

cept requiring that all property be owned by someone.[20] Lands not owned or occupied by a private individual remained crown property.

In fact, before the emergence of any notion that the public might have rights in navigable waters, nearly all submerged lands had passed into private ownership.[21] The only right recognized in such property was the king's,[22] and there was no question as to his absolute power to convey lands underlying the waters or to grant exclusive rights in the waters themselves.[23] At that time, "[t]he distinction between private rights and governmental powers was faintly perceived, if perceived at all."[24]

The notion that absolute crown ownership was subject to public rights had its genesis in a provision of the Magna Charta, which required the removal of certain fishing contrivances erected in rivers by persons to whom the king had granted exclusive fishing rights.[25] Despite a widespread misconception

20. Geiger v. Filor, 8 Fla. 325, 336 (1859). The common law required that everything capable of ownership be assigned an owner. Accordingly, all unoccupied and ungranted lands, including submerged lands, were considered the property of the king as the original and universal occupant. *Id., citing* J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS 19-20 (1826). *See also* H. FARNHAM, *supra* note 1, at 175; Fraser, *supra* note 11, at 433.

21. Stuart Moore, in his classic treatise, A HISTORY OF THE FORESHORE, observed that the land grants of the Saxon and Norman kings "extended to the shore of the sea, to the mid-stream of non-tidal rivers, and in the case of tidal rivers *inter fauces terrae,* also to the mid-stream." S. MOORE, A HISTORY OF THE FORESHORE 1 (1888). Consequently, by the end of the reign of King John in 1216, "the Crown had parted with and granted out almost every manor situate upon the sea-coast and the tidal rivers of the kingdom. . . ." *Id* at 24. Although these early grants did not expressly include seashore, as they did the beds of rivers, Moore concludes that such intent was implicit from the boundary descriptions. *Id.* at 14. *See also* H. FARNHAM, *supra* note 1, at 181. Inland lakes were clearly under private ownership and control, as confirmed by the numerous authorities reviewed in Hardin v. Jordan, 140 U.S. 371, 388-99 (1891).

22. The case of Gann v. Free Fishers of Whitstable, 11 Eng. Rep. 1305 (H.L. 1865), suggests that the ownership of submerged lands did not mean either the king or his grantee could prohibit or restrict public navigation in the superjacent waters. It does not appear, however, that there was any legally enforceable navigation right. To the extent such rights did not "have the law back of them," they could not be considered property rights as American law views that concept. *See* United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

23. *See* H. FARNHAM, *supra* note 1, at 166:

> The King acted on the theory that the whole land was in a certain and profitable sense his, and he gave it away, bartered it for spiritual benefits, or bestowed it upon whom he chose in exchange for any consideration which he deemed sufficient. And there is no doubt that all land under the water which could be profitably used by the individuals passed into private ownership.

Id. See also supra note 21 and *infra* text accompanying note 30; Le Strange v. Rowe, 176 Eng. Rep. 903, 905 (N.P. 1866) (in most instances the king had parted with the right to the foreshore between high and low water mark). It is equally clear that freshwater rivers and lakes were in private ownership. *See, e.g.,* Hardin v. Jordan, 140 U.S. 371, 388-89 (1891); Hale *De Jure Maris,* cap. I (1716), reprinted in S. MOORE, *supra* note 21, at 370; R. HALL, ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM 106 (2d ed. 1875).

24. H. FARNHAM, *supra* note 1, at 166.

25. As signed by King John at Runnymede in June of 1215, chapter 33 of the Magna

among American courts, the Magna Charta did not destroy the king's power to grant exclusive fishing rights,[26] and it certainly did not limit the king's ability to alienate submerged lands.[27]

Nonetheless, the Magna Charta's narrow restriction eventually ripened into a rule of law that the king's grant of lands under water did not confer an exclusive right of fishery, but merely a right in common with the general public.[28] This early limitation ultimately evolved into the principle that the sovereign holds the title to lands under navigable waters in two distinct capacities: as the governmental authority charged with the duty to protect the rights of the public, or *jus publicum;* and as the proprietary owner of the subjacent land with the right to grant to individuals any private property interest, or *jus privatum,* not destroying or interfering with public rights.[29]

As a practical matter, however, the public enjoyed few rights in navigable waters after the Magna Charta. Public rights were generally coextensive with the crown's ownership of the submerged land, but virtually all of the inland rivers and lakes, as well as most of the seashore, had already passed into private ownership.[30] Consequently, while the right of navigation applied to all tidally-affected waters regardless of whether the subjacent lands were held by the king or a private person, the superior property right of the owner restricted the public's right to use inland nontidal waters for that purpose.[31] Fishing

Charta provided: "Henceforth all fish-weirs shall be completely removed from the Thames and Medway and throughout all England except upon the sea coast." *See generally* J. HOLT, MAGNA CARTA (1965). The basis for the protest against the king's power to grant fishing rights was the fact that fishing contrivances placed at the mouths of rivers prevented upstream fishing and interfered with navigation. H. FARNHAM, *supra* note 1, at 167.

26. This notion apparently originated with Chief Justice Taney's dictum in Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), suggesting that the issue has been settled in England since the Magna Carta against the right of the king to make such a grant. *Id.* at 410.

27. The king continued to exercise this authority until modified by an Act of Parliament in 1702. 1 Anne, ch. 7, § 5. *See* Fraser, *supra* note 11, at 434-35. MacGrady, in refuting Taney's suggestion, observes that "no English court has ever held that [the Magna Charta] bars the king from alienating submerged land." MacGrady, *supra* note 2, at 554-55. Nevertheless, state courts perpetuated this error, perhaps because it lent support to the theory that the public trust doctrine was predicated on common law principles. *See, e.g.,* State v. Black River Phosphate Co., 32 Fla. 82, 91-92, 13 So. 640, 643 (1893).

28. *E.g.,* Malcolmson v. O'Dea, 11 Eng. Rep. 1155 (H.L. 1862). "[A]s the public utility and necessity of free fishing rights in public waters became more and more manifest, public sentiment became so strong that it became a rule of law that no exclusive fishing rights of that character could be granted in public waters." H. FARNHAM, *supra* note 1, at 167; *see also* S. MOORE & H. MOORE, THE HISTORY AND LAW OF FISHERIES 13 (1903).

29. *See, e.g.,* Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 358 (Mass. 1979).

30. *See supra* notes 21 & 23. *See also* S. MOORE, *supra* note 21, at 169; A. WISDOM, THE LAW OF RIVERS AND WATERCOURSES 22 (4th ed. 1979).

31. *See* A. WISDOM, *supra* note 30, at 58-61. While all tidal waters were technically viewed as an extension of the sea, and therefore subject to the public right of navigation, fresh inland waters were regarded strictly as private property, over which an easement for public passage could be obtained only by prescription, dedication, or statute. *Id.* at 58-60. Thus, where such a right was established in a freshwater river, it was "substantially a mere right to use the river for the purposes of navigation similar to the right the public may have to passage along a public road or foot path through a private estate." Ewing v. Colquhoun, L.R. 2 App. Cas. 839 (1877), *quoted in* H. FARNHAM, *supra* note 1, at 239.

rights remained directly tied to soil ownership,[32] so the public's right extended only to the sea and to those limited areas of tidal rivers and shores which the crown had not conveyed.[33]

This situation persisted until the emergence of the so-called "prima facie" rule of crown ownership of the tidelands.[34] In *De Jure Maris,* published in 1786, Sir Matthew Hale adopted the proposition that the tidal shores "doth *prima facie* and of common right belong to the king."[35] Hale conceded that the foreshore could be acquired by charter, grant, or usage,[36] but stressed that the owner's *jus privatum* was subject to the *jus publicum* of navigation.[37] Most importantly, Hale extended the public right of navigation to nontidal waters.[38]

32. H. FARNHAM, *supra* note 1, at 213. This principle, as settled by the Irish case of The Royal Fishery of the Banne, 80 Eng. Rep. 540 (K.B. 1610), has been acknowledged by American courts. *See* Hardin v. Jordan, 140 U.S. 371, 396 (1891); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 412 (1842).

33. In Hardin v. Jordan, 140 U.S. 371, 389 (1891), the Supreme Court reviewed the English cases and concluded that "[t]he right of public fishery is never mentioned except in connection with tide-waters where title to the land is in the crown. It is never said that this right exists in lakes or ponds, or in any other fresh waters." *Id.*

34. The prima facie rule was originally fabricated without any precedential support by one Thomas Digges in the mid-sixteenth century as part of a scheme to expand the crown's property holdings by provoking forfeitures. Digges' treatise, entitled *Proofs of the Queen's Interest in Land Left By the Sea and the Salt Shores Thereof,* is discussed and reprinted in S. MOORE, *supra* note 21, at 180-211. Digges' prima facie rule postulated that because the sea is owned by the sovereign as part of the waste and unoccupied lands of the kingdom, the tidelands and seashores up to the high water mark are presumed to be owned by the crown unless the private claimant can establish a superior title by proof of an express grant from the king. Seeking to exploit the fact that private claims to tidelands were usually predicated on prescriptive and possessory rights rather than express conveyances, *see supra* note 21, Digges rested his theory on the premise that "evidence of user and *longa possessio* avails not to give a title to [the foreshore] unless the grant be shewn." S. MOORE, *supra* note 21, at 182. Digges was one of many "title hunters," who assisted royal commissions of inquiry by investigating a land title, purchasing a patent from the commission, and proceeding to litigate the claim against the landowner. *Id. See also* H. FARNHAM, *supra* note 1, at 182; MacGrady, *supra* note 2, at 559-68. It appears, however, that Digges' theory was thoroughly rejected by the public, the Parliament, and the courts at that time. *See* H. FARNHAM, *supra* note 1, at 182 (claims of the crown "were uniformly defeated" in the courts); MacGrady, *supra* note 2, at 561-62 (crown's persistence in asserting claims prompted Parliament to enact a statute of limitations in 1623 to quiet all titles of over 60 years' duration); *Id.* at 562 (Digges himself "went to court several times . . . but lost every jury verdict."). *See generally* S. MOORE, *supra* note 21, at 212-24.

35. Hale, *supra* note 23, cap. IV. *See* MacGrady, *supra* note 2, at 549. *De Jure Maris* has come to be regarded as the most authoritative treatise on English common law water rights. Shively v. Bowlby, 152 U.S. 1, 11 (1894); MacGrady, *supra* note 2, at 550-51.

36. Hale, *supra* note 23, cap. VI. This concession undoubtedly reflects acceptance, if not approval, of the statute of limitations which Parliament established some 44 years before Hale authored his treatise. *See supra* note 34.

37. Hale, *supra* note 23, cap. VI. "[T]hough the subject may thus have the propriety of a navigable river part of a port, yet . . . the people have a publick interest, a *jus publicum,* of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions. . . ." *Id.* Unlike the freedom to navigate in tidal waters, which was absolute, public fishing rights were only presumptive and did not apply in areas where either the king or an individual had acquired an exclusive right. *Id.* at cap. IV and V.

38. Hale decidedly did not treat public navigational rights in freshwater rivers as a

While acknowledging that inland rivers above the tide were presumed to be privately owned and subject to exclusive fishing rights,[39] Hale posited that fresh rivers used in commerce as common highways, whether private property or held by the crown, "are *prima facie publici juris.*"[40] By declaring the *jus publicum* of free navigation applicable in all waterways, notwithstanding private ownership of the soils, *De Jure Maris* confirmed that the governmental power to protect public rights in navigable waters could be exercised independently of any proprietary interest in submerged lands.[41] The popular appeal of a rule according fair recognition to both public and private rights undoubtedly hastened the acceptance of Hale's ideas. Acceptance was further assured since *De Jure Maris* was published after Parliament had enacted laws protecting the *jus publicum* by limiting the king's power to alienate submerged lands.[42]

After Hale's theory succeeded as the governing rule,[43] the distinction between the king's private property rights, which he could alienate for personal profit, and the king's governmental powers, which were held in trust for public benefit, became more pronounced. While the former interest in the submerged lands remained absolutely vested in the crown, as the *jus privatum*, Parliament gradually assumed control over the *jus publicum*.[44] At the same time, the *jus publicum* came to encompass fishing as well as navigation rights, at least in tidal waters.[45]

The common law of England concerning ownership of submerged lands therefore came to be predicated on two fundamental distinctions. First, a locational distinction was drawn between waters affected by the tides, "technically" navigable or navigable at law, and freshwater inland streams and lakes, including some that were navigable in fact.[46] This distinction governed

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mere easement limited to areas where specifically acquired. He flatly asserted that "as the common highways on the land are for the common land passage, so these [private] rivers, whether fresh or salt, that bear boats or barges, are highways by water. . . ." *Id.* at cap. II.

39. Hale, *supra* note 23, at cap. I.

40. *Id.* at cap. III.

41. In language reminiscent of the Magna Charta and prescient of modern police power, Hale characterized the sovereign's authority to enforce navigational rights in private rivers as "part of the king's jurisdiction . . . to reform and punish nuisances in all rivers." He added that "all things of publick safety and convenience [are] in a special manner under the king's care, supervision, and protection." *Id.* at cap. II.

42. *See* H. FARNHAM, *supra* note 1, at 169-70; Fraser, *supra* note 11, at 434; MacGrady, *supra* note 2, at 555 n.237; Sax, *supra* note 10, at 476.

43. Hale's version of the prima facie rule was adopted as the correct principle within nine years after the publication of *De Jure Maris* in Attorney General v. Richards, 145 Eng. Rep. 980 (Ex. 1795), and was "accepted without question by English courts and cited forever after." MacGrady, *supra* note 2, at 566.

44. H. FARNHAM, *supra* note 1, at 213.

45. The English courts adhered to the rule that public fishing rights attached only to "technically" navigable waters (i.e., those affected by the tides). *See* Murphy v. Ryan, 2 ch. R.C.L. 143 (1868), which rejected the contention that crown ownership and public fishing rights accompanied the extension of public navigation rights into freshwater rivers.

46. American courts initially accepted the premise that tidality and navigability were equivalent under English law "because there was no navigable stream in the country beyond the ebb and flow of the tide. . . ." The Propeller Genesee Chief v. Fitzhugh, 53 U.S.

prima facie ownership of soil and connected fishing rights.[47] The king presumably owned the lands under tidal waters, and therefore public rights of navigation and fishing attached. Lands under nontidal waters, regardless of size, however, were presumed to be the private property of adjoining landowners, subject only to the public's right of navigation.[48]

The second distinction, pertaining only to tidelands prima facie owned by the king, determined which interests in the lands and waters were proprietary interests of the crown subject to alienation by the king's grant, and which interests were public rights under Parliament's control.[49] The prevailing English rule allowed the king to grant his proprietary interest for personal profit, but this property, whether held by the king or his grantee, remained subject to the paramount public rights of navigation and fishery, which could only be conveyed by Parliament.[50] It is therefore clear that under common law, the government's power to protect public rights in navigable waters was not diminished by private ownership and enjoyment of all proprietary interests in the underlying lands.[51]

Development of the Trust Doctrine in America

American courts, and particularly the United States Supreme Court, have been widely criticized for misconceiving and thereby distorting English common law rules governing rights in navigable waters.[52] This criticism has focused principally upon three interrelated doctrines which, as developed in the United States, differed from English principles. First, American courts generally have discarded ownership distinctions based on tidality in favor of a rule that extends sovereign ownership, and thus public rights, to all waters navigable in fact.[53] Second, American jurists have changed the prima facie rule, which pre-

(12 How.) 443, 454 (1851). The Supreme Court subsequently recanted, however, by acknowledging that there are nontidal waterbodies in England which are navigable in fact, though not considered navigable at law. Hardin v. Jordan, 140 U.S. 371, 383-84 (1891).

47. *See* MacGrady, *supra* note 2, at 587.

48. Hardin v. Jordan, 140 U.S. 371, 395 (1891) (quoting Cobb v. Davenport, 32 N.J.L. 369, 378 (1867)). "As indicated by *Murphy v. Ryan*, and as made clear in later English cases, however, the question of riverbed ownership in England remained a question of fact; tidality was only prima facie evidence of Crown ownership, and the absence of tidality was only prima facie evidence of private ownership." MacGrady, *supra* note 2, at 586.

49. *See* Langdon v. Mayor of N.Y., 93 N.Y. 129, 155 (1883); People v. New York & S.I. Ferry Co., 68 N.Y. 71, 76 (1877).

50. Sax, *supra* note 10, at 476. *See also* Langdon v. Mayor of N.Y., 93 N.Y. 129, 155 (1883) ("In England, Parliament had complete and absolute control over all the navigable waters within the kingdom.").

51. Fraser, *supra* note 11, at 435.

52. *See, e.g.*, H. FARNHAM, *supra* note 1, at 172, 179, 198, 202-07, 245, 248, 253, 260; Fraser, *supra* note 11, at 435-36, 445-46; MacGrady, *supra* note 2, at 547-52, 568, 571, 575-76, 584-91, 609-12.

53. This principle was first enunciated in Carson v. Blazer, 2 Binn. 475 (Pa. 1810), but widespread acceptance of the notion came only after the Supreme Court abrogated the tidality distinction for purposes of admiralty jurisdiction in the Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). The Court later approved some states' adop-

sumptively vested title to submerged tidal lands in the crown, into an absolute rule that the sovereign owns all lands underlying navigable waters.[54] Finally, and most significantly, "[t]he governmental or prerogative power of the English Crown has inadvertently been transformed into a trust by some of the courts in the United States," and the *jus publicum* has, as a consequence of the so-called "public trust doctrine," been expanded "beyond what would be possible under the common-law theory."[55]

The first two modifications are consistent with their English common law heritage, because the theoretical underpinnings of both the tidality distinction and the prima facie rule were inapplicable to the American situation. Both the feudal system and Hale's prima facie rule were predicated on the presumption that title to tidelands remained in the crown because few private claimants could produce evidence of an express grant, but the beds of inland waterbodies were prima facie regarded as the property of the riparian landowners on the basis of longstanding possession and a presumption that ancient grants conveying those lands had been lost.[56] In the colonies, however, there was no basis for presuming a lost grant.[57] Except to the extent that such grants had actually been issued, the title to all submerged lands both above and below the tide remained vested in the sovereign, and later the state, as the original owner. Thus, while American courts rejected the tidality criterion on the erroneous proposition that there were no navigable waterbodies in England above the ebb and flow of the tide,[58] and the prima facie rule was simply abandoned without explanation, both developments were entirely consonant with fundamental common law precepts.

Conversely, the notion that the protection of public rights in all navigable waters requires the sovereign to hold the underlying lands in an inalienable public trust is purely an American creation, with no foundation in the English common law.[59] Although rooted in the common law distinction between the *jus publicum* and *jus privatum*,[60] the American public trust doctrine has often been employed to restrict the sovereign's power of alienation far beyond any limitation imposed in England.[61] Nonetheless, the public trust doctrine has

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tion of factual navigability, rather than technical navigability, as the test for defining the extent of sovereign ownership. Barney v. Keokuk, 94 U.S. 324, 338 (1877).

54. Although the primary impetus for adoption of this modification was the decision in Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), it originated in earlier treatises. J. ANGELL, *supra* note 20; 3 J. KENT, COMMENTARIES ON AMERICAN LAW 344-48 (1828).

