To Have and Have Not -- Nantucket, Martha's Vineyard, and the Public Trust Doctrine: Remembering the Land that Time Forgot

Christopher Coli McMahon
Abstract: The Public Trust Doctrine, an ancient mandate under which the sovereign holds unique natural resources in trust for the benefit of the general public, has been adopted by the United States as a staple of American property law. While the federal government is the ultimate trustee of these lands, the states may flexibly interpret and administer this law to maximize the public benefit derived from trust resources. For instance, although most states own the land between the high and low tide lines in trust for its citizens, Massachusetts bases its common law interpretation of the Doctrine on the Colonial Ordinance of 1641-41, a statute passed by the early settlers of the commonwealth providing for private ownership of the ocean flats. However, the current application of the Doctrine to the beaches of Martha’s Vineyard and Nantucket directly contradicts the overall intent of the Doctrine. Although the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts have reasoned otherwise, there are strong historical, legal, and public policy arguments that these islands are instead subject to the traditional common law application of the Doctrine.

But look! here come more crowds, pacing straight for the water, and seemingly bound for a dive. Strange! Nothing will content them but the extremist limit of land... They must get just as near the water as they possibly can without falling in. Tell me, does the magnetic virtue of the needles of the compasses of all these ships attract them thither?

—Herman Melville

* Articles Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2003-04. This note was possible only through the invaluable assistance of Professor Zygmunt Plater, Professor of Law at Boston College Law School, who inspired this topic; Kelly Regan and Drew Skroback, who conducted some preliminary research regarding the subject; and Matthew Fee and Finn Murphy, members of the Nantucket Board of Selectmen.

1 HERMAN MELVILLE, MOBY-DICK, OR, THE WHALE 2 (Luther S. Mansfield & Howard P. Vincent eds., Hendricks House 1952) (1851).
INTRODUCTION

Massachusetts’s version of the public trust doctrine (the Doctrine) and William “Billy” Bulger: they are two Yankee phenomena as unique as they are controversial. Therefore, it is perhaps fitting that several years ago the two clashed in a conflict representing the opposite ends of the spectrum of this increasingly litigated area of property law concerning public use of private beachfront property in the commonwealth.

President of the Massachusetts Senate at the time, Mr. Bulger attempted to briefly escape the cares of the state house by taking a dip off the coast of Nantucket. Much to his chagrin, however, he was abruptly interrupted and chased off what proved to be a private beach. Not to be deterred, he responded to this affront by attempting to amend the law concerning public use of private beaches in the commonwealth, an action that was ultimately unsuccessful.

This anecdote illustrates a little-known and unique facet of Massachusetts law concerning the Doctrine, an ancient law that protects public access to certain unique natural resources, such as shorelines, against exclusion by private property owners. While the public’s right to access such resources by traversing private property is an issue of much dispute, most states own the flats—that portion of the beach

---

2 William Bulger served as the outspoken President of the Massachusetts Senate from 1978 to 1996, and more recently held the post of President of the University of Massachusetts. See Morning Edition: Analysis: President of the University of Massachusetts Resigns (NPR radio broadcast, Aug. 7, 2003), 2003 WL 4859202. Always a lightning rod for controversy, Mr. Bulger was recently entangled in a federal probe concerning his ties to the illegal activities of his brother, James “Whitey” Bulger, head of the notorious Winter Hill Gang, an organized crime syndicate formerly based in South Boston. See J.M. Lawrence, Bulger Hearing Will Be Public, Fed Panel Won't Meet Behind Closed Doors, BOSTON HERALD, May 17, 2003, at 5. As a result of mounting public pressure, Mr. Bulger announced his resignation from the presidency of the University of Massachusetts on August 6, 2003. See Patrick Healy, Bulger Set to Resign Today: Said to Believe Staying Would Divide UMass, BOSTON GLOBE, Aug. 6, 2003, at A1.


4 See id.

5 Id.

6 Id.


8 J. INST. 2.1.1; JESSE DUKEMENIER & JAMES E. KRIER, PROPERTY 818 (4th ed. 1998); see COLONIAL ORDINANCE, supra note 7, at 35.

9 See, e.g., Mathews v. Bay Head Improvement Ass’n, 471 A.2d 355, 358 (N.J. 1984). In this case the public’s trust right to use the flats was a foregone conclusion. See id. The con-
between the mean high- and low-tide lines—in trust for use and enjoyment by the public as beneficiaries of the public trust.\textsuperscript{10}

The Doctrine, however, is also a flexible and dynamic tool that may be employed to maximize the public benefit derived from trust resources.\textsuperscript{11} As such, it may be modified in the face of the peculiar, time-specific challenges faced by particular societies in order to achieve this end.\textsuperscript{12} Consistent with this flexibility, the Commonwealth's unique application of this ancient mandate is based on the Colonial Ordinance of 1641–47 (the Ordinance), a statute enacted in the seventeenth century by the Massachusetts Bay Colony.\textsuperscript{13} This law modified the Doctrine, a cornerstone of the English common law concerning property rights, in response to the economic realities of the settlement.\textsuperscript{14} The legacy of the Ordinance still affects Massachusetts today, and has been incorporated into the commonwealth's common law\textsuperscript{15} and statutory codification of the Doctrine.\textsuperscript{16} Therefore, as opposed to virtually every other state in the Union,\textsuperscript{17} private beachfront owners in the commonwealth possess a fee title down to the low watermark.\textsuperscript{18} As a result, in most cases these private owners are within their rights in ejecting the general public, including its elected officials, from these trust lands.\textsuperscript{19}

\textsuperscript{12}See id. at 632.
\textsuperscript{13}See, e.g., Opinion of the Justices, 313 N.E.2d 561, 565 (Mass. 1974) (examining the common law concerning the Ordinance and stating that "it has long been interpreted as effecting a grant of the tidal land to all coastal owners in the Commonwealth.").
\textsuperscript{15}See, e.g., Opinion of the Justices, 313 N.E.2d at 565–66.
\textsuperscript{17}Mitchell W. Feeney, Regulating Seaweed Harvesting in Maine: The Public and Private Interests in an Emerging Marine Resource Industry, 7 Ocean & Coastal L.J. 329, 338 (2002). Originally incorporated under the jurisdiction of the Massachusetts Bay Colony, Maine adopted the provisions of the Colonial Ordinance of 1641–47 (the Ordinance) as its common law concerning the application of the public trust doctrine (the Doctrine). Id. After achieving statehood, the courts continued to apply Massachusetts’s version of the Doctrine, and Maine is the only other state besides Massachusetts to do so today. Id.
\textsuperscript{18}See, e.g., Opinion of the Justices, 313 N.E.2d at 568.
\textsuperscript{19}See id. at 568; Schweitzer, supra note 3, at B1.
This right has led to a somewhat contradictory state of affairs, especially when considering the Doctrine’s emphasis on protecting the public’s rights to enjoy resources, such as ocean beaches, and the emergence of recreation as a protected trust interest. The contradictions are further highlighted in view of the appeal of the beaches on the islands of Nantucket and Martha’s Vineyard as attractive tourist destinations that draw millions of visitors annually.

Local officials on Nantucket have recognized this situation, and the battle between private beachfront property owners and would-be sunbathers has become a consistent source of tension on both this island and Martha’s Vineyard. The Nantucket Board of Selectmen’s most recent attempt to address this dilemma is the proposed One Beach initiative, designed to increase public access to the island’s privately-owned beaches. Under this initiative, private beach owners would grant easements in return for tax benefits in the form of reduced property assessments on the local level, and income tax deductions for these charitable contributions on the federal level. This plan has been met with mixed reactions among the island community and is likely to face substantial legal challenges in the months and years ahead.

