Stop the Beach Renourishment: A Case of MacGuffins and Legal Fictions

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I. INTRODUCTION

This article attempts to place the Supreme Court of the United States' decision in \textit{Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection (STBR)},\textsuperscript{1} in context of Florida property law. The decision juxtaposed Florida's riparian and littoral rights law against the state's beach renourishment program, all in an attempt to determine whether the judicial branch can be liable for compensable takings of property rights. While the Supreme Court held that no judicial taking occurred, it perfunctorily considered the underlying issues. What were the rights of Gulffront property owners on renourished beaches funded by state and local government? The fundamental issues concerned a simple truth: "Water not only fructifies the soil, but it also delimits the boundaries of land grants."\textsuperscript{2} Further, few battles over property boundaries are as heated, or yet as transitory, as those on the seashore.

The \textit{STBR} court split into three blocs regarding the judicial takings issue. All eight of the justices—Justice Stevens, who owns an oceanfront condominium in Florida, recused himself—held no judicial taking occurred in the case at bar. The court split as follows: Justice Scalia wrote for Chief Justice Roberts, Justices Thomas, Alito, and himself in a plurality, opining that judicial taking is a viable doctrine. They opined that a court effects a taking if it "declares that what was once an established right of private property no longer exists."\textsuperscript{3} Justice Kennedy wrote for Justice Sotomayor and himself in stating that the substantive due process doctrine sufficed to ad-

\begin{itemize}
\item \textsuperscript{1} 130 S. Ct. 2592 (2010).
\item \textsuperscript{3} \textit{Stop the Beach Renourishment, Inc.}, 130 S. Ct. at 2602 (plurality opinion).
\end{itemize}
dress the matter. Justice Breyer wrote for Justice Ginsburg and himself to say that the whole proceeding was unnecessary. Needless to say, much jousting occurred.

In particular, Justice Scalia attacked Justice Kennedy's reliance on the substantive due process doctrine. He emphasized "that the 'liberties protected by Substantive Due Process do not include economic liberties." Justice Scalia accused Justice Kennedy of "Lochner-izing," alleging that Justice Kennedy applied the due process clause in an unseemingly activist manner. Commentators assume Justice Scalia thought he had a fifth vote in Justice Kennedy for holding that a judicial takings doctrine exists. Hence, the antipathy.

The Court gave short shrift to the underlying issue. We do not. I write elsewhere about the STBR decision's impact on landowners' rights to exclude and on public rights of access on Florida's beaches. This article focuses on the myriad changes over two millennia in the law of waterfront ownership in questioning the STBR Court's determination that there is any settled law in Florida regarding who owns what on the waterfront, let alone the purportedly settled law upon which that court relied. The most recent and most settled appeared to support the property owner.

This requires an exegesis of how waterfront ownership law developed. We turn, first, to the development of common law real property rights. From the Norman Conquest forward, we see a broadening of private property rights, followed by increasing regulation. Next, the article addresses public rights in and under navigable waters, before turning to riparian and littoral

4. Id. at 2615-16 (Kennedy, J., concurring).
5. See id. at 2619 (Breyer, J., concurring).
6. Id. at 2606 (plurality opinion).
9. Id. The plurality's failure to gain the fifth vote rendered the underlying, significant private property and public access issues a "MacGuffin." Alfred Hitchcock explained that a MacGuffin is the initial object of the central search in the plot. The characters will risk life and limb to get the MacGuffin. Nonetheless, the MacGuffin ultimately has no significance except to drive the plot. See, e.g., Peter Conrad, The Hitchcock Murders 10 (2001); Donald Spoto, The Dark Side of Genius: The Life of Alfred Hitchcock 145 (Da Capo Press 1999) (1941). Hitchcock would allegedly explain that a MacGuffin was a diversion, like "an apparatus for trapping lions in the Scottish Highlands." Sidney Gottlieb, Framing Hitchcock 48 (2002).
10. See Sidney F. Ansbacher et al., Stop the Beach Renourishment Stops Private Beachowners' Right to Exclude the Public, 12 VT. J. ENVTL. L. 43 (2010).
rights alongside navigable waters, particularly as a category of property law. While the public trust in navigable waters might have originated as a "legal fiction," it is well entrenched in modern case law, and, in Florida, its constitution. We turn to property and waterfront rights law in Florida, with particular emphasis on STBR in the development of Florida's property law. The article concludes that STBR itself turns on what originated as multiple legal fictions regarding Roman, English, federal, and Florida law of both public and private property rights. Nonetheless, the law is binding, regardless of whether it originated in precedent or in social norms.

II. DEVELOPMENT OF PRIVATE REAL PROPERTY RIGHTS

A. William the Conqueror Through the Magna Carta

As we know, American real property law derives principally from English Common Law, and that, in turn, from Roman Law. While Rome delivered

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11. Jane Ball, The Boundaries of Property Rights in English Law, ELECTRONIC J. COMP. L., Dec. 2006, at 1, 2, available at http://www.ejcl.org/103/art103-1.pdf; Charles P. Sherman, The Romanization of English Law, 23 YALE L.J. 318, 318 (1914). Sherman emphasized two phases of Roman law in Britain. Rome occupied from the first century, AD, through the last Roman Legion's withdrawal in 455 AD. Id. Edward Re stated, "Britain was an imperial province of the first order," which had a garrison totaling 30,000 soldiers. Edward D. Re, Speech, The Roman Contribution to the Common Law-The Brendan F. Brown Lecture, 39 LOY. L. REV. 295, 300 (1993). Three of the empire's greatest jurists sat in York at one time. Id. "It was as if the United States Supreme Court were [able] to hold sessions in Alaska." Sherman, supra, at 318. St. Augustine (that Augustine) founded the primate English See of Canterbury in 596. Id. A key convert, Ethelbert, King of Kent, required a legal code ""ac- cording to the Roman mode."" Id. at 318-19 (citation omitted).

Sherman surmised that Augustine and Roman missionaries convinced the King of Kent of the legal primacy of the recently deceased Justinian. Id. Re explains: "It is well established that Gregory [Pope Gregory, who sent Augustine to England] knew the Digest of Justinian." Re, supra, at 302. Regardless, Roman law dominated through the eleventh century. Sherman, supra, at 319-20. The Anglo-Saxon reign in England, from Egbert in 827, followed Roman law. Id. Particularly, Alfred followed Charlemagne's Laws. Charlemagne sought to impose Roman laws, which influenced England by extension. Id. at 319. Sherman opined that Canute might have provided the most expansive legal influence when he ruled Denmark and England. Id. at 319-320. Edward the Confessor left some Roman code behind from his own restored Anglo-Saxon rule after Canute. Id. at 320.

Nonetheless, Sherman states that the turmoil of the occupations of the British Isles and the "rudeness of the Saxon invaders" combined to minimize outside influences during that period. Sherman, supra, at 321. Therefore, had the Norman conquest not occurred, "England seemed in danger of being lost to the civilizing influence of Roman law." Id. at 321.

Professor David Thomas explicates thoroughly the Roman influences on British property law. See David A. Thomas, Anglo-American Land Law: Diverging Developments from a Shared History—Part I: The Shared History, 34 REAL PROP. PROB. & TR. J. 143, 149—
neated between public and private law, England addressed both in "the same set of courts." Accordingly, "the public or private status of the land [was] much less important," as distinguished from France, where different courts address public and private property rights. Nonetheless, "the Crown owns a quantity of assets," including those held for the common good. Of most significance in Florida, the Crown presumptively owns all beaches below the mean high water line.

Supreme Court of Vermont Associate Justice, Denise R. Johnson, addressed the development of American Property Law in a 2007 article:

"The intersection of governmental authority and private owners' rights is one of the more interesting contexts in which to think about the viability of the bundle of rights. It is also the context in which American expectations about liberty and land ownership have been most seriously challenged."

Property law comes from three sources: the common law, statutes, and the Constitution. Common law principles are the primary source of property law. These are principles that have been developed by judicial decision in the United States, starting with the adoption of the common law of England at the beginning of our history.

Professor John Orth tells us that the English real property system has been a form of "feudal" rights since the Norman invasion of 1066 AD. Even today, "all English owners of freehold have a 'tenure' because, rather
confusingly, they are the Queen’s tenants in the sense that they hold (from the Latin ‘tenere’) property rights under her.”

The feudal system, after the 1066 Battle of Hastings, divided Saxon aristocrats’ lands among up to 10,000 Normans, in return for an oath of loyalty to the new king. As one commentator states: “To the conquering Normans nothing was more natural than that English nobles who resisted them should forfeit their land, and that William should grant it again to people on whom he could rely.” As Justice Bryson summed it up: “[T]he legal theory of the Normans was that with the Conquest William had become the owner of all land in England and that he granted it out to his own tenants in chief, who were in a bond of faith with him.”

Mark Senn explains the feudal system in his colorfully entitled article, *English Life and Law in the Time of the Black Death.* He says that feudalism creates a land ownership “pyramid with the king at the top beholden to no one, layers of lords in the middle beholden to their superiors, and serfs at the bottom beholden to everyone.”

The “tenement” was one’s land. The “tenant” held the land. The “tenure” was the interest that the tenant held in one’s tenement.

Senn explicates the way the tenure pyramid functioned:

Generally, a consensus on the terminology of land ownership and social status might be that the king, or crown, was at the top of the pyramid and owned all the land. Beneath the king were the barons, more commonly known as tenants-in-chief or tenants-in-capite, to whom the king granted—or enfeoffed—feoffs, foeds,

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20. Orth, supra note 18, at 74.
22. Id. Orth, supra note 18, at 74, stated the same:
   The legal theory of the effect of the Conquest of England in 1066 by Duke William of Normandy, which made him King William I (“the Conqueror”), was that all land belonged to the king by right of conquest. When William granted out estates to his vassals, he retained his overlordship, which entitled him and his successors to the land when those estates came to an end.
   Id.
24. Id. at 516.
25. Id. at 517.
26. Id.
27. Id.
fiefs, or fees. The tenants-in-chief could either keep their lands or enfeof parts of them to their knights who held knight’s fees sufficient to support their families and owed military service to their lords.28

While William and his successors owned all the land, some tenant had to be seised of the tenement at all times.29 Seisin meant possession, which was “critically important.”30 Whoever was seised in the tenement was responsible to the Crown for that parcel’s services or taxes.31 Senn emphasized that the greatest seisen granted only long possession.32 Only the Crown owned the property.33

Justice Bryson noted one of the fundamental flaws of feudalism:

In the logic of feudalism, the person to whom the king has granted land, who has entered into a bond of homage and fealty, is the only person who can own [or more properly, possess] that land; if that person rebels or dies, the king has no tenant and can keep the land or dispose of it.34

In application, however, the king often agreed to de facto succession by heirs who swore fealty.35 Also, sales to third parties were illegal, as only the vendor held good title.36 This was the origin of warranty deeds, as the purchaser would require the seller to warrant good title out of the king and to indemnify the purchaser against loss.37 Eventually, there were so many “sub-infeudations” from the tenant in chief down the chain that “the feudal system was becoming incoherent.”38

The Domesday Book was one of William’s greatest achievements. This was an “inventory of all the wealth of England.”39 Senn cites authorities variously crediting “avarice, the advancement of royal taxation, or a need to put in order the made [sic] after the Conquest.”40 He wraps up: “In ascribing

28. Senn, supra note 23, at 517 (footnotes omitted).
29. Id. at 518.
30. Id.
31. See id.
32. See id.
33. Senn, supra note 23, at 518–19.
34. Bryson, supra note 21.
35. See id.
36. See id.
37. See id.
38. Id.
39. See Senn, supra note 23, at 533.
40. Id.
a value to the realm, the *Domesday Book* monetized the feudal exchange of loyalty for protection and planted the seeds of royal taxation, centralized government, and a nation-state.”

King Henry I first pursued the new style of “administrative kingship” when he took the throne in 1100. At all times, however, tenure remained. The Crown allowed private ownership in return for services, which ranged from military service to rents and taxes. Henry I “transformed the treasury from a storehouse to a governmental accounting office that could keep better track of royal revenues and the activities of royal officials.” One commentator says: “The main theme of Henry I’s financial and judicial reforms was centralization.” He initiated broad legal reforms, “which, by virtue of their routine nature and wide applicability, were the origins of the common law.” Henry I also created the forebear to the common law judicial system. He was sometimes called the “Lion of Justice” as a result.

Henry I’s grandson, Henry II, restored order after civil wars marred the intervening reign of King Stephen. Henry II had to raise taxes for the Crusades. Professor Joseph Biancalana says Henry II was adept both as king and as feudal lord.

Due process was granted initially to common fee owners under Henry II. “Novel Disseisin” replaced previously arbitrary rights of nobility to throw a freeholder off of lands based on the noble’s unilateral claim in Lords’ court that the freeholder failed to provide services or rents. Henry II created a process under Novel Disseisin where: (1) The hearing went to the royal court; and (2) the defendant enjoyed a presumption of correctness that the noble had to rebut.

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41. *Id.* at 534.
43. *See id.*
44. *See id.; KENELM EDWARD DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY* 95–97 (3d ed. 1884).
46. *Id.*
47. *Id.*
49. *See id.* at 537–38.
53. *Id.* at 94–95.
54. *See id.*
Another major step taken under Henry II was a fuller development of the rights of inheritance. The limitation on these rights? Estate tax. Additional taxes accrued on sales of land. Taxes generally became necessary as the Crown conveyed more lands and could no longer survive on income from its own property.

Justice Bryson noted a major property development under Henry II:

In some legislative act of which we do not have a record Henry made the power of the royal court available to everyone with a dispute about title to freehold land. That is, he made it the business of himself and his court to protect all freehold titles, not only those held directly of the King.

King Henry II gave land disputants a theretofore unavailable option—filing a petition for Writ of Rights. The Crown Court heard these disputes. Previously, the feudal lords themselves alone addressed disputes over the lands they had conferred. Later, Henry created the Grand Assize, which was a panel of twelve knights from the area where the land dispute arose. The panel took testimony under oath and determined the title.

Of course, the defendant retained the right to settle title disputes by combat. Exercise of that option became rarer as the Crown Court system

55. ASSIZE OF NORTHAMPTON (George Burton Adams & H. Morse Stephens trans., 1176), reprinted in SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 20, 21 (George Burton Adams & H. Morse Stephens eds., 1914).


58. Id.

59. Bryson, supra note 21 (emphasis added).

60. Id.

61. Id.

62. Joshua C. Tate, OWNERSHIP AND POSSESSION IN THE EARLY COMMON LAW, 48 AM. J. LEGAL HIST. 280, 296 (2006). Tate says that the writ had antecedents back to William, but Henry II formalized it. Id. at 295–96; see also Senn, supra note 23, at 537–38. In addition to professional judges being less arbitrary than barons or local tribunals loyal to barons, royal courts had another advantage: “[T]hey could make new common law instead of repeatedly enforcing manorial custom.” Id. at 538.

63. Tate, supra note 62, at 296.

64. Id. “The origins of the jury system . . . go [] back at least to the assizes of Henry II, [which were] a means of taking census and collecting taxes.” HUGH H. BOWNES, SHOULD TRIAL BY JURY BE ELIMINATED IN COMPLEX CASES?, 1 RISK 75, 75 (1990).

65. Tate, supra note 62, at 296.
became more commonplace. Trial by combat remained available until 1819.

We remember King John most notably for the Magna Carta. The forces of Pope Innocent III defeated his soldiers in the battles of Normandy, Anjou, and Poitou. The “overtaxed and exasperated barons” of England then presented the Articles of the Barons to him at Runnymede in 1215. The final product was the Magna Carta.

The Magna Carta established modern English Common Law property rights. By far the most chapters devoted to any subject, thirty-eight of the total sixty-three, concerned property rights. Among the most significant issues in the Magna Carta were the Crown’s covenants that it would not take tenements arbitrarily against the desire of the freeholder and the Crown could not encroach against mesne wardships.

Moreover, among the most significant aspects of the Magna Carta that specifically addressed property were:

a) Section 39, providing, “No freeman shall be taken or imprisoned or disseised or any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.” Section 39 thereby provided the template for the Fifth and Fourteenth Amendments to the United States Constitution 575 years later, among other things;

b) Sections 12, 14, and 15, requiring the Crown to obtain consent of its tenants in the predecessor to Parliament before collecting “scuttage” (fee in lieu of military service) or “aid” (taxation).

Senn gets to the heart of the matter:

The unmistakable gravamen of the Magna Carta is the redress of problems that cost the barons money. One of the lasting results of the Magna Carta was the principle of no taxation without representation; the idea was that a tax could not be levied without a vote of the tenants-in-chief. The Magna Carta makes evident that the feudal tenure had been monetized and that the exchange of protection for loyalty had been lost in spirit, if not in word. The limita-

66. See id. at 297.
67. Senn, supra note 23, at 539.
68. See id. at 534–36.
69. Id. at 534.
70. Id.
71. Id. at 534–35.
72. Senn, supra note 23, at 535.
73. GOTTFRIED DIETZ, MAGNA CARTA AND PROPERTY 37 (Charlottesville: University Press of Virginia, 1965).
74. See id.
tion of reliefs to a fixed amount led to inheritability and alienability, but reliefs were destined to fall into desuetude [disuse] when inflation lowered the value of money. The nearest that the Magna Carta came to a philosophical principle was chapter 39, which may be the origin of due process: “No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We [the Crown] proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.”

B. Lord Coke and His Impact on Our Colonial System

As noted above, King Henry II did far more for the general freeholders of England than did the Magna Carta. The latter document, in all iterations, focused on the rights of nobility.

Further, the Magna Carta lay increasingly fallow until Lord Coke used it in the 17th Century as a basis to challenge the despotism of the Stuart monarchy. As the National Archives notes:

Lord Coke’s view of the law was particularly relevant to the American experience for it was during this period that the charters for the colonies were written. Each included the guarantee that those sailing for the New World and their heirs would have “all the rights and immunities of free and natural subjects.”

This, combined with the 1689 English Bill of Rights, established the colonists’ reasonable expectations of, inter alia, private property rights.

Coke acknowledged that “all the lands in England were originally derived from the crowne of England, and are holden of the same mediate or immediately.” Nonetheless, he noted significant protections for subjects. Coke, significantly, contended that the Magna Carta’s rights extended to “all

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75. Senn, supra note 23, at 535–36 (alteration in original) (footnotes omitted). I differ with his assessment that chapter 39 originated modern due process. Henry II arguably did so by creating public hearings at royal court with the presumption of correctness in the defendant under Novel Disseisen.


77. Id.

freemen.” Accordingly, “[N]o freeman could be deprived of his life, liberty or property without a fair trial.”

Coke, and the colonists, followed the dictate of seventeenth English philosopher, John Locke: “The reason why men enter into society is the preservation of their property.”

Blackstone oversimplified matters when he stated that property is a “‘sole and despotic’ relationship between a person and a thing.” He believed “the only obligation was to do no harm to others in the exercise of one’s [property] rights.” Nonetheless, commentators note, accurately, that a property owner of that era held a much larger bundle of sticks than one does in today’s regulatory regime.

Property rights differ from positive rights [conveyed by the sovereign] in another important way: property rights are independent of the state. For example, while the Constitution created the framework for government, expressly limited the powers of government, and provided safeguards against invasions of certain rights, the Constitution did not grant us the rights we have as citizens but recognized pre-existing rights.

C. Development of Property Rights and Vesting Law in American Jurisprudence, with an Emphasis on the Contracts Clause

As stated above, the American colonists believed that property rights were fundamental to free Englishmen. The American Revolution was fought largely to protect those rights. Locke, and therefore, the founders, contended that property rights stemmed from natural law.

81. See Johnson, supra note 17, at 250.
82. Id.
84. Id. (footnote omitted).
85. See Alex Tuckness, Locke’s Political Philosophy, Stanford Encyclopedia of Philosophy, (July 29, 2010), http://plato.stanford.edu/entries/locke-political/. See, e.g., Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in Inaugural Address of the Presidents of the United States, S. Doc. No. 101-10, at 22 (1st Sess. 1989). “[O]ur wish . . . is that . . . equality of rights [be] maintained, and that state of property, equal or unequal, which results to every man from his own industry or that of his father’s.” Id.
The Constitution contained numerous provisions related to property. Chief among them was the Contracts Clause, which barred the states from passing any laws, "impairing the [o]bligation of contracts."\textsuperscript{86} This clause dominated early jurisprudence concerning property rights.

One of the most famous property rights decisions, however, focused on fundamental private property rights stemming from the natural law as framed in the Constitution—\textit{Vanhorne’s Lessee v. Dorrance}.\textsuperscript{87} Justice Patterson rendered a renowned charge to the jury concerning a Pennsylvania law that purported to divest property without compensation: The constitution expressly declares, that "the right of acquiring," possessing, and protecting property is "natural, inherent, and unalienable."\textsuperscript{88} "It is a right not \textit{ex gratia} from the legislature, but \textit{ex debito} from the constitution."\textsuperscript{89}

He stated a maxim of statutory construction that we today think of only when addressing ambiguous ordinances.\textsuperscript{90} Nonetheless, this is stated here as a general maxim of statutes affecting real property: "\textit{Every statute, derogatory to the rights of property, or that takes away the estate of a citizen, ought to be construed strictly.}"\textsuperscript{91}

The early Supreme Court repeatedly addressed, and mostly struck down, state acts for violating allegedly vested property and contractual rights. The more significant decisions are addressed below.

In \textit{Calder v. Bull},\textsuperscript{92} Justice Chase, in one of four concurring opinions, noted that the Ex Post Facto Clause did not apply to civil cases.\textsuperscript{93} Rather, the Contracts Clause applied.\textsuperscript{94} Chase stated, however, in \textit{dicta}, that state legislatures may not "violate the right of an antecedent lawful private contract; or the right of private property."\textsuperscript{95}

In \textit{Fletcher v. Peck},\textsuperscript{96} Chief Justice Marshall wrote for a unanimous Court in holding that Georgia could not rescind any portion of the Yazoo Land Grant.\textsuperscript{97} The Court held that the Contracts Clause barred the state from doing so after title "passed into the hands of a purchaser for a valuable con-

\textsuperscript{86.} U.S. Const. art. I, § 10, cl. 1.
\textsuperscript{87.} 2 U.S. (2 Dall.) 304 (1795).
\textsuperscript{88.} Id. at 310.
\textsuperscript{89.} Id. at 311.
\textsuperscript{90.} See id. at 316.
\textsuperscript{91.} Id. at 316 (emphasis added).
\textsuperscript{92.} 3 U.S. (3 Dall.) 386 (1798).
\textsuperscript{93.} Id. at 387–88.
\textsuperscript{94.} Id.
\textsuperscript{95.} Id. at 388.
\textsuperscript{96.} 10 U.S. (6 Cranch) 87 (1810).
\textsuperscript{97.} Id. at 139.
This decision was rendered in the face of public outrage over widespread fraud. Most of the Georgia legislature was bribed to allow the sale of 30 million acres at less than two cents per acre. The next legislature tried to nullify the “sales.” Marshall held the land grant was a contract and upheld the subsequent sale to Fletcher, who was an innocent purchaser.

Mark Graber reconsidered the significance of Fletcher in 2000. He says that Fletcher “is routinely treated at present as an application of Contracts Clause principles.” Graber contends that analysis is only an alternative rationale for one part of Marshall’s opinion. Marshall emphasizes the purchaser’s acquisition with no knowledge of the initial fraud. Graber summarizes that “Fletcher, in Marshall’s opinion, concerned the power of a state to make naked land transfers, to divest any person whose original acquisition of the property in dispute was valid under common law.” This is not a Constitutional analysis. This is common law contract law. Graber says that Marshall held that Georgia lost under either the Contracts Clause or “by general principles which are common to our free institutions,” to wit, natural and common law. He points to Johnson’s concurrence, which stated that natural law barred Georgia from “revoking its own grants.” Johnson stated further that the Contracts Clause did not apply because the contract terminated upon conveyance. Graber concludes that Fletcher allowed a landowner to sue under the Contracts Clause or common law to challenge expropriation of property.

In Barron v. Baltimore, a wharf owner claimed that the city’s diversion of streams so lowered the water level in front of his wharves that they

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98. Id.
99. See id. at 88–89.
100. Id. at 87–89.
101. Fletcher, 10 U.S. (6 Cranch) at 89–90.
102. Id. at 137, 139.
104. Id. at 79.
105. Id.
106. Id.
107. Id. at 80.
108. Graber, supra note 103, at 80.
109. Id. at 80–81 (quoting Fletcher, 10 U.S. (6 Cranch) at 139).
110. Id. at 81 (quoting Fletcher, 10 U.S. (6 Cranch) at 143 (Johnson, J., concurring)).
111. Fletcher, 10 U.S. (6 Cranch) at 144.
112. See generally Graber, supra note 103.
became economically useless.\textsuperscript{114} Justice Marshall wrote for the Court in holding that there was no private cause of action under the Fifth Amendment.\textsuperscript{115} He opined that the then-extant Bill of Rights restrained only the federal government, so citizens had to rely on state constitutions to protect liberty and property against state action.\textsuperscript{116}

Graber directs us to Stephen Siegel's explication of antebellum constitutional law to understand \textit{Barron}.\textsuperscript{117} Siegel makes a key distinction. The judiciary of the era protected zealously one's possession of property. Conversely, the courts did not protect one's value in that same property.\textsuperscript{118}

The Taney Court substantially limited the then prevalent Contract Clause protections in \textit{West River Bridge Company v. Dix}.\textsuperscript{119} The majority opinion held that a state charter was a contract between the issuing state and the private party, in this case a bridge company.\textsuperscript{120} Nonetheless, the Contracts Clause did not bar states from exercising eminent domain.\textsuperscript{121}

\textit{West River Bridge} merits additional assessment. Justice Daniel, writing for the Court, acknowledged that the Contracts Clause \textit{would} apply to block any impairment of contract, but he did not believe that clause applied:

\begin{quote}
In considering the question propounded in these causes, there can be no doubt, nor has it been doubted in argument, on either side of this controversy, that the charter of incorporation granted to the plaintiffs in 1793, with the rights and privileges it declared or implied, . . . under the inhibition in the tenth section of the first article of the Constitution, could have no power to impair. \textit{Yet this proposition, though taken as a postulate on both sides, determines nothing as to the real merits of these causes.}\textsuperscript{122}
\end{quote}

The majority concluded that the inherent sovereign right of eminent domain is consistent with the inviolability of contracts.\textsuperscript{123}

Justice Woodbury's concurring opinion is noteworthy in stating the following:

\begin{itemize}
\item \textit{Id. at 243–44.}
\item \textit{Id. at 250–51.}
\item \textit{Id. at 248–49.}
\item Graber, \textit{supra} note 103, at 84 (citing Stephen A. Siegel, \textit{Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence}, 60 S. CAL. L. REV. 1, 87 (1986)).
\item \textit{Id. at 87.}
\item 47 U.S. (6 How.) 507, 531–32 (1848).
\item \textit{Id. at 531–32.}
\item \textit{Id.}
\item \textit{Id. at 531 (emphasis added).}
\item \textit{Id. at 532.}
\end{itemize}
I take the liberty to say, then, as to the cardinal principle involved in this case, that, in my opinion, all the property in a State is derived from, or protected by, its government, and hence is held subject to its wants in taxation, and to certain important public uses, both in war and peace. Some ground this public right on sovereignty. Some, on necessity.\textsuperscript{124}

\textit{Stone v. Mississippi}\textsuperscript{125} started to chip away at the primacy of the Contracts Clause doctrine.\textsuperscript{126} In 1867, Mississippi granted a twenty-five year charter to a private corporation to run a lottery.\textsuperscript{127} The next year, the state adopted a new constitution, which barred all lotteries.\textsuperscript{128} It contained a retroactive clause.\textsuperscript{129} Just as the Court had earlier in \textit{West River Bridge} held that a state charter or franchise was not impaired by eminent domain, in \textit{Stone}, the Court held that Mississippi did not impair the lottery charter.\textsuperscript{130} First, the Court held that the charter was a mere license, not a contract.\textsuperscript{131} Second, and more significantly, the Court held that the state could not contract away its police power obligation to protect public morals.\textsuperscript{132}

The Supreme Court turned next increasingly to substantive due process, in lieu of the Contracts Clause in state matters. The greatest blow to the doctrine occurred in \textit{Home Building \\& Loan Ass'n v. Blaisdell},\textsuperscript{133} which split the Court 5-4.\textsuperscript{134} The decision is extremely significant during today’s “Great Recession,” as it addressed a Minnesota act that authorized debtors to ask state courts for a stay of foreclosures through no later than May 1, 1935.\textsuperscript{135} The five-Justice majority upheld the act against the Contracts Clause challenge.\textsuperscript{136} The majority stated that one should not read the clause literally, but the “question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.”\textsuperscript{137} Justice Sutherland wrote for

\begin{itemize}
\item \textsuperscript{124} \textit{W. River Bridge Co.}, 47 U.S. (6 How.) at 539 (Woodbury, J., concurring) (citations omitted).
\item \textsuperscript{125} 101 U.S. 814 (1879).
\item \textsuperscript{126} \textit{See id.} at 816.
\item \textsuperscript{127} \textit{Id.} at 817.
\item \textsuperscript{128} \textit{Id.} at 819.
\item \textsuperscript{129} \textit{See id.}
\item \textsuperscript{130} \textit{Stone}, 101 U.S. at 816.
\item \textsuperscript{131} \textit{Id.} at 821.
\item \textsuperscript{132} \textit{Id.} at 817.
\item \textsuperscript{133} 290 U.S. 398 (1934).
\item \textsuperscript{134} \textit{Id.} at 448.
\item \textsuperscript{135} \textit{Id.} at 418.
\item \textsuperscript{136} \textit{See id.} at 447–48.
\item \textsuperscript{137} \textit{Id.} at 428, 442.
\end{itemize}
FDR’s hated “Four Horsemen” in stating that the clause meant what it said.\textsuperscript{138}

While the Contracts Clause remains the core of a body of law, it has never regained the primacy it enjoyed before \textit{Blaisdell}. Today, the Court has a three-prong test: (a) Is there a substantial impairment of contract; (b) Is there a significant and legitimate public interest served; and (c) Is the law narrowly tailored?\textsuperscript{139} The more highly regulated the matter subject to contract, the less likely the plaintiff is to succeed.\textsuperscript{140}

D. \textit{The Rise and Fall of Substantive Due Process in Federal Courts}

The first, notorious, federal opinion to use the term substantive due process was Chief Justice Taney’s 1857 opinion in \textit{Dred Scott v. Sandford}.\textsuperscript{141} As we all know, Taney refused to acknowledge that Dred Scott, or any black, was a citizen who had any liberty interests protected by the Constitution.\textsuperscript{142} Scott was found not to be a citizen of Missouri.\textsuperscript{143} Therefore, the federal judiciary lacked jurisdiction over Scott’s claim.\textsuperscript{144} Notwithstanding that jurisdictional bar, Chief Justice Taney noted in pointed dicta that the Fifth Amendment barred Minnesota or any free state from attempting to divest Scott’s owner of his rightful property, to wit, Dred Scott.\textsuperscript{145} Vehement dissents by Justices argued, first, that the jurisdictional bar precluded any other substantive work; second, that the Court had no basis to overturn the Missouri Compromise; and third, that blacks were free in many states.\textsuperscript{146}

In 1868, the Fourteenth Amendment was adopted, stating in pertinent part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”\textsuperscript{147} The states were now subject to the obligation first set forth by Henry II, and then Chapter 39 of the Magna Carta.

