THE GREENING OF FLORIDA'S CONSTITUTION

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I. INTRODUCTION

Florida's Constitution, like other state constitutions, is the organic law of the land. It defines the unique structure of its state and local government, establishes rights of its citizens, distributes power amongst branches of government, and places limitations on that power. Unlike the U.S. Constitution, state constitutions are more detailed, contain more issues, and are otherwise a limitation on the power of the state.[1] Thus, while the U.S. Constitution makes no mention of environmental protection or natural resource conservation, many state constitutions do, as they are far more detailed, generally more modern, and much easier to amend.[2] Indeed, environmental law often entails cooperative federalism, where the federal government enacts broad national environmental goals while states are left to implement programs and policies to achieve those goals.[3] Florida's Constitution provides authorization for statutory and regulatory environmental provisions, as well as proprietary functions of government. Inasmuch as any constitution is a "living document,"[4] the Florida Constitution reflects the

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1. TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION 25 (2d ed. 2017).

2. Art English & John J. Carroll, *State Constitutions and Environmental Bills of Rights*, *in* THE BOOK OF THE STATES (2015), *available at* http://knowledgecenter.csg.org/kc/system/files/English%20Carroll%202015.pdf (discussing the environmental rights provisions in the state constitutions of Illinois, Pennsylvania, Montana, Massachusetts, Hawaii, and Rhode Island).

3. *Environmental Law 101*, ENVTL. L. INST., https://www.eli.org/keywords/governance (last visited Apr. 19, 2020).

4. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 157 (1908).

state's long history as well as the evolution of fundamental values held by its citizens, who must ratify each proposed amendment. Accordingly, it is not surprising that the Florida Constitution contains numerous and varied provisions that have shaped environmental law and policy.

The Florida Constitution contains aspirational and policy statements, financial authorization and tax incentives, as well as specific provisions to empower agencies, authorize programs, and take specific actions geared toward environmental protection. This constitutional foundation includes the pronouncement of a "policy . . . to conserve and protect [Florida's] natural resources,"[5] the establishment of an independent agency with jurisdiction to conserve fish and wildlife,[6] and the dedication of billions of dollars for land conservation and restoration.[7] Collectively, these provisions were proposed by the Legislature, Constitution Revision Commission, Tax and Budget Reform Commission, and citizen initiatives, as Florida has a broad set of mechanisms that authorize the placement of proposed constitutional amendments on the ballot.[8] Some of these ratification campaigns have been among the most costly and controversial in Florida's history, while others have been quietly ratified by vast majorities.[9] Taken as a whole, Florida's Constitution contains a collection of environmental protection, conservation, and energy provisions commensurate with its nickname the "Sunshine State."

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5. FLA. CONST. art. II, § 7.

6. *Id.* art. IV, § 9.

7. *Id.* art. X, § 28.

8. *Id.* art. XI. This Article provides the mechanism for amending the constitution. Proposals may be initiated by the Legislature or initiative in any given year. *Id.* art. XI, § 1. Proposals may also be initiated by the Constitution Revision Commission and the Tax and Budget Reform Commission, which meet every 20 years. *Id.* at § 2. Lastly, there is a mechanism for a constitutional convention that has yet to be invoked. *Id.* art. XI, § 4. All proposals must be submitted to the voters for ratification to become effective. *Id.* art. XI, § 5. An amendment approved in 2006 now requires a 60% vote for ratification of a constitutional amendment. *Id.* art. XI, § 5(e).

9. The Florida Division of Elections maintains a website on all proposed constitutional amendments. *Initiatives / Amendments / Revisions Database*, FLORIDA DIVISION OF ELECTIONS, https://dos.elections.myflorida.com/initiatives/ (last visited Apr. 19, 2020). The most recent environmental provision, a prohibition on offshore oil drilling, passed with 69% of the vote with no opposition. *See Initiative Information: Prohibits Offshore Oil and Gas Drilling; Prohibits Vaping in Enclosed Indoor Workplaces*, FLORIDA DIVISION OF ELECTIONS, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=11&seqnum=23 (last visited Apr. 19, 2020). In 1994, the penny per pound tax on sugar, part of the Save Our Everglades proposals, was the most expensive campaign in Florida history as of that time. Newspaper accounts reported $38 million was spent on that campaign. Linda Kleindienst, *Sugar Lobby Bids to Shape Everglades' Future*, ORLANDO SENTINEL, Feb. 24, 1999, https://www.orlandosentinel.com/news/os-xpm-1999-02-24-9902240158-story.html.

This Article seeks to identify and contextualize the various constitutional provisions that authorize, finance, incentivize, or establish policy for environmental regulation, natural resource protection, wildlife conservation, and energy. The Article is divided into separate Parts that discuss provisions or issues within each article of the Florida Constitution. Part II discusses competing issues within the Declaration of Rights under Article I. Part III presents an historical analysis of Florida's territorial waters, defined within Article II, and focuses on the Natural Resources Clause within the same. Part IV discusses Florida's unique executive branch structure, including the Cabinet and an independent wildlife commission. Part V touches upon the doctrine of standing and the recent end of the *Chevron* Standard in Florida. Part VI explores financial authorizations and tax incentives that promote various environmental programs and policy. Part VII discusses home rule authority of county governments and how that authority has influenced environmental policy. Part VIII explores the hodgepodge of miscellaneous provisions in Article X that impact environmental law and policy. Lastly, a summary is provided to include conclusions on the long-term impact of these constitutional provisions.

Throughout this Article, reference will be made to each of Florida's six constitutions.[10] To be better understood, each of these constitutions should be seen in their historical context. The 1838 Constitution was adopted during the Territorial Period as a precursor to statehood that did not occur until 1845. The Constitutions of 1861, 1865, and 1868 need to be read in the context of secession, Civil War, and Reconstruction. The longest serving constitution was adopted during the Redemption Era in 1885. The 1968 Constitution is a modern constitution, which paved the way for Florida to evolve into one of our nation's largest and fastest growing states.[11] The threads that have weaved the quilt of Florida's environmental laws can be traced through each of these constitutions.

10. The text of each of Florida's six constitutions can be read at *Florida's Constitutions: The Documentary History*, FLORIDA CONSTITUTION REVISION COMMISSION, https://guides.law.fsu.edu/c.php?g=92130&p=595619 (last visited Apr. 20, 2019).

11. For a concise and excellent summary of Florida's six constitutions, see Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What It Has Become*, 18 FLA. COASTAL L. REV. 5, 7–16 (2016).

II. DECLARATION OF RIGHTS

The Florida Constitution is organized into twelve articles that set forth rights of citizens and the structure of government. Article I contains a set of rights that frames much of the conflict in environmental law. Section 5 proclaims the right of citizens "peaceably to assemble, to instruct their representatives, and to petition for redress of grievances."[12] Over the last fifty years, environmental activism—empowered by this Section—has shaped much of the explosion of environmental policy. On the other hand, Section 2 sets forth the basic right to "acquire, possess and protect property,"[13] and Section 9 provides that "[n]o person shall be deprived of . . . property without due process."[14] This grant of rights and limitations on power provide the constitutional tension underpinning much of environmental law.

The Due Process Clause contains within it the Takings Clause: government may not physically appropriate private property without adequate compensation.[15] The Florida Constitution parallels the federal constitution here, and it is quite specific in this regard: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."[16] Thus, if the state decided to use the power of eminent domain to acquire lands for a state park, there would be no question that the state would have to pay full compensation. But what if a water management district required an applicant for an environmental resource permit to convey real estate that the district could add to its conservation lands portfolio?

Inverse condemnation occurs when the state goes too far. Such was the case of *Koontz v. St. Johns River Water Management District*,[17] where the United States Supreme Court overruled the Florida Supreme Court to determine a taking had occurred. The Court found that the district's conditions of approval, namely placing certain lands under conservation easement and doing restoration work on district lands located miles away, would constitute a taking if they exceeded the "nexus" or "rough proportionality" between the property subject to the permit and the

12. FLA. CONST. art. I, § 5.
13. *Id.* art. I, § 2.
14. *Id.* art. I, § 9.
15. U.S. CONST. amend. V.
16. FLA. CONST. art. X, § 6.
17. 570 U.S. 595 (2013).

demands of the government agency to mitigate its impacts.[18] Recently, the Florida Third District Court of Appeal (DCA) gave a succinct explanation of inverse condemnation:

> Whether or not governmental action results in a de facto taking has been a thorny area for both state and federal courts. However, the United States Supreme Court summarized the existing jurisprudence on this issue by holding that a per se taking occurs "where government requires an owner to suffer a permanent physical invasion of her property," or where the government passes and applies "regulations [that] completely deprive an owner of 'all economically beneficial us[e]' of her property." If a court finds that either of these two conditions has occurred, the governmental action necessarily constitutes a taking, and full compensation must be paid for the property.[19]

The right to petition government for redress also has proven to have its limits. Maggie Hurchalla was a county commissioner and board member for several environmental organizations. She sent numerous emails to county commissioners urging them to overturn an agreement with a landowner who intended to mine lime rock from the site and then release it to the water management district for water storage. Hurchalla expressed strong opposition to the project and was successful in getting the county to delay the project. The landowner sued the county and Hurchalla for tortuous interference with a contract. Hurchalla defended by arguing her First Amendment privilege to petition her government on a matter of community import. The trial court rejected her defense and sent the case to the jury, which returned a verdict of $4.4 million in damages. The appeals court affirmed the verdict, noting that First Amendment privilege is not a defense when the statements to the elected officials were misleading to the point of malice.[20]

It should be noted that, unlike other states, Florida's Declaration of Rights article does not contain any specific right to a clean or healthy environment. During the Constitution Revision Commissions in 1997–1998 and 2017–2018, commissioners introduced proposals to create

18. *Id.* at 601–02, 618–19. Florida courts applying this standard on remand later found the conditions did in fact constitute a taking. St. Johns River Water Mgmt. Dist. v. Koontz, 183 So. 3d 396, 398 (Fla. 5th Dist. Ct. App. 2014).

19. Teitelbaum v. South Florida Water Mgmt. Dist., 176 So. 3d 998, 1003 (Fla. 3d Dist. Ct. App. 2015) (quoting Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005)) (internal citations omitted).

20. Hurchalla v. Lake Point Phase I, LLC., 278 So. 3d 58, 64–65 (Fla. 4th Dist. Ct. App. 2019).

such a right, but they did not pass.[21] Six states have some form of a right to a clean or healthful environment as part of their constitutions.[22] With or without such a declaration, the tension between individuals' or organized groups' advocacy for stronger environmental protection and private property rights has framed much of environmental law over the last fifty years, and it will continue to do so into the future.

III. GENERAL PROVISIONS

Article II, General Provisions, contains a number of basic sections establishing the fundamentals of a state, such as its boundaries, capital, branches of government, ethics, succession of government, and official language. Several of these provisions are fundamental considerations for environmental protection in Florida: what is the jurisdiction of the state, and what resources is it trying to protect?

A. State Boundaries

Article II, Section 1, sets forth a metes-and-bounds description of Florida's state boundaries, including its jurisdictional waters. For a state with the nation's second longest coastline, including both the Atlantic Ocean and Gulf of Mexico,[23] the determination of state boundaries governs environmental issues such as marine life protection, commercial and recreational fishing, coral reef preservation, endangered marine species, and offshore oil exploration. The Florida Keys, for example, protect North America's only coral barrier reef, which exists solely in nearshore waters governed by the state.[24] Other constitutional provisions specifically protect marine resources within

21. *See infra* pt. III.B.

22. Pennsylvania declares: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." PA. CONST. art. 1, § 27. Illinois declares a right to a "healthful environment" and the right to enforce it. ILL. CONST. art. XI, § 2. Hawaii and Montana both declare a right to "a clean and healthful environment." HAW. CONST. art. XI, § 9; MONT. CONST. art. II, § 3. Massachusetts declares, "The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment." MASS. CONST. art. XCVII. Rhode Island declares a right to fish and to "be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values." R.I. CONST. art. I, § 17.

23. Joyce Chepkemoi *US States with the Most Coastline*, WORLDATLAS, https://www.worldatlas.com/articles/us-states-by-length-of-coastline.html (last updated Dec. 17, 2018). Florida has 8,436 miles of coastline, second only to Alaska. *Id.*

24. *Explore Florida Keys National Marine Sanctuary*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., https://floridakeys.noaa.gov/explore.html (last visited Apr. 19, 2020).

the state's jurisdiction and prohibit nearshore oil drilling.[25] Where one is located offshore triggers different sets of rules, and there are no fixed signs amongst the waves to indicate that one has left the state's jurisdiction. To further complicate matters, Florida is the only state where its established territorial seas are defined differently on the Atlantic Ocean and Gulf of Mexico,[26] such that Florida's boundaries exceed those of other states.[27]

Historically, the state's territorial boundaries were first established in the 1838 Florida Constitution, which defined the "jurisdiction of the State of Florida" as encompassing lands ceded by the Adams–Onis Treaty of 1819.[28] The Treaty, however, was silent as to the specifics of the boundaries of East Florida, merely stating that "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida."[29] The Treaty went on to describe in great detail the boundary of West Florida, but it was otherwise silent as to the description of the Florida Peninsula.[30] During the late eighteenth century, Florida was a pawn in European geopolitical ambitions in North America. While Spain originally colonized Florida in the sixteenth century, the 1763 Treaty of Paris required Spain to cede the peninsula to Great Britain at the conclusion of the Seven Years War.[31] Thereafter, King George III established the boundaries of East and West Florida that included "the [Atlantic] Ocean, and the [Gulf] of Florida, including all islands within [s]ix leagues[32] of the

25. FLA. CONST. art. X, § 16; *id.* art. II, § 7(c).

26. Amanda Nalley, *How Florida's Saltwater Fishing Management Boundaries Came to Be*, FLA. FISH AND WILDLIFE CONSERVATION COMMISSION (Mar. 6, 2019, 8:47 AM EST), https://content.govdelivery.com/accounts/FLFFWCC/bulletins/2348cd3.

27. D'ALEMBERTE, *supra* note 1, at 76.

28. FLA. CONST. of 1838, art. XII.

29. Treaty of Amity, Settlement and Limits Between the United States of America and His Catholic Majesty art. II, Spain-U.S., Feb. 22, 1819, 8 Stat. 254; *available at* https://avalon.law.yale.edu/19th_century/sp1819.asp (last visited Apr. 19, 2020).

30. *Id.* art. II; *see also A New and Accurate Map of East and West Florida (ca. 1763)*, LIBRARY OF CONGRESS https://www.floridamemory.com/blog/2012/10/08/a-new-and-accurate-map-of-east-and-west-florida/ (last visited May 7, 2020) (depicting the rough boundaries of East and West Florida as they existed in 1763).

31. The Seven Years' War was a global war fought between European powers in several continents between 1756–1763. In the United States, it is more commonly called the French and Indian War. History.com Editors, *Seven Years' War*, HISTORY (Nov. 12, 2019), https://www.history.com/topics/france/seven-years-war.

32. A "league" over water in 18th Century Great Britain would have referred to 3 miles. *League (Measurement)*, BRITANNICA, https://www.britannica.com/science/league-measurement (last visited Mar. 27, 2020).

[s]ea [c]oast."[33] Following the American Revolution, a second Treaty of Paris (1783) required Great Britain to cede those lands back to Spain.[34] Accordingly, the state boundaries at the time of statehood would have extended eighteen nautical miles offshore.

The boundary issue was clarified in the 1865 Florida Constitution, which nullified the Ordinance of Secession and returned Florida to the Union after the Civil War. Article XII describes the boundaries as extending "within five leagues of the shore" from the St. Mary's River on the Atlantic Coast to the Perdido River on the "Gulf of Florida."[35] During Reconstruction, the new state constitutions were required to be approved by Congress,[36] and this will be an important consideration later.

The 1885 Florida Constitution had the longest shelf life as the state's organic law, and its enactment changed the boundary provision yet again:

> thence down the middle of [St. Mary's] river to the Atlantic Ocean; thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to, and including the Tortugas islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land to a point west of the mouth of the Perdido River; thence to the place of beginning.[37]

This description departs significantly from previous constitutional provisions in that there is a different nautical boundary for the Atlantic than the Gulf. Most significantly, the Atlantic coastal waters are defined by the Gulf Stream, which is not a fixed point or line.[38] Indeed, the exact location of the Gulf Stream varies each day depending upon various meteorological and climatic shifts, and its western wall is not uniform along the Atlantic coast of Florida.[39] The ocean current is relatively close

33. King George III, The Royal Proclamation (Oct. 7, 1763).

34. Office of the Historian, *Treaty of Paris, 1783*, U.S. DEP'T OF STATE ARCHIVE, https://2001-2009.state.gov/r/pa/ho/time/ar/14313.htm (last visited Apr. 19, 2020). A separate treaty between Great Britain and Spain effectuated the transfer of Florida back to Spain.

35. FLA. CONST. of 1865, art. XII, § 1.

36. First Reconstruction Act of 1867, Pub. L. No. 39-153, § 5, 14 Stat. 428, 429.

37. FLA. CONST. of 1885, art. I.

38. D'ALEMBERTE, *supra* note 1, at 77.

39. The axis of the Gulf Stream can move 60 miles during a week. U.S. Dep't. of Commerce, National Oceanic and Atmospheric Administration, *Gulfstream*, NAT'L WEATHER SERVICE, Sept. 1976, at 1, 6.

to the shore in South Florida but then extends outward north of Cape Canaveral.[40]

During the twentieth century, state interest in offshore oil and gas exploration prompted Congress to pass the Submerged Lands Act of 1953.[41] The Act established a general rule that state territorial waters extended "seaward to a line three geographical miles[42] distant from the coast line of each such State."[43] The Act, however, provided an exception if the boundary was established before the state was admitted to the Union, or if the boundary had been approved by Congress.[44] In the case of Florida, both conditions applied. Sen. Spessard Holland, one of the sponsors of the Act, noted in debate that the purpose of this exception was to "preserve in status quo the exact rights, whatever they may be, of the State of Florida . . . upon this question."[45]

Following the passage of the Act, the Federal Government filed a declaratory action against Texas, Louisiana, Alabama, Mississippi, and Florida to establish the three geographical mile limit against the various state governments along the Gulf of Mexico. These states and the Federal Government were fighting over exclusive rights to oil and gas production. Florida defended on the basis that Congress approved its three-league boundary when it approved the 1868 Constitution during Reconstruction. The court agreed, concluding, "[w]e hold that the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline, as described in Florida's 1868 Constitution."[46]

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40. The National Oceanic and Atmospheric Administration regularly tracks the western wall of the Gulf Stream as part of its marine forecast. *See NWS Marine Forecast*, NATIONAL WEATHER SERVICE, https://forecast.weather.gov/shmrn.php?mz=amz450&syn=amz400 (last visited Apr. 20, 2020). A recent National Weather Service reading showed the western wall of the Gulf Stream as "66 nautical miles east of Flagler Beach. 75 nautical miles east of Saint Augustine Beach. 86 nautical miles east of Jacksonville Beach. 99 nautical miles east southeast of St. Simons Island." *Id.* (screenshot of description on file with Author).

41. 43 U.S.C. §§ 1301–1302, 1311 (2018).

