

---

# NOTES

## EXTINGUISHING DRIED-UP PUBLIC TRUST RIGHTS

*William J. Bussiere\**

INTRODUCTION .....	1749
I. THE PUBLIC TRUST DOCTRINE ALONG THE SHORELINE .....	1753
A. <i>Origins of the Public Trust Doctrine and the Colonial Ordinances</i> .....	1754
B. <i>Federal and State Positions</i> .....	1756
C. <i>The Colonial Ordinances Through the Years</i> .....	1757
II. FILLED TIDELANDS.....	1758
A. <i>Shoreline Development and Regulation</i> .....	1759
B. <i>From Development to Conservation</i> .....	1760
C. Boston Waterfront .....	1761
D. <i>The Massachusetts Response</i> .....	1763
E. <i>The Maine Response</i> .....	1764
III. JUDICIAL RESPONSES TO PUBLIC TRUST LEGISLATION AND REGULATION .....	1765
A. <i>Massachusetts Decisions</i> .....	1766
B. Arno.....	1767
C. <i>Maine Decisions</i> .....	1771
D. <i>Efforts to Clarify Massachusetts Public Trust Law</i> .....	1772
IV. REUNITING MASSACHUSETTS AND MAINE, AT LEAST IN THE PUBLIC TRUST .....	1774
A. <i>Promoting Confidence in Title and in Property Rights</i> .....	1774
B. <i>Coherence with Current Massachusetts Law</i> .....	1778
CONCLUSION.....	1781

### INTRODUCTION

In 1962, Joseph V. Arno took title to a sliver of completely dry land straddling a harbor bulkhead at 27 Easy Street on Nantucket Island.<sup>1</sup> Forty

---

\* J.D. Candidate, Boston University School of Law, 2012; B.A. American Studies, Providence College, 2007. Heartfelt thanks for the support and suggestions of Bridget Bussiere, Michael Freeman, Chelsea Childs, Ashley Siegel, Gareth Orsmond, Professor Gary Lawson, Steve Mague, Michael Lezaja, Christopher Tom, Philip Fanning, and the Reverend Robert Carbonneau, as well as the staff and editorial board of the *Boston University Law Review*.

<sup>1</sup> See *Arno v. Commonwealth*, 931 N.E.2d 1, 20 (Mass. 2010) (displaying Arno's parcel

years later, he decided to tear down the existing commercial building on the property and replace it with a new development.<sup>2</sup> Because the property runs alongside Nantucket Harbor, he applied for a development license under the Massachusetts Waterways Act.<sup>3</sup> The Department of Environmental Protection (DEP), which administers the licensure process under the Waterways Act, attached several conditions to the license it granted, including that the public be permitted to cross his property to access a boardwalk along the harbor.<sup>4</sup> Unhappy with the DEP's conditions, Mr. Arno challenged the agency's findings in the Massachusetts Land Court, which held that "the public had no 'proprietary ownership rights'" in the portion of the property to be redeveloped.<sup>5</sup> Appeals by the Commonwealth traveled up from the Land Court to the Superior Court and the Massachusetts Supreme Judicial Court (SJC). In August of 2010, the SJC held that Mr. Arno owned 27 Easy Street in fee simple – but "subject to an easement, a condition subsequent, or both" that the land be used for some public purpose.<sup>6</sup>

More than eight years elapsed from the first license application to the SJC's determination. Turn the clock back to Mr. Arno's initial investment, and that's half a century of squandered potential. And for all that time and trouble, Mr. Arno is left with a parcel of land frozen in time – undevelopable without procuring a stringent license, and unmarketable thanks to a cloud on title thicker than the Nantucket fog. As extreme as this example may seem, it's reality for many Massachusetts landowners – fortunate to have a piece of the waterfront, but too hamstrung by the state's legal and regulatory hurdles to utilize that property to its fullest economic potential. Easy Street? Perhaps not so much.

Private ownership in land can exist practically anywhere one can stand with dry feet. But private parties can own more than just the dry land alongside a body of water. For example, many states allow private ownership of small ponds or lakes.<sup>7</sup> Riparian rights, broadly defined to include both riverbanks and riverbeds, may also come under private ownership, depending on the jurisdiction.<sup>8</sup> Where the land meets the sea, the majority of states limit private ownership of land to the high tide line, however "high tide" may be defined.<sup>9</sup>

---

along Easy Street and the harbor in an appendix to the court's opinion).

<sup>2</sup> *Id.* at 7.

<sup>3</sup> *Id.*; see *infra* Part II.D.

<sup>4</sup> *Arno*, 931 N.E.2d at 7.

<sup>5</sup> *Id.* at 9. To be precise, the land court held that no public rights were retained above the 1922 high tide line. *Id.* The many complex details of this case will be explored more fully *infra* Part III.B.

<sup>6</sup> *Id.* at 19.

<sup>7</sup> See *infra* note 37.

<sup>8</sup> See, e.g., Peter N. Davis, *Recreational Use of Watercourses*, 4 MO. ENVTL. L. & POL'Y REV. 71, 71-73 (1996).

<sup>9</sup> For a detailed discussion of how one might measure mean high tide for property

Below the high tide line, any member of the public with the ability to access the area may exercise the rights generally protected by the public trust doctrine – at minimum, the right to fish on the property and to navigate one’s boat or other vessel through the water.<sup>10</sup>

Several states, though, also allow private parties to own tidelands, that area of sometimes-submerged land between high tide and low tide.<sup>11</sup> In these states, there exist two relevant lines for purposes of ownership. Below the low tide line, all public trust rights previously mentioned apply without reservation.<sup>12</sup> But below the high tide line, private owners can hold land in fee and exclude all others from that land – except that public trust rights in fishing and navigation still apply.<sup>13</sup> Some jurisdictions liken the interaction of private ownership and public trust rights to an easement automatically granted by private owners to the public.<sup>14</sup> For centuries, this interaction has created slippery issues for bodies charged with reconciling the interests in this hybrid private-public space.<sup>15</sup>

As if to muddy the waters further, property along the shoreline rarely stays the same – a fact we owe not just to nature but also to human ambition. Wealth-seeking developers and shippers have long claimed land from water by undertaking filling projects, typically under local and state governmental oversight.<sup>16</sup> This reshaping of the coastline has created a very different map from the ones drawn by the first European visitors to America. As a general

---

purposes, see Donna R. Christie, *Of Beaches, Boundaries and Sobs*, 25 J. LAND USE & ENVTL. L. 19, 30-34 (2009).

<sup>10</sup> See Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1, 16-17 (2007).

<sup>11</sup> See *infra* Part I.B.

<sup>12</sup> See *infra* notes 26-30 and accompanying text.

<sup>13</sup> *Id.* Courts and legal historians often refer to private ownership of these lands as the *jus privatum* and to reserved public rights as the *jus publicum*. See, e.g., *Butler v. Att’y Gen.*, 80 N.E. 688, 689 (Mass. 1907); *infra* note 33.

<sup>14</sup> See *Butler*, 80 N.E. at 689 (finding such land “held . . . in fee subject, however, as to that portion between high and low water mark, to the easement of the public for the purposes of navigation and free fishing and fowling”).

<sup>15</sup> See, e.g., *Arno v. Commonwealth*, 931 N.E.2d 1, 17 (Mass. 2010) (“Title in tidelands is ‘in a special category, different from ordinary fee simple title to upland property.’” (citation omitted)); Opinion of the Justices to the House of Representatives, 313 N.E.2d 561, 566 (Mass. 1974) (describing how private property rights exist in lands between high tide and low tide, but subject to state interference to protect fishing and navigation rights); *Commonwealth v. Charlestown*, 18 Mass. (1 Pick.) 180, 187 (1822) (“The right, however, of fishing in such places, or sailing over them in boats, is common to all the subjects, but liable to be restrained or regulated by the sovereign power. So that the proprietor of upland contiguous has no greater right to the use of such privileges, than other subjects who are not the owners of upland.”).

<sup>16</sup> See *infra* notes 106-109 and accompanying text.

rule, though, public trust rights remain impressed upon any piece of land that has been underwater at any time.<sup>17</sup>

This creates particular challenges for shoreline owners like Mr. Arno who wish to develop or redevelop their property, especially when that property has an unclear history. What should be the result when a shoreline owner wishes to develop property that used to be partially or completely underwater? What if the land isn't even along the water anymore, due to additional filling that pushes the shoreline even farther seaward? In Massachusetts, a low tide ownership state since its landmark Colonial Ordinances of 1641-1647,<sup>18</sup> the answer has been tough for shoreline owners to decipher. A timid legislative response to public trust rights issues, hampered by delegation concerns, has stymied thirty years of efforts in Massachusetts to simplify the process by which public trust rights are deemed not to apply to formerly submerged or tidal pieces of property.<sup>19</sup> Meanwhile, evidentiary difficulties in determining the precise location of the "historical" high tide line have proven confusing beyond the point of useful application, resulting in expensive and lengthy proceedings that provide little guidance to future participants due to the fact-intensive nature of the inquiries.<sup>20</sup>

In contrast, in Maine – another low tide ownership state (owing to its original status as a district of Massachusetts) – case law on public trust issues has been relatively tame. Maine's legislature confronted the uncertainty at the same time as Massachusetts but with a more comprehensive response.<sup>21</sup> The result: If a piece of dry land was dry before October 1, 1975, then Maine retains no public trust rights in that land.<sup>22</sup> The outcome is the same whether the parcel is landlocked or not and whether the parcel's filling was licensed or not.<sup>23</sup>

This Note argues that public trust rights issues have introduced a cloud of uncertainty surrounding titles to Massachusetts tideland property, especially in developed areas previously altered by fill. Justifiably, environmental concerns about a fragile shoreline and recreational concerns about access to water drive opposition to economic maximization of private shoreline property.<sup>24</sup> But where private parties can own tidelands to the low tide line, this cloud on title runs counter to the common law notion, embodied by the Colonial Ordinances,

---

<sup>17</sup> See, e.g., Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 662 (2010) (exploring the Massachusetts rule and opining that "the public interest in such formerly submerged lands transcends the ordinary rules of property law").

<sup>18</sup> See *infra* Part I.

<sup>19</sup> See *infra* Part III.A.

<sup>20</sup> See *infra* Part III.B.

<sup>21</sup> See *infra* Part II.E.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See *infra* Part II.B.

that private shoreline property should be used for economic purposes. Massachusetts's piecemeal system for tidelands regulation is unpredictable, costly, and arcane – but not unsalvageable. The relative success of the Maine system shows the way to a clear and low-cost alternative. This Note advocates the implementation in Massachusetts of a statewide legislative determination of public trust rights, while showing that the state's case law on the subject does not foreclose such an approach, as might be argued.

Part I of this Note presents a history of the public trust doctrine, focusing on the 1641-1647 Colonial Ordinances of Massachusetts that first enabled private ownership of tidal flats impressed with public trust rights. Part II examines the difficulties that arise when balancing public trust rights against private ownership rights, again with an eye to the Massachusetts system of regulations and licensure as developed by case law. Part III analyzes recent Massachusetts case law concerning the filling of submerged lands and the lasting impression of public trust rights, with particular focus on the SJC's decision in *Arno v. Commonwealth*.<sup>25</sup> Part IV presents a way forward, proposing legislative changes to Massachusetts's licensure process that would bring much-needed clarity to the ownership status of former tideland areas. Along the way, this Note demonstrates that the proposed changes balance legitimate concerns involving environmental protection, maintenance of public rights, and legislative delegation with the need to promote certainty in title and efficiency in the licensure process.

