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INDELIBLE PUBLIC INTERESTS IN PROPERTY: THE PUBLIC TRUST AND THE PUBLIC FORUM

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Abstract: In response to the ongoing debate over how much of the surface real estate reclaimed by the Big Dig should be devoted to open space, and how much to other uses, this Article examines two legal doctrines that are frequently implicated by plans for changes in use and disposition of publicly-owned property. While these doctrines stand on distinct historical and theoretical foundations and diverge from each other in many respects, there are important parallels between them in how they conceptualize the relationship between government’s power to regulate, control, and dispose of land it owns, and the rights belonging to what one scholar has called the “unorganized public” in that same property. On a more pragmatic level, commonality between these two doctrines arises from their applicability to the same physical spaces and their concern with the same types of governmental actions. Therefore, while both the courts and the academy have largely examined these doctrines separately, this Article employs a comparative analysis to better understand the relationship between government and the “unorganized public” with respect to publicly-owned property, and to more fully appreciate the limitations on the use of currently and formerly publicly-owned lands.

Introduction

“Indelible” can be defined in absolute or relative terms.¹ The “indelible public interest” we address here is mostly of the latter type, difficult but not impossible to extinguish. While the public trust is of-

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¹ Webster’s Third New International Dictionary of the English Language, Unabridged 1147 (Philip B. Gove et al. eds., 1986) (defining “indelible” as “1: that cannot be removed, washed away, or erased; that cannot be effaced or obliterated: PERMANENT, LASTING 2: that makes marks that cannot easily be removed”).
ten misunderstood as an inalienable public interest, there have been very few cases in which judicial review has found a modification or disposal of public trust lands to be beyond the scope of the legislature’s power. As a derivative of the First Amendment, the public forum doctrine does categorically limit the ways in which government may restrict or regulate free speech in public forums, but it does not create permanent public forums that government cannot extinguish through sale or substantial modification of the physical space. While not absolute, these sometimes indelible public interests in land may condition or even preclude implementation of certain plans for the disposition or development of publicly-owned land.

I. How Indelible Public Interests Relate to the Big Dig

The question of how to utilize the surface real estate reclaimed by Boston’s Central Artery/Tunnel Project (Big Dig) continues to preoccupy politicians, design professionals, and laypersons. These twenty-seven acres in the heart of Boston offer opportunities rarely seen in this or any other city. Arguments over how to use this found land demonstrate an overarching acknowledgement that it is imbued with the public interest and the intrinsically indelible public rights of access and use.

One of the key debates thus far has addressed the appropriate balance between open space and development. Much of the wrangling has been about the idea that seventy-five percent of the reclaimed surface area should be open space. One staunch supporter of the seventy-five percent requirement is John DeVillars, who in August of 1990, as Massachusetts Environmental Affairs Secretary, demanded that seventy-five percent of the reclaimed land be designated as open space, after stating publicly that he intended to “extract every last ounce of environmental and recreational benefit that the law and

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2 See infra Part II.B.

3 The strict dichotomy between open space and development is not so clear. Article 49 of the Boston Zoning Code, which covers the Central Artery Special District, allows for several different types of open space designations within what is now referred to as the Rose Kennedy Greenway. These include Urban Plaza Open Space Subdistricts, Recreation Open Space Subdistricts, and Parkland Open Space Subdistricts. The allowed uses in these “open space” subdistricts include building types such as restaurants, cafes, community and recreation centers, and a conservatory complex which could include “accessory office, retail, educational, public assembly, Restaurant, and storage uses, and Cultural Uses.” Boston, Mass., Zoning Code art. 49 (1991), available at http://www.cityofboston.gov/bra/pdf/ZoningCode/Article49.pdf.
common sense allow.”

The seventy-five percent requirement was memorialized as “an essential mitigation measure” in the Secretary’s Certificate on the final supplemental environmental impact report issued in 1991. DeVillars has remained a vocal supporter of the seventy-five percent requirement. In an April 2002 op-ed piece in the Boston Globe, DeVillars acknowledged the controversy the seventy-five percent requirement had caused, but remained resolute stating, “if I had it to do over again, it would be 90 percent.”

In addition, DeVillars asserted that the seventy-five percent requirement and other environmental mitigation measures “continue to represent the legally binding obligations of the Commonwealth.”

Later in 2002, another opinion—written by a partner at a local law firm—appeared in the Boston Globe, setting forth a different view of the seventy-five percent rule. This piece made several arguments against retaining the seventy-five percent rule. In terms of process-oriented issues, the writer argued that the rule was not preceded by a planning process and engendered a stifling inflexibility in the planning and design of the twenty-seven acres. In terms of the substantive concept behind the rule, the writer argued that it “treats open space as a commodity to be maximized when, in reality, urban open space is valuable only if it’s used.” By replicating the form of the old elevated highway, the writer argued that it “merely compounds a 50-year-old planning failure.” It was further suggested that opening up more land to development would help pay for the open spaces to be created, given the challenges in funding the greenway. While the writer minimized the “supposed legal difficulties” of changing the seventy-five percent requirement, he cautioned that “[s]hould a [new] greenway be created, and should it prove to be a mistake, the Massachusetts constitution would require a two-thirds vote of the Legislature to undo it.”

6 Id.
7 Id.
9 See id.
10 Id.
11 Id.
12 See id.
13 Id.
The requirement for a two-thirds vote of the legislature is contained in article 49 of the Massachusetts constitution. A supermajority is required to approve changes in the use or disposition of land or easements taken or acquired to further the rights of the people to “clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment.” Considering the purposes for which public parks are conceived, it is readily apparent how this provision could apply to future plans to convert open space in the Rose Kennedy Greenway to a different use, whether private development or another public use such as a museum or police station. While the current version of article 49 was ratified just thirty years ago, it builds on and follows the principles of the older prior public use doctrine. In the way it limits local governments and state agencies from changing the use of public parks without legislative authorization, it grants a kind of protection to parks that closely parallels protections carried out under the ancient “public trust doctrine” in other states. Furthermore, dedicated public parks, sidewalks, and roadways along the Rose Kennedy Greenway would all most likely qualify as traditional public forums, another form of public interest that might be difficult to extinguish.

