

January 2016

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Recommended Citation

Peter H. Kenlan, *Maine's Open Lands: Public Use of Private Land, the Right to Roam and the Right to Exclude*, 68 Me. L. Rev. 185 (2016). Available at: <http://digitalcommons.minelaw.maine.edu/mlr/vol68/iss1/14>

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MAINE'S OPEN LANDS: PUBLIC USE OF PRIVATE LAND, THE RIGHT TO ROAM, AND THE RIGHT TO EXCLUDE

Peter H. Kenlan

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MAINE'S OPEN LANDS: PUBLIC USE OF PRIVATE LAND, THE RIGHT TO ROAM, AND THE RIGHT TO EXCLUDE

Peter H. Kenlan*

I. INTRODUCTION

On a late summer afternoon, a boy pilots a small boat toward a deserted beach while another crouches in the bow with an anchor poised and ready. As the boat gently scrapes to a halt, the anchor lands in the wet sand with a dull thud and the two boys splash ashore. Equipped only with peanut butter sandwiches, they set off along the beach looking for tide pools. Behind them, they leave only a few ephemeral footprints—readily erased by the waves.

On a bright and clear February morning, a man rides his snowmobile along a well-traveled trail. The scenery flashes past as he dives into the woods and then reemerges into the sunlight—crossing streams, fences, and stone walls. By lunchtime, the man has crossed land belonging to three dozen different people—none of whom he has ever met.

On an early fall day, a man and his son hike through the woods to get to a remote lake surrounded by a large tract of privately-owned forest. Around their necks, they carry binoculars for birdwatching. On the opposite side of the lake, a woman and her daughter also approach the lake with a small inflatable kayak and a fishing pole.

On Memorial Day weekend, an accountant packs her car in Boston for a trip to Maine. She closes the lid on a trunk filled with slightly musty clothing and then lifts her kayak up on top of the car. That afternoon, she parks at a public ramp and paddles a few miles out to a small privately-owned island where she sets up a tent for the night.

The people in each of these vignettes have certain things in common. They are all in Maine, they are all using private land, and they are all strangers to the owners of that land. Despite their commonalities, the law treats these people quite differently.

In many parts of the world, these activities would all be considered normal, wholesome, and, above all, *lawful*. In Maine, however, some of these people are enjoying their use by right while others are doing so at the landowner's whim. Still others may be trespassers. Yet even the participants themselves may not know for sure which is which.

Maine's Constitution declares that "possessing and protecting" property is a "natural, inherent[,] and unalienable right."¹ That statement is as enigmatic as it is

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1. ME. CONST. art. I, § 1. Here at the outset, a general comparison between the Maine and federal constitutions is both interesting and informative. Maine's constitution begins with *positive* declarations of "natural and unalienable rights" similar to those described in the U.S. Declaration of Independence. See ME. CONST. art. I-IV; THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776). By comparison, the federal constitution declares similar rights in *negative* terms, prohibiting the federal government from acting in certain areas. See U.S. CONST. amend. I.

illuminating. A nearly absolute “right to exclude” others is a core element of private property in Maine, but there is nevertheless a long-standing acceptance of the public use of private land—Maine’s “open lands tradition”—reflected in history, tradition, modern practice, and law.²

Part II of this Comment examines the right to exclude others from private property. Not all countries accept that such a right exists. Instead, many countries recognize the polar opposite—a public “right to roam” on private land. This section compares the right to roam in selected foreign jurisdictions with the development of the right to exclude in the United States.

In Part III, this Comment explores the right to exclude in Maine law and tradition while Part IV uses the extent of the public’s right to use intertidal land as a case study in the conflict between the Legislature’s stated desire for public access to the outdoors and the court’s protection of an individual’s right to exclude.³

Finally, in Part V this Comment considers the broad implications of Maine’s law and policy regarding public use of private land. The development of an unchecked right to exclude as a core element of Maine property law is an unbalanced oversimplification of the meaning of private property that has enriched property owners at the public’s expense. Ultimately, an absolute right to exclude in Maine is contrary to theory, history, and policy. Recalibrating the hierarchy of public and private rights in land would restore balance to property law.

II. BACKGROUND

In the background of this Comment are fundamental questions about the source and extent of property “ownership” whose temptingly straightforward answers belie morality, history, and policy. First among these is a consideration of why private property exists at all. Property theorists have long discussed and debated whether there is a rational source for private property that stands as a self-evident truth, but do not agree about the identity of the source, or whether such a source exists in the first place.⁴ Thus, it seems necessary to accept that any society must have, even within its bedrock principles, what amount to articles of faith—non-rational tenets nonetheless inextricably intertwined with law, society, and culture.⁵

Among the philosophical justifications for private property, two popular conceptualizations are emblematic of the extremes. One rests on a natural rights theory of private property as a sacrosanct individual entitlement, whereas the other rests on the notion that private ownership is an instrumentality—a means to achieve

2. E.g., James M. Acheson, *Public Access to Privately Owned Land in Maine*, 15 ME. POL’Y REV. 18 (2006) (“The widespread use of private land by the public goes by various names. Some refer to Maine’s ‘open land[s] tradition.’ . . . But more than informal tradition is involved. Maine law facilitates the public use of private land.”).

3. “Intertidal” refers to the region of the seashore that is between the high-tide mark and the low-tide mark. Donald R. Richards & Knud E. Hermansen, *Maine Principles of Ownership Along Water Bodies*, 47 ME. L. REV. 35, 49 (1995).

4. See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 533–41 (2005).

5. The Author recognizes the irony that accepting this premise is itself an article of faith.

a set of social ends.⁶ Even when we accept the latter as the source of individual rights, the former maintains some persuasive sway, and so the law in this area is a balance of conflicting ideologies.⁷

Perhaps the most familiar articulation of a natural rights theory of property is that of John Locke. Locke's creation myth assumes as a premise that in the beginning, the entire world was common property and the only thing to which a man could lay a moral claim was his own labor.⁸ By improving land, a man acquired ownership of the land he improved.⁹ Stripped to essentials, government's *sine qua non* under Locke's conception is to protect private property, which he defined to include "life, liberty, and estate."¹⁰

The competing theoretical extreme is that private property is no more than an instrumental creation of societies and governments.¹¹ In this conception, private ownership is not an article of faith, but a constellation of rules, subject to adjustment, to optimize the achievement of social ends.¹² This schema further reveals that to the extent that property is emblematic of personal liberty, such liberty is not infinite in quantity, nor created from thin air, but rather part of a zero-sum equation.¹³ To the extent that a property owner's increased ability to do what he wishes with his property increases his liberty, it equally reduces the liberty of every other party to do the same.¹⁴

A. *The Right to Roam*

Outside the United States, some jurisdictions achieve balance between public and private rights in land by sharply curtailing a landowner's right to exclude and instead carving out its inverse—a public right to roam the countryside. For example, Sweden and England both recognize different degrees of a right to roam, but both

6. Bell & Parchomovsky, *supra* note 4, at 546–50; see generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

7. These competing conceptions of property are not limited to expression within the fields of philosophy and legal scholarship. The United States is home to a vociferous and popular "Property Rights Movement" that might generally align with the natural rights theory. See Joseph L. Sax, *Why America has a Property Rights Movement*, 2005 U. ILL. L. REV. 513, 513 (2005). On the other hand, there are groups just as popular and just as vocal that support land use regulations—for example in the area of environmental protection—that align more with an instrumental view of private property. See *id.*

8. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 111 (Ian Shapiro ed., Yale Univ. Press 2003).

9. *Id.* at 111–12.

10. *Id.* at 136–37.

11. Take for example the simple core element of a capitalist economy—private ownership of the means of production. *Capitalism*, BLACK'S LAW DICTIONARY (9th ed. 2009). Hypothetically, an environmental regulation imposed on the owners of widget factories creates an incentive to comply with the regulations as efficiently as possible. In this simplistic example, private ownership of the factory results in efficient compliance with regulation—and the potential for innovative solutions to minimize costs and maximize results.

12. ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 10 (2007) ("Property arises not when Alice takes control of a piece of land but later, when Bob, Carol, and Dave . . . come along and get together with Alice to decide exactly what rights Alice shall have and how far Alice's property rights will limit the liberties of Bob, Carol, Dave, and all others.").

13. See *id.*

14. *Id.*

countries also protect landowners' important interests.

I. Swedish Allemansrätt

Many European countries recognize a right to roam that allows anyone to walk, hike, or camp on private land if he does no damage and does not disturb the owner.¹⁵ The Swedish call this right *Allemansrätt*—everyman's right—and include it in their constitution.¹⁶ In fact, Sweden's official tourism website specifically promotes the right of widespread public access.¹⁷

Moreover, Sweden's constitution acknowledges this right of public access in a provision equivalent to the United States Constitution's "Takings Clause," which protects private land from public appropriation or restriction and mandates compensation when such appropriation or restriction is required.¹⁸ At the same time, this provision guarantees "access for all to the natural environment in accordance with the right of public access."¹⁹ Accordingly, the right of access is subject to relatively few limitations, among them a prohibition on damaging the natural environment, causing the owner significant damage or inconvenience, or intruding on the *tomt*²⁰—roughly meaning the "homestead"—which is a zone of privacy.²¹

2. British Countryside and Rights of Way Act

In contrast to the stability of the Swedes' right to roam, Britons once enjoyed a robust right to roam but lost it over a period of centuries as the upper-classes converted the commons to private property.²² Envious of their other European neighbors, public sentiment favoring broad roaming rights began to grow in the late 20th century.²³ Finally, in 2000, the British Parliament enacted the "Countryside and

15. See Regeringsformen [Constitution] 2:15 (Swed.). An English translation of the Swedish Constitution is available from the Riksdagen website. *The Instrument of Government*, RIKSDAGEN 81, 85, <http://www.riksdagen.se/Global/dokument/dokument/laws/the-instrument-of-government-2012.pdf>. Similar rights exist to varying degrees in Norway, Finland, Denmark, and, outside of Scandinavia, Germany, Switzerland, Austria, and Spain. Heidi Gorovitz Robertson, *Public Access to Private Land for Walking: Environmental and Individual Responsibility as Rationale for Limiting the Right to Exclude*, 23 GEO. INT'L ENVTL. L. REV. 211, 215–16 (2011); Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 GEO. INT'L ENVTL. L. REV. 375, 404 (2007).

16. Regeringsformen [Constitution] 2:15 (Swed.).

17. See VISIT SWEDEN, <http://www.visitsweden.com/sweden/Things-to-do/Nature--Outdoors/Nature-loving-Sweden/Roam-free-in-Sweden/> (last visited Feb. 16, 2015) ("The Right of Public Access ('Allemansrätt') gives you the right to roam the countryside in Sweden in perfect peace and quiet without someone saying: 'get off my land,' unless you stomp all over someone's back garden or trample all over a farmer's cultivated field that is When you are in Sweden you have the right to walk, cycle, ride, ski and camp on any land with the exception of private gardens, near a dwelling house or land under cultivation.").

18. Robertson, *supra* note 15, at 216–21.

19. *Id.* at 216 n.22.

20. For a whimsical illustration of the *tomt* (homestead), see generally ASTRID LINDGREN, *THE TOMTEN* (PaperStar ed. 1997).

21. Robertson, *supra* note 15 at 217–19 (citing Kevin T. Colby, *Public Access to Private Land--Allemansrätt in Sweden*, 15 LANDSCAPE & URB. PLAN. 253, 259 (1988)).

22. Anderson, *supra* note 15, at 378–79.

23. *Id.* at 404.

