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Cover Page Footnote

The author dedicates this article to an excellent instructor of legal writing, Paul E. Lund.

HISTORY OF FLORIDA WATER LAW: TRACING THE EBB AND FLOW OF FLORIDA'S PUBLIC TRUST DOCTRINE THROUGH THE OPINIONS OF JUSTICE JAMES B. WHITFIELD

ROSANNE GERVASI CAPELESS*

I. INTRODUCTION

Numerous issues involving title to lands under Florida's waters were decided in the early 1900s, during the nearly three decades in which Justice James B. Whitfield authored several leading water law opinions for the Florida Supreme Court.[1] This article covers the twenty-six year period in which Justice Whitfield authored the majority of his water law opinions.[2] During this time, from 1908-1934, Justice Whitfield defined and interpreted the so-called public trust doctrine,[3] derived from English common law, as it applies to the state of Florida.[4] Under this doctrine, Florida gained title to the beds of navigable waters[5] upon admission into the Union in 1845.

Generally, lands that fall within the public trust doctrine, public trust lands, are those lands for which title is held in trust by a state, because of its sovereignty, for the use and enjoyment of all the people of the state.[6] Included within this definition, according to Justice

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1. "[W]hile Florida has 1,300 miles of *general* shoreline, it has 9,000 miles of *detailed* shoreline (the latter including all indentations and the shores of large and small islands), a shoreline longer by far than that of any other state except Alaska." LUTHER J. CARTER, THE FLORIDA EXPERIENCE 59 (1974). "Several generations of Florida attorneys have, by now, earned much of their livelihood by helping clients interpret, defend, or challenge confused and cloudy titles to submerged lands." *Id.* at 59-60.

2. Justice Whitfield sat on the Florida Supreme Court from 1904-1943. He served as Chief Justice in 1905, from 1909-13, and from 1935-37. Julia W. Neeley & Randolph Whitfield, *Our Father, James Bryan Whitfield*, 3 FLA. S. CT. HISTORICAL SOC'Y REV. 1 (1987-88).

3. For a discussion of the historical background of the public trust doctrine as it evolved in the common law of England and developed in America, see Michael L. Rosen, *Public and Private Ownership Rights in Lands under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 563-80 (1982). For a general discussion of Florida's public trust doctrine, see Sidney F. Ansbacher & Joe Knetsch, *The Public Trust Doctrine and Sovereignty Lands in Florida: A Legal and Historical Analysis*, 4 J. LAND USE & ENVTL. L. 337 (1989).

4. "Justice Whitfield is responsible for defining much of Florida's water law and public trust responsibilities through his cases." DONNA R. CHRISTIE, OCEAN AND COASTAL LAW AND POLICY: A UNITED STATES AND FLORIDA PERSPECTIVE 113 (1992).

5. Those waters which afford a channel for useful commerce. BLACK'S LAW DICTIONARY 1028 (6th ed. 1990).

6. The doctrine is codified in the Florida Constitution, which states that sovereignty lands are "held by the state . . . in trust for all the people" and that the "[s]ale of such lands may be authorized by law, but only when in the public interest." FLA. CONST. art. X, § 11.

Whitfield, are those lands lying beneath the navigable waters of Florida.[7] The concept of water navigability has proven to be problematic. What constitutes a navigable water? Must the water be navigable in fact to be included within the public trust, and by what criteria? Should land beneath waters that are influenced by the tides also be included within the public trust? As the late Dean Frank E. Maloney, eminent authority on Florida water law, pointed out, "'[o]f all the difficult questions which have arisen in the application of the law involving water rights, there is none which has produced more uncertainty, caused greater conflict of opinion or produced more diverse results than that relating to the title to the land under the waters.'"[8]

Land under navigable waters has traditionally belonged to the public trust. Problems arose in identifying which waters were navigable. Through the common law of England, the "ebb and flow of the tide" test was developed for determining water navigability for the purposes of subjecting land beneath tidal waters[9] to the public trust.[10] In early American cases adopting the English public trust doctrine, however, courts began to question whether the "ebb and flow of the tide" test should be the only appropriate test for determining navigability of American waters.[11] Because so many American water bodies capable of navigation are not affected by the tide, the "navigability in fact" test emerged. This test is exemplified in the United States Supreme Court decision in *The Daniel Ball*:[12]

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7. *See generally* State *ex rel.* Ellis v. Gerbing, 47 So. 353 (Fla. 1908).

8. FRANK E. MALONEY ET AL., FLORIDA WATER LAW 674 (1980) (quoting 1 FARNHAM, WATERS & WATER RIGHTS § 36 (1904)). "The truth of this quotation is nowhere more apparent than in Florida where the already confused common law is further complicated by old Spanish law, numerous statutes, and the activities of various administrative agencies." *Id.*

9. Tide-water is that which falls and rises with the ebb and flow of the tide. The term is not usually applied to the open sea, but to coves, bays, rivers, etc. BLACK'S LAW DICTIONARY 1482 (6th ed. 1990).

10. "[A]lthough the property *of the soil* is in the Crown, to high-water mark; yet the shore, or the land which is between the high and low-water marks, is also of common right public. . . . [T]he king has the property, but the people have the necessary use." JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS, AND IN THE SOIL AND SHORES THEREOF 20 (Boston, Harrison Gray 1826). This, the first American treatise on tidewaters, was one of the earliest American treatises. It was the "premier American authority on the subject [of tidewaters] throughout the 19th century." Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water*, 3 FLA. ST. U. L. REV. 513 at 547 (1975).

11. *See* MacGrady *supra* note 10, at 588-589.

12. 77 U.S. 557, 563 (1870). The Court found that:

> [t]he doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide-water and navigable water there signify

> A different test must . . . be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[13]

For over a century following *The Daniel Ball*, there was conflict among the states as to whether the "navigability in fact" test should be interpreted to replace or merely to supplement the "ebb and flow of the tide" test.[14]

In Florida, Justice Whitfield was generally consistent in his application of public trust principles. Even within his opinions, however, a conflict exists regarding his characterizations of the Florida title test for determining navigability under the public trust doctrine. This conflict involves apparent inconsistency as to whether lands lying beneath waters that are subject to the ebb and flow of the tides fall within the public trust doctrine when such waters are not navigable in fact.[15]

After years of ambiguity surrounding this issue in Florida as well as in other states, the United States Supreme Court in *Phillips Petroleum Co. v. Mississippi*[16] held that the states acquired at the time of statehood all lands lying under any waters influenced by the tide, whether or not navigable in fact.[17] Yet, this decision did not resolve the issue of whether the states *continue* to hold such lands in trust for the public. "The individual [s]tates have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[18]

> substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide-water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length.

Id.

13. *Id.* For a discussion of the current federal "navigability in fact" test, see MacGrady, *supra* note 10, at 592-93. The test remains substantially the same, with the added element that navigability for title purposes is to be tested as of the date the particular state entered the Union. *See* Utah v. United States, 403 U.S. 9 (1971). Florida's "navigability in fact" test is "similar, if not identical, to the federal title test." Odom v. Deltona Corp., 341 So. 2d 977, 988 (Fla. 1976).

14. CHRISTIE, *supra* note 4, at 103; *see also* MacGrady, *supra* note 10, at 588-89.

15. *See infra* part VI.

16. 484 U.S. 469 (1988) (5-3 decision in which Justice Kennedy took no part).

17. *Id.* at 476.

18. *Id.* at 475.

This article will examine certain cases authored by Justice Whitfield that define and interpret the public trust doctrine as applied to various parties, from representatives of the general public to riparian land owners.[19] Particular focus will be upon the apparent inconsistency within certain cases as to whether, according to Justice Whitfield, land lying beneath waters that ebb and flow with the tide necessarily fall within the definition of Florida's public trust doctrine, regardless of whether such waters are deemed navigable.

While the majority of Justice Whitfield's opinions suggest that the "ebb and flow of the tide" test is a valid test for determining whether Florida's submerged lands are subject to the public trust doctrine, his opinion in the case of *Clement v. Watson*[20] indicates otherwise. Because none of Justice Whitfield's opinions on Florida's public trust doctrine have been overruled, the validity in Florida of the "ebb and flow of the tide" test for declaring non-navigable waters as within the public trust is uncertain. This article suggests that Florida courts should resolve this uncertainty by clearly affirming the "ebb and flow of the tide" test, especially now that the United States Supreme Court has done so.

Justice Whitfield authored several landmark opinions for the Florida Supreme Court in which he developed and further clarified riparian rights,[21] legal issues pertaining to swamp and overflowed

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> In some states, public ownership appears to extend to submerged lands subject to the ebb and flow of the tide, regardless of actual navigability. An excellent in depth article on this subject indicates that in Louisiana, Maryland, Mississippi, New Jersey, New York, and Texas, state ownership extends to all waters subject to tidal ebb and flow; while in California, Connecticut, Florida, North Carolina, and Washington, public ownership is based on navigability-in-fact.