II. THE PUBLIC TRUST DOCTRINE

At its core, the public trust doctrine stands for the proposition that certain resources are held in trust by the government for the benefit of the “people” or the “public at large.” It is commonly stated that the emergence of the public trust doctrine can be traced to at least the sixth century AD, and that it has been a fixture of the common law since at least the signing of the Magna Carta. While historically the public trust doctrine applied to navigable or tidal waterways, it has expanded in some jurisdictions to protect certain inland re-

14 Mass. Const. art. XLIX. The 1972 adoption of article 97 annulled original article 49 and adopted the present version in its place. Id. art. XCVII.
15 Id. For a compilation of similar constitutional provisions from other states, see Bret Adams et al., Environmental and Natural Resources Provisions in State Constitutions, 22 J. LAND RESOURCES & ENVTL. L. 73 (2002).
sources, such as public parks. While the limitations imposed on government by the public trust doctrine are often overstated and the public’s rights are not per se inalienable, the public trust does impose important restrictions on government in its ability to dispose of or change the use of publicly owned lands.

A. The Jus Publicum

In one of his famous treatises, Lord Chief Justice Hale delineated three classes of interests in navigable waterways: the jus privatum, the jus publicum, and the jus regium. These can be translated, respectively, as the “private right,” the “public right,” and the “royal right.” Each term conforms to an idea still relevant in American public trust jurisprudence. The jus privatum can be understood as the rights granted to private individuals in public trust lands, whether in fee, licenses, or easements; these rights are subordinate to the jus publicum. The jus publicum essentially represents the rights of the “unorganized public” in public trust lands; these rights originally were defined in the context of tidal waterways, essentially as access to fishing and navigation. The jus regium is often left out of discussions of the public trust, but it is noteworthy: these rights essentially embody the state’s police power, encompassing the dual role of government as trustee and police officer with respect to public trust lands.

It is important to understand that the jus publicum is not per se inalienable. Historically, Parliament had the power to extinguish the jus publicum; after the American Revolution, this power passed to the

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18 See Lazarus, supra note 17, at 636.
19 See id.
21 Carol Rose makes a useful distinction between the “unorganized public” and the “governmentally-organized public” in describing that nature of the rights implicated by the public trust doctrine and other doctrines that similarly touch upon “inherently public property.” Rose, supra note 16, at 721.
22 See Patalano, supra note 20, at 703–04.
23 See id.
24 See Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471, 486 (1970) (“The first point that must be clearly understood is that there is no general prohibition against the disposition of trust properties, even on a large scale.”).
state legislatures. The role of the state legislature as trustee for the *jus publicum* is important in understanding the functioning of the public trust doctrine because local governments and state agencies are powerless without delegated authority from the legislature. While there have been a few instances in which courts have prevented the legislature from alienating the *jus publicum*, there have been many more cases in which the alienation of the *jus publicum* by the legislature has been held permissible.

**B. Extinguishing the Public Trust?**

1. Can the Federal Government Extinguish the Public Trust?

   It is “the settled law of this country” that the title to public trust lands—that is, tidal and navigable waterways—that vested in the States upon their entry into the Union, is subordinate to the authority of the federal government to regulate navigable waterways under the Commerce Clause. There is a split of opinion, however, on the relationship between the rights of the unorganized public—the *jus publicum*—and the federal government’s authority.

   The U.S. District Court for the District of Massachusetts has held that “the federal government is *as restricted* as the Commonwealth in its ability to abdicate to private individuals its sovereign *jus publicum* in the land.” This court strongly endorsed the theory that the *jus publicum* is inalienable, noting that “neither sovereign may alienate this land free and clear of the public trust” and that “[n]either the federal government nor the state may convey land below the low water mark to private individuals free of the sovereign’s *jus publicum*."

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27 See Appleby, 271 U.S. at 393–95 (interpreting Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892)).
28 See id. at 384–91 (listing several cases under New York law where the *jus publicum* had been alienated); see also Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1099 (Mass. 1981) (“The general view in this country is that constitutional considerations do not bar legislative grants of absolute rights in submerged lands, although a gross or egregious disregard of the public interest would not survive constitutional challenge.”).
31 Id. at 124.
However, the U.S. District Court for the Northern District of California has held that “[b]ecause . . . the United States’ power of eminent domain is supreme to the State’s power to maintain tidal lands for the public trust, the . . . United States’ condemnation of these lands extinguishes the State’s public trust easement.”32 This court made note of the Massachusetts decision but maintained that “[b]ecause this Court believes it is bound by the Supremacy Clause of the United States Constitution to hold otherwise, . . . it respectfully declines to follow that court’s ruling.”33

Since neither case has been overruled, the question of whether the federal government is subject to the *jus publicum* remains open.34

2. Local Governments Cannot Extinguish the *Jus Publicum*

Before acting with respect to public trust rights, local governments generally must obtain specific legislative permission. A Massachusetts court recently explained the origin of that doctrine and clarified how absolute the authority of the state legislature is in Massachusetts:

[The] history of the origins of the Commonwealth’s public trust obligations and authority, as well as jurisprudence and legislation spanning two centuries, persuades us that only