A Stanford publication posits that the substantive due process doctrine has two prongs:\textsuperscript{148}

\begin{itemize}
  \item \textsuperscript{138} \textit{Home Bldg. & Loan Ass’n}, 290 U.S. at 448–49 (Sutherland, J., dissenting).
  \item \textsuperscript{140} \textit{See id.}
  \item \textsuperscript{141} 60 U.S. (19 How.) 393 (1857), superseded by constitutional amendment, \textit{U.S. Const. amend. XIV}.
  \item \textsuperscript{142} \textit{Id.} at 411.
  \item \textsuperscript{143} \textit{Id.} at 406.
  \item \textsuperscript{144} \textit{Id.} at 427.
  \item \textsuperscript{145} \textit{See id.} at 450.
  \item \textsuperscript{146} \textit{Dred Scott}, 60 U.S. (19 How.) at 546–47 (McLean, J., dissenting).
  \item \textsuperscript{147} \textit{U.S. Const. amend. XIV, § 1}.
\end{itemize}
(a) First, Federal courts have discretion to decide what rights are protected, and the extent of the protection. There are two, alternative analyses: (i) Substantive incorporation, allowing the Supreme Court to apply selected provisions of the Bill of Rights to the States, and (ii) Fundamental rights—determination of substantive rights that are couched as fundamental “liberty” interests.

(b) Second, once the Court decides what rights are covered under Substantive Due Process, then the Court judicially reviews the state action for compliance with those rights.

Justice Field initiated use of the substantive due process doctrine under the Fourteenth Amendment in stinging dissents in the *Slaughter-House Cases* and *Munn v. Illinois*. The *Slaughter-House Cases* upheld a Louisiana law that created a New Orleans slaughterhouse and mandated that all butchering in that city occur there. The Republican Reconstruction legislature gave wealthy allies the lucrative business in the guise of public health, safety and welfare. Local butchers sued. Eventually, the matters made it to the Supreme Court.

The bare majority held that the Thirteenth, Fourteenth, and Fifteenth Amendments only protected Black freed men. The majority controversially held that the Privileges and Immunities Clause of the Constitution did not address the right to work. That seemingly fundamental right was delegated to the states.

Justice Field’s principal dissent contended that the right to work was a fundamental right that was protected under the Privileges and Immunities clause. Further, two of the dissenters argued that the act deprived local butchers of valuable property rights without due process.

In *Munn*, the majority upheld Illinois’ efforts to protect the Grange by setting train elevator rates only in Chicago. This was an effort by the downstate legislators in Springfield to balance the political and business cor-

149. Id.
150. Id.
151. Id.
152. 83 U.S. (16 Wall.) 36, 83 (1872).
153. 94 U.S. 113, 136 (1877).
155. See id. at 64.
156. Id. at 43.
157. See id. at 81.
158. See id. at 80.
160. Id. at 115–16, 127 (Bradley & Swayne, J.J., dissenting).
ruption that set outrageous rates in that city. The elevator operators sued under the Commerce Clause and Substantive Due Process.

The Supreme Court majority opinion emphasized that grain was a heavily regulated commerce. It concluded that the elevator operators were performing a quasi-public function in which they should have reduced expectations of vested substantive rights. The majority refused to reweigh what it saw as a political function.

Field's dissent raised an incipient economic substantive due process position. His view of the majority? "If this be sound law... all property and all business in the State are held at the mercy of a majority of its legislature."

The first major decision where the majority delineated the Substantive Due Process test under the Fourteenth Amendment was *Mugler v. Kansas.* Kansas passed a prohibition statute, which Mugler flouted as he continued to brew beer. After his arrest, Mugler claimed the statute was so broad that it barred his brewing for himself or for sale out of state. He asserted that this took his property rights without due process. The state contended, as Mississippi did in *Stone,* that it was entitled to bar beer to protect public health, safety, and morals.

While the five Justice majority upheld the prohibition statute, it held that a court may examine whether there is a police power basis for a state enactment. Justice Field wrote for the bitter, four Justice dissent, contending that the seizure and prohibition did violate the substantive due process rights of Mugler.

Justice Harlan, for the majority, said that the Court should not settle for the facial "pretences" of the state. Rather, in examining the "substance of things," the Court should determine the following:

162. *See id.* at 132.
163. *Id.* at 123.
164. *Id.* at 132.
165. *See id.* at 131–32.
166. *See* *Mann,* 94 U.S. at 133–34.
167. *See id.* at 139 (Field, J., dissenting).
168. *Id.* at 140 (Field, J., dissenting).
170. *Id.* at 655–57.
171. *Id.* at 660, 674.
172. *Id.* at 660.
173. *Id.* at 669.
175. *Id.* at 675 (Field, J., dissenting).
176. *Id.* at 678.
177. *Id.* at 661.
If... a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. 178

The substantive due process decision that would enjoy the most odious reputation but for the Dred Scott opinion was Lochner v. New York. 179 The Lochner Court struck a maximum working hours statute for bakers, distinguishing the statute from the Utah miners' and smelters' hours statute it upheld in Holden v. Hardy, 180 as one that was required for regulating a hazardous undertaking. 181 The Lochner majority stated:

[T]here can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. 182

Lawrence Berger states:

[T]he Court in Lochner effectively reserved unto itself the power to [determine] whether:

(1) the proclaimed end of the statute under review was legitimate;

(2) the proclaimed end was "really" the end of the legislature at all or there was perhaps another illegitimate purpose animating the law-making body; and

(3) even if the end was a legitimate one, the means selected were truly directed toward reaching it. 183

Justice Holmes' spirited dissent stated in most memorable part: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." 184

178. Id.
179. 198 U.S. 45 (1905).
180. 169 U.S. 366 (1898).
181. Lochner, 198 U.S. at 64–65; see Holden, 169 U.S. at 396.
182. Lochner, 198 U.S. at 59.
The Court retrenched from *Lochner* in *Nebbia v. New York*,185 *Home Building & Loan Ass'n v. Blaisdell*,186 and *Ferguson v. Skrupa*.187 *Ferguson* in particular held:

> We refuse to sit as a “superlegislature to weigh the wisdom of legislation,” and we emphatically refuse to go back to the time when courts used the Due Process Clause “to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”188

Thus ended the use of substantive due process as a major tool to challenge economic legislation.189

The Supreme Court clarified the “substantially advances” test under *Lingle v. Chevron U.S.A. Inc.*190 It noted that the formula applied to a due process challenge, but not to a takings claim.191 The Court emphasized that a strict requirement that courts review takings claims under that standard would lead to the judiciary substituting its judgment for elected legislatures and expert agencies.192

J. P. Byrne states that federal courts are far less likely to entertain due process claims after *Lingle*.193 He sums up: “How likely is it that landowners will be able to prevail against local governments on substantive due process claims challenging land use decisions? In federal court, the answer will—and should—be virtually never.”194

He concludes “that state court due process review is especially appropriate to correct local political distortions.”195

Byrne quotes noted Seventh Circuit Court of Appeals Judge Posner: “‘No one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions.’”196

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186. 290 U.S. 398 (1934).
188. *Id.* at 731–32 (footnotes omitted).
190. 544 U.S. 528, 540 (2005).
191. *Id.*
192. *Id.* at 544.
194. *Id.*
195. *Id.*
196. *Id.*
The Eleventh Circuit, in *McKinney v. Pate*, gutted substantive due process rights in federal courts in its jurisdiction—including Florida. *McKinney* held that substantive due process does not apply to administrative decisions and that property rights are created by the state. Therefore, these are not fundamental constitutional rights. Since *McKinney*, Florida courts have held that substantive due process applies only where the state or local acts “shock the conscience.”

E. **Takings Law**

Until now, we have focused on police power regulation. The logical extension, of course, is which acts of police power go so far as to deprive property rights. The Fifth Amendment to the United States Constitution states in pertinent part: “No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.” The Fourteenth Amendment, in Section 1, extends this obligation to the states. Various state constitutions contain similar protections. Florida does so at Article I, Section 9, which guarantees due process, and Article X, Section 6, which requires full compensation for public purpose takings.

Two twentieth century Supreme Court decisions combined to establish the modern body of regulatory taking law: *Pennsylvania Coal Co. v. Mahon* and *Penn Central Transportation Co. v. New York City.*

The *Pennsylvania Coal* Court analyzed a state law that barred mining in certain locations in order to protect the ground surface and structures. The Court held that two factors determine whether a regulation effects a taking: First, does the act substantially advance the public interest; and second, does the regulation “go too far?”

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196. *Id.* at 475 (citing Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 466 (7th Cir. 1988)).
197. 20 F.3d 1550 (11th Cir. 1994).
198. *See id.* at 1560.
199. *Id.*
201. U.S. CONST. amend. V.
204. 260 U.S. 393 (1922).
207. *See id.* at 415–16.
Penn Central established the following lodestar in determining whether a regulation effects a taking: The extent to which the government action interferes with the property owner’s investment-backed expectations.\textsuperscript{208} The Court focused on the actual impact of the governmental action:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.\textsuperscript{209}

The law clearly establishes a cause of action against legislative or executive actions that constitute a taking. STBR presented the prime opportunity to address whether the judicial branch is subject as well.

III. VESTED RIGHTS

A. Background of Vested Rights

There are differing views involving the origins of vested rights:

a) Common Law,\textsuperscript{210}

b) Equity,\textsuperscript{211} and

c) Constitutional Basis.\textsuperscript{212}

In application, most of the confusion over origin is clarified by determining whether the private party is claiming vested rights or estoppel.\textsuperscript{213}

B. Summation of Vested Rights

People v. Miller\textsuperscript{214} states cogently the vested rights doctrine: “[A] ‘vested right’ in the particular use . . . is but another way of saying that the property interest affected by the particular [governmental act] is too substan-
tial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision.\textsuperscript{215} While the terms are used interchangeably, there is a substantive difference between “vested rights” and “estoppel.”

(a) “Vested rights” are property rights, and as such, are transferable.\textsuperscript{216} They arise when the property owner has obtained real property rights that the government cannot repeal or rescind.\textsuperscript{217}

(b) “Equitable estoppel” is based on the equitable principle that it would be inequitable for government to repudiate its prior actions or inactions, including approvals, upon which the private party has relied in good faith to its detriment.\textsuperscript{218}

The Supreme Court in \textit{Shively v. Bowlby}\textsuperscript{219} explained the difficulties in establishing a rule governing vesting of waterfront property rights adjacent to tidelands:

\begin{quote}
[T]he . . . laws of the original States show[] that there is no universal and uniform law upon the subject [of property claims in submerged lands]; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.\textsuperscript{220}
\end{quote}

IV. DEVELOPMENT OF WATER RIGHTS IN ANTIQUITY

Hammurabi’s Code addressed water rights as a drainage obligation: “If a man open his canal for irrigation and neglect it, and the water carry away an adjacent field, he shall measure out grain on the basis of the adjacent fields.”\textsuperscript{221}

As extensive as his code was, he did not discuss private riparian rights. The Romans made up for this omission—in earnest.

\begin{footnotes}
\item[215] \textit{Id.} at 35.
\item[216] Taub, \textit{supra} note 200, at 915.
\item[217] \textit{Id.} at 916.
\item[218] \textit{Id.}
\item[219] 152 U.S. 1 (1894).
\item[220] \textit{Id.} at 26.
\item[221] \textit{King of Babylon Hammurabi, The Code of Hammurabi} 16 (c.1700 B.C.E.).
\end{footnotes}
The Emperor Justinian’s Code 222 is generally credited for memorializing the concepts of the public trust doctrine as developed under Roman rule:

Thus, the following things are by the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations.

. . . .

All rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.

. . . .

The sea-shore extends as far as the greatest winter flood runs up.

. . . .

The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons therefore are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself. But the banks of a river are the property of those whose land they adjoin; and consequently the trees growing on the [sic] them are also the property of the same persons.223

Justinian is interpreted by many modern scholars to confirm that the crown owns water in natural water courses and underlying lands for all of the people. One commentator stated the following concerning public trust ownership in and under navigable waters:

222. c. 534 AD.
223. J. INST. 2.1.1–.4 (Thomas Collet Sandars, trans., Chicago, Callaghan & Co. 1876). But see James L. Huffman, Speaking of Inconvenient Truths—A History of the Public Trust Doctrine, 18 DUKE ENVTL. L. & POL’Y F. 1, 7 (2007) (‘Justinian . . . was merely summarizing the laws of his time . . . .’), and 10 (“In fact there is no evidence whatsoever that the Roman concept of jus publicum [law] has even a distant relationship to contemporary concerns for the environment, nor is there any indication that Roman law had anything resembling the modern notion of trust, but I digress.”).
[A]ll systems of water law adopt the elemental idea that running water while in its natural situation is not owned; that the law regulates the use of it, but that rights of flow and use are what the law recognizes, and not property in the water itself. The water itself is "common" or "public juris." 224

The public trust was not always observed in the breach. The Roman Crown regularly conveyed submerged lands to favored citizens. 225

In fact, commentators point to numerous grants to private citizens to assert the public trust was not a remotely absolute rule. For example, Huffman emphasized: "What are these farms, monuments and buildings that the public trust must not harm doing on the seashore?" 226 Of course, given that we are discussing the public trust doctrine, multiple champions take up the opposite position.

For example, Robert Abrams cites numerous authorities for the proposition that limited private use of the foreshore actually aided public use. 227 Or, at least, that private use was so limited that it did not impede or impair public rights. 228 Abrams emphasized various scholars and original sources who asserted that any structures allowed were temporary huts and other minor structures:

[W. A.] Hunter, [who was a noted Roman scholar], expanded on the common use of the shores for fishing, with reference to parallel provisions of the Digests. For example, he noted a famous rescript (advisory opinion) issued to the fishermen of Formaie and Capena who had sought a ruling about use of the foreshore. In setting out their private rights of use of the foreshore, the commentator Antonius Pius stated that the right to build huts or to place pilings gave rights for only so long as the sea allowed it, for "when it fell into ruins, the soil reverted to its former state as a res communis, which any other person might build upon." 229

224. Samuel C. Weil, Theories of Water Law, 27 Harv. L. Rev. 530, 530 (1914).
226. Huffman, supra note 223, at 14.
228. Id. at 872–74 (citing, inter alia, James Hadley, Introduction to Roman Law 157 (New York, D. Appleton & Co. 1873)).
229. Id. at 874 (emphasis omitted) (citing Hunter, Roman Law 310 (J. Cross trans., 4th ed. 1903)).
Nonetheless, Huffman’s emphasis on the original source’s reservation of rights in “farms” and “buildings” shows that, at worst, there was mixed evidence as to the extent of private rights in the foreshore. Certainly, there was no prohibition.

Supporters of private rights focus on the practical realities of urban and rural Rome. One commentator states:

[Un]less and until a private person or the state required exclusive control of the resource, the sea and shore should be open for the use of all. In light of the vast coastal area of the Roman Mare Nostrum, the generally low population density outside the cities, and the even lower percentage of the population with sufficient means to utilize coastal lands, such an attitude was not impractical. However, to concentrate on this aspect of Roman law to the exclusion of its complements—state grants of exclusive rights and individual acquisition of ownership by occupation—is to [misunderstand] the Roman law and to ignore the economic realities of the time. 230

Justinian delineated between “perennial” rivers and “private” rivers. 231 The former flowed always, while the latter were “torrential.” 232 Perennial rivers were subject to the public trust. 233 Naturally enough, private rivers were not subject to public use. 234

Wescoat confirms one aspect of Huffman’s arguments, even as he anticipates Huffman’s critiques of Wescoat’s own article, favoring expansive public trust application. 235 He states that Justinian’s works acted as textbooks, not as edicts:

The story generally begins with The Digest of Justinian, compiled at the great law school in Beirut at the order of the emperor Justinian in the 530s C.E. If you studied law during the late Roman era through that of early modern Europe you would begin with the Digest and textbooks such as the Institutes of Justinian and Gaius, which distinguished various classes of things and associated rights—res nullius, things owned by no one; res communes, things

231. Baade, supra note 2, at 872.
232. Id.
233. See id.
234. See id.
open to all; *res publicae*, things held by the state on behalf of citizens; *res privatae*, things owned by persons; *res sacrae*, sacred things; and so on. The denotations and connotations of these categories, as well as the boundaries and overlaps among them, have been subjects of perennial debate.\textsuperscript{236}

Nevertheless, Wescoat interprets Justinian’s impact differently from Huffman. He acknowledges that the source material “partially support[s], but also nuance[s] [Huffman’s] arguments.”\textsuperscript{237} In particular:

*The Digest* offers diverse jurists’ perspectives on public interests in navigable waters, banks, canals, and shorelands. It notes various constraints as well as provisions for private actions in public waters. It addresses public and private interests affected by flooding, river channel change, engineering works, and private rights adjoining public waters. *These perspectives bear comparison with legal debates in later periods and places, and serve as antecedents and analogues, if not formal precedents, for public water law.*\textsuperscript{238}

The Institutes of Justinian describe accretion of soils onto private waterfront property:

Moreover, whatever a river adds to your land by alluvial soil belongs to you under the Law of Nations, for this deposit is an indiscernible increase; and that which is added in this manner is held to have been added so gradually that you cannot ascertain how much is added at any moment of time.\textsuperscript{239}

Abrams states that awarding accretions to the riparian owner allowed “a dynamic adjustment to the realities of the shore[s].”\textsuperscript{240} This adjusted the boundaries to preserve “riparian locational advantage and public uses.”\textsuperscript{241} More to the point: “This form of adjustment of boundaries without disturbing the relative rights of the private riparian and the public has continued unbroken from the Romans to the present.”\textsuperscript{242}

\textsuperscript{236.} *Id.* at 445 (citation omitted).
\textsuperscript{237.} *Id.* at 449.
\textsuperscript{238.} *Id.* at 449–50 (emphasis added).
\textsuperscript{239.} J. Inst. 2.1.20, *supra* note 223.
\textsuperscript{240.} Abrams, *supra* note 227, at 877.
\textsuperscript{241.} *Id.*
\textsuperscript{242.} *Id.* (citation omitted).
V. SPANISH WATER LAW

Roman antecedents helped to form Spanish water law.\textsuperscript{243} Spain's water law standards bore directly on Florida through colonial distribution.\textsuperscript{244} The three main sources of Spain's original law of water rights were: 1) Colonial Roman standards in Spain; 2) Roman influences imported from the arid Middle East; and 3) Islamic water law transmitted across North Africa and into Spain by the Moors.\textsuperscript{245}

Alfonso the Wise, King of Castile, directed the drafting of \textit{Las Siete Partidas} (The Seven Parts) in 1263.\textsuperscript{246} This edict established Spain's first civil law containing a formal water code in the Castile region.\textsuperscript{247} Alfonso discussed: a) All water belonged to the Crown; b) Individuals could obtain water rights in the same manner they obtained most property—by grants from the Crown; and c) As under Roman law, private, \textit{de minimus} consumption required no permission.\textsuperscript{248}

Eric Kunkel's seminal law review article on Spanish water law in colonial North America discusses the expansion of Alfonso's edicts in Spain's colonies.\textsuperscript{249}

[A Royal Decree in c. 1530] provided:

"We order and command that in all causes, suits and litigation in which the laws of this compilation do not provide for the manner of their decision, . . . then the laws of this our kingdom of Castile shall be followed, in conformity with the law of Toro, both with respect to the procedure to be followed in such cases, suits and litigations, and with respect to the decisions of the same on the merits."\textsuperscript{250}

\textsuperscript{243.} Wescoat, \textit{supra} note 235, at 453–54.
\textsuperscript{244.} \textit{Id.} at 453.
\textsuperscript{245.} \textit{Id.}
\textsuperscript{247.} \textit{Id.}
\textsuperscript{248.} \textit{See id.}
\textsuperscript{250.} \textit{Id.} at 364–65 n.135 (quoting \textit{LAS SIETE PARTIDAS} liii (Samuel Scott, trans., C.C.H. 1931)).
This had the effect of extending the *Partidas* to the Spanish Colonies. 251

Most significantly, Kunkel notes that *Las Siete Partidas* confirmed the Crown’s ownership of all lands. 252 Accordingly, “rights to land and water in New Spain could only be conferred by express grant from the Crown.” 253

Charles of Spain authorized the Recopilación de las Leyes de Reinos de Las Indias (the Compilation of the Laws of the Kingdoms of the Indies) (the Compilation) in 1520. 254 Kunkel recites the lengthy development of frequent citations to the Compilation. 255 Philip II caused the expansion of the Compilation, and Charles II required its most comprehensive, and final codification, in 1680. 256 The Compilation addressed water rights thoroughly, but focused on irrigation rights. 257 It introduced the concept of “beneficial use,” which weighed water rights by benefit to all. 258

The Compilation directed the designation of town sites with great detail:

Having made the selection of the site where the [colonial] town is to be built, it must, as already stated, be: in an elevated and healthy location; with means of fortification; fertile soil and with plenty of land for farming and pasturage; have fuel, timber and resources; [have] fresh water, a native population, ease of transport, access and exit; [and be] open to the northwind; and, if on the coast, due consideration should be paid to the quality of the harbour and that the sea does not lie to the south or west; and if possible not near lagoons or marshes in which poisonous animals and polluted air and water breed. 259

The Seven Parts tracked Justinian’s Códex in significant part: “The things which belong in common to the creatures of this world are . . . the air,

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251. *Id.* at 365 n.135 (noted by Judge Lobingier, Judge of the Court of First Instance, Territory of the Philippines, 1909–1914, in his introduction to Scott’s translation of *Las Siete Partidas* and quoted by Kunkel, *supra* note 249, at 364 n.135).
252. *Id.* at 366.
253. *Id.*
255. *Id.* at 366–67 nn.141–53 (especially n.148).
256. *Id.* at 367.
257. *Id.* at 368–69.
258. *Id.* at 363.
the rainwater, and the sea and its shores. . . . Rivers, harbors, and public highways belong to all persons in common."

As the author, together with Florida Department of Environmental Protection historian Joe Knetsch, has noted, "Spanish settlements were highly regulated affairs. Among other issues, the Crown favored access to river highways. Common concern for water access for the maximum number of colonists was reflected by the typical limitation of grants on highways and navigable waters to depth double the width of the parcel by the highway or navigable water.

The Supreme Court of Florida in Apalachicola Land & Development Co. v. McRae, confirmed the sovereign ownership of the navigable waters:

Under the civil law in force in Spain and in its provinces, when not superseded or modified by ordinances affecting the provinces or by edict of the crown, the public navigable waters and submerged and tide lands in the provinces were held in dominion by the crown . . . and sales and grants of such lands to individuals were contrary to the general laws and customs of the realm.

By the laws and usages of Spain, the rights of a subject or of other private ownership in lands bounded on navigable waters derived from the crown extended only to high-water mark, unless otherwise specified by an express grant.

VI. ENGLISH RIPARIAN LAW

English common law delineated principally between *jus publicum*, which was property that the Crown held presumptively for the people, and *jus pritavum*, which the Crown could freely convey into private hands.

260. 3 MEDIEVAL LAW: LAWYERS AND THEIR WORK 822 (Robert L. Burns ed. & Samuel P. Scott trans.)
262. Id.
263. See id.
264. 98 So. 505 (Fla. 1923).
265. Id. at 518.
The Black River Phosphate Court explained the Crown’s interest in jus publicum:

[T]he jus publicum, the royal prerogative by which the king holds such shores and navigable rivers for the common use and benefit of all the subjects, and, indeed, of all persons of all nations at peace with England, who may have occasion for purposes of trade. This royal right, or jus publicum, is held by the crown in trust for such common use and benefit, and cannot be transferred to a subject, or alienated, limited, or restrained, by mere royal grant, without an act of parliament. The King’s grant, therefore, although it may vest the right of soil in a subject, will not justify the grantee in erecting such permanent structures thereon as to disturb the common rights of navigation; and such obstruction, notwithstanding such grant, is held to be a public or private nuisance, as the case may be.

As described above, the Magna Carta focused on the nobility’s private property rights. Nonetheless, the document addressed several crucial water law issues at Chapters 16 and 23.

Chapter 16 states: “No riverbanks shall be placed in defense from henceforth except such as were so placed in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time.”  

Huffman states that this clause was a response to the Crown’s assertion of first right to fishing in fresh and salt rivers. It was understood at the time to limit the Crown. It was ultimately interpreted to prevent the Crown from granting exclusive fisheries.

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268. *See* Huffman, *supra* note 223, at 19 n.95; Magna Carta, Ch. 16, art. 20.
270. *Id.*
271. *Id.* at 19–20.
Chapter 23 stated: "All weirs for the future shall be utterly put [forth] on the Thames and Medway and throughout all England, except on the seashore." \(^{272}\)

Patrick Deveney wrote an exhaustive analysis of English public trust law that had a limited view of Chapter 23. \(^{273}\) He interpreted the chapter to bar the Crown from impeding fish passage on the major navigable rivers, so that the riparian landowners could fish. \(^{274}\)

Huffman quotes Lord Hale and others at length to contend that Chapter 23 was limited in intent and scope to the Crown’s confirming baronial rights:

Magna Carta Chapters 16 and 23 are very thin reeds upon which to rest an expansive public trust doctrine. The modern doctrine as applied to navigable waters relies heavily upon the state’s having title to the submerged lands. But at the time of Magna Carta, and for many centuries later, there was no concept in England of lands owned by the King (who, according to [the] modern public trust theory, was the predecessor in title to the states) as trustee for the general public. \(^{275}\)

Huffman’s position makes sense if we recall the Magna Carta was the result of barons forcing the Crown to counter the Kings Henry I and II. Those kings granted expansive rights to commoners and created substantial taxation systems with the result thereby to undermine the nobility. The Magna Carta was compelled largely to reclaim noble rights. \(^{276}\)

Deveney cites Bracton, who is credited for implementing the Institutes of Justinian into English water law shortly after the Magna Carta was signed. \(^{277}\) He states Bracton incorporated Justinian’s language regarding the seashore except that he deleted the phrase, "the ownership of the beaches is in no one." \(^{278}\) Huffman posits that this is “perhaps because the phrase
seemed inconsistent with the existence of farms and buildings that were not
to be injured by public use of the seashore and because he recognized that
many beaches in England were in fact private."279

Robert Abrams, a public trust advocate, acknowledges that Bracton had
an expansive view of private rights in the foreshore.280 He concedes that
Bracton amended the language of the rights in the foreshore, to "tolerate[]
the erection of private structures . . . beyond what [the] Roman[s] . . . would
have allowed."281

Abrams notes a far more extensive modification of Justinian’s language
by Bracton than does Deveney. Instead of simply deleting the phrase that the
foreshore is owned by no one, Bracton changed the language barring injury
to houses, monuments, and buildings to accommodate private structures con-
sistent with the practice by nobility in the England of his time:

No one therefore is forbidden access to the seashore, provided he
keeps away from houses and buildings [built there], for by the jus
gentium shores are not common to all in the sense that the sea is,
but buildings built there, whether in the sea or on the shore, belong
by the jus gentium to those who build them. Thus in this case the
soil cedes to the building, though elsewhere the contrary is true,
the building cedes to the soil.282

At least one federal Bureau of Land Management (BLM) document
notes a laissez faire attitude regarding coastal boundaries in early common
law England:

The original source of land titles in England is a grant from the
Crown. Most titles to land on the English seashore date as far
back as the grants of King John, whose reign ended in 1216. In
those early days in England, the initial grants of coastal lands pre-
sented no great problems, so it is not surprising that the grants
were imprecise and incomplete, particularly in their lack of de-
scription of the seaward boundary. As might have been expected,
the grantee of land along the coast came to look upon his property
as extending down to the sea. Either the Crown acquiesced in that
view or there were matters more pressing and interesting to the
Crown than the use of the barren seacoasts. No challenge was
made to the private use and occupancy of the tidelands until the latter part of the sixteenth century. Until then it just never occurred to the Crown, or anyone else for that matter to be specific about seacoast boundaries in conveyances. 283

As the BLM states, the Crown’s benign neglect of the foreshore ended with Queen Elizabeth in the latter half of the sixteenth century. MacGrady credits Thomas Digges with creating this prima facie rule in Digges’ treatise entitled Proof of the Queen’s Interest in Lands Left by the Sea and the Salt Shores Thereof.284 Both Deveney and MacGrady argue that Digges’ expansive public trust analysis is neither based on English caselaw nor as expansive as it is cited for being.285 Lazarus states that Digges acted as lawyer to Queen Elizabeth I in developing the prima facie rule.286 She sought to prevent private coastal ownership from impeding English naval power. Digges, therefore “developed the theory that without proof of specific grant of the shorezone (which almost never was found in royal deeds), the Crown was the

283. BLM Public Lands Surveying Casebook, Chapter D, Basic Law of Water Boundaries, D1, “Historic Development” (1975) (2001 revision), www.blm.gov/cadastral/casebook/basicwater.pdf. One assumes that the BLM has no reason to understate the public trust. After all, the BLM’s purposes are furthered by sovereign control of waterbodies.