42. "A 'geographical' or 'nautical' mile" is equivalent to one minute of arc of latitude (6,076 feet), which is longer than the traditional 5,280 feet "'statute' mile." *See Oregon Territorial Sea Plan*, STATE OF OREGON n.2, https://www.oregon.gov/lcd/OCMP/Documents/otsp_1-c.pdf (last visited Apr. 20, 2020).

43. 43 U.S.C. § 1301(a)(2).

44. "Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress." 43 U.S.C. § 1312 (2018).

45. 99 CONG. REC. S2622 (daily ed. April 1, 1953).

46. United States v. Florida, 363 U.S. 121, 129 (1960).

The 1968 Florida Constitution is now the latest authority on the question of state boundaries. It keeps the western wall of the Gulf Stream, but also adds the three geographical mile language of the Submerged Lands Act, but with a new twist:

> thence due east to the edge of the Gulf Stream or a distance of three geographic miles *whichever is the greater distance*; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, *whichever is greater*, to and through the Straits of Florida and westerly, including the Florida reefs . . . thence northerly and westerly three leagues distant from the coastline to a point west of the mouth of the Perdido River . . . .[47]

This language threads the needle by accepting the three geographical mile provision of the Submerged Lands Act, but also continuing the claim to territorial waters to the edge of the Gulf Stream. The "whichever is greater" language poses an interesting question when the edge of the stream is less than three miles from the beaches of South Florida.

While the historical context of Florida's boundaries may or may not be interesting, it directly impacts two other provisions of the Florida Constitution. The Net Ban amendment places significant limitations on marine net fishing in Florida's "nearshore and inshore . . . waters,"[48] while another subsection in Article II prohibits exploration or extraction of oil or gas from lands beneath Florida territorial waters from "the mean high water line and the outermost boundaries of the state's territorial seas."[49]

That this is not merely an academic issue is borne out in *Benson v. Norwegian Cruise Line Ltd*., where Benson was a thirteen-year-old passenger on a round-trip cruise between Miami and Key West.[50] He died from an allergic reaction to shellfish after being treated by a contract ship physician, a citizen of another country.[51] Norwegian defended on the basis of lack of jurisdiction, as the ship was 11.7 miles offshore and thus beyond the three-mile state territorial limit. The court found as follows:

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47. FLA. CONST. art. II, § 1(a) (emphasis added).
48. *Id.* art. X, § 16(b)(2).
49. *Id.* art. II, § 7(c).
50. Benson v. Norwegian Cruise Line Ltd., 859 So. 2d 1213, 1214–15 (Fla. 3d Dist. Ct. App. 2003).
51. *Id.* at 1215.

> The ship had not yet reached the edge of the Gulf Stream, which was 14 nautical miles east of the relevant portion of Florida's coastline on the day in question. Thus, based on the boundary as stated in the Florida Constitution, the claimed incident of medical malpractice occurred within Florida's territorial boundaries.[52]

Norwegian further argued that it was wrong to establish a variable boundary at the edge of the Gulf Stream, constantly on the move.[53] The court rejected that argument, stating that "[t]he Florida Constitution already establishes the boundary as the edge of the Gulf Stream, and the wisdom of that decision was for the drafters of the Constitution and the electorate in ratifying it. The boundary must be respected unless overridden by controlling federal law or treaty."[54]

The state's ability to regulate industries involving use of its seabeds was first confirmed in 1931 with *Lipscomb v. Gialourakis*.[55] Gialourakis, a sponge fisher, was indicted for violating a statute proscribing the use of underwater equipment for commercial sponge fishing.[56] Ruling against Gialourakis' petition for habeas corpus, the court upheld the state's right to "regulate industries having as their basis the products of [its] waters, or the bottoms thereof . . . and . . . may prescribe the means and methods by which such products . . . may be taken therefrom for private and/or commercial uses."[57]

The legislature's ability to regulate commercial fishing within its territorial boundaries was confirmed in *State v. Hill*.[58] A shrimper who was charged with violating an act prohibiting shrimping in certain areas challenged the law as unconstitutional on the ground that some of the prohibited areas exceeded the state's boundary line. The court held that because the shrimper was within the state's boundaries at the time he was arrested, the statute was constitutional as applied to his situation, even if some of the areas proscribed in the statute exceeded the boundary line. "Regardless of whether or not the state may prohibit shrimping in waters outside its boundaries, it clearly possesses the authority to proscribe such activities in areas subject to its jurisdiction."[59]

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52. *Id.*
53. *Id.* at 1216.
54. *Id.* at 1216–17.
55. 133 So. 104, 107 (Fla. 1931).
56. *Id.* at 105–06.
57. *Id.* at 107.
58. 372 So. 2d 84, 85 (Fla. 1979).
59. *Id.* at 85–86.

B. Natural Resources and Scenic Beauty

Article II, Section 2 is the general policy statement that is the conceptual peg for protection and conservation of Florida's natural resources. The Natural Resources Clause was included in the 1968 Florida Constitution and was fairly novel for its time, as it pre-dated the advent of modern federal environmental law that began a year later.[60] The 1968 Constitution was a reaction to a number of historic events and demographic changes that transformed Florida from a rural southern state to a modern cosmopolitan urbanizing region. Arguably the largest drivers of change were U.S. Supreme Court rulings on reapportionment in the 1960s.[61] Prior to these rulings, the Florida Legislature was dominated by rural north Florida interests and considered among the most malapportioned in the country, but that began to change after court-ordered reapportionment and special elections.[62] Urbanizing parts of the state began to see a fair share of representation in Tallahassee, which in turn changed legislative priorities.[63]

Following court-ordered reapportionment, there was a building consensus that a new, modern constitution was required.[64] The Legislature approved creation of a Constitution Revision Commission (CRC) to recommend changes to the Florida Constitution prior to its 1967 Session.[65] The CRC proposed an entire constitution revision, the text of which was introduced as a joint resolution in the Senate.[66] This resolution, however, made no reference to protection of natural resources. As senators considered amendments to the Joint Resolution, they approved a stand-alone amendment to create a new Section 7 entitled "Natural Resources and Scenic Beauty," which was adopted.[67] The amendment was engrossed into the final joint resolution passed by the Senate, and reads as follows:

60. W. Kepner, *EPA and a Brief History of Environmental Law in the United States*, EPA (June 15, 2016), https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NERL&dirEntryId=319430 (last visited May 7, 2020) (discussing the 1970 signing of the National Environmental Policy Act (NEPA), passed by Congress the year prior).

61. D'ALEMBERTE, *supra* note 1, at 15.

62. *Id.* at 15–16.

63. Adkins, *supra* note 11, at 9–14.

64. *Id.* at 9.

65. *Id.* at 14.

66. S.J. Res. 1-X(67), Special Sess. 5 (Fla. 1967).

67. S. JOURNAL, Special Sess. 78 (Fla. 1968). The Journal records the vote on the amendment as 30–11. We can only wonder why future governors Askew and Chiles voted against the amendment, as each had a commendable record on environmental matters while governor.

> Section 7. NATURAL RESOURCES AND SCENIC BEAUTY.
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> (a) The policy of the state shall be to conserve and protect its natural resources and scenic beauty. The legislature, in implementing this policy, shall adequately provide for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands, and shorelines, and the conservation and regulation of water resources.
>
> (b) The legislature shall also provide for the acquisition and dedication of structures, lands, and waters, which because of their natural beauty, wilderness character, or geological, ecological or historical significance shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or disposed of except by law. [68]

The version of the joint resolution passed by the House of Representatives did not contain any language regarding protection of natural resources.[69] In as much as there were differences between the House and Senate versions of the joint resolution, a Conference Committee was appointed to resolve the competing versions of the constitution revision, and the Conference Report contained a new Article II, Section 7, which was a shorter version of the Senate resolution.[70] The Conference Report was subsequently approved by both legislative bodies, the joint resolution was adopted, the revision was placed on the ballot, and it was ultimately ratified by the voters in 1968.[71] For the next thirty years, the Natural Resources Clause read as follows:

> Section 7. Natural Resources and Scenic Beauty. It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.[72]

68. S. JOURNAL, Special Sess. 78 (Fla. 1968).
69. S. JOURNAL, Special Sess. 114 (Fla. 1968).
70. *Id.* While it is not clear from the Journal, Talbot D'Alemberte credits Rep. John Robert Middlemas, "an ardent environmentalist," for pushing for the inclusion of the Natural Resources Clause. D'ALEMBERTE, *supra* note 1, at 85.
71. H.R. J. Res. 1-2X (Fla. 1967).
72. FLA. CONST. art. II, § 7 (amended 1996).

Beginning in 1969, modern federal environmental law took shape with the passage of the National Environmental Policy Act,[73] Clean Air Act,[74] Clean Water Act,[75] and Endangered Species Act,[76] all based in some degree upon the Commerce Clause of the U.S. Constitution. During the same time, Florida passed "The Florida Environmental Land and Water Management Act of 1972,"[77] which set into motion the framework for environmental regulation in the Sunshine State. The law's stated purpose was "to protect the natural resources and environment of this state as provided in s.7, Art. II of the State Constitution."[78] Indeed, the provision has been invoked on numerous occasions to justify particular environmental laws. For instance, the following year, the Legislature passed "The Big Cypress Conservation Act of 1973" and, as a legislative purpose, found the act "desirable and necessary to accomplish the purposes of 'The Florida Environmental Land and Water Management Act of 1972' and to implement s. 7, Art. II of the State Constitution."[79]

Courts have also invoked the Natural Resources Clause to uphold various environmental laws and policies. For example, in *Askew v. Game and Fresh Water Fish Comm'n*,[80] the Florida Supreme Court reviewed a circuit court decision that invalidated a policy of the Game and Fresh Water Fish Commission on the ground that the Commission lacked authority to undertake a fish stocking program. The Court disagreed:

> In construing the Constitution every section should be considered so that the Constitution will be given effect as a harmonious whole. A construction which would leave without effect any part of the Constitution should be rejected. Were we to hold the challenged statutes unconstitutional the Legislature would be stripped of its power in many instances to carry out the policy of abatement of water pollution, as embodied in Article II, Section 7. Consequently we construe former Article IV, Section 9 and Article II, Section 7 together to hold the challenged statutes to be constitutional.[81]

73. Pub. L. No. 91-190, 83 Stat. 852 (1970).
74. Pub. L. No. 91-604, 84 Stat. 1676 (1970).
75. Pub. L. No. 92-500, 86 Stat. 816 (1972).
76. Pub. L. No. 93-205, 87 Stat. 884 (1973).
77. FLA. STAT. § 380.012 (1972).
78. *Id.* § 380.021 (1972).
79. *Id.* § 380.055 (1973).
80. 336 So. 2d 556 (Fla. 1976) (citation omitted).
81. *Id.* at 559–60 (citation omitted).

Similarly, in *Seadade Indus., Inc. v. Florida Power & Light Co.*, the Florida Supreme Court found the Natural Resources Clause provided an appropriate public policy interest to support condemnation.[82] Plaintiff challenged a taking by FPL on the ground that it was not in the public interest, raising potential harmful ecological impacts from discharge of warm water into Biscayne Bay as one of the reasons.[83] While the Court ultimately upheld the taking, it ruled that protection of natural resources is an appropriate matter for consideration:

> Article II, Section 7, Florida Constitution, F.S.A., contains a declaration that the protection of our natural resources shall be the policy of the State. The protection of resources, being a policy of the State, is an appropriate matter for consideration in condemnation cases. We think it logically follows that if taking and condemnation is sought in furtherance of a condemning authority's project affecting natural resources, and independent authorities guarding the public interest must approve the project before it can be put into operation, it is within the discretionary power of the judiciary to require that safeguarding of the public interest be demonstrated by the condemning authority.[84]

In *Turner v. Trust for Public Land*, the Volusia County Property Appraiser appealed a judgment that Turnbull Hammock, a parcel owned by the Trust, was tax-exempt.[85] The Property Appraiser argued that land left in its natural state did not rise to be a "use" with a charitable purpose.[86] The court disagreed, stating, "There can be little question that conservation serves a public purpose. Article II, section 7 of the Florida Constitution provides, 'It shall be the policy of the state to conserve and protect its natural resources and scenic beauty . . . .'"[87]

The Florida Supreme Court also cited the Natural Resource Clause as among reasons it struck from the ballot an initiative that would have allowed a jury to determine awards for successful challenges to any rule that "damages the value of a vested property right."[88] The Court noted the proposed Property Rights Amendment would substantially affect

82. 245 So. 2d 209, 214 (Fla. 1971).
83. *Id.* at 211.
84. *Id.* at 214.
85. 445 So. 2d 1124, 1124 (Fla. 5th Dist. Ct. App. 1984).
86. *Id.* at 1126.
87. *Id.*
88. Advisory Op. to the Att'y Gen. re Tax Limitation, 644 So. 2d 486, 494–95 (Fla. 1994).

"the ability of the legislature to comply with the directive" of the Natural Resources Clause.[89]

One of the strongest judicial statements regarding the Natural Resources Clause came from the Florida Supreme Court in a case challenging a land use restriction designed to protect the imperiled Key Deer.[90] The Court stated:

> The clear policy underlying Florida environmental regulation is that our society is to be the steward of the natural world, not its unreasoning overlord. As the Constitution itself states: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for abatement of air and water pollution and of excessive and unnecessary noise." Art. II, § 7, Fla. Const. There is an obvious public interest in such a policy, given the fact that environmental degradation threatens not merely aesthetic concerns vital to the State's economy but also the health, welfare, and safety of substantial numbers of Floridians.[91]

The 1997–1998 Constitution Revision Commission considered various proposals to strengthen the Natural Resources Clause. Several ideas were offered by the public, including an "Environmental Bill of Rights," which received a sufficient number of votes to be introduced as a formal proposal.[92] The Commission approved and referred to the Committee on Style and Drafting a proposal entitled "providing a right to clean and healthful air and water and providing for the abatement of

89. *Id.* at 495.

90. Dep't of Cmty. Affairs v. Moorman, 664 So. 2d 930, 931 (Fla. 1995).

91. *Id.* at 932.

92. On September 25, 1997, the CRC reviewed 300 public proposals for consideration, including eight proposals to strengthen the natural resource clause. Commissioner Scott moved forward "the general concept of an environmental bill of rights." The language presented in the public proposal was as follows:

> Proposal II-7-x-1 Create an Environmental Bill of Rights:
>
> (1) Right to live in an environment free of toxic and manmade chemicals;
> (2) Right to protect and preserve our pristine natural communities;
> (3) Right to ensure the existence of the scarce and fragile plant and animal species that share Florida;
> (4) Right to outdoor recreation;
> (5) Right to sustained economic success within out natural resources capacity.

JOURNAL OF THE 1997–1998 CONSTITUTION REVISION COMMISSION, Sep. 25, 1997, at 44–45 (Fla.).

pollution and noise."[93] Ultimately, the committee recommended more modest changes to make the proposed revision consistent with additional conservation-related proposals that were cobbled together as a "bundle."[94] The final proposal, entitled "Revision [5]: Conservation of Natural Resources and Creation of Fish and Wildlife Conservation Commission," was approved and ratified:

> It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise *and for the conservation and protection of natural resources*.[95]

According to the analysis published by the CRC, the provision "[e]xpands the state's policy to conserve and protect natural resources by requiring the state to make 'adequate provision' for their conservation and protection."[96] A "Statement of Intent" filed by the sponsor stated that this revision was to "include more contemporary language" and intended to be "directive" rather than self-executing.[97] It has also been described as "a broader directive that requires 'adequate laws' for the 'conservation and protection of natural resources.'"[98] Prior to its adoption by the CRC, the Chairman of the Committee of Style and Drafting made the following remarks on the justification for the revision:

> This proposal dealing with conservation and protection of natural resources is both consistent with and responsive to what we heard throughout this state from everybody from hunters, fishermen, to gun owners, who all said, we want to conserve and protect the natural resources for our future. I think it is also important to look at the wording. Conservation and protection are the words that denote the kind of programs Florida has been using in the recent past, which

93. JOURNAL OF THE 1997–1998 CONSTITUTION REVISION COMMISSION, Jan. 27, 1998, at 156 (Fla.).

94. Revision 5 contained four proposed amendments. In addition to the Natural Resources Clause was creation of the Fish and Wildlife Conservation Commission, authorization of conservation bonding, and restrictions on disposition of conservation lands. *Nine Proposed Revisions for the 1998 Ballot*, FLORIDA CONSTITUTION REVISION COMMISSION, https://fall.law.fsu.edu/new_crc/proposals/history50.html (last visited Apr. 16, 2020).

95. FLA. CONST. art. II, § 7(a) (emphasis added).

96. *Analysis of the Revisions for the November 1998 Ballot*, FLORIDA CONSTITUTION REVISION COMMISSION, https://fall.law.fsu.edu/new_crc/tabloid.html (last visited Mar. 27, 2020).

97. JOURNAL OF THE CONSTITUTION REVISION COMMISSION, May 5, 1998, at 261 (Fla.) [hereinafter CRC JOURNAL, May 5, 1998].

98. Clay Henderson, *The Conservation Amendment*, 52 FLA. L. REV. 285, 288 (2000); *see also* Wm. Clay Henderson & Deborah Ben-David, *Protecting Natural Resources*, 72 FLA. B.J. 22, 22 (1998).

> is for land acquisition and protection of long-term property use. These all protect property rights and are nonregulatory in nature. That's important. It is also important that thematically this is precisely what the rest of the environmental package does and sets it off. The rest of the environmental package deals with [land] acquisition and preservation and protection and conservation for land for future generations.[99]

Consistent with this stated intent, courts have found that the Natural Resources Clause does not convey additional constitutional rights or remedies.[100]

C. Save Our Everglades

In addition to the revision of the Natural Resources Clause, Article II, Section 7 of the Florida Constitution has been amended twice to include additional subsections. In 1996, voters ratified two of the "Save our Everglades" amendments, both of which were proposed by initiative.[101] One of those amendments is now in Article II and generally referred to as the "polluter pays" provision, and it reads as follows:

> (b) Those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution. For the purposes of this subsection, the terms "Everglades Protection Area" and "Everglades Agricultural Area" shall have the meanings as defined in statutes in effect on January 1, 1996.[102]

Following the ratification of the amendment, the Attorney General opined that the amendment was self-executing, which prompted the Governor to seek an advisory opinion from the Supreme Court.[103] The

99. S., CONSTITUTION REVISION COMMISSION MEETING, (Fla. Mar. 17, 1998) (transcript at https://fall.law.fsu.edu/new_crc/minutes/crcminutes031798.html).

100. *See, e.g.*, DOT v. City of Miami, 20 So. 3d 908, 911 (Fla. 3d Dist. Ct. App. 2009).

101. The Save Our Everglades initiative contained three independent but complementary proposals, and the ratification campaign was one of the most expensive and contentious campaigns as of that time. A proposal to enact a penny per pound tax on sugar was defeated, while the polluter pay provision and the creation of the Everglades Trust Fund (Art. X, Sec. 17) were ratified. *See* Barley v. S. Fla. Water Mgmt. Dist., 823 So. 2d 73, 77–78 (Fla. 2002); *see also Fee on Everglades Sugar Production*, FLA. DIVISION OF ELECTIONS, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=15012&seqnum=3 (last visited Apr. 16, 2020).

