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THE PUBLIC TRUST DOCTRINE IN MASSACHUSETTS LAND LAW

Heather J. Wilson*

I. INTRODUCTION

Extensive residential property is becoming a commodity which fewer and fewer Americans can afford.1 Growing urbanization, economic factors, and increasing commercial demands for land may soon render the United States a largely “landless” society.2 Even among property owners, land use patterns are changing. Condominium complexes with common recreational facilities are becoming popular,3 as are housing units which share yard space.4 Residential developments are no longer laid out in a gridlike fashion; other configurations provide a greater sense of roominess while using less space.5 These methods of reallocating limited land resources indicate that the presence of open space and the availability of undeveloped land for recreational purposes are important social needs, and that people may be willing to sacrifice the right of exclusive ownership in order to obtain access to such land. The pervasiveness and strength of the general public’s demand for access to undeveloped land is evidenced by statisticians’ reliance on the amount of acreage which cities devote to general

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public use as a criterion for judging the quality of life in modern urban areas.\textsuperscript{6}

Individuals who own little or no land must rely on the government to satisfy their need for open space. These members of the public have a strong interest in maintaining access to land which has been made available to them. Do they, however, have any claim of right to such land based upon its public importance and their continued use of it? Property law offers several mechanisms by which one may obtain rights in the land of another.\textsuperscript{7} Some of these techniques, however, carry onerous requirements concerning the nature or the length of the public use, and others concern themselves with evaluating the actions or intent of the land's titular owner rather than the strength of the public's need and the social importance of the uses to which the public puts the land.

Nevertheless, there is a common-law rule which safeguards the public's right to use publicly owned land for socially valuable activities. This principle is the doctrine of public trust. The public trust doctrine originated under Roman law in order to grant the public unrestricted access to both the sea and the seashore. The ancient doctrine accomplished its aim by declaring that the sovereign state held the sea bed and the land affected by the tides in trust for the benefit of the public. This notion permitted the public to use the ocean and the seashore for any noninjurious purpose. The public trust doctrine was later adopted into English common law and consequently came to the American colonies, including Massachusetts.

Because of Massachusetts' coastal location and its citizens' historical dependence upon the sea, public trust has traditionally helped shape the use of the state's aquatic resources, and it continues to serve that valuable function today. The public's need for access to undeveloped land, however, is becoming as great as its need for access to the sea. This fact highlights the importance of applying the public trust doctrine to inland areas. The Massachusetts judiciary has recognized the need to protect public use of government-owned land. Although it has never explicitly extended the public trust doctrine to inland areas, it nevertheless has injected public trust concepts into land use law.


\textsuperscript{7} \textit{See infra} notes 123-27.
Massachusetts courts have implemented the essential ideas of public trust through several legal mechanisms. The foremost of these is a principle of eminent domain law called the doctrine of prior public use. This doctrine requires state agencies, municipalities, and other governmental entities to obtain legislative authorization before altering the existing use of public land. No existing land use doctrine, however, adequately protects the public’s interest in land which is made publicly available, but which is actually held by an organ of the state in its proprietary capacity.

Using Massachusetts as an example, this article will examine how public trust principles have been extended to protect public access to inland areas. First, it will outline the history and development of the public trust doctrine, concluding with a description of how the doctrine is currently applied to submerged lands in Massachusetts. Second, it will consider public trust’s applicability to undeveloped public land and the desirability of using the doctrine to protect such areas. Third, it will explore in some detail how Massachusetts has already incorporated public trust principles into its land use law. Finally, the article will analyze the sufficiency of Massachusetts’ approach to protecting its undeveloped public lands. It will also point out one situation in which legislative action may be required to defend fully the public’s interest in maintaining access to open land.

II. EVOLUTION OF THE PUBLIC TRUST DOCTRINE

The notion of a sovereign state holding land in trust for its people developed under Roman law, in which the doctrine was applied only to the bed of the sea and the area washed by the tides. Although the doctrine has been expanded somewhat in the United States, many courts and commentators still consider its applicability to be limited primarily to submerged lands and their banks or shores. In order to isolate the central purpose of the public trust doctrine, one must therefore look to both its aquatic heritage and its continuing role in the development of coastal law in the individual states, of which Massachusetts is an example.

A. Origins and Historical Development of Public Trust

For thousands of years, people have depended upon the sea as a source of food and a means of transportation. The satisfaction of

basic physical and social needs necessitated a policy of free public access to the sea among early organized societies. To Roman minds, the need for such a social policy also required the formulation of a legal justification for the exemption of the sea and its coastline from the principles of private property law. The legal underpinning which the Romans developed for this social necessity was the doctrine of public trust. Not only was the doctrine a central part of Roman water law, but it continued to play an important role in the law of those countries which made Roman practices the basis of their legal systems, such as England, France, and Spain. This article, however, will confine its discussion of history to England’s treatment of the public trust doctrine, since it is English legal principles which most American states, including Massachusetts, adopted as the foundation of their common law.

Over the centuries, the scope of the public trust doctrine has been contracted and expanded by lawmakers to reflect both changing public demand for access to coastal and inland waterways, and shifting public use of these natural resources. The course of the doctrine’s evolution, however, demonstrates that it is the satisfaction of public needs, and not the protection of natural resources, which is at the heart of public trust.

1. Roman Law

Under Roman law, the state’s sovereignty extended over the foreshore. This land, however, was considered the people’s com-

10. See H. Schultes, Aquatic Rights 5 (1811).
12. The foreshore is a comprehensive term generally used to refer to both the bed of the sea and the land over which the tide flows. Note, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L.J. 762 n.1 (1970) [hereinafter cited as Tidal Areas] This latter area is often called the shore, the tidelands, or the flats. Various legal systems have defined its upper boundary differently. Under Roman law it extended to "the limit of the highest winter flood", id. at 783 n.83 (quoting Inst. Just. 2.1.1 pr. (4th ed. J.B. Moyle transl. 1889)), and under Hawaiian law to the upper annual reaches of the waves, excluding storm and tidal waves, as indicated by vegetation and debris. Application of Sanborn, 57 Hawaii 585, 588, 562 P.2d 771, 773 (1977). English common law restricted its upper limit to the "ordinary" high water mark, M. Hale, De Jure Maris (1786), quoted in Shively v. Bowlby, 152 U.S. 1, 12 (1894), which was defined as the point at which the action of the waves ceased to disturb upland soil and vegetation. P. Nichols, The Law of Eminent Domain § 5.33 [4] (1982). See also, Corker,
mon property, of which the state was merely trustee.\textsuperscript{13} Therefore, the government could exercise its sovereign powers only in a regulatory capacity.\textsuperscript{14} According to Roman jurisprudence, “natural law” dictated that the “air, running water, the sea, and consequently the seashore were common to all”,\textsuperscript{15} and no one could be denied access to the seashore, as long as he or she refrained from injuring improvements made upon it.\textsuperscript{16} Although Roman writers discuss particular activities which were permitted upon the seashore, such as “fishing, navigating and taking water”,\textsuperscript{17} drying nets or building a cottage “for purposes of retreat”,\textsuperscript{18} this list seems to be merely indicative of common, appropriate uses rather than an enumeration of all permissible activities.\textsuperscript{19}

The concept of common ownership of the foreshore may have developed simply because the ocean did not lend itself to exclusive, private ownership,\textsuperscript{20} and could not be efficiently exploited by individuals.\textsuperscript{21} It may also have been that private ownership of the foreshore would have endangered the welfare of the whole society, considering Roman society’s heavy dependence on the sea for maintaining its widespread commercial networks and providing food for those who lived near its shores.\textsuperscript{22} Although both factors may have been important in bringing about communal ownership of the tidal areas, the latter was probably more influential. As one commentator has noted, “over the centuries, the extent to which the public’s interests have been recognized in the law has correlated directly with changes in the ratio of the demand to the supply of tidal resources”.\textsuperscript{23}

\textit{Where Does the Beach Begin and to what Extent is that a Federal Question}, 42 WASH. L. REV. 33, 43-54 (1966).

13. \textit{Tidal Areas}, supra note 12, at 772 n. 43.


15. INST. JUST. 2.1.1 pr., \textit{quoted in id.} at 763.

16. INST. JUST. 2.1.1-2.1.6 pr., \textit{quoted in Tidal Areas, supra} note 12, at 763-64. “Improvements” are defined as “habitations, monuments, and buildings” in INST. JUST., (T. Sanders trans. 4th ed. 1867).


18. INST. JUST., 2.1.1-2.1.6 pr., \textit{quoted in Tidal Areas, supra} note 12, at 764.


22. \textit{See generally, Tidal Areas, supra} note 12, at 763-64, 772-74.

23. \textit{Id.} at 771-73.
2. English Law

At some point before or during the Norman reign (1066-1154), the English king claimed a private interest in the land beneath the sea, and made grants of this land to individual subjects.24 Publicly available shoreline remained adequate until about the time of Magna Charta (1215), when an urgent need for reform was perceived, and the law began a trend back toward recognition of public rights in the seashore.25 Although the precise effect of Magna Charta is unclear,26 it is agreed that after Magna Charta, the king held two interests in the foreshore: the jus privatum and the jus publicum.27 The jus privatum was the proprietary interest in the foreshore which the sovereign had previously possessed. This interest, however, was subordinated to the jus publicum, an interest which the king henceforth held in his capacity as representative of the people, for the protection of their common fishing and navigational rights.28 The king could still convey his proprietary interest in land, but after Magna Charta, such land remained subject to the jus publicum which could be alienated only by an act of Parliament.29

The introduction of the jus publicum saved the public's right of access to the sea from total elimination at the hands of the king. The large areas of the foreshore, however, which, prior to Magna Charta, had been granted by generations of kings to private individuals, necessitated restricting the public's interest in the


25. Tidal Areas, supra note 12, at 765.


[The jus privatum of the owner or proprietor is charged with, and subject to, that jus publicum which belongs to the king's subjects; as the soil of a highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people which may not be prejudiced or damnified.

M. HALE, DE JURE MARIS (1786), quoted in Shively v. Bowlby, 152 U.S. 1, 12 (1894).]
sea to easements30 permitting only fishing and navigation.31 Thus, Magna Charta did not give Britons the extensive rights to tidal lands possessed by their Roman predecessors, but it did allow them to pursue those water-related activities most vital to a pre-industrial society.

3. American Law

Under their royal charters, the American colonies were given the king's title to both the jus publicum and the jus privatum, as well as Parliament's rights of regulation. After the Revolution, these interests passed to the newly formed states.32 As other states entered the Union, they too became entitled to the land under their navigable33 waters, subject to the public trust.34 Because the states have the power to administer their trust lands as they see fit, the public trust doctrine has always been considered exclusively a doctrine of state law,35 at least with respect to state owned land.36

In 1892, an Illinois case gave the Supreme Court of the United States an opportunity to consider public trust's applicability to inland bodies of water. This case, Illinois Central Railroad v. Illinois,37 has been called the "lodestar"38 of American public trust law. At issue in the case was a grant of approximately one thousand acres under Lake Michigan, made by the Illinois legislature to the Illinois Central Railroad. This block of submerged land encompassed virtually the entire commercial waterfront of the city of Chicago. Four years after making the conveyance, the

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30. "An easement is a right to use another's land for special purposes not inconsistent with the general property interest which the land owner retains." 2 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, § 315, at 2-3 (1980).

31. Tidal Areas, supra note 12, at 770.


33. American courts have expanded the English common law definition of "navigable." See infra text at notes 42-47.


37. 146 U.S. 387 (1892).

38. Sax, supra note 19, at 489.
legislature regretted its action, repealed the grant, and brought suit to have it declared void. The United States Supreme Court held that the original grant was invalid, because the legislature did not have the power to put such a large block of public trust land forever beyond its control.\(^{39}\) Although the Court in *Illinois Central* was interpreting Illinois public trust law, rather than creating a precedent binding on the states\(^{40}\) or establishing a distinct, federal public trust law,\(^{41}\) it is nonetheless an important statement concerning the purposes of the public trust doctrine and the flexibility with which it should be applied.

In reaching its decision, the Court expanded the scope of the public trust doctrine. The Court recognized that although English law considered all navigable waterways subject to the public

\(^{39}\) The Court stated:

The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. 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 State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace . . . \([\text{Property of a special character, like lands under navigable waters, . . cannot be placed entirely beyond the direction and control of the State.}]\)

\(^{40}\) See supra text at note 35.

trust, the doctrine's applicability in England was nevertheless limited to coastal areas. This was so because Britain's navigable waters were almost all affected by the action of the tides, and English jurists found it convenient to make the ebb and flow of the tide the legal test of navigability. In an earlier case, the Supreme Court had realized that such a definition of navigability was inappropriate in the United States, where many bodies of water unaffected by the tide were, in fact, navigable. Therefore, it had altered the English concept of navigability to match the characteristics of the new continent. The Illinois Central court recognized this previous change. It concluded that navigability should remain the test of whether submerged land was imbued with the public trust, but that navigability should be defined in terms of actual navigability, without any reference to the tide's ebb and flow. "The [public trust] doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide."

By noting with approval the American expansion of the category of lands covered by the doctrine, the Court implicitly cautioned against recognizing the public trust only in land possessing the same physical features as land traditionally subject to the trust. The Court realized that it is the social value of the uses to which the public has put the land, rather than the nature of the land itself, which determines the existence of public trust. It tacitly acknowledged that in identifying public trust land, there is no dependable shortcut for ferreting out the land's functional role,

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42. 146 U.S. at 435.
43. Id. at 435-36. See also Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C.D. L. REV. 195, 201-02 (1980).
46. Framing a definition of "navigability in fact" is beyond the scope of this article. However, it is often defined in terms of suitability for boating and the floating of logs. 2 P. NICHOLS, supra note 12, at § 5.30 [1] (1982). See generally MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water, 3 FLA. ST. U. L. REV. 513 (1975).
47. Illinois Cent. R.R. v. Ill., 146 U.S. 387, 436 (1892). See also Barney v. Keokuk, 94 U.S. 324, 336 (1876). It must be remembered, however, that navigability is not always coextensive with public ownership today. The ownership of navigable waters within its boundaries passed to each state as it entered the Union (see supra text at notes 32-34), but many states have seen fit to place the title to their submerged riparian lands in private hands. 2 P. NICHOLS, supra note 12, at § 5.30 [1].
48. See 146 U.S. at 458.
which may be defined as the presence or absence of public uses vital to the livelihood or welfare of the citizenry.