55. H. FARNHAM, *supra* note 1, at 172.

56. *See, e.g.*, MacGrady, *supra* note 2, at 568.

57. *See* Fraser, *supra* note 11, at 429; Note, *Power of the State to Convey Title to the Beds of Fresh-Water Navigable Streams*, 28 OR. LAW REV. 385-86 (1949).

58. *See supra* note 46.

59. MacGrady, *supra* note 2, at 589-91. *See also* Fraser, *supra* note 11, at 435-36.

60. *See supra* notes 29, 44-45, 49-50 and accompanying text. Fraser, *supra* note 11, at 436, points out that the common law theory of original crown ownership of all submerged lands "is sufficient cause for presuming title to all subaquaeous lands in the state, but not for holding them to be on an inalienable trust. On the contrary, it admits the alienability of the lands, at least in respect to the jus privatum." *Id.*

61. H. FARNHAM, *supra* note 1, at 198.

become the determinative legal basis for defining public and private rights in lands under navigable waters in this country.

While early American courts differed as to the ownership of lands under navigable waters,[62] it was universally understood that all proprietary interests in submerged lands could be freely exercised or conveyed by the owner, subject only, as in England, to public rights of navigation and fishing.[63] As the theoretical successor to both the crown and Parliament, the state could alienate the entire fee in subaqueous lands, including the *jus publicum* as well as the *jus privatum*.[64]

The public trust doctrine originated in the 1821 decision of the New Jersey Supreme Court in *Arnold v. Mundy*,[65] and developed into a general principle of law through several United States Supreme Court cases in the latter half of the nineteenth century. In *Arnold*, which involved a fishing rights claim derived from a royal grant to the provincial governor, the New Jersey court recognized that submerged lands in England were mostly owned by private persons,[66] but nonetheless declared that under English common law, "both the water and the land under the water . . . are common to all the citizens, and . . . the property . . . is vested in the sovereign . . . , not for his own use, but for the use of the citizen."[67] The court ruled that the grant from

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62. *See* Shively v. Bowlby, 152 U.S. 1, 26 (1894). The courts even differed as to the definition of navigability. MacGrady, *supra* note 2, at 589, 597-605. Two principal lines of authority surfaced in the state courts after the turn of the century. In Palmer v. Mulligan, 3 Cai.R. 308 (N.Y. Sup. Ct. 1805), Chief Justice James Kent held that a non-tidal portion of the Hudson River was privately owned because "by the rules and authorities of the common law, every river where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil." *Id.* at 318. Thus Kent adopted the English definition equating navigability with tidality. Although he erred in suggesting that ownership of the bed was an absolute rule of law, rather than a factual question aided by a presumption, Kent significantly recognized that even as to lands owned by the sovereign, "the absolute proprietary interest . . . may, by grant or prescription, become private property." 3 J. KENT, COMMENTARIES ON AMERICAN LAW 344 (1828). For a compilation of states following Kent's modified common law rule, see H. FARNHAM, *supra* note 1, at 249-53.

The second line of authority originated five years after *Palmer* when the Pennsylvania Supreme Court in Carson v. Blazer, B. Binn. 475 (Pa. 1810), rejected the English common law distinction between tidal and fresh waters as unreasonable, and held that the beds of all rivers navigable in fact are owned by the state. Although this rule ultimately prevailed over the English common law principles in the majority of states, *see* H. FARNHAM, *supra* note 1, at 254-56, and in federal law, see *supra* note 53, the continuing influence of *Palmer* is reflected in the numerous decisions holding major American rivers to be in private ownership. *See* H. FARNHAM, *supra* note 1, at 249-51 nn.4, 9, 10 & 12. A notable example is Middleton v. Pritchard, 4 Ill. 498, 3 Scam. 510 (1842) (holding the Mississippi River above the tide to be privately owned).

63. H. FARNHAM, *supra* note 1, at 229-31.

64. "In this country, the State has succeeded to all the rights of both crown and Parliament in the navigable waters and the soil under them, and here the jus privatum and the jus publicum are both vested in the State." Langdon v. Mayor of N.Y., 93 N.Y. 129, 155 (1883). *See also* H. FARNHAM, *supra* note 1, at 260.

65. 6. N.J.L. 1 (N.J. 1821).

66. *Id.* at 73.

67. *Id.* at 76. Ironically, this wholly fabricated statement of law was prefaced in the

King Charles II to the governor of the province did not convey any proprietary rights in navigable waters and the underlying lands, but only the governmental power to protect the public's rights. Significantly, the court concluded that the governor's subsequent grant could not convey any exclusive rights of fishery because the proprietary and governmental rights were inseparable, and remained so after they became vested in the state following the Revolution.[68] This principle, purely an invention of the *Arnold* court, laid the foundation from which the Supreme Court would ultimately develop the concept of an inalienable public trust.

United States Supreme Court Decisions

Under the unique system of dual sovereignty that developed in the United States, it has often been difficult to determine how the bundle of sticks comprising the totality of interests in submerged lands should be divided among the federal government, state governments, and private parties. The United States Supreme Court has repeatedly held that state law governs ownership rights in lands under the navigable waters.[69] Yet it has frequently formulated rules that were perceived, if not intended,[70] as controlling precedent by state court judges.

The first major Supreme Court decision on rights in lands under navigable waters, *Martin v. Waddell*,[71] presented a dispute over oyster fishing rights in the New Jersey coastal waters. King Charles II had granted certain charters conveying territory in the colonies to the Duke of York, who in turn sold his interests in the properties to a group of "proprietors."[72] As the result of a subsequent dispute between these proprietors and British authorities, the proprietors "surrendered to the crown all the powers of government, retaining their rights of private property."[73] One of the proprietors thereafter conveyed his retained proprietary rights to Waddell, who successfully maintained an action for ejectment in the New Jersey courts against persons claiming title under a state statute. Predictably, the Supreme Court relied on *Arnold* as New Jersey authority for deciding against Waddell's claim of private fishing rights.[74]

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opinion by an express apology from its author, Chief Justice Kirkpatrick, for not having researched the question of the proprietors' right to convey title "in so full and satisfactory a manner as could have been wished." 6 N.J.L. at 69-70.

68. For a more thorough discussion of Kirkpatrick's opinion in *Arnold v. Mundy*, see H. FARNHAM, *supra* note 1, at 203-05; MacGrady, *supra* note 2, at 590-91.

69. *E.g.*, Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371-81 (1977); Packer v. Bird, 137 U.S. 661, 669 (1891); Barney v. Keokuk, 94 U.S. 324, 338 (1877).

70. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 31 (1894) (stating that the Court's decisions regarding lands under navigable waters "should be considered with reference to the facts upon which they were made, and keeping in mind the local laws of the different states. . .").

71. 41 U.S. (16 Pet.) 367 (1842).

72. *Id.* at 407.

73. *Id.*

74. The irony is compounded in two respects. First, the majority characterized *Arnold* as having been decided "with great deliberation and research," *id.* at 418, despite the fact

Viewed narrowly, the majority opinion in *Waddell* held only that the words of conveyance in the king's original grant were insufficient to evince an intent to confer private fishing rights apart from the common right inherently connected with the governmental powers.[75] The Court sought to bolster this conclusion, however, by reasoning that although the king unquestionably had the right to make the grant, the "dominion and property in navigable waters, and the lands under them," were "held by the king as a public trust . . . for the benefit and advantage of the whole community"[76] The next question was whether this trust impaired the power of the king to convey private property rights in the submerged lands apart from the "prerogative powers of government." At this point, the majority was confronted with common law authority that was irreconcilable with the novel public trust concept.[77] It was essential to the result that the king's grant be held not to have conveyed the private rights claimed by Waddell, but instead that the state statute, which granted similar private rights to the other parties, be sustained.

The Court ingenuously solved this dilemma by entirely avoiding the question of whether the crown had the power to sever proprietary interests in the lands from the governmental interests, ruling that even if such a conveyance were permissible,[78] the language of this particular grant was insufficiently definite to sustain such an intention.[79] Recognizing the lack of any foundation for the trust doctrine in English law and the weakness of this rationale, the majority downplayed the question of the king's power by positing that the

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that *Arnold*'s author expressly apologized for not having adequately investigated or considered the subject. 6 N.J.L. at 69-70. Second, the Court reversed the New Jersey Supreme Court, which apparently either did not consider its own prior decision in *Arnold* as controlling precedent, or did not read *Arnold* to require the result reached by the Court.

75. Although the charter expressly conveyed "all the estate, right, title, interest, benefit, and advantage, claim and demand of the king, in the said land and premises," 41 U.S. (16 Pet.) at 408, the Court observed that if the king had intended to sever and divest the proprietary rights it "would not have been left for inference from ambiguous language." *Id.* at 416.

76. *Id.* at 411. For a discussion of the distinction between *dominium* and *imperium*, see Leighty, *supra* note 6, at 408-09.

77. 41 U.S. (16 Pet.) at 410.

78. Justice Taney vacillated on this question throughout the majority opinion. Ultimately, he suggested that some grants of private rights in navigable waterbodies were valid in England, subject to the rule that "whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community." *Id.* at 411. On the other hand, he concluded that different rules governed the king's charter to the duke covering large areas in the colonies, because it was not an ordinary deed of private property, but "was an instrument upon which was to be founded the institutions of a great political community." *Id.* at 411-12. The underlying notion that the magnitude and purpose of a grant may have some bearing on its validity has been perpetuated as an integral facet of the public trust concept. *See, e.g.*, Illinois Central R.R. v. Illinois, 146 U.S. 387, 452-53 (1892); State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 47 So. 353, 356-57 (1908).

79. On the theory that a royal grant of exclusive private rights in navigable waters would be in derogation of the public trust, Justice Taney opined that any such conveyance must be "construed strictly—and it will not be presumed that [the king] intended to part from any portion of the public domain, unless clear and especial words are used to denote it." 41 U.S. at 411.

crown's proprietary rights and Parliament's governmental powers had been reunited in the states upon independence,[80] and therefore grants made by the states were not governed by the same principles that applied to grants by the crown.[81]

The fundamental analytical fallacy in *Waddell* was the Court's adoption of *Arnold*'s notion that the crown's proprietary interests in lands under navigable waters[82] could not be severed from the governmental power without violating the public trust.[83] Although the majority did not expressly decide this point, but merely suggested it as a basis for holding that the king's grant was not intended to confer private fishing rights, many judges would later consider the dictum to be a central feature of the opinion.[84] The Court's result implicitly confirmed the power of the states, as successors to both the crown and Parliament, to alienate proprietary rights in submerged lands.[85]

Waddell established that upon independence from Britain the entire bundle of sticks representing interests in and power over the submerged lands passed directly to each original state, excepting only those powers surrendered by the state of the federal government. The federal government never held nor conveyed any proprietary rights in the lands under navigable water in the original colonies. The extent of federal authority over submerged lands in subsequently-admitted states was decided in *Pollard v. Hagan*[86] in which the Supreme Court held that states entering the Union after independence acquired absolute ownership of their navigable waters and underlying lands on an equal footing with the original states.[87] By ruling that the federal government exercised sovereignty over a territory prior to statehood only as a trustee for the future state,[88] and that a post-statehood federal patent of lands under navigable waters was ineffective to convey a title which had already passed to the state

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80. *Id.* at 416. As Justice Taney explained, "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. . . .*" *Id.* at 410 (emphasis added). *See also supra* note 64.

81. 41 U.S. at 410.

82. It is important to keep in mind the Court had not yet extended the meaning of navigable waters to include inland rivers and lakes, and would not do so until The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).

83. *See* Fraser, *supra* note 11, at 437.

84. *See* H. FARNHAM, *supra* note 1, at 202; Fraser, *supra* note 11, at 436-38; MacGrady, *supra* note 2, at 589-91. Justice Thompson's dissent may be largely responsible for this development. He was so thoroughly persuaded the words of the charter were sufficient to pass title that he felt the majority's result "must rest on the ground that the land under the water of a navigable river is not the subject of private right. . . ." 41 U.S. (16 Pet.) at 419 (Thompson, J., dissenting).

85. Justice Thompson's dissenting opinion demonstrates that Justice Taney implicitly upheld New Jersey's right to do by statute what the king was deemed powerless to do. *Id.* at 420-21.

86. 44 U.S. (3 How.) 212 (1845).

87. *Id.* at 223-24, 228-30.

88. *Id.* at 222-23. The federal government had authority to convey lands under navigable waters in a territory before statehood, but rarely did so. *See infra* notes 131, 138 and accompanying text.

by operation of law,[89] the *Pollard* Court settled for all time that the entire bundle of sticks in navigable waters, other than the power to regulate commerce reserved to the United States under the Constitution,[90] is vested in the states.

Although *Waddell* and *Pollard* were decided when the term "navigable waters" was limited to tidewaters,[91] the Court subsequently concluded in *Barney v. Keokuk*[92] that those decisions "enunciate principles which are equally applicable to all navigable waters."[93] This decision was clearly a departure from the precedents of those states which had adopted and applied the English common law.[94] In recognition of this problem, the Court confirmed that the states had not only acquired both the governmental and proprietary interests in submerged lands, but also the power to decide how those interests should be divided between the state and private individuals.[95] It did so, however, in terms that strongly encouraged the states to abrogate the common law rule recognizing riparian ownership of nontidal waters as being "at variance with sound principles of public policy."[96]

The policy basis for the *Barney* Court's suggestion that state ownership should apply to all waters navigable in fact was "that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience."[97] As a practical matter, the intimation that the governmental power to protect public navigational rights could not be exercised independently of bed ownership effectively eviscerated the concept that the states are free to formulate their own rules governing rights in subaqueous lands. This inseverability notion did not comport with the English common law, under which the *jus publicum* of navigation and fishery protected by Parliament had for centuries coexisted in harmony with private individuals' enjoyment of the *jus privatum*.[98] Moreover, the theory was wholly inconsistent with the practices of the states, most of which were indiscriminately selling their lands to the highest bidder or granting them wholesale into private ownership for some perceived public purpose.[99]

The tension that grew out of these fundamental inconsistencies reached a pinnacle in *Hardin v. Jordan*,[100] and was ultimately resolved in *Illinois Cen-*

89. *Id.* at 230.
90. U.S. CONST. art. I, § 8, cl. 3.
91. *See supra* note 82.
92. 94 U.S. 324 (1877).
93. *Id.* at 338.
94. *See supra* note 62.
95. 94 U.S. at 338.
96. *Id.*
97. *Id.*
98. *See, e.g.*, Fraser, *supra* note 11, at 433-36.
99. For a concise, but startling, summary of some early state land sales in Florida, see Note, *Florida's Sovereignty Submerged Lands: What Are They, Who Owns Them and Where Is the Boundary?*, 1 FLA. ST. U.L. REV. 596, 604 n.51 (1973). Sax, *supra* note 10, at 524-28, chronicles the California experience. *See also* H. FARNHAM, *supra* note 1, at 244.
100. 140 U.S. 371 (1891).

tral Railroad Co. v. Illinois.[101] *Hardin* represents a transition in the Court's development of its philosophy concerning alienability of interests in submerged lands. The Court implicitly acknowledged that the concept of inseverable proprietary and governmental interests was an inaccurate reflection of both English law[102] and the American experience.[103] More importantly, the Court conceded that a state may, by operation of law or otherwise, alienate ownership rights in lands under waters that are navigable in fact.[104] By qualifying this position with the caveat that such grants reserve to the state "those rights of eminent domain over the waters and the land covered thereby which are inseparable from sovereignty,"[105] the Court confirmed that the government retains authority to protect the public navigational easement even in waters not regarded as navigable in law for state ownership purposes.[106] Thus, while *Hardin* reaffirmed the general principle that states have the power to decide how the bundle of sticks shall be apportioned, it retreated from the notion that governmental control is inseparable from bed ownership.[107] The Court instead moved toward the opposite extreme by approving the common law rule recognizing virtually absolute alienability of proprietary interests in submerged lands.[108]

The Court finally settled on a middle ground in its "polestar" decision on the public trust doctrine, *Illinois Central Railroad Co. v. Illinois.*[109] In *Illinois Central,* the Court was squarely confronted with a dispute over the validity of a state legislative act granting lands under navigable waters to a

101. 146 U.S. 387 (1892).

102. The Court recognized that "[s]treams above tide-water, although navigable in fact at all times, or in freshets, were not deemed navigable in law," and that "[t]o these, riparian proprietors . . . could acquire exclusive ownership in the soil, water and fishery, . . . subject, however, to the public easement of navigation." 140 U.S. at 384 (quoting Middleton v. Pritchard, 4 Ill. 498, 3 Scam. 510 (1842)). The majority extensively discussed English law in confirming this principle, *id.* at 388-92, and concluded that all cases holding nontidal waters to be subject to any public rights other than navigation represented a departure from the common law. *Id.* at 395.

103. 140 U.S. at 382.

104. *Id.* at 383. The *Hardin* Court held that a federal patent of riparian lands up to the ordinary high water line of a freshwater lake effectively carried title to the lake's contiguous bed pursuant to Illinois law. The majority therefore reaffirmed the principle of Barney v. Keokuk, 94 U.S. 324 (1877), by declaring that "it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised." 140 U.S. at 382.

105. 140 U.S. at 383. It is clear that Justice Bradley was not using the term "eminent domain" merely in the sense of power to condemn, but intended the broader meaning that encompasses all governmental powers. *See* P. NICHOLS, NICHOLS ON EMINENT DOMAIN 24-25 (2d ed. 1917).

106. Although *Hardin* dealt only with acquisition of private ownership rights in lands under non-tidal waters, the Court had previously indicated that the navigational servitude was the only limitation upon the state's power to alienate tidelands. Weber v. Board of St. Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65-66 (1873).

107. *See* Barney v. Keokuk, 94 U.S. 324 (1877), discussed *supra* notes 92-99 and accompanying text.

108. Indeed, the *Hardin* Court condemned a lower federal court for departing from the common law rule. 140 U.S. at 397.

109. 146 U.S. 387 (1892).

private railroad company.[110] The statute, which originally conveyed most of Chicago harbor's submerged lands,[111] was later repealed by the Illinois Legislature; thereafter, the Illinois attorney general obtained a judicial determination that title was in the state rather than the railroad company.[112] Since the railroad's activities in the harbor had caused no actual interference with commercial navigation,[113] the case presented a pure question of law as to the validity of the state's original grant.[114]

The Court initially emphasized that the statute's express provisions prohibiting the railroad from conveying its interests to third parties or interfering with navigation in the harbor did not actually diminish the absolute nature of the grant.[115] Moreover, the observation that these restrictions in the grant "placed no impediments upon the action of the railroad company which did not previously exist"[116] seemed to confirm that there is an implicit reservation of state power to protect the public navigational easement in grants of lands under navigable waters. Paradoxically, however, the majority framed the critical issue as "whether the Legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, *and of the consequent control of its waters. . . .*"[117] Thus, the Court lapsed into the misconception that ownership of the underlying lands necessarily encompasses control of the superjacent water,[118] while simultaneously acknowledging that the state's power to protect the public navigational servitude is not affected by a grant of submerged lands. It was from this confusion that the model statement of the public trust doctrine in this country emerged.

