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FRIEND OF THE COURT: AN ARRAY OF
ARGUMENTS TO URGE RECONSIDERATION OF
THE MOODY BEACH CASES AND EXPAND
PUBLIC USE RIGHTS IN MAINE'S INTERTIDAL
ZONE

Orlando E. Delogu^{*}

I. INTRODUCTION

In the late-1980s, two cases decided by the Maine Supreme Judicial Court (Law Court) delineated littoral upland owner property rights vis-à-vis public use rights in the intertidal zone. The cases involved intertidal land in Wells, Maine, known as “Moody Beach” and were titled *Bell v. Town of Wells*.¹ Hereinafter, they will be referred to as *Bell I* and *Bell II*, respectively. Upland owner rights, to the surprise of even many upland owners, were significantly expanded; public use rights, to the disappointment of many, were correspondingly narrowed. The two cases were controversial at the time. The Marine Law Institute of the University of Maine School of Law submitted an extensive amicus brief on behalf of the public in the *Bell II* case; the *Bell II* opinion itself was a 4-3 decision of the Law Court which contained a stinging dissenting opinion by later Chief Justice Daniel Wathen.² In the wake of the two decisions, the Maine Law Review published a critical symposium issue.³

The *Bell* cases have produced further cases parsing out upland owner and public use rights in the intertidal zone, and they continue to provoke

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1. *Bell v. Town of Wells (Bell I)*, 510 A.2d 509 (Me. 1986); *Bell v. Town of Wells (Bell II)*, 557 A.2d 168 (Me. 1989).

2. *Bell II*, 557 A.2d at 180.

3. Symposium, *Public Access and the New England Shoreline*, 42 ME. L. REV. 1 (1990).

judicial and scholarly comment.⁴ Most recently, two lower court cases, both raising upland owner challenges to asserted public uses of intertidal lands, *Flaherty v. Muther*⁵ and *McGarvey v. Whittredge*,⁶ were appealed to the Law Court. The briefing schedules for both cases were set two weeks apart, and concluded in August, 2010. Oral arguments in both cases were heard in November, 2010.

Recognizing the importance of the two cases as possible vehicles for reexamination by the Law Court of one, or both, of the *Bell* holdings, the Maine Attorney General's office, asserting a broadened view of public use rights in the intertidal zone, sought and was granted intervenor status in the *Flaherty* case, and subsequently, amicus curiae status in the *McGarvey* case.

This author, a participant in the Marine Law Institute's 1989 amicus brief, sought and was granted amicus status in both cases. Both of the author's amicus briefs urged the Law Court to reexamine the *Bell* holdings, and then argued for an expanded view of public use rights in the intertidal zone.⁷

The two briefs were similar in many respects because the asserted *Bell I* and *Bell II* errors, i.e. the issues and arguments presented in each amicus brief, were similar. To avoid repetition, the second amicus brief, *Flaherty*, presented only new, alternative arguments in support of an issue already argued in the first amicus brief for *McGarvey*. Arguments in the *McGarvey* brief were incorporated by reference in the second

4. See *Eaton v. Town of Wells*, 760 A.2d 232 (Me. 2000) (particularly Justice Saufley's concurring opinion); Orlando E. Delogu, *Eaton v. Town of Wells: A Critical Comment*, 6 OCEAN & COASTAL L. J. 225 (2001).

5. *Flaherty v. Muther*, No. RE-08-098, 2009 WL 5667080 (Me. Super. Ct. Dec. 1, 2009).

6. *McGarvey v. Whittredge*, WASHSC-CV-08-42 (Me. Super. Ct., Wash. Cty., Jan. 21, 2010).

7. Brief for Orlando Delogu as Amici Curiae Supporting Plaintiffs/Third Party Defendants/Appellees, *Flaherty v. Muther*, No. CUM-09-631 (Me. 2010); Brief for Orlando Delogu as Amici Curiae Supporting Defendants/Appellees, *McGarvey v. Whittredge*, No. WAS-10-83 (Me. 2010). Amicus briefs in favor of expanded public use rights were also submitted in both cases by local counsel Adam Steinman and Neal Weinstein on behalf of the Surfrider Foundation, Northern New England Chapter. And finally, the Curtis Thaxter law firm submitted amicus briefs in both cases on behalf of littoral upland property owners asserting the correctness of the *Bell* holdings. Sidney St. F. Thaxter was lead counsel in the *Bell* cases, and is counsel on behalf of upland owners in a pending case raising many of the same issues in controversy here, *Almeder v. Town of Kennebunkport (the Goose Rocks Beach Case)*, No. RE-09-111 (Me. Super. Ct. York County, filed Oct. 23, 2009).

amicus brief.⁸ Each brief also contained those arguments unique to that case. For whatever value it may have to scholars, those in Maine, or other states, called upon to defend public rights in intertidal lands, all of the issues, arguments, and footnotes contained in the author's two amicus briefs are combined in this single article.

II. THE FACTS IN THE TWO CASES

A. *McGarvey v. Whittredge*, *Amicus Brief #1*

This relatively straightforward case came to trial on the basis of an agreed-upon statement of facts said to be “undisputed” by the trial court.⁹ In this statement both parties implicitly acknowledge that the public has a right to be upon the beach—that a “public easement” exists allowing “fishing, fowling, and navigation.”¹⁰ The trial court, relying on *Bell I*, accepted this proposition.¹¹ Plaintiffs/appellants asserted that defendants’ passage across what they referred to as “appellants’ beach” to gain access to the ocean and then to deeper water to engage in “scuba diving,” and also to use the beach for post-dive “socializing,” are not permitted “easement” uses.¹² Defendants/appellees, relying on reasoning in *Bell II*, asserted that the term “navigation” is broad enough to encompass “scuba diving”; they do not make a similar, or any argument that “socializing” on the beach is a permitted “easement” use.¹³ The trial court, drawing largely from *Bell II* reasoning, ultimately agreed with defendants’/appellees’ argument that “navigation” includes “scuba diving,” and thus is a permitted public use of the beach.¹⁴ The court characterized the “socializing” as a trespass, not a permitted use, and assessed nominal damages.¹⁵ Plaintiffs/appellants have appealed part one of the trial court’s conclusion and order in this case to the Law Court.¹⁶

8. This approach was taken because amicus briefs must conform to page, margin, and font size limitations. Given the number of issues raised, all of the arguments in support of a particular issue could not fit into a single brief—so they were divided between the two amicus briefs, with the noted incorporations by reference.

9. *McGarvey*, WASHSC-CV-08-42 at 2.

10. *Id.* at 4.

11. *Id.* at 4-5.

12. *Id.* at 3-4.

13. *Id.* at 1-2.

14. *Id.* at 8.

15. *McGarvey*, WASHSC-CV-08-42 at 7-8.

16. *See id.*

B. Flaherty v. Muther, Amicus Brief #2

The issues in this case¹⁷ are anything but straightforward; they have spawned an earlier case decided by the Law Court.¹⁸ The present case has multiple parties, interest groups not joined in the proceeding, and an angry, more than four-year long history. At the trial court level, counsel for Muther, a J-lot owner, laid out a detailed twenty-one page statement of facts that recounted a long series of confrontations and settlement efforts with respect to the use and scope of an easement providing public access to a beach area. These disputations are between Muther, on one hand, and members of two separate groups—other J-lot owners and a much larger group, the Broad Cove Shore Association. Issues between Muther and the Association were seemingly resolved in the earlier Law Court case.¹⁹ Because the rights and duties of the two groups antagonistic to Muther are not concentric, the current case between Muther and the other J-lot owners has had the effect at the trial court level of undoing some of the resolutions hammered out and sustained by the Law Court in the earlier litigation.

Several issues in this case—whether the trial court’s disposition of matters beyond the use and control of the access easement; whether Muther’s interests could be fully reconciled with the interests of the two groups they are contending with; whether the State was appropriately granted intervenor status in this case; and, whether it fully discharged its responsibilities as an intervenor, do not directly involve the scope of public use rights in the intertidal zone, and accordingly were not issues addressed in Amicus Brief #2.

Amicus Brief #2 *did* address what it regarded as the central strategy of Muther. It is an exclusionary strategy aimed first at limiting the number of people from within the two groups, noted above, who have access to intertidal land abutting Muther’s property—the smaller the number, the better. And secondly, relying on the *Bell* cases, Muther would limit those with access to the intertidal zone to a narrowly defined range of “fishing, fowling, and navigation” uses only. In sum, Muther, a littoral upland owner, sought to strengthen and enlarge his property right

17. Flaherty v. Muther, No. RE-08-098, 2009 WL 5667080 (Me. Super. Ct. Dec. 1, 2009).

18. See Muther v. Broad Cove Shore Ass’n, 968 A.2d 539 (Me. 2009).

19. See *id.*

by limiting the number of people with access to the intertidal zone, and the activities that may be engaged in by those with access.²⁰

III. STATEMENT OF ISSUES PRESENTED

As presented in the amicus briefs, the first issue is a threshold question:

I. Whether the Law Court should use one, or both, of the cases presently before it as a vehicle to reexamine its holdings in *Bell I* and/or *Bell II*.

If the Law Court reexamines Bell I, we reach Issues II through V:

II. Whether the *Bell I* court erred in its determination that the Colonial Ordinance vested all upland owners (in Massachusetts and by extension Maine) with fee simple title to land in the intertidal zone—leaving the public with an easement interest limited to “fishing, fowling, and navigation.”

III. Whether the *Bell I* court erred in its interpretation of *Shively v. Bowlby*,²¹ by ignoring the equal-footing doctrine, and the effect of the doctrine in determining title to intertidal lands in Maine.

IV. Whether the *Bell I* court erred in concluding that Article X, § 3 of the Maine Constitution, and section 6 of the Act of Separation between Maine and Massachusetts, incorporated the Colonial Ordinance (as interpreted in *Bell I*) into the common law of Maine.

20. In the statement of facts in Amicus Brief #2, amici noted that prior to the *Bell* cases there was no Maine case (from 1820 to the mid-1980s) that barred any public use of the intertidal zone (regulated, yes—barred, none). Since the *Bell* cases, there have been any number of cases pitting upland owners (who want the highest degree of exclusivity they can achieve) against sub-groups of the public who have sought to use the intertidal zone in one way or another. Besides this case, see *Eaton v. Town of Wells*, 760 A.2d 232, 248 (Me. 2000); *McGarvey v. Whittredge*, WASHSC-CV-08-42 (Me. 2010) (currently pending before the Law Court); and *Almeder v. Town of Kennebunkport (the Goose Rocks Case)*, No. RE-09-111 (a pending case involving Goose Rocks Beach in which upland owners would limit public use of intertidal land areas). There is no end in sight to these cases.

21. *Shively v. Bowlby*, 152 U.S. 1 (1894).

V. Whether the *Bell I* court erred in failing to treat the legislatively adopted Submerged and Intertidal Lands Act (Submerged Lands Act)²² as an implicit assertion of title to intertidal land in Maine.

If the Law Court reexamines Bell II, we reach Issues VI through VIII:

VI. Whether the *Bell II* court erred in its uncritical acceptance of the holdings in *Bell I*, given the intervening U.S. Supreme Court holding in *Phillips Petroleum Co. v. Mississippi*.²³

VII. Whether the *Bell II* court erred in narrowly interpreting the public uses permitted in the intertidal zone pursuant to the “public easement” recognized in the *Bell* cases.

VIII. Whether the *Bell II* court erred in concluding that The Public Trust in Intertidal Land Act (Intertidal Land Act),²⁴ constituted a taking of the upland owners’ private property, including whether the recent U.S. Supreme Court case, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,²⁵ should alter the *Bell II* court’s takings analysis.

If the Law Court, in deciding the cases before it, declines to reexamine either Bell I or Bell II, we reach Issue IX:

IX. Whether the Maine Superior Court in *McGarvey* correctly held that the term “navigation” allows the public to use intertidal land to gain access to deeper water for the purpose of engaging in recreational or commercial scuba diving.²⁶

22. ME. REV. STAT. tit. 12, §§ 1861-1867 (2005) (formerly enacted as ME. REV. STAT. tit. 12 § 559 (1997)).

23. 484 U.S. 469 (1988).

24. ME. REV. STAT. tit. 12 §§ 571-573 (2005) (permitting the public to use intertidal lands for recreational purposes).

25. 560 U.S. ___, 130 S.Ct. 2592 (2010).

26. With respect to the preparation of amicus briefs, Maine Rules of Appellate Procedure require that a separate Table of Authorities be prepared, and that after the Statement of Issues, a Summary of Arguments (in support of each issue) be presented. These are omitted in this article. All of the authorities relied upon are referenced either in the text or footnotes of this article.

IV. ARGUMENT: ISSUE I

As presented in the amicus briefs, the first issue is a threshold question:

Whether the Law Court should use the cases presently before it as a vehicle to reexamine its holdings in *Bell I* and/or *Bell II*.

Though it must be recognized that stare decisis—adherence to precedent—is the general rule, it cannot be an immutable rule, or the mistakes of the past will be with us forever.²⁷ In *Myrick v. James*, the Law Court noted that “[p]roper respect for precedent as a source of stability does not require that each decided case must be held inviolate for all time.”²⁸ More usefully, *Myrick* laid out a multi-factor test for determining when it is appropriate to reconsider a Law Court holding.²⁹

Another relatively recent Law Court case that addressed issues of stare decisis is *Adams v. Buffalo Forge Co.*³⁰ In *Adams*, the Law Court recognized that “[t]he underlying rationale of the doctrine of stare decisis is the obvious need to promote consistency and uniformity of decisions. The doctrine has been said to serve as a brake upon legal change to be applied in the interests of continuity.”³¹ The Law Court went on:

While we recognize the unquestioned need for the uniformity and certainty the doctrine provides, we have also previously recognized *the dangers of blind application of the doctrine merely to enshrine forever earlier decisions of this Court*. When principles fail to produce just results, this Court has found a departure from precedent necessary to fulfill its role of reasoned decision making *The doctrine, however, is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by*

27. See *Myrick v. James*, 444 A.2d 987 (Me. 1982).

28. *Id.* at 998. The *Myrick* court’s discourse on stare decisis is worth reading in full; it is replete with case law and scholarly support from Maine and other jurisdictions for invoking, and/or setting aside, principles of stare decisis.

29. *Id.* at 1000.

30. 443 A.2d 932 (Me. 1982).

31. *Id.* at 935 (citations and quotation marks omitted).

experience. Whether the doctrine should be applied or avoided is a decision which rests in the discretion of the court.³²

Even more recently the Law Court decided *Eaton v. Town of Wells*.³³ The dispute in *Eaton* was complex; it involved title issues and the scope of public use rights on some 2,200 linear feet of intertidal land. The *Bell* cases, particularly *Bell II*, were central to plaintiff's arguments in *Eaton*, and to the trial court's and the Law Court's disposition of the case.³⁴ A broadened range of public use rights (beyond the narrow "fishing, fowling, and navigation" holding of *Bell II*) was sustained.³⁵

But, for our purposes, Justice Saufley's concurring opinion in the case is more important. In a word, she would have revisited, and overruled, *Bell II*, but not before carefully examining the doctrine of stare decisis as well as the two Maine cases, *Myrick* and *Adams*, noted above.³⁶ The concurring opinion pointed out in footnote nine, that all five of *Myrick*'s tests for determining when it is appropriate to reconsider a Law Court holding were met.³⁷ But this reasoning, unfortunately, was not acquiesced to by the majority of the *Eaton* court. Justice Saufley's opinion does suggest, however, that the errors of the *Bell* cases will not go away—events have proved her correct. Parenthetically, it should be noted that all five factors of *Myrick*'s test for putting aside stare decisis, for reexamining the *Bell* holdings, are also met in the two cases now before the Law Court.

Beyond the reasoning in *Myrick*, *Adams*, and *Eaton*, perhaps the most compelling argument for reexamination of the *Bell* cases is the trial

32. *Id.* (emphasis added). Justice Roberts' opinion in *Adams* is worth a full reading. It examines reliance factors, whether there was a long line of authority supporting the case law sought to be reexamined, and whether the legislature has weighed in on the issue. In *Adams*, these factors warranted both re-examination and reversal of prior case law. Applying these factors to the cases now before the Law Court, we find that the narrow reading of public rights in the intertidal zone in both *Bell I* and *Bell II* is not supported by a long line of prior Maine case law. On the contrary, Maine case law has continuously expanded the "navigation" prong of public use rights. The *Bell* holdings, in addition to being in conflict with concepts underlying the *jus publicum*, are also in conflict with legislative enactments; they are not well reasoned, not a fair balancing of public and private rights in the foreshore, and have been criticized by courts and scholars alike. And other than quelling the exclusionist tendencies of upland owners, no significant reliance factors will be upset by a reexamination and modification of the *Bell* holdings—which were decided relatively recently.

33. 760 A.2d 232, 232 (Me. 2000); see also Delogu, *supra* note 4.

34. *Eaton*, 760 A.2d at 244, 247-48.

35. *Id.* at 248.

36. *Id.* at 248-50 (Saufley, J. concurring).

37. *Id.* at 249-50.

court opinion in *Flaherty*. It is a rare (and heartening) example of thoroughness, bluntness, and eloquence, laying out the illogic and inconsistencies of the *Bell* holdings. It underscores the widely perceived view that the *Bell* cases, rather than simply confirming widely held views of public and private rights in the foreshore, represented a fundamental shift in the balancing of public and private rights in this unique intertidal land area. Upland owners were given a windfall they could hardly have anticipated. Public use rights in the intertidal zone, and activities engaged in for generations, were to be narrowly construed. What Judge Crowley's opinion suggested was that decisions of this magnitude, given their relatively recent date, and the controversy surrounding them, ought at least to be reexamined by the Law Court, and if found wanting, as was the case in *Adams*, modified or overturned.

Furthermore, a reexamination of the *Bell* cases is necessary because of their impact on two significant enactments of the Maine State Legislature. *Bell II* declared the Intertidal Land Act³⁸ unconstitutional (a "taking" of an upland owner's property).³⁹ And, barely five years after an *Opinion of the Justices*⁴⁰ declared the Submerged Lands Act⁴¹ to be a useful, and a permissible, piece of legislation, *Bell I*, suggested that the Act wasn't even necessary—upland owners had fee simple title to intertidal land all along. *Bell I*'s terse statement that the 1981 *Opinion of the Justices* was "not binding"⁴² hardly explains the inconsistency between its own reasoning and that of the *Opinion of the Justices*. Given these realities, deference to a coordinate, co-equal branch of Maine State Government would suggest that reexamination of the *Bell* cases is appropriate. If this produces a reversal or modification of one, or both, of the *Bell* cases, it follows that these two enactments would take on a renewed and continuing significance.