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33 Id. at 217. The court here also declined to follow its own precedent from two years earlier, City of Alameda v. Todd Shipyards Corp., 632 F. Supp. 333 (N.D. Cal. 1986). In that case, the court cited 1.58 Acres of Land and held that, “[s]ince the State and the City both held the land subject to the public trust, the United States could take the land only subject to the public trust.” Id. at 341.
34 Some courts have sided with the court in 1.58 Acres of Land, finding that the federal government is subject to the limitations of the *jus publicum*. See, e.g., United States v. Burlington N. R.R. Co., 710 F. Supp. 1286, 1287 (D. Neb. 1989); In re Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (“Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public’s interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people.”); see also District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1083 (D.C. Cir. 1984) (“[N]either the Supreme Court nor the federal courts of appeals have expressly decided whether public trust duties apply to the United States. There appear to be only two district court cases which explicitly hold that this common-law rule applies to the federal government as well as to the states.”) (footnote omitted). Only one court has cited to 11.037 Acres of Land in support of the notion that the Supremacy Clause trumps the state’s public trust rights and it was not in a public trust case but rather in a case addressing the doctrine of prior public use. See United States v. Acquisition of 0.3114 Cuerdas of Condemnation Land, 753 F. Supp. 50, 53 (D.P.R. 1990) (“The power of the federal government to condemn state land is well-settled. The State cannot limit or frustrate that power.”) (citation omitted).
the Commonwealth, or an entity to which the Legislature properly has delegated authority, may administer public trust rights. This authority derives from the passage of trusteeship and ownership of lands from one sovereign authority to the sovereign authority of the Commonwealth. Absent a grant of authority from the Commonwealth, a municipality may not claim powers to act on behalf of public trust rights.35

Given that local governments are merely instruments of the state and may only exercise powers granted to them by the state, this statement does not seem surprising. Especially when applied to navigable waterways, one can see the rationale in limiting local control. With respect to such activities as regulating town beaches and public parks, one might begin to question the wisdom of vesting paramount control of the state in dictating the uses of these spaces. Nevertheless, with respect to the public trust, it is clear that the trustee is the state legislature.36

3. Trustee Obligations of States with Respect to the Public Trust

a. Illinois Central: The Outlier of Public Trust Jurisprudence?

*Illinois Central Railroad Co. v. Illinois,*37 an 1892 Supreme Court decision, is widely cited as the most influential decision in American public trust jurisprudence.38 In holding “inoperative” an act of the Illinois Legislature that purported to convey title to one thousand acres of submerged lands in the Chicago harbor to a railroad company,39 *Illinois Central* represents one of the few instances where a court has invalidated an act of the legislature under the public trust doctrine.40 The decision must be read in light of the extraordinary terms of the grant itself, acknowledged in the Court’s opinion: “We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the

36 See id.
37 146 U.S. 387 (1892).
40 See Sax, supra note 24, at 489 (“The Supreme Court [in *Illinois Central*] . . . wrote one of the very few opinions in which an express conveyance of trust lands has been held to be beyond the power of a state legislature.”).
harbor of a great city and its commerce have been allowed to pass into the control of any private corporation.”

In *Appleby v. New York*, decided thirty-four years after *Illinois Central*, the Supreme Court interpreted *Illinois Central* as allowing the grant of full fee to submerged waterways off Manhattan Island. The *Appleby* Court read *Illinois Central* as having prohibited only the “gross perversion” of the public trust and “abdication of sovereign governmental power,” not the alienation per se of the *jus publicum*.

b. Massachusetts

The long and convoluted history of the Massachusetts public trust doctrine begins with the Colonial Ordinance of 1647. This ordinance granted private property rights in the land between the high and low tide marks—known as the “flats”—to the upland property owners. While the Colony did retain an interest in the flats similar to an easement for navigation, this Ordinance can be viewed as an alienation of the public trust since it departed from the law of England, which had been brought to the Colony and did not allow private ownership of the flats.

Some Massachusetts decisions have suggested that the public trust is inalienable. For example, in *Newburyport Redevelopment Authority v. Commonwealth*, a Massachusetts Appeals Court stated that “land below the natural low water mark is impressed with a public trust, which gives the public’s representatives an interest and responsibility in its development which cannot be extinguished.” This formulation is not in conformity, however, with the opinion of the Massachusetts Supreme Judicial Court (SJC), which has accepted the *Appleby* interpretation of *Illinois Central*—that is, public trust lands are not inalienable. The SJC opinion was expressed in response to issues raised in *Boston Waterfront Development Corp. v. Commonwealth*, which was controversial when decided because it held that a parcel of private property

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43 See id. at 393; see also *Sax*, supra note 24, at 489 (“But the Court did not actually prohibit the disposition of trust lands to private parties; its holding was much more limited.”).
44 The Ordinance of 1647 is sometimes referred to as the Ordinance of 1641. *See Commonwealth v. Alger*, 61 Mass. 53, 67 (1851).
45 Id. at 67–68.
46 *See Sax*, supra note 24, at 487.
along the Boston waterfront was held subject to a “condition subsequent that it be used for the public purpose for which it was granted.” Many worried that this decision clouded the title of much of the valuable real estate in downtown Boston that at one time was waterfront property, and presumably under the common law, remained a part of the public trust.

Many of the legal uncertainties raised by this case were eventually resolved with the exclusion of “landlocked tidelands” from the purview of the regulations promulgated under chapter 91 of the General Laws of Massachusetts—the codification of the public trust doctrine in Massachusetts. This had important implications for much of the land under which the Central Artery now flows, since much of this land was at one time part of the tidal flats subject to the common law public trust doctrine. The Massachusetts Senate asked the SJC to comment on the constitutionality of a draft of chapter 91, which explicitly extinguished the **jus publicum** in parts of downtown Boston that were historically impressed by the public trust, but no longer adjacent to or related to the operation of the waterfront. The SJC found “no hesitancy in accepting the legislative conclusion that it is substantially in the public interest that such land be free from any claim of a public trust and any other vestigial interest of the Commonwealth.”