It is possible, however, that the battle to reclaim the beaches of Nantucket may already be half won. The Ordinance was enacted in the mid-seventeenth century, and the islands were not incorporated into

21 See infra notes 70–71 and accompanying text; see also Serena Williams, Sustaining Urban Green Spaces: Can Public Parks Be Protected Under the Public Trust Doctrine?, 10 S.C. ENVTL. L.J. 23, 24 (2002).
23 Interview with Mathew Fee, Nantucket Board of Selectmen, on Nantucket, Mass. (Apr. 3, 2002). Mr. Fee indicated that disputes between private beach owners and would-be sunbathers arise on Nantucket at least once every ten years. Id.
24 Nantucket, Mass., Ordinance One Beach, Once and For All (Proposed 2003). Local authorities see the One Beach initiative as a solution to beach access disputes. The proposal would allow owners to retain title to their land and therefore avoid costly eminent domain actions on these properties, a course of action local officials are reluctant to pursue. Id. In addition, the town asserts that this beach access scheme will, in effect, merely solidify the present state of affairs on Nantucket, since private beach owners on the island have generally proven themselves amenable to permitting public access to their beaches. Id. Town officials estimate that it will take approximately two to three years to secure all of the easements and settle all of the takings claims, and are reserving their judgment as to the cost of the project, which they say will depend on various legal costs and the number of challenges mounted by landowners. Id.
26 See Colonial Ordinance, supra note 7, at 35.
present-day Massachusetts until approximately fifty years later. This situation begs the question whether the islands’ beaches are instead subject to the traditional common-law application of the Doctrine, practiced on almost every beach in the country, which, while not affecting private-property rights in the sand above the high-tide line, nevertheless provides for state ownership of the ocean flats. This question is particularly relevant when considered in light of the following factors: (1) the independent history of Nantucket and Martha’s Vineyard; (2) Massachusetts Supreme Judicial Court (SJC) precedent regarding other trust resources in the state; (3) the overall purpose of the Doctrine and its recently expanding scope; (4) the mandates of the United States Supreme Court regarding the states’ duty to protect the public’s trust interests; and (5) the unique trust needs of the islands as compared to the rest of the state. According to the Court and the SJC, however, the answer is clear. These courts have unequivocally indicated that the Ordinance is the established common law of the commonwealth, and therefore applies to the entirety of its ocean flats.

This Note argues, however, that these decisions are misguided, and calls for a further modification of the public’s trust rights as they concern the islands of Nantucket and Martha’s Vineyard. Part I explores the ancient origins and English common law evolution of the Doctrine. It then examines the Doctrine’s modification and development in colonial and post-colonial Massachusetts. Next, it explores federal oversight regarding the Doctrine’s administration on the state level and the increasing range of its protections. This Note will then provide an overview of the judicial decisions supporting the application of the peculiar provisions of the Ordinance to the commonwealth’s ocean flats as well as its great ponds, another trust resource addressed by the law. Part II lays the framework for an examination of the validity of applying this ancient statute to the flats of Nantucket and Martha’s Vineyard by examining the islands’ unique history and economic developments in relation to the rest of colonial Massachu-

29 See Gautam, supra note 22, at 19–23.
31 Great ponds in Massachusetts are defined as “ponds containing in their natural state more than ten acres of land.” MASS. GEN. LAWS. ch. 91, § 35 (2002).
setts at the time the Ordinance was enacted, as well as their current economic realities.

Part III then applies SJC precedent regarding property rights in trust resources, the current federal framework regarding the Doctrine's administration on the state level, as well as the traditional purpose and expanding scope of this ancient canon regarding property rights, to the application of the Ordinance to the beaches of Nantucket and Martha’s Vineyard today. Applying the factors discussed in Parts I and II, Part III argues that the present application of this colonial statute to Nantucket and Martha’s Vineyard has resulted in an unnecessary violation of both the letter and spirit of the Doctrine on the islands. It asserts that this violation arises from both the SJC’s inconsistent rulings regarding the applicability of the Ordinance to the commonwealth’s trust resources, and inappropriate judicial usurpation of the authority to define public rights protected under the Doctrine. This Note will demonstrate that this misapplication is based on a fundamental misunderstanding regarding the flexible nature of the Doctrine that allowed for its common law modification in the seventeenth century. Lastly, although it will not prescribe the precise method by which to reestablish the correct balance of trust interests on the islands, this Note will nevertheless assert that the state legislature is well within its authority to further modify the Doctrine as applied to the beaches of Nantucket and Martha’s Vineyard in order to reclaim the flats along their coastlines. Although such a modification would not permit the public to enjoy the sands of these beaches above the high-tide line, it would be a substantial victory in the fight to reclaim the public’s trust rights in the flats on the islands consistent with the law’s true intent.
I. ANCIENT ORIGINS, ENGLISH COMMON LAW DEVELOPMENTS, AND APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE NEW WORLD AND POST-COLONIAL AMERICA

A. The Ancient Roots of the Public Trust Doctrine

Thus, the following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the sea-shore . . . for these are not, like the sea itself, subject to the law of nations . . . [These] cannot be said to belong to any one as private property.

—Justinian

So wrote Justinian approximately 1500 years ago in what is likely the first articulation of the public trust doctrine. Throughout history, the shorelines have been recognized as a special form of property, of inherent value to the public at large, which has certain vested rights to make use of this resource for fishing, fowling, navigation, and various other activities central to human existence. Since Roman society was heavily dependent on the sea for commerce and sustenance, access to beaches was considered indispensable to one’s livelihood. Therefore, "the Romans adopted and refined the Greek notion that marine resources were exempt from private property ownership," leading to the codification of the concept in the Institutes of Justinian.

B. English Common Law Developments in the Public Trust Doctrine

With the fall of the Roman Empire came a corresponding disregard of the tenets of the Doctrine. Consequently, shorelines fell into the hands of private owners as Europe descended into the Dark Ages. In medieval England, the King claimed ownership of all marine resources, and private rights thereto were sold to individual subjects. By the end of the twelfth century, however, the public became

32 J. Inst. 2.1.1.
34 See Fernandez, supra note 11, at 626–27.
35 See J. Inst. 2.1.1; see also Lahey, supra note 14, at 11-2.
36 Lahey, supra note 14, at 11-2.
37 See id.
38 Id.
39 Id.
dissatisfied with the English system of feudal land ownership. In responding to this situation, the Magna Carta "restored some of the public's rights in tidelands," and the tenets of the Doctrine re-emerged as trust rights were once again recognized as a protectable public property interest. From this point on, title to public trust land, *jus privatum*, "was held by the King, while dominion over the lands, *jus publicum*, was vested in the Crown in trust for the benefit of the public." *Jus privatum* comprises the lesser title to trust lands encompassing the right of the sovereign to alienate them subject to the public's inherent *jus publicum* rights. *Jus publicum* consists of the dominant title and protects the public's right to access and use trust lands for activities such as navigation, commerce, and fishing. The Doctrine subsequently appeared in the writings of Bracton, was indoctrinated into the English common law system, and is incorporated as a staple of property law in modern America.

C. Development of the Public Trust Doctrine in the United States

1. Massachusetts

a. Colonial Development

In the seventeenth century, the first English settlers of present-day Massachusetts established the colonies of Plymouth and Massachusetts Bay, bringing with them the basic common law tenets of the English legal system, including those regarding the Doctrine. In fact, Massachusetts Bay Colony was the first American entity to codify this law with the passage of the Colonial Ordinance of 1641–47 (the Ordinance). This statute, however, provided for private ownership of shoreline property down to the low-water mark in the settlement, and in this manner modified the traditional common law regarding prop-

---

40 Id.
41 Lahey, supra note 14, at 11-2; see Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842) (citing English common law precedent and reasoning that, since the Magna Carta, the king could not alienate trust lands to individual subjects).
42 See Langella, supra note 33, at 182.
43 Id. at 183.
44 Id.
45 See id. at 182–83.
46 See Storer v. Freeman, 6 Mass. (5 Tyng) 435, 438 (1810); see also Lahey, supra note 14, at 11-2, 11-2-1.
47 See id.
property rights in the ocean flats. Specifically, the Ordinance was designed to "encourage private wharf construction and maritime commerce in light of the colony's inability to afford these undertakings." Thus, it "created an exception to the application of the common law to satisfy a particular public need of a temporal nature," based on "the expectation of a public benefit to be derived from the development of the flats for navigation and commerce."

Nevertheless, since use of marine resources was still considered essential to human existence, this statute continued to protect the public's right to engage in activities associated with fishing, fowling, and navigation along the coast and the shorelines of the colony's great ponds. It states in part that "[e]ver[y] . . . householder [s]hall have free fi[s]hing and fowling, in any great Ponds, Bay[s], Coves and Rivers [s]o far as the Sea eb[b]s and flows, within the precincts of the town where thy dwell."

b. Post-Colonial Developments

The Ordinance was annulled with the rest of the Massachusetts Charter after the Revolutionary War. It remained the common law under the new state government, however, and is now loosely codified in chapter 91 of the Massachusetts General Laws, the commonwealth's statutory codification of the Doctrine. Nevertheless, it is important to note that the SJC has held that "the Commonwealth's authority and obligations under Chapter 91 are not precisely coextensive with its authority under the [Doctrine]," and the trust rights in