_Illinois Central_ highlighted the purposes of the public trust doctrine and demonstrated how that purpose gives the doctrine flexibility with respect not only to the types of land to which it may apply, but also to the types of public uses which it may protect. In discussing the importance of public access to the waters of Lake Michigan, the Court mentioned the time-honored public uses of fishing and navigation, but it particularly emphasized the value of commerce. 49 This emphasis undoubtedly reflected the priorities of the people of a city located on an immense body of water, at what was perhaps the height of the industrial revolution. By phrasing its rationale in terms of commerce rather than in terms of other uses, which were both more traditional and probably more widely practiced in bodies of fresh water, the Court indicated that the public uses protected by the doctrine may vary according to both the changing needs of the public and the activities to which the natural characteristics of the particular waterway, such as its size and depth, make it most amenable. "[T]he bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public uses for which they are adapted." 50 Thus, the Court acknowledged that the public's use of Lake Michigan was not limited to those activities which it had enumerated in its decision. Through its dicta, 51 _Illinois Central_ emphasized the flexibility with which the public trust doctrine should be interpreted, and thus set the tone for its further development by the individual states.

4. Massachusetts Law

Massachusetts lawmakers, like the United States Supreme Court in _Illinois Central_, have long recognized that the public trust doctrine should be given flexibility with regard to the types of submerged lands to which it applies and the public uses which it protects. More than a century before Massachusetts achieved statehood, the General Court of the Massachusetts Bay Colony moved to secure public access to the colony's many small freshwa-

49. _Id._ at 452, 454.
50. _Id._ at 457-58 (emphasis supplied).
51. _See supra_ note 39.
ter lakes, called Great Ponds. The Ordinance of 1641-47, which is now considered part of Massachusetts’ common law, prohibited towns from granting ponds larger than ten acres to private individuals, and required that such ponds be made available for public use. Although the Ordinance enumerated only the rights of “fishing and fowling,” the Supreme Judicial Court has liberally interpreted its provisions to permit virtually any use of a Great Pond which satisfies a public need.

Despite the harmony between Massachusetts law and Illinois Central regarding the public trust doctrine’s flexibility, the state’s
judiciary has ignored Illinois Central's proclamation that a state may not completely abdicate its responsibility to maintain public trust lands for public purposes.\textsuperscript{56} Massachusetts courts have never, until recently,\textsuperscript{57} questioned the power of the legislature to transfer public trust property into private hands. In the 1904 case of Commonwealth v. Boston Terminal Co.,\textsuperscript{58} the Supreme Judicial Court acknowledged that the various states differ in their opinions on a state's right to divest itself of its public trusteeship, but it noted that Massachusetts common law had never recognized any limitation on the legislature's power to alienate public trust land.\textsuperscript{59} In fact, the Massachusetts Bay Colony alienated some of its public trust land in the very same Ordinance in which it guaranteed public access to Great Ponds. The early settlers realized that the growth of commerce and industry in their community depended upon creating private incentives for the construction of wharves which the Colony could not afford to erect.\textsuperscript{60} The General Court therefore extended the title of waterfront owners to the line of extreme low tide or to 100 rods (1650 feet) from the mean high water mark, whichever was the lesser. The Ordinance, however, specifically reserved to the public the rights of fishing, fowling and navigation.\textsuperscript{61}

\begin{itemize}
  \item \textsuperscript{56} See \textit{supra} note 39.
  \item \textsuperscript{57} See \textit{infra} text at notes 78-88, 100-04.
  \item \textsuperscript{58} 185 Mass. 281, 70 N.E. 125 (1904).
  \item \textsuperscript{59} \textit{Id.} at 283, 70 N.E. at 126. The court elaborated on this point saying, "the sovereign power, having the absolute right to terminate the trust which is appurtenant to its ownership, can refuse to act longer as trustee, and convey its property, so that the grantee will hold it free from the trust." \textit{Id.}
  \item \textsuperscript{61} The Ordinance of 1641-47 states in pertinent part:
    
    Every inhabitant who is a house-holder shall have free fishing and fowling, in any great Ponds, Bayes, Coves and Rivers, so far as the Sea ebs and flows, within the precincts of the town where they dwell ... It is declared that, in all creeks, coves, and other places, about and upon salt water, where the Sea ebs and flows, the Proprietor of the land adjoyning, shall have proprietie to the low water mark where the Sea doth not ebb above a hundred rods, and not more wheresoever it ebs farther. Provided that such Proprietor shall not by this libertie have power to stop or hinder the passage of boats or other vessels in, or through any sea creeks, or coves or other mens houses or lands.

\textbf{General Lawes, supra} note 54, at 35. For lengthier discussions of the Ordinance and its effect on the law of the Massachusetts coastline, see also M. FRANKEL, LAW OF SEASHORE WATERS AND WATER COURSES: MAINE AND MASSACHUSETTS (1979); J. WHITTLESLEY, LAW OF THE SEASHORE, TIDEWATERS AND GREAT PONDS IN MASSACHU-
While the history of the Ordinance has been detailed in countless cases, some modern commentators have implied that this ancient law is obsolete, and is kept alive by modern courts merely to effectuate a policy of restrictive public access to the state's beaches. Thus, its significance in the scheme of public trust law has been largely ignored. Although the source of the General Court's authority to enact the Ordinance is not entirely clear, the Ordinance is, nevertheless, a good example of the flexibility of public trust principles. Aware of the conflicting needs of the public for the rapid development of shipping facilities and for the unrestricted use of the sea as a source of food and a means of transportation, the General Court reconciled those interests by alienating only as much of the tidelands as was necessary for wharf-building. The early colonists plainly recognized that the doctrine of public trust is intended to satisfy public needs rather than block their fulfillment, and that the doctrine protects primarily the public use, and only incidentally the natural resource, on which the public use depends.

The Supreme Judicial Court has consistently construed the Ordinance as granting littoral owners a fee in the land to which it applies, and has stolidly refused to expand the category of public rights in the privately-owned flats beyond those enumerated in the Ordinance; namely, fishing, fowling, and navigation. At least one commentator has called this judicial stance a

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62. See cases cited supra note 60 and cases cited by authorities listed supra note 61.

63. See, e.g., Graber, supra note 61, at 15; Comment, Who Owns the Beach? Massachusetts Refuses to Join the Trend of Increasing Public Access, 2 URB. L. ANN. 283 (1976).

64. There is some question as to whether the grant from Charles I to the Company of Massachusetts, under which the Massachusetts Bay Colony was founded, conferred on the Colony's General Court the power to make such a conveyance of tidelands. D. RICE, supra note 24, at 20-21; Commonwealth v. Roxbury, 75 Mass. (9 Gray) 451, 516-17 (1857).

65. Littoral owners are those holding title to land along the shore. Riparian owners, on the other hand, possess the banks of inland bodies of water.

66. A fee (also called a fee simple or a fee simple absolute) is "the largest estate known to the law: it denotes the greatest possible aggregate of rights, powers, privileges, and immunities which a person may have in land." C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 29 (1962).

67. Opinion of the Justices, 365 Mass. 681, 685-686, 313 N.E.2d 561, 566 (1974) and cases cited therein. The upland owner was free to enclose, fill, or build upon the flats adjoining his land and thereafter exclude the public from them, but as long as he or she left the land open and undeveloped, the public was free to use it for the purpose of fishing, fowling, and navigation. Weston v. Sampson, 62 Mass. (8 Cush.) 347, 354-55 (1851); Austin v. Carter, 1 Mass. 231, 232 (1804).

68. In Butler v. Attorney General, 195 Mass. 79, 80 N.E. 688 (1907), the Supreme
“comparatively narrow interpretation of the scope of the public trust,” but this description is misleading. The court has, in cases centering on public rights in land affected by the Ordinance, merely enforced the easements which the Ordinance created. Since the Ordinance does not apply to land below the extreme low water mark, the court, in Butler v. Attorney General, indicated that public rights in such land were not limited to fishing, fowling or navigation. Similarly, in Home for Aged Women v. Commonwealth, the Supreme Judicial Court stated that the public trust doctrine should be interpreted as a safeguard for not only the public’s navigational rights in waters below the line of low tide but also “all necessary and proper uses” to which such waters could be put. Thus, the scope of the public trust doctrine is not necessarily more “narrow” in Massachusetts than in some other states. Rather, the Ordinance of 1641-47 removed the tidelands from the domain of public trust law and subjected them to the rules of private property. The grants of shoreline which the Ordinance made to the owners of the adjoining uplands were much like the grants of tidal lands which various English kings made to favored subjects prior to the signing of the Magna Charta. Both necessitated defining the public’s rights to use of the sea in terms of easements for the performance of specific activities.

The Ordinance of 1641-47 and the common law doctrine of public trust which it modified are by no means historical curiosities. They remain a vital part of Massachusetts water law. In fact, the precise definition of the trust under which the state holds submerged coastal land is still evolving, and has, in recent years, become the subject of debate in both the state courts and the Legislature. A brief discussion of this controversy is needed to

Judicial Court held that the public had no right to use the flats for the purpose of bathing. Similarly, in Opinion of the Justices, the court warned that the state’s creation of a foot path along the coastline between the high and low water marks would be an unconstitutional taking of property rights granted to upland owners by the Ordinance of 1641-47. 365 Mass. 681, 313 N.E.2d 561 (1974). But see Barry v. Grela, 372 Mass. 278, 361 N.E.2d 1251 (1977) (recognizing plaintiff’s right to cross defendant’s beach in order to fish from a jetty located on another’s property).

69. Graber, supra note 61, at 15.
70. See cases discussed supra note 68.
71. 195 Mass. 79, 80 N.E. 688 (1907).
72. Id. at 83, 80 N.E. at 689 (dictum).
74. Id. at 434-35, 89 N.E. at 129.
75. See supra text and notes at notes 24-31.
accentuate the continuing importance of the public trust doctrine in Massachusetts.

B. Current Application of Public Trust in Massachusetts Water Law

Although the Ordinance of 1641-47 rendered tidelands law in the Commonwealth more complex than that in states which have no such statute,76 the extent of both public and private rights to the shore is well-settled in Massachusetts. Oddly, however, the law governing Massachusetts' submerged lands, which is unaffected by the Ordinance, has become muddled. The question of whether the Legislature may convey undersea land to private parties free of the public trust has been the central issue in three relatively recent Massachusetts cases. Two of the cases were authored by the Supreme Judicial Court, and one was decided by a Massachusetts federal district court. Although Massachusetts courts, in the first century of statehood, appeared to have resolved the alienability issue in favor of the Legislature’s power to free land from the public trust,77 only one of the three modern decisions followed this old line of cases.

The first unsettling case, Boston Waterfront Development Corp. v. Commonwealth,78 arose in 1978. It involved certain statutes,79 passed by the General Court more than a century ago, which gave the Boston Waterfront Development Corporation, a commercial enterprise, various wharfing privileges on historically submerged land in Boston Harbor.80 The corporation claimed that, by virtue of the wharfing statutes, it held a fee simple title81 to the land at issue. According to the Commonwealth, however, these laws

76. The Ordinance of 1641-47 is part of the law of Maine as well as Massachusetts. New Hampshire, Rhode Island, Connecticut, Pennsylvania, and Maryland have also accorded upland owners property rights in the flats adjoining their land. Shively v. Bowlby, 152 U.S. 1 (1894). Other jurisdictions make no legal distinction between tidelands and submerged lands. Ownership of land below the high water mark is in the state, subject to the public trust. Id.
77. See supra text at notes 58-59.
81. See supra note 66.
granted the developer less comprehensive rights in the land. The Supreme Judicial Court held that the statutes granted the Boston Waterfront Development Corporation only a fee simple subject to a condition subsequent\(^8\) that the land always be used for a public purpose related to maritime commerce.\(^9\) The Court dismissed as dicta language in Common\textit{wealth v. Boston Terminal Co.}\(^8\) and other, older, cases which adopted the view that the State was fully capable of relinquishing its trusteeship in submerged lands.\(^8\)

The court’s holding in \textit{Boston Waterfront} was based not only upon its interpretation of the relevant statutory language, but also upon its interpretation of the American development of the public trust doctrine as exemplified by \textit{Illinois Central}.\(^8\) The court was also swayed by its belief that the property at stake was part “of the Commonwealth’s most precious natural resources”\(^8\) which had “traditionally been held inviolably committed to the public domain.”\(^8\)

The court’s strong language implied that the legislature was not, after all, capable of freeing submerged lands from the rights of the public. This implication sparked considerable concern among owners of the Boston waterfront property which had been, at one time, part of Boston Harbor.\(^8\) The General Court responded to this concern by proposing legislation which, under certain conditions, would have eliminated any implied condition subsequent in favor of the Commonwealth in such land.\(^8\) Under

\(^8\) “A fee simple subject to a condition subsequent exists when the fee simple is subject to a power in the grantor to terminate the estate granted on the happening of a specified event.” If this event occurs, “the granted estate continues in existence until [the grantor] effectively exercises his option to terminate [the grant] . . .” C. \textit{MOYNIHAN}, \textit{supra} note 66, at 36.

\(^9\) 378 Mass. at 654, 393 N.E.2d at 369.

\(^8\) 185 Mass. 281, 283-84, 70 N.E. 125, 126 (1904).

\(^8\) 378 Mass. at 643, 393 N.E.2d at 364.

\(^8\) 146 U.S. 387 (1892). For discussion of this case, see \textit{supra} text and notes at notes 37-51. Some of the \textit{Illinois Central} language quoted by the \textit{Boston Waterfront} court, 378 Mass. at 647, 393 N.E.2d at 366, is set forth \textit{supra} note 39.

The \textit{Boston Waterfront} court, however, failed to consider that \textit{Illinois Central} was an interpretation of Illinois public trust law and not a proclamation of American public trust law. \textit{See supra} text at note 40.

\(^8\) 378 Mass. at 630, 393 N.E.2d at 357.

\(^8\) \textit{Id.} at 646, 393 N.E.2d at 365.

\(^8\) \textit{See} S. 2145 (1980); S. 2382 (1981). Over the centuries, much of the submerged land on the Harbor’s perimeter has been filled in, raised above sea level, and built upon. \textit{See} Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. at 630, 393 N.E.2d at 357.

\(^8\) S. 1001 (1981). \textit{See also} H. 658, (1981); S. 2145 (1980); S. 2150 (1980); S. 2382 (1981). Although many such bills were introduced, none was ever enacted.
one proposed statute, S. 1001, the Commonwealth would have relinquished its interest in specific land if the Secretary of the Executive Office of Environmental Affairs determined that the present or proposed use of such land would serve a public purpose noninjurious to public navigation in Boston Harbor.91

The validity of this legislation was the subject of the 1981 Opinion of the Justices,92 the second of the trio of recent Massachusetts public trust cases. In its decision, the court held that a relinquishment of the public trust is within the power of the legislature if it is done in furtherance of a "proper public purpose"93 and pursuant to explicit legislation.94 The court also implied that it would overrule its decision in Boston Waterfront if it could.95


Unlike the federal Constitution, Massachusetts' constitution specifically authorizes the Supreme Judicial Court to render advisory opinions at the request of the House, the Senate, the governor, or the council. MASS. CONST. pt. II, c.3, art. II. Article III, section 2 of the U.S. Constitution, in fact, prohibits the federal courts from granting advisory opinions by limiting their jurisdiction to "cases" and "controversies." See U.S. CONST. art. III, § 2; J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 54-57 (1978).