#### I. THE PUBLIC TRUST DOCTRINE ALONG THE SHORELINE

All fifty states enforce some version of the public trust doctrine along their shores.<sup>26</sup> The doctrine imposes responsibilities upon the sovereign as a trustee of certain rights to be enjoyed by all members of the public.<sup>27</sup> Public trust rights exist along most types of shorelines, whether the relevant body of water is an ocean, a lake, a river, or even a canal.<sup>28</sup> The specific rights reserved for the public vary from state to state, but most states have selected from a grab bag of the following rights: access to the water, sometimes granted by easement through the adjacent uplands;<sup>29</sup> navigation for either personal or

---

<sup>25</sup> 931 N.E.2d 1, 3 (Mass. 2010).

<sup>26</sup> See Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 425 (1989) (acknowledging the “fifty-one public trust doctrines in this country,” when one includes federal public trust doctrine alongside the fifty states).

<sup>27</sup> See, e.g., *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 718 (Cal. 1983) (rooting American public trust principles in “Roman law, the English common law,” and “admission to the union”); *infra* Part I.A.

<sup>28</sup> See, e.g., *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 120 n.7 (S.C. 2003) (“The fact that a waterway is artificial is irrelevant since it is considered the functional equivalent of a natural waterway.”).

<sup>29</sup> See Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories*

commercial watercraft, depending on the state and the body of water at issue;<sup>30</sup> and certain recreation or subsistence rights, namely fishing and hunting (all subject to other federal, state, and local regulations). Starting from the ideal that all citizens have some rights in the lands that they share by virtue of their citizenship, governments have used the doctrine over the years for ends deemed in the public interest – from economic growth to environmental protection. Not surprisingly, the prevailing tenor of the times and places determined which of those interests would be served in the name of public trust.

A. *Origins of the Public Trust Doctrine and the Colonial Ordinances*

The public trust doctrine landed on the shores of the American continent as an established legal custom, understood by English colonists as part and parcel of their royal land grants. To the first colonists, the doctrine traced back four centuries from the first landings, all the way to the Magna Carta – which implicitly included, among other concessions to the barons at Runnymede, recognition of those public rights advanced by the Institutes of Justinian in the fifth century.<sup>31</sup> That original statement acknowledged that “the air, running water, the sea and consequently the shores of the sea” are “common to mankind.”<sup>32</sup> English law viewed the public trust doctrine as a means of protecting the interests of its citizens where the land met the sea. Under the doctrine, the sovereign kept such submerged lands in trust, held out from private ownership for certain public uses.<sup>33</sup> This, in effect, meant that private ownership of property could extend no farther than the high tide line; the Crown held in trust for public use any parcel of land seaward from (that is, below) high tide.<sup>34</sup>

The Massachusetts Bay Colony, soon after its incorporation and its assumption of sovereignty from the Crown,<sup>35</sup> realized that the doctrine as

---

*and the Taking Issue*, 67 N.C. L. REV. 627, 640-43 (1989) (discussing the use of the public trust doctrine in New Jersey to protect public rights in access and use of beach areas).

<sup>30</sup> For a survey of several different tests to determine whether a body of water is “navigable” under the public trust doctrine, see Craig, *supra* note 10, at 18.

<sup>31</sup> See, e.g., Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 765-68 (1970).

<sup>32</sup> *Nat'l Audubon Soc'y*, 658 P.2d at 718.

<sup>33</sup> Lord Hale’s exposition of the public trust doctrine is most frequently cited as a statement of the British common law position. See, e.g., *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 90-92 (1851) (“It therefore appears, upon the authority of Lord Hale, that in regard to the sea-shore, arms of the sea, and navigable rivers, the king stood in two capacities, holding a *jus privatum*, or right of property in the soil, and also a *jus publicum*, or right, as sovereign, to hold such property under his royal authority, and power to regulate and govern, for the common use and benefit of all persons, for the purposes of navigation.”).

<sup>34</sup> See *infra* Part I.B for a brief discussion of how different states interpret their ownership rights and public trust duties below the high tide line.

<sup>35</sup> See *Commonwealth v. Hilton*, 54 N.E. 362, 363 (Mass. 1899).

imported from the British Isles did not accommodate the type of seafaring economy that New England would need to develop in order to remain viable. In particular, the colonial authorities saw the high tide rule as an encumbrance on commercial development, preventing shoreline landowners from building piers or wharves out into the sea.<sup>36</sup> To remedy this problem, the colony issued what came to be known as the 1641-1647 Colonial Ordinances.<sup>37</sup> Under these new rules, property owners along any waterway subject to tidal influence – including natural harbors and salt-water inlets – could claim ownership, not to the high tide line but to either the low tide line or a distance one hundred rods<sup>38</sup> from the high tide line, whichever is closer.<sup>39</sup>

In passing the Colonial Ordinances, the colonial government effectively established three classifications for land: (1) tidelands, which extend from mean high tide to mean low tide (or the first hundred rods from high tide); (2) submerged lands, which generally lie underwater (subject to the hundred-rods exception); and (3) uplands, which are never submerged and never subject to tidal influence.<sup>40</sup> In submerged lands,<sup>41</sup> no change in ownership was made – the Colony as sovereign acted as trustee for the public rights inuring in the seas. Nor were there any changes to the ownership status of uplands; private owners retained title all the way to their high tide line. What those owners gained was title in their tidelands, enabling them to build private piers and wharves without requiring that those structures belong to the public by virtue of their location.<sup>42</sup>

These new ownership rights, however, remained subject to certain public trust rights, as explicitly laid out in the Colonial Ordinances. In particular, the new shoreline owners could not interfere with the rights of navigation, fishing,

---

<sup>36</sup> See *Storer v. Freeman*, 6 Mass. (1 Tyng) 435, 438 (1810).

<sup>37</sup> The ordinance appears in its original codification in 1649, *The Book of the General Lawes and Libertyes*. As cited in *Opinion of the Justices*, 313 N.E.2d 561, 565-66 (Mass. 1974), it reads,

Every Inhabitant who is an housholder shall have free fishing and fowling in any great ponds, bayes, Coves and Rivers, so farr as the Sea ebbs and flowes, within the precincts of the towne where they dwell, unless the freemen of the same Town or the General Court have otherwise appropriated them . . . . The which clearly to determine, It is Declared, That in all Creeks, Coves and other places, about and upon Salt-water, where the Sea ebbs and flowes, the priortior of the land adjoyning, shall have propriety to the low-water mark, where the Sea doth not ebb above a hundred Rods, and not more wheresoever it ebbs further. Provided that such proprietor shall not by this liberty, have power to stop or hinder the passage of boates or other vessels, in or through any Sea, Creeks, or Coves, to other mens houses or lands.

<sup>38</sup> One hundred rods equals 1650 feet.

<sup>39</sup> See *supra* note 37.

<sup>40</sup> See, e.g., *Opinion of the Justices to the Senate*, 424 N.E.2d 1092, 1099 (Mass. 1981).

<sup>41</sup> Massachusetts law refers to submerged lands as “commonwealth tidelands” and refers to tidelands (as used in this Note) as “private tidelands.” MASS. GEN. LAWS ch. 91, § 1 (2008).

<sup>42</sup> *Storer v. Freeman*, 6 Mass. (1 Tyng) 435, 438 (1810).

and fowling.<sup>43</sup> On first examination, the colonial government's intent appears to have been the creation of a hybrid private-public space, where a landowner retained certain rights subject to a promise not to exclude his neighbors from a resource to which they should always have access as citizens under the sovereign.<sup>44</sup> But the backdrop of commercial growth against which the colonial government acted makes the primary purpose clear – creating the framework by which a private landowner could exclude the public with confidence, encouraging the landowner to unlock the economic strength of his land's location by building connections to the sea.<sup>45</sup>

B. *Federal and State Positions*

Massachusetts is one of a distinct minority of states that recognize private ownership in property below the high water mark. Other states that recognize this right in various bodies of water include Maine, Virginia, Delaware, and Pennsylvania.<sup>46</sup> But the Supreme Court has ruled that any land situated below the high water mark is subject to public rights, no matter how far into the water private ownership can extend.

The Court's seminal statement of the federal public trust doctrine appears in its 1892 decision, *Illinois Central Railroad Co. v. Illinois*<sup>47</sup>: Government ownership in tidelands and submerged lands "is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."<sup>48</sup> The decision invalidated a major grant of tidelands by the state of Illinois to a railroad company, confirming that states have a duty to their citizens to protect tidelands for the public benefit.<sup>49</sup> *Illinois Central* was followed in short order by *Shively v.*

---

<sup>43</sup> See *supra* note 37.

<sup>44</sup> See *supra* note 15 and accompanying text.

<sup>45</sup> See Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 ALB. L. REV. 623, 631 (1998).

<sup>46</sup> Craig, *supra* note 10, at 15-16 (2007). Professor Craig assumed a significantly heavy burden in this work, identifying distinctions among public trust doctrines for more than three-fifths of the states. The states unaddressed by this work received their due treatment in Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010).

<sup>47</sup> 146 U.S. 387 (1892).

<sup>48</sup> *Id.* at 452.

<sup>49</sup> *Id.* at 452-53; cf. Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 ARIZ. ST. L.J. 849, 879-80 (2001) (exploring *Illinois Central* in light of modern environmentalist justifications of the public trust doctrine); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489-91 (1970) (calling *Illinois Central* "the lodestar in American public trust law").

*Bowlby*,<sup>50</sup> which validated the application of the public trust doctrine in Oregon state law.<sup>51</sup> More recently, *Philips Petroleum Co. v. Mississippi*<sup>52</sup> presented the Court with an opportunity to affirm state ownership in tidelands – importantly, even those tidelands that are merely “influenced” by the tides and do not offer any meaningful “navigability” for owners.<sup>53</sup> The Court also rejected the notion that navigability had usurped the “ebb-and-flow” test – encompassing any property affected by the ebb and flow of some body of water – for public trust cases in this country.<sup>54</sup> The Court held that to do so would deprive the states of vast swaths of tidelands granted to them upon statehood.<sup>55</sup> In declining to endorse another approach, the Court also recognized that different states enforce different variants of the public trust doctrine.<sup>56</sup> Those states that have chosen low-water ownership must balance these private ownership rights against the public trust.

### C. *The Colonial Ordinances Through the Years*

Following the American Revolution, public rights to the shoreline passed from the Crown and her colonies to the United States and, in Massachusetts, to the Great and General Court of the Commonwealth, acting as sovereign representatives of the people.<sup>57</sup> Throughout the early years of the Commonwealth and into the nineteenth century, the SJC had cause to clarify the protections and limitations of the public trust doctrine as modified by the Colonial Ordinances in Massachusetts. One such case, *Storer v. Freeman*,<sup>58</sup> applied to property located in the Massachusetts district of Maine, ten years before that district became a state of its own.<sup>59</sup> Eleven years after the

---

<sup>50</sup> 152 U.S. 1 (1894).