48 Fernandez, supra note 11, at 631–32.
49 Lahey, supra note 14, at 11-2-1; see Storer, 6 Mass. (5 Tyng) at 438.
50 Fernandez, supra note 11, at 631–32.
51 See COLONIAL ORDINANCE, supra note 7, at 35; Fernandez, supra note 11, at 631–32.
52 See COLONIAL ORDINANCE, supra note 7, at 35; Fernandez, supra note 11, at 631–32.
53 See Fernandez, supra note 11, at 632 (citing Storer, 6 Mass. (5 Tyng) at 438).
56 Fafard, 733 N.E.2d at 71 n.11. Chapter 91 of the Massachusetts General Laws seeks "to strike a balance between the general rights of the public in fishing, fowling and navigation and the reasonable expectations of the landowners." Cooper, supra note 55, at 24. The statute requires that the commonwealth "act to preserve and protect the rights in tidelands of the inhabitants of the commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose." MASS. GEN. LAWS ch. 91, § 2.
Massachusetts have largely evolved through judicial common law interpretations rather than legislative action.57

2. Federal Oversight of the Public Trust Doctrine

Consistent with colonial adoption of the English common law system, stewardship of public trust rights passed from the Crown to the sovereigns of the new nation after the colonies won their independence.58 Due to the dual-sovereignty framework of the newly formed nation, however, the Doctrine was defined differently for the states than for the federal government.59 States retain a somewhat qualified role of sovereign over trust lands, and various jurisdictions administer the Doctrine in differing ways, according to their specific parochial needs.60 It is the federal government, however, that acts as the ultimate trustee over the nation's unique resources. It therefore retains the authority to oversee the Doctrine's administration on the state level in order to ensure the protection of the public's *jus publicum* rights.61

In *Illinois Central Railroad Co. v. Illinois*, the Supreme Court addressed this federal oversight and clearly imposed upon states a

57 See generally Opinion of the Justices, 313 N.E.2d. 561 (Mass. 1974) (relying on centuries old judicial precedent when determining what rights are protected under the Ordinance and Massachusetts's common law regarding the Doctrine).
58 See Langella, supra note 33, at 183.
59 Id.
60 See id.
61 See id. at 183–84. The federal government's authority under the Doctrine was first articulated by the Supreme Court in *Gibbons v. Ogden*, 22 U.S. 1 (1824), in which the Court emphasized the importance of maintaining exclusive federal control over regulating the nation's waterways to facilitate commerce; this federal power became known as the federal navigation servitude. Langella, supra note 33, at 183; Richard J. Lazarus, Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 IOWA L. REV. 631, 637 (1986). Approximately twenty years later, in *Martin v. Waddell's Lessee*, the Court ruled that the thirteen original colonies held title to the navigable waters and shores subject to these limited federal servitudes. 41 U.S. 367, 417 (1842); John A. Duff & Kristen M. Fletcher, Augmenting the Public Trust: The Secretary of State's Efforts to Create a Public Trust Ecosystem Regime in Mississippi, 67 MISS. L.J. 645, 648–49 (1998). Shortly after this decision, the Court held that new states entering the Union would do so on an "equal footing" and would therefore take title to the tidelands and navigable waters within their borders. Duff & Fletcher, supra at 649 (citing Pollard's Lessee v. Hagan, 44 U.S. 212, 222 (1845)). In 1894 the Court affirmed the states' titles to trust land, indicating that they "have the same rights as the original states in the tide waters, and in the lands below the high-water mark, within their respective jurisdictions." Id. (quoting Shively v. Bowlby, 152 U.S. 1, 26 (1894)).
fiduciary duty to protect the public's vested interest in trust lands. According to the majority:

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

The Court further reasoned that, under the Doctrine, if societal conditions change to such an extent that a previously valid alienation of trust lands subsequently becomes counterproductive to the public's overall *jus publicum* interests, such legislative grants may be revoked.

Consequently, in this case the Court upheld the State Legislature's repeal of a previous grant of a fee interest to the Illinois Central Railroad made in 1851, originally meant to facilitate railroad construction on trust lands surrounding Chicago's waterfront. The majority reasoned that this transfer had evolved into a situation in which a private entity received an economic advantage arising from its ownership of trust lands, the public's right to these lands was impaired, and there was no overall benefit conferred upon society that would outweigh this imbalance. Considering the immense commercial value of the land in question, the Court concluded that such an extensive grant to a private railroad was "a proposition that [could not] be defended," and was therefore revocable.

Nevertheless, in *Appleby v. City of New York*, the Court affirmed the authority of state legislatures to alienate both the *jus privitum* title to trust lands, as well as the public's *jus publicum* interest in these resources in certain limited cases. The majority held, however, that

---

64 *Id.* at 455; Hoffman, *supra* note 62, at 486.
67 *Id.* at 454.
68 See *Appleby v. City of New York*, 271 U.S. 364, 393-99 (1926); Hoffman, *supra* note 62, at 486. The controversy in this case arose over state legislative grants of trust lands to New York City which were subsequently alienated to a private party. *Appleby*, 271 U.S. at 367-68. This suit was brought by the owner of the land to restrain the city from using the water over this land for slips and mooring places for vessels. *Id.* at 372-73. The Court held that the city had consciously recognized and parted with both the *jus publicum* and the *jus privatum* titles in this land. *Id.* at 399; Hoffman, *supra* note 62, at 486. The Justices reasoned
such a transfer may only be executed if the state legislature affirmatively recognizes the public interests in the land, consciously intends to terminate such rights, and does so for a valid purpose.\textsuperscript{69}

More recently, as society has evolved and its priorities have shifted, the scope of trust activities has begun to expand in the United States. In addition to the traditional activities of fishing, fowling, and navigation, recreation is now emerging as a protected use of trust land in many states.\textsuperscript{70} The Court has followed this lead, and in \textit{Phillips Petroleum Co. v. Mississippi} it upheld a broad interpretation of state law regarding rights protected by the Doctrine, indicating that they may extend to, among other activities, "bathing, swimming, and recreation."\textsuperscript{71}

\section*{D. Judicial Application of the Ordinance to Massachusetts}

In Massachusetts, controversy surrounding the applicability of the peculiar, time-specific exceptions to the common law embodied in the Ordinance to lands outside the area initially contemplated by this statute—those regions outside the original boundaries of Massachusetts Bay Colony proper—began in the early nineteenth century.\textsuperscript{72} The SJC, however, has rendered inconsistent decisions in resolving these disputes. For instance, although judicial interpretations of the Ordinance as applied to the ocean flats have, on their face, remained faithful to this colonial statute and its relatively broad interpretation of the public’s trust rights,\textsuperscript{73} they have nevertheless violated the overall intent of this law, and thus the Doctrine itself.\textsuperscript{74} They have gradually eroded the public’s \textit{jus publicum} rights by subtly elevating \textit{jus privi-}

\textsuperscript{69} See \textit{Appleby}, 271 U.S. at 399; Hoffman, \textit{supra} note 62, at 486.

\textsuperscript{70} Marks \textit{v. Whitney}, 491 P.2d 374, 380 (Cal. 1971) (indicating that protected trust uses include "the right to fish, hunt, bathe, swim, . . . boat[,] and [engage in] general recreation"); Kootenai Envtl. Alliance, Inc. \textit{v. Panhandle Yacht Club}, Inc. 671 P.2d 1085, 1088 (Idaho 1983) (indicating that the Doctrine is a "dynamic . . . concept . . . destined to expand with the development and recognition of new public uses"); Borough of Neptune \textit{City v. Borough of Avon-by-the-Sea}, 294 A.2d 47, 54 (N.J. 1972) (stating that the scope of the Doctrine is expanding to include bathing, swimming and other shore activities in order "to meet changing conditions and needs of the public it was created to benefit"); Vestal, \textit{supra} note 28, at 25 n.84 (1999); Williams, \textit{supra} note 21, at 24.

\textsuperscript{71} See 484 U.S. 469, 482 (1998).


\textsuperscript{74} See, \textit{e.g.}, Opinion of the Justices, 313 N.E.2d 561, 568 (Mass. 1974).
tum interests as the dominant legal concern. This is particularly perplexing considering the SJC's more flexible and pragmatic interpretation of the Ordinance as it applies to the commonwealth's great ponds, or "those inland bodies of water of more than ten acres created by a natural formulation of the land." 

1. Privately Owned Ocean-Front Flats in Massachusetts

In Storer v. Freeman, the SJC held that the Plymouth Colony's modification of the common law concerning the Doctrine, via the Ordinance, was a valid method by which to facilitate commerce as the colonial government did not have the funds necessary to build wharves absent private development. The decision indicated that the Ordinance's provisions were now embedded as the common law of Massachusetts. The opinion reasoned that, "[t]his ordinance was annulled with the charter by the authority of which it was made; but, from that time to the present, a usage has prevailed, which now has force as our common law, that the owner of lands bounded on the sea or salt water shall hold to the low water mark ...." Forty years later, the SJC reaffirmed this holding in Commonwealth v. Alger, stating that the Ordinance was the settled law of Massachusetts. The same year, in Weston v. Sampson, the court indicated that the provisions of the Ordinance now extended to Massachusetts tidelands regardless of whether they were "under other territorial governments at the time the colony ordinance was passed."