For all of the reasons outlined above, a reexamination of one or both of the *Bell* cases seems both appropriate and necessary. Either the *Bell* cases will be adhered to, or reasonable new balances will be struck between public and private interests/rights in the intertidal zone. The Law Court should use the cases presently before it as a vehicle to accomplish these ends.

38. ME. REV. STAT. tit. 12, §§ 571-573 (2005).

39. *Bell II*, 557 A.2d 168, 180 (Me. 1989).

40. *Opinion of the Justices*, 437 A.2d 597 (Me. 1981).

41. ME. REV. STAT. tit. 12, § 559 (1995) (current version at ME. REV. STAT. tit. 12, §§ 1861-1867 (2009)).

42. *Bell I*, 510 A.2d 509, 516 n.14 (Me. 1986).

That said, it is within the prerogative of the Law Court to reexamine only one, both, or neither, of the *Bell* cases. If the Law Court reexamines *Bell I* and concludes that it is wrongly decided, then *Bell II* must almost certainly be rejected also—the fundamental premises underlying it will have been rejected. If the Law Court sustains, or declines to reexamine *Bell I*, then Amicus Brief #1 urged as a fall-back position that *Bell II* be reexamined with an eye to softening its harsh pronouncements with respect to the public trust doctrine, and the scope of the so-called “public easement” in the intertidal zone. *Bell II*’s crabbed, too literal reading of the “public easement” needlessly, and erroneously, cuts off the fundamental strength of the common law, i.e., its ability to evolve over time to encompass new and/or changed conditions within a framework of law. Bear in mind, new and/or changed conditions are often not foreseen, or anticipated, when the letter of a law is crafted, but if the new/changed condition is within the spirit of the law, the common law adjusts to assimilate the new reality—that’s what gives both beauty and vitality to the common law. *Bell II*, unfortunately, leaves little room for such adjustments.

A reexamination of *Bell II* seems all the more appropriate when it is remembered that the Colonial Ordinance, said to grant upland owners title to intertidal lands and to reserve a “public easement” (a thin remnant of the *jus publicum* that historically attached to intertidal land), was not the product of any bargain; there was no sale, no consideration, no language of conveyance.⁴³ It was a gift—an inducement to “wharf out,”⁴⁴ and as such should be liberally construed in favor of the grantor. The latter point was recognized by Massachusetts courts.⁴⁵ In *Bell II* there is no liberal construction in favor of the grantor, in favor of reserved public rights in the intertidal zone. For this reason, if no other, a reexamination of *Bell II* is warranted.

Finally, given the possibility that neither of the *Bell* cases will be reexamined in the context of deciding the cases presently before the court, Amicus Brief #1 simply urged that the Maine Superior Court’s holding in *McGarvey* be affirmed.

43. THE BOOK OF THE GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF MASSACHUSETTS 35 (1648) reprinted in SCHOLARLY RESOURCES, 1 THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691 7, 41 (1976).

44. See *Storer v. Freeman*, 6 Mass. 435 (1810).

45. See *Commonwealth v. Alger*, 61 Mass. 53, 94 (1851) (holding that when government grants a property in the soil of the seashore to enable riparians to erect wharves, and by the same act reserves public rights, “it seems just and reasonable to construe such reservation much more liberally in favor of the right reserved . . .”).

V. ARGUMENT: ISSUE II

If the Law Court reexamines Bell I, we reach Issue II:

Whether the *Bell I* court erred in its determination that the Colonial Ordinance vested all upland owners (in Massachusetts and by extension Maine) with fee simple title to land in the intertidal zone—leaving the public with an easement interest limited to “fishing, fowling, and navigation.”

Asserting that, at most, a “qualified title” had been conveyed by the Colonial Ordinance—that the grant is more correctly seen as a “license”—the amicus briefs argued that the *Bell I* court erred in its determination that the Colonial Ordinance vested all upland owners with fee simple title and left the public only with an easement interest limited to “fishing, fowling, and navigation.”

Before there was a State of Maine, a State of Massachusetts, a United States, a Massachusetts Bay Colony, a Colonial Ordinance—before there was parliamentary government in England, a Magna Carta—there was continental civil law that drew upon earlier Roman law, which in turn drew upon the Institutes of Justinian; the latter date back to the fifth century and drew upon so-called “natural law.” From these earliest roots it was held that some things were incapable of private ownership. Justinian codes said:

Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea; no man therefore is prohibited from approaching any part of the seashore whilst he abstains from damaging farms, monuments, edifices, etc., which are not in common as the sea is.⁴⁶

The U. S. Supreme Court has expressed similar views:

By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private

46. Mitchell M. Tannenbaum, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation, and the Role of the Courts*, 37 ME. L. REV. 105, 108 (1985) (quoting the Institutes of Justinian 2.1.1); see also *id.* at 107-110 (and accompanying footnotes).

occupation, cultivation and improvement; and their natural and primary uses are public in nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title . . . in such lands . . . belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.⁴⁷

At the same time, *Shively* recognized that the erection of wharves benefited navigation and had induced some states to grant "rights and privileges in the shore below high water . . . [b]ut the nature and degree of such rights and privileges differed in the different Colonies"⁴⁸ Similar views were expressed in *Illinois Central Railroad Co. v. Illinois*.⁴⁹ The Court held that a grant of submerged land encompassing essentially the entire harbor of Chicago (to a private riparian/upland owner, the Illinois Central railroad) was either void or voidable—the Court did not have to choose between the two.⁵⁰ The Legislature had repealed the grant.⁵¹ The Court affirmed the repeal, implicitly opting for the "voidable" approach.⁵² The Court reasoned that "[i]t is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found"⁵³ At another point, the Court noted:

[We have already shown] that the State holds the title to the lands under the navigable water of Lake Michigan, within its limits, in the same manner that [by the common law] the State holds title to soils under tide water It is a title held in trust for the people of the State The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands *But that [the granting of discreet parcels] is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or*

47. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894).

48. *Id.* at 18.

49. *Ill. Cent. R.R. Co. v. Ill. (Illinois Central)*, 146 U.S. 387 (1892).

50. *Id.* at 460.

51. *Id.* at 449.

52. *Id.* at 464.

53. *Id.* at 435.

*of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public.*⁵⁴

In sum, law going back 1,500 years, the common law in England before the first colony was established, and the basic law in this country, as seen by two different U.S. Supreme Court decisions from the late 1800s, held that land beneath tidal/navigable waters is part of a *jus publicum*. It is land held by government in trust for the public.

In some states, to induce or facilitate commerce, discreet parcels of intertidal land were granted to littoral or riparian upland owners to build wharves, docks, etc. But title to all other intertidal lands and all public rights in tidal/navigable waters remain part of the *jus publicum*, and are held in trust by the sovereign. And finally, the seminal lesson of *Illinois Central* would seem to be that if you can't give away all of the land underlying Chicago harbor, you surely can't give away all of the intertidal land adjacent to an entire state.

At least one Maine court has recognized this precise point. In the previously noted *Opinion of the Justices*, finding the Submerged Lands Act⁵⁵ constitutionally permissible, the Law Court noted that “[o]f course, legislation representing ‘a gross or egregious disregard of the public interest’ such as occurred in the *Illinois Central* case, *supra*, would be unconstitutional for failure to meet the reasonableness test of Maine’s Legislative Powers Clause.”⁵⁶

The *Bell I* court ignored almost all of the long history delineating and balancing public and private rights in intertidal lands; it ignored Justinian; it ignored the *Shively* Court’s summary of the common law, including government’s trust duties, and the concept of *jus publicum*; it ignored and does not even cite *Illinois Central*; and it ignored the *Opinion of the Justices* of the Law Court, noted above. Instead, *Bell I* asserts (contrary to *Shively*) that the common law of England is blurred and uncertain as a justification for beginning its analysis with the Colonial Ordinance.⁵⁷

54. *Id.* at 452-453 (emphasis added). The full reasoning of the Court on these issues is laid out on pages 450-460 of the *Illinois Central* opinion.

55. ME. REV. STAT. ANN. tit. 12 §§ 1861-1867 (2005) (formerly ME. REV. STAT. ANN. tit. 12 § 559 (1997)).

56. *See* *Opinion of the Justices*, 437 A.2d 597, 610 (Me. 1981). The constitutional permissibility of Maine’s Submerged Lands Act turned on the same reasoning that moved the *Illinois Central* Court—all of the state’s submerged and intertidal lands were not being given away—only discreet (filled) parcels, and then only to serve valid public purposes, such as commerce and navigation.

57. *See* *Bell I*, 510 A.2d 509, 511-512 (Me. 1986).

Bell I recognizes that the ordinance “may have been annulled by the abrogation of the Colonial Charter,” but asserts nonetheless that it “continues as a ‘usage’ that now ‘has force as our common law.’”⁵⁸ *Bell I*’s reasoning ends by concluding that “the owner of the upland holds title in fee simple to the adjoining intertidal zone . . .”⁵⁹—a judicial grant of the intertidal zone, if you will—ignoring whether such a grant, resting on nothing more than a judicially sponsored “usage,” is even remotely possible.⁶⁰

But there is more. If the common law needed to be modified or clarified to facilitate trade, navigation or commerce, then we must carefully examine the language of the Colonial Ordinance (the Ordinance) itself—the means by which these ends were to be achieved. And then an examination of relevant case law explicating the Ordinance seems in order. The critical section of the Ordinance states:

[I]t is declared that in all creeks, coves and other places, about and upon salt water where the Sea ebs and flows, the Proprietor of the land adjoining shall have proprietie to the low water mark where the Sea doth not ebb above a hundred rods, and not more wheresoever it ebs farther.⁶¹

Clearly this is not a deed—not a conventional grant of property. The terms of a bargain are not spelled out; there is no language of conveyance and no consideration. There is no language imposing, or even hinting of, any reciprocal duty imposed on upland owners (“the Proprietor[s] of the land adjoining”) that would serve as a quid pro quo for this grant—a grant that (under *Bell I*) is of unprecedented magnitude. And importantly, there is no language conveying a “title,” a “fee,” a “title in fee simple,” or a title in “fee simple absolute.” These terms (or any variation of them) cannot be found in the Ordinance. But

58. *Id.* at 513 (citation omitted).

59. *Id.* at 515.

60. The Law Court, albeit only in the noted *Opinion of the Justices*, took a contrary view. It also stated that “[o]nly the Parliament, [the Legislature] as the public’s representative could alienate the *jus publicum*.” *Opinion of the Justices*, 437 A.2d at 605.

61. There are many versions of the Ordinance with slight word, spelling and punctuation variations. To avoid seeming self-serving, the amicus briefs used a version cited by a strong proponent of littoral/upland owner property rights. See Sidney St. F. Thaxter, *Will Bell v. Town of Wells Be Eroded With Time?* 57 ME. L. REV. 118, 122-123 (2005); see also THE BOOK OF THE GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF MASSACHUSETTS 35 (1648) reprinted in SCHOLARLY RESOURCES, 1 THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691 7, 41 (1976). The cited text is a small part of a larger group of personal *Liberties Common*, which in turn are a small part of the General Lawes and Liberties of the Massachusetts Bay Colony.

littoral/upland owners (and the *Bell I* court) would bootstrap the only phrase used in the Ordinance, “shall have proprietie,” to pass a fee simple title to all intertidal land in the entire Massachusetts Bay Colony, and by extension to all intertidal land in what is now two states—Massachusetts and Maine,⁶² subject only to a reserved public easement of “fishing, fowling, and navigation” recognized in other (collateral) sections of the Ordinance.⁶³

Can these defects in the language of the Ordinance be ignored? The amicus briefs and this article argue that they cannot. Can the result contended for by littoral/upland owners and the *Bell I* court be squared with *Illinois Central*? It cannot. The *Illinois Central* Court approvingly cites earlier holdings that state “[t]he sovereign power itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the State, [and ‘lands under them’] divesting all the citizens of their common right.”⁶⁴

How then should the Ordinance and the critical phrase, “shall have proprietie,” be interpreted? The only way the broad view of public trust duty, *jus publicum*, *Shively*, *Illinois Central*, the Ordinance, and the critical phrase can be reconciled is to first see the intent of the Ordinance (laid out best in *Storer v. Freeman*),⁶⁵ and then see the Ordinance’s critical phrase as a bestowal of an enlarged property right (a title in fee simple) only on those who actually accept the inducement—those who wharf out, fill and/or build in the intertidal zone. They alone can be said to have acquired “title” to that portion of intertidal land so used. Those who do not accept the inducement gain nothing, and lose nothing—the common law with respect to adjoining intertidal land continues to apply.

This interpretation of the Ordinance and the critical phrase (“shall have proprietie”) explains why many courts referred to the upland owners’ rights under the Ordinance as a “qualified property.”⁶⁶ An early

62. The author was aware that there is Massachusetts case law (predicated on the same flawed reasoning) that predates and gives support to the *Bell* holdings. See *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851). But flawed reasoning, flawed conclusions, the abandonment of trust duties, a relinquishment of all intertidal land in two states on the basis of a judicially fashioned usage does not become good law merely because it is repeated over time. Sooner or later, ill-considered holdings of the past must be confronted and overturned.

63. *Bell I*, 510 A.2d 509, 510 (Me. 1986).

64. *Illinois Central*, 146 U.S. 387, 456 (1982) (citations omitted).

65. *Storer v. Freeman*, 6 Mass. 435 (1810).

66. See *Mass. v. Inhabitants of Charlestown*, 18 Mass. (1 Pick.) 180, 184 (1822); *Boston Waterfront Dev. Corp. v. Mass.*, 393 N.E.2d 356, 360 (1979).

Maine case, *Parker v. Cutler Milldam Co.*, uses the phrase “a qualified right” to describe the right conferred by the Ordinance—a right not to be used in a manner that interrupts the rights of the public.⁶⁷

Interestingly, the above stated interpretation of the Ordinance (and its critical phrase) meshes perfectly with the reasoning in *Illinois Central*. That Court, speaking of the time period between the Illinois legislature’s grant of submerged land to the railroad and the revocation of the grant, referred to the grantees’ interest as (at most) “a qualified fee in the soil under the navigable waters of the harbor”⁶⁸ The Court had earlier (more accurately) characterized the property interest of the railroad as “a mere license to the company” to prosecute (with the benefit of title to a discreet portion of submerged harbor land) such further improvement to commerce/the navigable character of the harbor as it chose.⁶⁹ In other words, the statutory inducement held out to the railroad was identical to the Colonial Ordinance’s inducement to “wharf out” described in *Storer*. If the inducement is acted upon by the railroad, they acquire fee title to a portion of submerged land; if not, title remains in State hands, part of the *jus publicum*.⁷⁰

The *Illinois Central* Court’s willingness to allow this limited alienation of trust property as long as there was no wholesale abdication of control over the bed of the entire Chicago harbor is clear. The Court noted that “[t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”⁷¹

Finally on this point, the amicus briefs’ interpretation of the Ordinance meshes with, and is implicitly supported by, the previously

67. *Parker v. Cutler Milldam Co.*, 20 Me. 353, 357 (1841).

68. See *Illinois Central*, 146 U.S. at 461.

69. *Id.* at 460.

70. In the same vein, *Shively*, in the context of applying the equal-footing doctrine to resolve a title dispute to intertidal land, noted that Oregon, and a number of other states (four) had adopted legislation intended to facilitate commerce by the building of wharves. *Shively v. Bowlby*, 152 U.S. 1, 55-56 (1894). Courts in each of these jurisdictions had held, as had the Oregon court: “this act is not a grant. It simply authorizes upland owners on navigable rivers . . . to construct wharves in front of their land. It does not vest any right until exercised. It is a license, revocable at the pleasure of the legislature until acted upon or availed of.” *Id.* at 55 (state court citations omitted). The point being made is that (in settings where the intent of state legislation is to encourage the building of wharves on intertidal land) the amicus briefs’ interpretation of the critical language of the Ordinance (“shall have proprietie”) is not just plausible, but widely accepted.

71. *Illinois Central*, 146 U.S. at 453.

noted 1981 *Opinion of the Justices*, sustaining the Submerged Lands Act.⁷² The *Bell I* court dismissed this *Opinion of the Justices* with the brusque observation that, “an advisory opinion . . . is not binding upon this court.”⁷³ True enough, but it certainly offers us (at a point in time) the best judgment of the state’s highest court. The *Opinion of the Justices* noted at the outset that, “intertidal and submerged lands are impressed with a public trust”⁷⁴ It recognized that only a legislature could alienate trust property.⁷⁵ Further, in a lengthy reference to *Illinois Central*, the *Opinion of the Justices* noted that “[t]he prodigality of the [original Illinois legislative grant] was obvious . . . ,” and that Maine’s Submerged Lands Act avoided any such excess.⁷⁶ As in *Illinois Central*, the *Opinion of the Justices* sustained a legislative act that enabled a discreet number of upland owners to obtain fee title to filled intertidal lands, but only when valid public purposes were met.⁷⁷

Summarizing this point, the logic of the Law Court’s *Opinion of the Justices* and the Supreme Court’s *Illinois Central* seems clear—taken together they wholly contradict/refute the holding in *Bell I*. If only a legislature can alienate trust property, then a judicially sponsored “usage” cannot. If a statute may alienate only discreet parcels of submerged and/or intertidal land, then the remaining portion of those submerged and/or intertidal lands (the part that has not been alienated) remains in state hands, and is today part of Maine’s (or Illinois’s) *jus publicum*.⁷⁸

Beyond the arguments made to this point for rejecting Massachusetts’ (and by extension the *Bell I* court’s) view that the Ordinance granted title/ownership of all intertidal lands to littoral upland owners, the amicus briefs urged the Law Court to consider the scholarship and reasoning offered by Mark Cheung.⁷⁹ To say that Mr. Cheung takes issue with the grant theory of intertidal land alienation is

72. See *Opinion of the Justices*, 437 A.2d 597 (Me. 1981).

73. *Bell I*, 510 A.2d 509, 516 n.14 (citations omitted).

74. *Opinion of the Justices*, 437 A.2d at 607.

75. *Id.* at 605.

76. *Id.* at 609.

77. *Id.* at 607-608.

78. Its status is similar to the “public lots” in Maine or public domain lands in the West; it is held (owned if you will) in trust by government on behalf of the people.