<sup>51</sup> *Id.* at 52 (validating an Oregon law that declared state ownership of lands below the high water mark, after reviewing Oregon’s path to statehood and to ownership of such lands). The case cited the equal footing doctrine for support. *Id.* at 57-58; *see also infra* note 57.

<sup>52</sup> 484 U.S. 469 (1988).

<sup>53</sup> *Id.* at 478 (citing *Shively*, 152 U.S. at 24, in affirming “that the States own[] all the soil beneath waters affected by the tide”).

<sup>54</sup> *Id.* at 481.

<sup>55</sup> *Id.* at 483.

<sup>56</sup> *Id.* (“[E]ach State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy.” (quoting *Shively*, 152 U.S. at 26)).

<sup>57</sup> *See, e.g.*, *Martin v. Waddell’s Lessee*, 41 U.S. (1 Wall.) 367, 410 (1842). States that were not among the original thirteen can claim adherence to the public trust doctrine in a variety of ways. Under the equal footing doctrine, all states accede to the Union as equals with the same sovereign rights over their territories. *See Wilkinson, supra* note 26, at 443-46. Some Western states also find the doctrine in their imports of Spanish law. *Id.* at 428-30.

<sup>58</sup> 6 Mass. (1 Tyng) 435 (1810).

<sup>59</sup> *Id.* at 435 (locating the dispute “on *Gamaliel’s Neck*, in the town of *Cape Elizabeth*” in Maine).

Compromise of 1820, the new Maine SJC recognized that the Colonial Ordinances persisted as common law even after Maine's separation from Massachusetts.<sup>60</sup>

The Colonial Ordinances were recognized early as bestowing upon owners of shoreline property the uncontested title to adjacent tidelands.<sup>61</sup> In its very first reported volume of cases, the Massachusetts SJC found town officials liable for trespass for dismantling piers situated on private tidelands.<sup>62</sup> The SJC just as clearly upheld public trust rights in the nineteenth century, holding that shellfishing qualified as "fishing" and could be lawfully undertaken by any member of the public below high tide, even on private tidelands.<sup>63</sup> And even though the body that passed the ordinances was a relic of colonial government, the ordinances were recognized custom even after the revocation of the charter of Massachusetts Bay Colony and were imported into the Commonwealth's common law following the Revolution.<sup>64</sup>

## II. FILLED TIDELANDS

Recall the three types of land created by the Colonial Ordinances in the Massachusetts Bay Colony: uplands, submerged lands, and tidelands.<sup>65</sup> The ownership statuses of the first two types of land did not change as a result of the Colonial Ordinances.<sup>66</sup> Tidelands, meanwhile, passed from public ownership to a form of private ownership held subject to the public trust.<sup>67</sup> This hybrid form of ownership might present relatively few quandaries if only

---

<sup>60</sup> See *Lapish v. President, etc., of Bangor Bank*, 8 Me. 85, 85 (1831) ("The colonial ordinance of 1641, extending the title of riparian proprietors to low water mark, though originally limited to the Plymouth colony, is part of the common law of Maine . . .").

<sup>61</sup> See, e.g., *Weston v. Sampson*, 62 Mass. (8 Cush.) 347, 353-54 (1851); *Austin v. Carter*, 1 Mass. (1 Will.) 231, 231 (1804).

<sup>62</sup> *Austin*, 1 Mass. (1 Will.) at 232.

<sup>63</sup> *Weston*, 62 Mass. (8 Cush.) at 355.

<sup>64</sup> *Id.* at 354. This common law approach led to the recognition, without much discussion, of the ordinances as binding on geographic areas that were not a part of the Massachusetts Bay Colony in 1647, including the areas of Plymouth Colony, Martha's Vineyard, and Nantucket. *Id.* For the application of the ordinances to Maine, see *supra* notes 58-60 and accompanying text.

<sup>65</sup> See *supra* Part I.A.

<sup>66</sup> The unchanged ownership status of uplands might be argued, since the tidelands that were deemed to pass into private hands upon the Colonial Ordinances did not register to separate title. One can imagine a world of property registration where the tidelands and the uplands were always held under separate titles, and, in fact, the title to tidelands can be conveyed separately from the title to uplands. See, e.g., *City of Boston v. Boston Port Dev. Co.*, 30 N.E.2d 896, 900 (Mass. 1941). A similar rule for riparian rights prevails in many states. See, e.g., *State v. Knowles-Lombard Co.*, 188 A. 275, 276 (Conn. 1936) (finding riparian ownership to "constitute a species of property . . . separable and alienable as thus separated in the same manner as other property").

<sup>67</sup> See *supra* note 14 and accompanying text.

the shifting sands of time<sup>68</sup> could alter the flow of the tides.<sup>69</sup> But the incentive for growth provided by the Colonial Ordinances was cashed in all too well by industrious New Englanders, who very soon outgrew the limits of the shoreline that the Crown's grant – and millennia of meticulous glacial sculpting<sup>70</sup> – could provide. Especially in port cities up and down the coast, the answer was seaward development, reclaiming tidelands and submerged lands from the ebb and flow of the sea. Such a dramatic reshaping of the shoreline required a body of law that could classify the rights afforded to the owners of this reclaimed land and the rights retained by the public and the Commonwealth even after the filling was complete.

#### A. *Shoreline Development and Regulation*

Because the sovereign administered public trust rights on sovereign-owned lands, in Massachusetts, only the legislature had the ability to remove the impression of public trust rights upon a piece of property.<sup>71</sup> Throughout much of the nineteenth century, Massachusetts operated under an ad hoc understanding of this reality. When a private individual or a town wished to reclaim tidelands or submerged lands by the use of fill, authorization for the reclamation project required an act of the legislature.<sup>72</sup> The legislature did not establish formal procedures for the licensing of such projects until 1866, when it enacted what became Chapter 91 of the Massachusetts General Laws.<sup>73</sup>

The Waterways Act, as Chapter 91 is also known, created the Board of Harbor Commissioners, an administrative body empowered to approve or reject development along the shoreline.<sup>74</sup> For the first time, shoreline property

---

<sup>68</sup> See, e.g., Brian R. Ballou, *Shoreline Moves in on Plum Islanders*, BOS. GLOBE, Mar. 4, 2010, at B2 (chronicling a fight against erosion to save three dozen houses from the advancing shoreline on Plum Island); Susan Milton, *Storm Takes the Last of First Village*, CAPE COD TIMES, Oct. 20, 2009, at A1 (reviewing the decisions of cottage owners on Cape Cod's eastern barrier beach either to move their cottages or leave them to destruction as heavy storms reshaped the shoreline).

<sup>69</sup> In such a case, where an act of nature or of coastal reshaping leaves a landowner's property in a different condition, the general rule is that an accretion of land extends a landowner's property line seaward to the new low water mark. See *Michaelson v. Silver Beach Improvement Ass'n, Inc.*, 173 N.E.2d 273, 275 (Mass. 1961).

<sup>70</sup> See BETH SCHWARZMAN, *THE NATURE OF CAPE COD* 7-23 (2002) (explaining the geological origins of the southeastern Massachusetts shoreline).

<sup>71</sup> See *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 90 (1851).

<sup>72</sup> See *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629, 637-39 (1979) (tracing the history of the "wharfing statutes" in the early 1800s that fueled the expansion of the Boston waterfront and "stimulat[ed] private investment in economic development"); Sax, *supra* note 49, at 498 (praising the Massachusetts SJC for preventing "low-visibility decision making" from dominating the field of public trust by insisting that only the legislature can act to extinguish public trust rights).

<sup>73</sup> MASS. GEN. LAWS ch. 91 (2008); 1866 Mass. Acts 107-10.

<sup>74</sup> The Board of Harbor Commissioners was the first of many names for the organization

owners could seek a filling or building license for their tidelands by means other than a legislative act. The original board had the power to issue (or deny) written licenses for shoreline construction, keeping public trust principles at the forefront of its reasoning.<sup>75</sup> Over the next century, the legislature amended the Waterways Act periodically to keep pace with judicial rulings that aimed to bring the common law context of the public trust doctrine to the state's laws and regulations.<sup>76</sup>

B. *From Development to Conservation*

By 1975, administration of the Waterways Act licensure process had fallen to a division of the Department of Public Works (DPW), reflecting that agency's status as a body qualified to oversee "the creation of new land and waterfront infrastructure."<sup>77</sup> The legislature amended the Waterways Act in 1975 to change oversight of the licensure process. Instead of the DPW, the Department of Environmental Protection (DEP) would issue new licenses under Chapter 91.<sup>78</sup> This shift coincided with a revival of legal scholarship in the field of public trust that centered on the use of the doctrine for environmental protection,<sup>79</sup> to say nothing of a more general push towards governmental protection of environmental resources.<sup>80</sup> The next fifteen years of legislative activity, following a century of near silence in the field, confirmed the legislature's desire that the Waterways Act licensure process provide a balance between landowners' interests and the need for conservation.

At least one Massachusetts case predicted this shift towards environmental protection, though it did so without making direct reference to the public trust doctrine. In 1966, the SJC invalidated a lease of state parkland that included the highest peak in Massachusetts, which the lessees would have developed

---

in charge of tidelands in Massachusetts. Government reorganizations resulted in no fewer than six changes to the name of the body controlling Chapter 91 licenses until 1975. See JACK H. ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS* 169 n.28 (1994).

<sup>75</sup> *Id.* at 169.

<sup>76</sup> See *id.* at 173-76.

<sup>77</sup> Robert H. Fitzgerald, *Unlocking Public Rights in Landlocked Tidelands*, 52 BOSTON B. J., May/June 2008, at 16, 17 (remarking that "licenses were issued to spur economic development").

<sup>78</sup> 1975 Mass. Acts 905.

<sup>79</sup> See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 644 n.76 (1986) (citing multiple sources for environmentally driven public trust scholarship).

<sup>80</sup> Fitzgerald, *supra* note 77, at 17. See generally Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7401) (charging the Environmental Protection Agency with rulemaking and enforcement power over air pollutants); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-47) (creating a Council on Environmental Quality to oversee a national environmental policy).

into a major ski resort area.<sup>81</sup> A statute authorized construction of a tramway to the summit of Mount Greylock, but the SJC found that this limited purpose did not include authorization of a larger development requiring “111 acres . . . to be cleared of trees and vegetation.”<sup>82</sup> The court took a stringent interpretive posture towards the authorizing statute: “The Greylock reservation, as rural park land, is not to be diverted to another inconsistent public use without plain and explicit legislation to that end.”<sup>83</sup> Scholars point to this decision as a watershed moment in the state’s recognition that lands held in trust cannot be developed so as to hinder existing public use without express legislative authorization.<sup>84</sup> Although public trust principles were not directly mentioned in the case,<sup>85</sup> the SJC’s holding signaled that protection of natural resources would be the state’s default position, to be usurped only by a clear legislative statement to the contrary.<sup>86</sup>

### C. Boston Waterfront

In Massachusetts, public trust rights in tidelands took center stage in 1979, when the SJC decided *Boston Waterfront Development Corp. v. Commonwealth*,<sup>87</sup> a case that cast a decades-long shadow over the state’s coastline. The plaintiff developer sought to register title to land at the end of Boston’s Lewis Wharf, claimed from Boston Harbor by filling undertaken with

---

<sup>81</sup> *Gould v. Greylock Reservation Comm’n*, 215 N.E.2d 114, 119-21, 124 (Mass. 1966).