93. What the court considered to be a "proper public purpose" is unclear. 1981 Mass. Adv. Sh. 1361 at 1376, 424 N.E.2d 1092 at 1103. S. 1001, § 3 (1981) defined "public purpose" to include any lawful use of real estate, and "proper public purpose" to include the promotion of "commercial, industrial, residential, conservation and recreational development of the city of Boston." S. 1001, § 2 (1981). The distinction between these two definitions is not apparent from the legislation. The court warned that the bill's broad definition of public purpose might not, in all instances, satisfy the Legislature's constitutional duty to act for a public purpose. 1981 Mass. Adv. Sh. at 1372, 424 N.E.2d at 1101. See MASS. CONST. pt. 2, c.1, § 1, art. IV. (The judiciary has developed its own body of law addressing the definition of public purpose within the meaning of the constitution. See cases cited in Mass. Home Mortgage Fin. Agency v. New England Merchants Nat'l Bank, 376 Mass. 669, 676-84, 382 N.E.2d 1084, 1089-93 (1978); Opinion of the Justices, 368 Mass. 880, 885-86, 335 N.E.2d 362, 365-66 (1975).) Nevertheless, the court found it "need not pause concerning this definition," because § 2 and § 4 of the legislation required that the land be used for a "proper public purpose" before the Commonwealth would relinquish its vestigial rights in the land. 1981 Mass. Adv. Sh. 1361 at 1376, 424 N.E.2d 1092 at 1103 (emphasis in original). The court, in some unexplained way, distinguished between a public purpose and a proper public purpose. The justices joining in the minority opinion, however, were unable to find any distinction between the two. See id. at 1390-92, 424 N.E.2d at 1111. See infra text at notes 132-42, 194-230.

94. 1981 Mass. Adv. Sh. at 1369, 424 N.E.2d at 1099. In an accompanying footnote, the court explained why it could not overrule Boston Waterfront. The court stated:

It is not open to the Justices in answering questions submitted to them under the Constitution to attempt to overrule a decision made by the court in a cause between party and party or to speculate upon the correctness of such a decision.
Opinion of the Justices is in keeping with the long line of Massachusetts cases which recognize in no uncertain terms the power of the sovereign, acting through the legislature, to surrender the public trust. Moreover, the proposed legislation on which the opinion focused was virtually indistinguishable in its purpose from the Ordinance of 1641-47, the validity of which even the Boston Waterfront court dared not question. Like the Ordinance of 1641-47, the bill represented an effort by the Legislature to reconcile conflicting public interests. S. 1001 attempted to weigh the public’s interest in the free availability of Boston Harbor against its demand for private ownership of land along the harbors’s periphery. The Ordinance of 1641-47 attempted to resolve the conflict between the public’s need for access to the shoreline and its need for the construction of commercial wharves.

In Opinion of the Justices, the court was unable to renounce completely its position in Boston Waterfront. It therefore attempted to distinguish that case from the one before it. The court reasoned that Boston Waterfront rested on an analysis of common law principles and statutory provisions, while its present decision was based on constitutional considerations. The court noted that most states do not consider their constitutions a bar to legislative grants of absolute rights in land under the sea, but it nevertheless cautioned that “a gross or egregious disregard of the public interest would not survive constitutional challenge.”

This novel reference to the public trust doctrine as a potential constitutional restriction on the ability of the legislature to relinquish the public trust in submerged lands was repeated in U.S. v. 1.58 Acres of Land, a Massachusetts federal district court case.
decided only two months after Opinion of the Justices. 1.58 Acres of Land involved the validity of the federal government’s taking of certain Boston waterfront property belonging to the Commonwealth. The property at issue lay below the historic low water-mark. The Commonwealth challenged the United States’ declaration of taking because it allowed for the ultimate disposition of the land to private individuals. The State claimed that this allowance “could vitiate the perpetual public trust that is impressed upon the land.” The district court, relying on the same Illinois Central language cited by the Boston Waterfront court, held that neither the federal government nor the state government could free submerged land from the sovereign’s jus publicum by conveying it to private parties. The court asserted that the jus publicum could not be extinguished even by constitutional amendment, but only by the demise of the nation itself: “The trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign.” This language implies that the public trust may actually be a sort of superconstitutional restriction on the conveyance of submerged lands.

As the foregoing discussion indicates, the law governing Massachusetts’ submerged lands is presently in a state of unresolved turmoil. Prior to 1978, it seemed clear that the Legislature possessed the power to convey submerged land free from the public trust, because the jus publicum, the jus privatum, and all Parliament’s rights of regulation had devolved upon the State at the time of the Revolution. The Boston Waterfront case rejected longstanding precedent and denied the existence of this power. Its holding was reinforced three years later by a federal case, U.S. v. 1.58 Acres of Land. This case, in turn, appears to be in direct conflict with the Supreme Judicial Court’s decision in its Opinion of the Justices, which upheld, as a general proposition, the Legislature’s power to free land from the public trust. The only element common to both of the latter cases is their implication that, in certain, undefined instances, the public trust doctrine may rise above its common law origins and assume constitutional or superconstitutional dimensions. To date, only one Massachusetts court,

101. See 40 U.S.C. § 258a (1976) (authorizing the filing of declarations of taking by the United States and setting forth the required contents of such declarations).
102. 523 F. Supp. at 121.
103. Id. at 124. See supra note 39.
104. Id. at 124.
the land court, has attempted to reconcile the holdings of these three cases, and its method of doing so was singularly unconvincing.\textsuperscript{105}

The judicial debate currently brewing in Massachusetts over the Legislature's ability to convey unencumbered title to the state's foreshore demonstrates the continuing vitality of the ancient doctrine of public trust and its ongoing importance as a framework for the formulation of coastal land use policy. The controversy, however, does not question the public trust doctrine's basic premise, which is the protection of the public's right to use resources essential to the welfare of society. It centers instead around the degree of power, if any, which the state or federal government should be given to dispose of publicly valued resources. Thus, it merely indicates that the judiciary is reexamining the effectiveness of legislative discretion as a means of implementing the doctrine's essential purpose. This scrutiny may stem from a judicial perception that the modern legislature is no longer able to recognize diffuse public interests or willing to respond to unvoiced public needs.\textsuperscript{106}

Just as the method of implementing the public trust doctrine merits reassessment in light of current political realities, the scope of the doctrine also requires reevaluation in light of changing public needs or environmental conditions. Both the implementation mechanism and the scope of the public trust are elements auxiliary to the doctrine's central purpose. These elements must be interpreted flexibly if the doctrine is to continue to fulfill its goal of preserving resources which satisfy important public needs.\textsuperscript{107} In this regard, the line of modern Massachusetts

\textsuperscript{105} Newburyport Redevelopment Authority v. Commonwealth, No. 39,539 (Mass. Land Court July 1, 1982). The land court resolved its dilemma by reconstructing English common law. It concluded that the flats are subject only to the jus privatum, while land below the low water mark is subject only to the jus publicum. The legislature controls the jus privatum and may convey tidelands free from the limited rights which the jus privatum bestows on the public. However, no government action whatsoever can free submerged lands from the jus publicum with which they are impressed. Thus, the court concluded, any grant of submerged lands carries with it a condition that the lands always be used for a public purpose. \textit{Id.} at 2-3.

\textsuperscript{106} Joseph Sax has concluded that the public trust doctrine is simply a mechanism for judicial oversight of legislative action. "The 'public trust' has no life of its own and no intrinsic content. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process." \textit{Sax, supra} note 19, at 521.

\textsuperscript{107} As one commentator explained, 

The assertion by the public of a right to enjoy additional uses is met by the assertion that the public right is defined and limited by precedent based upon
cases which critique the doctrine's means of implementation\textsuperscript{108} parallels the \textit{Illinois Central} case,\textsuperscript{109} which expanded the doctrine's scope to include navigable bodies of freshwater. The remainder of this article will explore another extension of the doctrine's scope: its applicability to publicly-owned, nonsubmerged land.

III. EXTENSION OF THE PUBLIC TRUST DOCTRINE TO INLAND AREAS

Tradition has kept the public trust doctrine confined primarily to large bodies of water and their shores. The doctrine is not, however, inherently more applicable to submerged land than to dry land. In fact, the historical reasons for applying different legal principles to the two types of land have largely disappeared. Both are currently in demand for development and both satisfy important public needs. Free availability of undeveloped land may have become as vital to modern society's well-being as unrestricted access to the sea. The doctrine of public trust is an appropriate means of preserving inland areas subject to public use. Moreover, the importance of applying the doctrine to land increases as publicly available property comes under mounting pressure from commercial interests within the private sector.

A. Public Trust's Applicability to Non-Submerged Land

This article has defined the purpose of the public trust doctrine as the protection of resources on which important public activities depend. Joseph Sax, in his seminal article on public trust law,\textsuperscript{110} refined this simple notion by identifying three general types of public interests guarded by the doctrine. First, he noted, there are “certain interests [which] are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs.”\textsuperscript{111} Second, there are “certain interests which are so particularly the gifts of nature's bounty that

\begin{footnotes}
\item[7] past uses and past demand. But such a limitation confuses the application of the principle under given circumstances with the principle itself.
\item[8] The law regarding the public use of property held in part for the benefit of the public must change as the public need changes.
\item[9] 1 R. CLARK, WATERS AND WATER RIGHTS, 202 (1967).
\item[10] See \textit{supra} text and notes at notes 78-106.
\item[12] Sax, \textit{supra} note 19.
\item[13] Id. at 484.
\end{footnotes}
they ought to be reserved for the whole of the populace."112 Third, there are "certain [resources, such as water, which] have a peculiarly public nature that makes their adaptation to private use inappropriate."113

It seems clear that the first two factors probably pertain to the public's interest in certain upland areas as well as in submerged land. The third factor's applicability to dry land, however, is more questionable. Water has always been thought to possess a peculiarly public nature, which is reflected in the following assertion, made in 1850: "The demand for land is, in a great degree, an individual demand ... while the demand for water is a demand of the public,—a demand of commerce, in which the State and nation have a deep and vital interest."114 While this statement perceptively isolates public demand as the essence of the public trust, the basis for its distinction between land and water needs reevaluation. Historically, the most common uses for submerged lands, such as fishing and navigating, were ones for which the right of exclusivity was unimportant. The rights of the public therefore dominated the sea. Meanwhile, the rights of the individual, championed by private ownership, ruled the land. Tidelands were not then, as they are now, subject to a countervailing pressure for devotion to individual enterprises.115

There is, however, another side to private ownership's growing challenge to continued public use of submerged lands. Just as the nation's technological development and industrial expansion have increasingly made the sea a target of private enterprise,116 population growth and modern patterns of low-density commercial and residential land use117 have created growing pressure for

112. Id.
113. Id. at 485.
115. Tidelands are not immune from such pressure, as the legislation drafted in response to the Boston Waterfront decision, and approved by the Supreme Judicial Court in its 1981 Opinion of the Justices, indicates. See supra text at notes 92-99. See also, Opinion of the Justices, 437 A.2d 597 (Me. 1981) (approving constitutionality of a bill, very similar to Massachusetts' S. 1001, which would have eliminated any interest of the public in privately owned, filled tidelands and submerged lands); People v. Cal. Fish Co., 166 Cal. 576, 591-92, 138 P. 79, 85-86 (1913) (noting that the State of California sometimes sold tidelands which could be made agriculturally productive).
117. See sources cited supra note 2.
the preservation of those undeveloped uplands which are presently available to the public. The usefulness of this same land to private developers has driven up its market value, however, and has rendered the provision of large areas of land for public use a task which the government is uniquely suited to perform. Thus, the public-private distinction between land and water which was so obvious in 1850 is rapidly disappearing. Today, the essential elements of public trust, defined by Sax, are as applicable to land above water as to that below water.

B. Desirability of Incorporating Public Trust Concepts into Land Use Law

When the United States was predominantly an agrarian society, individual ownership of large tracts of open land was common. Today, however, many modern urban dwellers own only their own housing unit or no real property at all. Therefore, they must rely on the government to provide them with open spaces for exercise and recreation. As the number of "landless" Americans grows, so does the need to introduce into land use law the concept of public trust, which protects the interests of members of the public in property to which they do not hold title.

118. This article discusses the public trust doctrine as applied only to undeveloped land. To the author's knowledge, the doctrine has never been used to preserve manmade appurtenances to public property. Such an application of the doctrine, however, seems like a logical extension of its basic purpose of protecting resources incident to important public uses. Although public trust has become inextricably linked to environmental protection, there seems to be no historical basis for limiting it to that context. The doctrine has traditionally defended the public nature of large bodies of water because of their importance to commerce and navigation, see supra text at notes 37-50, apparently without regard for the effect which those activities may have on the purity of the waterways which support them. Considering the importance to modern American society of transportation and communication networks, for example, and the essentially public nature of airports and highway systems, it would seem reasonable to find such assets also subject to the public trust. It is unlikely, however, that the public trust doctrine would ever be needed to preserve their viability. Their importance to the American economy virtually guarantees that they will never be transferred into private hands or allowed to fall into serious disrepair.

119. See supra text at notes 111-113.

120. Cf., Kloppenburg, supra note 2, at 37.

121. See Edgerton, supra note 3, at 44, 48-49; Stokes, supra note 4; Young & Devaney, What the 1980 Census Shows About Housing, AM. DEMOGRAPHICS, Jan. 1983, at 17, 21.

122. Sax has noted that:

The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title. The function of the public trust as a legal doctrine is to protect such public
Although there are legal mechanisms, such as the doctrines of adverse possession, custom, and prescription, which protect established public uses of private land, these methods are less flexible than the public trust doctrine, and they have not generally been applied to government-owned property. Demands for open space and access to areas of natural beauty may also be met in part by private individuals' creation of charitable trusts and expectations against destabilizing changes, just as we protect conventional property from such changes.

Sax, Shackles, supra note 20, at 188.