285. Abrams, supra note 227, at 882–83 (citing Deveney, supra note 230, and MacGrady, supra note 284). Moore, in History of the Foreshore (1888), blasted Digges regarding Crown title in submerged lands. Moore emphasized that most tidelands had been long held in private title when Diggs wrote. Id. at 24.

286. Digges was a polymath. He was a royal lawyer, surveyor, and engineer. Yet, he was not even the most talented Thomas Digges in Elizabethan England. Nor was he the only Thomas Digges who aided the Queen’s navy along the English coast. The other Thomas Digges was a renaissance man who set precedents in several fields. Among several biographies of the other Thomas Digges, the most fascinating, and quite thorough, is in Chapter 2 of Stephen Johnston, Making Mathematical Gentlemen, Practitioners, and Artisans in Elizabethan England (1994), http://www.mhs.ox.ac.uk/staff/saj/thesis/digges.htm#note2. Digges translated Copernicus’ De Revolutionibus into English. He is considered a major astronomer. Additionally, the “other” Digges was accomplished in mathematics, navigation, surveying, artillery, and military science. Id. (citing inter alia, D. W. Waters, The Art of Navigation in Elizabethan and Early Stuart Times (1958) and A. W. Richeson, English Land Measuring to 1800: Instruments and Practices (1966)). That Digges was a Member of the House of Commons and a powerful figure in the Privy Council. Id. at n.41–45 and accompanying text. Johnston notes: “Digges’ participation in the harbour works at Dover, arguing for their importance in terms of both economic development and national security, was closely linked to this parliamentary activity.” Id. at n.46 and accompanying text.
prima facie owner of the shore to the high water mark.”

Lazarus notes that property owners “resented what they perceived to be the Crown’s blatant confiscation of private property.” Nonetheless, the Crown pushed this theory to “enhance the royal purse,” and courts eventually “fell in line.”

Moore’s evisceration of Digges is near-total:

By this treatise was first invented and set up the claim of the Crown to the foreshore, reclaimed land, salt marsh, and derelict land in right of prerogative Mr. Digges boldly affirms that no one can make title to the foreshore or lands overflowed by the sea, and says it is a sure maxim in the common law that “whatsoever land there is within the King’s dominion whereunto no man can justly make property, it is the King’s by prerogative . . . .”

But it has been decided that Mr. Digges’ argument is unsound in the law. It is now settled that the foreshore may be shown to be parcel of the manor . . . . [Y]et we find the officers of the Crown still at this day persistently asserting Mr. Digges’ contention . . . . They proceed against him by the arbitrary and unconstitutional process of information (without any previous inquisition to charge the land to the Crown), and they make him set out his title . . . . [T]hey have it in their power to crush him with costs which he is helpless to avoid, and this wholly and solely upon an allegation of a theory, a theory of fact which is untrue, and which was invented by the ingenuity of Mr. Thomas Digges in the treatise set out below.

Abrams defends Digges’ treatise as another step in the development of modern public trust law via legal fiction:

Even if these critiques of Digges are apt in pointing out its [his theory’s] lack of support in English law of his time, the critiques are immaterial in assessing the rule that Digges’ presumption plays in American law as propounded in American courts.

287. Lazarus, supra note 266, at 635 & n.19 (citing Digges, Arguments proving the Queen’s Majesties Property in the Sea Landes, in S. Moore, supra note 266, at 185–211) (emphasis added).
288. Id.
289. Id.
290. Moore, supra note 266, at 182–84 (emphasis added).
291. Abrams, supra note 227, at 883 (emphasizing further that Lord Hale’s treatise provided the primary English source of American jurisprudence on use of the foreshore).
Digges was not acting solely for his queen. Elizabeth created a commission in 1571 to determine whether she owned certain foreshores. Not surprisingly, the commission determined that she did. She gave one member, Digges, a patent to all of her fee in those shorelands he could obtain title to within seven years.\(^{292}\)

The first, unreported English decision to hold expressly that the Crown held presumptive title to all lands that were not granted was Attorney-General v. Philpott.\(^{293}\) Philpott held that the Crown held title to all navigable, tidally influenced waters.\(^{294}\) Huffman states that Philpott "was decided by a corrupt court doing the king’s bidding and was not cited as authority by an English court for another 164 years."\(^{295}\) More to the point, both Huffman and Lazarus cite Moore for citing Philpott as one ground for the beheading of King Charles I.\(^{296}\)

Brent Austin wrote an exhaustive article in 1989 concerning the scope of sovereign submerged lands.\(^{297}\) Austin points out a fishing rights decision, The Royal Fisheries of the Banne.\(^{298}\) The Banne court delineated clearly the Crown’s submerged lands ownership:

> There are two kinds of rivers; navigable and not navigable. Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and it belongs to the king by his prerogative; but in every other river not navigable, and in the fishery of such river, the tenants on each side have interest of common right.\(^{299}\)

\(^{292}\) MOORE, supra note 266, at 212–24.

\(^{293}\) See id. at 895–907; Deveney, supra note 230, at 42. Neither Deveney nor Huffman believed this decision was well reasoned, and MacGrady pointed out the Philpott judges were corrupt. MacGrady, supra note 284, at 562. No court cited Philpott for over 150 years. Id. at 565.

\(^{294}\) Deveney, supra note 230, at 42–43.


\(^{296}\) Id.; Lazarus, supra note 266, at 635 n.19 and accompanying text (citing MOORE, supra note 266, at 310, who in turn cited Art. 26 of Grand Remonstrance Presented to Charles I ("Taking away of men’s rights . . . . to land between high and low water marks.").


\(^{298}\) Id. at 983–84 (citing The Banne, 80 Eng. Rep. 540 (1604)).

\(^{299}\) The Banne, 80 Eng. Rep. at 541.
As Abrams notes, Lord Hale’s legal treatise is the primary source of English and American common law on the foreshore. 300 Huffman explains at length Lord Hale’s analysis of coastal property in England:

Lord Hale identified three categories of coastal property. The *jus privatum* is held by individuals or by the Crown, and, as we have seen, the king’s private interests were not different from the holdings of other individuals except in amount. The *jus regium* he described as the royal right which was the equivalent of what we would call the police power today. Finally, the *jus publicum* are the rights of the general public. 301

Professor Lynda Butler addresses Hale’s departure from Digges in several regards. 302 While Hale resuscitated the prima facie theory, he differed from Digges in acknowledging that private parties could obtain foreshore rights by grant, prescription or other means. 303 Butler’s work focuses on the public commons. She emphasizes that Hale “further refined his theory, increasingly disagreeing with Digges.” 304 Butler shows that Digges emphasized (not surprisingly) the Crown’s interests, while Hale’s splitting of interests burdened even the Crown’s sovereign interest with the rights of the public.

Even though Hale’s acceptance of the prima facie rule was a key to the public trust doctrine’s development, Butler concludes he “did not recognize the concept of the public trust.” 305 She states that Hale’s failure to conclude that the Crown held inalienable public trust title demonstrated this point. 306 This is not so. As will be shown below, regarding the American law of the public trust, the ability of the sovereign to convey such lands as long as the conveyance does not wholly abrogate the duty to the public is a “soft” public trust. She does make a significant point in emphasizing the Crown’s duty to protect the *jus publicum ariscus* from its *jus reginum* duties. 307

300. Abrams, supra note 227, at 883.
303. Id. at 861 n.115–18 (citing various parts of Moore’s reprinting of Hale’s works).
304. Id. at 861.
305. Id. at 862–63.
306. Id.
Butler notes one major limitation on Hale’s analysis. It was unformed. Hale never explained exactly what the *jus publicum* rights were in the foreshore. Nonetheless, Hale’s *jus publicum* was “indestructible.” Huffman, among a myriad other water law scholars, acknowledges Hale’s primacy quite bluntly:

The treatise of Sir Matthew Hale, *De Jure Maris*, has been so often recognized in this country, and in England, that it has become the text book, from which, *when properly understood*, there seems to be no appeal either by sovereign or subject, upon any question relating to their respective rights, either in the sea, arms of the sea, or private streams of water.

MacGrady bristles at Hale’s imprimatur of the prima facie rule. He says that Hale’s acceptance of a doctrine that was created by the Tudors out of whole cloth shows “[t]he adoption of the prima facie rule is thus an example of lawmaking by personal reputation and treatise writing.” Nonetheless, both Huffman and Deveney state that Hale acknowledged that the Crown could convey, and often did convey, submerged and tidal lands into private lands. Accordingly, Deveney emphasizes that “[n]either the changes following the beheading of Charles I nor the revolution of 1688 reduced in any way the power of the sovereign to alienate the coastal area resources of the kingdom.”

Both Wescoat and Hope Babcock interject real politik in response to Huffman’s pedagogy. Simply stated, their response is: So what? Babcock discusses at length the use of “legal fictions,” such as the public trust doctrine, and concludes: “[T]he public trust doctrine [might be] a benign misreading of its historical provenance or a normative choice to legitimize a legal rule that has imbedded itself into property law.”

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308. *Id.* at 862 n.122 (citing multiple commentators opining various and contradictory rights and limitations).
309. *Id.* at 863.
312. *Id.*
Wescoat is blunter: "Once a precedent was applied and upheld, emphasis shifted from its historical truth to its consequences."\textsuperscript{316}

It is important to recall that the English prima facie rule was stated in terms of public rights, but that was simply not the case in reality. Lazarus explains that the only lands that were inalienable categorically at common law were those of the "ancient demesne."\textsuperscript{317} As we stated above in Section II-A, such lands belonged to William the Conqueror by conquest in 1066, and were registered in the Domesday Book as "permanently annexed to the kingly office."\textsuperscript{318} Lazarus string cites authority establishing that the Crown could convey sovereign submerged lands with "at most" Parliament's concurrence.\textsuperscript{319} English Freeholders own by "tenure" as tenants holding property rights under the Crown.\textsuperscript{320} Accordingly, even today, the rights to the fore-shore that Digges created in the sixteenth century to benefit Queen Elizabeth's navy are properly stated as belonging to the public only derivatively from the Crown.\textsuperscript{321}

VII. AMERICAN LAW OF NAVIGABILITY FOR TITLE PURPOSES

The original thirteen United States each took title to the submerged sovereign lands that the English Crown possessed within their respective boundaries. The Supreme Court held in \textit{Martin v. Lessee of Waddell}\textsuperscript{322} that each state took title as sovereign within its borders, subject to the federal navigational servitude.\textsuperscript{323} \textit{Pollard's Lessee v. Hagan}\textsuperscript{324} extended this sovereign submerged right to each subsequently admitted state upon statehood.\textsuperscript{325} The

\begin{footnotes}
\item[316] Wescoat, \textit{supra} note 235, at 452.
\item[317] Lazarus, \textit{supra} note 266, at 635–36 n.20.
\item[318] \textit{Id}.
\item[319] \textit{Id}.
\item[320] Ball, \textit{supra} note 11, at 12.
\item[321] \textit{See id}.
\item[322] 41 U.S. (16 Pet.) 367 (1842).
\item[324] 44 U.S. (3 How.) 212 (1845).
\item[325] \textit{Id} at 230.
\end{footnotes}
Court held the "equal footing doctrine" vested each new state the same rights as the thirteen original ones. 326

Mark Graber expounds on the significance of Pollard's Lessee. He explains that Jacksonian lenders believed that "the federal government retained title (though not jurisdiction) over unappropriated and waste lands" in each territory. 327 This remained the case even upon statehood. 328 The federal government conveyed Pollard's family a grant to certain lands in the Mobile Bay and Mobile River. 329 Hagan argued Alabama claimed as state sovereign, and the state had granted the submerged lands to him. 330 Graber cites a series of Alabama decisions that had upheld the state's sovereign submerged claims without their clarifying the basis. 331 Graber explains that Pollard's Lessee declared the federal law authorizing the putative federal grant unconstitutional without using those words. 332 The majority decision clarified the state's sovereignty:

[First], [t]he shores of navigable waters and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, [t]he new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. 333

The Daniel Ball 334 established the standard for determining navigability for title purposes. 335 MacGrady states four factors from The Daniel Ball in determining navigability for title purposes:

a. The waterbody needed only to be susceptible, not necessarily used, for navigation;

b. The waterbody must have been susceptible for navigable use in commerce;

c. The waterbody must be susceptible to navigation in its natural and ordinary condition; and

d. Commercial navigation must have been possible by any then customary mode of trade or travel. 336

326. Id.
327. Graber, supra note 103, at 102.
328. Id.
329. Id.
330. Id.
331. Graber, supra note 103, at 102–03.
332. Id. at 103–04.
334. 77 U.S. (10 Wall.) 557 (1870).
335. Id. at 563.
Under the Equal Footing Doctrine, the date of determining navigability for title purposes in a given state is when it entered the Union as a state. MacGrady notes that *Utah v. United States* confirms this point. The Supreme Court held there that the entirely intrastate Great Salt Lake was navigable for title purposes based on historical records showing that a rancher transported livestock across it at the time of Utah’s statehood.

The Supreme Court applied the test from *The Daniel Ball* in *United States v. Holt State Bank*. The *Holt State Bank* Court held that federal law governs navigability for title purposes at statehood. The Court explicated what constituted commerce for title purposes:

> [N]avigability does not depend on the particular mode in which [trade or travel on water] is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

While England limited sovereign ownership to lands under tidal waters, many states extended navigability for title purposes into non-tidal waters that were navigable in fact upon statehood. The states did so to facilitate free commerce up and down river highways. First in the new nation, then under the Equal Footing doctrine, they protected public rights to accommodate exploration and expansion.

States are free to alter sovereign lands boundaries or definitions after they achieve statehood. In *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, the Supreme Court confirmed Oregon’s right to limit...
sovereign lands.\textsuperscript{348} In \textit{Barney v. Keokuk},\textsuperscript{349} the Court held that a state may select certain sovereign submerged lands to convey to private parties.\textsuperscript{350}

\textit{Barney} exemplifies "soft public trust" states, which allow conveyances to private parties upon certain conditions.\textsuperscript{351} In that case, the conveyance was made to facilitate wharfage and attendant commerce where Keokuk, Iowa faced the Mississippi River.\textsuperscript{352} \textit{Illinois Central v. Illinois}\textsuperscript{353} is cited with reverence as establishing an overarching and strong public trust doctrine.\textsuperscript{354} In reality, it represents the paradigmatic "soft public trust" case. The \textit{Illinois Central} Court held that a state may convey submerged sovereign lands as long as the conveyance did "not substantially impair the public interest in the [submerged sovereign] lands and [overlying] waters remaining."\textsuperscript{355} The Court held that Illinois was authorized to repeal legislation conveying much of Chicago harbor's submerged lands to the Illinois Central Railroad.\textsuperscript{356} The Court concluded that the original grant was an unauthorized abdication of public ownership of the great harbor.\textsuperscript{357}

Wescoat delineated the long and somewhat inconsistent subsequent development of Chicago's lakefront before and since \textit{Illinois Central}.\textsuperscript{358} He shows both that \textit{Illinois Central} is not as simple as portrayed and that it has not been honored in the breach—even in Chicago.\textsuperscript{359} Daniel Burnham and Edward Bennett published their Plan of Chicago in 1908, sixteen years after \textit{Illinois Central}.\textsuperscript{360} The Plan envisioned a continuous park along the lakefront.\textsuperscript{361} Burnham's and Bennett's work was itself a major public effort, as it reflected a plan developed by the post-fire city's leaders to develop Chicago

\textsuperscript{348.} \textit{Id.} at 378–80.
\textsuperscript{349.} 94 U.S. 324 (1876).
\textsuperscript{350.} \textit{Id.} at 342.
\textsuperscript{351.} \textit{See generally id.}
\textsuperscript{352.} \textit{Id.} at 325.
\textsuperscript{353.} 146 U.S. 387 (1892).
\textsuperscript{355.} \textit{Ill. Cent. R.R. Co.}, 146 U.S. at 452.
\textsuperscript{356.} \textit{Id.}
\textsuperscript{357.} \textit{Id.} at 455.
\textsuperscript{358.} Wescoat, \textit{supra} note 235, at 436.
\textsuperscript{359.} \textit{See generally id.}
\textsuperscript{361.} Wescoat, \textit{supra} note 235, at 437.
in a coordinated and magnificent manner akin to Paris. The work is considered the first modern comprehensive municipal plan in the United States.

The Plan itself culminated a series of acts that envisioned an integrated railroad access to and public parks along Chicago’s lakefront. Wescoat notes the original 1830 plat of the Loop, south of the Chicago River, showed a public park along the lakefront. The park was named “Lake Park.” Maps show the park in the location of today’s Grant Park, which is bounded today on the south end by the Field Museum and the Shedd Aquarium, and on the north by the area of the Art Institute, Millennium Park, and Daley Plaza.

Illinois Central addressed the railroad’s access into central Chicago. The railroad’s southern entry into downtown was chosen along the lakefront. The 1869 Illinois legislature conveyed a massive, one-mile by one-mile grant of submerged lands along Lake Michigan to the city, with a legislative directive to the city to then flip the parcel to the railroad. The railroad intended to construct infrastructure to support its activities associated with the southern entry. The same year, the legislature created three park commissions in and around Chicago: the South Park Commission in Hyde Park, which would host the 1893 World’s Columbian Exposition; the Western Park Commission, which went out to Oak Park; and the Lincoln Park Commission, north of the city center.

The railroad sued after the 1873 Illinois legislature repealed the grant. Douglas Grant’s comprehensive public trust article focused on several interesting aspects of the case. First, this decision, which has had profound and sweeping impact on public and private rights, was itself a hotly contested 4-3 split, with two justices recused. Second, the massive scale of the grant is

363. See generally id. (telling of the circumstances surrounding the development of the plan).
364. Id. at 24.
366. Id.
368. See BURNHAM & BENNETT, supra note 360, at 5.
370. Id.
371. Id.
373. Id. at 860.
what caused Justice Field in a majority to affirm Illinois' revocation as an inherent, reserved state power to protect the people of Chicago.\footnote{374}

Kearney and Merrill read the decision as a result of the credo that all politics are local.\footnote{375} They assert that the decision, while couched as a public trust matter, resolved local political debates in a \textit{de facto} dispute resolution.\footnote{376} Kearney and Merrill, along with Wescoat, emphasize that each side received what it wanted: “The railroad obtained a right-of-way for its tracks that fulfilled its commercial aims and charter, and the city gained riparian rights to the valuable new public lakefront created by landfill dumped by the railroad, and by the city itself, after the great fire of 1871.”\footnote{377}

Let us explicate Wescoat’s quote. In 1871, two years after the grant to the railroad, and two years before the repeal, Chicago was overwhelmed by the “Great Fire.”\footnote{378} Until the fire, “Lake Michigan lapped right up to the edge of Michigan Avenue.”\footnote{379} After the fire, the city dumped much of the charred rubble “into the shallows of the lake in what is now Streeterville and Grant Park.”\footnote{380} While the Illinois legislature in 1873 protected the public from the railroad’s use of one mile along and one mile into Lake Michigan, the city’s fill along the lake front included “an unsightly mess . . . littered with stables, squatters’ shacks, a firehouse, garbage, and debris.”\footnote{381}

As noted above, the Plan of Chicago envisioned a continuous park along the Lake Michigan shorefront.\footnote{382} Chicago developed, and maintains, one of the great waterfront park systems in the world.\footnote{383} Nonetheless, the area of Grant Park, which was envisioned in some nineteenth century plats as “forever to remain vacant of buildings,” is today rife with iconic structures, including massive public buildings.\footnote{384} Roddewig emphasizes that Burnham’s plan envisioned many of the museums and structures we see today.\footnote{385} Wes-

\footnote{374. Id. at 861.}
\footnote{376. Id.}
\footnote{377. Id. at 801, cited by Wescoat, supra note 235, at 457–58 & n.125 and accompanying text.}
\footnote{379. Roddewig, supra note 378, at 402.}
\footnote{380. Id.}
\footnote{381. SMITH, supra note 362, at 24.}
\footnote{382. Wescoat, supra note 235, at 437.}
\footnote{383. Id. at 458.}
\footnote{384. Id. at 455 (citing Lois Wille, \textit{Forever Open, Clear and Free: The Struggle for Chicago's Lakefront} (2d ed. 1991) (1972)).}
\footnote{385. See Roddewig, supra note 378, at 401–02.
coat lists a "small sample" of the myriad lawsuits and projects associated with the development of the lakefront at issue in *Illinois Central* and around Chicago. While some courts strictly applied the decision to block divestiture of public interests, others allowed grants of submerged lands to private parties.

Kearney and Merrill sum up the intent and impact of Justice Field’s opinion in *Illinois Central* thusly:

His public trust doctrine was designed to preserve access to the lake for commercial vessels at competitive prices, not to preserve Lake [today Grant] Park or the shoreline from further economic development. Moreover, Justice Field was not alone in these preferences among the federal judges who ruled on aspects of the controversy. When the dust finally settled, all of Illinois Central’s massive landfills and improvements had been ratified by the federal courts as being consistent with the nebulous trust identified in *Illinois Central*. Thus, the public trust doctrine, as invoked in the *Illinois Central* litigation, was scarcely an anti-development doctrine.

Not surprisingly, Huffman raises issues aside from the “fable” of *Illinois Central*. He asserts that Justice Field misunderstood the legal background of the public trust doctrine.

Huffman emphasizes the fable that Field’s opinion held that public trust property cannot be alienated—that Field confirmed the “hard” public trust. He counters: “Justice Field expressly states that submerged and coastal lands affected with a public interest can be alienated.” Huffman points to examples where Field concluded grants of sovereign lands furthered the public interest:

The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as

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390. *Id.* at 54–60.
391. *Id.* at 56.
392. *Id.* Huffman also extracts numerous portions of Field’s text showing a “soft” public trust doctrine. *Id.* at 56–57 n.338 and accompanying text.
their disposition is made for such purpose[s], no valid objection[] [may] be made to the grants.393

Huffman concludes that Field did not posit a hard public trust.394 Rather, a state could alienate sovereign submerged lands for private purposes that fostered either navigation or commerce, but no grant could interfere with public navigation, commerce and fishing.395 Field determined that the grant of a wide swath of Chicago Harbor was simply too expansive to meet the soft public trust test.396

Huffman added his contention that Field misunderstood the source and nature of the *jus publicum.*397 He asserts that the *"jus publicum, properly understood, existed [under English common law] as an easement in properties in navigable waters and submerged lands whether held by the state or by private individuals."*398 Huffman denies Field’s conclusion that state ownership of the submerged lands necessarily leads to state control of the overlying navigable waters: “[T]he original understanding of the *jus publicum* denied the truth of this assertion by holding that without regard to ownership of submerged lands, the public had certain rights in the use—and therefore control to that extent—of the overlying waters.”399

Lazarus buttresses this point. He states that Field’s rationale that “the state would be powerless to prevent use of the harbor” if it divested itself of title “hardly seems plausible.”400 He argues that state police power authorizes the regulation of railroad impacts on the natural resources, and the “navigation[al] servitude would still provide for both maintenance of the navigability of the resource and public access.”401

Lazarus adds that the legal fictions both underlying and stemming from *Illinois Central* are not necessarily fatal.402 That includes his anticipation of Huffman in questioning even the very existence of the public trust doctrine in antiquity.403 Nonetheless, he quotes Professor Lon Fuller, stating that le-

394. See id. at 57–59.
395. Id. at 57–58 (citing *Ill. Cent. R.R. Co.*, 146 U.S. at 452).
396. Id. at 57–58. Permitted grants are under “‘a very different doctrine from the one which would sanction [an] 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.’” Id. at 58 (quoting *Ill. Cent. R.R. Co.*, 146 U.S. at 452–53).
397. Huffman, supra note 223, at 59.
398. Id. at 59 (citing Hale, supra note 301, at 336) (emphasis added).
399. Id. at 59–60 (citing Hale, supra note 301, at 336).
400. Lazarus, supra note 266, at 639.
401. Id. The navigational servitude is addressed at length, infra, in Section VII.
402. Id.
403. Id. at 633–35, 656–57.
gal fictions "are, to a certain extent, simply the growing pains of the language of the law."^{404}

Just two years after Illinois Central came Shively v. Bowlby,^{405} which a later Supreme Court public trust majority opinion cited as the """"seminal case in American public trust jurisprudence.""""^{406} Shively frames the soft public trust rule in Illinois Central.^{407} The Shively decision assumed that the State of Oregon had authority to convey submerged sovereign lands.^{408} Shively addressed the federal government's prior ability to grant submerged sovereign lands in the Columbia River when Oregon was a territory.^{409}

Shively claimed the parcel under a federal patent before Oregon's statehood.^{410} Bowlby and Parker countered that a statutory deed from the state vested title in them.^{411} The unanimous Supreme Court upheld the Supreme Court of Oregon's holding in favor of the claim deraigned under state statute.^{412}

The opinion of Justice Gray cited Hale's *prima facie* rule that a sovereign grant of upland oceanfront land is bounded by the high water mark "unless either the language of the grant, or long usage under it, clearly indicates that such was the intention."^{413} Shively held Martin v. Waddell established the sovereign ownership of tidelands, which could be granted solely by express conveyance.^{414} Shively itself affirmed a key component to sovereign lands law in the United States.^{415} Each of the original thirteen states, and each successively admitted state, may alter the sovereign boundaries or

404. *Id.* at 657 (quoting LON L. FULLER, LEGAL FICTIONS 21–22 (1967)).
405. 152 U.S. 1 (1894).
407. *See id.* at 473.
408. *See id.* at 473–74 (explicating Shively, 152 U.S. at 57).
409. Shively, 152 U.S. at 56.
410. *Id.* at 2.
411. *Id.* at 7.
412. *Id.* at 58.
413. *Id.* at 13. Nonetheless, the private usage of submerged lands should not vest title or easement against the sovereign. Shively, 152 U.S. at 14. First, one cannot claim sovereign lands by prescription. *See id.* at 11–12. Second the strong legal presumption of owner consent of use undermines the adversity of use necessary to establish prescription. *See id.* at 12–14. Therefore, the overwhelming law, discussed throughout this article, and by Justice Gray, holds that one must deraign title to initially sovereign submerged lands by *express* and *authorized* grant from the sovereign. *See id.* 17–18.
414. *Id.* at 15–17.
415. Shively, 152 U.S. at 58.
convey sovereign lands with its jurisdiction, subject only to a soft public trust. 416

Shively explained Illinois Central as confirming:

[T]he settled law of this country [is] that the ownership of and dominion and sovereignty over lands covered by tide waters, or navigable lakes, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce.417

One must emphasize that this interpretation came but two years after Illinois Central, by a Court that retained three of the four justices in the Illinois Central majority, included Justice Field, who wrote the majority opinion in Illinois Central.418 With all due respect to the modern scholars who contend that Illinois Central established a hard public trust doctrine, one should defer to the actual author’s interpretation of his recent opinion.

Indeed, Professor Joseph Sax’s exegesis of Illinois Central in his landmark 1970 public trust article addressed the decision from pages 489 through 491.419 This provided scant coverage for what Professor Sax entitled The Lodestar in American Public Trust Law: Illinois Central Railroad Company v. Illinois, in a ninety-three page article that is universally regarded as the source of the modern public trust doctrine.420 While Sax did not explore the conflicting and myriad issues raised in the case, he did conclude that the amplitude of the grant drove the decision.421 Sax stated the decision means that a sovereign may grant sovereign submerged lands—provided that there is a public benefit.422

The Supreme Court again faced the public trust in Appleby v. City of New York.423 The case featured similar issues to Illinois Central. The City of New York conveyed large portions of New York Harbor to Appleby for the private filling of submerged lands to facilitate mixed private and public

416. Id.
417. Id. at 47.
418. Huffman, supra note 223, at 77 n.464 and accompanying text.
420. See id. at 489.
421. Id. at 490–91.
422. See id. at 490.
Unlike Illinois, however, the City granted specific tracts for the purpose.  