102. FLA. CONST. art. II, § 7(b).

103. Advisory Op. to the Governor, 706 So. 2d 278, 279 (Fla. 1997).

Court held "Amendment 5 is not self-executing and cannot be implemented without the aid of legislative enactment because it fails to lay down a sufficient rule for accomplishing its purpose."[104] Further, the Court found that the "polluter pays" provision must be read together with the Natural Resources Clause:

> In addition, Amendment 5 does not exist in isolation; it was incorporated into an existing section and employs key terms of that provision, now article II, section 7(a). Where the constitution contains multiple provisions on the same subject, they must be read *in pari materia* to ensure a consistent and logical meaning that gives effect to each provision. Article II, section 7(a) establishes the state's policy "to conserve and protect its natural resources" and directs the legislature to provide by statute for the "abatement of air and water pollution." Thus, we answer the first part of your first question in the negative.[105]

The Legislature did not enact any enabling legislation immediately following the amendment's ratification. Thereafter, an action was brought by environmental advocates against the South Florida Water Management District alleging that the Everglades Forever Act[106] conflicted with the polluter pays amendment, as it made taxpayers, rather than polluters, primarily liable for the costs of restoring the Everglades.[107] The Supreme Court reiterated its 1997 *Advisory Opinion* and found that the amendment was not self-executing and that new legislation would be required to implement it.[108] In the meantime, the Everglades Forever Act was operative and not inconsistent with the amendment.[109]

D. Offshore Oil Exploration

At various times, Florida has sought to limit offshore oil and gas exploration and production due to the perceived risk to its white, sandy beaches. To that point, a recent Congressional Report stated, "Offshore oil and gas development pose existential threats to Florida's tourism, fishing, and recreation economy, which rely on clean water and healthy beaches."[110] In the early 1980s, the Reagan Administration proposed

104. *Id.* at 281.
105. *Id.* (citation omitted).
106. FLA. STAT. § 373.4592(1)(a)–(h) (2019).
107. Barley v. S. Fla. Water Mgmt. Dist., 823 So. 2d 73, 74 (Fla. 2002).
108. *Id.* at 83.
109. *Id.*
110. COMM. ON NATURAL RESOURCES, PROTECTING AND SECURING FLORIDA'S COASTLINE ACT OF 2019, H. R. REP. NO. 116-156, 116th Cong. 1st Sess., at 3 (2019).

opening much of the nation's coastline, including the Florida coast, to oil exploration and production.[111] Beginning in 1982, Congress used appropriations bills to attach conditions that prohibited leases of outer continental shelf lands off of Florida's coast for minerals extraction.[112] Congressional extensions have effectively kept a moratorium against offshore oil and gas exploration in Florida in place until 2022, when they are set to expire.[113] In 1996, the Florida Legislature passed a prohibition on permits for offshore oil and gas exploration within one mile of the shore.[114] The Deepwater Horizon accident, explosion, and oil spill in 2010 brought additional attention to the issue. The historic five-million-barrel discharge of oil blackened Florida's Gulf beaches and resulted in significant reduction of tourism.[115] Thereafter, the Obama Administration placed significant limits on the area available for leasing in the Gulf, including Florida.[116] In early 2017, the Trump Administration issued an executive order which would have rolled back the Obama Era prohibitions and ended the moratorium on oil and gas exploration off Florida.[117] This renewed interest in offshore oil and gas exploration came at the time of appointment of the 2017–2018 Constitution Revision Commission that decided to take up the issue.

The 2017–2018 CRC proposed a revision to the Florida Constitution to ban offshore oil exploration in Florida's waters and vaping in public places.[118] There is very little in the record to elucidate legislative intent

111. Robert Sangeorge, *Watt: U.S. Moving Closer to Energy Independence*, UPI (Jan. 28, 1983), https://www.upi.com/Archives/1983/01/28/Watt-US-moving-closer-to-energy-independence/9674412578000 (last visited Apr. 20, 2020).

112. COMM. ON NATURAL RESOURCES, PROTECTING AND SECURING FLORIDA'S COASTLINE ACT OF 2019, H. R. REP. NO. 116-156, 116th Cong. 1st Sess., at 2.

113. Tax Relief and Healthcare Act of 2006, Pub. L. No. 109-432, § 104, 120 Stat. 3003, 3003 (2006).

114. FLA. STAT. § 377.242(1)(a)4 (2019).

115. COMM. ON NATURAL RESOURCES, PROTECTING AND SECURING FLORIDA'S COASTLINE ACT OF 2019, H. R. REP. NO. 116-156, 116th Cong. 1st Sess., at 4.

116. Laura B. Comay, *Five-Year Offshore Oil and Gas Leasing Program for 2019–2024: Status and Issues in Brief*, CONGRESSIONAL RESEARCH SERVICE, https://fas.org/sgp/crs/misc/R44692.pdf, 4 (last updated Aug. 6, 2019).

117. Nathan Rott & Merrit Kennedy, *Trump Signs Executive Order on Offshore Drilling and Marine Sanctuaries*, NPR (Apr. 27, 2017, 9:16 PM ET), https://www.npr.org/sections/thetwo-way/2017/04/27/525959808/trump-to-sign -executive-order-on-offshore-drilling-and-marine-sanctuaries.

118. REVISION 4: A PROPOSAL TO REVISE THE STATE CONSTITUTION BY THE CONSTITUTION REVISION COMMISSION OF FLORIDA, NO. 20176004ER, at 6–7 (2017). The 2018 CRC proposals were "bundled" in ways different from predecessor CRCs and some of these proposals drew judicial challenges. The ban on vaping obviously had no relationship with the ban on offshore oil, but shared the ballot question:

other than a memorandum of staff analysis.[119] This memo discussed the issues concerning the extent of Florida's territorial waters and also described the assortment of state and federal laws on the subject. The provision was clearly intended to be an outright prohibition of exploration or extraction within all state waters and to be self-executing. A voter guide by the Florida League of Women Voters probably summarized it best—the purpose of the Amendment was to "[e]nshrine in the Constitution a ban on oil and gas drilling beneath Florida state waters."[120] The proposal was overwhelmingly ratified at the 2018 General Election, and now provides:

> To protect the people of Florida and their environment, drilling for exploration or extraction of oil or natural gas is prohibited on lands beneath all state waters which have not been alienated and that lie between the mean high water line and the outermost boundaries of the state's territorial seas. This prohibition does not apply to the transportation of oil and gas products produced outside of such waters. This subsection is self-executing.[121]

IV. EXECUTIVE

The Executive Article sets forth the powers of the Executive Branch "to take care that the laws be faithfully executed."[122] It vests "supreme executive power"[123] in a Governor, who can influence environmental policy both through agency and governing board appointments and as "chief administrative officer of the state responsible for the planning and budgeting for the state."[124] But the executive article also sets forth unique provisions for certain aspects of environmental regulation and

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> PROHIBITS OFFSHORE OIL AND GAS DRILLING; PROHIBITS VAPING IN ENCLOSED INDOOR WORKPLACES.—Prohibits drilling for the exploration or extraction of oil and natural gas beneath all state-owned waters between the mean high water line and the state's outermost territorial boundaries. Adds use of vapor-generating electronic devices to current prohibition of tobacco smoking in enclosed indoor workplaces with exceptions; permits more restrictive local vapor ordinances.

Id.

119. CONSTITUTION REVISION COMMISSION, GENERAL PROVISIONS COMMITTEE, PROPOSAL ANALYSIS, NO. P 9 (Fla. 2017).

120. *Amendments for November Election*, LEAGUE OF WOMEN VOTERS OF BAY COUNTY, https://my.lwv.org/florida/bay-county/amendments-november-election (last visited Apr. 20, 2020).

121. FLA. CONST. art. II, § 7(c).

122. FLA. CONST. art. IV, § 1(a).

123. *Id.*

124. *Id.*

administration. The establishment of a Cabinet, or "plural executive," is unique among the states, and Florida was also the first state to establish an independent commission for conservation of fish and wildlife.[125] The interplay of the powers of the Governor, other Cabinet members, and a wildlife commission have influenced environmental policy over the last several decades.

A. The Cabinet

Article IV, Section 4(f) of the Florida Constitution designates the Cabinet as consisting of the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture, who shall exercise certain powers set forth in the section and otherwise as provided by law.[126] While many states have statewide elected officials in addition to a governor, Florida is the only state with a "plural executive," where various routine executive functions are heard and decided by four statewide elected officials in an open public meeting,[127] and where the Cabinet can actually outvote the Governor.[128] The Cabinet has been a part of the Florida Government since the Civil War and was thereafter incorporated into the 1868 Constitution.[129] That Constitution, as well as the 1885 Constitution, merely provided that the Cabinet would "assist" the Governor.[130] The 1968 Constitution removed that language, giving the Cabinet independent authority separate from the Governor. It effectively weakened the Governor's office, as many traditional executive functions now had to be approved by seven independently elected statewide officeholders.[131]

The 1998 Constitution Revision Commission spent a considerable amount of time on the issue of cabinet reform and recommended reducing its membership to four statewide elected officials and eliminating some of its authority, such as sitting as the State Board of

125. Independent research by Author confirmed by telephone conversations and emails with Curtis Kiser and Preston Robertson.

126. Prior to 1999, the Cabinet consisted of the Governor, Attorney General, Commissioner of Agriculture, Treasurer, Comptroller, Commissioner of Education, and Secretary of State. *The Florida Governor and Cabinet*, MYFLORIDA, https://www.myflorida.com/myflorida/cabinet/structure history.html (last visited Apr. 20, 2020); *see also* Kent J. Perez, *The New Constitutional Cabinet: "Florida's Four,"* 82 FLA. B.J. 62, 65 (2008).

127. Florida's "sunshine law" requires all meetings of state boards and agencies to be public meetings with reasonable notice to the public. FLA. STAT. § 286.011(1) (2019).

128. D'ALEMBERTE, *supra* note 1, at 131.

129. FLA. CONST. of 1868, art. VII.

130. FLA. CONST. of 1885, art. IV, § 20.

131. ALLEN MORRIS, THE FLORIDA HANDBOOK 666–67 (1985).

Education.[132] The 1998 CRC was aware that the 1978 CRC proposed elimination of the Cabinet, but that proposal as well as all of their proposals were rejected by the voters.[133] Proponents of the Cabinet pointed out its importance as a "town meeting" where ordinary people could address their statewide elected officials on important issues such as the environment and growth management.[134] Due to its requirement to meet in public, environmental advocates used Cabinet meetings as a unique forum to discuss a wide range of statewide issues.[135] Over the years, the Cabinet has debated environmental permits, policies, and rules relating to growth management, manatee protection, marine fisheries, land conservation priorities, beach issues, power plants, and mines.[136] The Cabinet also confirms the Secretary of the Department of Environmental Protection[137] and the Director of the Division of State Lands.[138]

Some CRC members desired to keep these Cabinet functions even as they eliminated other duties; thus, the CRC specifically included the Land Acquisition Trust Fund and Trustees of Internal Improvement Trust Fund as specific responsibilities of the Cabinet.[139] This guarantees that an array of matters, including purchase or disposition of conservation lands, land management plans, and other proprietary issues, are required to be considered by the Cabinet in a public meeting, with engagement by stakeholders that often include environmental groups. This is in stark contrast to the manner in which similar issues are considered in other states.[140] The 1998 amendment provides as follows: "The governor as chair, the chief financial officer, the attorney general, and the commissioner of agriculture shall constitute the trustees of the internal improvement trust fund and the land acquisition

132. Perez, *supra* note 126. For a good description of the changing role of the Florida Cabinet, see ALLEN MORRIS, *The Florida Handbook* ch. 1, https://www.myfloridahouse.gov/filestores/Adhoc/FloridaHandbook/The%20Executive%20Branch%202013-2014.pdf (last accessed Apr. 16, 2020).

133. Steven Ulfelder and Billy Buzzet, *Constitutional Revision Commission, a Retrospective and Prospective Sketch*, FLA B.J., April 1997, at 21.

134. Stephen Maher, *The Florida Cabinet: Is It Time for Remodeling?*, 18 NOVA L. REV. 1124, 1128–29 (1994).

135. Email from Charles Lee to Clay Henderson, Executive Director for Stetson University's Institute of Water and Environmental Resilience (Nov. 21, 2019) (copy on file with *Stetson Law Review*). Lee was a long-time lobbyist for Florida Audubon Society who appeared before the Cabinet on environmental issues under six Governors.

136. *Id.*

137. FLA. STAT. § 20.255(1) (2019).

138. FLA. STAT. § 20.255(3)(g) (2019).

139. FLA. CONST. art. IV, § 4(f).

140. Maher, *supra* note 130, at 1128–29.

trust fund as provided by law."[141] Each of these executive functions have a long and important role in environmental policy over the history of the state.

1. Trustees of the Internal Improvement Trust Fund

The Trustees of the Internal Improvement Trust Fund was established in the early days of statehood, before the formal establishment of the Cabinet. Under the "equal footing doctrine,"[142] Florida anticipated the conveyance of federal lands to the new state government and thus included an "internal improvement" provision in its proposed 1838 Constitution.[143] Congress admitted Florida as a state in 1845 and conveyed 500,000 acres of land to the new state government for the purposes of internal improvement.[144] In addition, the state received approximately 22 million acres of "swamp and overflow lands," which also offered opportunities to the state for economic development.[145] The Internal Improvement Trust Fund was established by law in 1856, with its Trustees composed of the Governor, Comptroller, Treasurer, Attorney General, and State Register.[146] The purpose of the Trust was to establish a formal entity to take title to the new lands, sell them, and use the money for public improvements.[147] Following the Civil War, the Trustees were focused on sale of large tracts of lands to spur development and especially to encourage new railroads.[148] As a matter of history, the sale of lands to railroad companies, and most famously to real estate developer Hamilton Disston, resulted in significant alterations, arguably ruinous to the natural environment of Florida.[149] Governors in the nineteenth Century were elected on the promise to "drain the swamp," and drain the

141. FLA. CONST. art. IV, § 4(f).

142. The equal footing doctrine is understood to mean that each new state is "admitted into the Union on equal footing with the original States in all respects whatsoever." 5 U.S. Stat. 742 § 1, (Mar. 3, 1845).

143. FLA. CONST. of 1838, art. XI, § 2 (providing that "[a] liberal system of internal improvements, being essential to the development of the resources of the country, shall be encouraged by the government of this State.").

144. *Land Grants to the State*, in 3 *Fla. Stat. Helpful and Useful Matter* 232 (1941) [hereinafter *Whitfield's Notes*].

145. *Id.* at 233.

146. GENERAL STATUTES OF THE STATE OF FLORIDA 347–48 (1906).

147. *Whitfield's Notes*, *supra* note 145, at 233.

148. *See id.*

149. MARK DERR, SOME KIND OF PARADISE 86–87(1989).

Everglades and wetlands they did.[150] Until recent history, most wetlands were deemed wastelands, and proposals to dredge and fill wetlands for economic development were routinely approved by the Cabinet as Trustees.[151]

Not until the 1960s did the Trustees become interested in the proprietary value of state lands for parks and in natural resource values for submerged lands.[152] As will be discussed in detail later, the 1963 Legislature established the Land Acquisition Trust Fund to issue bonds to purchase lands for a new system of state parks.[153] All such acquisitions were in the name of the Trustees of the Internal Improvement Trust Fund.[154]

Following the ratification of the 1968 Constitution, the 1969 Legislature considered whether the "public trust doctrine" should also be enshrined in the Constitution.[155] The public trust doctrine was a matter of common law and United States constitutional law at the time, providing that lands under navigable waters and beaches below the mean high-water line were to be held in trust for public use.[156] This amendment was ratified in 1970,[157] and subsequently all submerged sovereignty lands have been held by the Trustees.[158] The evolution of the Trustees' role was complete when the 1979 Legislature clarified any inconsistencies by declaring, "All lands held in the name of the board of trustees shall continue to be held in trust for the use and benefit of the people of the state pursuant to s. 7, Art. II, and s. 11, Art. X of the State Constitution."[159] Subsequently, all lands held by the Trustees were to be held consistent with both the Natural Resources Clause and the Public Trust Doctrine.[160]

In the twenty-first century, the Trustees continue to play an important role in stewardship of millions of acres of state lands, as Florida law now requires the Trustees to manage lands in order to

150. *Id.* at 147; *see also* MICHAEL GANNON, THE HISTORY OF FLORIDA 289 (1996).

151. Conversation with Curtis Kiser. Prior to Governor Claude Kirk, Trustee decisions to dispose of wetlands and submerged lands were a "rubber stamp." To this day, when cabinet members are sitting as the Trustees of the Internal Improvement Trust Fund, they are referred to as the "Trustees."

152. GARY WHITE, CONSERVATION IN FLORIDA ITS HISTORY AND HEROES 92 (2010).

153. *Infra* pt. III.A.2.

154. FLA. STAT. § 253.02(1) (2019).

155. *Infra* pt. VIII.A.

156. D'ALEMBERTE, *supra* note 1, at 290.

157. H.R. J. Res. 792, 1970 Fla. Leg. *See also* FLA. CONST. art. X, § 11.

158. FLA. STAT. § 253.12(1) (2019).

159. *Id.* § 253.001.

160. *See* FLA. CONST. art. II, § 7; *id.* art. X, § 11.

protect their natural resource values.[161] According to the Division of State Lands, the Trustees hold 10 million acres of conservation lands, including 2.4 million acres purchased under the Preservation 2000 and Florida Forever land acquisition programs.[162] In addition, the Trustees still protect submerged sovereignty lands and administer sovereignty land leases, beach restoration programs, and land management plans.[163]

2. Land Acquisition Trust Fund

Article IV, Section 4(f) of the Florida Constitution also authorizes the Cabinet to act as the Land Acquisition Trust Fund (LATF).[164] The LATF works in conjunction with the Trustees of the Internal Improvement Trust Fund to finance acquisition of lands purchased and conveyed to the Trustees for conservation purposes.[165]

The 1963 Legislature created the LATF and provided that its funds could be used to "pay the rentals due . . . meet debt-service requirements . . . acquire land, water areas, and related resources and to construct, improve, enlarge, extend, operate, and maintain capital improvements and facilities in accordance with the plan."[166] That "plan" was the creation of the Florida Park System.[167] In November of the same year, voters ratified an amendment authorizing the issuance of revenue bonds for the purpose of acquiring lands, "water areas and related resources . . . in furtherance of outdoor recreation, natural resources conservation and related facilities."[168] The amendment also limited the life of the LATF with a "sunset clause" to 2013: "The land acquisition trust fund, created by the 1963 [L]egislature for these multiple public

161. FLA. STAT. § 253.034(1) (2019).

162. *Division of State Lands*, FLORIDA DEP'T ENVT'L PROT., https://floridadep.gov/lands (last visited Apr. 20, 2020).

163. *See* FLA. STAT. § 253.03 (2019).

164. FLA. CONST. art. IV, § 4(f).

165. *See id.*

166. 1963 Fla. Laws ch. 36, § 4(1)–(3).

