Adverse Possession Against the States: The Hornbooks Have It Wrong

Paula R. Latovick
Thomas M. Cooley Law School
ADVERSE POSSESSION AGAINST THE STATES: THE HORNBOOKS HAVE IT WRONG

Paula R. Latovick*

The hornbook rule is that adverse possession statutes do not run against land owned by state governments. Yet, in practice, the land of many states is subject to loss by adverse possession. Few states have statutes that simply and explicitly protect all state land from adverse possession. This Article describes the variety of ways in which states protect or fail to protect their land from adverse possession. It concludes with the recommendation that, given increasing development pressures and limited state enforcement budgets, state legislatures should protect completely all state land from adverse possession.

INTRODUCTION

Hornbooks generally assert that statutes delimiting acquisition of title by adverse possession do not run against the United States or state governments.1 While this statement is correct generally as applied to the United States,2 it often constitutes an inaccurate and misleading description of the law of several states.

---

* Associate Professor of Law, Thomas M. Cooley Law School. B.A. 1976, Michigan State University; J.D. 1980, University of Michigan Law School.


2. See 48 U.S.C. § 1489 (1994) (prohibiting adverse possession or prescription of United States land; allowing title to United States land only by conveyance). The United States, however, has waived its immunity from adverse possession in a few limited instances. See, e.g., Conveyances to Occupants of Unpatented Mining Claims, 30 U.S.C. §§ 701–709 (1994) (permitting the Secretary of Interior to convey up to five acres of an unpatented mining claim to an occupant who has used the land as a principal place of residence for not less than seven years prior to July 23, 1962, upon payment of not less than five dollars per acre); Lands Held Under Color of Title Act, 43 U.S.C. § 1068 (1994) (permitting the Secretary of the Interior to issue a patent to public lands for up to 160 acres, upon payment of not less than $1.25 per acre, to a claimant who establishes that he has held the tract "in good faith and in peaceful, adverse, possession . . . under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation").
This Article shows that the laws of many states in fact do permit private parties to acquire state land by way of adverse possession and describes the different legal approaches taken. Part I introduces the doctrine of adverse possession in general, and in particular against state-owned land, explaining the doctrine’s theoretical underpinnings. Part II describes the current law of adverse possession in many states. Part III discusses those states that have changed their law of adverse possession during the last twenty years. The Article concludes with the recommendation that those states that permit adverse possession of state land should reconsider this permission in light of modern land use constraints and needs. Current needs dictate protection of such land today, irrespective of whatever justifications may have existed previously for the availability of adverse possession against the state.

I. CLASSIC ADVERSE POSSESSION DOCTRINE

The doctrine of adverse possession provides that an owner of land may lose his land if he fails to eject trespassers promptly. If the trespasser uses the land as her own for the length of time specified in the state’s statute of limitations and satisfies common law and statutory requirements, the owner cannot recover possession.\(^3\) While most statutes speak only in terms of preventing a lawsuit by the original owner to recover possession,\(^4\) the passing of the statutory time period effectively creates a new title in the adverse possessor.\(^5\)

Common law typically requires that possession not only be continuous for the period of the statute of limitations, but also be actual, open, continuous, notorious, exclusive, and under color or claim of right.\(^6\) A number of state statutes also require that the adverse possessor have paid all state and local property

---

\(^3\) See, e.g., ALASKA STAT. § 09.10.030 (Michie 1994); COLO. REV. STAT. § 38-41-101(1) (1982).


taxes assessed during the period of possession.\textsuperscript{7} Still others require that the land be "protected by a substantial inclosure" or "cultivated or improved" in the usual way.\textsuperscript{8}

This rather surprising doctrine,\textsuperscript{9} which permits someone to take title away from the lawful owner of land simply by using the land openly for a sufficient period of time, is often justified by reference to one or more of three explanations. The first suggests that the owner who fails to assert her ownership within the statute of limitations deserves to lose her property because she has slept on her rights.\textsuperscript{10} Under this theory, the law's transferring title to the adverse possessor is no different than the law's barring a claim for malpractice or for breach of contract after the statute of limitations has run. As Justice Oliver Wendell Holmes wrote, "Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example."\textsuperscript{11}

The unarticulated premise behind this justification is that if the true owner had made productive use of her land herself, the land would not have been available for the adverse possessor to use. The law at once punishes the owner directly for failing to protect her rights and sanctions her indirectly for not making economic or productive use of her land.

A second and related justification is that the adverse possessor has earned title to the land by working it and putting it to use during the period of the statute of limitations. Justice Holmes

\textsuperscript{7} See, e.g., MINN. STAT. ANN. § 541.02 (West 1988); MONT. CODE ANN. § 70-19-411 (1995); NEV. REV. STAT. ANN. § 11.150 (Michie 1986); UTAH CODE ANN. § 78-12-12 (1992); see also IDAHO CODE § 5-210 (1990) (dealing only with "a person claiming title not founded upon a written instrument, judgment or decree").

\textsuperscript{8} N.Y. REAL PROP. ACTS. LAW §§ 512, 522 (McKinney 1979); see also NEV. REV. STAT. ANN. § 11.100 (Michie 1986).

\textsuperscript{9} Cf. John G. Sprankling, An Environmental Critique of Adverse Possession, 79 CORNELL L. REV. 816, 872-73 & n.279 (1994) (noting that most land owners have an "absolutist vision that property rights are free from third party interference").

\textsuperscript{10} Professor Powell explains that adverse possession:

 rests upon social judgments that there should be a restricted duration for the assertion of "aging claims," and that the elapse of a reasonable time should assure security to a person claiming to be an owner. The theory upon which adverse possession rests is that the adverse possessor may acquire title at such time as an action in ejectment by the record owner would be barred by the statute of limitations.

\textsuperscript{7} RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 1012[2][a] (Patrick J. Rohan ed., 1996) (citation omitted).

\textsuperscript{11} Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 476 (1897).
eloquently expressed the reasoning behind this justification when he commented that the connection between property and adverse possession is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.\textsuperscript{12}

Again, our society's traditional preference for the development of land appears. If the adverse possessor makes valuable use of land where the true owner does not, the law views the adverse possessor as more socially responsible and thus preferable to the true owner.\textsuperscript{13} Holmes' eloquence notwithstanding, others have argued that the best reason for adverse possession is to provide certainty in title.\textsuperscript{14}

The policy of statutes of limitation is something not always clearly appreciated. Dean Ames, in contrasting prescription in the civil law with adverse possession in our law, remarks: "English lawyers regard not the merit of the possessor, but the demerit of the one out of possession." It has been suggested, on the other hand, that the policy is to reward those using the land in a way beneficial to the community. This

\textsuperscript{12} Id. at 477.
\textsuperscript{13} One commentator has observed:

The idea of preserving land resources intact for future use has never gained much popular acceptance. To be sure, many conservationists stress the need for saving certain resources for future use; and some have probably overemphasized this point. But most people react negatively to a policy of nonuse. They favor the maintenance and saving of land resources, but only to the extent to which conservation policies can be made consistent with a program of effective current use.

\textsuperscript{14} See Paul E. Basye, Clearing Land Titles § 54 (2d ed. 1970) (noting that adverse possession's "great purpose" is "to quiet titles").
takes too much account of the individual case. The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.  

This third justification, then, focuses more on the burdens that old claims and proof problems place on real estate and litigation systems than on the particular equities between the original owner and the adverse possessor.  

Although these justifications may support the application of adverse possession against a private landowner, they do not appear universally convincing when applied to public property held by governmental entities. Stark differences exist between private and public ownership. Federal and state governments own far more land than any single private landowner. Unlike

15. Henry W. Ballantine, Title by Adverse Possession, 32 HARV. L. REV. 135, 135 (1918) (quoting JAMES B. AMES, LECTURES ON LEGAL HISTORY 197 (1913)) (emphasis added) (footnotes omitted). Justice Holmes rejected this justification for adverse possession saying:

The end of [statutes of limitations] is obvious, but what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time? Sometimes the loss of evidence is referred to, but that is a secondary matter. Sometimes the desirability of peace, but why is peace more desirable after twenty years than before? It is increasingly likely to come without the aid of legislation.

Holmes, supra note 11, at 476.

16. But see R.H. Helmholz, Adverse Possession and Subjective Intent, 61 WASH. U. L.Q. 331 (1983), in which Professor Helmholz concludes that most courts take into account the good faith of the adverse possessor. In other words, courts are more likely to reward a person who honestly but mistakenly thinks he has been occupying his own land than one who admits that he has been trespassing knowingly for the duration of the statute of limitations.

17. Scholars have offered other justifications for adverse possession. See Jeffry M. Netter et al., An Economic Analysis of Adverse Possession Statutes, 6 INT'L REV. L. & ECON. 217, 220 (1986) (arguing that adverse possession is primarily a device that reduces the risk associated with land title transfer); Sprankling, supra note 9, at 816 (arguing that adverse possession law is better explained by prodevelopment bias rather than by the "constructive notice fiction").

private owners of land, the federal and state governments are comprised of many different departments with varying responsibilities and functions. Perhaps in recognition of the administrative difficulties, the federal government consistently has maintained its immunity from adverse possession. After all, the public (for whom the government holds the land) should not suffer from the negligence or inattention of government agents. The states have not taken such a uniform approach.

Concerns of more recent vintage augment the traditional reasons for preventing adverse possession of state land. Although state legislatures have tried adopting measures to protect delicate environmental areas from private development, the United States Supreme Court has reduced their ability to do so. Given the difficulty of protecting open land in private hands, it is all the more important not to encourage development of the open land that the states themselves own. Permitting private interests to acquire title to state land by developing it sends the wrong message. Private developers may well take the chance that the

19. See supra note 2. Historically, the common law presumed “that the king was too busy looking after the welfare of his subjects to sue.” Developments in the Law—Statutes of Limitations, 63 HARV. L. REV. 1177, 1251 (1950).