George M. Cole, *Tidal Water Boundaries*, 20 STETSON L. REV. 165, 168 (1990) (referring to Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 209-16 (1974)). This article disputes that Florida adheres exclusively to the "navigability in fact" test.

19. Justice Whitfield defined riparian owners as being:

> [t]hose who own land extending to ordinary high-water mark of navigable waters . . . who, by implication of law, and in addition to the rights of navigation, commerce, fishing, boating, etc., common to the public, have in general certain special rights in the use of waters opposite their holdings; among them being the right of access from the water to the riparian land and perhaps other easements allowed by law.

Broward v. Mabry, 50 So. 826, 830 (Fla. 1909).

20. 58 So. 25 (Fla. 1912); *see infra* parts V.A-B.

21. Clement v. Watson, 58 So. 25 (Fla. 1912). In defining these special rights of "riparian holders," Justice Whitfield further explained that they are:

> property rights that may be regulated by law, but may not be taken without just compensation and due process of law. Riparian rights arise by implication of law and give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction, and other similar rights.

Id.

lands in Florida,[22] and the duty of the government to protect Florida's waters.[23] A discussion of these issues is beyond the scope of this article.

II. FEDERAL VALIDATION OF THE "EBB AND FLOW OF THE TIDE" TEST

In *Phillips Petroleum Co. v. Mississippi*,[24] the United States Supreme Court resolved the conflict among the states as to whether the "ebb and flow of the tide" test is, in itself, an adequate method for delineating navigable waters subject to the public trust doctrine. At issue for the first time in Mississippi was ownership and title to lands lying beneath non-navigable, tidal waters.[25] The petitioners favored the "navigability in fact" test, arguing that only those lands under navigable waters fell within the public trust.[26] The Mississippi Supreme Court determined that "by virtue of becoming a [s]tate, Mississippi acquired 'fee simple title to all lands naturally subject to tidal influence, inland to today's mean high water mark.'"[27]

In reviewing the judgment of the Mississippi Supreme Court, the United States Supreme Court noted its 1894 *Shively v. Bowlby*[28] decision. The *Shively* Court concluded that:

> At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders. . . . The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.[29]

The petitioner quoted out-of-state cases as authority for the "navigability in fact" test to determine whether submerged lands fall within the public trust even where the waters covering the lands are

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22. *Cf.* South Fla. Farms Co. v. Goodno, 94 So. 672, 677 (Fla. 1922), *error dismissed sub nom.*, 263 U.S. 684 (1924), wherein Justice Whitfield declared that lands under navigable waters in Florida were not included in the congressional grant of swamp and overflowed lands under the Swamp Lands Act of 1850; *see also infra* notes 40-44 and accompanying text.

23. *Cf. Ex parte* Powell, 70 So. 392, 396-97 (Fla. 1915) (declaring "[t]he right of individuals to fish in the public waters of the state [to be] subject to state regulation for the general welfare.").

24. 484 U.S. 469 (1988).

25. *Id.* at 472.

26. *Id.* at 473.

27. *Id.* at 472-73 (quoting Cinque Bambini Partnership v. State, 491 So. 2d 508, 520 (Miss. 1986)).

28. 152 U.S. 1 (1894). The Supreme Court quoted with approval the petitioners' assertion that Shively v. Bowlby is the "seminal case in American public trust jurisprudence." 484 U.S. at 473.

29. *Shively*, 152 U.S. at 57.

subject to tidal influence.[30] The Court warned that some of these out-of-state cases were "of only limited value in understanding the public trust doctrine and its scope in those [s]tates which have not relinquished their claims to all lands beneath tidal waters."[31] The individual states have the authority to define the limits of the public trust doctrine. Some states have abandoned the common law with respect to tidelands falling within the public trust, while others have not.[32]

The Court noted, and the petitioners conceded, that the states own those tidelands bordering the oceans, bays, and estuaries even though near the shore, such tide waters cannot possibly be navigable in fact:

> It is obvious that these waters are part of the sea, and the lands beneath them are state property; ultimately, though, the only proof of this fact can be that the waters are influenced by the ebb and flow of the tide. This is undoubtedly why the ebb-and-flow test has been the measure of public ownership of tidelands for so long.[33]

The Court determined that American case law firmly establishes that "the [s]tates, upon entering the Union, were given ownership over all lands beneath waters subject to the tide's influence."[34] It affirmed the Mississippi Supreme Court's holding, which validated the "ebb and flow of the tide" test, stating that "[w]e are unwilling, after its lengthy history at common law, in this Court, and in many state courts, to abandon the ebb-and-flow rule now, and seek to fashion a new test to govern the limits of public trust tidelands."[35] Thus, the "ebb and flow of the tide" test lives on, at least in those states that utilize it.

III. THE ORIGINS OF THE PUBLIC TRUST DOCTRINE IN FLORIDA

In early opinions, Justice Whitfield explored the common law history of the public trust doctrine and defined its application to Florida property law. He recognized that the state may convey title to public trust lands by statute under limited circumstances. He also clarified Florida's definition of "navigability in fact."

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30. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988) (referring to Groton v. Hurlburt, 22 Conn. 178 (1852); Wethersfield v. Humphrey, 20 Conn. 218 (1850); Rowe v. Granite Bridge Corp., 38 Mass. 344 (1838); Commonwealth v. Charlestown, 18 Mass. 180 (1822); Storer v. Freeman, 6 Mass. 435 (1810)).

31. *Id.* at 476.

32. *Id.* at 475-76.

33. *Id.* at 480.

34. *Phillips Petroleum*, 484 U.S. at 484.

35. *Id.* at 481. For further discussion of the *Phillips Petroleum* decision, see Norwood Gay, *Tidelands*, 20 STETSON L. REV. 143, 144-46 (1990).

A. State *ex rel.* Ellis v. Gerbing[36]

This is the first of Justice Whitfield's cases regarding public trust doctrine principles.[37] At issue was whether a riparian owner had authority to mark and stake off certain portions of the Amelia River bed in Nassau County and claim the exclusive right to the use, benefit and enjoyment of the natural or maternal oyster beds upon the land below high-water mark and extending out to the channel of the river.[38] Gerbing, the riparian owner, claimed that he owned the lands in question in fee simple by virtue of a chain of title dating back to the Act of Congress of 1850.[39] He argued that the salt marsh lands near Florida's rivers, inlets, and bays were not part of the beds of the navigable streams which vested in the state by virtue of its sovereignty, but were swamp[40] and overflowed lands.[41] Swamp and overflowed lands previously belonged to the United States and were granted to Florida by the Act of Congress of 1850.[42]

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36. 47 So. 353 (Fla. 1908).

37. Florida's original definition of navigability in fact is contained in Bucki v. Cone, 6 So. 160, 161-62 (Fla. 1889), a decision rendered before Justice Whitfield came onto the court. The *Bucki* court provided that:

> [I]n this country all rivers, without regard to the ebb and flow of the tide, are generally regarded as navigable, as far up as they may be conveniently used at all seasons of the year with vessels, boats, barges, or other water craft, for purposes of commerce, and others are regarded as navigable when so declared by statute. Further than this, what constitutes a navigable river, free to the public, is a question of fact, to be determined by the natural conditions in each case. A stream of sufficient capacity and volume of water to float to market the products of the country will answer the conditions of navigability . . . whatever the character of the product, or the kind of floatage suited to their conditions. . . . [I]t is not essential . . . that the stream should be continuously, at all seasons of the year, in a state suited to such floatage.

38. *Gerbing*, 47 So. at 354.

39. *Id.* This Act, also known as the Swamp and Overflowed Lands Act, provides that:

> the state of Florida, along with all other states that had been carved from the federal public domain, was allowed to claim 'swamp and overflowed lands' for the exclusive purpose of making them productive by drainage and construction of levees. Florida claimed 20.3 million acres, most of this property truly being inland swamps and marshes, although there were indeed sovereignty lands included.

43 U.S.C. § 864. "Because about two-thirds of the state of Florida was made up of [swamp and overflowed] lands . . . , the Act transferred more than 20 million acres to state ownership." CHRISTIE, *supra* note 4, at 44. Lands acquired under this Act are not part of the public trust. *See* Martin v. Busch, 112 So. 274 (1927); *see also infra* notes 214-217 and accompanying text.

40. Swamp lands are defined as lands that "require drainage to dispose of needless water or moisture on or in the lands, in order to make them fit for successful and useful cultivation." 47 So. at 357.