123. The doctrine of adverse possession allows a person to acquire rights in land of another by occupying or using it without a claim of right for a statutorily defined length of time, known as the statute of limitations, in a manner that is open, notorious, adverse, continuous, and exclusive. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 302, 340 (2d ed. 1975). However, this doctrine does not help preserve the public's interest in land which is made available for public use, because permissive use does not contravene any rights of private ownership. Therefore, such use does not satisfy the doctrine's requirement of adversity, and does not prevent the owner from excluding the public at will.

124. Custom is more useful than adverse possession as a means of formally establishing public rights in land which the public has used with the owner's consent. It, too, however, is of limited applicability because it requires the public use to have existed since time immemorial, which is generally considered to be established by twenty years of uninterrupted use. State ex rel Thornton v. Hay, 254 Ore. 584, 585-97, 462 P.2d 671, 677 (1969); Knowles v. Dow, 22 N.H. 387, 409 (1851). Massachusetts has included this notion of custom in MASS. GEN. LAWS ANN. c.79 § 5 (West 1969) which is intended to help preserve public parkland. The statute states in part:

No portion of a common or park dedicated to the use of the public, or appropriated to such use without interruption for a period of twenty years, shall be taken [by eminent domain] or used as a public way, canal, railroad or railway, or for altering or widening the same, except with the consent of the city or town in which such common or park is situated. . . .

For a case construing this statute, see Needham v. County Comm'r's of Norfolk, 324 Mass. 293, 86 N.E.2d 63 (1949).

125. Prescription is a third means by which the public may acquire the legal right to utilize private property. However, it is unclear what actions must be taken to establish a prescriptive easement, because prescription is frequently confused with adverse possession and custom. See J. CRIBBET, supra note 123, at 340-41.

For a general discussion of the applicability of these doctrines to tidelands law in various states, see Note, Who Owns the Beach? Massachusetts Refuses to Join the Trend of Increasing Public Access, 2 URB. L. ANN. 283 (1976).

126. It is important to distinguish between the doctrines of public trust and charitable trust because the two may be easily confused. Under both doctrines the state is the trustee and the public is the beneficiary. However, the two differ in critical ways. First, the notion of charitable trust concerns itself solely with the intent of the donor, while the doctrine of public trust focuses on the interests of the public. Second, the legal mechanism inhibiting change in the use of land subject to a charitable trust is the law of contract, whereas the method of enforcing the public trust is explicit legislative action. (See supra text at notes 58-59, and infra text and notes at notes 132-42, 194-230.) The distinction between the two was made explicit in Dunphy v. Commonwealth, 368 Mass. 376, 331 N.E.2d 883 (1975), in which the Supreme Judicial Court held that a skating rink
could not be constructed on land donated to the town of Rockland "to be kept and used as a Public Park in perpetuity for the public good" *Id.* at 378, 331 N.E.2d at 884, despite legislative approval. The Supreme Judicial Court determined that the construction would be inconsistent with the land's use as a public park, and would thus violate the town's contractual obligation to abide by the terms of the trust. Because the Legislature's approval of the skating rink contravened that obligation, such action violated the clause of the Federal Constitution prohibiting legislative impairment of contracts. *U.S. CONST.* art. 1, § 10. 368 Mass. at 382, 331 N.E.2d at 886. *See also* Opinion of the Justices, 369 Mass. 979, 338 N.E.2d 806 (1975); Salem v. Attorney General, 344 Mass. 626, 183 N.E.2d 859 (1962); Milton v. Attorney General, 314 Mass. 234, 49 N.E.2d 909 (1943); Adams v. Plunkett, 274 Mass. 453, 175 N.E. 60 (1931); Cary Library v. Bliss, 151 Mass. 364, 25 N.E. 92 (1890). That the prescribed use of charitable trust land cannot be altered, even with legislative approval, plainly indicates that charitable trust is something quite different than public trust.

Despite this significant distinction, courts often describe public trust land and charitable trust land in the same sort of terms. This is because charitable trusts are often used to preserve areas of natural beauty or public importance. In *Dunphy*, the Supreme Judicial Court remarked upon Reed Park's availability to the public for over 50 years and its support of "a stand of trees of great age." 368 Mass. at 379, 331 N.E.2d at 885. The court made similar observations in the earlier case of Nichols v. Comm'r of Middlesex County, 341 Mass. 13, 166 N.E.2d 911 (1960), which interpreted the terms of the trust under which the state held title to the land encompassing Walden Pond. It observed that the "grants were unique real estate in the history of Concord and of American letters." 341 Mass. at 22, 166 N.E.2d at 918. Although the intentions of the settlers of charitable trusts may sometimes coincide with notions of public trust law, as they did in these two cases, the inherent differences in the functions of the two doctrines precludes using the former as a substitute for the latter.

127. Like the doctrine of charitable trust, the common law doctrine of dedication has also been posited in contract terms. The creation of a dedication requires an offer from the donor and an acceptance by the public, both of which may be either express or implied from the actions of the parties. *Note, Public Ownership of Land Through Dedication*, 75 HARV. L. REV. 1406 (1962). Thus, the landowner's mere assent to public use may constitute an offer and public use itself can constitute acceptance. *E.g.*, Cincinnati v. White, 31 U.S. (6 Pet.) 431, 440 (1832); Attorney General v. Abbott, 154 Mass. 323, 328, 28 N.E. 346, 347 (1891). The public use need not continue over any established period of time. *E.g.*, Abbott v. Cottage City, 143 Mass. 521, 526, 10 N.E. 325, 329 (1887). After the dedication, the title to the property remains in the owner, but the public receives an easement from which the owner cannot free the land. Attorney General v. Abbott, 154 Mass. 323, 328-29, 28 N.E. 346, 348 (1891).

Because the public gives no consideration for this property right, some courts have analogized dedication to a gift. *E.g.*, Longley v. Worcester, 304 Mass. 580, 588, 24 N.E.2d 533, 537 (1939); Abbott v. Cottage City, 143 Mass. at 525, 10 N.E. at 329. It has also been discussed in terms of equitable estoppel; an owner who, by an act of dedication, has led the public to believe that land will be available for public use should not be permitted to disappoint that expectation. Cincinnati v. White, 31 U.S. at 438. This rationale for the doctrine of dedication is very similar to Sax's articulation of the underlying purpose of the doctrine of public trust. *See supra* note 122. Dedication also resembles public trust in its capacity to account for subtle public needs, such as psychological renewal, which almost defy precise definition. *See Attorney General v. Vineyard Grove Co., 181 Mass. 507, 508, 509, 64 N.E. 75 (1902) (ordering the removal of a building which obstructed the view of the sea from a bluff dedicated to the public); Attorney General v. Abbott, 154 Mass. at 328, 28 N.E. at 348 (noting that, even if no improvements were made by the
of public recreation areas and preservation of natural resources. These activities, however, merely create the opportunity for future public use. They do not fill the public trust doctrine's function of recognizing and legitimizing patterns of public use already in existence.

Despite the pressing reasons for interjecting public trust concepts into land use law, courts and commentators have generally been slow to recognize its importance in that context. This hesitancy may result from a perception that the crucial public uses to which water has traditionally been devoted simply have no counterparts on land. Certainly the tremendous physical differences between dry and submerged land dictate that the uses to which the public puts each type of land are likely to be commensurately different. The obvious distinctions between the two types of uses may obscure the more subtle similarities.

The contrasts and parallels between these uses may be demonstrated by a comparison of two traditional, water-related activities, commerce and fishing, with the recreational use of land. Historically, commerce was considered public not only because it provided a livelihood for many members of the public, but also because it simply could not be performed on an individual basis. It required concerted effort. Recreation, on the other hand, is highly individualized, and therefore has not generally been recognized as an important public activity, even though a great portion of society regularly engages in it.

Fishing, like recreation, was traditionally performed individually. The former, however, differed from the latter in a major way. Because fishing fulfilled the most basic of human needs, physical sustenance, the public importance of both the activity and the water which supported it was always self-evident.

donor on dedicated parkland, "there [would] still be some benefit from having a space left for air, and for an open, unobstructed prospect.") However, dedication differs from public trust, and instead parallels charitable trust, in the emphasis it places on the acts and intent of the private donor rather than on the needs of the public as a means of determining the relative rights of the two.Compare, e.g., Longley v. Worcester, 304 Mass. 580, 24 N.E.2d 533 (1939) (describing the character of private actions indicative of dedication) with Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124 (1909) (holding that a tideland owner's rights of access to the sea from his upland property is superceded by the Commonwealth's right to fill his tidelands for the improvement of public navigation).

The Supreme Judicial Court has occasionally used public trust language to describe the State's duties with regard to dedicated land. See Cogman v. Crocker, 203 Mass. 146, 149, 89 N.E. 177, 178 (1909) (stating that, "[a]s the holder of the title [to Boston Common, the State] is in a kind of trust relationship to the people for whose use the property was provided.")
The social value of recreation and the land on which it is performed is less obvious. The importance of open spaces, however, lies in the psychological sustenance which they give the modern urbanite. Because recreational uses provide a crucial buffer against the stresses of urban life, they are probably no less important to the long-term welfare of modern society than fishing and commerce were to the society of our ancestors. The differences in character between modern land uses and traditional aquatic uses does not justify according the former less protection than the latter. Judicial reluctance to extend the public trust doctrine to inland areas has produced this effect.

Happily, the Massachusetts Supreme Judicial Court is not among those judicial bodies which have failed to envision a role for public trust in land use law. In fact, the Supreme Judicial Court has been applying public trust concepts to public land for almost three quarters of a century. Its method of doing so, however, has been rather circuitous and not entirely satisfactory, as the following section explains.

IV. THE INCORPORATION OF PUBLIC TRUST INTO MASSACHUSETTS LAND LAW

Although the Supreme Judicial Court has recognized the appropriateness of applying public trust concepts to public land, it has been unwilling to transfer the doctrine from water to land explicitly, apparently because of its concern for maintaining doctrinal continuity. It has applied to land only the doctrine's essential purpose of sheltering public needs and expectations, and has transferred none of the doctrine's historical, common law trappings, such as jus publicum and jus privatum. The court has carried out the doctrine's central purpose by means of other doctrines more common to land use law. This fact explains the court's occasional discussion of public trust concepts in charitable trust and dedication cases. The court, however, will use any legal tool which both fits the facts of the case and allows it to achieve the same result it would have reached by applying the public trust doctrine. It has sometimes found mere judicial review

128. See Higginson v. Treasurer of Boston, 212 Mass. 583, 590, 99 N.E. 523, 527 (1912), discussed infra, text at note 159.
129. See discussion of Higginson infra, text at notes 156-61.
130. See supra text at notes 27-31.
131. See supra notes 126-27.
of legislative actions or statutory interpretation to be sufficient.\textsuperscript{132} The court’s primary mechanism for the implementation of public trust principles, however, is the doctrine of prior public use. Not only is this doctrine generally applicable to government-owned land, but it also shares with public trust two important characteristics. Both focus on the uses to which land is presently put, and both require that changes in those uses be authorized by an act of the Legislature.

\textbf{A. Prior Public Use as a Vehicle for Public Trust}

1. The Doctrine of Prior Public Use

The prior public use doctrine is a principle of eminent domain law which states, in essence, that “land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end.”\textsuperscript{133} This doctrine,\textsuperscript{134} which applies to all government entities\textsuperscript{135} other than the sovereign itself,\textsuperscript{136} serves two purposes.

First, by requiring legislative approval of any change in the use of public land, the doctrine forces legislatures to establish priorities between multiple government entities\textsuperscript{137} possessing the power of eminent domain. Without such a rule, either the courts themselves would have to engage in legislative decisionmaking by establishing such priorities, or the conflicting entities “might successively try to take and retake the property ad infinitum.”\textsuperscript{138} Thus, the rule promotes fiscal and social stability by establishing a hierarchy among the competing needs of the state’s various governmental, quasi-governmental, and administrative bodies.\textsuperscript{139}

\textsuperscript{132} See infra text at notes 267-73.
\textsuperscript{133} \textit{Higginson}, 212 Mass. at 591, 99 N.E. at 527-28.
\textsuperscript{134} Prior public use is by no means unique to Massachusetts. See, e.g., Washington Metropolitan Area Transit Auth. v. One Parcel of Land in District of Columbia Vestry of Rock Creek Parish, 514 F.2d 1350 (D.C. Cir. 1975); City of Shakopee v. Minnesota Valley Elec. Co-op, 303 N.W.2d 58 (1981); Hiland v. Ives, 154 Conn. 683, 228 A.2d 502 (1967). See also 1 P. NICHOLS, \textit{supra} note 12, § 2.2 at 57 (1981); Annot., 35 ALR3d 1302 (1971).
\textsuperscript{135} These may include state agencies, municipalities, and public service corporations, such as railroads or utilities. See 1972/73 Op. Att’y Gen. No. 45, Rep. A.G., Pub. Doc. No. 12 at 139, 144-46 (1973).
\textsuperscript{136} 1 P. NICHOLS, \textit{supra} note 12, § 2.2 at 55 (1981).
Second, the prior public use doctrine provides an objective review mechanism for changes in the use of public land proposed by legislative delegates. Because a state agency frequently does not have to pay for land which it takes from other agencies or municipalities,\textsuperscript{140} it is often more willing to appropriate public land than private land if it has a choice. Courts realize, however, that an alteration in the use of public land deserves no less careful consideration than a diversion of private land to public purposes.\textsuperscript{141} The prior public use doctrine's judicially imposed requirement that change only be made pursuant to explicit legislation necessitates deliberate decisionmaking at the highest level of governmental authority.\textsuperscript{142}

Many of the Massachusetts cases which developed the prior public use doctrine arose in the nineteenth century, often between public service corporations or municipalities. In these cases, one entity typically claimed authority to take the other's land through its general power of eminent domain. Whether the Supreme Judicial Court permitted the attempted taking without requiring more explicit legislative authority usually depended upon its assessment of the compatibility between the proposed use and the existing use. In \textit{Springfield v. Connecticut River Railroad Co.},\textsuperscript{143} for example, the court prevented a railroad from using a track which it had built over a well-traveled city street. Similarly, in \textit{Boston & Albany Railroad v. Cambridge},\textsuperscript{144} the court refused to allow the city of Cambridge to take a railroad's land for the establishment of a public park. The court generally permitted a taking, however, where the two public uses would not significantly interfere with one another.\textsuperscript{145} Even where the contem-

\footnotesize{\textsuperscript{140} See 1 P. \textsc{NICHOLS}, \textit{supra} note 12, § 2.225 [i] at 155 (1981); Annot., 56 ALR 365 (1928).
\textsuperscript{141} Cf. \textsc{Sax}, \textit{supra} note 19, at 495-99.
\textsuperscript{142} One commentator has argued that the power to authorize such change should be delegated by the Legislature to a specially created administrative body. The rationale for this contention is that this sort of legislative decisionmaking may be neither objective nor deliberate. Requiring the General Court to make decisions continually on an ad hoc, case by case basis, is burdensome and wasteful of legislative resources. Under these circumstances, the legislature may not be able to give competing interests the attention they deserve. Furthermore, the Legislature, in its haste, may be particularly susceptible to the influence of the agency advocating the change in use. 1967 \textsc{Ann. Surv. Mass. Law} § 11.3, at 196-97; 1970 \textsc{Ann. Surv. Mass. Law} § 17.20, at 481.
\textsuperscript{143} 58 Mass. (4 Cush.) 63 (1849).
\textsuperscript{144} 166 Mass. 224, 44 N.E. 140 (1896).
\textsuperscript{145} See, \textit{e.g.}, \textit{Boston v. Brookline}, 156 Mass. 172, 30 N.E. 611 (1892) (defendant's construction of a road would not interfere with plaintiff's waterpipes, which lay in the land over which the road would pass); \textit{Easthampton v. County Comm'rs}, 154 Mass. 424,
plated use conflicted with the existing one, the court upheld the attempted taking if the facts of the case indicated that the Legislature, when it authorized the proposed project, must have known that its implementation would injure the plaintiff's current use of the property.\textsuperscript{146}

Although most Massachusetts prior public use law was formulated in the last century, the doctrine continues to serve its important stabilizing function, as two relatively recent Supreme Judicial Court opinions indicate. In \textit{Bauer v. Mitchell},\textsuperscript{147} the Essex County Agricultural School sought to enjoin the Essex County Tuberculosis Hospital from maintaining cesspools for the disposal of the hospital's sewage on the school's land. The court held that the hospital's appropriation of the school's land was impermissible without specific statutory authorization.\textsuperscript{148} The more recent case of \textit{Somerset v. Dighton Water District}\textsuperscript{149} involved a conflict between two municipalities over their respective statutory rights to the waters of the Segreganset River. The court determined that the Legislature had empowered the town of Somerset to "take... and hold... the waters of [the] Segreganset river,"\textsuperscript{150} and that no subsequent legislation concerning the Dighton Water District was sufficiently explicit to permit Dighton to divert the Segreganset's water away from Somerset.