Exercising the federal fiduciary duty as the ultimate trustee of trust resources, the Supreme Court addressed the Commonwealth's application of the Ordinance in Shivley v. Bowlby. The decision indicated that the time- and place-specific modification of common law embodied in the Ordinance was now the established common law of Massachusetts. Specifically, the majority reasoned that the common-

75 See, e.g., id; Nichols, supra note 73, at 115.
77 6 Mass. (5 Tyng) at 438.
78 See id.
79 Id.
80 61 Mass. (7 Cush.) 53, 77 (1851).
82 See 152 U.S. 1, 15-19 (1894).
83 See id. at 19.
wealth's original colonial charters included the islands of Nantucket and Martha's Vineyard, and therefore the principles of the Ordinance had "been adopted and practiced" on the islands since their union with the Massachusetts Colony in 1692.84

Although employing strict interpretations as to the applicability of the Ordinance to those parts of the commonwealth annexed after the passage of this statute, the courts continued to interpret the activities protected by the law relatively broadly. For instance, the public was still vested with certain usage rights in trust lands if engaged in fishing, fowling, or navigation, as well as watering cows, bathing, or engaging in other activities inherent to the public use and enjoyment of these resources.85 In addition, while the majority in Alger held that navigation and fishing in and over the tidelands were the principal rights protected by the Ordinance, it nevertheless hinted that they were perhaps not the only trust interests covered by this law.86 Despite the court's indication of the law's potential flexibility, the opinion did not address what additional uses might be protected by the law.87

In 1907, the SJC shifted its emphasis away from protecting jus publicum rights by both solidifying the state legislature's (General Court's) authority over trust lands and severely curtailed the scope of activities protected by the Ordinance—an inconsistent holding. In Butler v. Attorney General, the court presumed to hold that the principal public uses covered under the Ordinance articulated in Alger were the exclusive trust interests covered by the law.88 The majority held that the Ordinance embodied "the local law as to jus privatum, which in England is represented by the crown, and the jus publicum, which is there represented by the Parliament, both of which in this country are subject to the exercise of legislative power."89 Although affirming the legislature's authority to determine trust rights by validating the provisions of the Ordinance, the majority limited their applicability to activities reasonably related to "bathing, fishing, fowling, and navigation."90

84 Id. at 18–19.
85 See Commonwealth v. Charlestown, 18 Mass. (1 Pick.) 180, 188–89 (1822); Nichols, supra note 73, at 118. Furthermore, in 1871, the court held that the public's usage rights in the flats included "fishing and fowling and other uses ... common to all." Nichols, supra note 73, at 118 (citing Paine v. Woods, 108 Mass. 160, 169 (1871)).
86 See Alger, 61 Mass. (7 Cush.) at 65; Nichols, supra note 73, at 118.
87 See Alger, 61 Mass. (7 Cush.) at 65.
88 See 80 N.E. 688, 689 (Mass. 1907); Fernandez, supra note 11, at 633; Nichols, supra note 73, at 118–19.
89 Butler, 80 N.E. at 689 (emphasis added).
90 See id. at 688; Fernandez, supra note 11, at 633.
Such precedent led to the SJC’s somewhat circular analysis in a 1974 opinion reviewing a legislative bill calling for a public right of on-foot passage along the shoreline flats of Massachusetts during daylight hours. The majority rejected the notion that the Ordinance conferred upon the legislature the right to allow all significant public uses in the seashore, indicating that it had historically declared the public’s rights in these lands to be limited in nature. Specifically, the majority explained that “the colonial ordinance has never been interpreted to provide the littoral owners only such uncertain and ephemeral rights as would result from such an interpretation.” The court reasoned that allowing public use of the flats for activities other than “natural derivative[s]” of those specifically protected by the Ordinance would constitute a “wholesale denial of an owner’s right to exclude the public.” In effect, the court once again solidified the legislature’s authority to define trust interests by affirming the Ordinance, but denied the General Court the authority to further modify these rights. Similar cases throughout the last 20 years have adhered to this rigid interpretation and application of the Ordinance to all ocean tidelands in the commonwealth.

2. The Ordinance and the Commonwealth’s Great Ponds

The SJC’s almost pathological affinity for the strict tenets of the Ordinance seems to disappear in other contexts, such as the court’s decisions concerning the commonwealth’s great ponds. For example, in Inhabitants of West Roxbury v. Stoddard, the SJC indicated that the purpose of the statute was “to declare a great principle of public right,” and therefore need not be strictly applied to all private grants of trust lands in the Massachusetts Bay Colony executed before the law was enacted. In addition, in Watuppa Reservoir Co. v. Fall River,

92 Id. at 566–67.
93 Id. at 567.
94 Id. at 566, 568.
95 See id.
96 See, e.g., Pazolt v. Dir. of the Div. of Me. Fisheries, 631 N.E.2d 547, 548 (Mass. 1994) (holding that shellfish cultivation is not a “natural derivative” of fishing, and therefore was not protected by the Ordinance, allowing the private owner to prohibit this activity on the flats); Wellfleet v. Glaze, 525 N.E.2d 1298, 1301 (Mass. 1988) (noting that “there is no general right in the public to pass over the land or to use it for bathing purposes”); Fernandez, supra note 11, at 652–53.
97 See 89 Mass. (7 Allen) 158, 165 (1863). In this case, however, the court held that the Ordinance did in fact control, even though the land grant in question was executed in
the court addressed the issue of whether the Ordinance applied to land held in another territorial jurisdiction—in this case Plymouth Colony—at the time the statute was passed. Justice Holmes found no concrete evidence that this statute was the law in the neighboring colony before it merged with Massachusetts Bay. Although conceding that the Ordinance became part of Plymouth's common law after it merged with the Massachusetts Bay Colony, he reasoned that "such an extension does not necessitate a fiction that the law has been so always which would be unreasonable as a change of private rights in the guise of a declaratory statute." The opinion further expressed skepticism as to whether the Ordinance was even practiced in Plymouth after this annexation.

Furthermore, in *Lynnfield v. Peabody*, the court reasoned that before the Ordinance was in force, the common law provided that great ponds were not in fact public property and could be given or sold to private persons. Therefore, contrary to the SJC's holdings in cases regarding the ocean flats, the court held that so long as title to the property was validly obtained, an owner's rights to these trust lands would be subject to traditional interpretations of the common law, notwithstanding the provisions of the Ordinance. In addition, the Massachusetts judiciary interprets the public's trust rights in these lands more broadly than merely applying to fishing, fowling, and navigation. Rather, they look to the actual intent of the law and have included boating, bathing, and even skating as protected uses under the Ordinance.

1636. *Id.* at 168-69. As the grant was made to Roxbury, the court held that the legislature could require towns to devote these lands to public purposes. *Id.* at 170.

99 See *id*.
100 *Id.* at 258.
101 *Id*.
102 See 106 N.E. 977, 984-85 (Mass. 1914). This case involved a dispute between the town of Peabody and the residents of Lynnfield over the ownership of Humphry Pond. *Id.* at 979. Lynnfield residents, as successors in interest to the owner who had gained title from the original private owner prior to the passage of the Ordinance, brought suit against Peabody for damages and lost value due to its extraction of water. *Id.* Peabody's defense asserted that the grant was invalid because it contradicted the provisions of the Ordinance. *Id.* The court held that plaintiffs could recover damages as private owners of the property. *Id*.
103 See *id*. at 984-85.
II. THE ISLANDS OF NANTUCKET AND MARTHA'S VINEYARD IN THE MASSACHUSETTS FRAMEWORK

A. The Independent Political History of Nantucket and Martha's Vineyard

They sailed into a frith; there lay an island before it, round which there were strong currents, therefore called they it Stream island.

—Thorfinn Karlsefne

Outside of hints found in Nordic lore, no records indicate any great European interest in the islands of Nantucket or Martha's Vineyard before the seventeenth century. In 1621, King James I of England reorganized the Plymouth Company under the name the Council for the Affairs of New England. Although the colonies of Plymouth and Massachusetts Bay were settled pursuant to patents and charters obtained through the Council, the islands most likely remained uninhabited because "[t]he savage was then too much of a problem for them to try the experiment of isolating themselves on an island populated with them, and thus be out of the reach of help in time of hostile attacks." As a result, settlers sought new homes in the more populated areas along the coast of Massachusetts.

In 1635, King James's successor, Charles I, urged the Council to convey land grants of present-day New York, including the islands of Nantucket and Martha's Vineyard, to William, Earl of Stirling, Secretary of State of Scotland. Having reached the limit of its usefulness, however, the Council surrendered its charter to King Charles I. He, in turn, granted a charter to Sir Fernando Gorges on April 3, 1639, "providing him undoubted sovereign rights over Martha's Vineyard.