<sup>82</sup> *Id.* at 120.

<sup>83</sup> *Id.* at 121 (internal quotation marks omitted).

<sup>84</sup> *See, e.g., Sax, supra* note 49, at 494.

<sup>85</sup> That the public trust doctrine was not directly mentioned should not be surprising, given that the lands at issue (though state-owned) were nowhere near the shoreline.

<sup>86</sup> While environmental and economic justifications for the public trust both found favor in Massachusetts and Maine, wholesale expansion of public trust rights did not. *See* Opinion of the Justices to the House of Representatives, 313 N.E.2d 561, 567-68 (Mass. 1974) (rejecting a bill which would grant a general right to pass on foot to the shoreline as incompatible with original public trust rights and violative of state and federal takings clauses); *infra* notes 161-168 and accompanying text (discussing Maine’s rejection of a general recreation right along the shoreline). *But see supra* note 167 (indicating some openness to new public trust rights in Maine’s doctrine). Other jurisdictions have disagreed on this point, finding recreation rights consistent with the spirit of the public trust doctrine. *See, e.g., Neptune City v. Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972). In this expansive spirit, other justifications for the public trust, including broad principles of social justice and civil rights, have been put forward elsewhere. *See, e.g., Marc R. Poirier, Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719, 760-72 (1996) (chronicling the work of Ned Coll’s Revitalization Corps in Connecticut); Robert Carbonneau, *A Walk Remembered*, HARTFORD COURANT, Aug. 4, 1978, at 15 (framing scant public access to the Connecticut shoreline as an “injustice,” and recounting a 250-mile walk along the state’s entire coast).

<sup>87</sup> 393 N.E.2d 356 (Mass. 1979).

the direct permission of the legislature in the early nineteenth century.<sup>88</sup> The Land Court held that the Lewis Wharf statutes had the effect of giving the developer's predecessor a fee simple title to the newly formed land.<sup>89</sup> The Supreme Judicial Court, confirming a modification of this ruling by an intermediary appellate court, disagreed.<sup>90</sup> Tracing the history of the Colonial Ordinances down to the present day, with particular attention to decisions contemporary to the Lewis Wharf statutes,<sup>91</sup> the SJC held that the statutes granted something less than a fee simple to the original owners of the filled land. The SJC looked to *Illinois Central* for the notion that tidelands can "be granted only for public purposes," a notion confirmed by the SJC's own prior and subsequent rulings.<sup>92</sup> The SJC provided a crystallized version of its holding:

[T]he land in question is not, like ordinary private land held in fee simple absolute, subject to development at the sole whim of the owner, but it is impressed with a public trust, which gives the public's representatives an interest and responsibility in its development. This concept is difficult to describe in language in complete harmony with the language of the law ordinarily applied to privately owned property. We are not dealing with the allocation of property rights between private individuals when we are concerned with a public resource such as Boston Harbor.<sup>93</sup>

The SJC finally held that the developer held the filled tidelands at issue "in fee simple, but subject to the condition subsequent that it be used for the public purpose for which it was granted."<sup>94</sup>

For those familiar with the state's public trust responsibilities, this formulation might not have come as such a shock. But developers and property owners who knew their history felt especially stung and vulnerable – after all, entire neighborhoods of Boston sat on filled land that had been tidal or submerged prior to the nineteenth century. The language "condition subsequent" particularly frightened Boston waterfront owners, as it appeared to

---

<sup>88</sup> *Id.* at 357.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 358.

<sup>91</sup> *Id.* at 360 ("Nineteenth century opinions of the Supreme Judicial Court construed this colonial ordinance as granting 'only a qualified property' in the flats to the upland owner . . . ." (quoting *Commonwealth v. Charlestown*, 18 Mass. (1 Pick.) 180, 184 (1822)).

<sup>92</sup> *Id.* at 366.

<sup>93</sup> *Id.* at 367.

<sup>94</sup> *Id.* *Boston Waterfront* included a dissent, one which argued that no condition subsequent external to the original language of the statutory grant should be attached to the land. *Id.* at 369 (Braucher, J., dissenting). But under the prevailing view of the Massachusetts public trust doctrine as a common law trump card existing external to any statutory or regulatory language, *see infra* Part III, this viewpoint seems rightly to have been swept away with the tide.

“significantly cloud[] the title to their properties.”<sup>95</sup> *Boston Waterfront* dredged up the very real fear that if formerly tidal or submerged lands were utilized for something other than a public purpose, the state government had the right to reclaim those lands in defense of the public trust.<sup>96</sup>

D. *The Massachusetts Response*

In the wake of *Boston Waterfront*, the Massachusetts Legislature sought to remove the clouds on title that had settled uncomfortably upon much of the city of Boston. In 1981, the state Senate and House proposed bills that would have created Chapter 91A of the Massachusetts General Laws, intended to settle the public trust status of Boston tidelands.<sup>97</sup> The proposed law would have drawn a line “along major Boston thoroughfares” ringing the city, declaring all property landward of that line to be free of any state interest.<sup>98</sup> Property seaward of the line could have also been relieved of its public trust rights on a case-by-case basis through a licensure process overseen by the secretary of the executive office of environmental affairs.<sup>99</sup>

The SJC generally approved of these bills as passing constitutional muster in a pair of opinions<sup>100</sup> issued in response to questions propounded by the state senate under a mechanism for seeking legal advice permitted by the Massachusetts Constitution.<sup>101</sup> The senate had expressed concern over whether the proposed law would be an improper delegation of the state’s responsibilities as public trustee of the interests in the affected lands.<sup>102</sup> But the SJC found no conflict in the creation of the licensure process, because the bill “identifie[d] the land as to which the secretary may act – tidelands in Boston in which an owner of record has a lawful interest and in which the Commonwealth has or may have vestigial rights.”<sup>103</sup> The SJC concluded,

We think the property has been adequately identified in the circumstances, the interest to be surrendered has been sufficiently recognized, and the proper purposes to which the property may be put have been adequately acknowledged. The secretary is given sufficient

---

<sup>95</sup> Jane F. Carlson, *The Public Trust and Urban Waterfront Development in Massachusetts: What Is a Public Purpose?*, 7 HARV. ENVTL. L. REV. 71, 87 (1983).

<sup>96</sup> *See id.* at 86.

<sup>97</sup> *See* Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1096 (Mass. 1981); Opinion of the Justices to the Senate, 424 N.E.2d 1111, 1113 (Mass. 1981).

<sup>98</sup> *Opinion of the Justices*, 424 N.E.2d at 1096.

<sup>99</sup> *Id.* at 1103-05.

<sup>100</sup> *See supra* note 97.

<sup>101</sup> MASS. CONST. pt. II, ch. III, art. 2 (“Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.”).

<sup>102</sup> *Opinion of the Justices*, 424 N.E.2d at 1097.

<sup>103</sup> *Id.* at 1108.

guidance for the exercise of the legislative policy. There would be no unlawful delegation of the Legislature's responsibility.<sup>104</sup>

Yet, despite these assurances that the bills passed muster under public trust requirements,<sup>105</sup> the legislature never adopted them as Massachusetts law.

Instead, the Massachusetts Legislature opted to overhaul Chapter 91 (the Waterways Act), the extant statutory mechanism for tidelands regulation. In 1983, new legislation dictated that the DEP find that a project built on tidelands, but not dependent upon access to the water, must produce some "public benefit" in order to receive a development license.<sup>106</sup> To provide a structure to this process, Chapter 91 allowed the DEP to promulgate regulations governing the issuance of licenses.<sup>107</sup> Those regulations,<sup>108</sup> issued in 1990, detail the application process that a developer must follow and outline the test that the DEP must apply to determine whether a project's public detriments outweigh its public benefits.<sup>109</sup> In an effort to provide some clarity to owners of upland property that had once been tidelands or submerged lands, the DEP excluded those lands from their regulatory process.<sup>110</sup> But no clearer statement than that was forthcoming from the Massachusetts Legislature – despite a much more definitive response put forth by the Maine Legislature years earlier.

#### E. *The Maine Response*

If *Boston Waterfront* made waves in Massachusetts, politicians in Maine felt at least the ripples of the decision, leading them to address independently the impact of public trust rights on filled tidelands. A 1975 Maine statute, the Submerged Lands Act, had introduced further uncertainty as to the ownership

---

<sup>104</sup> *Id.*

<sup>105</sup> The legislature might have been concerned with the SJC's determination that the bills required a two-thirds majority for passage because some public trust rights might have been considered "easements" acquired for purposes of environmental protection. *Id.* at 1107-08.

<sup>106</sup> 1983 Mass. Acts 1071; see also William L. Lahey, *Chapter 91 Regulations: The Commonwealth Moves Toward Statewide Zoning*, 35 BOSTON B. J., March/April 1991, at 21, 21. The regulations that followed indicated that "public benefit" was to be presumed for shoreline developments that depended on water access. Fitzgerald, *supra* note 77, at 17 (citing 310 MASS. CODE REGS. 9.12 (1990)). For a contemporary view of the "public benefit" requirement, see generally Carlson, *supra* note 95.

<sup>107</sup> MASS. GEN. LAWS ch. 91, § 18 (requiring review of such regulations by "the joint legislative committee on natural resources and agriculture, . . . the senate committee on ways and means, and . . . the house committee on ways and means . . . within sixty days prior to the effective date").

<sup>108</sup> See 310 MASS. CODE REGS. 9.00.

<sup>109</sup> 310 MASS. CODE REGS. 9.11(3)(c)(2).

<sup>110</sup> 310 MASS. CODE REGS. 9.04 ("The following geographic areas, generally considered 'trust lands,' are subject to licensing and permitting by the Department under 310 CMR 9.00: . . . all filled tidelands, *except for landlocked tidelands*, and all filled lands lying below the natural high water mark of Great Ponds." (emphasis added)).

status of filled tidelands by bringing such lands under state regulation.<sup>111</sup> The Maine SJC, approached for guidance about the proposed corrective legislation, signaled its approval.<sup>112</sup> The end result was a uniform statewide rule declaring all uplands filled prior to October 1, 1975, “released to the owners . . . by the State free of any claimed ownership in public trust.”<sup>113</sup> The Maine Legislature found that lands filled prior to that date<sup>114</sup> were “substantially valueless for trust uses and [that] such lands may be disposed of without impairment of the public trust in what remains.”<sup>115</sup>

The legislature made no distinction in the law between lands filled lawfully and lands filled unlawfully, believing that such an inquiry would have made their declaration ineffective because the majority of historical filling projects “were carried out without any conveyance or authorization from the State.”<sup>116</sup> The law included a declaration of clear title for any owners of such property, “free of any claimed ownership in public trust.”<sup>117</sup> It also described a process whereby landowners could receive a filing in their local registry of deeds from the Bureau of Public Lands, which would declare the property to be free of public trust rights upon a simple evidentiary showing on a Bureau form.<sup>118</sup> The Maine Legislature’s decision to bypass regulation with a clear statutory release of unusable public trust rights would prove economical in the years ahead.