These cases demonstrate the types of situations in which the doctrine of prior public use continues to operate independently of any notions of public trust. When public trust concepts are injected into the doctrine, however, its focus shifts from merely determining legislative priorities to weighing the relative values of conflicting public uses. This shift in focus, in turn, sometimes alters the traditional elements of the prior public use doctrine. These subtle modifications are the only doctrinal adaptation the Supreme Judicial Court has been willing to make in order to integrate public trust concepts into land use law. Therefore, they merit close examination.

\textsuperscript{28} N.E. 298 (1891) (defendant's construction of a road over a sector of plaintiff's schoolhouse lot would not wholly prevent plaintiff from using its land for school purposes).
\textsuperscript{147} Bauer v. Mitchell, 247 Mass. 522, 142 N.E. 815 (1924).
\textsuperscript{148} \textit{Id.} at 528, 142 N.E. at 817.
\textsuperscript{149} 347 Mass. 738, 200 N.E.2d 237 (1964).
\textsuperscript{150} \textit{Id.} at 742, 200 N.E.2d at 239.
2. How Prior Public Use May Change When Used in Conjunction with Public Trust

When public trust principles are implemented through the doctrine of prior public use, the latter may change in two important ways. First, factors other than a conflict between governmental entities may invoke the prior public use doctrine. These factors include those which indicate that the land at stake serves the sort of public need generally protected by the public trust doctrine. Second, legislation authorizing a change in the use of land which the court finds subject to the public trust must be more explicit than that required in typical prior public use cases. It must not only establish legislative priorities, but must also demonstrate that the General Court recognized the public's interest in maintaining the land in its present state. Each of these concepts may be clarified by tracing the line of cases through which it evolved.

a. Making the Public Interest a Legislative Priority

Early in the development of the prior public use doctrine, the Massachusetts courts began to recognize its potential not only as a tool for ensuring the orderly execution of legislative mandates, but also as a means of protecting the public's interest in land use.151 The Supreme Judicial Court first hinted that notions of public trust could be included in a prior public use analysis in the 1839 case of Boston Water Power Co. v. Boston & Worcester Railroad Corp.152 The court noted that if the Legislature permitted an agency or other delegate to build a turnpike or railroad and gave it a general power of eminent domain to carry out its task, the delegate should not be permitted to use its power to take and destroy "an arsenal, fort, state-house, or land already appropriated to a highly important, public use," unless the Legislature had unequivocally authorized such an action.153

By introducing the public trust concept of a "highly important public use" as a basis for invoking the prior public use doctrine's requirement of explicit legislation, the Boston Water Power court suggested that conflict between legislative directives could be created by inference, if none existed already. Stretching the scope of the prior public use doctrine by presuming the existence of

152. 40 Mass. (23 Pick.) 360 (1839).
153. Id. at 398.
friction between governmental bodies is common in cases in which public trust is being implemented through prior public use. In *Higginson v. Treasurer of Boston*,¹⁵⁴ and in *Gould v. Greylock Reservation Commission*,¹⁵⁵ for example, the two governmental entities involved in each case were in complete accord about what was to be done with the land under consideration. Furthermore, in each case, there existed a statute authorizing the agreed upon change. Nevertheless, the court found the relevant statutes insufficiently explicit to permit the contemplated alterations. Had the court, in each case, not presumed the public’s interest in the current use of the land to be a legislative priority which conflicted with the wishes of the governmental bodies involved, there would have been no dispute for the court to resolve.

The Supreme Judicial Court’s willingness to consider the needs of the general public to be a primary legislative concern introduces another issue central to the implementation of public trust through prior public use. That issue is, what public interests has the court elevated to the status of legislative priorities? Or, stated another way, how has the court identified land subject to the public trust?

b. Defining the Public Interest: Criteria for Identifying Land Subject to the Public Trust

*Higginson v. Treasurer of Boston*,¹⁵⁶ noted above, was the first case in which the Supreme Judicial Court used the prior public use doctrine for purposes other than mere administrative order. In that case, the court moved to protect a type of public resource which Professor Sax might describe as “so intrinsically important to every citizen that [its] free availability tends to mark the society as one of citizens rather than serfs.”¹⁵⁷ *Higginson* involved the validity of a statute permitting the park commissioners of Boston to authorize the construction of a high school on the Back Bay Fens park. The court determined that because one-fifth of the proposed building would be used to house the administrative offices of the school committee, the enabling statute, which re-

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¹⁵⁴. 212 Mass. 583, 99 N.E. 523 (1912). For further discussion of this case, see infra text and notes at notes 156-61.
¹⁵⁵. 350 Mass. 410, 215 N.E.2d 114 (1966). For further discussion of this case, see infra text and notes at notes 166-88.
¹⁵⁷. Sax, supra note 19, at 484. See also text at note 111.
ferred only to construction of a high school, was insufficiently explicit to allow the dual purpose structure to be built.158 The court phrased its holding in terms of its inability to determine the Legislature's priorities, but the opinion makes clear that the court's apprehension about administrative office space was merely a guise for its concern about the preservation of the little land in the central city still available for public recreation.

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. It relates not only to public health in its narrow sense, but to broader considerations of exercise, refreshment and enjoyment... There are decisions to the contrary by courts of recognized authority. [citations omitted] But they were made before the absolute necessity of public parks as an accompaniment of modern urban congestion had become so apparent as it is now...159

In assessing the public importance of parkland, the court was influenced by not only the city dweller's need for open space, but also the free availability of parkland to all members of the public,160 and the Commonwealth's general policy of preserving such recreational areas.161

In a series of cases arising a half-century after Higginson, the Supreme Judicial Court expanded the types of public interests in land protected by the prior public use doctrine to include both vital natural resources and those resources which might be considered "particularly the gifts of nature's bounty."162 The first of these cases, Commonwealth v. Massachusetts Turnpike Authority,163 involved an attempt by the Massachusetts Turnpike Authority to take from the Metropolitan District Commission certain lands in the Charles River Basin, including eight acres under the river itself which the Authority intended to fill for the relocation of a roadway. The court, recognizing that the filling "would cause irreparable damage by removing the minimal safety factor now

158. 212 Mass. at 592, 99 N.E. at 528. Although a statute passed two years earlier authorized the construction of a building for both educational and administrative purposes, the court refused to give any weight to this legislation. Id.
159. Id. at 590, 99 N.E. at 527.
160. Id. at 588-89, 99 N.E. at 525-27.
161. Id. at 592, 99 N.E. at 528.
162. Sax, supra note 19, at 484. See also text at note 112.
available for proper flood control," held that the statute granting the Authority a general power of eminent domain was insufficiently explicit to permit such a taking.

Three years after Massachusetts Turnpike Authority, the court handed down Gould v. Greylock Reservation Commission, its most illuminating opinion to date with regard to the criteria by which public trust land may be identified. Mt. Greylock is the highest peak in an isolated mountain range in Western Massachusetts. Its extreme elevation makes it the home of many species of flora and fauna not generally found south of Canada. It also features unusual geological formations. Due to the activism of a citizen’s group that wished to maintain it as ‘‘an unspoiled natural forest’’, the mountain, in 1898, was made the focal point of the new Greylock State Reservation. This reserve is administered by a gubernatorially appointed Commission. In 1953, the Legislature created the Mount Greylock Tramway Au-

164. Id. at 252, 191 N.E.2d at 483.
165. This statute stated:
   The Massachusetts Turnpike Authority . . . is hereby authorized and empowered . . . to construct, maintain, repair and operate at such location as may be approved by the state department of public works a toll express highway . . . from a point in the vicinity of the city of Boston or from a point or points within said city to a point at or near the boundary line between the Commonwealth and the State of New York . . .
   . . . The Authority is hereby authorized and empowered . . . (k) To acquire in the name of the Authority . . . by the exercise of the power of eminent domain . . . such public lands, parks, playgrounds, reservations, cemeteries, highways or parkways, or parts thereof or rights therein . . . as it may deem necessary for carrying out the provisions of this act . . .


It is curious to note that this case presented a fact pattern almost identical to the hypothetical situation posed by the court more than a century earlier in Boston Water Power Co. v. Worcester R.R. Corp., 40 Mass. (23 Pick.) 360, 398 (1839), in which the court first suggested that certain critical public land uses could be sheltered by the doctrine of prior public use. See supra text at notes 152-53.

166. 350 Mass. 410, 215 N.E.2d 114 (1966). For a further analysis of this case as well as subsequent cases, which are discussed infra at notes 189-93, see Sax, supra note 19, at 492-502.
168. Id. at 412 n.4, 215 N.E.2d at 118 n.4.
169. Id. at 411, 215 N.E.2d at 116.
tority and empowered it to build on the mountain an aerial tramway, ski facilities, and other accommodations "reasonably necessary" for the public's convenience in using the recreation area and the tramway. In 1960, pursuant to a statute permitting the Commissioner to lease reservation land to the Authority, the Authority leased from the Commission 4000 acres, almost half the total area of the reservation. Four years later, the Authority entered into a "management agreement" with American Resort Services, a private corporation. This agreement empowered the private company to carry out most of the Authority's operational and administrative duties after the resort's development had been completed. Prior to the execution of this contract, American Resort Services' parent organization had presented to the Authority elaborate plans for the construction of the tramway, ski lifts, and extensive auxiliary facilities. Before the construction was underway, however, a group of citizens filed suit against the Commission. The plaintiffs sought to invalidate the lease and the management agreement and to prohibit the construction of the ski resort.

The court, in its painstaking analysis of this complex factual situation, seemed particularly troubled by three factors: the development's interference with the area's ecology, the degree to which private parties would benefit financially from the development, and the restricted segment of the public to which the

172. Exactly what sort of "ski facilities" the Legislature had envisioned was a central issue in the case and one which the court was unable to resolve conclusively from its examination of the relevant legislative history. See 350 Mass. at 420 n.15, 215 N.E.2d at 122 n.15.
175. 350 Mass. at 417, 215 N.E.2d at 120.
176. These facilities were to include "a large activity center ... [with] a swimming pool, restaurant, fireplace, barbecue pit, bar, sundeck, summer dance terrace, ski shop, gift shop, ski rental and repair room and parking space for 2000 automobiles." Id. at 416, 215 N.E.2d at 120. The ski runs were to include, in addition to the tramway, "four separate double chair lifts and eleven ski trails . . . , an upper terminal house, and an expanded [lodge at the summit]." Id.
178. Id. at 424, 426, 215 N.E.2d at 125, 126.
land would be useful.\textsuperscript{179} Considering these factors as well as the reservation's unusual natural features,\textsuperscript{180} and the area's attractiveness to naturalists, students, tourists, and hikers,\textsuperscript{181} the court called the Greylock Reservation "rural park land,"\textsuperscript{182} and declared it to be subject to Higginson's prior use rule requiring specific legislative action.\textsuperscript{183}

The court's insistence that the Greylock Reservation be developed as a ski resort only upon explicit instructions from the legislature does not represent a shift in emphasis from public use to natural resource as the touchstone of the public trust doctrine. Rather, it merely indicates the judiciary's recognition that some natural resources possess such unusual characteristics that their very existence is valuable to the public as a whole, and that any acts which diminish the value of these resources merit careful legislative scrutiny.

By rejecting the Authority's development plans, the Gould court also acknowledged implicitly that the sheer number of people who use a particular piece of undeveloped property is an inappropriate yardstick by which to measure land's public importance. As the court apparently recognized, the mere knowledge that such an undisturbed haven is available to the public may bring peace of mind to the urban dweller, regardless of how frequently he or she is actually able to take advantage of its tranquility.\textsuperscript{184} Furthermore, the public trust doctrine, as it originally developed under Roman law,\textsuperscript{185} protected all noninjurious public uses of the shore. Enhancing the land's utility to one segment of the public at the expense of the rest is not in keeping with the concept of public trust. The value of the land for public trust purposes must therefore be gauged by its usefulness to the general public and not to any particular segment of the population.

The essence of this portion of the Gould decision was perhaps stated best by a Superior court judge in the similar case of Dunphy v. Commonwealth.\textsuperscript{186} Referring to a tract of parkland on which

\textsuperscript{179} See id. at 416, 215 N.E.2d at 120.

\textsuperscript{180} See supra text at notes 167-68.

\textsuperscript{181} 350 Mass. at 412 n.4, 215 N.E.2d at 118 n.4.

\textsuperscript{182} Id. at 419, 215 N.E.2d at 121.

\textsuperscript{183} Id. See also supra text at notes 158-61.


\textsuperscript{185} See supra text at notes 13-23.