21. See infra Part II. In practice, it sometimes has proven difficult for the appropriate departments of state governments to keep track not only of what state-owned land is being encroached upon, but occasionally even which land is owned by the state. See, e.g., Mackinac Island Dev. Co. v. Burton Abstract & Title Co., 349 N.W.2d 191, 196 (Mich. Ct. App. 1984) (holding that a private claimant had adversely possessed state land where the state park commission had not ousted the claimant from the land for more than 22 years, during which time the State Attorney General had negotiated with the claimant to purchase an aviation easement over the land, never realizing that the state owned an interest in the land); Hickey v. Illinois Cent. R.R. Co., 220 N.E.2d 415, 427 (Ill. 1966) (holding that Illinois was estopped from asserting its legal title in land along Chicago's waterfront because over the course of 50 years, the Illinois Attorney General had disclaimed any state interest in the land and the Illinois Commerce Commission repeatedly had approved sales by the privately owned Illinois Central Railroad of parts of the lands).

22. See, e.g., MICH. COMP. LAWS ANN. § 324.35302(a) (West Supp. 1996) (protecting "critical [sand] dune areas" as "unique, irreplaceable, and fragile resource[s] that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state and to people from other states and countries who visit"); S.C. CODE ANN. § 48-39-250 (Law. Co-op Supp. 1995) (protecting life, property, and the habitat of numerous plant and animal species, several of which were threatened or endangered).

23. See, e.g., Dolan v. City of Tigard, 114 S. Ct. 2309, 2318–19 (1994) (holding that a development permit condition must have a nexus to a legitimate state interest, bearing a "rough proportionality" to the expected impact of the proposed development); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992) (holding that if government regulations governing land development reduce land values to zero, this action constitutes a taking unless common law could have prohibited proposed development).
state will not discover in timely fashion their trespass, hoping thereby to acquire title. Further, it is likely that in times of economic downsizing, states are likely to spend less of their limited resources on monitoring state land and ejecting trespassers.

It is appropriate that those states where adverse possession is available against state-owned land consider changing their law to protect diminishing resources better.

II. THE VARIOUS STATE APPROACHES

As noted above, a number of hornbooks and other authorities make the mistake of suggesting simply that the states are not subject at all to adverse possession. Others are closer to the mark in saying that state lands are not subject to adverse possession unless the state has agreed expressly to waive its immunity. Even these authorities mislead, however, by implying that few states have made themselves subject to adverse possession statutes of limitations.

While a majority of states follow the hornbook rule, a survey of state law reveals that a sizeable number of states have waived to a greater or lesser degree their traditional immunity. In most cases, this was done without any real explanation as to why the citizens of the state should lose their public lands because of the laxity, mistake, or dishonesty of public servants.

24. Mackinac Island Dev. Co., 349 N.W.2d at 193-94 (noting that private claimant discovered state's recorded title to property, but attorney advised claimant not to inform state of title).

25. See supra note 1 and accompanying text.

26. See, e.g., PAUL GOLDSTEIN, REAL PROPERTY 56 (1984); SHELDON KURTZ & HERBERT HOVENCAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 179 (2d ed. 1993).

27. Many of these states have statutes that expressly exempt state land from adverse possession. See infra notes 185-93 and accompanying text. In states where the statutes are silent on the subject, the courts have generally followed the common law rule nullum tempus occurrit regi (time does not run against the sovereign) or more democratically nullum tempus occurrit republicae (time does not run against the state). In many of these states, the courts have relied on the common law rule of immunity to protect the state from adverse possession. See, e.g., Arkansas Game & Fish Comm'n v. Lindsey, 730 S.W.2d 474, 478-79 (Ark. 1987); Matto v. Dan Beard, Inc., 546 A.2d 854, 863 (Conn. Ct. App.), cert. denied, 550 A.2d 1082 (Conn. 1988); Columbus Corp. v. Cuyahoga County, 589 N.E.2d 467, 470-71 (Ohio Ct. App. 1990); Hall v. Nascimento, 594 A.2d 874, 877-78 (R.I. 1991).

28. In Devins v. Borough of Bogota, 592 A.2d 199 (N.J. 1991), the New Jersey Supreme Court, in reversing a lower court's holding that adverse possession could not run against a municipality, noted several reasons for allowing adverse possession of
A number of states do not permit adverse possession of state-owned land held in a governmental capacity or for a specific public use, but do allow adverse possession of land held by the government-owned land: (1) "Statutes of limitation allow repose and avoid adjudications based on stale evidence." (2) "Adverse possession promotes certainty of title." (3) Adverse possession "protects the possessor's reasonable expectations." (4) "Adverse possession promotes active and efficient use of land." (5) Adverse possession "tends to serve the public interest by stimulating the expeditious assertion of public claims." (6) Court decisions have ended New Jersey's historic sovereign immunity from suit in tort and contract claims. (7) At least seven other states permit adverse possession of state land. (8) Enforcing adverse possession against municipalities would not impose an "undue burden on municipalities." (9) The court was "reluctant to adopt a policy that would encourage municipalities not to use, dedicate, or even identify their property." Id. at 202-04 (citations omitted) (quotations omitted). The plaintiffs/claimants in Devins offered yet another reason: adverse possession "would encourage municipal efficiency and the return of property to the tax rolls." Id. at 202.

When examined closely, however, none of these reasons proves particularly compelling. The first five reasons, relating to certainty of title and barring stale claims, have always been asserted in favor of adverse possession in the private sector but have never been enough to overcome the historic protection of state-owned land. It is not clear why they should assume greater significance now.

Second, the fact that some or even many states have permitted themselves to be sued for claims sounding in tort and contract for the wrongful acts of their agents does not support the notion that the state should lose its land due to oversight, mistake, or fraud. Holding the state accountable for its agents' wrongful acts where innocent third parties have been injured is one thing. Giving away public land because the state failed to oust a persistent trespasser is another thing completely.

Likewise, the Devins court's suggestion that it is appropriate to eliminate the state's immunity from adverse possession because other states have done so is undermined by the fact that at least two of the states cited, Michigan and North Carolina, have moved recently to give greater protection to state-owned land. See Mich. Comp. Laws. Ann. § 600.5821 (West 1987 and Supp. 1996); N.C. Gen. Stat. § 1-45.1 (Supp. 1995).

Concomitantly, while the Devins court suggested that it is not a great burden to expect cities to protect their land through ejectment actions, this is not true of the states, whose territories are larger and harder to monitor. A mayor of a small town may personally know every city-owned lot and may notice when someone encroaches upon one of them. It is not reasonable to make a similar assumption about a governor, state department director, or even a state county land agent.

The Devins court also seemed oblivious to the differing environmental and conservation concerns which many states face today. In saying that it was reluctant to adopt a policy that would encourage a city not to use its land, the court gave voice to the unarticulated premise noted earlier—that is, that we prefer development to non-development of land. See supra notes 12-13 and accompanying text. In light of the growing environmental pressures to avoid development, see infra Part III, the court's stance not only appears irresponsible but also infringes on the legislative province.

Finally, one can hardly agree with the plaintiff in Devins that somehow the public wins when government land is transferred into private hands for no consideration. If enlarging the tax rolls is seen as necessary in any given city or state, presumably the governing body can choose to sell off some public land for full market value, thus enhancing public funds through both the sales price and the taxes. Simply transferring land to the tax rolls, without a formal sale, ignores the loss to the government of the value of the land itself.
state in a proprietary capacity. Other states have expressly refused to recognize these distinctions.

Strikingly, even though some states have statutes that generally seem to subject state land to adverse possession, state courts have refused to apply the laws as written, instead creating their own modifications of the legislative pronouncements. Finally, in a number of states the courts, perhaps following the oversimplified hornbook rule, have failed or refused to follow state laws expressly permitting adverse possession of state land. What follows in this Part, then, is a description of the various ways in which states protect or fail to protect their lands.

A. Statutes Providing That State Land Is Treated Like Private Property for Purposes of Adverse Possession

A number of state legislatures have stated that public lands are subject to adverse possession under essentially the same circumstances as private landowners. For example, Kentucky state law provides: "The limitations prescribed in this chapter shall apply to actions brought by or in the name of the Commonwealth the same as to actions by private persons, except where a different time is prescribed by statute." West Virginia

29. See infra Part II.C.2.
30. See infra Part II.C.2.
31. See infra Parts II.D, II.E.
32. See infra Part II.E.
33. KY. REV. STAT. ANN. § 413.150 (Michie 1992). This has been the law in Kentucky since 1851. See Kentucky Coal & Timber Dev. Co. v. Kentucky Union Co., 214 F. 590, 627 (E.D. Ky. 1914). Despite the clarity of the statute, Kentucky courts have not always agreed that adverse possession runs against the Commonwealth. In several early cases, the courts said that the language quoted above meant exactly what it said, i.e., that state land can be adversely possessed. See Whitley County Land Co. v. Powers' Heirs, 144 S.W. 2, 5 (Ky. 1912); Richie v. Owlsley, 121 S.W. 1015, 1017 (Ky. Ct. App. 1909), modified, Richie v. Owlsley, 135 S.W. 439 (Ky. 1911). In contrast, two later cases suggested that the Commonwealth cannot lose land by adverse possession. See Commonwealth Dep't of Parks v. Stephens, 407 S.W.2d 711, 712 (Ky. 1966); Ford Motor Co. v. Potter, 330 S.W.2d 934, 937 (Ky. 1959). The most recent case to discuss the issue, however, stated that "it seems clear that adverse possession may be the basis of acquiring title even against the Commonwealth in appropriate circumstances." Meade v. Sturgill, 467 S.W.2d 363, 364 (Ky. 1971). Presumably, "appropriate circumstances" would exist when all statutory and common law requirements for adverse possession have been met. This phenomenon of a court misinterpreting or ignoring a statute that expressly allows adverse possession of state land is not limited to Kentucky. See infra Part II.E.
uses a similar catch-all provision to subject the state to all general statutes of limitations.\textsuperscript{34}

While Tennessee's Code provides that the statutes of limitations "do not apply to actions brought by the state of Tennessee, unless otherwise expressly provided,"\textsuperscript{35} Tennessee's legislation does permit adverse possession of state land in one setting: where an adverse possessor has held state land under color of title and the document has been on file with the register's office for thirty years,\textsuperscript{36} "no person, whether upon disability or not, nor the state of Tennessee, shall commence or sustain an action for the recovery of same in any court."\textsuperscript{37}