### III. JUDICIAL RESPONSES TO PUBLIC TRUST LEGISLATION AND REGULATION

Running concurrent with (and often spurring) changes to state tidelands law was a line of judicial decisions that interpreted the public trust doctrine and its interaction with the statutory and regulatory regime concerning tidelands. In Massachusetts, the SJC has ruled consistently on the side of *express* legislative

---

<sup>111</sup> See *Opinion of the Justices*, 437 A.2d 597, 607 (Me. 1981).

<sup>112</sup> *Id.* at 606. As in Massachusetts, the Maine SJC can answer certified questions posed to it by the governor or by either house “upon important questions of law, and upon solemn occasions.” ME. CONST. art. 6, § 3.

<sup>113</sup> ME. REV. STAT. tit. 12, § 1865 (2010). The current version of the law, enacted in 1997 as part of a statutory reorganization of the state Bureau of Parks and Lands, see 1997 Me. Laws 1698-1732, appears in nearly identical form as the original version of the law, enacted in 1981 following the favorable *Opinion of the Justices*. See *Opinion of the Justices*, 437 A.2d at 600-03.

<sup>114</sup> The effective date of the Submerged Lands Act was October 1, 1975. *Opinion of the Justices*, 437 A.2d at 607.

<sup>115</sup> ME. REV. STAT. tit. 12, § 1865(1) (2010).

<sup>116</sup> *Opinion of the Justices*, 437 A.2d at 599.

<sup>117</sup> ME. REV. STAT. tit. 12, § 1865(3) (2010).

<sup>118</sup> *Id.* § 1865(4)(B). The form’s most important information was “[a]n accurate legal description of the filled land, proof that the land was filled by October 1, 1975 and sufficient details, such as a survey by a registered land surveyor, to locate the filled land on a map of general acceptability.” *Id.*

action<sup>119</sup> as a requirement for any governmental action invoking public trust rights, making historical inquiries vital and regulatory remedies difficult. Meanwhile, in Maine, where the legislature did act expressly with respect to the entire state's coastline, judicial interpretation has been much less frequent than in Massachusetts.<sup>120</sup>

A. *Massachusetts Decisions*

In 2003, the SJC decided *Trio Algarvio, Inc. v. Commissioner of the Department of Environmental Protection*,<sup>121</sup> a case that shows how historical irregularities can sink a claim of express legislative action. The landowner's property sat along a river where the legislature authorized filling under an 1806 wharfing statute.<sup>122</sup> His predecessors obtained the correct filling licenses several times over the course of the early twentieth century, but they filled half an acre without such a license.<sup>123</sup> The landowner sought and received a Chapter 91 license for use of that half-acre but was assessed displacement and occupation fees meant to compensate the public trust for his private use of the formerly submerged lands.<sup>124</sup> He appealed the fees, arguing that the 1806 wharfing statute nevertheless allowed the unlicensed filling because such fees would be "clearly in derogation of the grant formerly made."<sup>125</sup> Before pointing out that the landowner's grant did not include the half-acre in question, the SJC reiterated that only "lawful filling" could extinguish public trust rights.<sup>126</sup> Wharfing statutes passed by the legislature provided such an opportunity to shoreline owners; illegal filling projects failed to extinguish public trust rights, making fees for compensation to the public trust appropriate.<sup>127</sup>

In 2007, in *Moot v. Department of Environmental Protection (Moot I)*,<sup>128</sup> the SJC turned its attention to DEP regulations, invalidating one that the DEP had

---

<sup>119</sup> The emphasis here is mine, but this word is frequently emphasized in Massachusetts case law, especially in *Arno*. See, e.g., *Arno v. Commonwealth*, 931 N.E.2d 1, 14 (Mass. 2010) ("Only the Commonwealth, 'or an entity to which the Legislature has delegated authority expressly, may act to further public trust rights.'" (quoting *Moot v. Dep't of Env'tl. Prot.*, 861 N.E.2d 410, 416 (2007))).

<sup>120</sup> See *infra* Part III.C.

<sup>121</sup> 795 N.E.2d 1148 (Mass. 2003).

<sup>122</sup> *Id.* at 1149 (citing 1806 Mass. Acts 20 (1806)).

<sup>123</sup> *Id.* at 1149-50.

<sup>124</sup> *Id.* at 1150. The fees are statutorily provided at MASS. GEN. LAWS ch. 91, §§ 21-22 (2008).

<sup>125</sup> *Trio Algarvio*, 795 N.E.2d at 1154 (internal quotation marks omitted).

<sup>126</sup> *Id.* at 1151.

<sup>127</sup> *Id.* at 1155 (finding that the wharfing statute reserved the right to assess future penalties for landowners acting in noncompliance and that the public trust doctrine would require such a penalty even if the statute did not envision it).

<sup>128</sup> 861 N.E.2d 410 (Mass. 2007).

promulgated seventeen years earlier.<sup>129</sup> The regulation's downfall was that it extinguished public trust rights without express legislative permission.<sup>130</sup> The DEP likely employed the same reasoning as the Maine Legislature – that public trust rights are only useful to the public when they can be exercised on a given parcel of land. Seeking to remedy an impossibility while decreasing the volume of Chapter 91 licenses that the agency would have to process, the DEP specified that “landlocked tidelands,” where public rights in fishing, fowling, and navigation were meaningless for lack of a connection to the water, were not subject to the Chapter 91 regulations.<sup>131</sup> The SJC disapproved of such an approach:

If landlocked tidelands are exempt entirely from the statutory licensing procedures, no opportunity exists for the department to determine, as it must under § 18, whether a proposed use of filled tidelands meets that requirement. The department has no authority to forgo its responsibility to preserve and protect the public's rights in tidelands (water dependent or nonwater dependent), whether for administrative convenience, conservation of the department's resources or any other laudable agency reason. By exempting filled “landlocked” tidelands from the statute's licensing requirements, the department is relinquishing all control over the use of the filled land. It does so without legislative authorization, effectively relinquishing all public rights that the Legislature has mandated be preserved through the licensing requirements.<sup>132</sup>

This rejection of the DEP's regulation sent a loud signal to the legislature and the governor: Only express legislative action (or express legislative delegation) would be sufficient to extinguish public trust rights wherever they exist, even if the property in question is nowhere near the current high water mark.<sup>133</sup> It also called into question the wisdom of trusting the regulatory process to handle an issue that can only be dispatched with confidence by the legislature.

#### B. Arno

The SJC's 2010 tidal flats case, *Arno v. Commonwealth*,<sup>134</sup> hammered home the two greatest challenges facing would-be developers of shoreline property with an uncertain history. First, the *Arno* parcel's complex background

---

<sup>129</sup> *Id.* at 420.

<sup>130</sup> *Id.* The SJC consistently requires that only the legislature or a state agency with expressly delegated responsibilities may serve as public trustee, having earlier ruled that a municipality could not cite to public trust concerns in its denial of a development permit. *Fafard v. Conservation Comm'n of Barnstable*, 733 N.E.2d 66, 71 (Mass. 2000).

<sup>131</sup> 310 MASS. CODE REGS. 9.04.

<sup>132</sup> *Moot I*, 861 N.E.2d at 418.

<sup>133</sup> For a summary of the compromise enacted by the legislature between the real estate bar and environmental groups, see Fitzgerald, *supra* note 77, at 18-19. The results are discussed *infra* Part III.D.

<sup>134</sup> 931 N.E.2d 1, 4 (Mass. 2010).

demonstrated the ineffectual nature of an inquiry into the historical location of the high tide line, especially because the line moved several times over the years due to various filling projects. Second, the SJC reiterated the utter primacy of express legislative action pursuant to the public trust – not only over the operation of state statutes dealing with the registration of land and over state regulations directly affecting state administration of public trust rights, but also over the core function of the judiciary itself to make factual determinations in its proceedings.

The historical intricacies attached to the waterfront parcel at issue in *Arno* partially contributed to the eight-year time frame in which the action transpired.<sup>135</sup> *Arno* took title to the land, situated between Easy Street and present-day Nantucket Harbor, in 1962.<sup>136</sup> Eighty years before that, the vast majority of the parcel was completely submerged under the harbor.<sup>137</sup> As such, according to the rules laid out in Part II, the parcel would be considered submerged lands owned by the Commonwealth and subject to public trust rights – without any opportunity for private ownership unless a lawful filling occurred.

In 1882, the parcel's relationship with the shoreline changed when the Commonwealth issued a license to the Nantucket Railroad Company to build a road by filling part of the harbor.<sup>138</sup> Following that filling on the parcel's seaward (eastern) edge, the parcel became only partially submerged at low tide, with the remainder of the parcel taking on the characteristics of tidal flats as water flowed through a sluiceway under the new road.<sup>139</sup> In 1895, the Commonwealth issued a second filling license for the land west of the new roadway – essentially the remainder of the parcel that did not border the new harbor line created by the 1882 filling.<sup>140</sup>

For a quarter-century following the two fillings, no private individual made any formal claim in title to the parcels as land, despite the parcels' status as two "water lots" – submerged parcels yet granted to private owners by the local Nantucket government.<sup>141</sup> That changed in 1921 and 1922, "when two

---

<sup>135</sup> *Id.* (mentioning the "long and complicated proceedings" and the four-year lapse between judgments).

<sup>136</sup> *Id.* at 4, 20.

<sup>137</sup> *Id.* at 5. The map attached as an appendix to the SJC's opinion appears to show that a small strip of land in the northwest corner of *Arno*'s parcel could have been considered dry land in 1895, the date that the SJC fixes upon for determination of the "historical high tide line." See *id.* at 20. Perhaps for simplicity's sake, though, the parties stipulated that "no portion of *Arno*'s parcel was ever 'upland,' i.e., dry land to which the Commonwealth and the public possessed no special rights." *Id.* at 5 n.4. Most certainly, as the parties also stipulated, the parcel included both historical tidelands and historical submerged lands. *Id.*

<sup>138</sup> *Id.* at 5.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 6. The title proceedings observe, as does the SJC, that it was questionable whether Nantucket's local governing body had the ability in the first instance to grant title to

individuals petitioned to register the two lots that now constitute Arno's parcel."<sup>142</sup> An examiner who traced title of the water lots back to 1882 found that those owners were not the same as the petitioners who filled the parcel and that those owners, therefore, had no rights to gain title to the land.<sup>143</sup> The Attorney General appeared at the Land Court proceedings on behalf of the Commonwealth, asserting public rights in the lands seaward of the 1922 high water mark but offering no objection to a conditional registration decree that would reserve public rights below that mark.<sup>144</sup> The Land Court acceded to the Attorney General's recommendation, issuing registration certificates with "title subject to 'any and all public rights legally existing in and over the same below mean high water mark.'"<sup>145</sup> Forty years after that initial title registration, the same language carried over to Arno's title when he purchased the property in 1962.<sup>146</sup>

Another forty years later, Arno wished to redevelop the property by demolishing the existing building and replacing it with a newer one.<sup>147</sup> He applied for a Chapter 91 license with the DEP, which determined that his property's location made it subject to public rights, including public access through the property onto a boardwalk along the harbor line.<sup>148</sup> Arno responded by challenging that ruling on the administrative level, but soon afterward he challenged the need for a Chapter 91 license on the grounds that he owned his property in fee simple above the 1922 high water mark as a consequence of that year's registration proceedings.<sup>149</sup> His challenge succeeded in both the Land Court and in the Superior Court. The Superior Court judge parsed the regulatory language and found that for tidelands to be subject to DEP regulation, they must be "subject to some proprietary interest in the state or the public."<sup>150</sup> Looking to the decree issued by the Land Court,<sup>151</sup>

---

"water lots" that resided wholly underwater. *Id.* at 6 n.9.