The State of New York later established a fill control line to protect navigation in the harbor. This halved Appleby’s available use. The City sought to implement the state program by condemning all of the private wharf parcels in the harbor. Even though the City did not acquire Appleby’s lands, it commenced a dredge operation on his submerged parcels.

Appleby sued in state court to enjoin the dredging. He claimed the City was trespassing. Appleby won at trial, but the New York Court of Appeals reversed. Appleby petitioned the Supreme Court under the Contacts Clause. It was a decade before the 5-4 majority in Blaisdell undermined the Contracts Clause. Appleby’s theory was that the state contract with him vested rights that the joint state/city fill prohibition and dredging program eviscerated.

The Supreme Court in Appleby expounded on a key point that it mentioned in passing in Illinois Central. Which body of law controlled? Federal or State? While the Illinois Central majority opinion “referred vaguely to the use of sovereign trust language by state courts in their decisions discussing state ownership of the submerged beds,” it failed to cite any relevant Illinois precedent.

Charles Wilkinson examines the record in Illinois Central in attempting to ferret the Court’s rationale. He notes: "The federal public trust doctrine announced in Illinois Central . . . and the varying state-law based trust doc-

424. Id. at 367–68.
425. Id. at 368–69.
426. Id. at 369.
427. Id.
429. Id.
430. Id. at 371.
431. Id.
432. Id. at 364, 372–73.
436. See id. at 393–395 (citing Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452–53 (1892)).
trines total 51 separate public trust doctrines. Wilkinson contends that the decision allows each state to develop its own public trust doctrine.

The Appleby Court simplifies the Illinois Central Court’s substantive analysis: What is the substantive basis for the Public Trust doctrine? Wilkinson states that multiple bases could be the “settled law of this country” the Illinois Central Court holding requires that the “several states” enforce the public trust.

1. Federal common law: “not in favor, and is unlikely to be employed in light of the more specific available sources.”

2. Guaranty clause: “unlikely that a modern court would look to it as a basis.”

3. Congressional preemption: more likely, to maintain navigability.

4. Commerce Clause: probably most likely to maintain navigability.

Lazarus shows the impossible task of a modern scholar, or court, attempting to fathom the legal basis for the Illinois Central holding. He cites both text in the decision and historical antecedents that indicate the public trust sounds in property law. Lazarus notes that Sax’s article from 1970 rejected the property law basis. Sax was concerned that property law would limit the expansion of the public trust doctrine as needed to other public purposes. Yet, as stated, infra, Sax even refers to the property law basis as a “rather dubious notion.” Sax even refers to the property law basis as a “rather dubious notion.” Yet, as stated, infra, Sax has converted to the property law school of thought. Oddly enough, he did so in his analysis of Stop the Beach Renourishment.

439. Id. at 425 n.1 (citations omitted).

440. See id. at 455–56.

441. See Appleby, 271 U.S. at 383–84.


444. Wilkinson, supra note 438, at 456.

445. Id.

446. Id. Wilkinson believes commerce clause analysis most closely aligns with the complementary navigational servitude, which is discussed more fully, infra, in the next section.

447. Lazarus, supra note 266, at 642 n.63 and accompanying text (citing Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452–54 (1892)).

448. Id. at 642 (discussing Sax, supra note 354, at 478–83).

449. Id. at 642 n.64.

450. Sax, supra note 354, at 484.

451. See infra note 481 and accompanying text.
So, if one cannot today ferret out exactly what body of law the Illinois Central Court relied upon, how did the Appleby Court act in its own role as the Oracle of Delphi? Justice Taft stated that Illinois Central "was necessarily a statement of Illinois law." Huffman puzzles over this conclusion. Rather, Illinois Central relied on a vague, "settled law" throughout all states. What was that settled law?

Appleby presents a further twist. Today, both proponents and opponents of a broad public trust doctrine acknowledge that Illinois Central is the seminal decision, the "lodestar" in the field. This is so principally because Professor Sax told us. Most subsequent writers, including the author of this article, agree. One just wishes Sax gave us further analysis. Yet, the Appleby Court relegated the Illinois Central decision to an almost footnote status merely thirty-four years later. Rather, Taft cited New York law in Appleby for the right of New York City to grant submerged sovereign lands. He took the inherent authority as a given: "Upon the American Revolution, all the proprietary rights of the Crown and Parliament in, and all their dominion over, lands under tidewater vested in the several states, subject to the powers surrendered to the National Government..."

Frankly, the best analysis is Wilkinson’s conclusion that Illinois Central confirmed a federal general public trust, which each state could modify to meet the unique needs of its jurisdiction and its people. The Supreme Court established this in 1977 as its modern rule in Corvallis Sand & Gravel Co. No other major federal decisions addressed the public trust doctrine as applied to sovereign submerged lands until the doctrine crossed the Rubicon: the 1970 Sax article. Most commentators address the doctrine in its pre-Sax and post-Sax paradigms. Professor Sax drafted his article as "part of a
larger study [he was] making of citizen efforts to use the law in environmental-quality controversies.\textsuperscript{462} He concluded: “Of all the concepts known to American law, only the public trust doctrine \textit{seems to have} the breadth and substantive content \textit{which might make it useful} as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.”\textsuperscript{463}

In other words, he sought to implement an ancient legal doctrine in order to foster litigation to address modern environmental and natural resource issues. He was on a voyage of exploration, not making a map of known waters.

Sax cited three requirements to meet “[i]f that doctrine is to provide a satisfactory tool:”

1. “It must contain some concept of a legal right in the general public;”
2. “[I]t must be enforceable against the government;” and
3. “[I]t must be capable of an interpretation consistent with contemporary concerns for environmental quality.”\textsuperscript{464}

As noted above, Sax stated the concept that the public trust sounds in property law is “dubious.”\textsuperscript{465} He likewise questioned the strict application of historical antecedents, even though he did recite Roman and English law on the topic: “Certainly, the phrase “public trust” does not contain any magic such that special obligations can be said to arise merely from its incantation; and only the most manipulative of historical readers could extract much binding precedent from what happened a few centuries ago in England.”\textsuperscript{466}

Nonetheless, Sax saw much promise in modern application of the public trust doctrine: “But that the doctrine contains the seeds of ideas whose importance . . . might usefully promote needed legal development, can hardly be doubted.”\textsuperscript{467}

Sax concluded that property law would impede the sovereign’s ability to re-allocate the resource.\textsuperscript{468} He expressed further concern that treating public trust lands as public property rights might subject the government to a takings claim if the government withdrew the right.\textsuperscript{469}

\begin{footnotesize}
\begin{enumerate}
\item Sax, \textit{supra} note 354, at 473 n.1.
\item Id. at 474 (emphasis added) (citations omitted).
\item Id.
\item Id. at 484.
\item Id. at 485 (emphasis added).
\item Sax, \textit{supra} note 354, at 485 (emphasis added).
\item Id. at 482.
\item Id. at 478.
\end{enumerate}
\end{footnotesize}
He explained that the doctrine is not substantive at all.\textsuperscript{470} Rather, he contended it is more of a useful tool as several states have used it:

[T]here is a great deal of ingenuity which courts can use . . . . A recognition of that potential is important . . . because it indicates that public trust law is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process. The public trust approach [that] has been developed . . . and the exercise in applying that approach to existing situations . . . demonstrate that the public trust concept is, more than anything else, a medium for democratization.

* * *

Thus, the doctrine which a court adopts is not very important; rather, the court’s attitudes and outlook are critical. The “public trust” has no life of its own and no intrinsic content. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process.\textsuperscript{471}

At bottom, Sax’s public trust doctrine is not a talisman. Rather, it is but a tool.

Carol Rose’s article entitled \textit{Joseph Sax and the Idea of the Public Trust}\textsuperscript{472} confirms Sax’s intent to revive and expand the public trust doctrine:

Until it was revived and re-invented by Sax, the doctrine held that some resources, particularly lands beneath navigable waters or washed by the tides, are either inherently the property of the public at large, or are at least subject to a kind of inherent easement for certain public purposes. Those purposes are foremost navigation and travel, to a lesser extent fishing, and lesser still recreation and public gatherings.\textsuperscript{473}

Rose also explains why Sax would not want the public trust to be explained as a property interest:

\textsuperscript{470} See id. at 509.
\textsuperscript{471} Id. at 509, 521.
\textsuperscript{473} Id. at 351.
STOP THE BEACH RENOURISHMENT

There were good reasons for this, both as a general matter and for Sax's purposes in particular. First, a trust-based public property right would mean that the unorganized public could trump its own legislature's acts, implying that the public trust was some sort of an informal constitutional right, something certainly outside normal American legal practice. But for Sax, a second reason may have been more important: [H]e was most urgently concerned with extending and improving the public management of diffuse environmental resources.474

Rose infers that Sax "evidently" thought a property analysis would constrain legislative choices.475 She concludes that he likely wanted the legislatures to have the greatest flexibility in implementing the public trust in a myriad of modern scenarios.476

As Lazarus notes, Professor Sax ultimately stated, one decade later, that the public trust doctrine is based on property law.477 Lazarus emphasizes that Sax's shift to acknowledging that the public trust doctrine is only sensible.478 "The doctrine is squarely rooted in property law."479 Lazarus explicates: "The trust doctrine originated with the notion of sovereign ownership of certain resources in trust for the sovereign's citizens. Controversies over the doctrine historically have concerned ownership boundaries and the existence of public access or easements. The Illinois Central opinion is replete with references to property law concepts."480

Interestingly, Professor Sax wrote an article as STBR was pending that addressed this very issue in the context of that case.481 Sax stated that the mean high tide line demarcates the property boundary between beachfront littoral landowners and "seaward of that line is the state, a public landowner."482 This author did not find the words "public trust" in the recent Sax article.483 Rather, Sax contends: "The law is well settled that in its proprietary capacity the state is entitled to assert its ownership rights in the same

474. Id. at 357.
475. Id.
476. Id.
478. See id.
479. Id. at 642.
480. Id. n. 63 (citations omitted). Although, as noted, Illinois Central was replete with references to numerous legal doctrines, without pinning any one down.
482. Id. at 641–42.
483. See generally id.
way, and with the same vigor, as any other owner.” 484 Sax emphasizes: “As a proprietor, it should be neither worse off nor better off than any other proprietor.” 485 Nonetheless, Sax notes that only one amicus brief in *STBR* even raised the balance between the upland littoral property owner’s rights and the state’s property rights of lands seaward of the MHTL. 486

As Sax established *Illinois Central* as the “lodestar” public trust decision, 487 so he turns to a more recent Supreme Court decision to make his point on behalf of the state as proprietor, *United States v. Mission Rock Co.* 488 There, the Court upheld the state’s right to convey title lands to a third party who filled and “thereby cut[ ] off the littoral owner’s water access.” 489 The Court held the State could convey its tideland for any purpose for which it held the submerged parcel, “i.e., ‘in aid of commerce.’” 490 Interestingly, the *Mission Rock* Court cited *Shively*, not *Illinois Central*, as its principal authority a decade after the latter two decisions were issued. 491 Sax acknowledges that the result in *Mission Rock* was rather extreme. 492

Sax points to a scenario that is troubling to a sovereign proprietor, below MHTL (or MHWL, as it is known in Florida):

Another possible state proprietary claim could arise if—as the Florida Supreme Court found [In *Walton County v. Stop the Beach Renourishment*], the earlier loss of beach was caused by avulsion, and the public/private boundary did not move landward. In such an event, the foreshore between high and low tide (which formerly had been publicly owned and available for public use) would now be located entirely on land owned by the littoral proprietor and the public might not have a legal right of access to it. 493

Sax suggests that any public restoration could be done “assuming it could practically be [done] without also filling the littoral owner’s submerged land.” 494

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484. *Id.* at 643.
485. *Id.* at 644.
486. *Id.* at 648.
487. Sax, supra note 354, at 489.
488. 189 U.S. 391 (1902); Sax, supra note 481, at 644.
489. Sax, supra note 481, at 644.
491. See *id.*
492. *Id.*
493. *Id.* at 651.
494. Sax, supra note 481, at 651.
Sax’s acknowledgement that property law underlies the public trust doctrine raises a point mentioned both in his 1970 article and in the *Illinois Central* majority decision.\(^{495}\) What are the eminent domain implications where the state changes its mind? Justice Field mentioned that the state “ought to pay” for any “expenses incurred in improvements made under such a grant” that the state later repeals.\(^{496}\) Sax initially rejected property law underpinnings in part because of takings exposure if the state should change a public use to another purpose.\(^{497}\) The latter is a highly theoretical and unlikely scenario. The former, however, is not.

James Rasband addressed the takings issue in 1998.\(^{498}\) He argues that “compensation for [private] improvements is a small equitable price to pay for reversing the [allegedly] improvident . . . resource grants of the past.”\(^{499}\) Rasband limits such claims to riparian and littoral uses that are authorized.\(^{500}\) He cites to *Yates v. Milwaukee*,\(^{501}\) which confirmed the common law riparian or littoral right to “‘wharf out’ and build piers, wharves and other improvements on tidelands and submerged lands adjacent to [the riparian or littoral] property.”\(^{502}\) Left unchanged in *Illinois Central* was Justice Harlan’s holding below (while “riding the circuit”) that the railroad could continue to use the portion of the harbor it had filled pursuant to the grant.\(^{503}\) Any littoral improvements could remain, as long as they did not interfere with public navigation.\(^{504}\) Rasband states the Supreme Court’s direction that the lower court on remand order removal of any littoral improvements that interfere with navigation was consistent with the 1869 act of conveyance.\(^{505}\) That act barred obstructions to the harbor or general navigation.\(^{506}\) Rasband notes that the Seventh Circuit on remand found the “piers did not interfere with navigation.”\(^{507}\) Accordingly, there was no basis in *Illinois Central* for equitable takings compensation, both because the improvements remained and because

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\(^{496}\) *Ill. Cent. R.R. Co.*, 146 U.S. at 455.


\(^{499}\) Id. at 405.

\(^{500}\) Id. at 342–43 n.51.

\(^{501}\) 77 U.S. (10 Wall.) 497 (1870).

\(^{502}\) Rasband, *supra* note 498, at 343 n.51.


\(^{505}\) See Rasband, *supra* note 498, at 342–43 n.51.

\(^{506}\) Id. (citing Ill. Cent. R.R. Co., 146 U.S. at 450).

\(^{507}\) Id. (citing Illinois *ex rel.* Hunt v. Illinois Cent. R.R. Co. 91 F. 955 (7th Cir. 1899)).
there would have been no compensable good faith reliance if piers were built in violation of the grant conditions. 508

Rasband notes an additional and related limitation set out in Illinois Central. Where the grantee or its successor has in good faith so altered the trust property that it is no longer useful for trust purposes, the trust no longer burdens the parcel. 509 The parcel vests in the private party free of any public proprietary claim. 510 He states this was the correct result in Illinois Central regarding the piers that the railroad built in good faith "reliance on the 1869 grant." 511

The most significant Supreme Court public trust decisions between Appleby and STBR were Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co. and Phillips Petroleum Co. v. Mississippi. 512 We discussed Corvallis above. That decision confirmed the sovereign right of each state to alter its sovereign lands standards once it achieves statehood. 513 Nonetheless, Illinois Central seems to provide a general backstop. While the state may convey sovereign lands, it cannot abrogate its public trust obligations.

Phillips Petroleum was a quiet title action that concerned nonnavigable tidal wetlands several miles upriver of the Gulf Coast. 514 The case had a bizarre background. It originated in a 1973 Mississippi legislative directive to the state’s marine resources council to map the state-owned wetlands. 515 The council staff identified the wetlands at issue, and the state’s Mineral Lease Commission drafted a proposed lease. 516 So, the state was in the ironic position of asserting title to exploit, rather than to protect the wetlands. 517

The record showed that the parcel was non-navigable, but tidally influenced when Mississippi was granted statehood. 518 Phillips asserted the public trust extended to all tidally influenced navigable waters and underlying lands at statehood. 519 It claimed that sovereign boundary ended at the mean

508. Id. at 342–43.
509. See Rasband, supra note 498, at 396.
510. Id. at 395 (citing Illinois v. Ill. Cent. R.R. Co., 33 F. 730, 775–76 (C.C.N.D. Ill. 1888)).
511. See id. at 342–43 n.51.
516. Id.; Phillips Petroleum Co., 484 U.S. at 472.
517. Cinque Bambini P’ship, 491 So. 2d at 511.
519. Id. at 478–79.
high water line.\textsuperscript{520} Mississippi countered that it took title to all lands underly-
ning \textit{all} tidally influenced waters that had not been conveyed expressly when Mississippi be-
come a state in 1817.\textsuperscript{521} The state’s right to the oil lease income from the wetlands hung in the balance.\textsuperscript{522}

The Supreme Court cited \textit{Shively} in holding that the public trust covered all tidelands.\textsuperscript{523} The ebb and flow test was not limited by the mean high water line.\textsuperscript{524} The majority stated that the English crown owned all tidal waters, and each of the original thirteen states had the right to claim all tidal lands.\textsuperscript{525} Some original states’ decisions to reduce the scope of sovereign lands only confirmed their ability to choose their own public trust doctrines.\textsuperscript{526} A vigorous dissent countered that this was an issue of first impression.\textsuperscript{527} The dissent argued that navigability was the limiting factor, as it was the key to all common law public trust cases and treatises of consequence in England and the United States.\textsuperscript{528}

Austin explains that the \textit{Phillips} majority completely misunderstood \textit{Shively}.\textsuperscript{529} The \textit{Shively} Court considered title in an entirely navigable area of the lower Columbia River.\textsuperscript{530} Therefore, “the Court never alluded to the trust’s role in nonnavigable areas.”\textsuperscript{531}

Austin notes that the \textit{Shively} Court stated that “‘the title and dominion in [English] lands flowed by the tide water were in the King for the benefit of the nation.’”\textsuperscript{532} The \textit{Phillips} majority focused on the \textit{Shively} Court’s statement that such tidewater rights “passed to the states.”\textsuperscript{533} As Austin mentions, the \textit{Phillips} majority contended this was a “sweeping” acknowledgment of the extent of sovereign submerged lands.\textsuperscript{534}

Austin concludes that the \textit{Phillips} majority misread \textit{Shively}.\textsuperscript{535} The \textit{Shively} Court focused on the public trust in terms of waters’ use “for high-
ways of navigation and commerce, domestic and foreign, and for the purpose

\textsuperscript{520} Id. at 472–73.
\textsuperscript{521} Id. at 472.
\textsuperscript{522} Id.
\textsuperscript{523} Phillips Petroleum Co., 484 U.S. at 480 n.8.
\textsuperscript{524} Id. at 480.
\textsuperscript{525} Id. at 478.
\textsuperscript{526} Id. at 475–76.
\textsuperscript{527} Id. at 485 (O’Connor, J., dissenting).
\textsuperscript{528} Phillips Petroleum Co., 484 U.S. at 486 (O’Connor, J., dissenting).
\textsuperscript{529} Austin, supra note 297, at 967, 995–97.
\textsuperscript{530} Id. at 995 (citing Shively v. Bowlby, 152 U.S. 1, 8 (1894)).
\textsuperscript{531} Id.
\textsuperscript{532} Id. (quoting Shively, 152 U.S. at 57).
\textsuperscript{533} Id.
\textsuperscript{534} Austin, supra note 297, at 995.
\textsuperscript{535} Id.
of fishing by all the King's subjects." Moreover, Shively cited both Genesee and the English common law for the proposition that the ebb and flow test was merely a "convenient" navigability test in coastal jurisdictions.

Austin helpfully provides a long list of Supreme Court decisions that support the limitation of the navigability for title test. Martin and Barney were among several pre-Shively decisions. Many decisions, including one the year before Phillips, referred to navigability alone and stated the trust purpose was to protect navigation, commerce, and fishing.

At this point, I want to clarify a point from my own 1989 article on the public trust doctrine in Florida. The published text states that Phillips "confirmed the extent of the state sovereignty title to tidal lands under non-navigable waters." That sentence was added in the editing process. An errata sheet stated that Phillips only provided for the possible maximum extent of such lands. Florida's Constitution then limited, and still limits, public trust lands to those lying below the mean high water line. Therefore, Phillips is the Supreme Court's most current statement of the extent of submerged sovereign lands in tidal waters upon statehood. It does not bind forever each state, as we know from Corvallis. Further, the Phillips majority decision is itself contrary to the manifest precedent of the Court.

One further point is necessary to clarify the states' sovereign rights in coastal waters. The Supreme Court's 1947 decision in United States v. California, settled a debate between the states and the federal government regarding who owned the ocean bottom along the coasts. The Court held that the federal government owned the territorial seas. This undermined the various coastal states' claims to the first three miles of the coastal waters. Congress undid the 1947 decision by awarding the coastal states ownership to submerged lands and resources up to three miles offshore in the Sub-

536. Shively, 152 U.S. at 11.
537. Id. at 34.
538. See Austin, supra note 297, at 991–97.
539. Id. at 993 n.238 (citing, inter alia, Barney v. Keokuk, 94 U.S. 324, 338 (1876); Martin v. Lessee of Waddell, 41 U.S. 367, 407 (1842)).
540. Austin, supra note 297, at 997 (citing, inter alia, Utah Div. of State Lands v. United States, 482 U.S. 193 (1987)).
541. Ansbacher & Knetsch, supra note 336, at 369.
545. Id. at 41.
546. Id. at 40.
merged Lands Act of 1953. Congress simultaneously passed the Outer Continental Shelf Lands Act of 1953, which codified federal jurisdiction beyond three miles and established procedures for developing resources in the federal jurisdiction. Additionally, the state owned lands remain subject to the federal navigational servitude.

VIII. NAVIGABILITY FOR REGULATORY PURPOSES

One cannot segregate sovereign submerged lands law from its primary purpose—protecting the navigational servitude for the public. William Sapp, et al., drafted a useful outline entitled The Float a Boat Test: How to Use It to Advantage in This Post-Rapanos World for a 2009 ALI-ABA seminar. They noted three different lines of federal navigability decisions: 1) Commerce Clause; 2) Admiralty; and 3) Submerged Title.

They further delineated Commerce Clause decisions into: a) Commercial regulation; b) Federal Power Act; c) Rivers and Harbors Act; and d) Navigational Servitude.

The Commerce Clause of the United States Constitution grants Congress the power to regulate navigable waters. Additionally, Congress may regulate non-navigable waters that affect navigation. Navigable servitude may be traced back to Rome. We discussed Justinian's and Spain's edicts that navigable or perennial waters were held by the Crown for the public use. England differentiated between Crown ownership and public right of navigation. As stated above, the predominant strain of English com-

549. Id.
550. Id.
552. Id. at 10444.
553. Id. at 10444–47.
554. U.S. CONST. art. I, § 8, cl. 3.
555. U.S. CONST. art. I, § 8, cl. 3. But see, MacGrady, supra note 290, at 593 (citing various decisions holding that the federal authority to regulate navigation is based on the: Treaty Clause, U.S. Const. art. II, § 2; War Powers Clause, U.S. Const. art. I, § 8; General Welfare Clause, U.S. Const. art. I, § 8; and Public Property Clause, U.S. Const. art. IV, § 3). See also Ansbacher and Knetsch, supra note 336, at 339.
556. J. INST. 2.1, supra note 223.
559. See Ball, supra note 11, at 9.
mon law authority limited Crown ownership to lands underlying navigable, tidally influenced waters. 561

Austin does an admirable job of compiling authority showing that tidal influence was prima facie evidence establishing a public navigational influence in common law England. 562 Austin cites Mayor of Colchester v. Brooke: 563

“It cannot be disputed that the channel of public navigable rivers is properly described as a common highway . . . and there is no one circumstance which more decisively affixes on a river the character of being public and navigable in this sense of a highway than the flow and reflow of the tide in it.” 564

Austin cites multiple common law decisions where tidal rivers were determined nonnavigable by the public. 565 Austin notes a later English decision that “clarified” that navigable rivers for title purposes—and presumably for navigation—were tidal. 566

The Supreme Court of the United States language in United States v. Appalachian Electric Power Co. 567 exhibits the sweeping navigational powers of the federal government:

The state and [private riparian landowners], alike . . ., hold the [navigable] waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the power to regulate, i.e., to “prescribe the rule by which commerce is to be governed.” This includes the protection of navigable waters in capacity as well as use. . . . The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property;

560. Id. and accompanying text.
561. See HUMPHRY W. WOOLRYCH, A TREATISE OF THE LAW OF WATERS: OF THE CROWN TO THE LAND BETWEEN HIGH AND LOW WATER MARK 65 (1853) (“[T]he soil of ancient navigable rivers, where there is a flux and reflux of the sea, belongs to the Crown . . .”).
562. See Austin, supra note 297, at 985–86.
565. See id. (discussing Rex v. Montague, (1825) 107 Eng. Rep. 1183 (K.B.) 1185, 4 B.&C. 598, 602, which differentiated navigational servitude between “broad and deep” and “petty streams” affected by the tide).
566. Id. at 986 n.186 (citing Murphy v. Ryan, (1868) 2 Ir. R.-C.L. 143 (1868) (holding that navigable title required tidal influence). Austin also goes on to note that non-tidal waters are prima facie private, but can be deemed navigable by prescriptive right. Id. at 986.
567. 311 U.S. 377 (1940).
"that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.568

Gibbons v. Ogden569 was the landmark federal navigational servitude decision.570 Gibbons held that the Commerce Clause regulated interstate navigation.571 The Court held that the federal navigational servitude mandated free navigation:

The power over commerce, including navigation was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it.

...  

[D]eep streams ... pass through ... almost every State in the Union, and furnish the means of exercising this right [to regulate commerce]. If Congress has the power to regulate it, that power must be exercised whenever the subject exists.572

The Gibbons Court therefore upheld a steamboat license that conflicted with Robert Fulton's (yes—that Robert Fulton)573 and Robert Livingston’s exclusive, statewide steamboat rights granted by the State of New York.574 Dayton states: “The monopolistic grants by the states to Fulton and [Livingston] did much to delay the introduction of steamboats.”575 The state allowed them to seize any steamboat that any person attempted to operate without their exclusive license.576 The state even allowed them to collect a penalty.577 New Jersey passed responsive protectionistic legislation for its own steam-
boat operators on the Hudson.\textsuperscript{578} Gibbons obtained a federal "coasting license" under which he ran his steamboat back and forth between New Jersey and New York.\textsuperscript{579} When New York courts ruled in favor of the monopoly, the Supreme Court was asked to intercede.\textsuperscript{580} Justice Marshall wrote the opinion upholding the navigational servitude, adopting much of the argument of Daniel Webster.\textsuperscript{581}

Austin continues his thorough explication of tidal issues in navigability in analyzing early American authority concerning the "ebb and flow test."\textsuperscript{582} He cites text in the seminal Commentaries on American Law, written in 1832 by James Kent, later published in 1873.\textsuperscript{583} Quoting Kent, Austin wrote in turn:

\begin{quote}
It is a [well] settled principle of the English common law, that the right of soil owners . . . bounded by the sea, or on navigable rivers, where the tide ebbs and flows, extends to [the] high-water mark . . . .
\end{quote}

\begin{quote}
[In the common law sense of the term, . . . [the River Banne] only [was] deemed navigable in [the portion in] which the tide ebbed and flowed . . . .
\end{quote}

\begin{quote}
[N]o rivers are deemed navigable . . . except those where the tide ebbs and flows.\textsuperscript{584}
\end{quote}

Kent's restatement of English common law was consistent with early Supreme Court authority. In \textit{The Steam-Boat Thomas Jefferson},\textsuperscript{585} the Supreme Court held that federal courts lacked jurisdiction in admiralty over a claim for boatsman wages in the nontidal Missouri River.\textsuperscript{586} The Court held
that federal maritime law concerned only the open ocean or tidal waters. The Court continued its narrow interpretation and ruled similarly in *Steamboat Orleans v. Phoebus*.

The Court shifted and dramatically expanded course in *Propeller Genesee Chief v. Fitzhugh*. Chief Justice Taney pronounced the ebb and flow test inadequate to the United States. He stated the test made sense in England, where virtually all navigable streams were tidally influenced. He concluded that the driving factor was navigability, not ebb and flow:

In England, therefore tide-water and navigable water [were] synonymous terms, and tide-water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and [English courts] took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. *In other words, it is confined to public navigable waters*.

Accordingly, *Genesee* extended admiralty—and, practically all navigability tests under federal law to navigable, nontidal waters.