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any filled tidelands which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for that portion of such filled tidelands which are presently located:

(a) within 250 feet of the high water mark, or
(b) within any Designated Port Area. Said public way or ways shall also be defined as landlocked tidelands, except for any portion thereof which is presently within 250 feet of the high water mark.

51 The Massachusetts Department of Environmental Protection regulation exempts from chapter 91 regulation “landlocked tidelands,” defined as filled tidelands separated from the waterfront by a public way and more than 250 feet from the water’s edge as of January 1, 1984. See Mass. Regs. Code tit. 310, § 9.02. Much of the Central Artery runs through areas that were at one time either part of the tidal flats or underwater lands, but are now farther than 250 feet from the waterfront.
53 Opinion of the Justices to the Senate, 424 N.E.2d at 1103.
The SJC recognized two conditions that must be met in order for the alienation of submerged lands to be upheld. First, in order for the Commonwealth to “abandon, release, or extinguish the public interest in submerged land,” there must be explicit legislation that details the particular property involved, the interest being surrendered, and an acknowledgment of the public use served by the transfer. \footnote{Id.} In Massachusetts, “[s]imilar principles properly apply to any relinquishment or surrender of a public interest in real estate.” \footnote{Id.}

Second, in Massachusetts, dispositions of public assets must be “for a valid public purpose, and, where there may be benefits to private parties, those private benefits must not be primary but merely incidental to the achievement of the public purpose.” \footnote{Id.} While legislative and administrative determinations of the public interest are given some deference, these determinations are subject to judicial review. \footnote{Id. at 1101 (“The question whether a particular legislative act, or an administrative decision pursuant to statutory authorization, serves a public purpose is for the Legislature to determine, and, although that legislative determination is entitled to great deference, it is not wholly beyond judicial scrutiny.”).}

In Massachusetts, the “paramount test” for whether the public purpose requirement is satisfied is a two pronged inquiry that looks for (1) the existence of a direct public benefit that reaches “a significant part of the public;” and (2) “whether the aspects of private advantage . . . are reasonably incidental to carrying out a public purpose.” \footnote{Id. at 1100–01 (alteration in original) (internal quotation marks omitted).}

### III. Application of Public Trust Principles to Parks

#### A. Public Parks and the Public Trust


The law in some states, including Massachusetts, is consistent, at least in formal terms, with the ruling of the Connecticut Supreme Court that the public trust doctrine applied to shorefront property is “entirely separate and distinct” from doctrines that protect parks. \footnote{Leydon v. Town of Greenwich, 777 A.2d 552, 564 n.17 (Conn. 2001).} In other states, such as Illinois and New York, the courts have at least ostensibly applied the same doctrine to parks as to tidelands. Despite the formal differences, however, the prior public use doctrine...
protects parks in Massachusetts in substantially the same way that the public trust doctrine protects parks in Illinois and New York. The same general concepts are controlling in both regimes: (1) the requirement of legislative permission to divert or alienate park space; and (2) the importance of formal dedication in determining whether extra protection applies to public parks.

B. Illinois

Illinois is one of the few states to have judicially expanded the public trust doctrine to public parks. This was first accomplished in Paepcke v. Public Building Co., a 1970 Illinois Supreme Court decision holding that citizens had standing as beneficiaries of the \textit{jus publicum} to challenge a diversion of public park space. In \textit{Paepcke}, the plaintiffs challenged a diversion of park space for the construction of public school buildings. The court made clear that the public trust doctrine did not prohibit per se the diversion or alienation of public trust property, and focused on the question of whether or not the legislature had granted sufficient authority to the city agencies named as defendants in the action, such that those agencies could divert park space to build schools. The court concluded that the legislation was “sufficiently broad, comprehensive and definite” to allow the construction of the schools and affirmed the dismissal of the complaint. Since \textit{Paepcke}, the Illinois courts have continued to show deference, and not a single government act with respect to public parks has been found to violate the public trust doctrine. In the meantime, courts have found permissible diversions of parks for use as a golf course, a driving range, parking lots for Soldier Field, and the construction of a highway bridge.

\begin{itemize}
  \item[61] See \textit{infra} Part III.B–C.
  \item[62] See \textit{infra} Part III.B–C.
  \item[64] \textit{Id.} at 13.
  \item[65] \textit{Id.} at 18 (“If we understand plaintiffs’ position correctly they do not contend, as far as the rights of the public in public trust lands are concerned, that the legislature could never, by appropriate action, change or reallocate the use in any way. (This would be contrary to well established precedent.)” (citations omitted)).
  \item[66] \textit{See id.} at 17–18.
  \item[67] \textit{Id.} at 19, 21.
  \item[68] \textit{See, e.g.,} Friends of the Parks v. Chi. Park Dist., 786 N.E.2d 161, 171 (Ill. 2003).
  \item[69] Clement v. Chi. Park Dist., 449 N.E.2d 81, 83–84 (Ill. 1983).
  \item[71] \textit{See Friends of the Parks}, 786 N.E.2d at 163, 164.
\end{itemize}
The importance of formal dedications in determining whether or not public parks are protected under the public trust doctrine was underscored by an Illinois Appellate Court decision finding the doctrine inapplicable to a parcel of land that was coded on the city land use plan as “Public Park/Open Space.” 73 There had never been a formal dedication of the property as a public park and the court characterized the property as “an empty lot with drainage improvements.” 74

C. New York

New York has perhaps gone furthest in enforcing the public trust doctrine with respect to public parks. 75 In Friends of Van Cortlandt Park v. City of New York, the State’s highest court held that the city of New York could not construct a water treatment plant in a public park because it had not received “the direct and specific approval of the State Legislature, plainly conferred.” 76 This was true despite the recognition by the court that “the water treatment plant plainly serves an important public purpose,” and the fact that the diversion would only be temporary. 77 The court quoted an earlier case where a New York court invalidated a ten-year lease of a building in Central Park in explaining the absolute prohibitions against alienation or diversion of park space by park commissioners: “[Central Park] must be kept free from intrusion of every kind which would interfere in any degree with its complete use for this end [as a public park].” 78