Oklahoma's statutes do not specifically make state-owned land subject to adverse possession. The limitations period for general adverse possession is fifteen years.\textsuperscript{38} A later chapter entitled "Property" contains two sections, which, when read together, suggest that adverse possession is available against the state:

Occupy for any period confers a title sufficient against all \textit{except the state}, and those who have title by prescription, accession, transfer, will or succession.\textsuperscript{39}

Occupy for the period prescribed by civil procedure, or any law of this state as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, \textit{which is sufficient against all}.\textsuperscript{40}

Thus, occupancy without title for a period less than the statute of limitations will give the occupier rights against everyone but the state and those who actually have title. Occupancy for the duration of the statute of limitations, however, confers title

\textsuperscript{34} \textit{See} W. VA. CODE § 55-2-19 (1994) ("Every statute of limitation, unless otherwise expressly provided, shall apply to the State."). Despite the apparently unlimited nature of this language, however, the courts of West Virginia read this statute early on to permit adverse possession only of state land not "used in the administration of government." State v. Harman, 50 S.E. 828, 837 (W. Va. 1905). Thus, West Virginia state-owned land used "for purely governmental purposes" is not subject to adverse possession, but other state-owned land is. Foley v. Doddridge County Ct., 46 S.E. 246, 251 (W. Va. 1903). For a discussion of West Virginia and other states that distinguish between governmental and proprietary uses, see infra Part II.C.2.

\textsuperscript{35} TENN. CODE ANN. § 28-1-113 (1980).

\textsuperscript{36} \textit{See id.} § 28-2-105.

\textsuperscript{37} \textit{Id.} § 28-2-106.

\textsuperscript{38} \textit{See OKLA. STAT. ANN.} tit. 12, § 93 (West 1988).

\textsuperscript{39} \textit{Id.} tit. 60, § 332 (West 1994) (emphasis added).

\textsuperscript{40} \textit{Id.} § 333 (emphasis added).
“sufficient against all,” with no exception for the state. This seems to indicate that adverse possession for the statutory period is sufficient to obtain title even as to state-owned land.

As discussed more fully in Part III, Florida has moved away from protection of state land from adverse possession. Although a 1974 statute provided generally that “[a] civil action or proceeding . . . including one brought by the state . . . shall be barred unless begun within the time prescribed in this chapter,” a 1978 amendment exempted actions on behalf of the state for “unauthorized use or invasion of state-owned lands, including sovereignty lands,” thus preventing adverse possession of state-owned land. This exemption, however, expired by its own terms on July 1, 1983. The Florida legislature reenacted other portions of the exempting section, but it did not extend the state’s immunity from adverse possession at that time. As a result, Florida state-owned land, including sovereignty land, now appears to be subject to adverse possession on the same terms as privately owned land, although no cases have been decided since these legislative changes.

The Florida courts have allowed state land to be taken through means other than adverse possession. For example, in 1981 (before the expiration of the exemption of state land from adverse possession) the Florida Supreme Court held that the state could lose its title to so-called “section sixteen lands” (those designated for school purposes when the state was admitted to the Union) under the state’s Marketable Record Title Act. Furthermore, in a number of Florida cases, the courts held

41. FLA. STAT. ANN. ch. 95.011 (Harrison 1996) (emphasis added).
42. 1978 Fla. Laws ch. 78-289. The Florida Constitution defines “sovereignty lands” as “lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines.” FLA. CONST. art. 10, § 11. The state holds title to such lands “by virtue of its sovereignty, in trust for all the people.” Id.
44. See infra note 66 and accompanying text.
45. See Askew v. Sonson, 409 So. 2d 7, 15 (Fla. 1981). Marketable record title acts are designed to simplify title searches (and thereby simplify land title transactions) by cutting off interests and claims that are so old that recent records make no reference to the claims. See CUNNINGHAM ET AL., supra note 1, § 11.12. Florida’s current Marketable Record Title Act (MRTA) can be found at FLA. STAT. ANN. § 712 (West 1989 & Supp. 1996).

In Askew, an interloper’s deed of state lands had been recorded in the county offices. More than 30 years later, the owner brought suit to quiet title in himself and to extinguish any state claim based on the MRTA. Askew, 409 So. 2d at 7. The court held that the State had subjected itself to the MRTA and had lost title to the property upon the passage of 30 years, even though unlike a private person, the State had no way of
that although the claimant had not established adverse possession against the state, the state could still be estopped from reclaiming the land, based on the actions of its officers and agents.\textsuperscript{46}

Wisconsin, too, moved to increase the state's exposure to adverse possession. In 1979, the Wisconsin legislature cut the time period for adverse possession of state land in half, so that the time period is now twenty years, the same as that required of adverse possessors of private land.\textsuperscript{47}

Despite subjecting state land to adverse possession generally, however, the Wisconsin legislature has exempted certain classifications of state land from adverse possession. These include college, university, and school lands.\textsuperscript{48} The legislature expressly left all other state, city, village, town, county, school district, sewerage district, and other governmental lands subject to the twenty-year statute of limitations for adverse possession.\textsuperscript{49}

Despite the moves of Florida and Wisconsin to increase their exposure to adverse possession, other states have moved in the other direction—toward greater protection of state-owned land. These recent developments are discussed below in Part III.

knowing that a void deed had been given on its land. See id. at 15. The State, not subject to local taxes, would not have been put on notice of an adverse claim as a private citizen would be when she did not receive her annual tax bills. See id. at 13. It does not appear that the issue of adverse possession, or the State's immunity from it under the 1978 statutory amendment, was raised to the court. The treatment of section 16 lands is discussed fully infra, Part II.C.1.

46. See, e.g., Trustees of Internal Improvement Fund v. Bass, 67 So. 2d 433, 433–34 (Fla. 1953); see also infra Part II.D.

47. See 1979 Wis. Laws 323 (effective July 1, 1980); WIS. STAT. § 893.29(1) (1991–92). Despite this parity with general adverse possession, however, separate sections providing a shorter statute of limitations for adverse possession under a good faith claim of title or with payment of taxes do not apply against the state. See id. §§ 893.26–893.27.


49. See id. § 893.29(1). In Department of Transp. v. Black Angus Steak House, Inc., 330 N.W.2d 240, 241 (Wis. Ct. App. 1983), the court declined to extend protection against adverse possession to state highway property. The Wisconsin legislature, in response, amended section 893.29(2) to protect from adverse possession "property held by the state . . . for highway purposes, including but not limited to widening, alteration, relocation, improvement, reconstruction and construction." See 1983 Wis. Laws 189; WIS. STAT. § 893.29(2)(c) (1991–92).
B. Longer Statutes of Limitations Apply to the State Than to Private Land Owners

A number of state statutes allow state land to be taken by adverse possession, but provide a much longer time period for the state to bring actions for recovery of land than is given to private owners. For example, in almost identical statutes, North and South Dakota require forty years for adverse possession of state lands, but only twenty years for adverse possession against a private owner.

North Carolina's law provides that, where he has color of title, an adverse possessor must hold state land for twenty-one years to obtain title, but may take private land after only seven years, and, where there is no color of title, an adverse possessor must hold state land thirty years but may take private land after twenty years.

California and Montana have ten-year statutes for adverse possession of state-owned land and five-year statutes for privately owned land. Both California and Montana statutes provide, however, that land dedicated to public use may not be taken by adverse possession, no matter how long the occupancy continues.

50. See N.D. CENT. CODE § 28-01-01 (1991); S.D. CODIFIED LAWS § 15-3-4 (Michie 1984). As discussed in Part II.C.1, infra, North Dakota does exempt so-called original grant lands or school lands from adverse possession. Surprisingly, South Dakota's express permission of adverse possession appears to be in direct conflict with its state constitution, which provides that "No claim to any public lands by any trespasser thereon by reason of occupancy, cultivation or improvement thereof, shall ever be recognized ...." S.D. CONST. art. VIII, § 10.


52. See N.C. GEN. STAT. § 1-35(2) (1983). A separate section provides: "Title to real property held by the State and subject to public trust rights may not be acquired by adverse possession ...." Id. § 1-45.1 (Supp. 1995).


54. See id. § 1-35(1).

55. See id. § 1-39.


Idaho's statute provides a ten-year statute of limitations for actions for the recovery of state-owned land, compared with a five-year statute for privately owned land. The statutory language would seem to apply to all state-owned land. Yet, the Idaho Supreme Court has created two exceptions: (1) Land "reserved for, or dedicated to some public use" cannot be adversely possessed, and (2) "Title to school grant lands cannot be acquired as against the state no matter how long they have been adversely occupied."

Thus, while these state legislatures have been willing to permit adverse possession of state-owned land, they have also recognized that the state is not in the same position as a private landowner vis-à-vis its land, and should have a longer period of time in which to protect its rights.