The next major decision was *Daniel Ball*, which addressed a federal obligation that interstate steamship operators obtain a license to ply their trade. This was the logical extension of *Gibbons*. A steamship operator who plied solely between Grand Haven and Grand Rapids, Michigan, claimed the requirement did not apply to him. The Supreme Court rejected the argument, and created the susceptibility test for navigation:

[R]ivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may

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587. Id. at 429.
588. 36 U.S. (11 Pet.) 175, 184 (1837).
590. Id. at 453, 455–56.
591. Id. at 454–55. But see MacGrady, supra note 284, at 570.
593. Id. at 456–58.
595. Id. at 564–65.
be conducted in [their] customary modes of trade and travel on wa-

ter.596

The Supreme Court in United States v. Steamer Montello,597 expanded
the navigability test from Daniel Ball.598 The defense in The Montello stated
that a stretch of the Fox River in Wisconsin was so populated with rapids and
waterfalls that it was incapable of interstate commerce.599 The Court found
that canoes had navigated the river from the time Europeans had been in the
area.600 The Court held that the mode of transport did not affect navigabili-
ty.601 Rather, the key was that any transport was possible.602

The capability of use by the public for purposes of transportation
and commerce affords the true criterion of the navigability of a
river, rather than the extent and manner of that use. If it be capa-
ble in its natural state of being used for purposes of commerce, no
matter in what mode the commerce may be conducted, it is navig-
able in fact, and becomes in law a public river or highway.603

Two years after the Montello decision, and five years after the Daniel
Ball decision, the Supreme Court of the United States issued an opinion dis-
cussed above regarding the public trust title in Barney v. Keokuk.604 We
mention Barney here because the Court applied the Genesee test in extend-
ing the public trust far above tidal waters to a port located on the Mississippi,
in the southeastern corner of Iowa.605

Austin emphasizes the lineage in the following passage:

Since this court [declared in Genesee] that the Great Lakes and
other navigable waters of the country, above as well as below the
tide, are, in the strictest sense, entitled to the denomination of na-
vigable waters, and amenable to admiralty jurisdiction, there

596. Id. at 563 (emphasis added).
597. 87 U.S. (20 Wall.) 430 (1874).
598. Id. at 441-42.
599. Id. at 439-40.
600. Id. at 440.
601. Id. at 441.
602. The Montello, 87 U.S. (20 Wall.) at 441.
603. Id. at 441-42 (emphasis added).
604. Austin, supra note 297, at 970-71 (discussing Barney v. Keokuk, 94 U.S. 324
(1876)).
seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters.606

Barney followed Genesee’s conclusions that navigability drove the English ebb and flow test.607 Austin cites various earlier Supreme Court decisions that Barney relied upon, all of which “reinforce the view that navigability is the sole measure of the tidelands trust.”608

The navigational servitude is a federal easement that seeks to protect public waterways.609 It has been interpreted to allow federal waterway improvements without having to compensate adjacent riparian or littoral owners under the Takings Clause.610 In Goodman v. City of Crystal River,611 the United States Middle District of Florida held that historic canoe and small craft traffic established a federal navigational servitude granting public access to swim with the manatees overlying the Goodmans’ privately held lands at Three Sisters Springs off of the lower Crystal River.612

In Kaiser Aetna v. United States,613 and the companion decision of Vaughn v. Vermillion Corp.,614 the Supreme Court held that navigability for public servitude purposes does not flow into waterways that are built on private property with private funds.615 The Court noted that a servitude would be imposed if the waterway had been navigable for title purposes.616

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606. Austin, supra note 297, at 992 n.236.
610. Id. at 1472 n.6 (citing Murphy v. Dep’t of Natural Res., 837 F. Supp. 1217, 1221 (S.D. Fla. 1993).
611. 669 F. Supp. 394 (M.D. Fla. 1987) (By way of full disclosure, I represented the Goodmans at a later time concerning the same body of water and the same parcel.).
612. Id. at 401-02. See United States v. Cherokee Nation of Okla., 480 U.S. 700, 704 n.3 (1987); J.W. Looney & Steven G. Zraick, Of Cows, Canoes, and Commerce: How the Concept of Navigability Provides an Answer If You Know Which Question to Ask, 25 U. ARK. LITTLE ROCK L. REV. 175, 188 (2002) (My favorite title goes to this piece from Dean Looney, whom I clerked for at the University of Arkansas.; Charles A. Shafer, Public Rights in Michigan’s Streams: Toward a Modern Definition of Navigability, 45 WAYNE L. REV. 9, 22–24 (1999); Russell A. Austin, Jr. & Ralph W. Johnson, Recreational Rights and Titles to Beds on Western Lakes and Streams, 7 NAT. RESOURCES J. 1, 14 n.65 (1967).
615. Id. at 208–10; Kaiser Aetna, 444 U.S. at 179–80.
616. See Kaiser Aetna, 444 U.S. at 186.
Wilkinson questions the Court’s analysis. He contrasts the navigational servitude, which holds that the federal government owes no takings compensation when it improves waterways that are navigable by the public, with the public trust. He notes the public trust “has traditionally been used to protect the public’s right of access to navigable watercourses.”

Wilkinson emphasizes that “the opinions have not always precisely distinguished among the three distinctive rules that apply to watercourses [that are] navigable for title.”

IX. SOVEREIGN LANDS BOUNDARIES

The navigable for title test combines with the various regulatory navigability standards to mandate a clearly understood boundary of sovereign lands. While Corvallis Sand & Gravel Co. confirmed each state’s ability to alter the definition of, but not abrogate obligations over, sovereign submerged lands, there are currently two separate Supreme Court standards for the boundaries of sovereign lands when each state achieves statehood.

Under Phillips Petroleum Co.’s bare majority decision, sovereign lands extended under all tidally influenced waters. Under Barney, the boundary of sovereign submerged lands under nontidal waters was delineated by actual navigability at the time of statehood. So let us discuss these categories in turn.

A. Tidal Boundaries

As stated in section VI, the Supreme Court majority in Phillips Petroleum Co. appears to be contrary to the weight of historical authority. Justinian’s Code stated that Roman law provided that “[t]he sea-shore extends to the highest point reached by the waves in winter storms.” English com-

617. See Wilkinson, supra note 438, at 463 n.162.
618. Id.
619. Id.
620. Id. (citing (1) state right to ownership based on federal trust ownership before statehood; (2) public trust doctrine; and (3) navigation servitude). While he distinguishes categories that differ from Sapp, Wilkinson points out the muddying up of the different standards. See id. at 463–64 n.163.
623. Barney, 94 U.S. at 338.
624. J. INST. 2.1.3, supra note 223.
mon law, as early as chapter twenty-three of the Magna Carta\textsuperscript{625} and Bracton\textsuperscript{626} through Digges\textsuperscript{627} and onto Hale\textsuperscript{628} commentators from multiple decisions show that sovereign tidelands lay under navigable waters.

Austin cites a strain of English common law authority connecting navigability and tidality.\textsuperscript{629} He notes: “Where [English] authorities did not directly express a connection between navigability and tidality, they frequently spoke in terms of navigability alone.”\textsuperscript{630} He acknowledges that “[i]t is not clear why the common law linked navigability and tidal influence when delineating submerged bed ownership.”\textsuperscript{631}

Thomas Digges stated generally that the lands that Queen Elizabeth I claimed as foreshore lay between high and low tides.\textsuperscript{632} Nonetheless, he did not explain how to legally measure the tidal boundaries the Queen claimed.\textsuperscript{633}

Lord Chief Justice Matthew Hale’s \textit{De Jure Maris} tried to explicate the foreshores.\textsuperscript{634} He stated that the foreshore is overflowed by “[o]rinary tides or neap tides, which happen between the full and change of the moon.”\textsuperscript{635} Cole states that one knows today that Hale’s equating “neap” and “ordinary” tides was at least ambiguous, and at most incorrect.\textsuperscript{636} He does not, however, explain why.\textsuperscript{637}

The neap tide is the weakest tide, which occurs twice per lunar cycle when gravitational pulls of the sun and moon are at right angles to each other.\textsuperscript{638} Neap tides occur at quarter moons.\textsuperscript{639} Neap tides are the opposite of

\begin{footnotesize}
\begin{enumerate}
\item[625.] See Magna Carta ch.23 (William Sharp McKechnie trans., MacMillan 1905) (1225).
\item[626.] See BRACTON, 2 DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE (George Woodbine ed., 1259), available at http://ia600403.us.archive.org/1/items/delegibusetconsu02brac/delegibusetconsu02brac.pdf.
\item[627.] See generally Digges, supra note 287.
\item[628.] See generally Hale, supra note 301.
\item[629.] Austin, supra note 297, at 983–86; Digges, supra note 87, at 183.
\item[630.] Austin, supra note 297, at 984.
\item[631.] Id. Austin makes a factual error, however, in stating: “As a matter of policy, the difference between navigable freshwater and navigable tidewater is difficult to see.” Id. Tidal influence occurs more commonly near the sea, but tides often affect waters well into freshwater rivers. For example, the St. Johns River in Florida is tidally influenced many miles upriver of any salt water.
\item[633.] Id. at 166.
\item[634.] Id.; see also Hale, supra note 301.
\item[635.] Hale, supra note 301, at 393.
\item[636.] Id.
\item[637.] See Cole, supra note 663, at 166.
\item[639.] Id.
\end{enumerate}
\end{footnotesize}
spring tides, which occur when the Earth, sun and moon align.\textsuperscript{640} Spring tides occur during the full moon and the new moon.\textsuperscript{641} Newton first explained our modern notion of the lunar tides in his 1687 \textit{Principia},\textsuperscript{642} two decades too late to be of any use to Hale.

\textit{Attorney-General v. Chambers}\textsuperscript{643} is the English common law decision that is most cited for establishing the sovereign tidal boundary.\textsuperscript{644} Nonetheless, the decision established a "somewhat imprecise" definition of the boundary at the medium or ordinary high water mark.\textsuperscript{645}

This point of the shore, therefore, is about four days in every week—that is, for the most part of the year—reached and covered by the tides . . . . [T]he average of these medium tides, in each quarter of a lunar revolution during the . . . year, gives the limit . . . to the rights . . . .

. . . . .

[T]he line of the medium high tide between the springs and the neaps; all land below that line is more often than not covered at high water, and so may justly be said, in the language of LORD HALE, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line . . . .\textsuperscript{646}

Modern surveyors have complained of numerous problems caused by the amorphous definition established by \textit{Philpott}, Hale, and \textit{Chambers}. McGlashan et al., note that different passages in \textit{Chambers} recommended measurements over a week and over a quarter of an annual lunar revolution.\textsuperscript{647} This "could result in substantial differences in the tidal heights being used to define the foreshore boundaries."\textsuperscript{648}

\textsuperscript{640} Id.
\textsuperscript{642} See generally ISAAC NEWTON, NEWTON'S \textit{PRINCIPIA} (Percival Frost, M.A., 1863).
\textsuperscript{645} Id. at 187.
\textsuperscript{647} McGlashan, \textit{supra} note 644, at 186–87.
\textsuperscript{648} Id. at 187.
Surprisingly, the courts in the United States did not revisit the topic until 1935. I say surprisingly because of the presumption from the nation's birth that all lands below the high tide mark are owned by the sovereign. First the federal government, and then, at statehood, the respective state. One supposes quite reasonably, that the confusion and debate over tidal boundaries in Phillips Petroleum would not have occurred had the courts of the United States addressed the specific tidal boundaries when announcing repeatedly the primacy of sovereign ownership.

In 1935, the Supreme Court accepted the statistically determined mean high tide as the modern, substantial equivalent of the ordinary or medium high water mark:

In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey, that "[m]ean high water at any place is the average height of all the high waters at that place over a considerable period of time," and the further observation that "from theoretical considerations of an astronomical character" there should be "a periodic variation in the rise of water above sea level having a period of 18.6 years," the Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here . . . . We find no error in that instruction.

As Cole notes, this remains the general standard in the United States for determining the mean high tide or medium high water line.

Cole states that Spanish and Mexican grants confirmed in the American State Papers have been held to tidal limits that differ from the medium high tide or water line:

In Spanish and Mexican grants, for example, it has been held that the limit of ownership is controlled by old Spanish law contained in Las Siete Partidas, written in the thirteenth century and tracking the Roman Institutes of Justinian, written in the sixth century. A translation of a portion of that code reads as follows: "The seashores, that is, the shore as far as the waves go at the furthest, was

650. Id. at 31 (citations omitted).
considered to belong to all men. . . . The sea shore extends as far as the greatest winter flood runs up.”

*Borax* retains great significance in states, such as Florida, which adopt the mean high water line as the tidal boundary. *Phillips Petroleum’s* surprising holding that tidality trumps navigability limits *Borax’s* impact in other coastal states. We should note that a minority of coastal states follow the Massachusetts rule—that state and several others who follow it still use the Colonial Ordinance Standard. The 1648 Ordinance set the private boundary at the low water mark but no more than one hundred rods (1650 feet) beyond the high water mark. Additionally, Louisiana follows the Roman civil law by using the “highest winter tide” as the boundary. Louisiana is not limited by navigability. Hawaii’s laws are unique. Its upper reach of the wash of the waves standard is not based on civil law. Rather, it is allegedly derived by royal patents from King Kamehameha V.

**B. Non-Tidal Water Boundaries**

The sovereign submerged boundaries are often more difficult to determine in nontidally influenced waters. *Borax* confirms that the 18.6 year tidal “epoch” can establish mean high tide or mean high water. At worst, this requires a surveyor to determine mean high tide by extrapolating from the two closest tidal datum stations. This becomes trickier in inland tidally influenced waters, but the surveyor still has the datum stations as some, al-

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654. Id. at 169–70.
655. Id. at 4.
658. *Application of Ashford*, 440 P.2d 76, 77 (Haw. 1968) (citing Keelilikolani v. Robinson, 2 Haw. 514 (Haw. 1862)). The upper reach of the waves rule has been declared unconstitutional in at least one federal decision, *Sotomura v. Cnty. Of Haw.*, 460 F.Supp. 473 (D. Haw. 1978), which held that the high water mark was the actual, historical shoreline boundary, but Hawaii continues to follow it.
beit attenuated, baseline. Conversely, navigability title in non-tidally influenced waters requires a much trickier analysis.661

The Supreme Court in Howard v. Ingersoll662 addressed the proper location of the riverline border between Georgia and Alabama.663 The 1802 Treaty of Cession between the United States and Georgia, and treaty language ceding Alabama, stated the border lay along “the western bank of the Chattahoochee River.”664 The majority opinion in Howard held that the “bank” was that water line on the high banks “where the action of the water has permanently marked itself upon the soil.”665 Justice Curtis’ concurring opinion stated that the bank is neither the high nor low water mark.666 Rather, it is the clearest line of water on the bank.667 Justice Nelson dissented, and Justice Grier joined.668 Nelson stated that the higher bank precluded Alabama’s use of the waters of the river for hydraulic purposes.669 The dissent raised further concerns that high water would extend the river banks by a mile inland from a low water mark.670

Even though no other justices joined in Curtis’ concurrence, it “has been the one [test] most frequently cited.”661

This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line... will be found above or below, or at a middle stage of water, must depend upon the character of the stream.672

661. MALONEY ET AL., supra note 659, at 708.
662. 54 U.S. (13 How.) 381 (1851).
663. Id. at 397–98.
664. Id. at 413.
665. Id. at 417.
666. Id. at 427 (Curtis, J., concurring).
668. Id. at 419, 426 (Nelson, J. & Grier, J., dissenting).
671. MALONEY ET AL., supra note 659, at 709.
While Curtis did not use the term, the non-tidal boundary is called today the Ordinary High Water Line, or the OHWL.\(^{673}\) Maloney notes that “the determination of the OHWL is as confused as it is important.”\(^{674}\) Ansbacher and Knetsch note that non-tidal waters do not flow cyclically, as do tidal waters.\(^{675}\) Surveyors must use various physical characteristics to determine the OHWL.\(^{676}\) These include “water level records, vegetation evidence, geomorphological evidence, and soil classification.”\(^{677}\)

The most common definition used is from the Minnesota Supreme Court:

> [The] high-water mark, as a line between a riparian owner and the public, is to be determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long-continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as respects the nature of the soil itself.\(^{678}\)

One comprehends readily that the Carpenter test works well where streams are well defined. One comprehends just as readily that the test does not adapt well in the limpid swamps conditions described by Justice Nelson’s dissent in Howard. We see below, in Section X, that it does not suit well the conditions of much of inland Florida.

**X. RIPARIAN AND LITTORAL RIGHTS**

The property lying alongside a navigable waterbody carries appurtenant rights to that waterbody.\(^{679}\) These rights are known as “riparian” when the water is riverine, and “littoral” when the waterbody is a pond, lake or sea.\(^{680}\) Justice Field’s majority opinion in *Illinois Central* described riparian rights:

> The riparian proprietor is entitled, among other rights, as held in *Yates v. Milwaukee*, to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a

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\(^{673}\) See *Maloney et al.*, supra note 659, at 707.

\(^{674}\) *Id.*

\(^{675}\) Ansbacher & Knetsch, supra note 336, at 362.

\(^{676}\) *Id.*

\(^{677}\) *Id.* (citations omitted).

\(^{678}\) *Tilden v. Smith*, 113 So. 708, 712 (Fla. 1927) (quoting *Carpenter v. Bd. of Comm’rs*, 58 N.W. 295, 297 (Minn. 1894)).


\(^{680}\) See *Black's Law Dictionary* 1018, 1441 (9th ed. 2009).
landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public. In the case cited the court held that this riparian right was property and valuable; and though it must be enjoyed in due subjection to the rights of the public, it could not be arbitrarily or capriciously impaired. 681

Justice Peckham stated in *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners:* 682

The rights which thus belong to . . . [a] riparian owner of the abutting premises [are] valuable property rights, of which he could not be divested without consent, except by due process of law, and, if for public purposes, upon just compensation. 683

Justice Peckham noted in *Weems Steamboat Co. of Baltimore v. People's Steamboat Co.* 684 that each state establishes the specific riparian rights and obligations in its jurisdiction: "The rights of a riparian owner upon a navigable stream in this country are governed by the law of the State in which the stream is situated." 685

Nonetheless, "These rights are subject to the paramount public right of navigation." 686 *Weems* reiterated that a private riparian has "property the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary that it or any part of it be taken for the public use due compensation must be made." 687

As stated above, riparian or littoral rights are not unconditional. Justice Gray stated in *Shively* that the riparian owner must utilize his or her rights consistently with the public rights below the high water mark:

In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage . . . .

682. 168 U.S. 349 (1897).
683. *Id.* at 368 (quoting *Brisbine v. St. Paul & Sioux City R.R. Co.*, 23 Minn. 114, 130 (1876)).
685. *Id.* at 355.
686. *Id.*
687. *Id.* at 355–56.
By the law of England, also, every building or wharf erected, without license, below high water mark, where the soil is the King's, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation. 688

We cited multiple early Supreme Court decisions above, in Section II-C, that held a state cannot impair the obligations of contract by repeal or other substantial impingement on private rights. This includes a government's act that impairs vested property rights held under government grant or charter. 689 Nonetheless, riparian rights are like any other in being held subject to the government's policy power and right of eminent domain. 690

XI. OWNERSHIP OF LANDS INFLUENCED BY ACCRETION, AVULSION, RELICTION, AND EROSION

We discuss accretion in Section IV, above. Rome generally allowed riparian owners to take accretions that were added gradually to their parcels. 691 Common law is the same today. 692 Gradual additions of soils due to such actions as imperceptible shifting of stream channels vest the additional soils to the benefited riparian parcel. 693 Conversely, erosion changes boundaries in favor of the sovereign submerged lands. 694 Nonetheless, Sax wrote a recent article that explicated thoroughly the development of the law of accretion, together with the law of avulsion. 695 Avulsion occurs when sudden or rapid events cause soils to be deposited on riparian parcels. 696 Avulsion generally does not alter boundaries. 697 Sax questions the duality. 698 He says it

689. See, e.g., Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 90 (1810).
691. See generally Deveney, supra note 230.
693. Id. at 404.
694. Id.
695. Sax, supra note 266, at 305.
696. Id. at 306 n.2.
697. Id. at 306.
698. Id. at 307.
does not accord with actual hydrogeological changes. He adds that the history of law on accretion and avulsion “goes back a long way, and is more than a little obscure.”

Modern English common law acknowledges the effects of accretion and avulsion. For example, *Scratton v. Brown* held that the coastal foreshore is a “moveable freehold.” The boundary shifts with gradual and imperceptible accretion. Conversely, sudden physical shifts do not generally alter the legal boundary. England delineates the impacts of public and artificial alterations similarly. Generally, sudden changes do not alter legal boundaries, while gradual and imperceptible changes do so.

Sax shows that English law evolved gradually. In an accretive manner, if you will. Bracton spoke of shoreline changes as he did most of water law. He lifted his analysis from Justinian:

> Alluvion is an imperceptible increment which is added so gradually that you cannot perceive [what] the increase is from one moment of time to another. Indeed, though you fix your gaze on it for a whole day, feebleness of human sight cannot distinguish such subtle increases as may be seen in a gourd and other such things.

Nonetheless, Sax tells us that Bracton did not affect “the course of the English law governing shorelines.” Rather, the law developed in three fourteenth century court decisions.

The *Eyre of Nottingham* addressed an inland, apparently nontidal river. I say apparently so, because one lord had a riparian parcel, and the other,

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699. *Id.* He states, for example, one of the reasons given for avulsion not changing boundaries is that it is typically transient. Sax, *supra* note 266, at 307. Sax counters: “Notably, sudden changes are by no means always short-term . . . .” *Id.*

700. *Id.* at 308.


702. *Id.* at 1141–43.

703. *Id.* at 1144.


706. 2 BRACTON, *supra* note 278, at 44. Sax states this parallels JUSTINIAN, THE INSTITUTE OF JUSTINIAN 2.1.20, which states: “An alluvial accretion is one which goes on so gradually that you cannot tell at any one moment what is being added.” Sax, *supra* note 266, at 311 n.22.

707. Sax, *supra* note 266, at 314 (citing Blundell v. Catterall, (1821) 106 Eng. Rep. 1190 (K.B.), which stated that Bracton’s passage “plainly appears to have been taken from Justinian” but noted that Bracton was not cited in any reported decision). *Id.* at 314 n.38.

708. *Id.* at 314.
a facing riparian parcel and the entire river bottom. The river widened, submerging some of the lands of the first landowner. The court held that the bottom owner's submerged parcel enlarged where the others' riparian parcel submerged. The decision was dictated by the imperceptible nature of the submergence.

Sax asks reasonable questions at this point. First, why did the court distinguish between avulsion and accretion? It appears the court allowed gradual change to alter the legal boundary because:

If no one can determine where the original boundary was, there is no way to ascertain what the asserted loser has lost, and therefore the existing water boundary should be taken as the property line, even though in retrospect it is clear that the river is not where it once was.

If we take the Nottingham decision at its face value, then it seems inapplicable to modern law. Granted, it is generally more difficult to ascertain nontidal than tidal boundaries. That concession is made to account for the likely nontidal water in Nottingham because a private party owned the river bottom. That should not affect the rationale. Regardless, modern parcels are far more likely to be platted, surveyed, or otherwise delineated. Accordingly, the primary rationale of Nottingham appears inapposite to modern law.

Sax raises a second question that stems from the first. Why would a sudden river expansion, such as a flood, not alter the legal boundary? He says that two possibilities present themselves. First, the suddenness might make it easier to ascertain the original boundary. If so, I raise the same question as in the prior paragraph. Sax's second possibility is because floods and storms effect typically transient change. Regardless, Sax states: "I

709. Sax, supra note 266, at 357-58 (citing The Eyre of Nottingham Case, (1348) 22 Lib. Ass. Pl. 93).
710. Id. at 358.
711. Id.
712. Id. at 357-58 (citing The Eyre of Nottingham Case, (1348) 22 Lib. Ass. Pl. 93).
713. Id. at 358.
714. Sax, supra note 266, at 315-16.
715. Id.
716. Id. at 357-58 (citing The Eyre of Nottingham Case, (1348) 22 Lib. Ass. Pl. 93)).
717. Id. at 316.
718. Sax, supra note 266, at 316.
719. Id.
720. Id.
have found no such expressed justification for the avulsion rule in any of the early literature."

Sax refers us as well to Blackstone’s and Moore’s citations of the Abbot of Ramsey’s Case. The Abbot of Ramsey’s decision was in 1371. The Abbot defended charges that he appropriated submerged lands without permission of the Crown. The Abbot defended by saying the lands in dispute “sometimes shrinks, through the influx of the sea, and at other times is enlarged by the flowing out of the sea, and so he says he holds [the] marsh in that manner.” The jury agreed.

The Abbot of Petersborough’s Case was filed before Ramsey’s, but not decided until 1373. Petersborough argued that “local custom” justified boundary shifts with the “inflows and outflows of the sea.” The jury, again, agreed.

Sax emphasizes that neither reported decision gave any rationale for applying the rule that accretion alters legal boundaries. He notes that 14th century lawyers “no doubt were aware” of Justinian, but the reports do not cite Roman law either. He points us to Lord Hale’s exegis of Petersborough three centuries later. Hale distinguished between the incremental change here and “sudden reliction.” He emphasized further that the changes were “secret and gradual increases of the land,” which “by custom . . . becomes a perquisite to the land.”

Hale’s explanation baffles Sax:

Hale’s brief comment raised a number of issues that engaged and puzzled later commentators. Was it important that this was a case of accretion rather than reliction, or only that it was not a “sudden” reliction? What is the significance of his mention of prescription, and does it mean anything other than longstanding use? Why does

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721. Id.
722. Id. at 315 n.41, 316–19, 363–67 (full text at Appendix D) (citations omitted).
723. Sax, supra note 266, at 316; Moore, supra note 266, at 158–59 (citations omitted).
725. Sax, supra note 266, at 364.
726. Id. at 366–67.
727. Id. at 316.
728. Id. at 318, 359–60.
729. See id. at 361–62.
730. Sax, supra note 266, at 319.
731. Id.
732. Id.
733. Id. at 319–20.
734. Id. at 319.
he speak of the increases as being “secret” as well as gradual? And what does it take, legally, for accretions to become a “perquisite” (what we call an appurtenance) to the adjoining upland?\textsuperscript{735}

Sax concludes that it likely “seemed natural” for shorefront owners to use accretions for grazing, agriculture and other uses.\textsuperscript{736} He adds that both of Abbots’ arguments regarding the “flux and ebb of the sea” acknowledged “that their clients were sometimes losers of land as well as gainers.”\textsuperscript{737}

Sax points us to two treatises in the seventeenth century that expounded on accretion law.\textsuperscript{738} Of course, there is Hale.\textsuperscript{739} First, however, came Robert Callis’ 1622 treatise, which is known as \textit{Callis on Sewers}.\textsuperscript{740} Sax says Callis’ analysis is particularly cogent, because he was not writing a treatise.\textsuperscript{741} Rather, he was trying to address inconsistencies in the law because he sought “to come up with a coherent theory to use in a pending case where he was counsel.”\textsuperscript{742}

Callis cited decisions that refused to give littoral owners property where the sea relicted quickly.\textsuperscript{743} He contrasted these with older cases that were decided in favor of the landowner.\textsuperscript{744} Key among the latter was \textit{Digges v. Hamond}.\textsuperscript{745} Sax acknowledged Moore’s disdain for \textit{Digges}:

According to Moore, the \textit{Digges} case was part of an effort by Elizabeth and later James I—and according to Moore continued into modern times by the English government—to claim public title to the foreshore (land between high and low tide). Digges’ theory was that no private title in the foreshore could be obtained except by explicit grant from the Crown. Moore says that theory was rejected in \textit{Digges}’ case, in accord with the precedent set in the Abbot of Ramsey’s case.\textsuperscript{746}

\textsuperscript{735.} Sax, supra note 266, at 319–20, except that Sax explains at 320, n.72 that an “appurtenance is something that has become part and parcel of the land.”

\textsuperscript{736.} \textit{Id.} at 320.

\textsuperscript{737.} \textit{Id.}

\textsuperscript{738.} \textit{See id.} at 321

\textsuperscript{739.} \textit{Id.}; Hale, supra note 301.


\textsuperscript{741.} \textit{Id.} at 321.

\textsuperscript{742.} \textit{Id.} (discussing \textbf{CALLIS, supra note 740}).

\textsuperscript{743.} \textit{See id.} at 322 (citations omitted).

\textsuperscript{744.} \textit{Id.} at 322–23.

\textsuperscript{745.} Sax, supra note 266, at 322; \textit{see also MOORE, supra note 266, at 218–24.}

\textsuperscript{746.} Sax, supra note 266, at 322–23 n.88 (citations omitted).
Callis cites the following factors that he believed caused the courts to rule one way or the other in such cases:

[If the decrease of the sea be by little and unperceivable means, and grown only in long tract of time, whereby some addition is made to the frontagers' grounds, these . . . may be appertain to the subject; . . . but lands left to the shore by great quantities, and by a sudden occasion and perceivable means, accrue wholly [that is, remain in the title of] the King.]

Sax reasons that a gradual change did not alter boundaries per se. Rather, Callis treated that factor as evidence of a prescriptive use. Callis’ contrasting treatment of rapid changes as leaving boundaries unchanged “assured that large tracts of strategic land at the nation’s frontier would not be lost to the sovereign.” This, of course, is consistent with Digges’ goal of protecting the shores for mooring and navigation by the Royal Navy. Hale similarly focused on accretion that crept so slowly that one did not know where the original boundaries lay. Hale also followed Digges in worrying about the impact of shoreline shifts on access for the Crown’s naval power.

Sax makes as reasonable an analysis as one can from the doctrine of accretion through Callis and Lord Hale. Except where a shift was so sudden that it might jeopardize the Crown’s strategic interests, one looked at several factors. Was the original boundary known or knowable? Did the legal boundary change effectively acknowledge that in the course of time, moved land attaches to the new parcel?