79. Mr. Cheung, a legal historian, offers a careful exposition of the people, the customs, the competing interests extant in the colonial period (early 1600s), and the language and actual purpose of the Colonial Ordinance. Mark Cheung, *Rethinking the History of the Seventeenth-Century Colonial Ordinance: A Reinterpretation of an Ancient Statute*, 42 ME. L. REV. 115 (1990).

an understatement. He argues that Massachusetts got it wrong, and thus the *Bell I* court (by simply acceding to Massachusetts law) got it wrong. Cheung states:

Having reviewed the socio-economic history of the Massachusetts colony, the traditional interpretation of the Ordinance in Massachusetts and Maine becomes vulnerable. The language of the Ordinance itself, the existing laws, and the contemporary socio-political conditions favor another construction. Under this view, the Ordinance granted to the upland owners only a riparian right of priority [to] use [the intertidal zone] not a right of property [in the zone]. Two factors support this interpretation. First, the General Court that passed the Ordinance, though competent to make such a conveyance, gave no clear indication of any intent to convey a property right. Second, the traditional presumption that the Ordinance was designed to promote commercial activities is without firm historical foundation. If such had been the intent of the colonial government, other less drastic measures could have been implemented to achieve the same goal.⁸⁰

Cheung points out that the Ordinance phrase “shall have proprietie” at the time had two (or more) meanings.⁸¹ In some settings it connoted a “property” interest; in other settings, it connoted only “an appropriate use” or “a priority” of right.⁸² He concludes that the latter meaning was intended in the Ordinance because the language is a small part of a larger body of personal/individual rights and liberties, what were referred to as “Liberties Common.”⁸³ It is not in that part of the General Lawes and Libertyes dealing with the boundaries of towns and individual properties.⁸⁴

Furthermore, he points out that none of the customary words of conveyance (well-known at the time) are used in this purported grant.⁸⁵ He also points out that there was no pressing commercial need (at this time), nor does the language suggest an intent to convey all intertidal land.⁸⁶ On the contrary, the whole compilation of the General Lawes and Libertyes (almost twelve years in the making) was to strike a balance

80. *Id.* at 146-147 (citations omitted).

81. *Id.* at 149.

82. *Id.*

83. *Id.* at 150.

84. *Id.*

85. *See id.* at 148-49 n.217.

86. *See id.* at 152-54.

between public powers and private interests.⁸⁷ There was a felt need to restrain centralized government which seemed threatening to a dispersed citizenry.⁸⁸ Moreover, the government had engaged in some “wharfing out” projects to the detriment of upland owner interests.⁸⁹ Cheung argues that the balance sought to be struck was intended to recognize that littoral upland owners both needed and were entitled to “a priority,” a preferred right to use this intertidal area.⁹⁰ Their survival, by virtue of their location, often depended on fishing, fowling, and/or more limited navigational enterprises.⁹¹

Cheung buttresses his balancing thesis by pointing to the sentence in the Ordinance (after “shall have proprietie”)—a sentence that, while recognizing the priority of use accorded upland owners, protects larger public interests. This balancing sentence reads, “[p]rovided that such Proprietor shall not by this libertie have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks, or coves.”⁹² In sum, the *jus publicum* had to be maintained.

Cheung continues his argument by pointing out that upland owners almost certainly already had a common law right to “wharf out”; and, more importantly, he points out, “[e]ven if the General Court had intended to give the littoral owners a personal incentive to develop it [intertidal land] commercially, other more feasible and less drastic means were certainly available, short of a wholesale conveyance of the foreshore.”⁹³

Cheung cites any number of examples where franchises were granted or tax incentives fashioned (a range of 1640s industrial development mechanisms) all of which, “fall far short of annexation of the intertidal zone to the upland estate.”⁹⁴

Cheung concludes his historical analysis of the Ordinance by noting that, after its promulgation in 1647, the few court cases that can be found

87. *See id.* at 151-52.

88. *See id.*

89. *See id.* at 151-54.

90. *Id.* at 156-57.

91. *See generally id.* at 151-52. In the 1600s road networks were all but non-existent; navigation included the movement of persons and goods between coastal villages in small boats, and the lateral passage of persons and livestock along the foreshore (via wagon, on horseback, or on foot) as tide stages permitted.

92. *See THE BOOK OF THE GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF MASSACHUSETTS 35 (1648) reprinted in SCHOLARLY RESOURCES, 1 THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691 7, 41 (1976); see also Cheung, supra note 79, at n.236.*

93. Cheung, *supra* note 79, at 153.

94. *Id.* at 154.

addressing the Ordinance did not treat the upland owner as holding fee title to intertidal land—he notes that:

In a civil case in 1664, a Massachusetts court still referred to the high water mark as the natural monument by which to define boundaries at the shore. In 1790, the Massachusetts Supreme Judicial Court found it necessary to point out that the littoral proprietors may “use” [they did not own] the flats to the low water mark. If the Ordinance had clearly conveyed the intertidal zone to these littoral proprietors, they would certainly have had use of the flats without needing court authorization.⁹⁵

A review of Massachusetts court cases makes clear that more than 150 years elapsed (after promulgation of the Ordinance) before Massachusetts courts began to characterize the sparse and ambiguous language of the Ordinance as a conveyance of fee title to intertidal land. More than 200 years elapsed before what is regarded as the definitive case confirming this characterization, *Commonwealth v. Alger*, was decided.⁹⁶ Chief Justice Shaw’s lengthy discourse seeks to quell debate as to the meaning and effect of the Ordinance—he asserts that the Ordinance conveyed intertidal land in fee to upland owners.⁹⁷ But at the same time he admits the paucity of cases prior to 1800.⁹⁸ And he also recognizes the great value that these intertidal lands represented to upland owners in harbors such as Boston.⁹⁹ It does not strain credulity to see *Alger* as a post hoc interpretation of the Ordinance—an interpretation that met the commercial needs of Massachusetts in the 1850s (and continues to the present) but one not needed, not intended, and not contemplated by the seventeenth century drafters of the General Lawes and Liberties of the Massachusetts Bay Colony. Cheung summarizes his argument by noting that “[t]he intent behind the Ordinance remains the central dispute in modern litigation over rights in the intertidal zone. As this Article has demonstrated, colonial history does not support the traditional view that the Ordinance acted as a conveyance of property.”¹⁰⁰

The gap of more than 200 years between the 1647 Ordinance and *Alger*, the fact that the *Alger* interpretation is clearly out of sync with

95. *Id.* at 155; see especially *id.* at nn.252, 253. A full reading of pages 146-155 of Mr. Cheung’s article, including his extensive footnote citations, seems useful. See also *id.* at 146-155 for Mr. Cheung’s discussion of the Ordinance’s application.

96. See *Commonwealth v. Alger*, 61 Mass. 53 (1851).

97. *Id.* at 79.

98. *Id.* at 72-73.

99. *Id.* at 73.

100. Cheung, *supra* note 79, at 156. The author shares Mr. Cheung’s view.

English common law and early colonial law, and, as *Shively* points out, does not conform with the law regarding title to intertidal land in any of the other original states, strengthens Cheung's argument.

Concluding the entire argument on this issue, the critical errors of Maine law, with respect to intertidal land, are: first, that neither the legislative branch nor the judicial branch has ever undertaken to see Maine as a separate entity, entitled to fashion its own law with respect to intertidal land; second, there has been no critical examination of the actual language of the Ordinance, its real intent in a 1640s colonial setting, the law of other nations and other states with respect to intertidal land, or the implications of extending *Alger*-type reasoning to a coastal area as vast as Maine's. Early Maine legislatures charged with getting a new state up and running, and fashioning a first body of laws, were far too busy to concern themselves with these issues.¹⁰¹

And Maine's courts, from *Lapish v. Bangor Bank*¹⁰² to *Bell I*, have simply declined to examine the Ordinance in the light of Maine's new status—a state, separate and apart from Massachusetts.¹⁰³ The *Lapish* court, when invited by counsel to examine the Ordinance's application in Maine, responded as follows:

It has been contended by the counsel in the defence, as before observed, that for several reasons the colonial Ordinance of 1641 does not apply in the present case, either by enactment, construction, or adoption. The history of it is given in *Storer v. Freeman*, by *Parsons, C. J.*, and he observes, "This ordinance was annulled with the charter, by the authority of which it was made; but from that time to the present, *an usage has prevailed,*

101. Other than regulatory measures, perhaps the first intertidal land legislative action implicating ownership interests, trust duties, policy matters, and the *jus publicum* were the Submerged Lands Act, ME. REV. STAT. tit. 12 § 559 (1997) (currently enacted as ME REV. STAT. tit 12, §§ 1861-1867 (2005)), and the Intertidal Land Act, ME. REV. STAT. tit. 12 §§ 571-573 (2005). They were enacted in 1975 and 1985, respectively, and while neither examined the broad issues of Maine's intertidal land law, both suggested that the Legislature saw itself (in some sense) as owner/trustee of intertidal land, a body charged with protecting the *jus publicum*. The *Opinion of the Justice* was a response to questions posed with respect to the Submerged Lands Act. That response could not address the broadest questions in re Maine's intertidal land law, but it implicitly saw the state as owner/trustee/guardian of intertidal land, the *jus publicum*, and it recognized the implications of cases such as *Shively* and *Illinois Central* in shaping a distinct body of Maine intertidal land law.

102. 8 Me. 85 (1831).

103. See Orlando Delogu, *Intellectual Indifference—Intellectual Dishonesty: the Colonial Ordinance, the Equal Footing Doctrine, and the Maine Law Court*, 42 ME. L. REV. 43, 58 (1990).

which has now the force of our common law.” Ever since that decision, 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.*¹⁰⁴

In the same vein, the *Bell I* court wrapped its arms around early-1800s Massachusetts case law and, citing *Lapish*, declined to examine whether and, if so, to what extent the Ordinance and Massachusetts law ought to dictate Maine’s law with respect to intertidal land. *Bell I* accepts the *Lapish* view that “a usage” has prevailed, characterizing Maine’s intertidal land law as “a piece of judicial legislation.”¹⁰⁵ No thought is given to separation of powers, or to whether all intertidal land in an entire state can be alienated by such a glib turn of phrase. *Bell I*’s reasoning finds a hero in Chief Justice Shaw and embraces the *Alger* case without considering any of the several arguments laid out above.

In sum, the *Lapish* and *Bell I* courts have simply acquiesced to the receipt of Massachusetts intertidal land law as the law applicable in Maine. There has never been a full, independent assessment by the Law Court (or the Legislature) of the Ordinance, Massachusetts case law, the equal-footing doctrine, Maine’s extensive coastal geography, changing uses of intertidal land, or the reasoning of legal historians such as Mr. Cheung (presented above), in an effort to finally fashion a unique body of Maine law with respect to intertidal land.

The holding in *Bell I* (more firmly than in *Lapish*) aligns Maine’s intertidal land law squarely with Massachusetts law. The issue before the Law Court then, is whether *Bell I* was correctly decided; whether it ignored arguments, lines of reasoning that would have allowed Maine to carve out its own law with respect to intertidal land areas.

The amicus briefs argued that *Bell I*’s studied indifference to history, relevant case law, the intent and language of the Ordinance itself, the limits of judicial power, was error. These errors parroting past flawed interpretation of the Ordinance led to a flawed conclusion in *Bell I* as to littoral and upland owners’ property rights in Maine’s intertidal zone. The fact that these errors, stemming from flawed reasoning (in whole, or in part), have been handed down for some time does not make them any less erroneous. For some time many believed the world was flat, yet that did not make it so.

The fact that these errors find expression in the case law of a neighboring state is beyond our control. To the extent that they find

104. *Lapish*, 8 Me. at 93 (emphasis added, citation omitted).

105. See *Bell I*, 510 A.2d 509, 514 (Me. 1986).

expression in prior Maine case law, and are encapsulated in *Bell I*, the Law Court can, and the amicus briefs argued, should, take corrective action. In short, *Bell I* should be overturned.¹⁰⁶

VI. ARGUMENT: ISSUE III

If the Law Court reexamines Bell I, we reach Issue III:

Whether the *Bell I* court erred in its interpretation of *Shively v. Bowlby*,¹⁰⁷ by ignoring the equal-footing doctrine and the effect of the doctrine in determining title to intertidal lands in Maine.

The amicus briefs argued that the *Bell I* court's failure to address the equal-footing doctrine was indeed reversible error. Let's be clear, the *Bell I* court had *Shively v. Bowlby* in front of it; it cited *Shively* three times. The court's first reference accepts *Shively's* description of the English common law pertaining to the intertidal zone, i.e., that upland owner's rights did not extend below high water, and further, accepts the fact that this view "has prevailed in the United States."¹⁰⁸ The latter two references underscore *Shively's* point that some states had to a greater or lesser degree authorized departures from the common law of England.¹⁰⁹

These *Bell I* references to *Shively* are not unimportant; they both undercut and support aspects of *Bell I's* holding and final conclusions. But they focus on minor aspects of the *Shively* case and make no reference to the central issues in *Shively*: the meaning, the scope, and the application of the equal-footing doctrine.¹¹⁰

Because the dispute in *Shively* involved competing claims by two upland owners to the same intertidal land, and at the same time turned on this doctrine, the court found it necessary to explain the doctrine. Justice

106. It is worth noting that *Bell I's* views (in Massachusetts and in Maine) have always been held with some degree of discomfort and caution—thus the repeated case law admonition "to construe [the reserved rights] much more liberally in favor of [the grantor]," see *Commonwealth v. Alger*, 61 Mass. 53, 94 (1881); and the repeated characterization of the upland owners intertidal right as a "qualified fee," "a qualified property," "a mere license" see *supra* notes 65-70, and accompanying text. More recently the highest court in Massachusetts speaking of upland owner intertidal rights noted: "this ownership always had strings attached." See *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 360 (Mass. 1979).

107. 152 U.S. 1 (1894).

108. See *Bell I*, 510 A.2d at 511.

109. *Id.* at 511, 515.

110. See Delogu, *supra* note 103, at 53-55.

Gray noted that the doctrine applied to new states admitted into the Union—they were intended to have, “the same rights of sovereignty, freedom and independence as the other States . . .”—in other words, they were admitted “on an equal footing with the original States in all respects whatever.”¹¹¹ Speaking directly to intertidal land rights, *Shively* noted that “[t]he new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high water mark, within their respective jurisdictions.”¹¹² At another point,¹¹³ the *Shively* Court approvingly cited *Knight v. United States Land Association*¹¹⁴ and *Pollard v. Hagan*.¹¹⁵ The *Knight* Court stated:

It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States; and that the new States since admitted have the same rights, sovereignty, and jurisdiction in that behalf as the original States possess within their respective borders.¹¹⁶

The *Pollard* Court stated that “[t]he right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original state of the union, must be admitted, and remain unquestioned”¹¹⁷

With this doctrinal background in its mind’s eye, the *Shively* Court turned to the dispute before it. It is important to note that Oregon became a state in 1859. *Shively*’s claim had its roots in a pre-statehood (1850) grant by the United States of public domain land that abutted the Columbia River. *Shively* presumed his grant included land below high water. He subsequently subdivided the land.¹¹⁸ Bowlby legally acquired an upland parcel of the subdivided land; he subsequently acquired from the State of Oregon adjoining land below high water (pursuant to an 1872 Act); *Shively*, however, claimed he had retained title to this intertidal parcel of land.¹¹⁹

111. See *Shively*, 152 U.S. at 26 (citations omitted).

112. *Id.*

113. *Id.* at 30.

114. 142 U.S. 161 (1891).

115. 44 U.S. 212 (1845).

116. See *Knight*, 142 U.S. at 183.

117. *Pollard*, 44 U.S. at 224.

118. *Shively*, 152 U.S. at 9.

119. *Id.*

The trial court and the U.S. Supreme Court were of one mind. The United States could certainly alienate by granting title to public domain land in territories it held, leaving Shively's upland title secure; but drawing on cases such as *Pollard* and *Knight*, as well as English common law with respect to intertidal land, and the equal-footing doctrine, they could not alienate land below high water—"they held it only in trust for the future States that might be created out of such territory."¹²⁰ Oregon acquired title to these tidelands in trust for the public under the equal-footing doctrine upon becoming a state in 1859.¹²¹ The only question that remained was whether Oregon's grant of title to a discreet parcel of tideland to Bowlby was valid. Both courts determined that it was.¹²² Bowlby had fully responded to an Oregon statute intended to encourage "wharfing out"; he acquired title to the parcel of tideland in question by actually filling/building and enhancing the possibilities for marine commerce.¹²³

The relevance of these core issues *Shively* (the meaning, intent, and application of the equal-footing doctrine) to the issues before the Law Court in *Bell I* seems self-evident. The failure of the *Bell I* court even to mention the doctrine or consider whether the doctrine might free Maine (a new state in 1820) of the baggage Massachusetts had created for itself with respect to intertidal land titles is an egregious error.

Beyond the failure of the *Bell I* court to appreciate the central issue in *Shively*, i.e., its discussion and application of the equal-footing doctrine, the *Bell I* court failed to recognize that the roots of this doctrine extend much further back in time than the *Shively* case itself. The doctrine has its beginning in Article IV, of the United States Constitution, which with respect to a variety of issues, establishes the principal of co-equality among the several states, including new states which may be admitted into the Union.¹²⁴

The holding of the U.S. Supreme Court in *Martin v. Lessee of Waddell* offered early recognition of this equality as applied to rights in intertidal land.¹²⁵ In this case, claims said to originate from colonial grants and enactments reaching back to 1664 and 1674 were in conflict with more recent claims springing from 1824 legislation adopted by the State of New Jersey (one of the thirteen original colonies and states).

120. See *Knight*, 142 U.S. at 183.

121. *Shively*, 152 U.S. at 51-52.

122. *Id.* at 55-58.

123. *Id.* at 9.

124. U.S. CONST. art. IV.

125. *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842).

Chief Justice Taney, while expressing doubt that the *jus publicum* was, or could be, alienated by royal grant, took a more direct position.¹²⁶ In holding for those claiming under New Jersey law, Chief Justice Taney stated:

When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown¹²⁷

The above citation makes two important points. First, that all of the original states were equal in their “absolute right to all their navigable waters and the soils under them.” And second, that early claims rooted in British colonial grants drop away with the founding of a new nation with thirteen co-equal states.

If we take the development of the country one step further, the fashioning of new states beyond the original thirteen from territory of the new nation, then we come to *Pollard v. Hagan*.¹²⁸ In *Pollard* we were dealing with facts similar to the facts in *Martin*—both cases involved title disputes to intertidal land. In *Pollard*, one set of claimants relied on Alabama law;¹²⁹ the other set of claimants relied on Georgia law and/or early, pre-statehood Spanish grants.¹³⁰ Suffice it to say that the disputants claiming under Alabama law prevailed.¹³¹ The *Pollard* Court reasoned that just as a new nation was not bound by the law that preceded the revolution, so the new State of Alabama, fashioned out of territory formerly a part of Georgia, was not bound by Georgia intertidal land law or pre-statehood Spanish grants.¹³²

But more important for our purposes was the *Pollard* Court’s articulation of the co-equality of rights between new states and original states and the repeated references to a doctrine of equal-footing.¹³³

126. *See id.* at 408-409.

127. *Id.* at 410.

128. 44 U.S. 212 (1845). *See supra* note 117, and accompanying text.