The Court first characterized the state's title to lands under navigable waters as "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."[119]

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110. Enacted by the Illinois Legislature in 1869, the act was a grant of the fee in perpetuity conditioned upon the railroad not obstructing the Chicago harbor, impairing navigation, or alienating the lands. *Id.* at 448-49.

111. *Id.* at 451. The majority made no attempt to conceal its feeling that a grant of this magnitude constituted an egregious abuse of legislative power. *Id.* at 454-55.

112. Although the repealing act was adopted in 1873, exactly four years after the original enactment, *id.* at 448-49, the state did not bring suit to confirm its title until 1883. *Id.* at 433.

113. *Id.* at 443-44.

114. The Court could not evade the issue, as Justice Taney had in *Waddell,* because it was clear that the "object [of the act] was to grant to the railroad company submerged lands in the harbor." *Id.* at 449.

115. Construing the limitations contained in the act, the majority emphasized that the railroad's ability to make a lease for any period and to renew it at its pleasure rendered the prohibition against conveyances inconsequential. *Id.* at 451.

116. *Id.*

117. *Id.* at 452 (emphasis added).

118. In a later portion of the opinion, Justice Field concluded a brief analysis of *Arnold* by observing that the state necessarily forfeits control of navigable waters when it alienates the subjacent lands. *Id.* at 456.

119. *Id.* at 452. Sax, *supra* note 10, at 490, refers to this statement as "the central substantive thought in public trust litigation." He explains the public trust principle, the underlying basis for which was not articulated by the Court, as an outgrowth of the philosophy

Defining the extent to which submerged lands could be alienated without violating the trust, the majority did not interpret the trust doctrine as an absolute prohibition against alienation of submerged lands.[120] The Court merely held that a state could not abdicate its governmental authority to control public navigational use of an entire waterway.[121] Likening this trust responsibility to state police powers, the Court concluded that such trusts "cannot be placed entirely beyond the direction and control of the State."[122]

Illinois Central therefore treats the power of the state to alienate interests in land under navigable waters as a matter of degree.[123] At one extreme, an attempted conveyance of an entire commercial harbor to a private corporation is tantamount to a per se abuse of legislative authority.[124] At the other extreme, portions of submerged lands that can be occupied and used by private interests without impairing public easements cannot only be alienated by the state, but can be totally separated from the trust[125] and dealt with as

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that a government's function is to serve the whole public, and that it should not ordinarily confer benefits on particular groups or individuals. *Id.*

120. The *Illinois Central* majority broadly delineated the contours of the doctrine:

> It is grants of parcels of lands under navigable waters, that may afford foundation for . . . structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and water remaining, that are chiefly considered and sustained . . . as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But . . . the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake . . . is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public.

146 U.S. at 452-53.

121. *See id. See also* Sax, *supra* note 10, at 489.

122. 146 U.S. at 453-54. Conceding that it could not "cite any authority where a grant of this kind has been held invalid," the majority predicated the conclusion solely on its judgment that a legislature's authority to make such a grant "is hardly conceivable" and "would not be listened to." *Id.* at 454-55. *See supra* note 111.

123. *See generally* Note, *Conveyances of Sovereign Lands Under the Public Trust Doctrine: When Are They in the Public Interest,* 24 U. FLA. L. REV. 285, 289-90 (1972).

124. 146 U.S. at 453. Such a grant "would be held, if not absolutely void on its face, as subject to revocation." *Id.* The Court's position on the nature of the defect in such a grant is problematical. After explaining that the legislature could not alienate its inherent governmental power and duty, the majority held the original act granting the submerged lands "was inoperative," and then stated that the act "was annulled by the repealing act." It is therefore unclear whether the attorney general (or a citizen) could have avoided the original grant if the legislature had not expressly repealed the act, and whether such a legislative grant vested any compensable rights in the private grantee that were not perpetually subject to subsequent legislative repeal. Since the repealing act followed the grant by only four years in *Illinois Central,* it is perhaps not surprising that the Court reached its result without considering the full ramifications of some imprecise language on this point.

125. The *Illinois Central* Court noted that

> [t]he *control* of the State *for the purposes of the trust* can never be lost, *except* as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and water remaining.

ordinary property subject to any lawful use. Between these extremes, the state may transfer lands, but may not relinquish the trust responsibility for assuring that public easements in the waters are free from private interference.[126]

The Court's result in *Illinois Central* reflected an inclination to favor state ownership over private rights, but its rationale represented a compromise. In an effort to satisfy the state's objectives, the majority sought to fashion a result which would enable the legislature to invalidate the grant to the railroad company, while at the same time permitting subsequent state sales or dispositions of the same lands.[127] Consequently, the Court was forced to create a broad rule that would accommodate essentially contradictory claims, thereby further displacing common law principles with a uniquely American doctrine.

In effect, *Illinois Central* confirms the state's absolute power to control the disposition of submerged lands by holding that the state could revoke its own grant and regain ownership when necessary to protect public interests.[128] Yet the Court simultaneously reaffirmed the right of the state to dispose of submerged lands in any manner not contrary to the public interest. To that extent, the public trust doctrine constitutes little more than an expression of the common law principle that the sovereign may grant the *jus privatum* in submerged lands, but these proprietary rights remain subservient to the *jus publicum* in the superjacent waters.[129]

Following the crystallization of the public trust doctrine in *Illinois Central,* federal law concerning ownership interests in lands under navigable waters settled into a discernible pattern. Once it is determined that title to a body of water passed from the federal government to the state, state law generally governs the disposition of such property,[130] subject to the qualification that the

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Id. at 453 (emphasis added). *See also id.* at 455-56.

126. 146 U.S. at 458.

127. The state's complaint forced the Court to take a conciliatory position by alleging that "the claims of the defendants are a great and irreparable injury to the State of Illinois as a proprietor and owner of the bed of the lake, . . . preventing an *advantageous sale or other disposition thereof,*" and by requesting that the state "be declared to have the sole and exclusive right . . . to *dispose of such rights at its pleasure.*" *Id.* at 466 (Shiras, J., dissenting) (quoting the State of Illinois' complaint (emphasis in original).

128. *Id.* at 460-61.

129. Indeed, the Court would later hold that *Illinois Central* did not preclude the state from parting with both the *jus privatum* and the *jus publicum,* so long as the contemplated use could be justified as beneficial, or at least not injurious, to the public. *See* Appleby v. New York, 271 U.S. 364, 393-98 (1926).

130. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372-81 (1977); Archer v. Greenville Sand & Gravel Co., 233 U.S. 60, 68-69 (1914). The application of federal navigable waters law for the purpose of deciding land titles has been restricted to three types of controversies warranting a uniform federal standard: (1) boundary disputes between two states having their common border on a navigable stream, *e.g.,* Arkansas v. Tennessee, 246 U.S. 158, 175-76 (1918); (2) claims involving Indian tribal lands, *e.g.,* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 670-71 (1979); and (3) ownership contests between the United States and a state as to whether particular lands passed to the state under the equal footing doctrine, *e.g.,* Utah v. United States, 403 U.S. 9 (1971); United States v. Oregon, 295 U.S. 1 (1935); United States v. Utah, 283 U.S. 64 (1931). The Eleventh Circuit Court of Appeals has recently confirmed that an ownership dispute between the

state may not impair rights acquired through pre-statehood federal grants.[131] Accordingly, to determine the extent of private proprietary interests that may exist in a particular parcel of submerged land, the law of the property's situs must be consulted.

PUBLIC AND PRIVATE RIGHTS IN FLORIDA'S SOVEREIGNTY LANDS

Because the public trust is a uniquely American judicial doctrine, it should not be surprising that the principles were not simultaneously adopted nor uniformly applied in each state. The concept was not only foreign to the English common law from which most state courts sought guidance, but it also conflicted with the designs of many state legislatures. Lawmakers typically viewed submerged land as a worthless incident of statehood that could be readily converted into a revenue-producing windfall by conveying the land to private parties.[132] Consequently, judges have been confronted with the difficult task of reconciling the trust theory with legislative acts purporting to alienate the state's interests into private ownership.

Florida courts have resolved this dilemma by imparting a measure of flexibility to both the theory and its practical application. On a theoretical level, the courts have treated the public trust doctrine not as an absolute prohibition against alienation of lands under navigable waters, called "sovereignty lands" because of the manner in which they were acquired,[133] but as a conceptual merger of the common law *jus publicum* and *jus privatum*. This approach permits the state to alienate submerged lands, or proprietary interests in such lands, to any extent that does not interfere with public rights in the use of the waters. Such lands or interests, once conveyed or divested, are owned by

State of Florida and a private company, involving the issues of whether certain lands were beneath navigable waters at the time of statehood and therefore passed to the state under the equal footing doctrine, did not present a federal jurisdictional question. Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419 (11th Cir.), *cert. denied*, — U.S.L.W. — (U.S. Nov. 1, 1982) (No. 82-379).

131. United States v. Holt State Bank, 270 U.S. 49, 54-55 (1926); Shively v. Bowlby, 152 U.S. 1, 58 (1894). Of course, whether the submerged lands are held by the state or individual owners, their rights remain subject to the paramount authority of the United States to preserve and regulate the federal "navigational servitude" in all naturally occurring or publicly-created navigable waterways. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979); Gibson v. United States, 166 U.S. 269, 271-72 (1926); Scranton v. Wheeler, 170 U.S. 141, 163 (1900). For a discussion of the federal navigational servitude, see Munro, *The Navigational Servitude and the Severance Doctrine*, 6 LAND & WATER L. REV. 491 (1971); Comment, Kaiser Aetna: *Supreme Court Scuttles Federal Dominion Over Navigable Waters, Unsettles Takings Law*, 10 ENVT'L L. REP. 10028 (1980). Parallel state law doctrines are surveyed in Comment, *The State Navigation Servitude*, 4 LAND & WATER L. REV. 521 (1969), in which the author suggests that "Florida's navigation law could present American jurisprudence with one jurisdiction which has no navigation servitude at all." *Id.* at 524-25 n.22.

132. *See supra* note 99 and accompanying text. Courts have frequently agreed that at least some portions of the submerged lands are "for all practical purposes worthless," Tampa N. R.R. v. Tampa, 104 Fla. 481, 485, 150 So. 311, 313 (1932), and have openly endorsed legislative acts permitting the sale of such lands to private interests. Caples v. Taliaferro, 144 Fla. 1, 197 So. 861, 863 (1940).

133. *E.g.*, Martin v. Busch, 93 Fla. 535, 563-64, 112 So. 274, 283 (1927).

the private grantee, but may remain subject to some public rights so long as the lands are covered by water.[134] In practical application, Florida courts tend to gauge the severability of particular lands or interests on a sliding scale, whereby susceptibility to private ownership is balanced against the actual need to preserve the waters for public use.[135] By this approach, Florida courts have acknowledged that, in effect, some sovereignty lands are "more sovereign" than others. Before analyzing the development of Florida law on the alienability of interests in sovereignty lands, however, a brief examination of how Florida defines sovereignty lands will facilitate comprehension of the rules governing their disposition.

The Source and Extent of Florida's Title to Sovereign Lands

Upon attaining statehood in 1845, Florida assumed sovereignty over the navigable waters within the state,[136] including title to the underlying lands up to the ordinary high water mark.[137] Because sovereignty lands passed to the state[138] through operation of law under the equal footing doctrine,[139] and

134. *See* State v. Black River Phosphate Co., 32 Fla. 82, 113-14, 13 So. 640, 650 (1893). *See also* City of Long Beach v. Mansell, 3 Cal. 3d 462, 482, 91 Cal. Rptr. 23, 37-38, 476 P.2d 423, 437-38 (1970) (the common law public trust does not forbid alienation of sovereignty lands but ensures that when sovereignty lands are alienated they remain subject to the trust).

135. *See infra* note 156 and accompanying text. Florida courts have held that the public trust doctrine does not go so far as to require that all submerged lands be kept in their natural state. Sarasota County Anglers Club, Inc. v. Burns, 193 So. 2d 691, 693 (Fla. 1st D.C.A. 1967).

136. Merrill-Stevens Co. v. Durkee, 62 Fla. 549, 558-59, 57 So. 428, 431 (1912). Simultaneously with its admission to statehood in 1845, Florida also received from the federal government 500,000 acres of land for the general purpose of internal improvements, Act of March 3, 1845, ch. XLVIII, 5 Stat. 742, and other public lands for a seat of government and for school purposes. Act of June 3, 1845, ch. LXXV, 5 Stat. 788.

137. State v. Black River Phosphate Co., 32 Fla. 82, 106, 13 So. 640, 648 (1893). *See also* Thiesen v. Gulf F. & A. Ry., 75 Fla. 28, 57, 78 So. 491, 500 (1918) (on rehearing); State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 608-13, 47 So. 353, 355-57 (1908). For tidal waters, this reference point is the "mean high water line." *See generally* Gay, *The High Water Mark: Boundary Between Public and Private Lands*, 18 U. FLA. L. REV. 553 (1966). Some states extended sovereign title only to the low water mark. *See, e.g.*, Arkansas v. Tennessee, 246 U.S. 158, 176 (1918). By adopting the ordinary high water line standard, Florida extended its title to the limits of what federal law regarded as having passed under the equal footing doctrine. *See* Barney v. Keokuk, 94 U.S. 324, 338 (1877).

138. Because the Florida territory was under the sovereignty of Spain until 1819 and of the United States until statehood, some parcels of submerged lands which had been expressly conveyed into private ownership by the Spanish or federal governments during the periods of their respective sovereignties did not become the property of Florida. *See* State v. Black River Phosphate Co., 27 Fla. 276, 328, 9 So. 205, 208 (1891). Although the Florida Supreme Court suggested in an early decision that the federal government was powerless to grant submerged lands while Florida was in a territorial status, State v. Black River Phosphate Co., 32 Fla. 82, 94, 13 So. 640, 644 (1893), it later conceded federal authority as recognized in Shively v. Bowlby, 152 U.S. 1 (1894). For an example of a valid pre-statehood federal grant of lands under navigable waters to a private individual in Florida, see Silver Springs Paradise Co. v. Ray, 50 F.2d 356 (5th Cir. 1931). Similarly, the Florida Supreme Court acknowledged pre-1819 Spanish grants, but adopted such a strict rule of construction that even those grants

not by express grant, there was no specific designation of those lands considered to be under navigable waters.[140] Since the federal classification of lands was relevant only to define the means by which title passed out of the United States,[141] it remained for Florida to formulate its own rules for determining which lands were sovereignty lands, which were to be dealt with as swamp and overflowed lands, and what legal distinctions, if any, were to apply between the two categories.[142]

Early Florida decisions faithfully applied English common law principles governing ownership of lands under navigable waters, including the rule of riparian ownership of lands under nontidal waterbodies.[143] Although the federal courts had already endorsed the American rule recognizing state ownership of all waterbodies navigable in fact,[144] the Florida Supreme Court did

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which had been confirmed and approved by the federal authorities were found to be lacking the precise language demanded as evidence of an express intent to convey submerged lands. *See* Apalachicola Land & Dev. Co. v. McRae, 86 Fla. 393, 436-59, 98 So. 505, 519-26 (1923); Brickell v. Trammell, 77 Fla. 544, 563-68, 82 So. 221, 227-28 (1919); Sullivan v. Richardson, 33 Fla. 1, 113-30, 14 So. 692, 708-13 (1894).

139. *See, e.g.*, State v. Black River Phosphate Co., 32 Fla. 82, 93-94, 13 So. 640, 644 (1893). The Supreme Court enunciated the doctrine that same year in *Pollard v. Hagan*, discussed *supra* notes 86-90.

140. United States v. 2899.17 Acres of Land, 269 F. Supp. 903, 907-08 (M.D. Fla. 1967). This uncertainty was complicated by the subsequent federal grant to the state in 1850 of swamp and overflowed lands, which included the beds of nonnavigable waterbodies as well as uplands which bordered on the navigable rivers, lakes, and tidal waters. Act of Sept. 28, 1850, ch. 84, 9 Stat. 519 (codified at 43 U.S.C. §§ 981-94 (1976)). *E.g.*, Pierce v. Warren, 47 So. 2d 857, 858 (Fla. 1950); Martin v. Busch, 93 Fla. 535, 565-66, 112 So. 274, 284 (1927). *See also* State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 606, 615-16, 47 So. 353, 354, 357 (1908), which defined swamp and overflowed lands as follows:

> Within the meaning of this act of Congress, swamp lands, as distinguished from overflowed lands, are such as require drainage to dispose of needless water or moisture on or in the lands, in order to make them fit for successful and useful cultivation. Overflowed lands are those that are covered by nonnavigable waters, or are subject to such periodical or frequent overflows of water, salt or fresh (not including lands between high and low water marks of navigable streams or bodies of water, nor lands covered and uncovered by the ordinary daily ebb and flow of normal tides of navigable waters), as to require drainage or levees or embankments to keep out the water and thereby render the lands suitable for successful cultivation.

Id. at 615-16, 47 So. at 357. Thus, the lands underlying and adjoining practically all waterbodies in Florida, other than parcels conveyed by prior sovereigns, had passed into state ownership by 1850.

141. *See supra* notes 130-31 and accompanying text.

142. Once it has acquired both the lands under navigable waters (sovereignty lands) and the lands under nonnavigable waters (swamp and overflowed lands), "a state can set its own navigability standard to determine what waters will be retained for the public trust." Commentary, *The Public Trust Doctrine and Ownership of Florida's Navigable Lakes*, 29 U. FLA. L. REV. 730, 738 (1977). *See also* MacGrady, *supra* note 2, at 604.

143. Even before statehood, Florida had by statute adopted the English common and statutory law up to July 4, 1776. Act of Nov. 6, 1829, § 1. This statute remains in force today. FLA. STAT. § 2.01 (1981). The effect of such a statute is discussed in H. FARNHAM, *supra* note 1, at 244. *See also* Hardin v. Jordan, 140 U.S. 371, 386-87 (1891).

144. *See supra* note 53.

not conclude until 1891 that the state owned the beds of all rivers navigable in fact, whether fresh or tidal.[145]

The Florida rules currently governing the determination of whether submerged land is to be regarded as sovereignty in character closely parallel principles of federal law. In general, "a water body should be regarded as being non-navigable absent evidence of navigability."[146] Consequently, the party seeking to establish navigability must carry the burden of proof. If the original government surveyors meandered the waters, however, a rebuttable presumption of navigability arises,[147] requiring the opposing party to prove

145. State v. Black River Phosphate Co., 27 Fla. 276, 328, 9 So. 205, 208 (1891). As late as 1889, the Florida Supreme Court was deciding cases consistent with the English common law rule that the beds of waters not "technically" navigable were privately owned, though subject to a public navigational servitude. Bucki v. Cone, 25 Fla. 1, 19-20, 6 So. 160, 162 (1889). Apparently, the court was still undecided about which rule to adopt in Dumas v. Garnett, 32 Fla. 64, 73-74, 13 So. 464, 466-67 (1893).