The last English authority of note on point before our independence was Blackstone. As Sax notes: “Nowadays, one who wants to know about the

747. Id. at 324 (quoting Callis, supra note 740, at 65).
748. See id. at 324.
749. Id. at 324–25.
750. Id. at 325.
751. See Moore, supra note 266, at 635 n.19.
752. Hale, supra note 301, at 380. Hale distinguished alluvial deposits, which could shift boundaries, with reliction, which Hale said did not. Id. at 397. Sax says only Hale, and perhaps Bracton, have made this argument. Sax, supra note 266, at 326–27.
753. Hale, supra note 301, at 397–99.
754. See Sax, supra note 266, at 328–30.
755. See id. at 330.
756. See id. at 329.
757. Id. at 330.
English common law rules that shaped American law looks first to (and often not much beyond) Blackstone's Commentaries. Sax discusses that Blackstone over-generalized and was often wrong, or at least misleading, on the law of alluvial deposits.

Blackstone’s Commentaries stated the following regarding alluvial deposits:

And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. (o) For *de minimis non curat lex*: and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this is possible gain is therefore a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry. (p) So that the quantity of ground gained, and the time during which it is gaining, are what makes it either the king’s, or the subject’s property. In the same manner if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, he shall have what the river has left in any other place, as a recompense for this sudden loss. (q) And this law of alluvions and derelictions, with regard to the *rivers*, is nearly the same in the imperial law; (r) from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to marine increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before-mentioned, as upon this other general ground of prerogative, which was formerly remarked, (s) that whatever hath no other owner is vested by law in the king.

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759. Sax, *supra* note 266, at 308.
760. See *id.* at 309–10.
761. *Id.* at 308–09.
Sax raises several interesting questions regarding Blackstone's statements. Should the amount of alluvial deposits matter? If so, why? If reciprocality justifies the shifting of boundaries by accretion, why not by avulsion? Where do rising sea levels fit on the continuum? The last question is a modern one, but the text above in this section shows why Sax throws up his hands: "The more one thinks about these matters, and about Blackstone's famous passage, the more curious this little corner of the law becomes."

While it arose after American Independence, The King v. Lord Yarborough bears mention. The trial judge held that "imperceptible" change for purposes of boundary change meant that which was not perceptible as it occurred. The de minimus rule would scarcely be applied, as the lands in dispute totaled over 400 acres. On appeal to the House of Lords, the landowner won again. The rationale on appeal was that even a sliver of upland becomes valuable for agriculture, while the Crown loses nothing of value.

Sax emphasizes a key to historic accretion case law, which Yarborough exemplifies. He states that the primary value that shoreland had for the upland owner "was as pasturage, not for its water access." Access is more of a modern concern to the littoral or riparian owner.

The nineteenth century featured one treatise and significant case law. Angell's work in 1826 treated gradual and imperceptible accretion and reliciction the same. The legal boundary generally shifted. Sax notes that Angell tracked Yarborough in emphasizing the imperceptibility of change, and not the lost boundary. While Angell adopted Blackstone's avulsion position, Sax points out: 1. Angell did not explain why avulsion and accretion

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762. Sax, supra note 266, at 310.
763. Id.
764. Id. at 310–11.
765. Id. at 311.
767. Id.
768. Id.
770. Id.
771. Id. at 1025.
772. Sax, supra note 266, at 333 n.148.
773. See id.
774. See generally JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS, AND IN THE SOIL, AND SHORES THEREOF (Boston, Harrison Gray 1826).
775. See id. at vi.
should be treated differently; and 2. Why the reciprocity rationale supporting accretion could, or should, not also apply to avulsion.\footnote{Sax also asks why Angell and others did not discuss the lost boundary rationale for accretion. Sax suggests that they were satisfied by the fairness of adding accretions to littoral or riparian owners, and the general lack of harm to the sovereign. I suggest another possibility. By the nineteenth century, surveyors were generally able to better delineate boundaries. Even in the American frontier, government surveyor field notes demonstrate rather thorough boundary determinations.}

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The nineteenth century Supreme Court handled several matters involving alluvial deposits. Sax emphasizes a significant trend:

As one turns to the modern era and to the American cases, several features stand out. First, superficial appearances suggest that the old rules developed in England (and in the Roman law) are simply being taken up and applied to contemporary cases. The cases faithfully cite the standard rationales, such as reciprocity and de minimis; quote familiar passages from Lord Hale, Bracton, Blackstone, and Lord Yarborough's case; and duly cite the Institutes of Justinian and Gaius. But closer examination reveals two striking departures: the definition of what constitutes accretion, as contrasted with avulsion, has dramatically expanded; and a new justification for applying the accretion rule, maintaining water access for littoral/riparian owners, has become central.

Three nineteenth century decisions combined to reduce dramatically the scope of avulsion. Parenthetically, this is probably beneficial in large part due to the long-term unwillingness of authorities to even address avulsion, let alone explain why permanent changes wrought by avulsion should be treated differently from accretion.

*Nebraska v. Iowa*\footnote{Nebraska v. Iowa (1892) 143 U.S. 359.} acknowledged that the Missouri River's channels and banks shifted often, quickly, and dramatically. Regardless, the Court

\footnotesize{\begin{itemize}
\item \footnote{Id. at 340. Sax points out that Hall, albeit English, was more thorough than Angell. Id. at 341 (citing Matthew Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm (1830)). Nonetheless, Hall "fails to tackle the avulsion doctrine." Sax, supra note 266, at 343.}
\item \footnote{Id. at 341.}
\item \footnote{Id.}
\item \footnote{See Ansbacher & Knetsch, supra note 336, at 371-72 n.262-63.}
\item \footnote{Sax, supra note 266, at 343 (emphasis added).}
\item \footnote{143 U.S. 359 (1892).}
\item \footnote{Id. at 367.}
\end{itemize}}
held that accretion applied to such changes in the banks.\textsuperscript{784} \textit{Jefferis v. East Omaha Land Co.}\textsuperscript{785} loosened the lost boundary, imperceptibility and de minimis standards so much in another Missouri River litigation that Sax concludes: "Apparently, only a single sudden event (like a hurricane, or a river breaking through an oxbow) would now qualify as avulsion."\textsuperscript{786} He notes that the \textit{Nebraska} and \textit{Jefferis} decisions focused not on the rapidity of the shift, but on simply following the soil.\textsuperscript{787}

The most seemingly significant of the three nineteenth century decisions as applied to \textit{STBR} was \textit{County of St. Clair v. Lovingston}.\textsuperscript{788} The \textit{St. Clair} Court noted the majority rule that a riparian or littoral owner should not take title to alluvial deposits where the owner constructed improvements that caused or aided the accretion.\textsuperscript{789} Nonetheless, the Court held that the accretion attaches to a riparian or littoral parcel where third parties constructed the improvements or otherwise created the artificial cause leading to the accretion.\textsuperscript{790} The county asserted that alluvial deposits that originated with upstream public improvements were not accretion.\textsuperscript{791} The Supreme Court held that additions from the river constituted alluvial deposits regardless of their source.\textsuperscript{792}

Three significant holdings by the Supreme Court in the twentieth century addressed alluvial deposits. In the first, \textit{Hughes v. Washington},\textsuperscript{793} the Court addressed a Washington holding that vested alluvial deposits in the state.\textsuperscript{794} The majority held that riparian lands must generally be allowed to retain water frontage after the banks change because "[a]ny other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property."\textsuperscript{795}

Justice Stewart's concurring opinion in \textit{Hughes} became especially significant again in \textit{STBR}:  

\begin{itemize}
  \item \textsuperscript{784} \textit{Id.} at 369–70.
  \item \textsuperscript{785} 134 U.S. 178 (1890).
  \item \textsuperscript{786} Sax, \textit{supra} note 266, at 345 (emphasis added).
  \item \textsuperscript{787} \textit{Id.} at 346 n.229–30 and accompanying text.
  \item \textsuperscript{788} 90 U.S. (23 Wall.) 46 (1874).
  \item \textsuperscript{789} \textit{Id.} at 52.
  \item \textsuperscript{790} \textit{Id.} at 61–62.
  \item \textsuperscript{791} \textit{Id.} at 53.
  \item \textsuperscript{792} \textit{Id.} at 65.
  \item \textsuperscript{793} 389 U.S. 290 (1967).
  \item \textsuperscript{794} \textit{Id.} at 291 (citing \textit{Hughes v. State}, 410 P.2d 20 (1966)).
  \item \textsuperscript{795} \textit{Id.} at 293. \textit{Hughes} applied federal law to address accretions on lands conveyed by the federal government prior to Washington's statehood. \textit{Corvallis Sand & Gravel Co.}, 429 U.S. at 378, calls that portion of the holding into question.
\end{itemize}
There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment. 796

The second major decision was *Bonelli Cattle Co. v. Arizona*.797 The riparian’s lands submerged gradually into the Colorado River.798 They became the state’s as a result.799 The lands reemerged rapidly due to rechannelization resulting from an upstream dam.800 The Supreme Court applied federal common law because the riparian’s title came by federal grant.801 It applied “just principles” to treat the reemerged land as accretion vesting in the riparian upland.802

The final decision was *Corvallis*, which we discussed above.803 *Corvallis* is significant as to alluvial deposits, because it reversed *Bonelli* regarding...

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796. *Hughes*, 389 U.S. at 297–98 (Stewart, J., concurring);
    Where questions arise which affect titles to land it is of great importance to the public
    that, when they are once decided, they should no longer be considered open. Such decisions
    become rules of property, and many titles may be injuriously affected by their change. Legis-
    latures may alter or change their laws, without injury, as they affect the future only; but where
    courts vacillate, and overrule their own decisions on the construction of statutes affecting the
    title to real property, their decisions are retrospective and may affect titles [that were] pur-
    chased on the faith of their stability. Doubtful questions on subjects of this nature, when once
    decided, should be considered no longer doubtful or subject to change.

798. *Id.* at 316.
799. *Id.*
800. *Id.* at 316 n.2.
802. *Id.* at 330.
803. See supra Part VI, notes 529, 565, 650 and accompanying text. The BLM also
    represents that the modern trends support a strong presumption in favor of accretion. See
    BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, MANUAL OF INSTRUCTIONS FOR THE

https://nsuworks.nova.edu/nlr/vol35/iss3/3
the applicable body of law.\textsuperscript{804} As discussed above, \textit{Corvallis} reestablished the right of each state to apply its own public trust law after statehood, provided that the state does not wholly abrogate its public trust obligation.\textsuperscript{805}

Sax supports a strong presumption in favor of accretion.\textsuperscript{806} It preserves the high water line, which accentuates water access rights for property owners and a predictable public right waterward of the ambulatory boundary.\textsuperscript{807} He concludes:

\begin{quote}
[The] presumption [in favor of accretion] has largely relegated the avulsion rule to a minor role, except where there is a shift of a river into a new channel or the change is \textit{temporary} and \textit{of very short duration}, as with flood waters, in which cases retaining the original boundary is appropriate.\textsuperscript{808}
\end{quote}

Sax emphasizes that the beach "is neither wholly public nor wholly private," and the distinction between avulsion and accretion does not address sea level rise.\textsuperscript{809} He believes the primary goal should be "maintaining water adjacency for riparian/littoral landowners and assuring public use of overlying water (and some part of the foreshore)."\textsuperscript{810} He cites to \textit{STBR}, as it was still before the Supreme Court, in suggesting that the identity of the entity or person causing the change should be a factor.\textsuperscript{811}

\section*{XII. Florida}

An Act of Congress on March 3, 1845, admitted Florida as a state.\textsuperscript{812} Along, with Iowa, the state was "admitted into the Union on equal footing with the original states, in all respects whatsoever."\textsuperscript{813} One further provision

\begin{flushleft}

\textsuperscript{805} See generally \textit{id.}
\textsuperscript{806} Sax, \textit{supra} note 266, at 350–351.
\textsuperscript{807} \textit{Id.}
\textsuperscript{808} \textit{Id.} at 351 (emphasis added).
\textsuperscript{809} \textit{Id.} at 356.
\textsuperscript{810} \textit{Id.} at 353 (emphasis added).
\textsuperscript{811} Sax, \textit{supra} note 266, at 354.
\textsuperscript{812} Act of Mar. 3, 1845, ch.75, § 1, 5 Stat. 742, 742.
\textsuperscript{813} \textit{Id.}
\end{flushleft}
of note existed in the Act; section seven stated in pertinent part that the two states were "admitted into the Union on the express condition that they shall never interfere with the primary disposal of the public lands lying within them."⑧14

A. Colonial Background

Statehood did not begin Florida's long, storied, and tortuous water law history. We discussed Spanish colonial water law above. Spain first colonized Florida from 1565 to 1763.⑧15 Pedro Menendez de Aviles landed near St. Augustine with soldiers and colonists.⑧16 After slaughtering Jean Ribault's French force from Fort Caroline (modern Jacksonville), Menendez established a colonial town in St. Augustine.⑧17 After establishing forts and missions throughout the region, the Spanish retrenched in the face of disease, as well as Native American and British pressures.⑧18 (The Native Americans and British looted and burned most of the Spanish holdings except for the fort in St. Augustine at one time or another.⑧19) Britain exchanged Havana for Spanish Florida at the conclusion of those nations Seven Years' War in 1763.⑧20

Great Britain occupied the region from 1763 to 1783.⑧21 The British split Florida into East and West Florida at the Chatahoochee and Apalachicola Rivers.⑧22 The capital of East Florida was St. Augustine.⑧23 The capital of West Florida was Pensacola.⑧24 The British surveyed the coast and befriended Creek natives who moved into the region.⑧25 The British named the immigrants "Seminoles."⑧26

⑧14. Id. at 743.
⑧17. Id.
⑧18. See Worth, supra note 816.
⑧19. See id.
⑧20. Id.
⑧21. Apalachicola Land & Dev. Co. v. McRae, 98 So. 505, 522 (Fla. 1923).
⑧22. Id. at 522–23.
⑧24. Id.
⑧26. Id. at 28.
British grants during the twenty year reign presented early versions of Florida’s swamp sale regime. For example, the 1763 Treaty of Paris was implemented by allowing Spanish settlers to stay or to sell and to leave within eighteen months. The Crown disallowed a putative sale of over ten million acres from emigrating Spaniards to Jesse Fish and John Gordon. The British Crown refused to believe that that much land had been in private Spanish hands. After all, the British and their allies, the Creeks, had pushed the Spanish back from the frontier. The British knew that precious little Spanish land remained outside of garrisons. For a frame of reference, modern Florida totals nearly thirty-eight million acres.

Many British and Tories moved to Florida after the Revolution commenced. Dr. Andrew Turnbull “established at New Smyrna 1400 Minor-

827. Ansbacher & Knetsch, supra note 261, at 363–64 (quoting 1 The Historical Records Survey, Div. of Cmty Service Programs, Work Products Administration, Spanish Land Grants in Florida xxxii (Nov. 1940), http://floridamemory.com/collections/spanishlandgrants/. The WPA publication contains a thorough analysis of the British Grant system. Id. at xiv-xviii. Robert Gold wrote an article on Fish that said Fish’s claim was “only” 4,500,000 acres on both sides of the St. Johns River. Robert L. Gold, That Infamous Floridian, Jesse Fish, 52 FLA. HIST. Q. 1, 8 (1973). Gold refers to Fish’s, and his partner Gordon’s, purchase in quotes, and quotes one officer who “observed that their titles to the site seemed ‘far from indubitable.’” Id. Despite Gold’s efforts to rehabilitate Fish, Gold states: “Generally, he emerges as a sinister figure, an insidious schemer [who was] characteristically involved in contraband commerce, sedition, and illicit land transactions.” Id. at 1.

Of all sources, the Catholic Church takes up Fish’s cause. See 3 THE CATHOLIC CHURCH IN THE UNITED STATES OF AMERICA 239 (1914). The British took from the Church as well when it took from Fish. See id. The Church historian stated:

Contrast between Spanish and English Policies—Missionary enterprise was the special feature of the first Spanish occupation. No attempt was made at industrial advancement. The secular administration of the province subordinated plans of colonization and commercial development to motives of military expediency. . . . At the cession to England there were but two small towns: St. Augustine on the Atlantic, and Pensacola, on the Gulf Coast. . . . As soon as the English assumed control a new order of things was inaugurated. . . .

But while material prosperity was giving promise of large results, religion was practically neglected and suffered irreparably. By the articles of cession freedom of worship was granted, and property rights recognized. Article 20 provides for “the liberty of the Catholic religion . . . so far as the laws of Great Britain permit . . .”

The [C]hurch property [in St. Augustine] was accordingly conveyed in trust to John Gordon and Jesse Fish, British subjects of South Carolina; but, in defiance of the provisions of the treaty, the English officials entirely disregarded these conveyances, and occupied the property. Id.

Professor Gold treated the forfeiture as “good for the gander.” See Gold, supra note 827, at 7. He stated: “Since the Spanish monarchy enjoyed proprietorship rights in the patronato real relationship of church and state, those same privileges existed for the English monarch, who had assumed sovereignty in Florida.” Id.


830. WPA History of the Spanish Land Grants, supra note 827.
cans, Greeks, and Italians, the largest initial American colony in the history of what was later the United States.\textsuperscript{831} The Spanish in 1783 allowed British colonists the same choice the British had in 1763, stay, or sell and go.\textsuperscript{832} Colonists had to pledge loyalty and convert to Catholicism to stay.\textsuperscript{833} Some stayed, and the Spanish Crown confirmed their title.\textsuperscript{834} Most, unable to sell, abandoned their lands, principally to the Catholic Italians and Minorcans.\textsuperscript{835}

The Spanish regained the bulk of Florida in the 1783 Treaty of Paris and the related Treaty of Versailles, upon the end of the American Revolution.\textsuperscript{836} This was Spain's due to its acting as an ally of the French in support of the Revolution.\textsuperscript{837} Spain maintained the split between East and West Florida when that nation resumed sovereignty in 1783.\textsuperscript{838}

Spain opened up Florida in the second colony.\textsuperscript{839} The WPA summed up: "Spanish land grants may thus be said to have been based upon three royal orders: that of 1786 for the English in Florida [as of 1783]; that of 1790 for strangers, of which Spanish subjects also availed themselves; and that of 1815 for patriotic service."\textsuperscript{840}

We discussed how the 1790 order invited aliens, regardless of religion. The order allowed 100 acres to head of household and 50 additional acres for each member of the family.\textsuperscript{841} These were called "head rights."\textsuperscript{842} The head grant could be increased by up to 1000 more acres if it was capable of cultivation.\textsuperscript{843} If maintained and cultivated ten years, the title vested.\textsuperscript{844}

These lands were to be surveyed exactly under the direction of Captain Pedro Marrot of St. Augustine and his successors.\textsuperscript{845} Joe Knetsch, the official historian of the Florida Division of State Lands, states adamantly: "There is ample evidence, however, to conclude that many surveys in East Florida, specifically those more than fifteen miles outside of St. Augustine or

\textsuperscript{831} Id.
\textsuperscript{832} Id.
\textsuperscript{833} See id. This differs from the British, who allowed freedom of religion. Id. Nonetheless, the second Spanish colonial government allowed persons freedom of worship in private. See WPA History of the Spanish Land Grants, supra note 827.
\textsuperscript{834} Id.
\textsuperscript{835} Id.
\textsuperscript{836} See id.
\textsuperscript{837} See id.
\textsuperscript{838} WPA History of the Spanish Land Grants, supra note 827.
\textsuperscript{839} See id.
\textsuperscript{840} Id.
\textsuperscript{841} Id.
\textsuperscript{842} Id.
\textsuperscript{843} WPA History of the Spanish Land Grants, supra note 827.
\textsuperscript{844} Id.
\textsuperscript{845} Id.
Fernandina, were never performed upon the ground. Conversely, the WPA History asserts that the first several Spanish colony surveyors generally acquitted themselves well, and Jorge Clarke, appointed in 1811, testified that he was bound by no rules. A royal order of 1815 allegedly authorized grants to militia members who had defended East Florida against incursions by the United States in 1811-1812 (the "Patriotic War").

The WPA History tells us that a member of the United States Board of Commissioners for East Florida, Alexander Hamilton, Jr. (son of the Alexander Hamilton), questioned the authenticity of the documents supporting the putative 1815 order. Nonetheless, the grants were generally authorized for processing. We discuss the procedure below.

Additionally, the colony authorized grants for future services; those were for mills and cattle ranchers.

The Adams-Onis Treaty, dated February 22, 1819, conveyed East and West Florida to the United States, effective July, 1821. Anscher and Knetsch cite the authoritative federal Work Projects Administration publication on Spanish Land Grants in Florida concerning the impact of the Adams-Onis Treaty:

By Article VIII of the treaty of February 22, 1819, whereby Spain Ceded the Floridas to the United States, all Spanish grants of land made prior to January 25, 1818, the date on which the King of

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847. WPA History of the Spanish Land Grants, supra note 827.
848. Id.
849. Id. Of course, Hamilton would not be a figure in Florida colonial history if he were not the subject of controversy. The WPA History states that he was one of the three commissioners appointed for East Florida. Id. The burdens of that commission were great. They had "something like 600" claims to process, which were way too many for the time allotted. Id. Hamilton added to that and other problems: "And finally there was such a divergence of opinion between Hamilton and the other commissioners as to procedure that Hamilton refused to participate in the sessions and bombarded President Monroe, Secretary of State Crawford, Secretary of State Adams, and the chairman of the house committee on public lands with serious charges against his colleagues and those in charge of the Public Archives." WPA History of the Spanish Land Grants, supra note 827. The full scope of Hamilton's complaints is beyond this piece, but a representative portion is found at xliii–xlv of the WPA History. Most significantly, he made accusations of alteration, theft, and fraud on various grant processes. Id. Not surprisingly, Hamilton generated three lawsuits. Id.
850. Id.
851. Id.
Spain definitely expressed his willingness to negotiate, were to be "ratified and confirmed . . . to the same extent that the said grants would be valid if the territories had remained under the domain of his Catholic Majesty."

The upshot was that various Acts of Congress implemented the Adams-Onis Treaty by "ratifying and confirming [Spanish Land Grants] to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of [Spain]."\footnote{854}

The Adams-Onis Treaty extended the time grantees had to meet the terms of those grants:

But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty.\footnote{855}

Congress passed various acts to facilitate grant confirmation.\footnote{856}

The Supreme Court addressed two major Spanish grants in United States v. Arredondo\footnote{857} and Mitchel v. United States.\footnote{858} We discuss the Mitchel decision below, regarding its integral relationship with the turnover of Florida from Spain to the United States. The Alachua County, Florida, website describes the largest Arredondo Grant, which lies in north-central Florida:

Don Fernando de Maza Arredondo, a Spanish merchant and citizen of St. Augustine, had assisted in raising troops in 1811 for the town’s protection and played a significant role in its civic life, hazarding his own fortune to aid the city when public resources failed. As a compensation for his services in 1817, the King of Spain granted him 280,000 acres . . . .\footnote{859}
The *Arredondo* Court held that grants from the Spanish Colonial government and supporting surveys were deemed to be presumptively authorized by the Crown.860 Anscher and Knetsch point to the following language to support the presumption:

Yet, in [Congress'] whole legislation on the subject (which has all been examined), there has not been found a solitary law which directs; [sic] that the authority on which a grant has been made under the Spanish government should be filed by a claimant—recorded by a public officer, or submitted to any tribunal appointed to adjudicate its validity and the title it imparted—[C]ongress has been content that the rights of the United States, should be surrendered and confirmed by patent to the claimant, under a grant purporting to have emanated under all the official forms and sanctions of the local government. This is deemed evidence of their having been issued by lawful, proper, and legitimate authority—when unimpeached by proof to the contrary.861

Graber quotes Baldwin in support of a key component of *Arredondo*.862 *Fletcher* held that a state has no right to convey the same parcel twice, effectively annulling the first conveyance.863 *Arredondo* held unanimously that the Spanish land grant, once confirmed, barred Congress from conveying the same parcel.864

The procedure for confirmation under the Adams-Onis Treaty and implementing acts of Congress called for application to the federal Board of Commissioners for East or West Florida, based on predominant grant location, if the grant totaled under 3500 acres, then in turn, as appropriate, to Congress.865 The official records of these grants are found in the American State Papers.866 These papers summarize the application and list line items

861. Id. at 723 (emphasis added); see also Anscher & Knetsch, *supra* note 261, at 365.
862. Graber, *supra* note 103, at 86.
for disposition.867 The original records often contain supporting surveys as well.868

Professor Glen Boggs wrote two fascinating articles that bear on the Adams-Onis Treaty.869 One addresses Florida title chains deraigned to British colonial grants.870 He discusses *Arredondo* at length.871 While the Court addressed various issues, including fraud (as alleged by our friend Hamilton), *Arredando* held for the claimant.872

The other Boggs article dealt with the Spanish records supporting land transfers in Florida.873 Boggs explains that the Adams-Onis Treaty lopsidedly favored the United States.874 We promised to pay five million dollars in debts owed by Spain to third parties.875 In return, Spain gave us La Florida.876 Spain withheld or secreted substantial records.877 Additionally, as Boggs noted, the Americans questioned Spain’s honesty regarding the land records.878 Article II of the treaty required Spain to deliver all title and sovereignty records for the two Floridas.879 The Crown failed to fully comply, as it shipped many of the records to Havana.880 Adams dealt with Spain conveying as much land as possible to avoid conveying the parcels to the federal government.881

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867. See Ansbacher & Knetsch, supra note 261, at 364.
868. Id.
871. Id. at 26–28.
872. Id.
874. Id. at 11.
875. Id.
876. Id.
877. See id. at 11–13 (quoting President Monroe, complaining of Spain’s refusal to turn over title records). This is consistent with similar complaints cited in the definitive WPA publication. See WPA History of the Spanish Land Grants, supra note 827, at xxv.
879. Id. at 11–12.
880. Id. at 13.
881. Id. at 12. Expressing his frustrations, Adams stated:

This day, two years have elapsed since the Florida Treaty was signed. . . . Let them remark the workings of private interests, of perfidious fraud, of sordid intrigues, of royal treachery, of malignant rivalry, and of envy masked with patriotism, playing to and fro across the Atlantic into each other’s hands, all combined to destroy this treaty between the signature and the ratification, and let them learn to put their trust in the overruling providence of God. . . . An ambiguity of date, which I had suffered to escape my notice at the signature of the treaty, amply guarded against by the phraseology of the article, but leaving room to chicanery from a mere colorable question, was the handle upon which the King of Spain, his rapacious favorites,
The second major Supreme Court decision addressing Spanish land grants was *Mitchel v. United States*. Boggs gives us a detailed backstory. President Monroe sent Colonel James Gant Forbes to Havana with two goals. First, arrange diplomatic transfer of Florida to Governor Andrew Jackson. Second, recover the substantial cache of title and other records that Spain had secreted.

The King of Spain responded to Jackson by order of February 15, 1832, directing delivery of any remaining records. The Secretary of State sent James Robinson to Cuba to inspect and to retrieve the records. Robinson spent over two years pouring over the records before he died at his post. Boggs tells us that Robinson complained that Colin Mitchel stymied his efforts:

In due course, Robinson developed a decidedly negative attitude with regard to Mr. Mitchel. In fact, one commentator said Mitchel was, according to Robinson’s observations, the powerful evil force at work to prevent the accomplishment of the archive mission. A partner in John Forbes & Company, Florida traders, Mitchel maintained a large trading business in Havana.... When his overtures to Robinson were coldly rebuffed, he became vindictive, according to Robinson, spread malicious rumors and used his money and influence to frustrate efforts to secure the Florida papers. Robinson... soon became convinced that Mitchel had bribed Spanish functionaries to forge and alter records to assist him in his suit before the [United States Supreme Court].

and American swindling land jobbers in conjunction with them, withheld the ratification of the treaty, while Clay and his admirers here were snickering at the simplicity with which I had been bamboozled by the crafty Spaniard.

*Id.* at 12 (quoting George C. Whatley & Sylvia Cook, The East Florida Land Commission: A Study in Frustration, 50 FLA. HISTORICAL Q. 39 (1971) (which itself quoted John Quincy Adams’ diary notes on February 22, 1821, the day of Senate ratification of the Adams-Onis Treaty)).

882. 34 U.S. (9 Pet.) 711, 725 (1835).
884. *Id.* at 13–14.
885. *Id.* at 13.
886. *Id.* at 14.
887. *Id.* (citations omitted).
889. *Id.* (citations omitted).
890. The Supreme Court spelled his name with one “l,” while Gibbs spells it with two.
891. Boggs, (which Boggs?) supra note 869, at 15.
The lawsuit, *Mitchel v. United States*, was pending before the Supreme Court while Robinson was in Havana. Call directed Robinson to find whatever records he could to undermine the Spanish grant at issue, the John Forbes & Co. Grant. The Forbes Grant totaled 1,250,000 acres in north Florida—principally in the Panhandle. Robinson allegedly discovered that Forbes & Co., through its predecessor, the British company of Panton, Leslie & Company, helped the Spanish supply the Creek nation with arms and supplies that were used to kill frontiersmen. Robinson uncovered evidence that the company demanded indemnification from the Spanish Government for losses in the trade with the Native Americans who opposed the United States. Robinson implied that Forbes obtained huge swaths of land by forgery. Robinson concluded that widespread collusion existed. When he died abruptly, however, the search ended. The Supreme Court then affirmed Mitchel's title under his interest in Forbes & Company.