129. *Id.* at 214.

130. *Id.* at 214-16.

131. *Id.* at 230.

132. *Id.* at 225-30.

133. *See, e.g., id.* at 216, 222, 223. The *Pollard* case marks one of the first, if not the first, use by the U.S. Supreme Court of the phrase “equal-footing” to emphasize the

The manner in which the new states were to be admitted into the union, according to the ordinance [Congressional Act] of 1787, as expressed therein, is as follows: “And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its delegates into the Congress of the United States, *on an equal footing with the original states* in all respects whatever.”¹³⁴

The Court went on: “[t]he object of all the parties to these contracts of cession, was to . . . erect new states over the territory thus ceded; and . . . *they* [the new states], *and the original states, will be upon an equal footing, in all respects whatever.*”¹³⁵ And finally:

By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states.¹³⁶

If one substitutes Maine and Massachusetts for Alabama and Georgia, respectively, and if one substitutes the purported Colonial Ordinance grant, if indeed that’s what it was, which many years later is said to dictate Maine’s intertidal land law, for the Spanish grants in *Pollard* or the British grants in *Martin*, then the significance of these two cases is readily seen. Alabama and New Jersey prevailed; they were not saddled with ancient grants and they fashioned their own intertidal land law. Maine too, should not be saddled with ancient Ordinance grants. Maine, albeit belatedly,¹³⁷ should be permitted to fashion its own intertidal land law.

In sum, the *Martin* case makes clear that after the revolution there was a new paradigm—a new nation. This nation was prepared to protect

separateness, but at the same time the absolute equality of each state vis-a-vis every other state within the Union. This verbalization of the concept has been used repeatedly since *Pollard*, see, e.g., *Shively v. Bowlby*, 152 U.S. 1 (1894), and *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469 (1988), and has been extended to other areas of law, not just the law related to navigable waters and intertidal land. It seems firmly embedded as a doctrine in our constitutional law jurisprudence.

134. *Pollard*, 44 U.S. at 222 (emphasis added).

135. *Id.* at 224 (emphasis added).

136. *Id.* at 230.

137. It is worth recalling that in *Phillips Petroleum*, the U.S. Supreme Court was not troubled by the fact that Mississippi established its claim to intertidal land, by application of the equal-footing doctrine, 171 years after statehood.

the *jus publicum*; it clothed each of the thirteen new states with equal authority to control their navigable waters and intertidal lands and in each new state (as it came forward over time) a similar right to fashion its own intertidal land law was recognized. That is what equal-footing between the several states means. Anything less is not full equality.

Bell I's error was not simply that it failed to address *Shively*'s holding and analysis in regards to the equal-footing doctrine, but also that it failed to cite or understand the significance of the *Martin* and *Pollard* cases noted above—cases that early on gave meaning and scope to the equal-footing doctrine. The amicus briefs argued that the *Bell I* court's failure to address these cases and to accord them the respect they were due was error that the Law Court has the power to correct.

Moreover, the *Phillips Petroleum* case makes clear that the equal-footing doctrine has continuing vitality. Its application is not a matter of convenience or judicial discretion; it applies, even if it has lay dormant for almost two centuries—long settled expectations based on judicial errors of the past, notwithstanding. *Phillips Petroleum* further supports the view that *Bell I* should be overturned.

VII. ARGUMENT: ISSUE IV

If the Law Court reexamines Bell I, we reach Issue IV:

Whether the *Bell I* court erred in concluding that article X, section 3 of the Maine Constitution, and section 6 of the Act of Separation between Maine and Massachusetts, incorporated the Colonial Ordinance (as interpreted in *Bell I*) into the common law of Maine.

The amicus briefs argued that the *Bell I* court had indeed erred in this respect. The *Bell I* court's conclusion cannot be reached on the basis of the two enactments noted. Let's begin by examining the two critical enactments themselves. Article X, section 3 of Maine's Constitution reads, in pertinent part: "[a]ll laws now in force in this State, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature, or shall expire by their own limitation."¹³⁸ Section 6 of the Massachusetts Act of Separation reads, in pertinent part:

That all the laws which shall be in force within said District of Maine, upon the said fifteenth day of March next, shall remain, and be in force, within the said proposed State, until altered or

138. ME. CONST. art. X, § 3.

repealed by the government thereof, such parts only excepted as may be inconsistent with the situation and condition of said new State, or repugnant to the Constitution thereof.¹³⁹

Both of these enactments contain language suggesting that not all of Massachusetts law was to be brought forward and become a part of Maine law. Some laws were to be “excepted” as “inconsistent with” or “repugnant¹⁴⁰ to . . . the situation and condition of said new State,” the new Maine Constitution, and by extension the U.S. Constitution.¹⁴¹

These limitations are triggered here. Massachusetts law with respect to intertidal lands at the time of the separation of Maine from Massachusetts was described by state court cases, and more recently by *Bell I* as follows: the Ordinance, intending to foster “wharfing out,” broke with English common law—littoral upland owners were given fee simple title to intertidal lands and the public was accorded an easement allowing “fishing, fowling, and navigation.”¹⁴² *Bell I* also recognized that the English common law, which did not extend upland owner’s rights below high water, was the prevailing view in the United States in 1820. The two positions, i.e., Massachusetts intertidal land law and English common law, which was the prevailing view with respect to intertidal land in all of the other states, are inconsistent, contradictory, and incompatible with one another.

Ergo, the Massachusetts law did not become a part of Maine law by virtue of limiting provisions in both of the above enactments. After the Act of Statehood, the Maine Legislature was the only body that had the right to decide which of these two positions Maine would adopt. Notwithstanding the significance of the issue, one cannot find an enactment by the first Maine Legislature (or any subsequent legislative body) that resolves the issue of whether the English common law with respect to intertidal land or Massachusetts’ minority view was to be the law in Maine.¹⁴³

139. An Act Relating to the Separation of the District of Maine from Massachusetts Proper, and forming the same into a separate and independent State, ch. 161, § 6, 1819 Mass. Laws, in LAWS OF THE STATE OF MAINE 23 (Calvin Spaulding 1822).

140. The dictionary defines “repugnant” as inconsistent, contradictory, or incompatible. See, e.g. Merriam-Webster Dictionary Online, <http://www.merriam-webster.com/dictionary/repugnant> (last visited Jan. 3, 2011).

141. It should be noted that “not [being] repugnant” to the Maine Constitution, also requires that one’s actions “not [be] repugnant” to the Constitution of the United States. See ME. CONST. art. IV, pt. 3, §1.

142. *Bell I*, 510 A.2d 509, 515 (Me. 1986).

143. A reading of the *History of Statutory Law in the State of Maine*, indicates that the first meeting of the first Legislature of the State of Maine was held in Portland on May

The closest one comes is the Maine Legislature's enactment in 1981 of the Submerged Lands Act; this legislation was sustained by the Law Court in the 1981 *Opinion of the Justices*.¹⁴⁴ Implicitly, the Act adopts the English common law.¹⁴⁵ The sustaining *Opinion of the Justices* allows limited alienation(s) of trust property when public purposes are served. However, the court was not prepared to sustain the wholesale alienation of all of Maine's intertidal land; it noted, "[o]f course legislation representing a gross or egregious disregard of the public interest such as occurred in the *Illinois Central* case would be unconstitutional for failure to meet the reasonableness test of Maine's Legislative Powers Clause."¹⁴⁶ It follows then that an alienation of all of a state's intertidal land accomplished by "judicial usage," what the *Bell I* court refers to as "a piece of judicial legislation,"¹⁴⁷ would be similarly defective.¹⁴⁸ *Bell I*'s reasoning ignores the *Opinion of the Justices* and the holding in *Illinois Central*, and, more importantly, the express

31, 1820. HISTORY OF STATUTORY LAW IN THE STATE OF MAINE, ME. REV. STAT. ANN. vol. 1, 5-23 (1985). Two days later, June 2, 1820, then Governor William King addressing both houses of the Legislature urged that "serious consideration be given to the possibility of establishing a statutory code for Maine." *Id.* at 8. That recommendation was accepted—a Board of Jurisprudence was formed. The *History of Statutory Law in the State of Maine* states: "[t]he Board's procedure was to lay before it the laws of Massachusetts and report the acceptable provisions to the Legislature as fast as the drafts were finished, as separate acts." *Id.* at 12. By March 19, 1821, some 500 Acts were before the Legislature; 179 Acts (some revised versions of Massachusetts law, some wholly new Acts) were adopted and signed by the Governor. Many Acts were laid over for disposition at the next legislative session. *Id.* at 12, 16-17. In sum, early Maine legislatures were diligent in fashioning a first body of statutory law for Maine—they did not adopt Massachusetts statutes en masse. To be sure, Massachusetts statutes were the template, but many provisions of Massachusetts law were not adopted, while still others were amended or enlarged. The work went on for years. The *History of Statutory Law in the State of Maine* does not indicate that any aspect of Massachusetts common law was subject to legislative scrutiny, repeal, modification, or adoption. Nor does the *History* indicate that Massachusetts law delineating rights in the intertidal zone, said to derive from "judicial usage," was ever examined. Finally, the *History* indicates that no legislation addressing Maine intertidal land law was adopted.

144. See *Opinion of the Justices*, 437 A.2d 597, 597 (Me. 1981); see also *supra* notes 40, 55-60, 72-78, and accompanying text.

145. *Opinion of the Justices*, 437 A.2d at 597.

146. *Id.* at 610; see also ME. CONST., art. IV, pt. III, § 1.

147. *Bell I*, 510 A.2d at 514.

148. See Delogu, *supra* note 103, at 57-58 n.73.

language of article X, section 3,¹⁴⁹ and separation of powers provisions in article III of the Maine Constitution.

Moreover, neither of the two critical enactments (cited at the outset of this argument) can preempt application of the equal-footing doctrine. Given this reality and the fact that Massachusetts' position with respect to intertidal lands was conceded in the *Bell I* holding to be a minority view, and that English common law is the prevailing view in the United States, it follows that Maine as a new state, exercising its equal-footing prerogatives, acting through the Legislature, must choose whether to fashion a unique body of Maine law, or simply adopt Massachusetts intertidal land law. Massachusetts law cannot simply be foisted on Maine.

Furthermore, the Act of Separation ignores a necessary due regard for the separateness of states vis-a-vis one another. It is certainly true that Massachusetts, prior to 1820, had the power to create law that would be binding in the then District of Maine. But, as convenient a transitional mechanism as it may have seemed in 1819, Massachusetts could not pass a law like section 6 of the Act of Separation that would bind the soon to be created State of Maine to accept "*all the laws which shall be in force in the District of Maine*" and further, direct that this body of law "shall remain, and be in force, within [Maine] until altered or repealed by the [Maine] Legislature."¹⁵⁰ Such alterations or repeal might not take place for years, but more important, that's not how concepts of equality among the several states works.¹⁵¹

It is axiomatic that a legislative body in one state cannot by enactment export a specific law (or a body of law), with the intention that it take effect on a given future date, binding citizens and institutions in another state. It's simply not possible; states are separate, equal, independent, sovereign bodies. One state cannot dictate the law of another state. Upon statehood,¹⁵² Maine became a separate sovereign state, and Massachusetts law, having no binding force or effect beyond the borders of Massachusetts, ceased operating in Maine. The Massachusetts Legislature never had the legal power to create the first iteration of Maine law; that was a task that could only be performed by a Maine legislature.

149. With respect to the making, repeal, or amendment of law, the constitutional language speaks only of action by the "Legislature"—there is no mention of "judicial usage" or "judicial legislation."

150. An Act Relating to the Separation of the District of Maine from Massachusetts Proper, and Forming the Same into a Separate and Independent State, 1822 Me. Laws 16.

151. See U.S. CONST. art. IV.

152. Maine became a state on March 15, 1820.

Had the Massachusetts Legislature, in 1819, passed a much softer “resolve” that merely advised the soon-to-be-created State of Maine to adopt, as a first order of legislative business, the body of law then in existence in the District of Maine, and had that first Maine Legislature so acted, the transitional result sought may well have been largely achieved. *But that did not happen.* Instead, the first Maine Legislature began a long process of carefully examining (accepting, rejecting, revising) Massachusetts statutory law. This was a valid way in which to proceed given the fact that the Maine Legislature was then the only body with the legal power to fashion Maine law.¹⁵³

The argument that Maine’s constitutional language,¹⁵⁴ achieves on its own what Massachusetts’ Act of Separation could not achieve is similarly flawed. The argument fails to take into account the limiting phrase: “and not repugnant to this Constitution.” The *Bell I* court reasoned that the alienation of all of Maine’s intertidal land grows out of the peremptory adoption of “all” Massachusetts law in 1820.¹⁵⁵ Leaving aside for the moment the question of whether a Maine Legislature ever in fact adopted “all” Massachusetts law (the amicus briefs argued that it did not),¹⁵⁶ this total alienation of all intertidal land in Maine is “repugnant” to the Maine Constitution’s Legislative Powers Clause. The Law Court, citing *Illinois Central*, took this position in its 1981 *Opinion of the Justices*.¹⁵⁷

Summarizing this argument: the *Bell I* court’s conclusion that upon statehood in 1820, Massachusetts law (by virtue of the two critical enactments identified in the court’s opinion) became the law of Maine, is both legally and logically unsupportable. The court ignores the limitations within these enactments. It ignores the logic and reasoning of the Submerged Lands Act, and the *Opinion of the Justices* sustaining the Act. It ignores the equal-footing doctrine. It fails to acknowledge that one state may not impose its laws on another state, and that Maine’s adoption of a Constitution (a general document laying out a governmental structure, and the rights and duties of the people and those who govern) does not constitute the wholesale adoption of Massachusetts law. These errors, individually, and taken together, require that *Bell I* be overturned.

153. See *supra* note 143.

154. See generally ME. CONST., art X, § 3.

155. *Bell I*, 510 A.2d 509, 513-514 (Me. 1986).

156. See *supra* notes 140-148, and accompanying text.

157. See *Opinion of the Justices*, 437 A.2d 597, 609-10 (1981).

VIII. ARGUMENT: ISSUE V

If the Law Court reexamines Bell I, we reach Issue V:

Whether the *Bell I* court erred in failing to treat the legislatively adopted Submerged Lands Act¹⁵⁸ as an implicit assertion of title to intertidal land in Maine.

The amicus briefs argued that the *Bell I* court had erred in failing to treat the legislatively adopted Submerged Lands Act as an implicit assertion of title to intertidal land in Maine. The *Bell I* opinion seems troubled by the lack of firm legislative authorization (both in Massachusetts and in Maine) of the Ordinance as the granting instrument of all intertidal land in the two states.¹⁵⁹ It should have been. The court in an earlier Maine case, *Barrows v. McDermott*, was similarly troubled:

It may well be that the Ordinance has no force by virtue of positive enactment by any legislative body having jurisdiction at the time of such enactment over what is now the county of Piscataquis, and that its [the Ordinance's] operation has never been extended there by any specific act of legislation since; and it is quite true that when under the [1692] charter of William and Mary, [the Ordinance was] . . . re-enacted [it] . . . was never in terms extended to the Plymouth colony or to Maine under any legislative sanction.¹⁶⁰

Undaunted, the *Bell I* court asserts in several different word formulations that long usage, “judicial acceptance,” or what it terms “a piece of judicial legislation,” is sufficient authority for both the grant itself and the court’s conclusion with respect to the finality of the alienation of intertidal lands in the two states.¹⁶¹ To support these views the *Bell I* court takes refuge in the same reasoning that allowed the *Barrows* court to extricate itself from the dilemma it saw, i.e. that there was no legislative alienation (in either state) of all intertidal land. Both courts reasoned as follows:

But [the Ordinance] has been so often and so fully recognized by the courts both in this State and in Massachusetts as a familiar

158. ME. REV. STAT. tit. 12, §§ 1861-1867 (2005) (formerly enacted as ME. REV. STAT. tit. 12 § 559 (1997)).

159. *Bell I*, 510 A.2d at 511-512.

160. *Barrows v. McDermott*, 73 Me. 441, 447-448 (1882).

161. *Bell I*, 510 A.2d at 513-514.

part of the common law of both, throughout their entire extent, without regard to its source or its limited original force as a piece of legislation for the colony of Massachusetts Bay, that we could not but regard it as a piece of judicial legislation to do away with any part of it or to fail to give it its due force throughout the State *until it shall have been changed by the proper law making power*.¹⁶²

At its root, the argument offered by both courts is that judicial error, persisted in over a long period of time, becomes law and is tantamount to a legislative enactment. The amicus briefs urged a rejection of this proposition, asserting that it stands the concept of truth and justice on its head.

However, bad grammar aside, the last clause of both *Barrows* and *Bell I*'s "judicial usage" reasoning makes an important bow to legislative power. It suggests that "judicial usage," or "judicial legislation," must give way to changes wrought by "the proper law making power." This can only be the legislative branch of government.¹⁶³

But this seeming deference to separation of powers principles, and to legislative powers in particular, becomes mere rhetoric given the *Bell I* court's failure to examine the relatively recently enacted Submerged Lands Act which addressed title to filled, intertidal, and submerged land.¹⁶⁴ The court referred to this legislation (without discussion) only obliquely, and then went on to brush aside as "not binding upon this court" the *Opinion of the Justices* that thoroughly examined the Act and the 1981 amendment to the Act.¹⁶⁵ This *Opinion of the Justices* found the legislation to be both necessary and appropriate as "a statute of repose" and concluded, "[i]t is our opinion that L.D. 1594 does not exceed the constitutional power of the Legislature."¹⁶⁶

One might ask why the amicus briefs suggested that the 1981 legislation only implicitly asserts Maine's title to its intertidal lands. The short answer is that the legislation is unequivocal in asserting the state's

162. *Id.* at 514 (quoting *Barrows*, 73 Me. at 448) (emphasis added).

163. The amicus briefs consistently took the position that all of the intertidal land in two states cannot be alienated to littoral upland owners merely by a "judicial usage," "a piece of judicial legislation." The latter phrase seems on its face to be an oxymoron—a violation of separation of powers principles. There must at some point be a valid legislative enactment defining a state's intertidal land law.

164. ME REV. STAT. ANN, tit 12, §§ 1861-1867 (2005). This legislation was originally enacted in 1975; an important amendment releasing the state's ownership interest in certain parcels of filled intertidal and submerged land was adopted in 1981.

165. *Bell I*, 510 A.2d at 516.