167. *See* James A. Farr, Ph.D., & O. Greg Brock, Ph.D., *Florida's Landmark Programs for Conservation and Recreation Land Acquisition*, 14 SUSTAIN 35, 35 (2006) ("The . . . (LATF) was created to fund a newly-created Outdoor Recreation and Conservation Program, designed primarily to purchase land for parks and recreation areas.").

168. FLA. CONST. of 1885, art. IX, § 17. That amendment also provided that the Land Acquisition Trust Fund would collect revenues and make bond payments. Since 1967, the Land Acquisition Trust Fund has been funded through the documentary stamp tax, as Ch. 67-320, Laws of Fla. authorized a "documentary sur tax" to be paid into the Land Acquisition Trust for trust fund purposes.

purposes, shall continue from the date of the adoption of this amendment for a period of fifty years."[169]

In 1968, voters ratified a new Constitution without reference to the LATF or bond authorization for conservation lands acquisition. However, in 1972, voters ratified an amendment to carry forward the bond authorization from the 1885 Constitution into the 1968 Constitution with identical language.[170] Pursuant to this authority, the Legislature approved the Land Conservation Act of 1972 and the Florida Preservation 2000 Act of 1990, the latter of which used the documentary stamp tax to fund land conservation through the LATF.[171] Preservation 2000 was established as a ten-year, $3 billion conservation acquisition program funded through bonds that expired pursuant to the fifty-year sunset provision in 2013.[172] According to the Division of State Lands, the program acquired 1.8 million acres.[173]

The 1997–1998 Constitution Revision Commission heard extensive public testimony on the sunset provision of the LATF, and several proposals were introduced to eliminate the sunset provision. Revision 1 contained two related provisions designed to extend the sunset provision by moving the reference to the LATF from the schedule into the Executive Article and authorizing bonds in the Finance and Taxation Article. The new section authorized financing "the acquisition and improvement of land, water areas, and related property interests and resources for the purposes of conservation, outdoor recreation, water resource development, restoration of natural systems, and historic preservation."[174] The stated purpose of this amendment was elimination of the fifty-year sunset provision on the trust fund.[175]

Funding for the LATF was the subject of an initiative ratified in 2014 as Article X, Section 28, entitled "Land Acquisition Trust Fund." The

169. FLA. CONST. of 1885, art. IX, § 17(a)(1).

170. *See id.* art. XII, § 9(a)(1).

171. *Program History*, FLA. DEP'T OF STATE, https://dos.myflorida.com/historical/archaeology/public-lands/program-history/ (last visited Apr. 20, 2020).

172. *Id.*

173. *History of State Lands*, FLORIDA DEP'T ENVT'L PROT., https://floridadep.gov/lands/lands-director/content/history-state-lands (last modified July 15, 2019).

174. FLA. CONST. art. VII, § 11(e).

175. "This section addresses the bond limitation in Article XII Section 17 which is carried forward from the 1885 Constitution. The section authorizes bonds for land acquisition and outdoor recreation development through the Land Acquisition Trust Fund as authorized in 1963 for a period of 50 years. These bonds have been used to fund the Preservation 2000 Program, Section 259.101, Fla. Stat. The proposal enlarges current authority by allowing water areas, water resource development, restoration of natural systems, and historic preservation." CRC JOURNAL, May 5, 1998, *supra* note 97, at 262.

provision dedicates one-third of the documentary stamp tax revenue to the LATF for a term of twenty years,[176] and also lists purposes for which funds in the LATF may be expended.[177]

3. Other Cabinet Functions

Article IV, Section 4(f) also authorizes the Cabinet to undertake other responsibilities as provided by law. Several responsibilities relating to environmental regulation and growth management have been assigned by the Legislature to the Cabinet.

The Administration Commission was established by the Legislature to handle miscellaneous and unrelated executive functions.[178] Several of these additional responsibilities of the Cabinet have been important components of growth management and environmental protection. As noted above, the Environmental Land and Management Act of 1972 was the first comprehensive environmental law passed after the 1968 Constitution in furtherance of the Natural Resources Clause.[179] Among other things, the Act authorized the Administration Commission to designate areas of critical state concern, which are defined as "area[s] containing, or having significant impact upon, environmental or natural resources of regional or statewide importance."[180] In 1978, the Florida Supreme Court invalidated this section of the statute as an invalid delegation of authority to an administrative agency.[181] Subsequently, the Legislature re-affirmed the designations of the Florida Keys, Green Swamp, Big Cypress, and Apalachicola Bay as areas of critical state concern, and it also promulgated additional standards and procedures for the Administration Commission.[182] The Legislature has assigned other duties to the Administration Commission, including developing statewide standards for determining what constitutes a development of

176. FLA. CONST. art. X, § 28(a).
177. *Id.* § 28(b)(1).
178. FLA. STAT. § 14.202 (2019).
179. *See* Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 92-500, 86 Stat. 816 (1972); Pub. L. No. 93-205, 87 Stat. 884 (1973).
180. FLA. STAT. § 380.05 (2019).
181. Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978).
182. FLA. STAT. §§ 380.05–.0555.

regional impact[183] and serving as the Land and Water Adjudicatory Commission.[184]

The Cabinet also sits as the Electrical Power Plant and Transmission Line Siting Board, the body charged with final administrative approval for interagency review of power plants, transmission lines, and natural gas pipelines pursuant to the Power Plant Siting Act.[185] Power plants, transmission lines, and natural gas pipelines raise major land use and environmental issues. The Act creates a process of review where the Cabinet as the Siting Board acts in an appellate capacity and as the final decision-maker in the issuance of the certificate to the utility.[186] Under the procedures, the permit is reviewed through an administrative hearing, and the recommended order is presented to the Siting Board for certification.[187] The purpose of the certification is to provide reasonable assurance that operational safeguards are sufficient for the public welfare and protection.[188]

B. Fish and Wildlife Conservation Commission

Article IV, Section 9 establishes the Fish and Wildlife Conservation Commission (FWCC) as an independent agency with "the regulatory and executive powers of the state with respect to wild animal life . . . fresh water aquatic life, and . . . marine life."[189] Essentially, the FWCC acts as the legislature when it comes to rules and regulations relating to hunting, fishing, and wildlife conservation.[190] Florida is the only state with an independent constitutional agency to manage fish, wildlife, and marine life.[191] The 1998 Constitution Revision Commission proposed creation of the FWCC by combining the jurisdiction of the Game and Freshwater Fish Commission (Game Commission) and the Marine Fisheries Commission (MFC). While the predecessor Game Commission

183. *Id.* § 380.06.

184. *Id.* § 380.07 The Land and Water Adjudicatory Commission hears appeals of development orders of developments of regional impact and review of rules of the water management districts. *Id.* § 373.114.

185. *Id.* §§ 403.501–.518. Section 403.503(8), defines the siting board as the Governor and Cabinet.

186. *Id.* §§ 403.503(8), 403.508.

187. *Id.* § 403.508.

188. *Id.* § 403.509.

189. FLA. CONST. art. IV, § 9.

190. D'ALEMBERTE, *supra* note 1, at 148.

191. Independent research of Author. *See, e.g.*, *State and Territorial Fish and Wildlife Offices*, U.S. FISH AND WILDLIFE SERVICE, https://www.fws.gov/offices/statelinks.html (last visited Mar. 25, 2020).

was also an independent agency, the MFC was subject to the jurisdiction of the Cabinet.[192]

Conservation of wildlife was one of the first natural resource issues in Florida. During the late 19th century, nearly 90% of Florida's wading bird population was hunted for the feather trade.[193] In 1900, Congress passed the Lacey Act,[194] which prohibited illegal taking of certain game and bird species, but there were no means to enforce the law in Florida. In 1903, President Theodore Roosevelt issued an executive order establishing Pelican Island in Brevard County as what would become the first National Wildlife Refuge.[195] He issued nine additional executive orders to protect birds and wildlife in Florida.[196] During this same time, conservationists called on the state to establish a Game Department and appoint game wardens.[197] In 1913, the state created the office of Game and Fish Commissioner, and in 1927 it established the Department of Game and Fresh Water Fish, which was renamed Game and Fresh Water Fish Commission in 1935.[198]

In 1942, Governor Spessard Holland pushed the Legislature to establish an independent fish and wildlife commission out of concern that the existing commission was making political decisions rather than policy based upon science and data.[199] The Game Commission was added to the Florida Constitution as Article IV, Section 30.[200] The pertinent parts of the amendment read as follows:

> [T]he management, restoration, conservation, and regulation of the birds, game, fur bearing animals, and fresh water fish, of the state of Florida, and the acquisition, establishment, control, and

192. Henderson, *The Conservation Amendment*, *supra* note 98, at 294–95.

193. DERR, *supra* note 145, at 137.

194. *Prosecution of Federal Wildlife Crimes*, U.S. DOJ, https://www.justice.gov/enrd/prosecution-federal-wildlife-crimes (last updated May 13, 2015).

195. *History of Pelican Island NWR*, PELICAN ISLAND CONSERVATION SOC'Y, http://www.firstrefuge.org/history-of-pelican-island-nwr (last visited Apr. 6, 2020).

196. DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE TO SAVE AMERICA 16–17 (2009). The Full list of Roosevelt wildlife reserves is in Appendix 1.

197. *Id.* at 492.

198. *Game and Fresh Water Fish Commission Collection*, FLA. STATE ARCHIVES, https://www.floridamemory.com/photographiccollection/collections/?id=19 (last visited Apr. 20, 2020).

199. Telephone interview with Curtis Kiser (Mar. 26, 2020) [hereinafter Kiser Interview]. Kiser was elected to the Florida House of Representatives in 1972 and served until his election to the Florida Senate where he served from 1984–1994. During his tenure in the Legislature, he was regarded as an expert in the field of natural resource management. His service in state government began as an aide to Gov. Claude Kirk where he dealt with Game and Fish Commission issues.

200. *Florida Game and Fresh Water Fish Commission Amendment 3 (1942)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Game_and_Fresh_Water_Fish_Commission,_Amendment_3_(1942) (last visited Apr. 6, 2020).

> management, of hatcheries, sanctuaries, refuges, reservations, and all other property now or hereafter owned or used for such purposes by the State of Florida, shall be vested in a commission, to be known as the Game and Fresh Water Fish Commission.[201]

The provision clearly vested the Commission with rule-making power on all matters concerning hunting or taking of freshwater fish and fur bearing wildlife. In *Bell v. Vaughn*, the Florida Supreme Court overturned a local fishing ordinance because the constitutional amendment vested that power in the Commission.[202] The Court described the Commission's purpose as

> manag[ing], restor[ing], conserv[ing] and regulat[ing]' . . . the birds, game, fur bearing animals, and fresh water fish of the State . . . [by] 'fix[ing] bag limits and . . . seasons . . . as it may find to be appropriate, and to regulate the manner and method of taking, transporting, storing and using birds, game, fur bearing animals, fresh water fish, reptiles, and amphibians.[203]

The Game Commission's constitutional grant of authority precludes the legislature from unilaterally changing one of its rules if the rule was reasonably prescribed.[204] In a habeas action, petitioner who had been arrested for taking fish in violation of Commission rules argued he had acted in good faith under recently enacted statutes.[205] The Court held that the Florida Constitution granted the Game Commission exclusive rights to regulate fishing, and that while the legislature could pass laws to aid the Commission, it could not pass legislation inconsistent with the Commission's regulations.[206]

The 1968 Constitution continued the Game Commission but refined the constitutional language to make the agency more independent. The language referred to the powers of the Commission as "non-judicial" and expanded its reach to "wild animal life" as opposed to fur bearing animals.[207] To further make the point, Article III, Section 11(a)(19) prohibited the legislature from enacting a special law concerning

201. *Id.*
202. Bell v. Vaughn, 21 So. 2d 31, 32 (Fla. 1945).
203. *Id.* at 31–32 (quoting FLA. CONST. art. IV, § 30 (1942)).
204. State *ex rel.* Griffin v. Sullivan, 30 So. 2d 919, 920 (Fla. 1947) (affirming petitioner's conviction because the statutes on which petitioner relied were in violation of the state constitution).
205. *Id.*
206. *Id.*
207. FLA. CONST. art. IV, § 9 (amended 1968).

"hunting or fresh water fishing." The 1968 Constitution provided as follows:

> Section 9. Game and Fresh Water Fish Commission. There shall be a game and fresh water fish commission, composed of five members appointed by the governor for staggered terms of five years. The commission shall exercise the non-judicial powers of the state with respect to wild animal life and fresh water aquatic life, except that all license fees for taking wild animal life and fresh water aquatic life and penalties for violating regulations of the commission shall be prescribed by specific statute.[208]

An amendment proposed by the Legislature in 1973 and ratified the following year further clarified the independence of the Game Commission. The Commission was empowered with the "regulatory and executive powers of the state," and the legislature was prohibited from passing laws inconsistent with the commission.

> Section 9. Game and Fresh Water Fish Commission.
>
> There shall be a game and fresh water fish commission, composed of five members appointed by the governor subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, except that all license fees for taking wild animal life and fresh water aquatic life and penalties for violating regulations of the commission shall be prescribed by specific statute. The legislature may enact laws in aid of the commission, not inconsistent with this section. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from such license fees shall be appropriated to the commission by the legislature for the purpose of management, protection and conservation of wild animal life and fresh water aquatic life.[209]

By the 1970s, there were numerous policy discussions about how to further conservation efforts in the marine environment. When the Game Commission had been established, there was little concern that marine fisheries might need to have established limits. Indeed, there was

208. *Id.*
209. FLA. CONST. art. IV, § 9 (1974).

not a requirement for a salt water fishing license at that time. It began to feel anachronistic that the exclusive jurisdiction of an independent commission be limited to fresh water aquatic life in the state with one of the largest salt water coastlines in the nation. Following the enactment of the Federal Endangered Species Act, the Legislature passed the Florida Endangered and Threatened Species Act that respected the authority of the Game Commission for jurisdiction of wildlife and fresh water aquatic life, but urged cooperation with other state agencies to protect marine life.[210] Also during this time, the Legislature continued to pass special acts relating to fishing, and conflicts between recreational and commercial anglers routinely were fought out before the Florida Cabinet after review by the MFC. During this time, the Department of Natural Resources (DNR) had primary responsibility for rules concerning marine listed species, such as marine mammals and sea turtles, and these rules also were subject to review by the Cabinet. On the seas, bays, and estuaries, DNR enforced rules through the Florida Marine Patrol, while the Game Commission patrolled the freshwater rivers and lakes. Anglers were required to obtain a saltwater fishing license from DNR and a freshwater fishing license from the Game Commission. There was also concern that decisions of the Game Commission were based on science and data, while decisions of the Marine Fisheries Commission were more easily swayed by politics.[211] As a matter of practice, confusion generally reigned on rivers that were tidally influenced near their mouth. Was it salt or fresh water? Was the angler fishing for salt water fish or fresh water fish? What about those species who move back and forth between the rivers and the Gulf or Atlantic? No issue was more controversial than the decision by the Cabinet to impose boat speed limits on both fresh water and estuarine waters as part of manatee protection plans.[212]

Some of these issues were sorted out by the Florida Supreme Court in *State v. Davis*.[213] In 1999, the MFC enacted an emergency rule that

210. FLA. STAT. § 379.2291 (2020). In the 1970s the Department of Natural Resources and the Department of Environmental Regulation each had some jurisdiction over marine habitats. In 1995, the two agencies were merged to create the Department of Environmental Protection.

211. *See* D'ALEMBERTE, *supra* note 1, at 147–48; WHITE, *supra* note 152, at 154–55; Henderson, *The Conservation Amendment*, *supra* note 98, at 294–95; Henderson & Ben-David, *supra* note 98, at 25; Kiser Interview, *supra* note 199; and Email from Preston Robertson, President of Florida Wildlife Federation and Former Assistant General Counsel for Game and Freshwater Fish Commission (on file with Author).

212. CRAIG PITTMAN, MANATEE INSANITY, INSIDE THE WAR OVER FLORIDA'S MOST FAMOUS ENDANGERED SPECIES 171 (2010).

213. 556 So. 2d 1104 (Fla. 1990).

required turtle excluder devices on all shrimp trawler fishing boats to protect endangered marine sea turtles.[214] Davis was cited for violating this rule and defended on the basis that the action of the Commission was an "invalid exercise of delegated legislative authority," as DNR had exclusive authority to protect endangered species.[215] The Court found that the MFC had the exclusive authority to regulate gear specifications and could take into consideration the effects of those rules on endangered species.[216] "Furthermore, common sense dictates that the Commission may consider environmental concerns when it implements rules regulating shrimp trawling."[217] The Court gave broad brush to this authority:

> The need to protect natural resources is most compelling when the survival of a species is in jeopardy. That is why the legislature has seen fit to provide special protections for species of fish and wildlife deemed to be endangered or threatened. In the Florida Endangered and Threatened Species Act of 1977, the legislature recognized that it is the policy of the state to "conserve and wisely manage" its "wide diversity of fish and wildlife" resources "with particular attention to those species defined . . . as being endangered or threatened. As Florida has more endangered and threatened species than any other continental state, it is the intent of the Legislature to provide for research and management to conserve and protect these species as a natural resource."[218]

The increased popularity of recreational fishing in Florida inevitably led to conflicts with commercial fishermen, and these conflicts were often played out before the Legislature and Cabinet. In 1994, recreational anglers gathered enough signatures to place the Net Ban Amendment on the ballot and see it ratified.[219] In 1996, these anglers began another initiative to unify "the Marine Fisheries Commission and the Game and Fresh Water Fish Commission to form the Florida Fish and Wildlife Conservation Commission."[220] This initiative was struck from the ballot by the Florida Supreme Court, which found that the ballot summary did not adequately inform the voters of

214. *Id.* at 1105.
215. *Id.* 1105–06.
216. *Id.* at 1105–06.
217. *Id.* at 1108.
218. *Id.* at 1108 (quoting FLA. STAT. § 372.072(2) (1987)).
219. FLA. CONST. art. X, § 16.
220. Advisory Op. to the Att'y Gen. re FWCC, 705 So. 2d 1351, 1352 (Fla. 1998).

the amendment's purpose.[221] The Court's opinion focused on the conundrum of fresh and salt water regulation at that time:[222]

> The summary does not explain to the reader that the power to regulate marine life lies solely with the legislature, which has delegated that power to not only the Marine Fisheries Commission but also the Department of Environmental Protection and the Department of Agriculture. Though the summary states that the purpose of the amendment is to "unify" the Marine Fisheries Commission with the Game and Fresh Water Fish Commission, those two entities do not share the same status. Despite the common label "commission," the former is a legislative creation while the latter enjoys independent constitutional stature. Thus the proposed amendment does not unify the two so much as it strips the legislature of its exclusive power to regulate marine life and grants it to a constitutional entity. The summary does not sufficiently inform the public of this transfer of power.[223]

This Florida Supreme Court decision was handed down during the deliberations of the 1997–1998 Constitution Revision Commission. This provided the opportunity for the CRC to consider a proposal that would not be subject to the single subject rule that limits initiatives.[224] A proposal was introduced that mirrored the initiative petition, but it drew opposition from the new Department of Environmental Protection—created out of a merger of DNR and DER—that now had jurisdiction over the Marine Patrol, marine endangered species, and salt water fisheries. Commercial fishing interests also opposed the unification. Concern was raised about giving too much authority to the new commission and concern that rules of the commission would not be subject to the Administrative Procedure Act.