*Fletcher* might not have availed Mitchel. The earlier Court protected innocent purchasers from the alleged fraud and bribery between the Georgia legislature and buyers who in turn sold to them. In *Fletcher*, the private landowners were innocent of any perfidy that related to the original swindle. Mitchel, however, was allegedly in the midst of myriad misdeeds.

Here, Dr. Joe Knetsch disagrees categorically with Professor Boggs. Knetsch's job as official state historian for the Florida Division of State Lands has required him to cull thoroughly through the Forbes records over the past several decades. In a lengthy interview, Dr. Knetsch told the author that he believes the Mitchel records were substantially legitimate. Knetsch also emphasizes that both Call and Robinsen were Jacksonian protégées, who would have been colored by Jackson's antipathy toward the

892. *Id.*
893. *Id.*
894. *Id.*
895. *Id.*
896. Boggs, (which Boggs?) *supra* note 869, at 15.
897. *Id.* The story of Panton, Leslie & Company, and Forbes & Company is colorful, and well beyond this piece. *Id.*
898. *Id.*
899. *Id.*
901. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810).
902. *See id.*
903. *See Boggs, (which Boggs?) supra* note 869, 15–16.
904. Interview with Dr. Joe Knetsch, (Mar. 16, 2011) (notes on file with author).
905. *Id.*
906. *Id.*
private companies and every nation with whom they dealt.\textsuperscript{907} Additionally, just as Spain would have wanted its friends to have as much of Florida as possible, it was even more imperative politically for the United States to have as much public domain as possible.\textsuperscript{908} When one thinks about it, the American courts’ strong presumption in favor of the grants confirmation was quite remarkable.

Dr. Knetsch is by no means blind to the problems of grants in Florida. He wrote multiple papers and articles detailing fraud, collusion and ineptitude in the grants process.\textsuperscript{909} He noted that the problem in East Florida stemmed often from overly aggressive grant interpretations, and oftentimes fictitious surveys that were not run on the ground, by the Spanish Surveyor General, Jorge Clark.\textsuperscript{910} West Florida records, however, were disproportionately those that were spirited away to Havana, and then unavailable for United States review.\textsuperscript{911} Further, for many of the same problems Jesse Fish faced in East Florida, the British disallowed “practically all of the Spanish claims around Pensacola.”\textsuperscript{912}

We discuss at Section V above the guidelines and boundaries that Spain established in its New World colonies, including Florida. Two modern decisions exemplify the significance. \textit{Dawson v. Mathews}\textsuperscript{913} addressed a boundary dispute between claimants under Spanish land grant and the Swamp and Overflowed Lands Act.\textsuperscript{914} The \textit{Dawson} court held that water boundaries in a subsequent federal act could not and did not affect boundaries that the Adams-Onis Treaty confirmed pursuant to Spanish Grant.\textsuperscript{915} \textit{Dumas v. Garnett}\textsuperscript{916} came to the opposite result—also based on the language of the Spanish Land Grant there.\textsuperscript{917} The grant was bounded on the east by the “zacatel.”\textsuperscript{918} Evidence established that term meant marshgrass in colonial Flori-
The court held that the waterfront claimant held title only as far as the marshline.

B. Statehood

1. Sovereign Lands, Navigability, and the Public Trust

As stated above, Florida became a state on March 3, 1845. The Supreme Court of Florida Justice Whitfield drafted “Whitfield’s Notes,” which constitute one of our state’s principal repositories of legal analysis. It is considered roundly to be a lodestar of Florida water boundary law. One of the more subtly stated, yet legally significant, passages in Whitfield’s Notes is this: “The [general] common...law of England” as modified by statutes is in “force in this state [except where it is] inconsistent with the constitution and laws of the United States” or of the State of Florida.” The problems of conflicting grant instructions and favoritism renewed in the Second Spanish colonial period.

Apalachicola Land & Development Co. v. McRae was one of Florida’s bellwether sovereign land decisions. The court held that Mitchell’s confirmed Forbes Purchase did not convey any lands below the high water mark of the Gulf of Mexico. Justice Whitfield proclaimed: “It is settled law in this state that private ownership of lands bordering on navigable waters extends only to high-water mark.” Whitfield explicated at great length that Spanish colonial law was the same. Whitfield concluded that both the letter of the Forbes Purchase and the Spanish law dictated a boundary at the high water mark.

Whitfield tells us that Florida land titles deraign through three principal chains. First, there are Spanish land grants that were confirmed pursuant
to the Adams-Onis Treaty.\textsuperscript{932} Second, there are numerous federal patents and grants.\textsuperscript{933} Finally, the state granted or conveyed various lands received under Congressional Acts or, in the case of submerged sovereign lands, pursuant to the state’s sovereignty.\textsuperscript{934}

Whitfield explained thoroughly his analysis of Florida’s sovereign submerged lands. He cited \textit{Shively v. Bowlby} for the federal government’s obligation to “hold the lands under navigable waters and tide lands” in the public trust until Florida’s statehood.\textsuperscript{935} Clearly, Whitfield interpreted federal water law to encompass all tidelands in sovereign submerged lands.\textsuperscript{936} While I believe the \textit{Phillips Petroleum} dissent interpreted early federal law more correctly in limiting sovereign title to navigable waters, Whitfield’s broad scope is consistent with his reputation as Florida’s leading public trust proponent.\textsuperscript{937}

Whitfield stated expressly that Florida “became the owner for the benefit of its inhabitants of all lands under bodies of navigable water and tide lands within its territorial limits” upon statehood on March 3, 1845.\textsuperscript{938} We can understand why Justice Whitfield might have broadly interpreted \textit{Shively}. After all, the Court did refer to tidal lands, even though it limited the scope elsewhere by referring to riparian and littoral lands being bounded by the “high water mark.”

Regardless, the Supreme Court of Florida in \textit{Clement v. Watson},\textsuperscript{939} considered the issue of tidal boundaries.\textsuperscript{940} Whitfield did not cite this already fifteen-year-old decision in his original 1927 notes. In \textit{Clement}, the Supreme Court of Florida expressly rejected the ebb and flow test in favor of a high water mark boundary in tidal lands.\textsuperscript{941} Even odder—Justice Whitfield

\textsuperscript{932} Id.
\textsuperscript{933} Id.
\textsuperscript{934} Id. In light of the overarching question over whether \textit{Phillips Petroleum} decided properly that nonnavigable tidelands were sovereign at statehood, I feel compelled to note that the dean of Florida water law stated that “lands under bodies of navigable water or of tide lands [are] . . . two classes of lands belonging to the state by virtue of its sovereignty upon being ‘admitted into Union on equal footing with the original States in all respects whatsoever.’” \textit{Id.}
\textsuperscript{935} Whitfield’s Notes, supra note 829, at 235.
\textsuperscript{936} Id.
\textsuperscript{937} Shively, read in context, does not support Whitfield. The Court stated: “The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States.” Shively, 152 U.S. at 57–58.
\textsuperscript{938} Whitfield’s Notes, supra note 829, at 235.
\textsuperscript{939} 58 So. 25 (Fla. 1912).
\textsuperscript{940} Id. at 26.
\textsuperscript{941} See Clement, 58 So. at 27.
drafted the *Clement* opinion.\(^{942}\) He stated in *Clement*: "Waters are not under our law regarded as navigable merely because they are affected by the tides."\(^{943}\)

Additionally, the Supreme Court of Florida decided *Miller v. Bay-to-Gulf*,\(^ {944}\) just one year before Whitfield's Notes were republished in the Florida laws. *Miller* held that the Mean High Water Line is "the limit reached by the daily ebb and flow of the tide, the usual tide, or the neap tide that happens between the full and change of the moon."\(^{945}\)

Whitfield propounds a soft public trust in Florida:

> The use and disposition of [sovereign submerged] lands are within the regulating province of the legislature, subject only to the rights of riparian owners under the law of the state and to such rights as the public may have in the lawful use of the navigable waters and to the dominant power of congress over the navigable waters. It has been held that by statute, limited portions of the submerged lands may be sold to private ownership when substantial rights of the public in the use of the navigable waters are not unlawfully invaded and the authority of congress as to navigable waters is not interfered with.\(^ {946}\)

Even though Whitfield stated that the state took title on March 3, 1845, to all tidelands, he limits the scope of public trust ownership to navigable waters.\(^ {947}\) Whitfield cited various decisions, including *Illinois Central* and *Appleby* (although, curiously, not *Shively*) regarding the public trust "floor."\(^ {948}\) While the state could convey sovereign lands, it could not thereby wholly abrogate its public trust obligations.\(^ {949}\) He defined the standard obliquely: "There are recognized limitations upon the power of the legislature to pass to private ownership the submerged lands under navigable waters when the public interests and rights are disregarded so as to produce detriment."\(^ {950}\)

\(^{942}\) *Id.* at 26.

\(^{943}\) *Id.*

\(^{944}\) 193 So. 425 (Fla. 1940).

\(^{945}\) *Miller*, 193 So. at 428.

\(^{946}\) WHITFIELD'S NOTES, supra note 829, at 235 (emphasis added).

\(^{947}\) *Id.*

\(^{948}\) *Id.*

\(^{949}\) *Id.*

\(^{950}\) *Id.*
I want to point out Daniel Peyton’s two-part article in the Florida Bar Journal as thoroughly dissecting the extent of the public trust in Florida. In Sovereignty Lands in Florida: It’s All About Navigability, Part I, Peyton lists most of the major Florida decisions and several articles on the topic.

Peyton cites articles by Norwood Gay and Rosanne Gervasi Capeless that contend Florida’s public trust lands extend to all tidal lands. Peyton responds that Florida’s Fifth District Court of Appeal in Lee v. liams eviscerated the argument. Judge Griffin’s opinion in Lee held that Clement v. Watson binds Florida courts. She wrote in her opinion that the appellant and amicus the Governor and Cabinet’s (sitting as the Board of Trustees of the Internal Improvement Trust Fund) argument that Phillips Petroleum Co. controlled “must have been the result of an unexplainable aberration or the product of some terrible slip of the pen.” She concluded that Phillips Petroleum Co., even if decided correctly, bound the State of Florida only at the moment of statehood on March 3, 1845. Griffin’s opinion confirmed that Clement was a sound determination of the extent of Florida’s public trust doctrine, consistent with Corvallis Sand & Gravel Co.’s holding that each state may choose its own public trust doctrine as long as it does not abrogate public rights entirely.

More to the point, Judge Griffin held the court was constrained by Florida’s own state constitution. Article X, section 11 states:

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


952. Peyton, supra note 951. I was on the Dean Frank Maloney Award panel of the Florida Bar’s Environmental and Land Use Section that received and awarded Mr. Peyton’s piece in 2001.


954. 711 So. 2d 57 (Fla. 5th Dist. Ct. App. 1998).


956. Lee, 711 So. 2d at 59, 62.

957. Id. at 60.

958. Id. at 60, 61 n.9.


960. Lee, 711 So. 2d at 63.
state, by virtue of its sovereignty, in trust for all of the people.
Sale of such lands may be authorized by law, but only when not in
the public interest.961

Even if the Florida common law left open any question of where Flori-
da’s sovereign lands lay under tidal waters, the Florida Constitution settled
the issue in 1968. The 1970 amendment clarified the scope of possible sales,
but the state’s adoption in 1968 of a constitution that bounds sovereign lands
by “navigable waters” and “mean high water lines” seems dispositive. The
section augments this by stating all such lands are held “in trust for all the
people.”962 The only deviation from this standard is when the state wants to
convey any sovereign lands. The Florida Constitution implicitly bars public
trust sovereign lands claims in Florida above the high water mark. The only
“direction” that article X, section 11 allows the boundary to move is in favor
of limited private grant by the sovereign. The section limits the sovereign
grant to “navigable waters,” and buttresses the limitation by express refer-
ence to beach boundaries at the “mean high water lines.”963

No one can say that the Supreme Court of Florida has not ruled in favor
of property owners on this point before. In State v. Florida National Prop-
erties, Inc.,964 the court rejected a statute that fixed certain non-tidal water
boundaries.965 The court held that statutory deviation from the common law
transitory high water line would constitute a taking that violated the Four-
teenth Amendment to the United States Constitution, as well as article I, sec-
ction 9 of Florida’s Constitution.966

The Florida National Properties, Inc. majority’s rationale seemingly
bore directly on STBR. Section 253.151 of the Florida Statutes purportedly
fixed the boundary between sovereign lands and private uplands in “naviga-
ble meandered fresh water lakes.”967 The statute distinguished such water
bodies from “tidal” water bodies, but many tidal water bodies are fresh wa-
ter.968 Regardless, the Supreme Court of Florida held section 253.151 un-
constitutional, both facially and as applied.969

961. FLA. CONST. art. X, § 11.
962. Id.
963. Id.
964. 338 So. 2d 13 (Fla. 1976).
965. Id. at 18.
966. See id. at 18–19; see also FLA. CONST. art. 1, § 9. That section is entitled the “Due
Process” provision of article I, which is entitled “Declaration of Rights.” FLA. CONST. art. 1, §
9.
968. Id. at 14.
969. Id. at 16, 18.
The core holding upheld the trial court, which held that section 253.151 was indistinguishable from the Washington state statute that the Supreme Court of the United States struck in *Hughes v. Washington*. The lower court, and the Supreme Court of Florida held that the fixed boundary violated due process rights under the Federal and Florida Constitutions by fixing a statutory line in lieu of the vested, common law ambulatory high water line. This is particularly acute as to alluvial deposits and reliction.

As we stated above, Whitfield's Notes confirmed that the British common law remain in force in Florida except where inconsistent with express law of the United States or Florida. This has long been codified:

The common and statute laws of England which are of a general and not a local nature, [with the exception hereinafter mentioned,] down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

Accordingly, the common law of riparian and littoral rights has always applied in Florida, except when and where modified by statute. Farnham confirmed the relationship of riparian or littoral rights to adjacency of water:

The courts do not fully agree in their enumeration of these rights. Some concede more than do others; but the principles involved which will be developed in the course of this and succeeding chapters accord the owner of riparian land the right to have the water remain in place, and to retain, as nearly as possible, its natural character.

Florida's common law of littoral and riparian rights follows the English and general American common law. Such decisions as *Broward v. Mabry* and *Hayes v. Bowman* confirm riparian and littoral rights available under

970. *Id.* at 17 (citing *Hughes v. Washington*, 389 U.S. 290 (1967)).
971. *Id.* at 17, 18.
972. See *Fla. Nat'l Props.*, 338 So. 2d at 17–18.
973. *FLA. STAT.* § 2.01 (2010); *Whitfield's Notes*, *supra* note 829, at 223 (citation omitted); *FLA. STAT.* § 2.01 (1941).
974. *Whitfield's Notes*, *supra* note 829, at 224 (citing *FLA. STAT.* § 2.01 (1941)); see *FLA. STAT.* § 2.01 (2010).
976. 50 So. 826 (Fla. 1909).
977. 91 So. 2d 795 (Fla. 1957).
Florida law.\textsuperscript{978} \textit{Hayes} is the central Florida decision on riparian and littoral rights. There, the Supreme Court of Florida held that every riparian and littoral owner holds an appurtenant property right of wharfage, access and view from the parcel’s high water line to the navigable channel or waterbody.\textsuperscript{979} The Supreme Court of Florida more explicitly explained these rights in \textit{Game and Fresh Water Fish Commission v. Lake Islands:}\textsuperscript{980} “Reasonable [riparian or littoral] access must, of course, be balanced with the public good, but a substantial diminution or total denial of reasonable access to the property owner is a compensable deprivation of a property interest.”\textsuperscript{981}

The Supreme Court of Florida in \textit{Hayes} balanced the appurtenant littoral and private rights with public rights in the Boca Ciega Bay, where the land at issue lay.\textsuperscript{982} The parcel was constructed by adding fill into the bay.\textsuperscript{983} The court emphasized:

[The] power of the State to dispose of submerged tidal lands has assumed important proportions in recent years. Valuable subdivisions have been built on dredged-in fill. Large areas have been leased to those who would speculate in drilling for oil. Increased interest in this type of land bears forebodings of even more complex problems in the future. These lands constitute tremendously valuable assets. Like any fiduciary asset, however, they must be administered with due regard to the limitations of the trust with which they are impressed.\textsuperscript{984}

Even before \textit{Hayes}, the Supreme Court of Florida held consistently that a riparian or littoral owner in Florida had “the right of ingress and egress to and from . . . the waters . . . unobstructed view over the waters, and in common with the public the right of navigating, bathing, and fishing.”\textsuperscript{985} The Florida legislature codified these rights, first in section 192.61 of the \textit{Florida Statutes}, and then in today’s section 253.141 of the \textit{Florida Statutes}.\textsuperscript{986}

Florida’s tidal boundaries were first established in \textit{Miller v. Bay-to-Gulf, Inc.}\textsuperscript{987} The Miller Court had the opportunity to adopt a mean high tide

\begin{itemize}
\item \textsuperscript{978} Id. at 800–01; \textit{Mabry}, 50 So. at 829.
\item \textsuperscript{979} Id. at 798–800.
\item \textsuperscript{980} 407 So. 2d 189 (Fla. 1981).
\item \textsuperscript{981} Id. at 193.
\item \textsuperscript{982} \textit{Hayes}, 91 So. 2d at 802.
\item \textsuperscript{983} Id. at 798.
\item \textsuperscript{984} Id. at 800.
\item \textsuperscript{985} \textit{Webb v. Giddens}, 82 So. 2d 743, 745 (Fla. 1955) (quoting \textit{Thiesen v. Gulf F. & A. Ry. Co.}, 78 So. 491, 501 (1917)).
\item \textsuperscript{986} Id.; \textit{see also FLA. STAT.} § 192.61 (1956); \textit{FLA. STAT.} § 253.141 (2010).
\item \textsuperscript{987} 193 So. 425, 428 (Fla. 1940) (per curiam).
\end{itemize}
line, as the Supreme Court of the United States did five years before in *Borax*. Instead of adopting a scientifically based boundary that reflected the 18.6 year lunar epoch, the Supreme Court of Florida adopted a rule in *Miller* that the tidal boundary reflected the daily ebb and flow of the local tide.

The 1974 Florida legislature retreated from *Miller* by adopting a modified version of the tidal epoch test from *Borax*. Subsection 177.27(14) of the Florida Coastal Mapping Act of 1974 defines "mean high water" as "the average height of the high waters over a 19-year period." This rounds up the 18.6 year, technically correct epoch. Nonetheless, it dramatically improved *Miller's* standard.

The nontidal boundary is more problematic in Florida. The test in Florida remains substantially unchanged from the 1927 Supreme Court of Florida's decision in *Tilden v. Smith*.

>[It] is to be determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character [that is] distinct from that of the banks, in respect to vegetation, as well as ... [from] the soil itself.

David Guest explains thoroughly the sources of the Minnesota test, which we discuss above in the context of *Howard v. Ingersoll*'s three Supreme Court of the United States tests for the ordinary high water mark on nontidal waters.

While *Tilden* works where there exist sharply defined banks, the Supreme Court of Florida in the same year complained of the difficulty in implementing such a test in Florida's swamper and flatter regions. *Martin v. Busch* addressed the southwestern shore of Lake Okeechobee in the Moore Haven area. The *Martin* Court expounded on this problem:

991. *See FLA. STAT. §177.25 (2010).*
992. *Id.* § 177.27(14).
993. 113 So. 708 (Fla. 1927).
994. *Id.* at 712 (quoting Carpenter v. Bd. of Comm'rs, 58 N.W. 295, 297 (Minn. 1894)) (emphasis omitted).
996. 112 So. 274 (Fla. 1927).
997. *Id.* at 277, 280.
In flat territory or because of peculiar conditions, there may be lit-
tle if any shore to navigable waters, or the elevation may be slight
and the water at the outer edges may be shallow and affected by
vegetable growth or [by] conditions, and the line of ordinary high-
water mark may be difficult of accurate ascertainment; but, when
the duty of determining the line of high-water mark is imposed or
assumed, the best evidence attainable and the best methods availa-
ble should be utilized in determining and establishing the line of
true ordinary high-water mark, whether it is done by general or
special meandering or by particular surveys of adjacent land.
Marks upon the ground or upon local objects that are more or less
permanent may be considered in connection with competent testi-
mony and other evidence in determining the true line of ordinary
high-water mark. 998

2. Background to STBR

a. The Beach and Shore Preservation Act

The 1986 Florida legislature enacted the Beach and Shore Preservation
Act.999 The statutory purpose was to further "the public interest to preserve
and protect [beaches and shores] from imprudent construction which can
jeopardize the stability of the beach-dune system, accelerate erosion, provide
inadequate protection to upland structures, endanger adjacent properties, or
interfere with beach access."1000 The day-to-day core of the act was estab-
ishment and regulation of coastal construction control lines,1001 and imple-
menting protection further by establishing thirty-year erosion lines that are
the westward boundary for any state coastal permits.1002

Chapter 161 authorizes beach restoration projects, which are deemed to
be "in the public interest."1003 The conditions to obtain state permits for such
projects feature minimizing the adverse effects of erosion.1004 To obtain state
funding, the project must further protect listed species and natural resources,
and, of most interest in STBR, provide for public access on the renourished
beach.1005

998. Id. at 283.
1000. Id. § 161.053(1)(a).
1001. Id.
1002. Id. § 161.053 (5)(b).
1003. Id. § 161.088.
1005. See Id. § 161.101(12).
Core to beach renourishment under chapter 161 is the establishment of the Erosion Control Line (ECL) as the MHWL for that section of beach.\textsuperscript{1006} The ECL acts both as the baseline for newly renourished sands and as the new and permanent property boundary.\textsuperscript{1007} It replaces the ambulatory MHWL, which would otherwise be set by nineteen-year epochs under chapter 177.\textsuperscript{1008}

The state must determine if the currently determined, post-erosion or avulsion MHWL is where it will locate the ECL.\textsuperscript{1009} If engineering of the proposed project combined with the erosion or avulsion so requires, the state may select an ECL that lies upland of the MHWL.\textsuperscript{1010} If the latter occurs, the state must condemn the strip between MHWL and the ECL.\textsuperscript{1011}

3. The Administrative and Legal Background to STBR

\textit{STBR} arose when STBR and a second group, Save our Beaches (SOB), petitioned the Florida Department of Environmental Protection (FDEP) and the Governor and Cabinet, sitting as the Trustees of the Internal Improvement Trust Fund, to challenge FDEP and Trustees issuance of a permit allowing nearly seven miles of Gulf front beach to be renourished in the City of Destin and in unincorporated Walton County.\textsuperscript{1012} Central to the permit was the Cabinet’s adoption of and recordation in County records of the ECL as determined for the project.\textsuperscript{1013} Neither STBR nor SOB owned any of the littoral property, but STBR’s members did so.\textsuperscript{1014} The FDEP referred the matter to the Florida Division of Administrative Hearings (DOAH) pursuant to Florida Statutes sections 120.569 and 120.57.\textsuperscript{1015} The DOAH Administra-

\begin{itemize}
  \item \textsuperscript{1006} See id. § 161.191(1)–(2).
  \item \textsuperscript{1007} Id. § 161.191(1).
  \item \textsuperscript{1008} See id. §§ 161.181, .191; see also Fla. Stat. § 177.27(14) (2010).
  \item \textsuperscript{1009} FLA. STAT. § 161.141.
  \item \textsuperscript{1010} Id.
  \item \textsuperscript{1011} Id. §§ 161.141, .161, .191. See Donna R. Christie, \textit{Of Beaches, Boundaries and SOBs}, 25 J. LAND USE & ENVTL. L. 19, 40–41 (2009), for a good analysis of this portion of the program, in an article that defends strongly the beach renourishment program. Professor Christie wrote her article while \textit{STBR} was pending, and anticipated well the substantive issues that the Supreme Court addressed.
  \item \textsuperscript{1012} Save Our Beaches, Inc. v. Fla. Dep’t of Envtl. Prot., 27 So. 3d 48, 50–51 (Fla. 1st Dist. Ct. App. 2006), aff’d by Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot., 130 S. Ct. 2592 (2010).
  \item \textsuperscript{1013} Id. at 54.
  \item \textsuperscript{1014} Id. at 55.
  \item \textsuperscript{1015} See id. at 54–55. Those sections require state agencies to refer matters involving contested issues of fact to DOAH for an evidentiary hearing. DOAH issues a recommended
tive Law Judge held that DOAH lacked jurisdiction to address any constitutional issues, which Florida law holds must be preserved at the administrative agency level for review by any court of appeal reviewing the administrative action. 1016 DOAH issued a recommended order finding and holding that the permit applicants met all applicable administrative standards, and FDEP’s subsequent final order substantially adopted DOAH’s reasoning and conclusions and issuing the permit. 1017

SOB and STBR appealed the FDEP’s final order to Florida’s First District Court of Appeal. 1018 That intermediate appellate court discussed the DOAH record at length in concluding that the FDEP final order “unconstitutionally applie[d] Part I of Chapter 161, Florida Statutes.” 1019 The First District held that the severance of the littoral properties from the open waters of the Gulf of Mexico by the ECL and fill was both an unreimbursed, unconstitutional deprivation of their littoral rights and a resulting failure by the local governments to establish their own sufficient upland interest to perform the permitted renourishment. 1020 The First District emphasized the FDEP’s final order, which it said “expressly recognized” that section 161.191 eliminates the littoral property’s right to accretions and relictions after the ECL is established. 1021

The governmental entities appealed to the Supreme Court of Florida. 1022 The First District certified the following question to the Supreme Court of Florida for review:

Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply? 1023

order to the agency. The recommended order contains recommended findings of fact and conclusions of law. The agency issues the Final Order, which constitutes final agency action.

1016. Id. at 54 n.3.
1017. Save Our Beaches, Inc., 27 So. 3d at 51.
1018. Id. at 50.
1019. Id.
1020. Id. at 58.
1021. Id. at 54.
1022. See Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1105 (Fla. 2008).
1023. Id.
The Supreme Court of Florida accepted jurisdiction. A facial challenge is far harder to mount than is an as applied challenge, largely because a facial challenger must prove that the agency action cannot be constitutional under any circumstance. The Supreme Court of Florida also reframed the issue from accretion, as discussed expressly by section 161.191(2), to avulsion.

The Supreme Court of Florida majority held that the littoral owner’s right to alluvial deposits is contingent, not vested. It held further that littoral owners could gain accretions by “a rule of convenience intended to balance public and private interests by automatically allocating small amounts of gradually accreted lands to the upland owner without resort to legal proceedings and without disturbing the upland owner’s rights to access to and use of the water.” The majority concluded that the ECL and retention of access by statute virtually eliminated any risk to the littoral owner, and the amount of land needed to renourish the beach was not nominal.

The majority stated further that access to the water was a subordinate littoral right. The MHWL is based on a nineteen-year epoch, so the physical shore is sometimes in the water, and sometimes in the sand. This, the majority contended, added to retained littoral access by statute to preserve property rights.

The majority’s last point distinguished Belvedere Development Corporation v. Department of Transportation, Division of Administration. Belvedere held that a condemning authority could not sever riparian rights from a condemned parcel. The majority held that Belvedere dealt with distinguishable issues such as addressing condemnation of riparian lands. The majority reiterated its alleged irrelevance because Chapter 161, Part I of the Florida Statutes left the owner with “access, use, and view.”

1024. Id.
1025. Id.
1026. See, e.g., Fla. Dep’t of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005).
1027. See Walton Cnty., 998 So. 2d at 1116.
1028. Id. at 1112.
1029. Id. at 1118.
1030. Id.
1031. Id. at 1112.
1032. Id. at 1119.
1033. Id.
1034. 476 So. 2d 649 (Fla. 1985).
1035. Id. at 1120.
1036. 998 So. 2d at 1120 (citing Belvedere Dev. Corp., 467 So. 2d at 653).
1037. Id.
Justices Wells and Lewis dissented sharply. Justice Wells stated that *Florida National, Belvedere and Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates* controlled. Justice Lewis was blunter.

Justice Lewis accused the majority of having “butchered” Florida Law in seeking an equitable result. He took offense that the majority *sua sponte* reframed the issue from as applied to facial, after all parties and lower tribunals framed the issue as an as applied matter. He string cited Florida law in stating: “By essential, inherent definition, riparian and littoral property is that which is contiguous to, abuts, borders, adjoins, or touches water.” He further cited Judge Hersey’s special concurrence in Florida’s Fourth District Court of Appeal’s decision in *Belvedere Development Corp. v. Division of Administration*.

Justice Lewis contended that the majority’s argument that the ECL and fill would separate the littoral property from the sea by a short distance missed a key point: “Under the majority’s analysis, this State has ceased to protect the condition precedent to all other littoral rights: contact with the sea.” He lays out trenchantly his counter to the majority’s rationale: “I suggest that contact with the water by riparian or littoral property is ancillary, independent, or subsidiary to such property but is essential and inherent to its legal definition and is an indispensable predicate for the private owners’ possession of other associated rights.”

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1038. 512 So. 2d 934 (Fla. 1987).
1039. *Walton Cnty.*, 998 So. 2d at 1121 (Wells, J., dissenting).
1040. *Id.* at 1121 (Lewis, J., dissenting).
1041. *Id.*
1042. *Id.* at 1122 (citations omitted).
1043. *Id.* (citing Belvedere Dev. Corp. v. Div. of Admin., 413 So. 2d 847, 851 (Fla 4th Dist. Ct. App. 1982) (Hersey, J., specially concurring) *quashed by* 476 So. 2d 649 (Fla. 1985)).
1045. *Id.* at 1126–27.
1046. *Id.* at 1126.
1047. *Id.*
4. **STBR's Filing**

   a.  **On Judicial Takings**

   The principal issue STBR laid before the Supreme Court was whether the Supreme Court of Florida so deviated from Florida riparian and littoral precedential law that the state court's decision constituted a "judicial taking."  