C. The Use to Which State Land Is Put May Affect Adverse Possession

1. The Majority of States Hold Immune from Adverse Possession Land Dedicated to School Use—When many western and mid-western states were admitted to the Union, the U.S. government granted the new admittees designated lands specifically for the support of public education and of schools. The terms

60. See id. § 5-203.
61. Hellerud v. Hauck, 13 P.2d 1099, 1101 (Idaho 1932); see also Rutledge v. State, 482 P.2d 515, 517 (Idaho 1971) (holding that where a navigable river had changed course exposing the river bed, the state could not claim that the land was held for a public purpose as the river was no longer running over it for the benefit of the public).
64. See Arizona Enabling Act, ch. 310, § 24, 36 Stat. 557, 572-73 (1910); Act Supplementary to the Act of Admission of Arkansas, ch. CXX, 5 Stat. 58 (1836); Colorado Enabling Act, ch. 139, § 7, Pt. 3, 18 Stat. 474, 475 (1875); Idaho Admission Act, ch. 656, §§ 4-5, 26 Stat. 215, 215-16 (1890); Illinois Enabling Act, ch. LXVII, § 6, 3 Stat. 428, 430 (1818); Indiana Enabling Act, ch. 57, § 6, 3 Stat. 289, 290 (1816); Act Supplemental to the Act for Admission of Iowa and Florida into the Union, ch. LXXV, § 6, 5 Stat. 789, 789 (1845); Act Providing for the Admission of Michigan into the Union, ch. CXXI, 5 Stat. 59 (1836); Minnesota Enabling Act, ch. LX, § 5, 11 Stat. 166, 167 (1857); Act for Admission of Missouri into the Union, ch. XXII, 3 Stat. 545, 547 (1820); Montana Enabling Act, ch. 180, §§ 10-11, 25 Stat. 676, 679-80 (1889); Nebraska Enabling Act, ch. LIX, § 7, 13 U.S. Stat. 47, 49 (1864); Nevada Enabling Act, ch. XXXVI, § 7, 13 Stat.
of the grants varied from state to state, but the intention remained the same—to provide support for public schools. These “school lands” were not necessarily expected to be used for the location of schools. Instead, it was contemplated that many of these lands would be leased or sold; and, the proceeds applied to support schools. Most, but not all, states accepted these


65. The Utah Supreme Court recently observed:

When the thirteen original colonies formed the United States, each held sovereign control over the lands within its borders. Those lands provided a tax base for financing governmental functions, including public education. As the United States expanded westward, additional states were created on lands that belonged to the United States as territories. The federal government retained ownership over much of the land within those states. Because land owned by the federal government was exempt from taxation by the states, those states had a smaller tax base for financing public education. To provide a source of revenue for public education, Congress granted new states federal lands to be used for the support of public schools. The income from those lands was to be placed in a permanent trust fund for the support of the public schools.


66. For all the states discussed in this Article, the U.S. government designated at least section 16 of every township as “school land.” The term “section 16 land” has become synonymous with “school land.” See, e.g., infra notes 67, 89, 94, 106 and accompanying text.

67. See, e.g., Act Authorizing Alabama to Sell State School Lands, ch. LIX, 4 Stat. 237 (1827) (permitting Alabama to sell school lands “and to invest the money arising from the sale thereof, in some productive fund, the proceeds of which shall be forever applied, under the direction of said legislature, for the use and support of schools within the several townships . . . and for no other use or purpose, whatsoever”).

As the land in its wild state was of no benefit to the people of the township, and as a revenue could only be derived from it by cultivation, the lands were leased under suitable provisions to preserve them from waste. It was soon, however, discovered that this process would end in the destruction of the land; every where the sixteenth section was in a state of ruinous dilapidation. In this condition of things, application was made to Congress, by the Legislature of this State, for leave to authorize the sale of the sixteenth section, by the assent of the township, which was granted—the proceeds of the sale to be invested in some productive fund.

school lands in perpetual trust for the education of their children and adopted constitutional provisions to reflect that trust. 68

Often the trust extended to lands acquired by the state for educational purposes from any source, not just to lands granted for educational purposes by the U.S. government. 69 Other states, in addition to recognizing this trust, expressly dictated that such school lands should be immune from the claims of private occupiers. 70

These constitutional provisions mandate that if the state sells school lands, the proceeds must be held in trust for public education and may not be spent on other matters. 71 The courts interpreting these provisions often have taken them literally and have enforced them emphatically. One early Idaho court refused to take a penalty for a usurious loan out of a school fund, saying that any statute that allowed “one dollar” to be diverted from the school fund for any purpose other than support of the

68. See Ariz. Const. art. X, §§ 1, 2, 8; Idaho Const. art. IX, §§ 3, 4, 8; Ind. Const. art. 8, §§ 2, 3, 7; Iowa Const. art. 9, § 3; Minn. Const. art. XI, § 8; Mo. Const. of 1875 art. 11 § 6; Mont. Const. art. X, § 2; Neb. Const. art. VII, §§ 6–9; Nev. Const. art. XI, § 3; N.M. Const. art. XII, §§ 2, 3, 12; N.D. Const. art. IX, §§ 1, 9; Okla. Const. art. XI, §§ 1, 2, 4; S.D. Const. art. VIII, §§ 2, 5, 6, 9, 14; Utah Const. art. X, § 5; Utah Const. art. XX, § 1; Wash. Const. art. XVI, § 1; Wis. Const. art. 10, § 2.

69. See, e.g., Colo. Const. art. IX, § 5 (including within the public school fund estates that escheat to the state and all grants, gifts or devises made to the state for educational purposes); see also Iowa Const. art. 9, 2nd, § 3 (including in the fund the estates of people who died without heirs); Mont. Const. art. X, § 2 (including in the fund lands given or granted by a person or corporation, interests in estates that escheat to the state, unclaimed corporation shares and dividends, grants, gifts, devises, or bequests made to the state for general educational purposes).

70. For example, the Idaho Constitution provides:

No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon any such public lands [granted to the state by the U.S. government], subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly.

Idaho Const. art. IX, § 8; see also, Colo. Const. art. IX, § 10; N.D. Const. art. IX, § 9; S.D. Const. art. VIII, § 10.

71. For example, the Idaho Constitution provides:

The public school fund of the state shall forever remain inviolate and intact; the interest thereon only shall be expended in the maintenance of the schools of the state . . . . No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided.

Idaho Const. art. IX, § 3. See also Iowa Const. art. IX, § 2; Minn. Const. art. 11, § 8; Mont. Const. art. X, § 3; N.M. Const. art. XII, § 2; N.D. Const. art. IX, § 2; Okla. Const. art. XI, § 2; S.D. Const. art. VIII, § 2; Wis. Const. art. X, § 2.
schools was unconstitutional.\textsuperscript{72} More recently, the Idaho Supreme Court has held that income earned from leases and timber sales on school lands by the State Land Board must be used for school purposes and could not be paid into a general fund.\textsuperscript{73} Similarly, the Nebraska Supreme Court has held that school lands are held in trust for educational purposes.\textsuperscript{74}

The Texas courts have refused to allow counties to pay for the expense of a school land survey with a grant of a portion of such lands,\textsuperscript{75} and have said that a county may not convey school lands in settlement of a claim relating to other matters.\textsuperscript{76} Similarly, the United States Supreme Court has held that New Mexico could not use three percent of the annual income from sales and leases of school lands to advertise for buyers and lessees of the lands.\textsuperscript{77} Further, while school lands may be leased and the rentals applied to education,\textsuperscript{78} the lands may not be used for other purposes, even public ones. Thus, school lands cannot be used to create a state park.\textsuperscript{79}

The question of using school lands to achieve some other, non-school public purpose has arisen several times. In virtually every case, courts have concluded that, as to school trust lands, "trust beneficiaries do not include the general public or other governmental institutions, and the trust is not to be administered for the general welfare of the state."\textsuperscript{80} The United States Supreme

\begin{itemize}
  \item \textsuperscript{72} State v. Fitzpatrick, 51 P. 112, 114 (Idaho 1897).
  \item \textsuperscript{73} See Moon v. State Bd. of Land Comm'rs, 724 P.2d at 125, 125 (Idaho 1986).
  \item \textsuperscript{74} See Board of Educ. Lands & Funds v. Jarchow, 362 N.W.2d 19, 26 (Neb. 1985) (holding that the doctrine of laches cannot be applied against the state in a suit by the state to protect a public interest such as the school land trust); see also State ex rel. Bottcher v. Bartling, 31 N.W.2d 422, 428 (Neb. 1948) (refusing to permit the state to use gains in the school fund to offset previous losses as the state constitution required the state to preserve the school fund inviolate and undiminished).
  \item \textsuperscript{75} See San Augustine County v. Madden, 87 S.W. 1056, 1059 (Tex. Civ. App. 1905).
  \item \textsuperscript{76} See Colorado County v. Travis County, 176 S.W. 845, 851 (Tex. Civ. App. 1915).
  \item \textsuperscript{77} See Ervien v. United States, 251 U.S. 41, 48 (1919).
  \item \textsuperscript{78} See Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 729 (Utah 1990).
  \item \textsuperscript{79} See State v. University of Alaska, 624 P.2d 807, 814 (Alaska 1981) (holding that the State had violated trust provision of original federal grant by not compensating the trust for the value of university land included in a state park). The Alaska Supreme Court noted that language in the grant of land to the University was nearly identical to that used to grant school lands to several states. Based on that similarity, the court held that the University could not permit land granted to it by the United States to be included in a state park, but instead had to keep it "for the 'exclusive use and benefit' of the university." Id. at 813.
  \item \textsuperscript{80} National Parks & Conservation Ass'n v. Utah Bd. of State Lands, 869 P.2d 909, 919 (Utah 1993).
\end{itemize}
Court ruled that Arizona could not appropriate school lands for the construction of a state highway without compensating the school fund, even though the remaining school lands increased in value because of the presence of the highway.81 The Washington Supreme Court held that legislation to relieve the timber industry from contracts to harvest timber on school lands, after the price of timber fell precipitously, violated the state's role as trustee for the schools.82 This was true despite the threat to the state's economy posed by the devastating impact of the enforcement of the contracts on the timber industry.83

Not surprisingly then, most courts have held that a state statute of limitations for adverse possession that appears to apply to school lands violates the state constitution.84 In one of the leading cases on the subject, the Minnesota Supreme Court rejected a claim to school land by a trespasser who had been actively using the land for twenty-five years.85 In concluding that adverse possession should not run against school lands,86 the court cited the Organic Act of Minnesota,87 the Minnesota Enabling Act,88 and the Minnesota Constitution by which the

83. See id. at 578; Gladden Farms, Inc. v. State, 633 P.2d 325, 330 (Ariz. 1981) (holding that Arizona could not sell school lands to a state agency for relocation of people displaced by floods without a public auction). In Gladden Farms, the Arizona Supreme Court opined:

   However worthwhile and desirable this sale may be for the humanitarian purposes for which it is made, we do not believe that the sale without auction and bid assures the 'highest and best' price that the Enabling Act requires. The Enabling Act does not allow trust lands to be used for the purpose of subsidizing public programs no matter how meritorious the programs.