The final CRC proposal kept the existing language regarding the authority and jurisdiction of the Game Commission over wild animal life and freshwater aquatic life, and it reaffirmed that the new commission would be independent and not a subunit of any other executive agency.[225] A statement was added to clarify that the new Fish and

221. *Id.* at 1355.
222. *Id.*
223. *Id.*
224. The Florida Constitution requires initiatives "shall embrace but one subject and matter directly connected therewith." FLA. CONST. art. XI, § 3. There is no such limitation for proposals by a Constitution Revision Commission. County of Volusia v. Detzner, 253 So. 3d 507, 512 (Fla. 2018).
225. S*ee* FLA. CONST. art. IV, § 9.

Wildlife Conservation Commission would not establish a new pollution regulatory program. Jurisdiction of the new commission was expanded to include "marine life" to encompass salt water fisheries and marine listed species, but the term is not preceded by the word "the" as with "the wild animal life and fresh water aquatic life," so jurisdiction over marine life is not exclusive to the Commission.[226] A provision was included to require the new Commission to include adequate due process in the adoption of rules, and another provision prohibited the legislature from passing special acts concerning hunting or fishing.[227] Lastly, the new Commission was to contain seven members, and new language in the schedule provided for a smooth transition.[228] A Statement of Intent was placed in the Journal to explain some of the nuances of this transition.[229]

The provision as proposed by the CRC and ratified in 1998 is the last word on the FWCC:

> SECTION 9. Fish and wildlife conservation commission.—There shall be a fish and wildlife conservation commission, composed of seven members appointed by the governor, subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law. The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions. The legislature may enact laws in aid of the commission, not inconsistent with this section, except that there shall be no special law or general law of local application pertaining to hunting or fishing. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from license fees for the taking of wild animal life and fresh water aquatic life shall be appropriated to the commission by the legislature for the purposes of management, protection, and conservation of wild animal life and fresh water aquatic life. Revenue derived from license fees relating to marine life

226. *Compare* D'ALEMBERTE, *supra* note 1, at 146, *with* FLA. CONST. art. IV, § 9.
227. FLA. CONST. art. IV, § 9.
228. *Id.*
229. CRC JOURNAL, May 5, 1998, *supra* note 97, at 261–62.

> shall be appropriated by the legislature for the purposes of management, protection, and conservation of marine life as provided by law. The commission shall not be a unit of any other state agency and shall have its own staff, which includes management, research, and enforcement. Unless provided by general law, the commission shall have no authority to regulate matters relating to air and water pollution.[230]

The 1999 Legislature enacted Chapter 99–245 Laws of Florida to carry out the transition required by the unification of the Game Commission and Fish and Marine Fisheries Commission.[231] In doing so, it wrestled with the nuances in the new constitutional language as well as the mandate of the voters to consolidate authority within the new Commission. The Legislature conveyed authority over marine endangered and threatened species to the new Commission but made these rules subject to the to the Administrative Procedure Act.[232] In *Caribbean Conservation Corp. v. Florida FWCC*, environmental groups sought a declaratory judgment that this provision was unconstitutional.[233] The Court found that the jurisdiction over marine life held by the Marine Fisheries Commission was transferred to the constitutional authority of the FWCC.[234] On the other hand, it held that the authority to develop rules relating to marine endangered and threatened species was delegated by the legislature from DEP and thus subject to the APA.[235]

The independence of the FWCC creates a high bar for any challenges to its authority. The FWCC has authority to list species as imperiled and adopt various conservation measures for protecting them. However, it is also true that the FWCC can "de-list" a species and authorize its hunting. That was the case in 2012 when the FWCC removed the Florida Black Bear from the imperiled species list and authorized a limited

230. FLA. CONST. art. IV, § 9.
231. 1999 Fla. Laws 2251.
232. *Id.*
233. 838 So. 2d 492, 498–99 (Fla. 2003).
234. *Id.* at 502.
235. *Id.* This distinction was examined again in Wilkinson v. Florida FWCC, 853 So. 2d 1088, 1089 (Fla. 1st Dist. Ct. App. 2003), wherein the defendant was charged with violation of boat speed limits imposed pursuant to a manatee protection plan adopted by rule of the commission. The court upheld the conviction on the basis that the defendant could have challenged the rule under the APA but did not do so. *Id.* at 1090. As a result, he had given up his right to challenge the constitutionality of the rule. *Id.*

"harvest" or hunting season for the bear in 2015.[236] A coalition of environmental groups sought an injunction to stop the hunt, but the request for injunction was denied and the appeal was not heard before the hunt began.[237] Nevertheless, the issue was so controversial that a hunting season for bears has not been approved since 2015.[238]

Over the last twenty years, the FWCC has operated as an independent agency that endeavors to make policy decisions on the basis of science. Currently, it adopts and enforces rules with the force of law on a range of conservation measures including hunting, fishing, and imperiled species as well as managing publicly owned lands managed as wildlife habitats. By combining jurisdiction over freshwater and marine habitat, it is able to regulate and enforce holistically without regard to the ebb and flow of the tide. While every state has some form of game management, and a few other states have a constitutionally authorized game agency, no other state has the functional independence of the FWCC.[239]

V. JUDICIARY

Article V sets forth the structure and jurisdiction of the judicial branch of government. There is only a passing reference to administrative courts, which have jurisdiction over a range of environmental rules adopted by state agencies.[240] This Part highlights two important constitutional concepts that have been fundamental to environmental law. Both concepts grew out of federal constitutional law, and one has been a specific reaction to established constitutional doctrine.

236. *FWC: Black Bears No Longer a Threatened Species in Florida*, CBS MIAMI (June 27, 2012, 9:45 PM), https://miami.cbslocal.com/2012/06/27/fwc-black-bears-no-longer-a-threatened-species-in-florida/.

237. Associated Press, *Judge Refuses to Stop Florida Black Bear Hunt*, WCTV (Oct. 1, 2015, 7:03 PM), https://www.wctv.tv/home/headlines/Opponents-of-Florida-Black-Bear-Hunt-Seek-Injunction-330222061.html.

238. Julie Hauserman, *Updated: State Gives Confusing Signals on Prospect of FL Black Bear Hunt*, FLA. PHOENIX (Aug. 26, 2019), https://www.floridaphoenix.com/blog/updated-state-gives-confusing-signals-on-prospect-of-fl-black-bear-hunt/.

239. LEGISLATIVE ANALYST'S OFFICE, FISH AND WILDLIFE AGENCY STRUCTURES AND BEST PRACTICES: A STUDY OF FLORIDA, TEXAS, WASHINGTON, AND NEW YORK 7 (2011).

240. FLA. CONST. art. V, § 1.

A. Standing

The term "standing" is not mentioned in the Florida Constitution, nor is there a Cases or Controversies Clause, as there is in the U.S. Constitution, which forms the basis for standing in federal courts.[241] Essentially, a case to be decided by a judge should be brought by parties with a sufficient stake in the outcome rather than those who seek some kind of declaration from the court. To an environmental group or a homeowner's association, the issue of standing presents a threshold issue as to whether a plaintiff can get their case heard.

In 1969, Sierra Club sought to enjoin the Walt Disney Company from developing a ski resort adjacent to Sequoia National Park in California.[242] Respondent moved to dismiss the complaint on the basis that Sierra Club lacked sufficient standing.[243] Ultimately, the U.S. Supreme Court agreed, finding that a party must have a more direct interest in the outcome and suffer some economic injury.[244] A similar result was reached in *Lujan v. National Wildlife Fed'n*, where the Court indicated the challenging environmental organization must prove it is within a "zone of interest" worthy of protection.[245] In *Massachusetts v. EPA*, the Court added, "[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review."[246] Both *Sierra Club* and *Lujan* grew out of litigation involving the federal Administrative Procedure Act, and as a practical matter, review and challenges under a state or federal APA is where most environmental litigation is heard.

Florida's Administrative Procedure Act also does not include the term "standing" but addresses the issue in a portion of its definition of a "party":

> Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.[247]

241. U.S. CONST. art. III, § 2; *see* FLA. CONST.
242. Sierra Club v. Morton, 405 U.S. 727, 730 (1972).
243. *Id.* at 731.
244. *Id.* at 737.
245. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990).
246. Massachusetts v. EPA, 549 U.S. 497, 518 (2007).
247. FLA. STAT. § 120.52(13)(b) (2019).

Florida courts have been essentially consistent with the federal cases. In *Agrico Chem. Co. v. Dep't of Envtl. Regulation*,[248] the Florida Supreme Court set forth a succinct test for standing:

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury.[249]

In *Village of Key Biscayne v. Dep't of Envtl. Prot.*, the Third DCA found that "[p]etitioner must demonstrate substantial interests that exceed the general interests of its citizens and that are within the zone of interest of the proposed environmental permit."[250] In *Florida Home Builders Ass'n v. Dep't of Labor*, the Court addressed standing of associations to bring suit on behalf of its members.[251] The Court set forth a three part test: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[252] While not stated in a specific provision of the Florida Constitution, the concept of standing is a foundational concept of constitutional and environmental law.

B. Repeal of the *Chevron* Standard

The U.S. Supreme Court decision in *Chevron v. NRDC*[253] is so fundamental to environmental lawyers that it is referred to by shorthand as the *Chevron* Standard, *Chevron* Rule, or *Chevron* Deference.[254] While the case is fundamentally an administrative law case, it has cast a long shadow over environmental law over the last

248. Agrico Chem. Co. v. Dep't of Envtl. Regulation, 406 So. 2d 478 (Fla. 2d Dist. Ct. App. 1981), *review denied*, 415 So. 2d 1359 (Fla. 1982).

249. *Id.* at 482.

250. Village of Key Biscayne v. Dep't of Envtl. Prot., 206 So. 3d 788, 790 (Fla. 3d Dist. Ct. App. 2016).

251. 412 So. 2d 351, 352–53 (Fla. 1982).

252. *Id.* at 353.

253. 467 U.S. 837 (1984).

254. James Salzman & J.B. Ruhl, *Who's Number One? The Most Significant Cases in Environmental Law*, DUKE UNIV., https://www.law.duke.edu/fac/salzman/MostImportantCases-EnvLaw.pdf (last visited Apr. 4, 2020).

three decades. Simply put, an administrative law judge or federal judge is to give wide discretion to an agency's interpretation of a statute it administers.[255] Underpinning this rule is the understanding that administrative rules are often very technical and based upon extensive scientific, technical, or engineering data. This is particularly true with environmental agencies, which routinely adopt rules on pollution standards for air, water, soil, and hazardous waste where rules may read like a chemistry or biology exam. As a practical matter, most environmental cases are administrative challenges, and agencies are given a wide degree of deference as a matter of practice.[256]

In 2018, Florida voters ratified an amendment that repealed the *Chevron* Standard. The 2018 Constitution Revision Commission sent to the voters a proposal entitled "Rights of Crime Victims; Judges."[257] Seven of the nine pages of the proposal dealt with major changes to Article I relating to the rights of defendants and victims of crimes, while a separate section of the proposal made two changes to Article V.[258] One change increased the retirement age of judges, while the other effectively obliterated the *Chevron* Rule in Florida:

> Judicial interpretation of statutes and rules.—In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.[259]

There is a dearth of information in the record from which to determine either the justification or intent of the proposal. The proposal was adopted on the final day of the CRC.[260] The transcript reveals that

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255. *See Chevron*, 467 U.S. at 839.

256. *Chevron* Deference is often lumped together with "*Auer* Deference" where the Supreme Court found that agencies have wide discretion in interpreting their own rules. Auer v. Robbins, 519 U.S. 452, 462–63 (1997).

257. Roberto Martinez, William J. Schifino, Jr. & William N. Spicola, *Amendment 6: Rights of Crime Victims; Judges*, FLA. BAR J., Sept./Oct. 2018, at 12, 13.

258. The 2018 CRC bundled together various proposals as was done by previous commissions, but the revision as others combined various unrelated proposals in different articles of the constitution. Various lawsuits were brought challenging the bundling, but only one proposal was stricken from the ballot. Nearly all of the public advertising on this amendment focused on the victims' rights provisions while there was very little public discourse concerning repeals on the *Chevron* Standard.

259. FLA. CONST. art. V, § 21.

260. *Constitution Revision Commission, A.M. Session,* CONSTITUTION REVISION COMM'N at 5, 131 (Apr. 16, 2018), https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript04-16-2018Vol1.pdf.

the debate on the proposal covered 131 pages and that most of the discussion centered on the victim's rights provision and whether the "bundling" of these dissimilar proposals amounted to improper log rolling.[261] There was no debate on the substance of this section of the proposal or explanation of its purpose.[262] The sole staff memo on the proposal discussed the existing deferential standard and described the proposal as follows:

> This proposal eliminates the deference of the courts to an agency's interpretation and requires the courts to examine and determine, on their own, whether specific interpretations by the agency comply with the statute or rule in question. Deference shown to agency interpretations of state statute or rule would no longer apply in any situation.[263]

The CRC did discuss the proposal prior to referring it to the Committee on Style and Drafting.[264] The sponsor defended the measure because the current standard tilted the scales of justice against the parties when challenging agency action.[265] The sponsor noted the existence of the *Chevron* Standard but noted that the Florida standard was "more Draconian."[266] This provision is too new to reveal how parties will plead or argue their cases and how judges will apply this new standard, but it is likely to have a substantial impact on future environmental litigation in the state.

VI. FINANCE AND TAXATION

Article VII of the Florida Constitution sets forth the authorization for finance and taxation for state and local government.[267] Inherent in all constitutional provisions is a limit on the power of state government, and Article VII is no exception. Without question, Florida's constitutional prohibition on a state income tax, resulting in its reputation as a tax haven, has been a major factor in the state's significant growth. Other provisions of the constitution provide specific incentives for natural

261. *E.g. id.* at 109–27.
262. *Id.* at 5–131.
263. *Executive Committee Proposal Analysis,* CONSTITUTION REVISION COMM'N at 2 (Jan. 29, 2018), https://crc.law.fsu.edu/Proposals/Commissioner/2017/0006/Analyses/2017p0006.pre.ex.pdf.
264. CONSTITUTION REVISION COMM'N, *supra* note 260, at 58–84.
265. *Id.* at 62–63.
266. *Id.* at 65.
267. FLA. CONST. art. VII.

resource protection or clean energy, while others authorize specific conservation programs.[268] A consistent theme has been the authorization of significant financial resources for land and water conservation and restoration.[269]

A. Tax Exemptions

Ad valorem taxes, commonly called property taxes, are the primary revenue source of local governments, special districts, and school boards.[270] Section 3 provides for exemptions from ad valorem taxation for properties used for charitable and conservation purposes.[271] Specifically, Section 3(a) exempts "[s]uch portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes . . . ."[272] In addition, subsection (f) provides a specific exemption for conservation lands and conservation easements:

> There shall be granted an ad valorem tax exemption for real property dedicated in perpetuity for conservation purposes, including real property encumbered by perpetual conservation easements or by other perpetual conservation protections, as defined by general law.[273]

As noted above, in *Turner v. Trust for Public Land*, an appellate court found that holding natural lands for conservation purposes was an appropriate charitable purpose.[274] Thousands of acres of conservation lands and perpetual conservation easements are held by conservation organizations, including local land trusts, that are exempt from ad valorem taxation.[275]

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268. *See id.* §§ 3, 14.

269. *See id.*

270. Florida Revenue Estimating Conference 2020 Tax Handbook, at 203, http://www.edr.state.fl.us/Content/revenues/reports/tax-handbook/taxhandbook2020.pdf.

271. FLA. CONST. art. VII, § 3(a).

272. *Id.*

273. FLA. CONST. art. VII, §3(f). This provision was proposed by the Tax and Budget Reform Commission in 2008. *See* FLA. TAXATION & BUDGET REFORM COMM'N, FINAL REPORT 44 (Rep. 2008) [hereinafter FINAL REPORT].

274. 445 So. 2d 1124, 1126 (Fla. 5th Dist. Ct. App. 1984).

275. *See, e.g.*, *North Florida Land Trust Marks Largest Conservation Easement Acquisitions to Date*, NORTH FLORIDA LAND TRUST (Sep. 18, 2018), https://www.nflt.org/north-florida-land-trust-marks-largest-conservation-easement-acquisitions-to-date/. FLA. STAT. § 704.06 (2019). This statute sets forth the requirements for a perpetual conservation easement, which tracks the language in the Internal Revenue Code for similar federal income tax deductions. *Id.*

The Florida Constitution authorizes ad valorem exemptions for historic preservation.[276] Any county or municipal governing body may enact an ordinance providing for a tax exemption for historic properties.[277] The ordinance may determine the extent of the exemption and the criteria for the exemption.[278] The exemption mirrors the federal tax credit that has been responsible for the increase in historic preservation across the country.[279]

Article VII, Section (e)(2) also authorizes exemption from ad valorem taxes for solar power.[280] The implementing legislation provided that although solar equipment affixed to a residential home is usually part of the real estate, the "just value" of solar equipment would not be added to the real estate assessment.[281]

B. Tax Assessments

Ad valorem taxes are based upon the assessed value of the real property.[282] Article VII, Section 4 pertains to the manner in which ad valorem tax assessments are determined.[283] A few of these provisions provide specific tax incentives for land conservation.

Subsection (a) contains what are commonly referred to as "Greenbelt" and "Blue Belt" provisions.[284] These provisions authorize the locally elected Property Appraiser to establish a "just valuation" on "[a]gricultural land" and "land producing high water recharge to Florida's aquifers" on the basis of its "character."[285] By far, the most significant tax incentive in terms of acreage is the Greenbelt provision.[286] Each year, county property appraisers are required to classify real estate

276. FLA. CONST. art. VII, § 3(d).
277. *Id.*
278. *Id.*
279. *See* 26 U.S.C. § 47 (2018), which authorizes the federal historic preservation tax credit. *See also* FLA. STAT. § 196.1997 (2019), the implementing law that authorizes a county commission to adopt an ordinance to determine the extent of the tax exemption.
280. FLA. CONST. art. VII, § 3(e)(2).
281. FLA. STAT. § 193.624(2)(a) (2019).
282. FLA. CONST. art. VII, § 2.
283. *Id.* art. VII, § 4. A Property Appraiser is a constitutional officer elected in each county who determines the "just valuation" of property. *See id.* art. VIII, § 1(d). The taxing authorities for each unit of local government (city, county, school district, and special districts) levy an ad valorem tax as a "mill" or millage rate per $1000 in value. Other portions of the constitution limit the millage rate and the rate of increase in assessment. *Property Tax Information for First-Time Florida Homebuyers*, FLORIDA DEP'T OF REVENUE (Jul. 2018), https://floridarevenue.com/property/Documents/pt107.pdf.
284. *Id.* art. VII, § 4(a).
285. *Id.* art. VII, § 4(a).
286. FLA. STAT. § 193.461 (2019).

as either agricultural or non-agricultural.[287] Owners of "bona fide" agricultural lands may apply for the agricultural assessment if their lands are used for an "agricultural purpose" such as crop production, livestock, forestry, and a range of other uses such as production of tropical fish and aquaculture.[288]

What is not defined, but generally understood, is that the Greenbelt designation results in a significant reduction in the assessment of the land subject to ad valorem taxation. While one can argue about the merits of such a mechanism, among the justifications for the incentive is ecosystem services provided by certain agricultural activities. Forests and pasturelands in particular have habitat value for certain wildlife, and most agricultural lands provide surface area for water recharge and storage.[289] Agriculture lands also do not increase the need for local government and school district services usually funded through local ad valorem taxation. At the very least, the Greenbelt designation is an incentive that delays conversion of millions of acres of land into some form of development.