The Florida Supreme Court first formulated and applied a test of navigability to determine ownership of nontidal waterbodies in Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909). In *Broward*, the court adopted the rule that state ownership is determined by a watercourse's actual capacity for navigation in its ordinary or natural state, rather than its tidality or "technical" navigability, *Id.* at 409-10, 50 So. at 830. Having adopted this rule, the court subsequently accepted the corollary principle that submerged beds of waters not naturally navigable in fact are not sovereignty lands, regardless of whether the waters are tidal or fresh, and notwithstanding that the waters had been made navigable by artificial improvements. *See* Pounds v. Darling, 75 Fla. 125, 133-35, 77 So. 666, 669 (1918) (fresh waters); Clement v. Watson, 63 Fla. 109, 111-13, 58 So. 25, 26 (1912) (tidal waters and artificial improvements). The United States Supreme Court has also held that a private pond which was made navigable by artificial improvements at the owner's expense did not become subject to a public right of navigation, even though it had always been tidal in character. Kaiser Aetna v. United States, 444 U.S. 164 (1979).

146. Odom v. Deltona Corp., 341 So. 2d 977, 989 (1976).

147. *Id.* at 988-89. *See, e.g.*, Toledo Liberal Shooting Co. v. Erie Shooting Club, 90 F. 680, 681 (6th Cir. 1898). Meandering has been described as a "process of drawing the exact outline of a [watercourse] based on observations of its contours made while walking around the shore." Commentary, *supra* note 142, at 735. Meander lines were drawn by the original United States government surveyors, who were instructed to "accurately meander . . . all navigable rivers . . .; all navigable bayous . . .; all lakes or deep ponds of sufficient magnitude; and all islands suitable for cultivation." *See* Lopez v. Smith, 145 So. 2d 509, 511 (Fla. 2d D.C.A. 1962). The federal surveyor's determination as to navigability, once accepted by the state and relied upon for many years, is ordinarily accepted by the courts as correct. Odom v. Deltona Corp., 341 So. 2d 977, 984, 988 (Fla. 1976). These surveys were relied upon by state and federal land officials as the basis for selecting the parcels that were patented to Florida as swamp and overflowed lands. *See* South Fla. Farms Co. v. Goodno, 84 Fla. 532, 540-49, 94 So. 672, 674-77 (1922).

Ordinarily, if the water is actually navigable, a grant of the upland property carries title to the ordinary high water line, regardless of whether the meander line was located above or below that point. The meander line may constitute the boundary, however, if: (1) the water is not navigable in fact, *see* Florida Bd. of Trustees of the Internal Improvement Fund v. Wakulla Silver Springs Co., 362 So. 2d 706, 712 (Fla. 3d D.C.A. 1978), *cert. denied*, 368 So. 2d 1366 (Fla. 1979); (2) the waterbody is navigable, but the state cannot sustain its burden of establishing the location of the true high water line, *see id.*; *see also* Trustees of the Internal Improvement Trust Fund v. Wetstone, 222 So. 2d 10, 14 (Fla. 1969); or (3) the discrepancy between the meander line and the ordinary high water line is of such magnitude as to constitute fraud or mistake, *see generally* South Fla. Farms Co. v. Goodno, 84 Fla. 532, 543-49, 94 So. 672, 675-77 (1922).

otherwise. Except for waters that the legislature has classified nonnavigable as a matter of law,[148] navigability is a question of fact based on whether the water in its ordinary and natural condition is of sufficient size and permanence to be useful as a highway for public commercial transportation.[149] If this test is satisfied, the state owns the submerged lands up to the ordinary or mean high water line, and such lands are considered sovereignty lands held pursuant to the public trust. The precise nature of this trust ownership, and the extent to which the doctrine operates as a limitation upon the state's power to alienate particular interests in the property, remains to be defined.

The 1856 Riparian Act

Florida's first legislative act concerning sovereignty lands has also been its most thoroughly litigated. In 1856, the legislature enacted a statute entitled "An act to benefit commerce," by which the state expressly divested itself

> of all right, title and interest to all lands covered by water, lying in front of any tract or land owned by a citizen of the United States, or by the United States, lying upon any navigable stream, or bay of the sea, or harbor, as far as the edge of the channel, and hereby vest the full title to the same in and unto the riparian proprietors, giving them the full right and privilege to build wharves . . . and to fill up from the shore, bank or beach, as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce.[150]

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148. 341 So. 2d at 982-85 (construing FLA. STAT. § 197.228 (1981)). *See infra* note 271 and accompanying text.

149. Some states have adopted a more liberal test of navigability encompassing pleasure boating as well as commercial navigation. *See, e.g.*, Lamprey v. State, 52 Minn. 181, 53 N.W. 1139, 1143 (1893); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937). Florida does not recognize mere recreational boating as sufficient navigational activity on which to predicate state sovereignty ownership. *See* Odom v. Deltona Corp., 341 So. 2d 977, 986 (Fla. 1976). Florida's test remains "similar, if not identical, to the federal title test." *Id.* at 988. Although federal common law is employed to determine submerged land ownership only in a narrowly prescribed class of cases, *see supra* note 130, the federal title test of navigability has served as a model for those states which recognize sovereign ownership of all waters navigable in fact. The basic federal title test was first formulated in The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870), which established that waters 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 over water." *Id.* at 563. *See, e.g.*, Utah v. United States, 403 U.S. 9, 10-12 (1971).

Decisions involving navigable waters must be evaluated in light of the fact that different definitions or tests of navigability are required for different purposes. Kaiser Aetna v. United States, 444 U.S. 164, 170-72 (1979). The "title" test of navigability, requiring that waters be navigable in their "natural and ordinary condition," differs from the more expansive navigability tests used to determine federal admiralty jurisdiction or federal regulatory authority, both of which encompass waterways made navigable through artificial improvements. United States v. Appalachian Power Co., 311 U.S. 377, 407 (1940); Weiszmann v. District Eng'r, 526 F.2d 1302, 1305 (5th Cir. 1976). Thus, a finding of navigability under one test does not dictate a similar conclusion when another test is applied. *See, e.g.*, United States v. Utah, 283 U.S. 64, 75 (1931); Adams v. Montana Power Co., 528 F.2d 437, 440 (9th Cir. 1975).

150. 1856 Laws of Fla., ch. 791.

The earliest decisions involving the Riparian Act of 1856 recognized that by common law the sovereign holds property rights in submerged lands distinct from the public rights of navigation and fishing.[151] These decisions acknowledged, however, that any title conveyed by the Act, whether held by the state or the private grantee, is coupled with a trust for the public benefit prohibiting impairment of public rights in the waters.[152]

The nature of the title granted by the 1856 Riparian Act was initially defined through a series of decisions in the latter half of the nineteenth century. These cases elucidated general principles fundamentally consistent with English common law: the state, as sovereign, owns all lands under the navigable tide waters;[153] this ownership consists of the absolute proprietary interest in the lands, held subject to a governmental duty to protect the public rights of navigation and fishing;[154] the state may grant its proprietary interests subject to the same public rights;[155] and the state may permit the private grantee to impair or destroy the public usages in the exercise of his proprietary rights if the higher public interest in commerce is thereby enhanced.[156] Thus, the only lands considered to be sovereignty in character were those under tidal waters, and the only restriction imposed on the complete alienability of such lands was that their use could not interfere with public navigation and fishing, unless a conflicting use was authorized by the state for an overriding public purpose.

With the discovery of phosphate in the beds of inland rivers around 1890, however, state officials realized that submerged lands previously considered worthless might be a valuable revenue source if state ownership could be established.[157] In *State v. Black River Phosphate Co.*,[158] the state sought an injunction against a company mining phosphate from the bottom of Black River and requested an accounting for deposits already removed, on the theory that the river was navigable at the place in question. The phosphate company defended on the grounds that the state had not specifically set out the basis of its title claim nor alleged that the stream was within tidal waters.[159] The trial court sustained the defendant's demurrer, holding that even if the state owned the lands under nontidal rivers, it had conveyed its rights in such lands to the riparian proprietors under the Riparian Act of 1856.[160]

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151. *See* Geiger v. Filor, 8 Fla. 325, 336-37 (1859) (citing J. ANGELL, *supra* note 20, at 220-23).

152. Alden v. Pinney, 12 Fla. 348, 390 (1869).

153. *See, e.g.*, Sullivan v. Moreno, 19 Fla. 200, 219 (1882).

154. *See* Alden v. Pinney, 12 Fla. 348, 390 (1869). *See also* Bucki v. Cone, 25 Fla. 1, 19-20, 6 So. 160, 162 (1889) (where a river is not technically or *prima facie* navigable, its privately owned riverbed is still subject to public right of way).

155. *See* Rivas v. Solary, 18 Fla. 122, 126 (1881).

156. *See* Sullivan v. Moreno, 19 Fla. 200, 228-29 (1882). *See also* Sax, *supra* note 10, at 488-89.

157. *See supra* note 132 and accompanying text.

158. 27 Fla. 276, 9 So. 205 (1891).

159. *Id.* at 322, 9 So. at 206.

160. "Entertaining this view of the law, the court does not deem it necessary to express any opinion upon the question as to whether or not the state owns the soil in the channels

On appeal, the Florida Supreme Court found dispositive the state's failure to make a specific allegation of ownership.[161] Rejecting the contention that state ownership necessarily followed from an allegation that the stream was navigable in fact,[162] the court concluded that a specific averment of present title or ownership was essential to the state's claim. The court reasoned that even if the state did acquire original sovereignty title to lands under navigable fresh waters, the proprietary rights of the state may have been conveyed before independence by Spain or England, or afterwards by the state itself.[163] While this case did not finally settle the question of whether nontidal water bottoms are sovereignty lands, it clearly recognized that proprietary interests, such as mineral deposits, were severable from the governmental trust and subject to alienation by the state.

Taking its cue from *Black River,* the legislature two months later enacted a law asserting the state's ownership of and right to sell phosphate deposits in the beds of all navigable waters.[164] Significantly, the legislature expressly provided that the law should not be applied "in cases of navigable streams, or any part thereof that is not meandered, and the ownership of the lands embracing which is vested in a legal purchaser."[165] By this language, the legislature unmistakably recognized the validity of private proprietary rights in submerged beds acquired prior to the law.[166] When the statute first came before the Florida Supreme Court, however, the significance of the provision exempting prior interests was overlooked. Although the court acknowledged

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of rivers and streams in which the tide does not ebb and flow, though in fact capable of navigation." *Id.*

161. *Id.* at 325, 9 So. at 207.

162. *Id.* at 325-26, 9 So. at 207. The state argued that its ownership as sovereign extended to "the entire beds of all navigable streams within her borders, and all valuable deposits therein, whether the waters thereof were fresh or salt, and whether the tides of the sea ebbed and flowed therein or not . . . ." *Id.* at 323, 9 So. at 206. In opposition, the phosphate company maintained that these rights belonged to the riparian landowners, either by virtue of the English common law rule adopted in Florida, or under the Riparian Act of 1856. *Id.*

163. *Id.* at 327-28, 9 So. at 207-08.

164. 1891 Fla. Laws, ch. 4043. The act established a Board of Phosphate Commissioners having the power to contract with private persons for exclusive rights to mine the phosphate deposits. Their contracts could not grant rights for a period longer than five years, nor encompass an area exceeding "ten miles by the course of said stream . . . ." *Id.* § 4. Persons mining without a contract, unless "mining under a *bona fide* claim of ownership of said phosphate deposits," could be prosecuted for a misdemeanor, or sued by the Board. *Id.* § 5. The provisions of this act are thoroughly examined in State *ex rel.* Peruvian Phosphate Co. v. Board of Phosphate Comm'rs, 31 Fla. 558, 12 So. 913 (1893).

165. 31 Fla. 558, 563-68, 12 So. 913, 915 (1893). On the significance of meandering, see *supra* note 147.

166. This category certainly included pre-statehood grants by Spain or the United States. The reference to meandered areas, however, suggests another possible class of grants that were intended to be confirmed. Since the state had not asserted ownership of nontidal waterbodies until 1890, the beds of inland streams and lakes were not considered prior to that time to be sovereignty lands. *See supra* notes 143-45 and accompanying text. If thought to be owned by the state at all, they were regarded as "swamp and overflowed" lands, *see supra* note 140 and accompanying text, which had been placed under the control of the Board of Trustees of the Internal Improvement Fund in 1854. 1854-55 Fla. Laws, ch. 810.

that the legislature had the power to grant rights to phosphate deposits,[167] it inexplicably concluded that the statute's "theory and policy are inconsistent with a property right or ownership therein by others, either under the Riparian Act of 1856 . . . or otherwise."[168]

Even after the court declined to view the phosphate law of 1891 as a legislative acknowledgment of pre-existing private proprietary rights, it could still be argued that the Riparian Act of 1856, if applicable to inland navigable rivers, operated to vest in a qualified riparian landowner the state's title to the submerged lands from the shore to the channel, including its recently-asserted right to the underlying phosphate deposits. When this defense was asserted by the same company in *State v. Black River Phosphate Co. (Black River II)*,[169] however, the majority concluded that the 1856 Act was not intended to vest such proprietary rights in the grantee until the lands were actually filled in and "relieved of the trust."[170] By reading the specific legislative language permitting a grantee to wharf out and fill in to benefit commerce as a limitation on the rights conveyed, the court held that the grant was merely conditional.[171]

On the other hand, *Black River II* conceded that the Act vested in riparian landowners a sufficient interest to prevent the state from granting the same phosphate rights to others.[172] The court further stated that once the lands are filled pursuant to the statute, the proprietor's ownership is no longer subject

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Although the Trustees in 1891 had no authority to sell sovereignty lands, they did have the power to dispose of swamp and overflowed lands. *See, e.g.*, Martin v. Busch, 93 Fla. 535, 566-73, 112 So. 274, 284-87 (1927). *But see* Pembroke v. Peninsular Terminal Co., 108 Fla. 46, 74-76, 146 So. 249, 258-59 (1933) (the Trustees' determination that the lands are of a character subject to their statutory power of sale is not prone to collateral attack). In fact, the Trustees' "whirlwind campaign" to sell public lands resulted in an 1881 sale of four million acres at $.25 per acre, and ultimately left the state with less than five percent of the public lands it had received through federal grants. *See* Note, *supra* note 99, at 604 n.51. Thus, it is plausible to assume that the legislature, not wishing to disturb established titles through retroactive application of a new rule, intended to protect the rights of what were, at the time, legal purchasers from the Trustees. Particularly would this be true as to unmeandered areas, where no deductions of acreage were made for submerged lands either in the government patents and Trustees' deeds, or on the tax rolls. *See, e.g.*, Odom v. Deltona Corp., 341 So. 2d 977, 980 (Fla. 1976).

167. State *ex rel.* Peruvian Phosphate Co. v. Board of Phosphate Comm'rs, 31 Fla. 558, 570, 12 So. 913, 916 (1893).

168. *Id.* at 568, 12 So. at 915.

169. 32 Fla. 82, 13 So. 640 (1893). Unlike the 1891 case, however, the court treated the stream as being "both tidal and navigable in fact . . . ." *Id.*

170. *Id.* at 115, 13 So. at 650. This rationale made it immaterial whether the Riparian Act, if interpreted as an absolute grant, "would create any beneficial right in the contents of the soil beneath the sea, in so far as such contents could be used or availed of without impairing the public use of such waters . . . ." 32 Fla. 108, 13 So. at 648.

171. *Id.* at 108-15, 13 So. at 648-50.

172. *Id.* at 112, 13 So. at 650. Although the majority later insisted that this was not "a grant of any property right," the United States Supreme Court has recently observed that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . ." Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

to the trust.[173] In effect, then, the majority accepted the principle that both the state's proprietary interests and the governmental powers may be alienated by appropriate legislation, notwithstanding dictum suggesting that the public trust doctrine severely restricts legislative power to convey sovereignty lands.[174] It was this dictum, rather than the actual holding, which found its way into many subsequent opinions as an expression of Florida law.

Florida's Public Trust Doctrine: The Early Trend Toward Inalienability

The first comprehensive statement of Florida's modern public trust doctrine appeared in *State ex rel. Ellis v. Gerbing*.[175] The state challenged Gerbing's claim of an exclusive right to plant oysters in certain shallow "salt marsh lands" deeded to him by the Trustees of the Internal Improvement Fund as swamp and overflowed lands.[176] The trial court dismissed the proceeding upon finding that the lands, although below the mean high water line of the navigable Amelia River, were outside the channel and were therefore swamp and overflowed lands, not part of the river bed.[177] The supreme court reversed, concluding that the land below the mean high water line was not swamp and overflowed land, but rather sovereignty land which the Trustees then had no statutory authority to convey.[178] As a result, Gerbing had no legal basis to support his claim of exclusive rights.[179]

Adopting the broad dicta of *Illinois Central* and *Black River II*, the court

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173. 32 Fla. 113-14, 13 So. at 650.

174. *Id.* at 92-106, 13 So. at 643-48. This dictum was taken almost verbatim from the majority opinion in *Illinois Central*. *See supra* notes 119-26 and accompanying text.

175. 56 Fla. 603, 47 So. 353 (1908). Justice Whitfield, who wrote for the majority in *Gerbing*, authored most major Florida Supreme Court decisions involving navigable waters and the public trust doctrine in the early twentieth century, and thus significantly influenced the development of Florida law in this area. *E.g.*, Adams v. Elliott, 128 Fla. 79, 174 So. 731 (1937); Perky Properties, Inc. v. Felton, 113 Fla. 432, 151 So. 892 (1934); Trumbull v. McIntosh, 103 Fla. 708, 138 So. 34 (1931); Freed v. Miami Beach Pier Corp., 93 Fla. 888, 112 So. 841 (1927); Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927); Apalachicola Land & Dev. Co. v. McRae, 86 Fla. 393, 98 So. 505 (1923); City of Tarpon Springs v. Smith, 81 Fla. 479, 88 So. 613 (1921); Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919); Panama Ice & Fish Co. v. Atlanta & St. A.B. Ry., 71 Fla. 419, 71 So. 608 (1916); *Ex Parte* Powell, 70 Fla. 363, 70 So. 392 (1915); Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912); Merrill-Stevens Co. v. Durkee, 62 Fla. 549, 57 So. 428 (1912); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909); State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908).

176. 56 Fla. at 606-07, 47 So. at 354. On the origin and evolution of the Trustees as the principal agency exercising authority over Florida's state-owned lands, see Note, *supra* note 99, at 603-07.

177. 56 Fla. at 607-08, 47 So. at 355. The basis for the referee's conclusion was not disclosed.

178. *Id.* at 615-16, 47 So. at 357. *See supra* note 166.

179. *Id.* As an alternative to his ownership claim, Gerbing defended on the basis of an 1881 statute that authorized the county commissioners to grant exclusive oyster planting rights in the public waters of the state. 1881 Fla. Laws, ch. 3293. The court rejected this contention because the river contained natural oyster beds, which were expressly exempted and reserved for free public use by the 1881 act. 56 Fla. at 612-14, 47 So. at 356-57.

declared that the state held navigable waters not as ordinary property to be sold into private ownership, but for the public uses of navigation, commerce, and fishing.[180] This public character imposed an implied legal duty on the state to preserve and control the navigable waters and subjacent lands. Although the state could permit limited ownership or use of sovereignty lands where public rights would not be materially impaired, general control over the waters could not be abdicated.[181]

Having laid this foundation, the court delivered the classic statement of Florida's public trust doctrine:

> The trust with which these lands are held by the state is governmental, and cannot be wholly alienated. For the purpose of enhancing and improving the rights and interests of the whole people, the state may by appropriate means grant to individuals the title to limited portions of the lands, or give limited privileges therein, but not so as to divert them from their proper uses, or so as to relieve the state of the control and regulation of the uses afforded by the land and waters.[182]

Elaborating upon those interests the state could alienate, the court endorsed granting limited privileges to aid navigation or commerce, or to encourage new industry and the development of resources.[183] The court suggested that the exterior areas of a river beyond the point of useful navigation might be subject to conveyance, but it emphasized that the state's interests in sovereignty lands could be alienated only to the extent those interests do not "unreasonably" or "substantially" impair public rights, and then only pursuant to legislative authority.[184]

The *Gerbing* concept of the public trust doctrine represented a shift away from the common law treatment of governmental and proprietary interests in navigable waters. On the premise that ownership of the land was essential to control of the waters,[185] this public trust theory perceived the bundle of sticks as relatively indivisible, and the apportionment of public and private rights as a choice between absolutes. By declaring that the state could grant only limited portions of the lands or such privileges therein as would not substan-

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180. 56 Fla. at 615, 47 So. at 357.