<sup>142</sup> *Id.* at 6.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 6-7. The Attorney General also took issue with a bulkhead constructed sometime after 1882, but before 1922, and "also asked that the registration decree not include a right to maintain the illegal bulkhead that bordered it." *Id.* at 7. This arguably became moot when the Commonwealth issued a 1928 license for a bulkhead even farther seaward than the mysterious illegal bulkhead. *Id.* at 6 n.10.

<sup>145</sup> *Id.* at 7.

<sup>146</sup> *Id.* The court refers to Arno's property as a single parcel after it discusses Arno's purchase of the two lots in the court's chronological discussion of the facts, and the map in the opinion's Appendix also shows only one parcel (without demarcating the boundary between the original two lots). *Id.* at 4-7. To prevent confusion insofar as is possible, this Note also refers to the original two lots as one parcel.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 7-8.

<sup>150</sup> *Arno v. Commonwealth*, No. 03-29, 2009 WL 73255, at \*3 (Mass. Super. Ct. Jan. 12, 2009), *vacated*, 931 N.E.2d 1 (Mass. 2010).

the Superior Court found that the Commonwealth held no proprietary rights in the parcel, given that it existed above the 1922 harbor line.<sup>152</sup>

The SJC reversed. In a detailed discussion of the interaction between public trust rights and the land registration statutes,<sup>153</sup> the court held that registration of title could not constitute an explicit legislative action removing the impression of public trust rights.<sup>154</sup> Neither the Land Court's decree nor the Attorney General's 1922 appearance (declining to assert public rights in land below the disputed water line) constituted a delegation sufficient to extinguish public trust.<sup>155</sup> In a footnote, the court went so far as to wonder whether such a delegation could even be possible, given the stringent standards announced in *Moot I*.<sup>156</sup>

As for the complex historical inquiry, the SJC reiterated that the relevant line for purposes of determining public trust rights is the historical high tide line.<sup>157</sup> The SJC recognized the numerous factual difficulties that this case presented but implied that those difficulties make the historical inquiry necessary: “[B]ecause actual high and low water marks can change over time, notably pursuant to licenses to fill flats and submerged lands with soil, the starting point for determining the public’s rights in tidelands (filled or unfilled) must be the historic, or ‘primitive,’ high and low water marks.”<sup>158</sup> Absent some fixed date in the relatively recent past to which factfinders could turn, à la the Maine approach, the SJC could only direct the inquiry back to the very beginning.

---

<sup>151</sup> In fact, the same judge sat on both the Land Court and the Superior Court, the latter by special designation. *Id.* at \*1.

<sup>152</sup> *Id.* at \*3.

<sup>153</sup> See MASS. GEN. LAWS ch. 185 (2008).

<sup>154</sup> *Arno*, 931 N.E.2d at 14.

<sup>155</sup> *Id.* at 15 (“[The Attorney General] could not extinguish forever claims that he was not free to settle in the first place.”).

<sup>156</sup> *Id.* at 16 n.21 (“Any such delegation would be required to comply with the prerequisites articulated in *Opinion of the Justices*. Such compliance may not be possible.” (citations omitted)). Later decisions, though, have appeared to backtrack on the notion of express delegation to extinguish public trust rights, further confusing the issue. Just weeks after *Arno*, the SJC held that the state Energy Facilities Siting Board has an “express legislative directive” to administer public trust rights – allowing it, in this case, to approve a locally controversial wind farm proposed for Nantucket Sound. *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 799 (Mass. 2010). The dissent stated that the language in the siting board statute appeared less clear than the language in the land registration statute, which the court had found to be insufficiently explicit in *Arno*. See *id.* at 819 (Marshall, C.J., dissenting) (“[O]ur jurisprudence has made abundantly clear that the Legislature *must act expressly*. It has not done so here.” (citation omitted)).

<sup>157</sup> *Arno*, 931 N.E.2d at 4-5.

<sup>158</sup> *Id.*

Prior to the *Arno* arguments, a pair of real estate lawyers' organizations jointly submitted an amicus brief to the SJC on Mr. Arno's behalf. Among other concerns, they feared that an adverse ruling for Mr. Arno could nullify any prior adjudication of the Land Court that had determined whether a parcel was subject to public trust rights.<sup>159</sup> They framed the issue as one of reliance: "If such a process were to be endorsed by this Court it would call into question the certainty of all registered land titles throughout the Commonwealth."<sup>160</sup> With the ruling in *Arno*, this reliance issue now looms larger on the horizon than at any other time in Massachusetts since the *Boston Waterfront* decision.

### C. *Maine Decisions*

In Maine, meanwhile, public trust issues remained relatively quiet following the legislature's 1981 release of public trust rights in previously filled parcels. The most important public trust case in this period was *Bell v. Town of Wells (Bell II)*,<sup>161</sup> in which the Maine SJC invalidated a different state law purporting to expand the breadth of public trust rights.<sup>162</sup> Several beachfront owners brought a quiet title action to their beach, hoping for a declaration that the public held no recreation rights on their tidal lands.<sup>163</sup> During the pendency of the action, Maine's legislature passed the Public Trust in Intertidal Land Act,<sup>164</sup> which stated that public trust rights below the high tide line included recreation rights.<sup>165</sup> The Maine SJC disagreed with the legislature, looking to the Colonial Ordinances and finding only the original rights of fishing, fowling, and navigation reserved for the public trust.<sup>166</sup> To reserve the open-ended right of recreation<sup>167</sup> without compensating landowners for reserving

---

<sup>159</sup> Brief of the Real Estate Bar for Massachusetts & the Abstract Club as Amici Curiae Supporting Appellee at 15-19, *Arno v. Commonwealth*, 931 N.E.2d 1 (Mass. 2010) (No. SJC-10559), 2010 WL 620428 at \*15-19.

<sup>160</sup> *Id.* at \*17.

<sup>161</sup> 557 A.2d 168 (Me. 1989).

<sup>162</sup> *Id.* at 169.

<sup>163</sup> *Id.*

<sup>164</sup> 1986 Me. Laws 449.

<sup>165</sup> *Bell II*, 557 A.2d at 176.

<sup>166</sup> *See id.* at 173-76. Expansion of public trust rights has met with greater receptiveness in other jurisdictions. *See supra* note 86 (discussing New Jersey's landmark *Neptune City* decision).

<sup>167</sup> The *Bell II* court feared that this "unqualified term" could be broad enough to permit the public in unrestricted numbers . . . to come on this private property, not only for bathing, sunbathing, and walking as general recreation, but also for any other recreational activity whatever including, for example, ball games and athletic competitions, camping for extended hours, operation of vehicles (including even ATVs and other motorized vehicles, with State or municipal authorization), nighttime beach parties, and horseback riding. *Bell II*, 557 A.2d at 177. This language has since come under fire from the Maine SJC itself, which has recently endorsed public access to tidelands for scuba diving, not as one of the three traditional public trust rights but as an "ocean-based activit[y]" consistent with

such rights amounted to an improper taking under the federal and state constitutions.<sup>168</sup>

The *Bell II* court found no error<sup>169</sup> in the historical conclusions from its first opinion on the *Bell* action, issued three years earlier.<sup>170</sup> In a footnote to that opinion, the Maine SJC recounted the issues that brought about Maine's 1981 *Opinion of the Justices*.<sup>171</sup> While noting that advisory opinions do not bind the court,<sup>172</sup> the Maine SJC recalled and repeated the findings of legislative reasonableness that it had made before the legislature released the hold that public trust had on formerly filled lands.<sup>173</sup>

Among reported Maine cases since the 1981 legislation, only *Canadian National Realty v. Sprague*<sup>174</sup> includes an argument that public trust rights should apply to a parcel of filled land.<sup>175</sup> The Maine SJC first found the record lacking as to the appellant's contention that the previous low water line could be located with enough certainty to apply public trust rights to the parcel.<sup>176</sup> It concluded its dismissal of the argument with a citation supporting the validity of the Maine law: "Furthermore, Maine quitclaimed all rights arising out of the public trust doctrine to the owners of filled submerged lands, filled prior to 1975, and the Justices of this Court opined that the transfer of those rights was constitutional."<sup>177</sup> For the last nineteen years, in sharp contrast to Massachusetts, Maine's public trust rights in filled tidelands have required no further clarification than this.

#### D. *Efforts to Clarify Massachusetts Public Trust Law*

Following the 2007 *Moot I* decision – and before *Arno* was decided – the Massachusetts Legislature went back to the drawing board on the issue of filled tidelands and the public trust. The Massachusetts SJC signaled approval

---

Maine common law prior to *Bell II*. *McGarvey v. Whittredge*, No. WAS-10-83, 2011 WL 3715696, at \*12 (Me. Aug. 25, 2011).

<sup>168</sup> *See id.* at 176-79.

<sup>169</sup> *Id.* at 170-71.

<sup>170</sup> *Bell v. Town of Wells (Bell I)*, 510 A.2d 509, 510 (Me. 1986).

<sup>171</sup> *Id.* at 516 n.14.

<sup>172</sup> *Id.* (citing *Martin v. Maine Savings Bank*, 147 A.2d 131, 137 (Me. 1958)).

<sup>173</sup> *See id.* ("Reasoning that the clearing of title, so that commercial and other activity may go forward, is a legitimate and important public purpose and that the legislative findings, recited above, were reasonable, the justices concluded that the release of claims of state ownership did not violate the legislative powers clause.").

<sup>174</sup> 609 A.2d 1175 (Me. 1992).

<sup>175</sup> *Id.* at 1178-79. The *Sprague* court reviewed a complicated set of facts concerning an abandoned easement across a rail right-of-way, affirming a finding that the appellant trespassed when he made numerous wharf improvements on the water side of the right-of-way. *Id.* at 1177.

<sup>176</sup> *Id.* at 1178.

<sup>177</sup> *Id.* at 1178-79.

of the resulting process<sup>178</sup> for licensing development of such lands when *Moot* came back before the court in 2010.<sup>179</sup> The new process exempts landlocked tideland owners from Chapter 91 requirements, as had been the case under the earlier regime, but it subjects them instead to a “public benefit review” of broader scope in cases where a state license or an environmental impact report would already be necessary.<sup>180</sup> A proposal to redevelop such lands must also include an “environmental notification form,” filed pursuant to the Massachusetts Environmental Protection Act, which explains how development will impact the public’s right to enjoy the lands.<sup>181</sup> The environmental notification form needs merely to point out that the public cannot navigate or fish on the land because the land no longer abuts the water.<sup>182</sup> The DEP claimed that the SJC should have struck down this new process, arguing “that the act exceeds the Legislature’s authority because it effectively extinguishes and relinquishes public trust rights in landlocked tidelands without making the necessary explicit findings.”<sup>183</sup> The SJC found, however, that the new statute could stand because it bypassed Chapter 91 requirements without bypassing the public trust rights that Chapter 91 protects.<sup>184</sup>

The Massachusetts Legislature continues to recognize the need to balance public trust concerns with economic utilization of property, as evidenced by proposed measures that would broaden the scope of preferred uses for tideland property.<sup>185</sup> “An Act to revitalize the Commonwealth’s waterfronts,” currently pending before the Massachusetts Senate, would add the following to the legislative definition of “public purpose”: “revitalization of underutilized waterfront properties; promotion of regional and local commerce, employment, economic development, and community renewal; and promotion of other

---

<sup>178</sup> The 2007 amendments concerning landlocked tidelands are found in 2007 Mass. Acts 671-75.