166. *Opinion of the Justices*, 437 A.2d 597, 606 (Me. 1981).

title only with respect to submerged land, land that is below mean low or 100 rods from mean high (whichever is less) and extends seaward. But this is true in all states, including Massachusetts; it is a truism not affected by the Colonial Ordinance, it was true under English common law, and earlier.¹⁶⁷ The more ambiguous implicit assertion of title to intertidal lands derives from the provision in the legislation aimed at cleaning up uncertainties with respect to the title of upland littoral owners who filled (often years ago) intertidal or submerged land (or both). Specifically the legislation states: “[t]itles to properties and lands that once were or may have been submerged or intertidal lands subject to the State’s ownership in public trust that were filled by October 1, 1975 are declared and released to the owners of any such filled lands by the State”¹⁶⁸ Logically this language implicitly suggests that the Legislature believes it has title to both filled intertidal and submerged land (in trust for the public) that a discreet number of private owners need and want. Undoubtedly, mortgage lenders, title insurers, municipal taxing authorities, those who potentially would develop these parcels also supported this legislative amendment because it clarifies the title of these upland owners.

Beyond asserting title to these intertidal and submerged lands (albeit the assertion is only implicit to intertidal land), the State indicated a willingness to release its title interest to these discreet filled parcels of land when such alienation served valid public interests.¹⁶⁹ This legislative intent certainly parallels Illinois’ legislative actions sustained in *Illinois Central*.¹⁷⁰ In finding Maine’s legislative amendment appropriate, the above noted *Opinion of the Justices* cited *Illinois Central*, and also found that any number of valid public interests were served by this limited alienation of state property.¹⁷¹

The *Opinion of the Justices* did not comment on the mistaken legislative assertion that the state’s title to submerged land derived from the Colonial Ordinance. It took no issue with the implicit legislative assertion of title to intertidal lands, but noted that only the Parliament or the Legislature, as the people’s representative, could alienate the *jus*

167. The statement in the legislation, tit. 12, § 1865(1), that the ownership of submerged lands and the public trust imposed on these lands derives from the Colonial Ordinance is factually incorrect. The Ordinance only purported to affect lands between mean high and mean low up to 100 rods. Submerged land begins at mean low or 100 rods from mean high (whichever is less) and extends seaward.

168. See tit. 12, § 1861(3) (emphasis added).

169. See Cheung, *supra* note 79, at 126.

170. *Illinois Central*, 146 U.S. 387 (1982).

171. *Opinion of the Justices*, 437 A.2d 597, 609 (Me. 1981).

publicum.¹⁷² And, importantly, it pointedly noted that if the Legislature had sought to alienate all or most of the state's intertidal trust property, as the original *Illinois Central* grant did, that such action would violate the Legislative Powers Clause of the Maine Constitution.¹⁷³ Parenthetically, one wonders how the Justices would have handled the assertion that a "judicial usage" could (according to *Barrows* and *Bell I*) accomplish this very impermissible end. This issue, quite obviously, was not before the court when it fashioned its 1981 *Opinion of the Justices*.

The Submerged Lands Act is not the strongest legislative declaration of public rights, duties, ownership of, and title to intertidal lands in Maine that one might hope for. But this was the first time since statehood that a Maine legislature directed its attention to any of these issues and then only to fashion a piece of remedial legislation. Had the 1981 Legislature realized that no Maine Legislature had ever fashioned a unique body of Maine law with respect to intertidal lands (as the equal-footing doctrine entitled it to do), a more forthright assertion of public intertidal land rights, the scope of the *jus publicum*, public trust rights and duties might well have been articulated. This is a task that still awaits legislative attention.

In sum, the *Bell I* court, instead of embracing the reservations in *Barrows*, chose to pay mere lip service to "the proper law making power."¹⁷⁴ It could have recognized the implicit legislative assertion of title to intertidal lands embedded in the Submerged Lands Act. It could have embraced and built on the positive aspects of the 1981 *Opinion of the Justices* interpreting this Act. The *Bell I* court could have raised a series of unanswered questions that might have prompted the Legislature to look holistically, for the first time, at Maine's intertidal land law. The *Bell I* court did none of these things.

Relying instead on the hook of "judicial usage," "a piece of judicial legislation," it tied Maine's intertidal land law to the law of Massachusetts, a law predicated on a 350 year-old Ordinance (arguably misinterpreted at least since *Alger*), a law that had little relevance at the time of Maine's statehood, and less relevance today.¹⁷⁵ The *Bell I* court ignored the Submerged Lands Act. It ignored a timely, relevant, and unanimous opinion of the Law Court. These are errors that the Law Court can now correct.

172. *Id.* at 605.

173. *Id.* at 609.

174. *Bell I*, 510 A.2d 509, 514 (Me. 1986).

175. *Id.*

IX. ARGUMENT: ISSUE VI

If the Law Court reexamines Bell II, we reach Issue VI:

Whether the *Bell II* court erred in its uncritical acceptance of the holdings in *Bell I*, given the intervening U.S. Supreme Court holding in *Phillips Petroleum Co. v. Mississippi*?

The amicus briefs argued that the *Bell II* court's failure to fully address *Phillips Petroleum*, and the application of the equal-footing doctrine in Maine, in particular, was reversible error.¹⁷⁶ In the brief period between the Law Court's *Bell I* and *Bell II* decisions, the U.S. Supreme Court handed down its decision in the *Phillips Petroleum* case. The *Bell II* court acknowledges *Phillips Petroleum*, but, without a word of analysis, brushes it off as a "revisionist view of history [that] comes too late by at least 157 years."¹⁷⁷ Rather than drawing on *Phillips Petroleum* (or its predecessor *Shively*) to re-examine whether *Bell I* grasped the full significance of the equal-footing doctrine,¹⁷⁸ the *Bell II* court states, in what can only be described as a non-sequitur: "[t]he *Phillips Petroleum* . . . decision . . . in no way contradicts the plain and carefully explained decision in . . . *Shively*."¹⁷⁹ Of course it doesn't. *Phillips Petroleum* was not urged on the *Bell II* court because it contradicts *Shively*.

On the contrary, the importance of *Phillips Petroleum* lies in the fact that it reinforces, reinvigorates, and shows the continuing vitality of the equal-footing doctrine, which the *Bell I* court ignored in its analysis of *Shively*. The *Bell II* court failed to look at the *Bell I* holding critically and failed in its own right to properly analyze the equal-footing doctrine as it is laid out first in *Shively* and subsequently in *Phillips Petroleum*. Consequently, the State of Maine has not yet had the benefit of the equal-

176. *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469 (1988).

177. *Bell II*, 557 A.2d 168, 172 (Me. 1989). This dismissive remark would be humorous if it were not so unfortunate. The fact that the *Phillips Petroleum* Court, relying on the equal-footing doctrine, confirmed Mississippi's title to its tidelands 171 years after Mississippi became a state, is something other than "revisionist history"—it is doing justice, correcting long-standing error, albeit late in the day. Maine's highest court can, and should, do likewise.

178. Remember that *Bell I* totally ignored the equal-footing doctrine in its analysis of the issues before it. *See supra* Issue III.

179. *Bell II*, 557 A.2d at 172. The *Bell II* court seems to suggest that the *Phillips Petroleum* case must contradict *Shively* in order to be relevant—wrong. Exactly the opposite is true—what is needed and found in *Phillips Petroleum* is a strong reinforcement of *Shively*'s articulation of the equal-footing doctrine.

footing doctrine in delineating its own intertidal land law. Turning now to the language of *Phillips Petroleum*, Justice White, speaking for the Court, begins by stating the case, the Mississippi Supreme Court's disposition of the case, and the U.S. Supreme Court's disposition of the case:

The State of Mississippi, however, claim[s] that by virtue of the equal-footing doctrine it acquired at the time of statehood and held in public trust all land lying under any waters influenced by the tide, whether navigable or not The Mississippi Supreme Court, affirming the Chancery Court with respect to the lands at issue here, held that by virtue of becoming a State, Mississippi acquired "fee simple title to all lands naturally subject to tidal influence We granted certiorari to review the Mississippi Supreme Court's decision, and now affirm the judgment below."¹⁸⁰

Justice White, characterizing *Shively* as "the seminal case in American public trust Jurisprudence,"¹⁸¹ then cites the core holding of *Shively*: "[t]he new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions."¹⁸² Justice White then cites from *Knight v. United States Land Association*¹⁸³ the precise passage previously cited in the Issue III argument above.¹⁸⁴ Justice White, immediately after his citation from *Knight* continues, "[o]n many occasions, before and since, this Court has stated or restated these words from *Knight* and *Shively*."¹⁸⁵ Buttressing this statement, Justice White references ten different federal and state court cases.¹⁸⁶ Justice White then concludes the part of the *Phillips Petroleum* opinion that deals with the equal-footing doctrine:

Consequently, we reaffirm our longstanding precedents which hold that the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide. Under the well-established principles of our cases,

180. *Phillips Petroleum*, 484 U.S. at 472-73 (citations and footnotes omitted).

181. *Id.* at 473.

182. *Id.* at 474. Interestingly, there is a very slight word difference (but no substantive difference) between the actual language of *Shively*, 152 U.S. 1, 26 (1894), and Justice White's citation of *Shively* noted above.

183. *Knight v. U.S. Land Ass'n*, 142 U.S. 161 (1891).

184. See *supra* note 116, and accompanying text.

185. *Phillips Petroleum*, 484 U.S. at 474.

186. *Id.* at 474-475, nn.2-3.

the decision of the Mississippi Supreme Court is clearly correct: the lands at issue here are under tide waters, and therefore passed to the State of Mississippi upon its entrance into the Union.¹⁸⁷

Both the *Shively* and *Phillips Petroleum* Courts understood, and laid out, the prevailing view in the United States with respect to intertidal land rights—that the upland owner’s right/title did not extend below the mean high tide line. At the same time, both Courts acknowledged (as had the *Illinois Central* Court) that some states, Massachusetts among them, had (in order to facilitate “wharfing out”) enlarged upland owner’s rights in intertidal lands. Whether these enlarged rights constituted “fee title,” a “qualified” fee, a “qualified” property, a mere license, or a defeasible estate was for each of these states to decide.¹⁸⁸

The *Bell I* and *Bell II* courts seem clear (more clear than Massachusetts’ highest court) that Massachusetts law, by virtue of the Ordinance and long acquiescence to a judicial usage, gave upland owners fee simple title to all intertidal lands. And both *Bell* courts reasoned that, because Maine was once a part of Massachusetts and grew as a state out of Massachusetts, then Maine too, by the same Ordinance and judicial usage, alienated its intertidal lands to littoral upland owners.¹⁸⁹ But this reasoning has been expressly rejected as inconsistent with the equal-

187. *Id.* at 476-77.

188. The Massachusetts Supreme Judicial Court’s *Boston Waterfront* decision contains a lengthy discussion examining alternative possibilities as to the nature of the property right upland owners in Massachusetts have in intertidal land. *Boston Waterfront Dev. Corp. v. Mass* 393 N.E.2d 356, 363-367 (Mass. 1979). Though some are adamant in their view that the Ordinance conveyed fee title to all intertidal land in the state to upland owners, the *Boston Waterfront* court at several points acknowledges that the law is less than clear: “[p]ast decisions of this court have been inconsistent in their treatment of the relationship between wharfing privileges and ownership of the soil under the wharf.” *Id.* at 363. Its holding clearly suggests that any title held by the upland owner in this case is defeasible: “[w]e therefore hold that the BWDC has title to its property in fee simple, but subject to the condition subsequent that it be used for the public purpose for which it was granted.” *Id.* at 367. A similar case in Vermont, *Vermont v. Central Vermont Railway*, citing *Boston Waterfront*, involved lands underlying navigable waters in Vermont. *Vt. v. Cent. Vt. Ry.*, 571 A.2d 1128 (Vt. 1989). There, the Vermont Supreme Court concluded that the land was held in trust by the state for the people. *Id.* at 1135. The grant, the court explained, was for the purpose of erecting wharves and extending railroad service—these activities for the most part no longer exist. *Id.* at 1129. The court held that the railroad held title subject to a condition subsequent. *Id.* at 1135. The parallels to the issues before the Law Court seem clear.

189. See *Bell I*, 510 A.2d 509, 513 (Me. 1986); *Bell II*, 557 A.2d 168, 171 (Me. 1989).

footing doctrine by a long line of U.S. Supreme Court cases, e.g., *Pollard*, *Knight*, *Shively*, and now *Phillips Petroleum*.¹⁹⁰

For our purposes, the *Pollard* case is most interesting;¹⁹¹ just as Maine was formed out of Massachusetts, the State of Alabama was formed in 1819 from territory formerly part of the State of Georgia. The case involved a dispute over title to a parcel of intertidal land; the title asserted by plaintiff below had its roots in early pre-statehood Spanish grants said to have been confirmed by the United States.¹⁹² Whether the law of Georgia would have confirmed that title had a pre-statehood title dispute arisen with respect to the parcel was not a matter before the *Pollard* Court. What was before the Court was Alabama's contention that it held title (in trust for the public) to all intertidal land, based on its newly acquired statehood, and the equal-footing doctrine.¹⁹³ The U.S. Supreme Court agreed with Alabama, noting: "[w]hen Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession"¹⁹⁴ The *Pollard* Court went on:

Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution. Then to Alabama belong the

190. The *Pollard* Court said it first and perhaps best: "new states [are] admitted into the Union . . . on an equal-footing with the original states" *Pollard v. Hogan*, 44 U.S. 212, 222 (1845).

191. A careful analysis of the *Pollard* case as it related to *Martin* formed a significant portion of the Issue III argument. The use of *Pollard* in this Issue VI argument focuses on the parallel status of Georgia/Alabama on one hand, and Massachusetts/Maine on the other. The line of reasoning and citations to *Pollard* in this argument are different from those in the earlier argument but underscore the significance of the errors (of both *Bell* courts) in refusing to examine *Phillips Petroleum* and/or *Shively*, which would have led the courts to *Pollard* and the weight given to the equal-footing doctrine by the U. S. Supreme Court.

192. *Pollard*, 44 U.S. at 219.

193. *Id.* at 220-21.

194. *Id.* at 223.

navigable waters, and soils under them, in controversy in this case¹⁹⁵

In sum, when a portion of an existing state (e.g., Georgia or Massachusetts) is separated for the purpose of forming a new state (e.g., Alabama or Maine) the equal-footing doctrine holds that the law of the parent state does not ipso facto become the law of the newly created state. Law in the new state is a function of that state's legislature. In fact, the *Pollard* and *Phillips Petroleum* holdings go a step further; they recognize that new states such as Maine, under the equal-footing doctrine, "hold the absolute right to all their navigable waters, and the soils under them for their own common use."¹⁹⁶ Presumably, these rights can only be lost or modified by enactments of the legislature of the new state.

Finally, we must deal substantively with the *Bell II* court's assertion that acceptance of the equal-footing doctrine at this time would be "revisionist . . . history"¹⁹⁷—that it would upset settled expectations, and be (as *Bell I* argued), "fraught with mischief."¹⁹⁸ The petitioners in *Phillips Petroleum* certainly pressed the Court with these same arguments, asserting:

that the Mississippi Supreme Court's decision is inequitable and would upset various . . . kinds of property expectations and interests [which] have matured since Mississippi joined the Union in 1817[,] . . . that they have developed reasonable expectations based on their record title for these lands, and that they . . . have paid taxes on these lands for more than a century.¹⁹⁹

The *Phillips Petroleum* Court was not moved by this importuning, and the holding in the case flatly rejects these arguments. Reaching back 171 years, the Court held: "[w]e are skeptical . . . that a decision affirming the judgment below will have sweeping implications, either within Mississippi or outside that state Indeed, we believe that it would be far more upsetting to settled expectations to reverse the

195. *Id.* at 228-29; the *Pollard* Court reaffirms the equal-footing doctrine and Alabama's right thereunder by citing (almost verbatim) a portion of Chief Justice Taney's reasoning in *Martin*. See *supra* note 127; compare *Martin*, 41 U.S. 367, 410, with the above citation.

196. See *Pollard*, 44 U.S. at 229.

197. *Bell II*, 557 A.2d 168, 172 (Me. 1989).

198. *Bell I*, 510 A.2d 509, 514 (Me. 1986).

199. See *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 481-82 (1988).

Mississippi Supreme Court decision.”²⁰⁰ The *Phillips Petroleum* Court went on: “[t]he fact that petitioners have long been the record title holders, or long paid taxes on these lands does not change the outcome here Consequently, we do not believe that the equitable considerations petitioners advance divest the State of its ownership in the disputed tidelands.”²⁰¹ In closing the *Phillips Petroleum* Court also noted, “that under Mississippi law, the State’s ownership of these [intertidal] lands could not be lost via adverse possession, laches, or any other equitable doctrine.”²⁰² In short, Mississippi’s intertidal lands could not be lost merely by the passage of time. The Law Court is urged to take a similar view with respect to Maine’s intertidal lands.

Summarizing more broadly, it seems clear that the *Bell II* court’s failure to appreciate the reaffirming weight given to the equal-footing doctrine in the *Phillips Petroleum* case, coupled with its failure to recognize that the *Bell I* court had either overlooked or ignored the significance of the equal-footing doctrine in its use of the *Shively* case, was error. These errors, (by both *Bell* courts) in turn, led both courts to miss the significance of cases such as *Pollard*, *Knight*, and *Martin*, all of which explained the meaning and scope of the equal-footing doctrine—a doctrine certainly meant to apply to all new states, including Maine.

Given this continuous body of U.S. Supreme Court case law, the amicus briefs’ argued that the *Bell II* court’s holding should be reversed by the Law Court. The Maine Legislature should (at long last) be given the opportunity to exercise the equal-footing doctrine to determine Maine law with respect to intertidal lands.

X. ARGUMENT: ISSUE VII

If the Law Court reexamines Bell II, we reach Issue VII:

Whether the *Bell II* court erred in narrowly interpreting the public uses permitted in the intertidal zone pursuant to the “public easement” recognized in the *Bell* cases.

The amicus briefs argued that the *Bell II* court’s conclusion that public uses are permitted, but “only”²⁰³ for fishing, fowling, and navigation, was unduly narrow. The court failed to apply relevant

200. *Id.* at 482-83.

201. *Id.* at 484.

202. *Id.*

203. *Bell II*, 557 A.2d 168, 169 (Me. 1989).

property law rules of statutory construction (and case law construing these rules) to delineate the scope of the “public easement.” It further erred in failing to acknowledge the much broader range of public use rights implicit in the historical concept of *jus publicum*.

If arguments leading to this point are rejected, or, put another way, if the Law Court leaves in place the central holdings of *Bell I* and *Bell II*, i.e., that upland owners in Maine hold fee simple title to intertidal lands, subject only to a reserved “public easement,” then “the only question presented [to the *Bell II* court, and to the Law Court today] is the scope” (the breadth) of these reserved public rights on what is now characterized as privately owned intertidal land.²⁰⁴ This is the question addressed now.