The question of what qualifies as a “park use” was addressed in 795 Fifth Avenue Corp. v. New York, an action challenging a park commissioner’s decision to allow construction of a restaurant pavilion near the southeast corner of Central Park. 79 The court held that this use did not violate the public trust doctrine and that it was within the powers granted to the commissioner by the legislature because it

74 Id. at 174.
75 In New York, the public trust doctrine as it applies to parks is codified in General City Law section 20: “the rights of a city in and to its waterfront, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places, are hereby declared to be inalienable.” N.Y. Gen. City Law § 20 (2003).
77 Id. at 1054–55.
78 Id. at 1053 (quoting Williams v. Gallatin, 128 N.E. 121, 123 (N.Y. 1920)).
qualified as a “park use,” and thus the park commissioner’s plan “merely involve[d] a change from one proper park use to another.”

The court concluded that the proposed structure was a park use because it “offer[ed] substantial satisfactions to the public, which would only be possible in a park setting.” This reasoning was explained through analogy to other park uses that could exist outside the park, such as ice skating or Shakespearean theatre, but were enhanced by location inside the park.

With respect to the proposed pavilion, the court noted that “the savor of a meal or evening coffee, a snack or an aperitif, in the park setting is a unique one.” The court dismissed the idea that the elimination of green space implied a violation of the public trust, stating that the “transformation of parklands from their natural state to other park uses—e.g., into recreation areas, such as tennis courts and bridle paths, bandstands, beaches or open-air theatres—does not involve a violation of park purposes.”

Interestingly, the court also discussed the design and character of the structure as a relevant factor. In enthusiastic praise, the court stated that the proposed pavilion had “a ‘feel’ to it—which expresses joy, openness and light, and, according to the expert testimony, it is of a type which has long been found as part of parks in this country as well as western Europe. . . . It is as natural to the park as a boat house is to a lake.” As a final endorsement, the court stated that “[i]n all likelihood it will be considered in the future as one of the finest of its kind in the United States.”

Similar to Illinois courts, New York courts attach significance to formal dedications in determining whether the public trust doctrine applies. This was demonstrated in a recent controversy arising out of the city of New York’s plan to use community gardens as sites for the development of affordable housing. The trial court dismissed the action to prevent the diversion on the grounds that “community gardens are not considered dedicated Parkland pursuant to the Public Trust Doctrine.” In its decision, the court explained the many ways

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80 Id. at 968.
81 Id. at 969.
82 Id.
83 Id.
84 Id. at 968.
86 Id.
87 Id.
89 Id.
parks could be dedicated and become subject to the public trust doctrine, such as by private donation, formal public declaration, and “implied” dedication where “there is evidence of an unequivocal intent on the part of the municipality . . . to abandon the property and devote it to public use.”

The court noted that “an inference that a dedication has taken place may properly be drawn where the land was specifically purchased with the intention of constructing a park and the changes were indicated on City maps and the record map.” However, the court found no evidence that the city had taken such actions, noting that “[t]here have been no changes to any maps or public records.” This was despite the fact that the city “assisted with the care and security of these gardens.”

D. Massachusetts—Prior Public Use Doctrine

While the Massachusetts courts have not explicitly applied the public trust doctrine to parklands, at least one commentator has noted that the Massachusetts courts have applied “public trust principles” to parks through its application of the prior public use doctrine. While different in name, this doctrine has substantially the same requirements for alienating or diverting public parks to other uses.

The prior public use doctrine is rooted in the idea that cities are administrative conveniences of the state. An important consideration in deciding if the prior public use doctrine applies is whether the use of the property is one that is classified as a proprietary or governmental function of the local government. Property held in the proprietary capacity of a municipality “is not subject to the unrestricted authority of the Legislature, and no person can deprive it of such property rights against its will, except by the exercise of eminent domain with payment of full compensation.” Conversely, property held by the municipality in its governmental capacity “is subject to

90 Id. (citations omitted).
91 Id.
92 Id.
93 Id.
95 See Higginson v. Slattery, 99 N.E. 523, 524 (Mass. 1912) (“Cities and towns are territorial subdivisions of the State created as public corporations for convenience in the administration of government. They exercise only the powers which have been conferred by express enactment of the Legislature or by necessary implication from undoubted prerogatives vested in them.”).
96 Id. at 525.
legislative control. It may be transferred to some other agency of government charged with the same duties, or it may be devoted to other public purposes.”97 The maintenance of public parks is considered a governmental function and therefore subject to the authority of the legislature.98 The reasoning behind this classification was spelled out in Higginson v. Slattery:

[T]he dominant aim in the establishment of public parks appears to be the common good of mankind rather than the special gain or private benefit of a particular city or town. The healthful and civilizing influence of parks in and near congested areas of population is of more than local interest and becomes a concern of the state under modern conditions. . . . We should hesitate to say that the state would be powerless to exert compulsion if a city or town should be found so unmindful of the demands of humanity as to fail to provide itself with adequate public grounds.99

Similar to the public trust doctrine applied to parklands in Illinois and New York, “plain and explicit legislation” is required in Massachusetts to divert the parkland to another “inconsistent public use.”100 The court in Higginson granted an injunction prohibiting the construction of a school in the Back Bay Fens area after finding that “statutes upon which the respondents rely do not show a legislative intent to permit the erection of the kind of building here proposed.”101 This decision was made despite the fact that the legislature had passed a statute allowing for the “erection of a building for the High School of Commerce within the limits of the Back Bay Fens.”102 The court arrived at its seemingly untenable conclusion on the basis that about twenty-one percent of the proposed building would be utilized as administrative offices.103 This underscored how the requirement for explicit legislation has been more “stringently applied” with respect to public parks than to other uses because of “[t]he policy of the Commonwealth has been to add to the common-law inviolability

97 Id.
98 See id. at 525–26.
99 Id. at 527.
101 Higginson, 99 N.E. at 527.
102 Id. at 528 (internal quotation marks omitted).
103 Id.
of parks express prohibition against encroachment by buildings, highways, steam or street railways."