Id. at 330. See also Oklahoma Educ. Ass'n, Inc. v. Nigh, 642 P.2d 230, 236–38 (Okla. 1982) (holding that Oklahoma was not permitted to lease school lands for less than market value for the benefit of farmers and ranchers and that legislation setting ceilings on lease rates for school lands was invalid).


86. Id. at 861–62.
87. Ch. CXII, 9 Stat. 403 (1849).
state had accepted the grant of section sixteen and thirty-six lands for the use of the schools. The court said:

The state accepted the trust, and by its Constitution solemnly covenanted with the United States to apply the granted lands to the sole use of the schools according to the purpose of the grant, and prohibited the sale of any portion of the granted land except at public sale. Such being the nature of the title of the state to its school lands, it is unthinkable that the Legislature intended, by [its adverse possession statute of limitations] to provide a way whereby the trust as to any of the school lands might be defeated, and title thereto acquired by adverse possession, contrary to the mandate of the Constitution that title thereto could only be obtained by a public sale thereof.

....

We are, then, of the opinion that, if the statute under consideration must be construed as authorizing the acquisition of title to the school lands of the state by adverse possession, it violates in this respect, not only the terms of the grant, but also the Constitution of the state.  

The Supreme Courts of Idaho and Washington have also held that a statute that would subject school lands to adverse possession would be unconstitutional.  

The North Dakota Supreme Court has held school land immune from adverse possession, relying exclusively on the terms of the North Dakota Enabling Act. The North Dakota courts have, however, allowed adverse possession to begin to run

89. MINN. CONST. art. XI, § 8.  
90. Murtaugh, 112 N.W. at 862.  
against a private buyer of school lands before issuance of a deed, holding that the state’s interest is not affected so long as the buyer pays full compensation.93

Not all states, however, were treated in the same manner on their admission to the Union. For example, while the United States granted all section sixteen and thirty-six lands to the State of Oregon “for the use of schools,”94 the grant did not require that the lands and their proceeds constitute a permanent school fund for school support only, as the grants to some other states had.95 In light of this omission, the Oregon courts have held that school lands are not held in trust. Rather, like all other state-owned lands, Oregon school lands are subject to adverse possession under the state’s statute of limitations.96 In reaching the same conclusion, early courts in Indiana and Missouri addressed only state law and made no mention of their organic and enabling laws.97 The Indiana Enabling Act simply granted section sixteen lands to the inhabitants of the various townships “for the use of schools,” and made no mention of a trust.98 The Indiana Constitution does provide that the Common

94. Act of Feb. 14, 1859, ch. XXXIII, § 4, 11 Stat. 383, 383. The offer of these lands to the state for schools was expressly accepted by the Oregon legislature. 1859 Or. Laws Spec. Sess. 29.
96. See Schneider v. Hutchinson, 57 P. 324, 325 (Or. 1899). Unable to argue that school lands are held in trust, the plaintiff in Schneider argued that the school lands were granted upon a condition subsequent, and that if the lands were taken by adverse possession, the United States would have the right to re-enter and take possession. Id. at 326. The court rejected that argument, holding that the grant to the State of Oregon had been “an absolute grant, vesting the title in the state for a special purpose. The language of the act of congress is that such land 'shall be granted to the state for the use of schools,' and the United States has no right to re-enter for any reason whatever.” Id.
97. See Hargis v. Inhabitants of Congressional Township, 29 Ind. 70 (1867). The Hargis court did not mention the Indiana Constitution, which expressly provided that “[t]he principal of the Common School fund shall remain a perpetual fund, which may be increased, but shall never be diminished.” IND. CONST. art. VIII, § 3. See also School Dir. of St. Charles v. Georges, 50 Mo. 194 (1872).
98. Indiana Enabling Act, ch. 57, § 6, 3 Stat. 289, 290 (1816). The Act provided in pertinent part:

And be it further enacted, That the following propositions be, and the same are hereby offered to the convention of the said territory of Indiana, when formed, for
School Fund "shall remain a perpetual fund, which may be increased, but shall never be diminished," and that "[a]ll trust funds, held by the State, shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created." The Indiana Supreme Court, however, did not discuss those provisions in opining that school lands were subject to adverse possession.

It appears that the federal government also did not require California to pledge to protect its school lands upon admission to the Union. The Act for Admission of the State of California makes no mention of the public schools or the preservation of lands for their benefit. Nonetheless, the first California Constitution, adopted in 1849, provided: "the proceeds of all lands that . . . may be granted by the United States to this State for the support of common schools . . . shall be and remain a perpetual fund, the interest of which . . . shall be inviolably appropriated to the support of common schools throughout the State."

Despite this unambiguous language that the school fund would be "perpetual," and that it was "inviolably appropriated to the support of common schools," the voters of California repealed this section of their Constitution in 1964 without replacing it. With this section gone, there would seem to be no argument remaining that California's school lands are specifically protected from adverse possession under a theory of public trust.

The federal government offered Michigan all of the section sixteen lands in the state for school land at the time it was admitted to the Union. The Michigan Legislature formally accepted their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States.

First. That the section numbered sixteen, in every township, and when such section has been sold, granted or disposed of, other lands, equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools.

Id.

99. IND. CONST. art. VIII, § 3.
100. Id. § 7.
101. See Hargis, 29 Ind. at 72.
103. CAL. CONST. of 1849, art. 9, § 2 (emphasis added).
104. See CAL. CONST. of 1879, art. 9, § 4 (repealed 1964).
105. California's school lands presumably are covered under CAL. CIV. CODE § 1007 (West 1982), which protects land dedicated to public use from adverse possession. But this clearly is not as strong a protection as a constitutionally imposed trust.
those lands as part of its agreement to be admitted. The first Michigan Constitution, adopted in 1835, provided:

The proceeds of all lands that have been or hereafter may be granted by the United States to this state, for the support of schools . . . shall be and remain a perpetual fund; the interest of which . . . shall be inviolably appropriated to the support of schools throughout the state.

Like California, however, Michigan voters removed this language from their constitution in 1963. Interestingly, in an early case involving the sale of school lands by the state, the United States Supreme Court said:

The State of Michigan was admitted to the Union, with the unalterable condition "that every section No. 16, in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools."

Currently, the Michigan Constitution does not contain any reference to the section sixteen school lands or their proceeds. Following the 1963 constitutional amendment, school lands, like all other state land, probably were subject to adverse possession. The state amended its statute of limitations in 1988 to provide that state land is no longer subject to adverse possession, but significantly, that does not specifically mention school lands held by local municipal governments.

Alabama has an interesting history on this topic. At the time Alabama was admitted to the Union, the United States did not grant section sixteen school lands to the State of Alabama, but

---

108. See Mich. Const. art. VIII.
111. See id. The Michigan courts have long permitted adverse possession of municipally owned land. In a series of early cases, the Michigan Supreme Court held that adverse possession was available against land located within municipal streets, see, e.g., Leonard v. City of Detroit, 66 N.W. 488, 489 (Mich. 1896), and land held pursuant to non-payment of taxes, see, e.g., Klatt v. City of Detroit, 127 N.W. 409, 411 (Mich. 1910). No case appears to have involved school lands.
rather to "the inhabitants of such townships for the use of schools."112 Early on, the Alabama courts held that under the terms of this grant, the title was held by the state as trustee for the township inhabitants,113 but the school lands were not technically state land.114 As such, the Alabama Supreme Court held that they were subject to adverse possession under the statute of limitations applicable to actions to recover possession of land generally.115

In 1907, however, the Alabama Legislature adopted a new statute which provided that there was no limitation of time on the state’s ability to bring a cause of action for the recovery of state land generally, and went on to exempt specifically “sixteenth section lands, school indemnity lands and all other school lands, the lands of the University of Alabama, Auburn University and of any other public educational or governmental institution of this state.”116 Under these new provisions, the Alabama Supreme Court held that unless one had perfected adverse possession against school lands before the 1907 amendments, adverse possession could no longer be achieved.117

Illinois, like many of the states discussed above, was granted section sixteen lands for the use of the township schools upon admission to the Union.118 Supplemental legislation was passed by the Congress twenty-four years later, permitting the state to sell school lands and apply the proceeds to the use of schools.119 Despite the apparent intent of the Congress that these lands be dedicated exclusively to the support of schools, Illinois has not acted consistently with that intent. An early case permitted the

115. See Grissom v. State ex rel. Alabama College, 48 So. 2d 197, 200 (Ala. 1950); Schmidt, 61 So. at 293–94; Miller v. State, 38 Ala. 600, 604 (1863). Consider the difference in approach by the Washington Supreme Court. In Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co., 691 P.2d 178, 181 (Wash. 1984), the court exempted a school district from the statute of limitations applicable to construction claims that would ordinarily apply to a municipality: "It is well settled that school districts act on behalf of the State when they build and maintain school buildings." Id. at 182. Because "[education is one of the paramount duties of the state," a local school district was entitled to the state’s immunity from statutes of limitations when suing for breach of construction contracts related to the high school. Id. (quoting Edmonds Sch. Dist. No. 15 v. City of Mountain Lake, 465 P.2d 177, 178 (Wash. 1970)).
116. ALA. CODE §§ 6-2-31, 6-6-281 (1993) (originally found in ALA. CODE § 3859 (1907)).
117. See Grissom, 48 So. 2d at 200.
adverse possession of school lands owned by a school district. The court never mentioned the organic documents, the state constitution, or the congressional intent that such lands be faithfully applied to the schools. The current Illinois constitution makes no mention at all of school lands and has no requirement that proceeds of such lands be applied to the use of schools. It seems that Illinois has disregarded entirely the original congressional intent with regard to the grant of land for the support of schools.