41. Overflowed lands are those that are covered by nonnavigable waters, or are subject to such periodic or frequent overflows of water, salt or fresh (not including lands between high and low water marks of navigable streams or bodies of water, nor lands covered and uncovered by the ordinary daily ebb and flow of normal tides of navigable waters), as to require drainage or levees or embankments to keep out the water and thereby render the lands suitable for successful cultivation. *Id.*

42. State *ex rel.* Ellis v. Gerbing, 47 So. 353 (Fla. 1908).

The Florida Supreme Court rejected Gerbing's argument. In his opinion, Justice Whitfield explained that "[l]ands within the limits of the State of Florida that are covered and uncovered by the ordinary daily tides of public *navigable* waters are shore or tide lands, and the title to them is held by the state, because of its sovereignty, under its admission into the Union."[43] Though this language could be read to mean that lands subject to the ebb and flow of the tides of public *non-navigable* waters are not held in trust by the state, the court did not reach this conclusion. The waters of the river at issue were subject to the ebb and flow of the tide; however, they were also undisputedly navigable. Unable to prove legal claim to exclusive rights on lands under these waters, which included those lands lying between ordinary or normal high and low water marks, Gerbing lost his case.[44]

Justice Whitfield explained that because the original thirteen states were independent sovereignties, their navigable waters and the lands lying beneath them, including the shore or land between high and low water marks, were severally owned and held in trust for all the people within their respective borders.[45] Proprietary rights in these lands were not passed to the United States by the Federal Constitution, and no power to dispose of such lands was delegated to the United States.[46]

Justice Whitfield noted that when Florida was admitted into the Union in 1845, it was admitted on equal footing with the original states, in all respects.[47] "Among the rights thus acquired by the State of Florida is the right to own and hold the lands under navigable waters within the state, *including the shores or space between ordinary high and low water marks,* for the benefit of the people of the state."[48] Because of this so-called equal footing doctrine, the court held that the federal government had no authority to grant the submerged land at issue to the state under the Act of Congress of 1850, and consequently, Gerbing could not claim title to such land under this Act.[49] Justice Whitfield, however, did not state that shore land, or land situated between ordinary high and low water marks that lies beneath waters that ebb and flow with the tide, was not subject to the public trust doctrine. Indeed, the previously quoted passage implies that the Florida definition of navigable waters includes waters that wash over

43. *Id.* (emphasis added).
44. *Id.*
45. *Id.* at 355.
46. *Id.*
47. *Id.*
48. State *ex rel.* Ellis v. Gerbing, 47 So. 353, 355-56 (Fla. 1908) (emphasis added).
49. *Id.* at 357.

such tide lands, regardless of whether the waters are navigable in fact.

Justice Whitfield wrote, in a passage often quoted in subsequent Florida cases, that:

> [t]he navigable waters in the states and the lands under such waters . . . are the property of the states, or of the people of the states in their united or sovereign capacity, and are held, not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use of all the people of the states, respectively, for purposes of navigation, commerce, fishing, and other useful purposes afforded by the waters in common to and for the people of the states.[50]

He further explained that a state may make limited disposition of portions of public trust lands, but only when it would be in the interest of the public welfare to do so, meaning when "the rights of the whole people of the state as to navigation and other uses of the waters are not materially impaired."[51]

B. Symmes v. Prairie Pebble Phosphate Co.[52]

The *Symmes* cases illustrate how the State of Florida may make limited disposition of public trust lands. Justice Whitfield explained that, by statute,[53] the state legislature created limited exclusive rights to oyster beds lying within navigable waters, provided specific statutory terms were met.[54]

In *Symmes I*, Symmes sued eight phosphate companies for the value of an oyster bed that he had planted in a portion of the navigable Alafia River, in Hillsborough County.[55] The beds extended from the low-tide water mark to the edge of the channel. Symmes alleged that the companies covered and destroyed his oyster bed by depositing a large quantity of mud and refuse into the river.[56] To prove ownership, Symmes had to show, among other things, that he acquired ownership rights to the oyster bed by obtaining permission from the county commission to plant oysters there.[57] Additionally, he had to show that the space where he planted the oysters did not contain any existing natural or maternal oyster beds.[58] Symmes

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50. *Id.* at 355.
51. *Id.*
52. 60 So. 223 (Fla. 1912) (*Symmes I*); 63 So. 1 (Fla. 1913) (*Symmes II*).
53. 60 So. at 225 (discussing Gen. Fla. Stat. §§ 646-651 (1906)).
54. *Symmes I*, 60 So. at 225.
55. *Id.* at 223.
56. *Id.* at 224.
57. *Id.*
58. *Id.*

failed to meet these requirements.[59] Because he could not demonstrate the lawfulness of his asserted ownership, the court held for the phosphate companies and stated that "[t]he property alleged to have been injured is located in the bed of a navigable stream the title to which is in the state, in trust for the people of the state."[60]

In *Symmes II,* Symmes attempted to meet the statutory requirements by proving that he acquired exclusive rights to the oyster bed he planted.[61] Once again he failed to prove that there were no existing natural or maternal oyster beds in the area he planted.[62]

C. Broward v. Mabry[63]

Like *State ex rel. Ellis v. Gerbing,*[64] this case involved riparian owners' rights to land lying along a body of water. Here, Justice Whitfield further clarified the Florida definition of navigability in fact. The riparian owners of land along Lake Jackson, in Leon County, purported to own up to the middle of the lake by virtue of tracing title to certain U.S. patents.[65]

Justice Whitfield classified the lake as navigable[66] through a detailed description of its physical properties "so that the title to the bed of the lake vest[ed] in the state in trust for all the people of the state."[67] That the lake ran dry as its waters periodically escaped through sinkholes "[was] unimportant, if in its ordinary state it [was] in fact navigable[68]. . . . Capacity for navigation, not usage for that purpose, determines the navigable character of waters with reference to the ownership and uses of the land covered by the water."[69]

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59. *Id.* at 224-225.

60. *Id.* at 225.

61. Mr. Symmes showed that the county commission granted him permission to plant the oysters at the location. 63 So. at 1.

62. *Id.* at 2. The court did not discuss whether the phosphate companies had the right to injure or destroy existing maternal oyster beds, which were to "remain for the free use of the citizens of this state," because Symmes had no claim of right to such oyster beds. *Id.* (quoting Section 651, Fla. Statutes (1906)).

63. 50 So. 826 (Fla. 1909).

64. 47 So. 353 (Fla. 1980); *see supra* part III.A.

65. *Broward,* 50 So. at 827-28.

66.

> [N]otwithstanding the shallowness of the water . . . , the permanency, size, location, character, and conditions of the lake are such that in its ordinary state it, or at least a large part of it, may be used for purposes of utility common at least to the people of the community in which it is located, and consequently . . . such waters may be regarded as being of a public character . . . for purposes of navigation, fishing, bathing, and other lawful uses.

Id. at 831.

67. *Id.*

68. *Id.*

69. Vol. III, FLORIDA STATUTES, 1941, *Helpful and Useful Matter* at 236 (Whitfield's Notes).

Notably, Justice Whitfield stated that "[u]nder the common law of England, the crown in its sovereign capacity held the title to the beds of navigable *or tide waters, including the shore* . . . in trust for the people of the realm."[70] On its face, this language indicates that Justice Whitfield acknowledged that the crown held title to the beds of tide waters regardless of navigability. Because the lake was not tidally influenced, however, it was necessary to discern whether it was navigable in fact to determine whether it belonged to the public trust.

> When the Constitution . . . became operative, the several states continued to hold the title to the beds of all waters within their respective borders that were navigable in fact *without reference to the tides of the sea*, . . . such title was held in trust for all the people . . . subject to the rights surrendered by the states under the federal Constitution.[71]

In this passage, Justice Whitfield declares that *navigable* waters not subject to the ebb and flow of the tide, such as self-contained, navigable lakes, fall within the public trust doctrine. Whether non-navigable tidal waters also fall within the public trust doctrine was not addressed in the case.

IV. THE SIGNIFICANCE OF TRACING TITLE TO A TIME OF PRE-STATEHOOD

Prior to 1845, before Florida became a state, its lands were subject to diverse sovereignty. In 1513, Florida became a territory of Spain and the civil law of Spain was the generally recognized law. From 1763 to 1783, Florida was under the dominion of Great Britain. Next, Florida reverted to Spain under the Treaty of Paris of 1783 and remained under Spanish dominion until 1821, when Spain ceded all of its Florida lands to the United States. From 1821 until 1845, Florida fell under United States sovereignty.[72] "In view of the diverse sovereignty Florida was subject to, it should not be surprising that the sources of land titles in Florida, including titles to submerged lands, are also diverse."[73] The following two cases illustrate this phenomenon.