Formal dedications are also important in determining the protections afforded to public parks in Massachusetts. In *Muir v. City of Leominster*, for example, the court held that a parcel that had been used for several decades as a playground was not subject to the prior public use doctrine because it had not been “devoted to one public use,” largely because there had been “no formal dedication by the city of this area as park land.”

Private charitable dedications to park use are governed somewhat differently and create generally greater restrictions on alienation.

**IV. Public Forum Issues**

The public forum doctrine operates to guarantee First Amendment rights of free speech. Like the public trust doctrine and the prior public use doctrine, it limits the ability of government to control and make changes to publicly-owned property.

**A. Development—Linkage to Public Trust**

The public forum doctrine is a relatively recent incarnation. Some have pinpointed its origin to an article written by Professor Harry Kalven in 1965; the Supreme Court has identified its 1939

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104 See *id.* at 526. There is also a statutory restriction on buildings in public parks:

Land taken for or held as a park under this chapter shall be forever kept open and maintained as a public park, and no building which exceeds six hundred square feet in area on the ground shall be erected on a common or park dedicated to the use of the public without leave of the general court; but, except in parks in Boston and in parks comprising less than one hundred acres in extent, structures for shelter, refreshment and other purposes may be erected of such material and in such places as, in the opinion of the fire commissioners, if any, do not endanger buildings beyond the limits of such park. The superior court shall have jurisdiction in equity, upon petition of not less than ten taxable inhabitants of the city or town in which such common or park is located, to restrain the erection of a building on a common or park in violation of this section.


decision *Hague v. Committee for Industrial Organizations* as the beginning of the doctrine’s formation.\(^{108}\)

The parallels between the conceptual framework of the public forum doctrine and the public trust doctrine are discernible early in the public forum doctrine’s development. For example, Kalven describes “a kind of First-Amendment easement” on certain types of public property,\(^{109}\) which sounds similar to the *jus publicum*. Likewise, in the following well-known and frequently cited passage from *Hague v. Committee for Industrial Organizations*, public trust is linked with speech:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.\(^{110}\)

**B. What Is a Public Forum?**

While public forum issues most often arise with respect to publicly-owned property, a public forum can also exist on privately-owned property.\(^{111}\) Moreover, not all publicly-owned property is a protected public forum.\(^{112}\)

There are three general categories of public forums: (1) the traditional or “quintessential” public forum; (2) the designated public forum; and (3) the nonpublic forum.\(^{113}\) While this Article concerns itself primarily with defining traditional public forums, a brief sketch of


\(^{109}\) See Kalven, *supra* note 107, at 13; see also Haggerty, *supra* note 107, at 1128.


\(^{111}\) See, e.g., *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd.*, 257 F.3d 937, 948 (9th Cir. 2001).

\(^{112}\) *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (“The First Amendment does not guarantee access to property simply because it is owned or controlled by the government . . . . The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”) (internal quotations omitted).

\(^{113}\) See *id*. at 45–46.
these three classes and their general characteristics may still be helpful. Traditional public forums are defined as places that have a long tradition of being places of free expression and assembly.\textsuperscript{114} Public streets and parks are the most important examples of traditional or quintessential public forums.\textsuperscript{115} In these areas, the ability “of the State to limit expressive activity [is] sharply circumscribed.”\textsuperscript{116} Designated public forums are properties on which, by some voluntary act, the government has allowed free public expression.\textsuperscript{117} Examples of such designated public forums are meeting facilities, school board meetings, and municipal theaters.\textsuperscript{118} Nonpublic forums are essentially public properties that are neither traditional nor designated public forums.\textsuperscript{119} In nonpublic forums, speech restrictions only need to be “reasonable.”\textsuperscript{120}

C. Extinguishing Forums

Justice Kennedy, in his concurrence in \textit{International Society for Krishna Consciousness, Inc. v. Lee}, affirmatively answered this basic question of whether a public forum can be extinguished:

In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use. Otherwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require.\textsuperscript{121}

While there may be no such thing as a permanent public forum, a State’s actions must conform to a certain standard in order for the forum to be extinguished.\textsuperscript{122} Traditional public forums—such as parks and streets—are “defined by the objective characteristics of the

\begin{itemize}
  \item \textsuperscript{114} Id. at 37.
  \item \textsuperscript{115} See Frisby v. Schultz, 487 U.S. 474, 480–81 (1988) (rejecting an argument that these were clichés); \textit{Hague}, 307 U.S. at 515–16.
  \item \textsuperscript{116} \textit{Perry Educ. Ass’n}, 460 U.S. at 45.
  \item \textsuperscript{117} See id.
  \item \textsuperscript{118} See id. at 45–46.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id. at 46.
  \item \textsuperscript{121} 505 U.S. 672, 699–700 (1992).
  \item \textsuperscript{122} See First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114, 1124 (10th Cir. 2002) (“The government cannot simply declare the First Amendment status of property regardless of its nature and its public use.”).
\end{itemize}
property.”123 Whether or not a given area is considered a public forum “hinges on a case-by-case inquiry in which no single factor is dispositive.”124 In Utah Gospel Mission v. Salt Lake City Corp., the Court of Appeals for the Tenth Circuit refuted the argument that private property that was held open to the public should always be considered a public forum:

Such an argument could be made with respect to almost every retail and service establishment in the county, regardless of size or location. In addition, . . . to find state action based upon the mere fact that private property was open to the public, would constitute an unwarranted infringement of long-settled rights of private property owners protected by the Fifth and Fourteenth Amendments . . . . [Furthermore, it] would transform many religious property owners into state actors, a conclusion without any support in the case law. Thus, Plaintiffs’ allegations that the Plaza serves as a park where the public is invited to gather, relax, and enjoy the open space are irrelevant.125

There are three primary factors that courts look to in determining whether a forum has been extinguished: (1) the ownership interest retained by the government; (2) the changes made to the physical nature or purpose of the property; and (3) the property’s function.