As noted earlier, the Ordinance is the asserted founding document of this vast alienation of *jus publicum* property (the intertidal lands of two states). But, also noted is the fact that the Ordinance is not a deed; it is not a conventional grant or conveyance of property; it is not the product of any bargain. If the *Storer v. Freeman* case²⁰⁵ is accepted at face value, the Ordinance was widely viewed as an inducement to “wharf out”—an inducement without any time frame, and one that did not impose any reciprocal duties on the grantees. It was a gift. No other characterization of this conferred property interest seems possible.

It seems appropriate, then, to examine both conventional property law rules of construction, and case law applying such rules, to determine (as *Bell II* says we must) “the scope of the rights . . . reserved to the public.”²⁰⁶ A leading American treatise on property law puts it this way: “[i]t seems reasonable to attribute to the average transferor an intention that produces *a result which is more in accord with the public interest*, whenever the language he has employed in a donative transaction is susceptible of different interpretations. Consequently, a preference to this effect has been recognized.”²⁰⁷

The same treatise points out that when a grantor, who at the outset has the full quantum of rights, both transfers rights to a grantee, and retains rights (as the Ordinance is said to have done) *the grantor has/retains the residuum of rights* (whether by the fiction of “re-grant” or a more straight forward “reservation”).²⁰⁸ In other words, the Ordinance gave grantee(s) what they needed in order to “wharf out,” title in the

204. *Id.*

205. 6 Mass. 435 (1810).

206. *Bell II*, 557 A.2d at 173.

207. 5 AMERICAN LAW OF PROPERTY § 21.3(d) (1952) (emphasis added); see also Delogu, *supra* note 103, at 46-47, 50-51.

208. 2 AMERICAN LAW OF PROPERTY §§ 8.24-8.25 (1952) (emphasis added).

underlying flats—nothing more. Everything else embodied in the concept of *jus publicum*, the residuum of public rights in the foreshore, remained (and remains to this day) in the hands of government in trust for the public.²⁰⁹

In addition, the treatise makes clear that a grant that is made gratuitously, that lacks consideration (as was the case with the Ordinance), is to be construed narrowly against the grantee:

In ascertaining the meaning of a conveyance for the purpose of determining the scope of an [interest] created by it, account should be taken of the nature of the conveyance as being gratuitous or based upon a consideration *In the case of a gratuitous conveyance, less account need be taken of the meaning of the conveyance to the grantee.*²¹⁰

Here again, conventional property law rules of construction suggest that the *Bell II* court should have read private upland owner rights narrowly, and should have read the “public easement,” the “reserved” rights, expansively. The *Bell II* court, however, did the exact opposite. The upland owners—grantees under the Ordinance—gave nothing for what they received, but their rights were significantly enlarged by *Bell II*'s holding—public rights were narrowed.

Turning to the case law, both *Bell* courts relied on *Alger*,²¹¹ which the *Bell II* court characterized as “a leading case construing and applying the Ordinance.”²¹² Chief Justice Shaw, speaking for the Massachusetts Supreme Judicial Court in *Alger*, noted:

When therefore the government did, by such general act [the Ordinance] grant a right of separate property in the soil of the sea-shore, to enable the riparian proprietor to erect quays and wharves for a better access to the sea, and by the same act reserved some right to individuals and the public of passing and re-passing with vessels, but without defining it, *it seems just and reasonable to construe such reservation much more liberally in*

209. It should also be noted that there is no historical evidence—nothing in the Ordinance itself, or in cases like *Storer*, *Alger*, or *Boston Waterfront* that a secondary intent of the Ordinance was to limit or narrow public use rights in the foreshore. That motive did not exist in 1647. In the minds of many it was not thought possible. In Massachusetts and Maine, exclusion of the public, and/or limiting public use rights in the foreshore is a product of late twentieth century private property rights zealotry.

210. 2 AMERICAN LAW OF PROPERTY § 8.67 (1952) (emphasis added).

211. 61 Mass. 53 (1851).

212. *Bell II*, 557 A.2d 168, 171 n.10 (Me. 1989).

favor of the right[s] reserved, than it otherwise would be under other circumstances.²¹³

The court in *Commonwealth v. City of Roxbury* took a similar position:

[The Colonial Government] held a prerogative right to the sea and sea shores, in a fiduciary relation, for the public use. *As a general rule, in all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor* — reversing the common rule as between individuals.²¹⁴

At another point in this opinion, Justice Shaw (who also authored the *Alger* opinion) speaking of the scope of what he called the *publici juris* (reserved public rights) characterized them as being, “*for the use and benefit of all the subjects, for all useful purposes*, the principal of which were navigation and the fisheries.”²¹⁵ In other words, one of the foremost members of Massachusetts’ judiciary, a scholar in his day, looking back on almost 200 years of post-Ordinance history understood the appropriate rule/method of statutory construction to be applied in interpreting reserved public rights. He also understood the fact that those rights included “all useful purposes”—navigation and fisheries were important uses, but they were not the only reserved public uses permitted.²¹⁶

Beyond these treatise rules of statutory construction, and cases applying and interpreting these rules, there is further support for this argument in the fact that the so-called “public easement” is rooted in the *jus publicum*, which in turn is rooted in the Justinian view that some things are inherently incapable of private ownership—the air, running

213. *Alger*, 61 Mass. at 94 (emphasis added). A reading of all of pages 94-95 seems useful.

214. *Commonwealth v. City of Roxbury*, 75 Mass. 451, 492 (Mass. 1857) (emphasis added).

215. *Id.* at 483 (emphasis added).

216. *See also* *Home for Aged Women v. Commonwealth*, 89 N.E. 124 (Mass. 1909). The court takes the position that the trust for the public, under which the state holds and controls navigable tidewaters, encompasses more than navigation alone—“[i]t is wider in its scope, and it includes all necessary and proper uses, in the interest of the public.” *Id.* at 129. The *Boston Waterfront* case, beyond its discussion of (post-Ordinance) ambiguities in Massachusetts law with respect to upland owner property rights, also suggests at several points that reserved public rights were not intended to be, and were not always, narrowly construed. *Boston Waterfront Dev. Corp.*, 393 N.E.2d 356 (1979).

water, the sea, and the foreshore—an essential interface between dry land and the sea.²¹⁷

The underlying principle of *jus publicum* in the foreshore grew out of a belief that this intertidal land area was of necessity public—open to all, and essentially without limit as to uses. One may as readily dig for clams, as dive for sponges—or, in Maine, sea urchins. One may use the foreshore for lateral passage, or to launch a small boat from which one might fish or travel to another point along the foreshore, or simply sail for pleasure. One could engage in vast seaborne commerce, launch war canoes, dry or repair ones nets, or simply sit and watch the sea.²¹⁸ From time immemorial, all of these *jus publicum* and public use activities have been conducted on the foreshore of Massachusetts, Maine, and every other state and nation in the world which borders the sea. Different uses were more or less important at different times. The *jus publicum* was infinitely adaptable to the changing needs of a given time and place; that was the purpose and the beauty of the concept.²¹⁹

For our purposes, the point to be made is that nothing in the Ordinance (or in any case law purporting to interpret the Ordinance) suggests that the *jus publicum* was intended to be abrogated or limited. This point bears repeating—the Ordinance, the purported source of the upland owner's title, and the public's remaining reserved rights, does not use the terms “only” or “delimit[ed]” to circumscribe public use rights. If one looks at the four lines of the Ordinance said to convey title to intertidal lands, or the whole of the section titled *Liberties Common*, or the whole *Book of the General Lawes and Libertyes*, one cannot find any indication that public use rights, *jus publicum*, was to be “limited” to fishing, fowling, and navigation—that these were the “only” public use rights remaining and reserved as part of the *jus publicum*. This concept

217. Justinian codes date back almost 1500 years and themselves are based on so-called “natural law.” See Tannenbaum, *supra* note 46, at 107-110.

218. See G. Graham Waite, *Public Rights in Maine Waters*, 17 ME. L. REV. 161 (1965), particularly, “The Meaning of the Trust Doctrine in Maine” at 176-178, and “Public Rights of Access to Waterways and to the Ocean,” at 185-188.

219. To the extent that this foreshore area could be said to be owned, the sovereign or state was said to be a trustee, the holder of this unique property interest, in trust for the people. See Opinion of the Justices, 437 A.2d 597, 599, 605-609 (Me. 1981). Moreover, the sovereign or state must meet fiduciary duties, inherent in the role of trustee, to protect (by imposing necessary regulations) both the foreshore itself, and the *jus publicum*. Finally, in most jurisdictions, including Maine, it is clear that the *jus publicum* cannot be lost by prescription or adverse possession. It cannot be given away. It can be alienated, but only to a limited degree, and then only by legislative action, when larger public interests are served. See also Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475-478 (1970).

of limitation is simply not there. It's not implied, and it's certainly not in the language of the Ordinance.

In short, the *Bell II* court's holding that the reserved public easement may be used "only for fishing, fowling, and navigation"²²⁰ is an unwarranted judicially fashioned fiction. To be sure, fishing, fowling, and navigation are specifically mentioned in the Ordinance as permitted public uses—they were examples of the most common and the most obvious public uses of the day. But there is no suggestion in the critical four lines of the Ordinance, the *Liberties Common*, or the *Book of the General Lawes and Libertyes* that a rule of *ejusdem generis* was to be applied; that the drafters of the Ordinance intended to exclude any/all other public uses; that the historic elasticity of the concept of *jus publicum*, was to be frozen in time; that new public uses of intertidal land that could not be fitted into the rubrics of fishing, fowling, navigation, would be barred forever; or, that upland owners (beyond the title conferred) would forevermore have the right to exclude people and uses that could not fit themselves into the stated rubrics. It's preposterous—these intentions and motives did not exist in 1647. There is no suggestion that they existed in any of the documents noted above, and no such suggestion has been found in any colonial histories, or in the writings of any legal historians, to permit the inference that limiting the *jus publicum* rights was one of the intentions of those who drafted the Ordinance.

On the contrary, there is considerable evidence (at least in Maine) that the explicit limitations fashioned by the *Bell II* court did not exist prior to that court's holding.²²¹ For example, no Maine case can be

220. See *Bell II*, 557 A.2d 168, 169 (Me. 1989).

221. At this point the *Bell II* court is in something of a dilemma—it has fashioned an unwarranted limitation on public use rights and rigidly applied it to the case at hand. But, at the same time, it must acknowledge a body of Maine case law holding that 'fishing,' 'fowling,' and 'navigation' uses may be undertaken for pleasure or commercial purposes, or to provide sustenance. See e.g., *Barrows v. McDermott*, 73 Me. 441, 449 (1882). Other cases cited in the *Bell II* opinion have sympathetically interpreted what is encompassed within the terms fishing, fowling, and navigation.

For example, the operator of a power boat for hire may pick up and land his passengers on intertidal land, *Andrews v. King*, 129 A. 298 (1925); and "navigation" also includes the right to travel over frozen waters, *French v. Camp*, 18 Me. 433 (1841), to moor vessels and discharge and take on cargo on intertidal land, *State v. Wilson*, 42 Me. 9, 24 (1856); and, after landing, "to pass freely to the lands and houses of others besides the owners of the flats," *Deering v. Proprietors of Long Wharf*, 25 Me. 51, 65 (1845). Similarly, we have broadly construed "fishing" to include digging for worms, *State v. Lemar*, 87 A.2d 886 (1952),

found that bars simply “walking” within the intertidal zone. No Maine case can be found (prior to *Bell II*) embracing the dubious distinctions and reasoning of *Butler v. Attorney General*.²²² In *Butler*, the right to “swim” or “float” in public intertidal waters is said to be a permitted public use, but “bathing” is not a public use.²²³ One is at a loss to see the logic of this distinction, or how it would be enforced by an upland owner (or court) intent on limiting the *jus publicum* to fishing, fowling, and navigation.

There are also historical records/studies in Maine that evidence the felt need to maintain both narrow upland areas, and almost all intertidal areas, both for lateral passage and the storage of people, boats, wagons, and animals.²²⁴ In the first serious settling of the Town of Cumberland (in the 1730s), for example, a three rod wide (49.5 feet) swath of upland was to be kept open for public use, and almost all of the initial property conveyances in the town bounded by the sea were specifically extended only to mean high.²²⁵ The intertidal land was to be kept open for lateral passage—this was at the time an essential public use right.²²⁶

From statehood (1820) until *Bell II* (1989), no Maine case can be found that successfully challenged “walking,” “swimming,” “floating,” “bathing,” and “lateral passage”—activities well beyond the fishing,

clams, *State v. Leavitt*, 72 A. 875 (1909), and shellfish, *Moulton v. Libbey*, 37 Me. 472 (1854).

Bell II, 557 A.2d at 173. Unlike *Bell II*, none of these cases undertakes to limit public use rights. On the contrary, they each incrementally broaden public use rights.

The *Bell II* court was not inclined to overrule this long line of cases. Instead, it disingenuously expresses a sympathy for this liberality—a sympathy not borne out by its holding, and certainly not borne out by plaintiffs in the two cases now before the Law Court. More importantly, however, the long line of Maine cases the *Bell II* court would adroitly side-step give credence to the argument that the limitations on the *jus publicum* that *Bell II* imposed are not embodied in either the Colonial Ordinance itself, or prior Maine case law. They have instead been fashioned out of whole cloth by the *Bell II* court and thus can and should be overturned by the Law Court.

222. 80 N.E. 688 (Mass. 1907).

223. *Id.* at 689.

224. See ORLANDO DELOGU, AN EXAMINATION AND UPDATING OF RESEARCH RELATIVE TO TOWN OF CUMBERLAND CLAIMS TO UPLAND ALONG THE FORESHORE AND TO INTERTIDAL LANDS (1991). This source is on file in the University of Maine School of Law Library, and Cleaves Law Library.

225. *Id.* Interesting, too, is the fact that some eighty years after passage of the Ordinance, no one in the Massachusetts legislative body authorizing the Proprietors of the Town of Cumberland to make initial conveyances of what presumably was public domain land, felt bound by the Ordinance to convey these (approximately one hundred) littoral parcels to mean low water.

226. See Delogu, *supra* note 224, at 13-18.

fowling, and navigation limitations said to exist. This fact must be seen as evidence that no one, not upland owners or the public at large, believed that these activities were barred. Stated more affirmatively, upland owners and the public at large believed that the *jus publicum* encompassed these activities and more as needs may dictate.²²⁷ Depending on one's view, the Ordinance may have conveyed to littoral landowners a "title" to intertidal land, a "qualified title" to intertidal land, or a mere "license" to use, fill, and thereby gain title to intertidal land. But there is full agreement that the Ordinance did not convey to littoral landowners a "fee simple absolute title" to intertidal land. The broad range of reserved public use rights always remained in the hands of the state in trust for the people.²²⁸

In sum, the *Bell II* court failed to consider relevant and conventional property law rules of construction, and it ignored case holdings urging application of these rules. These were errors that led to further errors by the *Bell II* court, i.e., a failure to appreciate that the Ordinance grant of intertidal land to upland owners left a broad range of public uses, the *jus publicum* in governmental hands in trust for the public. There can be little doubt that whatever property the upland owners received under the

227. Interestingly, New Hampshire law is strikingly similar to the reasoning laid out above. As the New Hampshire Supreme Court explained in 1890:

[T]he legal title of New Hampshire land was in the king, who held it as trustee in his official and representative capacity The seashore, arms of the sea, and large ponds, by reason of their special adaptation to public uses, were set apart and reserved as public waters "The use of navigable waters is inalienable " Land covered by public water is capable of many uses. Rights of navigation and fishery are not in the whole estate. . . . He [the king] "held the seashores as well as the land under the sea," and other property of the same public class, "*for the use and benefit of all the subjects, for all useful purposes, the principal of which were navigation and the fisheries.*"

Concord Mfg. v. Robertson, 25 A. 718, 721 (N.H. 1890) (emphasis added).

228. See *James v. Inhabitants of Town of West Bath*, 437 A.2d 863 (Me. 1981). Holding that state regulation of worm digging preempted local regulations, the court further noted:

A consistent theme in the decisional law is the concept that Maine's tidal lands and resources, including marine worms, are held by the State in a public trust for the people of the State. The state, unless it has parted with title, owns the bed of all tidal waters within its jurisdiction as well as such waters themselves so far as they are capable of ownership, and has full power to regulate and control fishing therein for the benefit of all the people.

Id. at 865-6 (quoting *State v. Lemar*, 87 A.2d 886, 887 (Me. 1952)). At another point, the court states: "The continued vitality of the public trust doctrine was recently reaffirmed in *Opinion of the Justices*, 437 A.2d 597 (Me. 1981)." *James*, 437 A.2d at n.5.

Ordinance, they took it with full knowledge that a robust *jus publicum* remained in place.

Bell II's major error, however, was its summary conclusion that Massachusetts', and thus Maine's post-Ordinance intertidal land law not only gave fee title to upland owners subject to a reserved "public easement," but that this easement was "*delimit[ed]*"²²⁹—it encompassed "*only* fishing, fowling, and navigation."²³⁰ By affixing these words of limitation—"delimit" and "only"—to the Ordinance (words that are not in the Ordinance, not implied, and that were not intended by the drafters of the Ordinance), the *Bell II* court has again erred. These errors have expanded the rights of upland owners, and concomitantly narrowed public use rights and stultified the *jus publicum*. Prior to *Bell II*, no Maine court had similarly held.

The *Bell II* court's unduly narrow delineation of the "scope" of reserved public rights and uses of intertidal land is both unwarranted and legally unsustainable; it runs counter to the very cases and authorities the court purports to rely upon. It is a conclusion that almost certainly would not have been reached had the cited treatise and case law injunctions been followed, and/or if the court had fully grasped the purpose and meaning of the concept and doctrine of *jus publicum*.

The latter concept has never been a static one. Public uses of critical, unique intertidal lands have continuously changed over time; they must continue to do so. *Bell II* has the effect of freezing the public use rights at a point in time nearly 350 years ago. The dominant public uses then, become the "only" public uses permitted now. Changed conditions, changed needs, new technologies, and whole new realities for public use of intertidal land can no longer be taken into account by an evolving body of law.

This litany of error should be recognized by the Law Court and appropriate modifications of the *Bell II* holding fashioned—modifications that both recognize a broadened range of reserved public use rights in Maine and/or that fully recognize the legislative enactment struck down by the *Bell II* holding.²³¹ In short, *Bell II*'s "piece of judicial legislation" is egregious error which the amicus briefs call upon the Law Court to reverse.²³² In doing so, the *jus publicum* will be reaffirmed, and

229. *Bell II*, 557 A.2d 168, 173 (Me. 1886) (emphasis added).

230. *Id.* at 173 (emphasis added).