The Blue Belt incentive is similar to the Greenbelt program but focuses on water recharge.[290] The purpose of the provision is to grant an incentive based on whether the property is in a high-water-recharge area and remains essentially free of impervious surface.[291] The incentive is not available statewide, but only in areas of high recharge for the Floridan Aquifer and in counties where the county commission has adopted the policy.[292] In those counties, the property appraiser is required to classify lands as "agricultural, non-agricultural, or high water recharge."[293]

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287. *Id.* § 193.461(1) (2019).

288. *Id.* § 193.461 (2019). This statute enables the Greenbelt provision.

> For the purpose of this section, the term "agricultural purposes" includes, but is not limited to, horticulture; floriculture; viticulture; forestry; dairy; livestock; poultry; bee; pisciculture, if the land is used principally for the production of tropical fish; aquaculture as defined in s. 597.0015; algaculture; sod farming; and all forms of farm products as defined in s. 823.14(3) and farm production.

Id. § 193.461(5) (2019).

289. *See* Sanjay Shukla & Fouad H. Jaber, *Groundwater Recharge from Agricultural Areas in the Flatwoods Region of South Florida*, 2 University of Florida Institute of Food and Agricultural Services Fact Sheet ABE 370 1, 2, (July, 2006), https://ufdcimages.uflib.ufl.edu/IR/00/00/15/42/00001/AE39900.pdf.

290. FLA. STAT. § 193.625 (2019).

291. FLA. STAT. § 193.441(2) (2019).

292. D'ALEMBERTE, *supra* note 1, at 223. High water recharge areas comprise approximately fifteen percent of the state.

293. FLA. STAT. § 193.625 (2019).

The justification for the provision is provided in the legislative intent:

> The Legislature finds that Florida's groundwater is among the state's most precious and basic natural resources. The Legislature further finds that it is in the interest of the state to protect its groundwater from pollution, overutilization, and other degradation because groundwater is the primary source of potable water for 90 percent of Floridians. The Legislature declares that it is in the public interest to allow county governments the flexibility to implement voluntary tax assessment programs that protect the state's high-water recharge areas.[294]

Subsection (b) provides authorization for a separate classification of conservation lands for ad valorem purposes.[295] The provision was part of the Tax and Budget Reform Commission proposal which authorized the conservation easement exemption. It provides: "[a]s provided by general law and subject to conditions, limitations, and reasonable definitions specified therein, land used for conservation purposes shall be classified by general law and assessed solely on the basis of character or use."[296]

The implementing legislation provided that certain owners of property subject to a conservation easement, or dedicated for conservation purposes for ten years, could seek a reduced assessment based on the conservation purposes.[297]

C. Local Taxes

Article VII, Section 9 of the Florida Constitution authorizes special districts to levy ad valorem taxes when provided by law.[298] This is the conceptual peg which authorizes the state's five water management districts.[299] The Florida Water Resources Act of 1972 established the five water management districts, with governing boards appointed by the governor, and provided them with plenary authority to regulate waters

294. FLA. STAT. § 193.441(2) (2019).
295. FLA. CONST. art. VII, § 4(b).
296. *Id.* art. VII, § 4(b). This provision was proposed by Tax and Budget Reform Commission 2008. *See* FINAL REPORT, *supra* note 274, at Tab 1 (2007–2008).
297. FLA. STAT. § 193.501(3)(a) (2019).
298. FLA. CONST. art. VII, § 9.
299. *See* FLA. STAT. § 373.069 (2019).

of the state and levy taxes.[300] What was innovative about the establishment of the five independent special districts was that they were geographically defined around watersheds rather than tied to political boundaries. Water management districts are worth noting, as they touch and concern almost every aspect of environmental regulation and stewardship authorized in the constitution.

Water management districts issue environmental resource permits, regulate wetlands, manage groundwater and surface water withdrawals, establish minimum flows and levels for springs, and acquire and manage conservation lands.[301] In South Florida, the water management district is a principal agency of the massive Comprehensive Everglades Restoration Plan (CERP) approved by the U.S. Congress[302] and is specifically referenced in Article X, Section 17 of the Florida Constitution.[303] In 1975, the Legislature proposed, and the voters ratified, a provision that specifically authorized the tax levy but with specific limitations. Article VII, Section 9 limits the levy of taxes for "water management purposes" to 1.0 mill, and to .05 mill for the "northwest portion of the [s]tate."[304]

Tax authority for water management was confirmed by the First District Court of Appeals in *State ex rel. Gainesville v. St. John's River Water Management District*, wherein the water management district was precluded from paying taxes to the city as it exceeded the district's special purpose:

> Article VII, section 9(a), Florida Constitution, allows the legislature to authorize special districts, among other taxing entities, to levy ad valorem and other taxes *"for their respective purposes"* [e.s.]. Florida law has long established that a special taxing district may not be created with general taxing authority, and may be empowered to levy only those taxes bearing a substantial relation to the special purpose of the taxing district. In the present case the city's development plan

300. 1972 Fla. Laws Ch. 72-299, 1083–1093. The five water management districts are Northwest Florida Water Management District, Suwannee River Water Management District, St. Johns River Water Management District, Southwest Florida Water Management District, and South Florida Water Management District. *Id.* at 1093.

301. *See Water Management Districts*, FLA. DEP'T ENVT'L PROT. https://floridadep.gov/water-policy/water-policy/content/water-management-districts (last modified May 16, 2019).

302. Water Resources Development Act of 1996, Pub. L. No. 104-303, § 1, 110 Stat. 3658, 3658 (1996).

303. FLA. CONST. art. X, § 17.

304. *1975 Summary of General Legislation*, Reg. Sess. 64 (Fla. 1975). To see how this works in practice, see *supra* note 283. A cap of 1.0 mill on a parcel of property assessed at $100,000, would be $100 in ad valorem taxes.

> has not been shown to have any relation to water management purposes or concerns. We therefore conclude that respondent, as a special taxing district created for water management purposes, is prohibited by article VII, section 9(a), Florida Constitution, from levying taxes for, or making tax appropriations to, the redevelopment trust fund involved in this case.[305]

D. State Bonds for Conservation

Article VII, Section 11 of the Florida Constitution contains both authorization and restriction for pledging the full faith and credit of the state for borrowing for capital improvement projects.[306] Essentially, the state is prohibited from issuing bonds for borrowing unless approved by the electors, but bonding for land conservation has proven to be popular. Between 1963 and 2014, voters on multiple occasions approved constitutional authorization and bonding authority for the purchase of conservation lands and related capital improvements.[307] This long-standing support for funding has provided billions of dollars for land conservation, outdoor recreation, and restoration and made Florida a leader in the field.[308] The history of this trend also demonstrates the long-standing linkage between conservation land acquisition and environmental regulation.[309]

The 1963 Legislature sent to the voters a proposal to fund expansion of the state park system.[310] Voters ratified Art. IX, Sec. 17, Fla. Const. (1885), which authorized "the issuance of revenue bonds for the purpose of acquiring lands, water areas and related resources in furtherance of outdoor recreation, natural resources conservation and related facilities."[311] The provision also limited this bond authorization for a period of 50 years.[312] This language was not originally included in the 1968 Constitution but was carried forward through an amendment ratified in 1972.[313] That same year, the Florida Legislature passed both the Florida Water Resources Act of 1972 and the Land Conservation Act

305. 408 So. 2d 1067, 1068 (Fla. 1st Dist. Ct. App. 1982) (citations omitted) (alteration in original).
306. FLA. CONST. art. VII, § 11.
307. Henderson, *supra* note 98, at 290–92.
308. *Id.* at 290.
309. David L. Powell, *Growth Management: Florida's Past as Prologue for the Future*, 28 FLA. ST. U. L. REV. 519, 524 (2001).
310. *Supra* pt. IV.A.2.
311. D'ALEMBERTE, *supra* note 1, at 342–43.
312. *Id.* at 348.
313. FLA. CONST. art. XII, § 9(a)(1).

of 1972.[314] The latter established the Environmentally Endangered Lands Program and authorized a $240 million bond issue to fund it.[315] Portions of the Environmental Land and Water Management Act (in particular the establishment of Areas of Critical State Concern) were expressly contingent on the ratification of the conservation lands bond issue.[316] In 1979, the Legislature enacted the Conservation and Recreational Lands Act, which used dedicated sources of revenue to acquire lands.[317] Two years later, it enacted the Save Our Coast program and authorized $275 million in bonds secured by funds from the documentary stamp tax.[318]

In 1990, Governor Martinez proposed a new expansive land acquisition program called Preservation 2000 based on the remaining constitutional bond authority.[319] The Legislature approved the Preservation 2000 Act, which authorized $300 million per year for ten years, with bonds to be paid through documentary stamp taxes.[320] Consistent with the sunset provision, all bonds would have to be retired by 2013.[321]

The 1997–1998 Constitution Revision Commission considered several proposals to end the 50-year sunset provision so that conservation land acquisition could continue after 2000. One of the provisions in Revision 5 was a new subsection to provide an indefinite authorization for bonds for conservation purposes:

> (e) Bonds pledging all or part of a dedicated state tax revenue may be issued by the state in the manner provided by general law to finance or refinance the acquisition and improvement of land, water areas, and related property interests and resources for the purposes of conservation, outdoor recreation, water resource development, restoration of natural systems, and historic preservation.[322]

The language in the new provision was an enlargement of the 1963 proviso and amounted to an indefinite authorization for conservation

314. 1972 Fla. Laws 1082 (codified at FLA. STAT. 373.013 (2019)); 1972 Fla. Laws 1126 (codified at FLA. STAT. 259.01 (2019)).

315. 1972 Fla. Laws 1127. Voters that year approved the state bond issue for the EEL Program. *See* Farr & Brock, *supra* note 168, at 36.

316. *See* Cross Key Waterways v. Askew, 351 So. 2d 1062, 1066 (Fla. 1st Dist. Ct. App. 1977).

317. 1979 Fla. Laws Ch. 79-255, 1402–16.

318. Farr & Brock, *supra* note 168, at 36–37.

319. *Id.* at 37.

320. *Id.*

321. Henderson, *The Conservation Amendment*, *supra* note 98, at 290–91.

322. FLA. CONST. art. VII, § 11(e).

bonds.[323] The authorization listed "land, water areas and related property interests" for the purposes of "conservation, outdoor recreation, water resource development, restoration of natural systems, and historic preservation."[324] Clearly, "water areas" and "water resource development" were new concepts, as well as "restoration of natural systems" and "historic preservation." Sponsors pointed out that "related property interests" were a nod to inclusion of purchase of conservation easements and "restoration" was a reference to the large financial needs of the Comprehensive Everglades Restoration Plan.[325] Sponsors also noted that the term "water resource development" was defined by statute and not the same as development of water infrastructure.[326] The proposal was ratified in 1998, and the Legislature implemented it with the Florida Forever Act.[327]

Florida Forever provided approximately $300 million per year in funding for a variety of conservation land acquisition programs, including Florida Communities Trusts, Save Our Rivers, along with additions to state parks, state forests, greenways, and trails.[328] According to the Division of State Lands, Florida Forever was responsible for purchase of 818,616 acres of land for a little over $3.1 billion.[329]

The "Great Recession" of 2008 had a profound impact on Florida, and proceeds from the documentary stamp tax (based upon value of real estate sales) plummeted.[330] In a series of austerity budgets (beginning FY 2009–2010), the legislature significantly cut—and in some years eliminated—Florida Forever funding.[331] By 2013, the economy was recovering, but the Legislature was not interested in revisiting funding for conservation lands acquisition. A coalition of environmental organizations and others filed an initiative to dedicate one third of the

323. *Journal of 1997–1998 Constitution Revision Commission*, CONSTITUTION REVISION COMMISSION, i, 262 (1998).

324. FLA. CONST. art. VII, § 11(e).

325. CONSTITUTION REVISION COMMISSION, *supra* note 323, at 262.

326. *Id.*

327. 1999 Fla. Laws 2484 (codified at FLA STAT. §259.105 (1999)).

328. Henderson, *The Conservation Amendment*, *supra* note 98, at 291–92.

329. *Florida Forever*, FLA. DEP'T ENVT'L PROT., https://floridadep.gov/lands/environmental-services/content/florida-forever (last modified Apr. 6, 2020 at 11:55 AM).

330. Jeff Burlew, *Amendment 1 Intent in Jeopardy, Backers Say*, TALLAHASSEE DEMOCRAT (Apr. 25, 2015, 3:10 PM EST), https://www.tallahassee.com/story/news/2015/04/25/amendment-1-intent-in-jeopardy-backers-say/26359073/.

331. Sheryl Boutin, *Florida Forever: Current Complete Report of Financial Status* (FDEP Apr. 9, 2020), http://publicfiles.dep.state.fl.us/DSL/FFWeb/Current%20Complete%20Report%20of%20Financial%20Status.pdf.

documentary stamp tax to the Land Acquisition Trust Fund, to "finance or refinance: the acquisition and improvement of land, water areas, and related property interests."[332] The initiative was ratified in 2014 as Article X, Section 28 of the Florida Constitution and has been used to pay debt service on Florida Forever Bonds and Everglades Restoration Bonds.[333]

E. Water Pollution Bonds

Prior to the Clean Water Act of 1972, there were very few facilities for abatement of water pollution in Florida. Much of the focus of the Act was on point source discharge, including wastewater. One of the Act's earliest successes was the provision of federal funds to local governments to finance wastewater treatment plants.[334] The State of Florida also desired to incentivize construction of wastewater treatment plants. The 1970 Legislature proposed a new Section 14 to authorize state bonds, pledging full faith and credit, for the construction of air and water pollution control facilities and solid waste disposal facilities without the need for a referendum.[335] A 1980 amendment, also proposed by the Legislature, added "other water facilities authorized by general law" to the list of purposes for which bonds could be issued without an election.[336] In 2010, the Legislature authorized $225 million in water pollution bonds to assist local government with compliance with the Safe Drinking Water Act.[337] Taken as a whole, this bonding authority has provided local governments with significant resources to address wastewater treatment and drinking water quality.

VII. LOCAL GOVERNMENT HOME RULE

The field of environmental law provides ample examples of federalism where the federal government adopts national pollution

332. *See Amendment Text: The Florida Water and Land Conservation Amendment*, FLORIDA'S WATER & LAND LEGACY, http://floridawaterlandlegacy.org/sections/page/amendment (last visited Apr. 13, 2020).

333. *Infra* pt. VIII.E.

334. *See* William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 552 (2004).

335. State v. Div. of Bond Fin. of Dep't of Gen. Servs., 278 So. 2d 614, 615–16 (Fla. 1973).

336. D'ALEMBERTE, *supra* note 1, at 241.

337. DIVISION OF BOND FINANCE, FLORIDA STATE BOARD OF ADMINISTRATION, OFFICIAL STATEMENT: FLORIDA WATER POLLUTION CONTROL FINANCING CORPORATION 1–2 (July 27, 2010), https://www.sbafla.com/bond/Portals/0/Content/BondPrograms/Environmental/WaterPollution/SRF2010A_FOS.pdf?ver=2019-04-30-131712-583.

standards and the states implement the programs. But it is also true that local government is where the rubber often meets the road. The Clean Water Act is a case in point. The Act sets as a goal that our waters be fishable and swimmable but leaves the states to adopt total maximum daily loads to achieve this goal.[338] But, more likely than not, it is a local government's wastewater or stormwater treatment that determines the actual quality of a local watershed. Florida has a number of urban local governments that administer environmental protection in a proactive manner. Indeed, fifteen counties and some municipalities coordinate through the Florida Local Environmental Resource Agencies, an association that promotes natural resource protection at the local level.[339] As a "home rule" state, many local governments in Florida often have the authority to implement state programs or enact stricter environmental standards.[340] But it is also true that the Legislature can and does preempt the field in certain areas, which creates an ongoing tension in the field of environmental policy.

Prior to 1968, there was no local government article in the Constitution. Florida local governments operated under "Dillon's Rule"[341] and could only exercise such powers delegated by the State.[342] This changed with the 1968 Constitution that authorized counties to adopt home rule charters by vote of the local electors.[343] Once adopted, counties had "all powers of self-government not inconsistent with general law."[344] According to a survey of the Florida Association of Counties, twenty of the state's sixty-seven counties, representing 75% of the State's population as that list includes all the urban counties, have adopted a charter.[345] Several of these charters have specific authorizations for the county government to enact ordinances to set

338. 33 U.S.C. § 1251(a)–(b), (g) (2018).

339. *FLERA Members*, FLA. LOC. ENVTL. RESOURCE AGENCIES, https://www.flera.org/flera-members (last visited Apr. 6, 2020).

340. FLA. CONST. art. VIII, § 2(b). For a brief exposition on local "home rule" power in the United States and Florida specifically, see *Understanding Florida's Home Rule Power*, FLA. LEAGUE OF CITIES (May 10, 2011, 10:13 AM), http://www.floridaleagueofcities.com/docs/default-source/Civic-Education/historyofhomerule.pdf?sfvrsn=2.

341. Dillon's Rule, "derived from . . . court decisions issued by Judge John F. Dillon of Iowa in 1868," held that local governments could only engage in activities that were expressly sanctioned by their state governments. *Cities 101—Delegation of Power*, NAT'L LEAGUE OF CITIES (Dec. 13, 2016), https://www.nlc.org/resource/cities-101-delegation-of-power.

342. D'ALEMBERTE, *supra* note 1, at 249.

343. FLA. CONST. art. VIII § 1(c).

344. FLA. CONST. art. VIII § 1(g).

345. *Charter County Information*, FLA. ASS'N OF COUNTIES, https://www.fl-counties.com/charter-county-information (last visited Apr. 19, 2020).

environmental standards. For example, the Broward County Charter has directive language to "protect its citizens' right to a sustainable environment."[346] Several charters authorize minimum standards for environmental protection.[347] Charters in Volusia, Alachua, Columbia, Broward, and Orange Counties make clear that when a minimum standard is adopted, it takes precedence over any municipal ordinance.[348] Charters in Miami-Dade and Alachua Counties effectively protect park or preservation lands from being converted to another use.[349]

Three of the most populous counties have reached agreement with FDEP to locally administer Environmental Resource Permits. Section 373.441, Florida Statutes, authorizes this delegation by agreement, and

346. BROWARD COUNTY, FLA., CODE OF ORDINANCES pt. I, § 1.04(P) (Municode through Ordinance No. 2020-08, enacted Feb. 11, 2020), https://library.municode.com/fl/broward_county/codes/code_of_ordinances?nodeId=PTICH_ARTICRCOPOGO_S1.04CIBIRI ("Sustainable Environment - Broward County shall enact ordinances which protect its citizens' right to a sustainable environment, including clean air and clean water, while encouraging the stewardship of natural resources.").