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70. Broward v. Mabry, 50 So. 826, 829 (Fla. 1909) (emphasis added).
71. *Id.* (emphasis added).
72. *See* MALONEY ET AL., *supra* note 8, at 675-76.
73. *Id.* The authors explain that:

> In general, titles in Florida are predicated upon one or more of the following sources: (1) Spanish grants to individuals made . . . pursuant to the Treaty of Cession of 1821; (2) grants or patents from the United States to the Territory . . . or to the State of Florida or to private owners, of lands ceded by Spain to the United States; (3) grants or conveyances from the State to individuals . . . under various acts of Congress; and (4) grants of lands under bodies of navigable water (tidal and

A. Brickell v. Trammell[74]

The Trustees of the Internal Improvement Fund of the State of Florida[75] claimed title by virtue of sovereignty to an island in Biscayne Bay, near the Miami River, which was gradually and artificially formed as a result of digging and dredging activities.[76] Brickell sued, contesting the State's claim to ownership.[77] She alleged that prior to the formation of the island, she acquired title by deeds of conveyance to the shallow, non-navigable waters upon which it was formed.[78] Her title, she argued, was subject to the trust under which it was held prior to 1856, when the Riparian Act of 1856 was passed.[79]

Justice Whitfield noted that even if Brickell's title were connected to a previous Spanish grant title, private ownership under the civil law of Spain and under the common law extended only to the high-water mark, "except under special circumstances, and no such circumstances [were] shown here."[80] He asserted that private ownership of riparian land in Florida ordinarily extends only to the high-water mark of navigable waters.[81] Therefore, if the land below the high-water mark was held by the state in trust for the people prior to the 1856 Act, it continued to be so held because that Act granted only an easement to certain riparian owners who owned lands actually bounded by and extending to the low-water mark.[82]

> nontidal) belonging to the state by virtue of its being admitted into the Union on an equal footing with the original thirteen states.

Id.

74. 82 So. 221 (Fla. 1919).

75. In 1851, the Florida legislature established an Internal Improvement Board to manage all of the state's lands, especially the vast acreage of swamp and overflowed lands. This Board was replaced by the Board of Trustees of the Internal Improvement Fund in 1885. The Board was made up of the governor and several independently elected cabinet officers. CARTER, *supra* note 1, at 63.

76. *Brickell*, 82 So. at 225.

77. *Id.* at 224-25.

78. *Id.* at 225.

79. *Id.* at 223.

> To encourage commerce and development of navigation, many states passed legislation to grant special rights to riparian owners who improved their properties by building wharves, docks, and channels. Florida's first such act, the Riparian Act of 1856, granted the riparian a qualified right of ownership from the low water mark to the channel of navigable waters if the riparian owned to the low water mark.

CHRISTIE, *supra* note 4, at 113.

80. Brickell v. Trammell, 82 So. 221, 229 (Fla. 1919).

81. *Id.* at 227.

82. *Id.* at 229.

B. Apalachicola Land & Development Co. v. McRae[83]

The Apalachicola Land and Development Company sued to enjoin the State Commissioner of Agriculture from leasing or using certain submerged lands under navigable and tide waters of Apalachicola Bay.[84] Apalachicola Land claimed title and exclusive rights to these submerged lands through an Indian-Spanish grant made in 1811 (the "Forbes Purchase").[85]

Justice Whitfield held that Indians could not grant or cede lands in the Floridas,[86] except under the authority of Spain during the Spanish dominion.[87] Under the law of Spain at the time of the "Forbes Purchase," grants could not be made of submerged lands below high-water mark except by the King of Spain or by his express authority.[88] The "Forbes Purchase" was not made by the King to transfer title to any submerged lands below ordinary high-water mark to private ownership.[89] Therefore, the "Forbes Purchase" did not transfer these lands to private ownership, and the Commissioner of Agriculture prevailed.[90]

V. *CLEMENT V. WATSON*: ITS PRINCIPLES, ITS VARIOUS SOURCES OF AUTHORITY AND ITS PROGENY

Surprisingly, in the case of *Clement v. Watson*,[91] Justice Whitfield declared that the water body at issue was not within the public trust although it was subject to the ebb and flow of the tide. Following an

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83. 98 So. 505 (Fla. 1923), *appeal dismissed*, 269 U.S. 531 (1925).

84. *Id.* at 507.

85. *Id.* Spain ceded the territories of Florida to the United States by treaty dated February 22, 1819. The treaty provided that: "[a]ll the grants of land made before the 24th of January, 1818, . . . shall be ratified and confirmed to the persons in possession of the lands. . . . All grants made since the said 24th day of January, 1818, . . . are hereby declared, and agree to be null and void." WHITFIELD, *supra* note 69, at 237. "Prior to 1819, trading companies known as Panton, Leslie & Co., and their successors John Forbes & Co., by permission of the Crown, did an extensive mercantile business among the Indians." *Id.* at 238. The Indians incurred large debts to the companies, and in consideration of these debts, ceded large tracts of lands occupied by them to the companies. As part of this so-called "Forbes Purchase," the Indians granted an island in the Apalachicola river to John Forbes, confirmed by Spanish authority in 1811. *Id.*

86. During the period from 1763 to 1783, when Florida was under the dominion of Great Britain, the English, by royal proclamation, called the territory east of the Apalachicola River "East Florida," and the territory west of that river "West Florida." Collectively, the two territories were referred to as "the Floridas." MALONEY ET AL., *supra* note 8, at 674.

87. "The title of the Indians to the lands in the provinces of East and West Florida under the Spanish monarchy was in the nature of a possessory right, held in common according to prevailing customs and tribal dominance among the Indians, subject to the sovereign dominion of the crown." Apalachicola Land & Dev. Co. v. McRae, 98 So. 505, 518-19 (Fla. 1923), *appeal dismissed*, 269 U.S. 531 (1925).

88. *McRae*, 98 So. at 523.

89. *Id.* at 524.

90. *Id.* at 526.

91. 58 So. 25 (Fla. 1912).

analysis of the case, the author examines the applicability of the various authorities that Justice Whitfield supplied for his decision.

A. *The Case of* Clement v. Watson

This controversy arose when Clement alleged that Watson assaulted him in an effort to exclude him from fishing in the waters of a cove on the Watson lands.[92] The cove waters were affected by the ebb and flow of the ocean tides.[93] The Watsons indirectly derived title to this property from the U.S. government.[94] Clement argued that Watson could not exercise private or exclusive ownership in waters subject to the daily ebb and flow of the ocean tides and, therefore, could not control or regulate fishing in such waters.[95] However, the court rejected this argument in favor of the "navigability in fact" test.[96]

To assess the applicability of the public trust doctrine, Justice Whitfield described the physical properties of the cove to determine whether it was in fact navigable. The cove was surrounded by the Watsons' property, "except [at] the mouth of the cove, which [met] the waters of New River Sound."[97] The cove was small and narrow from its mouth, which was about 300 feet wide, to its end at the Watsons' dry lands.[98] Justice Whitfield wrote that it was assumed that originally the cove waters were very shallow and not useful for navigation.[99] His opinion is silent as to how the court arrived at this assumption, however.[100] The reason may be that the Watsons' predecessor in title dredged a channel into the cove and also dredged a place for a yacht to dock at low water.[101] The Watsons' wharf extended into the cove from their land.[102]

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92. *Id.*
93. *Id.*
94. *Id.*
95. Clement v. Watson, 58 So. 25 (Fla. 1912).
96. *Id.* at 26.
97. *Id.*
98. *Id.*
99. *Id.*
100. See Odom v. Deltona Corp., 341 So. 2d 977, 988 (Fla. 1976) for the modern version of the "navigability in fact" test, which is substantially unchanged from Whitfield's era, with the additional element that navigability for title purposes must be tested as of the state's date of entry into the Union. Commentators have pointed out that the determination of whether a given waterbody was in fact navigable on the date of statehood requires fact-intensive proof of ancient history. "Twentieth century judges and juries, accustomed to the luxury of live testimony by persons with first-hand knowledge, are not well equipped to deal with these types of issues." Joseph W. Jacobs & Alan B. Fields, *Sovereignty Lands in Florida: Lost in a Swamp of Ambiguity*, 38 U. FLA. L. REV. 347, 390 (1986).
101. *Id.*
102. Clement v. Watson, 58 So. 25, 26 (Fla. 1912).