<sup>179</sup> *Moot v. Dep’t of Env’tl. Prot. (Moot II)*, 923 N.E.2d 81, 82 (Mass. 2010).

<sup>180</sup> *Id.* at 83; *see also* Fitzgerald, *supra* note 77, at 18.

<sup>181</sup> *Moot II*, 923 N.E.2d at 84.

<sup>182</sup> One could theoretically continue to engage in fowling on the land even without the presence of water, but this right remains associated with the water and does not usually stand on its own absent the more commonly litigated rights of fishing and navigation. The express inclusion of fowling in the Colonial Ordinances secures its position as a public right, protected against challenges by landowners that the right should not be treated the same as the other two rights. *See* *Butler v. Attorney General*, 80 N.E. 688, 689 (Mass. 1907) (“The right of fowling was expressly mentioned in the ordinance of 1641, and was thereby created as a public right . . . . There may be ground for a question as to whether it was nullified by the subsequent grant of lands to individual proprietors between high-water mark and low-water mark. We think it better to hold that it was not.”).

<sup>183</sup> *Moot II*, 923 N.E.2d at 84.

<sup>184</sup> *Id.* at 84-85.

<sup>185</sup> S.B. 371, 187th Gen. Court (Mass. 2011) (*available at* <http://www.malegislature.gov/Bills/187/Senate/S00371>).

community or maritime uses in the area.”<sup>186</sup> If enacted, this change would allow shoreline property owners to claim public purpose in uses that are not necessarily water-dependent. Restaurant development comes to mind as one open-to-the-public use that would reconnect members of the community and visitors to the waterfront but would be considered non-water-dependent.<sup>187</sup> Both the new Chapter 91 exemption and this proposed change represent steps in the right direction for would-be developers, but neither reduces the need to present arguments before the DEP about the nature of the property’s history or use. Instead, each merely provides the property owner with a few new arguments to present during the costly licensure process.

#### IV. REUNITING MASSACHUSETTS AND MAINE, AT LEAST IN THE PUBLIC TRUST

To reduce the public cost associated with public trust arguments, the Massachusetts Legislature should settle the question of public trust rights in as many disputable properties as possible with a single stroke. An approach like the Maine law would accomplish this by ensuring that public trust rights encumber only those properties that currently fall under the influence of the tides – which, after all, are the only places where public trust rights can be properly exercised. This Part argues that much in the current Massachusetts public trust case law could have been handled more definitively and decisively – and in better accord with the economic motivations of the public trust doctrine as imported by the Colonial Ordinances – had Massachusetts adopted the Maine approach following *Boston Waterfront*.

##### A. *Promoting Confidence in Title and in Property Rights*

The desirability of a Maine-style comprehensive release of public trust rights becomes clear upon examination of the legislative findings of Maine’s act itself, as well as the Maine SJC’s examination of those findings in the *Opinion of the Justices*. Maine’s governor submitted questions about the then-proposed law to the court primarily out of concerns that the law would be “violative of the State’s legal responsibilities as trustee for the public of the

---

<sup>186</sup> *Id.*

<sup>187</sup> For a recent administrative adjudication considering – and rejecting – an historical argument that restaurants should not be considered non-water-dependent in the context of a bustling city wharf, see *In the Matter of Wharf Nominee Trust, Philip Y. DeNormandie, Trustee*, Nos. 2009-052, 2009-053, 2010-002A, 2010 WL 5804743, at \*7 (Mass. Dept. of Env. Prot. Nov. 3, 2010). Looking prospectively, one might even imagine a Massachusetts appellate court ruling unfavorably on some application of this non-water-dependent determination (along the lines of the holding in *Moot I*) because the legislature has not named with particularity the land on which public trust rights could be bypassed. As with previous SJC decisions, the vital inquiry will be whether the legislature has expressly delegated authority to the regulatory agency to administer public trust rights in this fashion.

submerged and intertidal lands” in the state.<sup>188</sup> Another question pointed to Maine’s proposed way around these trustee responsibilities: whether the law would pass muster under the Maine Constitution<sup>189</sup> and its grant of power “to make and establish all reasonable laws and regulations for the defense and benefit of the people.”<sup>190</sup> The Maine SJC concluded that the law would have to meet a “high and demanding standard of reasonableness” to dispatch with public trust rights, and it pointed to five reasons (all applicable to the Massachusetts situation) that the law in fact met such a standard.<sup>191</sup>

The Maine SJC first indicated that a law clearing title to properties facing uncertain ownership “is a legitimate and important public purpose.”<sup>192</sup> The declaration would benefit not just the owners of the affected property, who would feel freer to pursue economic uses without fear of violating public trust rights, but also the rest of the state, which would experience residual benefits from the stronger economy that the law would produce.<sup>193</sup> Maine’s SJC quoted the Massachusetts *Opinion of the Justices* from earlier that year: the bills from both states,<sup>194</sup> in its view, would provide “a direct public benefit of a reasonably general character, that is to say, to a significant part of the public.”<sup>195</sup> Moreover, the Maine SJC credited legislative findings that filled lands across the state contribute to municipal coffers in the form of valuable property taxes.<sup>196</sup> Overall, the Maine SJC found reasonable the legislature’s conclusion “that case-by-case resolution of the existing problem . . . would be costly, time-consuming, and ineffective.”<sup>197</sup>

Consider the desirability of such a broad resolution in Massachusetts. In *Moot*, for example, the development project stalled by public trust concerns

---

<sup>188</sup> *Opinion of the Justices*, 437 A.2d 597, 600 (Me. 1981). Later cases have noted that the Maine SJC did not actually opine on “the existence of a trust responsibility on the part of the State in intertidal land, the rights of the beneficiaries and the responsibilities of the trustees.” *Bell v. Town of Wells*, 510 A.2d 509, 516 n.14 (Me. 1986).

<sup>189</sup> *Opinion of the Justices*, 437 A.2d at 600.

<sup>190</sup> ME. CONST. art. IV, pt. III, § 1. A parallel section of the Massachusetts Constitution exists in MASS. CONST. pt. II, ch. I, § 1, art. IV (“[F]ull power and authority are hereby given and granted to the said general court . . . to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof . . .”).

<sup>191</sup> *Opinion of the Justices*, 437 A.2d at 607.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> See *supra* notes 97-105 and accompanying text.

<sup>195</sup> *Opinion of the Justices*, 437 A.2d at 607 (quoting *Opinion of the Justices* to the Senate, 424 N.E.2d 1092, 1100 (Mass. 1981)).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 608.

over landlocked tidelands has only recently begun to move fully forward and has done so only after a change in the development's ownership.<sup>198</sup> Both *Moot* and *Arno* represent developments stalled and money lost on all sides – including municipalities unable to reap either economic benefits or increased property taxes from new developments on these lands. While pending legislation in Massachusetts might provide relief for economically desirable developments in some instances,<sup>199</sup> the end result of that legislation would be a regulatory determination followed by possible judicial review. A simpler resolution of such cases would be much preferred to the eight years elapsed since *Arno* was filed or the ten years elapsed since the development in *Moot* was introduced.<sup>200</sup>

The Maine SJC next credited the legislature's findings that previously filled lands "are now substantially valueless for public trust uses."<sup>201</sup> Certain of these lands might still be valuable for certain original Colonial Ordinances purposes, i.e. wharfing and boating, but "doubts about the titles to all filled lands"<sup>202</sup> could reasonably outweigh those purposes. Moreover, the Maine SJC favorably cited *City of Berkeley v. Superior Court*,<sup>203</sup> a landmark California case, which found that "filled land was no longer important for public uses" and held that private title trumped public trust rights in filled land.<sup>204</sup> The Maine SJC concluded this part of its opinion by again citing with approval the Massachusetts *Opinion of the Justices*, which examined and approved of legislation similar to the Maine approach though less comprehensive.<sup>205</sup>

By mentioning the original purpose of the Colonial Ordinances – to provide access to the water for economic reasons – the Maine SJC's *Opinion of the Justices* engenders confidence that the law before it could also function within the framework of Massachusetts public trust law. Because Massachusetts has rejected more general recreation rights as being beyond the scope of its common law public trust doctrine,<sup>206</sup> any law concerning public trust rights

---

<sup>198</sup> See Jenifer B. McKim, *Magic Touch? New Developers Take Over NorthPoint*, BOS. GLOBE, Sept. 9, 2010, at B7 (reporting basketball star Magic Johnson's new investment in the project).

<sup>199</sup> See *supra* notes 185-187 and accompanying text.

<sup>200</sup> McKim, *supra* note 198, at B7.

<sup>201</sup> *Opinion of the Justices*, 437 A.2d at 608.

<sup>202</sup> *Id.*

<sup>203</sup> 606 P.2d 362 (Cal. 1980).

<sup>204</sup> *Opinion of the Justices*, 437 A.2d at 608. *Berkeley* has received scant attention in this Note mainly because of California's status as a high tide-ownership state and also because Massachusetts jurisprudence so boldly declined to follow California's path.

<sup>205</sup> *Id.*

<sup>206</sup> See *Opinion of the Justices to the House of Representatives*, 313 N.E.2d 561, 567 (Mass. 1974) ("We are unable to find any authority that the rights of the public include a right to walk on the beach.").

would have to operate in accordance with established common law. Recognition of economic benefit in clearing title for owners of filled tidelands would bring the Colonial Ordinances full circle, while remedying the obvious and needless impossibility of applying public trust rights to dry land.

Third, the Maine SJC accepted the legislature's finding "that the public trust in remaining intertidal and submerged lands will not be impaired by releasing the State's interest in land filled prior to October 1, 1975."<sup>207</sup> The court cited as support numerous statutes requiring regulatory or other action for developments slated to occur on lands impressed with a public trust.<sup>208</sup> The reason addressed fifth by the Maine SJC – a reason which pairs naturally with the court's third finding – was the recognition that "by releasing title to these filled lands, the State has not lost any of its broad regulatory authority over them."<sup>209</sup>

These findings serve as a reminder that a Massachusetts version of the Maine law would not affect the impact that public trust rights and Chapter 91 licensing have on *current* submerged and tidal lands. Admittedly, it seems likely that Chapter 91 would play a role in the licensing of development for the parcel in *Arno* under a Maine-style regulatory scheme, because of its status along a waterway.<sup>210</sup> But a case like *Moot* could be dispatched much more quickly, without remand and review and without recourse to complicated legislative and regulatory changes.