347. VOLUSIA COUNTY, FLA., CODE OF ORDINANCES pt. I § 202.4 (Municode through Ordinance No. 2019-22, enacted Dec. 10, 2019), https://library.municode.com/fl/volusia_county/codes/code_of_ordinances?nodeId=PTICH_ARTIIPODUCO_S202.4MISTENPR ("Such minimum standards, procedures, requirements and regulations may include, but shall not be limited to, tree protection, aquifer protection, stormwater management, wastewater management, river and waterway protection, hazardous waste disposal, wetlands protection, beach and dune protection, environmental protection including air pollution, and the protection from destruction of the resources of the county belonging to the general public, and such other environmental standards as the council determines to be necessary for the protection of the public health, safety, and welfare of the citizens throughout Volusia County.").

348. *Id.* (allowing municipality to "establish more restrictive standards . . . for protection of the environment"); BROWARD COUNTY, FLA., CODE OF ORDINANCES pt. I, § 11.01(A) (establishing that county ordinances prevail over conflicting municipal ordinances "with respect to . . . minimum standards protecting the environment"); COLUMBIA COUNTY, FLA., HOME RULE CHARTER § 1.8 (2012) (permitting a municipality to establish stricter ordinances regarding environmental protection); ORANGE COUNTY, FLA., CODE OF ORDINANCES pt. I, § 704(B)(1) (Municode through Ordinance No. 2019-16, enacted Oct. 22, 2019), https://library.municode.com/fl/orange_county/codes/code_of_ordinances?nodeId=PTICH_ARTVIIGEPR_S704COCOORMUORPR (establishing that "county ordinances . . . prevail over municipal ordinances when the county sets minimum standards for . . . protecting the environment"); ALACHUA COUNTY, FLA., CODE OF ORDINANCES pt. I, § 1.4 (Municode through Ordinance No. 2019-24, enacted Nov. 12, 2019), https://library.municode.com/fl/alachua_county/codes/code_of_ordinances?nodeId=PTIHORUCH_ARTICRPOORHORUCHGO_S1.4REMUOR (providing municipal ordinances prevail over conflicting county ordinances unless ordinance is protecting the environment, in which case the more stringent ordinance prevails).

349. ALACHUA COUNTY, FLA., CODE OF ORDINANCES pt. I, § 1.7; MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES pt. I, § 7.01 (Municode through Ordinance No. 19-126, enacted Dec. 13, 2019), https://library.municode.com/fl/miami_-_dade_county/codes/code_of_ordinances?nodeId=PTICOAMCH_ART7PAAQPRPRLA_S7.01PO ("Parks, aquatic preserves, and lands acquired by the County for preservation shall be held in trust for the education, pleasure, and recreation of the public and they shall be used and maintained in a manner which will leave them unimpaired for the enjoyment of future generations as a part of the public's irreplaceable heritage. They shall be protected from commercial development and exploitation and their natural landscape, flora and fauna, and scenic beauties shall be preserved.").

Broward and Hillsborough Counties have executed such an agreement.[350] Miami-Dade County has entered into an agreement with the Division of State Lands to administer certain permitting under the sovereign and submerged lands program.[351] Hillsborough County has established its own Environmental Protection Commission that administers a full range of environmental programs. It was established by special act in 1967 but is now incorporated in the county charter.[352] Miami-Dade Department of Environmental Resources Management also administers a full range of environmental programs.[353] Other local governments have specific program-related operating agreements with FDEP on a range of programs, from wastewater to mangroves.[354]

The issue of climate change has been an interesting flash point between state and local government. At the state level, little has been done to address climate change. However, numerous local governments have adopted "climate action plans," and four populous south Florida counties have adopted the Southeast Regional Climate Compact to address the growing threat of sea level rise.[355]

All local governments in Florida are required to enact a comprehensive plan and land development regulations pursuant to the Community Planning Act.[356] The comprehensive plan is required to have a future land use element that "ensure[s] protection of natural and historic resources."[357] The plan is also required to adopt a conservation element with the following natural resource goals:

> A conservation element for the conservation, use, and protection of natural resources in the area, including air, water, water recharge

350. *ERP Local Program Delegation*, FLA. DEP'T ENVT'L PROTECTION, https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/erp-local-program-delegation (last modified Mar. 30, 2020, 8:38 AM).

351. Memorandum of Agreement Among Bd. of Tr. of the Internal Improvement Tr. Fund, Dep't of Envtl. Prot. & Metro. Dade Cty., Apr. 5, 1996, MA-13-114.

352. HILLSBOROUGH COUNTY., FLA., CODE OF ORDINANCES pt. A, Charter, § 9.10 (Municode through Ordinance No. 19-32, adopted Dec. 20, 2019; Resolution No. 19-136, adopted Nov. 6, 2019; House Bill 1373 (2019-183), enacted October 1, 2019), https://library.municode.com/fl/hillsborough_county/codes/code_of_ordinances,_part_a?nodeId=CHHICO_ARTIXGEPR_S9.10ENPR.

353. *Environment,* MIAMI DADE CTY., https://www.miamidade.gov/environment/ (last visited Apr. 19, 2020).

354. *See, e.g.*, *Operating Agreements Between Broward County and DEP,* FLA. DEP'T ENVT'L PROT., https://floridadep.gov/ogc/ogc/content/operating-agreements#localprograms (last visited Apr. 19, 2020).

355. *Southeast Florida Regional Compact Climate Change*, SOUTHEAST FLA. CLIMATE COMPACT, https://southeastfloridaclimatecompact.org (last visited Apr. 19, 2020).

356. FLA. STAT. § 163.3167(2) (2019).

357. FLA. STAT. § 163.3177(6)(a)(3)(f).

> areas, wetlands, waterwells, estuarine marshes, soils, beaches, shores, flood plains, rivers, bays, lakes, harbors, forests, fisheries and wildlife, marine habitat, minerals, and other natural and environmental resources, including factors that affect energy conservation.[358]

In addition, local governments are required to adopt land development regulations that are consistent with the comprehensive plan.[359] Several Florida counties amended their charters to address growth management issues. Broward County adopted a charter amendment to establish a county-wide planning council,[360] while Charlotte County authorized a county-wide comprehensive plan.[361] Volusia County amended its charter to establish a Growth Management Commission to establish consistency between the county and local government comprehensive plans.[362]

In recent years, tensions have heightened between local governments and the Legislature on the issue of preemption. Lawmakers have sought to rein in local governments when they appear to go too far or impede economic development. Legislators specifically preempted local governments from further restricting agricultural practices in comprehensive plans,[363] and they have also preempted any local regulation of packaging material, containers, and plastic bags.[364] This has created significant tension between the state and local governments, as the latter are required to implement recycling programs and most localities operate landfills.[365] To test these

358. FLA. STAT. § 163.3177(6)(d).

359. FLA. STAT. § 163.3194(1)(b).

360. BROWARD COUNTY, FLA., CODE OF ORDINANCES, pt. 1, § 8.01 (Municode through Ordinance No. 2020-08, enacted Feb. 11, 2020), https://library.municode.com/fl/broward_county/codes/code_of_ordinances?nodeId=PTICH_ARTVIIILAUSPL_S8.01BRCOPLCO.

361. CHARLOTTE COUNTY, FLA., CODE OF ORDINANCES, Home Rule Charter, § 1.3(B) (Municode through Ordinance No. 2020-010, adopted Feb. 11, 2020), https://library.municode.com/fl/charlotte_county/codes/code_of_ordinances?nodeId=HORUCH_PR_ARTICRPOORHORUCHGO_S1.3REMUOR.

362. VOLUSIA COUNTY, FLA., CODE OF ORDINANCES pt. I, § 202.3 (Municode through Ordinance No. 2019-22, enacted Dec. 10, 2019), https://library.municode.com/fl/volusia_county/codes/code_of_ordinances?nodeId=PTICH_ARTIIPODUCO_S202.3VOGRMACO.

363. FLA. STAT. § 163.3162(4).

364. FLA. STAT. § 403.708(9) ("The packaging of products manufactured or sold in the state may not be controlled by governmental rule, regulation, or ordinance adopted after March 1, 1974, other than as expressly provided in this act."); FLA. STAT. § 403.7033 ("Until such time that the Legislature adopts the recommendations of the department, no local government, local governmental agency, or state government agency may enact any rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags.").

365. FLA. STAT. § 403.706.

preemptive measures, the City of Coral Gables enacted an ordinance to prohibit polystyrene containers.[366] This prompted the Legislature to pass legislation specifically preempting regulation of polystyrene, granting exclusive regulatory authority to FDEP.[367]

The ordinance also drew a legal action from the Florida Retail Federation. The Federation argued the ordinance was preempted, while the city argued the preemption was a violation of home rule. The trial court agreed with the city but was reversed on appeal. The appellate court found that the Legislature is empowered to preempt local government ordinances and invalidated the local ban.[368]

Regulation of fertilizer has also been an issue for preemption. Recent algal blooms, particularly in the Indian River Lagoon, prompted environmental groups to encourage local government to regulate use of fertilizer on home lawns.[369] This prompted the Legislature to consider preempting local ordinances on the subject. Lawmakers reached a compromise on the issue by encouraging local governments to adopt a model ordinance, while authorizing additional standards if certain conditions were present, and exempting ordinances passed prior to the new law.[370]

In addition to regulatory matters, voters in over twenty counties have passed bond issues or sales tax increases that raised revenues in excess of $12 billion to address environmental lands, environmental restoration, and climate change.[371] In 1986, Volusia County was the first in the nation to enact a voter-approved bond issue for protection of "environmentally endangered lands," and it subsequently approved a supplemental bond issue entitled Volusia Forever in 2000.[372] The most ambitious program was the Preservation Project of the City of

366. *See* Jim Saunders, *Four Years After Passing Law, Coral Gables Loses Fight to Ban Styrofoam Containers*, MIAMI HEARALD, https://www.miamiherald.com/news/local/community/miami-dade/coral-gables/article240245936.html (last updated Feb. 12, 2020, 9:34 PM). Polystyrene containers are commonly called Styrofoam.

367. FLA. STAT. § 500.90.

368. Florida Retail Fed'n, Inc. v. City of Coral Gables, 282 So. 3d 889, 896 (Fla. 3d Dist. Ct. App. 2019), *review denied*, No. SC19-1798, 2020 WL 710303 (Fla. Feb. 12, 2020).

369. *See, e.g.*, Conservancy of Southwest Florida, *Fertilizer Ordinance*, CONSERVANCY, https://www.conservancy.org/our-work/policy/water-quality/fertilizer-ordinance (last visited Apr. 20, 2020).

370. FLA. STAT. § 403.9337(1)–(3).

371. Tr. for Pub. Land, *TPL LandVote Database*, TPL, https://tpl.quickbase.com/db/bbqna2qct?a=dbpage&pageID=8 (last visited Apr. 20, 2020) (from "Measures" menu, click "Summary of LandVote Measures by State, 1988–present, then select "FL," and filter by "County").

372. Volusia Cty., Fla., *Land Management,* VOLUSIA, https://www.volusia.org/services/community-services/parks-recreation-and-culture/land-management/ (last visited Apr. 20, 2020).

Jacksonville that was approved in 2000 as part of a $2.25 billion sales tax, resulting in "the largest urban park system in the nation."[373] In 2016, Brevard County voters approved a $300 million plan to restore the Indian River Lagoon.[374] In 2017, Miami Dade voters approved a $400 million "Miami Forever" plan that includes $192 million to combat sea level rise.[375] Taken as a whole, local governments in Florida have a significant role in environmental protection, which is a direct result of the home rule authority in Article VIII.

VIII. MISCELLANEOUS PROVISIONS

Article X of the Florida Constitution originally included matters that did not comfortably fit in other parts of the document. Since 1968, it has become a favorite article in which to place new amendments, including thirteen proposed as initiatives.[376] As such, Article X is now a hodgepodge of unrelated constitutional provisions. Five of these sections deal specifically with natural resources conservation measures.[377] Three were proposed by initiative, one was proposed by the legislature, and another was proposed by the Constitution Revision Commission.[378]

A. Public Trust Doctrine

The 1968 Constitution included Article X, Section 11, entitled "sovereignty lands," which makes the common law Public Trust Doctrine a constitutional doctrine.[379] Because of Florida's long and complicated

373. Opinion, *Preservation Project: Happy Anniversary*, FLA. TIMES UNION, Nov. 22, 2009, at B-4, https://www.jacksonville.com/article/20091122/OPINION/801224126; David Bauerlein, *Funding Woes Alter Jacksonville Plan Timetable; Work Projects Around Town Could Linger on to 2025, Rather Than Ending in 2010 as First Planned*, FLA. TIMES UNION, Oct. 2, 2005, at A-1.

374. Brevard Cty., Fla., *Brevard County Save Our Lagoon,* BREVARD FLA., https://www.brevardfl.gov/SaveOurLagoon/Home (last visited Apr. 20, 2020).

375. City of Miami, *Miami Forever Bond,* MIAMI GOV, https://www.miamigov.com/Government/Departments-Organizations/Office-of-Capital-Improvements-OCI/Miami-Forever-Bond (last visited Mar. 8, 2020).

376. *See generally* FLA. CONST. art. X.

377. *Id.* §§ 11, 16, 17, 18, 28. Arguably, Article X, § 21, known as the "Pregnant Pig" amendment, has some natural resource value by limiting the spread of industrial-scale pork production, but it will not be discussed here.

378. *Id.*

379. Monica K. Reimer, *The Public Trust Doctrine: Historic Protection for Florida's Navigable Rivers and Lakes*, 75 FLA. B.J., Apr. 2001, at 10, 1.

history, there has always been a degree of uncertainty as to the absolute title to lands beneath navigable waters, including beaches. Given the contemporary value of tourism, fishing, outdoor recreation, and the vast value of waterfront development, this continues to be a vital interest.

Any discussion of the public trust doctrine must begin with a history lesson.[380] The King of Spain was the sovereign of Florida from 1513–1763 and from 1783–1821.[381] Various grants of lands were conveyed by the King to encourage Florida's development. Between 1763–1783, Florida was a colony of Great Britain but failed to join the American Revolution of 1776.[382] During that time, the Common Law of England was the law of Florida, and the British Sovereign, like the Spanish King, also awarded land grants to increase development.[383] The Adams-Onis Treaty protected these land grants but conveyed all remaining lands to the United States, which were in turn conveyed to the State of Florida upon the Act of Admission in 1845.[384] Florida, like all states, entered the union "on equal footing" with other states and thus obtained title to lands beneath navigable waters.[385] Shortly after statehood, the legislature enacted what is now Section 2.01, Florida Statutes, which accepted the Common Law of England from 1066 to 1776 as the law of Florida until otherwise amended by the legislature.[386] During the nineteenth century, the Florida legislature and Trustees of the Internal Improvement Trust Fund conveyed millions of acres of swamp and overflow lands for development.[387] But in 1892, the United States Supreme Court in the *Illinois Central* case set forth the "public trust doctrine."

> [T]he 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. . . .

380. *See id.* (explaining that "[t]he doctrine is ancient rule").

381. Glenn Boggs, *Florida Land Titles and British, Not Just Spanish, Origins*, 81 Fla. B.J., July/Aug. 2007, at 23, 23–24.

382. *Id.*

383. *See* M.C. Mirow, *The Supreme Court, Florida Land Claims, and Spanish Colonial Law*, 31/32 TUL. EUR. & CIV. L.F. 181, 185 (2017) (discussing British and Spanish land grants and the conditions placed on them).

384. State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 609–10 (1908); Mirow, *supra* note 383, at 183.

385. State *ex rel.* Town of Crescent City v. Holland, 151 Fla. 806, 834 (1942).

386. FLA. STAT. § 2.01 (2019).

387. MICHAEL GRUNWALD, THE SWAMP: THE EVERGLADES, FLORIDA, AND THE POLITICS OF PARADISE 85 (2007) (describing the famous sale of 12 million acres to Hamilton Disston for the purpose of drainage and reclamation).

> is not consistent with the exercise of that trust which requires the government . . . to preserve such waters for the use of the public.[388]

A year later the Florida Supreme Court echoed this same language:

> [T]he navigable waters of the state and the soil beneath them . . . were held, not for the purposes of sale of conversion into other values, or reduction into several or individual ownership, but for the use and enjoyment of the same by all the people of the state for at least the purposes of navigation and fishing and other implied purposes.[389]

By the time the Public Trust Doctrine was established in Florida, it was late in the game. By the turn of the 20th Century, all but 3 million acres of swamp and overflow lands had been sold off to private interests.[390]

Prior to the 1968 Constitution, there was no reference to the Public Trust Doctrine, as it was generally accepted as part of common law. There was, however, an evolving concept of "concern for the conservation and preservation of Florida's natural resources."[391] Nevertheless, there was always a concern that the legislature could erode the common law through legislation in order to promote economic development or enhance property rights of adjacent upland owners. This fear led the legislature to propose the constitutional amendment, which essentially protects Florida's beaches and waterways for traditional recreational interests such as fishing, swimming, and boating.

Pursuant to Article X, Section 11, title to lands beneath navigable waters, "including beaches below mean high water lines, [are] held by the state . . . in trust for all the people."[392] An amendment proposed by the legislature and ratified in 1970 strengthened the provision. It provided that sovereignty lands could only be disposed of after an affirmative showing that the sale was "in the public interest."[393] In addition, the legislature tied this provision to the Natural Resources

388. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452–53 (1892).
389. State v. Black River Phosphate Co., 32 Fla. 82, 106 (1893).
390. FRANK E. MALONEY ET AL., WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE 357 (1968) (citation omitted).
391. *Id.*
392. FLA. CONST. art. X, § 11.
393. *Id.*

Clause by designating the Trustees of the Internal Improvement Trust Fund as the keepers of the trust.[394]

B. Limiting Marine Net Fishing

Article X, Section 16 was proposed by initiative and ratified in 1994, and it pertains to restrictions on commercial fishing.[395] It prohibits "gill nets" in all Florida waters and places significant restrictions on net size in nearshore waters.[396] The amendment also contains a broad policy statement that "the marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations."[397] As noted previously, this provision was proposed and ratified at a time prior to the creation of the Fish and Wildlife Conservation Commission, when regulatory authority for saltwater fishing was vested in the Marine Fisheries Commission and cabinet.[398] During this time, the recreational anglers advocated for limits on gill nets and commercial trawlers but were unsuccessful.[399] Failing to gain relief before the legislature, Commission, or cabinet, supporters used the initiative process to enact the restrictions.[400]

The language of the amendment contains both broad aspirational language and legislative detail. The "marine resources" language should be read alongside the directive language of the Natural Resources Clause. Definitions of "coastline," "Florida Waters," and "nearshore and inshore waters" provide an interesting comparison to the constitutional description of the state boundaries.[401] The provision contains a broad prohibition on the use of gill nets and imposes net size restrictions on trawlers in nearshore waters.[402] The provision contains very specific definitions of "gill net" and "mesh area" to preempt the legislature from redefining nets to neutralize the amendment.[403] Not only is the provision

394. *See* FLA. STAT. § 253.03(15) (2019).
395. FLA. CONST. art. X, § 16.
396. *Id.* art. X, § 16(b)(1)–(2).
397. *Id.* art. X, § 16(a).
398. *See* discussion *supra* pt. IV.B.
399. Karl Wickstrom, *The Big Net Debate: Is Ban the Way to Save Sea Life?*, ORLANDO SENTINEL (Oct. 30, 1994), https://www.orlandosentinel.com/news/os-xpm-1994-10-30-9410310431-story.html.
400. *Id.*
401. *See* State v. Kirvin, 718 So. 2d 893, 899–901 (Fla. 1st Dist. Ct. App. 1998) (discussing these boundary definitions).
402. FLA. CONST. art. X, § 16(b).
403. *Id.* art. X, § 16(c).

self-executing, but it makes a violation of its provisions enforceable as other fish and wildlife regulations.