Although the cove waters were influenced by the tide, and Justice Whitfield noted that "the navigable waters in the state and the lands under such waters, *including the shore, or space between high and low water marks,* are held by the state for the purpose of navigation and other public uses,"[103] he went on to determine that this rule applied "only to such waters as by reason of their size, depth, and other conditions are in fact capable of navigation for useful public purposes."[104] Waters are not under our law regarded as navigable merely because they are affected by the tides."[105] No citation to case precedent or other sources of authority follows these statements.

Justice Whitfield went on to write a seemingly obscure definition of what constitutes "the shore" for the purposes of the public trust doctrine,[106] apparently to shield the particular shore land at issue from the public trust for some reason.[107] He narrowly distinguished the tidelands in the Watsons' cove from the tidelands at issue in *Gerbing* with the following assertion:

> [The shore of navigable waters] does not include lands that do not immediately border on the navigable waters, and that are covered by water not capable of navigation for useful public purposes, such as mud flats, shallow inlets, and lowlands covered more or less by water permanently or at intervals, where the waters thereon are not in their ordinary state useful for public navigation. [Such lands] are

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103. *Id.* (emphasis added).

104. *Id.*

105. *Id.*

106. Clement v. Watson, 58 So. 25, 26 (Fla. 1912).

107. Perhaps at the time this case was heard, the political heat was too high regarding the state's attempts at "reclamation," that is, drainage of Everglades lands (such as Watson's), for Justice Whitfield to dare declare the "ebb and flow of the tide" test to be valid. In the late 1800s, the State of Florida promised some 15 million acres of land to several railroad companies in exchange for the laying of many miles of railroad track. The state did not own this much acreage to give away. The railroad companies received deeds to about 3/5 of the promised acreage and claimed ownership of the rest–including the 4 million acres within the Everglades. Powerful land companies also claimed an interest in the Everglades, having dug and drained parts of it during the 1890s. However, the state (and perhaps Justice Whitfield) was sympathetic to the farmers and homesteaders who also wanted to purchase drained Everglades land in order to settle on it. *See generally,* NELSON M. BLAKE, LAND INTO WATER – WATER INTO LAND 88-90 (1980). But the state ran into money problems as it realized the vastness and complexity involved in "reclaiming" the Everglades. The Trustees of the Internal Improvement Fund paid for the work with drainage taxes collected from purchasers of Everglades land, and these purchasers in turn gathered in payments from more than 200,000 persons of small means who had signed up for farms in the Everglades. *Id.* at 113. By 1912, the year *Clement* was decided, most of the land was still under water. Disillusioned buyers, perhaps people like Watson, stopped paying their installments as they began to doubt whether they would soon be cultivating fertile, well-drained soil. *Id.* Affirming the "ebb and flow of the tide" test for declaring that tidal lands fall within the public trust would surely have exacerbated the settlers' doubts, since portions of non-navigable Everglades lands were, like Watson's cove, tidally influenced.

> the subjects of private ownership, at least when the public rights of navigation, *etc.*, are not thereby unlawfully impaired.[108]

Justice Whitfield's use of the above emphasized word "etc." may not have been simply an attempt to abbreviate well known doctrine. Presumably included within "etc." would be, among other things, the unstated public right of fishing. This case seems to be inconsistent with the strong public interest stance that Justice Whitfield previously took in *State ex rel. Ellis v. Gerbing*,[109] in which he announced that the navigable waters in the states and the lands under such waters were held, "not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use of all the people of the states, . . . for purposes of navigation, commerce, *fishing*, and other useful purposes."[110]

Interestingly, the United States Supreme Court rejected a similar "proximity to the shore" argument in *Phillips Petroleum Co. v. Mississippi*.[111] Though the *Phillips* Court admitted a difference in degree between the waters at issue and non-navigable tidal waters on the seashore, the Court declared there was no difference in kind. "For in the end, all tidewaters are connected to the sea. . . . Perhaps the lands at issue here differ in some ways from tidelands *directly adjacent* to the sea; nonetheless, they still share those 'geographical, chemical and environmental' qualities that make lands beneath tidal waters unique."[112]

The Florida Supreme Court in *Clement* held for Watson, however.[113] The court concluded that the cove was subject to private ownership, including fishing privileges, for two reasons. First, the cove was not a part of the shore of the navigable waters in the sound adjacent to it despite that its waters ebbed and flowed with the tide.[114] Second, the cove was not capable of navigation for useful public purposes in its original state, before a channel and yacht space were dredged.[115] "The fact that a part of the cove was made navigable by artificial means after it became private property did not take away the right of the owner to control the fishing privileges therein subject to law."[116]

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108. *Clement*, 58 So. at 26 (emphasis added).
109. *See supra* part III.A.; *see also* CHRISTIE, *supra* note 4, at 113.
110. State *ex rel.* Ellis v. Gerbing, 47 So. 353, 355 (Fla. 1908) (emphasis added).
111. 484 U.S. 469 (1988); *see supra* part II.
112. 484 U.S. at 481 (emphasis added).
113. *Clement*, 58 So. at 27.
114. *Id.*
115. Clement v. Watson, 58 So. 25, 27 (Fla. 1912).
116. *Id.*

B. *Purported Authority for the Principles of* Clement v. Watson

In *Clement v. Watson,* Justice Whitfield adopted the "navigability in fact" test, of which the general principles are that navigability is a prerequisite for waters to fall within the public trust and that waters are not navigable "merely because they are affected by the tides."[117] He evidently read these principles as effectively excluding from the public trust all lands lying beneath non-navigable tidal waters. Justice Whitfield cited mainly to out-of-state sources of authority for this interpretation.[118] He neither cited to specific page numbers other than to the first page of each source, nor did he provide a parenthetical explanation as to the applicability of the citations. The cases cited seem to provide minimal support, at best, for the *Clement* decision. The following is a discussion of these cited sources and an attempt to determine the applicability of each source to the *Clement* holding.

Justice Whitfield first cited to his previous opinions in *State ex rel. Ellis v. Gerbing,*[119] and *Broward v. Mabry.*[120] It is difficult to ascertain why he did this. The facts surrounding the *Gerbing* and *Broward* decisions and the facts of *Clement* contain a striking difference: the waters at issue in *Gerbing* and in *Broward* were navigable in fact,[121] whereas the waters at issue in *Clement* were deemed by the court to be non-navigable.

As previously discussed, the *Gerbing* opinion expressed the principle that tide lands of public navigable waters are subject to the public trust.[122] It does not necessarily follow, and the *Gerbing* court did not establish, that the converse is also true—that public non-navigable waters are not subject to the public trust.[123]

In *Broward v. Mabry,* Justice Whitfield found the waters at issue were navigable, and therefore subject to the public trust.[124] Yet, the case does not hold that waters which are merely subject to the ebb and flow of the tides, without a showing of navigability, are *per se* non-navigable. Nor does the case hold that a body of water, non-

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117. *Id.* at 26.

118. *Id.*

119. 47 So. 353 (Fla. 1908); *see supra* part III.A.

120. 50 So. 826 (Fla. 1909); *see supra* part III.C.

121. *See supra* notes 43, 66-69, & 102-103 and accompanying text.

122. *See supra* note 43 and accompanying text.

123. *But see* Gay, *supra* note 35, at 149. The author suggests that because Justice Whitfield excluded from his meaning of non-navigable waters those "lands between high and low water marks of navigable streams . . . [or] lands covered and uncovered by the ordinary daily ebb and flow of normal tides of *navigable* waters," the effect of the Gerbing decision was that tidelands not immediately bordering upon navigable waters were not subject to the public trust doctrine (emphasis supplied by author).

124. *See supra* notes 66-69 and accompanying text.

navigable in its natural state, but subsequently made navigable by artificial means, is not of public character.

Next, Justice Whitfield cited to an impressive number of out-of-state cases.[125] In determining whether these cases supply appropriate authority for *Clement*, it is important to note that during the early nineteenth century, state courts were in the preliminary stages of developing their own laws of navigability for determining title to submerged lands, while federal courts were silent on the issue. As the United States Supreme Court pointed out in *Phillips Petroleum*,[126] some states adopted the "ebb and flow of the tide" test,[127] meaning that waters subject to the ebb and flow of the tides fall within the public trust irrespective of whether they are navigable in fact. Other states rejected this test in favor of navigability in fact,[128] and still other states used some combination of both tests.[129] With this in mind, the following is a description of the out-of-state authorities cited within *Clement* for the affirmation of the "navigability in fact" test over the "ebb and flow of the tide" test.

Sullivan v. Spotswood,[130] an Alabama case, involved a suit brought by Sullivan, a riparian owner of certain property along Hog Bayou, located about four and a half miles north of Mobile. Sullivan sought damages from Spotswood for allegedly disabling a logging boom that Sullivan had constructed on the water.[131] The court described the bayou[132] as being within tide water. The bayou was a recess of a navigable creek. It emptied into Mobile River and it had navigable water communication with the river, bay, and harbor of Mobile.[133] Unlike the cove waters in *Clement*, the court found the bayou waters subject to the public trust.[134] Spotswood successfully argued that

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125. Clement v. Watson, 58 So. 25, 26-27 (Fla. 1912).