1. Ownership Interest Retained by the Government

Whether or not the government retains a property interest is an important factor in determining if a public forum has been extinguished. Easements are constitutionally protected property interests and the retention of a public easement can perpetuate a public forum.126 The importance of property interests in forum analysis was underscored by a series of recent cases respecting the forum status of the plaza fronting the headquarters of the Church of Jesus Christ of Latter-day Saints (Church) in Salt Lake City.127 Prior to becoming a

123 Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 677 (1998); see also First Unitarian Church, 308 F.3d at 1125.
126 See First Unitarian Church, 308 F.3d at 1122–23.
plaza, this area had been a section of Main Street and a traditional public forum. The Church negotiated for the purchase of this property from the City. Under the terms of the conveyance, the City retained a pedestrian easement for public passage through the plaza. In the first round of litigation concerning the forum status of this plaza, the Court of Appeals for the Tenth Circuit determined that, despite terms in the conveyance specifying that the easement was not a public forum, a traditional public forum survived on the portion of the plaza covered by the easement.

After this adverse decision, the City and the Church negotiated a new deal whereby the City conveyed its easement to the Church at a price that was a multiple of the appraised value. After this deal, the U.S. District Court for the District of Utah found that the relinquishment of the easement helped extinguish the public forum, concluding that “[t]he Property at issue is now an entirely private, Church-owned Plaza devoid of any government property interests that could possibly create a public forum.”

2. The Importance of Physical Characteristics

Physical characteristics and design of space are important considerations in forum analysis. For instance, in Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc., the U.S. District Court for the District of Massachusetts held that the Faneuil Hall Marketplace, Inc., a private shopping mall, was a private forum.

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128 See First Unitarian Church, 308 F.3d at 1117.
129 The reservation provided in pertinent part:

Pedestrian Access and Passage: Subject to the conditions, limitations, and restrictions set forth in section 2 hereinbelow, Grantor reserves an easement over and across the surface of the Property for pedestrian access and passage only . . . . Grantee shall not erect any perimeter fences or gates on the Property along the North Temple or South Temple rights of way . . . . Grantor may allow the general public to use this easement for pedestrian access and passage only, but all use of this easement shall be subject to the conditions, limitations, and restrictions described hereinbelow.

Id. at 1118 (emphasis added) (omissions in original). The City also retained a right of reverter conditioned upon the maintenance of a view corridor through the plaza. In the second round of litigation, the court held that this right of reverter was a future interest that was not compensable under the Fifth Amendment and through analogy concluded that it was not a sufficient property interest for the creation of a public forum. Utah Gospel Mission, 316 F. Supp. 2d at 1232–35.

130 First Unitarian Church, 308 F.3d at 1118, 1132–33 (“Right to Prevent Uses Other Than Pedestrian Passage: Nothing in the reservation or use of this easement shall be deemed to create or constitute a public forum, limited or otherwise, on the Property.”).

131 Utah Gospel Mission, 316 F. Supp. 2d at 1214, 1225, 1228.
132 Id. at 1235.
District Court for the District of Massachusetts noted the lack of clearly distinguishable boundaries between the publicly-owned and privately-owned property as relevant to its forum analysis:

The similarity of the Marketplace to a municipal park is underscored by the absence of any discernable boundaries between the Marketplace and the immediately-adjacent, public areas, such as Faneuil Hall Square. The absence of such boundaries has proven to be critical in distinguishing between purely private shopping centers and shopping centers to which the Constitution applies.¹³³

Similarly, the Court of Appeals for the Sixth Circuit recently looked at the physical character of the sidewalk as one of “two key reasons” why the sidewalk in question was a public forum.¹³⁴ The case involved the status of a privately-owned sidewalk that ran through a sports complex housing the Cleveland Indians baseball stadium.¹³⁵ Specifically, the court noted how it “blends into the urban grid, borders the [public] road, and looks just like any public sidewalk.”¹³⁶ The court discounted the importance of landscaping that “roughly delineated” some portions of the sidewalk from the public realm, concluding that “the average observer would be unfamiliar with the geographic significance of this sporadic vegetation.”¹³⁷ Apparently, this conclusion was buttressed by the fact that “the public and Gateway sidewalks are made of the same materials and share the same design.”¹³⁸

In some cases, a physical transformation may be so dramatic as to extinguish the public forum in property still owned by the government. For example, in *Hawkins v. City & County of Denver*, the Court of Appeals for the Tenth Circuit held that in constructing a covered walkway leading to a performing arts complex, “Denver has altered the physical characteristics and function of the former public street sufficiently to remove its status as a traditional public forum.”¹³⁹ The court noted that “[t]he government may, by changing the physical

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¹³⁵ Id.
¹³⁶ Id.
¹³⁷ Id.
¹³⁸ Id.
¹³⁹ Hawkins v. City & County of Denver, 170 F.3d 1281, 1288 (10th Cir. 1999).
nature of its property, alter it to such an extent that it no longer retains its public forum status.”\footnote{Id. at 1287.}

3. Function

As a criterion for determining whether a public forum survives, “function” is closely aligned with questions about the modification of physical characteristics. In the above-described case relating to the sidewalk outside the Cleveland Indians’ stadium, the court looked to how the sidewalk functioned as “a public thoroughfare” as one of the “key reasons” the sidewalk remained a public forum.\footnote{Id.} The court noted that “[b]y design, the Gateway Sidewalk contributes to the City’s downtown transportation grid and is open to the public for general pedestrian passage. Indeed, rather than leading to the rest of the Complex, the Gateway Sidewalk encircles it as a through route.”\footnote{United Church of Christ, 383 F.3d at 452.}