105 See Charles Edward Banks, 1 The History Of Martha's Vineyard, Dukes County, Massachusetts 58 (Edgartown, Dukes County Historical Soc'y 1966) (1911) (quoting a Norse saga purportedly describing present-day Martha's Vineyard).
106 Id. at 58-59. The island "round which there were strong currents" was christened with the name Straumey, or the stream island, due to "that peculiar co-tidal phenomenon which impressed all the early voyagers sailing into these waters." Id. This depiction has led some historical scholars to assert that these early Norsemen were in fact describing what would later become known as the island of Martha's Vineyard. See id. at 58.
107 Id. at 58-59; Lydia S. Hinchman, Early Settlers of Nantucket; Their Associates and Descendants 1 (Charles E. Tuttle Co. 1980) (1896).
109 See Banks, supra note 105, at 71.
110 Id.
112 Banks, supra note 105, at 71-72.
and Nantucket," although Lord Stirling continued to assert that he held a proprietary interest in the islands.\(^\text{113}\) In 1641, Thomas Mayhew secured titles from both interests in an attempt to establish settlements on the islands.\(^\text{114}\)

In 1643, the colonies of Massachusetts Bay, Plymouth, Connecticut, and New Haven formed a mutual security alliance known as the Commission of the United Colonies of New England.\(^\text{115}\) In 1644, the Commissioners authorized Massachusetts to bring the Vineyard under its jurisdiction, if it so chose.\(^\text{116}\) This annexation was not executed;\(^\text{117}\) in fact, in 1654, the Massachusetts Bay Colony legislature specifically voted that the region was not within its jurisdiction.\(^\text{118}\) Therefore, Mayhew's island kingdom off the coast of Cape Cod remained what it had been up until this point, namely an "independent, self-governing" entity belonging to no chartered province as the concept was then understood.\(^\text{119}\)

On March 12, 1664, Charles II granted the Patent of New York, Maine, and Long Island, as well as Nantucket and Martha's Vineyard, to James, Duke of York.\(^\text{120}\) Pursuant to his authority as provincial governor of New York, Francis Lovelace affirmed the titles of the islands' inhabitants in 1671, granting them "all ye lands, soyles, woods, meadows, pastures, marches, waters, []fishing, hawking, hunting, and []fouling."\(^\text{121}\) In 1684, Governor Thomas Dongan affirmed the Lovelace grants with a more specific grant bestowing the "Trustees" of the islands with rights in "all the lakes, ponds, brookes, streams, [and] beaches."\(^\text{122}\)

In 1673, New York was taken by the Dutch, leading to dissent on the Vineyard as to whether the island's inhabitants would pledge their allegiance to the Dutch or Massachusetts authorities.\(^\text{123}\) Responding to these concerns, the Massachusetts authorities determined that they could not find "sufficient re[a]son . . . to take upon us the Governm't of any

\(^\text{113}\) Id.

\(^\text{114}\) Id. at 80–83; C.G. Hine, The Story of Martha's Vineyard 6 (1908).

\(^\text{115}\) See The Forme of the Comission to Be Granted to the Comissionrs for the United Colonies (1644), reprinted in 2 Records of the Governor & Company of the Massachusetts Bay in New England 69 (Nathaniel B. Shurtleff ed., 1853).

\(^\text{116}\) Banks, supra note 105, at 132.

\(^\text{117}\) Id. at 132.

\(^\text{118}\) Hine, supra note 114, at 7.

\(^\text{119}\) Banks, supra note 105, at 132 (emphasis added).

\(^\text{120}\) Id. at 139.

\(^\text{121}\) Franklin B. Hough, Papers Relating to the Island of Nantucket 129–31 (1856).

\(^\text{122}\) Id. at 133–35.

\(^\text{123}\) Banks, supra note 105, at 154–55.
people upon the request of a part of them," indicating once again that this region was beyond their jurisdiction.124

In February 1674, the Treaty of Nieuw Amsterdam was executed between the English and the Dutch, firmly reestablishing Nantucket and Martha’s Vineyard under the jurisdiction of the Colony of New York.125 In 1683, the Provincial Assembly of New York divided the province into several counties including “the Islands of Nantucket . . . [and] Martha’s Vineyard,” consolidating the islands in a county organization within the province of New York.126

Yet another transfer was made in 1691, and pursuant to the Charter of William and Mary, the Plymouth and Massachusetts Bay Colonies were combined, the islands were detached from New York, and all were consolidated under the authority of the Massachusetts government.127 In order to solidify this transfer, the General Court quickly passed the Act for the Confirmation of Titles within the Islands of Capawock, alias Martha’s Vineyard and Nantucket.128 This resolution provided:

That all lands, tenements, hereditaments and other estates, held and enjoyed by any person or persons, towns or villages within the said islands of . . . Martha’s Vineyard and Nantucket . . . by or under any grant or estate duly made or granted by any former government, or by the successive governors of New York, or any other lawful right or title whatsoever, shall be, by such person or persons, towns or villages, their respective heirs, successors and assigns, forever hereafter held and enjoyed according to the true purport and intent of such respective grant . . . .129

Nantucket and Martha’s Vineyard thus became firmly embedded within Massachusetts.

124 See id. at 159 (quoting a Letter from The Court of Assistants, Mass., to Mr. Thomas Bercher, Mr. Isaac Robenson, and the Rest of the Subscribers of a Petition Sent From Mar­tens Vineyard (Oct. 31, 1673)) (emphasis added).
125 Id. at 162–63.
126 Id. at 258–59.
128 STARBUCK, supra note 108, at 83.
B. Economic Development of Nantucket and Martha's Vineyard

[An island] so universally barren, and so unfit for civilization, that they mutually agreed not to divide it.

—J. Hector St. John de Crevècoeur, French Surveyor

1. A Distinct Society

After obtaining grants of land from the Stirling and Gorges interests that included Nantucket and Martha's Vineyard, Thomas Mayhew turned his attention to developing these "as yet uninhabited" islands. After receiving fair titles from the native inhabitants, he was "determined to . . . start a new home, perhaps found a new colony, for [the islands] were situated without the lawful bounds of the territory of Massachusetts Bay." Thereafter, Mayhew, his son, and a few associates took possession of the islands and "formed the vanguard of English settlers . . . under the laws of the Kingdom of England." Mayhew, not Massachusetts, exerted direct control over Martha's Vineyard and left Nantucket to the control of its indigenous people. Local historians recount a cordial relationship between the English settlers and the Indians of the islands, and that a usage arose under which they shared the islands' resources in common, including coastal beaches.

2. Independent Commercial Development

From its earliest settlements around the year 1649, shepherding drove the economy of Nantucket. By 1672 islanders began to turn to whaling as an additional source of revenue, and by 1712 the sperm whale was discovered off the coast; it subsequently became the island's chief commodity. From 1800 to 1840 the island earned the distinction of "Whaling Capital of the World." By the 1850s, however, the

---

131 Banks, supra note 105, at 80–83; Hine, supra note 114, at 6.
132 Banks, supra note 105, at 80, 84 (emphasis added).
133 Id. at 87.
134 Id. at 258.
135 See Interview, supra note 23.
137 See Starbuck, supra note 108, at 354; Nantucket History, supra note 136.
138 Nantucket History, supra note 136.
industry was in decline, the population of the island decreased rapidly, and Nantucket became an isolated community once more.\textsuperscript{139} Similarly, the Vineyard was among the first of the colonies to make use of whaling as a commercial industry.\textsuperscript{140} Much like Nantucket, however, the whaling industry on Martha’s Vineyard was on the wane by the end of the Civil War.\textsuperscript{141}

3. The Rise of a New Commodity

The death of whaling returned the islands of Nantucket and Martha’s Vineyard to isolation.\textsuperscript{142} This relative obscurity, however, helped to retain the unique charm of the islands, and they have become attractive tourist destinations today.\textsuperscript{143} Tourism is, in fact, a large driving force behind the economies of Nantucket and Martha’s Vineyard.\textsuperscript{144} During the summer months the population of the islands more than doubles; this number continues to increase as the islands become ever more popular vacation destinations.\textsuperscript{145} Most tourism revenue is generated from eating and drinking establishments, hotels and other lodging places, amusement and recreational services, and museums.\textsuperscript{146} Despite this booming industry, however, the average per capita earnings on the islands are considerably lower than the statewide average, the cost of living is considerably higher than that of the rest of the region, and this gap continues to widen.\textsuperscript{147}