Rights of Way Act,” which opened up certain private property to public access.²⁴ Among the provisions of the Act, the public may freely enter private lands classified as “open country,” including mountain, moorland, heath, and downland.²⁵ However, the British right of access is more limited than its Swedish counterpart. The right extends primarily to walking and picnicking, but not to hunting, kindling fires, cycling, horseback riding, or removing plants.²⁶

Thus, the Countryside and Rights of Way Act carefully balances the competing interests of landowners against public interests, including transportation, enjoyment of nature, public health, culture and history, and community cohesion.²⁷ In return for the statutory right of access to the countryside, landowners ultimately received assistance with the cost of providing that access, along with limited liability for injuries sustained by those exercising their new rights.²⁸

B. The Right to Exclude

The examples from Sweden and England demonstrate that a qualified right to roam does not necessarily harm private property interests. Even in the early United States, land that was both unimproved and unenclosed was open to the public for hunting, grazing livestock, walking, and gathering food or firewood.²⁹

In a South Carolina example, the state supreme court refused to find a hunter liable for trespass when the hunter openly defied the landowner’s order to keep off.³⁰ There, the court relied not on the landowner’s limited right to exclude, but on the hunter’s positive right to hunt on unenclosed land.³¹ In Vermont, the state’s constitution specifically protects that right.³²

Similarly, in both Georgia and Alabama, unenclosed lands were common pasture, and the public could use the countryside so long as it respected fenced areas and did not interfere with landowners.³³ At least with respect to uncultivated or unimproved land, the acceptance of a right to roam in the United States predates and opposes the notion of an absolute right to exclude others from private land.³⁴

However, in the 1979 case of *Kaiser Aetna v. United States*, the United States Supreme Court identified the right to exclude others as “one of the most essential

24. Countryside and Rights of Way Act, 2000, c. 37, § 1, (Eng.).

25. *Id.*

26. Anderson, *supra* note 15, at 407.

27. *Id.* at 412–17.

28. *Id.* at 406.

29. FREYFOGLE, *supra* note 12, at 33.

30. *Id.* at 38 (citing *M’Conico v. Singleton*, 9 S.C.L. (2 Mill) 244 (S.C. 1818)).

31. *Id.*

32. VT. CONST. ch. II, § 67 (“The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.”).

33. FREYFOGLE, *supra* note 12, at 29–30.

34. See Robert M. Hynes, *Posted: Notice and the Right to Exclude*, 45 ARIZ. ST. L.J. 949, 951–52 (2013) (reporting that roughly half of the states retain a presumption of landowner consent to enter unenclosed, unposted land).

sticks in the bundle of rights that are commonly characterized as property.”³⁵ For so forceful a pronouncement, the Court relied on only three sources in a footnote: a case involving the occupancy required to establish “Indian Title” in the Court of Federal Claims,³⁶ Fifth Circuit dicta,³⁷ and Justice Brandeis’ dissent in an intellectual property case.³⁸ Despite the proposition’s weak support, the Court’s subsequent opinions in *Loretto v. Teleprompter Manhattan CATV Corp.*³⁹ and *Nollan v. California Coastal Commission*⁴⁰ firmly embraced the fundamental nature of a landowner’s absolute right to exclude.

In *Loretto*, a New York property owner challenged a cable television provider that had installed equipment under the authority of a New York law requiring landlords to permit the installation of cable equipment.⁴¹ The Court relied in part on *Kaiser* and the right to exclude in holding that “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.”⁴² A few years later in *Nollan*, the Court held that a legislatively-created public access easement constitutes a permanent physical occupation and is likewise a taking.⁴³

Prior to the *Kaiser-Loretto-Nollan* line of cases, the right to exclude was far more limited.⁴⁴ These relatively recent developments established a nearly absolute right to exclude as fundamental to private property rights in the United States.

35. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). A common—if tortured—metaphor for understanding property rights is that those rights consist of a bundle of “sticks” that correspond to different “pieces” of property ownership. For example, a man may own title to a home while he surrenders the right of occupancy to a lessor, a bank owns a mortgage lien, a neighbor owns an access easement, and the municipality and a public utility each own a right-of-way for services. However, at least one Commentator argues that the Court’s pronouncement that a property owner’s right to exclude was within the “category of interests that the Government cannot take without compensation” was weakly supported by precedent. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 667–68 (2011).

36. Anderson, *supra* note 15, at 427 (citing *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975)).

37. *Id.* (citing *United States v. Lutz*, 295 F.2d 736, 740 (5th Cir. 1961)).

38. *Id.* (citing *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)). As one Commentator put it, “[n]one of these sources really support the notion that the right to exclude must be absolute.” *Id.*

39. 458 U.S. 419 (1982).

40. 483 U.S. 825 (1987).

41. *Loretto*, 458 U.S. at 421–22.

42. *Id.* at 426, 433.

43. *Nollan*, 483 U.S. at 831–32.

44. See FREYFOGLE, *supra* note 12, at 29–39. Other theoretical limitations continue to exist, for example in the case of necessity. See *Ploof v. Putnam*, 71 A. 188 (Vt. 1908). But see David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U.J.L. & POL’Y 39, 39 (2000) (arguing that the right to exclude others is a fundamental aspect of property rights that have “always been fundamental to and part of the preservation of liberty and personal freedom in the United States.”). However, in arriving at this conclusion, the article relies substantially on the cases discussed *supra* in notes 35, 39–40. *Id.* at 41–42. There are only two cases—the earliest being a New Hampshire case from 1872—discussing a right to exclude prior to the 20th century. *Id.* at 46–47 (citing *Eaton v. B.C.&M.R.R.*, 1872 WL 4329 (1872)).

C. Summary

Courts have come to describe a landowner's absolute right to exclude as a foregone conclusion—as though private ownership fails to make sense without it. Notwithstanding the popularity of that view, examples abound both abroad and in the United States' history of an expansive right of the public to use private land under certain circumstances. It is in this historical and political context that this Comment goes on to examine the public use of private land in Maine.

III. MAINE'S OPEN LANDS

A. Tradition

Whose woods these are I think I know.
His house is in the village though;
He will not see me stopping here
To watch his woods fill up with snow.
—Robert Frost⁴⁵

Maine is home to a long tradition of public use of private land and of landowner acquiescence to such use. It is readily apparent that this arrangement is a virtual necessity because the vast majority of land in the state is privately owned.⁴⁶ To illustrate, only fifteen landowners held the nearly half of Maine's land area contained within its north woods.⁴⁷ Nonetheless, the owners posted only 8% of that land against trespassing.⁴⁸ This distinguishes Maine from the western United States—especially Nevada, Utah, Idaho, Wyoming, and Arizona in which the public owns more than half of the land area.⁴⁹ Despite the private ownership of most of Maine, there is extensive public use of that land in different contexts.⁵⁰

The best example of the open lands tradition and its reflection in Maine culture is the use of private land for hunting. In the early United States, it was the regular

45. ROBERT FROST, *Stopping by Woods on a Snowy Evening*, in NEW HAMPSHIRE: A POEM WITH NOTES AND GRACE NOTES 87, 87 (1923).

46. Approximately 94% of all land in Maine is privately owned. *Public Land Ownership by State*, NATURAL RES. COUNCIL OF ME., <http://www.nrcm.org/documents/publiclandownership.pdf> (last visited Feb. 15, 2015).

47. David Vail & Lars Hultkrantz, *Property Rights and Sustainable Nature Tourism: Adaptation and Mal-adaptation in Dalarna (Sweden) and Maine (USA)*, 35 *ECOLOGICAL ECON.* 223, 230–31 (2000).

48. *Id.*

49. The reason for the disparity between East and West in this regard is simply that in the East, States joined the union as preexisting entities whereas most western land entered federal ownership through conquest, compromise, or purchase before the establishment of States in those territories. ROSS GORTE, CAROL VINCENT, LAURA HANSON & MARC ROSENBLUM, CONG. RESEARCH SERV., R42346, *FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1–7* (2012). In these states, land is commonly owned by federal agencies such as the U.S. Forest Service, Bureau of Land Management, and National Park Service. *Id.* at 8–13. Interestingly, in western states, public use of public land is low. See Charles S. Lucero, *Public Access to Federal Lands: Dilemma*, 3 *PUB. LAND L. REV.* 194, 195 (1982) (citing lack of awareness, physical remoteness, leaseholder interference, and obstructive private landowners as factors preventing public access to federal land in the western United States).

50. *But see* James M. Acheson & Julianna Acheson, *Maine Land: Private Property and Hunting Commons*, 4 *INT'L J. COMMONS* 552, 564 (2010) (arguing that describing Maine as “over 90% . . . ‘private property’ oversimplifies a very complicated ownership” regime).

practice of the public to hunt on private land.⁵¹ Not only was the practice common, in some places it was a usage undertaken by right.⁵² With 94% of Maine's land in private hands, modern hunting could not exist without extensive public use of private land.⁵³ What is more, a sizable segment of the hunting community believes that private landowners lack the right to restrict hunting—especially when there is a history of that use going back many years.⁵⁴ When philanthropist Roxanne Quimby accumulated large tracts of forest in Maine's north woods and then posted the land against hunting and motorized access, the *Bangor Daily News* published an article in which hunting camp owners called her “Public Enemy No. 1.”⁵⁵ Those who became accustomed to using the land had inaccurately come to believe that they had a right to continue that use.

In other instances, private groups have taken the initiative to develop relationships with landowners to secure access to conduct certain activities on private land. For example, the Maine Snowmobile Association oversees a network of 14,000 miles of trails, 95% of which are on private property.⁵⁶ The Association serves as an umbrella under which local clubs organize to groom and maintain trails, and negotiate with landowners on an individual level.⁵⁷ The cumulative effect of these local connections has created an extensive trail network that is open to the public.

Another example is the Maine Island Trail Association, which oversees a water

51. See Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L. J. 549, 554–56 (2004) (describing the United States' departure from English common law in allowing the public to hunt on private land).

52. See, e.g., *M'Conico v. Singleton*, 9 S.C.L. (2 Mill) 244 (S.C. 1818).

53. See Acheson, *supra* note 2, at 21 (“The tradition of using other people's property for recreation has enormous economic implications for the state In 2004, it was estimated that hunting was worth \$325 million to the Maine economy These activities depend, in large measure, on tourists and sportsmen having access to other people's land.”)

54. Lloyd C. Irland, *Land, Timber, and Recreation in Maine's Northwoods: Essays by Lloyd C. Irland*, ME. AGRIC. & FOREST EXPERIMENT STATION MP730, 73 (“The public has never clearly perceived the Maine Woods as private property. The phrase ‘our forests’ is repeatedly heard in the rhetoric of hunters, canoeists, and snowmobilers as well as citizens concerned about broader values.”); see Acheson *supra* note 50, at 556 (“People hunt on land owned by others, run their snowmobiles and all-terrain vehicles (ATVs) on it, and use the land for bird watching and cross country skiing. In northern Maine, people take hiking and canoeing trips in which they camp for days on end on land owned by others. Members of the public generally feel they have a ‘right’ to use the land of others for recreation—particularly in the vast forested regions of northern Maine. Sometimes they ask permission to use the land, but often they do not. When land is posted, many feel that something that should be theirs has been taken away. It is not uncommon for members of the public to tear down the ‘No Trespassing’ signs and use the land anyway. The landowners, for their part, generally acquiesce. Even if they are not entirely happy with the arrangement, they generally allow others to use their land without much complaint.”).

55. Nick Sambides, Jr., *‘She Has Hurt so Many People’; For Wilderness Camp Leaseholders Roxanne Quimby is Public Enemy No. 1*, BANGOR DAILY NEWS, May 22, 2008 at A1; Acheson, *supra* note 2, at 20 (“Roxanne Quimby had posted her land and no one in authority seriously challenged her right to do so, but in the process, she had violated a number of informal rules and expectations of rural Mainers.”).

56. *Our Landowners*, ME. SNOWMOBILE ASS'N, <http://www.mesnow.com/MaineLandowners.html> (last visited Nov. 24, 2015). Snowmobiling contributes up to \$350 million to Maine's economy each winter. Julia Bayly, *Snowmobile Enthusiasts Fuel \$350 Million Economic Boom Statewide*, BANGOR DAILY NEWS (JAN. 29, 2010, 9:29 PM), <http://bangordailynews.com/2010/01/29/business/snowmobile-enthusiasts-fuel-350-million-economic-boom-statewide/>.