\textsuperscript{186} 368 Mass. 376, 331 N.E.2d 383 (1975). For a lengthier discussion of this case, see supra note 126.
the town of Rockland planned to build a skating rink, the judge remarked,

When . . . for all practical purposes, the entirety of the area is devoted to a permanent building, and hot-top parking spaces and driveways, the parcel is no longer a park with a skating rink. It is a skating rink—period. The preservation of a token number of trees does not change the situation. The public at large will no longer use [the park]. Skaters will use it. 187

Since free accessibility is a crucial characteristic of public trust land, the preservation of that accessibility is central to the state’s faithful execution of its duties as trustee, as long as the land remains subject to the trust. Honoring this trust may therefore require the state to maintain land in its natural condition, not because the public trust doctrine necessitates leaving trust land untouched, but because the doctrine mandates free availability. It may be that there is no feasible means of developing the land which does not result in the exclusion of some segments of the public, and therefore, unless the Legislature eliminates the public trust through explicit legislation, leaving the land in an undeveloped state may be the only means of ensuring that virtually everyone will be able to make some use of it. 188

187. Id. at 380-81, 331 N.E.2d at 885. Joseph Sax considers this notion “the central substantive thought” of public trust law. Sax, supra note 19, at 490. He has phrased this principle in the following, somewhat more elegant, manner:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restrictive uses or to subject public uses to the self-interest of private parties. Id. (emphasis in original)

Sax, supra note 19, at 490.

188. Paradoxically, excluding the public from trust lands sometimes may be the state’s best means of responsibly discharging its duties as trustee of land possessing resources which are not only vital or unusual, but also fragile or dangerous. In 1980, the Attorney General rendered an opinion concerning the issuance of exclusive land permits by the Department of Environmental Management (DEM) to property owners whose land abutted the shoreline of a reservoir owned by DEM. He concluded that the issuance of such permits was in conformity with the Department’s duties as trustee of undeveloped public land. Among the reasons which supported his opinion were the need to insure public safety by limiting access to the reservoir, the impracticality of making the small, irregularly-shaped perimeter strip recreationally useful, and the fact that exclusivity enhanced both conservation projects and the reservoir’s overall environmental quality. 1979/80 Op. Att’y Gen. No. 15, Rep. A.G., Pub. Doc. No. 12 at 129, 131 (1980). See also Nelson, supra note 39. Nelson argues that the nature of the public interest which the state should protect has shifted from “promotion and protection of use and commerce to non-use and enhancement of ecology.” Id. at 497. This view supports the position of the Attorney General.
In the three years following Gauld, the Supreme Judicial Court twice more identified public trust land by using some of the same criteria it had defined in Gauld, namely, the free availability of the land and the uniqueness of its resources. It then gave the legislature an opportunity to reconsider the importance of the public uses dependent on those lands by declaring the lands subject to the doctrine of prior public use. Sacco v. Department of Public Works, which arose in 1967, centered around an attempt by the Department of Public Works to fill part of a Great Pond in the town of Arlington for the expansion of a state highway. "The Great Ponds of this Commonwealth," the court stressed, "are among its most cherished natural resources. Since early times they have received special protection." The court therefore refused to permit any filling of the pond unless the legislature passed a more specific enabling statute.

Robbins v. Department of Public Works, decided two years after Sacco, involved an area called Fowl Meadows, described by the court as "wetlands of considerable natural beauty with a large capacity for the storage of water during flood seasons and [which] are often used for nature study and recreation." Had it not been for the court's requirement of more explicit statutory authorization, the Meadows would have been transferred from the Metropolitan District Commission to the Department of Public Works, and turned into an interstate cloverleaf.

The foregoing discussion has identified the types of factors which the Massachusetts courts have considered in gauging the value of particular public land to the people, and thus, in determining whether that land should be considered subject to the public trust. This determination, in turn, dictates whether a court will presume the present use of the land to be a legislative priority requiring the invocation of the prior public use doctrine, even in the absence of agency conflict. If a court applies this doctrine, then the land cannot be devoted to a new, inconsistent use "without plain and explicit legislation to that end." A court's decision

190. Id. at 671, 227 N.E.2d at 479. The court, in this statement, was alluding to the special provisions for the public's access to Great Ponds established by the Massachusetts Bay Colonists in the Ordinance of 1641-47. See supra text and note at note 54.
192. Id. at 329, 244 N.E.2d at 578.
to employ prior public use, however, leaves unanswered one important question: precisely what constitutes "plain and explicit legislation" sufficient to free land from the public trust?

c. Protecting the Public Interest: The Heightened Standard for Legislation Affecting Public Trust Land

When a court is presented with a simple interagency eminent domain dispute, it attempts to establish the order of the Legislature's priorities by interpreting the potentially conflicting enabling statutes. The change in use statute need only be specific enough to indicate that the Legislature prefers the new use over the old one. If the court cannot discern the Legislature's preference from its analysis of the relevant pieces of legislation, it will apply the prior public use doctrine and will require that the current use be continued until the legislature chooses to express itself more clearly.

When a court finds land subject to the public trust, however, it will presume the existing use of that land to be a Legislative priority because of its inherent value to the public. This presumption creates an artificial situation by attributing to the legislature a judgment which, in reality, the legislature never made. In such instances, the court is, in fact, expressing its own unwillingness to give effect to the legislative action rather than its inability to identify the legislature's will.194 This point is an important one because the degree of statutory specificity which a court requires to permit a change in the use of public lands is determined largely by the court's own assessment of both the importance of the use to which the public currently puts the particular piece of land and the degree to which the proposed use will interfere with the presently existing one.

While the standard for requisite legislative precision has varied from case to case, an overview of prior public use law indicates that courts have generally held the Legislature to a higher degree of specificity in cases involving public trust land. In such cases, courts have required the Legislature to indicate not only that it approves of the change in use but also that its approval is the product of deliberate and informed decisionmaking.195 This propo-

194. See Sax, supra note 19, at 494-95.
195. See id. at 502.
sition can be illustrated by reviewing the statute at issue in each of the cases discussed above.\textsuperscript{196}

In \textit{Higginson v. Treasurer of Boston},\textsuperscript{197} the Supreme Judicial Court recognized that the Legislature had adequately authorized the construction of a school on the Back Bay Fens park.\textsuperscript{198} Although it acknowledged that the Legislature had made clear its priorities as between the park and the school building, the court nevertheless declared itself unable to determine the Legislature's priorities as between the park and a school building which contained twenty-one percent administrative office space.\textsuperscript{199} Therefore, the court held that the high school could not be erected unless the city agreed to build the type of structure originally authorized.\textsuperscript{200} It seems unlikely that the court would have required such legislative detail if it had not itself determined the value of the park to the public to be at least as great as that of the school, and that the Legislature's decision to destroy the park therefore merited reconsideration.

The court reached a similar conclusion in \textit{Gould v. Greylock Reservation Commission},\textsuperscript{201} when it weighed the public importance of the Greylock Reservation as a recreation area and nature preserve against its value as a ski resort. In considering the explicitness of the relevant enabling act,\textsuperscript{202} it questioned whether the elaborate, commercially-oriented project proposed by the Authority exceeded the scope of the enabling legislation. Although the court did not base its decision on the prior public use doctrine,\textsuperscript{203} it nevertheless concluded that if the Legislature had in-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{196} See supra text at notes 156-61, 166-91.
\item \textsuperscript{197} 212 Mass. 583, 99 N.E. 523 (1912).
\item \textsuperscript{198} Act of June 10, 1911, ch. 540, 1911 Mass. Acts 561, cited in id. at 592, 99 N.E. at 528.
\item \textsuperscript{199} 212 Mass. at 592, 99 N.E. at 528.
\item \textsuperscript{200} \textit{Id.} at 592-93, 99 N.E. at 528.
\item \textsuperscript{201} 350 Mass. 410, 215 N.E.2d 114 (1966).
\item \textsuperscript{203} Instead, the court reached the same result by using other interpretative tools. First, it found that the lease by the Greylock Reservation Commission to the Greylock Tramway Authority of almost half the reservation could not be permitted under a "reasonable" interpretation of the authorizing statute, because the statute must have meant for the lease to be limited to land needed by the Authority for the actual construction of its project. "If this is not the proper interpretation," the court warned ominously, "then the Legislature has delegated to the Commission (without clearly defining the scope of what is intended, essentially without restrictions, and subject to no sufficiently stated standards) power to deal in its unfettered discretion with a large, unique tract of public park land." 350 Mass. at 422, 215 N.E.2d at 123. The court refused to comment further upon the validity of such an act by the Legislature. Second, the court
\end{enumerate}
\end{footnotesize}
tended to authorize the development of such a grandiose enterprise, it would have stated its approval in more definite and specific terms.204

The court’s decision to prevent the partial filling of a Great Pond in Sacco v. Department of Public Works205 required less justification than its holdings in either Higginson or Gould. The authorizing statutes relied upon by the Department of Public Works in Sacco were far more general than those which had been at issue in either of the other cases. The Sacco court held that neither the statute granting the department broad powers of eminent domain206 nor the act giving the department charge of

held that the management agreement between the Authority and American Resort Services was a greater delegation of the Authority’s powers and duties than was authorized by its statute of origination. See id. 424, 215 N.E.2d at 124.

Although it is unclear exactly why the court wished to avoid relying on the prior public use doctrine as the foundation of its holding, several reasons can be suggested. The opinion’s lengthy discussion of the ambiguous, but fairly detailed, legislative history of the Authority’s enabling statute (id. at 420 n.15, 215 N.E.2d at 122 n.15) implies that the court was itself unsure whether the Authority’s elaborate resort plan was supported by sufficiently explicit legislation. If this was so, the court may have felt that striking down the statute as too vague would establish a standard of legislative specificity higher than it was willing to set for most prior public use cases. The court also may have wished to avoid pitting its judgment regarding land use policies directly against that of the legislature through the prior public use doctrine when it could invalidate the statute on other, less sensitive, grounds. Alternatively, it may have decided that using the doctrine as only one of several bases for its holding would detract from Gould’s precedential value as a case in which public trust principles were carried out by means of prior public use. Therefore, the court may have considered it wiser to confine the disclosure of its intent to thwart the destruction of public trust resources through the doctrine of prior public use.

204. 350 Mass. at 421, 215 N.E.2d at 123. For another case involving a challenge to the development of parkland based in part upon the proposed project’s commercial nature, see Everett v. Metropolitan District Commission, 350 Mass. 575, 215 N.E.2d 763 (1966). This case centered around the erection of a high school athletic facility on land adjoining the Chestnut Hill Reservoir in Boston. The Metropolitan District Commission had been given statutory authorization to execute leases for the use of the facility with private parties. The plaintiffs alleged that the lease of the facility to private parties when it was not being used for educational activities would make it an unacceptably commercial enterprise. The court was unimpressed by this argument, however, and found the construction of the recreation center permissible under the existing enabling legislation. Id. at 380-81, 215 N.E.2d at 767.


the Commonwealth's lands and authorizing it to improve those lands for the benefit of the state was specific enough to permit the proposed filling of the pond. The court emphasized that an agency's possession of broad discretionary powers does not exempt it from having to obtain explicit legislative authorization for projects affecting the use of public land within its control. "Where land devoted to a public purpose is concerned, specific statutory language is required."

Exactly what constituted specific statutory language, however, was not answered by Sacco. Furthermore, the differences in the scope of the statutes at issue in Sacco, Higginson, and Gould created uncertainty regarding future statutory requirements. Higginson and Gould had found fairly narrow and explicit enabling legislation insufficient, while Sacco had held inadequate a more general statute which granted the delegatee both broad powers and considerable discretion. The court therefore attempted to clarify its expectations in Robbins v. Department of Public Works. Robbins is the Supreme Judicial Court's most definitive pronouncement to date on the prior public use doctrine's requirements of statutory specificity when public trust land is at stake.

The court recognized that the legislation at issue in Robbins accorded the Department of Public Works far less power and discretion than it had been given by the Sacco statutes, and that it was therefore less likely that the agency had abused its privileges in this instance. Nevertheless, the court found the stat-
ute inadequate to permit the construction of a highway interchange on a tract of wetlands. A mere check on administrative discretion, such as that provided by the enabling statute’s requirement of approval from the governor and council, could not compensate for a lack of specificity where land of extraordinary public worth was concerned. 213 As for what constituted adequate specificity, the court declared that before “parklands, Great Ponds, reservations and kindred areas” could be devoted to an inconsistent public use, the Legislature must identify the land, state the new use, and in some way demonstrate “legislative awareness of the existing public use.” 214 “In short,” the court concluded, “the legislation should express not merely the public will for the new use, but its willingness to surrender or forego the existing use.” 215

Shortly after establishing the three-pronged test of legislative specificity in Robbins, the court invoked it to invalidate two other proposed development projects. In Brookline v. Metropolitan District Commission, 216 the court prevented the Commission’s taking of parkland from the town of Brookline for the reconstruction of a roadway because the relevant enabling legislation did not specifically identify the land to be appropriated. 217 Similarly, the court forestalled the construction of an airport runway through Martha’s Vineyard State Forest in Abbot v. Commissioners of Dukes County. 218 Although the Commissioners already held an easement for air navigation over some of the land and a deed to another parcel in the reserve, the court found that they had never received permission from the Legislature to use their property rights in a manner inconsistent with the present use of the land as a state forest. 219

Despite the heightened standard of specificity to which the court has traditionally held change-in-use statutes affecting public trust land, it has not always found such legislation to be inadequate, as two pre-Robbins decisions indicate. In Appleton v. Massachusetts Parking Authority, 220 the court approved of the

213. See 355 Mass. at 331, 244 N.E.2d at 580.
214. Id.
215. Id.
217. Id. at 441, 258 N.E.2d at 287.
219. Id. at 785, 260 N.E.2d at 143.
defendant's plans to build a parking garage under the Boston Common after it found the Authority's enabling statute sufficiently specific to permit the limited taking which the Authority proposed. The court cautioned, however, that the relevant legislation was not "a roving eminent domain provision which could be used to take as yet unspecified substantial portions of the Common and the Public Garden." In *Trustees of Reservations v. Stockbridge*, the town of Stockbridge, in order to construct a public high school, wished to take half of Naumkeag, a historic preserve possessing expansive views and unusual gardens. The court upheld the taking after examining the highly explicit legislation from which the town drew its authority.