\textsuperscript{139} Id.
\textsuperscript{140} Banks, supra note 105, at 432.
\textsuperscript{142} Nantucket History, supra note 136.
\textsuperscript{143} Id. The Vineyard was, however, a bit slower to take advantage of the tourist industry than Nantucket. It was not until the servicemen stationed on the island’s airbase—which later became the county airport—returned home to their families after World War II that word of the island’s unique charm began to spread. See Vineyard Gazette Online, supra note 141.
\textsuperscript{144} See Gautam, supra note 22, at 19.
\textsuperscript{145} Id. at 22. The number of annual visitors to Nantucket increased an estimated 29% from 1992 to 1997, and approximately 400,000 people visit the island each year. Id. Similarly, the annual number of visitors to Martha’s Vineyard has increased an estimated 21.5% to 2.1 million over the same period. Id. As a result, tourism accounts for 23.1% of employment in this region. See id.
\textsuperscript{146} See id. In 1997, the highest concentration of jobs in the region was in the private sector. Id. at 23. This represents 32% of all employment, of which most is in retail. Id. Eating and drinking establishments are the largest employers in the area, providing 11,689 jobs and accounting for 13.2% of employment and 41% of retail trade. Id.
\textsuperscript{147} See id. at 22.
III. MISAPPLICATION OF THE PUBLIC TRUST DOCTRINE ON NANTUCKET AND MARTHA'S VINEYARD

In the sense that the ancient Greeks and Romans considered the use of marine resources as essential to survival, the present application of the Ordinance to the beaches of Nantucket and Martha's Vineyard is facially consistent with the ancient roots of trust rights.\^\textsuperscript{148} Although providing for private ownership of the flats, the law still protects the public's rights of fishing, fowling, and navigation, activities considered essential to human existence at the time of enactment.\^\textsuperscript{149} In addition, it remains at least nominally faithful to the current federal framework regarding the Doctrine as mandated by the Supreme Court. At the time the law was passed, the colonial authorities asserted that the economic benefits that would accrue to the entire settlement stemming from private developments of the flats would outweigh the partial loss of the public's \textit{jus publicum} rights in this resource.\^\textsuperscript{150} Indeed, both subsequent case law\^\textsuperscript{151} and the Commonwealth's modern codification of the Doctrine\^\textsuperscript{152} seem to follow these mandates: that the public's interest in these trust lands is explicitly recognized, and to terminate the public's interest, the legislature must consciously intend to do so, and have a valid purpose.\^\textsuperscript{153}

Upon closer examination, however, the application of the Ordinance to the entirety of the commonwealth's flats, especially with respect to Nantucket and Martha's Vineyard, seems to: (1) contradict SJC precedent regarding the Ordinance as it relates to property rights in the commonwealth's trust resources;\^\textsuperscript{154} (2) violate the federal guidelines regarding state administration of the Doctrine;\^\textsuperscript{155} and (3) contradict the overall spirit and intent of the Doctrine.\^\textsuperscript{156} Nevertheless, the courts have repeatedly held that the Ordinance is the established common law in Massachusetts regarding its ocean flats.\^\textsuperscript{157}

\^\textsuperscript{148} See J. Inst. 2.1.1; Lahey, supra note 14, at 11-2.
\^\textsuperscript{149} See Colonial Ordinance, supra note 7, at 35.
\^\textsuperscript{150} See Storer v. Freeman, 6 Mass. (5 Tyng) 435, 438 (1810); Fernandez, supra note 11, at 631-32.
\^\textsuperscript{151} See Opinion of the Justices, 313 N.E.2d 561, 567-68 (Mass. 1974).
\^\textsuperscript{153} See Appleby v. City of New York, 271 U.S. 364, 399 (1926).
\^\textsuperscript{154} See, e.g., Lynnfield v. Peabody, 106 N.E. 977, 984-85 (Mass. 1914).
\^\textsuperscript{156} See J. Inst. 2.1.1.
\^\textsuperscript{157} See, e.g., Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974).
These decisions are based on inconsistent reasoning by the SJC and a fundamental misunderstanding of the judicial role in protecting trust rights, as well as confusion over the Doctrine's inherent flexibility that gave rise to its modification in the seventeenth century. The result is the misapplication of the Ordinance to the islands today. Therefore, a further modification—or at least a more flexible interpretation—of the common law regarding the Doctrine is perhaps in order, and under SJC precedent, federal mandate, and emerging trends in other states, is permissible.

A. The Violation of the Public Trust Doctrine on Nantucket and Martha's Vineyard

1. Independent Trust Rights Vested in the Beaches of Nantucket and Martha's Vineyard

Historical records clearly indicate that during most of the colonial period the islands of Nantucket and Martha's Vineyard were "independent self-governing" entities that were largely ignored by early settlers. King Charles I initially granted the islands to William, Earl of Stirling in 1635, and then to Fernando Georges in 1639, never hinting that they were under the jurisdiction of the Massachusetts Bay Colony. In addition, under the grants of Charles II, they were embedded within the jurisdiction of New York for the next three decades. In fact, the Massachusetts Bay Colony declined to annex the region in 1644 and specifically voted against incorporation in 1654. In 1671, Francis Lovelace, the provincial Governor of New York, affirmed the titles of the islands' inhabitants, and Thomas Dongan reaffirmed them in 1684.

Under the authority vested in him by the Province of New York, Thomas Mayhew governed the county that included the islands. It was not until 1691 that the islands were detached from their connec-

158 See Colonial Ordinance, supra note 7, at 35.
159 See, e.g., Lynnfield, 106 N.E. at 984-85.
161 See infra note 223.
162 See Banks, supra note 105, at 132.
163 See Banks, supra note 105, at 71-72, 80-83; Hine, supra note 114, at 6; Starbuck, supra note 108, at 13.
164 See Banks, supra note 105, at 139.
165 See Banks, supra note 105, at 132; Hine, supra note 114, at 7.
166 Hough, supra note 121, at 133-35.
167 Banks, supra note 105, at 258.
tion with New York and placed under the authority of the Massachusetts government. In short, there are no historical records indicating even nominal political ties between the islands and the Massachusetts Bay Colony, nor any proprietary interests connecting them, during this period.

As a result, until the 1691 union, the islands largely developed as distinct societies and were, in a sense, colonies unto themselves. Indeed, records indicate that Thomas Mayhew was determined to establish “the vanguard of English settle[ment] . . . under the laws of the Kingdom of England.” Therefore, titles granted to private individuals were independent of the colonial laws of the Massachusetts Bay Colony and subject to the common law of that province. Due to this state of law, it is reasonable to assume that at least until 1691, and likely well past this time, landowners held their oceanfront property pursuant to the “true purport and meaning” of the grants conferred upon them by New York authorities; under the traditional English common law tenets of the Doctrine, that did not provide for private ownership of the flats.

In this context, the SJC’s decisions regarding the commonwealth’s great ponds are illustrative. In West Roxbury v. Stoddard, the court indicated that land grants made to private parties before the passage of the Ordinance, even if within the bounds of the Massachusetts Bay Colony, need not be subject to its modification of the common law. Therefore, it would seem contradictory to apply this statute to the islands, which were transferred several years prior to this legislation. Further, as to lands granted to private parties in territories beyond the original bounds of this colony—the SJC’s decisions regarding the flats notwithstanding—it is unlikely that either private beachfront owners, or the general public, automatically shifted use of these lands to conform to the Ordinance. Thus, applying this law to the beaches of Nantucket and Martha’s Vineyard today “would be unreasonable as a change of private rights in the guise of a declaratory
statute,"\(^{176}\) although in this case the property rights affected would be the public's trust interests.

Finally, as the grants made to the islanders by New York authorities were valid, under *Lynnfield v. Peabody*, these lands should be subject to traditional interpretations of the common law, including those regarding the Doctrine.\(^{177}\) This assertion finds support in the provisions of the Act for the Confirmation of Titles because it provided that landowners continued to own property alienated before the consolidation of Massachusetts "*according to the true purport and intent of such respective gr[a]nt[s]*."\(^{178}\) Therefore, it is reasonable to assume that the fundamental property laws under which these lands were held, i.e., the traditional tenets of the Doctrine, remained intact, were part of the intent of early land transfers on the islands, and as such are independently vested in their beaches today.\(^{179}\)

2. The Legislature Must Recognize the Public’s Trust Rights and Conscious Intend to Terminate Them

Due to the unique circumstances surrounding the history of Nantucket and Martha's Vineyard, it may be argued that the Ordinance does not apply to their beaches. Therefore, by definition, it would be impossible that Massachusetts authorities recognized the public's trust rights to these beaches and consciously intended to terminate them. Aside from an argument based on the historical technicalities involved in the transfers of these lands, however, the root of the Doctrine violation on Nantucket and Martha's Vineyard also stems from the judiciary's fundamental misunderstanding of its role in protecting trust rights.