181. *Id.*

182. *Id.* at 612, 47 So. at 356. Although the majority cited *Illinois Central* as authority, it clearly modified Justice Field's dictum in significant respects. For example, *Illinois Central* emphasized that the public trust doctrine would not "sanction the abdication of the general control of the state over lands under the navigable waters of *an entire harbor or bay, or of a sea or lake.*" 146 U.S. at 452-53 (emphasis added). *Gerbing* simply declared that "[t]he states cannot abdicate general control over *such lands and the waters thereon . . . .*" 56 Fla. at 609, 47 So. at 355 (emphasis added).

183. 56 Fla. at 612, 47 So. at 356. The *Gerbing* majority undoubtedly was aware that the 1856 Riparian Act and the 1891 phosphate legislation had been judicially approved.

184. *Id.* at 613, 47 So. at 356-57. *See, e.g.*, Symmes v. Prairie Pebble Phosphate Co., 64 Fla. 480, 483-84, 60 So. 223, 224-25 (1912) ("[T]he acquisition of such property is not of common right, but depends upon proper legislation and authorized appropriopra [sic] action duly taken thereunder.").

185. 56 Fla. at 615, 47 So. at 357. This was the same misconception that had given birth to the public trust doctrine in American law. *See supra* notes 68, 83 and accompanying text.

tially impair public interests protected by the trust or interfere with riparian rights,[186] *Gerbing* largely discounted the fact that property interests in the submerged bed could be held apart from, but still subject to, those servitudes. In theory and in practice, the prohibition against private ownership of lands under navigable waters which were useful for public purposes or subject to riparian rights would assure that title to sovereignty lands remained in the state.

While Florida courts were restricting the state's power to alienate sovereignty lands, the legislature was becoming increasingly active in providing for their disposition.[187] A 1913 statute vested title to all islands, sand bars, and shallow banks in the tidal waters of Dade and Palm Beach Counties in the Trustees of the Internal Improvement Fund.[188] By 1917, this statute was extended to include the entire state.[189] These acts, which marked the first attempts to vest a state agency with authority to convey sovereignty lands, were soon challenged as a violation of the public trust.

In *Brickell v. Trammell*,[190] a riparian landowner on Biscayne Bay claiming title to an island under the Riparian Act of 1856 challenged the Trustees' power to sell the island pursuant to the 1913 legislation. Avoiding the issue of the Trustees' authority, the Florida Supreme Court further restricted the public trust to allow only the grant of limited privileges in sovereignty lands.[191] The court concluded that the 1856 Riparian Act conveyed no title to lands below the high water mark, but merely granted an easement to wharf out or fill in to the channel's edge.[192] The legislature promptly signaled its disapproval of this narrow interpretation by adopting the Riparian Act of 1921, reconfirming the statutory rights of riparian owners originally granted in the 1856 legislation.[193] Thus, by the early 1920's, a confrontation had developed be-

186. In Broward v. Mabry, 58 Fla. 398, 410, 50 So. 826, 830 (1909), the court observed that title to lands under navigable waters "passes subject to the public easements and to the riparian rights allowed by law." This thought was somewhat superfluous in light of the rule which already restricted alienability to those limited areas where public rights would not be substantially impaired.

The appearance of riparian rights as a limitation on the alienability of sovereignty lands probably reflected the fact that the court had recently examined the subject of riparian rights in Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909). In Thiesen v. Gulf, F. & A. Ry., 75 Fla. 28, 78 So. 491 (1918), the court held that the common law rights of a riparian proprietor include "the right of ingress and egress to and from the lot over the waters . . . and that of unobstructed view over the waters, and in common with the public the right of navigating, bathing, and fishing," but not the right to wharf out and fill in from the shore to the channel. *Id.* at 59, 78 So. at 501. Riparian rights were held to constitute property which could not be taken without just compensation. *Id.* at 76-77, 78 So. at 506.

187. This tension was not atypical. *See* Sax, *supra* note 10, at 547.

188. 1913 Fla. Laws, ch. 6451.

189. 1917 Fla. Laws, ch. 7304. *See* Note, *supra* note 99, at 604-06.

190. 77 Fla. 544, 82 So. 221 (1919).

191. *Id.* at 559-60, 82 So. at 226.

192. *Id.* at 570, 82 So. at 230. In a further departure from the common law, the court declared that "[t]itle as against the public cannot be acquired by adverse possession." *Id.*

193. 1921 Fla. Laws, ch. 8537 § 1. The 1921 Act, which was made retroactive back to 1856, contained language similar to the 1856 Act, except that it applied to all riparian proprietors

tween the legislative acts, which attempted to confer private rights in sovereignty lands, and the judicially-created trust doctrine, which refused to recognize the validity of such conveyances. This conflict could ultimately be resolved only by a determination of the extent to which the public trust doctrine operated as a limitation upon the legislative power.

The Transitional Period: Recognition of Legislative Authority to Alienate Sovereignty Lands

The Florida Supreme Court's movement toward a theory of absolute inalienability halted in *State ex rel. Buford v. City of Tampa.*[194] The legislature had by special acts granted the City of Tampa all state-owned sovereignty lands under Hillsborough Bay and the Hillsborough River.[195] In 1924, the city conveyed the submerged lands to a private individual so that the property could be developed into a private residential subdivision.[196] The attorney general then brought suit to invalidate the conveyances as violative of the public trust.[197] Despite a lengthy dissent, the court upheld the legislature's power to grant title to sovereignty lands, declaring that Florida had no constitutional provision prohibiting such alienation, and that "[w]hatever trust was imposed was that of the common law."[198] The majority concluded that no express constitutional authorization was required to empower the legislature to dispose of sovereignty lands.[199] *Buford* thus confirmed that the public trust

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owning to the *high* water mark; expressly made the grant "subject to any inalienable trust under which the state holds said lands"; and provided that the grant of title was not effective until the lands were "actually filled in or permanently improved." *Id.* The validity of the act was upheld in State *ex rel.* Buford v. City of Tampa, 88 Fla. 196, 210-11, 102 So. 336, 340-41 (1924). *See also* Commodore's Point Terminal Co. v. Hudnall, 3 F.2d 841, 844-45 (S.D. Fla. 1925).

194. 88 Fla. 196, 102 So. 336 (1924).

195. 1899 Fla. Laws, ch. 4882; 1913 Fla. Laws, ch. 6781.

196. 88 Fla. at 204, 102 So. at 339.

197. *Id.* at 205, 102 So. at 340.

198. *Id.* at 207, 102 So. at 340.

199. *Id.* at 210, 102 So. at 341. Although his general philosophy had been rejected, Justice Whitfield continued his efforts to fashion judicial principles that would preserve the state's sovereignty lands against private claims. In Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927), decided with the concurrence of three circuit judges sitting in place of three disqualified justices, Whitfield attempted to reaffirm or establish several important principles relating to grants of public lands which encompassed some sovereignty lands: (1) that because lands under navigable waters passed to the state under the equal footing doctrine in 1845, federal grants of swamp and overflowed lands after 1850 could not include any sovereignty lands, *id.* at 566, 112 So. at 284; (2) that since the Trustees had no authority to convey sovereignty lands through their deeds of swamp and overflowed lands, neither the description in such a deed nor the subsequent exercise of ownership rights could give the grantee title to lands below the ordinary high water line, *id.* at 567, 112 So. at 284; (3) that title to submerged lands exposed by artificial lowering of the water did not vest in the grantee, because the bed "remained sovereignty lands when the water receded," *id.*; (4) that the grantee of swamp and overflowed lands deeded by the Trustees before an official survey was conducted took the unsurveyed lands subject to the boundaries subsequently fixed and "with notice that the conveyance of swamp and overflowed land does not in law cover any sovereignty lands,"

doctrine does not absolutely bar alienation of state interests in sovereignty lands.[200]

Subsequently, in *Pembroke v. Peninsular Terminal Co.*,[201] the court upheld legislation authorizing the Trustees to sell sovereignty lands against the contention that such acts were either prohibited by the state constitution or in conflict with the public trust doctrine.[202] Having upheld the Trustees' statutory power to grant sovereignty lands, the court rejected arguments that the retained governmental powers over the lands constituted a title encumbrance sufficient to warrant rescission of the sale contract.[203] The court concluded that the Trustees' deed conveyed a fee simple title subject at most to the state's police power and the power of Congress under the Commerce Clause.[204]

With this decision, the court brought the public trust doctrine full circle to its modest common law origins.[205] In effect, *Pembroke* recognized that the state may freely alienate its proprietary interests in lands under navigable waters,[206] subject only to retained governmental powers to regulate for the

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id. at 570, 112 So. at 285-86; and (5) that the grantee of swamp and overflowed land could not become the owner of the inadvertently included sovereignty land through the doctrine of "after-acquired title," *id.* at 573, 112 So. at 287.

Although some of these statements were overruled or qualified in later decisions, one significant feature that merits attention here is that when a submerged bed becomes dry, it remains sovereignty land. Implicit in this principle is a recognition that, although the public rights in the waters are terminated, some interests in the lands are still held by the state. Since the beneficial uses for which the trust was created are no longer present, only the proprietary rights remain, and thus there is no longer any reason to treat the lands as sovereignty lands. This concept is consistent with Florida's treatment of filled lands. *See supra* text accompanying note 173 and *infra* note 211 and accompanying text.

200. The holding in *Buford* was reaffirmed in Tampa N. R.R. v. City of Tampa, 104 Fla. 481, 140 So. 311 (1932), where the court upheld the validity of a similar grant from the City of Tampa to a private entity. The city sought to avoid the conveyance some 20 years later for lack of consideration, but the majority found ample consideration in the company's commercial development of the property. *Id.* at 485, 140 So. at 313. *See also* Bryant v. Lovett, 201 So. 2d 720, 724 (Fla. 1967). *But see* Sax, *supra* note 10, at 504.

201. 108 Fla. 46, 146 So. 249 (1933).

202. *Id.* at 68, 146 So. at 256. The *Pembroke* court observed that "a state has *full power to legislate concerning the disposition and use of navigable waters and the lands thereunder*," subject only to the federal power to regulate interstate commerce or to any state constitutional limitations. *Id.* (emphasis added). The 1917 statute, discussed *supra* note 188 and accompanying text, authorized the Trustees to sell submerged tidal lands "upon which the water is not more than three feet deep at high tide and which are separated from the shore by a channel or channels, not less than five feet deep at high tide." FLA. STAT. §§ 1061-62 (1920). Since some areas qualifying for sale under the statute would undoubtedly be of significant public usefulness, but no limitation was placed on the quantity of lands subject to conveyance, the act was manifestly irreconcilable with the public trust philosophy espoused in the earlier opinions of Justice Whitfield.

203. 108 Fla. at 77-92, 146 So. at 259-64.

204. *Id.* at 88-89, 146 So. at 263. By equating the state's retained governmental interest with the police powers, the court foreshadowed the demise of the *jus publicum* as a separate stick in the bundle of rights comprising the totality of interests in sovereignty lands. *See infra* notes 315-21 and accompanying text.

205. *See* Hayes v. Bowman, 91 So. 2d 795, 798 (Fla. 1957) ("In our democracy the State's title is in the nature of the sovereign proprietorship as it existed at common law.").

206. In a succession of cases after *Pembroke*, the court consistently upheld the power

public benefit. These retained governmental "sticks" neither diminish the fee simple character of the state's grant nor encumber the grantee's right to exploit his proprietary interest in any manner consistent with the public rights in the waters.

The absolute nature of the grantee's title to sovereignty lands was fortified in *Holland v. Fort Pierce Financing & Construction Co.*[207] A private company had acquired title to sovereignty land by bulkheading and filling to the channel pursuant to a general grant under the 1921 Riparian Act. Subsequently, the legislature by special act attempted to vest the Trustees with the title and authority to sell the filled sovereignty land.[208] When the company sought to prevent a sale by the Trustees on the ground that the special legislation constituted a deprivation of private property, the Trustees challenged the company's title under the Riparian Act.[209]

In resolving the conflict between the statutes, the court ruled that the 1921 Riparian Act constitutionally alienated sovereignty lands,[210] and that the riparian owner's title to those lands, once filled, became "absolute and equal to that of the upland."[211] The court rejected the Trustees' contention that such legislation was necessarily inconsistent with the public trust, explaining: "[I]f the grant of sovereignty land to private parties is of such nature and extent as not to substantially impair the interest of the public in the remaining lands and waters it will not violate the inalienable trust doctrine."[212] The court decided that the company's title, once perfected under the Riparian Act, could not be divested by subsequent legislation; instead, the public's use of the waters "must yield to the paramount proprietary right of the riparian owner."[213]

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of the legislature to control the disposition and exercise of rights in sovereignty lands. A statute authorizing the Trustees to grant permits for the construction of public recreational facilities was approved in Hicks v. State *ex rel.* Landis, 116 Fla. 603, 607-08, 156 So. 603, 604 (1934). In Adams v. Elliott, 128 Fla. 79, 174 So. 731 (1937), the court recognized that although the primary uses of beaches were for public swimming and recretation, a statute authorizing the use of the beach as a public highway "is a valid exercise of the sovereign power of the state in the premises." 128 Fla. at 87, 174 So. at 734. In Watson v. Holland, 155 Fla. 342, 20 So. 2d 388 (1945), the court upheld the authority to lease oil and gas rights in sovereignty lands even without public notice. The legislature's grant of authority to allow the Trustees to sell sovereignty lands was actually praised by the majority in Caples v. Taliaferro, 144 Fla. 1, 7, 197 So. 861, 863 (1940).

207. 157 Fla. 649, 27 So. 2d 76 (1946).

208. *Id.* at 652, 27 So. 2d at 78.

209. *Id.* at 652-53, 27 So. 2d at 78-79.

210. *Id.* at 656-57, 27 So. 2d at 80-81. *See supra* notes 183-85 and accompanying text.

211. 157 Fla. at 656, 27 So. 2d at 80. This ruling settled the confusion arising out of the prior decision in Trumbull v. McIntosh, 103 Fla. 708, 138 So. 34 (1931), where Justice Whitfield had mistakenly held that the statutory rights "vested in the owner of the upland *at the effective date of the statute*" and that "[f]illing in and improving gave no new title to the submerged land." *Id.* at 712, 138 So. at 35 (emphasis added). Ironically, an earlier federal court decision had correctly interpreted the act as a conditional grant under which the riparian proprietor acquired title only when the lands were bulkheaded and filled in. Commodore's Point Terminal Co. v. Hudnall, 3 F.2d 841, 845 (S.D. Fla. 1925).

212. 157 Fla. at 657-58, 27 So. 2d at 81. *See also* Hayes v. Bowman, 91 So. 2d 795, 799 (Fla. 1957).

213. 157 Fla. at 658, 27 So. 2d at 82. On this point, the Florida court adopted a position

Under *Holland,* once the state has determined that the exercise of private proprietary rights in a specific parcel or an entire category of sovereignty lands will not substantially impair the public interests in the remaining lands and waters, and has conveyed such rights pursuant to legislative authority, both the state and the public must honor the grantee's vested proprietary interests. The juxtaposition of this perception of the public trust against that of the *Gerbing* opinion reflects a swing of the ideological pendulum from one extreme to another during the two intervening decades. The court moved from a restrictive view recognizing state authority to grant only limited parcels of sovereignty land, to a liberal approach acknowledging virtually absolute legislative authority to alienate the whole bundle of sticks. At both extremes, the court treated the ownership issue in terms of absolutes.

The 1962 case of *Gies v. Fischer*[214] ultimately defined the contours of the relationship between private proprietary interests and retained governmental powers in sovereignty lands. In *Gies,* private persons who had purchased submerged land in Boca Ciega Bay from the Trustees challenged the "Bulkhead Act," which authorized local officials to fix a bulkhead line across their property and to prevent filling beyond that line.[215] After holding the Bulkhead Act applicable to both private and publicly owned sovereignty lands, the court found that the prohibition against filling into the area of the public navigational servitude did not constitute a deprivation of the grantee's proprietary interest; rather, it was merely an exercise of the retained governmental power to which his ownership was necessarily subject. The majority reasoned that a conveyance of sovereignty lands, while vesting in the purchaser all of the grantor's rights of use and control, would, in the absence of "overriding necessity," be invalid if it actually impaired the public servitudes.[216] The landowners had no right to fill beyond the point of the public servitude before the statutory restriction, so the fixing of a bulkhead line merely prevented them from doing what they could not lawfully have done beforehand. Consequently, the court concluded that the legislation could be "sustained as police regulation or an exercise of retained power under the trust doctrine governing sovereign lands."[217]

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directly contrary to that taken by the United States Supreme Court in *Illinois Central,* 146 U.S. at 455, 460-61.

214. 146 So. 2d 361 (Fla. 1962).

215. The statute empowered the local governing body to establish a line "beyond which a further extension creating or filling of land or islands outward into the waters . . . shall be deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of this state are inalienably impressed." *Id.* at 362 n.2. 1957 Fla. Laws, ch. 57-362. The "Bulkhead Act" also repealed the Riparian Act of 1921. *Id.* § 9. *See, e.g.,* Helliwell v. State, 183 So. 2d 286 (Fla. 3d D.C.A. 1966). In attacking this provision, the landowners contended that the statute "could not lawfully authorize the establishment of a bulkhead line, for any reason, upon submerged lands to which [they] hold title by deraignment from a duly confirmed conveyance from the trustees . . . ." 146 So. 2d at 363.

216. 146 So. 2d at 363. The court also recognized that, as to areas which had already been filled, "the doctrine of estoppel . . . may further bolster title," and might operate "to cut off all residual public rights, or create a conclusive presumption that any subsequent impairment be corrected only by exercise of the power of eminent domain . . . ." *Id.*

217. 146 So. 2d at 363.

Gies confirms that the state can sever proprietary interests in submerged lands and grant them to private owners without sacrificing its inherent governmental power to protect and preserve public easements in the waters. The opinion equates the *jus publicum* with the police power, and strongly suggests that except for retained governmental interests, a conveyance by state officials will effectively vest rights in the grantee to the same extent as a deed between private parties. The *Gies* court also conceded that the filling of submerged lands may, through estoppel, eliminate residual public rights, or create a conclusive presumption that public interests were not initially impaired, so that an exercise of the eminent domain power would be required to correct any subsequent impairment of those interests.[218] The majority indicated that rights conveyed by the state may constitute private property, which cannot be recovered without payment of just compensation.