Illinois has a rather complex set of statutes relating to adverse possession and school lands. One statute provides a twenty-year limitations period for adverse possession generally. Although this section says nothing about its applicability to state-owned land, the courts have held that it cannot be used to make an adverse possession claim against state-owned lands. Another Illinois statute provides a seven-year statute of limitations for adverse possession under color of title and with payment of applicable taxes. By a separate section, state-owned lands generally, and school lands specifically, are made immune from adverse possession under this seven-year statute of limitations. It is not clear why the Illinois legislature chose to leave school lands subject to the longer twenty-year statute of limitations while protecting them from the seven-year statute. Perhaps the longer time period is deemed sufficient protection for the school lands. Furthermore, in the section making state-owned and school lands immune from the seven-year statute of limitations, the Illinois legislature stated that the exemptions in that section would not protect such lands from loss under the state's forty-year Marketable Title Act provisions.

120. See Brown v. Trustees of Sch., 79 N.E. 579, 581 (Ill. 1906).
121. The Illinois Constitution of 1870 provided: "All lands, moneys, or other property, donated, granted or received for schools, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made." ILL. CONST. of 1870, art. 8, § 2 (repealed 1970). No specific mention was made of section 16 lands granted by the United States.
122. See Brown, 79 N.E. at 580–81.
123. See ILL. CONST. art. 10.
127. See id. at 5/13-111.
128. Id. The Marketable Title Act also makes it clear that its provisions apply to state-owned land as well as that of all political subdivisions. Id. at 5/13-121. Thus, in Illinois, while state-owned land generally is protected by the courts from adverse pos-
As this section has demonstrated, in spite of the similarity in the original grants of school lands from the United States to the states, the protection offered to such lands under state laws varies substantially. Given the almost universal concern about funding education, it would appear wise for those states where school lands are not exempt from adverse possession to consider making them so as a simple way to preserve this valuable educational asset.

2. Land Held by the State in a Proprietary Capacity is Subject to Adverse Possession—A number of states allow adverse possession of state-owned land held in a proprietary or non-governmental capacity while maintaining the immunity for state-owned land held in a governmental capacity. In others, this distinction has been expressly rejected.

session under the 20-year statute of limitations, and both state-owned and school lands are statutorily protected from adverse possession under the seven-year statute of limitations, both are subject to loss under the 40-year Marketable Title Act. For a general explanation of marketable record title acts, see supra note 45.

Like Illinois, Washington has a multi-level approach to adverse possession and to the protection of school lands. The statutes provide a 10-year statute of limitations for adverse possession generally. See WASH. REV. CODE ANN. § 4.16.020 (West 1986 and Supp. 1996). While state-owned lands are expressly protected from the application of this statute of limitations, lands of counties, municipalities and "quasimunicipalities" are left subject to it. See id. § 4.16.160 (West 1996). Ordinarily, a school district would appear to be a county, municipality, or quasimunicipality of the state, and thus subject to the statute of limitations. The Washington Supreme Court, however, held that a school district was acting on behalf of the state when it sued for breach of contract for the construction of a high school and thus was immune from the operation of the statute of limitations. See Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co., 691 P.2d 178, 182 (Wash. 1984). It appears likely, based on this holding, that the Washington courts would also give local governments the protection of the state’s immunity from the statute of limitations to protect their school lands from adverse possession.

A separate chapter of the Washington statutes provides a general seven-year statute of limitations for adverse possession under color of title and payment of taxes. See WASH. REV. CODE ANN. § 7.28.070 (West 1992). This chapter expressly exempts school lands from its operations. See id. § 7.28.090.

129. See, e.g., Goldman v. Quadrato, 114 A.2d 687, 690 (Conn. 1955); Hall v. Nascimento, 594 A.2d 874, 877–78 (R.I. 1991); Outlaw v. Moise, 71 S.E.2d 509, 511 (S.C. 1952). This dichotomy is similarly applied in many states to land held by municipal governments. See, e.g., Central Collection Unit v. Atlantic Container Line, Ltd., 356 A.2d 555, 557 (Md. 1976) (opining that immunity "as applied to political subdivisions, is ordinarily limited to land held in a governmental capacity").

130. See, e.g., Todd v. State, 474 So. 2d 430, 431 (La. 1985) (observing that the "strong public policy of the state to protect the wealth of its lands and minerals would not be served by distinguishing between public things and private things and permitting the possessory action against the state as relates to private things"); Pioneer Nat’l Title Ins. Co. v. State, 695 P.2d 996, 998 (Wash. Ct. App. 1985) (noting that the "governmental-proprietary distinction as to the capacity in which the property is held arises only with regard to claims against counties and municipalities" not state-owned property).
Connecticut provides a general fifteen-year statute of limitations for adverse possession, but is silent as to the treatment of state-owned land. In analyzing claims against state land, the courts have frequently stated that adverse possession does not run against the state or its subdivisions as to land held for public use. No cases appear to have held that the state's use was not sufficiently "public." Presumably, however, a case could arise in which state land not dedicated to a public use would be lost through adverse possession.

New York's statute expressly provides a twenty-year statute of limitations for adverse possession of state-owned land. By its terms, this statute makes no distinction between land held in a proprietary capacity and land held for public use. The New York courts, however, have held that this section allows adverse possession only of lands not "held in trust for the public." But not all lands "held in trust" are subject to the same rule on adverse possession. Some "trust lands" are completely inalienable under state constitutional provisions while others are alienable by express grant. Under New York law, adverse possession "always rests on the presumption of a lost grant." For this reason, the courts have held consistently that where public trust property is inalienable under the state's constitution, no presumption of a grant can arise, and the land cannot be adversely possessed.

---

Simonson v. Veit, 683 P.2d 611, 614 (Wash. Ct. App. 1984) (stating that the "statute does not distinguish between the proprietary and the governmental functions of the state, and no such distinction has been implied in the case law").


133. See N.Y. C.P.L.R. Law § 211(c) (McKinney 1990).


and forest preserve land, the claimants could not establish adverse possession even though they had satisfied all of the elements because the lands were held subject to an inalienable public trust.¹³⁹

The New York rule is different as to state-owned public trust lands alienable by grant. A 1922 case expressly left open the question of whether such alienable lands could be acquired by adverse possession.¹⁴⁰ In 1957, the New York Court of Appeals answered this question in the affirmative, holding that the state legally could have made a grant of the bed of a navigable river, and because of that, adverse possession of the bed was possible.¹⁴¹ The court went on to hold that while the private claimant might now own the bed of the river, he had no right to use the river in a manner that would interfere with the state's ability to control the river, navigation in general, or the level of the lake that poured into the river. This meant that the state could regulate the dam owned and operated by the claimant, even though it no longer owned the land under the dam or the dam itself.¹⁴²

Both California and Montana expressly provide that land dedicated to “public use” may not be taken by adverse possession, no matter how long the occupancy continues.¹⁴³ Montana emphasizes that state-owned land is not dedicated to “public use” simply because it is owned by the state: “All property has an owner, whether that owner is the state and the property public or the owner an individual and the property private. The state may also hold property as a private proprietor.”¹⁴⁴

In one California case decided under this “public use” provision, the state had leased land to the City of San Francisco for ninety-nine years, with the expectation “that the lots should be filled in and utilized for the purpose of business and industry.”¹⁴⁵ Shortly thereafter, the city sold the land to private interests who immediately constructed buildings on it. About a year later it

₁³⁹. See Smith, 193 N.Y.S.2d at 129–30 (involving canal land in a state-owned reservoir area); Helms, 349 N.Y.S.2d at 922 (involving forest preserve land).

₁⁴⁰. See Hinkley v. State, 137 N.E. 599, 602–03 (N.Y. 1922) (refraining from “holding that in no instance can title be acquired by adverse possession where the state in the first instance could have made a grant of the land to private individuals”).


₁⁴². See id. at 435.


was determined that the sales were invalid, and therefore the purchasers had not acquired a valid title.\textsuperscript{146} In spite of this ruling, the purchasers continued in use and possession, and ninety years later, the California Supreme Court held that the state had not dedicated the land for public use and that the purchasers had adversely possessed the land.\textsuperscript{147}

West Virginia's statute provides generally that "[e]very statute of limitation, unless otherwise expressly provided, shall apply to the State."\textsuperscript{148} It would appear then, that the ten-year statute of limitations for adverse possession\textsuperscript{149} would apply to all state land. The West Virginia courts, however, have determined that the statute runs only against state-owned land not used for governmental purposes.\textsuperscript{150} In reaching this conclusion, the West Virginia Supreme Court of Appeals noted the state's vast holdings of "wild lands," observing that "state officers cannot possibly watch lands in all sections of the state."\textsuperscript{151} The court said:

[W]e may well doubt the wisdom of the statute giving benefit of limitation to the occupant in such case, and thus causing the state to lose its property. But the Legislature has seen proper to do so: but can we say that it intended to deprive the state of property which in its very self is held for government purposes, and essential to enable the public authorities to carry on government? We cannot think so. . . . Reason, necessity, the public welfare, and legal authorities deny such result.\textsuperscript{152}

Yet, given the changing nature of government uses, the distinction between governmental and proprietary uses may no longer be valid in many jurisdictions. The Pennsylvania Supreme Court presciently noted more than twenty years ago that what constitutes a "public use" may be expected to change over time as governmental functions change.\textsuperscript{153} Legislatures are increasingly cognizant that holding land in its open, natural

\begin{itemize}
\item \textsuperscript{146} See id.
\item \textsuperscript{147} See id. at 333.
\item \textsuperscript{148} W. VA. CODE § 55-2-19 (1994).
\item \textsuperscript{149} See id. § 55-2-1.
\item \textsuperscript{150} See State v. Harman, 50 S.E. 828, 837 (W. Va. 1905); Foley v. Doddridge County Ct., 46 S.E. 246, 251 (W. Va. 1903).
\item \textsuperscript{151} Foley, 46 S.E. at 251.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} See Torch v. Constantino, 323 A.2d 278, 280 (Pa. 1974).
\end{itemize}
condition may achieve a valuable public goal. The Massachusetts legislature, for instance, recently amended its adverse possession statute to protect "land or interests in land held for conservation, open space, parks, recreation, water protection, wildlife protection or other public purpose."\textsuperscript{154} It would seem that in a world where undeveloped land is becoming increasingly scarce, all state-owned land, even that held without development plans, should be considered held for public use and immune from adverse possession.