231. Intertidal Land Act, ME. REV. STAT. ANN. tit. 12, §§ 571-573 (2005).

232. In *Concord Manufacturing*, the New Hampshire Supreme Court recognizes in a related context that alienation of trust property is a legislative function:

[T]he title of the soil under large ponds and tide waters [held to be trust property] does not pass by an ordinary governmental grant of land bounded by or on them.

a range of public uses commensurate with today's needs, and able to adjust to tomorrow's changing conditions, can emerge.

XI. ARGUMENT: ISSUE VIII

If the Law Court reexamines Bell II, we reach Issue VIII:

Whether the *Bell II* court erred in concluding that The Intertidal Land Act²³³ constituted a taking of the upland owners' private property, including whether the recent U.S. Supreme Court case, *Stop the Beach Renourishment*²³⁴ should alter the *Bell II* court's analysis.

The amicus briefs argued that the *Bell II* court had erred in concluding that the Act constituted a taking and that this error is underscored by the recently decided *Stop the Beach Renourishment* case. It must also be recognized that if any one of the substantive arguments previously advanced²³⁵ are acceded to by the Law Court, the whole paradigm is shifted. The Intertidal Land Act will not have effected a taking of any upland owner property because the Law Court will have recognized either that the boundary of upland owner property²³⁶ does not reach below mean high²³⁷ or that, even if title to intertidal land remains with the upland owner, the residuum of the *jus publicum* remains with the state, in trust for the people.²³⁸ In either case, the Intertidal Land Act will not have invaded any private property right or interest of upland

... [a]n alienation of the title of soil is not an exercise of executive [or judicial] power, and cannot be effected without legislative authority.

Concord Mfg. v. Robertson, 25 A. 718, 720 (N.H. 1890).

233. tit. 12 §§ 571-573 (2005) (permitting the public to use intertidal lands for recreational purposes).

234. 560 U.S. ___, 130 S.Ct. 2592 (2010).

235. Issues II, III, IV, IV, IV, or VII.

236. To be completely accurate, it should be noted that there is an exception for the relatively few parcels where adjacent intertidal land, now filled, was validly alienated pursuant to the Submerged Lands Act.

237. If the Law Court reaches this conclusion, it will have explicitly or implicitly found that the state holds title to intertidal land in trust for the people—the prevailing view in the United States will be reestablished as the law in Maine.

238. Even if, in addressing Issue VII, the Law Court does little more than expand the “scope” of the reserved “public easement” (beyond the narrow fishing, fowling, and navigation), the point being made here remains accurate. The Intertidal Land Act would appropriately be seen as prior legislative action paralleling the court's action (no taking). The Intertidal Land Act's inclusion of police power regulatory measures designed to protect intertidal lands, and public use thereof, is quite clearly not a taking of any upland owner property interest.

owners. It simply stands as a permissible legislative Act defining the *jus publicum*; a current range of permitted public uses of intertidal land are spelled out and some regulatory measures designed to protect intertidal land are fashioned. The enactment applies only to property interests held by the state, in trust for the public.

Even if all of the substantive arguments previously advanced by the amicus briefs are rejected by Law Court, leaving upland owners with fee title to intertidal lands, the Intertidal Land Act is still not an unconstitutional taking of upland owner property, as takings law is currently defined by national and Maine cases.²³⁹ If one asks: does the Intertidal Land Act take some property interest, however small, of upland landowners? The answer is: yes. The upland owner's right to preclude many recreational uses²⁴⁰ in the intertidal zone would no longer be permitted. But this is not the relevant question; the answer tells you nothing as to whether an unconstitutional taking has occurred. Every zoning-type regulation in the country, permitting some uses in a particular zone and prohibiting others, takes away some element of private property prerogative. But zoning regulations have long been deemed, necessary, and constitutionally permissible—not a taking. The leading U.S. Supreme Court case dealing with regulatory takings, *Pennsylvania Coal Co. v. Mahon*,²⁴¹ noted that: “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”²⁴²

In other words, not all regulations which diminish property rights are constitutionally impermissible—some are simply reasonable exercises by government of the police power necessary to protect some aspect of the public's health, safety, or general welfare. In determining whether a particular regulation is a reasonable, uncompensated diminution of a private property right, or an unconstitutional taking of that right, *Pennsylvania Coal* was also helpful. The Court noted: “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.”²⁴³ So the real question that must be asked and answered here is: does the Intertidal Land Act go “too far”?

239. See Orlando Delogu, *The Law of Taking Elsewhere and One Suspect in Maine*, 52 ME. L. REV. 323, 325-33, 353-54 (2000).

240. Intertidal Land Act does not affect all recreational uses. Both the state and upland owners agree that, pursuant to the reserved “public easement,” recreational fishing, boating, and bird shooting are already permitted public uses in intertidal land.

241. 260 U.S. 393 (1922).

242. *Id.* at 413.

243. *Id.* at 415.

It does not. By any of the conventional factors courts use to determine whether a regulatory statute is reasonable, or a taking, the Intertidal Land Act passes the reasonable test. The first thing courts often ask is whether the intrusion on the private property right serves a valid public interest. The Intertidal Land Act restricts imprudent intertidal land uses, and it makes clear that municipalities may participate in regulating intertidal land use—provisions that benefit upland owners and the public alike.²⁴⁴

The Intertidal Land Act's authorization of recreational use within the intertidal zone by members of the public is nothing more than the recognition of a changed condition, a new reality that was unforeseen and unforeseeable at the time the reserved "public easement" was fashioned. The new reality put simply is that the recreational use of intertidal land is as economically valuable in the twentieth and twenty-first centuries as "wharfing out" (i.e. marine commerce and fishing) was in the colonial era. This recognition is obvious to the public, and to courts and legislatures in other coastal states.²⁴⁵ This recognition breathes life into the common law, and is correctly seen as an exercise by the Maine legislature of its long-standing prerogative to define, modify, expand, and/or abrogate the common law. It seems well within the legislative powers clause of the Maine Constitution.

Another factor examined by courts in determining whether a regulation is reasonable, or a taking, is the economic consequences of the regulation. Is the diminution in value caused by the regulation shocking or inconsequential? Maine cases, and the case law of most jurisdictions, suggests that fairly large diminutions in value occasioned by the imposition of a regulation will be sustained—not a taking—if the economic value that remains with the regulation in place still provides a

244. Intertidal Land Act, ME. REV. STAT. ANN. tit. 12, §§ 571-573 (2005).

245. For example, in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, the New Jersey Supreme Court noted:

We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit. The legislature appears to have had such an extension in mind in enacting N.J.S.A. 12:3-33, 34, previously mentioned.

Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972); see also *Mathews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 363 (N.J. 1984) ("extension of the public trust doctrine to include bathing, swimming, and other shore activities is consonant with and furthers the general welfare").

reasonable economic return to the property owner.²⁴⁶ Whichever way one approaches the economic consequences of the Intertidal Land Act, it seems fair to say that it has had little, or no, economic impact on the value of upland property. These properties were not depressed in value before the *Bell* holdings, when a broad range of recreational uses of intertidal land was common, and they have not shot up in value since *Bell II* declared the Intertidal Land Act to be a taking. In other words, the economic consequences of the Intertidal Land Act are negligible. This would suggest that the regulation is not a taking.

A third factor often looked to in determining whether a regulation is permissible or a taking, is the reasonable expectations of property owners, particularly “investment-backed expectations.” This formulation for examining the taking question derives from another widely cited U.S. Supreme Court case, *Penn Central Transportation Co. v. City of New York*.²⁴⁷ What then were the “reasonable investment-backed expectations” of the *Bell* plaintiffs? Arguably, there were not any in this case because there was no investment. *Bell*’s predecessors in title were the beneficiaries of a windfall, a gift bestowed on them by the Ordinance. Can one reasonably expect such fortuity? Not usually. The loss of a windfall can hardly be characterized as a taking.

Given these beginnings, was it reasonable for the grantee to expect that some reciprocal duty would never be imposed? Hardly. Was it reasonable for the grantee to expect that the reservation would be interpreted narrowly against the interests of the grantor, in this case, the public? Hardly. Was it reasonable for the grantee to expect that the reserved rights would be frozen in time—that they would never be adjusted to take into account changed conditions, new and unforeseen public uses of intertidal land? Hardly. Expectations like these are not reasonable.

If the questions are put the other way one might ask: is it reasonable for the *Bell* plaintiffs, beneficiaries of a gift, to seek the narrowest interpretation of the reserved public easement? It is not. Is it reasonable for the *Bell* plaintiffs, and the *Bell II* court, to claim that the Intertidal Land Act is a taking because it deprives upland owners of “the general right to exclude others”? It is not. *There never was a general right to exclude others*. It’s a fiction demonstrating the unreasonableness of the *Bell* plaintiffs and the illogic of the *Bell II* holding.

246. See *Hall v. Bd. of Env'tl. Prot.* 528 A.2d 453 (Me. 1987).

247. 438 U.S. 104 (1978) (holding that none of the reasonable investment-backed expectations of *Penn Central* were cut off by the regulation—there was no taking).

Passage of the Ordinance may have given upland owners a title to intertidal land, but, at the very least, a reserved “public easement” was simultaneously created. Stated more generously, the residuum of public use rights, the *jus publicum*, continued. These interests, however characterized, are held in trust by government, and serve to retain long-standing public access to, and public use of, intertidal land. Whether by Ordinance or *jus publicum* or both, access and use rights were intended to benefit the public the whole public.²⁴⁸ Whether one looks to the Ordinance or to the *jus publicum*, no member of the public was, or could be, excluded by upland owners; not historically, not now. In short, the public has always had access to intertidal land. The Intertidal Land Act merely broadens and makes explicit the uses available to today’s public pursuant to this right of access. And, as shown above, it does so in a manner that does not rise to the level of a taking.²⁴⁹

Finally, *Alger*,²⁵⁰ the case most often relied upon by the *Bell* courts, anticipated the very issues raised here. Chief Justice Shaw, while confirming the title of upland owners arising out of the Ordinance, stated:

[T]he riparian proprietor[s] . . . must have well understood that all estate[s] granted by the government to individuals is subject, by reasonable implication, to such restraints in its use, as shall make the enjoyment of it by the grantee consistent with the equal

248. The *Bell II* court’s flawed reasoning on this point draws heavily on the flawed reasoning and takings analysis of a Massachusetts advisory opinion. Opinion of the Justices (*Mass. Opinion*), 313 N.E.2d 561, 567-569 (Mass. 1974). The *Mass. Opinion* is premised on the view that the Ordinance gave upland owners fee title which drew with it a general right to exclude. Such a view is inconsistent with both the reserved public easement and the *jus publicum*, which could not be alienated, and which guaranteed a general public right of access to intertidal land. Long-standing rights of lateral passage, sitting, storing nets, grazing animals, et cetera, bear out the fact that this general right of access extended beyond the access for fishing, fowling, and navigation specifically noted in the Ordinance. The errors of the Massachusetts court were followed almost word for word by the *Bell II* court (see *Bell II*, 557 A.2d at 177-178) and led to *Bell II*’s erroneous holding that the Intertidal Land Act was a taking. These compounded errors should not be perpetuated.

249. *Bell II*’s reliance on cases such as *Nollan v. California Coastal Commission* and *Loretto v. Teleprompter Manhattan CATV Corp.* is misplaced. In these cases, prior to regulation, there was no preexisting right to use or access the property—here, there clearly is. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

250. *Commonwealth v. Alger*, 61 Mass. 53 (1851).

enjoyment by others [the public] of their several and common rights²⁵¹

Chief Justice Shaw continued:

Considering, therefore, that all real estate derived from the government is subject to some restraint for the general good, whether such restraint be regarded as a police regulation [or] of any other character; considering that sea-shore estate, though held in fee by the riparian proprietor, both on account of the qualified reservation under which the grant was made, and the peculiar nature and character, position and relations of the estate, and the great public interests associated with it, *is more especially subject to some reasonable restraints, in order that the exercise of full dominion over it, by the proprietor, may not be noxious to others, and injurious to the public*, the court are of opinion that the legislature has power, by a general law affecting all riparian proprietors on the same line of shore equally and alike, to make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce these restraints by suitable penalties.²⁵²

All of Chief Justice Shaw's foregoing arguments suggest that the *Bell II* court's conclusion that the Intertidal Land Act was a taking of property are incorrectly premised and incorrectly apply current takings law. The Intertidal Land Act is a legislative exercise of the Maine's power to clarify or redefine the common law (the *jus publicum*, the reserved public right), to adjust to new realities, new valuable uses of intertidal land. At the same time, the Intertidal Land Act is an exercise of police power, a regulatory measure that confers benefits on both upland owners and the public. It does not go "too far." The Intertidal Land Act is therefore entitled to deference by the Law Court; it follows then that the Law Court should reverse the holding of *Bell II*, and to declare the Intertidal Land Act valid and fully operational.

The above arguments were buttressed by the U.S. Supreme Court's holding in *Stop the Beach Renourishment*,²⁵³ handed down even while

251. *Id.* at 94. A complete reading of this portion of the opinion seems useful.

252. *Id.* at 95 (emphasis added).

253. 560 U.S. ___, 130 S. Ct. 2592 (2010). In accordance with Law Court briefing schedules, the *McGarvey* amicus brief was submitted to the court on June 2, 2010; it contains no reference to *Stop the Beach Renourishment*. The *Flaherty* amicus brief submitted to the Law Court on June 30, 2010 contains argument (Issue VIII in that brief) that relies on the U.S. Supreme Court's reasoning in *Stop the Beach Renourishment* that

briefs in the *Flaherty* and *McGarvey* cases were being submitted. On the critical (for our purposes) taking issue in *Stop the Beach Renourishment*, the U.S. Supreme Court (by a vote of 8-0)²⁵⁴ affirmed Florida's highest court and sustained what seems an axiomatic proposition: that in order for a "taking" argument to succeed, the party who claims its property interest has been taken, must show that it actually possesses the property interest in question.²⁵⁵ The littoral upland owners in the Florida case, and in *Bell II*, failed to meet this threshold requirement; thus their "taking" claim fails. Justice Scalia, speaking for the Court, noted:

There is no taking unless petitioner can show that, before the Florida Supreme Court's decision [sustaining the State's claim to the renourished beach], littoral property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land. Though some may think the question close, in our view the showing cannot be made.²⁵⁶

The Court went on to note that the Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established.²⁵⁷ We cannot say that the Florida Supreme Court's decision eliminated a right of accretion established under Florida law.²⁵⁸ In short, no property interest means no valid "taking" claim.

A second aspect of the case worth noting is that the Court in *Stop the Beach Renourishment* puts the threshold burden of showing that a property interest exists squarely on the petitioner, the party claiming there is a "taking."²⁵⁹ The mere assertion of a "taking" claim does not shift the threshold burden onto the state to show that its actions do not constitute a "taking." The relevance of these aspects of the *Stop the Beach Renourishment* holding to issues currently before the Law Court seems clear. *Bell II* held that the Intertidal Land Act constituted a "taking" of littoral upland owners' property. But *Stop the Beach Renourishment* prompts one to ask—what property interest of littoral

seemingly precludes *Bell II*'s finding that Maine's Intertidal Land Act constituted a taking of upland owner property interests.

254. Justice Stevens did not participate in the decision.

255. *Stop the Beach Renourishment*, 560 U.S. ___, 130 S. Ct. at 2611.

256. *Id.*

257. *Id.* at 2612.

258. *Id.*

259. *See id.* at 2611. Justice Scalia makes clear that the littoral property owners theory, "puts the burden on the wrong party." *Id.*

upland owners is invaded by the Intertidal Land Act? Did the *Bell* plaintiffs meet their burden of showing that a protectable property interest exists? The short answer to these questions is: none and no.

The Intertidal Land Act does not challenge any aspect of littoral upland owners' purported title to intertidal land; nor does it encourage or permit any invasion, by any member of the public of the upland portion (the area above the mean high tideline) of the littoral landowners' property.²⁶⁰ If the Intertidal Land Act did either of these two things, a "taking" claim might very well lie. The question, then, remains—what property right of littoral upland owners involving intertidal land is invaded by the Intertidal Land Act?

As noted earlier, the *Bell II* court accepted in total the Massachusetts court's reasoning that the Ordinance conveyed a title to littoral upland owners of intertidal lands; the court also held that this title drew with it a "right to exclude the public."²⁶¹ But even if one concedes, for the sake of argument, that littoral upland owners have some form of title to intertidal land, what they do not have is a "fee simple absolute" title.²⁶² All parties concede that the Ordinance, the granting instrument, simultaneously gave rise to a public easement specifically allowing within the intertidal zone public access (at a minimum) for fishing, fowling, and navigation. This precludes characterization of the upland owner's title to this land as "absolute"; they do not have all of the sticks in the property rights bundle. Because the whole public may exercise the public easement then no one can be excluded by upland owners from the intertidal zone.

Further limiting upland owners' claimed right to exclude the public from intertidal land is the previously noted fact that the Ordinance contains no language that limits the reserved public easement to access for fishing, fowling, and navigation *only*.²⁶³ No such limiting language can be found anywhere in the Ordinance. A non-trespassory access to engage in other public uses of intertidal land, such as sitting, walking, lateral passage, or the temporary grazing of animals, has a long history that both pre-dates and post-dates the Ordinance. There is no evidence supporting the assertion that upland owners' (who have less than "fee

260. In *Stop the Beach Renourishment*, the Court, littoral landowners, and the state all agreed that if the renourishment project had extended above the mean high tide line, the state would have had to acquire the upland property it needed, or a "taking" claim would certainly lie. *See id.* at 2600 n.2.

261. *Bell II*, 557 A.2d 168, 178 (Me. 1989).

262. This point is important because only an "absolute" title, a title that includes all of the sticks in the property rights bundle, would allow the holders of such title the right to exclude whom they will from the property.

263. *See supra* arguments under Issue VII.

simple absolute” title to intertidal land) could exclude members of the public who would engage in these activities in the intertidal zone. No Maine cases have been found that bar the public from engaging in these activities.

And finally on this point, historically broad public access and use rights were part of the *jus publicum*, which as previously noted were not abridged or abrogated by any express language in the Ordinance. These *jus publicum* rights,²⁶⁴ which were held in trust, by the original colonial government, and which are now held by a successor government, the State of Maine, dictate that upland owners (who, at most, hold a title to intertidal land that is not “absolute”) have no right to exclude the public who would engage in these *jus publicum* access and use rights in the intertidal zone.²⁶⁵

In sum, the *Bell II* court’s reasoning that the Intertidal Land Act is a taking because the Intertidal Land Act infringed upon the upland owner’s right to exclude the public from these lands, is not borne out by the facts. Upland owners do not have “fee simple absolute” title to intertidal land—thus they have no right to exclude anyone from the intertidal zone. The public (*every* member of the public), either through the reserved public easement created by the Ordinance itself, or by the grantors retention of the residuum of rights not expressly granted by the Ordinance, or by application of the far more ancient *jus publicum*

264. *Jus publicum* access rights certainly include fishing, fowling, and navigation (broadly defined). Historically, they included sitting, walking, lateral passage, the temporary grazing of animals, and today they would almost certainly include general beach-related recreation activities: bathing, surfing, kite-flying, and scuba diving—not to mention structures that house or support water-related recreational pursuits. This list is not intended to be exclusive, and it will, as history shows us, evolve over time.