57. ME. SNOWMOBILE ASS'N, <http://www.mesnow.com/> (last visited Nov. 24, 2015).

trail spanning Maine's coast with islands and other coastal sites available for public use.⁵⁸ Originally encompassing state-owned islands exclusively, its purpose is similar to the Maine Snowmobile Association—to exchange good stewardship for assurance of access.⁵⁹ Over time, private owners came to value that exchange in their own right.⁶⁰ As of the summer of 2014, the Maine Island Trail included some 207 islands and coastal sites open to public camping or picnicking, of which two-thirds are private property.⁶¹

B. Law

Customary uses and private agreements allowing public use still do not confer any public *right* to use private property. Those who enjoy this permissive access fear that landowners might withdraw their permission at any time.⁶² Demographic changes in the state and “horror stories” of in-migrants buying Maine land and posting it, unaware or unmindful of the culture of permissive access, heighten this fear.⁶³

Maine's Legislature has clearly acknowledged the importance of permissive access and has enacted legislation to maintain and promote public access to the outdoors.⁶⁴ The legislative findings that preface Maine's Natural Resource Protection Act recognize the recreational value of natural resources as contributing

58. *About Us*, ME. ISLAND TRAIL ASS'N, <http://www.mita.org/about> (last visited Oct. 27, 2014). Economic activity related to the Maine Island Trail amounts to approximately \$1.75 million per year. Tux Turkel, *The Revenue Trail: Maine's Nationally Recognized Recreational Water Route Generated \$1.75 Million a Year in Spending over the Past Nine Boating Seasons*, PORTLAND PRESS HERALD, Apr. 17, 2011 at A1.

59. See David R. Getchell, Sr., *The Island Trail*, 57 SMALL BOAT J. 88, 88 (1987).

60. See generally ME. DEP'T OF CONSERVATION, BUREAU OF PARKS & LANDS, THE RECREATION MGMT. PLAN FOR THE PUBLIC ISLANDS ON THE ME. ISLAND TRAIL 2004–2014 (2003).

61. *Partners Answer the Call*, THE ISLAND TRAIL 13 (Summer 2014), http://issuu.com/meislandtrail/docs/mita_spring14_final_pagesreordered (last visited Apr. 25, 2015).

62. Restricting access is commonly referred to as “posting” land—usually by literally posting “no trespassing” signs as prescribed by statute. 17-A M.R.S.A. § 402(1)(C) makes it a crime to enter land (1) posted in accordance with 17-A M.R.S.A. § 402(4), which requires signs not more than 100 feet apart, (2) posted in a manner that is “reasonably likely to come to the attention of intruders,” or (3) fenced or otherwise enclosed to exclude intruders.

63. According to a survey conducted by the Small Woodland Owners Association of Maine, 14.9 percent of survey respondents posted their land “no trespassing” in 1991. In 2005, the results of a similar survey indicated that 39.4 percent of owners posted them. Acheson, *supra* note 2. Still, that fear is likely overstated. See Kristen Andresen, *Whose Woods?*, UMAINE TODAY, Fall 2010 at 27, 29 (“One of the biggest misconceptions that has emerged . . . is that out-of-state landowners are more likely to post their land. In fact, just the opposite is true. People from away don't always come up here in the fall, so they don't see the hunters on their land . . . [t]here's this idea that we've got new landowners coming in and buying off the land and shutting down access, but that's not the case. It's the Mainers.”) (internal quotations omitted).

64. To the extent that the public must rely on landowner acquiescence to provide the vast majority of land for hunting, snowmobiling, kayaking, hiking, and other outdoor pursuits, the State has a powerful incentive to create policies that encourage landowners to allow public use. In 2013, hunting accounted for over \$231 million of the \$7.7 billion spent on tourism in Maine. ME. OFFICE OF TOURISM, HUNTING IN MAINE IN 2013: A STATEWIDE AND REGIONAL ANALYSIS OF PARTICIPATION AND ECONOMIC CONTRIBUTIONS ii (2014), https://www1.maine.gov/ifw/pdfs/ME_Hunt_Economics_Final_Report_10-06-2014.pdf (last visited Nov. 24, 2015); VISITMAINE.COM, 2013 MAINE TOURISM HIGHLIGHTS, http://visitmaine.com/assets/downloads/2013_MaineFactSheet.pdf (last visited Nov. 24, 2015).

to the general welfare of Maine's citizens.⁶⁵ Likewise, the statute creating the Land for Maine's Future program states at the outset that public access to Maine's natural environment is essential to the State's quality of life.⁶⁶ Further, in the statutes relating to planning and land use regulation, Maine recognizes recreational access to critical natural resources as one of the State's goals in enacting those statutes.⁶⁷ Finally, the Department of Inland Fisheries & Wildlife is required to develop and implement a landowner relations program to "[e]ncourage landowners to allow outdoor recreationists access to their property."⁶⁸

The Maine Supreme Judicial Court, sitting as the Law Court, has also given legal effect to Maine's tradition and culture of permissive use. As the Law Court explained, "Maine has a tradition of acquiescence in access to nonposted fields and woodlands by abutters and by the public. Pursuant to our open lands tradition, recreational use of unposted open fields or woodlands and any ways through them are presumed permissive[.]"⁶⁹

1. Trespass

Still, a Maine outdoorsman faces a confusing array of statutes, customs, and presumptions if he attempts to determine his rights with certainty. As a starting point, Maine's criminal trespass statute makes it a crime when a person, "knowing

65. 38 M.R.S.A. § 480-A (Pamph. 2014) ("[T]he State's rivers and streams, great ponds, fragile mountain areas, freshwater wetlands, significant wildlife habitat, coastal wetlands and coastal sand dunes systems are resources of state significance. These resources have great scenic beauty and unique characteristics, unsurpassed recreational, cultural, historical and environmental value of present and future benefit to the citizens of the State and that uses are causing the rapid degradation and, in some cases, the destruction of these critical resources, producing significant adverse economic and environmental impacts and threatening the health, safety and general welfare of the citizens of the State.") (emphasis added).

66. 5 M.R.S.A. § 6200 (2013 & Supp. 2014) ("Maine is blessed with an abundance of natural resources unique to the northeastern United States; that these natural resources provide Maine residents and visitors to the State with an unparalleled diversity of outdoor recreation opportunities during all seasons of the year and a quality of life unmatched in this nation; that the continued availability of public access to these recreation opportunities and the protection of the scenic and natural environment are essential for preserving the State's high quality of life . . . that rising land values are putting the State's real estate in shoreland and resort areas out of reach to most Maine citizens . . . and that public interest in the future quality and availability for all Maine people of lands for recreation and conservation is best served by significant additions of lands to the public domain.") (emphasis added).

67. 30-A M.R.S.A. § 4312(3)(F), (J) (2011 & Supp. 2014) ("The Legislature declares that, in order to promote and protect the health, safety and welfare of the citizens of the State, it is in the best interests of the State to . . . protect the State's other critical natural resources, including without limitation, wetlands, wildlife and fisheries habitat, sand dunes, shorelands, scenic vistas and unique natural areas; [and] . . . promote and protect the availability of outdoor recreation opportunities for all Maine citizens, including access to surface waters.")

68. 12 M.R.S.A. § 10108(4-A)(A) (2005 & Supp. 2014). The statute goes as far as to prescribe that, to the extent resources allow, the program shall include education programs for landowners regarding liability, landowner rights, and the tradition of allowing use of private land for recreation, and programs for land users including a code of ethics for using private land. *Id.* § 10108(4-A)(C). Still, this program is always a work in progress. George Smith, *Maine Must Expand Landowner Relations Programs—and it's Up to You to Git-er-done!*, BANGOR DAILY NEWS (Jan. 5, 2015), <http://georgesoutdoornews.bangordailynews.com/2015/01/05/maine-woods/maine-must-expand-landowner-relations-programs-and-its-up-to-you-to-git-er-done/>.

69. *Weeks v. Krysa*, 2008 ME 120, ¶ 8, 955 A.2d 234 (citations omitted).

[he] is not licensed or privileged to do so,” (1) enters a dwelling, (2) enters any locked or barred structure, (3) enters any enclosed or posted place, or (4) defies a lawful order to leave or not to enter.⁷⁰ In the face of landowner silence, then, a mere stroll through private woods does not expose a man to criminal liability. Obtaining a similar result, Maine’s civil trespass provisions typically include damages as an element.⁷¹ On the other hand, the Law Court has recently confirmed that common law trespass remains a viable cause of action in Maine.⁷² Nevertheless, a Maine court ruling on a common law trespass action would likely consider custom and history as evidence of consent in the case of landowner silence, defeating the claim.⁷³

2. Access Protection

The popular understanding of the tradition of public use of private land is that it is enshrined as a rule of “permissive trespass.”⁷⁴ However, beyond mere permissive trespass, Maine law also specifically protects certain kinds of access to private land.

The Great Ponds Access Act is a statutory provision that authorizes a particular public use of private land.⁷⁵ The act secures the public right to access great ponds,⁷⁶ stating, “[n]o person on foot shall be denied access or egress over unimproved land to a great pond.”⁷⁷ Great ponds are held by the State in trust for the public.⁷⁸ Even without this statute, the public has a common law right “to fish and fowl and to cut ice upon [great ponds] . . . provided it can reach the pond by ‘passing to it on foot

70. 17-A M.R.S.A. § 402(1) (2006 & Supp. 2014).

71. *See, e.g.*, 14 M.R.S.A. §§ 7551-B, 7552 (2003 & Supp. 2014) (providing liability in a civil action when a person intentionally enters another’s land without permission and causes damage).

72. *Medeika v. Watts*, 2008 ME 163, ¶ 5, 957 A.2d 980 (“A person is liable for common law trespass ‘irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally enters land in the possession of the other, or causes a thing or a third person to do so.’” (citing RESTATEMENT (SECOND) OF TORTS § 158(A) (1965))). Even in the absence of damage, a court would go on to address the issue of nominal damages. *See id.*; *Gaffny v. Reid*, 628 A.2d 155, 158 (Me. 1993) (“Some damage is presumed to flow from a legal injury to a real property right.”).

73. *See Weeks*, 2008 ME 120, ¶ 8, 955 A.2d 234; RESTATEMENT (SECOND) OF TORTS § 892(1) (1965) (“Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.”); *id.* at cmt. d. (“[I]f it is the custom in wooded or rural areas to permit the public to go hunting on private land or to fish in private lakes or streams, anyone who goes hunting or fishing may reasonably assume, in the absence of a posted notice or other manifestation to the contrary, that there is the customary consent to his entry upon private land to hunt or fish.”).

74. *See* Deirdre Fleming, *New bill to protect rights of owners worries land users*, PORTLAND PRESS HERALD (Mar. 20, 2011), http://www.pressherald.com/2011/03/20/new-bill-to-protect-rights-of-owners-worries-land-users_2011-03-20/ (referencing a century-old history of “permissive trespass” and describing proposed legislation that would enact a “reverse posting” law in Maine requiring recreational users including hunters to obtain express permission before traversing private land for outdoor pursuits); Trevor Maxwell, *Can you get to the beach?*, PORTLAND PRESS HERALD (Jul. 31, 2011), http://www.pressherald.com/2011/07/31/can-you-get-to-the-beach_2011-07-31/ (invoking Maine’s history of “permissive trespass” or “permissive access”).

75. 17 M.R.S.A. § 3860 (2006).

76. “Great ponds” are defined by Maine statute as “any inland bodies of water which in a natural state have a surface area in excess of 10 acres and any inland bodies of water artificially formed or increased which have a surface area in excess of 30 acres.” 38 M.R.S.A. § 480-B(5) (2001 & Supp. 2014).