The initiative was overwhelmingly ratified by the voters[404] and had an immediate effect on commercial fishing in the state. From the moment the initiative was ratified, litigation was initiated by commercial anglers.[405] In 1997, the Florida Supreme Court had the first opportunity to address a challenge to the amendment based upon due process and taking issues. In *Lane v. Chiles*, the Court upheld the net ban amendment as a valid state objective to protect the state's natural resources.[406] Further, it found that the net ban did not rise to the level of a taking:

> The State clearly has an interest in preserving and protecting the resources of the State, which are commonly owned by the people, and restrictions on the harvest of marine fish does not constitute a taking of property from particular individuals.[407]

In *State v. Kirvin*, the First DCA overturned a county court dismissal of criminal charges against a commercial fisherman who argued the net ban amendments were unconstitutionally vague.[408] The court found otherwise.[409] Finally, by 2014, the court presumably had enough and found the continuing challenges to the net ban amendment were barred by *res judicata*.[410]

C. Everglades Trust Fund

Article X, Section 17 establishes the Everglades Trust Fund, which was proposed by initiative in 1996, along with the "polluter pays" provision in Article II, Section 7(a).[411] It places into the Florida

404. *See November 8, 1994 General Election Official Results: Constitutional Amendment*, FLA. DIVISION OF ELECTIONS, https://results.elections.myflorida.com/Index.asp?ElectionDate=11/8/1994&DATAMODE= (last visited Apr. 20, 2020) (select Election as "1994 General", select Office as "Const. Amendments") (showing the amendment passed with 71.7% of voters supporting it).

405. *See* FWCC v. Wakulla Fishermen's Ass'n, 141 So. 3d 723, 725 (Fla. 1st Dist. Ct. App. 2014) (providing brief descriptions of cases).

406. Lane v. Chiles, 698 So. 2d 260, 263 (Fla. 1997).

407. *Id.* at 264.

408. *Kirvin*, 718 So. 2d at 894.

409. *Id.*

410. *FWCC*, 141 So. 3d at 727.

411. *See* Barley v. S. Fla. Water Mgmt. Dist., 823 So. 2d 73, 76–78 (Fla. 2002). A third proposal, a tax on sugar, was not ratified in the 1996 election. *Id.* at 78. An earlier 1994 initiative that would have imposed a tax on sugar to be paid into an Everglades Trust Fund was struck from the ballot

Constitution the statutory definitions of "Everglades Protection Area," "Everglades Agricultural Area," and "South Florida Water Management District."[412] The amendment also establishes the Everglades Trust Fund, to be administered by the South Florida Water Management District for the purposes of "conservation and protection of natural resources and abatement of water pollution in the Everglades."[413] The trust fund is permanent, as it is not subject to termination pursuant to Article III, Section 19(f).[414] Subsequent to the ratification of this amendment, Everglades restoration has become a state and national conservation priority. Congress passed the Comprehensive Everglades Restoration Plan (CERP) as part of the Water Resources Development Act of 2000.[415] Following the ratification of Article X, Section 28 funding, the Florida Legislature passed the Legacy Florida Act that authorizes $200 million per year for the state's share of CERP projects.[416] In addition, the legislature authorized the "Everglades River of Grass" license plate program, in which proceeds from the sale of the tag are directed to the trust fund.[417]

D. Disposition of Conservation Lands

The success and impending conclusion of the Preservation 2000 program led the 1997–1998 Constitution Revision Commission to consider expansion and protection of conservation land acquisition programs. Nearly two million acres of conservation lands had been acquired under Preservation 2000 and earlier land conservation programs, which led many to argue there was a need to protect these lands from being sold off by the state for future development.[418] The

for violation of the single subject rule. *See In re* Advisory Opinion to the Attorney General—Save Our Everglades, 636 So. 2d 1336, 1340–41 (Fla. 1994). Accordingly, the sponsors came back with three related proposals that this time made their way to the ballot. The three proposals were designed to work together but also stand alone as individual amendments.

412. FLA. CONST. art. X. § 17(d).

413. *Id.* art. X, § 17(a).

414. *Id.*

415. Comprehensive Everglades Restoration Plan, Pub. L. No. 106-541, § 601, 114 Stat. 2572, 2680 (2000).

416. *See* Mary Ellen Klas, *Scott Signs Legacy Florida Act to Dedicate Funds for Everglades and Springs*, TAMPA BAY TIMES (Apr. 7, 2016), https://www.tampabay.com/scott-signs-legacy-florida-act-to-dedicate-funds-for-everglades-and-springs/2272332/.

417. FLA. STAT. § 320.08058(21)(b) (2019).

418. *FAQ: Florida Forever*, FLA. DEP'T ENVT'L PROT., https://floridadep.gov/lands/environmental-services/content/faq-florida-forever (last modified Oct. 24, 2019) ("P2000 was responsible for the public acquisition and protection of more than 1.7 million acres of land."); Henderson, *The Conservation Amendment*, *supra* note 98, at 292–94.

Commission included the new Section 18 in its Revision 5, coupled with the additional bonding authority to acquire new conservation lands.[419] In a compact seventy-five words, the amendment has afforded significant protection for conservation lands.[420] First, the amendment declares that lands held "by an entity of the state"[421] for conservation purposes are to be "managed for the benefit of citizens of this state."[422] This was purposely similar to the language of the Public Trust Doctrine in Article X, Section 11.[423] Next, conservation lands may not be disposed of without a finding that the land is "no longer needed for conservation purposes" and only after a vote of two-thirds of the governing board holding title to the lands.[424] In the case of the Trustees of the Internal Improvement Trust Fund, the legislature has determined that three out of four members must approve a surplus of conservation lands.[425] Though there was no definition of the term "entity of the state," the sponsors assumed this to include the water management districts, and the legislature made this a requirement for surplus of conservation lands.[426] The legislature has also determined that all lands purchased from Preservation 2000 bonds, Conservation and Recreation Lands program, Save Our Rivers program, Save Our Coast program, and Environmentally Endangered Lands program are subject to the provision of this amendment.[427] This section has proved to be a very high bar for surplus or exchange of conservation lands. In 2013, Governor Scott directed the Department of Environmental Protection and the water management districts to review their inventory of public lands to determine those which should be sold off.[428] Eventually, a list of 160 properties was developed, but none were sold.[429]

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419. FLA. CONST. art. X, § 18.

420. *See id.*

421. Earlier drafts of the proposal applied it to lands held by the Trustees and water management districts, but it was determined that other state agencies actually held property for conservation purposes, so "entity of the state" was adopted as a catch-all phrase. *Id.*

422. *See id.*

423. CRC JOURNAL, May 5, 1998, *supra* note 97, at 262.

424. FLA. CONST. art. X, § 18.

425. FLA. STAT. § 253.0341(1) (2019).

426. *Id.* § 373.089(6)(a) (2019).

427. *Id.* § 253.0341(2).

428. Craig Pittman, *Battling Florida's Government to Protect Public Lands*, SARASOTA MAG. (Mar. 31, 2014), https://www.sarasotamagazine.com/news-and-profiles/2014/03/battling-floridas-government-protect-public-lands.

429. Melissa Ross, *Proposed Sale of Florida Conservation Lands Causes Concern*, WJCT (Sep. 5, 2013), https://news.wjct.org/post/proposed-sale-florida-conservation-lands-causes-concern.

E. Land Acquisition Trust Fund

Article X, Section 28 was proposed by initiative and ratified in 2014.[430] The initiative was pushed by a coalition of environmental groups concerned by the failure of the legislature to fund the Florida Forever program after the onset of the Great Recession.[431] The provision earmarks one-third of the documentary stamp tax to the Land Acquisition Trust Fund for acquisition and improvement of land and water areas for a range of conservation purposes for a period of twenty years.[432] Forecasts from the Office of Economic and Demographic Research estimate revenues from this amendment to exceed $22 billion over its life.[433] As a statement of its significance, the measure is the largest voter approved environmental funding mechanism in our nation's history.[434] Nevertheless, environmental groups and the legislature are still litigating the implementation of the amendment.[435]

The initiative was entitled "Water and Land Conservation—Dedicates Funds to Acquire and Restore Florida Conservation and Recreation Lands."[436] It built upon language from the 1963 and 1998 constitutional amendments to dedicate funds to the Land Acquisition Trust Fund to "finance or refinance: the acquisition and improvement of land, water areas, and related property interests," for a broad list of purposes:

> resources for conservation lands including wetlands, forests, and fish and wildlife habitat; wildlife management areas; lands that protect water resources and drinking water sources, including lands protecting the water quality and quantity of rivers, lakes, streams, springsheds, and lands providing recharge for groundwater and

430. FLA. CONST. art. X, § 28.

431. *About the Water and Land Conservation Campaign*, FLORIDA'S WATER AND LAND LEGACY, http://floridawaterlandlegacy.org/sections/page/about (last visited Apr. 20, 2020).

432. FLA. CONST. art. X, § 28(a).

433. *See* INITIATIVE FINANCIAL INFORMATION STATEMENT, WATER AND LAND CONSERVATION—DEDICATES FUNDS TO ACQUIRE AND RESTORE FLORIDA CONSERVATION AND RECREATION LANDS, FLORIDA OFFICE OF ECONOMIC AND DEMOGRAPHIC RESEARCH, at App'x C.

434. Holland & Knight LLP, *Florida's Amendment 1: Water and Land Conservation Funding Passed by Voters - The 20-Year Program Will Generate Almost $20 Billion in Funding*, JD SUPRA, LLC (Nov. 10, 2014), https://www.jdsupra.com/legalnews/floridas-amendment-1-water-and-land-co-09037/.

435. Jake Stofan, *Environmental Groups Back to Square One in Amendment 1 Lawsuit*, WJHG (Sep. 10, 2019), https://www.wjhg.com/content/news/Environmental-groups-back-to-square-one-in-Amendment-1-lawsuit-559973921.html.

436. Advisory Opinion to the Attorney General Re: Water and Land Conservation–Dedicates Funds to Acquire and Restore Florida Conservation and Recreation Lands, 123 So. 3d 47, 51 (Fla. 2013).

> aquifer systems; lands in the Everglades Agricultural Area and the Everglades Protection Area, as defined in Article II, Section 7(b); beaches and shores; outdoor recreation lands, including recreational trails, parks, and urban open space; rural landscapes; working farms and ranches; historic or geologic sites; together with management, restoration of natural systems, and the enhancement of public access or recreational enjoyment of conservation lands.[437]

The measure also authorized funds to be used to pay debt service on bonds and prohibited comingling of LATF funds with general revenue.[438]

The initiative was drafted narrowly to avoid violating the single subject rule by referencing existing provisions in the Constitution. It funded the existing land acquisition trust fund, authorized financing and refinancing pursuant to Article VII, and defined the Everglades per Article II.[439] The Florida Supreme Court concurred:

> We conclude that the proposed amendment in this case properly "embrace[s] but one subject." Art. XI, § 3, Fla. Const. The proposed amendment will have only one effect: it will constitutionally establish the proportion of an existing revenue stream that is to be dedicated to an existing trust fund. Because the amendment would make a single change—establishing the percentage of documentary tax revenue credited to the Land Acquisition Trust Fund—and does not contain any unrelated provisions, the amendment does not engage in logrolling. [440]

In its first year, the LATF generated over $740 million,[441] but the 2015 legislature responded with a "fund shift" by eliminating several environmental trust funds and paying for those programs from the LATF.[442] The FY 2016 General Appropriations Act provided about $15 million from the LATF for the Florida Forever Program, far less than the early years of the land acquisition program.[443] The 2016 legislature, however, did approve a measure that dedicated significant funds from the LATF for environmental restoration.[444] The Florida Legacy Act

437. FLA. CONST. art. X, § 28(b)(1).
438. *Id.* art. X, § 28(c).
439. *Id.* art. X, § 28(b)(1)–(2).
440. *Advisory Opinion*, 123 So. 3d at 51 (Fla. 2013).
441. Andrew Quintana, *Senate Passes Florida Forever Funding Package*, WFSU (Jan. 31, 2018), https://news.wfsu.org/post/senate-passes-florida-forever-funding-package.
442. 2015 Fla. Laws ch. 229.
443. *Id.* ch. 232 § 1569A.
444. 2016 Fla. Laws ch. 201.

earmarked no less than $200 million per year to Everglades restoration, $50 million per year for springs restoration, and $5 million per year for Lake Apopka restoration over the twenty-year life of the dedication.[445] The General Appropriations Act increased funding for Florida Forever to $53 million,[446] out of the $823 million earmarked by the LATF.[447]

Following the 2016 legislative session, various environmental groups sued the state alleging that the lack of significant funding for land acquisition violated the constitutional amendment.[448] The legislature and state agencies responded that the amendment provided significant discretion to the legislature as to how the funds could be spent.[449] The trial court entered summary judgment for the environmental group plaintiffs, finding:

> [t]he plain meaning is that funds in the Land Acquisition Trust Fund can be expended only for (1) the acquisition of conservation lands, and (2) the improvement, management, restoration and enhancement of public access and enjoyment of those conservation lands purchased after the effective date of the amendment.[450]

The state filed an appeal focusing on the portion of the decision which would have restricted restoration funds to be used only on lands acquired with new funds from the LATF.[451] As a practical matter, nearly all of the areas targeted for restoration had already been acquired. The First DCA agreed with the State "that LATF revenue is not restricted to use on land purchased by the State after 2015."[452] The court did not reach a decision on the plain meaning of the amendment or the validity of the appropriations and remanded the case back to the trial court for further consideration.[453]

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445. *Id.* § 2.

446. *Id.* ch. 66 § 1531.

447. *Report of Florida Revenue Estimating Conference, Documentary Stamp Tax Collections 2016*, FLA. OFFICE OF ECON. AND DEMOGRAPHIC RESEARCH (Jan. 19, 2016), http://edr.state.fl.us/Content/conferences/docstamp/archives/160119docstamp.pdf (last visited Apr. 20, 2020).

448. Florida Wildlife Fed'n, Inc. v. Negron, et al., No 2015-CA-001423, slip op. at 3 (Fla. Cir. Ct. June 28, 2018), https://earthjustice.org/sites/default/files/files/Amendment-1_0501_Final-Judgment-Order.pdf.

449. Initial Br. of the Legis. Parties at 5, Jose Oliva v. Florida Wildlife Fed'n Inc., https://edca.1dca.org/DCADocs/2018/3141/183141_115_12262018_10051986_e.pdf.

450. *Negron*, slip op. at 3.

451. Initial Brief of Appellants, *Oliva v. Florida Wildlife Fed'n, Inc.*, 281 So. 3d 501 (Fla. Dist. Ct. App. 2019) (No. 1D18-3141).

452. Oliva v. Florida Wildlife Fed'n, 281 So. 3d 531, 539 (Fla. 1st Dist. Ct. App. 2019).

453. The environmental group plaintiffs subsequently filed for a discretionary review to the Florida Supreme Court. Oliva v. Florida Wildlife Fed'n, SC2019-1935 (Fla. 2019).

In some respects, the amendment is a fitting coda to fifty years of the environmental evolution of Florida's Constitution. The amendment contains a laundry list of natural resources worthy of protection, including the Everglades, springs, beaches, wildlife habitat, and a range of water resources, together with funding for programs. As a result of the amendment, record amounts of funding have been provided both to the Everglades Restoration Plan and springs. The 2019 legislature appropriated over $600 million of LATF funds for water-resource-related restoration projects. At the very least, the amendment has authorized historic levels of environmental restoration.[454]

IX. SUMMARY AND CONCLUSIONS

One of the fundamentals of our federalist system is each of our fifty states has a constitution different from the U.S. Constitution, as they serve different purposes. The U.S. Constitution is a grant of power from the state, while state constitutions tend to contain limitations of power. Generally speaking, state constitutions are more recent, more detailed, and more easily amended than their federal counterpart, and they reflect the distinct origins of each state.[455]

The Florida Constitution is consistent with these generalizations, so it is no surprise that it contains multiple references to environmental policies and governmental structure to protect the environment. A review of all fifty state constitutions shows over one-third have some reference to environmental protection.[456] Twelve state constitutions contain the word "environment," while another twenty-seven states use the term "conservation."[457]

The Florida Constitution contains broad policy language, authorizes unique government structure, and funds historically significant programs to engage in a wide spectrum of programs for the purposes of conservation, environmental protection, and restoration. The state has both regulatory authority and proprietary jurisdiction to protect

454. *See Governor Ron Desantis 2020-2021 Budget: Environment*, A BOLDER, BRIGHTER, BETTER FUTURE, http://www.boldvisionforabrighterfuture.com/content/current/Environment.htm (last visited Apr. 20, 2020).

455. G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 8 (2011).

456. Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 158 (2003).

457. John Joseph Wallis, *The NBER/Maryland State Constitutions Project*, THE UNIVERSITY OF MARYLAND, http://www.stateconstitutions.umd.edu/index.aspx (follow "Search Constitutions" hyp erlink and perform a "Full-text search" for the selected word) (last visited Apr. 20, 2020).

important natural resources subject to other constitutional restraints. Voters support what they value, and ratification of numerous amendments over the last fifty years is a demonstration of electoral support for environmental protection measures now enshrined as part of Florida's organic law.[458]

458. The last three environmental amendments were ratified with overwhelming support. The offshore oil ban passed with 69% of the vote in 2018. *November 6, 2018 General Election Official Results: Constitutional Amendments*, FLA. DEP'T OF STATE DIVISION OF ELECTIONS, https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018&DATAMODE= (last visited Apr. 20, 2020) (select Election as "2018 General Election," select Office as "Const. Amendments"). The solar exemption passed with 72% of the vote in 2016. *August 30, 2016 Primary Election Nonpartisan Primary Official Results: Constitutional Amendments*, FLA. DEP'T OF STATE DIVISION OF ELECTIONS, https://results.elections.myflorida.com/Index.asp?ElectionDate=8/30/2016&DATAMODE=(last visited Apr. 20, 2020) (select Election as "2016 Primary Election," select Office as "Const. Amendments"). The land and water conservation fund passed with 75% of the vote in 2014. *November 4, 2014, General Election Official Results: Constitutional Amendments*, FLA. DEP'T OF STATE DIVISION OF ELECTIONS, https://results.elections.myflorida.com/Index.asp?ElectionDate=11/4/2014&DATAMODE= (last visited Apr. 20, 2020) (select Election as "2014 General Election," select Office as "Const. Amendments").