126. 484 U.S. 469, 474 (1988).

127. California, Connecticut, and South Carolina were specifically mentioned by the Court, which also referred to other, unnamed states using the "ebb and flow of the tide" test. *Id.* at 474, n. 3, 481. The list of amici curiae urging affirmance of the Mississippi Supreme Court's decision included Alabama, Alaska, Arizona, Florida, Hawaii, Louisiana, North Carolina, Delaware, Georgia, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Virginia. *Id.* at 471-72.

128. *See* MALONEY ET AL., *supra* note 8, at 685, n. 57. Cases are cited from Georgia, Nebraska, North Carolina, and Pennsylvania; the rejection of the "ebb and flow of the tide" test in favor of the "navigability in fact" test was for regulatory purposes only, however. *Id.* at 685.

129. *Id.* at 685, n. 56 (listing Connecticut, Delaware, Georgia, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, Ohio, South Carolina, Wisconsin, and Utah).

130. 2 So. 716 (Ala. 1887).

131. *Id.* at 719.

132. A species of creek or stream common in Louisiana and Texas. An outlet from a swamp, pond, or lagoon, to a river, or the sea. BLACK'S LAW DICTIONARY 153 (6th ed. 1990).

133. *Id.* at 718.

134. *Sullivan*, 2 So. at 718.

Sullivan's logging boom impermissibly obstructed him from public use of the bayou.[135]

Presumably, the *Clement* court cited to this case for the proposition that the "flow and ebb of the tide is not regarded, in this country, as the usual, or any real test of navigability."[136] This principle is quoted within the context of the "navigability in fact," rather than the "ebb and flow of the tide" test.[137] Indications are that the *Sullivan* court meant it as such. Consider that the *Sullivan* court declared the appropriate test of navigability to be "whether the stream is susceptible or not of use as a common passage for the public."[138] This is an element of the usual "navigability in fact" test.[139] Despite its "navigability in fact" analysis, the court did not invalidate the "ebb and flow of the tide" test.

Moreover, the court did not articulate the *Clement* "navigability in fact" requirement that to be navigable, a stream must be susceptible of use in its ordinary, natural state. Under the *Sullivan* court's definition, the Watsons' cove in *Clement* could have met the "susceptibility of use as a common passage" element of Alabama's "navigability in fact" test. Certainly, at least from the time the channel was dredged into the mouth of the Sound, the cove was susceptible of being used for navigation.

In the South Carolina case of *State v. Pacific Guano Co.*,[140] the court found that the two creeks at issue were non-navigable, although subject to the ebb and flow of the tide, because "the conditions necessary to sustain trade or commerce of any kind [did] not exist."[141] The court noted that the creeks did not connect with thoroughfares of travel or trade.[142] The court then contrasted these creeks to other water bodies that *were* deemed navigable in fact solely because they constituted parts of water communications between navigable rivers.[143]

In *Clement*, the court did not consider whether the cove waters were of a nature to sustain trade or commerce. Furthermore, the cove constituted a part of water communication with the Sound.[144] Under this South Carolina criterion, then, perhaps Watson would have prevailed. Nevertheless, the South Carolina case was likely cited in

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135. *Id.*
136. *Id.* at 717.
137. *See supra* notes 9-13 and accompanying text.
138. 2 So. 716, 717 (Ala. 1887).
139. *Id.*
140. 22 S.C. 50 (1884).
141. *Id.* at 57.
142. *Id.*
143. *Id.* at 57-58.
144. Clement v. Watson, 58 So. 25, 26 (Fla. 1912).

Clement for the principle that "although every stream in which the tide ebbs and flows is, according to the common law, *prima facie* a navigable stream, . . . this presumption may be rebutted by showing that the conditions and objects of navigation do not exist."[145] This "rebuttable presumption" rule was new to Florida case law at the time, and Justice Whitfield did not adopt such a rule in *Clement* or in his subsequent opinions.

Of the several out-of-state authorities cited for Justice Whitfield's decision in *Clement*, a Massachusetts case, *Rowe v. Granite Bridge Corp.*,[146] provides the strongest support. The court, clearly rejecting the "ebb and flow of the tide" test for the "navigability in fact" test, stated that "[i]t is not every ditch, in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream."[147] The court noted that for a stream to be deemed navigable and subject to the public trust, it must be navigable "to some purpose, useful to trade or agriculture."[148]

New Jersey also employed the "navigability in fact" test. At issue in the case of *Glover v. Powell*[149] was the navigability of a small creek that emptied into the Delaware River, although the creek ebbed and flowed with the tide for about two miles from its mouth.[150] At certain stages of the tide, the creek was navigable by small, flat-bottomed boats.[151] Pursuant to the state legislature's determination that the creek was non-navigable, the court held that the creek was not subject to the public trust.[152]

In the Connecticut case of *Wethersfield v. Humphrey*,[153] the court never discussed the ebb and flow test. Instead, the court found that the cove at issue was not navigable "by any craft whatever, though at times, a fish-boat, or skiff, or Indian canoe may be pushed through its waters . . . . But this is not navigation."[154] The court defined navigable waters as being "where the public pass and repass upon them, with vessels or boats, in the prosecution of useful occupations."[155]

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145. *Id.* at 56.
146. 21 Pick. 344 (Mass. 1838).
147. *Id.* at 347.
148. *Id.*
149. 10 N.J. Eq. 211 (1854).
150. *Id.* at 221.
151. *Id.* at 222.
152. *Id.* at 223-24, 227.
153. 20 Conn. 218 (1850).
154. *Id.* at 227.
155. *Id.*

Justice Whitfield next cited to Angell's treatise on tide waters.[156] Page 89 of the treatise, cited by Justice Whitfield, discusses private rights by prescription, not by title or grant.[157] The material appears wholly inapplicable to the *Clement* case. Justice Whitfield himself stated in *Bass v. Ramos*,[158] in which Bass held no title to certain land covered by the waters of Pensacola Bay, a navigable waterway, yet he attempted to eject Ramos from the land by prior possession:

> The mere possession of public land, without title, will not enable the party to maintain a suit against any one who enters on it. If this is so as to public land that may be granted or conveyed to private ownership, for a greater reason is it so in the case of lands held in trust for public easements such as land under navigable waters. . . . The lands under the navigable waters belong to the state in its sovereign capacity, in trust for all the people of the state, for the uses and purposes allowed by law.[159]

Moreover, authority in favor of the "ebb and flow of the tide" test can be found elsewhere in the Angell treatise. In his discussion of the English common law, Angell explained that "the King has no authority either to grant the exclusive liberty of fishing in any arm of the sea, or to do any thing which will obstruct its navigation."[160] The right of property in the sea is vested in the King for the purposes of protecting the public rights.[161] Furthermore, in defining "arm of the sea," Angell quoted Lord Coke, who stated that "'an arm of the sea is where the sea or tide flows and reflows.'"[162] Angell explained that:

> [b]y this definition, it appears that *all* branches of the main ocean, or those parts of the sea which extend into some inlet or angle of the land, are arms of the sea. Hence they may properly be said to include what are commonly called bays, roads, creeks, *coves*, & c.[163]

By citing to this treatise, Justice Whitfield effectually provided authority for a principle that he rejected in *Clement*: waters subject to the ebb and flow of the tide, or "arms of the sea," are tide lands and, as such, fall within the public trust.

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156. ANGELL, *supra* note 10, at 89 (cited in *Clement* as "Angell on Tide Waters, 89").

157.

> [I]n the case of rights relative to the sea, & c. which are common to all, the use and possession of any one person is *lawful*, and the mere lawful exercise of a common right for [the statutory period], cannot, on any well settled principle, be regarded as conferring any exclusive right.

Id.

158. 50 So. 945 (Fla. 1909).

159. *Id.* at 947 (citation omitted).

160. Angell, *supra* note 10, at 33.

161. *Id.*

162. *Id.* at 60 (quoting Lord Coke in Sir Henry Constable's Case, App. 140).

163. *Id.* at 60-61 (emphasis added).