Finally, the Maine SJC most directly spoke to owners of properties like those at issue in *Trio Algarvio*, *Moot*, and *Arno*. The court credited the issue of reliance – "that an expectation of private ownership has developed in those private parties who for long periods have relied on their title to filled lands."<sup>211</sup> The legislature proposed the law with these parties in mind, "consider[ing] the hardship otherwise worked upon persons who for years have dealt with filled lands as their own."<sup>212</sup>

Here the need for clarity in Massachusetts public trust law can be framed as an issue of reasonable reliance that a landowner may have in the value of his property. In *Trio Algarvio*, such clarity would have meant not having to worry about whether parts of one's property were filled by a predecessor in interest without permission. Under the Maine law, such concerns are irrelevant to a declaration that public trust rights do not apply.<sup>213</sup> In a case like *Moot*, action by the legislature, rather than by a regulatory agency, would prevent delegation

---

<sup>207</sup> *Opinion of the Justices*, 437 A.2d at 608.

<sup>208</sup> *Id.* at 608 & n.7.

<sup>209</sup> *Id.* at 608.

<sup>210</sup> Perhaps, though, this would not be the case, depending on the actual location of the *Arno* property line in relation to the harbor as it sits today. *See supra* notes 144-146 and accompanying text.

<sup>211</sup> *Opinion of the Justices*, 437 A.2d at 608.

<sup>212</sup> *Id.*

<sup>213</sup> *See supra* note 116 and accompanying text.

concerns from wreaking havoc with one's clear title. And in *Arno*, a uniform law would have eliminated the lengthy debate as to whether an Attorney General could disclaim public trust rights – the issue would have been irrelevant, a mere historical curiosity.

B. *Coherence with Current Massachusetts Law*

A statewide declaration removing public trust rights from filled tidelands would serve Massachusetts well, as it has in Maine. The similarity between the two states only begins with their adherence to the Colonial Ordinances; they also share parallel constitutional provisions that would make passage of the law possible because of its general applicability to the citizens of the state.<sup>214</sup> The Maine SJC quoted the Massachusetts SJC in its view that only “a gross or egregious disregard of the public interest would not survive constitutional challenge.”<sup>215</sup>

Massachusetts case law might give pause to legislators, who may fear that a statewide declaration deeming certain property freed from public trust rights could not be legally undertaken. In particular, one thread running through Massachusetts public trust cases has been the requirement that any lands on which public trust rights would be extinguished must be identified with particularity.<sup>216</sup> But Maine's SJC also addressed this issue, raised in a brief to the court prior to its *Opinion of the Justices*.<sup>217</sup> The court wrote, “We think the legislation meets whatever requirements are relevant under these circumstances. [The proposed law] applies by its terms to all lands . . . that were filled as of October 1, 1975. . . . That specificity is all that is necessary to achieve the bill's purpose . . . .”<sup>218</sup> Massachusetts case law seems to bear this conclusion out with statements like this: “[T]he Legislature . . . may, of course, enact legislation that it deems appropriate to relinquish these public interests, as it has done on previous occasions.”<sup>219</sup> It therefore appears well within the power of the legislature to declare all previously filled lands in Massachusetts

<sup>214</sup> See *supra* note 190.

<sup>215</sup> *Opinion of the Justices*, 437 A.2d at 610 (quoting *Opinion of the Justices to the Senate*, 424 N.E.2d 1092, 1099 (Mass. 1981)).

<sup>216</sup> See, e.g., *Arno v. Commonwealth*, 931 N.E.2d 1, 15 (Mass. 2010) (“It is essential to recall what type of legislative action is required to relinquish the public's rights. In the case of submerged lands, the Legislature must . . . identify the land with specificity and be motivated by an adequate public purpose.”).

<sup>217</sup> 437 A.2d at 609.

<sup>218</sup> *Id.*

<sup>219</sup> *Moot v. Dept. of Env. Prot. (Moot I)*, 861 N.E.2d 410, 419 (Mass. 2007). Not all justices have subscribed to a theory that accepts extinguishment of public trust rights. *Opinion of the Justices to the Senate*, 424 N.E.2d 1092, 1110 (Mass. 1981) (opinion of Liacos & Abrams, JJ.) (“While we are comforted by the limitations implied by our brethren as to this so-called ‘authority to surrender’ of the Legislature, we are unable to agree that the Legislature may surrender or destroy the public rights in submerged lands.” (footnote omitted)).

free from the impression of public trust. The Commonwealth in *Moot* also appears to have desired such a result, at least for landlocked tidelands, twice having enacted a statute-authorized regulation process to remove the impression of public trust rights from these properties.<sup>220</sup> With respect solely to landlocked tidelands, a 1990 bill would have performed this task by statute, but that bill – like the 1981 Boston bill – was never enacted.<sup>221</sup>

Lower Massachusetts courts have also reacted favorably to the argument that certain parcels where filling once occurred can be adjudged free of public trust impressions. For example, the Massachusetts Appeals Court found in *Rauseo v. Commonwealth*<sup>222</sup> that a long-filled parcel of land no longer carried public trust rights.<sup>223</sup> The *Rauseo* parcel bears some similarity to the *Arno* parcel for its historical position relative to the water: it originally sat partially as uplands and partially as tidelands along the Mystic River in Charlestown, now a part of Boston.<sup>224</sup> Two wharfing statutes passed in the 1850s authorized filling along the river, seaward of the parcel at issue.<sup>225</sup> This filling farther out into the water converted the parcel from tidelands to dry land.<sup>226</sup> When the parcel's owners registered it in 1907, the land court issued a registration certificate with language mirroring the "waterways encumbrance" found on *Arno's* title – they owned the parcel in fee subject to "any and all public rights legally existing in and over the same below mean high water mark."<sup>227</sup> Five years later, the owners split the parcel in two, such that the upland portion became the precise boundary of the parcel at issue in *Rauseo*.<sup>228</sup>

In 2002 (the same year in which *Arno* brought his challenge), the *Rauseo* plaintiff brought an action to remove the waterways encumbrance from his title certificate.<sup>229</sup> By this time, the parcel sat not only 675 feet upland from the river, but also behind a railroad right-of-way and several other buildings.<sup>230</sup> Such a distance made it impossible to exercise public trust rights on the parcel, a point that the Appeals Court emphasized in its analysis:

The [tidelands] owner was only obliged not to interfere with the public's right to navigate the stream in question or to interfere with the public's rights of fishing and fowling. The owner was entitled to fill the flats and thereby to exclude the public completely (including for the purpose of

---

<sup>220</sup> See *supra* Part III.D.

<sup>221</sup> See *Moot I*, 861 N.E.2d at 417 n.16.

<sup>222</sup> 838 N.E.2d 585 (Mass. App. Ct. 2005).

<sup>223</sup> *Id.* at 591 ("None of the potential sources of public rights . . . actually retains the public rights that once existed in the land below the high water mark . . .").

<sup>224</sup> *Id.* at 587.

<sup>225</sup> *Id.* at 588 & n.2.

<sup>226</sup> *Id.* at 588.

<sup>227</sup> *Id.* (internal quotation marks omitted).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 587.

fishing and fowling) so long as he did not unreasonably interfere with navigation. The right to navigation is also not necessarily a claim on the tideland itself, but rather a protection of access for those upstream. For example, the Supreme Judicial Court has held that the public did not have the right to use a private beach for bathing, stating that the owner's interest was subject to "that portion between high and low water mark, to the easement of the public for the purposes of navigation and free fishing and fowling, and of passing freely over and through the water without the use of the land underneath, wherever the tide ebbs and flows."

Occupation of the tidal flats "is always on condition that the navigation of the stream be not materially impaired." Here, there is no claim that the filling and use of [the parcel] has any material impact on the navigability of the Mystic River. Thus, as the plaintiff correctly argues, no rights in the public based on the provisions of the Colonial Ordinance remain.<sup>231</sup>

In sum, *Rauseo* – which was not explicitly overruled by *Moot* or *Arno* – still stands for the proposition that land once impressed with public trust rights can be adjudged free of those rights. But one can imagine, in light of *Moot* and *Arno*, that the courts would require either direct legislative approval or a set of facts placing the parcel at least as far from the water as in *Rauseo* before ruling this way again.

One might fairly argue that the complexity of the *Arno* case could not be wrangled towards simplicity by any change to state law. But the historical inquiry would become considerably easier with the existence of a clear, broad statement from the legislature explaining where public trust rights do and do not apply. Instead of an inquiry that seeks to find a historical high tide line, the investigation could more properly begin at a time fixed by the legislature as one when accurate, accessible, and comprehensive mapping data could be reasonably expected to exist. Maine set its fixed date at six years prior to the enactment of its law. If Massachusetts were to do the same, the state would benefit tremendously from the advances in satellite technology and record keeping since the passage of Maine's law. These resources would serve to make the inquiry into a parcel's status even more precise and less costly.<sup>232</sup>

---

<sup>231</sup> *Id.* at 589 (citations omitted) (emphasis in original removed).

<sup>232</sup> In recent years, Massachusetts has taken strides to alleviate these precision and cost issues with the undertaking of the Massachusetts Historical Shoreline Mapping Project. Using maps dating to the mid-nineteenth century, see Stephen T. Mague and Robert W. Foster, *Where's the Shoreline? Sources of Historical High Water Lines Developed in the Context of Massachusetts Coastal Regulations*, INT'L FED'N OF SURVEYORS 2 (2008), available at [http://www.fig.net/pub/monthly\\_articles/february\\_2008/february\\_2008\\_mague\\_foster.pdf](http://www.fig.net/pub/monthly_articles/february_2008/february_2008_mague_foster.pdf), the project provides would-be developers with a dataset mapping out the presumptive historical high tide line (as defined in 310 MASS. CODE REGS. 9.02) for Chapter 91 purposes. See *Tidelands Jurisdiction (M.G.L. c.91) Datalayers from the MassDEP Waterways Program*, MASS. OFFICE OF GEOGRAPHIC INFO. (Mar. 2011),

## CONCLUSION

In an era where state legislation particular to one parcel is unpractical,<sup>233</sup> a waterfront parcel permanently carries its public trust rights as a matter of common law – even when that parcel no longer fronts the water. Courts have been clear that only an express legislative action directed towards a particular parcel can remove the impression of public trust rights. While courts have been at times permissive towards regulatory mechanisms to dispatch public trust issues, this permissiveness has been unpredictable. Adopting a statewide legislative declaration quieting title to previously filled tidelands would address a needless complexity in the realm of Massachusetts land ownership. Such a move would also reap economic benefits for landowners, who could be more certain in their ability to develop property and more confident in a price for that property upon disposition. Local and state governments also stand to benefit from increased property taxes and increased economic activity in their communities. And existing review requirements imposed by Chapter 91 will ensure that economic gains do not come at the expense of ecological losses or public access to the shoreline. For all parties involved in Massachusetts, following Maine’s lead would result in fewer headaches, greater prosperity, and more certainty about where and how public trust rights impact the shoreline.

---

<http://www.mass.gov/mgis/tidelands.htm>. Because the project’s dataset provides only a presumption of the historical high tide line’s location, however, a shoreline owner displeased with the project’s conclusions might seek out evidence of his own to rebut an unfavorable presumption. Thus, only fixation of a more recent date, from which an unquestionably reliable and uniform dataset could be gathered, could produce across-the-board cost savings, both for the Commonwealth and for shoreline owners.

<sup>233</sup> And indeed, such legislation could even paradoxically be seen as bypassing the regulatory processes put into place by the legislature.