The just compensation issue came to the surface in *Zabel v. Pinellas County Water & Navigation Control Authority*.[219] In *Zabel*, other private owners of submerged land in Boca Ciega Bay who had acquired title from the Trustees before the Bulkhead Act contested the denial of permission by local authorities to fill their subaqueous property. The supreme court emphasized that the landowners' right to bulkhead and fill, although subject to reasonable regulation under the police power, was a valuable property right expressly granted in the conveyance from the Trustees.[220] Since that conveyance was presumed to be a valid grant based upon a determination that the public interest would not be impaired, the court placed the burden of showing a change of conditions, to the extent that the exercise of the right to fill would adversely affect the public interest, on the objecting parties rather than the grantee.[221] Consequently, because it was not established that the proposed filling would materially and adversely affect the public interest, the court held that denial of the permit constituted a taking of property without just compensation.[222]

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218. *Id.*

219. 171 So. 2d 376 (Fla. 1965).

220. Indeed, the majority later commented that the statutory rights to bulkhead and fill are the "only present rights attributable to ownership of the submerged land itself." *Id.* at 381. The statement is puzzling when juxtaposed with language from *Gies* and earlier decisions concerning the extent of proprietary rights conveyed by the state's grant. Properly, it should be observed that the grant carries with it all interests which are not inconsistent with the public rights, such as the right to mineral deposits. *See, e.g.*, Watson v. Holland, 155 Fla. 342, 20 So. 2d 388 (1945); State *ex rel.* Peruvian Phosphate Co. v. Board of Phosphate Comm'rs, 31 Fla. 558, 12 So. 913 (1893); State v. Black River Phosphate Co., 27 Fla. 276, 95 So. 205 (1891).

221. 171 So. 2d at 380. The majority opined:

> Conceding . . . that, *under certain conditions, a police power regulation could, by prohibiting filling or dredging, deprive the owner of any valuable use of his property,* it is clear that such regulation can be valid only if a material adverse effect specified by the legislature is proven. Such regulation, absent proof of an overriding public necessity, constitutes the taking of private property without just compensation.

Id. at 379-80 (emphasis added).

222. *Id.* at 381. Undoubtedly, the adoption in 1968 of a constitutional provision embodying the public trust doctrine was attributable in part to *Zabel*. FLA. CONST. art X, § 11.

Zabel in effect elevated the proprietary interests of the state's grantee to a level of parity with the state's governmental powers by requiring the state to demonstrate an overriding necessity for exercising governmental power before private rights can be taken without compensation. The decision would appear to have undermined the basic precept of the public trust doctrine, that private interests in sovereignty lands must remain subject to the exercise of governmental power for the protection of public rights. A close reading, however, reveals that *Zabel* was predicated more on the notion that the Trustees' initial determination that the grant was not adverse to the public interest worked a kind of estoppel, which prevented the state from subsequently asserting a contrary position, absent a change of circumstances.

The rationale of *Gies* and *Zabel* revealed a new perspective on private rights in sovereignty lands by suggesting that the grantee's title could be equated with the ownership of nonsovereignty land; that the retained governmental trust power could be equated with the police power; and that the state could be estopped from exercising its authority to prohibit the grantee's use of the property without payment of just compensation. These concepts, clearly irreconcilable with traditional public trust philosophy, constituted the raw materials from which courts constructed contemporary Florida law.

The Emergence of Estoppel Principles

Even before *Gies* and *Zabel,* the Florida Supreme Court had established that the state could be estopped, by long acquiescence and collection of taxes, to deny the validity of technically defective prior deeds purporting to convey public lands.[223] The court in *Trustees of the Internal Improvement Fund v. Claughton*[224] applied the doctrine of equitable estoppel against the state to quiet title to sovereignty lands that had been filled, but never purchased from the Trustees.[225] Rejecting the contention that application of this doctrine would improperly transfer public rights held in trust, the court concluded

223. *See* Daniell v. Sherrill, 48 So. 2d 736 (Fla. 1950). Estoppel doctrines are designed to ensure fairness where strict application of the law would yield unseemly or unjust results. *See, e.g.,* Griffin v. Bolen, 149 Fla. 377, 5 So. 2d 690, 693 (1942). The use of estoppel principles in the adjudication of rights in sovereignty lands had been foreshadowed by Perky Properties, Inc. v. Felton, 113 Fla. 432, 151 So. 892 (1934). On the distinction between ordinary "public lands" and sovereignty lands, see State *ex rel.* Town of Crescent City v. Holland, 151 Fla. 806, 10 So. 2d 577, 587-90 (1942).

224. 86 So. 2d 775 (Fla. 1956).

225. The property at issue was a 20.7 acre island in Biscayne Bay. Although five acres of the island had been validly purchased as sovereignty lands from the Trustees, the remaining acreage had been added through the deposit of spoil from a federal dredging operation in an adjacent channel. *Id.* at 777-82. The filling had been authorized by the City of Miami, but the sovereignty land on which the filling was done had never been purchased from the Trustees. The landowners contended that the original purchase of the five-acre parcel of sovereignty land entitled them to bulkhead and fill the adjoining bottomland under the 1921 Riparian Act. *Id.* at 782. The court rejected this theory, however, finding that the right to fill granted by the riparian acts did not apply to grants of sovereignty lands; a grantee of sovereignty lands could fill the acreage actually deeded by the Trustees, but only a purchaser of riparian uplands was given the statutory authority to fill the contiguous submerged lands. *Id.* at 787-89.

that estoppel could be invoked even against the state's sovereignty interests when necessary to prevent manifest injustice, provided it did not interfere with the exercise of governmental power.[226]

Despite broad language, *Claughton* did not imbue the doctrine of equitable estoppel with sufficient force to divest the state of all interests in all sovereignty lands. The court merely ruled that since the state can convey its proprietary rights in the same manner as do private landowners, equitable estoppel should operate as it would against any other landowner.[227] By cautioning that the doctrine cannot interfere with the exercise of governmental power, the court limited the application of estoppel to those rights which the state could have expressly granted to the private claimant.[228]

Trustees of the Internal Improvement Fund v. Lobean[229] employed a similar rationale in applying legal estoppel to defeat the state's claim in a parcel of sovereignty land mistakenly sold by the Trustees through a concededly void deed. The Trustees attempted to sell the same land again on the theory that the void deed was ineffective to convey sovereignty lands, but the court held that the Trustees were legally estopped by having purported to deed lands which they had authority to convey.[230] Inferentially, to the extent that the state could sell the land, its interest could be divested by the same legal principles that applied to private landowners.[231] In a special concurrence joined by all the court's participating members, Justice Drew stressed that when the state engages in the business of selling land, a nongovernmental function, it is subject to the same rules and regulations that apply to private citizens.[232]

226. 86 So. 2d at 789-90.

227. *Id.* at 792.

228. It was possible in *Claughton* to hold that equitable estoppel operated to quiet title absolutely in the private landowner, subject only to the same police powers that are applicable to all property, because the case actually involved only sovereignty lands which had been filled and thereby relieved of the trust. See *supra* text accompanying note 170. *See also* Oliphant v. State, 381 Mich. 630, 637, 167 N.W.2d 280, 283 (1969) (court rejected state assertion that it continued to own a trust interest in filled and developed submerged lands, and noted that the lands, once filled, "lost their value for such trust purposes.").

229. 127 So. 2d 98 (Fla. 1961). As the distinction was explained in *Claughton*, legal estoppel "exclude[s] evidence of the truth and the equity of the particular case to support a strict rule of law, on grounds of public policy," while equitable estoppel prevents a party from asserting rights when his conduct determines it would be against equity and good conscience. 86 So. 2d at 791 (quoting Horn v. Cole, 51 N.H. 287, 291 (1868)).

230. 127 So. 2d at 103. The court clearly indicated, however, that legal estoppel precludes a party from repudiating its facially valid deed, regardless of whether that party at the time of the deed actually had authority to convey the property. *Id.* at 102. The court suggested that the doctrine of "after-acquired title" could operate to vest sovereignty lands in a grantee who had received a deed from the Trustees purporting to convey a different kind of public lands at a time when they had no statutory authority to grant sovereignty lands. *Id. See* Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976), confirming *Lobean*'s statement and thus overruling statements to the contrary in Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927). *See supra* note 199.

231. 127 So. 2d at 102. The court acknowledged a limitation on the estoppel doctrine by noting that "[t]he authority of the Trustees to sell said lands is at all times subject to the various trusts named in the act." *Id.* at 103.

232. *Id.* at 104 (Drew, J., concurring). *Accord* Oliphant v. State, 381 Mich. 630, 167 N.W.2d 280 (1969).

By employing this reasoning, the court for the first time approved a divestment of the state's title to lands actually submerged under navigable waters by a conveyance not conforming with prescribed legislative authority.

The court subsequently defined the outer limits of *Claughton* and *Lobean* by ruling that estoppel doctrines could not be invoked to create title, but only to "bolster a paper title" from the state.[233] The application of equitable principles to divest the state of its ownership interests in sovereignty lands, however, was predicated not on the claimant's possession of paper title,[234] but on the state's conduct concerning the lands and its purpose in pursuing the claim.[235] At the very least, *Claughton* and *Lobean* establish that when a private person receives paper title to sovereignty lands from the state, even if the deed is technically void for purporting to convey a different class of lands, state acquiescence in the exercise of private rights on the land may warrant the invocation of estoppel to quiet the grantee's title.[236]

The retreat from the rule that sovereignty land could pass into private ownership only pursuant to valid legislative authorization was accelerated by implicit reliance upon estoppel principles in *Trustees of the Internal Improvement Fund v. Wetstone.*[237] In *Wetstone,* the Trustees had issued a deed of swamp and overflowed lands, which actually encompassed some lands beneath navigable waters, prior to obtaining statutory authority to convey sovereignty

233. Bryant v. Peppe, 238 So. 2d 836, 838 (Fla. 1970) (where a strip of sovereignty land had suddenly emerged after a hurricane, the adjoining riparian landowners did not acquire title through equitable estoppel merely by paying taxes on the property). *But see* J. POMEROY, 3 EQUITY JURISPRUDENCE § 802, at 180 (5th ed. 1941), stating that the "practical effect" of equitable estoppel is "to create and vest opposing rights in the party who obtains the benefit of the estoppel."

234. In an effort to distinguish *Claughton,* which involved lands that had been filled but never deeded by the Trustees, the majority in Bryant v. Peppe, 238 So. 2d 836 (Fla. 1970) suggested that because the disputed parcel had been statutorily granted to the City of Miami before being quitclaimed back to the Trustees, it was "not sovereignty but city-owned land." *Id.* at 838. Since it is clear that Claughton had never obtained a paper title to the filled land, the majority was apparently trying to establish that the title which was divested by equitable estoppel was not the state's. Yet the title had been quitclaimed back to the Trustees by the city at the time of the decision, and the majority itself acknowledged that the doctrine operated to "cut off" certain residual state interests. If the characterization was intended to imply that the Trustees were not holding title as "the state," it ignores the fact that all lands held by the Trustees are by statute state-owned. *See* FLA. STAT. § 253.03(1) (1981). In reality, the key difference between the two cases is that in *Claughton,* the title to the land had been *conveyed* by the state (to the City of Miami) and the land had been raised by deliberate filling, which the state could have prevented; in *Peppe,* the title had never left the government's control. Thus, the critical factor was not that the landowners did not have a paper title emanating from the state, but that the state had acted like a proprietor in *Claughton* by intentionally divesting itself of the land and allowing its character to be altered, while in *Peppe* the state had never dealt with the land in anything other than a purely governmental capacity.

235. Conduct is the principal basis of equitable estoppel. J. POMEROY, *supra* note 233, at § 802, at 180.

236. *See* Commentary, *supra* note 142, at 741-43 (criticizing the use of estoppel to divest state sovereignty land titles). *See also* City of Long Beach v. Mansell, 3 Cal. 3d 462, 91 Cal. Rptr. 423, 476 P.2d 423 (1970).

237. 222 So. 2d 10 (Fla. 1969).

lands.[238] The grantee claimed that his title, as described in the deed, extended to the meander line of the original government survey, even though the meander line was located as far as a quarter mile offshore beyond the mean high water line. Paying lip service to the rule that sovereignty lands cannot be conveyed without lawful authority,[239] the court held that where the Trustees have deeded lands to private grantees, then subsequently contend a portion of the property was beneath navigable waters, the state has the duty and burden to establish the true boundary between the sovereignty lands and private uplands.[240] Because the Trustees had failed to locate the mean high water line, the court implicitly ascribed an estoppel effect to the deed and ruled that the meander line constituted the boundary.[241] The practical result of the judgment was to divest the sovereignty lands lying between the true mean high water line and the meander line from the state and to quiet title in the Trustees' grantee.[242]

Another variation of the estoppel theory has been suggested as a means of divesting the state of sovereignty lands when an artificial lowering of the water table exposes previously submerged sovereignty lands.[243] Although a change in a navigable lake's ordinary high water line precipitated by unnatural or unlawful causes would not ordinarily transfer ownership of any exposed sovereignty land from the state to a private riparian owner, the court noted that "[a]cquiescence or failure by the State to restrain an artificial lowering of the water table for a long period might constitute laches or estoppel. . . ."[244]

238. Wetstone's deed was issued by the Trustees in 1905, but the Trustees did not acquire the power to sell the disputed sovereignty lands until 1917. *Id.* at 12. *See also* 1917 Fla. Laws, ch. 7304.

239. *See, e.g.*, Pierce v. Warren, 47 So. 2d 847 (Fla. 1950); Martin v. Busch, 93 Fla. 525, 112 So. 274 (1927); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 47 So. 253 (1908).

240. 222 So. 2d at 13.

241. *Id.* at 14.

242. This point was stressed in a lengthy dissent by Chief Justice Ervin, who concluded that the majority's result effectively overruled *Martin v. Busch*. *Id.* at 14-19 (Ervin, C.J., dissenting). *See supra* note 199. Nonetheless, the *Wetstone* principle has consistently been followed. *See* State of Florida Bd. of Trustees of the Internal Improvement Trust Fund v. Charley Toppino & Sons, 514 F.2d 700 (5th Cir. 1975); State Bd. of Trustees of the Internal Improvement Trust Fund v. Laney, 399 So. 2d 408 (Fla. 3d D.C.A. 1981); Florida Bd. of Trustees of the Internal Improvement Trust Fund v. Wakulla Silver Springs Co., 362 So. 2d 706 (3d D.C.A. 1978), *cert. denied*, 368 So. 2d 1366 (Fla. 1979).

243. State v. Florida Nat'l Properties, Inc., 338 So. 2d 13, 18-19 (Fla. 1976).

244. *Id.* at 18-19. The court also held that the legislature could not constitutionally enact a law fixing specific and permanent boundaries between sovereignty lands and riparian uplands, since an inflexible boundary would deprive the landowner of his riparian right to future alluvion or accretions, and thus amount to a taking of his property without just compensation. *Id.* at 17. The act invalidated in *Florida National Properties*, FLA. STAT. § 253.151 (1975), was designed to settle the extent of state ownership in Florida's meandered fresh water lakes by providing a statutory method for establishing the boundary between the submerged beds, which were to be designated as a separate class of sovereignty lands, and the riparian uplands. The legislature's reliance on meandering as the criterion for determining state ownership was reminiscent of the earlier phosphate legislation, *see supra* notes 165-67 and accompanying text, and would later be read as evincing a legislative intent to treat nonmeandered lakes as subject to private ownership. *See* Odom v. Deltona Corp., 341 So. 2d 977, 982-85 (Fla. 1976); *see also infra* notes 270-71 and accompanying text.

The court implied that the state has an affirmative duty to monitor activities that might affect its title to sovereignty land and that the neglect of its duty may operate to divest the state of such title. This dictum fits squarely in line with the trend toward assessing the state's legal rights by the same standards applicable to private persons.[245]

The Marketable Record Title Act: Merger of Statutory and Judicial Doctrines

The trend toward desanctification of state interests in sovereignty lands has continued, despite inclusion of the public trust doctrine in the 1968 Florida Constitution[246] and the concurrent emergence of the environmental movement as a political force. In 1969, the legislature completed the process begun in 1913[247] by granting the Trustees authority to sell all classes of state-owned sovereignty lands.[248] A more significant development, however, was the judicial recognition of the Marketable Record Title Act (MRTA) as a means of confirming private titles in alleged state-owned sovereignty lands.[249]

Although enacted in 1963, MRTA was not considered in a submerged lands case until 1973. In *Sawyer v. Modrall*,[250] Sawyer sought to enjoin Modrall and the public generally from navigating across a portion of the intracoastal waterway covering land to which Sawyer claimed title under an 1890

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245. *See, e.g.*, City of Eustis v. Firster, 113 So. 2d 260 (Fla. 2d D.C.A. 1959).

246. FLA. CONST. art. X, § 11 provides:

> *Sovereignty lands.* The title to lands under navigable waters within the boundaries of the state, 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 use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

Id. Before a 1970 amendment, adopted under a legislative proposal, H.J.R. RES. 792 (1970), the last two sentences were joined so that both sales and private use of sovereignty lands could be permitted when "not contrary" to the public interest. *See* Note, *supra* note 99, at 599 n.23. This constitutional provision has been characterized as a confirmation of Florida's common law public trust doctrine and an acknowledgment that some sovereignty lands had in fact been alienated by the state. Odom v. Deltona Corp., 341 So. 2d 977, 981, 987 (Fla. 1976).

247. *See supra* notes 187-89 and accompanying text.

248. 1969 Fla. Laws, ch. 69-308, § 1 amended FLA. STAT. § 253.12, to include the title to navigable fresh water lakes, rivers, and streams. Prior to the 1969 amendment, § 253.12 provided that title to state sovereignty lands "[e]xcept submerged lands heretofore conveyed by deed or statute, and submerged lands in navigable freshwater lakes, rivers and streams" were vested in the Trustees.

249. FLA. STAT. ch. 712, enacted by 1963 Fla. Laws, ch. 63-133. *See, e.g.*, Starnes v. Marcon Inv. Group, 571 F.2d 1369 (5th Cir. 1978); Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976); Board of Trustees of the Internal Improvement Trust Fund v. Paradise Fruit Co., 414 So. 2d 10 (Fla. 5th D.C.A. 1982); State Dep't of Natural Resources v. Contemporary Land Sales, Inc., 400 So. 2d 488 (Fla. 5th D.C.A. 1981); State Bd. of Trustees of the Internal Improvement Trust Fund v. Laney, 399 So. 2d 408 (Fla. 3d D.C.A. 1981); Sawyer v. Modrall, 286 So. 2d 610 (4th D.C.A. 1973), *cert. denied*, 297 So. 2d 562 (Fla. 1974).