The more recent *Opinion of the Justices* is the only case since *Robbins* in which the court has found change-in-use legislation explicit enough to accomplish its aim. In that case, the court advised that the proposed legislation permitting the elimination of the public's interest in Boston tidelands adequately fulfilled *Robbins*' three-pronged requirement of identifying the property, recognizing the public interests which will be foreclosed, and articulating the land's new use. In fact, the bill identified the land affected only generally as "tidelands within the city of Boston lying seaward of the 1980 Line," and both the existing and the proposed uses were described as any "public purpose," which the bill's author had defined to encompass virtually any lawful activity. Finally, the significance of the public's current interests in the land under consideration was to be assessed not by the Legislature, but by the Secretary of Environmental Affairs. The court's approval of these provisions appears to be a substantial departure from its stringency in *Robbins*. The decision, however, was not an unreasonable one, given that much of the area covered by the proposed provisions, although technically subject to the public trust, was already commercially developed, and therefore of little value to the general public.
The willingness which the court showed in this case to relax the standards of the *Robbins* criteria in appropriate instances was foreshadowed by two earlier opinions of lower authorities. In a 1978 opinion, the Attorney General advised that the three *Robbins* criteria could be satisfied essentially through implication. The question posed to the Attorney General involved the adequacy of a statute authorizing the transfer of part of a park on Gooseberry Neck in Westport (the specific tract to be chosen by the transferee) from the Department of Environmental Management (DEM) to the Southern Massachusetts Technological Institute for the construction of an oceanographic experimental station. The Attorney General concluded, first, that *Robbins* did not prohibit the delegation of the duty to designate the particular parcel to be transferred as long as the eligible land was properly identified. Second, he decided that the *Robbins* requirement of showing legislative awareness of the existing use was fulfilled by the General Court's recognition that the land was owned by DEM. "Given the limited uses for which DEM could own land ... the Legislature's awareness that [Gooseberry Neck] land was owned by DEM implies a general knowledge that the land was used for recreation and conservation purposes at the time."

Two years later, in *Newburyport Redevelopment Authority v. Commonwealth*, the Appeals Court upheld a conversion of public land from a city park to a city parking lot on the basis of a statute which identified the parkland's new use only as "such municipal purposes as [the city] may from time to time determine." Although the *Robbins* court might not have endorsed such a decision, the *Newburyport* court was undoubtedly influenced by the fact that, at the time the case arose, the park had already been used as a parking lot for several years.

A realistic judicial appraisal of the value which the citizenry places on any piece of public land is essential to maintaining the integrity of both the doctrines of public trust and prior public use. Therefore, loosening the standards for the *Robbins* criteria as the

234. Id. at 132.
case requires neither undermines Robbins’ doctrinal validity nor runs afoul of public trust principles which mandate an individual assessment of the public importance of certain land. The Massachusetts courts remain free to reign in the Legislature or its delegates by applying the Robbins criteria stringently whenever the situation so demands.

The implementation of public trust concepts through the prior public use doctrine, as-developed in the line of cases discussed,\(^{238}\) is a creative and generally effective judicial technique. By choosing to introduce public trust principles into land use law through a well-established doctrine which, like the public trust doctrine itself, focuses on the uses of land and acts defensively to protect existing uses, the court has been able to carry out public trust’s essential purpose, which is the preservation of land whose characteristics make it especially valuable and useful to the general public.

In order to carry out the public trust doctrine’s primary aim, courts have traditionally applied it to governmental, as well as private, actions which infringe on public uses. It has also been accorded flexibility in order to meet the changing needs of the public.\(^{239}\) Without its broad applicability and flexibility, the public trust doctrine would offer the public little protection. The Supreme Judicial Court wisely recognized this fact and ensured the public trust’s effectiveness in protecting nonsubmerged public lands by grafting it onto a preexisting doctrine which applied primarily to land transfers between public entities, and which allowed the Legislature, under certain conditions, to redefine land use priorities.

Prior public use’s applicability to governmentally instigated alterations in land use permits the judiciary to police those changes which are brought about in furtherance of legitimate,

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\(^{238}\) See supra text at notes 152-92.

\(^{239}\) As Joseph Sax has noted:

It is unreasonable to view the public trust as simply a problem of alienation of publicly owned property into private hands, since many if not most of the depredations of public resources are brought about by public authorities who have received the permission of the state to proceed with their schemes. On the other hand, it is inconceivable that the trust doctrine should be viewed as a rigid prohibition, preventing all dispositions of trust property or utterly freezing as of a given moment the uses to which those properties have traditionally been put. It can hardly be the basis for any sensible legal doctrine that change itself is illegitimate.

Sax, Shackles, supra note 20, at 186.
but destabilizing, public purposes. Because prior public use permits changes to be made pursuant to explicit legislation, however, the public trust doctrine is able to be as flexible on land as it has always been in water. Furthermore, the Robbins requirement that the Legislature articulate the public use to which public trust land is presently subject ensures that the Legislature has recognized and heeded the interests of the general public, and not only those of special interest groups.  

The Supreme Judicial Court has found prior public use to be such an effective vehicle for public trust that the former may eventually usurp the latter. In Opinion of the Justices, the court cited the Robbins criteria as a primary restriction on the Legislature’s ability to free submerged lands from the public trust with which they are impressed. Its reliance on Robbins in this case is perhaps the greatest possible tribute to the appropriateness of the prior public use doctrine as a means of implementing public trust. Opinion of the Justices concerned Boston’s foreshore, precisely the type of land to which the public trust doctrine has traditionally applied. There was no apparent reason for the court to implement public trust through the mechanism of another doctrine other than its belief that the principles of prior public use provided the wisest and most fitting means of enforcing the public trust. Thus, the court, in Opinion of the Justices, brought public trust full circle; in grappling with the doctrinal confusion which it had created in its Boston Waterfront decision concerning the alienability of submerged lands, it clung to the simplicity of the device it had initially fashioned for bringing public trust out of the water and onto the land.

Opinion of the Justices was not the first time that principles of prior public use had been recognized as more than merely a convenient way for the courts to use public trust concepts without drastically expanding the scope of that doctrine. The stature of

240. See Sax, supra note 19, at 498, 502.
242. Id. at 1371, 424 N.E.2d at 1100.
244. Although no previous case substituted prior public use for public trust in tidelands as explicitly as did Opinion of the Justices, there are several older decisions, concerning the obstruction of watercourses, which draw upon elements of both. See Quincy v. Boston, 148 Mass. 389, 19 N.E. 519 (1889); Marblehead v. County Comm’rs of Essex, 71 Mass. (5 Gray) 451 (1855); Kean v. Stetson, 22 Mass. (5 Pick.) 492 (1827).
the prior public use doctrine as a means of ensuring the responsible use of public lands also received attention from the Legislature, which incorporated it, in somewhat varied form, in its amendment of the "conservation" provision of the Massachusetts constitution. Because this amendment contains elements of both prior public use and public trust, it is worthwhile to compare the scope of the constitutional codification with that of each of these common law doctrines.

3. Article 97: the Codification of a Hybrid

Massachusetts first enacted a constitutional provision for the protection of its natural resources in 1918. In 1972, the state annulled this amendment and replaced it with a new one which described the public's environmental rights in greater detail and provided additional protection for land already devoted to conservation purposes. This enactment, known as Article of Amendment Ninety-seven, states:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and natural scenic historic and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands or easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of

245. This provision provided:

The conservation, development and utilization of the agricultural, mineral, forest, water and other natural resources of the commonwealth are public uses, and the general court shall have power to provide for the taking, upon payment of just compensation therefor, of lands and easement or interests therein, including water and mineral rights, for the purpose of securing and promoting the proper conservation, development, utilization and control thereof and to enact legislation necessary or expedient therefor.

except by laws enacted by a two thirds vote, taken by yeas or nays, of each branch of the general court. 246

The first paragraph of the amendment proclaims the public's right to several environmental elements basic to the health and welfare of society. Thus, its premise is strikingly similar to that of the public trust doctrine which protects resources used by the general public for activities of social importance. The Article's second and third paragraphs merely pronounce the means by which the enumerated rights may be enforced; the last paragraph sets forth the method of disposing of property rights acquired pursuant to those means. The mechanism set out in the amendment's final paragraph is plainly based on the prior public use doctrine's procedure for establishing priorities among conflicting public uses. 247 Although the doctrine's requirement of explicit legislation was not included, a two-thirds vote by the General Court replaced the simple majority imposed by common law.

Despite the basic similarities between the constitutional amendment and the doctrines of public trust and prior public use, Article 97 differs from both these common law precepts in several significant ways. The foremost of these is the subject of its focus. Article 97, it has been noted, "seeks to prevent government from ill-considered misuse or other disposition of public lands and interests held for conservation, development, or utilization of natural resources." 248 Thus, it concentrates primarily on preservation of natural resources rather than on preservation of existing public uses. This distinction is extremely important, because it explains why the amendment does not simply codify, and therefore usurp, the doctrines of public trust and prior public use. Nevertheless, the coverage of the three may frequently overlap.

The precise scope of Article 97 and the meaning of its terms relative to those of the prior public use and public trust doctrines have been considered once by the Supreme Judicial Court, 249 once

246. MASS. CONST. Art. of Amend. Ninety-Seven (1972, superseding Art. of Amend. Forty-Nine). See supra note 245. For a thorough analysis of the effect of this amendment, a comparison of its provisions with those of similar pieces of legislation from other states, and a discussion of alternative provisions for the amendment which were never enacted, see P. DONOVAN, REPORT: PRESERVATION OF THE NATURAL ENVIRONMENT, H.R. Doc. No. 5301 (1971).
248. Id. at 148.
by the Appeals Court,\(^{250}\) and a number of times by the Attorney General.\(^{251}\) These decisions draw several other noteworthy distinctions between the amendment and its common law forebears.

In some respects, the amendment is more narrow in scope than the common law doctrines. First, Article 97's two-thirds vote requirement protects only those public interests which rise to the status of "lands or easements."\(^{252}\) The Supreme Judicial Court, in *Opinion of the Justices*,\(^{253}\) therefore advised that a two-thirds vote of the Legislature is not required to alienate the public's interest in tidelands or submerged lands, because the public's rights in such aquatic resources are generally lesser property interests than either "lands or easements."\(^{254}\) Thus, the amendment is less extensive than the common law doctrines, both of which protect uses to which public land is put, regardless of the status of those uses under property law. Second, Article 97's change-in-use provision pertains only to land taken or acquired for certain enumerated conservation-related purposes, while the common law doctrine of prior public use applies to any publicly held land regardless of the purpose for which it was acquired.\(^{255}\) Recognition of this difference caused the Attorney General to conclude that undeveloped land taken by the Massachusetts Port Authority for airport purposes could be transferred to the Metropolitan District Commission and used for conservation and recreational purposes without the approval of two-thirds of the Legislature, but not without explicit statutory authorization.\(^{256}\)

In one respect, however, the amendment is more comprehensive than either of the doctrines whose elements it incorporates. The Attorney General has construed the term "disposed of" in Article 97 to include "any transfer, without limitation, of either the legal interest in the acquired land or physical control over

\(^{252}\) See text of Art. of Amend. Ninety-Seven, supra text at note 246.
\(^{254}\) Id. at 1385, 424 N.E.2d at 1107.
\(^{256}\) Id.
it." Therefore, a two-thirds vote by the General Court is required to effect a transfer of land between governmental entities, even when no change in the use of the land is contemplated. Because both the doctrines of prior public use and public trust focus on changes in use rather than on changes in the controlling public entity, they do not apply to this situation.

In another respect, Article 97 is broader than the prior public use doctrine, but coextensive with the doctrine of public trust. Article 97 covers transfers of land from public to private control, a situation to which, the Attorney General has noted, the prior public use doctrine "has not yet been applied." The prior public use doctrine has not been applied to public-private land transfers because it is inappropriate in that context, having originated primarily as a means of judicial "buck passing" when the courts were confronted with legislative delegates' conflicting claims of control over public land. The prior public use doctrine does not address the legislature's conveyance of public land to private parties.

Principles of public trust, on the other hand, do apply to this situation. In fact, they may be more vital to the protection of the public interest in the context of public-private land transfers than in any other. Because the public trust doctrine is concerned with alterations in use rather than transfers of ownership, it is not activated solely by a shift in the public body controlling trust land. Such change, however, cannot be compared with a transfer of control from a public to a private entity. The public trust doctrine is indifferent to shifts in ownership between governmental bodies because land managed by any such body, in its public capacity, remains under the auspices of the sovereign which may dictate the uses to which that land is put. An unrestricted conveyance to a private party is another matter, however, because it extinguishes the sovereign's right to exert direct control over the use of the land, and automatically permits exclusion of the public. Because the legal right to alter land's use cannot logically be

259. Id. at 146.
260. See supra text at notes 133-42.
262. Of course, the sovereign may still exert control over the land through its police power.
distinguished from the physical acts of doing so, the safety checks imposed by the public trust doctrine are at least as applicable to a transfer of land from public to private control as a transfer from one public use to another.263

Thus, the doctrines of prior public use and public trust part company on the issue of public to private land transfers. The Supreme Judicial Court has generally been unwilling to stretch the prior public use doctrine to encompass this type of transaction.264 This is not surprising, since the court apparently adopted prior public use as a means of implementing notions of public trust because of its reluctance to expand the public trust doctrine beyond the scope of its origins. Nevertheless, the court's hesitancy to apply the prior public use doctrine to real estate exchanges between public and private parties deprives the public trust doctrine of its traditional vehicle in such situations. Article 97 may prove to be a valuable means of implementing notions of public trust in cases like these to which prior public use does not apply.

Article 97 may not be useful in all such instances, since it applies only to property interests taken or acquired for certain conservation purposes.265 Even in situations which fall outside the scope of both the prior public use doctrine and Article 97, however, the court is unlikely to be at a loss for mechanisms with which to carry out public trust concepts. The following cases illustrate two other legal tools which the court has employed.

B. When Prior Public Use Fails: Other Vehicles for the Implementation of Public Trust Principles

Article 97266 mandates a supermajority vote of the legislature to authorize the sale of certain types of public land to private

263. This fact was demonstrated by the Gould court's hostility toward the commercial nature of the management agreement between the Mount Greylock Tramway Authority and the private development company, American Resort Services, Inc., which placed primary control over placing public lands in private hands. See supra text at notes 175-78.


265. See supra text at note 255.

266. Quoted supra, text at note 246.
parties. Prior to its passage, however, the Supreme Judicial Court, in at least two cases involving a proposed transfer of land from public to private hands, brought to bear public trust considerations through two common legal mechanisms: judicial review and statutory interpretation.