77. 17 M.R.S.A. § 3860.

78. *Flood v. Earle*, 145 Me. 24, 28, 71 A.2d 55, 57 (1950).

without trespassing upon any man's corn or meadow.”⁷⁹ The Great Ponds Access Act codifies this common law right.⁸⁰

Maine's common law also authorizes the public to enter private intertidal land for the purpose of “fishing, fowling, [or] navigation.”⁸¹ In the early 1980's, the Maine Legislature attempted to codify this common law right as well, but the Law Court held that the resulting statute was unconstitutional because it simultaneously purported to expand the scope of the right.⁸²

3. Landowner Incentives

As an alternative to creating statutory rights to access private land, other provisions of Maine law encourage landowners to permit public access voluntarily. For example, Maine's landowner liability law protects landowners against tort claims from members of the public injured while on private land.⁸³ The landowner liability law states that “[a]n owner . . . of premises does not have a duty of care to keep the premises safe for entry or use by others for recreational . . . activities or to give warning of any hazardous condition . . . to persons entering for those purposes.”⁸⁴ Because the statute eliminates any duty owed by a landowner to anyone using the landowner's property for recreation, it thereby defeats ordinary negligence claims.⁸⁵ The law goes even further by requiring anyone who fails in an action for landowner liability to pay the landowner's costs, including attorney's fees.⁸⁶ Since the enactment of the landowner liability law, there has not been even one successful suit for damages based on landowner liability to recreational users of private land.⁸⁷ The protection landowners receive through this statute is likely responsible for the success of arrangements like the snowmobile trail network that depend on extensive

79. *Id.* (citing *Conant v. Jordan*, 107 Me. 227, 229–30, 77 A. 938, 939 (1910)). These common law rights derive in part from the Colonial Ordinance of 1641–47. See Massachusetts Body of Liberties § 16 (Dec. 10, 1641), reprinted in SOURCES OF OUR LIBERTIES 148, 150 (Richard L. Perry ed. 1978).

80. See *Conant v. Jordan*, 107 Me. 227, 230, 77 A. 938, 939 (1910) (“[F]or great Ponds lying in common though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow.”). The court explained that the Colonial Ordinance became part of Maine common law “not in the sense that the court extended it to this state, but that the court found it extended by the public itself, as the expression of a public right, so acted upon and acquiesced in as to have become a settled, universal right.” *Id.* The statute further authorizes a fine and jail time for anyone impeding access to a great pond across private land. 17 M.R.S.A. § 3860 (“Whoever violates this section shall be punished by a fine of not more than \$100 and by imprisonment for not more than 90 days.”).

81. For a more expansive discussion, see *infra* Part IV.

82. See *infra* Part IV.B.1.

83. 14 M.R.S.A. § 159-A (2003 & Supp. 2014).

84. *Id.*

85. *Id.*; see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 cmt. b (2010).

86. 14 M.R.S.A. § 159-A (“The court shall award any direct legal costs, including reasonable attorneys' fees, to an owner, lessee, manager, holder of an easement or occupant who is found not to be liable for injury to a person or property pursuant to this section.”).

87. *Landowner Liability Explained: Rights and Responsibilities*, ME. DEP'T OF INLAND FISHERIES & WILDLIFE, http://www.maine.gov/ifw/aboutus/commissioners_office/OutdoorPartnersPgrm/landowner_liability_explained.htm (last visited Nov. 24, 2015).

use of private land.⁸⁸

Another example concerns the establishment of a public easement by prescription. In that context, the Law Court will apply a presumption that any public use is with the landowner's permission and is not adverse to the landowner's interests.⁸⁹ This has the effect of defeating the adversity element of prescriptive easement claims when the public undertakes recreational use of private land.⁹⁰

Here, both the Legislature and the Law Court apply incentives to encourage a policy of promoting public access to the outdoors by opening private land to the public. Specifically, Maine's law negates a landowner's otherwise well-founded fears of adverse possession claims and suits for personal injury.

4. Eminent Domain

Finally, Maine takings law demonstrates that courts have been especially jealous guards of individual property rights. Both the Federal and Maine Constitutions limit the exercise of eminent domain by requiring that the government pay "just compensation" whenever it takes private property for public use.⁹¹ Even early Maine cases insisted that takings be justified by true public use, while later cases held that takings could occur even when the private owner retains his title.

a. Public Use

In one early Maine case, *Proprietors of the Kennebec Purchase v. Laboree*, the Law Court declared that legislation making it easier to establish an adverse possession claim was unconstitutional.⁹² The court took the position that doing so transferred some quantum of property from the owner to the adverse possessor thereby taking property from one party and giving it to another.⁹³ This the court refused to allow.⁹⁴ Accordingly, the early Maine court also categorically refused to allow the exercise of eminent domain to seize land for the use of a railroad, holding that between private parties no man could be compelled "to part with an inch of his

88. See *supra* Part III.A.

89. *Lyons v. Baptist Sch. Of Christian Training*, 2002 ME 137, ¶ 24, 804 A.2d 364.

90. *Id.* ¶ 25; see also RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 (2000).

91. See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); Me. Const. art. I, § 21. Eminent domain is the inherent power of the sovereign to take private property and convert it to public use. *Eminent Domain*, BLACK'S LAW DICTIONARY (9th ed. 2009).

92. 2 Me. 275 (1823). This decision also established the Law Court's power of judicial review—to strike down unconstitutional acts of the Maine Legislature in the same way that *Marbury v. Madison*, 5 U.S. 137 (1803), did for the United States Supreme Court. HUGH G. E. MACMAHON, PROGRESS, STABILITY, AND THE STRUGGLE FOR EQUALITY 38 (Drummond, Woodsum & MacMahon 2009).

93. *Laboree*, 2 Me. 275, 290–91 (1823). The statute would have enabled a person claiming title by adverse possession to claim a parcel of land greater than that which he actually occupied during the statutory period. Further, the statute purported to have retroactive effect. P.L. 1821, ch. 62, § 6.

94. *Id.* ("[T]he private property of one man cannot be taken for the private uses of another in any case. It cannot by a mere act of the legislature be taken from one man, and vested in another directly[.]"). The Law Court held that the statute was unconstitutional because it would "impair and destroy vested rights, and deprive the owners of real estate of their titles thereto, by changing the principles and the nature of those facts, by means of which those titles had existed and been preserved to them in safety." *Id.* at 295.

estate.”⁹⁵

However, by the early 20th century, the Law Court was willing to allow the exercise of eminent domain to take private property and convey it to another private entity if the public nonetheless held a right to use the condemned property. In the case of *Ulmer v. Lime Rock Railroad Co.*, the court approved of taking private land to construct a railroad branch line.⁹⁶ The court reasoned, “[T]ransportation lines from place to place . . . are as much a public enterprise and use as are public roads.”⁹⁷ Not to be dissuaded by the contention that only the railroad would put the track to use, the court held that “[t]he character of the use, whether public or private, is determined by the extent of the *right by the public* to its use, and not by the extent to which that right is . . . exercised.”⁹⁸

Still, the Law Court was unwilling to extend such a right in a situation where the public would merely benefit from a private use. In the case of *Brown v. Gerald*, an electric company sought an easement by eminent domain to cross a private farm with its poles and wires to reach a private manufacturing facility.⁹⁹ While the court recognized that the manufacturing facility would be of great “public benefit,” it was unwilling to equate that with “public use.”¹⁰⁰ In the court’s view, taking private property to facilitate private business—no matter the degree of public utility—was “not legislation, but robbery.”¹⁰¹ Since the 1905 decision in *Brown* through the present, the Law Court has remained protective of this narrow interpretation of “public use.”¹⁰² Given this long and consistent history, the public use requirement

95. *Bangor & Piscataquis R.R. Co. v. McComb*, 60 Me. 290, 294 (1872) (“This exercise of the right of eminent domain is, in its nature, in derogation of the great and fundamental principle of all constitutional governments, which secures to every individual the right to acquire, possess, and defend property. As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate. The constitution protects him and his possessions, when held on, even to the extent of churlish obstinacy.”).

96. 98 Me. 579, 57 A. 1001 (1904).

97. *Id.* at 586, 57 A. at 1003.

98. *Id.* However, it is worth considering whether this seeming relaxation of the “public use” requirement reflects a change in the court’s view of private property, or the degree to which the court would go to facilitate the business of the railroad. The court’s cases of the late 1800’s and early 1900’s made it effectively impossible for a railroad to ever be held liable for damages resulting from a collision at a railroad crossing. See MACMAHON, *supra* note 92, at 79–102 (surveying tort cases involving collisions at railroad crossings through 1920 and reasoning that the doctrine of contributory negligence barred a plaintiff’s recovery whether he saw the train coming, in which case he was negligent for failing to avoid it, or did not see the train coming, in which case he was negligent for failing to see it).

99. 100 Me. 351, 356, 61 A. 785, 787 (1905).

100. *Id.* at 370, 61 A. at 793 (“Something more than mere public benefit must flow from the contemplated use. Public benefit or interest are not synonymous with public use. . . . If the doctrine of public utility were adopted in its fullest extent, there would practically be no limit upon the exercise of this power.”).

101. *Id.* at 371, 61 A. at 794. The court further discussed the difference between supplying electricity to a private business and supplying electricity for public lighting. In its view, the latter would constitute a public use justifying the exercise of eminent domain. *Id.* at 376, 61 A. at 796.

102. See, e.g., *Paine v. Savage*, 126 Me. 121, 125, 136 A. 664, 666 (1927) (holding that a statute purporting to allow lumber operators to cross private land without being liable for trespass was unconstitutional and holding that “[t]he public benefit doctrine does not obtain in this state.”); *Hayley v. Davenport*, 132 Me. 148, 149–50, 168 A. 102, 103 (1933) (holding that a statute purporting to allow a

under Maine law is narrower—and thus more protective of individual property rights—than federal law.¹⁰³

b. Takings

Another limitation on a state’s power of eminent domain is the term “taking” itself. The requirement that a state pay compensation whenever its actions amount to a taking limits the state’s exercise of the police power.¹⁰⁴ Yet, it is not always clear when a taking has occurred. Easy cases are those where legal title is wrested from one party and vested in another. Hard cases concern when a legislative action *short of taking title* restricts what the landowner may do with his land—so-called “regulatory takings.”¹⁰⁵

In *State v. Johnson*, a 1970 opinion involving a wetlands statute that prevented a property owner from filling in coastal land, the Law Court reasoned, “[D]eprivation of property contrary to constitutional guaranty occurs if it deprives an owner of one of its essential attributes, destroys its value . . . or imposes conditions upon the right

person to establish drains or ditches across other private property to make the person’s own land accessible or useful was unconstitutional and holding that “an appropriation of property for a purpose which is a great benefit to the public is not for that reason a taking for a public use.”); *Blanchard v. Dep’t of Transp.*, 2002 ME 96, ¶ 29, 798 A.2d 1119.

103. See *Kelo v. City of New London*, 545 U.S. 469 (2005). The plaintiffs in *Kelo* challenged the City’s exercise of eminent domain to take their property for the purpose of economic redevelopment. *Id.* at 472. In a controversial decision, the Court held that a “public purpose”—in this instance economic redevelopment—was a public use that could support the exercise of eminent domain. *Id.* at 489–90. What is more, the Court recognized that “many States already impose ‘public use’ requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.” *Id.*

104. See *supra* note 1. A state’s police power is the inherent right of the sovereign to legislate to enhance the public health, safety, morals, and general welfare. *Police Power*, BLACK’S LAW DICTIONARY (9th ed. 2009).