250. 286 So. 2d 610 (4th D.C.A. 1973), *cert. denied*, 297 So. 2d 562 (Fla. 1974).

deed from the Trustees.[251] Sawyer contended that the original deed vested fee simple title in him since there was no express reservation of rights or interests in favor of the state.[252] Addressing the effect of MRTA on Sawyer's claim,[253] the district court focused on the Act's operative provision declaring void any private or governmental interest based on transactions that occurred prior to the root of title,[254] except rights reserved by the federal or state government in the original patent or deed.[255] The court read this provision literally and concluded that MRTA required an express reservation by the state of its interests in sovereignty lands.[256] Since the 1890 deed contained no explicit reservations, Sawyer had clear title to the submerged land.[257] The Florida Supreme Court denied certiorari over a vigorous dissent.[258]

In effect, the *Sawyer* court viewed MRTA as a manifestation of legislative intent to place the state on the same footing as a private landowner when

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251. 286 So. 2d at 611. Sawyer also sought damages for trespass resulting from a slight encroachment of Modrall's seawall onto Sawyer's submerged property.

252. 1885 Fla. Laws, ch. 3641, and 1889 Fla. Laws, ch. 3995, required the Trustees to convey nearly 350,000 acres of land to the Florida Coast Line Canal & Transportation Company. The title to Sawyer's parcel originated in the 1890 deed which was executed pursuant to those acts. 286 So. 2d at 611, 613.

253. Although the district court initially determined that Modrall was precluded from collaterally attacking the Trustees' deed, it proceeded "in the interest of a complete exposition of all the appeal facets" to address the "reframed dispositive issue" of whether the Marketable Record Title Act "operated to quiet plaintiff's title" to the sovereignty lands in dispute. 286 So. 2d at 611-12. The court's treatment of the standing issue reflects a lack of sensitivity to the distinction between governmental and proprietary interests. In prior decisions prohibiting collateral attacks on Trustees' deeds, the third party was asserting a personal interest. *See* Pembroke v. Peninsular Terminal Co., 108 Fla. 46, 73-74, 146 So. 249, 257-58 (1933). *See also* Morgan v. Canaveral Port Authority, 202 So. 2d 884, 886 (Fla. 4th D.C.A. 1967); Conoley v. Naetzker, 137 So. 2d 6, 8-10 (Fla. 2d D.C.A. 1962). Sawyer, by contrast, sought to vindicate a public right protected by the trust doctrine. 286 So. 2d at 611.

254. FLA. STAT. § 712.04 (1981). Interests pre-dating the root of title will not be extinguished if a notice of claim has been filed within 30 years. *See id.* § 712.05. "Root of title" is defined as "the last title transaction to have been recorded at least 30 years prior to the time when marketability is being determined." *Id.* § 712.01(2). The courts have given an expansive interpretation to this concept, holding not only that an instrument in a chain of title arising out of a void deed could constitute a root of title, *see, e.g.*, Marshall v. Hollywood, Inc., 224 So. 2d 743, 750 (4th D.C.A. 1969), *cert. discharged*, 236 So. 2d 114, 120 (Fla.), *cert. denied*, 400 U.S. 964 (1970), but that the root of title itself may be a "wild" deed. City of Miami v. St. Joe Paper Co., 364 So. 2d 439, 447 (Fla. 1978), *app. dismissed*, 441 U.S. 939 (1979).

255. FLA. STAT. § 712.04 (1981). The court also found that none of the six enumerated exceptions to the act set forth in § 712.03 was applicable. 286 So. 2d at 613. It is noteworthy that the court did not consider relevant the exception for easements or servitudes in use. FLA. STAT. § 712.03(5) (1981). A seventh exception, exempting state title to sovereignty lands, was added in 1978. *See infra* note 306.

256. 286 So. 2d at 613. The court specifically rejected the contention that the proviso was intended to include "*implied* state governmental reservation of title to sovereign lands," holding instead that "the statute should be interpreted so as to require an explicit reservation on the state's part." *Id.*

257. *Id.* at 614.

258. 297 So. 2d 562 (Fla. 1974). In the dissent, Justice Ervin argued that MRTA should not impart validity to deeds of sovereignty lands which were "illegal" at the time of their execution. *Id.* at 562-66 (Ervin, J., dissenting).

dealing with sovereignty property, by abrogating the rule that deeds of public property are subject to an implied reservation of the state's title to lands under navigable waters.[259] If this interpretation meant that MRTA could operate to divest the state of proprietary rights in sovereignty lands, the decision comports with prior judicial recognition of the same policy.[260] On the other hand, if the court was ruling, as the result seems to suggest, that public easements in the waters could be terminated by operation of the Act, it clearly went too far.[261]

Any lingering uncertainties about the legislature's power to alienate the governmental interests in lands under navigable waters were resolved when sovereignty lands became subject to the protection of the Florida Constitution in 1968. The constitutional provision basically embodies the common law public trust doctrine,[262] prohibiting the legislature from divesting the state of the governmental power and duty to protect the *jus publicum,* except where such action is affirmatively determined to be in, or at least not contrary to, the public interest.[263] Thus, wholesale curtailment of governmental powers under a general law like MRTA is clearly impermissible.[264] Since *Sawyer* involved only a dispute between private parties over title to the submerged land, however, the court did not address the Act's effect on the state's governmental powers.[265]

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259. *See supra* note 239 and accompanying text.

260. *See supra* notes 226-32 and accompanying text.

261. *See* Note, *supra* note 57, at 387 ("the grantee of the *jus privatum* takes title just as absolutely as under a conveyance from a private individual, but the *jus publicum* cannot be abdicated or granted."). It is clear that the controverted lands were beneath the waters of the intracoastal waterway, and that Modrall as well as other members of the public had operated boats in these waters. The district court did not rule that Sawyer was entitled to an injunction against such "continuous entry," however, but held only that he had a valid title which conferred standing to assert the claim. 286 So. 2d at 611.

262. *See supra* note 246.

263. There is no specific definition of what constitutes the "public interest." *See* Note, *supra* note 123, at 305 ("Total reliance upon judicial decisions to define the elements comprising the 'public interest' may create a distorted perception of the applicable limits to the trust theory.").

264. Because MRTA became law before the constitutional sovereignty lands provision was adopted, there may be questions concerning retrospective effect and vesting of rights. If, however, the constitutional provision merely "confirmed" common law principles, as suggested in Odom v. Deltona Corp., 341 So. 2d 977, 981 (Fla. 1976), then governmental powers could not have been alienated in any event. The only effect of timing, if any, would be that state proprietary rights which had not become vested in a private claimant by virtue of the Act before 1969 may be subject to question. In 1969, the Trustees were given the power to sell any sovereignty lands, including those under fresh water rivers and lakes, if determined to be "in the public interest," but only after complying with specific statutory procedures which include mandatory publication of notice of intent to sell and, if objections are submitted, a public hearing. 1969 Fla. Laws, ch. 69-308, codified as FLA. STAT. § 253.12 (1969). Since article X, section 11 of the Florida Constitution specifically required such legislative authority, the 1969 act would seem to supersede the 1963 Marketable Record Title Act to the extent of curtailing future divestment of state title to sovereignty lands except by valid deed from the Trustees in compliance with the provisions of FLA. STAT. ch. 253.

265. The absence of the state or the Trustees as parties made the decision technically binding only on the private litigants. *See* Perky Properties, Inc. v. Felton, 113 Fla. 432, 439-40,

The only circumstance under which MRTA might affect state governmental powers would be to bolster fee title in sovereignty lands under waters which have been filled, reclaimed, or otherwise rendered useless to the public. The Florida Supreme Court addressed this situation in *Odom v. Deltona Corp.*,[266] and combined *Sawyer's* construction of MRTA with estoppel principles to forge a new multifaceted framework of analysis for sovereignty land disputes. At issue in *Odom* was the ownership of certain nonmeandered fresh water lakes which were being altered by Deltona Corporation in the development of two residential communities.[267] Deltona sought to enjoin the exercise of state regulatory jurisdiction on the ground that it had acquired fee simple title to the property through uninterrupted chains of conveyances, of record for over thirty years, which originated in federal patents or in deeds of swamp and overflowed lands from the Trustees.[268] The property descriptions in the government patents and deeds, none of which contained express reservations of rights, had included submerged lands, and Deltona or its predecessors had paid all taxes assessed on the property. In opposition to Deltona's claim, the Trustees asserted that the lakes were navigable and, consequently, the submerged beds were state-owned sovereignty lands that could not validly have been conveyed through the post-statehood federal patents or pre-1969 Trustees' deeds.[269]

In a lengthy and detailed order, the trial judge rendered summary judgment for Deltona,[270] initially holding that nonmeandered fresh water lakes which had been conveyed into private ownership by the state without an express reservation of public rights were statutorily classified nonnavigable as a matter of legislative policy, and therefore the lake beds were not state-owned sovereignty lands.[271] The court also ruled that MRTA confirmed the

151 So. 892, 895 (1934); Lopez v. Smith, 145 So. 2d 509, 522 (Fla. 2d D.C.A. 1962). Arguably, the court's entire discussion of the Marketable Record Title Act was unnecessary because Modrall's lack of standing to challenge the deed offered an independent ground for reversal. *See supra* note 253. Alternatively, since the trial court's judgment was premised on the finding that at the time of the conveyance sovereignty land was not legally alienable by the Trustees, the court could have held that whatever authority the Trustees lacked was supplied by the specific legislative acts directing issuance of the deed. *See supra* note 252 and accompanying text.

266. 341 So. 2d 977 (Fla. 1976).

267. *Id.* at 979. For a thorough study of the legal status of Florida's fresh water lakes, see Maloney & Plager, *Florida's Lakes: Problems in a Water Paradise*, 13 U. FLA. L. REV. 1 (1960); Commentary, *supra* note 142, at 730.

268. 341 So. 2d at 979. Although the precise dates of the original conveyances are not provided, the trial court's order notes that most of the government patents and deeds were executed before the turn of the century, but some were issued as late as 1952. *Id.* at 980.

269. *Id.* at 980.

270. The trial court's order is republished in the supreme court's majority opinion. *Id.* at 979-87.

271. *Id.* at 982-85. The trial judge relied principally upon two statutes for this conclusion. FLA. STAT. § 197.228 (1975), specifically provided that "navigable waters" would not include any lakes, ponds, swamps or overflowed lands which had previously been conveyed into private ownership by the federal or state government without reservation of public rights in the waters, and that the beds of nonmeandered lakes conveyed by the Trustees without reservation would be subject to private ownership if the grantee held title and paid taxes for fifty

plaintiff's title, extinguishing the Trustees' claim of sovereignty land status.[272]

The Florida Supreme Court affirmed the order granting summary judgment for Deltona; significantly, however, it did so without ever deciding whether the lakes were in fact navigable.[273] Although the trial court declared the lakes nonnavigable as a matter of law based on the absence of meandering, the majority recognized that navigability is a question of fact,[274] and that the absence of meandering creates only a rebuttable presumption of nonnavigability.[275] Since the *Odom* majority necessarily concluded that the issue of navigability was immaterial,[276] the legal principles upon which the court relied are equally applicable whether the lands were in fact sovereignty or nonsovereignty in character.

The legal foundation of the majority opinion in *Odom* rests upon three

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years. *Id.* This provision was enacted in 1953 as part of a taxation act, and had previously been construed to be merely "a guide for the benefit of tax assessors," not intended as a renunciation of title to state lands. McDowell v. Trustees of the Internal Improvement Fund, 90 So. 2d 715, 717 (Fla. 1956). The other statute, § 253.151, was the same provision that was subsequently invalidated by the supreme court in State v. Florida Nat'l Properties, Inc., 338 So. 2d 13 (Fla. 1976). *See supra* note 244. The trial court did not rely on these statutes as an independent basis for quieting title in *Deltona*, but used them as evidence of a legislative intent to establish "certain conclusive presumptions and limitations of claims" and to "settle uncertainties of status of certain fresh water areas in which private owners have muniments of title purporting to confer valid unconditional ownership." 341 So. 2d at 984. The harmless nature of the trial court's reliance on the invalid statute was confirmed by the supreme court on appeal. *Id.* at 989.

272. 341 So. 2d at 985. The trial court specifically ruled that *Sawyer* "is dispositive adversely of the contention of defendant that claims of sovereignty are not extinguished by the operation of this Act." *Id.* at 985-86. The trial court also held that the criminal penalty for filling, dredging, or pumping in navigable waters without a state permit was unconstitutional because the term "navigable" is too vague a standard for defining criminal conduct. *Id.* at 987.

273. Although the majority opinion by Justice Boyd was adopted by a 4-3 vote, only Justice England dissented from the result of the decision. Justice Sundberg authored an opinion, joined by Justice Overton, in which he dissented only from those portions of the decision holding the Marketable Record Title Act effective to divest the state of sovereignty land and approving the trial court's disposition of the Attorney General's counterclaim to abate a public nuisance. Sundberg's opinion is analyzed *infra* in text accompanying notes 297-305.

274. 341 So. 2d at 988. The court also indicated that navigability at the time Florida became a state "must be determined under federal standards of navigability . . . ." *Id.* This statement warrants qualification. While the federal title test must be applied to determine what lands passed under the equal footing doctrine in an ownership contest between the federal government and a state, wholly intrastate disputes such as *Odom* are governed by the state's own navigability test. *See supra* note 130. In any event, no navigability test was ever applied in *Odom*.

275. 341 So. 2d at 988-89. *But see* FLA. STAT. § 197.228 (1981). Like the Florida Legislature, Congress has acknowledged by law that " 'lands beneath navigable waters' does not include the beds of streams . . . if such streams were not meandered . . . and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person." The Submerged Lands Act, 43 U.S.C. § 1301(f). *See* United States v. Rands, 389 U.S. 121 (1967).

276. Since Florida law strictly prohibits summary judgment unless it is clear that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," FLA. R. CIV. P. 1.510(c), the navigability issue must have been deemed immaterial.

distinct grounds. First, the court adopted *Sawyer*'s unarticulated reasoning that the legislature's enactment of MRTA made it "logical" to insist that the state must operate under the same rules as its citizens. Accordingly, the court held that the Act extinguished the Trustees' claim to lands under navigable waters which had previously been conveyed.[277] Because some of the government deeds were executed as late as 1952, however, MRTA alone was inadequate to resolve the entire controversy.[278] The court therefore reinforced its result by invoking the doctrines of legal and equitable estoppel.[279]

In holding that legal estoppel was applicable to bar the Trustees' ownership claim, the majority reasoned:

> Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation. If the state has conveyed property rights which it now needs, these can be reacquired through eminent domain. . . .[280]

Similarly, the court decided that because public officials had acquiesced in Deltona's development and thereby induced reliance on the apparent lack of any state claim, equitable estoppel prevented the state from renouncing actions taken by earlier officials.[281]

The court's antipathy toward the state officials' renunciation of their predecessors' conveyances was further reflected in its treatment of the rule that a grantee of unsurveyed swamp and overflowed lands takes with notice that the deed impliedly reserves sovereignty lands which the Trustees at the time

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277. 341 So. 2d at 989. In this instance, unlike *Sawyer*, the Trustees were participating litigants, and thus became bound by the ruling.

278. *Id.* at 980. Indeed, there is some doubt as to whether any conveyance dated after 1938 could constitute a "root of title" effective to divest the state of its interests in sovereignty lands. *See supra* note 264. This does not prevent a landowner from "tacking" his ownership to an earlier "root of title" to establish a chain exceeding 30 years in length before 1968; it merely means that those sovereignty lands not deeded out by the government in some form prior to 1938 could not be divested solely by virtue of MRTA.

279. One commentator has suggested that the court's "shotgun approach" may be attributable to "its recognition of the weakness of each of the [three] arguments when viewed individually and a belief that the whole is greater than the sum of the parts." *See* Commentary, *supra* note 142, at 749. This observation overlooks the possibility that no single one of the three bases would have been sufficient to dispose of the entire case. Due to the necessity of a 30-year chain of title, MRTA would not apply to the more recent deeds. Under *Peppe*, estoppel would not preclude the Trustees from asserting title to those lands which had been acquired by Deltona through federal patents rather than state deeds. Moreover, it is at least equally plausible that the court was deliberately engaging in a bit of "overkill" to register its disapproval of the state's conduct.

280. 341 So. 2d at 989 (citing Trustees of the Internal Improvement Fund v. Lobean, 127 So. 2d 98, 104 (Fla. 1961)).

281. *Id.* (citing Trustees of the Internal Improvement Fund v. Claughton, 86 So. 2d 775, 790 (Fla. 1956)).

had no authority to convey.[282] The *Odom* court acknowledged the applicability of this rule in cases where the body of water is obviously navigable,[283] but recognized that the doctrine is limited both by the inherent difficulty of determining whether a small watercourse is navigable[284] and by the actions of state officials after a survey has been conducted.[285]

In effect, the *Odom* majority combined the presumptive effects of meandering with estoppel principles to resolve the Trustees' notice of navigability argument. Under this reasoning, a grantee of unsurveyed land takes with notice that any of the described property shown by the subsequent survey to be under navigable waters could not be included in the deed.[286] When the survey is later conducted, however, the surveyor's failure to meander the watercourse creates a rebuttable presumption of nonnavigability,[287] so the land is presumably nonsovereignty and the implied notice principle is no longer in force. If the state accepts the surveyor's judgment, the grantee is entitled to rely upon these official acts and may exercise the ordinary incidents of ownership over the lands.[288] Eventually, the state will be estopped by its acquiescence from asserting any interests not expressly reserved in the deed.

It was through this reasoning, rather than by examining the lakes' actual navigability, that the court found the lands to be privately owned and not subject to public rights.[289] By denying the state's right to regulate Deltona's

282. *Id.* at 988. The principal authority for this rule was Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927), discussed *supra* note 199. The Trustees asserted in *Odom* that "since Florida became a state in 1845 [they have] held title to sovereign lands beneath the navigable waters of Florida, particularly those beneath fresh navigable waters . . . ." 341 So. 2d at 988. Although it is true that the lands under navigable waters vested in the state as of 1845, *see, e.g.*, United States v. Utah, 283 U.S. 64, 83 (1931), the Trustees did not acquire statutory title to lands under *fresh* navigable waters until 1969. *See supra* note 248.

283. 341 So. 2d at 988. Florida courts have applied the so-called "notice of navigability" doctrine only in cases involving grants of unsurveyed land adjoining concededly navigable waterbodies. Pierce v. Warren, 47 So. 2d 857 (Fla. 1950) (Biscayne Bay); Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927) (Lake Okeechobee).

284. 341 So. 2d at 988. The court also upheld the trial judge's conclusion that the penal provisions of the regulatory statute at issue were unconstitutional because the term "navigable" is excessively vague. *Id.* at 990. *See supra* notes 6 & 272.

285. "[A]t this late date we are not in a position 'to evaluate the work of those surveyors of many decades past' and can merely accept their work as correct, particularly since the state itself has relied upon it constantly since it was completed." 341 So. 2d at 988.

286. *See supra* note 199.

287. 341 So. 2d at 988-89. *See supra* note 147 and accompanying text. Conversely, meandering creates a rebuttable presumption of navigability. Thus, if the waterbody is meandered, the lands are presumed to be sovereignty lands, and it is the grantee's burden to offer evidence in rebuttal if he wishes to establish a private claim to the submerged land as against the state.

288. In rejecting the Trustees' attempt to contest the correctness of the original surveys, the trial court in *Odom* observed that "governmental conveyances were made in reliance on [the surveys] and the grantees had the right to assume the U.S. government and the Trustees were acting lawfully." 341 So. 2d at 984.