Following the Angell treatise, Justice Whitfield cited to *Burns v. Crescent Gun & Rod Club*,[164] a Louisiana Supreme Court decision that aligns with *Clement*. In this case, Burns challenged the Club's actions in preventing him from fishing in the waters of several bayous located near Lake Pontchartrain.[165] Burns contended that the bayous formed "a chain of streams that have been navigable and that are still impressed with the character of navigability."[166]

The court noted that the waters of all the bayous at issue were affected by the lake's tide.[167] Yet the court held only one of the bayous, Irish Bayou, subject to the public trust.[168] In its determination, the court used a "navigability in fact" test. "Irish Bayou, by reason of its width and depth, is a navigable stream."[169] The remaining bayous were found not navigable in fact and, as a result, did not fall within the public trust.[170] The court stated that "[n]avigable means when a stream is large enough to float a boat of some size, engaged in carrying trade. It implies the possibility of transporting men and things."[171]

The Louisiana court also articulated a narrow definition of the shore,[172] which corresponds to the definition given by Justice Whitfield in *Clement*. Likewise, the court narrowed the "ebb and flow of the tide" test to those lands that are, by definition, the seashore:

> [T]he shore is that space of land on the borders of the sea which is at times covered by the rising, and at other times is left dry by the falling, tide. . . . [T]he shores include only the lands along the sea or the ocean, and do not extend back from the one or the other.[173]

The court thus rejected Burns' argument that non-navigable bayous subject to tidal influence fall within the public trust. It is interesting to note, however, that the court referred to French, rather than to English or American, commentators as authority for its definition of the shore.[174]

At issue in *Chisolm v. Caines*[175] was a large body of marsh land, through which the tide ebbed and flowed. This court distinguished

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164. 41 So. 249 (La. 1906).
165. *Id.* at 250.
166. *Id.*
167. *Id.*
168. *Id.*
169. Burns v. Crescent Gun & Rod Club, 41 So. 249, 250 (La. 1906).
170. *Id.* at 251.
171. *Id.*
172. *Id.*
173. *Id.*
174. The references provided by the court included "6 Laurent § 6, Baudry, verbo 'Des Biens,' § 175," and "38 Dalloz 208, § 106." *Id.*
175. 67 F. 285 (D.S.C. 1894).

marsh lands from other navigable bodies and held that "[t]he uniform rule in South Carolina has been to treat marsh lands as subject to grant."[176] Certainly, the *Clement* cove was distinguishable from the *Chisolm* marsh land. In *Clement*, Justice Whitfield articulated no such "uniform rule" for Florida coves *or* marshes.

The *Chisolm* court further determined that the essential characteristic of a public, navigable stream was not the bare fact that the tide ebbed and flowed within it.[177] "The essential characteristic of a navigable stream is that it is, or is capable of becoming, a public highway . . . —a means open to the public of passing from one place, where they have a right to be, to another, in which they have the same right."[178] This language indicates the *Chisolm* court's rejection of the "ebb and flow of the tide" test for determining public trust navigability.

Finally, Justice Whitfield cited the Illinois case of *Schulte v. Warren*[179] as precedent for the *Clement* principle that a water body does not lose its private character when it is made navigable by artificial means.[180] In *Schulte*, the defendants were enjoined from hunting water fowl on the complainant's lands, which consisted of a submerged portion of the Illinois River bottom.[181] Subsequent to the complainant's taking title to the property, the lands at issue became sufficiently submerged so as to be deemed navigable, as a result of the construction of a dam down river.[182] However, the lands were originally subject to the ebb and flow of the river.[183]

Illinois public trust law in 1905 was materially distinguishable from Florida's public trust law as defined by Justice Whitfield in *Gerbing*.[184] As explained in *Schulte*, in Illinois the public had a right to use navigable waters as public highways, "but every other beneficial use and enjoyment [including hunting and fishing] belonged to the owner of the soil"[185]. . . ."[T]he owner of the soil [had] the absolute

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176. *Id.* at 290. The court further elaborated that:

> Although the sovereign can determine for itself, in the matter of marsh lands, and can grant them to private persons in fee, giving them title to the exclusive use of them, it is not competent for the sovereign to grant the exclusive use of public navigable streams, bays, and harbors, or the beds thereof, so as to prevent the use of them by the public for commerce, travel, or even pleasure.

Id. at 291.

177. *Id.* at 292.

178. *Id.*

179. 75 N.E. 783 (Ill. 1905).

180. *See supra* notes 115-16 and accompanying text.

181. *Schulte*, 75 N.E. at 787.

182. *Id.* at 783.

183. *Id.* at 783-84.

184. *See supra* note 50 and accompanying text.

185. Schulte v. Warren, 75 N.E. 783, 786 (Ill. 1905).

right to use and enjoy the waters flowing over the same, even if navigable, so long as he [did] not interfere with the public use for navigation or pollute the stream or diminish the supply."[186]

The *Schulte* court paid little heed to the fact that the waters at issue were rendered navigable by artificial means. Rather, the court concentrated on defining the meaning of navigability in fact under Illinois law.[187] In so doing, the court distinguished the Illinois "navigability in fact" test from the test adopted by other states, such as Florida. The court pointed out that "[i]n some states, where the lumber interest has been regarded of first importance, the courts have held that waters which are capable of floating logs are navigable."[188]

Although Florida case law did not declare lumber interests to be of first importance, *Bucki v. Cone*[189] allowed that waters capable of floating logs could be deemed navigable in fact. In Illinois, however, the public trust "navigability in fact" test required that "navigable waters . . . be capable of practical general uses."[190] The court elaborated on this statement by finding that "[t]he fact that . . . hunters and fishermen pass over the water with boats ordinarily used for that purpose[ ] does not render the waters navigable."[191] Thus, it is difficult to see how this case provides authority for the *Clement* principle that the property owner did not lose his exclusive right to fish in the cove when the waters became navigable in fact by artificial means.

C. *The* Clement v. Watson *Progeny*

The Justice Whitfield-authored *Clement v. Watson* progeny consists of one case, *City of Tarpon Springs v. Smith*,[192] which seems to follow the *Clement* rejection of the "ebb and flow of the tide" test. At issue was a private conveyance of a salt marsh, more or less covered by growing vegetation, that was affected by the tides of the navigable Anclote River.[193] The city contested the validity of the private title due to the tidal character of the waters covering the land in dispute.[194] Justice Whitfield relied upon *Clement*, holding that "[t]he fact that the [marsh was] covered by tidewaters, or by the waters of the

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186. *Id.*

187. *Id.* at 785.

188. *Id.* It is not clear from the opinion which states the court meant here.

189. 6 So. 160 (Fla. 1889). For discussion of Bucki v. Cone, see State *ex rel.* Ellis v. Gerbing, 47 So. 353, 354 (Fla. 1908).

190. *Schulte*, 75 N.E. at 785.

191. *Id.*

192. 88 So. 613 (Fla. 1921).

193. *Id.* at 619.

194. *Id.* at 615-16. "At high tide the waters from the river cover some and perhaps nearly all of the lands referred to." *Id.* at 619.

river at high-water periods, [did] not give an easement [to the *city*] over the land."[195]

The court declined to determine whether the state owned the lands at issue. Rather, the court "assumed, but [did] not decide[ ]," that the easement dedicator actually owned the marsh because there was insufficient data in the record to prove otherwise.[196] Notably, the court declared that "[i]f the [marsh is] owned by the state, its title thereto is not affected by this suit. The city shows no authority to assert the rights of the state in lands covered by navigable *and* tide waters."[197] Consequently, Justice Whitfield implied that although a city may not claim title to lands simply because they lie beneath tidally-influenced waters, the state may continue to hold title to such lands in trust for all the people of the state.[198] Hence, Justice Whitfield set the stage for a return to pre-*Clement* public trust principles that validate the "ebb and flow of the tide" test.

VI. A RETURN TO PUBLIC TRUST PROTECTION FOR TIDAL LANDS

The following is a discussion of post-*Clement* decisions in which Justice Whitfield participated. In these cases, the Florida Supreme Court embraced the "ebb and flow of the tide" test in pre-*Clement* style. These cases effectively overrule *Clement*.