105. The United States Supreme Court sketched out the framework for these hard cases in 1922: “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Penn. Coal. Co. v. Mahon*, 260 U.S. 393, 415–16 (1922) (“We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said this is a question of degree—and therefore cannot be disposed of by general propositions.”). Since then, the Court has endeavored to determine exactly how far is “too far.” See *Penn. Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978) (“[W]hether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case.”) (internal quotation omitted). Perhaps unsurprisingly, bright line rules in this area of the law—so-called “regulatory takings”—have been hard to come by. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 646–47 (1981) (Brennan, J., dissenting) (“The question presented on the merits in this case is whether a government entity must pay just compensation when a police power regulation has effected a ‘taking’ of ‘private property’ for ‘public use’ within the meaning of that constitutional provision. Implicit in this question is the corollary issue whether a government entity’s exercise of its regulatory police power can ever effect a ‘taking’ within the meaning of the Just Compensation Clause.”). Still, two bright-line rules are that “permanent physical invasions” and regulations stripping land of all economically beneficial use constitute takings. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007, 1015–17 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421–22, 425–26 (1982).

to hold or use it and thereby seriously impairs its value.”¹⁰⁶ The 1982 case of *Seven Islands Land Co. v. Maine Land Use Regulation Commission* expanded on that definition, explaining that “[t]he proper procedure for analyzing taking questions is to determine the value of the property at the time of the governmental restriction and compare that with its value afterwards, to determine whether the diminution, if any, is *so substantial as to strip the property of all practical value*”¹⁰⁷

Applying these rules, the court was unwilling to find takings for the following: (1) lost profits due to public competition with a private ambulance service;¹⁰⁸ (2) withholding “pass-through” of child support overpayments;¹⁰⁹ (3) withholding overpayments of Medicare reimbursements;¹¹⁰ and (4) a wetlands ordinance that prevented building on property that was already unbuildable.¹¹¹

On the other hand, the court found that a taking occurred when a statute purported to allow a private way to be laid out across private property that was formerly a public way because it would not have been for a public use.¹¹² A taking also occurred when a statute purported to expand the public’s existing rights to use private intertidal land because it deprived owners of an essential attribute of property: the right to exclude.¹¹³

106. 265 A.2d 711, 715 (Me. 1970). The statute at issue required permission from a State Wetlands Control Board prior to any alteration or use of wetlands. *Id.* at 712–13. The statute has since been repealed. P.L. 1975, ch. 595, § 1. Making an ad hoc inquiry into “facts peculiar to the case,” the court found that preventing the property owners from filling their land was “both an unreasonable exercise of police power *and* equivalent to taking within constitutional considerations.” *Johnson*, 265 A.2d at 716–17 (emphasis added).

107. 450 A.2d 475, 482 (Me. 1982) (emphasis added).

108. *Ace Ambulance Serv., Inc. v. City of Augusta*, 337 A.2d 661 (1975). In *Ace Ambulance*, the City of Augusta planned to operate a publicly funded ambulance service as authorized by 30 M.R.S.A. § 5105(7) (repealed by P.L. 1987, ch. 737, § A, 1). The plaintiffs operated a private ambulance service and argued that because they expected to lose profits due to competition, the City’s action amounted to a taking requiring just compensation. The court did not agree, reasoning that “[n]or is the fact that in operation the act may tend to lessen the profits of a few private dealers or even force them from business, a matter of consideration for the court. ‘It is for the legislature to determine from time to time what laws and regulations are necessary or expedient for the defense and benefit of the people, and however inconvenienced, restricted or even damaged, particular persons and corporations may be, such general laws and regulations are held valid unless there can be pointed out, some provision in the State or United States Constitution, which clearly prohibits them.’” *Id.* at 666–67 (citations omitted).

109. *Farley v. Dept. of Human Svcs.*, 621 A.2d 404 (1993). The Law Court held that the “plaintiffs held no constitutionally protected property rights in the improperly withheld pass-through funds ‘The concept of a taking does not apply to an overpayment of money to the state by a citizen, whether in the form of a welfare reimbursement[,] tax payment, or a fine under a statute later declared unconstitutional.’” *Id.* at 407 (“It would be quite strange indeed if, by virtue of an offer to provide benefits to needy families . . . Congress or the States were deemed to have taken some of those very family members’ property.”).

110. *York Hosp. v. Me. Health Care Fin. Comm’n*, 719 F.Supp. 1111, 1121 (D. Me. 1989) (“[T]he Court finds no entitlement on the part of Plaintiffs to ‘profits’ from its administration of care under the Medicare Act. Absent legal entitlement to specific profits, there can be no property interest, and thus, no taking.”).

111. *MC Associates v. Town of Cape Elizabeth*, 2001 ME 89, ¶¶ 12–16, 773 A.2d 439 (holding that a landowner failed to establish that his property was actually “buildable” prior to the enactment of the wetlands ordinance that was being challenged and therefore did not establish that the ordinance deprived the landowner of economically viable use of the property).

112. *Brown v. Warchalowski*, 471 A.2d 1026 (Me. 1984).

113. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989). For a much more extensive discussion of this subject, see *infra* Part IV.

C. Summary

While it lacks an enforceable right to do so, the public enjoys a liberal practice of using private land for recreation. That practice stems from a long tradition of public access to private property, and Maine law provides incentives for landowners to allow such access. Nonetheless, the existing scheme is weak in comparison to anything resembling a right to roam and reduces property to a one-sided consideration of the landowner's perspective, allowing little or no weight to outside considerations.¹¹⁴ Compared with its neighbors, Maine's hierarchy of rights is typical. Even Vermont, which has constitutionalized a right to hunt on private property, allows for the abrogation of that right through a landowner's affirmative actions.¹¹⁵

Accordingly, Maine takings law demonstrates a consistent strong protection for individual property rights throughout the state's history. Thus, with limited exceptions for great ponds and the intertidal zone, Maine recognizes a right to exclude that trumps any public right to access private land, even if that right requires the landowner to take some affirmative action such as enclosing an area with a fence or posting no trespassing signs to exercise that right.¹¹⁶

IV. CASE STUDY: PUBLIC RIGHTS IN THE INTERTIDAL ZONE

By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.¹¹⁷

An examination of Maine's treatment of intertidal lands is especially informative on the issue of how the Law Court has addressed direct conflicts between public and private rights. Disputes over intertidal land represent a perennially relevant clash between public and private rights and have spawned prolific litigation as well as extensive treatment in the literature.

Most states hold title to intertidal land pursuant to the public trust doctrine.¹¹⁸ That is to say, the public retains a right to access the intertidal zone regardless of the ownership of the upland parcels.¹¹⁹ Due to its shared legal heritage with Massachusetts, Maine has one of the most restrictive public trust doctrines in the

114. FREYFOGLE, *supra* note 12, at 31 (“To phrase this arrangement . . . in terms of the legal right to exclude, is to view the issue from the landowner's perspective. It is to define the arrangement in terms of a legal right that sounds incomplete. An alternative approach . . . is to assess things from the other side, in terms of rights possessed by the public to use otherwise private lands.”).

115. *See supra* note 32.

116. *See* 17-A M.R.S.A. § 402(1)(C).

117. JUSTINIAN INST. 2.1.1 (Thomas Collett Sandars trans., 7th Am. ed. 1876).

118. *See generally* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENV'T'L L. REV. 1 (2007).

119. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) (“It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters . . . belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public[.]”).

country.¹²⁰ In the 1640's, the Massachusetts Bay Colony, of which Maine was a part, passed a series of ordinances known as the "Body of Liberties."¹²¹ The relevant portions are generally referred to today as the Colonial Ordinance of 1641–1647.¹²² Among the provisions of the ordinance, fee owners of coastal land were presumptively given title, in fee simple, extending to the mean-low water mark.¹²³ This contrasts sharply with most other states and with most countries in the world.¹²⁴ Yet, the seemingly small difference between high and low water has been controversial and made a tremendous difference to the scope of public rights in the state.

This case study of the public right to use the intertidal zone is helpful for two reasons. First, the controversy involves highly valued oceanfront property. The desirability of the contested property and the intensity of the controversy have generated a substantial body of case law on the issue.¹²⁵ Second, the most recent cases in this area do not involve the establishment of novel rights to access the ocean where none previously existed. Rather, the issue has been whether a pre-existing right could expand to encompass modern uses. In ruling on that more limited issue, the Law Court's holdings demonstrate that even a nominal infringement of the right to exclude constitutes a taking.

A. Intertidal Lands before Moody Beach (Bell I/II)

Cases beginning shortly after statehood and continuing through the mid-1980s trace Maine's treatment of the common law in the intertidal zone. In a case exemplifying the legal continuity between Massachusetts and the new State of Maine, *Lapish v. President of Bangor Bank* cites with approval a Massachusetts Supreme Judicial Court opinion approving of the presumption that an upland owner's property extends to the low-water mark.¹²⁶ The court noted "[e]ver since [the decision in *Storer v. Freeman*], as well as long before, the law on this point has been considered as perfectly at rest; and we do not feel ourselves at liberty to discuss it as an open question."¹²⁷ Accordingly, the Law Court repeatedly reaffirmed and applied the presumption that the upland owner's title extends to the low-water

120. Craig, *supra* note 118, at 4–5.

121. Sidney St. F. Thaxter, *Will Bell v. Town of Wells be Eroded With Time?*, 57 ME. L. REV. 117, 120 (2005).

122. *Id.*

123. Massachusetts Body of Liberties § 16, *reprinted in* Perry, *supra* note 79 ("[I]n all creeks, coves, and other places, about and upon salt water where the Sea ebs and flows, the Proprietor of the land adjoining shall have propieter to the low water mark[.]"); *see also* Brian Sawers, *The Right to Exclude from Unimproved Land*, TEMP. L. REV. 665, 671 (2011) (discussing Massachusetts' and Maine's failed attempts to overturn the 1647 statute that transferred ownership of the intertidal to the upland property owner).

124. *See generally* Craig, *supra* note 118.

125. *See infra* Part IV.

126. 8 Me. 85, 93 (1831).

127. *Id.* In *Lapish*, the Law Court cited with approval an opinion of the Massachusetts Supreme Judicial Court, *Storer v. Freeman*. *Id.* *Storer* involved a dispute in what would become the state of Maine ten years later, in which the court held that the presumption of fee ownership to the low-water mark could be defeated by specific language in the deed. *Storer v. Freeman*, 6 Mass. 435, 439–40 (1 Tyng) (1810).

mark.¹²⁸ In this consistent line of cases, the court has held that private titles in Maine may include the intertidal zone, but that the public nevertheless retains some rights therein.

B. *Moody Beach and Aftermath*

In the 1980s, the Law Court issued a pair of opinions that drew a figurative “line in the sand” narrowly defining the rights held by the public in intertidal land. The cases involved upland owners of Moody Beach, located in the Town of Wells, Maine.¹²⁹ The owners sought to quiet title to their beachfront parcels, and to obtain declaratory judgment that the public claim to the intertidal zone encompassed only “fishing, fowling[,] and navigation.”¹³⁰

I. *Bell v. Town of Wells*

In *Bell I*, the Law Court reviewed the general principles of the public trust doctrine related to intertidal zones in the United States—except for Maine and Massachusetts.¹³¹ However, the court explicitly noted that the common law of the intertidal zone in Maine is distinct from the common law of England, having developed instead from the Colonial Ordinance.¹³² The court went on to conclude that these considerations compelled the conclusion that upland owners of shorefront land also own title *in fee simple* to the adjoining intertidal zone, subject to a public easement for “fishing, fowling, and navigation.”¹³³

128. *E.g.*, *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384, 392 (1847) (holding that the ordinance of 1641 did not intend to abridge the right to use the waters between high and low water for navigation, nor to remain on the flats for commercial purposes at the ebb of the tide); *State v. Wilson*, 42 Me. 9, 28 (1856) (holding that an upland owner’s “title to the shore [is] as ample as to the upland.”); *Marshall v. Walker*, 93 Me. 532, 536, 45 A. 497, 498 (1900) (“[T]he proprietor of the main holds the shore to low water . . . in fee, like other lands, subject, however, to the jus publicum, the right of the public to use it for the purposes of navigation and of fishery[.]”).