In *Loomis v. Boston*,267 the court upheld the legislature’s sale of city parkland to Sears, Roebuck & Co. for the construction of a parking lot. Although it directed its attention to determining whether the Legislature had acted arbitrarily or capriciously in authorizing the sale, the court implicitly passed judgment on the extent of the public’s interest in the land and found the land not subject to the public trust. It noted as significant the trial court’s findings that the area “‘was not landscaped and continued to have a barren appearance’”268 despite its designation as a park more than fifty years earlier, and that “‘extensive park land in the immediate area [was] available for the use of the public.’”269 Therefore, it declared the authorizing statute neither arbitrary nor capricious, by which it apparently meant that the legislation was adequate to relinquish the public’s limited interest in the land. In reaching its conclusion, the court noted both the precision of the statute,270 and its requirement that the city’s board of park commissioners, its council, and its mayor all consent to the sale.

In a second Supreme Judicial Court case involving a proposed land transfer between public and private entities, *Jacobson v. Parks and Recreation Commission of Boston*,271 the court decided that even the approval of the city council and the mayor was insufficient to legitimize the park commission’s sale of 64,000 square feet of parkland for the construction of an apartment building. The court avoided pronouncing the authorizing statute itself inadequate, however, by interpreting it in a way that instead rendered deficient the actions of the board of park commissioners. The statute in question permitted the commission to sell any land placed under its control, on the condition that the “board ... use the proceeds thereof in payment for any lands taken for park purposes under this act.”272 The court interpreted this to

268. Id. at 131, 117 N.E.2d at 540.
269. Id.
mean that the board could not carry out the proposed sale until it had located appropriate land to purchase with the proceeds of that transaction. It pragmatically concluded that reserving the sale's proceeds for the purchase of another park was an inadequate solution, because an opportunity to replace the land might never arise.\textsuperscript{273} Thus, the court preserved the public's interest in the park without producing any distortion of the prior public use doctrine.

As these cases demonstrate, the court has persisted in applying public trust principles to land use law in cases involving public-to-private land transfers even without the aid of the prior public use doctrine. It is noteworthy, however, that the judicial mechanisms discussed in this article for adapting public trust to land law, namely, the prior public use doctrine, judicial review, and statutory interpretation, have all involved some form of analysis of legislative action. Regardless of the particular legal tool through which the Massachusetts judiciary has implemented public trust concepts, it has always relied on legislative decision-making as a means of safeguarding existing public uses as well as providing an avenue for the responsible alteration of those uses. This reliance creates a thorny problem: what mechanism can the courts use to protect land which appears to be impressed with the public trust but which is not subject to the legislature's jurisdiction?

This difficulty is peculiar to land law, where public trust principles are pitted directly against concepts of private property. It never arises where notions of public trust are applied to submerged land because the state holds all navigable waters in trust for the people, and the only subject of dispute is how the state may best carry out its duties as trustee.\textsuperscript{274} The situation becomes more complex, however, when public trust principles are applied to upland areas, where public trust land must be identified before the state's responsibilities as trustee of such land can be delineated. The identification of public trust land can be divided into two steps. One step, which has already been discussed,\textsuperscript{275} involves

\begin{itemize}
\item \textsuperscript{273} 345 Mass. at 646, 189 N.E.2d at 203.
\item \textsuperscript{275} See supra text at notes 156-93.
\end{itemize}
recognizing the existence of nonrestrictive public uses or physical characteristics which make the land particularly valuable to the public. The mere presence of such factors, however, is not sufficient to render land subject to the public trust; the controlling governmental entity must also own the parcel in its public, rather than its private, capacity.\textsuperscript{276} If land is not legally public, it cannot be subjected to legislative control. Thus, private property law may be the greatest obstacle to moving the public trust doctrine inland.

Governmental bodies' ability to hold property privately may create situations in which land exhibits public trust characteristics even though it is not publicly owned. Although such a case has never come before the Supreme Judicial Court, an issue of this sort was raised in the 1974 Appeals Court case of \textit{Muir v. Leominster}.\textsuperscript{277} An examination of \textit{Muir} is worthwhile because it exemplifies the complicated conflict between the values of public trust and those of private property. Furthermore, it provides a framework for speculation about whether the public's interests can still be protected in such a situation.

\section*{C. Muir v. Leominster: The Limits of Public Trust?}

\textit{Muir v. Leominster},\textsuperscript{278} like \textit{Jacobson v. Parks and Recreation Commission of Boston},\textsuperscript{279} involved a citizen's suit to void the sale of a tract of parkland to a commercial developer. At issue in \textit{Muir} was an eight-acre parcel of land, called Whitney Field, which had been donated to the city of Leominster in 1935, free from any restrictions on its use. The city eventually constructed a swimming pool and other recreational facilities on two acres, but retained the rest of the tract as "an open green spot."\textsuperscript{280} For thirty-five years, most of Whitney Field was used for recreational purposes such as "hiking, winter sliding, nature walks and picnicking."\textsuperscript{281} Then, in 1970, the city voted to sell six acres of the Field for private development.

The residents who sued to void the transaction plainly felt that the public's interest in the land had not received adequate consid-

\textsuperscript{276} For an explanation of the distinction between a governmental body's public and private character, see \textit{infra} text at notes 288-93.
\textsuperscript{278} \textit{Id}.
\textsuperscript{279} 345 Mass. 641, 189 N.E.2d 199 (1963), discussed \textit{supra} text at notes 271-293.
\textsuperscript{281} \textit{Id}. 
eration. They maintained, therefore, that the prior public use doctrine invalidated the transfer because the city had failed to procure the requisite legislative authorization. The Appeals Court rejected this contention, and upheld the conveyance. It may have reached this decision in part because it considered the evidence concerning the land's value to the public insufficient to merit finding the land impressed with the public trust. Although the land had been made available to the public for thirty-five years, vandalism forced the closing of its recreational facilities around 1965. Furthermore, the petitioners were unable to prove that the public had made any significant use of the remaining area during the years preceding the suit.

The weight of the evidence, however, was not the only basis for the decision. The opinion indicates that the court was grappling with the more perplexing problem of weighing the public's needs and expectations against a municipality's right to exercise exclusive control over land which a private citizen had placed in its keeping. The Muir court determined that the scales tipped in favor of the town.

The manner in which the Appeals Court arrived at its conclusion merits special attention. It first determined that the prior public use doctrine did not pertain to the fact situation presented by Muir. The court did not, however, base this decision on the doctrine's inapplicability to conveyances between governmental entities and private parties. Instead, it determined that the prior public use doctrine applies "only to those lands which are in fact 'devoted to one public use.'" Whitney Field could not fulfill this condition because it had been given to the city by means of a deed which had placed no conditions on the use of the land.

282. Id. at 591, 317 N.E.2d at 215.
283. Id. at 589, 317 N.E.2d at 214.
286. Id., quoting Robbins v. Dept't of Pub. Works, 355 Mass. 328, 330, 244 N.E.2d 577, 579 (1969). In a footnote the court continued:
   The use of the phrase 'parklands, Great Ponds, reservations and kindred areas' in Robbins v. Department of Public Works, supra, at 331 ... is not helpful to the petitioners as it was apparently intended to include only other types of areas which the Legislature has specifically identified with or restricted to a particular public use.
287. The court elaborated on this point in the following manner:
   In this case there had been neither prior legislative authorization of a taking for
Through this rather inarticulate reasoning, the court intended to point out that Leominster held the land in its proprietary capacity rather than its public capacity. This double nature of municipal and state authority merits elaboration because it lies at the heart of the *Muir* decision.

In its public capacity, a municipality serves as an agent of the sovereign, helping to perform those governmental activities which benefit the public as a whole. These may include holding general elections, suppressing crime, constructing highways, and creating recreation areas. In its private capacity, however, a municipality acts as a private corporation on behalf of its own residents. The construction of libraries, the laying out of cemeteries, and the establishment of water supply systems are all functions which a town may perform in its character as a private corporation. The public-private distinction is important because the degree of control which the sovereign may exercise over certain municipal land depends upon the capacity in which the city holds the property. Without paying a town the value of the land or obtaining its consent, the state may require the town to transfer its publicly-held property to another governmental entity or to use it for different purposes. The state, however, must treat a municipality's privately-held land as it would any other private property. It can only assume direct control of such land through its power of eminent domain, which requires payment of just compensation.

In *Muir*, the grantor's unrestricted conveyance of Whitney

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290. 1 P. Nicholls, supra note 12, § 2.225[1], at 155 (1981).
Field allowed Leominster to devote the property to any public or private purpose. It chose to use the land as a park, which has always been considered a public use in Massachusetts.\textsuperscript{294} The Appeals Court, however, may have felt that applying the prior public use doctrine to Whitney Field would have been tantamount to declaring that Leominster held the Field in its public capacity. Such a statement would have effectively deprived the town of both the value of its gift and its exclusive control over the land.\textsuperscript{295} Furthermore, the court was aware that Leominster had never expressly dedicated Whitney Field to the public domain.\textsuperscript{296} Thus, the court reached a rather paradoxical result. In order to avoid penalizing the town for having made its open land publicly available, the court granted the town the right to extinguish the public's interest in the property at will. The Muir court concluded that public expectations, no matter how well established, are secondary to the rights of private ownership. Clearly, this decision is a setback to the expansion of public trust principles in inland areas.

Because Muir's fact situation was not particularly unique, cases similar to it may arise in the future. Therefore, it is worth considering whether such a case could be decided differently, were one to reach the Supreme Judicial Court. First, it may be argued that a governmental entity's proprietary rights should never take precedence over the public's interest, and that the Muir court misbalanced the equities of the case. A municipality is created by the legislature, which bestows on it all the powers which it may possess.\textsuperscript{297} Even in its private capacity, a municipality acts on behalf of its residents,\textsuperscript{298} who represent one segment of the general public. A municipality has never been thought to possess the same degree of autonomy as a private individual or corporation.\textsuperscript{299} In light of these compelling factors, why should a court, in any situation, favor a town’s proprietary rights over the expectations of the public? The most likely answer is a pragmatic one. A town would probably hesitate before permitting any public use of its privately-held land if doing so were tantamount to donating that

\textsuperscript{294} See sources cited supra at note 289.
\textsuperscript{295} See supra text at note 292.
\textsuperscript{298} See supra text at note 290-91.
\textsuperscript{299} Agawam v. Hampden, 130 Mass. 528, 530 (1881).
land to the state. Thus, the judiciary, by wholeheartedly supporting the public's interest in a case like *Muir*, might do the public more harm than good.

A reconciliation between the public’s needs and a town’s right to reap the benefits of private ownership appears to be the only sensible solution. There are two means by which the judiciary might accomplish this aim. It could adopt the proposal of one commentator who advocates declaring that all private property owners hold their lands’ natural resources in trust for the benefit of the public. 300 According to this scheme, owners would be legally obligated to preserve and enhance the ecological value of their land. This notion could easily be extended to protect established public uses as well as natural resources. This solution, however, would hardly be practical for Massachusetts, where the judiciary has been unwilling to extend openly the public trust doctrine beyond its birthplace in submerged land. 301 Since the Supreme Judicial Court will not apply public trust explicitly to public inland areas, it would certainly never expand the scope of that doctrine to encompass private property as well.

The public’s interest in maintaining access to municipal land might be better protected through the doctrine of implied dedication, 302 which is based on the principle of estoppel. The policy reasons for preventing a party from dishonoring public uses to which he or she knowingly assented ought to apply even more strongly to an arm of the government, such as a municipality, than to a private individual, because citizens assume that their government acts for the public good. Although implied dedication would meet the public’s interests, it would not necessarily satisfy the concerns of the town. Implied dedication would require the town to obtain legislative permission before altering the use of its land. Like express dedication, it would divest the town of its proprietary interest in the property and subject the land to the prior public use doctrine. Because implied dedication renders land public, this doctrine would also prevent the municipal owner from receiving compensation for its property, were the land to be subsequently taken by the state. 303

This seemingly unavoidable inequity may continue to prevent

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301. See *supra* text at notes 130.
302. For a brief discussion of this doctrine, see *supra* note 127.
303. See *supra* text at note 292.
Massachusetts courts from applying public trust principles to cases like *Muir*. The public’s expectations might receive greater judicial attention if the General Court were to enact legislation compensating municipalities for the taking of land which they have voluntarily dedicated to the use of the general public. Had such legislation been in place when *Muir* was decided, the Appeals Court might have been willing to declare Whitney Field to be publicly-held land. Unless the legislature takes such action, however, the *Muir* case may continue to represent a public need which property law does not recognize and which public trust concepts cannot fulfill.

V. CONCLUSION

Increasingly, urban Americans are looking to their state or local government to provide them with open, undeveloped areas. As this dependency grows, so does the public’s need for a legal tool with which to defend its interest in land which the government has made available to it. The public trust doctrine can serve this purpose.

This doctrine developed under Roman law as a means of making the sea and its shores freely available to the citizenry for the performance of all noninjurious activities. In somewhat restricted form, it later became part of English common law. American courts also made use of the doctrine and adapted it to fit the characteristics of the North American continent.

Public trust has always been an important concept in the coastal law of Massachusetts. Although the Massachusetts Bay colonists, in an effort to promote wharfbuilding, granted much of the state’s shoreline to private individuals, the doctrine still protects the public’s right to use the sea itself. The degree of protection which the doctrine offers submerged land, however, is presently uncertain. The legislature’s ability to alienate public trust land, which has traditionally been unquestioned, has become the subject of recent debate in the state’s courts.

The public trust doctrine is as applicable to publicly-owned inland areas as it is to coastal regions. Furthermore, its adaptation to nonsubmerged land is particularly desirable, because no other doctrine of property law can adequately fulfill its purpose of protecting resources on which important public activities depend. Massachusetts courts have recognized the importance of adopting public trust principles into land use law. Although they have
not explicitly applied the public trust doctrine to nonsubmerged land, the courts have carried out its purposes through other legal mechanisms.

The primary vehicle for public trust in its inland context is the doctrine of prior public use, a principle of eminent domain law traditionally used to settle interagency land disputes. When public trust is implemented through prior public use, however, no dispute is needed to invoke the latter doctrine's requirement of explicit legislation. Furthermore, the Supreme Judicial Court has formulated a heightened standard of specificity for legislation authorizing a change in the use of land exhibiting public trust characteristics.

Because the purpose of the prior public use and public trust doctrines are not identical, prior public use is sometimes an inappropriate vehicle for public trust. In such cases, the courts can implement public trust principles through other legal mechanisms, such as the "conservation" provision of the Massachusetts constitution, judicial review, and statutory interpretation. Because the public trust doctrine applies only to public property, however, there may be cases in which land exhibiting public trust characteristics is left without protection. This situation has arisen, and may continue to arise, when a municipality makes publicly available undeveloped land which it owns in its proprietary capacity. Unfortunately, there appears to be no existing legal mechanism by which the courts can protect both the interests of the municipality and the public's right to access in such cases.