The application of the Doctrine under the dual sovereignty framework of the United States dictates that trust rights be defined differently from state to state, according to particular needs.\(^{180}\) This framework seems to argue for deferential federal review of state judicial and legislative determinations of trust rights.\(^{181}\) The Supreme Court's decisions in *Illinois Central Railroad Co. v. Illinois* and *Appleby v.*

---

\(^{176}\) See *id.*


\(^{179}\) See Langella, *supra* note 33, at 182–83.

\(^{180}\) *Id.* at 183.

\(^{181}\) See *id.*
New York support this proposition, as the Court deferred to legislative determinations of states’ trust interests.\textsuperscript{182} It is essential to note that in these cases, although the respective majorities endeavored to protect the trust interests of the public, they \textit{did not presume to define precisely what these rights were}.\textsuperscript{183}

In Massachusetts, however, the SJC defers to a nearly 400-year-old legislative determination of the public’s trust rights, and indicates that the modern legislature is powerless to amend the Ordinance. By abridging the General Court’s power in this fashion, the SJC has, in effect, usurped the commonwealth’s role as sovereign over trust lands. The court has presumed to define the precise uses protected in Massachusetts’s flats, rather than allowing the legislature—the proper arbiter of trust rights—to determine these rights.\textsuperscript{184} The SJC fails to see the forest for the trees by holding that the paramount consideration is remaining faithful to the strict provisions of the Ordinance, as opposed to adhering to the overall intent of the law to use trust resources to maximize the benefits they generate for the public.\textsuperscript{185}

Although the SJC’s decision in \textit{Commonwealth v. Alger} came close to comporting with the true intent of the Doctrine, hinting that traditional trust activities were perhaps not the \textit{only} interests covered by the Ordinance, the decision fell short because it did not address the question of whether the common law could be further modified to meet the changing needs of society.\textsuperscript{186} As a result, subsequent cases have continued to usurp the General Court’s role of defining the public’s trust rights in Massachusetts by forbidding the legislature to update them in accordance with society’s current trust needs.\textsuperscript{187} The SJC has treated a unique modification of the Doctrine, arising from a legislative determination of the specific needs of a particular jurisdiction nearly 400 years ago, as the final word regarding the scope of the public’s trust needs in Massachusetts today.\textsuperscript{188} Therefore, due to a judicial usurpation of the legislative authority to define the public’s \textit{jus publicum} rights, as well as a misinterpretation of a modification exhibiting the Doctrine’s flexibility, the development of the public’s trust rights has been stunted


\textsuperscript{184} See, \textit{e.g.}, Butler v. Attorney Gen., 80 N.E. 688, 689 (Mass. 1907).

\textsuperscript{185} See, \textit{e.g.}, Opinion of the Justices, 313 N.E.2d 561, 566–68 (Mass. 1974).


\textsuperscript{187} See, \textit{e.g.}, \textit{Opinion of the Justices}, 313 N.E.2d at 566–68.

\textsuperscript{188} See id.
in Massachusetts, rendering it unable to meet the changing needs of society.\textsuperscript{189}

It is true, however, that the judicial decisions establishing the foundations for the Doctrine's application in Massachusetts were rendered before the Supreme Court's decisions on the subject,\textsuperscript{190} and it may be unreasonable to indiscriminately apply the current federal standards in hindsight.\textsuperscript{191} Even the decisions rendered after the Supreme Court's rulings, however, fail to acknowledge that the trust rights in properties outside the Massachusetts Bay Colony were perhaps impaired by the blanket application of the Ordinance to all the flats of the modern commonwealth, indicating that this situation has possibly gone unnoticed by the courts.\textsuperscript{192}

3. Trust Rights May Only Be Extinguished for a Valid Purpose

The benefits bestowed upon the general public by the modification of the common law via the Ordinance were confined to the residents of the Massachusetts Bay Colony.\textsuperscript{193} The greater Boston area was the center of commerce for the New England region during the colonial period, and this was the area originally contemplated by the law.\textsuperscript{194} The Doctrine's trustee ceded part of the general public's trust interests to private developers in order to stimulate the economy of the region.\textsuperscript{195} This modification to the common law, intended to benefit the citizens of the Massachusetts Bay Colony, would have bestowed little benefit upon the inhabitants of the islands and therefore was not a valid interpretation of the islanders' trust needs.\textsuperscript{196}

This proposition is supported by the early economic development of Nantucket and Martha's Vineyard. Initially, their economies were driven by whaling.\textsuperscript{197} As opposed to industrial and commercial development, private development of the flats would hinder rather than fa-

\textsuperscript{189} See id.
\textsuperscript{190} See, e.g., Storer \textit{v. Freeman}, 6 Mass. (5 Tyng) 435 (1810).
\textsuperscript{191} See \textit{Opinion of the justices}, 313 N.E.2d at 566.
\textsuperscript{192} See, e.g., \textit{id.} at 566–68.
\textsuperscript{193} See \textit{BANKS}, supra note 105, at 434; Fernandez, \textit{supra} note 11, at 631–32.
\textsuperscript{194} See \textit{BANKS}, supra note 105, at 434; Fernandez, \textit{supra} note 11, at 631–32.
\textsuperscript{195} See Fernandez, \textit{supra} note 11, at 632; Lahey, \textit{supra} note 14, at 11-2-1.
\textsuperscript{196} See \textit{NANTUCKET HISTORY}, \textit{supra} note 136; \textit{VINEYARD GAZETTE Online}, \textit{supra} note 141.
\textsuperscript{197} See \textit{BANKS}, supra note 105, at 432; \textit{STARBUCK}, \textit{supra} note 108, at 354; \textit{NANTUCKET HISTORY}, \textit{supra} note 136; \textit{VINEYARD GAZETTE Online}, \textit{supra} note 141.
cilitate these activities.\textsuperscript{198} In addition, consistent with the uses of trust lands inherent to these pursuits, local historians assert that a custom and usage arose under which islanders and natives shared the islands' trust resources, including their coastal beaches, in common.\textsuperscript{199}

While the original purpose for which the Ordinance changed the common law was not particularly relevant to the needs of the islands in the past, it is even less so today. Currently, tourism is the main industry of the islands, and it is the driving force behind their economies.\textsuperscript{200} It is therefore hard to discern the trust benefits arising from excluding the public from the beaches of islands that do their best to generate tourist revenue by encouraging beach goers to visit their shores.\textsuperscript{201} Since the staples of the islands' economies are service industries associated with tourists, a law that could potentially repel such visits would seem counterproductive to economic development on the islands, especially since the average per-capita income on the islands is considerably less than the rest of the commonwealth.\textsuperscript{202}

In addition, as currently applied, the Ordinance bestows special benefits upon private owners of trust lands to the detriment of the public. The private right of exclusion protected by the law has considerably increased privately-owned beachfront property values, while the public is left with very limited access to these beaches.\textsuperscript{203} Although private beach owners on Nantucket seem to be generally amenable to allowing the public to use their beaches for recreation,\textsuperscript{204} under the current application of the Doctrine in Massachusetts they are, theoretically, within their rights if they choose to withdraw this access.\textsuperscript{205}

Therefore, emerging modern trust interests, like recreation on the beaches of Nantucket, are at the mercy of the whims of individual

\textsuperscript{198} For instance, it was a common practice of Nantucket whalers to erect lookout towers and temporary huts along the island's beaches, where approximately six hunters would live, each, in turn, manning the tower and spotting for whales. \textsc{Starbuck}, supra note 108, at 353. A whale, once captured, was towed ashore where the blubber was cut up and tryed out in temporary try-pots built on the shore. \textit{Id.} Therefore, obstructing the shorelines by facilitating the construction of private wharves and piers would have inevitably led to conflicts between whalers and these private property owners. See \textsc{Ghen} v. \textsc{Rich}, 8 F. 159, 159–60 (D. Mass. 1881).

\textsuperscript{199} Interview, supra note 23.

\textsuperscript{200} See \textsc{Gautam}, supra note 22, at 19.

\textsuperscript{201} See \textit{id.}; Interview, supra note 23.

\textsuperscript{202} See \textsc{Gautam}, supra note 22, at 22; Interview, supra note 23.

\textsuperscript{203} See \textsc{Schweitzer}, supra note 3, at B1.

\textsuperscript{204} See Interview, supra note 23.

\textsuperscript{205} See, \textit{e.g.}, Opinion of the Justices, 313 N.E.2d 561, 566–68 (Mass. 1974).
Further, they are subject to the uncertainty arising from the possibility that such property may change hands to owners less enthusiastic about providing the public access to their property. As a result, the public is left with the hollow right of engaging in largely irrelevant traditional trust activities on the flats, while private owners enjoy a financial windfall arising from their right to, in most cases, totally exclude the public from their beaches. The potential danger of this situation is highlighted by the current state of affairs on Martha’s Vineyard. On this island, most owners are unwilling to allow any general recreational use of their beaches, all but excluding the public from these beaches. This violation of the public’s trust interest is therefore more egregious than that on Nantucket, but it arises from the same set of circumstances.