129. *Bell v. Town of Wells*, 510 A.2d 509, 510 (Me. 1986) [hereinafter *Bell I*].

130. *Id.*

131. *Id.* at 511 (describing as “settled” that “[b]y the common law of England that was brought to this country by the earliest settlers, unless title to the intertidal zone was held by private landowners pursuant to grant or prescription or by the crown in its private capacity, the title was vested in the crown which held it in trust for the use of the public.”). The idea that certain lands were held by the sovereign in trust for the public is of ancient pedigree and is referred to as the “public trust doctrine.” *Public-trust Doctrine*, BLACK’S LAW DICTIONARY (9th. ed. 2009).

132. *Bell I*, 510 A.2d at 512 (distinguishing Maine and Massachusetts law from the rest of the United States because “the Maine common law of the intertidal zone has not developed directly from English common law, but from the Massachusetts Colonial Ordinance of 1641–47.”).

133. *Id.* at 514–15 (noting that a grantor can, by specific deed language, convey the uplands without the intertidal or the intertidal without the uplands.). This holding is not without controversy. Arguments have been made that the Colonial Ordinance was not a grant of title or, even if it was, it was beyond the state’s power to grant, and at most the presumption of ownership is of “qualified title.” See Orlando E. Delogu, *Friend of the Court: An Array of Arguments to Urge Reconsideration of the Moody Beach Cases and Expand Public Use Rights in the Intertidal Zone*, 16 OCEAN & COASTAL L.J. 47, 57–69 (2010). Delogu further argues that the Law Court erred in failing to apply the equal footing doctrine, as interpreted in *Shively v. Bowlby*, whereby states newly admitted into the Union are intended to have the same rights as the other States. *Id.* at 69–74; *Shively v. Bowlby*, 152 U.S. 1 (1894). However, questioning the *Bell I* holding is beyond the scope of this Comment.

Three years later, the court returned to the Moody Beach issues in *Bell II* to determine whether the public easement was limited to those purposes the court found in *Bell I*: fishing, fowling, and navigation.¹³⁴ In a four-to-three decision, the Law Court held that the public easement encompassed only those previously enumerated purposes.¹³⁵ With the status of the intertidal zone settled in respect to fee title and the extent of the public easement, the court went on to consider Maine's Public Trust in Intertidal Land Act.¹³⁶

The Public Trust in Intertidal Land Act (the "Act") was passed by the Maine Legislature as an attempt to "protect public uses" in the intertidal zone—something "of great public interest and grave concern to the State."¹³⁷ The Act codified the existing common law of the intertidal zone but also expanded the public rights, declaring that they included "[t]he right to use intertidal land for recreation[.]"¹³⁸ The court held that the Act was an unconstitutional taking of private property without paying just compensation.¹³⁹ The court did not analyze the statute as a regulatory taking,¹⁴⁰ but rather as an infringement on the landowner's right to exclude, constituting a physical invasion that destroyed an "essential attribute" of private property.¹⁴¹ The court endorsed the view that "[i]f a possessory interest in real property has any meaning at all it must include the general right to exclude others."¹⁴² Following *Bell II*, the court has had several opportunities to apply its holding in other similar cases over the years.

2. Eaton v. Town of Wells

In 2000, the Law Court decided *Eaton v. Town of Wells*, a case with facts similar to those in *Bell*.¹⁴³ The Eatons sued the Town of Wells seeking to quiet title to their portion of Wells Beach, which was the site of longstanding public recreational use.¹⁴⁴ The Town asserted an easement by prescription and the State intervened, asserting a claim that the public trust doctrine encompassed "walking and other recreational and amusement activities, in addition to fishing, fowling, and navigation."¹⁴⁵ The court held that the Town had in fact established a public easement by prescription over the Eatons' portion of Wells Beach, but, in so doing, the court avoided reaching the issue

134. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) [hereinafter *Bell II*].

135. *Id.* at 173.

136. *Id.* at 176–79.

137. 12 M.R.S.A. §§ 571–573 (2005 & Supp. 2014) (declared unconstitutional by *Bell II*, 557 A.2d at 179).

138. *Id.* § 573(1)(B).

139. *Bell II*, 557 A.2d at 176–79.

140. See cases cited *supra* notes 106–107.

141. *Bell II*, 557 A.2d at 177–78; *Johnson*, 265 A.2d at 715. The court relied on the *Kaiser-Loretto-Nollan* line of Supreme Court cases discussed *supra* in Part II.B. See *supra* notes 35, 39–40.

142. *Bell II*, 557 A.2d at 178 (citing Opinion of the Justices, 365 Mass. 681, 689, 313 N.E.2d 561, 568 (1974)).

143. 2000 ME 176, 760 A.2d 232. Although it is beyond the scope of this Comment, for a critique of the court's *Eaton* opinion, see Orlando E. Delogu, *Eaton v. Town of Wells: A Critical Comment*, 6 OCEAN & COASTAL L.J. 225 (2001).

144. *Eaton*, 2000 ME 176, ¶¶ 8–9, 760 A.2d 232.

145. *Id.* ¶ 3.

of the public trust doctrine.¹⁴⁶

3. McGarvey v. Whittredge

The 2011 case of *McGarvey v. Whittredge* provided a factual variation on a similar question.¹⁴⁷ The case involved a pair of scuba divers in an unusual situation in that they were unable to access the ocean from their own property, but were able to access the ocean by crossing only the neighbor's intertidal land, without passing through the neighbor's uplands.¹⁴⁸ McGarvey sought declaratory judgment that Whittredge had no right to cross the intertidal zone for scuba diving and an injunction preventing that use.¹⁴⁹

In a split opinion, three judges voted effectively to abandon *Bell II*'s rigid adherence to fishing, fowling, and navigation as the only permissible public activities in the intertidal zone, preferring instead to read those terms as providing context rather than exclusively defining the public trust rights.¹⁵⁰ Another three judges voted to retain the strict limitation, but to read the right to navigation with a "sympathetic generosity" broad enough to encompass crossing the intertidal zone to enter the ocean for scuba diving.¹⁵¹

While the Law Court's opinion was significant for expressly allowing a new type of activity, the crack it opened was a narrow one. It also raised the question whether it is workable for the court to be called on to determine, on a per-activity basis, whether the public has the associated right to engage in that activity in the intertidal zone. Despite another opportunity to do so, the court once again avoided revisiting its *Bell II* holding.¹⁵²

C. Almeder v. Town of Kennebunkport

Adding to this twenty-five year history of the public trust doctrine in the intertidal zone, the Law Court recently decided several issues in the most recent of the "beach cases:" *Almeder v. Town of Kennebunkport*.¹⁵³ The controversy in *Almeder* concerned the public right to use Goose Rocks Beach in Kennebunkport.¹⁵⁴ Goose Rocks Beach is a long sandy beach with ownership of the uplands fragmented

146. *Id.* ¶ 49. However, a concurring opinion would have preferred to overrule the court's holding in *Bell II*. *Id.* ¶ 50 (Saufley, J. concurring).

147. 2011 ME 97, 28 A.3d 620. For a critical analysis of the court's holding, see Benjamin Donahue, Case Note, *McGarvey v. Whittredge: Continued Uncertainty in Maine's Intertidal Zone*, 64 ME. L. REV. 593 (2012).

148. *McGarvey*, 2011 ME 97, ¶¶ 2–4, 28 A.3d 620 (Saufley, C.J., concurring).

149. *Id.* ¶ 6.

150. *Id.* ¶ 56.

151. *Id.* ¶ 77 (Levy, J., concurring).

152. Chief Justice Saufley continued to argue that the court need not "strictly adhere to principles of stare decisis when addressing the development of the common law," and that *Bell II* should not be construed to limit, forever, the public's rights in the intertidal zone. *Id.* ¶¶ 52–56 (Saufley, C.J., concurring); see also *Eaton*, 2000 ME 176, ¶¶ 50–55, 760 A.2d 232 (Saufley, J., concurring).

153. *Almeder v. Town of Kennebunkport*, 2014 ME 139, 106 A.3d 1099. This opinion amends and supersedes the Law Court's initial opinion in the case, *Almeder v. Town of Kennebunkport*, 2014 ME 12, 2014 WL 418052. Subsequently, the court heard motions to reconsider the judgment, which it denied in part and granted in part. *Almeder v. Town of Kennebunkport*, 106 A.3d 1115 (Me. 2014).

154. *Almeder*, 214 ME 139, ¶ 1, 106 A.3d 1099.

into numerous private house lots mixed with publicly owned parcels and access points.¹⁵⁵ For many years, beachfront owners, backlot owners, and the public alike have used and enjoyed horizontal access to the beach.¹⁵⁶ During the twentieth century, the town patrolled and maintained the beach and even provided lifeguards for a time.¹⁵⁷ Still, the duration and nature of the public's use goes back 400 years with the beach serving as, among other things, a public highway, animal pasture, and source for gathering seaweed.¹⁵⁸ The public's use of the beach has been uninterrupted for that period, but the nature of those uses has changed over time.¹⁵⁹

In 2009, the beachfront owners sued the Town of Kennebunkport, seeking (1) declaratory judgment that the public rights in the intertidal were limited to those usages expressly permitted by the Colonial Ordinance, and (2) to quiet title to their parcels down to the mean low-water mark.¹⁶⁰ The York County Superior Court found not only that the public had acquired a prescriptive easement to use the beach, and that the public had obtained an easement by custom to use the beach, but that the public trust doctrine, as expressed by the Colonial Ordinance, permits the public to engage in ocean-based activities such as windsurfing and paddle boarding.¹⁶¹ On appeal, the issues of primary importance for this Comment were whether the trial court erred: (1) in granting a prescriptive easement to the Town; (2) in granting a public easement by custom; and (3) in holding that the public trust doctrine includes the right to engage in ocean-based activities.

Establishing an easement based on prescription is similar to establishing a claim to title through adverse possession.¹⁶² Specifically, a claim of a prescriptive easement must be based on a use: (1) under a claim of right adverse to the owner; (2) with the owner's knowledge or acquiescence; and (3) for the statutory period of at least twenty years.¹⁶³ Establishing an easement by custom is somewhat different, having "developed in English common law to account for usage that lasted from time immemorial, without interruption and as a right, and that was reasonable, certain, peaceably enjoyed and consistent with other customs and laws."¹⁶⁴

155. Brief for Appellee Town of Kennebunkport at 12, *Almeder v. Town of Kennebunkport*, 2014 ME 12, 106 A.3d 1099. Of Maine's 3,500 miles of shoreline, approximately 2% is considered "beach" and only half of that—35 miles—is sand. *Costal Marine Geology—Frequently Asked Questions*, DEP'T OF AGRIC, CONSERVATION, AND FORESTRY, <http://www.maine.gov/dacf/mgs/explore/marine/faq.html#q15> (last visited December 6, 2014). Sand is therefore a rare commodity of great significance to beach-goers in Maine.

156. *Almeder*, 2014 ME 139, ¶¶ 6–11, 106 A.3d 1099. On a typical Maine beachfront, an access road runs parallel to the beach with house lots on either side of the road. The so-called "backlot" owners are those whose parcels are across the road from the beachfront. See *Back Lands*, BLACK'S LAW DICTIONARY (9th ed. 2009).

157. Brief for Appellee Town of Kennebunkport at 7, *Almeder v. Town of Kennebunkport*, 2014 ME 12, 106 A.3d 1099.

158. *Id.* at 3–4.

159. *Id.* at 3–15.

160. *Almeder*, 2014 ME 139, ¶ 3, 106 A.3d 1099.

161. *Almeder v. Town of Kennebunkport*, YORSC-RE-2009-111 at 21 (Me. Super. Ct., Yor. Cnty., Oct. 16, 2012).

162. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 (describing the elements of establishing an easement by prescription).

163. *Almeder*, 2014 ME 139, ¶¶ 20–22, 106 A.3d 1099.

164. *Id.* ¶ 35 (internal quotation marks omitted).

The significance of this holding is discussed *infra*, but what the court did not decide is equally important. The court reasoned that because the issue in front of it was solely whether the history of use established a public easement by prescription, the lower court's holding that the public trust doctrine was broad enough to encompass ocean-based recreational uses was premature, and it vacated that court's interpretation of the public trust doctrine.¹⁶⁵ On the remaining issues, the court held that the Town had also failed to establish an easement by custom.¹⁶⁶ Here the court was persuaded that easement by custom is "largely a dead doctrine in the United States because . . . no American custom could have lasted long enough to be immemorial, and that we have established methods for claiming and recording rights in land that no longer necessitate employment of the doctrine."¹⁶⁷ Accordingly, the Law Court "[has] never recognized an easement by custom as a viable cause of action in Maine."¹⁶⁸

Finally, the court remanded to the trial court the determination of whether the Town had established a prescriptive easement allowing the public to access the beach.¹⁶⁹ During the trial, the Town strenuously argued that the court should make the determination of a prescriptive easement as to the entire beach.¹⁷⁰ However, the Law Court remanded the case so that the determination could be made on a parcel-by-parcel basis.¹⁷¹ Recognizing that allowing a party to relitigate an issue it had expressly waived was unusual, the court noted that due to the importance of "public[] access to sandy beaches in Maine," equity demanded that the issue be reopened.¹⁷² However, in strong terms the court instructed the trial court to apply the presumption of permission to the facts of the case.¹⁷³

D. Summary

The court's position firmly precludes any gain of public rights in the intertidal zone through either legislation or prescription. Since *Bell II*, the Law Court has avoided revisiting its decision despite numerous invitations to do so. While this line of cases remains controversial, it is beyond the scope of this Comment to criticize

165. *Id.* ¶ 36. The court reiterated that the public trust doctrine remains defined as it was in *Bell II*. *Id.* ¶ 35 n.22.

166. *Id.* ¶ 35, 106 A.3d 1099.

167. *Id.* (quoting 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34.11[6], at 34–132 (Michael Allan Wolf ed., 2005)) (internal quotation marks omitted).

168. *Id.* Nor does there appear to be any party inclined to argue that Maine should follow a doctrine allowing the establishment of easement by custom. For example, the Maine Snowmobile Association opposes such a doctrine, believing that it would result in a "chilling effect on landowners' willingness to allow recreational access to their land." Brief of the Maine Snowmobile Association as Amicus Curiae at 12, *Almeder v. Town of Kennebunkport*, 2014 ME 139, 106 A.3d 1099; *see supra* Part III.A.

169. *Almeder*, 2014 ME 139, ¶ 33, 106 A.3d 1099.

170. *Id.* ¶ 25.

171. *Id.*

172. *Id.* ¶¶ 26–27.

173. *Id.* ¶ 33 ("[T]his is precisely the type of matter in which *Lyons* requires that the presumption of permission be applied. On remand, when the court evaluates the element of adversity, it must consider whether the Town has rebutted the presumption."); *see supra* Part III.B.3.

the legal correctness of those decisions.¹⁷⁴ Rather, the precedential effect of these cases—particularly *Bell II*'s holding that the right to exclude is an essential attribute of property ownership—is considered for what it says about the meaning of private property and the scope of the right to exclude in Maine.

V. ANALYSIS

A. *What is Left for the Public?*

In light of the Law Court's holdings in *Bell I*, *Bell II*, *Eaton*, *McGarvey*, and *Almeder* (collectively, "beach cases"), and the Supreme Court's holdings in *Kaiser*, *Loretto*, and *Nollan*, the first question is whether anything of a public right to roam remains, or whether it has been completely consumed by a private right to exclude.¹⁷⁵

1. *Token Public Rights to Use Private Land*

A person in Maine assessing the degree to which he can access the outdoors finds that his positive rights to access the land of others are few.¹⁷⁶ Nearly 400 years later, the only reliable protections are the common law rights derived from the Colonial Ordinance—the right to ingress and egress relative to a great pond, and the right to fish, fowl, and navigate in the intertidal.¹⁷⁷ Despite the solidity of those two rights and their common law pedigree, the Law Court has ironically left little room for common law development in this area.

In place of a right to roam, a would-be outdoorsman in Maine has the benefit of the presumption of landowner consent to public access.¹⁷⁸ This presumption results from a long history and tradition of landowner acquiescence to public use of unimproved land and is surely quite valuable.¹⁷⁹ However, the fact that such use is always subject to the landowner's withdrawal of consent means that there is no guarantee that this arrangement is stable or sufficient to protect the broad access to private land that the public currently enjoys. Recreational users should therefore question whether there is any possibility of expanding public rights to use private land.

2. *Restoring the Right to Roam*

Conceptually, there are only a few ways for the public to obtain new or expanded rights to access private land: (1) legislative action; (2) easement, by prescription or

174. However, there are substantial arguments that *Bell II* was wrongly decided and should be overturned. See Orlando E. Delogu, *Friend of the Court: An Array of Arguments to Urge Reconsideration of the Moody Beach Cases and Expand Public Use Rights in the Intertidal Zone*, 16 OCEAN & COASTAL L.J. 47 (2010). Despite the continuing controversy, for use as a case study the decisions are assumed settled.

175. See *supra* Parts II.B, IV.B.

176. See *supra* Part III.B.

177. See *supra* Parts III.B.2 and IV.B.1. It is notable that the rights that remain protected are those specifically found in *Bell I*, despite extensive history of other uses undertaken under claim of right. See *supra* citations at notes 158–159.

178. See *supra* Parts III.B.1, III.B.3.

179. See *supra* Part III.A.

custom; (3) purchase, by voluntary sale or eminent domain; and (4) other private agreement. Whatever the ultimate fate of *Bell II*, the Law Court was clear in that case that the public cannot acquire a *right* to use private property by legislation that infringes on a landowner's right to exclude as the Public Trust in Intertidal Lands Act purported to do.¹⁸⁰ The logical extension of the *Bell* holdings and their progeny is that the Law Court would view any legislative attempt to create a public right to access private land as a categorical taking because it would diminish a landowner's right to exclude others.¹⁸¹ Yet, the court's insistence on an absolute right to exclude is inconsistent with history.¹⁸² As was discussed *supra*, the absolute right to exclude was not originally part of a landowner's bundle of sticks in the United States.¹⁸³ Nevertheless, under the current state of the law, any legislative restoration of the right to roam is a non-starter.¹⁸⁴ The court favors a private property regime that in many ways reveres at its center the notion of private property as an absolute individual entitlement. Still, it is unsatisfying if all the Legislature may do is increase the number of benefits accruing to landowners in exchange for their suffering public access.¹⁸⁵

As for establishing public prescriptive easements, *Eaton* seemed to open the door.¹⁸⁶ With parties aligned in the same fashion as in the case of *Almeder*, the *Eaton* court held that the Town had established a public easement by prescription.¹⁸⁷ However, this opening was short-lived and the court's holding in *Almeder* weakens that option.¹⁸⁸ In a footnote, discussing the presumption that recreational activities are undertaken with the permission of the landowner, the court factually distinguished *Eaton* and reiterated that the presumption of permission must be applied in such circumstances.¹⁸⁹

Whether or not the court correctly applied the presumption of permission in *Eaton*, its opinion in *Lyons v. Baptist School of Christian Training* was clear that the presumption applies whenever the public makes recreational use of private property.¹⁹⁰ The Law Court held in *Lyons* that "it is the public recreational uses of land, not the nature of the land alone, that triggers application of the rebuttable

180. See *supra* Part IV.B.1.

181. Though the court described the extension of the public easement in the intertidal to encompass recreational uses as an extreme expansion of the public's right, it looks dramatically smaller from the landowner's perspective. See *supra* note 114. The Public Trust in Intertidal Lands Act would have increased the number of permissible uses, to be sure, but the landowner already lacked an absolute right to exclude people from the intertidal. See *supra* notes 129, 134, 137. *But see* Proprietors of the Kennebec Purchase v. Laboree, 2 Me. 275 (1823) (holding that legislation making it easier to establish an adverse possession claim was unconstitutional because it transferred some quantum of property between private parties). Still, unlike the transfer of a property to a private party in *Laboree*, this analysis concerns a right that would accrue to the public.

182. See *supra* Part IV.B.1. Surely the court could not have meant that private property had no meaning whatsoever until courts began to recognize the right to exclude as absolute.

183. See *supra* Part II.B.

184. See *supra* Part II.C.

185. See *supra* Part III.B.3.

186. See *supra* Part IV.B.2.

187. *Eaton*, 2000 ME 176, ¶ 49, 760 A.2d 232.

188. See *Almeder*, 2014 ME 139, ¶ 32 & n.19, 106 A.3d 1099.

189. *Id.*

190. 2002 ME 137, ¶ 24, 804 A.2d 364.

presumption of permissive use in public prescriptive easement cases,” and that it applies equally to “children playing on a vacant lot in town, hunters and snowmobilers crossing a cultivated field after the harvest, or families camping on privately owned wood lots.”¹⁹¹ Thus, *Almeder* limits, or at least reaffirms the limitation on, the public’s ability to acquire rights through an easement by prescription or custom.¹⁹²

Although purchase of the intertidal zone is another alternative, the cost for municipalities is probably prohibitive.¹⁹³ A more aggressive option would be to accept that granting public rights in the intertidal is a taking, exercise eminent domain for that purpose, but argue that just compensation under the circumstances is no more than a nominal payment.¹⁹⁴ Still, political concerns likely foreclose that option. Currently, that leaves only the fourth conceptual option—private agreement—to obtain and protect a public right to access private property.

3. *Begging Permission to Roam*

In theory, a balance between the landowner’s legitimate concerns regarding access and the public’s understandable interest in gaining access should work well. There is an ever-present risk that abusive behavior on behalf of recreational users will result in a loss of access because property owners would respond by withdrawing consent for public use.¹⁹⁵ At the same time, the presumption of permission and the abrogation of a legal duty to recreational users—defeating adverse possession and prescription claims as well as tort claims—mean that landowners have little practical need to deny access until and unless their land is abused.¹⁹⁶

The examples of the Maine Snowmobile Association and the Maine Island Trail Association prove that this arrangement works in practice. The combination of a tradition of shared access along with the associated landowner protections has created a legal environment that permits, if not outright fosters, the development of broad swathes of private land to which the public enjoys nearly free access.¹⁹⁷ Although the transaction costs are high, these sorts of negotiated arrangements successfully strike a balance between a landowner’s interest in a right to exclude and the public interest in having recreational access to private land.¹⁹⁸

There may also be an additional benefit in that this sort of arrangement could mitigate the “tragedy of the commons” that may result if the public had an unlimited

191. *Id.* ¶ 24.

192. *See supra* Part IV.C.

193. One wonders, however, whether the value of a strip of land that is flooded twice each day is truly more than nominal.

194. It is beyond the scope of this Comment to speculate, but it seems that a reasonable argument could be made that just compensation for the landowner’s nominally diminished right to exclude would itself be nominal.

195. *See supra* Part III.B.1.

196. *See supra* Part III.B.3.

197. *See supra* Part III.A.