289. 341 So. 2d at 989. *See, e.g.*, Osceola County v. Triple E Dev. Co., 90 So. 2d 600, 602 (Fla. 1956) (private ownership of nonnavigable inland lakes is absolute and not subject to any public fishing or boating rights). On the right to use nonnavigable lakes in Florida, *see, e.g.*, Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners Assoc., Inc., 245 So. 2d 609 (Fla. 1971); Sunney Isles Ocean Beach Co. v. Benke, 126 So. 2d 307 (Fla. 3d D.C.A. 1961); Florio v. State *ex rel.* Epperson, 119 So. 2d 305 (Fla. 2d D.C.A. 1960).

dredging and filling operation, the majority seemingly held that MRTA and estoppel principles taken together can annul the state's governmental authority, as well as its proprietary interest. Yet the opinion also suggested that the state can reacquire through eminent domain any property rights needed to enforce its regulations.[290]

The key to unraveling this apparent inconsistency in the majority opinion lies in the court's discussion of state police power, together with the fact that state officials had already acquiesced in some modification of the lake bottoms.[291] The court had earlier recognized that the state's power to preserve the public navigational servitude over privately owned submerged lands could be sustained either as a regulation under the police power or as an exercise of the retained governmental interest under the public trust doctrine.[292] In *Odom,* the majority observed that while the state "has the *inherent police power* to enact such standards and regulations as may be necessary for the public interest relating to the use and development of all public and private water areas, . . . this state regulation must be accomplished in a constitutionally permissible manner."[293] In effect, the *Odom* court simply recognized that the state's governmental interest in sovereignty land is subject to the same constitutional limitations as the state's police power. Certainly, the state could exercise its police power to halt Deltona's development, but only with proper justification and upon payment of just compensation.[294]

Odom did not hold that MRTA itself terminated the state's governmental interest in sovereignty lands; it merely recognized that the state could not use its retained governmental interest to destroy private proprietary rights which had vested in its grantee by virtue of the Act and had been exercised without objection from the state in a manner that only later was determined to be contrary to the public interest. The court acknowledged the state could require private owners to obtain permits before altering submerged lands,[295] but found the imposition of such a requirement unreasonable after the state had acquiesced in Deltona's operations.[296] Thus, MRTA extinguished only the Trustees' claim to proprietary ownership of the submerged lands; the state's governmental power was forfeited by its own conduct.

In a separate opinion,[297] Justice Sundberg found it "inconceivable" that

290. 341 So. 2d at 989.

291. *Id.*

292. *See* Gies v. Fischer, 146 So. 2d 361, 363 (Fla. 1962), discussed *supra* notes 214-18 and accompanying text.

293. 341 So. 2d at 987 (emphasis added).

294. *Id.* at 989.

295. *Id.* at 987.

296. *Id.* at 989.

297. *Id.* at 990 (Sundberg, J., concurring in part and dissenting in part). Joined by Justice Overton, Sundberg concurred in the application of legal and equitable estoppel to confirm Deltona's ownership, but echoed the dissenting views expressed by Justice Ervin in *Sawyer* concerning the effect of MRTA. *Id.* at 990-91. Justice Sundberg also dissented from the majority's decision "insofar as it approves an adverse judgment against the Attorney General upon his counterclaim" to abate Deltona's operations as a public nuisance. *Id.* at 991-92. Since the trial court had simply declined to dispose of that issue, however, the majority did not actually approve an adverse judgment against the counterclaim; it merely

the legislature could divest public trust lands through a general act without requiring an affirmative determination that each grant was not contrary to the public interest.[298] Unless it is regarded strictly as an attack on the wisdom of MRTA, however, this argument necessarily rests upon two assumptions: that governmental power to protect public rights in navigable waters depends upon state ownership of the beds; and that the Act itself operates to terminate the state's governmental interest in sovereignty lands. These assumptions overlook the established relationship between the state's proprietary interests and its retained governmental power under the trust doctrine.

The public trust doctrine focuses on the state's duty and power to preserve the public servitudes in navigable waters, which cannot be alienated so long as the waters remain susceptible to such use. Yet, the line of decisions from *Pembroke* through *Gies* established that private ownership of the submerged lands does not necessarily impair the exercise of governmental power to protect public servitudes in the waters.[299] Courts have consistently permitted the legislature by general law to grant private rights in sovereignty lands to the exclusion of public interests without requiring an assessment for each parcel of the effect on those public interests.[300] Since the Florida Constitution did not limit legislative power in this regard until 1968, the validity of MRTA as a statutory basis for divesting the state of its ownership interests in sovereignty lands could hardly have been questioned at the time of its enactment.[301] Once the Act vested those proprietary interests in the private landowners, of course, they could not be subsequently taken by the state without compensation or proof of an overriding public necessity.[302]

Nonetheless, MRTA did not, and could not of its own force, deprive the state of the retained governmental power to prevent any exercise of proprietary rights actually interfering with the public servitudes. The legislature could not divest the state of its governmental power over navigable waters, just as it could not contract away the state's police powers.[303] The private landowner whose deed contained no express state reservations of proprietary interests, however, was entitled to exercise all "rights of use and control normally accompanying title," subject to the state's inherent power to protect

observed the general policy of not considering questions that were not passed upon by a lower court.

298. *Id.* at 990.

299. "[P]ublic rights in navigable waters generally are well recognized, and private ownership of the bed is not inconsistent with public rights in the use of the water." F. MALONEY, S. PLAGER & F. BALDWIN, WATER LAW AND ADMINISTRATION 61 (1968). *See also infra* note 319 and accompanying text. Even Justice Ervin conceded that "public rights arising incident to the navigable character of a waterbody . . . are not theoretically inconsistent with the fact that the bed of the waterbody may be privately owned." Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners Assoc., Inc., 245 So. 2d 609, 617 (Fla. 1971) (Ervin, C.J., dissenting).

300. Illustrative of these statutes are the Riparian Acts of 1856 and 1921. *See supra* notes 150-52 & 193 and accompanying text.

301. *See supra* notes 246 & 264.

302. Zabel v. Pinellas County Water & Navigational Control Authority, 171 So. 2d 376, 379-80 (Fla. 1965).

303. *See, e.g.*, Tampa N. R.R. v. City of Tampa, 91 Fla. 241, 107 So. 364, 365 (1926).

the public use of the water.[304] If the landowner engaged in activities jeopardizing public rights, the state could intervene and prevent further damage. If the state permitted the landowner's conflicting use to proceed without protest, however, it could not subsequently reverse its position and deprive the individual of the fruits of his labor, at least not without appropriate justification and compensation.[305]

Odom therefore stands for the proposition that MRTA operates to vest in a grantee of sovereignty lands, whose chain of title extends back at least to 1938,[306] the right to exercise all proprietary interests in the lands.[307] If the

304. Gies v. Fischer, 146 So. 2d 361, 363 (Fla. 1962).

305. 341 So. 2d at 989. The United States Supreme Court has taken the same position with respect to the federal navigational servitude. In Kaiser Aetna v. United States, 444 U.S. 164 (1979), the Court held that the acquiescence of the Corps of Engineers in Kaiser Aetna's dredging of a pond as part of a residential development precluded a subsequent assertion of the navigational servitude in the waters without compensation to the developer.

> While the consent of individual officials representing the United States cannot "estop" the United States, . . . it can lead to *the fruition of a number of expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property* . . . . And *even if the Government physically invades only an easement in the property, it must nonetheless pay just compensation.*

Id. at 179-80 (emphasis added) (citations omitted). Of course, if the waters were filled in to become dry land, all public rights in the waters would be severed, and the retained governmental trust power would terminate. *E.g.*, State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640, 650 (1893).

306. In 1978, the legislature limited the effect of *Odom* by amending the Marketable Record Title Act so as to exclude from its operation "[s]tate title to lands beneath navigable waters acquired by virtue of sovereignty." 1978 Fla. Laws, ch. 78-288, *codified at* FLA. STAT. § 712.03(7) (1981). Although the Florida Supreme Court has recently declined to address the question whether the 1978 amendment operates retrospectively, Askew v. Sonson, 409 So. 2d 7, 8-9 (Fla. 1981), other Florida appellate decisions have confirmed that retroactive application of the amendment would be unconstitutional, and that since there was no legislative expression of intent for retroactive application, this new exception has only prospective effect. Board of Trustees of the Internal Improvement Trust Fund v. Paradise Fruit Co., 414 So. 2d 10, 11 (Fla. 5th D.C.A. 1982); Laney v. State Bd. of Trustees of the Internal Improvement Trust Fund, No. 79-1192, Final Summary Judgment at 7 (16th Cir. Ct. June 30, 1980), *aff'd*, 399 So. 2d 408 (Fla. 3d D.C.A. 1981). *See also* State Dep't of Natural Resources v. Contemporary Land Sales, Inc., 400 So. 2d 488, 492 & n.4 (Fla. 5th D.C.A. 1981).

307. The extent of the landowner's freedom under the trust is appropriately described by an informal opinion of the California Attorney General:

> The owner of lands subject to the public trust *may use the property as he sees fit*, subject to the power of the State to abate (prevent or remove) any nuisance or illegal obstruction he may create thereon, and to reoccupy the lands in the event such occupation becomes necessary for trust purposes.

San Francisco Bay Conservation & Dev. Comm'n, SAN FRANCISCO BAY PLAN SUPPLEMENT 442 (Jan. 1969). At least one state has held, however, that while the state may intervene to abate activities which may jeopardize the navigational easement, it may not recover the value of minerals removed from the submerged lands by the private party. State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914). Fraser explains that the use of the minerals in the land "is not part of the common public right and could not be from its very nature." Fraser, *supra* note 11, at 432.

lands have not been so altered as to destroy the navigational servitude, the proprietary rights, although wholly owned by the grantee, continue to be held subject to the public rights in the waters.[308] If, however, the proprietary rights have been exercised so as to impair or destroy the navigational servitude and the state has acquiesced in such usage, estoppel principles will preclude the state from asserting its governmental interests to deprive the grantee of property rights acquired by his investment of labor and capital,[309] in good faith reliance on the state's failure to object, unless the state can prove an overriding necessity and provide just compensation.[310] By employing MRTA and estoppel principles in this fashion, the *Odom* court formulated a workable method of balancing public and private rights in submerged lands. This approach yields predictable results based on considerations of fairness, thereby obviating the uncertainties and inequities inherent in a system under which rights are made to rest on the often obscure physical characteristics of waters at some time in the past.[311]

After *Odom* there remained one significant difference between the state's ability to prevent impairment of public rights under the retained governmental trust authority and the control which it could exert through police power. At least theoretically, the state's latitude as trustee was virtually unfettered. The exercise of police power, on the other hand, has always been circumscribed by the constitutional prohibition against taking property for public purposes without just compensation.[312] With the decision in *Graham v. Estuary Properties, Inc.*,[313] the court completed the conceptual equation between the governmental trust and the general police power. Upholding the assertion of state regulatory authority to prohibit a landowner from developing a vast expanse of environmentally sensitive tidal wetlands, the majority concluded that if the government intervention is designed to prevent a public harm rather than to create a public benefit, denial of permission to alter the character or use of such property is not a compensable taking, but is a legitimate exercise of police power.[314] Because the retained governmental interest under the trust doctrine has traditionally been applied solely to prevent impairment of or to maintain existing public rights in navigable waters, *Estuary Properties* essentially means there is no situation warranting the invocation of the trust authority that would not be as readily remediable by a legitimate exercise of the police power.

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308. H. FARNHAM, *supra* note 1, at 229.

309. *See supra* note 305.

310. "The private right of the grantee is always subject to the law of eminent domain, so that the land may be taken for public use for which it is needed upon due compensation being made." H. FARNHAM, *supra* note 1, at 232.

311. "[A]lthough 'navigable' is one way to describe waters subject to public protection, a navigability criterion is not a necessary one at all for state regulation of public and private usufructuary rights in water." MacGrady, *supra* note 2, at 605. The trial court in *Odom* stressed the difficulty in determining past navigability. 341 So. 2d at 984.

312. *See* U.S. CONST. amend. V.; FLA. CONST. art. X, § 6(a).

313. 399 So. 2d 1374 (Fla. 1981).

314. *Id.* at 1380-83. *See generally* Comment, *Environmental Law: Wetlands Regulation Prevents Harm*, 33 U. FLA. L. REV. 615 (1981).

CONCLUSION AND PROSPECTUS

Odom and *Estuary Properties* represent the culmination of Florida's trend toward "desanctifying" state ownership interests in sovereignty lands and merging the retained governmental interest with general police powers. The synthesis of MRTA with judicially created estoppel doctrines limited the implied reservation principle to the extent that state proprietary interests are treated the same as individual private property rights in the contemplation of the law.[315] Once it was recognized that preservation of public rights in navigable waters did not require state ownership of the underlying lands, there was no reason to prohibit state alienation of such property; and once the power to alienate was acknowledged, there was no reason to treat the state differently than a private landowner dealing with ordinary real property.

The realization that the state's retained governmental power to control the use of navigable waters is not dependent upon ownership of the submerged property has facilitated the conceptual merger of the state's public trust authority with general police powers. It must be remembered that the notion of a distinct governmental interest in navigable waters was the product of an era in which virtually the only rights over the use of property that were accorded legal recognition were those connected with some identifiable interest in the property.[316] Under common law theory, even the sovereign could not regulate the use of property in which he held no ownership rights, at least not without acquiring such rights through eminent domain.[317]

With the expansion of the state's police power in the twentieth century, however, it came to be accepted that the use of private property could be controlled through reasonable regulations, such as zoning.[318] Once it was recognized that both public servitudes in the navigable waters and private development of the underlying lands could be adequately regulated through the police power,[319] there was no longer any need for a distinct governmental trust

315. *Cf.* United States v. General Petroleum Corp., 73 F. Supp. 225, 234 (S.D. Cal. 1946) (the government, in dealing with public mineral lands, acts in a proprietary capacity and is to be treated as would any private landowner), *aff'd sub nom.*, Continental Oil Co. v. United States, 184 F.2d 802 (9th Cir. 1950). *See also* United States v. Midwest Oil Co., 236 U.S. 459, 474-75 (1915).

316. Although some land use controls have existed for centuries in England, they were dictated by practical considerations of economic or social necessity and were predicated upon a corresponding land ownership pattern. These systems "differed from the present, where control rests upon statutory powers conferred on public authorities who do not themselves own the land." W. O. Hart, *Control of the Use of Land in English Law*, in LAW AND LAND 5 (C.M. Haar ed. 1964).

317. *See, e.g.*, W. BLACKSTONE, 1 COMMENTARIES 139. Illustrative of the narrow scope imparted to the police power in regulating the use of privately owned waterbodies is Pounds v. Darling, 75 Fla. 125, 77 So. 666 (1918), in which the court adopted the rule that the police power cannot be invoked to prevent riparian owners from exercising their incidental rights of bathing, fishing, and boating in a private lake, even though the lake was the source of a city's water supply. *Id.* at 134-35, 77 So. 2d at 669.

318. Zoning, as such, did not exist in England or the United States until the twentieth century. *See generally* J. METZENBAUM, THE LAW OF ZONING 7-15 (2d ed. 1955).

319. "[T]he mere granting of property to a private owner does not ipso facto prevent the exercise of the police power, for states routinely exercise a great deal of regulatory authority

interest in sovereignty lands.[320] Thus, when the *Odom* court equated the retained governmental interest with the police power, it hastened the demise of an archaic concept which had outlived its usefulness and become a source of confusion for generations of judges, lawyers, and litigants.[321]

By placing the state's proprietary interests in sovereignty lands on an equal ground with those of private citizens, and by replacing the governmental trust authority with the police power, Florida courts have effectively jettisoned the archaic and amorphous principles of the public trust doctrine in favor of a more familiar framework of analysis. The potential benefits of applying general property law to title disputes and police power principles to regulatory controversies are manifest. Where a legitimate public interest is threatened, there is no need for a determination of title to the land; thus, the costs and complications attendant to the determination of navigability are eliminated.[322] When only proprietary rights are at stake, there is no basis for the state to assert the public trust principle as a pretext for attempting to appropriate without compensation property rights that had, by virtue of the state's own acts or omissions, become vested in a private party — a practice courts have repeatedly condemned.[323] Instead of treating the resolution of disputes over public and private rights as a choice between absolutes, Florida may now achieve the balancing of public rights and proprietary interests originally intended by the trust doctrine.

Application of the governmental/proprietary distinction by Florida courts in resolving the conflict between public and private rights in lands under navigable waters confirms that the public trust doctrine is not concerned with ownership of the submerged lands so long as there is no interference with the public's right to use the navigable waters. The recognition of a severable proprietary interest in submerged lands is consistent with both common law precedent and common sense logic. There are many benefits that can be derived from submerged lands apart from but consistent with public rights in

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over privately owned land." Sax, *supra* note 10, at 489. Without regard to the validity of private titles to sovereignty lands, the public trust interests can be enforced through extensive regulation without raising a constitutional right to compensation. *Id.* at 528 n.174.

320. Other states have reached the same conclusion. *See, e.g.*, MINN. STAT. ANN. § 105.38 (1964). *See generally* Leighty, *Public Rights In Navigable State Waters — Some Statutory Approaches*, 6 LAND & WATER L. REV. 459 (1971).

321. *Odom* has been welcomed by both federal and state courts as a solution to the problem of determining relative rights in sovereignty lands. Starnes v. Marcon Inv. Group, 571 F.2d 1369-70 (5th Cir. 1978); City of Miami v. St. Joe Paper Co., 347 So. 2d 622, 624-25 (3d D.C.A. 1977), *cert. discharged*, 364 So. 2d 439 (Fla. 1978), *appeal dismissed*, 441 U.S. 939 (1979).

322. *See supra* notes 6, 311 and accompanying text.

323. For an excellent illustration of this point, *compare* Oliphant v. State, 381 Mich. 630, 167 N.W.2d 280, 283 (1969) (applying estoppel where the state had conveyed lands, which were then filled and developed, because the lands had "lost their value for . . . trust purposes" and were sought by the state only "for the purpose of enriching the central [general] fund of the State") *with* People *ex rel.* Gazlay v. Murray, 54 Mich. App. 685, 221 N.W.2d 604, 607 (App. 1974) (refusing to apply estoppel to validate a federal patent of submerged lands because the state's objective to prevent the landowner from filling was, unlike its purpose in *Oliphant*, "consistent with holding the land in public trust.").

the waters. It makes no sense to say such interests must be preserved, if their preservation neither enhances nor diminishes the public rights for which the trust was created.

Moreover, the capacity to alienate proprietary interests in sovereignty lands is a natural concomitant of the state's function as trustee for the public's property.[324] Since the state has the power to preserve the public servitudes in the waters, it is in the interest of the state and all of its citizens to permit private development of those resources that are not susceptible to common public use or enjoyment. If the distinction between governmental powers and proprietary rights is properly observed, public and private rights in navigable waters need not conflict, but may be exercised within their respective spheres to the mutual benefit of all.

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324. *See* Note, *supra* note 57, at 390.

> If private persons were allowed to take the proprietary interest of the state in the beds of fresh-water navigable streams, a greater development of the state's natural resources would result . . . . Practically, the use to which such property would be put, and the added revenue from the sale thereof, would better accomplish the "trust" in which the property is sometimes said to be held.

Id.