   The Supreme Court once stated, in 1897, that the state judiciary could be liable under the Fourteenth Amendment for compensable takings of property. Coincidental to our topic, the case addressed a railroad in the City of Chicago. The City took the railroad's right-of-way to connect Rockwell Street. The railroad appealed its eminent domain award of one dollar.

   *Chicago, Burlington & Quincy Railroad Co. v. Chicago* considered whether the Fourteenth Amendment barred Illinois state courts from awarding a nominal sum to the railroad whose property was taken by the City of Chicago. The first Justice John Marshall Harlan wrote the opinion for the Supreme Court in holding that the Fourteenth Amendment incorporated a right to compensation for a state actor's taking. David Sarratt quotes the following, sweeping passage:

   "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."
Modern courts\textsuperscript{1057} and commentators\textsuperscript{1058} cite \textit{C, Burlington & Quincy Railroad Co.} as the decision that first incorporated the Fifth Amendment Takings Clause against state actors under the Fourteenth Amendment. Professor Bradley Karkkainen counters that the decision never cited that premise.\textsuperscript{1059} Rather, he contends that \textit{Chicago, Burlington & Quincy Railroad Co.} was decided under substantive due process.\textsuperscript{1060}

The \textit{Chicago, Burlington & Quincy Railroad Co.} opinion stated that “[d]ue process of law . . . means . . . such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public.”\textsuperscript{1061} The Court upheld the award just the same, because of instructions and facts in the record supporting the jury award.\textsuperscript{1062}

Karkkainen concedes that the \textit{Chicago, Burlington & Quincy Railroad Co.} opinion cites no authority for the holding that due process under the Fourteenth Amendment required just compensation for a state taking.\textsuperscript{1063} He responds that \textit{Munn v. Illinois}\textsuperscript{1064} supported \textit{Chicago, Burlington & Quincy Railroad Co.} Dicta in \textit{Munn} stated that a State could take private property consistent with the Fourteenth Amendment, but due process required just compensation.\textsuperscript{1065}

Karkkainen emphasizes that \textit{Chicago, Burlington & Quincy Railroad Co.} did not mention \textit{Barron},\textsuperscript{1066} which limited the takings clause to the Fifth Amendment.\textsuperscript{1067} He contends:

The historical record is unambiguous: \textit{Chicago B & Q} was not understood at the time it was decided, nor for many decades thereafter, to have extended the Fifth Amendment Takings Clause.

\textsuperscript{1057} Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994).
\textsuperscript{1058} See e.g., Barton H. Thompson, Jr., Judicial Takings, 76 VA L. REV. 1449, 1463 (1990).
\textsuperscript{1060} See id. at 844.
\textsuperscript{1061} \textit{Chi., Burlington & Quincy R.R. Co.}, 166 U.S. at 236.
\textsuperscript{1062} Id. at 235–36.
\textsuperscript{1063} Karkkainen, supra note 1059, at 848.
\textsuperscript{1064} 94 U.S. 113, 145 (1877).
\textsuperscript{1065} Karkkainen, supra note 1059, at 848 (citing 94 U.S. at 145).
\textsuperscript{1066} Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). See supra notes 113–118 and accompanying text, which explain that \textit{Barron} might be best understood by the Supreme Court’s tendency in that era to protect property rights, but not property value.
\textsuperscript{1067} Id. at 250–51; Karkkainen, supra note 1059, at 852–54.
to the states. That interpretation of *Chicago B & Q* is a latter-day contrivance, at odds with historical understandings.\footnote{1068}

*Muhlker v. New York & Harlem Railroad Co.*\footnote{1069} first raised the concept of judicial takings in the context of a state judiciary’s reversal of longstanding precedent.\footnote{1070} While Justice McKenna wrote for a four justice plurality stating that the state courts could not take property rights by unwarranted reversal of precedent, he neither cited precedent nor explained why his observation was not dicta.\footnote{1071}

The Supreme Court in the 1930s moved away from any judicial takings rationale.\footnote{1072} Nonetheless, Sarratt argues that the Supreme Court left the door open a crack.\footnote{1073}

As we have discussed above, Justice Stewart’s concurrence in the 1967 *Hughes* decision revived the doctrine—at least in theory.\footnote{1074} Justice Scalia’s dissent from the Supreme Court’s denial of certiorari in *Stevens v. Cannon Beach*\footnote{1075} made it clear he agreed with Justice Stewart:

As a general matter, the Constitution leaves the law of real property to the States. But just as a state may not deny rights protected under the Federal Constitution through pretextual rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate “background law”—regardless of whether it is really such—could eliminate property rights. “[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.” No more by judicial decree than by legislative fiat may a State transform private property without compensation. Since opening private property to public use constitutes a taking, if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights

\footnotesize

\begin{itemize}
\item 1068. Karkkainen, *supra* note 1059, at 855.
\item 1069. 197 U.S. 544 (1905).
\item 1070. *Id.* at 574 (Holmes, J., dissenting).
\item 1071. Thompson, *supra* note 1058, at 1464–65 n.61 (citing Muhlker, 197 U.S. at 572–76).
\item 1072. Thompson’s seminal article declares that the doctrine died that decade. *Id.* at 1467.
\item 1073. See Sarratt, *supra* note 1056, at 1505–07.
\item 1075. 510 U.S. 1207 (1994) (Scalia, J., dissenting).
\end{itemize}
to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.\textsuperscript{1076}

Professor Benjamin Barros stated that the Supreme Court’s acceptance of jurisdiction in \textit{STBR} likely portended the Court’s willingness to decide the issue of a judicial taking in favor of the property owner.\textsuperscript{1077} Barros said that Scalia had passed on “at least” fifteen petitions that argued for certiorari on the judicial takings issue between \textit{Cannon Beach} and \textit{STBR}.\textsuperscript{1078}

Justice Scalia provided fertile ground, however, for consideration of the doctrine. He is the current Court’s most zealous proponent of a robust takings doctrine.\textsuperscript{1079} One wonders how it comports with constitutional originalism,\textsuperscript{1080} but it does further Justice Scalia’s efforts to both augment and emphasize the takings doctrine\textsuperscript{1081} and to supplant substantive due process.\textsuperscript{1082}

In addition to \textit{Cannon Beach}, Scalia’s analysis in \textit{Lucas v. South Carolina Coastal Council}\textsuperscript{1083} showed a willingness to address a significant state takings case. His majority opinion held that a state that deprives an owner of all economic value of a property must pay just compensation, unless the owner’s use or proposed use violates “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”\textsuperscript{1084} \textit{STBR} presented an ideal synergy of \textit{Cannon Beach} and \textit{Lucas}. Barros expected so, as he predicted a 5-4 victory for the property owners, with Justice Scalia writing for himself, Chief Justice Roberts, and Justices Thomas, Alito, and Kennedy, with a possible concurrence as well by Justice

\begin{itemize}
\item \textsuperscript{1076} Id. at 1211-12 (alterations in original) (citations omitted).
\item \textsuperscript{1077} D. Benjamin Barros, \textit{What’s at Stake in Stop the Beach Renourishment}, \textsc{Property Prof Blog} (July 1, 2009), http://lawprofessors.typepad.com/property/2009/07/whats-at-stake-in-stop-the-beach-renourishment.html.
\item \textsuperscript{1078} Id.
\item \textsuperscript{1081} See, e.g., Stevens v. Cannon Beach, 510 U.S. 1207, 1207-14 (1994) (Scalia, J., dissenting from denial of certiorari).
\item \textsuperscript{1082} See, e.g., Aaron Shuler, \textit{From Immutable to Existential: Protecting Who We Are and Who We Want To Be With the “Equalery” of the Substantive Due Process Clause}, 12 \textsc{J.L. & Soc. Challenges} 220, 315-16 (2010) (discussing Justice Scalia’s disdain for use of substantive due process to protect liberty, citing to \textit{Lawrence v. Texas}, 539 U.S. 558, 588-92 (2003) (Scalia, J., dissenting)).
\item \textsuperscript{1083} 505 U.S. 1003 (1992).
\item \textsuperscript{1084} Id. at 1029.
\end{itemize}
Kennedy on due process grounds. As it turned out, he was ever so close on his prediction. As one assumes, so was Justice Scalia.

5. The Oral Argument

My friend Gary Oldehoff wrote an extraordinary amicus brief on the other side of our amicus brief in STBR. His subsequent Florida Bar Journal article summed up the oral argument quite well: "The parties and their amici left the oral argument with no clear sense of the likely outcome. The same was clearly true for the media."

6. The STBR Decision

a. Florida Law

The Supreme Court issued its decision on June 17, 2010. The only thing the Court agreed upon was that the Supreme Court of Florida majority did not effect a judicial taking. Justice Scalia wrote for a unanimous Court. The Court held that Florida law does not require a littoral parcel to maintain direct physical contact with the navigable water to keep the appurtenant right of access to that waterbody.

This decision upheld the Supreme Court of Florida majority opinion distinguishing Belvedere Development Corp. v. Florida Department of Transportation, cited by the Petitioners and Florida’s First District Court of Appeal. Belvedere addressed the rights of a condemnee to retain riparian rights. The Supreme Court of Florida majority opinion in Walton County limited Belvedere’s application to eminent domain. Belvedere

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1085. Barros, supra note 1077.
1087. Oldehoff, supra note 7, at 18, 21 & n.46 (citing news stories with vote predictions that, well, crossed the waterfront).
1089. Id. at 2613.
1090. Id. at 2592.
1091. Id. at 2598–99.
1092. 476 So. 2d 649 (Fla. 1985).
1094. See Belvedere Dev. Corp., 476 So. 2d at 650.
1095. See Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1120 (Fla. 2008).
was consistent with *Crutchfield v. F. A. Sebring Realty Co.*, which over a half century before *Walton County* held that riparian rights are appurtenances to waterfront parcels and may not be severed from such lands.

The *STBR* Court upheld the *Walton County* majority holding that the fill constituted an avulsive event, not accretion. As the Supreme Court of Florida reframed the issue in *Walton County*, artificial avulsion would not change preexisting waterfront boundaries. Nonetheless, this settled law retains none of the classic rationales for the avulsion-accretion distinction. We no longer have "lost boundary" conundrums in alluvial settings—at least we do not in most Gulf coast beaches that are surveyed by the MHWL for which historic aerial photographs are generally available. Artificial avulsion, as in renourishment, is nominally more permanent than were the classically avulsive events described in English common law that distinguished accretion and avulsion. Even Sax, whom all concede is the godfather of the modern public trust doctrine, does not support the blanket distinction. Finally, the major support of holding the traditional boundary where improvements cause "artificial" avulsion does not exist where the landowner does not participate in the improvements. The landowner does not allegedly benefit from her own activities in this adding to her physical property.

Justice Scalia stated at footnote 12 that the switch from common law property rights to those granted by statute did not have any material effect. As Juras, Lincoln, and I point out in our article on the public access aspects of *STBR*, the Eleventh Circuit’s law on-point is not comforting. *McKinney v. Pate* held that a government may rescind statutory rights as long as it provides procedural due process—notice and an opportunity to be heard.

Justice Scalia’s opinion concluded that the *Walton County* decision was controlled by a decision that the lower court nowhere mentioned:

In *Martin v. Busch*, the Florida Supreme Court held that when the State drained water from a lakebed belonging to the State, causing land that was formerly below the mean high-water line

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1096. 69 So. 2d 328 (Fla. 1954).
1097.  Id. at 329.
1099.  *Id.*
1100.  See *id.* at 2613 n.12.
1102.  *Id.* at 213.
1103.  20 F.3d 1550 (11th Cir. 1994).
1104.  *Id.* at 1567.
1105.  112 So. 274 (1927).
This followed Justice Scalia’s and Justice Kennedy’s questions at oral argument why Martin was not cited below.\textsuperscript{107} I discussed this at length in the ABA Constitutional Law Committee Newsletter.\textsuperscript{108}

Several major reasons come to mind. First, Martin addressed Swamp and Overflowed Lands along the shore of Lake Okeechobee.\textsuperscript{109} The federal and state government drained the lake through several major canals, for the “improvement” of the Everglades by large-scale reclamation.\textsuperscript{110} The Busch parties took title by a patent that expressly reserved to the state the right to enter their parcel for “canals, cuts, sluiceways, dikes and other work” that the state deemed appropriate to drain and reclaim.\textsuperscript{111} The deed expressly limited the parcel by the margins of the lake and its tributaries.\textsuperscript{112} No one under that chain had a reasonable expectation of unqualified littoral rights.\textsuperscript{113} In fact, it was quite the opposite.

Finally, the majority decision in Sand Key expressly reversed, or at least said that Martin was dicta as related to reliction.\textsuperscript{114} Accordingly, it was appropriate and reasonable for littoral property owners after Sand Key to assume that alluvial deposits caused by third party governmental action incurred to them. It made imminent sense for them to assume Martin was no longer applied.

b. Judicial Takings

Justice Scalia was unable to get Justice Kennedy to join his four justice plurality.\textsuperscript{115} While he held that Florida did not take property here, Justice

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\textsuperscript{1106}. Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot., 130 S. Ct. 2592, 2611 (2010).
\textsuperscript{1108}. See generally Sidney F. Ansbacher, What Did You Expect from Swamp Sales, a Happy Ending?, CONST. L. COMMITTEE NEWSL. (Am. Bar Ass’n, Chicago, Ill.), Sept. 2010 at 11.
\textsuperscript{1109}. Id. at 12.
\textsuperscript{1110}. Id.
\textsuperscript{1111}. Id. at 16 (quoting Martin v. Busch, 112 So. 2d 274, 281 (Fla. 1927)).
\textsuperscript{1112}. Id. (discussing Martin, 112 So. 2d at 280).
\textsuperscript{1113}. Id.
\textsuperscript{1114}. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assoc’s., 512 So. 2d 934, 942 (Fla. 1987) (Ehrlich, J., dissenting).
\textsuperscript{1115}. See generally Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot., 130 S. Ct. 2592 (2010).
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Scalia opined that the judiciary can be liable for a taking. He concluded that the standard for a judicial taking was not the one cited by Stewart in *Hughes*, and thus relied upon by the Petitioner in *STBR*. Rather, Justice Scalia stated that a state court should be liable where it deprives one of an established property right. He expounded: "A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court."

Justice Scalia also discussed the delicate question of whether the remedy for a judicial taking was the same as for a taking by the other two branches—just compensation. He concluded no. Rather, his opinion stated the remedy was reversal, thus allowing the state legislature to "either provide compensation or acquiesce in the invalidity of the offending features of the Act."

Justice Kennedy’s opinion, joined by Justice Sotomayor, stated that the due process clause provides the primary method of relief where a court deviates from precedent. Only when the due process clause proves inadequate should the Supreme Court consider the judicial takings doctrine. He emphasized that he believed the doctrine is "inconsistent with historical practice."

One commentary, logically enough, states: "That Justice Kennedy thoroughly denounced a judicial takings doctrine for lack of any historical, substantive, or theoretical backing makes it surprising that he left any door open to the creation of such a doctrine in the future."

Justice Kennedy’s due process analysis is understandable, and consistent with much Supreme Court precedent. Nonetheless, Justice Scalia blasted him, essentially, for not joining Scalia, and, specifically, for relying on due process.

1116. *Id.* at 2618.
1117. *Id.* at 2610.
1118. *Id.* at 2608.
1119. *Id.* at 2609–10, n.9.
1120. *Stop the Beach Renourishment, Inc.*, at 2610.
1121. *Id.* at 2607.
1122. *Id.*
1123. *Id.* at 2613–18 (Kennedy, J., concurring in part and concurring in the judgment).
1124. *Id.* at 2618.
1125. *Stop the Beach Renourishment, Inc.*, at 2616.
1127. See Ryan C. Williams, The One and Only Substantive Due Process Clause, 120 YALE L.J. 408 (2010), dissects the history of substantive due process.
1128. See *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2605–10.
Justice Scalia’s castigation of Justice Kennedy’s reliance on substantive due process was predictable. Constitutional originalists generally view the doctrine as a catchall with no historical basis. Justice Scalia stated that the Due Process Clause “places no constraints whatever upon this Court” in the substantive context.

Yet, Justice Scalia joined a plurality in *McDonald v. City of Chicago* just eleven days after *STBR*, which held that the Second Amendment was incorporated in the Fourteenth Amendment’s Due Process Clause. Ilya Shapiro and Trevor Burrus of the Cato Institute (the former of whom was on Cato’s briefs in both *STBR* and *McDonald*) sought to explain why. They contend that Scalia will use the Due Process Clause when he must, but refuses to do so “either to protect unenumerated rights or, as in [*STBR*], to supersede more historically rooted textual provisions.”

One commentator makes a trenchant observation regarding how close Justice Scalia came to a possible majority in *STBR*. Professor John Echeverria notes that Justice Kennedy’s concurrence focused on whether “a judicial ruling upsets ‘settled principles’” regarding the state’s law. While Kennedy stated that “owners may reasonably expect or anticipate courts to make certain changes in property law,” a decision that disturbed established expectations would go too far. The commentator observes that Kennedy’s “settled expectations” standard “seems to have a good deal in common” with Stewart’s judicial takings analysis in *Hughes*. He suggests that Scalia might well have lost his majority by hewing to a per se takings test instead of Stewart’s test.

Justice Breyer’s separate concurrence wondered why the plurality even needed to address the issue. He expressed concern that federal courts

1130. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2608 (emphasis omitted).
1131. 130 S. Ct. 3020 (2010).
1134. Id. at 433.
1136. Id.
1137. Id. (quoting *Stop the Beach Renourishment, Inc.*, v. Fla. Dep’t of Envtl. Prot., 130 S. Ct. 2592, 2615 (Kennedy, J., concurring in part and concurring in the judgment)).
1138. Id. at 480.
1139. See id.
1140. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2618–19 (Breyer, J., concurring).
would be called on to act as a *de facto* final state appellate court to address matters that are familiar to the state, but not federal judiciary.\textsuperscript{1141}

7. **STBR's Results**

a. **Title Coverage**

One aspect of *STBR* remains that received little attention in the decision or the various articles addressing the decision: title coverage. There is little doubt that a waterfront home is worth more than a waterview home.\textsuperscript{1142} There is little doubt that an exclusive right of beach access down to the MHWL is worth more than one shared with the public. Government acts that deprive one of either waterfront or exclusive access deprive one of valuable rights.

Nonetheless, it is exceedingly rare that a Floridian can obtain title insurance for such actions as complained of in *STBR*. One of the most insightful briefs in the case was an *amicus curiae* brief of the New Jersey Land Title Association for the Petitioner.\textsuperscript{1143} That brief discussed the key role of title insurance in “allow[ing] [parties] to invest in real estate with confidence” that title “is good and free of encumbrances,” or that such encumbrances are at least disclosed sufficiently to allow the user to make an informed decision.\textsuperscript{1144} The association emphasizes title insurance’s “focus[] more on an analytical risk-elimination rather than a risk-assumption, such as happens with casualty insurance.”\textsuperscript{1145} The brief summarizes the role of title insurance in protecting title conveyance as “seamlessly trac[ing] [title] backwards in time to a point beyond the statute of limitations for claims against that title.”\textsuperscript{1146}

Nonetheless, one major limitation exists to reasonable investment backed expectations in beachfront property in Florida. Title policies typical-

\textsuperscript{1141} Id. at 2619.
\textsuperscript{1142} See, e.g., Florida Department of Revenue, The Florida Real Property Appraisal Guidelines at 2.4.2 p.8 (Nov. 26, 2002) (bodies of water among four interactive forces that influence real property value), and addendum (3) at 57 (location of property is a factor in determining just valuation) (citations omitted).
\textsuperscript{1143} Brief for N.J. Land Title Ass’n as Amicus Curiae Supporting Petitioners at 1, Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot., 130 S. Ct. 2592 (2010) (No. 08-1151).
\textsuperscript{1144} Id. at 2 (citing Joyce Palomar, Title Insurance Law, § 1.8 (2008)).
\textsuperscript{1145} Id. at 3 (citing Palomar, *supra* note 1214, at § 1.15).
\textsuperscript{1146} Id. (citing Lawrence Joel Fineberg, Handbook of New Jersey Title Practice: A Treatise Concerning the Examination and Insurance of Real Estate Titles in the State of New Jersey, § 803 (3d ed. 2007)).

https://nsuworks.nova.edu/nlr/vol35/iss3/3
ly exclude coverage for riparian and littoral rights appurtenant to the property.\footnote{See, e.g., Homer Duvall, Title Insurance, in Fl.a. Ba.r, Florida Real Property Title Examination and Insurance 4-13 (6th ed. 2010).}

While the exception is typical of those found in many states, it stems from a long and tortuous chain of case law in Florida. In 1973, Florida’s Fourth District Court of Appeal in Sawyer v. Modrall\footnote{286 So. 2d 610 (Fla. 4th Dist. Ct. App. 1973).} stated in dicta that Florida’s Marketable Record Title Act (MRTA) operated to extinguish state sovereign title.\footnote{Id. at 613.} Florida enacted MRTA in 1963 to “‘[simplify] and facilitate[ate] land title transactions by allowing persons to rely on a record title.’”\footnote{Ansbacher & Knetsch, supra note 336, at 349-50 (quoting Fla. Stat. § 712.10 (2010)).} MRTA generally clears title to one whose chain deraigns from a “root of title” that has appeared of record for at least thirty years.\footnote{Id. §§ 712.01(2); .02.} All conflicting claims are extinguished unless they fall under a MRTA exception.\footnote{Id. § 712.03.}

Ansbacher and Knetsch cited various authorities undermining the contention that the Florida Bar, who supported MRTA’s passage, or the legislature intended MRTA to extinguish sovereign claims and stated:

The members of the Florida Bar who supported drafting MRTA did not anticipate that the Act would affect sovereignty land titles. One commentator stated that the legislature deleted the proposed exemption of state lands from the MRTA bill when it was introduced only because it knew that the Act could not affect such state’s rights. In Professor Barnett’s 1967 review of various state MRTAs, he cited the Florida act as excepting all interests of the state from MRTA’s operation.\footnote{Ansbacher & Knetsch, supra note 336, at 351 (citations omitted).} In addition, one of the Florida Bar Association proponents of MRTA wrote a letter to the MRTA Commission Chairman in 1985 stating: “I did not believe the Act could affect sovereignty lands unless it said so.”\footnote{Id. (quoting Letter from Richard W. Ervin, Esq., Tallahassee, Fla., to J. Hyatt Brown, Chairman, Marketable Record Title Act Study Commission, Daytona Beach, Fla. (Sept. 30, 1985)).}

The Supreme Court of Florida in Odom v. Deltona Corp.\footnote{341 So. 2d 977 (Fla. 1976).} held that MRTA extinguished sovereign claims to non-meandered waters within the legal description of a swamp and overflowed lands conveyance once thirty
years passed.\textsuperscript{1156} The state had conveyed the parcel over fifty years before.\textsuperscript{1157} The \textit{Odom} court held further that, as meandering creates a presumption that a waterbody is navigable, the failure to meander creates a presumption of non-navigability.\textsuperscript{1158} An adamant dissent by Justice Sundberg countered that MRTA is only a curative statute, which cannot \textit{per se} divest the state of sovereign lands held in the public trust.\textsuperscript{1159}

Governor Reuben Askew called a special session of the Florida legislature to respond to \textit{Odom}. The body passed into law a bill that excluded "State title to lands beneath navigable waters [that are] acquired by virtue of its sovereignty."\textsuperscript{1160} While the statute did not state whether it applied retroactively, its procedural posture indicated that it was intended to do so.\textsuperscript{1161} Courts interpreted the exception to apply prospectively only until 1986.\textsuperscript{1162}

The Supreme Court of Florida in \textit{Coastal Petroleum Co. v. American Cyanamid Co.}\textsuperscript{1163} addressed 1883 deeds from the Florida Cabinet, sitting as the Board of Trustees of the then-Internal Improvement Fund of Swamp and Overflowed Lands that did not expressly reserve the state's sovereign lands under the navigable Peace River.\textsuperscript{1164} As was the case in the \textit{Phillips Petroleum} case pending at the same time in Mississippi courts and then the Supreme Court of the United States,\textsuperscript{1165} \textit{Coastal} addressed disputes over private mineral rights and state lease fees and taxation.\textsuperscript{1166}

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\item[1156] \textit{Id.} at 988–89.
\item[1157] \textit{Id.} at 980.
\item[1158] \textit{Id.} at 988–89. Note, however, that government surveyors whose records are in federal Field Notes meandered only waters that crossed government survey section lines. Ansbacher & Knetsch, \textit{supra} note 336, at 371–72 n.263.
\item[1159] \textit{Odom}, 341 So. 2d at 990 (Sundberg, J., dissenting).
\item[1162] \textit{Compare} State v. Contemporary Land Sales, Inc., 400 So. 2d 488, 492 n.4 (Fla. 5th Dist. Ct. App. 1981) ("It will be readily noted that this exception is patently ambiguous as relating to a case, such as this, involving lands no longer beneath navigable waters. If by this statute the Legislature intended to correct an oversight, not only did the horse in this case escape in the hiatus but the barn door is still ajar.")., with Coastal Petroleum Co. v. Am. Cyanamid Co., 492 So. 2d 339, 344 (Fla. 1986) ("[T]he legislature intended to overturn the well-established law that prior conveyances to private interests did not convey sovereignty lands encompassed within swamp and overflowed lands being conveyed.").
\item[1163] 492 So. 2d 339 (Fla. 1986).
\item[1164] \textit{Id.} at 342–43.
\item[1166] \textit{See generally Coastal Petroleum Co.}, 492 So. 2d at 339.
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Florida’s Second District Court of Appeal held that the Trustees’ 1883 conveyance without reservation implicitly determined that the submerged lands were not sovereign. Even if they were navigable, the failure to reserve estopped the state from so claiming. Finally, MRTA extinguished any state claims. The appellate court certified all three prongs of its holding to the Supreme Court of Florida as issues of great statewide significance.

The Supreme Court of Florida held, first, that the Trustees did not hold authority to convey sovereign lands in 1883. Second, estoppel did not apply because a sovereign may convey lands only by clear and express intent. The majority held that the lower court’s focus on the failure to reserve sovereign title improperly reversed the burden. Last, MRTA did not apply because MRTA nowhere stated that it was intended to divest sovereign title. Further, and consistent with Illinois Central and Article X, section 11, of the Florida Constitution, the majority stated in dicta that it questioned whether the Florida legislature had authority to make an ex post facto divestiture of sovereign lands.

Therefore, while an oceanfront owner in STBR had good arguments for vesting and reasonable, investment backed expectations, the owner almost certainly lacked title insurance coverage against the state’s renourishment and locking in of a new MHWL. Accordingly, title insurance was almost certainly unavailable after Coastal.

C. Constitutional Issue

As I noted above, and in the Vermont Environmental Law Journal article, the decision leaves one major issue unaddressed. How does the fixed ECL comport with Article X, section 11, of the Florida Constitution, which

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1168. Id. at 9.
1169. Id.
1170. Id. at 9–10.
1171. Coastal Petroleum Co., 492 So. 2d at 342–43. Ansbacher and Knetsch cite the 1913 act authorizing conveyance of tidal lands and 1969 for nontidal submerged sovereign lands to the Governor and Cabinet, sitting as the Board of Trustees of the Internal Improvement Fund. Ansbacher & Knetsch, supra, note 336, at 357–58, n.175 and accompanying text. Until then, the Trustees did not have such lands, let alone the authority to convey them. Id.
1172. Coastal Petroleum Co., 492 So. 2d at 343.
1173. Id.
1174. Id. at 344.
1175. Id.
states that Florida holds lands below the MHWL along its beaches, together with other sovereign lands. This is by all law a transitory, not a static boundary. Consistent with Corvallis, the Constitution allows transfers from the state. It nowhere says one can transfer more sovereign lands to the state.

XIII. CONCLUSION

STBR dismissed quickly the most established body of Florida law concerning littoral rights. In the stead of that case law, the Supreme Court resuscitated a decision that most observers thought had been relegated to the dustbin. The STBR court stated that a decision that the lower court had not even cited was the seminal Florida decision supporting the Supreme Court. Of course, this all seems more logical if one assumes that the entire history of riparian rights and the public trust is an internally contradictory Rube Goldberg contraption.\footnote{Which seems all the more appropriate when one realizes Rube started out as an engineer with the San Francisco Water and Sewer Department.} For every putative rule, we see multitudinous exceptions. If indeed, what we know as a rule is even the rule. Certainly, this body of the law shifts as policies and needs dictate.

For example, if Sax is correct, and the fill in STBR merely reestablished the foreshore location that preexisted multiple hurricanes, then the net effect of two sets of avulsive events would by common law have reestablished the littoral ownership out to that prior point. A literal reading of Art. X, s. 11 of Florida’s Constitution supports that result. Instead, the STBR Court decided issues as the Florida Supreme Court reframed them, and no party had preserved a record to address. The state court was entitled to do so. Indeed, one doubts the United States Supreme Court would have asserted jurisdiction had the issues not been reframed. Regardless, there is no reason to expect today’s Supreme Court to establish a standard for the ages, any more than the ages have provided us a standard.