198. *See* Ben Leoni, *Maine Voices: Kennebunkport Missed Collaborative Opportunity in Goose Rocks Beach Dispute*, PORTLAND PRESS HERALD, Mar. 27, 2014, http://www.pressherald.com/2014/03/27/maine-voices_kennebunkport_missed_collaborative_opportunity_in_goose_rocks_beach_dispute/. Leoni represented the plaintiffs in the *Almeder* case.

right to access private land.¹⁹⁹ Significantly, one of the important concerns to the *Bell* plaintiffs was that the beach had both a privately owned and a publicly owned section.²⁰⁰ Although the town enforced a set of rules on the public portion, there was no such enforcement on the private beach.²⁰¹ As a result, people engaged in the most objectionable activities simply took their use across to the private side of the beach where there was no enforcement.²⁰²

Both the Maine Snowmobile Association and the Maine Island Trail Association seek and obtain affirmative landowner permission in exchange for a promise of responsible use and good stewardship.²⁰³ In some sense, these communities have organized around supporting the absolute conception of private property rights, but taken a pragmatic approach to obtaining the best result. By securing the investment of both the community of landowners and the community of users, these organizations seek to protect public access and avoid the degradation of the resource.²⁰⁴

4. Summary

Maine's people, through their Legislature, have placed a high value on public access to natural resources.²⁰⁵ Yet, Maine's highest court, through its opinions in the beach cases, has interpreted Maine's Constitution to impose a nearly complete restriction on the degree to which Maine's people may gain access, by right, to use more than 90% of Maine's land area.²⁰⁶ Nevertheless, the system of legal incentives and protections that landowners enjoy likely fosters greater landowner willingness to allow public use of private land than might otherwise exist, and serves to perpetuate Maine's longstanding tradition of presumed permission.²⁰⁷ This legal regime contributes to the creation of groups dedicated to securing explicit permission to use private land in a quasi-public manner and offering user-stewardship of these

199. See generally Garrett Hardin, *The Tragedy of the Commons*, 168 SCI. 1243 (1968). The "Tragedy of the Commons" is a thought experiment describing an outcome that arises when a resource is common and open for anyone to exploit freely. In that situation, each person who uses the resource gains the full benefit of his use, yet the cost of that use is borne by the entire community of users. Ultimately, the demand of the users outstrips the available resource and the resource collapses. While Hardin was most interested in using the theory in the context of population growth, it applies equally well to this context.

200. John Duff, Orlando Delogu, Pete Thaxter, Durward Parkinson, Amy Tchao, Ben Leoni, & Tim Glidden, Remarks from panel discussion at the University of Maine School of Law, *From Moody to Goose Rocks: Public Access and Private Ownership of Maine's Shoreline* (Oct. 2, 2014).

201. *Id.*

202. *Id.*

203. See *supra* note 56; *Stewardship*, ME. ISLAND TRAIL ASS'N, <http://mita.org/volunteer/stewardship> (last visited Apr. 11, 2015).

204. See Scott Russell Sanders, *A CONSERVATIONIST MANIFESTO* 215 (Ind. Univ. Press 2009) ("Only by caring for particular places, in every watershed, can we take care of the planet. Every place needs people who will dig in, keep watch, explore the terrain, learn the animals and plants, and take responsibility for the welfare of their home ground. *No matter what the legal protections on paper*, no land can be safe from harm without people committed to care for it, year after year, generation after generation. *All conservation, therefore, must aim at fostering an ethic of stewardship.*") (emphasis added).

205. See *supra* Part III.B.

206. See *supra* Parts III.A, IV.D.

207. See *supra* Part III.C.

recreational resources in return.²⁰⁸

The question remains whether the current state of the law is the most the public can hope for. While the current regime fosters a culture of permissive use that addresses the Legislature's policy of ensuring public access to the outdoors, it still depends on landowner acquiescence to a social contract that may be unstable. The primary tool of the Legislature has been to offer a series of incentives to landowners. The next section of this Comment considers a fundamental change to one of property's articles of faith.

B. Unringing Bell

It is not an easy task to unring a bell, nor to remove from the mind an impression once firmly imprinted there.²⁰⁹

Ever since the *Bell* cases, the Law Court's holding has been controversial, and many have argued that the court's holding was legally incorrect or that there is support for interpreting the list of permitted uses as examples rather than excluding all other possible uses.²¹⁰ The Law Court itself is divided on the continued vitality of *Bell* in the context of the intertidal.²¹¹

Supposing that the Law Court one day accepts an invitation to overrule its holding in *Bell*, it would create an opening for an increased public right to use certain private land in Maine. Yet, the opening would be only in the use of the intertidal itself. The court did not limit itself in *Bell II* to holding that the Tidal Lands Act violated the Maine Constitution, but the federal Constitution as well.²¹² Specifically, the court held that the Tidal Lands Act took greater rights than those reserved by the common law, violating the Takings Clause.²¹³ Even if the court later decides that the common law permits certain activities, or even broad recreational rights, in the intertidal, it would not follow that the public could gain similar rights in a terrestrial setting. Under the *Kaiser-Loretto-Nollan* line of cases, the Supreme Court would view an attempt to create such public rights as a taking.²¹⁴

C. Moderating the Right to Exclude

This raises the question whether the Court's formalism regarding a right to exclude is justified. The Supreme Court has constructed a formidable barrier to granting the public anything resembling a right to roam across private land.²¹⁵

208. See the discussion of the Maine Snowmobile Association and the Maine Island Trail Association *supra* Part III.A.

209. *State v. Rader*, 124 P. 195, 196 (Or. 1912) (describing the difficulty inherent in instructing a jury to disregard evidence).

210. The validity of the specific arguments is beyond the scope of this Comment and has been ably addressed elsewhere. A lively discourse regarding the soundness of the Law Court's holding in *Bell I/II* and their brethren has filled many pages over the past 25 years in both the *Maine Law Review*, and the *Ocean & Coastal Law Journal*. See, e.g., Delogu, *supra* note 133; Thaxter, *supra* note 121.

211. See *McGarvey v. Whittredge*, 2011 ME 97, ¶ 56, 28 A.2d 620 (3-3 decision, Saufley, C.J., concurring); *Eaton v. Town of Wells*, 2000 ME 176, ¶¶ 50–55, 760 A.2d 232 (Saufley, J., concurring).

212. *Bell II*, 557 A.2d at 177.

213. *Id.*

214. See *supra* Part II.B.

215. See *supra* Part II.B.

Despite characterizing the right to exclude as “one of the most essential,” it was not always the case, nor is there any reason compelling that conclusion as necessary.²¹⁶ Finding an absolute right to exclude in connection with real property severely curtails the instrumental functions of property. As in Locke’s creation myth, the Court has placed society’s role subservient to individual property rights instead of the reverse or a thoughtful balance.²¹⁷

Locke himself understood the limitations of his labor theory.²¹⁸ Specifically, he acknowledged that the labor theory only worked when land was abundant.²¹⁹ The degree to which United States courts have adhered to an absolute right to exclude denies the reality that the planet does not contain “enough, and as good, left in common for others.”²²⁰ Thomas Paine, by comparison, described a conception of private property that differed from Locke’s in one fundamental respect.²²¹ Whereas under Locke’s theory a man obtains ownership of land to which he has applied his labor, Paine thought, “[I]t is the value of the improvement only, and not the earth itself, that is individual property.”²²²

Paine’s differentiation between the right to own the earth itself and the right to own improvements provides a solid theoretical underpinning for a more just conception of the right to exclude. The proper scope of the right to exclude would extend only to improved land while the landowner would retain the sole right to make improvements.²²³ Put another way, private use would remain superior to public use,

216. See *supra* Part II.B. The only Supreme Court precedent supporting the *Kaiser* Court’s finding of a “universally held” right to exclude was Justice Brandeis’ dissent in *Int’l News Serv. v. Assoc. Press. Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 & n.11 (1979) (“As stated by Mr. Justice Brandeis, ‘[an] essential element of individual property is the legal right to exclude others from enjoying it.’”) (quoting *Int’l News Serv. v. Assoc. Press.*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)). Yet, there are reasons to think that a right to exclude from intellectual property is different from a right to exclude from real property. First, denying a right to exclude in favor of a holder of intellectual property would in fact deprive the holder of all economically beneficial use. See *generally* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). Second, the federal Constitution expressly grants Congress the power to secure a right to exclude in the context of intellectual property. U.S. CONST. art I, § 8, cl. 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive Right* to their respective Writings and Discoveries[.]”) (emphasis added).

217. See *supra* Part II & notes 8–10.

218. LOCKE, *supra* note 8, at 112 (“For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.”).

219. *Id.* at 114 (“Nor was this appropriation of any parcel of land . . . any prejudice to any other man, since there was still enough, and as good left: and more than the yet unprovided could use.”).

220. *Id.* at 112.

221. THOMAS PAINE, *AGRARIAN JUSTICE* 12 (1797). Paine was moved to write on the subject after coming across a sermon entitled *The Wisdom and Goodness of God, in having made both Rich and Poor*. *Id.* at vi. According to Paine, “It is wrong to say that God made *Rich* and *Poor*; he made only *Male* and *Female*; and he gave them the earth for their inheritance.” *Id.* He further explained, “[I]t would be better that Priests employed their time to render the general condition of man less miserable than it is. Practical religion consists in doing good; and the only way of serving God is, that of endeavoring to make his creation happy. All preaching that has not this for its object is nonsense and hypocrisy.” *Id.* at vii.

222. PAINE, *supra* note 221, at 12. Further, in exchange for society’s toleration of a system of private property, Paine insisted that proprietors of cultivated land owed “ground-rent” to the community. *Id.*

223. Courts should interpret “improved land” liberally to encompass dwellings, structures of any kind, cultivated fields, and even lawns and gardens.

but public use would in turn become superior to private non-use.

As the examples from Sweden and England show, the right to exclude need not be absolute to protect a landowner's important interests.²²⁴ Moreover, examples from the United States' own history show that a more limited right to exclude is not fundamentally anathema to American notions of liberty, freedom, and property.²²⁵ Tempering that right so that it applied only to the landowner's homestead, land under cultivation, or other improved land would have the effect of restoring a public right to access the countryside while harming nothing other than an absolutist ideology.

Instead, the right to exclude currently functions as a property right for landowners to enjoy the status quo.²²⁶ Lost is the recognition that property rights in a finite world cannot consider solely the relationship between an individual and his property, but must also consider the relationship between the individual, other individuals with property, and those without.²²⁷ Without this recognition, courts weighing disputes between landowners and non-landowners will risk being unbalanced and unjust.

VI. CONCLUSION

Maine citizens and visitors to the state are fortunate to have an enviable degree of access to some of the most beautiful and captivating landscapes in the country: the rocky and sandy coast, sprawling fields and meadows, peaceful lakes, and the seemingly endless north woods. This access is all the more remarkable because so much of it takes place on private land. Yet, private landowners have steadily accumulated rights adverse to the public interest over the past few centuries, culminating in an explicit, fundamental, and, according to the Supreme Court, absolute right to exclude others.

However, the expansion of a private landowner's right to exclude has come at the cost of the public right to roam. The fact that courts have focused only on the individual landowner's perspective—viewing an increase in his power to exclude as an expansion of absolute liberty—obscures half of what logic dictates must be a zero-sum equation. Since man first looked to the Moon and saw the round shadow of our Earth fall across it, courts have had no excuse for failing to behave in accordance with a world where all resources—especially land—are finite. Rights then, particularly rights in land, cannot be created from thin air but must instead be granted by the public to an individual. Truly, the unfettered right to exclude has deprived every other person of essential property rights—for which there has been no compensation.

224. See *supra* Part II.A.

225. See *supra* Part II.B.

226. For a literary expression against this sentiment, see ROBERT A. HEINLEIN, *THE PAST THROUGH TOMORROW* 25 (1967) ("There has grown up in the minds of certain groups in this country the notion that because a man or corporation has made a profit out of the public for a number of years, the government and the courts are charged with the duty of guaranteeing such profit in the future, even in the face of changing circumstances and contrary public interest. This strange doctrine is not supported by statute nor common law. Neither individuals nor corporations have any right to come into court and ask that the clock of history be stopped, or turned back, for their private benefit.").

227. See FREYFOGLE, *supra* note 12, at 12–15.