\textbf{D. In Some States, Estoppel Can Result in Loss of State Land}

In a number of states, courts have held that under appropriate circumstances, the state may be estopped from recovering land from private users regardless of whether adverse possession is available against state land. For example, in a now-repealed statute, Florida had made itself immune to the seven-year statute of limitations applicable to the recovery of land.\textsuperscript{155} The Florida courts held however, that individuals could obtain title to state land through estoppel, regardless of any adverse possession claims.\textsuperscript{156} Likewise, in a recent case, the Washington Court of Appeals also held that estoppel claims can be made against the state.\textsuperscript{157}

\hspace{1em}


\textsuperscript{156} See, e.g., Daniell v. Sherrill, 48 So. 2d 736 (Fla. 1950) (en banc). In Daniell, land owned by the United States was sold erroneously at a tax sale in which the State of Florida issued tax deeds as grantor. Thereafter, state and local taxes were assessed and paid. In 1947, the U.S. government sold the property to the State of Florida. The State then sought to quiet title in itself as against the individuals who had been occupying the land and paying state taxes on it for more than 50 years. See id. at 737–38. The Florida Supreme Court held that the State was estopped from denying its own deeds based on general principles governing conveyancing as well as its own conduct, including its acquiescence in possession for more than 50 years, the collection of taxes, and the failure to offer to refund those taxes. See id. at 740; see also Lobean v. Trustees of the Internal Improvement Fund, 118 So. 2d 226 (Fla. Ct. App. 1960). In Lobean, the State mistakenly had sold submerged lands to the plaintiff. Such lands are sovereignty lands that cannot be sold in the manner used by the State, and the deed was unquestionably void. Nonetheless, the Florida Supreme Court held that the State was legally estopped to deny its own deed. Id. at 227–30. The court reached the same conclusion on similar facts in Trustees of Internal Improvement Fund v. Bass, 67 So. 2d 433 (Fla. 1953).

\textsuperscript{157} See Pioneer Nat'l Title Ins. Co. v. State, 695 P.2d 996, 997 (Wash. Ct. App. 1985). The State apparently had not known that a county had mistakenly sold state-owned school lands at a tax sale. When the mistake was discovered several years later,
In a contrary vein, the New York courts decided early on that estoppel is not available against the state. Thus, even where a private claimant had been assessed and had paid state taxes from 1857 to 1921, the state was "not prejudiced in its rights by the failure of its appointed agents or officers to obey its commands, nor by their unauthorized acts or omissions."\(^{158}\)

Given the importance of the state's interest in protecting title to its land, and the corresponding significance to an individual who has been led to believe in good faith that he has acquired valid title based on the actions of state employees, it would seem that the Washington Court of Appeals has struck the proper balance. That court said:

The doctrine of equitable estoppel is applicable against a state acting in its governmental as well as proprietary capacity when necessary to prevent a manifest injustice, and the exercise of governmental powers will not thereby be impaired. The doctrine is not favored, however, and requires that every particular be proved with clear, cogent and convincing evidence.\(^{159}\)

In applying this rule, it would be reasonable and appropriate to favor a party who not only has paid adequate consideration for a deed but also has relied in good faith on state officers in accepting a deed.\(^{160}\) To permit the state in this setting to retract its deed could, it seems, often cause manifest injustice. It will be a rare case where the state's exercise of governmental powers will be impaired by holding it to its sale. It is likely that this will occur only where unusual public trust land is at stake. Absent payment and a deed, however, it should be very difficult for a private claimant to succeed on an estoppel claim against a state. This should be especially true for those states that do not permit adverse possession of state land.


\(^{159}\) Pioneer Nat'l Title Ins. Co., 695 P.2d at 997 (citations omitted).

\(^{160}\) This was the setting in the Florida and Washington cases, discussed supra notes 156-57 and accompanying text.
E. Some State Courts Ignore State Laws Regulating Adverse Possession of State Lands

It seems that the hornbook law that state land is not subject to adverse possession is so well known that a number of attorneys and judges have forgotten the follow-up provision. That is, the state is not subject to adverse possession unless it has agreed to be. In a number of cases, the parties and the courts seem not to have realized that their state had legislatively agreed to be bound by the applicable statute of limitations for purposes of adverse possession. In other states, courts failed to notice that their legislatures had provided expressly that the state was not subject to limitations periods and adverse possession.

For example, Michigan law expressly allowed adverse possession against state land as early as 1846.\(^{161}\) This provision was reenacted consistently each time the state revised its limitations provisions. The attorneys and courts of Michigan invoked the statute sparingly. In a series of cases between 1911 and 1976, the Michigan Supreme Court repeatedly held that the statute of limitations did not run against the state.\(^ {162}\) Years later, the Michigan Court of Appeals speculated that the statute "appears to have been ignored by bench and bar."\(^ {163}\)

In 1976, however, the Michigan Court of Appeals discovered the long-standing statute and gave it effect. The court held that the state had lost the land at issue in the case by adverse possession.\(^ {164}\) Despite this unambiguous application of the statute

---

164. Id. at 258. The Caywood court struggled with the apparent conflict between the clear language of the statute and contrary case law:

We have expressed statutory language which appears to allow adverse possession claims against the state. On the other hand, we have Supreme Court precedent which apparently demands the contrary result. Our inclination would be to assume that the Court had not been called upon to decide the meaning of the statute and that we would be free to find the meaning of this legislation.

Id.
in 1976, the state continued to argue that it should not be subject to adverse possession. In 1984, the Michigan Court of Appeals put that argument to rest, again allowing a private claimant to take state land by adverse possession. This case may have been the genesis for the Michigan legislature's change to the law in 1988, making state land immune from adverse possession.

Similarly, New Jersey law provides that no person "shall be sued or impleaded by the state of New Jersey for any real estate, or for any rents . . . except within 20 years next after the right or title thereto or cause of such action shall have accrued." Nonetheless, a New Jersey court has held that "[a]dverse possession does not run against the State; there can be no title by prescription against the public." In a case involving an attempt to acquire adverse title to property owned by a municipality, Devins v. Borough of Bogota, the New Jersey Supreme Court examined the history of adverse possession against governmental entities in general. The court noted the twenty-year statute of limitations that expressly applies to the state, but then argued:

Although none of the New Jersey statutes of limitation expressly excepts governmental entities, courts have long ruled, in reliance on the principle of nullum tempus, that the statutes do not run against property owned by either the State or by a municipality. These decisions, however, have all involved land dedicated to or used for a public purpose.

Perhaps trying to explain this inconsistency between the legislation and the court decisions, the court said, "Historically,

166. See id. at 198.
167. See Mich. Comp. Laws Ann. § 600.5821 (West 1987 & Supp. 1996). Subsequent to this amendment, the Michigan Court of Appeals enforced a claim for adverse possession of state land. See Gorte v. Department of Transp., 507 N.W.2d 797, 801 (Mich. Ct. App. 1993) (holding that a private claimant could claim adverse possession of state land where the statute of limitations had passed before the enactment of the amendment, even though his action was not filed until after its passage).
171. See id. at 201.
172. Id. at 201–02 (citations omitted).
courts have been more exacting when reviewing claims of adverse possession of governmentally-owned property. So stringent are the requirements that neither our research nor that of counsel has uncovered a New Jersey case allowing a claim of adverse possession of governmental property. 173

Perhaps the New Jersey court was trying to say that the state has retained its immunity from adverse possession as it applies to land held for a public or governmental purpose, despite the broad language of the statute to the contrary. If that was the message, however, it was not based on anything found in the statute, or in the older cases, none of which made a distinction as to the use to which the land was put. Surely a subject as important as this to the state and to private claimants should be more clearly explained. In concluding its opinion, the Devins court said:

Given the legislative origins of statutes of limitation, including those underlying the doctrine of adverse possession, we anticipate that the Legislature might want to review those statutes in light of today's decision. In inviting the Legislature's attention, we note that other states have looked to their legislatures for the abolition of nullum tempus. We therefore commend the matter to the Legislature. 174

Given the straightforward language of the existing statute, it is not clear what more the Devins court wanted. Despite the Devins court's invitation to the New Jersey legislature, the law has not been changed. Indeed, legislation has been introduced that would reverse the Devins decision and specifically protect state and municipally owned land from adverse possession. 175

Although a statute in Delaware 176 expressly exempts the state from adverse possession, the Delaware courts have discussed the issue solely in terms of the common law. In Kemper v. Aetna Hose, Hook & Ladder Co., 177 the Delaware Court of Chancery concluded that the state was immune from adverse possession under the general theory that "acts of limitation do not run against the state, unless a statute provides otherwise," 178 but

173. Id. at 201.
174. Id. at 204 (citations omitted).
177. 394 A.2d 238 (Del. Ch. 1978).
178. Id. at 239.
made no reference to the express immunity provided by statute. The court did note that a former statute permitting adverse possession against the state had been repealed in 1953\textsuperscript{179} but did not acknowledge the more recent statute\textsuperscript{180} codifying the state's immunity.

On its face, Minnesota's statute would seem to protect only state-owned land dedicated to public use from adverse possession. The statute says that the state and its subdivisions are generally subject to all statutory limitations periods, but then limits that by providing that "no occupant of a public way, levee, square, or other ground dedicated or appropriated to public use shall acquire, by reason of occupancy, any title thereto."\textsuperscript{181}

The Minnesota Supreme Court, however, has refused to give state-owned land such limited protection. In reading this statutory language, the Minnesota Supreme Court rejected a claim that land not previously dedicated to public use was subject to adverse possession.\textsuperscript{182} Instead, it examined a long line of cases holding state-owned land immune.\textsuperscript{183} Because of these cases, and in spite of the limiting language of the statute, the court concluded: "Simply put, the rule is that one cannot acquire adverse title against the sovereign under our statutory scheme."\textsuperscript{184}

It seems clear beyond cavil that a review of the statutory law is in order for the parties and courts in many states. Where the common law rule of immunity is so ingrained that parties and courts do not even bother to check for statutes abrogating or confirming that immunity, it is easy for mistakes to occur. In states like New Jersey, where the courts have refused to allow adverse possession of state land, the legislation should be amended to achieve that same result.