265. *Bell I* and *Bell II* do not hold that the *jus publicum* has been abrogated. To do so would have required them to ignore or overrule any number of Massachusetts and Maine cases which, long after the Ordinance came into being, allude to the continuing existence of the *jus publicum*. See, e.g. *Commonwealth v. Alger*, 61 Mass. 53, 90 (1851); *Boston Waterfront Dev. Corp. v. Mass.*, 393 N.E.2d 356, 359 (1979); and in Maine, *Moulton v. Libbey*, 37 Me. 472, 485-486 (1854); *Opinion of the Justices*, 437 A.2d 597, 605 (Me. 1981). The *Bell* cases suggest, without any analysis or case law support, that *jus publicum* rights of access and use have been conflated with and are limited, defined by, the public easement reserved in the Ordinance. They go so far as to suggest that littoral upland owners in Maine are now trustees of whatever public access and use rights exist. See *Bell II*, 557 A.2d 168, 171 (Me. 1886). But the Ordinance itself does not say, or even suggest this; this view, as noted, is contrary to conventional property law rules for gratuitous conveyances. See 2 AMERICAN LAW OF PROPERTY §§ 8.24, 8.25, 8.67 (1952). Finally, no Maine case has been found that has taken a view similar to that of the *Bell II* holding. The *Bell II* court’s reasoning is an error built on an error, and ought not to be perpetuated by the Law Court. See *supra* note 248 (citing to Mass. Opinion).

doctrine, has both access to intertidal land and a wide range of historic and modern use rights.

The conclusion is clear: the Intertidal Land Act does not effect a taking, because it has not infringed on any property right held by littoral upland owners.²⁶⁶ Equally clear is the fact that the holding in *Stop the Beach Renourishment* requires that before a taking claim can be brought one must possess a unique property right and demonstrate that this right has been infringed by some governmental action. The littoral upland owners in *Bell II* have not met these requirements, thus there is no taking.

An attenuated argument that upland owners have a property interest dictating the uses that the public may undertake while in the intertidal zone also fails. Suffice it to say there is nothing in the Ordinance that suggests that these grantees were also given a right or property-type interest to pick, choose, identify, or shape in any way, the public uses permitted or barred in the reserved public easement. This bears repeating—there is no language, not even a hint, in the Ordinance that the power to dictate or limit future uses of intertidal land was conferred.

To be sure, fishing, fowling, and navigation are specifically mentioned in the Ordinance as permitted public uses. However, as previously noted, these were examples of the most common, the most obvious public uses of the day. But there is no suggestion in the critical four lines of the Ordinance that the drafters of the Ordinance intended to exclude any or all other public uses; or, that they clothed these grantees and their successors with a power to limit or bar future uses of public intertidal lands that an elected legislative body would deem necessary and appropriate to define or explicate the *jus publicum*, enabling it to meet the needs of that day.

An analogy to modern zoning law is apt. Can property owners subject to a validly enacted zoning law dictate permitted uses in a given zone? Can they dictate uses that will be barred in the future? Can they preclude the governing body from changing permitted and prohibited uses as changed conditions over time may dictate? Obviously not. A landowner has no property interest in an existing framework of zoning law. Similarly, littoral upland owners have no property interest allowing them to dictate or limit public uses in the intertidal zone.

An even more attenuated argument might suggest that the *Bell II* court has recognized or conferred on upland owners a property-type interest that the Ordinance did not convey. Can the *Bell II* court in the

266. The littoral owners' claim some type of qualified title to these lands is not infringed; the upland portion of their littoral estate is not infringed; and they had no right to exclude anyone from intertidal land to begin with.

same breath claim to be the source of the property right and assert that the legislature's passage of the Intertidal Land Act has infringed this right, thus giving rise to a taking claim? This proposition seems untenable. As previous arguments have noted, it is not supported by separation of powers principles, or the holding in *Stop the Beach Renourishment*.

One might begin by noting that courts almost never create property rights. The regulatory process, exercises of police power, contract law, and acts of legislatures²⁶⁷ are the sources of property rights. In *Stop the Beach Renourishment*, Florida statutes²⁶⁸ shaped the law that delineated the line between accretion and avulsion; that law, in turn gave rise to the holding that the beach renourishment in question did not infringe any property interest of littoral upland owners, and thus, that no "taking" claim existed.

In the same vein, Maine's Intertidal Land Act delineated permitted public uses in the intertidal zone more precisely than they had been. Clearly, the Colonial Ordinance did not express an intention to exclude public uses other than those noted; nor does it clothe the grantees or their successors with a power to limit or bar other public uses of intertidal land in the future. But that's precisely what upland owners were seeking to do; that's the mindset that eventually gave rise to the *Bell* cases. In this context, it was both necessary and appropriate for the Maine Legislature to enact the Intertidal Land Act.

Prior to *Bell II* the Legislature's right/duty to reshape the common law, the *jus publicum*, to more fully meet public needs, had seldom been questioned, much less found to be an unconstitutional "taking." The *Bell II* court erred in doing so here; its errors trace back to its misreading of what the Colonial Ordinance did, and did not do. The court also erred in its application of conventional takings law to the facts and statute before it, and in the lack of deference shown to legislative enactments, i.e., the Intertidal Land Act.

This brings us to *Stop the Beach Renourishment*, a case decided subsequent to *Bell II*, but a case that the Law Court can and should take into account in reviewing *Bell II*'s takings analysis. The key holdings in *Stop the Beach Renourishment* are that a property interest must be shown

267. See *Bd. of Regents of State Colls v. Roth*, 408 U.S. 564 (1972). The Court noted that: "protected interests in property are normally not created by the Constitution. Rather, they are created and their dimensions are defined by an independent source such as state statutes or rules." *Id.* at 577; see also *Goss v. Lopez*, 419 U.S. 565 (1975).

268. See *Stop the Beach Renourishment v. Fla. Dep't of Env't Prot.*, 560 U.S. ___, 130 S. Ct. 2592, 2600 (2010).

to exist before a “taking” claim will lie, and that the burden is on the petitioners (here, littoral upland property owners) to show that a property right (here a right to dictate future public uses in the intertidal zone) actually exists.²⁶⁹ Amicus Brief #2 argued that littoral upland owners (the *Bell* plaintiffs) did not meet these threshold requirements. It seems clear that no property interest of these littoral owners was invaded; that they do not possess either a right to exclude members of the public from the intertidal zone, or a right to dictate or limit future public uses in the intertidal zone. Ergo, *Stop the Beach Renourishment* bars a takings claim.

It follows then that the *Bell II* court’s conclusion that the Intertidal Land Act constitutes a “taking” should not be allowed to stand. The Law Court, in the cases now before it, was urged to reverse *Bell II*. It seems clear that the Intertidal Land Act is both constitutional and necessary legislation that breathes life into the *jus publicum*.

XII. ARGUMENT: ISSUE IX

If the Law Court declines to re-examine both Bell I and Bell II in deciding the two cases before it, we reach Issue IX:

Whether the Maine Superior Court in *McGarvey v. Whittredge* correctly held that the term “navigation” allows the public to use intertidal land to gain access to deeper water for the purpose of engaging in recreational or commercial scuba diving.

The amicus briefs argued that the superior court’s holding on this point is correct and should be affirmed. The superior court, bound by the *Bell* cases, framed the issues correctly. *Bell II* held that the reserved “public easement” was limited to “fishing, fowling, and navigation.” Defendants, as members of the public, must show that their activities fall within the parameters of one of these three terms of art. If they can, the activity is permitted; if they cannot, the activity is barred.

The superior court had little difficulty determining that defendants use of plaintiffs’ intertidal land to picnic and socialize with clients before and after scuba diving activities did not fall within the parameters of any

269. Whether the property right arises from state regulatory measures, statutory enactments, or arises from language in the original Ordinance grant is a matter of indifference—but, it must be shown to independently exist; it cannot be fashioned out of whole cloth by the judicial branch of government.

of the permitted uses.²⁷⁰ The court characterized these actions as a “trespass” and awarded nominal damages.²⁷¹ But merely walking across plaintiffs intertidal land to ingress or egress the water for the purpose of teaching or engaging in scuba diving was held by the court to be within the term “navigation,” and therefore a permitted public use.²⁷²

The court’s decision seems to turn on a question it poses to itself, “whether the law [the definition of navigation] is captive of the practices that existed in 1647 or has it evolved?”²⁷³ The court immediately answers its question by drawing upon case law, noted in the *Bell II* dissenting opinion,²⁷⁴ which clearly indicates that the terms “fishing” and “navigation” have both evolved over time.²⁷⁵ Focusing on “navigation,” the court cites *Marshall v. Walker*²⁷⁶ and *Andrews v. King*,²⁷⁷ in particular. The *Marshall* court, speaking of intertidal land, noted that:

[T]he *jus publicum* remains. [The public] may sail over them [flats], may moor their craft upon them, may allow their vessels to rest upon the soil when bare, may land and walk upon them, may ride or skate over them when covered with water-bearing ice, may fish in the water over them, may dig shellfish in them, may take sea manure from them. . . .²⁷⁸

The *Andrews* court adds: “[t]he right of navigation so reserved is not simply the right to sail over the flats, when covered with water . . . but includes the right of mooring on the flats, of unloading the cargo upon

270. *McGarvey*, WASHSC-CV-08-42 at 9.

271. *Id.* Neither party to these proceedings contested this holding of the lower court.

272. *Id.*

273. *See id.* at 6.

274. *See Bell II*, 557 A.2d 168, 186-187 (Me. 1989). The court could also have cited cases that the *Bell II* majority acknowledged had broadened the term navigation under the rubrics of “a sympathetically generous interpretation” of the term, and/or that were deemed “reasonably incidental or related thereto.” *Id.* at 173.

275. *McGarvey*, WASHSC-CV-08-42 at 7-8. A broader range of authority supports this view. *See 2 MAINE LAW AFFECTING MARINE RESOURCES* 235 (1970) (“[T]he modern interpretation of the right of navigation is much broader than the English common law right of navigation or the right of navigation expressed in the Colonial Ordinances. . . .” This treatise goes on to lay out Maine case law that gave rise to an expanded array of “fishing” and “navigation” related uses. *Id.* at 236-41; *see also Whittlesey*, *Law of the Seashore, Tide-waters and Great Ponds in Massachusetts and Maine* (1932) (“In Maine, however, the courts have extended the public privileges on flats and navigable rivers to include . . . [cases fashioning an expanded array of fishing and navigation uses are then laid out].”). *Id.* at 14.

276. 45 A. 497 (Me. 1900).

277. 129 A. 298 (Me. 1925).

278. *Marshall*, 45 A. at 498.

the flats, and of transporting it to other men's lands and houses."²⁷⁹ In sum, the Maine Superior Court's view that the term "navigation" has evolved beyond its 1647 parameters seems born out in scholarly writings, and by an extensive array of Maine case law.

Having made this essential point, the superior court acknowledges that, "scuba diving and its associated uses did not exist when the Law Court last dealt with interpretation of the term navigation"²⁸⁰ In other words, there is no higher court opinion directly on point. The court resolves this dilemma by reasoning:

[A] narrow reading of the term navigation, as encouraged by the plaintiff, seeks to ignore the evolution and expansion of that term by . . . the courts. A narrow reading of navigation would trap the law to uses and related events associated with navigation as it existed in the 1900's and earlier . . . it does significant damage to the evolution of the common law to reflect and react to the development of our society.²⁸¹

This reasoning led the court to conclude that scuba diving is a permitted use in the intertidal zone, a further evolving of the public's navigational right.²⁸² The amicus briefs, agreeing with the court's logic and result, would also reference the case of *Butler v. Attorney General*.²⁸³ This case states that: "among these [public rights] is, of course, the right of navigation, with such incidental rights as pertain thereto. We think that there is a right to swim or float in or upon public waters as well as to sail upon them."²⁸⁴ *Butler* clearly suggests that the public's navigational

279. *Andrews*, 129 A. at 299.

280. *McGarvey*, WASHSC-CV-08-42 at 7.

281. *Id.* at 7-8.

282. *Id.* at 9.

283. 195 Mass. 79 (1907).

284. *Id.* at 84. The *Butler* court distinguished swimming and floating (holding these to be permitted public uses) from bathing (holding it not to be a public use) probably on the ground that the latter usually takes place in shallower intertidal water, or in the surf, and often involves laying or being upon an exposed portion of beach below mean high for extended periods of time. Whether this distinction as a practical matter, or in law, was sound when *Butler* was decided, or is sound today, was not a matter the superior court needed to reach or discuss. It did not comment on the *Butler* court's distinction, but make no mistake, *Butler* sustains the superior court's conclusion.

On the point of whether the *Butler* distinction should be reexamined, it is appropriate simply to note that the *Butler* distinction is thin indeed. It is certainly within the Law Court's prerogative to reexamine it. In doing so, the court ought to accept the view that the same evolving of permitted uses or a "sympathetic generosity of interpretation" of permitted uses that allowed the superior court, and hopefully the Law

use right includes scuba diving, which involves swimming, floating, moving about in intertidal waters. It seems clear that scuba diving is correctly seen as a permitted, an “evolved,” and an “incidental public use right.”

Finally, one must note that the *Bell II* holding, at least impliedly, supports the superior court’s holding. *Bell II* states:

We have held that the public may fish, fowl, or navigate on the privately owned land for pleasure as well as for business, or sustenance, *Barrows v. McDermott*, 73 Me at 449; and we have in other ways given a sympathetically generous interpretation to what is encompassed within the terms, “fishing,” “fowling,” and “navigation,” or reasonably incidental or related thereto.²⁸⁵

Assuming the premise made at the outset of this argument that *Bell II* remains the controlling law with respect to public and private rights in the intertidal zone, it is irrelevant whether *Bell II*’s interpretation of reserved public rights is more or less generous than some might like. It is generous enough to affirm the superior court’s holding. An affirmation by the Law Court of the lower court’s holding would be a small but useful step in the right direction.

XIII. CONCLUSION

It is not possible, or particularly useful, to recapitulate arguments carefully laid out in the nine separate issues. There are, however, several underlying themes that bear repeating. To begin with, for nearly 2,000 years organized society has viewed the intertidal zone as a unique space—a fragile area of transition between open ocean, not amenable to private ownership, and littoral upland, which is, for the most part, privately owned. Most nations, and states within our nation, have retained a large degree of public ownership of, and a trusteeship with respect to public uses in, these intertidal areas. Discrete parcels of intertidal land have been alienated, often to facilitate commerce; this is the exception, not the rule.

Second, the range of uses made of these intertidal areas over this 2,000 year period has varied widely and is constantly changing. The drying of nets, erection of weirs, lateral passage along the foreshore are almost non-existent today; recreational activities too numerous to

Court, to accept scuba diving as a logical extension of navigational use, would also accept bathing as a similar logical extension of a permitted use.

285. See *Bell II*, 557 A.2d 168, 173 (Me. 1989) (emphasis added).

mention, surfboards, scuba diving, lawyers offices and condominiums on refurbished piers—who could have imagined it when the Ordinance was promulgated to facilitate commerce in a fledgling colonial setting. The beauty of the common law is its ability to adjust to changing conditions and new realities. The *jus publicum* has a similar vitality with respect to defining and redefining public uses of intertidal land. The *Bell* decisions lose this adaptability and the flexibility to adjust to the next round of change. These decisions trap us in the past.

This factor alone, beyond the arguments raised in the issues presented above, strongly suggests that the *Bell* cases were wrongly decided. This view finds expression in the dissent in *Bell II*, the concurring opinion in *Eaton*, and in Maine Superior Court decisions that press *Bell II* to its limits, and often a small step beyond. The superior court findings of fact in *Muther* barely temper the court's incredulity with the *Bell* cases. And finally, a growing range of scholarly writing has critically reviewed these cases. None of this is likely to end unless the Law Court reexamines these cases and modifies them in a way that gives new vitality to the *jus publicum*—that enables the common law to adjust and accommodate to new and changing conditions.

Finally, it must be noted that the *Bell* cases represent a paradigm shift, a break with the past that is not in the best interest of large numbers of Maine people. Prior to the *Bell* holdings, generations of Maine people, including many littoral upland landowners, grew up honestly believing that the public had a right to be upon intertidal land to walk, swim, sit, fish, shoot duck, play with children and sand toys, toss a ball, skim and ride boards on the very edge of the surf, put in a boat, a kayak, a surfboard, or just watch the water, the waves, the changing colors of the sea and sky. No one thought to interdict these pleasures; few thought it was possible to interdict them.

The *Bell* cases ended that long bucolic era of sharing public and private use rights in the intertidal zone. What has emerged is a growing private property rights zealotry, and counsel equal to the task, ready to press each case. One of the parties in the cases now before the Law Court uses the phrase “appellant's beach” repeatedly, as if he created it, or earned it, rather than being the fortuitous beneficiary of random events. Littoral upland owners today talk openly of exclusion, keeping people out, limiting the range of permitted public uses in the intertidal zone. The larger public has had to adjust to these new realities; there is a growing range of places they cannot go, and a growing range of pleasurable activities that cannot be permissibly engaged in. One is constantly aware today that one may be asked to move along. Like the shrinking of Maine's northern forests, and the increased posting of lands

throughout the state, accessible foreshore is less and less open to the public; it is becoming an enclave of the wealthy.

All of this derives from the *Bell* cases. This paradigm shift is unwarranted; it's bad for Maine's people and our economy. More importantly, Maine's people and Legislature have never alienated the vast majority of our intertidal lands. We never, with our own statehood in hand, examined the implications of the Ordinance. We never grasped the full meaning of the equal-footing doctrine. We simply acquiesced. The court in *Lapish*, told us it was no longer "an open question," and we believed it.²⁸⁶ The *Bell* cases repeat this theme. They would confine us to a history Massachusetts created for us—a history we did not create for ourselves. *Phillips Petroleum* says it's not too late; 171 years of error can be undone.

In short, public and private sharing of Maine's intertidal lands can, and must be revived. We cannot be locked into an ambiguous 360-year old Ordinance, and be held captive by Massachusetts law. Maine can and must develop its own intertidal land law. Private property rights count, but the public interest of an entire state counts for more. The Law Court should correct the errors of our past—to fashion a robust *jus publicum*—to recognize that the tidelands in truth, and in law, belong to the people of Maine.

286. *Lapish v. Bangor Bank*, 8 Me. 85, 93 (1831).