Conversely, the court in \textit{Hawkins} noted that the Galleria did not “form part of Denver’s automotive, bicycle or pedestrian transportation grid, for it is closed to vehicles, and pedestrians do not generally use it as a throughway to another destination. Rather, the Galleria’s function is simply to permit ingress to and egress from the . . . various complexes.”\footnote{Id.}

\textbf{Conclusion}

The public trust doctrine and public forum doctrine both imply that there is infused in certain property a public interest that may only be extinguished when certain conditions are met. While the two doctrines diverge in defining these conditions—for example, legislative authority is an important consideration under the public trust doctrine but not at all under the public forum doctrine—the central notion of a public right that the government is bound to respect is found in both.

In her article \textit{The Comedy of the Commons},\footnote{Hawkins, 170 F.3d at 1287.} Carol Rose offers a way of reconciling the two doctrines. First, she argues that “there lies outside purely private property and government-controlled ‘public property’ a distinct class of ‘inherently public property’ which is fully
controlled by neither government nor private agents.” Rose explores the apparent incongruity between “inherently public property” and the classical economic property rights theory, which holds that property rights exist because the right to exclude encourages investment and efficiency and avoids the much celebrated “tragedy of the commons.” Rose ultimately concludes that “commerce was clearly the central object” of the public trust doctrine and other nineteenth century doctrines that created “inherently public property,” and that these doctrines are consistent with classical economic property rights theory. This is because commerce, “of all activities, is ever more valuable as more participate.” In other words, since “we all become exponentially richer as more of us truck, barter, and exchange,” barriers to participation, such as private property, are considered undesirable from an efficiency standpoint. Given the focus throughout on economics, it is somewhat surprising that Rose concludes her article with a discussion of “sociability.” This discussion builds on the premise that wealth creation was not the sole objective of commerce in the nineteenth century; Rose gives several examples of Enlightenment and nineteenth century thinkers speaking to the value of commerce as “an educative and socializing institution.” Rose goes further, stating that “[c]ommerce still seems to be our quintessential mode of sociability,” because “[d]espite its appeal to self-interest, it also inculcates rules, understandings, and standards of behavior enforced by reciprocity of advantage.”

Rose then outlines how the same “returns to scale” argument that justifies “inherently public property” as a better means to wealth creation can be used to justify it as a better means of “socialization,” noting that “perhaps our most important ‘returns to scale’ involve activities that are somehow sociable or socializing—activities that allow us to get along with each other.” Identifying free speech as a socializing institution, Rose sees a connection between the public trust doctrine and the public forum doctrine. Drawing on Justice Brennan’s

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145 Id. at 720.
146 Id. at 711–12, 717.
147 Id. at 774.
148 Id.
149 Id. (internal quotation marks omitted).
150 Rose, supra note 16, at 775.
151 Id. at 775.
152 Id. at 776.
153 Id.
154 See id. at 778.
dissent in *Members of City Council v. Taxpayers for Vincent*, Rose states that Brennan’s argument that posting signs on telephone polls should be allowed “could be stated as a public trust concept: this property is needed for the public’s political communication, thus governments hold the property in ‘trust’ for this communication, and have only limited abilities to divest the public of its trust rights.”\(^{155}\) For Rose, “inherently public property” is not a static concept but, rather, it is tied to changing notions about what constitutes “valuable socializing institutions.”\(^{156}\)

Public parks represent an important nexus between the public trust and public forum doctrines. Rose discusses in passing how the socialization rationale might apply to protecting public parks for reasons other than commerce and free speech, noting that Frederick Law Olmsted had argued that recreation can be a socializing and educative influence, particularly helpful for democratic values. Thus rich and poor would mingle in parks, and learn to treat each other as neighbors. Parks would enhance public mental health, with ultimate benefits to sociability; all could revive from the anti-social characteristics of urban life under the refining influence of the park’s soothing landscape.\(^{157}\)

It is clear that parks are protected in ways that other public uses are not. Parks, however, are only one of many valuable uses for public lands and their protection is not absolute. Furthermore, their effectiveness in terms of fostering socialization or allowing for recreation or free speech is largely influenced by the extent to which they are used. While an unused park may still be an asset from an environmental standpoint—giving lungs to the city or helping preserve groundwater quality by reducing the amount of impermeable surface—it does not add much in terms of socialization.\(^{158}\) If Rose’s socialization thesis is correct in explaining inherently public property, the question then emerges as to how different modes of socialization,

\(^{155}\) Id.

\(^{156}\) Rose, supra note 16, at 777–78.

\(^{157}\) Id. at 779 (footnotes omitted, but citing in particular Frederick Law Olmsted, *Public Parks and the Enlargement of Towns* (1870), reprinted in *Civilizing American Cities: A Selection of Frederick Law Olmsted’s Writings on City Landscapes* 65–66, 74–81, 96 (S. Sutton ed., 1971)).

\(^{158}\) While environmental protection has been offered as a rationale for the public trust doctrine, this was not its historical origin and has no potential in explaining the public forum doctrine.
such as commerce, free speech, and cultural institutions, should be balanced in the city. To a large extent, this is what Boston has been grappling with in recent years in deciding how to use the twenty-seven acres of surface area reclaimed by the Big Dig.

While it would not be accurate to say that parks represent permanent or inalienable interests of the public, we can still call them “inherently public property.” Government, especially local government, should be ever aware of the public’s interest in the land and be mindful of how the law protects this interest before proceeding with plans to alienate or change the use of publicly-owned property. The public interest may be indelible.