F. The State Is Made Statutorily Immune From All Adverse Possession

A number of states have enacted legislation that expressly provides that statutes of limitations do not apply to actions by

\textsuperscript{179} See id. at 240 (citation omitted).
\textsuperscript{180} See title 7, § 4519.
\textsuperscript{181} MINN. STAT. ANN. § 541.01 (West 1988).
\textsuperscript{182} See Fischer v. City of Sauk Rapids, 325 N.W.2d 816, 819 (Minn. 1982).
\textsuperscript{183} See id. at 818–19.
\textsuperscript{184} Id. at 819.
the state to recover land. They have done so in a variety of ways. Most of these states have provided, more or less simply, that adverse possession is not available against the state.\(^{185}\)

Other states have chosen not to make a simple statement of government immunity from adverse possession. Instead, they exempt the state from the operation of the statutes of limitations by reference to other specified sections.\(^{186}\)

Some legislation does not discuss a statute of limitations relating to land specifically, but makes the state immune from all statutes of limitations.\(^{187}\) Yet other states take quite a different approach. Rather than exempting the state from all limitations periods, the state is generally made subject to all statutes of limitations. These states then except those statutes involving the recovery or possession of land. For example, Nevada's statute makes it clear that although adverse possession statutes of limitations do not run against the state, all other limitations periods do.\(^{188}\)

Washington makes a distinction in its statute between the different levels of government, limiting actions by counties, municipalities and quasimunicipalities, but exempting actions brought by the state.\(^{189}\)

Finally, Wyoming is unusual in that it does not specifically exempt the state from the running of the statutes of limitations.\(^{190}\) Wyoming does, however, spell out a process for the sale of state lands\(^{191}\) that requires that such lands be sold "only at public auction to the highest responsible bidder after having been duly appraised by the board [of land commissioners] . . . and for not less than ten dollars . . . per acre."\(^{192}\) Concomitantly, a "fee interest in any state land may be perfected only as herein provided and only by express grant by the state of Wyoming for


\(^{186}\) See, e.g., ALA. CODE § 6-2-31 (1975); TEX. CIV. PRAC. & REM. CODE ANN. § 16.061 (West 1986).


\(^{188}\) See NEV. REV. STAT. ANN. § 11.255 (Michie 1986).


\(^{190}\) See WYO. STAT. ANN. §§ 1-3-103 (Michie 1996).

\(^{191}\) See WYO. STAT. ANN. §§ 36-9-101 to -114 (Michie 1977).

\(^{192}\) Id. § 36-9-102.
that purpose."193 If a fee interest in state land may be perfected only by express grant after auction to the highest bidder, it would seem clear that adverse possession statutes of limitations do not run against state-owned land.

G. Some Special Types of State-Owned Land Are Expressly Protected from Adverse Possession

In a number of states, special statutes of limitations protect specific open state lands from adverse possession or prescription. Often these lands fall within the jurisdiction of a specific environmental or forestry department.

For example, Kentucky expressly makes the state subject to the limitations periods prescribed for private persons.194 Nonetheless, a separate chapter establishing the Division of Forestry provides that land owned by the Division may not be taken by adverse possession.195

Similarly, in Massachusetts, the state is generally subject to a twenty-year statute of limitations.196 A separate section, however, provides that no person shall acquire any rights by prescription or adverse possession in lands under the control of the Department of Environmental Management.197

The State of Washington is in general immune from all adverse possession,198 but the Washington legislature has provided specifically that no rights in surface or ground waters of the state may be acquired by adverse possession or by prescription.199

If all state-owned land were clearly immune from adverse possession, there would be no need for this piecemeal approach. These statutes reflect a concern that open and undeveloped lands not be lost to occupying claimants.200 Such concerns appear equally valid as to open land generally owned by the state.

193. Id. § 36-9-112(a).
194. See KY. REV. STAT. ANN. § 413.150 (Michie 1992).
195. See id. § 149.040(3).
200. See supra notes 153–54 and accompanying text.
III. RECENT DEVELOPMENTS

In the last twenty years, several states have made legislative changes to their laws that address adverse possession of state-owned land. In four states, the legislatures have moved to provide greater protection for state-owned land. In one state, however, state-owned land became subject to adverse possession after a long period of immunity. It thus appears that the trend in these states has been in favor of providing more protection of state-owned land than has heretofore existed.

These developments make sense for a number of reasons. First, as state resources become increasingly scarce, protecting state land from adverse possession by law is a relatively easy and inexpensive way to ensure that the state retains the land it has. It is quite clear that in a time of declining budgets, the states will have fewer dollars for monitoring their land and for bringing ejectment actions to clear them.

Preventing adverse possession of state land also avoids confrontation with trespassers. The state is not forced to oust trespassers to protect its interest and thus can avoid the risks involved in ejectment actions.

A few states have moved to protect open lands from adverse possession. This legislative protection reflects the recognition that there is a value in keeping lands open and undeveloped. Such lands historically could have been subject to adverse possession in those states protecting only lands held in a governmental capacity. The holding of open and undeveloped land traditionally would not have been deemed to constitute a governmental or "public purpose." Rather than relying on courts to continue expanding the definition of what constitutes a public

201. See infra notes 208–20 and accompanying text.
203. See FLA. STAT. ANN. ch. 95.011 (Harrison 1996).
204. The misadventures of federal agents in the western states trying to protect federal lands is one example of this type of problem. See Tom Kenworthy, Western Interests Lose Court Battle Over Public Lands, WASH. POST, Mar. 15, 1996, at A27; End Western 'Range War,' Make Wise Use of Land, USA TODAY, Mar. 14, 1996, at A10.
or governmental purpose, however, these legislatures have acted correctly to make it clear that the states have an interest in seeing that open lands remain state land.

Developments in land use regulation law have tended to limit the types of development restrictions state and local governments can place on private landowners. Because states are experiencing a decreased ability to prevent development of private land, it will become all the more important that undeveloped state land remain that way. Preventing adverse possession of all state land is one simple way to ensure that the states will not lose the ability to protect open lands despite reduced enforcement budgets.

The only state to completely abrogate its immunity in recent years is Florida, but Wisconsin has also moved to make it easier to obtain adverse possession of state-owned land in one significant respect. In 1979, the Wisconsin legislature cut in half the time in which adverse possession of state-owned land could be achieved.

Given the limited ability of states to prevent the development of privately owned lands, and the pressures to develop...
undevolved areas, it is disappointing to see states making their own limited resources more readily susceptible to adverse possession. In contrast, it makes sense that the legislatures in at least four other states have voted to increase the protection afforded to their state-owned lands.

Indiana and Michigan have gone the farthest in protecting state-owned land from private claimants. In both states, the legislatures have adopted language providing complete immunity from adverse possession.

Since at least 1931, Indiana law had expressly allowed adverse possession of state-owned land with a twenty-year statute of limitations. This rule was abolished in favor of complete immunity for state-owned land in 1985 by statutory language that reads simply: "Title to real property owned by the state may not be alienated by adverse possession."

Michigan's statutory turn-around on this issue was equally dramatic. Since at least 1846, state law had expressly permitted adverse possession of state-owned land. In 1988, however, the Michigan legislature reversed course, adopting language stating: "Actions for the recovery of any land where the state is a party are not subject to the periods of limitations, or laches." Quite recently, the Michigan Court of Appeals commented on this change, saying, "we note the Legislature has decided that a claim of adverse possession against state lands is against public policy and, therefore, will not be recognized."

Other states have also moved to reduce the exposure of state-owned land to adverse possession, but have not made such land completely immune. For example, North Carolina has historically provided that the limitations generally applicable to civil actions apply equally to actions brought in the name of the state. In 1985, however, the North Carolina legislature adopted a provision protecting from adverse possession "real property held by the State and subject to public trust rights." This

provision defined "public trust rights" as "those rights held in trust by the State for the use and benefit of the people of the State in common."\textsuperscript{218}

Massachusetts has also long permitted adverse possession of state-owned land. Historically, the only state-owned land not subject to adverse possession included province land in Province-town, the "Back Bay" lands of Boston, and land below the high water mark or in the "great ponds."\textsuperscript{219} In 1987, the Massachusetts legislature expanded this protection to include "land or interests in land held for conservation, open space, parks, recreation, water protection, wildlife protection or other public purpose."\textsuperscript{220} Although this will leave land held by the state in a proprietary capacity subject to adverse possession, it should remove the lion's share of state-owned land from the reach of private claimants.

CONCLUSION

It is open to some debate whether it was ever appropriate for state-owned land to be subject to adverse possession by private interests. Prevention of stale claims and achieving certainty of title simply does not justify the loss of state lands. Historically, most states recognized this and chose to make their lands immune from adverse possession. In those states where state-owned land continues to be subject to adverse possession, one may well suggest that it is time to revisit this issue. Between development pressures on ever-shrinking open lands, reduced state-land protection enforcement budgets, and the pressures on the ecosystem to handle ever greater pressures of development, a simple solution is to make state-owned land expressly immune from all forms of adverse possession. In this way, state resources used for monitoring and challenging encroachments can be used elsewhere, without the fear that the state's title will be lost to aggressive developers. Further, states will be freed of the need

\textsuperscript{218} \textit{Id.} More specifically, public trust rights "include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches." \textit{Id.}

\textsuperscript{219} \textit{See MASS. ANN. LAWS ch. 260, § 31 (Law. Co-op. 1992).}

\textsuperscript{220} \textit{Id.}
to prove that keeping undeveloped lands undeveloped qualifies as holding them for a governmental or public purpose.

The hornbook rule, in its broadest application—that state land is immune from adverse possession—is a good one. States should be protected from the loss of state lands because of the laziness, mistake, or dishonesty of their employees. Given the uncertainty of the courts and parties as to what the law is on this issue in certain states, it is reasonable to ask that legislatures at least consider the posture of their law and whether it is justified under modern conditions. States that currently permit adverse possession should reconsider their policy in light of current land usage and needs as well as the reliability of enforcement measures.