A. Thiesen v. Gulf, F. & A. Railway Co.[199]

This case was decided on rehearing, five years after *Clement*. The opinion was written by Justice Ellis and was joined by Justice Whitfield. Thiesen, a riparian owner, sued the Railway Company after the Railway Company filled in the submerged land in front of Thiesen's lot which, according to Thiesen, extended to the waters of Pensacola Bay.[200] The Florida Supreme Court stated that:

> In this state because of its great coast line and many navigable rivers and lakes and the number of bays and harbors and lowlands, there are many places where the tide ebbs and flows, or which are covered by ordinary high water, *that are of no navigable use,* but which according to the common law belong to the public.[201]

Although this language clearly conflicts with, and effectively overrules the *Clement* decision, the court did not distinguish *Clement* on any ground. Unfortunately, the *Thiesen* court failed to even mention

195. *Id.* at 621.
196. *Id.*
197. City of Tarpon Springs v. Smith, 88 So. 613, 621 (Fla. 1921) (emphasis added).
198. *Id.*
199. 78 So. 491 (Fla. 1917).
200. *Id.* at 500.
201. *Id.* at 503 (emphasis added).

the *Clement* holding. Therefore, conflicting *Clement* and *Thiesen* principles endure in Florida case law.[202]

B. State *ex rel.* Buford v. City of Tampa[203]

In 1899, the Florida Legislature granted to the city of Tampa, in fee-simple absolute, "all lands owned or held by the state of Florida, in trust or otherwise, [situated within the city], whether said lands are covered, or partly covered by the tide, . . . as well as the bottom of Hillsborough Bay and Hillsborough River."[204] In *Buford*, the Attorney General argued that this conveyance was void, as it constituted an attempt to dispose of the state's title to submerged lands, "which [the state] holds in its sovereign capacity for the benefit of the people for navigation, boating, or fishing."[205]

In an en banc decision written by Justice Ellis, the court initially held in favor of the city.[206] However, in so doing, the court acknowledged that "the waters embraced within the area [were] tidal waters . . . . The right of property in such waters and in the soil is in the state."[207] The court cited *Thiesen* for this principle. Again, the court declined to explicitly overrule *Clement*, although the city argued for the *Clement* principle that "[l]ands not covered by navigable waters, and not included in the shore space between ordinary high and low water marks, immediately bordering on navigable waters, are the subject of private ownership."[208] Instead, the court explained that the state, through the legislature, had authority to part with title to public trust lands provided it deemed the transfer of title to be in the best interests of the people.[209]

Justice Whitfield dissented,[210] taking an even stronger public interest stance. With reference to lands under tide waters, he stated:

> They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right.

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202. *Compare* Clement v. Watson, 58 So. 25, 26 (Fla. 1912) ("[w]aters are not under our law regarded as navigable merely because they are affected by the tides,") *with* Thiesen v. Gulf, F. & A. Ry., 78 So. 491, 503 (Fla. 1917) ("there are many places where the tide ebbs and flows, or which are covered by ordinary high water, that are of no navigable use, but which according to the common law belong to the public.").

203. 102 So. 336 (Fla. 1924).

204. *Id.* at 337.

205. *Id.* at 340.

206. *Id.* at 341.

207. *Id.* at 340.

208. State *ex rel.* Buford v. City of Tampa, 102 So. 336, 340 (Fla. 1924).

209. *Id.*; *see also supra* note 43 and accompanying text.

210. *Buford*, 102 So. 2d at 341.

> Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.[211]

Justice Whitfield agreed that the states may grant title to limited portions of public trust lands, "but not so as to divert them from their proper uses for the public welfare."[212]

On rehearing, in an opinion written by Justice Terrell, the court held that the city had no authority to convey sovereign lands. The legislature held this power exclusively, and could exercise it only in limited circumstances.[213] Justice Whitfield concurred.

C. Martin v. Busch[214]

This opinion by Justice Whitfield resolved a claim of private ownership of lands below the high-water mark of navigable, non-tidal Lake Okeechobee. Title was traced back to a conveyance by the Trustees of the Internal Improvement Fund to a predecessor in title under the Act of Congress of 1850.[215] In holding the conveyance was void, Justice Whitfield declared that "[t]he grantee takes with notice that the conveyance of swamp and overflowed land does not in law cover any sovereignty lands, and that the trustees . . . have no authority to convey sovereignty lands."[216] Furthermore, Justice Whitfield affirmed the "ebb and flow of the tide" test, in contrast to *Clement*, by stating that "[i]f by mistake or otherwise sales or conveyances are made by the [T]rustees . . . of sovereignty lands, such as lands under navigable waters in the state *or tidelands*, . . . such sales and conveyances are ineffectual for lack of authority from the state."[217]

D. Perky Properties, Inc. v. Felton[218]

Under facts similar to those of *State ex rel. Ellis v. Gerbing*,[219] the complainant asserted exclusive rights to grow sponge in the tidal waters of the Gulf of Mexico.[220] Following *Thiesen* principles once again, Justice Whitfield held that:

> [T]he exclusive rights and privilege to grow and gather sponges upon large areas of tidal submerged lands of the state, with the

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211. *Id.* (quoting Shively v. Bowlby, 152 U.S 1 (1894)).
212. *Id.* at 343.
213. *Id.* at 346.
214. 112 So. 274 (Fla. 1927).
215. *Id.* at 283; 43 U.S.C. § 864, also known as the Swamp and Overflowed Lands Act.
216. *Id.* at 285-86.
217. *Id.* at 285 (emphasis added).
218. 151 So. 892 (Fla. 1934).
219. *See supra* notes 36-42 and accompanying text.
220. *Felton*, 151 So. at 894.

> right to inclose [sic] such areas and to close the inlets thereto, . . . is not contemplated by the public nature and purposes of the title of the state to such lands which was acquired as a sovereign right[.]"[221]

VII. CONCLUSION

In *Phillips Petroleum*, the United States Supreme Court declared that the "ebb and flow of the tide" test, supplemented by the "navigability in fact" test, were the proper tests for determining sovereignty lands when title to these lands transferred from the federal government to the states following the Revolution.[222] The Court left the development of the public trust doctrine to state law.

Justice Whitfield contributed greatly to the development of the public trust doctrine in Florida. Although the *Clement v. Watson* decision seems to contradict "ebb and flow of the tide" principles set forth in prior Florida public trust cases, Justice Whitfield did not generally follow the *Clement* line of reasoning in his later opinions.[223] Indeed, his analyses involving the nature of submerged sovereignty lands come full circle, from *State ex rel. Ellis v. Gerbing* in 1908, to *Perky Properties, Inc. v. Felton* in 1934.[224] In the end, Justice Whitfield not only clarified the "navigability in fact" test. He also retained the "ebb and flow of the tide" test for determining navigability of Florida's waters for public trust determinations.

In 1970, the public trust doctrine was codified in the Florida Constitution.[225] The relevant provision provides that:

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including *beaches below mean high water lines*, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.[226]

Perhaps the above emphasized passage should be expanded to include "beaches and other lands lying beneath tidally-influenced

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221. *Id.* at 895.

222. The Court found that "our cases firmly establish that the States, upon entering the Union, were given ownership over all lands beneath waters subject to the tide's influence." Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484 (1988).

223. "*Clement v. Watson* seems to be an anomaly, . . . clearly at odds with the strong public interest stance he took in cases both prior to and after *Clement*." CHRISTIE, *supra* note 4, at 113.

224. *But see* Maloney & Ausness, *supra* note 18, at 214 ("Inferentially, based on Clement v. Watson, public or private ownership of a tidal watercourse in Florida depends upon the navigability for commerce of the watercourse.")

225. FLA. CONST. art. X, § 11.

226. *Id.* (emphasis added).

waters below mean high water lines." This would help to resolve existing doubts left from the *Clement* decision as to whether the "ebb and flow of the tide" test is, in itself, a valid measure for determining navigability of waters that are not navigable in fact.[227]

Both the "ebb and flow of the tide" and the "navigability in fact" tests continue to be used in defining lands subject to Florida's public trust doctrine. Thus, a clear mandate, ideally from the state legislature, or, perhaps more realistically, from the Florida Supreme Court affirming the "ebb and flow of the tide" test and overruling *Clement*, would affirm the viability of the ebb and flow test as a method for identifying Florida's sovereignty lands. Based on Justice Whitfield's pre- and post-*Clement* decisions, which indicate that the state holds in the public trust property in tidally influenced waters and in the lands these waters embrace, such a mandate is only appropriate.

227. *Compare* Helliwell v. State, 183 So. 2d 286, 289 (Fla. 3d DCA 1966), *cert. denied*, 192 So. 2d 487 (Fla. 1966) (title dispute involves partially submerged, tidally-influenced salt marsh and mangrove flats in Biscayne Bay; quoting State *ex rel.* Ellis v. Gerbing in holding title to the lands to be held in public trust by the state; declaring there to be "no reason to add to the 'rivers of ink' which have been written on this subject") *with* Fla. Board of Trustees v. Wakulla Silver Springs Co., 362 So. 2d 706, 710-11 (Fla. 3d DCA 1978), *cert. denied*, 368 So. 2d 1366 (Fla. 1979) (quoting Clement v. Watson, 47 So. 353 (Fla. 1908) and City of Tarpon Springs v. Smith, 88 So. 613 (Fla. 1921) in determining the waters at issue, Rock Harbor inlet and Rock Harbor basin, to be non-navigable for the purposes of public trust title although the waters are subject to the rise and fall of the tide).