Judged by today’s standards, and absent affirmative legislation suggesting otherwise, the above factors illustrate that the current application of the Ordinance to the beaches of Nantucket and Martha’s Vineyard is facially invalid and unnecessary, according to the federal framework regarding the Doctrine. In short, the public’s *jus publicum* rights on the flats of Nantucket and Martha’s Vineyard were not considered by the framers of the Ordinance, were not consciously terminated, and the Ordinance has never had a valid purpose as applied to them.

C. Reestablishing Trust Rights on Nantucket and Martha’s Vineyard

As illustrated above, there is an argument to be made that the provisions of the Ordinance do not apply to Nantucket and Martha’s Vineyard as a matter of strict property law. Nevertheless, assuming that the opinions of the SJC regarding the commonwealth’s flats are a valid interpretation of the Ordinance, an avenue still seems to exist for reclaiming the flats under Supreme Court precedent. Applying
Illinois Central Railroad Co. v. Illinois, and considering the potential economic boost to the islands’ economies stemming from public beach access, it would seem that the previous legislative grant embodied in the Ordinance is, in the context of the islands, “a proposition that cannot be defended,” and perhaps should be revoked.\textsuperscript{212} For instance, it does not seem that the economic benefits accruing to private beachfront property owners from decreased public access to the beaches on Nantucket and Martha’s Vineyard are outweighed by the overall benefits conferred upon the community, because it does not appear that any community benefits exist. This seems to present the precise circumstances described by the Supreme Court when it held that such legislative grants of trust lands may be revoked.\textsuperscript{213}

Considered in this light, the beach access bill addressed by the SJC in 1974 was deficient. Contrary to the SJC’s reasoning, however, its failing lies not in the fact that it impaired the private right to eject the public from trust lands, but rather in not degrading this right far enough.\textsuperscript{214} Under the federal/state sovereignty framework regarding the application of the Doctrine, it seems that the legislature was well within its right to revoke the grant of the flats to private owners altogether.\textsuperscript{215}

Again, however, it would be hard to justify grandfathering the islands into the federal mandates regarding the Doctrine. Such action would likely produce a host of costly takings challenges.\textsuperscript{216} Further, it would not be good for the islands or the private owners.\textsuperscript{217} In fact, island officials, at least on Nantucket, have explicitly indicated a reluctance to pursue this course of action due to its potential detrimental effect on the island’s economy.\textsuperscript{218} Therefore, perhaps a more flexible approach along the lines of the original intent of the Ordinance is in order.

Controversy surrounding public use of private beaches on Nantucket and Martha’s Vineyard is likely to reemerge in the face of individual action, as a result of initiatives such as that currently proposed by the Nantucket Board of Selectmen,\textsuperscript{219} or perhaps after another

\textsuperscript{212} Ill. Cent. R.R., 146 U.S. at 453–56.
\textsuperscript{213} See id. at 455, 460–64.
\textsuperscript{214} See id.; Opinion of the Justices, 313 N.E.2d at 567–68.
\textsuperscript{215} See Ill. Cent. R.R., 146 U.S. at 455, 460–64.
\textsuperscript{216} See Nantucket, Mass., Ordinance One Beach, Once and for all (Proposed 2003).
\textsuperscript{217} See Interview, supra note 23.
\textsuperscript{218} See Nantucket, Mass., Ordinance One Beach, Once and for all (Proposed 2003).
\textsuperscript{219} See Interview, supra note 23.
state legislator is ejected from an island beach. Since the courts bear the lion’s share of responsibility for degrading the public’s trust interests on the islands, they should do their part in rectifying this situation. Therefore, in response to these likely challenges to a more flexible interpretation of the Ordinance, the courts should, in effect, make a graceful exit from the stage of attempting to define the public’s trust rights.

For instance, as illustrated by the Colonial Ordinance and subsequent Supreme Court cases, as well as conventional state court modifications of the Doctrine in other areas of the country, state legislatures may modify the Doctrine on the state level, according to the particular needs of society. For instance, because the legislature is well within its authority to affirmatively address specific time-based dilemmas facing the islands of Nantucket and Martha’s Vineyard, simply codifying the scope of protected trust activities in Massachusetts tidelands to include recreation would go a long way in resolving this issue.

Therefore, in addition to using the flats for fishing, fowling, and navigation, the public would be able to stroll along the shore, as well as swim. Although the potential exists for rowdy teenagers and other members of the general public to exploit this window of access and spill over above the high tide line, this would seem to be the least invasive method of beginning to address the issue. There would be no need to litigate the intent of ancient land titles, fundamentally alter property rights, or execute unpopular takings.

On the other hand, this remedy is admittedly limited as the public would only gain access to the flats, and local officials on Nantucket are interested in securing broader grants of beach access. Because

220 Schweitzer, supra note 3, at B1; Interview, supra note 23.
221 See Colonial Ordinance, supra note 7, at 35.
223 See Mathews v. Bay Head Improvement Ass’n, 471 A.2d 255, 365 (N.J. 1984) (recognizing that the right to enjoy the portion of the beach below the mean high-tide line required public access across the dry sand to access it); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972) (“We have no difficulty finding that, in this latter half of the twentieth century, the public rights in tidelands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.”); Susan M. Codaro, A High Water Mark: The Article IV, Section 2, Privileges and Immunities Clause and Nonresident Beach Access Restrictions, 71 FORDHAM L. REV. 2525, 2532 (2003). In addition, the Oregon State Legislature has broaden the scope of the Doctrine, enacting a law to protect public access to dry sand areas of the beach, while the Texas Legislature has passed an act prohibiting the erection of structures that would impede the public’s beach access. Codaro, supra at 2532.
224 See Nantucket, Mass., Ordinance One Beach, Once and for all (Proposed 2003).
their plan calls for a comprehensive set of easements from all of the islands' private beach owners, it will inevitably meet resistance from some individuals, and at least a limited number of eminent domain actions will likely have to be executed. If such local action is executed in conjunction with a legislative modification of trust rights, however, the public would gain both a vested right in a substantial portion of the beach, including that above the high tide line in some cases, as well as possess a vested interest in the entirety of the island's flats. In addition, such legislation would restore *jus publicum* on Martha's Vineyard—and the rest of the commonwealth, for that matter.

Regardless of the avenue pursued to increase public access to the islands' private beaches, the courts can facilitate this by employing reasoning consistent with the SJC's decisions regarding the commonwealth's great ponds when faced with controversies surrounding Massachusetts's version of the Doctrine. Therefore, rather than employing the strict textualist approach exhibited in the cases regarding the ocean flats, the SJC should adopt the overall philosophy that the Ordinance was meant to "declare a great principle of public right," and leave it to the legislature or local officials to define precisely what this right entails. Of course, the courts must still protect the integrity of trust rights in Massachusetts and remain faithful to the true intent of the Doctrine. It is likely that if it assumed its proper role, however, modification of the common law concerning the Doctrine in the commonwealth consistent with its true intent and spirit would be a forgone conclusion.

**CONCLUSION**

The rigid application of a flexible interpretation of the public trust doctrine to the privately-owned beaches on Nantucket and Martha's Vineyard has resulted in a sort of historical accident, one in which a law meant to protect the public's access to unique resources and maximize the public's benefit from them now operates to do the exact opposite. As the public demand for access to trust resources for recreational activities increases, and the stock of these unique treasures continues to wane, this problem is likely to remain at the forefront of property disputes on Nantucket and Martha's Vineyard. Therefore, as the sovereign

---

trustee of the public’s rights under the Doctrine, this issue must be addressed by either the federal, state, or perhaps local government.

History indicates that the islands were outside of the area originally contemplated by the Ordinance, and perhaps this law does not apply to them in a strict sense. Nevertheless, even assuming that the islands are subject to the Ordinance pursuant to their merger with Massachusetts in 1691, the current application of this law violates the overall intent of the public trust doctrine as mandated by the Supreme Court, and may possibly be revoked. There may be a less heavy-handed approach to restore the public’s trust rights in the flats.

Before the beach access issue in Massachusetts may be addressed in any meaningful fashion, however, the courts must get out of the legislature’s way and abandon their rigid interpretation of the Ordinance regarding the commonwealth’s flats. Instead, courts must employ the more pragmatic approach of the SJC’s decisions regarding the great ponds. Perhaps in this manner the correct balance of trust rights can be reestablished on the islands of Nantucket and Martha’s Vineyard. Although reclaiming the ocean flats of Massachusetts is a limited victory in the fight to allow public enjoyment of the commonwealth’s unique resources, it is nevertheless an important one.